

69548-7

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No. 695487

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JESSICA MACLEAN,

Plaintiff/Appellant,

v.

KATE CHASE RYAN, a married individual, and
ADVANCED EDUCATORS, LLC,
a Washington Limited Liability Company

Defendants/Respondents.

81-111-1
APPELLANT'S REPLY
BRIEF
FILED
MAY 23 2011
COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

REPLY BRIEF OF APPELLANT

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 ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. ARGUMENT	1
A. OPPOSITION TO MOTION TO STRIKE	1
B. PLAINTIFF’S INTENTIONAL INTERFERENCE CLAIM AGAINST DEFENDANT RYAN SHOULD NOT HAVE BEEN DISMISSED	2
1) Plaintiff has Business Relationships and Business Expectancies	2
2) Defendants Admit the Knowledge Element	3
3) Defendants’ Interference Induced the Termination of Business Relationships and Business Expectancies..	4
4) Improper Purpose.....	5
5) Defendant Ryan’s Interference was Not “Contractually Privileged”.....	9
6) Independent Duty Doctrine	11
7) Personal Liability	11
8) Personal Liability under the CPA	11
II. CONCLUSION	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Bailie Communications, Ltd. v. Trend Business Systems</u> , 53 Wn.App. 77, 765 P.2d 339 (1988)	8
<u>Consulting Overseas Mgmt., Ltd. v. Shtikel</u> , 105 Wn. App. 80, 18 P.3d 1144 (2001)	12
<u>Elcon Const., Inc. v Eastern Washington University</u> , 174 Wn.2d 157, 272 P.3d 965 (2012)	9, 11
<u>Hudson v City of Wenatchee</u> , 94 Wn. App. 990, 998, 974 P.2d 342, 347 (1999)	2
<u>Jackowski v Borchelt</u> , 174 Wn.2d 720, 738, 278 P.3d 1100 (2012)	11
<u>Johnson v. Harrigan-Peach Land Dev. Co.</u> , 79 Wn.2d 745, 489 P.2d 923 (1971)	12
<u>Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.</u> , 114 Wn. App. 151, 158, 52 P.3d 30 (2002)	2
<u>Park Avenue Condo. Owners Ass'n. v. Buchan Devel. L.L.C.</u> , 117 Wn.App. 369, 71 P.3d 692 (2003)	8
<u>Scymanski v. Dufault</u> , 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971)	2,3
<u>State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.</u> , 87 Wn.2d 298, 322, 553 P.2d 423 (1976)	12
<u>Vacova Co. v. Farrell</u> , 62 Wn.App. 386, 814 P.2d 255 (1991)	8
 <u>Statutes</u>	 <u>Page</u>
RCW 25.15.125(2)	11

Other Authorities

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 302.03 8
(6th ed.)

I. ARGUMENT

A. OPPOSITION TO MOTION TO STRIKE

Plaintiff objects to the motion to strike regarding “briefing surrounding the result at trial”. The only reference to the trial in plaintiff’s brief is in the statement of the case explaining the status of the lawsuit and the procedures preceding the appeal. The final judgment that gives rise to this appeal, dated October 18, 2012, is a part of the record accompanying the Notice of Appeal. It identifies the result of the trial described in the statement of the case. That record is properly before this court.

While the subject of designated Exhibits 85 & 86 was referenced in the summary judgment arguments (the National Board’s “archiving” of plaintiff’s credentialed status for her classes in the first 6 months of 2009 and the printing mistake by the Oregon Newsletter), plaintiff agrees those specific exhibits were not summary judgment exhibits. However, plaintiff objects to defendants’ motion to strike the remaining designated Exhibits. Exhibit 75, the January 23, 2009 email between plaintiff and defendant Ryan, is a duplicate of a summary judgment exhibit – Exhibit 6 to the Declaration of Jessica MacLean and CP 116. Exhibit 89, the July 29, 2012 denial of plaintiff’s independent application to the National Board for her own Approved Provider number, is also a duplicate of a summary judgment exhibit – Exhibit 9 to the Declaration of Matthew King and CP 56.

B. PLAINTIFF'S INTENTIONAL INTERFERENCE CLAIM AGAINST DEFENDANT RYAN SHOULD NOT HAVE BEEN DISMISSED.

1) Plaintiff has business relationships and business expectancies.

"To prove tortious interference with a business expectancy, a plaintiff must show (1) the existence of a valid contractual relationship or business expectancy..." Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc., 114 Wn. App. 151, 158, 52 P.3d 30 (2002). In the present case, defendants admit that plaintiff had existing contracts during the first half of 2009. Respondent's Brief, pg. 12. Therefore, plaintiff has established the first element of this claim.

While "an existing enforceable contract is not necessary . . . All that is needed is a relationship between parties contemplating a contract, with at least a reasonable expectancy of fruition." Scymanski v. Dufault, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971). Plaintiff had business expectancies for the remaining half of 2009.

Defendants cite Hudson v City of Wenatchee, 94 Wn. App. 990, 998, 974 P.2d 342, 347 (1999). That case is distinguishable both from Newton, supra, and from the present matter. In Hudson, that plaintiff simply claimed anyone the police helped would have hired plaintiff but for the police officers' help. The group of potential customers in the instant case is more specific and reasonably identifiable. Plaintiff in the instant

case needed the Approved Provider number as proof of certification for continuing education credit in order to provide services to her potential customers. If the police in Hudson had destroyed the locksmith's tools for unlocking vehicles, that would be a scenario comparable to the instant case. The police in Hudson took no specific action against Hudson's ability to reach its potential customers. That is unlike and distinguishable from defendants in the instant case, who intentionally eliminated plaintiff's use of the Approved Provider number, thereby eliminating plaintiff's ability to contract with her specific group of potential customers – medical health professionals in need of CEUs.

Defendants knew that plaintiff could only market continuing education courses if she had an Approved Provider number; that is why Ryan and MacLean prepared the Co-Sponsored Application for the Approved Provider number. The existence of a pool of potential attendees is not disputed. And we know plaintiff had obtained attendees to her certified classes in the first half of 2009. It is reasonable to expect that plaintiff would continue to have people sign up for her certified course work throughout 2009 but for defendants' interference.

- 2) Defendants admit the knowledge element.
- 3) Defendants' interference induced the termination of business relationships and business expectancies.

In Plaintiff's Opposition to Summary Judgment, pg. 13, lns 4-15, plaintiff details her argument regarding her expected use of the Approved Provider number through AE, which was supposed to last for a period of three years. The paragraph goes on to discuss defendant Ryan's letters to the National Board and submits that her intentional act of writing to the National Board and decertifying her course work induced the termination of plaintiff's business relationship with her existing customers who were promised continuing education courses credits during the first half of 2009 and induced future interference with potential attendees who would no longer sign up for classes because the continuing education accreditation had been terminated.

The fact that MacLean was "unable to market her courses for CEU's for 18 months" is supported by the record. The 18 month delay is identifiable from the July 14, 2008 letter from defendant Ryan terminating MacLean's use of the co-sponsored Approved Provider number and the December 28, 2010 letter from the National Board finally granting her separate Approved Provider status. CP 130-131 and CP 146, respectively. Defendant Ryan conceded she had the sole ability to determine if plaintiff's classes would be recognized as having approved provider status: "...I have the ability to say which classes under AE have approved status whether or not I have informed the NCB". CP 116. And the

approval of the Co-Sponsored Approved Provider application was good for 3-years. Id.

The record also contains defendant Ryan's e-mail to the National Board in November 2009. CP 139-140. Plaintiff submits this e-mail is retaliation for a letter sent to Ryan by plaintiff's counsel (CP 95, para 23). The email serves no purpose other than to interfere in plaintiff's ability to obtain her own Approved Provider number. The opening line of the email ("Thanks for taking time to talk with me today.") demonstrates that defendant Ryan initiated the communication. Defendant Ryan admits she knew MacLean was attempting to obtain her own certification number. Respondent's Brief pg. 13. Four months after the initial decertification by defendants, defendant Ryan goes out of her way to both telephone and e-mail the National Board with unproved accusations against MacLean. In the letter from the National Board denying plaintiff's initial application for her own independent Approved Provider number, the National Board cites defendant Ryan's letter from November 2009 as evidence to support the denial of MacLean's application. CP 56.

Plaintiff had multiple business expectancies with which defendant Ryan intentionally interfered. They include plaintiff's existing business relationship with her customers who took accredited classes in the first half of 2009, only to have those credits revoked by Ryan; plaintiff's

expectancy to be able to use her Co-Sponsored Approved Provider number for 3 years; plaintiff's expectancy to conduct the remaining scheduled 74 classes in the last half of 2009 which could not be held or sold as accredited CEU courses; and plaintiff's expectation to obtain her own independent Approved Provider number from the National Board. There are at least questions of fact regarding any defense defendant Ryan asserts for these intentional acts – questions of fact that should have been decided by the jury in the trial.

4) Improper Purpose.

Defendant Ryan decided to terminate her relationship with plaintiff long before she came up with the alleged breach by plaintiff in July 2009. Defendant Ryan's e-mail to her website editor, Matt, eight months earlier, stating that she plans to "fire her" shows that defendant Ryan had already decided not to work with plaintiff anymore. CP 87 & 88. In addition, through the first half of 2009, defendant Ryan never fulfilled the website marketing obligations she agreed to as her part of the contract. CP 93-94. Her justifications in her July 2009 letter for terminating plaintiff's use of the Co-Sponsored Approved Provider number were fabrications to justify her own wrongful actions of failing to fulfill defendants' marketing obligations under the parties' oral agreement. Defendant Ryan's actions of terminating use of the Co-Sponsored Approved Provider number and

notifying the National Board of the decertification of plaintiff's classes were acts of hostility to cover her breach.

All of defendant Ryan's defenses to the intentional interference claim are based on her alleged rights under her contract with plaintiff. The trial court ruled that genuine issues of fact existed regarding the terms of the contract and any alleged breach. Logically those same questions of fact exist regarding defendant Ryan's alleged right under the contract to take the actions she did against MacLean. Defendant Ryan's conclusory allegations that MacLean breached the contract, justifying termination of MacLean's use of the Co-Sponsored Approved Provider number, does not make it so. That is a question of fact that should have been put to the jury on the tort claim, just as it was on the breach of contract claim.

For example, in her July 14, 2009 letter, defendant Ryan claims she is terminating plaintiff's use of the Approved Provider number because of plaintiff's alleged breaches of their agreement, including the alleged misleading ad in the Oregon massage monthly newsletter. CP 130. That was a printing error by a third-party. The class advertised was an approved course curriculum under the Co-Sponsored Approved Provider number. See CP 116.

"A 'material breach' is a breach that is serious enough to justify the other party in abandoning the contract. A "material breach" is one that

substantially defeats the purpose of the contract, or relates to an essential element of the contract, and deprives the injured party of a benefit that he or she reasonably expected. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 302.03 (6th ed.); Park Avenue Condo. Owners Ass'n. v. Buchan Devel. L.L.C., 117 Wn.App. 369, 71 P.3d 692 (2003). The materiality of a breach is a question of fact. Bailie Communications, Ltd. v. Trend Business Systems, 53 Wn.App. 77, 765 P.2d 339 (1988). The question of materiality depends on the circumstances of each particular case. Vacova Co. v. Farrell, 62 Wn.App. 386, 814 P.2d 255 (1991). In the instant case, defendant Ryan had no legal justification for terminating the certified status of plaintiff's classes based on a third party's printing error.

The improper motive of defendant Ryan is underscored by her retaliatory "follow-up" letter to the National Board in November 2009, four months after initially terminating plaintiff's use of the Co-Sponsored Approved Provider number. After receiving a demand letter from plaintiff's attorney, defendant Ryan contacted the National Board a second time to influence the National Board's decision on plaintiff's independent application for an Approved Provider number. CP 95 & CP 140. There is no proper purpose associated with this action.

In the Respondent's Brief, pg. 8, 1st para., defendant Ryan now tries to claim that she wrote the letter because she discovered in April

2008 and September 2008 "misuse" of an approved provider number from a different coalition of massage educators -- a number the parties relied on in the years before defendants obtained the Co-Sponsored Approved Provider number at issue in this litigation. CP 56. Defendant Ryan cites CP 56 for her discovery. Yet, that source of her discovery wasn't written for another eight months. Defendant Ryan's story does not hold up. Her intentional interference was both hostile and retaliatory.

The case of Elcon Const., Inc. v Eastern Washington University, 174 Wn.2d 157, 272 P.3d 965 (2012) is distinguishable from the present matter. In Elcon, the plaintiff failed to provide any evidence of defendant's motivation in writing a letter to plaintiff's bond company. The Elcon plaintiff presented no evidence of that defendant's greed, retaliation, or hostility. Unlike Elcon, plaintiff in this case has demonstrated that defendant Ryan's first letter writing motivation came from her effort to cover up her own breach of the parties' oral agreement and her second letter to the National Board was motivated by retaliation. There is at least a genuine issue of material fact regarding defendant Ryan's improper purpose for intentionally interfering with plaintiff's business relationships and expectancies.

5) Defendant Ryan's Interference was Not "Contractually Privileged". Defendant Ryan had breached the parties' agreement by

failing to provide the required internet marketing services for the first half of 2009. To get rid of the plaintiff, without having to follow through with her side of the agreement, defendant Ryan took the offensive and sent the July 14, 2009 letter terminating plaintiff's use of the Co-Sponsored Approved Provider number. Plaintiff had a substantial expectancy in having her accredited classes listed on the defendants' website and having access to the approved provider number obtained, based in part, on plaintiff's curriculum submitted with the co-sponsored application. There is no evidence that a minor typographical error in a third party's newsletter could rise to the level of a false or misleading class offering. Or that a reasonable person would consider it a false or misleading class offering. The specific class advertised was included in the curriculum approved through the co-sponsored application. It was a properly certified class and defendant Ryan knew that. There is no evidence that the minor typographical error in the newsletter ad arose from any improper conduct by the plaintiff.

Whether defendant Ryan's actions were justifiable under the circumstances is a question of fact. Plaintiffs claim for intentional interference should not have been dismissed on summary judgment.

6) Independent Duty Doctrine.

The Elcon court directed lower courts not to apply the independent duty doctrine to bar tort claims, despite the existence of a contract between the parties, "unless and until" the Supreme Court has "decided otherwise." Elcon, 174 Wn.2d at 165 . Given the express admonition to lower courts not to reject potential tort claims, even if arguably contract-related, defendants' argument is meritless. The Supreme Court has allowed claims to proceed for the following torts independent of any related contract: Fraud, negligent misrepresentation, and tortious interference. See Jackowski v Borchelt, 174 Wn.2d 720, 738, 278 P.3d 1100 (2012); Elcon, 174 Wn.2d at 165-66. Independent of the parties' agreements, defendant Ryan has a duty to not intentionally interfere for a wrongful purpose with plaintiff's business relationships and expectancies.

7) Personal Liability.

Defendant Ryan is subject to personal liability for her own torts. RCW 25.15.125 (2).

8) Personal Liability under the CPA.

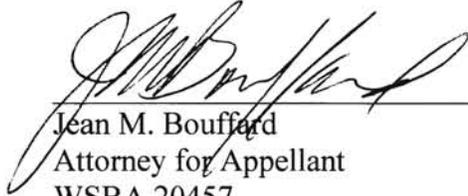
The trial court in the instant case ordered a blanket dismissal of the individual defendant Kate Chase Ryan, and her husband, based on a corporate shield principle. However, it is a well-settled principle that under the CPA, "[i]f a corporate officer participates in the wrongful

conduct, or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties." State v. Ralph Williams' N. W. Chrysler Plymouth, Inc., 87 Wn.2d 298, 322, 553 P.2d 423 (1976); Johnson v. Harrigan-Peach Land Dev. Co., 79 Wn.2d 745, 489 P.2d 923 (1971); Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wn. App. 80, 18 P.3d 1144 (2001). Accordingly, because defendant Ryan was the sole participant in the wrongful acts alleged by plaintiff, it is appropriate for the court to reinstate defendant Ryan as a defendant in her individual capacity for plaintiff's CPA claim.

V. CONCLUSION

In sum, genuine issues of material fact exist regarding defendants' improper motive and wrongful means of interfering with plaintiff's existing and prospective customers, precluding summary judgment. Reasonable minds could differ and the factual questions should be decided by a jury. As a matter of law, defendant Kate Chase Ryan should be reinstated as an individual defendant subject to personal liability for the intentional interference with business expectancies claim because an LLC member is not shielded from liability for her own torts. And, under the CPA, as the corporate officer that performed the wrongful conduct, defendant Ryan is personally liable for her actions and should be reinstated as an individual defendant.

RESPECTFULLY submitted this 24th day of July, 2013.



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CERTIFICATE OF SERVICE

I certify that I caused to be served via e-mail a copy of the foregoing REPLY BRIEF OF APPELLANT this 24th day of July, 2013, to the following counsel of record at the following addresses:

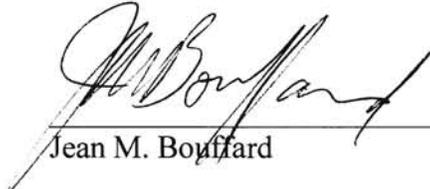
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COURT OF APPEALS DIV. I
STATE OF WASHINGTON

And caused the foregoing REPLY BRIEF OF APPELLANT to be mailed to the Court of Appeals for filing on this date.

Clerk of the Court
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