DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

FLOYD JAY HENDRIX, individually, and JOHN MICHAEL CONWAY, individually, Plaintiffs/Appellants, v. WERCS aka WYOMING EMPLOYEE RESOURCE CAPITAL & SERVICES, a Wyoming corporation, Defendant/Appellee.	1 CA-CV 09-0602 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2006-092564

The Honorable Karen Potts, Judge

REVERSED AND REMANDED

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K E S S L E R, Presiding Judge

¶1 Plaintiffs Floyd Jay Hendrix and John Michael Conway ("Appellants") appeal the superior court's grant of summary judgment in favor of defendant-appellee Wyoming Employee Resource Capital & Services ("WERCS"). We reverse the superior court's order granting summary judgment because Appellants presented sufficient evidence that WERCS agreed to employ and pay bonus compensation to Appellants.[1]

FACTUAL AND PROCEDURAL HISTORY

¶2 Appellants filed a complaint in the superior court alleging they had a contract of employment with WERCS which entitles them to receive bonuses that WERCS subsequently failed to pay.[2] WERCS filed a motion for summary judgment, arguing that it was not liable to pay bonuses to Appellants because they were employed by Major Mortgage ("Major"). Major is a corporation which once existed as a controlled subsidiary of WERCS but has subsequently been dissolved.

[1] In light of our decision to reverse the order granting summary judgment, we need not consider whether the superior court erroneously failed to grant a motion for reconsideration from the order granting summary judgment.

[2] Although Hendrix initially claimed that he had a written contract attached to his pleading, he began contending that an oral contract existed when deposition testimony revealed that the attachment to his pleading was not signed by any representative of either putative employer.

¶3 The evidence attached to the motions and responses revealed that Appellants were each hired by Deines McCutcheon ("Deines") to manage various Arizona offices of a mortgage origination business. While Appellants were employed by Deines, Major acquired Deines, continued the business of originating mortgages, and continued using the Deines tradename. After the Deines acquisition Appellants continued in their prior jobs after orally negotiating new compensation agreements.

¶4 Hendrix negotiated an oral contract for compensation with Dick Bratton and Robert McBride. Bratton was CFO of WERCS. McBride was president of Major and a director of WERCS.[3] The summary judgment papers do not present a detailed script of what was said, but Hendrix testified in deposition that the substance of the conversation was negotiation of a compensation agreement between Hendrix and WERCS. Hendrix also testified that as a result of the oral negotiation he "was on a salary and a commission structure and a bonus program." The amount of the bonus was fifteen percent of his branch's gross net income.

[3] After oral argument, WERCS submitted a supplemental citation emphasizing that McBride was not an officer of WERCS and pointing out that individual directors may not bind a corporation. This does not alter our analysis for two reasons. First, Bratton was an officer of WERCS and participated in the negotiation. Second, even if neither McBride nor Bratton had actual authority to bind WERCS, there is a genuine issue of fact as to whether WERCS ratified the agreement by claiming to employ Hendrix, paying his bonuses, and procuring an at-will agreement indicating that WERCS was the employer.

¶5 Conway spoke with Steve Carver regarding his future compensation. Carver was CFO of Major and an employee of WERCS. Conway and Carver agreed that Conway would receive a salary plus twenty percent of the gross revenue he generated. Conway believed that WERCS would be the party obligated to pay his compensation because he negotiated the agreement with Carver, a WERCS employee.[4]

¶6 WERCS produced several written statements consistent with these negotiations. WERCS identified itself as the employer on I-9 and W-2 forms and used its own employer identification number on these forms, even though Major had its own separate employer identification number. WERCS procured the Appellants' signatures on at will employment acknowledgements indicating that WERCS was the employer. Every paycheck Appellants received bore WERCS's logo. Bonuses prior to the final unpaid bonus were routinely paid by Robert Moberly at WERCS headquarters. Moberly was CEO of WERCS.[5]

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[4] Conway's deposition testimony reads as follows: "Well, Steve Carver, who also worked at Major Mortgage and was employed by WERCS, told me I would receive a salary for the gross revenue I generated for WERCS, plus a 20 percent bonus on the gross revenue."

. . .

"Well since he [Steve Carver] was an employee of WERCS, I would assume he would be speaking on their behalf."

[5] According to Appellants' separate statement of facts, Moberly was also a director and president of Major. However, Hendrix's

¶7 WERCS also had evidence supporting its view that Major employed Appellants. Appellants identified Major as their employer on benefits enrollment forms. Appellant Conway also identified Major as his employer on his W-4 form. Both Appellants initially identified Major as their employer when demanding payment of their allegedly unpaid bonuses. Additionally, their attorney initially identified Major as the employer when he began asserting the right to bonus compensation on their behalf.[6]

¶8 WERCS argued that Appellants' evidence was consistent with its claim that it did not employ Appellants. WERCS introduced evidence that the reason it was identified as the employer was that its ordinary practice as a holding company was to provide payroll and HR services to its subsidiaries. WERCS contended that although paychecks bore its logo and drew from its account, the funds were provided by Major. However, Appellants presented contradictory evidence indicating that the payments from Major to WERCS did not correspond to the amount needed to pay employees and were motivated by WERCS's desire to

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deposition testimony indicates that McBride was president of Major. This conflict does not impact our decision.

[6] At oral argument, WERCS emphasized that there was a written compensation agreement attached to the second amended complaint signed by Hendrix reflecting Major as the employer. These agreements, however, had never been executed by WERCS or Major.

extract money from Major to fund itself or other subsidiaries rather than the value of any services rendered.

¶9 Major became insolvent, sold its assets and portfolio, and filed a statutory dissolution proceeding. Major listed Appellants as creditors for the proceeding and provided them notices to present any claims they had against Major in the proceeding. Appellants sought payment of their bonuses from WERCS and did not present claims in the dissolution of Major.

¶10 The superior court granted summary judgment to WERCS. The court's analysis began by faulting Appellants for allegedly presenting no direct evidence of the formation of their contract with WERCS. Next the court analyzed the relationship in light of a multi-factor test in *Santiago v. Phoenix Newspapers, Inc.*, 164 Ariz. 505, 508, 794 P.2d 138, 141 (1990), articulated to determine whether a worker is an independent contractor or an employee. Finally, the court determined that the numerous admissions by WERCS that it was the employer constituted a mere scintilla of evidence insufficient to resist summary judgment.

¶11 Appellants filed an untimely notice of appeal from the final judgment of the superior court. This Court dismissed the appeal and Appellants filed a Rule 60(c) motion for relief from judgment. The superior court vacated and reentered its judgment. Appellants filed a timely notice of appeal from the

reentered judgment. This Court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

ANALYSIS

¶12 We review a summary judgment de novo and construe all facts in the light most favorable to the nonmoving party. *Yeung v. Maric*, 224 Ariz. 499, 501, ¶ 7, 232 P.3d 1281, 1283 (App. 2010) (citation omitted). Summary judgment is inappropriate if conflicting evidence creates a genuine issue of material fact. Ariz. R. Civ. P. 56(c). Even if the facts are undisputed, summary judgment is unwarranted if different inferences may be drawn from those facts. *See Santiago*, 164 Ariz. at 508, 794 P.2d at 141 (citation omitted). Evidence of conduct consistent with a contract is admissible to show its existence. *See Healey v. Coury*, 162 Ariz. 349, 352-53, 783 P.2d 795, 799-800 (App. 1989) (affirming verdict based on oral employment agreement when employee testified that contract existed and introduced evidence of his own performance).

I. Appellants Submitted Sufficient Evidence of an Employment Contract With WERCS

¶13 WERCS contends that there was insufficient evidence of an agreement by it to pay bonuses and of any employment agreement between it and Appellants. We disagree. Appellants presented sufficient evidence of an oral contract of employment between themselves and WERCS to withstand a motion for summary

judgment. Appellants testified that they negotiated compensation agreements with WERCS employees on behalf of WERCS. These negotiations included agreement to pay bonuses in particular amounts. At the beginning of the employment relationship, WERCS procured a written agreement confirming the employment relationship with WERCS was at-will. WERCS claimed to employ Appellants on multiple forms it filed with federal agencies. WERCS performed the employer's obligation under the contract of employment by paying both regular salary and bonus compensation. Collectively, this evidence supports Appellants' claim to have a contract which includes bonus compensation with WERCS.

¶14 WERCS contends that summary judgment was proper because the summary judgment materials do not include any direct evidence regarding contract formation. We disagree. Although it was not particularly detailed, Appellants did present direct evidence of contract formation. Each appellant testified that a conversation took place resulting in a negotiated compensation agreement.[7] Each Appellant stated the name of the person he

[7] WERCS focuses on the lack of information regarding formation in the Hendrix Affidavit. While the affidavit lacks that information, his deposition testimony attached to the statement of facts describes formation. The statement of facts asserts the existence of an oral contract and cites a different part of the same deposition transcript. The superior court may consider factual material presented with the motion which is not referred to in the statement of facts. *Herring v. Railway Exp. Agency*,

negotiated with and testified that person was a representative of WERCS. Further, each Appellant testified that the WERCS representative he negotiated with agreed to pay bonus compensation. This is sufficient to defeat a motion for summary judgment.

¶15 Further, the evidence of conduct conforming to a contract is sufficient to defeat summary judgment based on an implied in fact contract. "The terms of a contract may be expressly stated or may be inferred from the conduct of the parties." *Beaudry v. Ins. Co. of the West*, 203 Ariz. 86, 89, ¶ 10, 50 P.3d 836, 839 (App. 2002) (reversing summary judgment

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13 Ariz. App. 28, 30, 474 P.2d 35, 37 (1970). "The trial court must consider all of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits before making its decision on a motion for summary judgment; that is, the entire record must be examined. Likewise, the Court of Appeals, in ruling on the propriety of the summary judgment, must review the whole record to determine whether a material issue of fact exists." *Giovanelli v. First Fed. Sav. & Loan Assoc. of Phx.*, 120 Ariz. 577, 581, 587 P.2d 763, 767 (App. 1978) (citations omitted). Hendrix asserted the existence of the oral agreement in the statement of facts and attached specific deposition testimony describing the formation of the agreement. This is sufficient.

WERCS alleges the crucial flaw in Conway's case is the lack of evidence that Carver was an agent of WERCS. Conway alleged that Carver was an employee of WERCS in his deposition, and we may consider that evidence. WERCS's answering brief quotes the relevant deposition transcript, so they can hardly claim to be taken by surprise that we have considered that evidence.

WERCS additionally claims that there was a lack of evidence demonstrating that either alleged contract provided for a bonus. Hendrix and Conway specifically testified that they negotiated with WERCS representatives for specific bonus amounts. Their testimony is sufficient to resist a motion for summary judgment.

because ten year pattern of performance in commercial insurance transaction supported a reasonable inference of an implied in fact contract) (citing *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 381, 710 P.2d 1025, 1036 (1985)). "The general rule is that the determination whether in a particular case a promise should be implied in fact is a question of fact. Where reasonable minds may draw different conclusions or inferences from undisputed evidentiary facts, a question of fact is presented." *Wagenseller*, 147 Ariz. at 383, 710 P.2d at 1038 (citations omitted). "Whereas an implied in fact contract is a true contract, it differs from an express contract because it is proved by circumstantial evidence and not by express written or oral terms." *USLife Title Co. of Ariz. v. Gutkin*, 152 Ariz. 349, 354, 732 P.2d 579, 584 (App. 1986) (citation omitted). Appellants presented substantial circumstantial evidence supporting an implied in fact contract with WERCS. Each party expressed a belief in the existence of a contract between them. Each party performed the contract. This includes WERCS's CEO personally performing the duty to pay particular bonuses to Appellants. Even if there were no direct evidence of contract formation, the circumstantial evidence of a lengthy pattern of mutual performance, on this record, creates an issue of fact regarding the existence of an implied in fact contract.

¶16 WERCS also contends that the evidence in favor of a contract is a mere scintilla. We disagree. Our review of the record has revealed substantial evidence of a contract including: 1) testimony from Hendrix indicating that a WERCS officer and a WERCS director agree on behalf of WERCS to pay his bonus; 2) testimony from Conway indicating that a WERCS employee agreed on behalf of WERCS to pay his bonus; 3) WERCS's admission that it employed Appellants on multiple W-2 forms; 4) WERCS's admission that it employed Appellants on I-9 forms; 5) payment of all Appellants' wages by WERCS; 6) personal payment of prior bonus obligations by WERCS's CEO at WERCS's headquarters; 7) WERCS's procurement of an at-will employment agreement indicating that WERCS employed and could fire Appellants; and 8) Major's failure to execute an agreement that would have made it Hendrix's employer. We hold this is more than a scintilla of evidence.

II. WERCS Failed to Conclusively Establish It is a Payroll Outsourcing Firm

¶17 WERCS claims that summary judgment was proper because of uncontroverted evidence that it merely provided administrative services for its subsidiaries to explain away the documents identifying WERCS as the employer. We disagree for

several reasons.[8] First, although this evidence could explain away the conduct conforming to the contract, it does not explain away the Appellants' testimony that they negotiated with WERCS representatives to be employed by and receive bonuses from WERCS. The direct evidence of an oral contract of employment directly controverts WERCS's theory and precludes summary judgment.

¶18 Second, we disagree because evidence of the financial dealings of WERCS and Major controverts the claim that WERCS merely provided administrative services to Major. WERCS relies on its own claim that all funds it paid to Appellants were reimbursed by Major, the true obligor. However, an affidavit attached to Appellants' statement of facts indicates that transfers of funds between Major and WERCS do not correspond to the amounts required to reimburse WERCS for those expenses. For the purposes of summary judgment, the key motivation to transfer funds from Major to WERCS was the financial need of WERCS or another WERCS subsidiary and not the cost of services WERCS provided Major. The affidavits also indicate that WERCS paid the wages of Major employees when Major lacked adequate funds. Appellants controverted WERCS's claim and it is up to a jury to determine the nature of the employment relationship.

[8] In light of our resolution on the merits, we need not resolve Appellants' argument that WERCS waived this issue.

¶19 Third, summary judgment was inappropriate because Appellants presented an alternative theory explaining WERCS's evidence: that they were employed by WERCS to work at Major.[9] As the answering brief notes, that was the consistent theme of discovery. The evidence, construed most favorably to Appellants, shows that they worked for the benefit of Major at a Major site as managers of Major's business. However, they negotiated their compensation with WERCS, WERCS paid them their compensation, and WERCS filed immigration and tax forms listing WERCS as the employer. Major periodically made payments to WERCS which were possibly in consideration of the arrangement.

[9] Although the claim to work for WERCS at Major is inelegant at best, it is consistent with the concept of employee leasing. In this situation a principal employer forms the contract with an employee, who then works in the business of a third party. The third party pays the principal employer, who is responsible for compensating the leased employee. *See, e.g.*, Stephen J. Dunn & Karen B. Berkery, *Employee Leasing: The Risks for Lessees*, 84 Mich. B.J. 22, 23, 25 (2005) (noting that employee leasing may provide administrative convenience and that some companies directly hire no employees and rely exclusively on employee leasing); Barry L. Salkin, *Who's the Boss?: New York Defines Roles in the Professional Employer Organization Act*, 77 N.Y. St. B.J. 34, 35 (2005) (explaining that employee leasing companies directly "hire" employees who work on the site of another employer); Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 Tex. Wesleyan L. Rev. 109, 114 (2003) ("The . . . leasing firm . . . is a company which assumes responsibility for payroll, benefits, and other human resource functions of the long-term workers of another workplace and is set up with the particular purpose of becoming a surrogate employer." Leasing companies are designed "to be classified as the employers of the workers, so that the user-client of these workers will avoid such classification.").

While this could be payroll outsourcing, it could just as easily be employee leasing.[10] The evidence supports distinct inferences, so summary judgment was inappropriate. *Santiago*, 164 Ariz. at 508, 794 P.2d at 141.

III. *Santiago* Is Not Controlling

¶20 WERCS contends that a multi-factor test relating to the extent of control it has over Appellants is the correct test for determining whether it is their employer.[11] *See Santiago*,

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[10] Appellants' opening brief quotes minutes of a WERCS board meeting indicating that the WERCS board would run each subsidiary through WERCS employees. This evidence was not proffered in the trial court until a motion for reconsideration and we therefore decline to consider it. *Brookover v. Roberts Enters.*, 215 Ariz. 52, 57 n.2, ¶ 17, 156 P.3d 1157, 1162 n.2 (App. 2007) (citation omitted).

[11] At oral argument WERCS contended that *Mohan v. Publicker Indus., Inc.*, 222 A.2d 876 (Pa. 1966) is particularly relevant in support of the contention that the appropriate test is control. We disagree. *Mohan* upheld a JMOL that a subsidiary corporation employed a decedent when the decedent worked at the subsidiary's factory in furtherance of the business of the subsidiary. *Id.* at 878. This holding could be made as a matter of law notwithstanding that the parent paid decedent, claimed to be her employer on W-2's, had the power to hire and fire her, and issued her gate card to access the factory where she worked. *Id*. However, *Mohan* considered a different question than the one before this Court. *Mohan* determined that the subsidiary was the employer within the meaning of a worker's compensation statute applicable in Pennsylvania in 1966 and therefore the worker's compensation statute provided the exclusive remedy for her work-related death. *Id*. Additionally, in *Mohan* it was undisputed that regular monthly payments between the subsidiary and the parent were in consideration of payroll and management services. *Id.* at 879. In this case, conflicting evidence precludes us from relying on such a factor to uphold a summary judgment. An out of state case interpreting an employment relationship for the purpose of an out of state statutory alternative to the tort system does not compel us to affirm a grant of summary judgment

164 Ariz. at 509, 794 P.2d at 142. We disagree. The test WERCS relies on is not one designed to determine who employs a person but whether a known relationship is employment or independent contracting. *Id.* The contested issue in *Santiago* was not liability to pay wages but vicarious liability for a worker's tort. *Id.* at 506, 794 P.2d at 139. Contract terms between two parties are not binding on third parties who are injured by one of them. *Id.* at 508, 794 P.2d at 141. Some of the factors considered in *Santiago*, such as the control of the Appellants and the beliefs of the parties are relevant circumstantial evidence to determining between whom a contract was formed. However, the *Santiago* test does not control the issue of contract formation.

¶21 WERCS contends that this Court should apply the *Santiago* test regardless of its actual propriety for the contested issue in this case because any error the trial court committed in applying it was invited by Appellants. We disagree. Invited error applies only when the party urging the error then complains of it on appeal. *State v. Lucero*, 223 Ariz. 129, 138, ¶¶ 30-31, 220 P.3d 249, 258 (App. 2009) (citing *State v. Logan*, 200 Ariz. 564, 30 P.3d 631 (2001)).

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in a contract case, especially when facts disputed in this case were not disputed in *Mohan*.

¶22 WERCS was the first party to urge resort to an erroneous standard. Although it fails to provide a citation, WERCS's motion for summary judgment includes a block quote from *Growers Company v. Industrial Commission of Arizona*. 173 Ariz. 309, 314, 842 P.2d 1322, 1327 (App. 1992). Like *Santiago*, *Growers* resorts to a multi-factor test to determine whether a worker is an employee or an independent contractor. Appellants' invocation of a different case's articulation of a similar multi-factor test was not an affirmative initiation of error. Therefore, they did not invite the superior court's erroneous reliance solely on the multi-factor test in *Santiago*. *See Lucero*, 223 Ariz. at 138, ¶¶ 30-31, 220 P.3d at 258. The correct test is whether there is sufficient evidence indicating that WERCS actually or impliedly agreed to pay Appellants' bonuses. Applying this test, summary judgment is inappropriate because Appellants presented sufficient evidence that WERCS agreed to pay their bonuses. Subject to the trial court's discretion, the parties are free to offer evidence as to whether WERCS actually or impliedly contracted with Appellants to pay compensation, including WERCS's extent of control and the belief of the parties.

IV. WERCS is Not Entitled to Attorneys' Fees

¶23 The superior court's award of attorneys' fees was based on A.R.S. § 12-341.01 (2003), which permits an award of

attorneys' fees to a prevailing party in a contract case. Because we reverse the summary judgment in favor of WERCS, it is no longer the prevailing party. Therefore we also reverse the award of attorneys' fees. *See Nelson v. Phx. Resort Corp.*, 181 Ariz. 188, 202, 888 P.2d 1375, 1389 (App. 1994).

CONCLUSION

¶24 For the foregoing reasons, we reverse the superior court's grant of summary judgment and remand for further proceedings consistent with this decision. WERCS requested attorneys' fees on appeal pursuant to A.R.S. §§ 12-341 (2003) and -341.01. Because it is not presently the prevailing party, we deny its request for fees without prejudice to the superior court including the cost of this appeal in a fee award on remand depending on which party, if any, prevails. We will award Appellants their costs on appeal subject to compliance with ARCAP 21.

/s/

DONN KESSLER, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

JON W. THOMPSON, Judge