

68434-5

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No. 68434-5

WASHINGTON COURT OF APPEALS
DIVISION ONE

JOYCE LEAH BURTON

Respondent / Cross-Appellant

v.

JANICE BECKER and AFFILIATED MENTAL
HEALTH PROGRAMS, INC.

Appellants / Cross-Respondents

REPLY BRIEF OF RESPONDENT / CROSS-APPELLANT

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INDEXED
FILED
JUN 11 2003
FBI - TACOMA

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RESTATEMENT OF THE CASE

Pre-Trial Notices to AMHP and Becker - Approximately two months before trial, Burton informed AMHP and Becker, through discovery responses, that she began providing free services for three or four former AMHP clients in July 2009. (CP 139, Ex 139, answer to interrog No. 3. See also Ex 139, answers to interrogatories 2, 10, 11, and 12).

Burton also provided the amounts and dates of payments she received from former AMHP clients before September 12, 2009, through her discovery responses, approximately two months before trial. (CP 139, Ex 137 and Ex 138, answers to interrogatories to 2, 3, 10, 11, and 12 and response to Request for Production No. 16 which references the attached "Accounting for Self-Employment Income" spreadsheet).

The same spreadsheet that Burton provided in response to AMHP's Request for Production No. 16 was admitted as an exhibit at trial. (CP 139, Ex 137). It is the only evidence, other than Burton's testimony, as to what payments were received from former AMHP clients. (CP 139, Ex 137). Burton confirmed its contents during AMHP's cross-examination of her. (Defendants' RP 75:2-15).

On April 5, 2011, approximately three weeks before trial, Burton filed and served a pre-trial brief, (CP 33-79), which cited:

(1) RCW 18.225.100 and the American Mental Health Care Association's Code of Ethics, (2010 Edition), in favor of Burton's position that mentally ill patients have sole choice over their providers, (CP 35-38),

and

(2) Danny v Laidlaw Transit, 165 Wn2d 200, 193 P3d 128, (2008) in favor of Burton's position that Washington had a longstanding exception which excused breach in contract cases where the breach fulfilled a public policy goal or directive. (CP 35-38).

The April 5, 2011 pre-trial brief also attached a copy of the July 13, 2009 termination letter, (CP 47), the January 1, 2007 employment agreement, (CP 51-54), and the notices terminating Burton's AMHP insurance as of July 31, 2009, (CP 57-58), and August 1, 2009, (CP 59). Finally, the April 5, 2011 pre-trial brief attached the self-employment accounting provided in discovery, (later admitted as Exhibit 137, supra), (CP 60-62), and the American Mental Health Counselors Association, ("AMHCA"), 2010 Code of Ethics, later identified, but not admitted, as Exhibit 21. (CP 62-81 and CP 133, Ex 21).

The April 5, 2011 pre-trial brief was followed by an April 8, 2011 "Memorandum of Law re. Public Policy Exception to Enforcement of Contract Terms." (CP 80-89). The April 8, 2011 Memorandum included the declarations of the parents of the

patients at issue in the case. (CP 96-102). These parents testified, by declaration, in substantially similar fashion as they did at trial. (See Burton's opening brief for trial testimony and citations below for declaration testimony).

I told [Janny Becker] that [my daughter] needed desperately to talk with her counselor [Burton], Becker (sic) still refused to give me any contact info. To make a long story short that night my daughter ... wound up in the psychiatric ward of Harborview Hospital. I am trying to remember when or if I have ever dealt with a more careless, insensitive, rude health care professional if that is the title Ms. Becker (sic) claims. As late as this morning [July 23, 2009] Affiliated has contacted [my daughter] soliciting her business with another counselor. It appears that I will have to take legal action to keep them at bay;" (CP 96-98),

We decided, independently, to hire Leah [Burton], despite the fact that the AMHP employee tried to convince us that anyone at AMHP could provide the same services as Leah ... Leah did not solicit us to continue providing services. We contacted her; (CP 99-100),

On, or after, July 13, 2009, an AMHP employee called me and tried to switch our family's care to someone other than Leah [Burton]. I refused[. I told the AMHP employee that I wanted the family to continue receiving care from Leah and I did not want our family to switch to a different individual ... Leah never solicited my family's business after the AMHP employee told us she no longer worked at AMHP. We decided independently, to hire Leah, despite the fact that the AMHP employee tried to convince me that anyone at AMHP could provide the same services as Leah. Leah did not solicit me to continue providing services, I contacted her. (CP 101-102).

In her April 8, 2011 Memorandum of Law, Burton, cited an additional case, Gardner v Loomis Armored, Inc.,¹ and, again, cited RCW 18.225.100 and Danny v Laidlaw Transit,² in favor of the propositions that provider choice was in the hands of the patient alone and Washington recognized a public policy exception in the enforcement of contracts, including, and specifically, employment contracts. (CP 84-89).

Finally, in its pre-trial reply briefing, Burton cited additional authorities in support of Burton's right, as third party, to take action to enforce the rights of a first party that a statute is designed to protect, citing Sullivan v Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969).

Uncontested Findings About Patient Choice - In its Findings of Fact and Conclusions of Law, the Trial Court found and concluded that both parties testified, and the law provides, that the choice of a therapist belongs solely to the client. (CP 128, FOF No. 12).

AMHP and Becker assigned error to this Finding / Conclusion, (AMHP's Opening Brief, p 2), but cite no evidence or authority to contradict it. In fact, in their opening brief, AMHP and

¹ Gardner v Loomis Armored, Inc., 128 Wn2d 931, 913 P2d 377 (1996).

Becker state: “the trial court noted ... the clients had a right to choose their therapist [and] [t]his is true ...” (AMHP’s Opening Brief, p 19).

Breach Events After the July 13, 2009 Termination Letter

- After Burton began treating three or four former AMHP clients for free in July 2009, AMHP terminated her insurance benefits on July 31, 2009 or August 1, 2009,. (CP 135, Ex 37).

On August 1, 2009, AMHP failed to send Burton a \$600.00 draw which Burton had been receiving, at AMHP’s discretion, on the first of every month, since she began working at AMHP in 2004. (Defendants’ RP 88:10 - 89:15 and 117:17 – 119:2).

AMHP’s business manager, Natalie Hoffman, testified that, under AMHP’s payroll system, there was a three week lag between the end of the pay period and the date paychecks were issued, so AMHP’s employees received \$600.00 draws on the first of every month if the employees needed them. CP 336.

Burton admitted in testimony that the right to a draw was not written into her employment contracts, (Defendants’ RP 88:10 – 89:15), but Hoffman testified that, based on the payroll records, Burton typically received a \$600.00 draw virtually every month. CP 340.

² Danny v Laidlaw Transit Services, 165 Wn2d 200, 193 P3d 128

Prior to August 1, 2009, Burton had not received any money from former AMHP clients for treatment. (Defendants' RP 115:22-24). After Burton's expected draw was not processed and her insurance benefits were terminated, Burton received \$1,250.00 in payments from former AMHP clients before September 12, 2009. (CP 139, Ex 137).

Basis for Burton's Belief in AMHP's and Becker's Bad

Faith - Burton believed, in August of 2009 and as of the date of trial, that AMHP's failure to provide the draw on August 1, 2009 was punitive and demonstrated a lack of good faith, on AMHP's part, to pay Burton what she was due in severance and benefits.

(Defendants' RP 118:13 – 119:2). This belief was also further supported, in Burton's mind, by previous letters she received from Becker stating AMHP would discontinue severance if Burton continued seeing former AMHP clients. (Defendants' RP 117:7-13 and CP 136-37, Exhs 112 and 114).

Absence of Any Findings of a Legitimate Business

Expectancy by AMHP – "Representatives of the clients testified that they were not interested in disrupting the therapeutic relationship they had established with ... Burton and would not have considered staying with AMHP after ... Burton left the

(2008)

agency.” (CP 128, FOF 11). Further, “[t]he evidence established ... that the three clients ... Burton ‘took’ with her from AMHP had sought her out. (CP 128, FOF 11).

Trial Court Findings / Conclusions on Tortious

Interference - The Trial Court concluded that AMHP failed to carry its burden of proof on its tortious interference claim against Burton, (CP 130, COL 9), but, seemingly inconsistently, concluded that all the elements of a claim for tortious interference were satisfied by AMHP. (CP 130, COL 8),

ARGUMENT

- A. The Trial Court did not err in requiring AMHP to pay Burton’s salary, and should have left Becker joined as a co-defendant, because:**
- (i) Washington caselaw clearly excuses a breach that serves an explicit statutory requirement and public policy goal of allowing mentally ill patients to treat with a provider of their own choosing;**

and

 - (ii) Burton only accepted payments from former clients after AMHP demonstrated its bad faith by prematurely terminating Burton’s insurance benefits and failing to issue her the customary draw against her future paycheck.**

Argument on the above propositions has been made in Burton’s opening brief. Burton’s initial breach in treating mentally ill patients is, as a matter of statutory directive, excused. Additional arguments appear in sections “B” and “C” below, which provide

legal reasoning in support of the above proposition. Also, the arguments in section “B” and “C” below clearly show that AMHP and Becker were the first parties to breach the contract by terminating Burton’s insurance benefits and draw. As a result, the trial court did not err in requiring AMHP to pay Burton’s salary for the 60 day period following her July 13, 2009 termination letter.

B. The Trial Court did not err in holding that AMHP failed to prove tortious interference.

AMHP and Becker Cited the Wrong Test for Proving a future Business Expectancy Claim - The four-element Kieburtz test that AMHP and Becker cited for tortious interference claims was replaced, or in Pleas wording, infra, “rejected,” in 1989, for the type of claim AMHP and Becker are making, i.e., a future business expectancy claim. Hudson v City of Wenatchee, 94 WnApp 990, 999, 974 P2d 342 (1999), following Pleas v Seattle, 112 Wn2d 794, 802-4, 774 P2d 1158 (1989), (specifically rejecting the four-element test used in Calbom, infra, and other previous Washington cases).

Pleas, instead, adopted a five-element test then followed by Oregon’s courts. Pleas, supra. Washington’s new five-element test neither slavishly followed the then-existing First Restatement of Torts formula nor the Second Restatement of Torts formula. See Hudson and Pleas, supra. As such, it is no longer enough to simply

rejecting the four-element test). Also, a privilege from liability for tortious interference may exist when the alleged tort-feasor has the responsibility for the welfare of another or gives requested advice. Calbom v Knudtson, 65 Wn2d 157, 163, 396 P2d 148 (1964), abrogated, on other grounds, by Pleas, supra.

There Is No Evidence in the Record to Support Proximate Cause or Improper Motive. In Addition, Any Act by Burton in Treating the Clients is Otherwise Excused by a Legally Recognized Privilege Within the Particular Tort Theory Cited by AMHP and Becker - In the above-captioned case, there is substantial evidence in the record that AMHP had no business relationship with the clients, at all, after Burton left and Burton, therefore, interfered with nothing. The Trial Court found, in essence, that the clients bolted from AMHP, sought Burton out on their own, and had no interest in continuing treatment with anyone else at AMHP. These facts are not controverted by AMHP or Becker. They, therefore, prevent a tortious interference claim for future business expectancy because no act performed by Burton caused resultant damages to AMHP or Becker. See citations to Newton, below.

A similar, but more extreme, situation existed in Newton Insurance, supra. Clients previously associated with Newton's

former employee left Newton Insurance and went to the new employer of Newton's former employee. *Id.* at 160-61. The new employer was co-defendant Caledonian Insurance. Newton at 160-61. In addition, however, Caledonian Insurance and Newton's former employee admitted soliciting Newton's clients with the intention of drawing them away from Newton, despite the non-compete agreement signed by Newton's former employee. *Id.*

In spite of the above evidence, however, the Newton Court found there was evidence in the record that the clients associated with Newton's former employee would have most likely left anyway after Newton's former employee went to work at Caledonian. *Id.* Therefore, the required element of proximate cause was not proven and judgment against Caledonian and Newton's former employee was not proper, as a matter of law, despite their solicitation with improper motives, because the issue of proximate cause for alleged damages was for the trier-of-fact. *Id.* This ruling was given in spite of the fact that Newton had otherwise proven its tortious interference claim and a civil conspiracy claim against Newton's former employee and Caledonian Insurance. *Id.*

It is clear from the record that AMHP, unintentionally perhaps, caused its relationships with the clients to end when it fired Burton, but that is the sole reason why AMHP's relationships

with these clients ended according to all evidence in the record. As a result, there were no resultant damages to AMHP from any actions of Burton. AMHP had already created the damage by, metaphorically, shooting itself in the foot.

Further, while Burton knowingly treated the clients, there is no evidence of any motive, on Burton's part, to injure AMHP. It would be hard to find a motive more pure, or responsibility for the welfare of another so clear, as the psychological counseling of children with self-harm issues. (See Burton's Opening Brief). Therefore, the record provides ample evidence for the Trial Court's Conclusion of Law No. 9, i.e., that AMHP failed to carry the burden of proof on tortious interference, (CP 130, COL 9), but no evidence for the Trial Court to conclude that all the elements of a claim for tortious interference were satisfied by AMHP. (CP 130, COL 8).

It cannot be disputed that the termination of Burton, alone, caused AMHP's relationship with the clients to end and that Burton's subsequent acts were not the cause of any "resultant" damage. The damage had already been done.

C. Burton's request for statutory double damages and personal liability for AMHP's owner, (Becker), is absolutely meritorious because Becker admitted that the choice of provider is up to the patient alone and Burton's pleadings, before trial, put AMHP and Becker on notice that this was a statutorily protected right of the clients.

No Relevant Facts Are In Dispute - Undisputed findings are verities on appeal. In re the Contested Electin of Schoessler, 140 Wn2d 368, 385, 998 P2d 818 (2000). The Trial Court found that it is undisputed that both parties testified, and the law provides, that the choice of a therapist belongs solely to the client. (CP 128, FOF No. 12). Further, the Trial Court found the “representatives of the clients testified they were not interested in disrupting the therapeutic relationship they had established with ... Burton and would not have considered staying with AMHP after ... Burton left the agency.” (CP 128, FOF 11). Finally, that, “[t]he evidence established ... the three clients ... Burton ‘took’ with her from AMHP had sought her out. (CP 128, FOF 11).

These finding have not been argued, factually or via cited legal authorities, by AMHP or Becker on appeal.

It is also undisputed that Burton did not receive any payments from former AMHP clients until after AMHP / Becker terminated Burton’s insurance benefits and elected not to provide Burton with her customary \$600.00 draw on August 1, 2009.

The Law Does Not Recognize AMHP’s and Becker’s Assertions as a Bona Fide Dispute - A “bona fide dispute” is defined in Ebling as a dispute in which the employer had a “genuine belief that it was not obligated to pay wages.” Ebling v Gove’s

Cove, 34 WnApp 495, 500-503, 663 P2d 132 (1983). Simply claiming to have a “genuine belief” that one is not obligated to pay wages, is, by itself, insufficient for proving that a bona fide dispute exists. Id at 501-3. If an employer’s understanding of the dispute is “arbitrary and unreasonable,” there is no “bona fide dispute” and the dispute is “insufficient ... to remove ... the sanctions imposed by RCW 49.52.050(2) and RCW 49.52.070.” Id at 502-3.

The Court of Appeals upheld the ruling of Ebling's trial judge that the employer’s understanding of the dispute was “arbitrary and unreasonable” when substantial evidence indicated the employer paid lower commission rates to his employee for sales finalized after November 1, 1978, but argued and testified that he had a genuine belief that industry standard allowed him to do this. Ebling at 501-2.

The Ebling Court was not persuaded by the employer’s argument and testimony that industry standard allowed employers to modify commission terms at any time prior to “the time the sale was consummated and payment received.” Id. As a result, “there was no bona fide dispute as to the amounts actually owed ... [and] the dispute was insufficient to remove [employer] Gove’s nonpayment of wages from the sanctions imposed by RCW 49.52.050(2).” Ebling at 501-2.

Likewise, in AMHP's and Becker's other cited case, Schilling v Radio Holdings, the Washington Supreme Court declined to allow Schilling's employer to avoid double damages by arguing that its poor financial situation made payment impossible or that it had a good faith belief that the new owner would pay Schilling's back wages. See Schilling v Radio Holdings, Inc., 136 Wn2d 152, 157-9, esp 159, 961 P2d 371 (1998). "In the absence of an express legislative exception to the double damages provision ... for an employer who alleges a financial inability to pay wages due, we decline to create such an exception judicially." Id at 165-66.

The Court of Appeals Can Decide the "Bona Fide Dispute" Issue Without Remanding This Case - As a policy matter, the allegation of a "bona fide dispute" by the employer must be viewed skeptically by the courts because the "bona fide dispute" exception for withholding wages is meant to be construed narrowly. See Schilling v Radio Holdings, Inc., 136 Wn2d 152, 157-9, esp 159, 961 P2d 371 (1998).

Whether an employer has a genuine belief that it is not obligated to pay wages is a question of fact requiring the trial court to weigh the credibility of the evidence, but where there is no dispute as to the material facts, the Court of Appeals "will resolve the case on summary judgment." Schilling at 160.

There can be no dispute as to whether provider choice belongs to mental health clients in Washington State because:

(1) Becker and AMHP admitted that it does,

and

(2) Washington statutory law states likewise. See RCW 18.225.100.⁵

As a result, the Court of Appeals can decide the issue of whether AMHP/Becker had a genuine and non-arbitrary belief that they did not owe Burton wages.

Finally, there should also be no dispute as to whether the Court of Appeals should decide the issue and enforce the patients' statutory rights, under RCW 18.225.100, through this lawsuit. See Sullivan v Little Hunting Park, Inc., 396 U.S. 229, 235, 238-39, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969),⁶ (a statute which directly provides an African-American plaintiff with the right to sue for damages as a result of race-based exclusion from a community corporation also provides a third party with a right to sue under that action for being terminated from the community corporation upon

⁵ RCW 18.225.100: A person licensed under this chapter must provide clients ... with accurate disclosure information ... including the right of clients to refuse treatment [and] the responsibility of clients to choose their provider and treatment modality which best suits their needs ...

⁶ Possibly superceded, on other grounds, by statute, according to Oliver v Dunn Company, 2009 U.S. Dist. LEXIS 40434 (C.D. Ill. 2009)

protesting the exclusion of the first party and if the statute provides no explicit method of enforcement, the court can fashion its own remedy).

“Fairly Debatable” Is Not The Legal Standard - One term cited by AMHP and Becker as a standard for withholding wages, i.e., when things are “fairly debatable,” is not the legal standard. See Schilling, below. The words “fairly debatable” are simply used, in Schilling, as an example as to what might be considered a “bona fide dispute.” See below.

In order to preclude a finding of willfulness, “[t]he dispute must be ‘bona fide,’ e.g. a ‘fairly debatable dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid.’” Schilling at 161.

The Overnite Case is Controlling and Favors Burton - A close examination of a case factually similar to the above-captioned one illustrates that AMHP and Becker’s allegations of a “bona fide dispute” are on quicksand. See Department of Labor & Industries v Overnite Transportation, 67 Wn App 24, 834 P2d 638 (1992), *review denied*, 120 Wn2d 1030, 847 P2d 481(1993), below.

Overnite concerned a Virginia corporation doing business as a common carrier in Washington. Id at 27. Eleven Washington driver employees had collectively worked almost 2000 hours of

overtime without receiving the overtime compensation required under the Washington Minimum Wage Act. Overnite at 27.

The Overnite Court disagreed with the employer's, (Overnite's), assertion "that a bona fide dispute existed about the obligations of pay[ing]" overtime. Id at 35-36. The Court, therefore, imposed double damages and attorneys' fees and costs on Overnite. Id.

The Court imposed double damages and attorneys' fees and costs on Overnite, and considered Overnite's wage-withholding actions meritless, because the Department of Labor & Industries, ("L&I"), *in its notice of unpaid wages to Overnite*, cited the Washington Minimum Wage Act and two federal cases as authority that local law provisions on overtime were not pre-empted by the Federal Motor Carrier Act, ("MCA"). Id at 35-36. As a result, Overnite was not entitled to benefit from the "narrow" exception for wages whose payment is subject to a bona fide dispute because the cases cited in L&I's notice distinguished themselves from the case that Overnite was erroneously relying on⁷ to withhold overtime payment. Id at 35-36.

In its decision, the Overnite Court ruled that Overnite's allegation that a different line of cases should be followed, did "not

amount to a bona fide dispute.” Overnite at 36. Specifically, Overnite’s disagreement with L&I over which line of cases should be followed did “not ... justifi[y] invoking the narrow exception to the statute providing ... double damages [RCW 49.52.070].

Department of Labor & Industries v Overnite Transportation, 67 Wn App 24, 36, 834 P2d 638 (1992), *review denied*, 120 Wn2d 1030, 847 P2d 481(1993).

In addition to double damages and attorneys’ fees and costs, the Overnite Court ruled, on nearly the exact same grounds, that a statutory L&I penalty of 10%, for Overnite’s failure to, within 30 days of the notice, pay the wage claim or provide a satisfactory explanation to L&I, was correctly imposed because Overnite’s legal explanation concerning why it did not pay overtime to the drivers “did not ultimately prevail and was contravened by persuasive authority offered by [L&I].” Overnite at 38-9.

Overnite’s Facts Are Very Close to Those of the Above-Captioned Case - Burton served her pre-trial memorandum on AMHP / Becker three weeks before trial and gave AMHP and Becker the set-off amount, i.e., \$1,250.00, two months before trial. As a result, AMHP / Becker had explicit notice that statutory legal authority prohibited AMHP from interfering with the patients’

⁷ Levinson v Spector Motor Serv, 330 U.S. 649, 91 L.Ed. 1158, 67

choices of provider. Furthermore, it had a fixed set-off amount against Burton's 60 days of severance salary which AMHP and Becker never, subsequently, disputed. In addition, Becker has testified that she knew, all along, that she was prohibited from interfering with the patients' choice of providers.

The notice provided by Burton is more explicit, and easily understood, than the caselaw provided by L&I in Overnite because Burton cited to an explicit statute, not legal opinions. In addition, Burton cited the American Mental Health Counselor's Association's standards on patient choice and Danny's rulings on excusable breach. As a result, a recognized industry standard and Washington caselaw provided any additional guidance that AMHP / Becker required. Finally, the evidence shows that the parties agreed that Burton's citation to RCW 18.225.100 was controlling because both parties testified that the choice of provider was up to the patient.

CONCLUSION

Under the above facts, there is absolutely no basis for AMHP / Becker to argue that they genuinely believed they could terminate Burton's insurance benefits and withhold Burton's wages. In addition, there was no evidence submitted at trial by Becker and

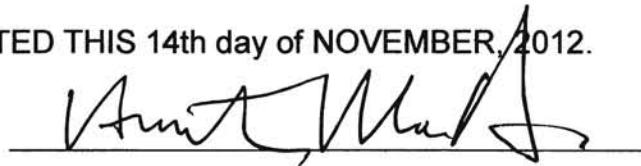
S.Ct. 931 (1947).

AMHP that there was ever any issue as to whether Burton should have received her 60 day severance pay, less the \$1,250.00 set-off, which Burton conceded before trial.

Becker was, and is, the owner of a company providing mental health counseling whose practices are regulated by RCW 18.225.100. Under RCW 18.225.100's explicit language, Becker knew she could not interfere with a patient's choice of provider.

To argue that Becker had a genuine belief that terminating Burton's insurance benefits and wages would not affect this choice or was not designed to punish this choice is simply not consistent with the facts. The intent was, pure and simple, to punish, (see Trial Exhibits 112 and 114 at CP 136-37). This cannot be reconciled with the explicit directives of RCW 18.225.100, Danny v Laidlaw Transit, and Garder v Loomis Armored, Inc.,⁸ and Department of Labor & Industries v Overnite Transportation, 67 Wn App 24, 834 P2d 638 (1992), *review denied*, 120 Wn2d 1030, 847 P2d 481(1993). AMHP's and Becker's requests for relief should be denied and Burton's should be granted.

DATED THIS 14th day of NOVEMBER, 2012.



⁸ Danny v Laidlaw Transit, 165 Wn2d 200, 193 P3d 128 (2008) and Garder v Loomis Armored, Inc., 128 Wn2d 931, 913 P2d 377 (1996).

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