

FILED

APR 16 2011

COURT OF APPEALS
DISTRICT III
SPokane, Washington

Case No. 287343

COURT OF APPEALS,
DISTRICT III
OF THE STATE OF WASHINGTON

BRET WHEELER, Respondent

v.

SARA M. CALLOWAY et vir, et al, Appellant

APPELLANTS' BRIEF

SARA M. CALLOWAY
Appellant, pro se

ERICK CALLOWAY
Appellant, pro se

824 E Longfellow
Spokane, WA. 99207
(509) 489-4427

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COMES NOW Appellants SARA M. CALLOWAY and ERICK CALLOWAY, wife and husband, d/b/a WWW.SARAMCALLOWAY.COM, pro se, and submits this Appellant's Brief on Appeal as follows:

I. ASSIGNMENTS OF ERROR

A. Assignment of Errors

1. The trial court erred in granting Wheeler's motion to strike and entering the order of October 28, 2009, and granting the Wheeler's amendment on February 26, 2010, effectively barring Calloway, et al from defending themselves.
2. The trial court erred in granting Wheeler's motion for a partial summary of judgment and entering the order of October 28, 2009, and granting Wheeler's amendment on February 26, 2010, despite the genuine issue of material facts.
3. The trial court erred in entering the judgment and judgment summary of December 3, 2009, and Wheeler's amended judgment and judgment summary on February 26, 2010, adding additional findings for claims not presented, argued or heard in the record.
4. The trial court erred in failure to consider all facts submitted and all reasonable inferences for the facts in a light most favorable to the non-moving party.

5. The trial court erred in awarding excessive attorneys fees and denying the request for itemization of presented fees.
6. The trial court erred in awarding damages as requested by Wheeler despite the lack of financial documentation to substantiate the calculations and dollar amounts.

B. Issues Pertaining to Assignments of Error

1. Did the trial court properly conclude that the declaration by Sara M. Calloway was identical to a previously stricken declaration dated October 13, 2008 and conclude it be stricken from the record, granting CR 11 sanctions? **No.**
2. Did the trial court properly conclude there were no genuine issues of material fact preventing a summary of judgment as to the claims contained in Wheeler's complaint for breach of partnership agreement, breach of fiduciary duties, violation of the Computer Fraud and Abuse Act, conversion and unjust enrichment? **No.**
3. Did the trial court act properly in entering the judgment and judgment summary of December 3, 2009, Wheeler's amended order of summary judgment, amended judgment and amended judgment summary on February 26, 2010, adding additional claims of fraud, false pretenses and other wrongful acts not

presented, argued or heard within the oral or written record?

No.

4. Did the trial court properly consider all facts submitted and all reasonable inferences for the facts in a light most favorable to the non-moving party, Calloway et al? **No.**
5. Did the trial court properly consider and review attorney's fees and grant Calloway, et al's request for itemization and an explanation of presented fees? **No.**
6. Did the trial court properly consider and review financial documentation disputing the calculations and dollar amounts presented by Wheeler before awarding? **No.**

II. INTRODUCTION

During the periods of June 13, 2001 to March 31, 2003 and April 30, 2004 to July 31, 2006, Calloway was employed by Group Northwest, Inc. ("GNI"), an insurance agency that wrote insurance benefit packages. Calloway was licensed and appointed to write health insurance policies for health clients of GNI. During this period, Wheeler was engaged in a wholly independent business as a sole proprietor using the marketing name Packard and Wheeler Offices, which wrote life insurance policies. Wheeler, and the marketing name

Packard and Wheeler Offices, were not duly appointed by the Washington State Office of Insurance Commissioner or the insurance carriers to write health policies. GNI and Wheeler had an agreement that provided Wheeler commissioned compensation on health insurance policies written for client referrals he made to GNI. Calloway was one of the agents at GNI who presented, secured, sold and serviced these clients for such health insurance policies.

Effective August 1, 2006, Calloway terminated her employment with GNI and Wheeler terminated his relationship with GNI, as well. Calloway entered into an agreement with Wheeler whereby she would be the agent of record for sixty-nine specified files previously serviced by GNI. Calloway's agreement with Wheeler dictated the net commissions on those sixty-nine files would be split equally, 50-50. Calloway and Wheeler also agreed that any net commissions for new health insurance policies Calloway wrote after August 1, 2006 would be split equally, 50-50; in consideration for that split, Wheeler agreed to promote Calloway's health benefits business and introduce her to the life insurance clients he serviced as a part of the marketing name Packard and Wheeler Offices.

Also in August 2006, Calloway and Wheeler attempted to form a limited liability company ("LLC"), but never agreed to terms. The

parties did, however, operate in cooperation pursuant to an oral agreement, which included opening a joint personal bank account at Washington Trust Bank.

The parties operated under said oral agreement for approximately eighteen (18) months, from August 2006 until February 2008 (“the partnership period”). During this period another approximately one hundred and twenty (120) health insurance policies were written and serviced by Calloway under this oral agreement.

During the “partnership period,” Wheeler was not appointed by the Washington State Office of the Insurance Commissioner and the insurance carriers or permitted to become the agent of record for any health insurance company; nor did Wheeler service any existing health insurance clients, because he was not an appointed insurance agent of record or recognized individual. Wheeler was not allowed access to client files and/or the federally and state protected confidential health and financial information contained therein. In fact, Wheeler did not personally possess a set of keys that could access the files.

Calloway and/or her assistant, Andrea Brown, a recognized individual under Calloway’s licenses and appointments, performed all client contact, maintenance and other necessary services on the health policies.

Calloway operated as a sole proprietor throughout this “partnership period,” carried all liability insurance and errors and omission insurance in her name and under her licenses, and held all appointments and contracts under her name and her licenses. Wheeler was a subcontracted 1099 employee of Calloway’s sole proprietorship. The parties never applied for a master business license, city business license, insurance agency license, federal tax identification number or filed a 1065 Federal partnership tax return on behalf of the “partnership,” nor did the parties issue Federal K-1s.

Following Calloway’s maternity leave, approximately September to December 2007, Calloway and Wheeler re-commenced discussions regarding the formalization of their business arrangement and its terms. Again, the parties could not agree.

On or about February 11, 2008, Calloway expressed to Wheeler that the oral agreement was dissolved and must be renegotiated. Calloway dissociated from the partnership.

On or around February 13, 2008, Calloway and Wheeler had a meeting to discuss options for formalizing some kind of business arrangement. Wheeler brought a typed Agenda to the meeting, which outlined a number of options. Ultimately, the parties agreed that the business arrangement was irretrievably broken. Calloway agreed to

continue paying Wheeler a commission for his referrals only, but not at the rate of 50%. The new terms under which Calloway was willing to continue this business relationship were confirmed in a letter dated February 25, 2008.

On or around February 25, 2008, Calloway and Wheeler had another meeting wherein Wheeler dictated the parties were going to have “*a clean separation.*” Wheeler dissociates from the partnership. Wheeler indicated he would be hiring staff to service “*his clientele.*” The parties both expressed a desire that Andrea Brown subsequently work for their respective businesses.

Unbeknownst to Calloway, prior to the February 25, 2008 meeting, Wheeler had already contacted 95% of the health insurance clients for whom she was the agent of record. On February 25, 2008, Wheeler indicated to Calloway “*95% of [the health insurance clients] were going with him.*” Prior to that comment, Calloway did not know Wheeler had acted in a self-serving, clandestine manner to solicit and contact the health insurance clients for whom she had been doing all of the work.

In addition to contacting and soliciting the health insurance clients for whom Calloway was the agent of record, on February 21, 2008 Wheeler also registered a new entity with the Washington State

Department of Revenue. Calloway was to have no involvement with this new legal entity Wheeler called Packard & Wheeler Group Benefits, LLC despite the similar name as the dba listed on the state and federal business license of her sole proprietorship.

Based on Wheeler's actions and comments in February 2008, Calloway understood that Wheeler intended to, and had already began the process of, misappropriating every health insurance file wherein Calloway acted as the agent of record. Such action was in complete derogation of the August 2006 oral agreement, the subsequent discussions to formalize the arrangement, Federal HIPAA Laws, State privacy laws and State insurance laws, and her Business Associate Agreements with the health insurance carriers. 45 C.F.R. Article §160 and §164; WAC 284-04-220.

Wheeler threatened to change the locks and prevent Calloway's access to the files she was the agent of record on and therefore responsible for servicing.

In response to Wheeler's overt actions and threats, on or about February 26, 2008, Calloway was faced with an impossible choice – (1) leave all health insurance files she serviced in the offices, and run the risk of directly violating federal HIPAA laws, state privacy laws, state insurance laws, and Business Associate Agreements being locked

out of the business and exposing those files to violations of her client duties and confidences; or (2) take the files and attempt to negotiate proper handling of the information contained therein and the terms of the split with Wheeler at a later date. 45 C.F.R., Article §164.306(a)(1)(2)(3) and §164.502(a); WAC 284-04-220.

In order to avoid violation of federal HIPAA laws and state insurance laws, including state privacy regulations, and at the advice of then counsel, on or about February 27, 2008, Calloway removed the files of health insurance clients for whom she acted as the agent of record. Upon receipt of valid, written or electronic authorization to do so, and/or a subsequent court order Calloway transferred all files to Wheeler.

In addition to Wheeler secretly contacting and soliciting clients for whom Calloway served as the agent of record, Wheeler has contacted and continues to contact numerous health insurance clients for whom Calloway is or was the agent of record, and to make harmful, defamatory, and false light accusations about Calloway.

III. STATEMENT OF THE CASE

A. Factual Background

- Fact #1.** August 1, 2006 Calloway's employment with Group Northwest, Inc. (GNI) is terminated. (CP 23).
- Fact #2.** August 1, 2006 Wheeler's relationship as a referring agent is terminated. (CP 23).
- Fact #3.** Throughout the partnership period, Calloway operates as a sole proprietorship and is licensed and registered with both the State of Washington and the Internal Revenue Service as Sara M Calloway d/b/a Packard & Wheeler Benefits Division. (CP 130-132).
- Fact #4.** Wheeler was a 1099 employee of Calloway's sole proprietorship. (CP 104-106).
- Fact #5.** On or about February 11, 2008, Calloway expresses the will to dissociate from the partnership. (CP 43-45).
- Fact #6.** On or about February 13, 2008 both Wheeler and Calloway agree the business arrangement is irretrievably broken. (CP 50-51).
- Fact #7.** On or about February 21, 2008, Wheeler registers a new entity with the Washington Secretary of State. Calloway has no involvement with this new legal entity, which Wheeler calls Packard & Wheeler Group Benefits, LLC. (CP 52).

Fact #8. On February 25, 2008, Wheeler dictated the parties were to have “*a clean separation.*” Wheeler dissociates from the partnership. (CP 215).

Fact #9. On or about March 5, 2008, Wheeler hired Scott D. Mitchell to perform diagnostic work on the computers previously used by Calloway. Mitchell’s report ultimately concluded “*business files were recovered*” (emphasis added), therefore concluding, Calloway did not permanently damage or wipe any computers previously used. (CP 225).

Fact #10. Calloway did not contact clients until after Wheeler’s dissociation of February 25, 2008. In fact, Calloway did not contact clients until March 1, 2008. And even then, Calloway’s contact was by written letter. In that letter, Calloway stated:

My relationship with Packard & Wheeler Offices has recently gone through a re-negotiation and due to a difference in business models, the relationship has been terminated.

I am currently the agent of record for [client] and would love to continue to serve as your agent and broker of record. Remember, it is completely up to you. You have a choice as to who your employee benefit agent is and/or will be. (emphasis added).

(CP 224.)

- Fact #11.** Wheeler filed an improper Second Amended Complaint on August 28, 2008 without leave of the trial court therefore violating CR 15(a). CR 15 states that a party may amend the party's pleadings once as a matter of course, requiring leave of the court for any further amendments. Wheeler amended his original complaint on August 1, 2008 utilizing his 'matter of course' amendment. (CP 199-208).
- Fact #12.** Wheeler acknowledges "the partnership" did in fact terminate on February 29, 2008. (CP 200).
- Fact #13.** Wheeler moved for a partial summary of judgment in August 2009 for his claims of breach of partnership agreement, breach of fiduciary duty, violation of the Computer Fraud and Abuse Act, conversion, and unjust enrichment. No argument for or presentment of evidence for the claims of fraud, false pretenses, or other wrongful acts that were willful and malicious was included. (CP 20).
- Fact #14.** On October 28, 2009, Wheeler's Motion for Partial Summary Judgment was granted. (CP 54-58)
- Fact #15.** Wheeler was granted partial summary judgment for breach of partnership agreement, breach of fiduciary duties, violation of The Computer Fraud and Abuse Act, conversion and unjust enrichment, awarded judgment establishing his capital account, or investment, in the partnership existed consisting of funds he contributed to the business, all clients he brought into the business, and one-

half of all proceeds generated on work performed by Calloway since February 28, 2008, all attorneys fees and sanctions. (CP 57).

Fact #16. On November 13, 2009, Wheeler filed a Notice of Presentment just 6 days after Calloway's attorneys' withdrawal. The presentment was for a proposed judgment and proposed judgment summary corresponding to the entered October 28, 2009 order. (CP 234-239; 231).

Fact #17. On November 20, 2009 and December 3, 2009, Calloway objected to the proposed judgment and proposed judgment summary, noting the addition of claim of fraud, false pretenses, and other wrongful acts, noted the additional award of damages, provided financial documentation and industry testimony to dispute the damages accounting, and offered alternative calculations. (CP 68-71; 172-173)

Fact #18. On December 3, 2009, Calloway's request for an itemization and explanation of the presented attorney's fees was denied. (CP 173; 179).

Fact #19. On December 3, 2009 Judge Salvatore Cozza struck the trial date scheduled for January 25, 2010, and granted Wheeler's proposed judgment and judgment summary as presented because Wheeler's counsel 'dotted every "i" and crossed every "t".' (CP 179).

B. Chronological Timeline of Relevant Dates

5/2/2008	Summons and Original Complaint
6/6/2008	Order Directing Clerk to Issue Prejudgment Seizure/Writ of Attachment Order for Immediate Possession of Property to Plaintiff
6/12/2008	Notice of Withdrawal and Substitution of Counsel for Defendants
7/18/2008	Plaintiff's First Set of Interrogatories and Requests for Production Propounded to Defendants (With Answers)
8/01/2008	Amended Summons and Amended Complaint
8/13/2008	Deposition of Sara M Calloway
8/27/2008	Deposition of Andrea Brown
8/28/2008	Second Amended Summons and Second Amended Compliant
9/12/2008	Order Granting Plaintiff's Motion for Preliminary Injunction
9/24/2008	Defendants Answer to Complaint
9/30/2008	Notice of Withdrawal and Substitution of Counsel for Defendants
11/19/2008	Letter Ruling on Motion to Strike and Motion for Reconsideration
1/8/2009	Notice of Stay RE: Bankruptcy
1/16/2009	Notice of Intent to Withdrawal of Counsel for Defendants
6/22/2009	Removal of Stay; Notice of Appearance of Counsel for Defendants
6/25/2009	Order Denying Leave to Amend Answer to Second Amended Compliant
7/07/2009	Letter from John Mueller RE: Assignment of Judge to Judge Salvatore Cozza
10/27/2009	Notice of Intent to Withdrawal of Counsel for Defendants

10/28/2009	Order Granting Plaintiff's Motion to Strike and Motion for Partial Summary Judgment
12/03/2009	Judgment and Judgment Summary
1/04/2010	Notice of Appeal
2/3/2010	Plaintiff's Motion to Amend Order Granting Plaintiff's Motion to Strike and Motion for Partial Summary Judgment, Judgment and Judgment Summary
2/26/2010	Amended Order Granting Plaintiff's Motion to Strike and Motion for Partial Summary Judgment, Amended Judgment and Amended Judgment Summary

IV. ARGUMENT

This appeal deals with the trial court's granting of Wheeler's Motion to Strike Calloway's testimony, the trial court's granting of Wheeler's Motion for a Partial Summary Judgment, the Amended Partial Summary Judgment, the failure of the trial court and its duty to review all evidence provided, and the abuse of the trial court's discretion in awarding attorney fees and damages to Wheeler.

A. Calloway was Unjustly Barred from Defense

On October 13, 2008, Calloway, et al filed a declaration in support of their Motion for Reconsideration for the reconsideration of the Preliminary Injunction granted by Judge Gregory Sypolt. Wheeler filed a motion to strike all five (5) declarations of Calloway, et al and

the two (2) declarations of her assistant Andrea Brown, complaining they contradicted each other and/or their respective depositions.

On November 19, 2008, Judge Gregory Sypolt issued a Letter Ruling on Motion to Strike and Motion for Reconsideration. In that Letter Ruling, Judge Gregory Sypolt, struck 'the declarations of Ms. Calloway and Ms. Brown.' No other declaration and/or affidavit was specified, identified or stricken from the record; nor did the Letter Ruling provide any guidance as to exactly which portions of the declarations were objectionable and/or why. (CP 228-229).

In response to the Wheeler's Motion for Partial Summary Judgment in September 2009, Calloway's counsel drafted the Declaration of Sara M. Calloway in Support of Defendants' Memorandum Opposing Plaintiff's Motion for Partial Summary Judgment and submitted it in support of their response. (CP 38-53).

It was not an attempt to ignore or evade Judge Gregory Sypolt's Letter Ruling. The submitted declaration was based on and contained the same set of facts, description of events and elaboration on events included in the four (4) other declarations and/or affidavits of Calloway, et al and the complete Deposition of Sara M Calloway.

The declaration included allegations and documentation not in dispute. It included information and supporting documentation found

in the Deposition of Sara M. Calloway, dated August 13, 2008 and the first set of Calloway, et al's Interrogatories with Answers, dated July 18, 2008. For example, there was and is no dispute that:

1. Calloway and Wheeler met on February 11, 2008, and that Calloway sent a confirming letter the next day. (CP 43-45).
2. The parties met again on February 13, 2008, and Wheeler brought a typed agenda to the meeting. (CP 46-49).
3. On February 25, 2008, the parties met again and Wheeler informed Calloway that they needed to have a clean separation. (CP 215).
4. At the meeting on February 25, 2008, the parties agreed to terminate their relationship. (CP 50-51).

The declaration in question was not solely based on nor was it identical to the stricken declaration by Judge Gregory Sypolt. It was a presentation of uncontroverted facts which could not be and were not stricken from Judge Gregory Sypolt's Letter Ruling.

By granting the motion to strike and CR 11 sanctions, and entering them in the order on October 28, 2009, not only did the trial court fail to recognize Calloway, et al is entitled to a vigorous defense that is well grounded in law, subsequently limiting their ability to defend themselves and their counsel's ability to advocate on their

behalf, but it violated its duty to consider all facts and evidence submitted, and all reasonable inferences for the facts, in a light most favorable to the non-moving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982); Douglas v. Freeman, 117 Wn.2d 242, 247, 814 P.2d 1160 (1991). The trial court completely barred Calloway from testifying in her own defense and prevented the Calloway, et al from having their day in court. (RP 10/9/09 p. 15).

**B. Issues of Material Facts Existed Regarding Partnership
Dissolution, Termination and Duties**

On review of an order for summary judgment, the Appellate Court is to perform the same inquiry as the trial court. Hisle v. Todd Pac. Shipyards Corp. 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing Kruse v. Hemp, 121 Wn.2d 715, 722 853 P.2d 1373 (1993)). As specifically stated in Kruse v. Hemp in reviewing a summary judgment order, an Appellate Court evaluates the matter de novo, and performs the same inquiry as the trial court. Kruse at 722.

As this Court is aware, summary judgment is governed by the Civil Rules of Procedure, Rule 56(c). The rule provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories admissions on file, together with affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In this case, summary judgment was inappropriate. Summary Judgment, pursuant to CR 56(c), is only proper if the pleadings, affidavits and depositions before the trial court establish that there are no genuine issues of material fact. Ruff v. County of King 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting Dickenson v. Edwards, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). A material fact is one on which the outcome of the litigation depends. Swinehart v City of Spokane, 145 Wn.App. 836, 844, 187 P.3d 345 (2008). Once the moving party demonstrates the absence of any genuine issue of material fact, the burden shifts to the non-moving party to set forth specific facts that would raise genuine issues of material fact for trial. Schaff v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995); Iwai v. State, 129 Wn.2d 84, 915 P.2d 1089 (1996). The court must then construe all facts in favor of the non-moving party and make all justifiable inferences. Anderson 477 U.S. at 255.

These specific facts may not rest upon the mere allegations of pleadings, but must affirmatively present as admissible evidence through affidavits, depositions and/or interrogatory answers, such that

a jury could return a verdict for that party. CR 56(e); Reed v. Streib, 65 Wn.2d 700, 399 P.2d 388 (1965); Meissner, 69 Wn.2d at 956; Anderson, 477 U.S at 249; Coltex 377 U.S at 323-24.

Here, the summary judgment was not appropriate as there are and were genuine issues of material fact in dispute, such as:

1. When the partnership actually dissolved?
2. When the partnership terminated?
3. When Calloway's duties to the partnership terminated?

The trial court blatantly ignored the clear language within Washington's Revised Uniform Partnership Act, RCW 25.05, and relied solely on Wheeler's belief that The Computer Fraud and Abuse Act (CFAA) was and is applicable to business partners and owners.

1. The Partnership Agreement and Washington's Revised Uniform Partnership Act (RUPA)

Under RCW 25.05.225(1) and Pollock v Ralston, 5 Wn.2d 36, 104 P.2d 934 (1940), when a partnership is verbal and silent as to the duration, as Wheeler and Calloway's unequivocally was, the partnership is subject to termination at any time at the will of either of the parties thereto. There is no dispute both parties expressed a desire

to terminate their business relationship and that it came to an end on February 25, 2008. (CP 215; 50-51).

RUPA provides that a partner is dissociated from a partnership upon having notice of that partner's express will to withdraw as a partner. Calloway expressed this desire on February 11, 2008, as documented in the letter dated February 13, 2008. Wheeler expressed it on February 25, 2008 describing it as a 'clean separation,' according to the notes of John A Packard. (CP 43-45; 215).

RCW 25.05.230(1) specifically states that 'a partner has the power to dissociate at any time, rightfully or wrongfully, by express will. . .' And, a partner can only wrongfully dissociate by a breach of an express provision of the partnership agreement or for a definite term or particular undertaking, and before expiration of the term or undertaking. Here, there was no express provision in the partnership agreement to breach. There was no definite term or particular undertaking. There was no written partnership agreement; it was verbal and silent as to the duration.

RCW 25.05.300(1) states that a partnership is dissolved upon the dissociation of the parties and that the business must therefore be wound up. At this point, a partnership exists only for the express 'purpose of winding up its business.' RCW 25.05.305(1).

The partnership agreement ceased to exist at the moment of dissociation, and the subsequent and automatic dissolution, on February 25, 2008. Therefore, as a matter of law, Calloway, et al could not have and did not violate any partnership agreement.

2. Fiduciary Duties: The Duty of Loyalty and Duty of Care

'Upon a partner's dissociation...the partner's duty of loyalty under RCW 25.05.165(2)(c) terminates...' RCW 25.05.235(2)(b)

The fiduciary duties of a partner to a partnership are exclusively spelled out and consist of only a duty of loyalty and a duty of care. A partner's duty of loyalty to the partnership and to the other partner is found in RCW 25.05.165 which provides:

- (1) The only fiduciary duties a partner owes to a partnership and the other partners are a duty of

loyalty and the duty of care set forth in subsection (2) and (3) of this section.

- (2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:
 - a. To account to the partnership and to hold as trustee for it any property, profit or benefit derived by the partner in the conduct and winding up of the partnership business or derived from the use any the partner of partnership property, including appropriation of a partnership opportunity
 - b. To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

Since the commencement of the superior court lawsuit, Calloway, et al has not been permitted to be involved in the winding up process of the partnership and/or its affairs, and in fact, have been actively excluded from that role by Wheeler and the trial court. Calloway's duty to account to the partnership and the duty to refrain from dealing as or on behalf of a party having an adverse interest would and has therefore been limited to matters and events occurring before the mutual dissociation and the subsequent and automatic dissolution on February 25, 2008. RCW 25.05.235(2)(b) and (c).

- c. To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership

Since RCW 25.05.300(1) clearly states that a partnership is dissolved upon the dissociation of one or more partners, Calloway's duty to refrain from competing is limited to events occurring before the mutual dissociation and dissolution on February 25, 2008, and was consequently free to compete for the partnership clients.

3. The Computer Fraud and Abuse Act

The trial court granted summary of judgment and the associated costs and attorney fees based on Calloway's alleged violation of The Computer Fraud and Abuse Act, 18 U.S.C § 1030 (CFAA) despite Wheeler's failure to cite within his Second Amended Complaint any specific section of the act which was violated. (CP 206).

Wheeler claims within his Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment that the Act ' has been increasingly used by **employers as a basis to sue former employees** (emphasis added) and their new

companies for seeking a competitive edge through the wrongful use of information from the **former employer's computer system** (emphasis added).' He goes on further to argue 'the CFAA is equally applicable to claims against business partners.' (CP 17).

Wheeler failed to and fails to cite any decisions in which former partners or owners of a business have been found to violate the CFAA, and he bases the rest of his claim on a single case and an employer-employee relationship, Shurgard Storage Centers, Inc v. Safeguard Self Storage, Inc., which was not binding to the trial court and has been extensively criticized for its reliance on the previous version of the CFAA. (CP 33-34)

According to Cenveo Corp v. Celumsolutions Software GMBH & Co. KG, 581 F.Supp.2d (D. Minn. 2007), the 2001-2 amendments to the CFAA require plaintiffs to allege and prove that the defendant accessed a computer without authorization and as a result suffered a loss. A loss is defined as any reasonable cost for damage incurred because of an interruption of service and does not

include a loss of business based on the use of proprietary information.

Calloway, et al simply could not have violated the CFAA because as a partner/owner in the business, she had full access and authorization to any and all business computers, and the proprietary information belonged to them as well. Calloway, et al was not an employee with limited access and/or authorization.

Clearly, there are genuine issues of material fact concerning this case. When did the partnership actually dissolve? When was the partnership terminated? When did Calloway's duties to the partnership terminate? When did Wheeler's duties to the partnership terminate? And, how should the court apply and interpret Washington's Revised Uniform Partnership Act and the federal Computer Fraud and Abuse Act? All these issues were clearly and concisely presented to the trial court. (RP 10/9/09 16-18; CP 22-53). Regardless, the trial court abused its discretion and erred granting Wheeler's Motion for a Partial Summary Judgment and entered the subsequent orders, judgments and judgment summaries on October 28, 2009, December 3, 2009 and February 26, 2010. Thomas v. Wilfax, Inc., 65 Wn.App 255, 838 P.2d 597 (1992).

C. Trial Court Record Did Not and Does Not Justify or Support the Additional Claims of Fraud, False Pretenses, or Other Wrongful Acts

At the October 9, 2009 hearing, Wheeler, by and through his attorney, presented for and was granted partial summary judgment for breach of partnership agreement, breach of fiduciary duties, violation of The Computer Fraud and Abuse Act, conversion and unjust enrichment, was awarded a judgment establishing his capital account, or investment, in the partnership consisting of:

- a) funds he contributed to the business,
- b) all clients he brought into the business, and
- c) one-half of all proceeds generated on work performed by Mrs. Calloway since February 28, 2008,

attorneys fees to be approved by the court and sanctions. **There was no presentment on the allegations of other wrongful acts, fraud, false pretenses, and/or willful and malicious intent and there is no court record of the argument oral or written containing a preponderance of evidence for these allegations.** (CP 5-20, 54-57. RP 10/9/09 13 ll. 17-19, 23 ll. 1-4).

Wheeler filed a Notice of Presentment 6 days following the withdrawal of Calloway, et al's attorneys, Winston & Cashatt, due to their inability to pay. The presentment hearing was for the additional

proposed judgment and proposed judgment summary corresponding to the already entered Order Granting Plaintiff's Partial Summary Judgment and Judgment. (CP 231; 234-239).

Calloway, et al objected to the additional proposed judgment and proposed judgment summary, specifically **noting the additional claims of fraud, false pretenses, willful and malicious intent, and other wrongful acts, noted the additional award of damages.** Judge Salvatore Cozza and the trial court noted the objection, informed Calloway, et al this was not the venue to present evidence, struck the trial date scheduled for January 25, 2010, and granted the proposed judgment and judgment summary with the additional claims as presented. (CP 159-162, 172-177).

According to WAC 192-100-050 Fraud defined. Fraud is an action by an individual in which **all** of the following elements must be present:

- a) the individual made a statement or provided information
- b) the statement was false
- c) the individual knew the statement was false or did not know whether it was true or false when making it
- d) the statement concerned a fact that was material to the individuals rights
- e) the individual made the statement with the intent on would rely on it when taking action.

It goes further to state that to decide one has committed fraud, all of the above elements must be shown by clear, cogent and convincing evidence. 'Fraud cannot be presumed.'

Again, there was no presentment on the allegations of other wrongful acts, fraud, false pretenses, and/or willful and malicious intent. There is no record of any clear, cogent and convincing evidence presented, and there is no record of any argument, oral or written, containing these allegations. (CP 5-20, 54-57. RP 10/9/09 1-24; RP 2/26/09 5 ll.14-20).

Wheeler simply alleged fraud in his Second Amended Complaint and took the liberty, by and through his counsel, to add it into the verbiage of the proposed documents at presentment. (CP 202).

The trial court erred by allowing this additional text to be entered into the Judgment and Judgment summary and then again in the Amended Order Granting Summary Judgment, Amended Judgment and the Amended Judgment Summary without any evidence presented in record, specifically and certainly not clear, cogent and concise evidence. (CP 159-162, 190-98).

D. Calloway, et al is Entitled to an Itemized Bill Explaining Attorney Fees

At the December 3, 2009 hearing, Calloway, et al did not object to the cost and attorney fees presented by Wheeler's counsel. Their only request was an itemization and explanation of the \$95,000 plus in charges submitted to the trial court for approval. Calloway, et al are not attorneys and did not, and do not, understand the documentation submitted. (CP 173 ll.7-22).

Requesting an itemization and explanation of fees is a completely reasonable, common and fair practice on behalf of a debtor. The trial court erred by denying this reasonable, frequent request, effectively belittling Calloway, et al by stating the charges make 'perfectly good sense.' (CP 179).

E. Substantial Financial Documentation Exists in the Trial Court Record Disputing Wheeler's Calculations and Dollar Amounts

As stated previously and as provided within the trial court record, the Report of Proceedings and the Clerk Papers, Calloway, et al objected to the trial court's use of Wheeler's calculations and the lack of financial documentation presented to substantiate the calculations, and Calloway, in turn, provided an abundance of

documentation disputing the calculations and dollar amounts. (CP 68-95, 103-128, 129-158).

The trial court was provided only an excel spreadsheet by Wheeler, and his testimony, by and through his attorney, that it was a final accounting of the partnership and that Calloway, et al had not objected to until the hearing on December 3, 2009. (CP 170). When in fact, the excel spreadsheet provided by Wheeler was an illustration pursuant with ER 408 and claimed to be used for settlement/mediation purposes only by Wheeler's counsel in December 2008.

The excel spreadsheet contained no calculations or substantiation of funds contributed to the partnership, the clientele contributed to the partnership or an estimated dollar amount of the proceeds received by Calloway, et al from February 28, 2008 to the final resolution of the matter. It included an inflated estimated business valuation, an estimated gross income, additional claims of unsubstantiated damages, approximately \$60,000 in attorney fees above and beyond those submitted by counsel, and all without documentation to support. (CP 63).

Calloway, et al provided federal tax documentation, federal tax records of payments to Wheeler, paid for a business valuation to best estimate the actual value of the business, and a conceivable calculation

of potential proceeds owed to Wheeler (CP 68-70, 72-86, 103-106, 130-158).

Calloway, et al provided bank statements for 2007 of the joint personal bank account used by Wheeler and Calloway, clearly illustrating bankcard charges for marketing and lunches with partnership clients totaling \$708.62, not the \$5,800 as Wheeler claimed and the trial court allowed. Federal tax documents were submitted illustrating Calloway's health insurance premiums for 2007 were in fact \$2,452, not the \$3,600, as claimed and allowed. (CP 70, 107-129, 130-158).

Wheeler requested, and the trial court awarded, reimbursement for an ad/personnel service he and his other business associate, John A. Packard, **in different business venture** placed seeking to replace an ex-employee, Matthew Paulson, for a Financial Representative position, despite the testimony and documentation this was done without Calloway's knowledge or any partnership approval. (CP 70, 87-88).

Wheeler requested, and the trial court awarded, reimbursement for a lease extension on property Wheeler was already leasing with Greenstone Properties **and his other business** without Calloway's knowledge or any partnership approval. (CP 70).

The trial court erred when it informed Calloway, et al that it was not the time nor the place to bring documentation to dispute Wheeler's calculations, and informed them these were issues meant for trial. Judge Salvatore Cozza and the trial court further erred granting the judgment and judgment summary as presented and striking the trial scheduled for January 25, 2010. (CP 159-162, 177, 179). And, then it erred yet again by granting the amended order, judgment and judgment summary on February 26, 2010. (CP 190-198).

V. CONCLUSION

The trial court erred in law and its use of discretion by granting Wheeler's Motion to Strike Calloway's testimony, effectively denying her a day in court and removing her ability and right to a defense.

The trial court erred by granting Wheeler's Motion for Partial Summary Judgment, and the Amended Partial Summary Judgment when there were clear genuine issues of material fact regarding partnership dissolution, partnership termination, termination of Calloway's duties, and the interpretation and application of

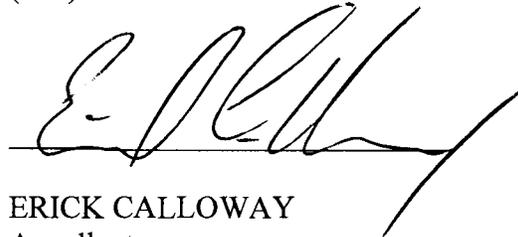
Washington's Revised Uniform Partnership Act and The Computer Fraud and Abuse Act.

The trial court failed it's duties to review all evidence provided in a light most favorable to the non-moving party, and it abused its discretion in awarding attorney fees without itemization or explanation, and abused its discretion in allowing and awarding the unsubstantiated, undocumented damages to Wheeler despite the abundance of documentation provided directly in dispute of and contradiction with Wheeler's calculations.

Respectfully submitted this 15th day of July, 2010.



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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, under the laws of the State of Washington, that on the 15th of July, 20 10, I caused to be served a true and correct copy of the foregoing APPELLANTS' BRIEF by the method indicated below, and addressed to the following counsel of record:

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Signed:



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