

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 89301-2

(Court of Appeals No. 68434-5-I)

JOYCE LEAH BURTON,

Respondent,

v.

JANICE BECKER and AFFILIATED MENTAL HEALTH
PROGRAMS, INC.,

Petitioners.

PETITION FOR REVIEW

2013 SEP 11 PM 3:16
COURT OF APPEALS DIVISION
STATE OF WASHINGTON

FILED
SEP 23 2013

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON *DF*

Jeffrey B. Youmans
Davis Wright Tremaine LLP
Attorneys for Petitioners

Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| I. INTRODUCTION AND IDENTITY OF PETITIONERS..... | 1 |
| II. COURT OF APPEALS DECISION..... | 3 |
| III. ISSUES PRESENTED FOR REVIEW | 3 |
| IV. STATEMENT OF THE CASE..... | 3 |
| A. Factual Background. | 3 |
| B. Procedural History. | 6 |
| V. ARGUMENT..... | 8 |
| A. The Lower Courts Correctly Held That Burton Breached Her Duty of Loyalty to AMHP. | 8 |
| B. The Lower Courts Erred in Refusing to Impose Any Consequences for Burton’s Breach of Loyalty. | 9 |
| C. The Court of Appeals’ Holding That the Purpose of Salary Forfeiture “Is Not to Impose a Penalty” Is in Conflict With Decisions of This Court. | 12 |
| D. The Court of Appeals’ Upholding of the Award of Salary in the Absence of Any Basis for Apportionment Is in Conflict With Decisions of This Court. | 16 |
| E. The Court of Appeals’ Decision Improperly Conflates the Common Law Duty of Loyalty With a Contractual Non-Solicitation Claim..... | 19 |
| VI. CONCLUSION..... | 20 |

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| Cases | |
| <i>Astra USA, Inc. v. Bildman</i> , 455 Mass. 116, 914 N.E.2d 36 (2009) | 10, 11 |
| <i>Cogan v. Kidder, Mathews & Segner, Inc.</i> , 97 Wn.2d 658 (1982) | <i>passim</i> |
| <i>Farrell v. Score</i> , 67 Wn.2d 957 (1966) | 17 |
| <i>Ford v. Trendwest Resorts, Inc.</i> , 146 Wn.2d 146 (2002) | 15 |
| <i>Horton v. Whitehill</i> , 121 Or. App. 336, 854 P.2d 977 (1993)..... | 10 |
| <i>Kane v. Klos</i> , 50 Wn.2d 778 (1957) | <i>passim</i> |
| <i>Keystone Fruit Marketing, Inc. v. Brownfield</i> , 2008 WL 1971412 (E.D. Wash. 2008) | 8, 9, 10, 18 |
| <i>Kiebertz & Associates, Inc. v. Rehn</i> , 68 Wn. App. 260 (1992) | 8, 19 |
| <i>Leppaluoto v. Eggleston</i> , 57 Wn.2d 393 (1960) | 14 |
| <i>Little v. King</i> , 160 Wn.2d 696 (2007) | 16 |
| <i>Merkley v. MacPherson's, Inc.</i> , 69 Wn.2d 776 (1966) | 9 |
| <i>MSC Venture Corp. v. Goei</i> , 2009 WL 1423567 (W.D. Wash. 2009)..... | 9, 11 |

| | |
|---|----------------|
| <i>O'Brien v. Puget Sound Plywood, Inc.</i> , 23 Wn.2d 917 (1946) | 12 |
| <i>Obert v. ERADCO</i> , 112 Wn.2d 323 (1989) | 3, 16, 20 |
| <i>In re Parentage of Jannot</i> , 110 Wn. App. 16 (2002) | 16 |
| <i>Phansalkar v. Andersen Weinroth & Co.</i> , 344 F.3d 184 (2nd Cir. 2003)..... | 10, 11 |
| <i>Rathke v. Roberts</i> , 33 Wn.2d 858 (1949) | 12 |
| <i>Riggs Inv. Management Corp. v. Columbia Partners, L.L.C.</i> , 966 F. Supp. 1250 (D.D.C. 1997)..... | 10, 11 |
| <i>State v. Brewster</i> , 152 Wn. App. 856 (2009) | 13 |
| <i>Wheeler v. Catholic Archdiocese of Seattle</i> , 124 Wn.2d 634 (1994) | 12 |
| <i>Williams v. Queen Fisheries, Inc.</i> , 2 Wn. App. 691 (1970) | 13, 14, 17, 18 |
| <i>Zakibe v. Ahrens & McCarron, Inc.</i> , 28 S.W.3d 373 (Mo. App. 2000) | 10 |
| Other Authorities | |
| Black's Law Dictionary (Abridged 6th ed. 1991) | 13 |
| Restatement (Second) of Agency § 393 (1958)..... | 8 |
| Restatement (Second) of Agency § 456 (1958)..... | 17 |
| Restatement (Second) of Agency § 469 (1958)..... | 17, 19 |
| Restatement (Third) of Agency § 8.01 (2006)..... | 8, 15, 17 |
| Restatement (Third) of Agency § 8.04 (2006)..... | 9 |

I. INTRODUCTION AND IDENTITY OF PETITIONERS

Petitioners Janice Becker and Affiliated Mental Health Programs, Inc. (“AMHP”) seek review of the Court of Appeals decision designated in Part II of this petition.

This case raises important issues regarding an employee’s common law duty of loyalty to her employer, and what the consequences should be for breaching that duty. Joyce Leah Burton is a former employee of AMHP. The lower courts held that during the last 60 days of her employment, she breached her duty of loyalty by providing counseling to AMHP clients on her own, directing them to start sending their payments to her rather than the agency, and keeping the payments for herself. Nevertheless, the lower courts ordered AMHP to pay her salary for this 60-day period—effectively requiring the agency to pay her for competing against it.

For the following reasons, this Court should accept review under RAP 13.4(b)(1) and (4):

First, the Court of Appeals’ refusal to impose any consequences for Burton’s disloyalty is in conflict with this Court’s holding that as a general rule, an agent is entitled to “no compensation” for conduct which is “disobedient” or “a breach of his duty of loyalty.” *Kane v. Klos*, 50 Wn.2d 778, 789 (1957).

Second, the Court of Appeals' holding that the purpose of this rule "is not to impose a penalty" (App. 9) is in conflict with this Court's characterization of the rule as a "forfeiture"—which by definition is a penalty—as well as this Court's decisions explaining the rule's purpose as punishing disloyal agents so that others will be deterred from engaging in similar misconduct. *Kane*, 50 Wn.2d at 789; *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 668 (1982).

Third, the Court of Appeals' decision conflicts with the principle, long recognized by the courts and the Restatement of the Law of Agency, that compensation may be awarded to a disloyal employee only if there is a basis for apportioning it to specific work performed for the employer which is untainted by the employee's disloyalty. There is no basis here for apportioning Burton's pay or awarding her any part of her salary, because it is undisputed that she performed *no work whatsoever* for AMHP during the last 60 days of her employment.

Fourth, the Court of Appeals' holding that Burton's breach of loyalty is somehow "mitigate[d]" or excused by the fact that she did not solicit the clients in question (App. 10) confuses the common law duty of loyalty with a much narrower contractual non-solicitation claim; undermines the substantial public interest in deterring *all* types of disloyal conduct by agents and employees; and is contrary to this Court's holding

that the remedy for a breach of loyalty does not depend on the severity of the breach. *Obert v. ERADCO*, 112 Wn.2d 323, 338-39 (1989).

II. COURT OF APPEALS DECISION

Petitioners seek review of the decision filed by Division I of the Court of Appeals on August 12, 2013, affirming the trial court's judgment against AMHP. A copy of the decision is in the Appendix. App. 1-16.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals erroneously hold, contrary to this Court's decisions, that the purpose of the salary forfeiture rule "is not to impose a penalty" on disloyal agents? App. 9.

2. Do the courts have discretion to depart from the forfeiture rule when there is no basis for apportioning the salary to work properly performed for the employer and untainted by the employee's disloyalty?

3. Does the fact that a disloyal employee did not initiate or solicit the relationships or transactions at issue "mitigate" or excuse the employee's breach of loyalty such that the courts may depart from the forfeiture rule? App. 10.

IV. STATEMENT OF THE CASE

A. Factual Background.

AMHP provides mental health counseling and case management services to people with chronic and serious mental health issues. CP 127

(FOF 1).¹ Janice Becker is AMHP's owner and President. *Id.* Joyce Leah Burton worked for AMHP from 2004 to 2009. FOF 2. Beginning in January 2007, Burton served as AMHP's Director and was responsible for running the agency as a whole. FOF 2-3; CP 23-25; RP 4-5.

When Burton became Director, she signed an Agreement for Professional Services with AMHP (the "Contract" or "Employment Contract"). CP 23-26; FOF 2. Paragraph 5 of the Contract, titled "TERMINATION," states that "AMHP may terminate this agreement with 60 days notice and with due cause and upon payment of compensation due to the Director for services rendered to the date of termination." CP 24.

On July 13, 2009, Becker met with Burton and gave her 60 days' written notice of the termination of her employment. Ex. 1. In the notice, AMHP made clear that while Burton would no longer be required to render services to the agency, the effective date of her termination was September 11, 2009—60 days out—and she would be paid her salary through that date. Ex. 1; FOF 9; RP 50-51. The notice also reminded Burton of her obligations under the Contract's "Competition" provision, which prohibited her from approaching or soliciting AMHP clients. Ex. 1;

¹ "FOF" refers to the trial court's Findings of Fact, which are at App. 17-19. "COL" refers to the trial court's Conclusions of Law, which are at App. 19-20.

CP 25. Becker told Burton not to contact the clients she had been counseling, and that the agency would take care of them. RP 51-52.

Within a week or two after receiving her 60-day notice of termination, Burton began seeing AMHP clients on her own. RP 69-70; Ex. 138 at 5-6. She admits that during the notice period from July 13 through September 11, 2009, she provided counseling to a total of four AMHP clients. *Id.* She says she did “some” of this counseling for free, but admits that the clients paid her for the rest of it. RP 74; CP 41-42. Moreover, she admits that she told the clients to start sending their payments directly to her, rather than to AMHP; that they did as she instructed; and that she did not forward any of the payments she received to the agency. RP 74-75; CP 30.

In late July 2009, AMHP repeatedly warned Burton, in writing, that she was still the agency’s employee and was in breach of her duty of loyalty, and that if she continued to divert money from AMHP clients to herself, the agency would no longer be obligated to continue paying her. Exs. 112, 114.

Burton ignored these warnings. RP 74; Ex. 138 at 6. As a result, on August 11, 2009, AMHP sent a letter to Burton informing her that she had forfeited any right under the Contract to payment of additional salary and benefits. Ex. 37. The agency explained in the letter that “[y]ou

cannot take AMHP's clients and pocket the proceeds, and still expect to continue receiving a salary from AMHP." *Id.* at 1. The letter enclosed Burton's final paycheck covering her salary through July 13, 2009, plus another check cashing out her accrued but unused vacation. *Id.*

Burton continued treating AMHP clients through August 2010—over a year after she stopped working for AMHP. RP 74. She says she received a total of \$4,125 in payments from those clients, \$1,125 of which was for counseling she provided during the 60-day notice period from July 13 through September 11, 2009. RP 75-77; Ex. 137.

B. Procedural History.

In October 2009, Burton filed suit against AMHP in King County Superior Court. Her Complaint alleged that AMHP (1) terminated her without "due cause" in breach of the Employment Contract, and (2) further breached the Contract by not continuing to pay her salary during the 60-day notice period. CP 6-7. AMHP denied any liability and asserted counterclaims against Burton for (1) breach of the Contract's "Competition" provision, and (2) breach of her duty of loyalty. CP 17-19.

The case was tried without a jury in April and August 2011. CP 108-118. Before the trial, AMHP withdrew its counterclaim based on the Contract's "Competition" clause, and argued only that Burton breached her duty of loyalty. CP 83-84.

On September 22, 2011, the trial court issued its Findings of Fact and Conclusions of law. App. 17-20. It held that AMHP had “due cause” to terminate Burton under the Contract. FOF 8; COL 4-6. It also concluded that by seeing AMHP clients on her own and keeping their payments for herself, Burton had committed a breach of her duty of loyalty during the last 60 days of her employment. COL 8; FOF 11-12. Nevertheless, the trial court held that AMHP breached the Contract by refusing to continue paying her salary during this period of disloyalty. COL 6-7. On February 23, 2012, the trial court entered judgment against AMHP directing it to pay the salary. CP 219-220.

On appeal, the Court of Appeals agreed that Burton breached her duty of loyalty, and that “as a general proposition” she could be denied her salary as a result of this breach. App. 7. It held, however, that the trial court properly exercised its discretion in awarding the salary for the period of her disloyalty. App. 12. According to the Court of Appeals, “[d]epriving her of her salary on these facts would only serve to punish,” and the purpose of the forfeiture of compensation rule “is not to impose a penalty” on disloyal agents. App. 9. The Court of Appeals found that Burton had earned the salary during the period at issue, even though it was undisputed that she had performed no work for AMHP during that period. *Id.* The Court of Appeals also held that because Burton did not violate the

Contract's "Competition" clause by soliciting the clients in question, this "mitigate[d] the egregiousness of her breach" of loyalty and justified the trial court's order that she be paid. App. 10.

V. ARGUMENT

A. The Lower Courts Correctly Held That Burton Breached Her Duty of Loyalty to AMHP.

"An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." Restatement (Third) of Agency § 8.01 (2006). This general fiduciary principle applies to employees. *Id.* at Comment c. Thus, "[u]nder Washington law, it is well established that a common law duty of loyalty exists between an employee and his current employer, even where no covenant not to compete exists." *Keystone Fruit Marketing, Inc. v. Brownfield*, 2008 WL 1971412 at *5 (E.D. Wash. 2008). Because of this duty, during the period of his or her employment, an employee cannot "act in direct competition with his or her employer's business." *Kiebertz & Associates, Inc. v. Rehn*, 68 Wn. App. 260, 265 (1992) (citing Restatement (Second) of Agency § 393 Comment e (1958)).

During the 60-day notice period, when Burton was still an employee of AMHP, she acted in direct competition with the agency by treating AMHP clients on her own, instructing them to start sending their

payments to her rather than the agency, and keeping the proceeds for herself. RP 69-70, 74-75; Ex. 138 at 5-6. By acting in a way that was directly at odds with her employer's interests, Burton breached her duty of loyalty. *See Keystone*, 2008 WL 1971412 at *6 (employee who worked to establish a competing business while still employed by employer violated his duty of loyalty); Restatement (Third) of Agency § 8.04 Comment b (an agent must "place the principal's interests first as to matters connected with the agency relationship").

Both the trial court and the Court of Appeals agreed that Burton breached her duty of loyalty to AMHP. App. 7; COL 8. That holding is clearly correct. The only question is what the consequences should be for Burton's undisputed breach.

B. The Lower Courts Erred in Refusing to Impose Any Consequences for Burton's Breach of Loyalty.

As a general rule, an agent is entitled to "no compensation" for conduct which is "disobedient" or "a breach of his duty of loyalty." *Kane v. Klos*, 50 Wn.2d 778, 789 (1957) (citing Restatement (Second) of Agency § 469 (1958)); *Merkley v. MacPherson's, Inc.*, 69 Wn.2d 776, 778 (1966) (same); *Keystone*, 2008 WL 1971412 at *7 (same); *MSC Venture Corp. v. Goei*, 2009 WL 1423567 at *11 (W.D. Wash. 2009) (same). An employee who acts contrary to his employer's interests forfeits his right to

be paid any salary “during the period in which he breached his duty of loyalty.” *Keystone*, 2008 WL 1971412 at *8.²

On July 13, 2009, AMHP gave Burton the 60 days’ notice required by the Contract, and expressly stated that it would continue paying her salary through September 11. Ex. 1; RP 50-51. It was only after Burton persisted in breaching her duty of loyalty that AMHP informed her that it would not make these payments. Ex. 37. By competing with AMHP when she was still an employee, Burton forfeited her right to continue receiving her salary. *See, e.g., Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 666-68 (1982) (real estate broker forfeited right to \$19,000 in commissions by violating duty of loyalty); *Keystone*, 2008 WL 1971412 at *8 (requiring employee who set up competing business to reimburse \$145,000 in salary paid to employee during period of

² *See also Astra USA, Inc. v. Bildman*, 455 Mass. 116, 914 N.E.2d 36, 47 (2009) (disloyal employee must “forfeit his compensation even if he otherwise performed valuable services for the principal”); *Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 200 (2nd Cir. 2003) (“One who owes a duty of fidelity to a principal who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary”); *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 385 (Mo. App. 2000) (“An agent who breaches a fiduciary duty likewise forfeits any right to compensation”); *Riggs Inv. Management Corp. v. Columbia Partners, L.L.C.*, 966 F. Supp. 1250, 1266 (D.D.C. 1997) (“no compensation is owed an employee who has breached his duty of loyalty to his employer”); *Horton v. Whitehill*, 121 Or. App. 336, 854 P.2d 977, 980 (1993) (corporate officer who breaches duty of loyalty “is not entitled to any compensation for services during that period of time even though part of those services may have been properly performed”).

disloyalty); *MSC Venture Corp.*, 2009 WL 1423567 at *11 (employer not liable for unpaid wages if employee breached duty of loyalty).³

Nevertheless, the trial court ordered AMHP to pay Burton her salary during the period of her breach—in effect making the agency pay her for competing against it. FOF 17; COL 7-8. The Court of Appeals affirmed, holding that awarding the salary in spite of Burton’s breach was a permissible exercise of the trial court’s discretion. App. 8-10.

In support of this holding, the Court of Appeals pointed to the trial court’s allowance of an offset for “mitigating income or benefits” that Burton received during the 60-day notice period, *i.e.*, the \$1,125 she was paid directly by the clients in question. FOF 17. The Court of Appeals characterized this offset as a “remedy” for Burton’s breach of loyalty, and “disagree[d] that AMHP would have been entitled to the offset absent the breach of loyalty.” App. 10. This is clearly incorrect.

The trial court awarded the salary based on Burton’s claim that AMHP breached the Employment Contract by not paying her through the termination date. COL 6-7. The deduction of her interim earnings for that period is a standard mitigation offset in contract and employment cases,

³ See also *Astra USA*, 914 N.E.2d at 39, 46, 51 (disloyal CEO forfeited all of his salary and bonuses during period of his disloyalty, which totaled over \$7 million); *Phansalkar*, 344 F.3d at 188, 199-200, 208 (disloyal employee forfeited all compensation received during period of disloyalty); *Riggs Inv. Management Corp.*, 966 F. Supp. at 1266 (same).

which AMHP would be entitled to in any event, even absent a breach of loyalty by Burton. *See, e.g., Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 639-40 (1994) (in employment cases, employee’s interim earnings are deducted from any back pay award); *Rathke v. Roberts*, 33 Wn.2d 858, 865 (1949) (party suing for breach of contract “is not entitled to be placed in a better position than he would have been in if the contract had not been broken”) (quoting 15 Am. Jur. 422, § 43); *O’Brien v. Puget Sound Plywood, Inc.*, 23 Wn.2d 917, 926 (1946) (“The rule is well settled that the measure of damages ... is the contract price, salary or wages, reduced by whatever sums the discharged employee has ... earned from the time of his discharge to the period of the expiration of the contract”) (Millard, J., dissenting).

In other words, the trial court awarded Burton the full measure of contract damages. It imposed *no consequences* on her for breaching her duty of loyalty, and granted AMHP *no relief whatsoever* for establishing that breach. The Court of Appeals’ affirmance of this denial of any remedy to AMHP was error.

C. The Court of Appeals’ Holding That the Purpose of Salary Forfeiture “Is Not to Impose a Penalty” Is in Conflict With Decisions of This Court.

In upholding the award of salary, the Court of Appeals declared that “[d]epriving [Burton] of salary on these facts would only serve to

punish” her for her disloyal conduct. App. 9. The Court of Appeals held that this would be improper because, based its earlier decision in *Williams v. Queen Fisheries, Inc.*, 2 Wn. App. 691 (1970), the purpose of the forfeiture rule “is not to impose a penalty.” App. 9.

This holding makes little sense. A forfeiture by definition is a form of penalty. *See, e.g.*, Black’s Law Dictionary 449 (Abridged 6th ed. 1991) (defining “forfeiture” as the “[l]oss of some right or property as a penalty for some illegal act”); *State v. Brewster*, 152 Wn. App. 856, 859 (2009) (“In criminal law, the terms ‘penalty’ and ‘forfeiture’ are synonymous with ‘punishment’”). Moreover, the *Williams* court acknowledged that in *Kane v. Klos*, 50 Wn.2d 778 (1957), the Washington Supreme Court applied the forfeiture of compensation rule “in the sense of a penalty.” *Williams*, 2 Wn. App. at 698 n.3.

In *Kane*, this Court used strong language making clear that the rule’s purpose is to punish disloyal agents, thereby discouraging others from engaging in similar misconduct:

This was a suit in equity to disgorge [a fiduciary’s] ill-gotten gains. Public policy forbids compromise with a swindler. The fiduciary who engages in such conduct forfeits all right to compensation. Similar misconduct would be encouraged if the court, under such circumstances, temporized with the guilty. It must be made unmistakably clear that when one assumes

the duties of a fiduciary, the law will exact of him not the best-policy kind of honesty, but “a punctilio of honor the most sensitive.”

Kane, 50 Wn.2d at 789.

The *Williams* court claimed that this part of *Kane* “appears to be modified” by this Court’s later ruling in *Leppaluoto v. Eggleston*, 57 Wn.2d 393 (1960). *Williams*, 2 Wn. App. at 698 n.3. But *Leppaluoto* merely held that an agent’s breach of a fiduciary obligation “is not conclusive proof that he, in fact, failed to earn his salary,” provided he can present evidence that he continued to perform work beneficial to the principal. *Leppaluoto*, 57 Wn.2d at 405. Thus, while *Leppaluoto* allows for a possible award of salary in certain circumstances, it does not suggest that the purpose of the forfeiture rule is anything other than punitive. *See id.* at 407-08 (discussing *Kane*).

Similarly (and more recently), this Court in *Cogan* agreed with *Williams* that the forfeiture rule is “flexible,” but in no way changed the rationale for depriving a disloyal employee of compensation. *Cogan*, 97 Wn.2d at 667. On the contrary, the Court reiterated the same rationale it had previously articulated in *Kane* for punishing disloyal agents:

While the rule might seem harsh, strong public policy reasons justify it. If damages were measured solely by the loss to the principal often there would be little disincentive to the agent for assuming

conflicting responsibilities without disclosure. If the commission itself is subject to forfeiture, however, agents will be disinclined to blithely assume conflicting responsibilities without disclosure to and consent of both principals.

Cogan, 97 Wn.2d at 668.

This punishment-as-deterrence rationale is also consistent with the Restatement of the Law of Agency, which over the years has served as a touchstone for this Court's decisions regarding the duty of loyalty and the consequences for its breach. *See* Restatement (Third) of Agency § 8.01 Comment d(2) ("Forfeiture may also have a valuable deterrent effect because its availability signals agents that some adverse consequence will follow a breach of fiduciary duty").

By holding that forfeiture of compensation is not about imposing a penalty, the Court of Appeals has erroneously adopted the sort of "no harm no foul" approach that prevails when determining contract damages. *See Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155 (2002) (because "a breach of contract is neither immoral nor wrongful," but "is simply a broken promise," the "central objective behind the system of contract remedies is compensatory, not punitive"). That approach should *not* be applied to duty of loyalty cases, because it fails to vindicate the strong public policy interest in deterring disloyal agents and employees. *See*

Obert v. ERADCO, 112 Wn.2d 323, 337 (1989) (rejecting attempt “to equate a breach of a fiduciary duty to a mere breach of contract,” which “ignore[s] the very real distinctions between the two”). It is also contrary to this Court’s holdings that the remedy for a breach of loyalty does not depend on the severity of the breach or the extent of the damages suffered by the principal. *Id.* at 338-39; *Cogan*, 97 Wn.2d at 666.

This Court should grant review to make clear that, consistent with its prior decisions in *Cogan* and *Kane*, the purpose of the forfeiture of compensation rule is to deter disloyal conduct by punishing disloyal agents and employees.

D. The Court of Appeals’ Upholding of the Award of Salary in the Absence of Any Basis for Apportionment Is in Conflict With Decisions of This Court.

The Court of Appeals correctly noted that forfeiture of compensation “is not an inflexible rule,” and that the courts have discretion in appropriate cases to award some or all of the pay at issue. App. 7. But the courts’ exercise of this discretion must be consistent with the law and based on tenable reasons. *Little v. King*, 160 Wn.2d 696, 703 (2007) (“Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law”); *In re Parentage of Jannot*, 110 Wn. App. 16, 22 (2002) (“The abuse of discretion standard is not, of course, unbridled discretion,” and a trial court’s decision must be

supported by the facts and consistent with applicable law). The trial court abused its discretion by awarding Burton her salary without any tenable basis for doing so.

An agent who breaches his duty of loyalty “is not entitled to compensation even for properly performed services for which no compensation is apportioned.” Restatement (Second) of Agency § 469. This Court has agreed with this general principle. *See Farrell v. Score*, 67 Wn.2d 957, 964 (1966) (stating general rule that “a faithless fiduciary may not retain compensation even for properly performed services”). In appropriate cases, however, the courts have discretion to apportion a disloyal agent’s salary, and to award compensation for those periods of time or specific work items that are untainted by the agent’s disloyalty. Restatement (Third) of Agency § 8.01 Comment d(2); *Williams*, 2 Wn. App. at 697-99 (upholding award of salary apportioned to properly performed work based on Restatement (Second) of Agency § 456 (1958)); *Cogan*, 97 Wn.2d at 667 (adopting *Williams* court’s holding allowing apportionment of compensation).

It is undisputed that Burton was disloyal throughout the 60-day notice period, and performed no work at all for AMHP during that period. Ex. 1; FOF 9; RP 50-51. Because she cannot point to any work she performed for AMHP’s benefit during the period in question, there is no

basis for apportioning her pay or awarding any part of the disputed salary. See *Keystone*, 2008 WL 1971412 at *8 (disloyal employee forfeits his right to be paid any salary “during the period in which he breached his duty of loyalty”).

Other than this case, it does not appear that any court has awarded a disloyal employee his salary for a period in which he admittedly performed no beneficial work for the employer. Even the *Williams* court acknowledged that refusal of compensation for disloyal conduct rests on the theory that “payment is not due for services not properly performed,” but compensation may be apportioned “to services properly performed.” *Williams*, 2 Wn. App. at 697-98 (quoting *Lydia E. Pinkham Medicine Co. v. Gove*, 303 Mass. 1, 20 N.E.2d 482, 486 (1939)). That rationale obviously does not support the award of any payment here.

The trial court’s decision to give Burton her salary without any basis for apportionment was contrary to the law and an abuse of discretion, and the Court of Appeals’ affirmance of that decision was error. This Court should grant review to make clear that the courts do not have discretion to depart from the general rule of forfeiture where the record does not establish any basis for apportionment for work properly performed.

E. The Court of Appeals' Decision Improperly Conflates the Common Law Duty of Loyalty With a Contractual Non-Solicitation Claim.

The Court of Appeals correctly noted that an employee's common law duty of loyalty is broader than a contractual obligation not to solicit the employer's clients. App. 6-7. To establish a breach of loyalty, an employer does not have to show that the employee solicited any clients (although that is one way to do it). The employer need only show that the employee competed with the employer or otherwise acted contrary to the employer's interests. *Kieburz*, 68 Wn. App. at 265 (employee cannot "act in direct competition with his or her employer's business"); Restatement (Second) of Agency § 469 Comment a (agent may not act "for his own benefit or for the benefit of another in antagonism to or in competition with the principal"). There is no question that Burton did that here.

Nevertheless, the Court of Appeals ultimately held that because Burton did not solicit the clients in question, this "mitigate[d] the egregiousness of her breach" and justified the trial court's decision to award her salary. App. 10. This was error.

The Court of Appeals' holding conflates and confuses two distinct and very different types of claims. It eviscerates the duty of loyalty by tying it to the much narrower issue of who solicited whom, and by limiting the duty's potency to those cases where the employer is able to prove that

the employee initiated the disloyal conduct or transactions. By giving the employee an easy out—that his admittedly disloyal behavior was not his idea, and he was just giving the employer’s clients or competitors what they wanted—the Court of Appeals undermines the strong public policy in favor of ensuring the undivided loyalty of agents and employees. The Court of Appeals’ consideration of non-solicitation as “mitigation” is also contrary to this Court’s holding that the remedy for a breach of loyalty does not turn on the severity of the breach. *Obert*, 112 Wn.2d at 338-39.

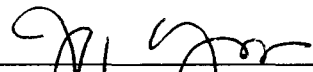
This Court should grant review to reaffirm the breadth of the common law duty of loyalty, and to make clear that a breach of that duty is not excused by the fact that the disloyal employee did not initiate or solicit the transaction in question.

VI. CONCLUSION

For all of the foregoing reasons, Petitioners respectfully ask the Court to grant review of the Court of Appeals’ decision.

RESPECTFULLY SUBMITTED this 11th day of September, 2013.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 
Jeffrey B. Youmans
WSBA #26604

CERTIFICATE 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 PETITION FOR REVIEW to be served in the manner noted below on the following:

F. Hunter MacDonald
The MacDonald Law Office
P.O. Box 1761
Tacoma, WA 98401

BY:

| | |
|-------------------------------------|----------------|
| <input checked="" type="checkbox"/> | U.S. MAIL |
| <input type="checkbox"/> | HAND DELIVERED |
| <input type="checkbox"/> | OVERNIGHT MAIL |
| <input type="checkbox"/> | FACSIMILE |
| <input checked="" type="checkbox"/> | EMAIL |

Dated this 11th day of September, 2013.



Valerie S. Macan

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOYCE LEATH BURTON,

Respondent/Cross Appellant,

v.

JANICE BECKER, aka JANNY BECKER,
and the marital community of JANICE
BECKER and JOHN DOE BECKER; and
AFFILIATED MENTAL HEALTH
PROGRAMS, INC.,

Appellants/Cross Respondents.

No. 68434-5-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: August 12, 2013

2013 AUG 12 AM 9:08
COURT OF APPEALS
STATE OF WASHINGTON

APPELWICK, J. — During the 60 day period between Burton's notice of termination and the effective date of her termination, Burton provided mental health treatment to former AMHP clients. AMHP withheld its severance payments based on Burton's breach of her duty of loyalty. The trial court determined that Burton breached her duty of loyalty, but nevertheless ordered AMHP to pay her salary, offset by payments she received from clients and unemployment benefits. AMHP argues that salary forfeiture is the exclusive remedy for an agent's breach of loyalty and that Burton tortiously interfered with its business expectancies. Burton argues that the actions leading to her breach of loyalty were justified by public policy considerations, that the trial court miscalculated her damages, and that she should have been able to obtain double damages and to pursue a claim against AMHP's president individually. The trial court improperly offset Burton's salary by the amount of unemployment benefits she received during her severance period. We otherwise affirm.

FACTS

Affiliated Mental Health Programs Inc. (AMHP) provides mental health counseling services to individuals with chronic and serious mental health issues. Joyce Burton worked for AMHP from 2004 to 2009. From January 2007 forward, she served as AMHP's director. As director, Burton was responsible for the company's financial performance and stability. She also maintained a counseling caseload.

When she accepted the director position, Burton signed an employment contract that explained the procedure for termination:

AMHP may terminate this agreement with 60 days notice and with due cause and upon payment of compensation due to the Director for services rendered to the date of termination.

The agreement also included a noncompetition provision:

The Director promises not to approach or solicit from AMHP clients on whose behalf Director has done any work pursuant to this contract for a period of three years from the date of the Director's completion of the work for the agency.

In July 2013, AMHP decided to terminate Burton on the basis of poor financial performance, and a poor management style. It contended that she was insensitive to staff members and communicated in a disrespectful manner. AMHP's owner and president, Janice Becker, gave Burton notice of termination on July 13. In a termination letter, she informed Burton that she would receive 60 days of pay and that she should not work during those final days of her employment:

You will be paid as provided in the Agreement through your termination date [September 11, 2009]. However, you will not be required to render any services to AMHP during these final 60 days of your employment, other than answering brief phone calls if we have questions about matters you have handled or become familiar with during your employment here.

Becker also told Burton not to contact her existing clients. Nevertheless, Burton had contact with at least three clients after she was given notice of termination, beginning within one to two weeks of the termination letter.

On July 21, Becker warned Burton to stop talking to clients:

I am even more disturbed to learn that you have improperly been contacting AMHP clients. Since we are not asking you to perform work duties at this point, there is no valid reason for you to be contacting any AMHP clients. You are no longer authorized to act on behalf of AMHP or to suggest to anyone that you are doing so. But until your termination date, you still have a duty of loyalty to AMHP, and it is unlawful for you to divert clients away from the agency. You have also promised, in Paragraph 10 of your Agreement for Professional Services, **“not to approach or solicit from AMHP clients on whose behalf Director has done any work pursuant to this contract for a period of three years from the date of the Director’s completion of the work for the agency.”** By contacting and approaching AMHP clients, you are breaching your contract with AMHP.

You must immediately stop contacting AMHP clients. If you continue to do so, AMHP will take legal action against you, and will seek all remedies available to the agency under the contract and the law, including payment of money damages based on any reduction in the agency’s case load resulting from your improper contacts with agency clients. In addition, if you continue to approach agency clients, then you will be in material breach of your contract, AMHP will no longer be obligated to continue paying your salary and benefits through the termination date, and AMHP will stop making those payments.

On July 24, AMHP’s lawyer sent a letter to Burton’s lawyer:

AMHP’s position in this matter is straightforward. As an employee of AMHP, Ms. Burton continues to have a duty of loyalty to the agency through at least her termination date in September. In addition, the Agreement for Professional Services she signed broadly states that she cannot “approach or solicit” AMHP clients for a period of three years. Nevertheless, since the day AMHP notified her of its intent to terminate her employment, she has improperly contacted AMHP clients, including Redacted who has now told AMHP that she will be seeing Ms. Burton rather than AMHP. Please understand that AMHP is very serious about taking legal action against Ms. Burton, as well as discontinuing payment of her salary, if she continues to violate her legal obligations.

AMHP sent Burton another letter on August 11, informing her that she forfeited any right to further salary or benefits:

In spite of my warning to you in [the July 21] letter, you have continued to see AMHP clients on your own, and are diverting payments from those clients to yourself for your own financial gain. . . . This is a breach of your duty of loyalty to AMHP, as well as a breach of your Agreement for Professional Services.

Because of these breaches, you have forfeited any right under that agreement to payment of additional salary and benefits. You cannot take AMHP's clients and pocket the proceeds, and still expect to continue receiving a salary from AMHP.

AMHP sent checks for Burton's salary through July 13, plus a payout of accrued but unused vacation. It informed her that it had paid for health and dental benefits through July 31, and gave instructions for Burton to begin paying for her own benefits.

Burton contended she did some counseling for free during the 60 day period, but also acknowledged she received and kept \$1,125 from clients during that stretch. She directed the clients to send payment directly to her instead of to AMHP. While counseling the clients, she did not instruct them to formally terminate their relationship with AMHP, even though she knew the clients had signed an agreement with AMHP that required them to do so.

Burton sued AMHP and Becker personally, alleging that AMHP fired her without due cause, that AMHP breached its duties to her by discontinuing her salary and benefits, and that AMHP improperly used Burton's image on its website. AMHP denied liability and counterclaimed for breach of the employment contract's noncompetition provision, breach of the duty of loyalty, and tortious interference with a contractual or business relationship. Before trial began, AMHP withdrew its claim for breach of the

noncompetition provision. During trial, the court dismissed Burton's claims against Becker as an individual and her claim that AMHP improperly used her image.

The trial court concluded that AMHP had due cause to terminate Burton. But, it found that all the clients Burton continued to see unilaterally sought her out, and she did not solicit or approach them. It ordered AMHP to pay Burton her withheld salary. It ultimately ordered AMHP to pay \$6,259. That amount includes \$10,500 for Burton's salary, \$962 in medical expenses she incurred while she did not have benefits, and \$230 in costs, but is offset against \$3,558 she received in unemployment benefits, \$1,125 in payments she received from clients during the 60-day severance period, and \$750 in sanctions. As described more fully below, there is ambiguity in the trial court's findings and conclusions concerning AMHP's counterclaims for breach of the duty of loyalty and tortious interference. It appears that the trial court found Burton breached her duty of loyalty, but did not commit tortious interference.

AMHP appeals and Burton cross appeals.

DISCUSSION

AMHP argues that Burton breached her duty of loyalty, that the mandatory remedy for a breach is forfeiture of her entire salary, and that the trial court erred by not concluding that Burton tortiously interfered with AMHP's business expectancies. Burton claims on cross appeal that the trial court should have found that her breach was excused by public policy considerations, that the trial court incorrectly calculated damages, and that she is entitled to double damages and to pursue Becker personally because AMHP willfully withheld wages.

I. Duty of Loyalty

Burton's employment contract contained a noncompetition provision that required her not to "approach" or "solicit" any former clients for three years after leaving AMHP. But, AMHP did not pursue a claim for breach of that provision. Indeed, it appears Burton did not "approach" or "solicit" any former clients. Although Burton continued to see a few former AMHP clients, the trial court found that those clients sought her out, had a close and long-held relationship with Burton, were not interested in disrupting that relationship, and would not have stayed with AMHP after Burton left.¹ Thus, instead of pursuing a claim for breach of the noncompetition provision, AMHP asserted a breach of the common law duty of loyalty.

The specific duty AMHP relies upon stems from Kiebertz & Associates, Inc. v. Rehn, 68 Wn. App. 260, 265-66, 842 P.2d 985 (1992). In that case, we concluded that an implicit duty not to compete may exist even in the absence of a specific contractual duty of noncompetition. Id. In doing so, we outlined the rule provided by Restatement (Second) Agency § 393 (1958). Id. at 265. Specifically, during the period of his or her employment, an employee is not entitled to solicit customers for a rival business or to act in direct competition with his or her employer's business. Id. In like manner, unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency. Id.

Unlike Burton's contractual noncompetition duty, her duty of loyalty does not extend beyond the period of employment. But, the duty itself is broader because

¹ Although AMHP assigns error to that finding, it offers no argument that it is not supported by substantial evidence. Nor does it argue that Burton did, in fact, approach or solicit former AMHP clients.

“noncompetition” is not limited to approaching or soliciting former clients. Several key facts are undisputed. Burton kept at least \$1,125 in proceeds she received directly from clients during the 60 days following her notice of termination. She directed the clients to send payment directly to her instead of to AMHP. She did not instruct the clients to formally terminate their relationship with AMHP even though she was aware the clients had signed an agreement with AMHP that required them to do so. Thus, even though the evidence does not establish that Burton breached her contractual noncompetition duty, she did violate an independent common law duty.

II. Salary Forfeiture

Washington courts have adopted the language of Restatement (Second) Agency § 469, which provides:

An agent is entitled to no compensation for conduct which is disobedient or is a breach of his duty of loyalty; if such conduct, constitutes a willful and deliberate breach of his contract of services, he is not entitled to compensation even for properly performed service for which no compensation is apportioned.

See, e.g., Cogan v. Kidden, Mathews & Segner, Inc., 97 Wn.2d 658, 667, 648 P.2d 875 (1982); Merkley v. MacPherson's, Inc., 69 Wn.2d 776, 778, 420 P.2d 205 (1966); Kane v. Klos, 50 Wn.2d 778, 789, 314 P.2d 672 (1957): Thus, as a general proposition, an agent or other fiduciary who is unfaithful may be denied compensation. Williams v. Queen Fisheries, Inc., 2 Wn. App. 691, 698, 469 P.2d 583 (1970). But, it is not an inflexible rule and the decision to allow an unfaithful agent or fiduciary to receive compensation rests within the discretion of the court. Id. at 696 n.2, 698; Cogan, 97 Wn.2d at 667. The rationale for placing the decision within the discretion of the court is

that the mere fact of breach is not conclusive proof that the agent failed to earn his or her salary or commission. See Williams, 2 Wn. App. at 697.

AMHP nevertheless argues that forfeiture of the agent's entire salary is the mandatory and exclusive remedy. It claims that the court's discretion does not kick in until the agent specifically requests apportionment and points to discrete job functions that were properly performed. It further asserts that it was entitled to a mitigation offset for the amount Burton received from clients even absent a breach of the duty of loyalty.² Burton claims that her breach should be excused due to a public policy of allowing clients to choose their providers, and that the trial court erred by not explicitly finding that such a public policy exists.

Despite AMHP's insistence that forfeiture of Burton's entire salary is a mandatory remedy, it can cite to no cases that state complete forfeiture is always required. AMHP instead cites to cases where the court did, in fact, uphold or order complete forfeiture. Those holdings do not conflict with the rule that the decision to award compensation is within the court's discretion. In fact, in Williams we explicitly stated that even though an agent who breaches a duty of loyalty does not have a right or entitlement to compensation, the court may nevertheless exercise its discretion in granting compensation. Id. at 698-99. That conclusion was not, as AMHP argues, limited to the circumstance where an agent triggers the court's discretion by requesting apportionment. Indeed, in Williams an agent was awarded compensation despite

² AMHP also makes a cursory alternative argument that, even if forfeiture of salary was not justified, its actions can be seen as rightfully terminating Burton's contract early in response to her breach. But, its actions did not take that form. It withheld her entire salary for the two month period.

breaching a duty of loyalty, and there is no suggestion that the agent explicitly requested apportionment. Id. at 699.

AMHP contends that, even if the court's discretion is triggered, apportionment was improper here because Burton "performed no work at all for AMHP during that period." AMHP also argues that the offset for amounts that Burton received from clients had "nothing to do with punishing Burton for her breach of loyalty." The rationale for forfeiture is that an agent is not entitled to compensation for conduct that is disobedient or constitutes a breach of the duty of loyalty. Cogan, 97 Wn.2d at 667. Its purpose is not to impose a penalty. See, e.g., Williams, 2 Wn. App. at 697-98. AMHP and Burton were parties to an employment contract that required AMHP to give 60 days notice of termination. She had a contractual right to her salary during that period and no obligation to perform job functions. In fact, AMHP explicitly instructed her not to perform any job functions. In light of that explicit direction, it is disingenuous to now argue that she could only earn her salary by affirmatively performing work for AMHP. Depriving her of salary on these facts would only serve to punish.

Further, AMHP argues that it would have been entitled to an offset in the absence of a breach of loyalty. It claims that in employment cases, such as employment discrimination and wrongful termination cases, earnings from outside work are deducted from the salary award. While that is true, Burton did not make an employment discrimination claim and had no recovery on her claim for wrongful termination on which to claim an offset. Had there been no breach of loyalty, AMHP would have no claim for any offset because it would not have had a cause of action to pursue. The nature of the outside income, resulting from the breach of loyalty, is the

only thing that allowed AMHP to obtain an offset. The terms of Burton's termination required her to answer questions if asked, but not to otherwise perform any work for AMHP. It imposed no obligation to remain completely unemployed. The forfeiture rule does not make every type of employment during the termination period a violation of the duty not to compete or of the duty of loyalty. AMHP cites no authority that would allow it to offset wages Burton earned during the 60 days from employment which did not violate the duty of loyalty or the noncompetition requirements. We disagree that AMHP would have been entitled to the offset absent the breach of loyalty.

Moreover, the clients that Burton treated had already elected to leave AMHP. The only evidence on the issue established that the clients independently elected to leave AMHP when Burton was terminated, and AMHP does not challenge the trial court's finding to that effect. Burton's activities did not violate the contractual noncompetition clause and did not cause the harm to AMHP from loss of clients. This mitigates the egregiousness of her breach. Under these circumstances, the trial court's remedy of offsetting receipts from those clients against the salary she was owed was not an abuse of discretion.

Burton argues that the trial court's remedy is also supported by public policy, and that the trial court erred by not explicitly finding that her breach is excused by public policy considerations. She claims that it is an established public policy that it is the client's right to choose a provider. Whether Washington has established a clear mandate of public policy is a question of law subject to de novo review. Danny v. Laidlaw Transit Servs., Inc., 165 Wn.2d 200, 207, 193 P.3d 128 (2008). To determine whether a clear public policy exists, we consider whether the policy is demonstrated in a

constitutional, statutory, or regulatory provision or scheme. Id. at 207-08. Although judicial decisions may establish public policy, we proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject. Id. at 208.

Here, Burton's entire argument is based on a brief statutory reference to the client's responsibility to choose a provider:

A person licensed under this chapter must provide clients at the commencement of any program of treatment with accurate disclosure information concerning the practice, in accordance with rules adopted by the department, including the right of clients to refuse treatment, the responsibility of clients to choose the provider and treatment modality which best suits their needs, and the extent of confidentiality provided by this chapter. The disclosure information must also include the license holder's professional education and training, the therapeutic orientation of the practice, the proposed course of treatment where known, financial requirements, and such other information as required by rule. The disclosure must be acknowledged in writing by the client and the license holder.

RCW 18.225.100 (emphasis added). From that brief reference, she asserts that she had an obligation to accept her former clients.³ But, the client's "responsibility" to choose a provider is not the same as the client's "right." Further, that provision merely explains the disclosures that must be made by mental health counselors, marriage and family therapists, and social workers. Id. The disclosures imply a substantive legal

³ Burton also refers the court to the American Mental Health Counselors Association Code of Ethics. But, the portion she cites merely says that she had an ethical obligation not to abandon or neglect her clients, to setup a safety plan for her clients, to refer her clients to appropriate resources, and to contact appropriate support if necessary. AM. MENTAL HEALTH COUNSELORS ASS'N, AMHCA CODE OF ETHICS § 1(B)(5) (2010). Those directives did not require her to accept the clients herself or accept the proceeds of treatment sessions while still employed by AMHP. Id. And, this is a legal dispute concerning an employer-employee relationship, not the scope of Burton's ethical obligations.

obligation but do not expressly state one. More significantly, RCW 18.225.100 at best speaks to the client's responsibility to choose a provider, not the provider's obligation to accept clients. It does not follow that a provider must accept every client that chooses it. Burton's policy argument is further weakened by the fact that Washington courts have not held that restrictive covenants between physicians are unenforceable, a fact that unquestionably infringes on clients' right to choose providers. See Emerick v. Cardiac Study Ctr., Inc., 170 Wn. App. 248, 259, 286 P.3d 689, review denied, 175 Wn.2d 1028, 291 P.3d 254 (2012).

The trial court correctly declined to find that Burton's conduct was excused by public policy considerations and appropriately exercised its discretion in awarding Burton her salary.

III. Tortious Interference

The elements of a claim for tortious interference with contractual or business expectancies are (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference, for an improper purpose or using improper means, inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. Kiebertz, 68 Wn. App. at 267. The trial court concluded, "The first, second, and fourth elements are easily satisfied by the evidence, and the third element is satisfied by Ms. Burton's breach of her duty of loyalty." But, in the next conclusion of law it stated, "AMHP failed to carry its burden of proof on tortious interference with the agency's contractual and business relationships." Regardless of the confusion created by those conflicting

statements, the only conclusion supported by the trial court's findings of fact is that the elements were not met.

Even assuming that Burton's breach of loyalty could constitute intentional interference for an improper purpose or using improper means, there is no evidence that the breach induced the termination of AMHP's relationship with any of the clients in question, or that there was any resultant damage. To the contrary, the undisputed evidence establishes that each of the clients Burton treated independently elected to leave AMHP. Even if Burton should not have accepted the clients, she did not cause the defections. AMHP argues that it clearly established damages, because it presented evidence that Burton received payments from clients that previously provided AMHP with between \$4,500 and \$10,000 in monthly income. But, the issue is not whether AMHP lost income. It is whether that loss is attributable to Burton's actions. There is no evidence that it is.

IV. Wage Calculations

The trial court based its award on a salary of \$10,500 for the 60 day period of lost income and included an offset for \$3,558 Burton received in unemployment benefits. Burton challenges both of those amounts.

First, she argues that the trial court miscalculated her salary:

If one divides the AMHP wages Burton received between January 1, 2009 and July 13, 2009, (\$47,747.51) by the amount of calendar days represented, (194), her earnings are \$246.12 per calendar day, not per workday. . . .

Burton calculates her gross lost wages amount as 60 days x \$246.12 per day for a total of \$14,767.27.^[4]

But, the amount of \$47,747.52 is a vastly inflated salary, because it includes a one-time payout of \$7,653.83 for accrued but unused vacation time. That amount was paid, but not all earned, during the January 1 – July 13 timeframe. Further, her calculations include salary paid to Burton on January 15, 2009, which appears to have been earned in December 2008. AMHP's earnings record for Burton states that her gross income per month was \$5,250. The trial court properly used that figure in calculating damages. The award is supported by substantial evidence.

Second, Burton argues that the trial court erred by offsetting her award by the unemployment benefits she received. She claims that the offset results in a windfall to AMHP, because the money does not belong to AMHP, and if she was entitled to her salary and thus not unemployed during the 60 day period, then the money does not belong to her either.⁵ We agree. Absent a breach of loyalty, if Burton received her salary during the 60 day period and simultaneously obtained unemployment benefits that she was not entitled to, that is an issue between the state and Burton. See RCW 50.20.190 ("An individual who is paid any amount as benefits under this title to which he or she is not entitled shall, unless otherwise relieved pursuant to this section, be liable for repayment of the amount overpaid."). Receipt of those benefits is not a breach of loyalty and AMHP would have no claim to the unemployment benefits. The result does

⁴ One of the exhibits Burton relies on for these figures is not part of the record on appeal.

⁵ AMHP argues that Burton's argument is precluded by the invited error doctrine, because she included an offset for unemployment benefits in her damages calculations. Although Burton did include an offset in discovery responses and in an exhibit containing lost wages calculations, she disputed the offset before the trial court entered its judgment.

not change because of Burton's unrelated breach of loyalty or AMHP's decision to withhold salary. The trial court erred by offsetting Burton's award by the unemployment benefits she received.

V. Willful Withholding of Wages

In addition to recovering withheld wages, an employee is entitled to double damages and reasonable attorney fees and costs when the wages are willfully withheld. RCW 49.52.050; RCW 49.52.070. And, an officer who violates those provisions may be held personally liable for the violations. RCW 49.52.070. Willful means that the employer knows what it is doing and intends to do what it is doing. Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159-60, 961 P.2d 371 (1998). Thus, an employer's failure to pay wages is willful unless it was careless or it erred in failing to pay, or there was a bona fide dispute regarding payment. Id. at 160. A bona fide dispute is a "fairly debatable" dispute over whether an employment relationship exists, or whether all or a portion of the wages must be paid." Id. at 161 (quoting Brandt v. Impero, 1 Wn. App. 678, 680-81, 463 P.2d 197 (1969)). Whether a bona fide dispute exists is a question of fact that must be supported by substantial evidence. Lillig v. Becton-Dickinson, 105 Wn.2d 653, 659-60, 717 P.2d 1371 (1986).

Burton argues that she is entitled to double damages for willfully withheld wages and should be able to enforce her claim against Becker individually. AMHP argues that Burton failed to make a timely request for double damages. It is apparent from minute entries that the first time she raised the willful withholding issue below, the trial court orally denied her request. But, there is no written ruling. After the trial court entered its findings of fact and conclusions of law but before it entered its judgment, Burton again

requested double damages. The record does not establish whether the trial court made any ruling on that request, oral or otherwise. The court made no factual finding of willfulness. Failure to make a finding of fact where one is required is presumed to be a negative finding. Fettig v. Dep't of Social & Health Servs., 49 Wn. App. 466, 478, 744 P.2d 349 (1987). Consistent with this presumption, the judgment did not provide double damages.

Even assuming Burton timely sought double damages below, the trial court did not err in denying double damages on the merits. It was not in dispute that AMHP had withheld wages based on an alleged breach of the duty of loyalty. The dispute was as to the legal consequences of that fact. Before AMHP withheld Burton's wages, it asserted a legal justification for doing so. We agree an agent who breaches her duty of loyalty may forfeit her entitlement to some or all of her salary. Whether and how much Burton should forfeit constituted a bona fide dispute, which rested within the discretion of the trial court. AMHP did not willfully withhold wages.

We remand for the trial court to correct its judgment by removing the offset for unemployment benefits. We otherwise affirm.

WE CONCUR:

Speiman, J.

Appelwick, J.

Leach, C. J.

FILED
KING COUNTY, WASHINGTON

SEP 23 2011
SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

JOYCE LEAH BURTON,
Plaintiff,

v.

JANICE BECKER, aka JANNY BECKER, the
marital community of Janice Becker and
John Doe Becker, and AFFILIATED
MENTAL HEALTH PROGRAMS, INC.,
Defendants.

No. 09-2-38470-3SEA

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This matter came before the Court for trial beginning April 25, 2011, and continuing from time-to-time until August 8, 2011. The following parties: Plaintiff Joyce Leah Burton, represented by F. Hunter MacDonald of The Law Office of John A. Sterbick, P.S., and Defendants Affiliated Mental Health Programs, Inc. ("AMHP") and Janice Becker, represented by Jeffrey B. Youmans of Davis Wright Tremaine LLP. At trial, the Court received live testimony and admitted exhibits into evidence.

NOW, THEREFORE, based upon the admitted evidence and pursuant to Civil Rule 52, the Court makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. AMHP provides mental health counseling and case management services to people with chronic and serious mental health issues, as well as support to their families. Ms. Becker is AMHP's owner and President.

2. Plaintiff, Ms. Burton, worked for AMHP from 2004 to 2009. From January 2007 onward, she was employed as the agency's Director. When she became Director, Ms. Burton signed an employment contract with AMHP (the "Contract").

3. As Director, Ms. Burton was responsible for running the agency as a whole, and had ultimate responsibility for AMHP's financial performance and stability.

4. When Ms. Burton took over as Director of AMHP, Ms. Becker stepped back from seeing clients and from involvement in AMHP operations. Although Ms. Becker was no longer generating income for AMHP, she continued to take draws ("dividends") at a rate that approximated the amount of salary she had earned as a therapist, case manager, and director.

5. Ms. Becker noted several performance issues that caused AMHP to terminate Ms. Burton's employment in 2009. One of the main reasons cited by Ms. Becker was Ms. Burton's failure to market adequately and increase AMHP's client base. The AMHP financial position deteriorated. For the first six months of 2009, the agency's gross income was down approximately \$45,000 compared to the same period the prior year. Ms. Becker attributed all the revenue loss to a failure of Ms. Burton to run the business, but accepted no responsibility for the loss of her own revenues and the continuing drain of her "dividends" from the AMHP coffers.

6. Ms. Becker testified that, in addition to the financial disappointments, she was disappointed in Ms. Burton's management style. Ms. Becker disapproved of Ms. Burton's staff management and of her continuing to carry a personal caseload that precluded Ms. Burton from devoting more time to administrative matters and marketing.

7. On July 13, 2009, Ms. Becker gave Ms. Burton AMHP's 60 days' written notice of the termination of her employment. The letter instructed Ms. Burton that she was being terminated as of September 11, 2009, *i.e.* in 60 days, and that Ms. Burton would not be required to render any services to AMHP during those final 60 days, other than answering brief phone calls from AMHP about matters Ms. Burton had "handled or become familiar with" at AMHP.

8. AMHP decided to terminate Ms. Burton's employment for fair and honest reasons. The decision was not based on arbitrary, capricious, or illegal reasons. The decision was based on facts supported by substantial evidence and reasonably believed by AMHP to be true.

9. In the notice of termination, AMHP made clear that while Ms. Burton would no longer be required to render services to the agency, the effective date of her termination was September 10, 2009 – 60 days out – and she would be paid her salary through that date. AMHP also reminded her of her obligations under her contract's "Competition" provision, which prohibited her from approaching or soliciting AMHP clients.

10. By the terms of Ms. Burton's employment agreement, she agreed expressly not to "approach or solicit" AMHP clients for a period of three years after termination.

11. Ms. Burton did continue seeing and treating a few AMHP clients. The evidence established, however, that the three clients Ms. Burton "took" with her from AMHP had sought her out. Each client had a close and long-held working relationship with Ms. Burton. Representatives of the clients testified that they were not interested in disrupting the therapeutic relationship they had established with Ms. Burton and would not have considered staying with AMHP after Ms. Burton left the agency.

12. Both parties testified, and the law provides, that the choice of a therapist belongs solely to the client. AMHP could not have required those clients to stay with the agency in any event. Because Ms. Burton was providing services to the clients who sought her out, she kept the payments she received for her services. Her termination letter made clear that she was not to render any therapy services for AMHP during her 60-day notice period.

13. Ms. Burton admits that she continued to treat and receive payments for former AMHP clients who made clear to her their independent choices to leave AMHP and that she continued the therapeutic relationships with those clients through August 2010.

14. The employment agreement provides that AMHP may terminate Ms. Burton's employment "with 60 days' notice and with due cause *and upon payment of compensation due to [Ms. Burton] for services rendered to the date of termination.*" (*Emphasis added*).

15. In late July 2009, AMHP repeatedly alleged and warned Ms. Burton that she was in breach of her duty of loyalty; that she could not take AMHP's clients and pocket the payments for herself while still expecting to be paid a salary by the agency; and that if she continued to divert money from AMHP clients to herself, the agency would no longer be obligated to continue paying her.

16. On August 11, 2009, AMHP informed her that she had forfeited any right under the Contract to payment of additional salary and benefits.

17. After AMHP discontinued contract payments and benefits, Ms. Burton lost income in the aggregate amount of \$13,379.03 (less any mitigating income or benefits Ms. Burton earned or received between July 14, 2009, and September 10, 2009) and she incurred uninsured medical costs in the amount of \$2,083.70 and out-of-pocket expenses in the amount of \$2,091.56. She should recover those amounts from Defendants.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction of this action pursuant to RCW 2.08.010. This Court is the proper venue for this action pursuant to RCW 4.12.020(3).

2. The Contract gives AMHP the right to terminate Ms. Burton's employment "with due cause" and upon 60 days' notice.

3. The term "due cause" is synonymous with "just cause." In Washington, "just cause" means "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 139 (1989). A discharge is for just cause if it "is not for any arbitrary, capricious, or illegal reason" and is "based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true." *Id.* Even if the employer is wrong about the factual basis for the discharge, there is still just cause so long as the employer acted on a reasonable, good faith belief that termination was warranted. *Gagliardi v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 438 (1991) (*whether plaintiff was fighting irrelevant to action; rather, issue is whether "defendant reasonably, in good faith, and based on substantial evidence believed plaintiff had done so."*).

4. AMHP presented substantial evidence that Ms. Burton's termination was justified by performance issues. AMHP's reliance on fluctuations in agency income is insufficient, under all the circumstances, to support termination of Ms. Burton for failure to meet the financial performance of the agency. Ms. Becker expected Ms. Burton to fill two positions at the agency, to make up for the loss of Ms. Becker's revenue stream, to market and grow the agency, and to assure Ms. Becker continued to draw "dividends" from the agency without contributing to its growth and development.

5. AMHP did have due cause to termination of Ms. Burton, however, for her perceived failures as a staff manager: for her insensitivity to staff and her abrupt and disrespectful manner. Whether Ms. Burton agrees with their differences, Ms. Becker had good faith beliefs based upon her own observations and those of staff.

6. Ms. Burton has failed to carry her burden of proving that AMHP lacked "due cause" to terminate her employment. Ms. Burton has, however, carried her burden of proving that AMHP breached the Contract by failing to pay "compensation due to the Director for services rendered to the date of termination."

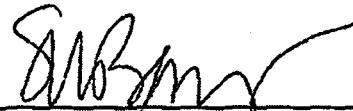
7. On July 13, 2009, AMHP gave Ms. Burton the 60 days' notice of termination required by the Contract, and expressly stated that it would continue paying her salary through September 10. Ms. Burton was damaged by AMHP's failure to continue compensation and, more importantly, benefits for the full 60-day period.

8. The elements of a claim for tortious interference with contractual or business expectancies are (1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference, for an improper purpose or using improper means, inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Kieburz*, 68 Wn. App. at 267. The first, second, and fourth elements are easily satisfied by the evidence, and the third element is satisfied by Ms. Burton's breach of her duty of loyalty. *Id.* (breach of duty of loyalty would satisfy element requiring improper purpose or improper means).

9. AMHP failed to carry its burden of proof on tortious interference with the agency's contractual and business relationships.

10. Counsel for Ms. Burton shall submit, on notice, a form of Judgment in favor of Ms. Burton and against Defendants accordance with these findings and conclusions, with costs awarded to Ms. Burton.

SO ORDERED, ADJUDGED, AND DECREED this 22nd day of September, 2011.



Judge, KING COUNTY SUPERIOR COURT