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

JOYCE LEAH BURTON,

Respondent/Cross-Appellant,

v.

JANICE BECKER and AFFILIATED MENTAL HEALTH
PROGRAMS, INC.,

Appellants/Cross-Respondents.

OPENING BRIEF OF APPELLANTS/CROSS-RESPONDENTS

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I. INTRODUCTION

This case is about an employee's duty of loyalty to her employer, and what the consequences should be for breaching that duty. Joyce Leah Burton is the former Director of Affiliated Mental Health Programs, Inc. ("AMHP"). AMHP terminated her employment for performance issues, which the trial court correctly held amounted to "due cause" for termination under her employment contract. The trial court also correctly held that during the last 60 days of her contract's term, Burton breached her duty of loyalty to AMHP. This holding is amply supported by the evidence at trial that during that period, Burton began seeing and providing counseling to AMHP clients on her own, directed them to start sending their payments to her rather than the agency, and kept the payments for herself.

Nevertheless, the trial court ordered AMHP to pay Burton's salary for this 60-day period, despite her breach of loyalty. The trial court erred by requiring AMHP to pay Burton for competing against the agency, and by failing to impose any consequences for her disloyal actions.

The trial court also erred in holding that AMHP failed to prove that Burton tortiously interfered with AMHP's contractual relationships with its clients, even after the trial court found that the evidence established all of the elements of that claim.

On appeal, AMHP asks this Court to reverse the judgment in favor of Burton for the 60 days' salary, to direct entry of judgment in favor of AMHP on its tortious interference claim, and to remand the case to the trial court for determination of AMHP's damages.

II. ASSIGNMENTS OF ERROR

AMHP assigns error to:

1. The trial court's entry of judgment in favor of Burton. CP 219-220.
2. The trial court's Findings of Fact Nos. 4, 5, 11-13, and 17. CP 127-129.
3. The trial court's Conclusions of Law Nos. 4, 6, 7, 9, and 10. CP 129-130.

III. ISSUES PRESENTED

AMHP's appeal presents the following issues:

1. Whether the trial court erred by awarding Burton her salary for the last 60 days of her employment contract with AMHP, despite the trial court's holding that she breached her duty of loyalty during that period.
2. Whether the trial court erred by holding that AMHP failed to carry its burden of proving that Burton tortiously interfered with its contractual relationships with its clients, despite the trial court's

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. Paragraph 10 of the Contract, titled “COMPETITION,” states that “[t]he 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.” CP 25.

3. The Agreement for Services.

AMHP requires its clients to sign an Agreement for Services, which sets forth the terms of the mental health counseling and related services the agency will provide (the “Agreement for Services”). Ex. 140 at Bates Nos. 203-205. This client contract states that it will remain in effect until terminated by either party in accordance with the contract’s termination clause. *Id.* at Bates No. 203. Paragraph 7 of the Agreement for Services, titled “Termination,” states that “[t]his Agreement may be terminated by either party with 30 days written notice,” which “is a minimum amount of time necessary to provide a smooth transition for the client and other parties involved.” *Id.* at Bates No. 204.

Paragraph 4 of the Agreement for Services, titled “Promise to Pay Fees,” states that the client (or the guardian or sponsor who is financially responsible for the client) promises to remit payment to AMHP for the counseling services received. Ex. 140 at Bates No. 203.

Paragraph 10 of the Agreement for Services, titled “Assignment of Work,” states that “[t]he parties agree that AMHP has the sole discretion to hire individuals to provide the services called for in this agreement.” Ex. 140 at Bates No. 205. It further states that:

AMHP staff leaving the agency is expected to establish a professional and appropriate termination of relationship with any clients followed for AMHP. AMHP will assign new, compatible and competent staff. AMHP strives for continuity of care which is best provided by the agency as a whole and is not dependent on any individual alone.

Id.

Burton helped write the Agreement for Services, and as Director made sure that all of AMHP’s clients signed it. RP 60-63. She understood that it was up to AMHP to decide which counselor to assign to a particular client. RP 65-66. She admits that when counselors left the agency, AMHP’s practice was to reassign the clients they had been responsible for counseling to other AMHP staff members. RP 67-68. She

also admits that when she was Director, she expected departing staff members to terminate their relationships with AMHP's clients. RP 66-67.

4. AMHP Gives Burton 60 Days' Notice of Termination.

There were several performance issues that caused AMHP to terminate Burton's employment. FOF 5. 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 – a staggering drop for such a small agency. FOF 5; RP 7-10; Ex. 132 at 1. Most of this drop was attributable to the fact that the agency's "care coordination fees" – the payments the agency's counselors bring in from treating clients – were way down. RP 10-11.² Burton admits that by early 2009, AMHP was no longer fiscally sound, which was causing a "tremendous amount of stress" for everyone at the agency. RP 13-14. In addition, Becker disapproved of Burton's management style, including her insensitivity to staff members and her abrupt and disrespectful manner of communicating. FOF 6; COL 5.

AMHP decided that a change in leadership was necessary. 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

² For the first six months of 2009, AMHP's care coordination fees were down about \$52,000 compared to the same period the prior year, which Burton concedes was a "very serious drop." Ex. 132 at 1; RP 10-11.

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

5. While Still an Employee, Burton Begins Seeing AMHP Clients on Her Own for Her Own Financial Gain.

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.

Burton says she kept the payments for herself because the clients contacted her (rather than the other way around) and asked her to continue treating them; she did not solicit them. CP 30; FOF 12; RP 115-116. She also says she felt professionally obligated to continue seeing the clients. RP 81. She does not claim, however, that she was professionally or ethically obligated to tell the clients to start sending their payments to her. *Id.* She admits that nothing prevented her from remitting the payments she received to AMHP. *Id.*

Burton also admits that when she began seeing the clients on her own, she did not tell them to give AMHP 30 days' written notice that they were terminating their relationship with the agency – even though she knew this was required by the Agreement for Services. RP 64-65. She does not claim that anything prevented her from doing that. *Id.*

6. Burton Ignores AMHP's Warnings That She Is Breaching Her Duty of Loyalty.

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; 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. Exs. 112, 114.

Burton read and understood these letters from AMHP. RP 79-80. She ignored AMHP's warnings, however, and continued seeing AMHP clients and keeping the payments for herself. RP 74; Ex. 138 at 6.

7. AMHP Notifies Burton That She Has Forfeited Her Salary.

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.* It also informed her that AMHP had paid her health and dental insurance coverage through July 31, and explained how she could elect continuation coverage at her own expense. *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. 137.³

B. Procedural History.

1. The Parties' Claims.

In October 2009, Burton filed suit against AMHP and Becker in King County Superior Court. Her Complaint alleged that Defendants (1) terminated her without “due cause” in breach of the Employment Contract; (2) further breached the Contract by not continuing to pay her salary during the 60-day notice period; and (3) used her image on AMHP’s web site without her permission. CP 6-7.

Defendants denied any liability and asserted counterclaims against Burton for (1) breach of the Contract’s “Competition” provision; (2) breach of her duty of loyalty; and (3) tortious interference with AMHP’s contractual and business relationships. CP 17-19. In her reply to Defendants’ counterclaims, Burton admitted that she had continued to

³ For purposes of this appeal, AMHP does not contest Burton’s estimate of the income she received from AMHP clients. AMHP notes, however, that her estimate is almost certainly low. During the first half of 2009, Burton personally provided counseling to between four and six AMHP clients. RP 26-27, 77. Those clients provided income to the agency of at least \$4,500 per month, and sometimes as much as \$10,000 a month. RP 27-29, 77-78. Burton says that after she received the notice of termination, she began providing “some” of this counseling for free, CP 41-42, but that does not fully explain how the payments from the four clients she continued to see suddenly become so much lower. Burton admits that her calculations of the amounts she made are “based on my recollection” of the payments she received, not on contemporaneous documentation. RP 78. It is also undisputed that Burton failed to report earnings from her continued treatment of AMHP clients when she applied for unemployment benefits, and as a result ended up having to pay back over \$1,000 of those benefits. RP 121-126; Exs. 144, 145.

treat AMHP clients and had kept the payments for herself. CP 29-30. She argued, however, that her duty of loyalty to AMHP was outweighed by the clients' right to choose their counselor. CP 82-89, 104-107.

2. The Trial Court's Ruling.

The case was tried without a jury on April 25-28 and August 8, 2011. CP 108-118. Before the trial, Defendants withdrew their counterclaim based on the Contract's "Competition" clause. CP 83-84. During the trial, after Burton rested her case, the trial court granted Defendants' motion to dismiss (1) Burton's claim that AMHP had used her image on its web site without permission, and (2) her claims against Becker as an individual defendant. CP 115-116. Burton filed a motion for reconsideration of the dismissal of her claims against Becker, which the trial court denied on the last day of trial. CP 117, 120-125.

On September 22, 2011, the trial court issued its Findings of Fact and Conclusions of law. CP 127-130. The trial court found that "AMHP decided to terminate Ms. Burton's employment for fair and honest reasons"; that the decision "was not based on arbitrary, capricious, or illegal reasons"; and that the decision "was based on facts supported by substantial evidence and reasonably believed by AMHP to be true." FOF 8. The trial court concluded that AMHP had "due cause" to terminate Burton under the Contract. COL 4-6.

The trial court held, however, that AMHP breached the Contract by refusing to continue paying Burton's salary during the 60-day notice period. COL 6-7. The trial court found that Burton "did continue seeing and treating a few AMHP clients," and that "she kept the payments she received for her services," but noted that these clients had "sought her out." FOF 11-12. The trial court concluded that Burton had committed a "breach of her duty of loyalty." COL 8. Nevertheless, the trial court held that AMHP was still obligated to continue paying her salary – apparently because Burton had not solicited the clients, who had made their own "independent choices" to leave AMHP. COL 6; FOF 11-13.

The trial court also concluded that all of the elements of AMHP's counterclaim for tortious interference were "easily satisfied" by the evidence. COL 8. Inexplicably, however, and without explanation, the trial court then held that AMHP had "failed to carry its burden of proof" on that claim. COL 9.

3. The Judgment.

The trial court ordered AMHP to pay Burton her salary and uninsured medical costs for the 60-day notice period, less mitigating income and benefits she received for the same period. FOF 17.⁴ In

⁴ Burton's salary was \$5,250 per month, or \$10,500 over a two-month period. Ex. 3 at Bates Nos. 215-216.

response to a motion by AMHP to amend certain findings relating to damages, the trial court revised and clarified the amount owed and the applicable offsets. CP 293-294.

On February 23, 2012, the trial court entered judgment against AMHP in the amount of \$7,009.25. CP 219-220. The trial court also assessed \$750 in sanctions against Burton, to be offset against the judgment amount, for filing a late and overlength reply brief in support of her proposed judgment. CP 217-218. As a result, the net amount of the judgment entered against AMHP is \$6,259.25.

AMHP timely appealed the judgment on March 5, 2012. CP 229-304. Burton timely cross-appealed.

V. ARGUMENT

The trial court correctly held that Burton breached her duty of loyalty to AMHP, but erred in requiring AMHP to continue paying her salary in spite of her breach. The trial court correctly held that the evidence satisfied all of the elements of AMHP's counterclaim for tortious interference, but erroneously (and inconsistently) held that AMHP failed to carry its burden of proof on that claim. This Court should reverse the judgment in favor of Burton on her claim that AMHP breached the Contract by failing to pay her salary, should reverse the trial court's

dismissal of AMHP's claim of tortious interference, and should remand the case for a determination of AMHP's damages.

A. The Trial Court 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.” *Kieburtz & 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, directing 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. Moreover, she persisted in

doing this even after AMHP repeatedly warned her to stop. Exs. 112, 114; RP 79-80. By continuing to act in a way 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 (2006) (an agent must "place the principal's interests first as to matters connected with the agency relationship").

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

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

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 *8.⁵

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., Keystone*, 2008 WL 1971412 at *8 (requiring employee who set up a business competing with his employer to reimburse \$145,000 in salary paid to employee during period of disloyalty); *MSC Venture Corp.*, 2009 WL 1423567 at *11 (employer not liable for unpaid wages if employee breached duty of loyalty); *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 666-68 (1982) (real

⁵ *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 (2d 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”).

estate broker forfeited right to \$19,000 in commissions by violating duty of loyalty).⁶

In addition, “[b]ecause it constitutes a material breach of the contract by the agent, an agent’s breach of fiduciary duty may also privilege the principal to terminate the principal’s relationship with the agent in advance of a time set for termination in any contract between them.” Restatement (Third) of Agency § 8.01 Comment d(1). Thus, even if one views AMHP’s actions as effectively terminating the Contract early, rather than as a forfeiture of salary by Burton during the Contract’s term, AMHP was well within its rights to stop paying the salary. *See Williams v. Queen Fisheries, Inc.*, 2 Wn. App. 691, 694-95 (1970) (principal may terminate an agency relationship “before the end of the period for which he has agreed to employ the agent” if agent has violated duty of loyalty).

Nevertheless, despite holding that Burton breached her duty of loyalty, the trial court ordered AMHP to pay her salary during the period of her breach. FOF 17; COL 7-8. The trial court allowed an offset for “mitigating income or benefits” that Burton received during the 60-day notice period. FOF 17. But that is a standard mitigation offset in contract

⁶ *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).

and employment cases, 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); *Sandler v. U.S. Development Co.*, 44 Wn. App. 98, 104-05 (1986) (offsetting plaintiff's earnings from outside business activity against salary awarded for his wrongful termination).

In other words, the trial court imposed no consequences on Burton for breaching her duty of loyalty, and granted AMHP no relief for establishing that breach. This was error.

1. The Trial Court's Rationale for Awarding Burton Her Salary Does Not Withstand Analysis.

The trial court's apparent reasons for awarding Burton her salary in spite of her disloyalty do not withstand scrutiny:

First, the trial court stressed that the Contract by its terms requires AMHP to pay Burton her salary during the 60-day notice period. *See* FOF 14; COL 6-7. This is certainly true, and explains why AMHP initially said it would do precisely that, but misses the point. By breaching her duty of loyalty, Burton forfeited her right to the compensation she would otherwise be entitled to under the Contract (or alternatively, gave AMHP the right to terminate the Contract early without incurring liability). *See*

Keystone, 2008 WL 1971412 at *7-*8 (holding that disloyal employee was not entitled to his salary under employment contract); *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 386 (Mo. App. 2000) (“As a result of his breach of fiduciary duty, plaintiff forfeited his rights to all compensation, including bonuses and severance pay, to which he may have been entitled under the contract”); *Williams*, 2 Wn. App. at 694-95 (principal may terminate relationship early due to agent’s disloyalty).

Second, the trial court stressed that the clients in question contacted Burton and asked her to continue seeing them; she did not solicit them. FOF 11-13. This point confuses a claim for breach of the duty of loyalty with a non-solicitation claim. 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.

Third, the trial court noted that the clients had a right to choose their therapist. FOF 12. This is true, though the point has been overstated

by Burton. In Washington, the principle of patient choice is not absolute. For example, reasonable non-competition agreements with doctors – which can restrict patient choice – are enforceable in this State, and are not contrary to public policy. *Ashley v. Lance*, 75 Wn.2d 471, 473, 475-77 (1969) (reinstating claim based on non-competition agreement among physicians). In any event, there is nothing in the law that says that patient choice trumps an employee’s duty of loyalty or excuses disloyal behavior – especially in cases where both principles can be accommodated.

Fourth, Burton is wrong that the choices of AMHP’s clients were so at odds with her duty of loyalty that the latter had to give way. *See* CP 82-89, 104-107 (Burton’s arguments to trial court). The trial court easily could have accommodated both interests by (1) allowing Burton to treat the clients who asked her to do so during the 60-day notice period, and even to keep the payments she received from them, and (2) ruling that AMHP was not obligated to continue paying her salary while she was doing that. This would have respected client choice while avoiding the obvious unfairness of making AMHP pay Burton for competing against the agency. The supposedly irreconcilable conflict between patient choice and Burton’s duty of loyalty is illusory.

Fifth, the principle of patient choice does not explain or excuse Burton’s most obviously disloyal act: her telling the clients to start

sending their payments to her rather than AMHP, when she was still AMHP's employee, and keeping those payments for herself. RP 74-76. Burton does not claim that anything other than her own economic self-interest required her to do this. She admits that nothing in her professional or ethical obligations prevented her from remitting the payments to AMHP; she simply chose not to do so. RP 81, 115-117. Whatever the merits of patient choice, it is not an escape hatch that allows Burton to avoid the consequences of her disloyalty, or that permits patently disloyal and self-interested actions that were in no way compelled by the choices of AMHP's clients.⁷

2. There Is No Basis for Apportioning Burton's Salary.

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; *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"). However, in appropriate cases, courts have discretion to apportion a disloyal agent's salary, and to award

⁷ Burton also had a duty to inform AMHP that she was continuing to see the clients on her own. Restatement (Third) of Agency § 8.11 (2006) ("An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows" which are "material to the agent's duties to the principal"). Her failure to do so was another breach of her duty of loyalty. *Id.*

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); *Phansalkar v. Andersen Weinroth & Co.*, 344 F.3d 184, 205 (2nd Cir. 2003) (forfeiture may be limited to compensation paid during time period of disloyalty).

There is no basis for apportioning Burton's salary in this case, for two reasons:

First, Burton did not ask for, and the trial court did not order, any such apportionment. She argued only that her salary should be reduced by the payments she received from AMHP's clients during the 60-day notice period, which is all that the trial court did. CP 105-106 (arguing that trial court should at most apply a "set-off" of the amounts Burton received from clients against the salary AMHP owed her); FOF 17 (awarding Burton 60 days' salary "less any mitigating income or benefits" she received for the same period). As mentioned above, this was a standard offset for interim earnings that AMHP was entitled to under basic mitigation principles. It had nothing to do with punishing Burton for her

breach of loyalty, or with apportioning her salary for work untainted by her breach.

Second, 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"); *Riggs Inv. Management Corp. v. Columbia Partners, L.L.C.*, 966 F. Supp. 1250, 1266 (D.D.C. 1997) (employee forfeited all compensation earned during six-month period in which he was disloyal); *Williams*, 2 Wn. App. at 697-98 (refusal of compensation for disloyal conduct rests on theory that "payment is not due for services not properly performed," though compensation may be apportioned "to services properly performed") (quoting *Lydia E. Pinkham Medicine Co. v. Gove*, 303 Mass. 1, 20 N.E.2d 482, 486 (1939)).

In the end, Burton simply cannot have it both ways. Once she decided to start competing with AMHP by seeing its clients on her own and keeping the proceeds for herself, she gave up her right to continue

drawing a salary from the agency. The trial court's holding to the contrary was error.

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

At trial, AMHP also established that Burton tortiously interfered with its contractual relationships with its clients. The elements of that claim 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; *Keystone*, 2008 WL 1971412 at *6.

All of these elements are met in this case. Burton was well aware of AMHP's Agreement for Services with its clients, including its provisions regarding advance notice of termination, payment to AMHP, and assignment of work. Ex. 140 at Bates Nos. 203-205. In fact, she helped write the Agreement for Services, made sure that all of AMHP's clients signed it, and expected her staff members to follow what it said – including terminating their own relationships with AMHP's clients when they left the agency's employment. RP 60-63, 65-68. Burton induced

AMHP clients to breach Paragraphs 4 and 7 of the Agreement for Services by telling them to start paying her instead of the agency, and without giving AMHP the required 30 days' notice of termination. RP 64-65, 74-75; Ex. 140 at Bates Nos. 203-204. Her breach of her duty of loyalty establishes an improper purpose or improper means. *Kieburz*, 68 Wn. App. at 267; *Keystone*, 2008 WL 1971412 at *7. Finally, AMHP was damaged by Burton's interference because it diverted the clients' payments from the agency to Burton. RP 74-75; Ex. 137.

By converting AMHP clients to her personal clients while she was still an employee, Burton tortiously interfered with the agency's contractual relationships. In Conclusion of Law No. 8, the trial court correctly concluded that all of the elements of this claim were "easily satisfied" by the evidence. COL 8. In Conclusion of Law No. 9, however, the trial court then held that AMHP "failed to carry its burden of proof" on the claim. COL 9. These conclusions are directly contradictory, and cannot be reconciled.

The trial court's holding that AMHP failed to carry its burden despite establishing all of the elements of the claim is reversible error. *See Sorenson v. Pyeatt*, 158 Wn.2d 523, 538 fn. 13 (2006) ("we are troubled by the fact that the trial court made alternative, directly inconsistent conclusions of law in this case," which constituted both an abuse of

discretion and an error of law). This Court should direct entry of judgment in favor of AMHP on its tortious interference claim based on Conclusion of Law No. 8, which is more in the nature of a finding of fact, and which is supported by substantial (and indeed undisputed) evidence. *See Riley v. Sturdevant*, 12 Wn. App. 808, 812 (1975) (“Where a conclusion of law is not consistent with the findings, the findings control”); *Littlefair v. Schulze*, 278 P.3d 218, 221 (Wash. App. June 5, 2012) (“Conclusions of law must flow from the findings of fact”).

D. This Court Should Remand the Case for a Determination of AMHP’s Damages.

Because Burton tortiously interfered with AMHP’s contractual relationships, she is liable to AMHP for its lost profits relating to the clients in question. *See Keystone*, 2008 WL 1971412 at *8 (disloyal employee who tortiously interfered with employer’s business relationships was liable for substantial lost profits damages). This Court should remand the case for a determination of AMHP’s damages. *See Northlake Marine Works, Inc. v. State Dep’t of Natural Resources*, 134 Wn. App. 272, 294-95 (2006) (remanding case to trial court for further fact-finding and determination of amount of damages); *Heaton v. Imus*, 93 Wn.2d 249, 256 (1980) (remanding case to trial court for determination of lost profits).

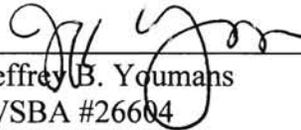
VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 23rd day of July, 2012.

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DECLARATION OF SERVICE

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

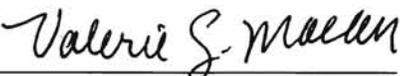
On this date I caused copies of the OPENING BRIEF OF APPELLANTS/CROSS-RESPONDENTS and the VERBATIM REPORT OF PROCEEDINGS to be served in the manner noted below on the following:

F. Hunter MacDonald
The MacDonald Law Office
P.O. Box 1761
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Dated this 23rd day of July, 2012.



Valerie S. Macan