68434-5

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NO. 68434-5-I

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

JOYCE LEAH BURTON,

Respondent/Cross-Appellant,

v.

JANICE BECKER and AFFILIATED MENTAL HEALTH PROGRAMS, INC.,

Appellants/Cross-Respondents.

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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I. INTRODUCTION

Burton does not deny that she breached her duty of loyalty to AMHP, or that the accepted penalty for such a breach is forfeiture of her salary during the period of her disloyalty. Instead, she urges this Court to create a new "public policy exception" to the forfeiture rule based on RCW 18.225.100, which would "excuse" and "justify" her breach. That statute does not embody the public policy Burton says it does, and does not come close to justifying the exception she seeks. The trial court erred by allowing Burton to continue drawing a salary from AMHP when she was actively competing with the agency by seeing its clients on her own and pocketing their payments for herself.

The trial court also erred in holding that AMHP failed to prove that Burton tortiously interfered with AMHP's contractual relationships with its clients, even after the trial court found that the evidence established all of the elements of that claim. Burton's arguments that AMHP failed to establish certain elements are contrary to the record evidence, including her own testimony at trial.

Finally, Burton's arguments on her cross-appeal—most of which relate to the trial court's calculation of her alleged contract damages—are without merit. As a result, this Court should reverse the judgment awarding Burton 60 days' salary, direct entry of judgment in favor of

AMHP on its tortious interference claim, and remand the case to the trial court for determination of AMHP's damages.

II. STATEMENT OF THE CASE

AMHP relies upon and incorporates by reference its Statement of the Case in its Opening Brief.

III. ARGUMENT

A. The Trial Court Erred in Requiring AMHP to Pay Burton's Salary for the Period of Her Disloyalty.

1. Burton Does Not Deny That She Breached Her Duty of Loyalty.

The Washington courts, other state and federal courts, and the Restatement of Agency all agree: employees have a common law duty of loyalty to their employers, and cannot act in direct competition with their employers' business. Opening Brief of Appellants/Cross-Respondents ("AMHP's Br.") at 14-15 (citing authorities). Moreover, an employee who breaches this duty of loyalty is entitled to no compensation during the period of his or her breach. *Id.* at 15-18 (citing authorities). ***Burton's brief does not even mention any of this authority, much less attempt to address it.*** Nor does she deny that during the 60-day notice period, when she was still AMHP's employee, she acted in direct competition with AMHP by treating its clients on her own, directing them to start sending their payments to her rather than the agency, and keeping the proceeds for

herself. The trial court's conclusion that Burton breached her duty of loyalty to AMHP is clearly correct. COL 8.

2. RCW 18.225.100 Does Not "Excuse" or "Justify" Burton's Breach of Loyalty.

The courts and the Restatement have recognized only one basis for "apportioning" a disloyal agent's salary: courts have discretion to award compensation for those periods of time or specific work items that are untainted by the agent's disloyalty. AMHP's Br. at 21-23 (citing authorities). Burton does not deny that this (partial) exception to the general rule of forfeiture is inapplicable here, because she did not perform any work at all for AMHP during the 60-day notice period.

Instead, Burton asks this Court to create a new "public policy exception" based on RCW 18.225.100, which would "excuse" and "justify" her admitted breach of loyalty. Second Amended Opening Brief of Respondent/Cross-Appellant ("Burton's Br.") at 1, 32-33. The Court should decline to do so, for several reasons:

First, RCW 18.225.100 does not support Burton's argument that patient choice overrides all other considerations. That statute requires licensed mental health counselors to make certain written disclosures to new clients. RCW 18.225.100. Its focus is on the disclosure obligations of providers, not the rights of clients. In fact, the relevant part of the

statute speaks of client responsibilities, not rights: it says that clients have a "responsibility" to choose the provider that best suits their needs, not a "right" to choose whichever provider they want. *Id.* The statute does not even apply after "the commencement of any program of treatment," once a provider-client relationship has been established. *Id.* Thus, RCW 18.225.100 does not purport to address the scope of the right of clients to choose or change their providers, much less declare such a right so absolute that it would negate a provider's duty of loyalty to her employer.

Second, Burton's claim that clients have an "absolute" right to choose their provider is simply untrue, at least in Washington. Burton's Br. at 32. As the Washington Court of Appeals recently affirmed, reasonable non-competition agreements with health care providers are enforceable in this State, and are not contrary to public policy. *Emerick v. Cardiac Study Center, Inc.,* --- P.3d ---, 2012 WL 3831960 at *4-*5 (Wash. App. Aug. 8, 2012) (reversing trial court ruling that non-competition agreement with physician was contrary to public policy, noting that unlike some other jurisdictions, "Washington courts have not yet held that restrictive covenants between physicians are unenforceable"); *see also Ashley v. Lance,* 75 Wn.2d 471, 743, 475-77 (1969) (reinstating claim based on non-competition agreement among physicians). Since contractual non-competition agreements are enforceable against

providers—even though they unquestionably restrict patient choice—there is no basis for refusing to enforce the common law duty of loyalty, either.[1]

Third, the two cases Burton actually cites in support of her "public policy" argument are not on point. Both cases address claims of wrongful discharge in violation of public policy—a claim that Burton did not make in this case. *See Danny v. Laidlaw Transit Services, Inc.,* 165 Wn.2d 200 (2008); *Gardner v. Loomis Armored, Inc.,* 128 Wn.2d 931 (1996). Neither case has anything to do with the duty of loyalty, a patient's right to choose, or any of the other issues relevant to this appeal.

Fourth, Burton claims that "[r]ealistically," enforcing her duty of loyalty would prohibit her "from complying with a patient's choice." Burton's Br. at 33. This makes no sense. AMHP repeatedly warned her about the consequences of breaching her duty of loyalty, yet she continued to see AMHP clients on her own anyway. AMHP's refusal to pay her salary had no deterrent effect on her whatsoever.

Fifth, at bottom, Burton's argument is that imposing forfeitures of employees' salary will create a "serious financial disincentive" to act

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[1] It should also be noted that the evidence at trial shows only that the AMHP clients in question preferred to continue their treatment with Burton instead of switching to one of AMHP's other counselors—nothing more and nothing less. None of the clients or their family members who testified claimed that AMHP's other counselors were ***unqualified*** to continue their treatment. *See, e.g.,* RP 4/25/11 at 12 (testimony from Melanie Scott that while she was not going to consider using anyone else for her daughter, "I knew several counselors [at AMHP] and I felt like they were plenty qualified. It wasn't a qualifying issue"). Thus, Burton's suggestion that a change of counselor would have put client health at risk is unsupported by the evidence.

disloyally—which is certainly true. Burton's Br. at 33. But that is precisely the point of the forfeiture rule. If Washington recognizes the duty of loyalty—which it does—then the courts must impose consequences for its breach. The trial court's error in this case was to recognize Burton's obvious breach of loyalty, but then fail to impose any consequences for it.

Sixth, in its Opening Brief, AMHP challenged Burton to explain why the principle of patient choice, or any of her alleged professional or ethical obligations, required her to direct the clients in question to start paying her directly or to keep the money for herself. AMHP's Br. at 20-21. Her failure to provide any such explanation speaks volumes about the strength of her position. She diverted the payments to herself out of economic self-interest, not because patient choice required it.

In the end, Burton has failed to identify any "public policy" that trumps her duty of loyalty or otherwise allows her to have it both ways. Once she decided to start competing with AMHP and keeping the proceeds for herself—which she admits to doing—she gave up her right to continue drawing a salary from AMHP.

B. The Trial Court Erred in Holding That AMHP Failed to Prove Tortious Interference.

The trial court correctly found that all of the elements of AMHP's tortious interference claim were "easily satisfied" by the evidence. COL 8. It erred, however, by then holding that AMHP "failed to carry its burden of proof" on this claim. COL 9. Burton ignores the contradictory and irreconcilable nature of these holdings, instead arguing that AMHP failed to prove two of the required elements of this claim: (1) the existence of a valid contract, and (2) damages. She is wrong on both counts.

First, Burton claims that "there is no evidence in the record" that the clients in question had signed the Agreement for Services with AMHP. Burton's Br. at 29. This is false. Burton herself testified that the Agreement for Services was a standard contract that ***all*** AMHP clients were required to sign. RP 4/27/11 at 60-63; Ex. 140 at Bates Nos. 203-205. While she now faults AMHP for submitting a single copy of the contract at trial rather than signed copies for each of the clients, she made no such objection to the trial court. Signed copies of the contract were unnecessary in any event, given her admission that the Agreement for Services was a form contract that all clients signed—which she continues to admit on appeal. Burton's Br. at 30 (admitting that as Director, she

"made sure that all clients of AMHP had written contracts, like the form contract"). The trial court's finding that the clients in question had a valid contract with AMHP in the form of the Agreement for Services is supported by substantial evidence. *See Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wn.2d 873, 879 (2003) ("Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true").

Second, Burton's claim that AMHP failed to show any damages ignores the substantial evidence in the record on that issue, including her own admission that she received over $4,000 in payments from the clients she induced to breach their contracts. RP 75-77; Ex. 137. The record also establishes that during the first half of 2009, Burton personally provided counseling to between four and six AMHP clients, and that those clients provided income to the agency of at least $4,500 per month and sometimes as much as $10,000 a month. RP 27-29, 77-78; Exs. 22-26. The trial court's conclusion that AMHP made a sufficient showing of damages is amply supported by the evidence. *See Alpine Industries, Inc. v. Gohl,* 30 Wn. App. 750, 754 (1981) (a party is entitled to recover lost profits that are "the proximate result" of the other party's breach and "are proven with reasonable certainty"); *California Eastern Airways, Inc. v. Alaska Airlines, Inc.,* 38 Wn.2d 378, 380 (1951) ("It is not necessary that

lost profits be susceptible of exact calculation," so long as they are proven "by competent evidence, and with sufficient certainty to remove it from the realm of speculation").

Thus, the trial court correctly found that all of the elements of tortious interference are satisfied by the evidence. COL 8. This Court should therefore direct entry of judgment on the claim in favor of AMHP, and should remand the case for a determination of what amount of damages AMHP should be awarded. *See Northlake Marine Works, Inc. v. State Dep't of Natural Resources,* 134 Wn. App. 272, 294-95 (2006) (remanding case to trial court for further fact-finding and determination of amount of damages); *Heaton v. Imus,* 93 Wn.2d 249, 256 (1980) (remanding case to trial court for determination of lost profits).

C. Burton's Cross-Appeal Lacks Merit.

In her cross-appeal, Burton does not dispute that AMHP had "due cause" to terminate her employment. Burton's Br. at 1-2, 4-5 (Burton is not appealing trial court's ruling that AMHP had "due case" to terminate). Rather, she argues that the trial court should have awarded her more damages on her claim for 60 days' salary, and should have held Becker individually liable on that claim. These arguments are baseless.

1. Burton Is Not Entitled to Additional Damages.

Burton urges this Court to increase her damages award for a number of reasons, all of which lack merit:

First, Burton disingenuously argues that 60 days of her salary amounts to $14,767.27, not the $10,500 awarded by the trial court. Burton's Br. at 18. AMHP's pay records clearly show that she made $5,250 a month, or $10,500 over two months. Ex. 3 at last three pages (showing gross earnings of $5,250 per month). Burton gets a bigger number by ignoring the monthly amounts on the payroll records, and instead dividing the number of days she worked in 2009 into the total compensation she received from AMHP that year, which was over $47,000. But as Burton is well aware, $7,653.83 of that amount was a cash-out of accrued, unused vacation that AMHP paid her on August 15, 2009; it was not part of her monthly compensation. *See* Ex. 3 at last page (showing 8/15/09 vacation cash-out); Ex. 37 (letter enclosing a "separate check in the amount of $5,581.56 ($7,653.83 gross) which is a pay-out for your 262.91 hours of accrued but unused vacation").

Before Burton began to engage in creative re-calculations of her salary, she told the trial court that she "was contractually entitled to $10,500 from July 13, 2009 to September 11, 2009." CP 83. The trial

court correctly used that amount as her gross damages on the salary claim. CP 293-94.

Second, Burton claims that her out-of-pocket medical expenses during the 60-day notice period were $1,088.25, rather than the $962.25 awarded by the trial court. Burton's Br. at 15-16. But some of the expenses she now claims AMHP should pay were not incurred during the 60-day period, and therefore are not recoverable. *See* Ex. 9 ($103.00 charge from eye doctor for services performed on 10/16/09); Ex. 41 (12/15/09 request for payment for $243.06 in prescription charges).[2] Burton's own summary exhibit she used at trial states that her total uninsured medical costs through September 2009 were $962.25. Ex. 16 at 1. The trial court correctly awarded out-of-pocket medical expenses in that amount. CP 293-94.

Third, Burton argues that the trial court should not have deducted from her recovery the $3,558 in unemployment benefits she received during the 60-day notice period. Once again, she is making an argument that is directly contrary to the position she took at trial. Throughout the trial, not just AMHP but ***Burton*** consistently argued that her unemployment benefits should be offset against any recovery. *See* Ex. 15 (Burton's "Lost Wages Calc." proposing set-off for unemployment

[2] In addition, Burton neglected to designate either of these exhibits as part of the record on appeal.

benefits); Ex. 138 at 18-20 (Burton's discovery responses regarding damages, including offsets for unemployment); CP 326 (noting that Burton's proposed findings of fact and conclusions of law proposed a set-off for unemployment). Having agreed to apply an offset for unemployment benefits, Burton cannot now fault the trial court for doing so. *See Hymas v. UAP Distribution, Inc.,* 167 Wn. App. 136, 148 (Mar. 8, 2012) ("The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal"); *State v. Studd*, 137 Wn.2d 533, 547 (1999) (invited error doctrine prevented defendants from complaining on appeal about a jury instruction they had requested that the trial court give).

Moreover, Burton's argument that such an offset results in a "windfall" for AMHP is baseless. An offset for unemployment is not a windfall for AMHP, any more than an offset for Burton's interim earnings is. It simply ensures that Burton will not be placed in a better position than she would have been in had the contract not been breached —which is a fundamental principal of contract damages. *See Lincor Contractors, Ltd. v. Hyskell,* 39 Wn. App. 317, 320-21 (1984) (purpose of awarding contract damages is "to place the plaintiff, as nearly as possible, in the position he would be in had the contract been performed"; he is "not,

however, entitled to more than he would have received had the contract been performed").

Burton got it right at trial when she proposed offsetting unemployment. The trial court correctly offset the unemployment benefits she received against her recovery under the contract. CP 294.

Fourth, Burton asks this Court to award double damages under RCW 49.52.070. But Burton's Complaint did not seek double damages, or even mention that statute. CP 7-8 (Burton's prayer for damages). Neither did her pre-trial brief. CP 45-46 (listing damages sought by Burton at trial). Unsurprisingly, the trial court did not award double damages when it issued its Findings of Fact and Conclusions of Law. *See* CP 129-30.

In fact, Burton did not make a proper argument for double damages against AMHP until after she presented a proposed judgment in December 2011—which was four months after the completion of trial, and three months after the trial court issued its findings and conclusions. *See* CP 161-178 (Burton's 1/3/12 reply brief in support of her proposed judgment—her first substantive argument for double damages against AMHP under RCW 49.52.070). It was improper and unfair for Burton to wait until the end of the case to present argument in favor of an award of

punitive double damages. The trial court properly refused to award double damages at that late date. CP 217-220.

In any event, Burton simply is not entitled to double damages, because she failed to prove that AMHP "willfully" deprived her of her wages. *See* RCW 49.52.050-.070 (providing for an award of double damages only upon a finding that employer "willfully" deprived employee of wages). An employer does not willfully withhold wages under RCW 49.52.070 if there is a "bona fide dispute" as to the obligation to pay them. *Ebling v. Gove's Cove, Inc.,* 34 Wn. App. 495, 500-01 (1983). Such a dispute exists where the question of the employer's obligation to pay is "fairly debatable." *Schilling v. Radio Holdings, Inc.,* 136 Wn.2d 152, 161 (1998). Here, based on the wealth of case law and other authority AMHP has cited in support of its appeal—which Burton has not even attempted to refute—there was at the very least a good faith dispute as to whether she was entitled to continue receiving her salary while she was directly competing with her employer. The trial court's denial of double damages should be affirmed.

2. There Is No Basis for Imposing Individual Liability on Becker.

In her cross-appeal, Burton also argues that Becker should be individually liable under RCW 49.52.070. Burton's Br. at 14-15, 18-19.

But as noted above, that statute applies only to willful withholdings of wages, not to cases such as this one where there is a bona fide dispute regarding the obligation to pay. Since Burton has failed to prove any willful withholding, there is no basis for imposing individual liability on Becker, and the trial court's dismissal of Burton's claims against her should be affirmed. CP 294.

IV. CONCLUSION

AMHP respectfully asks this Court to reverse the judgment in favor of Burton, to direct entry of judgment in favor of AMHP, and to remand the case for a determination of AMHP's damages.

RESPECTFULLY SUBMITTED this 15th day of October, 2012.

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DECLARATION OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused copies of the REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS to be served in the manner noted below on the following:

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Dated this 15th day of October, 2012.

Valerie Macan

Valerie S. Macan