

68434-5

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No. 68434-5

WASHINGTON COURT OF APPEALS
DIVISION ONE

JOYCE LEAH BURTON

Respondent / Cross-Appellant

v.

JANICE BECKER and AFFILIATED MENTAL
HEALTH PROGRAMS, INC.

Appellants / Cross-Respondents

SECOND AMENDED OPENING BRIEF OF RESPONDENT /
CROSS-APPELLANT

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ASSIGNMENTS OF ERROR

Cross-Appellant Burton assigns error to:

1. The judgment amount that the Trial Court entered on her behalf CP 219-220.
2. The Trial Court's Findings of Fact Nos 9 and 17 concerning the amount of damages suffered by Burton and the date to which AMHP was obligated to pay salary to Burton, i.e., September 11, 2009, as opposed to September 10, 2009.
3. The Trial Court's Conclusion of Law Nos. 7 concerning the date to which salary should have been paid to Burton, i.e., September 11, 2009, as opposed to the Trial Court's date of September 10, 2009.
4. The Trial Court's Conclusion of Law No. 10 concerning its failure to allow judgment against all original defendants.

ISSUES PRESENTED

Burton's cross-appeal presents the following issues:

1. Whether the Trial Court erred in dismissing AMHP's owner, Janice Becker, as defendant in the above-captioned case?
2. Whether the Trial Court erred in failing to issue a definitive conclusion of law as to whether a public policy exception contained within RCW 18.225.100 excuses, and justifies, any breach, or tortious interference, which was allegedly committed by Burton?
3. Whether the Trial Court erred in calculating its judgment by failing to accurately account for Burton's out-of-pocket costs resulting from termination of her AMHP benefits, from August 1, 2009 until September 11, 2009?
4. Whether the Trial Court erred in denying double damages to Burton, in accordance with RCW 49.52, for wages withheld by AMHP?

5. Whether the Court of Appeals should remand this case with instructions for the Trial Court to correct its judgment by accurately calculating damages to Burton from withheld wages by allowing double damages for withheld wages?
6. Whether the Trial Court erred in assessing a set-off against the judgment for amounts that are allegedly owed to the Employment Security Department?
7. Whether the Court of Appeals should vacate the Trial Court's judgment and remand this case to the Trial Court with instructions to calculate Burton's actual lost wages in a manner which is limited to the evidence at trial and without deductions for an Employment Security Department Set-Off?
8. Whether the Court of Appeals should remand this case to the Trial Court with instructions to order the original Defendants to deposit any amount alleged to be an Employment Security Department Set-Off into the Registry of the Court for distribution to the Employment Security Department if a Set-Off against the judgment is granted?

STATEMENT OF THE CASE

A. CLAIMS AND DEFENSES

Background – Cross-Appellant Joyce Leah Burton, aka (“Burton”), was an employee of Appellant Affiliated Mental Health Programs, Inc., (“AMHP”). AMHP is a mental health counseling agency. Burton uses her middle name, i.e., Leah, and is referred to as “Leah” in witness testimony. VRP of M. Scott, pp 5:22 – 6:1.

Relief Sought – This is a breach of contract case. Burton is seeking reversal of certain Trial Court decisions and a remand on the issue of damages. Burton believes that, upon remand, the Trial Court will be compelled to award her:

1. the value of benefits improperly withheld by AMHP from July 31, 2009 until September 11, 2009

and

2. double damages for wages improperly withheld by AMHP during the period of July 14, 2009 to September 11, 2009.

Burton's appeal is based on her disagreement with the amount awarded to her for damages and the Trial Court's dismissal of Janice Becker as a liable defendant in the above-captioned matter.

Burton seeks double damages for \$13,642.27 in improperly withheld wages, in other words a total gross amount of \$27,284.54 as double damages for the underlying amount of \$13,642.27, but concedes a set-off of \$1,125.00 is proper to account for the other income she earned during the period she alleges that AMHP improperly withheld her wages. Burton also seek \$1,088.25 in out-of-pocket costs that were incurred as a result of AMHP terminating Burton's insurance prematurely.

Basis for Burton's Claims - Burton is a licensed mental health counselor and was AMHP's Director from January 1, 2007

until July 13, 2009. CP 132 and 135, Exhs 2 and 45. Prior to that Burton had served as AMHP's Clinical Director from June 21, 2004 until December 31, 2006. CP 134, Exh 36.

Burton was terminated from her Director position on, or around, July 13, 2009, by Appellant Janice Becker. CP 132, Exh 1. Becker is the owner of AMHP.

An employment agreement was in effect between Burton and AMHP which required "due cause" and 60 days notice prior to termination. CP 132, Exh 2. After Burton's termination, there were crossing claims by Burton and AMHP for breach. CP 1-32.

Burton claimed: (1) there was an absence of due cause, (2) AMHP failed to pay any salary during the 60 day period following July 13, 2009, and (3) AMHP terminated her benefits six weeks early. CP 1-8.

The Trial Court concluded there was "due cause" for termination, but Burton was entitled to salary and benefits for the 60 day notice period because she had "carried her burden of proving that AMHP breached the contract by failing to pay 'compensation to the Director [Burton] for services rendered to the date of termination.'" CP 129, COL 6 and CP 130, COL's 7 and 10.¹

¹ COL refers to the Trial Court's Conclusions of Law in the above-captioned matter

Burton is not appealing either of the above conclusions. She seeks a decision that remands this case on the issue of damages and a decision, in accord with the Trial Court's Findings of Fact, which holds that any breach of "loyalty" alleged by AMHP was justified or excused by Burton's duty to her clients. See Trial Court FOF's 11 and 12² at CP 128.

B. PATIENT CARE

RCW 18.225.100 and Patient Choice - Burton testified that she had no supervisor at AMHP other than Becker. CP 331. Burton also testified that she had a master's degree in psychology, was familiar with RCW 18.225.100's qualifications for being a licensed mental health counselor, and that clients, by statute, have decision-making authority in determining their individual treatment provider and the method and mode of treatment. CP 333 and RP 64:23 – 65:7.

Reduction of Patients' Names to Initials - Testimony from the adult heads of household for three former AMHP clients appears below. (See paragraphs titled "Testimony of P.B.," "Testimony of D.E.," and "Testimony of M.S.," below). The full

² FOF refers to the Trial Court's Findings of Fact in the above-captioned matter.

names of these persons are reduced to initials to protect their privacy.

Length and Focus of Treatment of P.B.'s, D.E.'s, and M.S.'s Families - Burton had been the individual therapist for each of the families for at least a year when she was terminated by AMHP on July 13, 2009. CP 341-42 and VRP of M. Scott, 6:20 - 7:6.

The focus of treatment for two of the families concerned a child with self-harm issues. See paragraphs regarding Testimony of "P.B." and "D.E.," below. The third involved a child who, according to her mother, had been "psychotic" for two years. See paragraph regarding Testimony of "M.S.," below.

Testimony of P.B. - P.B. testified that Burton provided therapy to his daughter, who has a chromosomal development issue, as well as difficulty interpreting things that people say to her, getting along with other people, and new relationships. CP 341.

P.B. testified that, in the middle of July 2009, (around the time Burton was terminated), P.B. contacted AMHP after his daughter spoke to emergency personnel at a hospital about self-harm. CP 341. P.B. then attempted to contact Burton at AMHP, explained that it was an emergency because his daughter was in a

psychiatric ward at the hospital, and stated he needed Burton to speak with his daughter and the hospital. CP 341.

P.B. was told by AMHP that there were other counselors who could do the same thing and AMHP would not give out Burton's home number. CP 341. P.B. turned down the offer of another counselor because he felt his daughter would benefit much more from someone she knew and was comfortable with. CP 341.

P.B. explained to AMHP that it was a necessity for his daughter to speak with Burton, pointing out the familiarity between Burton and his daughter and that Burton could explain what was going on to the hospital much better than a new counselor. CP 341-42.

P.B. also testified he did not want to use AMHP for a new counselor because the tone he got on the phone was that they did not care about his daughter. CP 342. It was an emergency and AMHP refused to help. CP 342.

P.B. testified he was finally contacted by his daughter's psychiatrist and the psychiatrist provided P.B. with Burton's home number. CP 341. (the psychiatrist is not an employee or agent of AMHP). After that, P.B. called Burton and solicited her to provide counseling for his daughter. CP 341-42.

Testimony of D.E. – D.E.’s family was a client of AMHP.

The counseling was specifically set for their daughter, but Burton also provided counseling to the parents. CP 342.

D.E. learned that Burton was no longer with AMHP toward the middle of July 2009. CP 342. D.E. had been informed that Burton was on vacation. CP 342. He called at a later date and was informed that Burton was no longer with AMHP. CP 342.

D.E. testified that, when he called AMHP, the individual answering the call said AMHP could provide another counselor, but D.E. chose not to accept another counselor and hung up. CP 342. D.E. then received an unsolicited call from AMHP offering to set him up with another counselor, but he, again, said “no.” CP 342.

D.E. testified he chose to pursue Burton, rather than another counselor at AMHP, because his daughter had a disorder that caused her to harm herself. CP 342. D.E. felt that Burton was the best person to provide care. CP 342. He was eventually able to reach Burton directly because he recalled that Burton, due to his daughter’s problem, had previously provided D.E. with her personal phone number. CP 342.

D.E. testified that, due to his daughter’s high risk situation, he pushed Burton to continue providing care. CP 342. D.E. chose not to go with another counselor because his daughter had gone

through many therapists before Burton and Burton was the only one able to get through to his daughter. CP 342. Also, D.E. did not want to go through another month of work with a new therapist to get back to where they already were with Burton. CP 343.

Testimony of M.S. – M.S. testified that she called Burton directly after someone from AMHP told her that Burton was no longer at AMHP. VRP of M.S., 8:11 - 10:15. She asked Burton to continue providing treatment to M.S.'s daughter. VRP of M.S., 9:11 – 10:15. M.S. also testified that "... I was very clear that I was not at all interested or willing to work with anyone except Leah [Burton], regardless of whether she was with [AMHP] or not ..." VRP 10:3-6. Finally, M.S. testified she knew several other AMHP counselors who, she believed, were "qualified" to treat her daughter, but she "never gave" Burton the "chance [to recommend another counselor at AMHP]." VRP of M.S., 12:7-23.

I was adamant [about keeping Burton]. My daughter had not been -- she had been psychotic for most of the two years previous, and Leah [Burton] was the only person who had been there through that whole time. I was not even going to consider using anyone else. VRP of M.S., 12:11-23.

M.S. also testified that much of Burton's subsequent counseling was provided for free because M.S.'s husband lost his job and they could not afford to pay Burton. VRP of M.S., 10:8 -15.

C. **TERMINATION**

Events of July 13, 2009 – Becker went into Burton's office on July 13, 2009 and delivered a letter stating Burton's employment with AMHP was being terminated as of September 11, 2009 because:

you have failed to adequately market the agency and increase the agency's client base. In fact, during your time as Director, the agency's case load and revenues have actually fallen ... (CP 132, Exh 2).

The letter stated Burton would be paid "as provided in the Agreement through your termination date." (CP 132, Exh 2).

Natalie Hoffman, AMHP's Business Manager, testified that, on July 13, 2009, Becker went into Burton's office and then Burton packed her things and left. CP 337. According to Hoffman, Burton was asked to leave the premises that day and Burton's exit from the building happened quickly after the entry of Becker into Burton's office. CP 337.

Termination of Salary and Benefits - On July 21, 2009, Becker sent Burton a letter which, in part, told Burton: "You must immediately stop contacting AMHP clients ... 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.” CP 136, Exh 112.

On July 24, 2009, AMHP’s attorney sent a letter to Burton’s attorney which stated, in part: “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.” CP 137, Exh 114.

On August 11, 2009, Becker, again, sent a letter to Burton which stated, in part:

In spite of my warning to you in [my letter dated July 21, 2009], you have continued to see AMHP clients on your own ...

... you have forfeited any right under [your Agreement for Professional Services] 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.

I am enclosing your final paycheck in the amount of \$2,699.41 (\$3,634.80 gross) which covers payment of your salary through July 13, 2009, plus a separate check in the amount of \$5,581.56 (\$7,653.83 gross) which is a pay-out for your 262.91 hours of accrued but unused vacation. AMHP has also paid the premium for your health and dental insurance coverage through July 31, 2009. AMHP will not be paying you any additional salary or providing you with any additional benefits.

CP 135, Exh 37

Summary of Events After July 13, 2009 - Burton was paid her salary through July 13, 2009 and all accrued vacation / leave

she had earned through July 13, 2009. CP 135, Exh 37. No additional amounts have been paid. Burton's insurance benefits were terminated on either July 31, 2009 or August 1, 2009. CP 137, Exh 124.

D. TRIAL COURT's FINDINGS and CONCLUSIONS

No Solicitation by Burton - The Trial Court found that "the evidence established ... that the three clients Ms. Burton 'took' from AMHP had sought her out[,] ... were not interested in disrupting the therapeutic relationship ... established with Ms. Burton[,] and would not have considered staying with AMHP after Ms. Burton left the agency. CP 128, FOF 11.³

Choice Belongs to Patient - The Trial Court found that both parties testified, and the law provides, that the choice of a therapist belongs solely to the client. CP 128, FOF 12.⁴ [So] AMHP could not have required [the] clients to stay with the agency in any event. Id.

Employment Agreement Required AMHP to Pay Wages and Benefits for an Additional 60 Days - The Trial Court found Burton lost income and uninsured medical expenses and costs that should be recovered from the Defendants based on the 60 days of

³ FOF refers to the Trial Court's Findings of Fact in the above-captioned matter.

notice that were required prior to termination by the employment agreement. CP 128, FOF 14 and CP 129, FOF 17.

The Trial Court concluded that Defendants had an obligation to provide Burton with an additional 60 days of pay and benefits past July 13, 2009, based on the parties' employment agreement. See CP 130, COL 7⁵ and CP 132, Exh 2. Burton was directed to submit a form of judgment in favor of Burton. CP 130, COL 10.

E. APPEAL ISSUES

The Court's Dismissal of Claims Against Becker and Denial of Motion for Reconsideration – Trial in the above-captioned case, took place from April 25-28, 2011, then was continued until August 8, 2011. CP 108-118.

On April 27, 2011, after Burton rested her case, the Trial Court dismissed Janice Becker, individually, as a defendant in the above-captioned matter. CP 116.

Subsequent to the Court's April 27, 2011 dismissal of Becker as a defendant, but prior to the end of trial, Burton moved the Trial Court to reconsider its April 27, 2011 ruling dismissing Becker as a defendant. CP 122-125. On August 8, 2011, the Trial Court denied

⁴ Id.

⁵ COL refers to the Trial Court's Conclusions of Law in the above-captioned matter.

Burton's motion for reconsideration of its decision to dismiss Becker. CP 117.

Judgment Amounts - The final Trial Court judgment awarded a principal amount of \$6,779.25 and a cost judgment of \$230.00 to Burton on February 23, 2012. CP 219-220.

Absence of Conclusion on Whether Upholding Patient Choice Excuses Breach and/or Tortious Interference - The Trial Court found that P.B., D.E., and M.S. testified they solicited Burton to provide continuing counseling, rather than Burton soliciting them, (CP 128, Finding of Fact 11), and that both Burton and Becker testified, and the law provides, that the choice of therapist belongs solely to the client, (CP 128, Finding of Fact 12). In spite of the above findings, however, the Trial Court entered no explicit conclusion of law concerning whether any breach or tortious interference by Burton was otherwise excused by this public policy exception. (CP 129-130). Nevertheless, as stated in the preceding paragraphs, the Trial Court directed Burton to prepare a judgment against AMHP for withholding wages and benefits from Burton.

The Trial Court's Rejection of Proposed Entry of Judgment for Double Damages Against Both AMHP and Becker – Prior to the entry of judgment in the above-captioned matter, Burton argued and urged that, because AMHP breached

the terms of her employment agreement by withholding 60 days worth of wages and six weeks worth of benefits during the Severance Period, she was statutorily entitled to double damages from AMHP and joint and several liability against AMHP's owner, Janice Becker, because RCW 49.52.050 and RCW 49.52.070 allow double damages and individual liability against the owner of a corporate employer when wages are willfully withheld. CP 168-176, esp 173-4 and footnotes 7 and 8 at CP 174.

F. PROOF OF DAMAGES

Evidence Regarding Amount of Withheld Wages – Burton entered evidence at trial that she earned \$47,747.51 from January 1, 2009 through her termination date of July 13, 2009. CP 132, Exh 3. AMHP entered evidence at trial that Burton earned \$47,245.00 in income from January 1, 2009 through the termination date. CP 138, Exh 135.

Evidence of Costs Incurred Due to Termination of Benefits - Unrebutted evidence was entered at trial showing that Burton's AMHP employee insurance was cancelled as of July 31, 2009 or August 1, 2009. CP 137, Exh 124.

There was also unrebutted evidence that Burton incurred the following costs, prior to September 12, 2009, to pay for medical and

optical benefits previously covered by her AMHP insurance

benefits:

Exh 9 – Polaris Eyecare	\$103.00
Exh 10 – Omri Touboul, MD	\$495.25
Exh 41 – Regence Repayment	\$243.00
Exh 43 – Orthopedics Int'l	\$247.00
TOTAL	\$1,088.25

CP 132 and 135, Exhs 9, 10, 41, and 43.

The “Severance Period” - Burton shall, hereinafter, refer to the 60 day period following July 13, 2009 as the “Severance Period.”

Set-Off for Counseling Income Received from Former AMHP Clients – It is conceded, by Burton, that there should be a set-off for any income that Burton earned from counseling former AMHP clients during the Severance Period, i.e., for the 60 days following July 13, 2009. Burton received \$1,125.00 from former AMHP clients during the Severance Period. (CP 139, Exh 137).

Set-Off for Unemployment Payments During Severance Period – Evidence was entered at trial that Burton received \$3,558.00 in unemployment compensation during the Severance Period. CP 139, Exh 144. Burton objected to any set-off for that amount. CP 144-5. Her objection was based on the fact that the Employment Security Department, (“ESD”), though not a party, will look to Burton for its recovery of payments made during the

Severance Period because there is no provision in the judgment for AMHP to forward or pay the set-off amount to ESD. CP 144-5 and 219-20.

G. THE ALLEGED 30 DAY CLIENT NOTICE REQUIREMENT

AMHP's References to a Requirement for Clients to Provide 30 Days Notice Before Terminating Services - AMHP supports some of its arguments in its Opening Brief by alleging Burton knew that AMHP's clients were required to give 30 days notice before terminating services with AMHP and that Burton was aware of this provision in AMHP's agreements. (AMHP's Opening Brief at page 8). There are no signed agreements between AMHP and P.B., D.E., or M.S. in the record.

Burton acknowledged that a 30 day notice provision is in the standard AMHP contract, but testified, on cross-examination, that she did not tell or encourage any former AMHP client to give 30 days written notice of termination to AMHP because she wasn't allowed to talk to these AMHP clients "prior to them coming to service with me. So when they came into service with me, they already chose to be with me and they had the right, under their rights as a client, to choose who to see." Defendant's RP 64: 23 - 65:7.

ARGUMENT

The Trial Court's Judgment Amount is Less Than Any Possible Calculation of the Improperly Withheld Wages - 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. The \$47,747.52 total is in the payroll records and includes all vacation and deferred compensation, as of July 13, 2009, even if it was paid later. (See CP 132 and 138, Exhs 3 and 135).

Burton calculates her gross lost wages amount as 60 days x \$246.12 per day for a total \$14,767.27 because the Trial Court's COL 7 concluded that AMHP owed Burton salary and benefits for 60 days past July 13, 2009. It is conceded by Burton that AMHP should be granted a set-off of \$1,125.00 for the \$1,125.00 Burton earned from treating the former AMHP clients during the 60 days following July 13, 2009, thus making Burton's **actual** lost wages \$13,642.27, after the set-off.

Double Damages and Entry of Judgment Against Becker is Allowed Under RCW 49.52 To Discourage the Acts of AMHP and Becker – Under RCW 49.52.070, “[a]ny employer ... who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be

liable in a civil action by the aggrieved employee ... to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees. RCW 49.52.070

It is a violation of RCW 49.52.050(2) if: Any employer ... whether said employer be in private business or an elected public official, ... willfully and with intent to deprive the employee of any part of his/her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract ...

Burton's complaint, itself, in part, asked for "damages related to the above claims ... attorney's fees, costs, and disbursements allowable under statute ... pre-judgment interest," and "such other relief as the Court deems just and equitable." CP 8. In a sister jurisdiction, it has been ruled that it is not necessary to cite the statute under which recovery is sought if the statute is intended to further a public policy. Tiano v Elsensohn, 268 Ore 166, 169-170, 520 P2d 358 (1974), (It suffices as notice to the opposing party that the plaintiff intends to avail itself of its statutory rights to its reasonable actual attorney's fees if the underlying allegation is listed in the complaint). As such, if pre-trial notice was required for relief in the form of double damages, Burton provided it.

Denying Double Damages Was an Abuse of the Trial Court's Discretion, Even If the Trial Court Determined the Pleadings Need to Be Conformed to the Evidence - Even if a failure to list the particular double damages statute in her complaint was a procedural flaw, this does not foreclose Burton from receiving relief in accordance with those statutes. See Tiano, supra, and Safeport, Inc. Equipment Roundup and Manufacturing, Inc., 184 Ore App 690, 698-701, 60 P3d 1076 (Ore Court of Appeals 2002).

The correct remedy, if conformation of the pleadings is required, is to grant the plaintiff leave to amend his/her complaint, even after trial has concluded, where doing so is not the product of a "unilateral effort by the petitioner to interject entirely new claims in the litigation [but rather] to cure deficiencies that Defendant identified." Safeport, Inc. Equipment Roundup and Manufacturing, Inc., 184 Ore App 690, 698-701, esp 701.

After considering the relevant factors governing the trial court's discretion, we conclude that the trial court erred in denying defendant's motion to amend its pleading to allege compliance with ORS 87.057(2) [even after summary judgment had been entered and more than two years had passed since the original pleading of the moving party was filed]. Accordingly we reverse and remand for entry of a judgment

awarding attorney fees to defendant [i.e., the moving party]. Safeport at 700-01.⁶

The exercise of discretion, under Safeport, is considered under four bases. Id at 699. None of the bases apply in this case. Any AMHP objection to double damages boils down to a bad faith attempt to avoid the repercussions which should flow from AMHP depriving Burton of her salary and benefits.

AMHP and Becker Knew, Long Before Trial, That There Was No Justification for Withholding Burton's Salary During the 60 Days After July 13, 2009 - As of April 8, 2011, (17 days before trial), AMHP had actual notice that the former AMHP clients were entitled to exercise their own choices about who to treat with because the relevant statutory and case authority was within Burton's "Pre-Trial Memorandum of Law Re. Public Policy Exception," as well as the filed declarations of three of the parents/payors of the mental health clients. CP 80-103, esp CP 96-102. On April 8, 2011, Burton filed and served P.B.'s, D.E.'s, and M.S.'s declarations on AMHP and each testified that they solicited Burton to provide treatment after rejecting AMHP's offers to switch the patient to another therapist. CP 96-102.

⁶ Washington's Court Rule for amendment of pleadings, CR 15, is substantially similar, if not identical, to the Oregon Court Rule, ORCP 23 cited in Safeport.

P.B. would testify that even after he told AMHP's owner, ("Becker"), that his daughter "needed desperately to talk with [Burton] ... Beckar (sic) still refused to give me any contact info. To make a long story short that night my daughter wound up in the psychiatric ward at Harborview Hospital ... I am trying to remember when or if I have ever dealt with a more careless, insensitive, rude health care professional, it that is the title Ms. Beckar (sic) claims." CP 96-98.

Presumably, AMHP also has constructive knowledge of RCW 18.225.100 since it is a mental health services provider. It should have known patient choice and patient care prevails over its own contractual clauses.

Also, AMHP knew it was not necessary to withhold all of Burton's salary and benefits to cover any potential Employment Security Department, ("ESD"), set-offs because AMHP is not responsible for protecting the interests of ESD.

Withholding Salary Was Simply a Tactical Maneuver -

AMHP knew, as early as February 28, 2011, that it had withheld much more salary than necessary to set off any amount otherwise inappropriately acquired by Burton from former AMHP clients because Burton's discovery responses stated she earned approximately \$500.00 per month in August and September 2009

from these client and AMHP did not enter any contrary evidence at trial. CP 139, Exh 138, pp 9-10. In addition, AMHP certainly had no reason to believe Burton's insurance could be replaced when it terminated those benefits.

The total amount of compensation Burton received in the 60 days, following July 13, 2009, from the three families, was \$1,125.00. (CP 139, Exh 137).⁷ Burton did not receive any compensation for any therapy sessions with former AMHP clients until August 4, 2009. (CP 139, Exh 137). AMHP knew they were overreaching.

Any Allegation That All of Burton's Wages Were Arguably Subject to Withholding is Not Supported by the Undisputed Facts – The paragraphs above indicate that, at least in the two-month time period before trial, AMHP willfully withheld wages in an amount greater than any set-off it could hope to achieve in terms of dollar amount. The non-AMHP income that Burton had earned in the 60 days after July 13, 2009 had been disclosed and was not disputed. As a result, AMHP knew, two

⁷ Defendant's Trial Exhibit 137, (CP 139) is an exact duplicate of the document referenced at page 30 of Defendant's Trial Exhibit 138, (CP 139) as Burton's "Accounting for Self-Employment Income after July 13, 2009." In other words, Defendant's Trial Exhibit 138 is a set of discovery responses and Defendant's Trial Exhibit 137 is one of the documents provided by Burton to AMHP, on, or around, February 28, 2011 in response to its discovery requests.

months before trial, that it owed Burton at least as much in wages as the amount proposed, before adding double damages, in Burton's judgment summary.

By withholding all salary, AMHP was simply pursuing a strategy of go-for-broke. The go-for-broke theory, though, could not ever have been raised in good faith, especially after April 8, 2011.

As of April 8, 2011, AMHP had been put on actual notice of the previously described plain, unambiguous language of RCW 18.225.100, Danny v Laidlaw Transit, 165 Wn2d 200, 221-7, 193 P3d 128 (2008),⁸ Gardner v Loomis Armored, Inc., 128 Wn2d 931, 941, 913 P2d 377 (1996), and the American Mental Health Counselor Association's Code of Ethics. It should be presumed that, as a mental health treatment provider, AMHP is fluent in the English language, but AMHP continued to trial against Burton for her supposed tortious interference with AMHP's business relationships.

AMHP did not prevail at trial, nor ever have any basis to believe it would prevail, for reasons that were plainly apparent on

⁸ Danny's and Gardner's public policy exception is well-settled in Washington and elsewhere. See Lopatka, *The Emerging Law of Wrongful Discharge-A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 Bus.Law 1, 6-17 (1984) and Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 Harv.L.Rev. 1931(1983).

April 8, 2011: AMHP's right to succeed as a business does not trump a patient's right to treat with whomever he or she chooses. It simply defies imagination for AMHP to assert or imply that AMHP's owner, Janice Becker, could have reasonably thought, prior to trial, that she had the right to withhold the wages and benefits of Burton as a penalty for treating patients who, on their own, solicited Burton.

Burton is Entitled to Double Damages as the Substantially Prevailing Party - "A party need not recover its entire claim in order to be considered the prevailing party." Silverdale Hotel Assocs v Lomas & Nettleton Co., 36 WnApp 762, 774, 677 P2d 773 (Div 2, 1984). In Silverdale, it was determined that the respondent, (Silverdale), was entitled to its attorney's fees as the prevailing party, despite the fact that Silverdale lost its claims, at trial, for "[some] claimed costs, expenses and possible liabilities" that resulted from the appellant's breach. Id at 772-77. Silverdale was entitled to attorney's fees because it was the only party who prevailed on any of its claims.

Likewise, Burton is entitled to a judgment for the amount that remained unpaid to her, (60 days salary and benefits), because of AMHP's breach, less an offset for other income acquired during the

60 day period. Burton is entitled to her double damages for the same reason that Silverdale was entitled to its attorney's fees; Burton was the only prevailing party.

Any Historical Requirement that a Double Damages Statute Be Listed in the Complaint was Overruled by Beckmann – The Beckmann Court, in 1987, ruled on the applicability of in-pleading requirements for reasonable actual attorney's fees under RCW 4.84.250 and treble damages, for timber cases, under RCW 64.12.030. See Beckmann v Spokane Transit Authority, 107 Wn2d 785, 790, 733 P2d 960 (1987), (overruling Warren v Glascam Builders, 40, WnApp 229, 698 P2d 565 (1985) and Tatum v Cable, 30 WnApp 580, 636 P2d 508 (1981), *review denied*, 97 Wn2d 1007 (1982)).

When Beckmann filed her original complaint, RCW 4.84.250 provided for actual reasonable attorney's fees in matters where a judgment of less than \$3,000.00 was sought.⁹ Id at 787-90.¹⁰

RCW 4.84.250's explicit statutory requirement that notice of the selected statute be in the pleadings was voided and overruled

⁹ Currently, the RCW 4.84.250 amount is \$10,000.00.

¹⁰ The issue of whether any or all of RCW 4.84.250's requirements were independently applicable to RCW 64.12.030 cases, pre-Beckmann, was mentioned, but not clarified or resolved, in Beckmann at 788. That issue is not examined in this brief because the issue became irrelevant after Beckmann was decided.

by the Beckmann court for cases like Warren, supra. Beckmann at 787-90, esp. 788 and 790. Likewise, any in-pleading requirement for treble damages under the statute(s) at issue in Tatum, supra, was overruled.

It should be noted that the explicit in-pleading, pre-Warren, notice requirement was eviscerated by the Washington Supreme Court for sound policy reasons:

[Warren and Tatum] give little justification for why notice at such an early stage is required. The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims ... "[t]he obvious legislative intent is to enable a party to pursue a meritorious small claim without seeing his award diminished in whole or in part by legal fees." [citing] *Northside Auto Serv Inc v Consumers United Ins Co*, 25 WnApp 486, 492, 607 P2d 890 (1980). Beckmann at 788-89.¹¹

Beckmann's policy reasons have been repeated in cases upholding attorney's fees in wage recovery actions, Firefighters and Hayes, infra. The double damages provisions of RCW 49.52 should, likewise, be enforced.¹²

¹¹ Additional following language in the Beckmann opinion regarding the 10 day pre-trial notice requirement of RCW 4.84.250 is omitted from this brief because, as stated above, 4.84.250 is not the statute at issue in the above-captioned case.

¹² Under RCW 49.52.070, "[a]ny employer ... who shall violate any of the provisions of RCW 49.52.050 (1) and (2) shall be liable in a civil action by the aggrieved employee ... to judgment for twice the

"[RCW 49.48.030] ... must be construed to effectuate its purpose." Int'l Ass'n of Firefighters, Local 46 v City of Everett, 146 Wn2d 29, 41, 42 P3d 1265 (2002). The purpose of this statute is to make the successful plaintiff whole. Hayes v Trulock, 51 WnApp 795, 755 P2d 830 (1988).

It Was Not Within the Trial Court's Equity Powers to

Create a Windfall for AMHP by Deducting ESD Payments from

the Judgment Amount - A windfall was created for AMHP when the Trial Court elected to discount the judgment against AMHP by the amount of Employment Security Department, ("ESD"), payments to Burton during the Severance Period. AMHP or Burton, instead, should have been ordered to deposit the ESD set-off amount into the registry of the Trial Court and then move the Trial Court to disburse the funds to ESD because these funds do not belong to AMHP or Burton.

This case should be remanded to the Trial Court with directions to amend the judgment in accordance with the above directions in order to avoid creating a windfall for AMHP and,

amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees.

It is a violation of RCW 49.52.050(2) if: Any employer ... whether said employer be in private business or an elected public official, ... willfully and with intent to deprive the employee of any part of his/her wages, shall pay any employee a lower wage than

possibly, an unknowing attempt by ESD to obtain double recovery against Burton for the ESD payments made to Burton because if Burton's wages not been wrongfully withheld, she would not have been eligible for, nor received, the ESD payments.

There Is No Evidence in the Record that the Families of P.B., D.E., or M.S. Ever Signed an Agreement Requiring 30 Days Notice Before Terminating AMHP – AMHP's Opening Brief mentions an alleged 30 Day Notice Requirement before a client may terminate services with AMHP. Any such requirement would be void as against a statutory public policy directive mandating patient choice, i.e., RCW 18.225.100, infra, but, nevertheless, there is no evidence in the record that P.B., D.E., M.S., or their families had such written agreements with AMHP. Therefore, this argument should not be considered by the Court.

Those portions of AMHP's Opening Brief which mention or rely upon the 30 day notice requirement should be stricken or ignored.

In addition, AMHP is not being entirely truthful when it states that Burton helped write the agreement, made sure all of AMHP's clients signed it, and expected her staff members to follow what it said. (AMHP Opening Brief at pp 4-6 and 24). Burton's actual

the wage such employer is obligated to pay such employee by any

testimony was that she was familiar with a form contract signed between AMHP and its clients requiring a 30 day notice prior to terminations and that she did not actually “write” the contract, but rather made sure that it was written, in other words, made sure that all clients of AMHP had written contracts, like the form contract. RP 60:23 – 64:15. Specifically, her Q and A was as follows:

Question: And you wrote that [30 day] provision too, correct?

Answer: I didn’t write this legal contract, no.

Question: ... But this was part of the contract that was used during your time [at AMHP], correct?

Answer: Yes.

RP 64:11-15

There is No Tortious Interference Claim Because AMHP

Did Not Incur Any Lost Profits - It would be improper and moot to remand the matter of whether Burton unjustifiably and tortiously interfered with AMHP’s business relationships with P.B., D.E., and M.S. because AMHP has no evidence in the record to show it could ever prove it could have retained the clients that Burton, supposedly, interfered with. In fact, the evidence is quite the opposite.

statute, ordinance, or contract shall be guilty of a misdemeanor.

- (1) There is no evidence in the record of any agreement being signed between the former AMHP clients at issue which binds them to AMHP or a 30 day notice period before terminating treatment with AMHP;
- (2) The 30 day notice for termination of any actual agreement is unenforceable under the facts of the above-captioned case; (see citations, infra),
- (3) Burton never solicited these clients in an effort to seize them from AMHP, and
- (4) AMHP could not reasonably expect that they could have continued billing the clients for services provided by other AMHP counselors because all of the former AMHP clients testified they either:
 - (a) rejected services through another AMHP therapist after Burton was fired
 - or
 - (b) would not have even considered an offer to switch therapists, due to the serious nature of the conditions being treated and their fear of retarding or terminating the progress of their children by switching therapists. See "Statement of the Case," supra, and summaries below.

As D.E. put it, he rejected the offer of a different AMHP therapist because many other therapists had previously been tried and Burton "was the only one able to get through to [my] daughter." See "Statement of the Case," supra, and esp CP 342.

Likewise, P.B. testified he did not want to use AMHP for a new counselor for his daughter because Burton had a long history with his daughter and the tone he got on the phone from AMHP was that they did not care about his daughter and the individuals

there refused to help him contact Burton despite the fact it was: (a) an emergency situation and (b) Burton was the person best equipped to help. See Statement of the Case,” supra, and NRP CP 341-42. P.B. characterized the situation by testifying he would not even consider hiring someone else at AMHP. See “Statement of the Case,” supra, and CP 341-42.

Finally, M.S. testified she was “adamant” that Burton continue to be the counselor for M.S.’s daughter and never gave Burton the chance to recommend another AMHP counselor. See “Statement of the Case,” supra, and VRP of M.S., 12:7-15.

AMHP Cannot Enforce a 30 Day Notice Requirement or Loyalty Pledge If It Impairs the Client’s Absolute Right to Choose His/Her Individual Provider - It is clear, from RCW 18.225.100, that clients have sole control over who will provide continuing mental health treatment to them:

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

Strict enforcement of either a 30 day notice period or Burton’s contract duty of “loyalty” to AMHP, though, would have rendered the above statute meaningless because the client would be compelled to either accept AMHP as a treatment provider or go

without treatment. This is certainly not what the legislature intended. As a result, enforcement of either the alleged 30 day notice requirement or the loyalty clause impairs RCW 18.225.100.

The "loyalty" obligation is, plain and simple, a poison pill, in terms of patient choice, because if, for example, Burton chooses to ignore it and treat former AMHP clients who seek her out directly, she will have to accept serious financial injury for complying with the patient's choice of treatment provider. Realistically, the "loyalty" obligation prohibits Burton from complying with a patient's choice. Therefore, the patient will not be able have the "provider and treatment modality which [the patient believes] best suits their needs," RCW 18.225.100, supra.

It is not realistic to suppose, as AMHP's Opening Brief does, that the clients' and AMHP's interests could both be accommodated by simply allowing Burton to keep the money for treating the P.B., D.E., and M.S. families during the Severance Period, but forfeiting her salary during that period. (AMHP's Opening Brief at p 20).

This is not realistic because the \$1,125.00 paid by the former AMHP clients to Burton during the Severance Period is substantially less than the \$10,000.00 in salary, plus six weeks worth of benefits, that AMHP withheld. As a result, imposing the above solution would provide a serious financial disincentive, in fact

a penalty, for any counselor who elects to assist the patient in enforcing his / her right to choose his / her treatment provider.

Even in the Absence of RCW 18.225, Public Policy Considerations Clearly Void the “Loyalty” Obligation in Burton’s Employment Agreement - The statutory directive giving patients sole control over the choice of their mental health care provider is consistent with a longstanding exception exempting parties from contract duties where accommodating the contract terms is contrary to public policy. See Danny v Laidlaw Transit Services, 165 Wn2d 200, 221-7, 193 P3d 128 (2008).¹³

The crucial inquiries are: (1) whether the policy is demonstrated in a constitutional, statutory, or regulatory provision or scheme; Danny at 207-8, and (2) “whether, on the facts of each case, the employee’s discharge contravenes or jeopardizes public policy.” Gardner v Loomis Armored, Inc., 128 Wn2d 931, 941, 913 P2d 377 (1996).¹⁴

¹³ This exception is well-settled in Washington and elsewhere. See Lopatka, *The Emerging Law of Wrongful Discharge-A Quadrennial Assessment of the Labor Law Issue of the 80’s*, 40 Bus.Law 1, 6-17 (1984) and Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 Harv.L.Rev. 1931(1983).

¹⁴ To satisfy the ‘jeopardy’ element, the employee ‘must prove that discouraging the conduct in which [she] engaged would jeopardize the public policy,’ Danny at 222, citing Gardner at 941, and “the

According to Gardner, Which Post-Dates Ashley by 27

Years, Public Policy Trumps Contractual Agreements - In

Gardner, supra, employee Gardner violated a specific provision of his contract with Loomis Armored by going to the aid of another person in danger, rather than staying in his armored truck. Id. Gardner was then fired. Id. The dismissal of Gardner's wrongful termination case was reversed by the Washington Supreme Court, because to do otherwise would contravene a strong public policy, whether statutorily memorialized or not, in favor of rendering aid to those in danger. Id. As a result, Gardner, if not overruling Ashley v Lance, (cited by AMHP's Opening Brief at pp 19-20), certainly appears to strongly support the proposition that a public policy, when coupled with an explicit statute, like RCW 18.225.100, overrules the terms of AMHP's employment agreement with Burton or even an agreement it may have in place with its clients requiring a 30 day termination notice.

Danny Also Presented Public Policy Considerations

Despite the Absence of Any Statutory Directives - In Danny, the

Washington Supreme Court ruled that an at-will worker could contest her termination due to absenteeism as a wrongful termination where such absenteeism was caused by the

employee must show that other means of promoting the policy are

employee's efforts to escape domestic violence even though there was no specific statutory language excepting domestic violence victims from workplace requirements or protecting them as a class within the workplace. Danny v Laidlaw Transit Services, 165 Wn2d 200, 221-7, 193 P3d 128 (2008).

In [Danny's] case, like in Gardner, Danny was faced with a critical situation that was not related to her employment duties. Like in Gardner, she took action in response. Like in Gardner, those actions entailed leaving work for a period of time in an effort to further a clearly established public policy. If her actions were necessary to further the public policy, as the truck driver's actions were in Gardner, her conduct is protected. Danny at 225.

The Statutory Directive for Mental Health Patients

Required Burton to Provide Continuing Treatment Regardless of Her "Loyalty" Obligation - In the absence of specific statutory language, the determination of whether a public policy exception exists is usually fact-specific, (see Danny at 222, citing Gardner at 945), but in Burton's case, the existence of a duty is a matter of law because patient choice is a specific statutory directive and it is hard to see how another "means of promoting the policy" would be adequate. Id. Patient choice is patient choice. The statutory language could not be much more narrow and direct and the evidence shows the patients clearly wanted Burton, not AMHP.

inadequate." Danny at 222, citing Gardner at 945.

There is No “Balancing” Test - There is no “balancing test”

in weighing public policy vs. other interests:

[T]he critical inquiry in the four-part wrongful discharge test is not whether the employer’s actions directly contravene public policy, but whether the employer fired the employee [or, in Burton’s case, terminated wages and benefits] because the *employee* took necessary action to comply with public policy. Danny at 226, citing Gardner v Loomis Armored, Inc., 128 Wn2d 931, 941, 912 P2d 377 (1996), (emphasis in Danny’s original opinion).

The determination of whether a clear public policy exists is a question of law and does not involve a balancing of an employer’s interests in operating a business, an employee’s interest in continuing employment, and the public’s interest in effectuating broad public policies. Gardner at 128 Wn2d 937 and 942-5.

Burton and AMHP Had a Duty to Accommodate Patient

Choice, Even Without a Statutory Directive - Even without RCW

18.225.100, it should be clear that enforcing the “loyalty” portion of Burton’s employment agreement would be contrary to the interests of the former AMHP clients at issue *and* AMHP’s duties to these former clients because, according to the American Mental Health Counselor Association’s Code of Ethics, providers [like AMHP] cannot “enter into counseling relationships with a person being served by another mental health professional unless all parties have been informed and agree.” See single-spaced citations below.

(4) Clients Served by Others - Mental health counselors do not enter into counseling relationships with a person being served by another mental health professional unless all parties have been informed and agree. When clients choose to change professionals, but have not terminated services with the former professional, it is important to encourage the individual to first deal with that termination prior to entering into a new therapeutic relationship. When clients work with multiple providers, it is important to secure permission to work collaboratively with the other professional involved.

[www.amhca.org/assets/news/AMHCA code of ethics 2010](http://www.amhca.org/assets/news/AMHCA_code_of_ethics_2010). (Review AMHCA Code of Ethics, pp 5-6, sec I.B(4). Section I is entitled "Commitments to Client." Subsection B is entitled "Counseling Process.").

In the cases of P.B., D.E., and M.S., it is clear that AMHP had no permission to work collaboratively, or at all, for P.B., D.E., of M.S. after AMHP terminated Burton. In fact, AMHP's services, after July 13, 2009, were emphatically rejected. There was no need to encourage P.B., D.E., or M.S. to "first deal" with the termination of AMHP before continuing counseling because they were not, in reality, treating with AMHP. They were treating with Burton. Nevertheless, the former AMHP clients made it clear that they wished to terminate AMHP, whatever its status. Therefore, the standards of the industry required AMHP to respect that decision, not withhold Burton's wages and benefits in an attempt to thwart it.

See also American Mental Health Counselor Association's 2010 Code of Ethics, Section I.(B)(7):

(7) Clients Rights – In all mental health services, whenever and however they are delivered, clients have the right:

(e) ... to request and receive referrals to other clinicians when appropriate.

(i) To refuse any recommended services ...

[and]

(l) ... to discontinue therapy at any time.

See www.amhca.org/assets/news/AMHCA_code_of_ethics_2010.¹⁵

Finally, the existing individual therapist, i.e., Burton, had an independent professional duty to continue providing care to the families of P.B., D.E., and M.S., not refuse to treat them. See American Mental Health Counselors Association Code of Ethics, 2010 Edition, section I.B (5), below.

(5) Termination and Referral – Mental health counselors do not abandon or neglect their clients in counseling.

(f) If clients are in danger, such as domestic violence or suicidality, mental health counselors shall take steps to secure a safety plan, refer to appropriate resources, and if necessary contact appropriate support.

See www.amhca.org/assets/news/AMHCA_code_of_ethics_2010.¹⁶


¹⁵ AMHCA 2010 Code of Ethics, pp 5-6. Section I is entitled “Commitments to Clients.” Subsection B is entitled “Counseling Process.”

¹⁶ AMHCA 2010 Code of Ethics, pp 5-6. Section I is entitled “Commitments to Clients.” Subsection B is entitled “Counseling Process.”

CONCLUSION

The Court of Appeals should remand this case and direct the Trial Court to issue a definitive conclusion of law as to its determination that a public policy exception contained within RCW 18.225.100 excuses, and justifies, any breach, or tortious interference, by Burton in the above-captioned case and that Burton's out-of-pocket costs resulting from termination of her AMHP benefits from August 1, 2009 until September 11, 2009, as well as double damages for any of Burton's recoverable wages for the period of July 14, 2009 until September 11, 2009 shall be included in a future, and superceding judgment. Finally, that, while a \$1,125.00 set off for other income is conceded and applicable, any amount necessary to repay the Employment Security Department shall be added to the judgment against AMHP, but deposited into the Court registry for disbursal to the Employment Security Department by the Trial Court.

DATED THIS 9th day of OCTOBER, 2012.



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