

No. 66754-8-I

DIVISION I COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

ROBERT BRANTING and THERESA SWEETON

Appellants,

v.

POULSBO RV,

Respondent.

---

**BRIEF OF RESPONDENT**

---

MICHAEL & ALEXANDER PLLC

Stephanie R. Alexander, WSBA No. 28007  
Matthew J. Macario, WSBA No. 26522  
701 Pike Street, Suite 1150  
Seattle, WA 98101  
(206) 442-9696

Attorneys for Respondent

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JAN 27 PM 3:36

**TABLE OF CONTENTS**

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>II.</b>	<b>RESTATEMENT OF THE ISSUE.....</b>	<b>3</b>
<b>III.</b>	<b>RESTATEMENT OF THE FACTS.....</b>	<b>3</b>
<b>A.</b>	<b><u>Factual Background</u>.....</b>	<b>3</b>
1.	<u>Salesperson Compensation at Poulsbo RV.....</u>	3
2.	<u>Robert Branting’s Employment at Poulsbo RV.....</u>	6
3.	<u>Theresa Sweeton’s Employment at Poulsbo RV.....</u>	9
<b>B.</b>	<b><u>Procedural History</u>.....</b>	<b>13</b>
1.	<u>Appellants’ Complaint.....</u>	13
2.	<u>The 2008 Ancillary Hearing.....</u>	13
3.	<u>Discovery.....</u>	13
4.	<u>The Trial Court’s Order Granting Summary Judgment.....</u>	14
<b>IV.</b>	<b>ARGUMENT IN RESPONSE.....</b>	<b>16</b>
<b>A.</b>	<b><u>Standard of Review</u>.....</b>	<b>16</b>
<b>B.</b>	<b><u>Appellants Cannot Prove Poulsbo RV Breached a Contract with Them for the Calculation of Gross Profits</u>.....</b>	<b>17</b>
1.	<u>Appellants Did Not Have an Oral Contract with Poulsbo RV Regarding How Gross Profit Must be Calculated.....</u>	18

2.	<u>Appellants Did Not Have an Implied Contract with Poulsbo RV Regarding How Gross Profits Must be Calculated.....</u>	21
3.	<u>Appellants Produced No Evidence of Damages Related to Their Unsupported Claims for Breach of Contract.....</u>	24
C.	<b><u>Appellants Cannot Prove that Poulsbo RV Withheld Any Wages Owed to Them Under Any Contract.....</u></b>	29
1.	<u>Appellants Did Not Have a Contract with Poulsbo RV Regarding How Gross Profits Must be Calculated.....</u>	30
2.	<u>Appellants Have Not Produced Any Evidence to Support a “Willful” Withholding of Wages.....</u>	31
3.	<u>Appellants’ Wage Claims are Duplicative of Their Breach of Contract Claims.....</u>	33
D.	<b><u>Appellants Failed to State Facts Necessary to Support a Claim for Negligent or Intentional Misrepresentation.....</u></b>	33
E.	<b><u>The Law Does Not Support Appellants’ Claims for Breach of Fiduciary Duty and an Accounting.....</u></b>	35
F.	<b><u>Appellant Theresa Sweeton Voluntarily Quit Her Employment and Cannot Support a Claim for Wrongful Termination.....</u></b>	38
V.	<b>CONCLUSION.....</b>	41

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Baxter v. National Safety Council</i> , 275 Fed. Appx. 632, (9th Cir. 2008), <i>cert. denied</i> , 553 U.S. 1024 (2008) (attached).....	24-25
<i>Meinhard v. Salmon</i> , 249 N.Y. 458, 164 N.E. 545 (1928).....	35

### CASES

<i>Bovy v. Graham, Cohen, and Wampold</i> , 17 Wn. App. 567, 546 P.2d 1175 (1977).....	35
<i>Champagne v. Thurston County</i> , 163 Wn.2d 69, 178 P.3d 936 (2008).....	31
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782 P.2d 1002 (1989).....	39-40
<i>Francom v. Costco Wholesale Corp., Inc.</i> , 98 Wn. App. 845, 991 P.2d 1182, <i>review denied</i> , 10 P.3d 1071 (2000).....	32-33, 37
<i>Gaasland Co. v. Hyak Lumber &amp; Millwork, Inc.</i> , 42 Wn.2d 705, 257 P.2d 784 (1953).....	24, 28
<i>Gardner v. Loomis Armored, Inc.</i> , 128 Wn.2d 931, 913 P.2d 377 (1996).....	38-39
<i>Gauthier v. Dickerson</i> , 41 Wn.2d 419, 249 P.2d 370 (1952).....	34-35
<i>Golf Landscaping, Inc., v. Century Const. Co., a Div. of Orvco, Inc.</i> , 39 Wn. App. 895, 696 P.2d 590 (1984).....	27
<i>Karle v. Seder</i> , 35 Wn.2d 542, 214 P.2d 684 (1950).....	35
<i>Keystone Land &amp; Dev. v. Xerox Corp.</i> , 152 Wn.2d 171, 94 P.3d 945 (2004).....	17

<i>Korslund v. Dyncorp Tri-Cities Servs., Inc.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	39
<i>Micro Enhancement Int'l, Inc. v. Coopers &amp; Lybrand</i> , 110 Wn. App. 412, 40 P.3d 1206 (2002).....	34
<i>Moore v. Blue Frog Mobile, Inc.</i> , 153 Wn. App. 1, 221 P.3d 913 (2009), <i>rev. denied</i> , 168 Wn.2d 1020 (2010).....	31
<i>Myers v. State</i> , 152 Wn. App. 823, 218 P.3d 241 (2009), <i>review denied</i> , 230 P.3d 1060 (2010).....	17, 24, 27
<i>Roberts v. Atl. Richfield Co.</i> , 88 Wn.2d 887, 568 P.2d 764 (1977).....	21-22, 38
<i>Roberts v. Dudley</i> , 140 Wn.2d 58, 993 P.2d 901 (2000).....	38
<i>Ross v. Kirner</i> , 162 Wn.2d 493, 172 P.3d 701 (2007).....	33
<i>Saluteen-Maschersky v. Countrywide</i> , 105 Wn. App. 846, 22 P.3d 804 (2001).....	17, 21
<i>Sandeman v. Sayres</i> , 50 Wn.2d 539, 314 P.2d 428 (1957).....	17, 23
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998).....	31
<i>Stewart v. Chevron Chem. Co.</i> , 111 Wn.2d 609, 762 P.2d 1143 (1988).....	20
<i>Stiley v. Block</i> , 130 Wn.2d 486, 925 P.2d 194 (1996).....	33
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	38, 40
<i>Trimble v. Wash. State Univ.</i> , 140 Wn.2d 88, 993 P.2d 259 (2000).....	16
<i>Vacova Co. v. Farrell</i> , 62 Wn. App. 386, 814 P.2d 255 (1991).....	16
<i>Westby v. Gorsuch</i> , 112 Wn. App. 558, 50 P.3d 284 (2002),	

<i>review denied</i> , 149 Wn.2d 1008 (2003).....	33
<i>Winspear v. Boeing Co.</i> , 75 Wn. App. 870, 880 P.2d 1010 (1994), <i>review denied</i> , 126 Wn.2d 1006 (1995).....	16
<i>Yakima County Fire Prot. Dist. No. 12 v. City of Yakima</i> , 122 Wn.2d 371, 858 P.2d 245 (1993).....	17

**STATUTES**

RCW 49.48.010.....	29-30
RCW 49.52.050.....	29
RCW 49.52.070.....	29-31

**OTHER AUTHORITIES**

Restatement (Third) of Agency § 8.13 (2006).....	35
--	----

## I. INTRODUCTION

In January 2008, Robert Branting and Theresa Sweeton filed a complaint against their former employer, Poulsbo RV, alleging multiple duplicative causes of action based on a theory that Poulsbo RV failed to pay them their full sales commissions during their employment. During the period of time relevant to Mr. Branting and Ms. Sweeton's claims, Poulsbo RV consistently paid its salespeople 25 percent commission based on "gross profits" per sale, calculated based on the final sale price of the vehicle, minus costs. Mr. Branting and Ms. Sweeton both agreed that, during the period of time relevant to their claims, Poulsbo RV *never made any promises or had any written agreements* with them as to how gross profits would be calculated. Nonetheless, they complained that, during their employment, Poulsbo RV allegedly made "unauthorized" cost deductions from the sales price of the vehicles they sold, and that those deductions allegedly resulted in lower commission payments to Mr. Branting and Ms. Sweeton.

In January 2011, more than three years after Mr. Branting and Ms. Sweeton filed their complaint, the trial court held a ninety-minute hearing on Poulsbo RV's motion for summary judgment dismissal of all claims. In light of Mr. Branting and Ms. Sweeton's admission that Poulsbo RV never made any promise or had any written agreements with them

regarding how gross profit would be calculated, Poulsbo RV argued that Mr. Branting and Ms. Sweeton could not satisfy their burden to prove the existence of a contract for the calculation of gross profit, and correspondingly, they could not satisfy their burden of proving their other duplicative claims. The trial court agreed, further emphasizing the fact that the discovery period had ended, and Mr. Branting and Ms. Sweeton had also failed to produce any evidence of damages related to their claims. Indeed, Mr. Branting and Ms. Sweeton could not produce credible, admissible evidence of even a *single* erroneous commission calculation. Accordingly, the trial court granted Poulsbo RV's motion for summary judgment.

On appeal before this Court, Mr. Branting and Ms. Sweeton now challenge the trial court's order dismissing their claims. Yet Mr. Branting and Ms. Sweeton still agree that Poulsbo RV *never made any promises or had any written agreements* with them as to how gross profits would be calculated. Mr. Branting and Ms. Sweeton still cannot possibly prove that any of the cost deductions they now challenge were "unauthorized." The record remains devoid of any evidence to support their theory that Poulsbo RV erroneously calculated their commission payments, and no evidence exists of any damages related to their claims. Even taking the facts in the light most favorable to Mr. Branting and Ms. Sweeton, no material factual

issues are in dispute. Accordingly, this Court should affirm the trial court's award of summary judgment to Poulsbo RV on all claims.

## **II. RESTATEMENT OF THE ISSUE**

In light of the lack of any promise or agreement between the parties to calculate gross profits in any specific way prior to the 2007 written agreements, and in light of the corresponding lack of any evidence to support any errors in calculating Mr. Branting and Ms. Sweeton's commission payments or any damages related to their claims, should this Court affirm the trial court's decision to award summary judgment to Poulsbo RV on all claims?

## **III. RESTATEMENT OF THE FACTS**

### **A. Factual Background**

#### **1. Salesperson Compensation at Poulsbo RV**

Poulsbo RV is a recreational vehicle dealer that employs commissioned salespeople. Mr. Branting and Ms. Sweeton are former salespersons for Poulsbo RV. CP 214-15, 235, 247. The job of the salesperson is to reach an initial deal with the customer and negotiate a sales price for the vehicle. CP 40. An employee from the finance department handles the next stage of the transaction, and the salesperson finalizes the transaction by delivering the vehicle to the customer and conducting the final walkthrough. CP 40, 256.

At all relevant times, salespeople for Poulsbo RV received 25 percent commission based on “gross profits” per sale. CP 40, 256. Gross profits were calculated differently for new and used vehicles, but in both situations, “gross profits” consisted of the final sale price of the vehicle, minus costs.<sup>1</sup> CP 40. Typical costs included (1) the factory or dealer invoice price, including holdbacks, regional advertising, and any other costs associated with the inventory purchase; (2) dealer-installed options and equipment; (3) transportation for dealer trade-ins; (4) cash paid on the customer’s behalf; (5) over-allowances on trade-ins; (6) vehicle “spiffs,” which are any bonuses associated with the sale; and (7) vehicle “packs,” which are general sales and delivery costs, such as fuel charges, inspections, minor repairs, and other costs. CP 40.

Over the years, as associated costs increased, Poulsbo RV made periodic adjustments to the vehicle packs. CP 40. As set forth above, vehicle packs were factored into the calculation of gross profits and were not deducted from commission percentages. CP 40. Thus, despite changes to the vehicle pack, at all relevant times, the salesperson commission remained set at 25 percent of gross profit. CP 40.

In 2007, Poulsbo RV created its first written commission

---

<sup>1</sup> This fact has always been undisputed. *See* Brief of Appellants at 5 (“Sweeton and Branting understood ‘gross profit’ to mean vehicle sale price less dealer cost.”).

agreement for its salespeople. The agreement, entitled "Salesperson Commission Policy Agreement," set forth in writing how gross profit would be calculated going forward:

**CALCULATION OF PAYABLE GROSS PROFIT –  
NEW VEHICLES**

New Vehicle calculation – Payable Gross Profit is calculated in the following manner:

1. New Vehicle Sales Price (Per Buyer's Order)
2. Less – Gross Factory Invoice Amount – including holdback, delivery and destination, regional advertising
3. Less – Dealer Installed Options/Equipment
4. Less – New Vehicle Service "Pack" of \$600.00 on travel trailers, \$900.00 on fifth wheels, and \$1,200.00 on motor homes
5. Less – New Vehicle Delivery "Pack" of 6% of Gross factory Invoice Amount from Line 2 above, with a minimum amount of \$900.00 and a maximum amount of \$7,000.00
6. Less – Cost of transportation for a dealer trade if applicable
7. Less – Lot damage to vehicle if applicable
8. Less – Over-allowance on trade-ins
9. Less – Cash Paid on Customers behalf
10. Less – Aftermarket sales, if included in New Vehicle Sales Price from Item 1 above
11. Less – Special Vehicle Spiffs

Minimum commission on new vehicles is \$250.00 on travel trailers and fifth wheels, \$400.00 on gas powered motor homes, and \$750.00 on diesel motor homes.

**CALCULATION OF PAYABLE GROSS PROFIT –  
USED VEHICLES**

Used Vehicle Calculation – Payable gross profit is calculated in the following manner:

1. Used Vehicle Sales Price (Per Buyer's Order)
2. Less – Dealer inventoried amount on purchased

vehicles and Actual Cash Value (ACV) on Trades

3. Less – Vehicle Re-Conditioning/Repairs – pricing of work is set by service department, detail department or outside vendor
4. Less – Used Vehicle Service “Pack” of \$600.00 on travel trailers, \$900.00 on fifth wheels, and \$1,200.00 on motor homes
5. Less – Used Vehicle Delivery “Pack” of 12% on dealer inventoried amount from Line 2 above, with a minimum amount of \$900.00 and a maximum amount of \$7,000.00
6. Less – Lot damage to vehicle if applicable
7. Less – Over-allowance on trade-ins
8. Less – Cash Paid on Customers behalf
9. Less – Applicable After-Sale Repairs, Fixes, Promises
10. Less – Market adjustments
11. Less – Aftermarket sales, if included in Used Vehicle Sales Price from Item 1 above
12. Less – Special Vehicle Spiffs

Minimum commission on used vehicles is \$250.00 on travel trailers and fifth wheels, \$400.00 on gas powered motor homes, and \$750.00 on diesel motor homes.

Commission % (New and Used—Month): 25%

CP 40, 271-79. There was nothing unusual about the costs identified in the written commission agreement or the method by which Poulsbo RV calculated gross profits. In fact, these costs were representative of the standard practice in the industry. CP 40.

2. Robert Branting’s Employment at Poulsbo RV

Mr. Branting began working for Poulsbo RV at its Auburn, Washington, store in 1998—well before Poulsbo RV created the written commission agreement. CP 214-15. He took a break from employment

with Poulsbo RV between September 2004 and January 2006, when he went to work for Poulsbo RV's competitors. CP 216-18. But Poulsbo RV ultimately recruited him back, first to its Auburn store and then, in April 2007, to its Mount Vernon, Washington, location. CP 219-21.

When Poulsbo RV rehired Mr. Branting in 2006, he understood that he would earn commission based on 25 percent of gross profits, less the actual costs, and less a pack of 6% on new vehicles and 12% on used vehicles, with a maximum pack of \$5,000. CP 222-23, 230. He did not have a written agreement with Poulsbo RV prior to the 2007 commission agreement, and he never received a verbal promise prior to that time regarding how gross profits would be calculated. CP 229-30. Although he allegedly experienced problems with his paychecks during his employment on a "regular basis," Mr. Branting says that sometimes he went to his manager to discuss the alleged problems, and sometimes he did not.<sup>2</sup> CP 222-25.

In July 2007, Mr. Branting signed the written commission agreement with Poulsbo RV. CP 228, 271-74. Mr. Branting was not surprised by the packs identified in the agreement because he had received a prior memorandum suggesting that additional packs were being

---

<sup>2</sup> To the extent there were, in fact, any such errors, Mr. Branting's decision not to bring those alleged errors to the attention of his manager prevented Poulsbo RV from correcting any valid complaints he might have had.

considered. CP 226. He felt as though Poulsbo RV had already been increasing the packs, and that the commission agreement simply formalized that arrangement. CP 227. Mr. Branting signed the agreement as written, but he later took issue with the actual commission payments he received. CP 221, 231. In testimony obtained during his deposition, Mr. Branting attempted to explain the basis for his allegations as follows:

When you received the commission agreement that you were initially reluctant to sign, were you surprised by the numbers in there for the pack?

A. That there were additional packs?

Q. Well, that's what I'm asking.

A. There was a memo that came out a while before that would suggest that they were considering additional packs and I don't remember the dates. . . .

Q. Did Poulsbo RV make any sort of oral or verbal promise to you prior to your commission agreement that you signed in 2007 regarding how your commissions would be calculated?

A. No.

Q. Was it just general knowledge around the sales staff that you were to be compensated 25 percent of the gross?

A. And I was told that when I was hired.

Q. Were you promised anything along the lines of certain things would be exempt from pack or certain things would not be included as part of the cost of doing business? Was there any sort of promise in that regard?

A. No.

CP 226, 229-230 (emphasis added). In relation to actual alleged errors in his commission payments, Mr. Branting testified:

Q. And when you say commission issues, what do you mean?

A. Money problems, commission issues. I sold a – I'll give you an example. I don't even remember what kind of – it was a new diesel pusher and it showed a gross of \$18,000. I got paid 2-, so I kept trying to work my calculator and see if that fit the 25 percent and it didn't, and that was a big – that was a big hit and I thought that was going to take me out of my cash flow problems and it didn't.

CP 231. In August 2007, Mr. Branting quit his employment at Poulsbo RV. CP 221, 231.

### 3. Theresa Sweeton's Employment at Poulsbo RV

Theresa Sweeton began working for Poulsbo RV at its Auburn location in 1993 or 1994. CP 235, 247. She took a break from employment with Poulsbo RV for one year in 1999 and for four months in 2003. CP 236-37. The first break was due to personal issues, and after those issues resolved, Ms. Sweeton again sought reemployment with Poulsbo RV. CP 237. The second break was again due to personal issues, and afterwards, Ms. Sweeton again sought reemployment at Poulsbo RV. CP 238-39. Her return in 2003 was to the Auburn location. CP 239.

During her employment at Poulsbo RV, Ms. Sweeton understood that she would earn commissions based on 25 percent of gross profits. CP 240. Ms. Sweeton kept track of her expected commission for each sale, and she received commission vouchers with each paycheck that explained her commission payments per sale. CP 242-45. With that information,

she could verify the accuracy of each commission payment in comparison to her estimate. CP 243. Although Ms. Sweeton sometimes had concerns that Poulsbo RV had calculated her commission incorrectly, she knew that she could bring any apparent discrepancies to her manager's attention, which she did. CP 243.

In approximately July 2007, Ms. Sweeton signed the written commission agreement with Poulsbo RV. CP 249. Ms. Sweeton did not like the way the agreement described how gross profits would be calculated, because she believed that she had never previously agreed to the specific cost deductions set forth in the agreement. CP 248. Notwithstanding this belief, however, Ms. Sweeton ultimately signed the agreement as written. CP 276-79. She understood that the costs identified in the commission agreement would affect *only* the gross profit calculation per deal, and would not affect her commission calculation per deal. CP 250-51. But she did not like the way commissions were calculated, even though the calculations were lawful. She predicted that, after signing the commission agreement, her earnings would decline. CP 251. This prediction proved to be untrue, however, and Ms. Sweeton's income actually increased more than \$7,000 during 2007, which is the year she signed the commission agreement. CP 252-53, 262-69. This was consistent with an overall increase in her annual income at Poulsbo RV of

more than \$30,000 between 2001 and 2007. CP 262-69.

At her deposition, Ms. Sweeton attempted to clarify the basis for her allegations, as follows:

Q. How were commissions – what was your understanding of how commissions were earned at Poulsbo RV?

A. **That I was to receive 25% of gross profit.**

Q. And was that 25% figure constant throughout the duration of your employment at Poulsbo RV?

A. **Yes.**

Q. So that never changed, correct?

A. That percentage did not change.

Q. Okay.

What was your understanding of how gross profit was calculated?

A. **You know, it was never fully disclosed.** My understanding from working at other RV dealerships prior was you were shown what the cost of a unit was, what anything – any pack, which was a small percentage, and any ROs, which are called “repair orders,” against a unit, and that was all disclosed and spelled out to you. And after that was done, this was the amount of the gross profit on a sheet and you could calculate your commissions.

CP 240-41 (emphasis added). In relation to the actual alleged errors in her commission payments, Ms. Sweeton testified:

Q. Focusing on these commissions for a moment, the ones where you say that you were shorted at least \$1,200 per unit on average, what information do you have, if any, to establish that you were, in fact, shorted money? Are there any documents that you have to show that?

A. No, sir, other than the amounts on the commission policy agreement that I signed after the fact; they had been taking those amounts out and doing that before I agreed to that.

Q. Okay.

This is where I think we are confused, because is it your belief that the amounts of money that are set forth in Exhibit 2 [the written commission agreement], these various amounts of money that are set forth in Exhibit 2, these various packs and other deductions, is it your belief that those were actually taken out of your commissions?

A. It is my belief that those are taken out of the gross profit before my commissions are calculated, and they were done so without my permission for a number of years until this agreement came forth and then they wanted this to be signed so that they could legally be doing that, and I believe that prior to that they had no salesman's permission to legally be doing that.

CP 257-58.

In December 2007, Ms. Sweeton had a disagreement with her sales manager, Stan Tacazon. CP 253-54. Ms. Sweeton believed that Mr. Tacazon had intentionally changed her regular work schedule to prevent her from having her usual days off. CP 255. She asked him about the schedule, and Mr. Tacazon allegedly "began screaming [at] and berating" her. CP 253. She did not say a word in response, but simply grabbed her purse, left the store, and never returned. CP 253-54. No one from Poulsbo RV ever told Ms. Sweeton that she had been terminated. CP 259. In fact, Ms. Sweeton had engaged in a prior unprofessional outburst at work for which she had received a written warning, and she was not terminated for that incident either. CP 261. Nonetheless, with absolutely no support or evidence, Ms. Sweeton speculates that if she had tried to

return to work, Poulsbo RV would have asked her to leave. CP 260. She never even tried to return to work. CP 253-54, 260.

**B. Procedural History**

1. Appellants' Complaint

In January 2008, the appellants filed this action against Poulsbo RV seeking damages based on causes of action for (1) Breach of Contract, (2) Failure to Pay Wages, (3) Intentional Misrepresentation, (4) Negligent Misrepresentation, (5) Breach of Fiduciary Duty, (6) an Accounting of Gross Profits and Commissions; and (7) Wrongful Termination in Violation of Public Policy (as to Ms. Sweeton only). CP 3-9.

2. The 2008 Ancillary Hearing

On October 21, 2008, the trial court held an ancillary hearing for the sole purpose of determining the enforceability of an arbitration clause that was contained in the written commission agreements signed by each of the appellants in 2007. CP 71. In other words, the limited purpose of the hearing was to determine whether the parties would move forward in arbitration or in King County Superior Court.<sup>3</sup> CP 71. Because the court

---

<sup>3</sup> The appellants make much of this ancillary hearing in an apparent effort to support their substantive claims, since the appellants failed to take any depositions of witnesses during the discovery period in this case. *See* Brief of Appellants at 9-13. But the ancillary hearing did not address the merits of any of the appellants' claims. As discussed above, the trial court held the ancillary hearing solely to determine the enforceability of the arbitration clause in the written commission agreements. The ancillary hearing is irrelevant to this appeal of the trial court's award of summary judgment to Poulsbo RV on the substantive issues.

held that the arbitration clause was unenforceable, the parties moved forward in the King County docket. CP 110-11. The appellants never brought any claims regarding the enforceability of the written commission agreements, and they even went so far as to specify, “In this case, PRV is *not* being criticized for issuing a written pay plan in 2007.” CP 47 (emphasis in original). The enforceability of those agreements was, therefore, irrelevant to the appellants’ litigation claims.

3. Discovery

During the discovery phase of this case, neither Mr. Branting nor Ms. Sweeton were able to provide any evidence to support the alleged existence of any errors in their commission payments, nor were they able to provide any evidence to support why their belief as to what the gross profit calculation should have been was correct, and Poulsbo RV’s calculation was wrong. RP 39, 45-46. During the discovery period, the appellants’ counsel took no depositions whatsoever.

4. The Trial Court’s Order Granting Summary Judgment

On January 28, 2011, King County Superior Court Judge Jay White held a hearing on Poulsbo RV’s motion for summary judgment on all seven of the appellants’ claims. CP 201. The hearing lasted more than ninety minutes, and ultimately, the court determined that no material issues of fact existed and summary judgment in favor of Poulsbo RV was

appropriate as a matter of law. RP 52-54. The court reasoned that the appellants failed to meet their burden to establish the existence of a material fact precluding entry of summary judgment. The court observed that the discovery period had ended, and the appellants failed to produce any evidence to support a breach of contract or any of their other duplicative claims. In addition, the court emphasized the fact that the appellants had failed to establish *any actual evidence* of any errors in their commission payments, and they could not prove the existence of any damages related to their claims. RP 39, 45-46. RP 39, 45-46. The trial court made the following incisive comments regarding the appellants' failure to provide any evidence supporting their claims:

THE COURT: . . . The case has been going on since January of 2008. Unfortunately, it seems to be a situation where you can't show even a single example of credible evidence that would allow a trier of fact to find that the commission was falsely calculated other than, we have things like Mr. Branting's assertion that he can't quite remember, but he does remember there was this \$18,000 deal and he says he only got \$2,000. That isn't the same thing as saying, "And here is why two was wrong." . . . Now, sure, if I was sitting here as a lay person, seeing \$2,000 versus \$18,000, that looks a little shocking, but it doesn't take away the necessity to show, since that's a pretty good example, evidence that the Court or a jury could rely on to say, "Yeah, they used phony numbers to bring it down to \$2,000." That's what appears to be missing.

RP 39-40. The court correctly recognized that the appellants' action

against Poulsbo RV rested entirely on their unsupported and speculative assertion that Poulsbo RV made “unauthorized” deductions from gross profits, with the result that their commissions were reduced, but no evidence in the record existed to support those claims. CP 223-24; RP 45-46. Accordingly, the trial court granted respondent’s motion. The court interlineated its order with the following language:

There is no genuine issue of material fact and defendant is entitled to summary judgment as a matter of law for reasons discussed on the record. **The evidence in the record is insufficient for the trier of fact to do anything other than speculate as to damages**, even assuming any of plaintiffs’ legal claims are viable under the applicable law.

CP 201-03 (emphasis added). The appellants now appeal the trial court’s order granting summary judgment in favor of Poulsbo RV. CP 204-05.

#### IV. ARGUMENT IN RESPONSE

##### A. **Standard of Review.**

The appellate court’s review of a grant of summary judgment is *de novo*. *Winspear v. Boeing Co.*, 75 Wn. App. 870, 874, 880 P.2d 1010 (1994), *review denied*, 126 Wn.2d 1006 (1995). Summary judgment is appropriate when no genuine issue exists as to any material fact and reasonable persons could reach but one conclusion from all the evidence. *Winspear*, 75 Wn. App. at 874. In the absence of actual evidence,

unsupported conclusory allegations and argumentative assertions that a genuine material issue exists will not defeat summary judgment. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991).

**B. Appellants Cannot Prove Poulsbo RV Breached a Contract with Them for the Calculation of Gross Profits.**

All of the appellants' claims are dependent on their claim for breach of contract, and the appellants have failed to allege any disputed facts necessary to defeat summary judgment on their breach of contract claim. Contrary to the appellants' assertions on appeal, until 2007, the appellants had no express or implied contract with Poulsbo RV regarding how gross profits must be calculated, and after Poulsbo RV created the written contract in 2007, the appellants never disputed the terms of the written contract.<sup>4</sup>

To establish a claim for breach of contract, the appellants must show three elements: "(1) a contract that imposed a duty, (2) breach of that duty, and (3) an economic loss as a result of the breach." *Myers v. Dep't of Soc. & Health Servs.*, 152 Wn. App. 823, 827-28, 218 P.3d 241 (2009). Washington follows the objective manifestation test for contracts.

---

<sup>4</sup> In their summary judgment response, the appellants pointed out that they were not criticizing the issuance of the written pay plan in 2007. CP 47. Tellingly, they criticized Poulsbo RV for not creating the written pay plan sooner, which is a tacit admission of the fact that there was never any prior contract for commission calculations between Poulsbo RV and the appellants.

*Keystone Land & Dev. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). For a contract to form, the parties must objectively manifest their mutual assent, usually in the form of offer and acceptance. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). In particular, the terms assented to must be sufficiently definite. *Sandeman v. Sayres*, 50 Wn.2d 539, 541, 314 P.2d 428 (1957). If a term is so “indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties,” there cannot be an enforceable agreement. *Sandeman*, 50 Wn.2d at 541. The burden of proving a contract, whether express or implied, is on the party asserting it, and he or she must prove each essential fact, including the existence of mutual assent. *Saluteen-Maschersky v. Countrywide*, 105 Wn. App. 846, 851, 22 P.3d 804 (2001).

1. Appellants Did Not Have an Oral Contract with Poulsbo RV Regarding How Gross Profit Must be Calculated.

Contrary to the appellants’ bare assertions in their brief on appeal, there is no dispute regarding the fact that the parties never had an oral agreement with Poulsbo RV for the calculation of commissions. Both appellants specifically testified that, until 2007 (when they signed the Salesperson Commission Policy Agreements), Poulsbo RV *never made any promise* to them regarding how gross profits would be calculated. CP

226, 229, 240-41. Mr. Branting testified that Poulsbo RV never promised to calculate gross profits in any specific way:

Q. Did Poulsbo RV make any sort of oral or verbal promise to you prior to your commission agreement that you signed in 2007 regarding how your commissions would be calculated?

A. **No.**

Q. Was it just general knowledge around the sales staff that you were to be compensated 25 percent of the gross?

A. And I was told that when I was hired.

Q. Were you promised anything along the lines of certain things would be exempt from pack or certain things would not be included as part of the cost of doing business? Was there any sort of promise in that regard?

A. **No.**<sup>5</sup>

---

<sup>5</sup> Contrary to the unsupported assertion of their counsel on appeal, Mr. Branting knew what he was testifying to. *See* Brief of Appellants at 29-30. At the outset of the deposition, counsel for Poulsbo RV asked Mr. Branting specifically:

Q. If you don't understand a question I ask, please ask me to repeat or rephrase it. If you don't do that and you answer the question, I'm going to assume that you understood the question; is that fair?

A. **That's fair.**

CP 285-86. Here, Mr. Branting did not ask for clarification of the question as to whether Poulsbo RV made any promise to him regarding how gross profits would be calculated. Mr. Branting's answer was simply, "No." CP 229-30. "When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989) (quoting *Van T. Jenkins & Assocs., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984)). Here, Mr. Branting never even attempted to provide the trial court with an affidavit contradicting his prior testimony. On appeal, however, his counsel nonetheless continues to insist that Mr. Branting misunderstood the question, without providing any support for this assertion. His contention is without merit and should be rejected.

CP 226, 229-30 (emphasis added). Similarly, Ms. Sweeton testified that the calculations used to determine gross profits were “never fully disclosed”:

What was your understanding of how gross profit was calculated?

**A. You know, it was never fully disclosed.** My understanding from working at other RV dealerships prior was you were shown what the cost of a unit was, what anything – any pack, which was a small percentage, and any ROs, which are called “repair orders,” against a unit, and that was all disclosed and spelled out to you. And after that was done, this was the amount of the gross profit on a sheet and you could calculate your commissions.

CP 240-41 (emphasis added). By their own testimony, the appellants admit that Poulsbo RV never made a specific promise to them regarding how gross profits would be calculated.

Where, as here, the appellants have failed to set forth evidence of a specific promise or commitment by the employer to support their claim for breach of contract, the analogous case *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 762 P.2d 1143 (1988), is instructive. In *Stewart*, the Washington Supreme Court concluded that even a written policy in an employee manual did not constitute a definite promise or commitment on the employer’s part. 111 Wn.2d at 613-14. The particular policy provided that, in layoff determinations, “consideration should be given” to certain

factors. *Id.* at 611. The Court concluded that those terms lacked the specificity necessary to create a binding promise. *Id.* at 613-14.

Similarly to *Stewart*, Poulsbo RV's agreement to pay the appellants commission based on 25 percent of gross profits did not constitute a definite promise or commitment to calculate gross profits in whatever manner the appellants preferred. Both appellants have already admitted that Poulsbo RV never made them a specific promise as to how gross profits would be calculated. CP 226, 229-230, 240-41. Accordingly, any alleged "terms" of the agreement would necessarily lack the specificity required to create a contract, and an oral contract with Poulsbo RV regarding how gross profits would be calculated could not have formed.

2. Appellants Did Not Have an Implied Contract with Poulsbo RV Regarding How Gross Profits Must be Calculated.

The appellants do not allege the existence of an implied contract with Poulsbo RV, but even if they did, the appellants' subjective interpretations regarding how gross profit should be calculated is insufficient to establish a contract with Poulsbo RV for the calculation and payment of commissions. An implied contract cannot be established based on merely the subjective interpretation or understanding of one party. *Roberts v. Atl. Richfield Co.*, 88 Wn.2d 887, 894, 568 P.2d 764

(1977). In determining whether an implied contract exists, Washington courts examine “the alleged ‘understanding,’ the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstance of the case to ascertain the terms of the claimed agreement.” *Roberts*, 88 Wn.2d at 894-95. “[B]are assertions of ultimate facts and conclusions of fact are alone insufficient to defeat summary judgment.” *Saluteen-Maschersky*, 105 Wn. App. at 852.

Washington courts often address implied contracts in the context of alleged promises of continued employment. For example, in the analogous case of *Roberts*, the plaintiff claimed he could only be discharged for cause because the circumstances surrounding his employment agreement created an implied contract with his employer. 88 Wn.2d at 894. The court observed that neither an assurance of “steady employment,” nor the plaintiff’s understanding that he would be employed as long as he performed his work in a satisfactory manner, could establish evidence of an implied agreement. *Id.* The plaintiff had merely provided evidence of his “own personal understanding that he would be employed as long as he did his job in a satisfactory manner,” and on such evidence, an implied contract could not be established. *Id.* at 894-95.

Similarly to *Roberts*, here, the appellants’ subjective understanding of how gross profit must be calculated is insufficient to support a claim for

breach of contract. Indeed, the appellants testified that they *knew* gross profit calculations at Poulsbo RV had changed over time, as had the pack deductions. CP 227. Thus, by their own testimony, the appellants' subjective understanding of the gross profit calculation was that it was *not* definite. Both appellants testified that they actually left their employment at Poulsbo RV at various times, only to return later, despite knowing that gross profit calculations were subject to change. CP 214-21, 235-39, 247. This is not surprising, given that Ms. Sweeton's earnings increased by more than \$30,000 over the last six years of her employment at Poulsbo RV. CP 262-69. The appellants accepted that the gross profit calculations were subject to change, and they continued to work for Poulsbo RV regardless.

The written agreements created by Poulsbo RV in 2007 were the *only* express statement Poulsbo RV *ever made* regarding how gross profit would be calculated, and the appellants both signed the agreements. The appellants testified that the dealer costs identified in the written commission agreements were not surprising to them, even though they might not have agreed with all of those costs. CP 226-27. The mere fact that the appellants disagreed with, or did not like, the way gross profit was calculated in the written agreements does not make Poulsbo RV's calculation unlawful and does not support a breach of contract claim.

Poulsbo RV never made any prior promises to the appellants regarding how gross profit would be calculated.

As our state's Supreme Court has held, if a term is so "indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties," there cannot be an enforceable agreement. *Sandeman*, 50 Wn.2d at 541. Here, the appellants failed to produce any evidence of an implied agreement regarding commission calculations and how gross profit must be calculated. The terms of such an alleged agreement would be so indefinite that the legal liability of the parties could not be determined. Because an implied contract cannot be established based on merely the subjective preference of one party, the appellants have failed to meet their burden of proof to establish the existence of an implied contract with Poulsbo RV.

3. Appellants Produced No Evidence of Damages Related to Their Unsupported Claims for Breach of Contract.

Even if the appellants could prove the existence of a contract with Poulsbo RV for the calculation of gross profits—which they cannot—no evidence in the record supports the existence of any damages related to any incorrect payments under such a contract. To prevail on a claim for breach of contract, a plaintiff must show that the contract imposed a duty, the duty was breached, and the breach proximately caused damage to the

plaintiff. *Myers*, 152 Wn. App. at 827-28. Thus, it is not enough for a plaintiff to show that a breach occurred. The plaintiff must also establish damages resulting from the breach with a reasonable degree of certainty. *See, e.g., Gaasland Co. v. Hyak Lumber & Millwork, Inc.*, 42 Wn.2d 705, 712, 257 P.2d 784 (1953). This rule is meant “to assure that one will not recover where it is highly doubtful that he has been damaged in the first instance[.]” *Gaasland*, 42 Wn.2d at 713. Only after the *fact* of damage has been established is the jury then “permitted to make reasonable inferences based upon reasonably convincing evidence indicating the *amount* of damage.” *Id.* at 712-13 (emphasis added).

For example, in *Baxter v. National Safety Council*, 275 Fed. Appx. 632, 634 (9th Cir. 2008), *cert. denied*, 553 U.S. 1024 (2008),<sup>6</sup> a former employee alleged that his employer breached an agreement to set incentive goals and pay commissions to the employee during the second and third fiscal quarters, but the evidence showed that the employee failed to meet the incentive goals during the first quarter. Although the employer did not set incentive goals for the second and third quarters, the evidence showed that the employee’s sales during that time period decreased over the first quarter. *Baxter*, 275 Fed. Appx. at 634. The court of appeals upheld summary judgment dismissing the employee’s breach of contract claim,

---

<sup>6</sup> Pursuant to GR 14.1, a copy of this decision is attached hereto.

recognizing that even if the employer had breached a contract to set incentive goals, the plaintiff failed to present any evidence that he suffered damages as a result of the alleged breach, and accordingly, no damages were recoverable. *Id.*

Here, similarly to *Baxter*, the appellants failed to present any evidence of actual damages related to their claims. Indeed, by their own testimony, the appellants admitted that they cannot point to any credible, admissible evidence showing even a *single* erroneous gross profit calculation by Poulsbo RV. The appellants did not take a single deposition during the discovery phase of this case. Indeed, all that the appellants have offered is their own unsupported assertions. Mr. Branting's testimony that he was paid \$2,000 on a sale that he *believed* had a gross profit of \$18,000 (which would have resulted in a maximum commission of \$4,500) is mere speculation and is unsupported by any actual evidence.<sup>7</sup> Similarly, Ms. Sweeton specifically testified that she had no evidence to support her assertion that the commission payments she received were, in fact, incorrect.<sup>8</sup> CP 257-58. On the contrary, the

---

<sup>7</sup> Appellants have never identified the date, customer name, or any other relevant information about this alleged sale, let alone any documentation to support it.

<sup>8</sup> The appellants' argument on appeal that Poulsbo RV "refused" to provide access to evidence that would have supported their damages claims is irrelevant and misleading. *See* Brief of Appellants at 31. The appellants made the same allegation during the summary judgment hearing, arguing that Poulsbo RV had objected to their initial requests for certain sales records. RP 38-39. The trial court responded:

evidence shows that her earnings increased by more than \$30,000 over the last six years of her employment at Poulsbo RV, in direct contradiction of her assertion that her commission payments at Poulsbo RV decreased over time. CP 262-69.

As the court noted during the summary judgment hearing, the discovery period had already ended, and the appellants simply failed to present any evidence to support even a single example of an erroneous commission calculation. The burden of proving each specific element of the appellants' claims, including the issue of damages, lies with the appellants. *See Myers*, 152 Wn. App. at 827-28.

Even if the appellants could establish the fact of damages—which they cannot—“a claim for lost profits is properly denied ‘when the alleged

---

[Court:] I mean, I don't want to belabor it particularly, but I don't understand why there wasn't a motion to compel, a request for terms for failure to respond, for failure to provide documents. The case has been going on since January of 2008. Unfortunately, it seems to be a situation where you can't show even a single example of credible evidence that would allow a trier of fact to find that the commission was falsely calculated other than, we have things like Mr. Branting's assertion that he can't quite remember, but he does remember there was this \$18,000 deal and he says he only got \$2,000. That isn't the same thing as saying, “And here is why two was wrong.” . . . Now, sure, if I was sitting here as a lay person, seeing \$2,000 versus \$18,000, that looks a little shocking, but it doesn't take away the necessity to show, since that's a pretty good example, evidence that the Court or a jury could rely on to say, “Yeah, they used phony numbers to bring it down to \$2,000.” That's what appears to be missing.

RP 38-40.

loss cannot be proved adequately and remains speculative.” *Golf Landscaping, Inc., v. Century Const. Co., a Div. of Orvco, Inc.*, 39 Wn. App. 895, 903, 696 P.2d 590 (1984). In *Golf Landscaping*, a subcontractor seeking to recover lost profits for delay on a construction project provided evidence of the possible jobs it could have bid on during the delay, coupled with testimony regarding the number of jobs it typically bid on and its average success rate per bid. 39 Wn. App. at 903. The court of appeals affirmed the trial court’s award of summary judgment to the defendant, holding that the evidence of alleged damages was too attenuated to support the plaintiff’s claim for breach of contract. *See id.* at 903-04.

Here, similarly to *Golf Landscaping*, the appellants’ offer to estimate their alleged damages by multiplying their total estimated number of vehicles sold by the estimated amount of fees, charges, and packs disclosed in the written agreement is woefully inadequate and legally untenable. Such a calculation would require speculation as to the number of vehicles each appellant sold over the course of many years, the sales price per vehicle, the factory or dealer invoice price, and the agreed and allegedly disputed costs that were deducted from commission payments in order to determine the difference between the actual commission payment received by the appellants and their preferred commission payment. *See*

CP 40. Although the finder of fact is generally “permitted to make *reasonable* inferences based upon *reasonably convincing* evidence indicating the amount of damage,” *Gaasland*, 42 Wn.2d at 713 (emphasis added), the type of wholesale speculation advocated by the appellants is simply too attenuated to support a recovery on their claim.<sup>9</sup>

The appellants fundamentally failed to provide evidence in support of the fact or amount of damages, which is a key element of their claim for breach of contract. They cannot prove they are entitled to any recovery for damages in the first instance, nor can they prove with reasonable certainty what the amount of those alleged damages might be. Their presumptive estimation as to the amount of damages is inconsequential. The trial court’s order granting summary judgment dismissing the appellants’ claims for breach of contract should be affirmed.

**C. Appellants Cannot Prove that Poulsbo RV Withheld Any Wages Owed to Them Under Any Contract.**

---

<sup>9</sup> As the court aptly pointed out during the summary judgment hearing:

Even if the Court somehow accepted this alternate formula, how would it work? Wouldn’t the numbers—you know, if you just took[,] you’re saying, take the list of things in the contract that are deducted, multiply them by the number of transactions, that’s our damages, and the intellectual difficulty I have with that is that, first of all, these do not appear to be challenged as things that are proper deductions. So I don’t know why proper deductions would be damages.

As discussed above, the appellants cannot prove that Poulsbo RV had a prior contract with them for the calculation of gross profit, nor can they prove the existence of any damages (*i.e.*, unpaid commissions) related to the alleged breach of such a contract. The appellants cannot prove Poulsbo RV improperly withheld any commissions owed to them, and the trial court's order granting summary judgment on their wage claim should be affirmed.

RCW 49.48.010 requires employers to pay employees their wages due on account of employment when they cease working for the employer. RCW 49.52.050(2) (the criminal wage provision) provides for criminal liability where “[a]ny employer or officer, vice principal or agent of any employer” *willfully* fails to pay wages owed by statute, ordinance, or contract. And in turn, RCW 49.52.070 imposes civil liability on employers who can be found to have violated the provisions of the criminal wage provision. As explained below, none of these statutes has any bearing on appellants' claims.

1. Appellants Did Not Have a Contract with Poulsbo RV Regarding How Gross Profits Must be Calculated.

The appellants do not dispute the accuracy of the payments they received under the 2007 written contract with Poulsbo RV. Instead, the appellants' claims for wage withholding are derivative of, and dependent

upon, their non-actionable claims for breach of contract. Since Poulsbo RV had no express or implied contract with the appellants regarding how gross profits would be calculated, however, the appellants cannot prove a key element of their wage claim—*i.e.*, the existence of a statute, ordinance, or contract under which unpaid wages were due. In addition, since the appellants admit that they cannot prove the existence of any incorrect commission payments, the appellants cannot prove damages in relation to their claim. Thus, no liability exists under either of the wage withholding statutes, RCW 49.48.010 or RCW 49.52.070, and summary judgment is appropriate.

2. Appellants Have Not Produced Any Evidence to Support a “Willful” Withholding of Wages.

Even if the appellants could produce evidence showing they had an implied agreement with Poulsbo RV for gross profit calculations—which they did not—any debate over the existence of an implied contract is a “bona fide dispute” that would negate the necessary finding of willfulness to support double damages under RCW 49.52.070. The critical determination in a claim under RCW 49.52.070 is whether the employer’s failure to pay wages was *willful*. *Moore v. Blue Frog Mobile, Inc.*, 153 Wn. App. 1, 7-8, 221 P.3d 913 (2009), *rev. denied*, 168 Wn.2d 1020 (2010). A “bona fide” dispute between the employer and employee

regarding wages will negate a finding of willfulness. *Morgan v. Kingen*, 166 Wn.2d 526, 534, 210 P.3d 995 (2009). A bona fide dispute is one that is “fairly debatable.” *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 161, 961 P.2d 371 (1998).

In their brief on appeal, the appellants assert that the issue of whether a bona fide dispute exists is a question of fact. *See* Brief of Appellants at 26-27. On the contrary, however, where, as here, reasonable minds could not differ, courts have decided the question as a matter of law. *See, e.g., Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008); *Moore*, 153 Wn. App. at 8.

Here, the appellants testified that Poulsbo RV made no promises to them regarding how gross profits would be calculated. Yet, the appellants nonetheless based their entire lawsuit on the contention that an implied agreement existed regarding the calculation of gross profits. Indeed, as described above, even the amount of alleged damages claimed by the appellants is wholly speculative and based solely on their subjective preference; the appellants admitted that they cannot prove the existence of any erroneous commission payments in relation to their claims. Even if there were evidence that Poulsbo RV withheld any wages owed to the appellants—there is not—a bona fide dispute exists regarding whether any

commissions were, in fact, withheld from them. Accordingly, any withholding could not have been willful.

3. Appellants' Wage Claims are Duplicative of Their Breach of Contract Claims.

The appellants' wage claims are also duplicative of their breach of contract claims and should be dismissed on that basis as well. *See, e.g., Francom v. Costco Wholesale Corp., Inc.*, 98 Wn. App. 845, 864-66, 991 P.2d 1182 (dismissing duplicative claims based on same set of facts in employment discrimination case), *review denied*, 10 P.3d 1071 (2000). There is no genuine issue for trial on the appellants' wage claims, and summary judgment dismissing their claims is appropriate.

**D. Appellants Failed to State Facts Necessary to Support a Claim for Negligent or Intentional Misrepresentation.**

Since the appellants admit that, prior to the 2007 written agreements, Poulsbo RV made no representations to them regarding how gross profit must be calculated, the appellants do not have legally cognizable claims for intentional or negligent misrepresentation. At best, these claims are duplicative of the appellants' other claims, which, again, are not actionable. *See, e.g., Francom*, 98 Wn. App. at 864-66 (dismissing common law negligence claims in employment case as duplicative of other claims).

To establish a claim for negligent misrepresentation, a plaintiff must establish that (1) he received information for the guidance of his business transactions that was false, (2) the supplier of the information knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the supplier of the information was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused damages to the plaintiff. *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).<sup>10</sup>

As discussed above, the appellants previously testified that Poulsbo RV specifically made *no representations* to them regarding how gross profit would be calculated. CP 226, 229-230, 240-41. On the contrary, the appellants confirmed that the 2007 written commission agreements were the only documents that ever set forth the gross profit calculations upon which their commissions were based, and the appellants further stated that they were *not* alleging that the 2007 written commission

---

<sup>10</sup> The standard for *intentional* misrepresentative is even more stringent. To establish a claim for intentional misrepresentation, the appellants must prove nine elements: (1) a representation of an existing fact; (2) the factual representation was material; (3) it was false; (4) the person making the representation knew it was false; (5) the person making the statement intended that its recipients take an action based on the false representation; (6) the appellants were ignorant of the falsity of the representation; (7) the appellants relied on the false representation; (8) the appellants had a right to rely on the representation; and (9) the appellants suffered damages due to their reliance on the false representation. *Westby v. Gorsuch*, 112 Wn. App. 558, 570, 50 P.3d 284 (2002) (citing *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996)), *rev. denied*, 149 Wn.2d 1008 (2003).

agreements were breached. This leaves no evidence of *any* disputed representations by Poulsbo RV—whether intentional or negligent—that could form the basis for the appellants’ claims. Summary judgment dismissing their claims for intentional and negligent misrepresentation is appropriate.

E. **The Law Does Not Support Appellants’ Claims for Breach of Fiduciary Duty and an Accounting.**

Despite the appellants assertions to the contrary, Washington law does not unilaterally impose a fiduciary duty on an employer to disclose to its employees in writing its definition of gross profits and all facts material to the calculation of commissions. The burden is on the plaintiff to establish the existence of such a duty, and here, the appellants failed to satisfy their burden because no such duty exists. *See Micro Enhancement Int’l, Inc. v. Coopers & Lybrand*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002) (plaintiff in a claim for breach of fiduciary duty must prove the existence of a duty owed).

Despite the appellants’ ongoing argument before the trial court and on appeal, *Gauthier v. Dickerson*, 41 Wn.2d 419, 249 P.2d 370 (1952), does not support their claims for breach of fiduciary duty and for an accounting. *See* Brief of Appellants at 21 n.16. *Gauthier* involved a written contract that specifically *required* the employer to keep an

accounting of costs and profits, and the employee was compensated based on a share of net profits. 41 Wn.2d at 419-20. On those specific facts, our Supreme Court determined that the employer and employee had a fiduciary relationship pursuant to the written contract, and based on the complexity of the records, an accounting was in order. *Id.* at 422. This is not surprising, given that the law recognizes a fiduciary relationship arising under contract. *See* Restatement (Third) of Agency § 8.13 (2006). Where no contract exists, however, as in this case, no fiduciary duty arises under contract, and no accounting is required.

Like *Gauthier*, the other cases cited by the appellants in support of their claims for breach of fiduciary duty are also distinguishable. *See* Brief of Appellants at 22. The case *Karle v. Seder*, 35 Wn.2d 542, 214 P.2d 684 (1950), involves an action between *partners* for the sale of real property. The case *Bovy v. Graham, Cohen, and Wampold*, 17 Wn. App. 567, 546 P.2d 1175 (1977), also involves an action between *partners* for specific performance of a written partnership agreement. And the New York case *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928), involves an action between “*coadventurers*” for management of real property pursuant to a written agreement. None of the cases cited by the appellants recognizes the imposition of a specific fiduciary duty between an employer and an employee to disclose commission information in

writing, and indeed, in the absence of a contract imposing such a duty, no duty exists.

Here, Poulsbo RV had no duty to fulfill a promise it never made, and Poulsbo RV never made any promise to the appellants nor assumed a duty that it would disclose gross profit and commission calculations in writing. Significantly, both appellants testified that if they had problems with their commission calculations, they could bring any alleged discrepancies to their manager's attention, which they sometimes did. CP 222-25, 243. Both appellants testified that Poulsbo RV would correct any apparent problems in their commission payments, if any. *Id.* The costs that the appellants now claim Poulsbo RV had a duty to disclose, which were ultimately identified in the 2007 written agreement, were not unusual and actually represented the standard practice in the industry. CP 40. The appellants cannot impose a duty on Poulsbo RV after-the-fact, simply because they disagreed with or did not like some of the costs identified in the 2007 written agreement.

Contrary to the appellants' argument on appeal, RCW 46.70.180 and WAC 308-66-152 are red herrings and have no bearing on their present claims. *See* Brief of Appellants at 23. As an initial matter, the appellants have not pled any causes of action under those statutes, so any purported violation is irrelevant. Further, the calculation of "invoice

price” for purposes of a sale is not analogous to the calculation of “gross profits” for purposes of commission calculations. Finally, neither law is violated unless a false statement or representation is made, and as discussed above, the appellants have admitted that Poulsbo RV made no such representation. Thus, the statutes relied on by the appellants are entirely irrelevant to their claims.

Even if the appellants were somehow able to establish the existence of a fiduciary duty—which they cannot—like so many of the appellants’ other claims, their claims for breach of fiduciary duty are also duplicative of their other causes of action and should be dismissed on that basis as well. *See Francom*, 98 Wn. App. at 864-66. The trial court’s award of summary judgment dismissing the appellants’ claims for breach of fiduciary duty and for an accounting should be affirmed.

**F. Appellant Theresa Sweeton Voluntarily Quit Her Employment and Cannot Support a Claim for Wrongful Termination.**

The final cause of action is Theresa Sweeton’s claim for wrongful termination in violation of public policy. Ms. Sweeton’s employment, however, was not actually terminated. She quit. She cannot meet the demanding standard for a claim that she was constructively discharged, and even if she could, Ms. Sweeton’s unilateral decision to leave her

employment at Poulsbo RV was not even remotely linked to a clear mandate of public policy.

In Washington, “an employer has the right to discharge an employee, with or without cause, in the absence of a contract for a specified period of time.” *Roberts*, 88 Wn.2d at 891. In a cause of action for wrongful discharge, Washington does not recognize an exception to the at-will doctrine unless the discharge “contravenes a ‘clear mandate of public policy.’” *Roberts v. Dudley*, 140 Wn.2d 58, 63, 993 P.2d 901 (2000) (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)). The plaintiff must prove (1) the existence of a clear public policy; (2) that discouraging the conduct in which she engaged would jeopardize the public policy; and (3) that the public policy-linked conduct caused her dismissal. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996).

Here, contrary to the appellant’s argument in her brief on appeal, Ms. Sweeton did not testify that issues concerning her commission payments caused her to quit. Instead, Ms. Sweeton testified that she got into an argument with her manager over her unhappiness with a new work schedule, which prompted her to walk out of the store and never return. CP 260. On these undisputed facts, Ms. Sweeton cannot maintain a claim for wrongful discharge in violation of public policy because she was

neither discharged nor forced to quit. She simply walked off of the job. She admitted that, even after her behavior, no one from Poulsbo RV ever told her that she had been discharged. CP 259.

In Washington, an employee who quits her employment cannot establish a claim for wrongful constructive discharge unless she proves that her employer *deliberately* created intolerable working conditions that forced her to resign. *Korlund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 180, 125 P.3d 119 (2005). Here, there are no facts to support such a conclusion. Again, Ms. Sweeton simply got into an argument with her manager over her unhappiness with a new work schedule, walked out of the store, and never returned.

No published decision in Washington holds that these facts, or similar facts, are sufficient to satisfy the “intolerable working conditions” requirement. The public policy exception to the at-will doctrine has been recognized by Washington courts in only four situations: when an employee is (1) fired for refusing to commit illegal act; (2) fired for performing a public duty or obligation such as jury duty; (3) fired for exercising a legal right or privilege; or (4) fired in retaliation for reporting employer misconduct. *See, e.g., Gardner*, 128 Wn.2d at 936; *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989); *Thompson*, 102 Wn.2d at 234. Here, none of the four situations applies. Ms. Sweeton simply quit

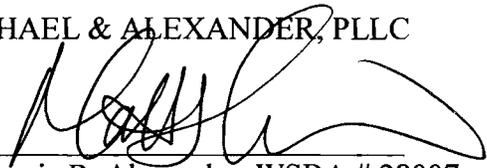
after she got into an argument with her manager over her schedule. These facts cannot support a claim for wrongful termination. Like all of appellants' other claims, the trial court's award of summary judgment dismissing Ms. Sweeton's wrongful termination claim should be affirmed.

#### V. CONCLUSION

This Court should affirm the trial court's award of summary judgment to Poulsbo RV on all of the appellants' claims. Because the appellants admit that Poulsbo RV never made any promise to them regarding how gross profits must be calculated, Poulsbo RV had no contract or duty to calculate gross profits in the manner the appellants preferred. The appellants simply failed to produce the necessary evidence to support their claims. Ms. Sweeton's decision to walk off the job because of her unhappiness with a new schedule does not support a claim for wrongful termination. Summary judgment on the appellants' claims was appropriate, and the trial court should be affirmed. Respondents request an award of their costs on appeal.

DATED this 27th day of January, 2012.

MICHAEL & ALEXANDER, PLLC

By:   
Stephanie R. Alexander, WSBA # 28007  
Matthew J. Macario, WSBA # 26522  
Attorneys for Respondent

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Respondent on:

Nigel S. Malden  
Law Offices of Nigel S. Malden  
711 Court A, Suite 114  
Tacoma, WA 98402  
Facsimile: (253) 573-1209  
Email: nm@nigelmaldenlaw.com

by the following indicated method or methods:

- by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Seattle, Washington, on the date set forth below.
- by sending full, true and correct copies thereof via **e-mail** addressed to the e-mail address shown above for the attorney for appellants, on the date set forth below.
- by causing full, true and correct copies thereof to be **hand-delivered** to the attorney at his last-known office address listed above on the date set forth below.

DATED this 27th day of January, 2012.

  
Lois Widmer