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COURT OF APPEALS  
DIVISION II

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No. 48818-3-11 STATE OF WASHINGTON

BY  DEPUTY

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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CORY NEWINGHAM, *Plaintiff/Respondent*

vs.

JOHN NEWINGHAM and KRISTIE NEWINGHAM, husband and  
wife, and VELOCITY CNC MACHINING, INC,  
*Defendant/Appellant.*

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APPELLANTS' BRIEF

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### **III ASSIGNMENTS OF ERROR**

1. The trial court did not enter conclusions of law as to service of the summons/complaint and even if it had the findings would not support a conclusion that Velocity CNC Machining was properly served.
2. The trial court erred in concluding appellants did not establish the tort of defamation.
3. The trial court erred in concluding appellants did not establish the tort of intentional infliction of emotional distress
4. The trial court erred in concluding that the contract at issue was not confirmed under circumstances that rise to the level of duress/coercion

### **IV ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Because the trial court did not enter conclusions regarding proper service upon Velocity CNC Machining, is the judgment void for lack of jurisdiction? (Pertains to Assignment of Error 1)
2. Is there substantial evidence to support the court's findings that Velocity CNC Machining was properly served? (Pertains to Assignment of Error 1)
3. Did appellants establish the "falsity" element of the tort of defamation? (Pertains to Assignment of Error 2, 3)
4. Did appellants establish the tort of intentional infliction of emotional distress? (Pertains to Assignment of Error 2, 3)

5. Did the court correctly rule as a matter of law that appellant was not coerced or subject to undue influence in the contract? (Pertains to Assignment of Error 4)

## **V STATEMENT OF THE CASE**

### **1. Facts**

Plaintiff Cory Newingham and John Newingham are brothers.<sup>1</sup> The facts are essentially undisputed in that John opened his own business, Velocity CNC Machining (hereinafter, Velocity). Cory was terminated from his prior employment and hired on by John.

At some point John attempted to fire his brother September 19, 2014.<sup>2</sup> Two days later John was asked by a friend of Cory's to come to a come to Cory's home because he was threatening suicide.<sup>3</sup> John was never told this was to be a family meeting regarding Cory's continued

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<sup>1</sup> Because both parties are brothers with the last name they will be referred to as Cory or Cory Newingham John or John Newingham. No disrespect is intended as this is for clarity of the parties.

<sup>2</sup> VRP 128-29

<sup>3</sup> VRP 137

<sup>4</sup> VRP 137

employment at Velocity.<sup>4</sup> Those who were present at Cory's home included his wife, Amanda Newingham, Cory Newingham, their father Ronald Newingham and Russel Ferguson.<sup>5</sup> Within 30 seconds of his arrival Amanda Newingham began yelling at John, how he could ruin their (Cory's) family, how they were going to survive.<sup>6</sup> John attempted to leave multiple times but we prevented from doing so by their father, Ronald Newingham.<sup>7</sup> This meeting took place over the course of at least two and one half hours.<sup>8</sup> During this time John felt coerced and pressured into keeping his brother on as an employee and ultimately agreed to paying Cory a commission for new customers he brought to

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5 VRP 137  
6 VRP 138  
7 VRP 138  
8 VRP 139  
9 VRP 137-143

the business with no end date.<sup>9</sup> By this time it was clear the entire family was working in a concerted effort to preserve Cory's job. Id.

Cory then filed a summons and complaint on January 9, 2015.<sup>10</sup> Respondent served the original summons and complaint upon the daughter of John, then aged 15.<sup>11</sup> There was no testimony and there is no record in the court file nor trial proceedings as to when this actually occurred. However, respondent then filed an amended complaint on February 24, 2015.<sup>12</sup> The amended complaint was never served upon any defendant.

Following Cory's termination from Velocity, Cory then began making threats to John.<sup>13</sup> Cory then began posting about an affair between John

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<sup>10</sup> CP 2-3

<sup>11</sup> VRP 166; CP 55, 57

<sup>12</sup> CP 6

<sup>13</sup> VRP 66; lines 15-23; trial exhibits

<sup>14</sup> VRP 211-220; defense exhibit 5

and Kaycee Stackle on the internet (Facebook) and told family members as well as Mrs. Stackle's husband.<sup>14</sup> Any sexual relationship between John and Kaycee Stackle had occurred almost a decade earlier and was not publicly known, or known even within the Newingham family.<sup>15</sup> In fact, Cory told KayCee's husband, Scott Stackle about the affair which occurred before John and Kristie were even married.<sup>16</sup>

Mr. Stackle did not know for of the affair until after Cory disclosed this and following a meeting at Cory's home.<sup>17</sup> Everyone involved denied there was ever an affair up until this meeting.<sup>18</sup> In fact, Scott Stackle had suspicions *at that time* but was not going to bring it up

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15 Id

16 Id 16 Id

17 Id

18 Id

19 VRP 231; lines 10-25

20 VRP 232-233

without some basis to do so.<sup>19</sup> These suspicions were back in 2004 but Mr. Stackle never brought it up nor did he even have it confirmed until Cory did so in 2014.<sup>20</sup>

## **2. Procedural posture**

Plaintiff commenced this action on January 9, 2015 by filing a summons and complaint.<sup>21</sup> Plaintiff served the original summons and complaint upon the minor child of appellants.<sup>22</sup> There is no affidavit or declaration of service in the court file, only a pattern form Confirmation of Service.<sup>23</sup> Plaintiff then filed an amended complaint.<sup>24</sup> The court record and trial record are wholly devoid of the amended complaint having

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21 CP 2-3  
22 VRP 166; CP 55, 57  
23 CP 5  
24 CP 6  
25 VRP  
26 CP 62-63

ever been served upon any defendant/appellant. This matter went to trial January 7, 2016.<sup>25</sup> The trial court entered its findings of fact and conclusions of law and judgment on March 4, 2016.<sup>26</sup>

## VI ARGUMENT

### 1. Standard of Review

On review of a case tried before the court, the Court of Appeals reviews findings of fact for substantial evidence and whether the findings support the trial court's conclusions. Landmark Development, Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999); Korst v. McMahon, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). Conclusions of law are reviewed *de novo*, Sunnyside Valley Irrigation District v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); Korst v. McMahon, 136 Wn. App. 206.

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2. **The trial court did not enter conclusions of law as to service of the summons/complaint and even if it had the findings would not support a conclusion that Velocity CNC Machining was properly served.**

Error is assigned to finding 1A that all parties were properly served.

RCW 4.28.080 specifies how defendants must be served to effectuate proper service. Subsection (9) is specific to Washington corporations and provides that service must be made upon the

...president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

Continuing, RCW 4.28.080(16) provides that service upon individuals is as follows:

In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode *with some person of suitable age and discretion* then resident therein.

(Emphasis added).

Proper service of the summons and complaint

is necessary to bestow jurisdiction upon our Courts, including an amended complaint. A judgment entered without proper notice of the summons and complaint is void for lack of jurisdiction. American Exp. Centurion Bank v. Stratman, 172 Wash. App. 667, 292 P3d 128 (2012). See also, Hastings v. Grooters, 144 Wash. App, 121, 182 P3d 447 (2008).

In Hastings the court discussed substantial compliance with service of process as follows:

RCW 61.30.120(2) requires personal service on one of three individuals. *Service is insufficient under RCW 4.28.080(15) when made upon an employee of the person to be served unless the employee is authorized to accept service on the person's behalf.*

In French v. Gabriel, 57 Wn. App. 217, 225-26, 788 P.2d 569 (1990), *aff'd*, 116 Wn.2d 584, 806 P.2d 1234 (1991), personal service was found insufficient where process was left with the attorney's secretary. In Nitardy v. Snohomish County, 105 Wn.2d 133, 712 P.2d 2296 (1986), the court considered RCW 4.28.080 as it applies to service on the county auditor when the plaintiff served process on a secretary to the county executive. *The court rejected the argument that service substantially complied with the statute. The court*

*determined that the legislature was clear in its mandate and had named a specific person. Hence, service on anyone other than the auditor was insufficient. Id. at 135.*

Id. at 130 (Emphasis added).

Hastings is similar to the facts of the present case wherein service upon an employee of a defendant is insufficient to establish proper service upon the defendant personally or by leaving a copy of the summons at defendant's abode. Id. at 130. In the present case respondent served the corporate entity Velocity through the minor daughter of appellants, whom was not the registered agent nor any of the enumerated persons who may be served pursuant to RCW 4.28.080(9). Because plaintiff never filed an actual affidavit/declaration of service it is unclear when this actually occurred. However from the designated clerk's papers it is clear that the confirmation of service was filed January 9, 2015, *nearly a full month before the amended complaint was filed February 24, 2015.* Service of the

summons and complaint vests jurisdiction to the court and were there is no such service the court lacks jurisdiction entirely.

RCW 4.28.080 requires more than notice and an opportunity to be heard. This is a statutory requirement. Farmer v. Davis, 161 Wash. App. 420, 250 P.3d 138, reconsideration denied, review denied 172 Wash. 2d 1019, 262 P3d 64 (2011). (Due process requirements were not met. Proper service requires not only compliance with due process but also with compliance with standards established by the legislature).

The Court discussed the strict compliance requirements of RCW 4.28.080 as follows:

*In Washington, proper service of process must not only comply with constitutional standards but must also satisfy the requirements for service established by the legislature. The fact that the due process requirements of Central Hanover have been met, standing alone, is not enough. Thayer v. Edmonds, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972) ("beyond due process, statutory service requirements must be complied with in order for the court to finally adjudicate the dispute"), review denied, 82 Wn.2d 1001 (1973); Powell v.*

Sphere Drake Ins. PLC, 97 Wn. App. 890, 899, 988 P.2d 12 (1999) ("Service of process is sufficient only if it satisfies the minimum requirements of due process and the requirements set forth by statute."); Gerean v. Martin-Joven, 108 Wn. App. 963, 971, 33 P.3d 427 (2001) (plaintiff's general observation that constitutional due process was satisfied by method of service "ignores specific statutory requirements for effecting service on an individual defendant in Washington"), review denied, 146 Wn.2d 1013 (2002).

Id. at 432-33 (Emphasis added). Therefore strict compliance with the statutory service requirements of RCW 4.28.080 must be adhered to.

In Crystal, LTD v. Factoria Ctr. Inv., 93 Wn. App. 606, 969 P.2d 1093 (1999) plaintiff left a copy of the summons and complaint with a bookkeeper at the office of the registered agent for defendant Factoria, a Washington corporation. The bookkeeper worked for a different company than the registered agent of Factoria. Id. Plaintiff Crystal, Ltd. argued that it had substantially complied with the service statute and that Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858 (1991) was controlling. (Service upon a nonresident adult

child at a defendant's usual abode was sufficient to satisfy the substitute service provision of RCW 4.28.080(15)). Wichert, 93 Wn. App. 606, 609, 969 P.2d 1093 (1999).

The Court rejected Crystal's substantial compliance argument by stating that

[T]he service statute for corporations communicates the Legislature's decision *that only persons holding certain positions can accept service on behalf of a corporation. We find no justification that permits services of persons in unnamed occupations to satisfy the statute.*

Id. at 610 (Emphasis added).

The Court then went on to discuss "due diligence" as used in the substitute service provision for serving individuals. However the facts of the case don't support any "due diligence" sufficient to allow substitute service upon appellant Velocity, a Washington corporation.

Failure to properly serve a defendant prevents a court from exercising jurisdiction over a defendant. Scott v. Goldman, 82 Wn. App. 1, 6, 917 P.2d 131 (1996).

Even assuming arguendo that personal service upon John and Kristi Newingham in their individual capacities through their minor child at their usual abode satisfied statutory service requirements and due process, that same method certainly does not rise to the service requirements upon corporations. Personal service upon individuals may be made "...by leaving a copy of the summons at the house of his or her usual abode *with some person of suitable age and discretion* then resident therein" RCW 4.28.080 (16). However, service upon corporations *specifically excludes this method of service.* RCW 4.28.080(9).

In the present case appellants were served via the 15-year old daughter of John Newingham. There is no declaration of service as to the time or date. No service was made upon the business, Velocity. Plaintiff/respondent then filed an amended complaint which was never served. Respondent argued in his reply brief that service

upon a 15-year old daughter is not only proper service upon both defendants individually, but also upon a corporation in clear contravention of RCW 4.28.080.

**3. The trial court erred in concluding appellants did not establish the tort of defamation.**

Error is assigned to findings 38-39, 41-44, 48, 51 and 52 as well as the courts conclusions 7 and 9 that others knew of the affair and that this disclosure by Cory did not defame John Newingham.

In a recent decision discussion defamation cases, the court in Valdez-Zontek v. Eastmont Sch. Dist. said as follows:

A defamation plaintiff must establish four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. Mohr v. Grant, 153 Wn.2d 812, 822, 108 P.3d 768 (2005); Bender v. City of Seattle, 99 Wn.2d 582, 599, 664 P.2d 492 (1983). The degree of fault necessary to make out a prima facie case of defamation depends on if the plaintiff is a private individual or a public figure or official. Bender, 99 Wn.2d at 599. The negligence standard of fault applied os the plaintiff is a private individual; negligence is established by a preponderance of the evidence. Id.....

To establish the falsity element of defamation, the plaintiff must show the offensive statement was "provably false." Schmalenberg v. Tacoma News, Inc., 87 Wn. App. 579, 590-91, 943 P.2d 350 (1997). "[E]xpressions of opinion are protect by the First Amendment'" and "'are not actionable.'" Robel v. Roundup Corp., 148 Wn.2d 35, 55, 59 P.3d 611 (2002) (quoting Camer v. Seattle Post-Intelligencer, 45 Wn. App. 29, 39, 723 P.2d 1195 (1986)). *But a statement meets the provably false test to the extent it expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion.* Schmalenberg, 87 Wn. App. at 590-91; See Henderson v. Pennwalt Corp., 41 Wn. App. 547, 557, 704 P.2d 1256 (1985) (citing Benjamin v. Cowles Publ'g Co., 37 Wn. App. 916, 684 P.2d 739 (1984); *Restatement (Second) of Torts* § 566 (1976)). One way a statement could be provably false is when "it falsely describes the act, condition or event that comprises its subject matter." Schmalenberg, 87 Wn. App. at 591. If a direct statement of facts would be defamatory, then a statement of an opinion implying the existence of those false facts supports a defamation action. Henderson, 41 Wn. App. at 557. *Such is the case when ordinary persons hearing the statements would not perceive them to be "pure" expressions of opinion.* Id. at 557-58.

We do not reweigh conflicting evidence or otherwise disturb the jury's determinations as to persuasiveness of the evidence or credibility of

witnesses. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994). The District argues its officials only referred to an "inappropriate relationship" during a legitimate investigation and never specifically alleged a sexual affair. But, abundant substantial evidence supports the jury's contrary conclusion.

154 Wash. App. 147, 157-58, 225 P.d 339 (2010)  
(Emphasis added).

Prior to Valdez-Zontek Division II of the Court of Appeals went through a thorough discussion of defamation, and specifically falsity of a statement. Schmalenberg v. Tacoma News, 87 Wn. App. 579, 943 P.2d 350 (1997).

A defamation claim must be based on a statement that is provably false. A statement meets this test to the extent it falsely expresses or implies provable facts, regardless of whether the statement is, in form, a statement of fact or a statement of opinion. A statement does not meet this test to the extent it does not express or imply provable facts; necessarily, such a statement communicates only ideas or opinions, and "there is no such things as a false idea." The burden of proving falsity rests on the one claiming defamation.

*A statement may be provably false in at least the following ways: because*

*it falsely represents the state of mind of the person making it, because it is falsely attributed to the person who did not make it, or because it falsely describes the act, condition, or even that comprises its subject matter.*

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*When a statement is false because it falsely describes the act, condition, or event that comprises its subject matter, it may be provably false in part but not in whole. Thus, if a television station says that a doctor has been charged with stealing \$200,000, its statement may be true in that the doctor has been charged with stealing an amount in excess of \$75, but false in that the doctor has not been charged with stealing \$200,000. Similarly, if a television station says that a prosecutor received half of his campaign contributions from bail bondsmen, its statement may be true in that the prosecutor received some contributions from bondsmen, but false in that the prosecutor did not receive half his contributions from bondsmen.*

*When a statement is provably false in part but not in whole, it satisfies the element of falsity (but not necessarily the other elements of defamation regardless of whether it is false in material part.*

Id. at 591-93 (Emphasis added, citations omitted).

Therefore a statement may be provably false in part and still satisfy the element of "falsity"

for purposes of defamation.

Here Cory made a concerted effort to disclose to his new employer, the Newingham family, and the general public via social media of what he labeled an affair between his brother John and KayCee Stackle.

Cory testified he had this right under his freedom of speech however even freedom of speech has its limitations. Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed. 430 (1969) (speech is unprotected when it is "directed to inciting or producing imminent lawless action); Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919) (falsely yelling "fire" in a crowded theater); Gertz v. Robert Welch, Inc., 4128 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1973) (there is no constitutional value in false statements of fact); Miller v. California 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (Obscenity is unprotected); Chaplinsky v. New Hampshire 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.

1031 (1942) ("fighting words" are not protected).

**4. The trial court erred in concluding appellants did not establish the tort of intentional infliction of emotional distress.**

Error is assigned to findings 38-39, 41-44, 48, 51 and 52 as well as the courts conclusions 7 and 9. Appellant relies upon the facts and argument regarding Defamation, supra. Cory intentionally disclosed the false affair to family members and the general public as a whole in a clear effort to damage John's reputation.

**5. The trial court erred in concluding that the contract at issue was not confirmed under circumstances that rise to the level of duress/coercion.**

Error is assigned to the court's findings 7, 8, 10, 12-13, 24, 28 and its conclusions 1 and 4-6 that John was not subjected to coercion in honoring this contract.

One of the basic tenets of contracts is that the contract be entered into by a party's free will, void of any undue influence or coercion. Our courts have traditionally held that coercion or duress exists where a promisor's free will is

overborne by duress of a third party in executing a contract. McDonald v. Pend Oreille Mines & Metals Co., 189 Wash. 389, (1937). See also, Harstad v. Frol, 41 Wash. App. 294, 704 P.2d 638 (1985) (Any wrongful act of one person that compels manifestation of apparent assent by another to a transaction without other's volition constitutes duress.)

In the context of business relationships, the doctrine of business compulsion exists where the promisor is compelled to suffer a serious business loss or make payments to his detriment. Nord v. Eastside Ass'n Ltd., 34 Wash. App. 796, review denied 100 Wn.2d 1014, 664 P.2d 4 (1983). See also, Barker v. Walter Hogan Enterprises, Inc., 23 Wash. App. 450, 596 P.2d 1359 (1979). "Business Compulsion" is duress involving involuntary action in which one is compelled to act in such a manner that he either suffers serious business loss or he is compelled to make a monetary payment to his detriment. Id.

Undue influence and overreaching are a species of fraud and vitiate a transaction. In Interest of Perry, 31 Wash. App. 268, 641 P.2d 178 (1982). In the context of undue influence, persuasion is unfair, or influence is undue when it overcomes the will of another such that his own free agency is destroyed. Ferguson v. Jeanes, 27 Wash. App. 558, 619 P.2d 369 (1980). See also Peters v. Skalman, 27 Wash. App. 247, review denied 94 Wash.2d 1025, 617 P.2d 448 (1980) (Contract can be invalidated on basis of undue influence when it can be said that the influence exerted has been so persistent or coercive as to subdue and subordinate the promisor and take away his freedom of action.).

The elements of undue influence were discussed in Gerimonte v. Case as follows:

In the Restatement (Second) of Contracts § 177 (1981), based on former § 497, the elements of undue influence are further articulated:

(1) Undue influence is unfair persuasion of a party who is under the domination of

the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that the person will not act in a manner inconsistent with his welfare.

(2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim.

...  
Comment:

*a. Required domination or relation.* The rule stated in this Section protects a person only if he is under the domination of another or is justified, by virtue of his relation with another in assuming that the other will not act inconsistently with his welfare. Relations that often fall within the rule include those of parent and child, husband and wife, clergyman and parishioner, and physician and patient. In each case it is a question of fact whether the relation is such as to give undue weight to the other's attempts at persuasion...

*b. Unfair persuasion.* Where the required domination or relation is present, the contract is voidable if it was induced by any unfair persuasion on the part of the

stronger party. The law of undue influence therefore affords protection in situations where the rule on duress and misrepresentation give no relief.

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This rule was adopted from Binder v. Binder, 50 Wn.2d 142, 309 P.2d 1050 (1957). The Binder court derived the rule from the Restatement of Contracts § 497 (1932).

In In re Infanct Child Perry, 31 Wn. App. 268, 641 P.2d 178 (1982), however, this court state that "[t]he essence of undue influence is unfair persuasion." Perry, at 272. We then quoted the Restatement (Second) of Contracts § 177, comment *b* (1981) which states:

The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Such factors as the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded are circumstances to be taken into account in determining whether there was unfair persuasion,...

Perry, at 272-73. *To establish undue influence it is no longer necessary to prove that the persuasion has "overcome*

*the will."*

Gerimonte, 42 Wn. App. 611, 614-15, 712 P.2d 876 (1986). Emphasis added.

In the present case plaintiff, Cory Newingham, called upon the parties' father to set up a meeting. John was told that Cory was despondent from having been fired from a second job and was threatening to commit suicide. Relying upon this information John went straight to his brother's home where he was confronted by their common father as well as several members of plaintiff's family. Discussions quickly turned to finding a way for Cory to remain employed and John, under the duress of the situation and trying to keep the peace, may have agreed to give his brother commission-based sales which is in essence a promotion/raise.

There can be no mutuality nor consent under these facts. Even if there was an agreement, clearly John Newingham's free will was significantly diminished under this ambush-style

situation.

## **VII CONCLUSION**

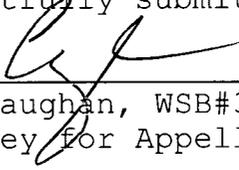
The trial court's failure to enter conclusions of law regarding proper service is fatal and does not support its finding that all parties were properly served. Appellant filed a summons and complaint, served petitioner's minor child only, then filed an amended complaint which was never served. Moreover when it comes to service upon a corporation our legislature has specifically listed those individuals who may be served and that does not include a minor child.

The trial courts findings and conclusions likewise erroneously concluded that appellants had not established "falsity" for purposes of their defamation and intentional infliction of emotional distress claims. There is substantial evidence that respondent Cory Newingham knew his statements were materially false and disclosed his knowledge of a relationship between his brother and another individual publicly with the clear intent to harm

John Newingham. The trial court's judgment should be reversed.

DATED this 2 Day of ~~August~~<sup>September</sup>, 2016.

Respectfully submitted,

  
Eric Maughan, WSB#32704  
Attorney for Appellants

## **VIII APPENDICES**

1. Findings of Fact and Conclusions of Law
2. Judgment

2016 SEP -2 PM 3:47

**IX CERTIFICATE OF MAILING**

STATE OF WASHINGTON

I, Eric Maughan, certify that on 2<sup>nd</sup> day of  
September, I served upon respondent a copy of DEPUTY  
Appellants' Brief upon all parties listed below  
at their address of record in the following  
manner:

Dorothy Bartholomew  
Attorney at Law  
5310 12<sup>th</sup> St E, Ste C  
Fife, WA 98424

Via E-Mail

Clerk  
Washington State Court of Appeals  
Division II  
930 Broadway, Suite 300  
Tacoma, WA 98402-4454

Hand Delivery

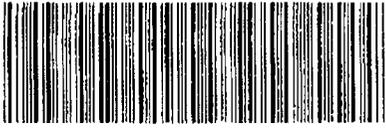
Dated this 2<sup>nd</sup> day of September, 2016, at  
Tacoma, Washington.

  
Eric Maughan

0118

11061

3/7/2016



15-2-05019-8 46483001 FNFL 03-07-16

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR PIERCE COUNTY

CORY NEWINGHAM,

Plaintiff;

vs.

JOHN NEWINGHAM, KRISTIE  
NEWINGHAM, AND VELOCITY CNC  
MACHINING, INC.,

Defendants.

Case No. 15-2-05019-8

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

DEPT. 5  
IN OPEN COURT

MAR - 4 2016

Pierce County Clerk  
By *[Signature]*  
DEPT. 5

After a January 7, 2015 non-jury trial on Plaintiff's Breach of Contract Claim and on Defendants' Counterclaims for Defamation, Outrage, and Intentional Interference with Business Expectancy, and after review of the pleadings filed by the parties, the Court hereby enters the following Findings of Fact, Conclusions of Law, and Judgment.

FINDINGS OF FACT

1(A) All parties were properly served.

1. Plaintiff Cory Newingham ("Cory") is a citizen of the State of Washington.
2. Defendant Velocity CNC Machining, Inc. ("Velocity"), is a Washington Corporation doing business in the State of Washington.
3. Defendant John Newingham ("John") is a citizen of the State of Washington and President of Velocity.
4. Defendant Kristie Newingham ("Kristie") is the wife of John and the Vice President

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of Velocity.

5. Sometime between August and October 2012, after leaving Sakco Precision Manufacturing, John started his own machine shop business—Velocity— in his garage.
6. Between October and November of 2012, John moved Velocity to a warehouse in Sumner.
7. At this time, through its president John, Velocity made an offer to Cory and others to pay commissions for obtaining new customers for Velocity. Only Cory accepted the offer.
8. The offer included the following relevant terms: Cory would immediately begin to solicit new business for Velocity; Cory would receive a ten percent commission on all invoices paid by each client who was brought to Velocity by Cory's solicitation; and, the commissions would be paid so long as Velocity did business with and performed services for customers that were brought to Velocity by Cory's efforts.
9. The terms of the agreement between John Newingham, as president of Velocity, and Cory were never reduced to writing.
10. The testimony is undisputed that both parties anticipated and expected that this arrangement and agreement would be long-term. After all, they were brothers. Even though John was acting in his capacity as president of Velocity, both expected that they would make significant money if Cory was successful in bringing in new clients.
11. It is undisputed that Cory brought in 17 clients to Velocity.
12. It is also undisputed that once the offer was made and accepted, Cory immediately

began to procure clients for Velocity, and this procurement continued for approximately one and three quarter years, i.e., from November 2012 until September 2014.

- 1 13. It's also undisputed that Cory procured these clients under the terms of the parties' oral
- 2 understanding and agreement, even though Cory was employed full time at Staffmark.
- 3
- 4 14. Regardless of the reasons for Cory's separation of service, by April of 2013 Cory was
- 5 no longer employed at Staffmark.
- 6
- 7 15. Cory began to pick up part-time work at Velocity in mid April of 2013, for which he
- 8 was paid \$12.00 an hour.
- 9
- 10 16. Cory also received unemployment benefits during that period of time.
- 11
- 12 17. Between April and May of 2013, through its president John Newingham, Velocity
- 13 offered Cory a position as the machine shop's general manager.
- 14
- 15 18. Cory accepted the offer and began working at Velocity at \$23.34 an hour. This
- 16 amount was increased to \$24 an hour in August of 2014.
- 17
- 18 19. The exhibits admitted into evidence show payment for salary as general manager as
- 19 well as overtime and expenses in this general management position.
- 20
- 21 20. In July 2013, Velocity began paying commissions to Cory according to the terms of
- 22 their oral agreement.
- 23
- 24 21. Velocity also paid Cory a regular full-time general manager salary including the
- 25 overtime at approximately a thousand dollars in bonuses in 2013.
- 26
- 27 22. In mid-September of 2014, Cory learned from John that Sterlitech was going to have
- 28 all of its machine shop business completed through Velocity.

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23. It is undisputed that Sterlitech was a client produced by Cory, as evidenced on Exhibit 2, the last page.
24. According to John, the volume of the anticipated work would bring large commission checks to Cory and significant business to Velocity.
25. It is also undisputed that one week later John terminated Cory from his general manager position and terminated Cory's ability to procure new clients for Velocity under the commission contract.
26. After the termination, there was a meeting at Cory's home. Present at the meeting were Cory, his wife Amanda, John, their brother-in-law, Russell, and the parties' father Ronnie Newingham.
27. At that meeting John confirmed that Cory no longer had the general manager position at Velocity.
28. Also at this meeting John confirmed and reaffirmed that he would continue to pay Cory commissions for an indefinite period of time as originally agreed.
29. Pursuant to the offer made at the meeting, Velocity sent a commission contract for signature to Cory in October of 2014.
30. The contract contained different terms than the November 2012 agreement.
31. Because Cory did not agree to the new terms, Cory refused to sign the contract.
32. Cory did not procure new clients for Velocity nor did he return to the warehouse as general manager.
33. Two commission checks were paid by Velocity to Cory post-termination.
34. All commission checks terminated thereafter.

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35. The exhibits demonstrate that in 2013, Cory received seven commission checks that totaled \$8,055.48 and 11 commission checks totaling \$14,133.07 in 2014, for a total of \$22,188.55 over a period of 16 months.
36. Defendants Velocity CNC Machining, Inc., and John and Kristie Newingham in their individual capacities, counterclaimed for defamation, tortious interference with business expectancy, and intentional infliction of emotional distress.
37. It is undisputed that Cory posted on Facebook regarding the affair that John previously had with Kaycee Stackle.
38. It is also undisputed that there was an affair. John was not married, but Kaycee was married to Scott at the time of their affair.
39. It is also undisputed that others knew or suspected of the affair, including Amanda Newingham, Cory Newingham, and Scott Stackle.
40. It was Cory that revealed the affair by Facebook posting.
41. The relationship of the affair to John and Kristie, whether they were living together, dating, not dating, not seeing each other, is of no legal consequence.
42. Whether the affair continued during the time John was living with Kristie or occurred only after John and Kristie resumed their relationship is of no legal consequence.
43. John and Kaycee had an affair. There was no other way to re-spin what is undisputed occurred. There was an affair. John never told his now wife Kristie.
44. There was no evidence of how Cory's disclosure of the affair defamed John and Kristie other than to reveal that which John had not told Kristie or others about.
45. It's also undisputed that there were e-mails and texts between John and Cory that were

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mean, that were hurtful, and that were unnecessary. But there was a failure of proof on how this defamed John and Kristie individually or the business.

46. It is undisputed that Cory threatened to contact Velocity's customers in an attempt to take them away from Velocity.

47. There was a failure of proof that Cory in anyway interfered with any Velocity business expectancy or interfered with any business relationship or client.

48. It is undisputed that both John and Cory spoke, e-mailed, and sent text messages to each other that were hurtful and unnecessary concerning John's affair, Velocity's termination of Cory's general manager position, and over Velocity's failure to honor the commissions contract.

49. It is undisputed that Cory flipped Kristie off on occasion.

50. The evidence is disputed over whether Cory swerved his vehicle in an attempt to run off the road the car in which Kristie and her children were riding.

51. As a result of Cory's revelation of the affair and defendants' breach of the commission contract as well as termination of Cory's employment as Velocity's general manager, the Newingham family is now at odds. Marriages and family relationships have been affected. Friendships have been lost. Attendance at family social events have been affected for everyone. Everyone is responsible for this dysfunction. Everyone is too proud, too stubborn, too polarized, too angry, and has said too many regretful things for the family to self-repair, even as Ronnie Newingham's health continues to deteriorate.

52. There is a failure of proof that Cory intended to inflict emotional distress on John or

Kristie individually, and there is no such tort available for Velocity.

### CONCLUSIONS OF LAW

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1. Velocity, through its president John made an offer to Cory to pay commissions on all clients that Cory acquired for Velocity and who continued to do business with Velocity. Cory accepted the offer by performance. Consideration on Cory's part was his acquisition of new clients. On Velocity's part, consideration consisted of payment of the promised commissions. Velocity and Cory had a binding oral contract.
2. John and Kristie Newingham are not liable on the contract in their individual capacities.
3. There is no legal basis whereby Velocity may be relieved from the payment of commissions under the oral contract formed.
4. While John's post-termination offer to continue to pay commissions to Cory is asserted to have been made under duress, a new and different commission contract was never formed after Cory was terminated from Velocity.
5. Damages are awarded for a breach of contract to protect a party's reasonable expectation. *Veritas Operating Corp. v. Microsoft Corp.*, 2008 U.S. Dist. LEXIS 112135, 11-13 (W.D. Wash. Feb. 26, 2008). "For cases in which profits are the inducement for entering into a contract, lost profits are the proper measure of damages for a breach of contract if they can be proven with reasonable certainty." *Ranchers Exploration & Dev. Corp. v. Miles*, 102 N.M. 387, 389 (1985). Plaintiff Cory Newingham had a reasonable expectation that he would receive a 10% commission *ad infinitum* for his role in building Velocity's business. Plaintiff is entitled to the

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average monthly commission for 36 months. The total lost profits is \$49,924.08.

6. A court has the authority to award prejudgment interest if the amount due is liquidated, or the amount is based on a specific contract for the payment of money and “the amount due is determinable by computation with reference to a fixed standard.”

*Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32 (1968). The amount due is liquidated. The interest rate is 12% per annum. Thus prejudgment interest totals \$5,990.89.

7. Defendants counter claimed for defamation. A defamation plaintiff must establish four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). Defendants have failed to establish falsity because it is undisputed that John had an affair with Kaycee Stackle who was married at that time to Scott Stackle. There is also a failure of proof on the element of damages.

8. Defendants counterclaimed for Tortious Interference with Business Expectancy. It is undisputed that Cory threatened to contact and take away clients from Velocity however there was no evidence that Cory carried through with his threats. There was a failure of proof that Cory in anyway interfered with any Velocity business expectancy or interfered with any business relationship or client.

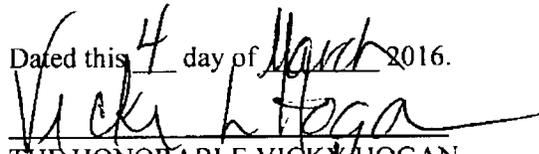
9. Defendants counterclaimed for Intentional Infliction of Emotional Distress. John and Cory exchanged words, e-mails, and text messages that were hurtful and unnecessary to each other over the termination of the commission contract and Cory’s general manager position as well as over Cory’s revelation of John and Kaycee’s affair. As a

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result, family relationships have been damaged and friendships have been lost. Everyone is responsible for this dysfunction. Everyone is too proud, too stubborn, too polarized, too angry, and has said too many regretful things for the family to self-repair, even as Ronnie Newingham's health continues to deteriorate. However, there is a failure of proof that Cory intended to inflict emotional distress on John or Kristie individually, and there is no such tort available for Velocity.

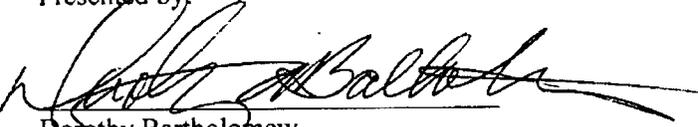
DATED:

Dated this 4 day of March 2016.

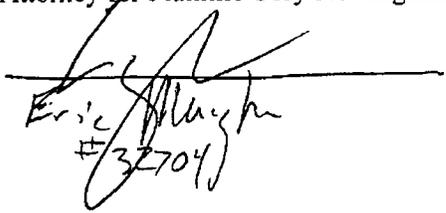


THE HONORABLE VICKY HOGAN  
PIERCE COUNTY SUPERIOR COURT JUDGE

Presented by:



Dorothy Bartholomew  
WSBA 20887  
Dorothy Bartholomew, PLLC  
5310 12<sup>th</sup> Street East, Suite C  
Fife, Washington 98424  
Attorney for Plaintiff Cory Newingham

  
Eric Mayhew  
#32704

DEPT. 5  
IN OPEN COURT

MAR - 4 2016

Pierce County Clerk  
By   
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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR PIERCE COUNTY**

CORY NEWINGHAM,

Plaintiff;

vs.

JOHN NEWINGHAM, KRISTIE  
NEWINGHAM, AND VELOCITY CNC  
MACHINING, INC.,

Defendants.

Case No. 15-2-05019-8

ORDER OF JUDGMENT

DEPT. 5  
IN OPEN COURT

MAR - 4 2016

Pierce County Clerk  
By *[Signature]* DEPUTY

**JUDGMENT SUMMARY**

Judgment Creditor:	Cory Newingham
Attorney for Judgment Creditor:	Dorothy A. Bartholomew DOROTHY BARTHOLOMEW, PLLC 5310 12 <sup>th</sup> Street East, Suite C Fife, WA 98424
Judgment Debtor:	Velocity CNC Machining, Inc. 13701 24 <sup>th</sup> Street East, Unit D10 Sumner, WA 98390
Attorney for Judgment Debtor:	Eric Maughan ERIC B. MAUGHAN, P.S. INC. 901 South I Street, Ste 202 Tacoma, WA 98405

Dorothy A. Bartholomew  
**DOROTHY BARTHOLOMEW, PLLC**  
5310 12<sup>th</sup> Street East, Suite C  
Fife, Washington 98424  
253/922-2016 Fax: 253/922-2053

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3/7/2016

Principal Amount:	\$49,924.08
Prejudgment Interest:	\$5,990.89
Total Judgment:	\$55,914.97

Post judgment interest accrues at the rate of 12% per annum on the total judgment.

ORDER AND JUDGMENT

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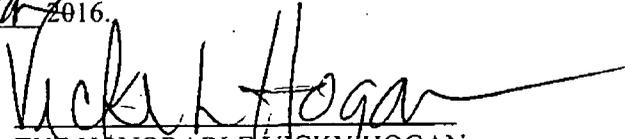
This matter came before the Court for trial on January 7, 2016, before the undersigned judge of this court. The court, having <sup>entered findings of fact and conclusions of law on 3/4/16</sup> found that: On or about November 2012, the Defendant promised to pay Plaintiff a 10% commission on all paid invoices for all work performed for any new customer that Plaintiff procured for Defendant. Defendant would pay Plaintiff the commissions no later than the last business day of the following month (i.e. services performed and completed in September would be paid to Cory by the end of October). Commissions would be paid as long as Velocity did business with and performed services for the new customer. Plaintiff accepted the offer and immediately began to solicit business. During the months of April and May 2013, Cory was able to bring in two new customers, Belshaw Adamatic and Dylan Aerospace. By September 21, 2014 Cory had brought in 17 new customers for Velocity. Velocity send Cory a commission check for September on October 15, 2014, and a commission check for October on November 10, 2014. Cory has received eighteen (18) commission checks since the inception of the original contract. Cory last received a commission check on November 10, 2014. The court, having found that the contract was fully performed by plaintiff and all that remains is for defendant to perform its obligations under the contract, it is now hereby

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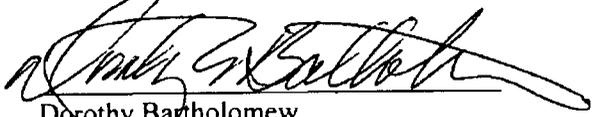
~~ORDERED that Velocity breached the oral sales representation agreement to pay commissions. It is further~~

ORDERED that the plaintiff have and is hereby granted judgment against defendant, Velocity CNC Machining, Inc., in the principal amount of \$49,924.08 and prejudgment interest of \$5,990.89 for a total judgment of \$55,914.97. Post judgment interest shall accrue on the judgment total at the rate of 12% per annum.

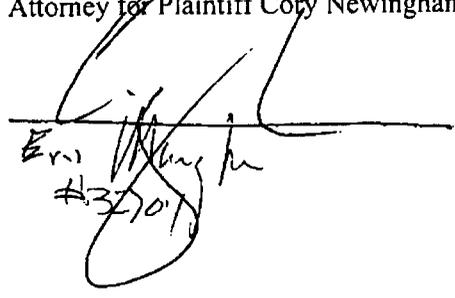
Dated this 4 day of March 2016.

  
THE HONORABLE VICKY HOGAN  
PIERCE COUNTY SUPERIOR COURT JUDGE

Presented by:



Dorothy Bartholomew  
WSBA 20887  
Dorothy Bartholomew, PLLC  
5310 12<sup>th</sup> Street East, Suite C  
Fife, Washington 98424  
Attorney for Plaintiff Cory Newingham

  
Cory Newingham  
#32701

DEPT. 5  
IN OPEN COURT  
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By  DEPUTY

Dorothy A. Bartholomew  
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