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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 39133-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES ROLLAND and SUSAN ROLLAND, husband and wife and the
marital community comprised thereof,

Appellants,

v.

WAYNE WILLIAMS and MELANIE STEWART, husband and wife and
the marital community comprised thereof, DOUGLAS WYCKOFF and
CAROL WYCKOFF, husband and wife and the marital community
comprised thereof, ROLLAND, O'MALLEY, WILLIAMS &
WYCKOFF, P.S., a Washington professional services corporation and
Washington professional services limited liability company.

Respondents.

AMENDED REPLY BRIEF OF APPELLANTS

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REPLY TO INTRODUCTION

Attorneys Rolland, Williams and Wyckoff, operated ROWW, an L&I firm. Williams and Wyckoff formed WWO, firing Rolland in the process. The parties had agreed to send out concurrent letters to the firm's clients to allow the clients to elect which attorney would continue with their L&I claims. Williams and Wyckoff, as WWO, in breach of this agreement, and before Rolland could set up his office, sent out letters to some 300 clients, all but the 42 on Rolland's "Open Matter List" CP 582; 1.15-16; CP 432-446. These letters deceptively stated that WWO was the successor to ROWW, intimated that Rolland was not available to represent the clients' interests, and that it was necessary to sign enclosed retainer forms "to satisfy the Department of Labor and Industries' requirements." CP 610.

The result of the WWO solicitations was that clients were denied a chance to make a reasoned election of attorneys, and Rolland was damaged by being denied the opportunity to represent the clients as his own.

The court erred in dismissing Rolland's claim on summary judgment by requiring him to come forward with the burden of proof as to what clients would have selected him 'but – for' respondent's 'bad conduct'. See, CP 714, 1. 1-2. Given the wrongful solicitation of clients, the court erred in not placing the burden of proof on Respondents to demonstrate that there was no damage to Rolland. RP 01/25/08 p.9 1.9-10.

The actions of WWO affected the public interest and were a CPA violation. The solicitations resulted in illicit gains to the enrichment of WWO and damages to Rolland.

This case should be remanded for trial, an accounting by WWO for their ill-gotten gains, and for judgment for Rolland.

REPLY TO RESTATEMENT OF THE CASE

A. Causation remains an issue of fact

In support of Rolland's tort claims, he shows, BA 3-4, that rather than waiting as agreed to send joint letters on March 28, 2005 to the 391-plus clients with pending cases (CP432-445), Williams and Wyckoff, as WWO, rushed out a letter on March 23, representing to clients that, if a Rolland client, "your case has already been assigned to an experienced partner...": and to sign new retainer agreements "[i]n order to satisfy (L&I) requirements." CP 15. At this point, the horse had escaped, the damage had been done. This is evidence, with reasonable inferences therefrom, that precludes summary judgment, regardless of whether Rolland could now show that any particular client would have made a decision other than to sign as instructed.

As Respondents note at RB 5, the court saw fact questions as to whether there was CPA violation in the improper solicitation of clients. These questions should have been preserved for trial.

The standard of review on appeal from summary judgment is de novo.

Even when the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, summary judgment is not proper.”

Money Savers Pharmacy, Inc. v. Koffler Stores (Western) Ltd., 37 Wn. App. 602, 608, 682 P.2d 960 (1984)

B. Williams’ and Wyckoff’s explanation for terminating Rolland are immaterial to the issue of damages. The method of soliciting ROWW clients remains at issue.

Respondents seek to make much of Rolland’s past problems with alcohol, as grounds for his termination. It was generally accepted below that the cause of the lawyers’ breakup was not relevant to the question of how they should have proceeded to wind up their affairs.

The parties signed a ‘Behavior Agreement’ on January 7, 2005 to deal with the alcohol issue CP 589. There is no evidence, from that date to the client letters of March 31 2005, to the trial below in November 2008, or to the present time, that Rolland was anything but “dry” and sober. Mr. Wyckoff testified on June 26, 2007, “I don’t have any basis to believe that [Rolland] violated anything under the recovery portion.” Yet, Respondent’s are employing this tool to sway personal opinion as to character or to interject prejudice to a trier of fact or law.

C. WWO acted improperly in sending letters and misinforming ROWW clients.

Williams and Wyckoff claim that they did not know of Rolland’s future plans, RB 8. But their office manager, Julie Hatcher, knew that he was at home, CP 626, 1.6, while letters to clients were being drafted and when clients calling

were being told “that he was no longer with the firm” CP626, 1.18. Later, a client walking into the WWO office was misinformed of Mr. Rolland’s location, while he was in fact operating one floor below. CP 543-4.

Respondents agree, RB 8, that all ROWW clients were firm clients. The pension fees were assigned 1/3 to Mr. Rolland, CP 453. This reflecting his work, his contribution to goodwill in attracting clients, office protocol, which was established by Mr. Rolland, CP 391, 1.25, as well as the internal firm assignment of particular work. He still claims 1/3 of the gross receipts from the former ROWW clients. CP 428. The practice of this workers compensation work did not involve such a close personal attorney-client working relationship as may be involved in other areas of law, so much as the system in place at ROWW of processing these caseloads. Whether Rolland handled litigation or other work is of no moment. Rolland’s contributions *and his damages* are reflected in the listing of income generated to the firm. Income from earlier clients, listed by attorney, at CP 189–196, reflect the following 12-month income, where details were provided:

<u>Rolland</u>	<u>Williams</u>	<u>Wyckoff</u>	<u>Ostrander</u>
\$ 386,128.04	197,885.25	313,302.67	219,039.84
34.59%	17.73%	28.06%	19.62%

Contrary to Respondents’ assertions at RB 10 that time was of the essence to notify clients of Rolland’s departure, a more cogent argument can be made that it was an opportune time to fire Rolland, on the false premise that he was having a personal illness, and to divert the future earnings from work in progress to the new WWO firm and to the other three lawyers. If joint letters had been sent out,

there would have been an understandable concern by the WWO lawyers that clients would have disproportionately signed with the first of the named ROWW lawyers, Rolland.

The post-separation earnings (as opposed to work-in-progress as of the date of termination) from the former clients of ROWW should be accounted for in a remand of this case, and available for division by the trier of fact if the trier of fact were to find that they were ill-gotten gains by WWO's wrongful conduct. Rolland's expert witness, Michael Moss, at summary judgment found from WWO's records that the fees to WWO from former ROWW clients had come to \$2,947,402. CP 548.

D. At all times, Rolland was available to be contacted. The haste to exclude him from an initial letter to clients was a proximate cause of damage to Rolland.

On March 23, 2005, 'Wayne and Doug' sent a letter to Rolland advising that "We would be happy to wait to send letters to your existing clients until you can get a phone and mailing address." CP 14. Respondents have not given a good reason why this process could not have been carried out. All clients could have been serviced through ROWW until they elected either WWO or Rowland. Yet on the same date, CP 623, Julie Hatcher was typing and mailing letters from WWO to ROWW clients which stated, "Because of the recent departure of Jim Rowland from our firm and the death of Tom O'Malley ... we believe it was important to have the firm name reflect who the members are... we would request that you sign the enclosed forms ..." CP 15, 17. These letters were sent out on March 23 and over 'a couple days' CP 625-6. Then clients started calling for

Rolland, and being told 'he was no longer with the firm'. CP626. *The trier of fact can reasonably draw the inference that the a portion of the clients simply followed the instructions on the WWO letters and acquiesced to the new representation.*

After the March 31 respective letters were sent, it is apparent from the record that confusion had ensued among clients, but now the time had passed to correct the notification process.

E. ROWW clients were patently diverted from Rolland to WWO.

Ms. Hatcher seemed to recall that there were calls for Rolland from the 'very beginning', if not very many. CP 626, 1.14-20. She knew he was at home or, after March 31, at his office. Both phone numbers were known. But no phone number was given out from March 22 to March 31. CP 628, 1.12-14.

F. Rolland's subsequent work in procuring new clients does not remedy the damage caused by Respondents.

The income to ROWW generated by Rolland's presence, CP 189-196, refutes WWO's argument that he was not a fully productive partner. That he acquired a successful practice following being done wrong by his partners is to his credit, but not a set-off to his damages.

G. What Williams and Wyckoff withheld from Rolland was the work-in-progress and fees generated after termination from clients that were wrongfully diverted by WWO.

Respondents point to a small sum of cash on hand and completed pension accounts in arguing here and in the court below that Rolland suffered no damages. However, they neatly ignore the reasonable prospect that the clients came to WWO and did not go to Rolland but-for their wrongful actions, and that the fees generated and to be generated at WWO from that work rightfully belonged to ROWW and Rolland.

H. Procedural History

The summary judgment dismissed Rolland's claims arising from wrongful conduct of Respondents. At RB 17, there is a list of items that remained in ROWW that were disbursed at the subsequent trial. This did not dispose of the damages that arise from the tort claims at the heart of the summary judgment and this appeal. The "work in progress" RB 17, CP1163, refers to "work in progress (WIP) at ROWW" after 3/22/05. Obviously there was *none* remaining for disposition by the trial court, the clients having been transferred to WWO. At CP 1226 the trial court's Finding of Fact No.4.9 states that valuation of any ROWW work in progress or Pension Notes are "irrelevant and need not be resolved by the court at this time..."

Rolland's appeal is from the summary judgment dismissing his claims arising from improper solicitation of clients, including the transfer of the ROWW

work to WWO, and the ill-gotten gains to WWO, namely their work-in-progress and fees earned for clients wrongfully diverted from ROWW to WWO.

REPLY TO ARGUMENT

A. Standard of review

The standard of review on appeal from summary judgment is de novo.

Rolland made out a prima facie case of tort and breach of contract by Respondents and damages to him. Letters to ROWW clients were improvidently sent in violation an agreed timetable. These induced the vast majority of ROWW clients to sign new retainer letters to the exclusion of Rolland.

We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court., considering all facts in the record and reasonable inferences in a light most favorable to the nonmoving party. Wilson Court Ltd. P'ship v. Maroni's, Inc., 134.Wn.2d 692, 698, 952 P.2d 590 (1998). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wilson, 134 Wn2nd at 698.

MRC Receivables Corp. v. Zion, 152 Wn. App. 625, 629, 218 P3d 621 (2009)

Respondents misstate the ruling of Boguch v. The Landover Corporation, Slip Op. #62446-6, at 12 (Div. I, December 21, 2009) as to the burden on the non-moving party on summary judgment in making out its prima facie case, namely that "[a] failure of proof regarding an essential element 'renders all other facts immaterial.'" RB p. 18. Rather, the Court in Boguch held,

If, at this point, the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' then the trial court should grant the motion." Young, 112 Wn.2d at 225 (quoting Celotex, 477 U.S. at 322). Summary judgment in this context is warranted "'since a **complete** failure

of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Young, 112 Wn. 2d at 225 (quoting Celotex, 477 U.S. at 322-23).

Id. (Emphasis added.) The Court's use of the word "complete" is by design. The distinction between the actual language of the decision and the assertion by WWO is material, as WWO gets caught between the burden of *proof* versus the burden of *production*. The burden of persuasion upon Rolland arises at trial, whereas the burden of production of facts upon which reasonable inferences may be drawn to support the prima facie showing upon each element arises in response to summary judgment.

In every case, there is a burden of production and a burden of persuasion. In re C.B., 61 Wn. App. 280, 282, 810 P.2d 518 (1991); see Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 133-34, 769 P.2d 298 (1989); Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 362, 753 P.2d 517 (1988); E. Cleary, McCormick on Evidence 946-52 (3d ed. 1984). The burden of production is applied by the judge, In re C.B., 61 Wn. App. at 283; McCormick, at 952-56, who must take the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. Xieng v. Peoples Nat'l Bank, 63 Wn. App. 572, 581, 821 P.2d 520 (1991). The burden of persuasion is applied by the trier of fact.

Carle v. McChord Credit Union, 65 Wn. App. 93, 98, 827 P.2d 1070 (1992). This analysis carries through on appeal that courts on review of summary judgment that "'it is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility, nor may we do so on appeal.'" [quoting, No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc., 71 Wn. App. 844, 854 n.11, 863 P.2d 79 (1993).] Our job is to pass upon whether a burden of production has been met, not whether the evidence produced is persuasive. That is

the jury's role, once a burden of production has been met.” Renz v. Spokane Eye Clinic, 114 Wn. App. 611, 623, 60 P.3d 106 (2002).

Therefore, “proof” of each element of the tort claims is not Rolland’s burden in defending his causes of action against WWO’s motion for summary judgment, but rather the burden is to show that a reasonable trier of fact *could*, but not necessarily *would*, draw the inferences..

B. Williams, Wyckoff, and WWO had an obligation to notify clients in an ethical manner, which would have included an opportunity for each client to make a reasoned election between Rolland and WWO.

Williams, Wyckoff, and WWO cannot escape the fact that the manner of excluding Rolland from the initial letters to ROWW clients was arguably wrong. WWO acknowledge in RB at 21 that “[t]he trial court did not resolve whether the notification letters went beyond proper notice to ROWW clients.” The bottom line is that an inference may be drawn from the reasonable construction of the letters that the relationships with the ROWW clients were tainted by the letters. This is the prima facie evidence of the causation that reserves the issue of comparative versions of events for the jury.

It is appropriate on summary judgment for the Court to consider what a reasonable client would do upon receiving instructions from his or her (supposed) law firm to sign new L&I forms, recalling that the WWO letterhead identified WWO as “formerly Rolland, O’Malley, Williams & Wyckoff, P.S.” implying that WWO was simply a name change.

C. Causation and damages were shown.

The elements of tortious interference were shown:

1. Rowland ROWW had contractual relationships and business expectancies from existing ROWW clients.
2. The Respondents had full knowledge of this relationship.
3. The initial letters from Respondents caused clients to sign new fee letters with WWO and to terminate relations with Rolland and ROWW.
4. The transfer of clients had the improper purpose and effect of terminating the clients' relationship with Rolland and ROWW.
5. Rolland was damaged in the loss of clients and their accounts.

Causation is, at its very root, a factual analysis.

Generally, the issue of proximate causation is a question for the jury. Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 935, 653 P.2d 280 (1982). A proximate cause is one that in natural and continuous sequence, unbroken by an independent cause, produces the injury complained of and without which the ultimate injury would not have occurred. Bernethy, 97 Wn.2d at 935; see also, Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998). Because the question of proximate cause is for the jury, "it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court." Bernethy, 97 Wn.2d at 935 (citations omitted).

Attwood v. Albertson's Food Ctrs., 92 Wn. App. 326, 330, 966 P.2d 351 (1998).

The rules of production as to proximate cause should be applied no differently in this case, namely: "The plaintiff need not establish causation by direct and positive evidence, but only by a chain of circumstances from which the ultimate fact required is reasonably and naturally inferable." Id., at 331, *citing* Teig v. St. John's Hosp., 63 Wn.2d 369, 381, 387 P.2d 527 (1963).

Rolland may establish any fact by circumstantial evidence, as it is as good as direct evidence. Tabak v. State, 73 Wn. App. 691, 696, 870 P.2d 1014 (1994). “Circumstantial evidence is evidence from facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience.” WPI 1.03. Therefore, is it plausible that a rational, fair-minded person could be convinced that the client contracts with WWO at issue occurred because of the misleading language of WWO’s solicitation letter? Absolutely. A trier of fact could find from the evidence that but for the misleading language of the WWO solicitation letter, ROWW clients would have selected Rolland as the product of a “meaningful choice.”

WWO suggests that the foregoing proposition creates an impermissible presumption. RB 21-31. However, WWO misapplies the concept of presumption versus inference. “As nebulous as the distinction may occasionally be, inferences are one thing, and presumptions are another. Inferences are logical deductions or conclusions from an established fact. Fannin v. Roe, 62 Wn.2d 239, 242, 382 P.2d 264 (1963). Presumptions are assumptions of fact that the law requires to be made from another fact or group of facts found or otherwise established in an action.” Lappin v. Lucurell, 13 Wn. App. 277, 284, 534 P.2d 1038 (1975). A presumption *requires* the trier of fact to assume a particular fact upon proof of an underlying fact; whereas, an inference is permissive, as it *allows* the jury to assume a particular fact upon proof of the underlying fact. The jury resolves the question, not the law. 5 Wash. Practice, Tegland on Evidence, §301.9 (5th ed.)

It can reasonably be inferred that the misleading statements in the WWO letter that (a) it was in some fashion an extension of ROWW, (b) Rolland was no longer available to the client (“If you have been a client of Jim Rolland’s, your case has already been assigned to an experienced partner... .”) and (c) the Department of Labor and Industries required the clients to sign and return the new fee agreements, assumed actual significance to the recipients of the letter, thereby rendering the misstatements as material misrepresentations, and, therefore, actionable. At RB 26, Respondents point to the crux of the herein issue: that “Rolland never offers any proof that ROWW clients were actually tainted by Williams and Wyckoff’s notification letters.” Rolland offered evidence of the confusion of clients in receipt of WWO’s solicitation letter and of the misdirection of clients by WWO. ROWW clients had WWO solicitation letters in their hands for 4-5 days, with urgent instruction to sign forms to change their representation. Nevertheless, 33 clients elected instead to be transferred to Rolland RB 30. It is left to be assumed that many others would have acted likewise if they had had a true choice between the two sides. That only 19 of the 31 clients assigned to Rolland re-signed with him is evidence upon which an inference may be drawn that the remaining 12 were improperly influenced.

At CP 432-445, there is a listing of ROWW clients as “Open Matter List”.

The clients are separated into the following categories:

	<u>‘Dave’</u>	<u>‘Wayne’</u>	<u>‘Doug’</u>	<u>‘Jim’</u>	<u>(unlabeled)</u>
<u>‘Open matters’</u> :	109	63	96	42	18, 22,31,10
	CP 433	CP 435	CP 438	CP 440	CP 434, 436, 439,441

First and foremost, these 391 'open matters' were ROWW clients. From the above listings for Dave, Wayne and Doug, it would appear that the initial letter to clients involved 268, or perhaps 349, discreet client mailings, all with instructions to "Sign Here" CP 612. At this time, 'the bell had been rung', and Rolland could not recover his share of ROWW clientele. By the time of the second letters to all, many clients would have already signed up with WWO. Eight then signed with both. CP 265, 1.22-26. Others would have been uncertain as to what to do next. Still others retained their preference for Rolland CP 615. They were in a legal office that brought in and processed L&I claims in an efficient and cooperative manner. CP 629, 1.17-19. It cannot be said, given the sheer numbers of clients, over 600 (CP 85 1.21) and the work of staff, that any lawyer could claim a greater loyalty from an assigned client, as opposed to that client's loyalty to the firm as a whole.

"Ordinarily, it cannot be proved conclusively what would have happened if something else had not happened." Shawmut Bank, N.A. v. Kress Assocs., 33 F.3d 1477, 1496 (9th Cir. 1994). It remains up to the trier of fact to determine the balance of probabilities, namely what would have happened if WWO had sent out a neutral letter or waited for a concurrent mailing of Rolland's office information as contemplated by the parties in the March 23, 2005 Memorandum. Id.

Defiance of logical application of the facts presented to the elements of the torts at issue becomes the defendants' problem before the jury when the disputed version of events as to who, what, when, why, and how much are resolved.

The only issue in question at the summary judgment was whether Rolland could prove damages by pointing to particular clients that would have elected him but-for the WWO contacts. This was an improper shifting of the burden to produce evidence which burden should have remained with WWO. There should be no question that damage to Rolland could be inferred from the WWO action, and the appropriate measure may be the disgorging of profits wrongfully procured by WWO, akin to lost profits to ROWW and therefore Rolland, by WWO's solicitation of the clients. Those lost profits were properly established on a prima facie basis at summary judgment by Rolland's expert witness, CPA Michael Moss, sufficient to present the issue to the trier of fact. No Ka Oi Corp. v. Nat'l 60 Minute Tune, 71 Wn. App. at 849. (1993).

D. WWO was unjustly enriched.

At RB 42, the reason Respondents give for WWO not being unjustly enriched is that they would provide legal service to the former ROWW clients. Of course, this misses the point that they became WWO clients by the wrongful actions of WWO. The reasonable prospect of future fees to ROWW from its client base, except from a few clients signing with Rolland, became the property of WWO. CP 1163.

Rolland did show that a least one client, given the chance, would have selected him over WWO. CP 615; RP10/27/06 P.7,l.21. This evidence is sufficient to present the question to the jury to determine whether other transferred clients would have made the same choice if given the opportunity, that

WVO has wrongfully retained benefits which would have been shared within ROWW or transferred to Rolland.

CONCLUSION

The summary judgment below should be reversed. This case should be remanded for trial on the merits upon Rolland's tort claims.

DATED this 11 day of March 2010.

DAVIES PEARSON, P.C.



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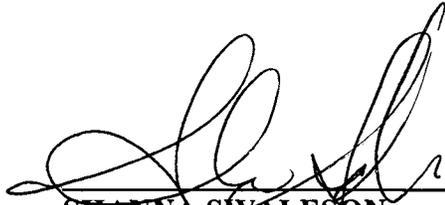
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CERTIFICATE OF SERVICE BY MAIL

**I certify the I mailed, or caused to be mailed, a copy of the foregoing Reply
Brief of Appellant by U.S. Mail, first class postage prepaid, on the 11th day of
March, 2010, to the following counsel of record at the following addresses:**

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