Court of Appeals No. 31451-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WALTER L. TAMOSAITIS and SANDRA B. TAMOSAITIS, a marital community,

Plaintiffs/Appellants,

v.

BECHTEL NATIONAL, INC., FRANK RUSSO, and GREGORY ASHLEY,

Defendants/Respondents

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Craig J. Matheson)

Case No. 10-2-02357-4

BRIEF OF RESPONDENTS

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I. INTRODUCTION

A plaintiff asserting a claim for "tortious interference with a business expectancy" must demonstrate a specific, reasonable expectation in future pecuniary gain; that a third party to the expectancy intentionally interfered in it with knowledge of the plaintiff's particular interest; that as a consequence the expectancy was breached or terminated; and that the plaintiff suffered tangible economic harm. Here, appellant Walter Tamosaitis sued Bechtel National, Inc. ("BNI"), the prime contractor at the U.S. Department of Energy's Waste Treatment and Immobilization Project ("WTP" or "the Project"), after his employer, BNI's subcontractor URS Energy & Construction, transferred him off the Project at BNI's direction and reassigned him to different duties at the same salary. The trial court correctly granted summary judgment on multiple grounds, all of which were based on the glaring inconsistency between the admitted facts in the record and the legal requirements of a tortious interference claim, and any one of which mandated dismissal of Tamosaitis's claim:

First, BNI exercises control over the staffing of WTP senior management positions, and thus cannot, as a matter of law, be a third party to an alleged expectancy in such a position. ***Second***, Tamosaitis had known for months that his assignment at WTP would end in mid-2010, and had no specific expectancy in any future opportunity on the Project,

let alone one involving the prospect of additional pecuniary gain. ***Third***, BNI had no knowledge of Tamosaitis's interest in either of the two WTP positions he identified as alleged expectancies in his deposition in this matter. ***Fourth***, Tamosaitis's employment relationship with URS has not been breached or terminated. To the contrary, he admits that he has "continuously been a URS employee," that there has "been no interruption in his status as a paid employee" of URS, and that he continues to receive his full URS salary. ***Fifth***, Tamosaitis, whose 2011 income of $375,000 was as high as ever, has suffered no economic damage whatsoever.[1]

Tamosaitis never squarely addresses the five separate and independent bases for affirming the trial court's ruling. Indeed, nowhere in his brief does he even contest the threshold reason his claim must fail, namely the futility of any attempt to characterize BNI as a "third-party intermeddler" with respect to a WTP expectancy. Tamosaitis instead tries to change the subject by making red-herring arguments. For example, he attempts to turn this appeal into a test case on whether a tortious interference claim can ever be based on an at-will expectancy—an issue that is *not* before this Court. Further, Tamosaitis repeatedly blurs the

[1] A sixth ground for the trial court's entry of summary judgment relates only to the individual claim against respondent Gregory Ashley: Tamosaitis offered no evidence that Ashley took any action that could be construed as "intentional interference." The other five grounds for the trial court's entry of summary judgment also apply equally to Ashley and co-respondents Frank Russo and BNI.

distinction between his temporary relationship with WTP—a BNI-managed Department of Energy *project* to which employees of BNI and URS are temporarily assigned, but which itself employs nobody—and his separate and distinct *employment relationship* with URS, which continues without interruption.

Tamosaitis also cites to "evidence" that was not before the trial court when summary judgment was entered (and that would not have changed the outcome even if it had been timely submitted). This Court should focus on the evidence that was actually before the trial court when it entered its ruling, and should disregard untimely materials the trial court did not consider.

The trial court's ruling should be affirmed on any or all of the above grounds.

II. RESTATEMENT OF ISSUES

Should this Court affirm the trial court's entry of summary judgment based upon the undisputed evidence that:

(1) BNI has sweeping management control over WTP and thus is not a third party to any senior management opportunity at WTP allegedly sought by Tamosaitis;

(2) Tamosaitis had no contract or valid business expectancy in any specific position at the WTP Project;

(3) BNI lacked knowledge of the alleged business expectancies upon which Tamosaitis testified his claims are based;

(4) Tamosaitis's separate employment relationship with URS was not breached or terminated;

(5) Tamosaitis has suffered no pecuniary damages; and

(6) Defendant/respondent Gregory Ashley did not participate in the decision on which appellants' "intentional interference" allegation is based?

III. STATEMENT OF THE CASE

A. As the WTP Prime Contractor, BNI Exercises Broad Management Control Over the Project.

Respondent BNI is a private company that provides engineering and construction services. BNI serves as the U.S. Department of Energy's prime contractor for the WTP Project, the cornerstone of the DOE's massive environmental cleanup effort focused on stabilizing the 56 million gallons of nuclear waste stored at the Hanford Nuclear Site in Richland, Washington. CP 1721-24. Once operational, WTP will be a complex of structures that will combine liquid waste with molten glass, solidifying the mixture into a stable, glass-like form through a process called vitrification.

Respondent Frank Russo is a BNI employee and the current WTP Project Director. He took on that role in early January, 2010. CP 1745. Respondent Greg Ashley was from the summer of 2009 to January 2011 a BNI employee and the Technical Director at WTP. CP 1769.

BNI exercises sweeping management control over all aspects of the Project. The WTP prime contract specifically states that BNI shall

"provide the personnel, materials, supplies, and services . . . and otherwise do all things necessary and incident to designing, constructing, and commissioning" the entire Project. CP 1724. Similarly, BNI's subcontract with URS Energy & Construction ("URS") vests in BNI "general supervision, direction, control, and approval powers" over the entire "extent and character of the work" to be done by URS. CP 1735.

As Tamosaitis has admitted, BNI's control over the Project includes control over who fills WTP management positions: "[C]ertainly at the management level, they control it." CP 1652. This is in keeping with the prime contract's specific directive that BNI "provide the personnel" for the Project, as well as the subcontract's express grant to BNI of the authority to "require . . . that [URS] remove from the work any employee the Contracting Officer [defined as BNI or BNI's representative[2]] deems incompetent, careless, or otherwise objectionable." CP 1724, 1734, 1731.

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[2] Subcontracts on DOE projects are subject to federal-contract "flowdown" requirements, which means that certain provisions of the prime contract must appear verbatim in the subcontract as well, with no adjustment to the identification of the parties. In order to make sense of these otherwise confusing "flowdown" provisions, the subcontract provides as follows in the preamble to Section I: "Whenever necessary to make the context of [such] clauses applicable to this Subcontract, the term "CONTRACTOR" shall mean "SUBCONTRACTOR" and the term "Contract" shall mean this Subcontract, and the term "Government," "Contracting Officer" shall mean Bechtel National, Inc. (BNI) or BNI's representative . . . ." CP 1731.

B. Tamosaitis Knew that his WTP Assignment Would End as the Design Phase of the Project Wound Down in Mid-2010.

1. Tamosaitis's URS work history and WTP assignment.

Tamosaitis is an engineer with a Ph.D. in systems engineering. CP 1656. He has been continuously employed for the past 42 years by URS, its predecessor corporation Washington Group International ("WGI"), or Dupont Corporation, which preceded WGI/URS in operating the Savannah River nuclear facility in Aiken, South Carolina. CP 1661-62. Tamosaitis has lived and worked at multiple locations across the country, including in Ohio, New Jersey, North Carolina, Texas, and Tennessee and Delaware (twice). CP 1662. Immediately prior to his transfer to WTP, Tamosaitis worked for URS at the Savannah River site. *Id.*

Tamosaitis was assigned to WTP in 2003. CP 1668-69. He held the position of manager of the WTP Research & Technology ("R&T") group, which from 2006 operated within the WTP Process Engineering & Technology ("PE&T") Department led by another URS employee, Richard Edwards. CP 1669, 1653.[3] Throughout his time at the Project, Tamosaitis remained a URS employee. CP 1662.

[3] WTP has an integrated management structure, *i.e.*, WTP positions are staffed by a mix of BNI and URS employees. CP 1949. However, as Tamosaitis concedes, BNI and URS maintain totally separate on-site HR departments, and separately address employment-related matters (including compensation, performance evaluations, discipline, etc.) for their respective employees. App. Br. 41; CP 1950. In addition, Tamosaitis has acknowledged that BNI has approval power over any senior WTP management position filled by URS: "I would say at my level, that BNI would have to agree." CP 1652.

2. The R&T group's design phase work scope.

Tamosaitis's R&T group was charged with resolving engineering and technical issues that arose in the course of the design phase of the Project. From early 2006 forward, WTP design phase efforts included resolving 28 technical issues, 17 of which were identified by an independent review team as "major" issues and thus designated "M1" through "M17." CP 1706.

By mid-2009, 27 of the 28 technical issues had been deemed "closed" by DOE. Tamosaitis had himself been involved in the closure of major issues, including M6 and M12. CP 1707-08. However, the M3 issue—regarding the design of the mixing system (employing pulse-jet mixers) which would mix liquid waste before it became vitrified—remained open. After the Project missed the September 2009 target date for M3 closure, Tamosaitis was given the additional task of leading the M3 efforts, with a new target date of June 30, 2010. CP 1653, 1671. During the remainder of 2009, however, the M3 team under Tamosaitis's direction continued to be plagued by missteps and disorganization.[4]

[4] For instance, following a disastrous mid-December 2009 presentation in Washington, D.C., to DOE's Office of River Protection ("DOE-ORP") and CRESP, the multi-university "Consortium for Risk Evaluation with Stakeholder Participation" that provided technical support to DOE-ORP concerning the status of M3, Tamosaitis lamented: "[W]e were not prepared with the proper documentation that the CRESP team wanted to review. Ideally this info would have been sent out ahead of the review. It wasn't. Even the charts which were

Upon taking stock of the situation after his arrival as Project Director in early 2010, BNI's Russo determined that in order to meet the June 30, 2010 target date, it would be necessary to place the M3 resolution effort under the leadership of an experienced project manager. He selected Mike Robinson, a senior BNI employee with a strong project engineering background, for this role. Tamosaitis agreed with the elevation of Robinson to the leadership of M3, felt that it was motivated solely by Russo's "good faith belief as a manager" and considered it a "good move." CP 1653. Tamosaitis continued to provide technical support on M3, and reported to Robinson in that capacity. *Id.*

3. Tamosaitis memorialized his understanding that the R&T group's work would end in mid-2010.

Tamosaitis understood that his role on the Project would end when the R&T group's design phase work was substantially complete. This is part of the normal rotation of personnel at projects such as WTP, where engineering and technical staff involved in a given phase of a project often move on to other assignments within their home organizations after completion of their project assignments, while the next phase of the project continues forward in their absence.[5] CP 1749. On May 13,

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sent out had transmittal problems." CP 1779. As Tamosaitis acknowledged at the time, "The problem is mine." CP 1782.

[5] Senior technical staff who left WTP at approximately the same time as Tamosaitis included Richard Edwards, the URS employee and Project PE&T

2009—just over a year before he left the Project—Tamosaitis demonstrated that he had a keen (and, as it turned out, accurate) understanding of the likely timing of his departure from WTP, emailing Edwards that he had been "putting together personnel plans for [URS] R&T people" for implementation "as R&T winds down over the next year +/-." CP 1784.

C. Tamosaitis Announced that he Was Available to Transfer Off WTP as of June 30, 2010—the Target Date for M3 Closure—and Intensified his Search for his Next URS Assignment as that Date Neared.

In the weeks prior to June 30, 2010, Tamosaitis focused on that day as the date by which his work at WTP would be finished and he would be available to move on to his next assignment within the URS corporate system. For example, on May 27, 2010, Tamosaitis expressed his strong interest in a non-WTP assignment under a senior URS manager named Duane Schmoker, and told Schmoker that the highest-ranked URS manager at WTP, Bill Gay, had "agreed I could be made available at the end of June." CP 1787. Tamosaitis admits he gave Schmoker that date because "[t]he end of June was the target date for M3 closure." CP 1671.

As the June 30th target date loomed, Tamosaitis sent out multiple emails to a number of senior URS managers under the title "Jobs for

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Director to whom Tamosaitis reported as Manager of R&T, and Mike Robinson, the BNI employee to whom Tamosaitis reported on the M3 team. CP 1950.

Walt." CP 1789-90, 1792, 1794-95, 1797-98. In a June 3, 2010 email to Gay, Tamosaitis listed six possible new assignments. CP 1789-90. On June 16, 2010, just two weeks before his departure from the Project, Tamosaitis sent an expanded "Jobs for Walt" email directed to URS human resources manager Cami Krumm, CP 1797-98, listing ***eleven*** possible "jobs for me I suggested to Bill [Gay]." Included on this "enhanced list" were seven potential new assignments at various non-WTP facilities at which URS has management responsibilities, including WRPS (*i.e.*, the "Tank Farm"), WSMS (Washington Safety Management Solutions, headquartered at URS's Savannah River facility), and the Sellafield nuclear facility in England. *Id.*[6] Tamosaitis's "Jobs for Walt" emails, as well as his May 27, 2010 email to Schmoker, went only to URS management employees and not to anyone at BNI. *See, e.g.*, CP 1787-98.

Tamosaitis testified that he also raised with URS's Gay the possibility of taking over the position of WTP Director of PE&T previously held by Edwards. CP 1672. He admitted, however, that those discussions were vague and that by May/June 2010 he "certainly had no certain expectation" of taking over Edwards' job, or obtaining any other

[6] Tamosaitis was so focused on trying to find a new position that he suggested that the incumbent in more than one already-occupied URS job be forced to relocate so that he could take over that person's position. *See, e.g.*, CP 1797 (suggesting that Tamosaitis replace a URS manager named Marshall Miller, with Miller moved "to the tankfarm or England," or that he be named Technology Development Manager at WRPS, and that he "[r]eplace Terry Sams").

particular position, because he was "looking at other alternatives." CP 1673.[7] When asked in his deposition to identify any other WTP opportunities as to which he now claims "interference" by BNI, he named only one other position, that of WTP chief engineer, CP 1672, but acknowledged that his discussions with Gay regarding that position were even more cursory: "Only expressing [his wish to get the position] to Bill Gay." CP 1673-74. Tamosaitis had no communications with BNI regarding either of the two positions he discussed with Gay, and has no basis for believing his interest in them was communicated to BNI. *Id.*[8]

In short, Tamosaitis's job search was not zeroing in on any specific opportunity but rather was expanding. As he has since admitted, he "did not have any specific knowledge" of where he was "going to end up as of June 30, 2010." CP 1671.

D. While Tamosaitis Searched for his Next Assignment, URS Was Engaged in a Parallel Effort to Place him at the Sellafield Project in the United Kingdom.

As URS's senior-most manager at WTP, Bill Gay actively assisted Tamosaitis's search for his next assignment within the company. Although he contacted multiple URS managers at facilities in the United

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[7] In any event, Edwards' position as Manager of PE&T, like Tamosaitis's own position as Manager of R&T, was phased out upon the closure of M3. No one holds either title today. *See* CP 1950.

[8] Tamosaitis's discussions with Gay were very preliminary and did not include any "specific terms." CP 1672.

States and overseas, Gay soon focused his efforts on a URS-led nuclear project at the Sellafield site in the United Kingdom, which he believed would be a good career opportunity for Tamosaitis. CP 1868-75, 1808.[9] Gay communicated repeatedly with a URS manager at Sellafield named Todd Wright. For example, on June 2, 2010, URS HR director Cami Krumm emailed Wright "at the request of Bill Gay. We are wondering if you would have a 12 to 18 month assignment for Walt Tamosaitis. *His project is scheduled to complete soon.*" CP 1832-33 (emphasis added). On June 10, 2010, Gay followed up with his own email to Wright (copying Russo, among others): "I would welcome the temporary assignment for Walt T if it is available. He is very supportive of the opportunity." CP 1835-36.

After some delays in the Sellafield position opening up,[10] Wright emailed Gay on July 1, 2010 to tell him that the position was open and the

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[9] Tamosaitis had forwarded an internal URS "Career Opportunities" posting about Sellafield to his home email address on May 15, 2010, CP 1830, and knew that Gay had spoken to Tamosaitis's wife about the Sellafield opportunity at a URS function in early June 2010. CP 1794.

[10] Those delays extended even after an announcement was drafted stating that Tamosaitis would soon be leaving for his next assignment at Sellafield (CP 1838-39), requiring Gay to look for a temporary WTP position in which to place Tamosaitis while the Sellafield arrangements were completed. The concept was to place Tamosaitis temporarily under Dennis Hayes, the URS employee who is the head of WTP Operations. CP 1805, 1847-48; *see also* the draft announcement that was prepared in connection with this idea, CP 1841-42. In the end, Tamosaitis left the Project (and the Sellafield position opened up) before it became necessary to implement the contingency plan to place him in a temporary position in Operations.

paperwork for Tamosaitis's transfer could move forward. CP 1855.

E. Tamosaitis Resisted Any URS Assignment Outside of the Richland, Washington Area.

While Gay worked hard to land Tamosaitis a new URS position at Sellafield, Tamosaitis's strong preference was to find a new assignment at one of the several projects *in Richland* in which URS is involved. Though he has since acknowledged that frequent moves and uncertainties regarding one's next posting are realities of the job,[11] Tamosaitis's May/June 2010 emails to other URS managers made it clear that he and his wife did not want to move away from their two local grandchildren:

- On May 13, 2010 Tamosaitis told Krumm that he was not interested in a URS position at Idaho National Laboratory: "with 2 granddaughters here, moving is about out of the question." CP 1857.

- In his June 16, 2010 email to Krumm listing in order of preference eleven jobs he was interested in, only at the bottom of the list did he offer "[s]hort-term assistance" at Sellafield. His reason? "Wife will not move to England and leave the grandchildren." CP 1797-98.

- On June 22, 2010, Krumm solicited Tamosaitis about another out-of-town project. He responded: "Interested in helping—yes. Interested in moving—no. Wife is not going to leave grandkids." CP 1861.

See also CP 1787-95, 1863-64.

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[11] Tamosaitis agreed, "that's something that's always an issue in a job . . . where you're a high level manager and sometimes moving to different projects . . . trying to work out where you're going to be next and what your personal life is going to be and the impact on it." CP 1662.

F. WTP Project Director Frank Russo Accommodated Tamosaitis's Protracted Search for his Next URS Assignment.

Russo was aware in June 2010 that Tamosaitis was due to leave the Project as part of the routine rotation of BNI and URS Design-phase personnel. CP 1747. Russo also knew that URS was lining up a post-WTP position for Tamosaitis at its Sellafield project. *Id.*[12] Russo allowed Tamosaitis to remain in his position, despite the fact that his WTP duties were essentially at an end, while the details of the transfer to Sellafield were completed. Russo made this accommodation as "a professional courtesy to both Walt and to URS . . . recognizing that high paid professionals take longer than journeymen engineers to place, I gave them a very reasonable amount of time to place Walt in a new assignment." *Id.*

G. On July 1, 2010, Tamosaitis Sent an Inaccurate Email that Offended DOE's Project Consultant.

On July 1, 2010, the day after the June 30 submission to DOE of closure documentation for M3, Tamosaitis sent an email (from his Project email address, which because of the integration of the WTP email system

[12] Gay led Russo to believe that Tamosaitis's transfer to Sellafield was a done deal, and did not tell Russo that he had not yet spoken directly with Tamosaitis about it. On June 10, 2010, for example, Gay copied Russo on an email stating that Tamosaitis "is very supportive of the [Sellafield] opportunity." CP 1835-36. Because it was URS's sole responsibility to coordinate the next assignments for URS personnel who were rotating off the Project, Russo was not involved in that process and believed that Tamosaitis had accepted the transfer to Sellafield and was definitely going to the U.K. CP 1751-52, 1757. Thus, in a July 1, 2010 email to DOE Project Director Dale Knutson, Russo stated his belief that Tamosaitis "did get an assignment at Sellafield and leaves next week." CP 1877.

read as "bechtel.com") misrepresenting the position of CRESP[13] and the content of a CRESP formal report concerning the Project. CP 1880.[14] The inaccuracies in this email upset CRESP's chairman, Vanderbilt University Professor David Kosson. After reviewing Tamosaitis's July 1 email, Kosson spoke with Russo and told him "that I was upset because it appeared to cast negatively on one of my team members . . . [o]r on the team as a whole. So I was upset by that." CP 1901.

H. Russo Decided to End the Accommodation Period and Directed URS to Complete Tamosaitis's Transfer to Sellafield from its Corporate Office.

After speaking with Kosson, Russo decided that it was time for the accommodation period to end and for URS to transfer Tamosaitis off the Project (*i.e.*, government) payroll.[15] CP 1755, 1749. Accordingly, on the

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[13] To reiterate, CRESP is the independent, multi-university "Consortium for Risk Evaluation with Stakeholder Participation" that provides technical support to DOE-ORP on the Project.

[14] Specifically, Tamosaitis's statement that "I anticipate the NN [non-Newtonian] test will go by the way side since SRNL and CRESP have indicated that no test is needed" was false, and he knew it. CRESP's report stated, among other places, at page 8, "Design confirmation for PJM vessels should include full-scale or near full-scale experimental demonstration of critical performance aspects of PJM vessels containing Newtonian and non-Newtonian slurries." CP 1893. Tamosaitis reviewed CRESP's June 24, 2010 draft report when he received it three days prior to his July 1 email. CP 1692; *see also* CP 1883-97 (the draft CRESP report and the June 28, 2010 cover email transmitting it to Tamosaitis).

[15] Two episodes that had occurred in the days and weeks prior to July 1, 2010 reinforced Russo's conclusion that it was time to transfer Tamosaitis off the WTP payroll. On June 17, 2010, Russo met with Mike Kluse and Terry Walton of national laboratory PNNL, to convince PNNL to re-engage with the Project. CP 1760. Walton told Russo that PNNL found Tamosaitis "a challenging customer, or a challenge to work with." CP 1906, 1748. Relying on what he had been told by URS's Gay, Russo responded that Tamosaitis was about to leave for his new

afternoon of July 1, 2010, Russo told Gay in an email that Tamosaitis "is killing us"—his misrepresentations were insulting nationally prominent technical experts and undermining client relationships. CP 1912. Russo directed Gay to "get him in your corporate office" and complete his reassignment to Sellafield from URS's payroll. *Id.* At the same time, Russo directed his staff to turn off Tamosaitis's "bechtel.com" email address. CP 1753-54. URS complied with BNI's management directive, transferring Tamosaitis off the Project the next day, July 2, 2010. CP 1547.[16]

I. Tamosaitis was Reassigned to the Position he Had Requested in Schmoker's Group, and his URS Employment Has Continued Without Interruption to this Day.

Tamosaitis admits that his URS employment has continued uninterrupted since his departure from WTP. CP 1657. In fact, he concedes, his next URS assignment, on which he began work just days after leaving WTP, was *the very position on Schmoker's project he had so*

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assignment at Sellafield, and "would be on an airplane that week." CP 1757; *see also* CP 1905-06. Then, on June 28, 2010, Tamosaitis suggested that certain information be withheld from CRESP. CP 1909 ("[h]opefully CRESP does not lock onto" a certain scaling factor used in testing). Russo testified that Tamosaitis's suggestion was contrary to the transparency that is a guiding principle of WTP's work and offended another senior manager who felt that the comment attacked his integrity. CP 1748. However, believing that Tamosaitis was about to depart for Sellafield, Russo chose not to make an issue out of it: "And I said, Don't worry about it, Walter's leaving, just relax." CP 1763-64.

[16] Shortly after his departure from WTP, Tamosaitis (through URS's Gay) sought to return to the Project. Russo refused this request, stating: "His assignment was over, it's still over." CP 1754-55.

enthusiastically sought in his May 27, 2010 email. CP 1659.[17]

Tamosaitis further concedes he has "continued to receive [his] URS salary" right up to today. CP 1657. He remains at pay grade 21, the highest non-executive pay grade within the URS system, earning a base salary of $228,800. When combined with his bonus and Savannah River retirement benefit, his total annual compensation is about $375,000, not including his employee benefits package. CP 1663-64.[18] In 2011, Tamosaitis received the same percentage merit raise that he had received in 2009 and 2010. CP 1689. When given the opportunity in his deposition to identify any monetary damages suffered as a result of his July 2, 2010 reassignment off WTP, Tamosaitis acknowledged he would be unable to do so without speculating. CP 1683-84.[19]

J. Undisputed Evidence Refutes Tamosaitis's Allegations of Retaliation.

Tamosaitis now claims that his transfer off WTP was motivated by retaliation for raising safety concerns. In fact, Tamosaitis never stepped

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[17] Contrary to the statements in his brief, Tamosaitis admits he was not assigned to a "basement office" while working on Schmoker's project. CP 2497-2500.

[18] Tamosaitis "did not complain" when in early 2011, he received a bonus of approximately $60,000. CP 1664.

[19] After summary judgment was granted, Tamosaitis attempted to remedy his failure to show economic loss by filing a supplemental declaration. This untimely submission was not mentioned by the trial court in its denial of Tamosaitis's motion for reconsideration, and would not have made any difference if it had been considered. *See* the discussion at pp. 45-47, *infra*.

outside his normal job duties to raise any specific safety concern; nor did he oppose M3 closure.

1. The undisputed evidence regarding the R&T group's 2010 issues list.

Tamosaitis claims that his departure from WTP was somehow connected with his submission, on June 30, 2010, of a list of potential technical issues to WTP management. In fact, Russo never saw that list before Tamosaitis was transferred off WTP. CP 1758-59. Further, that issues list was *not* Tamosaitis's idea, but rather was *solicited* by his WTP superiors as part of a "clean out your drawers" initiative designed to make sure that all open or loose-end technical issues were appropriately tracked, binned and dispositioned. *See* CP 1917, Richard Edwards' June 2, 2010 email to Tamosaitis forwarding Ashley's *directive* that issue lists be prepared and submitted by each of the WTP technical groups by June 30, 2010. Tamosaitis admitted that his R&T group submitted a similar issues list as part of a similar "clean out your drawers" initiative in 2009, and he was not retaliated against in any way for doing so. CP 1696-97.

Moreover, the 2010 R&T issues list was not "Tamosaitis's" list; it was instead a collaborative effort of the entire R&T group and certain outside consultants, submitted in conjunction with a Project-wide initiative in which other engineering and technical groups compiled and submitted

their own parallel lists. *Id.* It was a routine part of the R&T group's work, and was a matter of so little urgency to Tamosaitis that he described the issues on a draft of the list to Gay as "tech issues that may exist," CP 1919 (emphasis in original), and did not get around to submitting the final list until June 30, 2010, the deadline set by Ashley, and the date the M3 closure documentation was submitted. CP 1922 (Tamosaitis's June 30, 2010 cover email).[20]

2. The undisputed evidence regarding Tamosaitis's position on M3 closure.

Tamosaitis now claims that he had been opposed to M3 closure prior to June 30, 2010. He admits, however, that he never actually *told* Russo, Ashley, or the M3 team leader, Mike Robinson, that he opposed M3 closure. CP 1677. In fact, Tamosaitis was anxious to ensure that M3 closure occurred on time, because his URS bonus (unlike the bonuses of BNI managers) was directly keyed to that closure. As Tamosaitis put it in a May 6, 2010 email to fellow URS employees Cami Krumm and John Truax, "[O]ur incentive [*i.e.*, URS bonus] is jeopardized by M3." CP 1929. In the same email, Tamosaitis made it abundantly clear to his colleagues at URS that he would be very disappointed to miss the M3 closure target date and thereby lose out on the M3 component of his

[20] Tamosaitis was the last manager to turn in his group's list, and had to be repeatedly prodded to do so by the WTP engineering personnel responsible for collecting the various technical groups' lists. CP 1924-25, 1927.

bonus: "Bill Gay continues to tell us (John heard it) that he has 'plenty of money and doesn't need this.' This may well be the case for him, but not for me." *Id.*[21]

3. The undisputed evidence regarding Tamosaitis's position on the safety of the WTP design.

Tamosaitis also concedes that he never said "I have a safety concern," but instead raised only "technical issues" in the course of his job duties.[22] *See, e.g.,* CP 1678, 1676. As of June 22, 2010—*just ten days before he left the Project*—Tamosaitis told Krumm that "it seems like my best value to the Company is right here to maximize our profits in startup and commissioning." CP 1861. That statement echoed Tamosaitis's June 9 email to Gay, CP 1792, suggesting that he be made WTP chief engineer or chief process engineer "as we get closer to WTP startup and commissioning," as well as his June 17 email to Gay and Ashley, among others, CP 1863-64, proposing a brand new group that would address

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[21] *See also* CP 1933, Tamosaitis's March 8, 2010 email to URS's Daryl Miyasaki ("To have URS incentives tied to WTP performance when BNI makes all the decisions is bull shit"); CP 1936, his May 6, 2010 email to URS's Bill Gay ("[O]ur bonus and WTP performance resides on their decisions and actions, not anything URS mgmt does or says"); and CP 1939, his May 12, 2010 email to Donna Busche ("[O]ur $ and career recognition is controlled by BNI . . . . Our reward ought to be based on what we control . . . . [T]he path to [M3] closure is clearly through BNI Engineering, not us").

[22] Nor did Tamosaitis utilize any of the available procedures at WTP to raise a safety concern: he never registered a safety concern under the Project Issue Evaluation Reports ("PIER") system; nor did he take advantage of the Differing Professional Opinion ("DPO") process; nor did he report any concern to the Employee Concerns Program ("ECP"). CP 1697-98.

"startup and commissioning performance" and several issues designated by Tamosaitis as "post M3 action[s]."[23] Tamosaitis's expressions of eagerness to "maximize profit" by pushing the WTP design through startup and commissioning, and by addressing "post M3" actions, are hardly the words of a whistleblower who thought that design was unsafe and M3 should not close.

K. Following his Transfer off WTP, Tamosaitis Filed Two Parallel Actions, then Voluntarily Dismissed BNI from his ERA Whistleblower Case.

Following his July 2, 2010 departure from the Project, Tamosaitis brought two parallel actions. On July 30, 2010, he commenced an administrative action before the U.S. Department of Labor, naming URS and (eventually) DOE and BNI as respondents, pursuant to the whistleblower protection provisions of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851. App. Br. 6. He also filed this action in Benton County Superior Court on September 13, 2010 against BNI, URS,

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[23] *See also* CP 1941-1946, a handout prepared by Tamosaitis for his May 12, 2010 presentation to David Pethick, the president of the URS business unit involved in WTP. CP 1680. Under the heading "Overview Summary" on the first page, Tamosaitis reported to Pethick that the various technical groups were "*aligned and focused on providing needed support for June 30 closure*. Approx $5M fee (2.5M for URS) associated with M3 closure by June 30. Path to closure is through Engineering." CP 1941 (emphasis added). Under the bolded heading **"May 12, 2010 - Where We Are Today,"** Tamosaitis told his company president: "*On target to close M3 by June 30 . . . No float in schedule.*" CP 1943 (emphasis added). He added: "*On target to submit paperwork for closure to meet June 30 date (no float).*" CP 1944 (emphasis added). Nowhere in this report did Tamosaitis suggest to his company president that he had an environmental or nuclear safety concern, or that M3 should not close.

and five individual defendants, alleging civil conspiracy and tortious interference with a business expectancy. CP 1-34. Months later, Tamosaitis voluntarily dropped BNI from his ERA whistleblower action, and also voluntarily dismissed his civil conspiracy claim against the URS and BNI defendants in this action. App. Br. 7; CP 1601, 1522-24.

The Hon. Craig J. Matheson granted summary judgment dismissing Tamosaitis's remaining tortious interference claim against the BNI defendants on January 9, 2012. CP 2503-04. After summary judgment had already been entered, Tamosaitis attempted to supplement the record, and then moved for reconsideration. CP 2508-69.[24] The trial court made no mention of Tamosaitis's untimely submissions in denying reconsideration. CP 2576-77.

IV. ARGUMENT

A. An Appellate Court Considers Only the Evidence Before the Trial Court on Summary Judgment, and May Affirm on Any Basis Supported by the Record.

In conducting its *de novo* review of the trial court's entry of summary judgment, this Court may affirm "on any basis supported by the record." *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005).

[24] The numbering of the Clerk's Papers reflects the sequence of filing. The fact that Tamosaitis's supplemental materials were filed after entry of summary judgment is further confirmed by the Superior Court docket, as well as by the absence of those materials from the list of what was considered in the trial court's summary judgment order. CP 2503-04; CR 56(h).

An appellant's failure to identify evidence sufficient to raise a genuine issue as to *any* material fact entitles respondent to judgment as a matter of law. CR 56(c); *Gosset v. Farmers Ins. Co.*, 133 Wn.2d 954, 973, 948 P.2d 1264 (1997). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who 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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In undertaking its review, the appellate court considers only those facts in the record before the trial court when it granted summary judgment. RAP 9.12; *see also Wagner Dev. Inc. v. Fid. & Deposit Co. of Md.*, 95 Wn. App. 896, 898 n.1, 906, 977 P.2d 639 (1999), *rev. denied*, 139 Wn.2d 1005 (1999) (where evidence available at time of the motion for summary judgment was first presented in a motion for reconsideration, trial court did not abuse its discretion in rejecting the motion for reconsideration, and appellate court properly considered only those facts considered by the trial court in entering summary judgment).

B. The Legal Requirements of a Tortious Interference Claim.

As a threshold requirement, a tortious interference claim can be maintained only against an "outside intermeddler," that is, a *third party* to

the business relationship at issue. *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 598, 611 P.2d 737 (1980); *Houser v. City of Redmond*, 91 Wn.2d 36, 39, 586 P.2d 482 (1978); *Calbom v. Knudtzon*, 65 Wn.2d 157, 162, 396 P.2d 148 (1964).

In addition, the party asserting the claim must establish *each* of five separate elements:

(1) A valid contractual relationship or business expectancy;

(2) That defendants had knowledge of that relationship or expectancy;

(3) An intentional interference inducing or causing a breach or termination of the relationship or expectancy;

(4) That defendants interfered for an improper purpose or used improper means; and

(5) Resultant damages.

See Commodore v. Univ. Mechanical Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (1992). If a plaintiff is unable to prove *any one* of the above elements, his or her claim must fail. *Id.* (all five elements are "necessary to make a claim").

In this case, the trial court's entry of summary judgment was supported by an avalanche of undisputed evidence—much of it consisting of Walter Tamosaitis's own sworn admissions—that simply cannot be reconciled with the legal requirements of a tortious interference claim.

C. The Trial Court's Ruling Should Be Affirmed for the Threshold Reason that BNI Cannot Be a "Third-Party Intermeddler" as to Any Claimed Expectancy in a Senior WTP Management Position.

Tamosaitis's claim is expressly premised on the notion that BNI "interfered" with his alleged "expectancy" to remain *at WTP*. *See, e.g.*, App. Br. 33 ("Dr. Tamosaitis Had a Valid Business Expectancy of Continued Assignment to the WTP"). As the WTP prime contractor, however, BNI is vested with sweeping management authority over all aspects of the day-to-day operation of the Project, including personnel matters, and thus cannot be a "third-party intermeddler" as to the staffing of any WTP senior management position. Tamosaitis's inability to satisfy this threshold legal requirement of a tortious interference claim mandates affirmance of the trial court's ruling. *Olympic Fish Prods.*, 93 Wn.2d. at 598 (action for tortious interference "lies only against a third party").

The evidentiary record uniformly supports the conclusion that BNI cannot be a third party to any WTP expectancy claimed by Tamosaitis. BNI's WTP management powers are spelled out in its prime contract with DOE, which expressly authorizes BNI to "provide the *personnel*, materials, supplies, and services . . . and otherwise do all things necessary and incident to designing, constructing, and commissioning" the Project. CP 1724 (emphasis added). In addition, BNI's subcontract with URS

vests in BNI "general supervision, direction, control, and approval" powers over the entire "extent and character of the work to be done" by URS, and also gives BNI the right to require removal from the Project of any URS personnel deemed "objectionable." CP 1735, 1734.

Tamosaitis has acknowledged that BNI is "the design agent and the design authority for the project and the prime contractor. So in essence, *they decide what needs to be done and how it will be done*." CP 1652 (emphasis added). Tamosaitis has in fact specifically admitted that BNI controls WTP staffing decisions: "[C]ertainly at the management level, they *control* it." *Id.* (emphasis added). When asked point-blank whether it was fair to say that URS could not assign him to a WTP management position without first gaining the prime contractor's consent, Tamosaitis's testimony was unequivocal: "Yes, sir. *I would say at my level, that BNI would have to agree*." *Id.* (emphasis added).[25]

To be liable for tortious interference with business relations, "one must be a stranger to the business relationship giving rise to" the claim.

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[25] In addition, it is undisputed that BNI's Russo exercised his management authority over WTP personnel matters on July 1, 2010 by directing URS to remove Tamosaitis from the Project payroll and complete his transfer to his next URS assignment out of URS's Richland office, and that URS complied with that directive. *See, e.g.*, App. Br. 37. Tamosaitis's unsupported statement that "BNI . . . had no authority to remove him from the WTP," *id.*, is directly contradicted by a huge body of uncontested evidence.

44 B Am. Jur. 2d Interference § 7.[26] Tamosaitis's own admissions demonstrate that BNI is anything but a "stranger" to WTP staffing decisions. Instead, BNI obviously has a "legitimate interest" in the makeup of the senior management team on the $12 billion-plus project it manages for the DOE. *See id.* Similarly, a party such as BNI who is hired "to *administer*, *operate*, or promote the event that forms the basis for the business relationship" in question "is no stranger to that relationship and cannot be held liable for interfering therewith." *Id.* (emphasis added). Any other conclusion simply defies logic. This Court should affirm on this basis alone.[27]

Instead of identifying any facts that could conceivably support a characterization of BNI as a "third-party intermeddler," Tamosaitis suggests that BNI's contractual authority over the Project is somehow inconsistent with its assertion, made in Tamosaitis's separate DOL case,

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[26] The Washington Supreme Court has recognized American Jurisprudence as an authority on tortious interference claims. *Calbom*, 65 Wn.2d at 161, 163.

[27] Courts in other jurisdictions agree. *See, e.g.*, *Adidas Am., Inc. v. Herbalife, Inc.*, 2011 U.S. Dist. LEXIS 85677, at *10-11 (D. Or. Aug. 1, 2011) ("Under Oregon law, [t]he tort . . . protects the interests of a plaintiff from intermeddling strangers. . . . Where a defendant has a legitimate interest in either the contract or a party to the contract, the defendant is not a stranger to the contract itself or to the business relationship.") (internal quotations and citations omitted); *Lee v. Caterpillar Inc.*, 2011 U.S. Dist. LEXIS 144959, at *18 (N.D. Ga. Dec. 2, 2011) (holding that "a business is not a stranger" with respect to "the contractor employees who provide the contracted services to the business"); *see also Armer v. OpenMarket, Inc.*, 2009 U.S. Dist. LEXIS 72434 (W.D. Wash. July 27, 2009) (Washington tortious interference claim depends on whether defendant is a "stranger" to contractual relationship under *Houser*, 91 Wn.2d at 39).

that it is not Tamosaitis's "co-employer." App. Br. 6-7. The "third-party intermeddler" standard applicable to this tortious interference claim is, however, entirely distinct from the "co-employer" standard applicable to a claim brought under the whistleblower protection provisions of the ERA. The former concerns Tamosaitis's WTP *assignment*; the latter concerns his URS *employment*.[28] Nor is there any inconsistency in BNI's positions on these separate issues. Neither BNI nor the WTP Project have ever paid Tamosaitis, maintained his employment records, provided him with annual performance reviews, or otherwise acted as an employer towards him. CP 1950; App. Br. 41. Indeed, Tamosaitis concedes that BNI and URS maintain separate HR departments at WTP. App. Br. 8. Accordingly, while BNI cannot be a third party as to Tamosaitis's alleged expectancy in a WTP position, it has always been a third party with respect to his separate and distinct employment relationship with URS.[29]

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[28] As the DOL's Administrative Review Board has held, "controlling the quality of a contractor's employee's work performance under the contract is not tantamount to having 'the ability to hire, transfer, promote, reprimand, or discharge' that employee, as our case law requires." *Fullington v. AVSEC Services, LLC*, ARB No. 04-019, ALJ No. 2003-AIR-30, at 7 (ARB Oct. 26, 2005). Indeed, the *Stephenson* case cited by Tamosaitis, App. Br. 3 n.6, requires that the putative co-employer "establish[], modify[], or otherwise interfer[e] with . . . the employee's compensation, terms, conditions or privileges of employment." *Stephenson v. National Aeronautics and Space Admin.*, ARB No. 98-025, ALJ No. 94-TSC-5, at 11 (ARB July 18, 2000). BNI correctly pointed out in Tamosaitis's ERA case that it has done none of those things.

[29] Tamosaitis further conflates those separate relationships by quoting from BNI's answer in the DOL action and highlighting the phrase "BNI did not and does not have the authority to fire Tamosaitis," App. Br. 6, while neglecting to

D. The Trial Court's Ruling Should Be Affirmed for the Additional Reason that Tamosaitis Cannot Satisfy Four of the Required Elements of a Tortious Interference Claim.

Even if Tamosaitis's claim against BNI were not barred by his inability to meet the threshold requirement that the defendant be a "third-party intermeddler," that claim would still fail because, on these admitted facts, he cannot satisfy four of the five required elements of the tort.

1. At the time of his departure from WTP, Tamosaitis had no valid expectancy in a future WTP position.

A plaintiff asserting a tortious interference claim must demonstrate the existence of a valid contractual relationship or business expectancy. *Commodore*, 120 Wn.2d at 137. Tamosaitis concedes that he was not a party to a contract. CP 1671. Nor can he demonstrate the existence of a legitimate "business expectancy."

a. Tamosaitis's only true expectancy was the certain knowledge that his WTP position was ending.

Tamosaitis was aware of the likely date of his departure from his WTP position for at least a year before it occurred. For example, in May 2009 he communicated to his direct superior, Richard Edwards, his understanding that the work of his R&T group was winding down "over the next year +/-." CP 1784. As the June 30, 2010 target date for M3

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highlight the remainder of that sentence "—indeed, he continues to be employed by URS to this day." As BNI has consistently stated, BNI has no authority to fire Tamosaitis *from his URS employment relationship*; however, BNI *does* have authority over the staffing of WTP senior management positions.

closure approached, Tamosaitis emailed a senior URS manager at a different project, Duane Schmoker, regarding his interest in a new assignment at Schmoker's project, and stated that he would be available to transfer off WTP "at the end of June." CP 1787. In his deposition, Tamosaitis acknowledged that he chose June 30, 2010 because M3 was targeted to close on that date. CP 1671.

Tamosaitis's self-serving claim that URS guaranteed him a position at WTP "until he 'retired or died,'" App. Br. at 10, is rendered nonsensical by his own documented understanding that he was leaving WTP in mid-2010, as well as by his intensive job search undertaken as a result of that understanding. CP 1784, 1787-98. Moreover, Tamosaitis's deposition testimony acknowledging that he received "no guarantee" concerning the length of his WTP assignment, CP 2502, flatly contradicts his current claim of lifetime tenure,[30] as does an April 11, 2006 letter he received from URS HR director David Hollan that expressly disclaims any guaranteed tenure. Tamosaitis *countersigned* this letter. CP 1948.[31]

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[30] Tamosaitis's attempt to "undo" his own deposition admissions should be disregarded by the Court pursuant to *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 782 P.2d 1107 (1989): "When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." 56 Wn. App. at 185 (alteration in original).

[31] Tamosaitis has further admitted that he had "no discussions with anybody at BNI" regarding "how long the manager of R&T position would last." CP 2502. Now, however, he simply ignores his testimonial admissions and urges this Court

b. Tamosaitis pursued numerous potential assignments on various projects in which URS was involved, and admittedly had no idea where he would end up after June 30, 2010.

Tamosaitis never harbored anything even remotely resembling a reasonable expectancy in a specific future position. In fact, as June 2010 progressed, his job search encompassed *additional* potential assignments, not just at WTP but at a variety of projects in which URS was involved. Thus, while his June 3, 2010 "Jobs for Walt" email referenced six potential new assignments, the updated "Jobs for Walt" email he circulated on June 16, 2010 had been "expanded" in light of "other discussions" to list *eleven* possible "jobs for me I suggested to Bill [Gay]." CP 1789-90, 1797-98. Meanwhile, as Tamosaitis's personal wish list continued to grow, his employer, URS, was engaged in a parallel effort to place him at URS's Sellafield, England project. CP 1832-36. No wonder Tamosaitis admitted that he "did not have any specific knowledge" of where he was "going to end up as of June 30, 2010." CP 1671.

Nor did Tamosaitis's "Jobs for Walt" search ever focus on a single, specific WTP position. Instead, when asked in his deposition to name the

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to read unreasonable significance into an offhand comment made by Russo in an email sent to a senior DOE official two weeks after the lengthy accommodation period ended and Tamosaitis departed from the Project: "[Tamosaitis] is very annoyed because he intended to retire off the Project." App. Br. 24. The very next sentence, however, makes it clear that Russo's email lends no support to Tamosaitis's case: "That was never an option." CP 2201.

WTP opportunity with which BNI allegedly interfered, he named *two* separate positions, PE&T Director (Edwards' former position) and Chief Engineer, and then admitted that he had only preliminary discussions with Gay—and no discussions at all with BNI—regarding those two positions. CP 1672-74. The bottom line, he conceded, is he had "no certain expectation," because he was "looking at other alternatives." CP 1673. In sum, to the extent he harbored hopes to be assigned to a future WTP position, those hopes were not based on a "reasonable expectation" but on legally insufficient "wishful thinking." *Sea-Pac Co. v. United Food & Comm. Workers Union*, 103 Wn.2d 800, 805, 699 P.2d 217 (1985).

Tamosaitis now attempts to sidestep his testimonial admissions by arguing that he had an "expectancy" in a *different* WTP position. Specifically, Tamosaitis seizes on a draft organizational announcement prepared in connection with a plan to place him in a post-June 30 temporary position in the WTP Operations department while waiting for the Sellafield position to open up, CP 1841-42, and argues that because the word "temporary" is not on that document, the position in question must have been a permanent one. App. Br. 34.[32] Notably, Tamosaitis neglects

[32] While some lower-level members of the R&T group did move into the Operations group after June 30, 2010 to complete follow-on work, WTP Operations Manager Dennis Hayes did not have the budget or the work scope for anything other than a very short-term position for someone of Tamosaitis's seniority and pay grade. CP 1847-48. Tamosaitis's June 23, 2010 email to one

to mention the *other* draft organizational announcement stating that he would soon be leaving for the Sellafield assignment. CP 1838-39.[33] More fundamentally, his newfound claim to have had an expectation of a permanent position in the Operations department is utterly at odds with, first, his failure to identify that alleged opportunity during his deposition, and second, his identification of *two completely different alleged expectancies* in the course of that same deposition. How could Tamosaitis have expected to take over Edwards' job, the WTP chief engineer job, and a position in the Operations department all at once?

Faced with such a moving target, this Court should disregard the entirety of Tamosaitis's after-the-fact "wishful thinking" regarding supposed WTP "expectancies" and instead take at face value his sworn admission that in June 2010 he had "no specific knowledge" of where he

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of his R&T subordinates made it clear that he understood these limitations. CP 1851-52.

[33] In addition, Tamosaitis's assertion that Ashley "approved" the draft organizational announcement concerning the temporary placement in the Operations department (App. Br. 34) proves too much. How could Ashley (or, for that matter, Russo or BNI itself) be a "third-party intermeddler" who was a "stranger" to this alleged "business expectancy," if he was involved in the preparation and approval of the announcement of it? The same can be said of Tamosaitis's further alternative argument that Russo blocked his return to the Project after his July 2, 2010 departure. App. Br. 37. If Russo had the power to decide whether Tamosaitis could return to the Project, he was hardly a stranger to whatever senior management position Tamosaitis wished to assume. Tamosaitis's "return" allegations, like his pre-July 2, 2010 allegations, also fail to identify any specific, well-defined opportunity for additional pecuniary gain—let alone any breach or termination of Tamosaitis's employment relationship with URS, or any showing of economic loss. *See* Subsections D.1.c, D.3, and D.4, *infra*.

was "going to end up." Tamosaitis is entitled only to the *reasonable* inferences that may be drawn from the evidence, not "[u]nreasonable inferences that would contradict those raised by evidence of undisputed accuracy." *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 226, 242 P.3d 1 (2010), *rev. denied*, 171 Wn.2d 1014 (2011) (affirming summary judgment dismissing tortious interference claim) (internal quotations omitted).

c. There is no evidence that any future assignment on which Tamosaitis purports to base his claim would have had additional pecuniary value.

Even if Tamosaitis were able to establish the existence of a single, specific, well-defined missed opportunity, he would still be unable to satisfy the "business expectancy" element of his claim. In order to be actionable, an alleged expectancy must be "of pecuniary value." *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002); *see also* Rest. (2d) Torts § 766B, cmt. c; *accord Kane v. City of Bainbridge Island*, 2011 U.S. Dist. LEXIS 138848, at *21 (W.D. Wash. Dec. 2, 2011). It is undisputed that Tamosaitis's employment with URS was never interrupted, and in fact continues uninterrupted to this day. CP 1657. Tamosaitis continues to receive his full compensation from URS, remains at the highest non-executive pay grade within the URS corporate system, and concedes that

he has no non-speculative basis to calculate any economic loss. CP 1663-64, 1683-84. He introduced no evidence that *any* of the potential future assignments he was pursuing in May/June 2010 would have earned him a single cent of additional compensation.

Tamosaitis instead equates his alleged lost "business expectancy" with his dissatisfaction with the specific assignments he has been given by URS since July 2, 2010: "[T]here is a lot more to job satisfaction than just pay. There's responsibility. There's challenge. There's development." CP 1672. Under Washington law, however, no cognizable claim exists for "wrongful transfer"—which is in essence what Tamosaitis is complaining about. *See White v. State*, 131 Wn.2d 1, 18-20, 929 P.2d 396 (1997) (declining to recognize a "cause of action in tort for wrongful transfer" because by "recognizing a cause of action for employer actions short of an actual discharge, the court would be opening a floodgate to frivolous litigation and substantially interfering with an employer's discretion to make personnel decisions"). Non-pecuniary concepts such as "job dissatisfaction" are likewise not compensable. *See, e.g., Eserhut v. Heister*, 62 Wn. App. 10, 14-16, 812 P.2d 902 (1991) ("*Eserhut II*") (holding that even facts amounting to workplace "social ostracism" that led to "subjective unhappiness" on the part of plaintiff did not give rise to a tortious interference claim).

d. Tamosaitis's inability to demonstrate the existence of a valid business expectancy does not depend on whether the alleged expectancy is "at will."

Tamosaitis devotes a substantial portion of his brief (*e.g.*, App. Br. 1-2, 5-6, 29-33) to the contention that a split of authority exists between divisions of the Court of Appeals as to whether a tortious interference claim may be based on an "at will" business expectancy. In fact, that issue has little or no relevance to this matter, for multiple reasons:

First, as discussed in Subsection IV.D.1, *supra*, Tamosaitis admittedly did not have *any* valid business expectancy in any particular WTP position, whether "at will" or otherwise. Second, BNI did not argue in its summary judgment motion, and does not now argue, that a tortious interference claim can never be based on an at-will expectancy. Instead, because BNI has the right to terminate its subcontract with URS at any time for any (or no) reason, CP 1738, BNI pointed out that Tamosaitis was, in effect, an "at will" employee of an "at will" subcontractor, and accordingly questioned whether he or any other URS employee could *ever* reasonably harbor a valid "expectancy" in a WTP assignment. *See* CP 1625.[34] Third, Tamosaitis's employment relationship with URS was

[34] In arguing the supposed centrality of the "at will" issue, Tamosaitis confuses the grounds for the trial court's entry of summary judgment with entirely different issues addressed by a FRCP 12(b) motion brought a year earlier, when the action was venued in federal court. *See, e.g.*, App. Br. 5-6. That Rule 12(b) motion was focused on the *bare pleadings*, and did not "challenge the actual

never breached or terminated. CP 1657. He therefore has no legally valid basis for a tortious interference claim directed to that employment relationship, irrespective of whether he is employed on at-will basis (*see* Subsection IV.D.3, *infra*).[35] Fourth, the "at will" issue is irrelevant to additional independent reasons Tamosaitis's claim is insufficient as a matter of law (*e.g.*, BNI cannot be a third party to any WTP expectancy, Tamosaitis has suffered no economic loss, etc.). In short, the "at will" issue is a red herring, the resolution of which would result in an advisory opinion that would provide no basis to reverse the trial court's ruling.

2. BNI was not aware of Tamosaitis's interest in either of the two WTP positions on which he testified his claim is based.

Tamosaitis cannot show that BNI—the alleged "interferor"—had knowledge, at the time of the interfering conduct, of either of the two

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existence of a meritorious claim" after discovery established the absence of genuine issues of material fact. Wright & Miller, Fed. Pract. & Proc. § 2713.

[35] By contrast, in each of the cases cited by Tamosaitis regarding the "at will" issue, the alleged interference resulted in *termination* of the relationship in question. *See, e.g., Evergreen Moneysource Mortgage Co. v. Shannon*, 167 Wn. App. 242, 258, 274 P.3d 375 (2012) (employees terminated their relationship with one mortgage company and moved to work with another); *Island Air, Inc. v. La Bar*, 18 Wn. App. 129, 131, 566 P.2d 972 (1977) (contract for delivery of parcels terminated); *Calbom*, 65 Wn.2d at 161, (attorney-client relationship terminated); *Cherberg v. Peoples Nat'l Bank of Washington*, 88 Wn.2d 595, 598, 564 P.2d 1137 (1977) (lessor terminated lease and lessee subjected to constructive eviction); *Commodore*, 120 Wn.2d at 124 (employee dismissed); *Eserhut v. Heister*, 52 Wn. App. 515, 517, 762 P.2d 6 (1988)" ("*Eserhut I*") (employment relationship terminated); *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 319-20, 692 P.2d 903 (1984) (contractor discharged). This appeal is therefore not an appropriate case to address the alleged conflict in appellate authority asserted by Tamosaitis.

alleged business expectancies he named in his deposition. He concedes that he never spoke to anyone at BNI about either of those two positions—PE&T Director and WTP Chief Engineer. CP 1672-74. He further concedes that BNI approval would have been necessary for him to be moved into either of those positions. CP 1652. Tamosaitis's failure to come forward with any evidence that BNI knew of his interest in either of those positions provides yet another separate and independent ground for affirmance of the trial court's ruling. *Fisher v. Parkview Properties, Inc.*, 71 Wn. App. 468, 480, 859 P.2d 77 (1993).

3. Tamosaitis's separate employment relationship with URS was not breached or terminated, and thus cannot be the basis for a tortious interference claim.

Any attempt by Tamosaitis to skirt the multiple fatal flaws in his claim of an alleged WTP "expectancy" by making the alternative argument that BNI somehow interfered with his separate employment relationship with URS would be equally futile. In order to support a tortious interference claim, the employment relationship in question must have been breached or terminated. *Commodore*, 120 Wn.2d at 137 (plaintiff must show intentional interference "inducing or causing a breach or termination of the relationship or expectancy"); *Steele v. Johnson*, 76 Wn.2d 750, 753, 458 P.2d 889 (1969) (whether tortious interference occurred "depends upon the answer to the question of whether defendants

breached a duty to plaintiff"). Tamosaitis admits that there has been no interruption in his employment with URS. He has "continuously been a URS employee" since he left WTP on July 2, 2010, and has "continued to receive [his] URS salary" right up to today. CP 1657.[36]

In fact, Tamosaitis's very next URS assignment after leaving WTP was a position he had enthusiastically *sought* in the course of his intensive job search over the prior months. His May 27, 2010 email to Schmoker (marked "Importance: High") spoke of a "Special Assignment" in which he professed to be "***really*** interested." CP 1787 (emphasis in original). After stating that Gay "agreed that I could be made available at the end of June," Tamosaitis made the pitch to Schmoker that "I bring a lot to the table to help you," and indicated his interest "in learning more about the business and the marketing side of our Company." *Id.* Immediately following his transfer off WTP, Tamosaitis *was* assigned by URS to Schmoker's "skunk works" (a group supporting URS's work at the "Tank Farm"). Tamosaitis conceded this was the assignment he had pursued with Schmoker:

> Q: But my point is that the—that type of work is something that you had solicited in an email, Mr. Schmoker to be involved in, back in May 2010, correct?

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[36] Tamosaitis's conclusory statement that BNI "caused a breach" in his "employment relationship with URS" (App. Br. 37) is unsupported by any evidence.

A: Yes.

Q: And then that's where you ended up actually as of July 13, 2010, correct?

A: Correct.

CP 1659. Tamosaitis further conceded that this was a "genuine program," CP 1660, and that he was treated cordially by Schmoker and indeed by all of his URS co-workers while assigned to it. CP 1657-58.

In light of these admissions, no reasonable juror could find that Tamosaitis's employment with URS was breached or terminated.[37]

4. Tamosaitis has suffered no economic damages.

a. A plaintiff asserting a tortious interference claim must demonstrate economic loss.

In order to sustain a tortious interference claim, the plaintiff must demonstrate that he or she has suffered economic loss. *See Newton Ins.*, 114 Wn. App. at 158 (a business expectancy is something of "pecuniary

[37] The admitted absence of any breach or termination of Tamosaitis's URS employment distinguishes this case from *Awana v. Port of Seattle*, 121 Wn. App. 429, 89 P.3d 291 (2004), where a subcontractor ***fired*** its employees after they allegedly raised safety concerns. 121 Wn. App. at 431-32. The Court of Appeals affirmed the trial court's order of summary judgment dismissing wrongful discharge and breach of contract claims brought against the Port of Seattle, the prime contractor, by members of the subcontractor's work crew. In dictum, the Court noted that while no direct contract or whistleblower claim could be sustained against the Port, the workers "presumably have an action against the Port for tortious interference." *Id.* at 436. Here, Tamosaitis admits he was *not* fired, and his employment with URS continues to this day. Accordingly, the Court of Appeals' dictum in *Awana* is inapposite. Likewise, any attempt to invoke *Awana* in support of a tortious interference claim premised on an alleged WTP expectancy would be meritless: While in *Awana* the Port had "no contractual or other right to intervene" in the subcontractor's work crew assignments, *id.* at 435, BNI has authority to decide who fills senior management positions at WTP and thus cannot be considered an intermeddling third party.

value"); Rest. (2d) Torts § 766, cmt. t ("The cause of action is for pecuniary loss resulting from the interference"). The alleged improper interference "must 'in fact cause injury to the . . . contractual relationship,'" that is, the economic relationship interfered with. *Cornish*, 158 Wn. App. at 225 (quoting *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997)) (alteration by the court); *accord Schmerer v. Darcy*, 80 Wn. App. 499, 505, 910 P.2d 498 (1996) ("Intentional interference . . . requires . . . injury to the person's contractual or business relationships.").[38]

Tamosaitis's contrary argument, App. Br. 42-47, misconstrues Washington case law by purporting to rely on cases that uniformly *do* involve a threshold showing of economic loss. For example, in *Cherberg v. Peoples Nat'l Bank of Washington*, 88 Wn.2d 595, 564 P.2d 1137 (1977), a lessee business owner sued its landlord for harm to its business, alleging the landlord wrongfully refused to repair the property, thereby forcing the temporary closure of the lessee's business. The plaintiff satisfied the pecuniary loss requirement of the tort by introducing evidence

[38] Courts in other jurisdictions are in accord. *See, e.g., All Star, Inc. v. Fellows*, 297 Ga. App. 142, 142, 676 S.E.2d 808 (2009) ("[t]o support a verdict for tortious interference with business relations the evidence must show . . . plaintiff suffered some financial injury"); *Tech Plus v. Ansel*, 59 Mass. App. Ct. 12, 18-19, 793 N.E.2d 1256 (2003), *rev. denied*, 440 Mass. 1108 (2003) (emotional distress and harm to reputation insufficient to state claim for intentional interference because "actual pecuniary loss" is "essential element" of the claim).

of "business disruption" damages of $3,100. 88 Wn.2d at 600. The Court separately addressed the appropriateness of the jury's overall verdict of $42,000 to determine whether it was justified in light of *additional* evidence regarding the mental distress, inconvenience and discomfort suffered by the plaintiffs. *Id.* at 606-07.

The Court's reasoning in *Cherberg* is in keeping with the Restatement, which emphasizes that while "[r]ecovery may be had ***also*** for consequential harms for which the interference was a legal cause," the cause of action "is for pecuniary loss resulting from the interference." Rest. (2d) Torts § 766, cmt. t (emphasis added). Nothing in the *Cherberg* Court's opinion negates the well-established necessity of showing concrete pecuniary loss arising from harm to the underlying economic relationship in order to satisfy the elements of the tort.[39]

Similarly, in *Island Air, Inc. v. La Bar*, 18 Wn. App. 129, 145, 566 P.3d 972 (1977) (cited by Tamosaitis at App. Br. 42), the Court of Appeals addressed the question of whether the *amount* of damages awarded for tortious interference was "adequate." The court found "no

[39] Tamosaitis also cites to *White River Estates v. Hiltbruner*, 134 Wn.2d 761, 953 P.2d 796 (1998). That case did not address damages recoverable on a tortious interference claim but rather the availability of emotional distress damages under the Mobile Home Landlord-Tenant Act, RCW 50.20.073. 134 Wn.2d at 763. Moreover, as in *Cherberg*, the plaintiff in *White River Estates* demonstrated tangible economic loss—resulting in a "compensatory damages" award of $17,800—in addition to her emotional distress claim. *Id.* at 765.

basis for overturning the assessment of damages"—$18,000 in yearly profits—and held that there had not been "any loss to the plaintiff from mental anguish, discomfort, inconvenience, injury to reputation or humiliation." *Id.* Neither *Island Air* nor any other case cited by Tamosaitis suggests that non-pecuniary harm can satisfy the "resultant damages" requirement of a tortious interference claim.[40]

b. Tamosaitis has admitted under oath that he has suffered no economic loss.

Tamosaitis admits that he has "continued to receive [his] URS salary," and remains at the highest non-executive pay grade within the URS system, earning a base salary of $228,800. CP 1657, 1663-64. His total annual compensation, including his bonus and Savannah River retirement benefits, is about $375,000, not including additional compensation in the form of his employee benefits package. CP 1663-64. He received a merit pay raise in 2011 of the same percentage he received

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[40] Tamosaitis claims that the Court in *Seidell v. Taylor*, 86 Wash. 645, 151 P. 41 (1915) "affirmed a judgment for loss of goodwill without any 'tangible damages.'" App. Br. 45. In reality, the phrase "tangible damages" appears nowhere in the *Seidell* decision, and the damage award in that case was supported by "abundant[]" evidence of pecuniary harm to the business relationship interfered with: plaintiffs suffered a loss of "good will . . . of very substantial value," and "the evidence showed the manner of carrying on the business, its receipts, expenses, and profits for some time . . . in considerable detail." 86 Wash. at 648. Nothing in *Seidell* relieves Tamosaitis of the obligation to show pecuniary harm resulting from the alleged interference in order to maintain his claim. Tamosaitis also cites to *Sunland Invest., Inc. v. Graham*, 54 Wn. App. 361, 773 P.2d 873 (1989), and *Calbom*, 65 Wn.2d 157. In both of those cases, however, the damages awarded to the plaintiff went to *the lost value of the actual business expectancy that was interfered with.* 54 Wn. App. at 364; 65 Wn.2d at 166-67.

in 2009 and 2010. CP 1689. *He has conceded that any claim of economic damages would be speculative.* CP 1683-84.

Tamosaitis attempts to deflect attention from his failure to produce evidence of economic damages by citing a number of cases for unremarkable principles that are irrelevant to his claim. For example, he cites to *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993) for the proposition that damage to reputation may be pecuniary in nature. He also cites *Taskett v. King Broad. Co.*, 86 Wn.2d 439, 480, 546 P.2d 81 (1976) for the same concept, but quotes only from Justice Horowitz's dissenting opinion in that libel case. He cites *In re Fleege*, 91 Wn.2d 324, 326, 588 P.2d 1136 (1979), for the equally uncontested proposition that business goodwill may have "real pecuniary value." These authorities do not excuse Tamosaitis's inability to introduce *any evidence* of actual pecuniary loss associated with goodwill, his professional reputation, or anything else. He instead has offered only broad, conclusory statements that were indistinguishable from the bare allegations of his complaint.[41] In his briefing to this Court, Tamosaitis continues to substitute meaningless, conclusory statements,

[41] Examples of the empty statements that masqueraded as evidence of damages in Tamosaitis's Response to BNI's Motion for Summary Judgment included that he has lost "career advancement opportunities" (CP 1954), "future consulting opportunities" (*id.*), "income" (CP 1983), and "professional opportunities" (CP 1984). None of those conclusory allegations was supported by a shred of evidence.

such as that his "career is damaged" (App. Br. 46), for actual evidence. Such empty allegations will not suffice to avoid summary judgment. *Brown v. Park Place Homes Realty, Inc.*, 48 Wn. App. 554, 558-60, 739 P.2d 1188 (1987) (affirming entry of summary judgment dismissing wrongful interference claim where plaintiff made "only broad, conclusory statements concerning the damages he suffered," and therefore "failed to raise any factual issues regarding damage").

c. *The trial court properly disregarded the additional "evidence" submitted by Tamosaitis after summary judgment was entered.*

After summary judgment had been entered on January 9, 2012, Tamosaitis attempted to remedy his wholesale failure to offer evidence of economic damages by submitting a supplemental brief and declaration. CP 2508-20. Tamosaitis had ample opportunity to submit those materials within the time frame established by Civil Rule 56. In fact, he had been aware of the alleged "damages" information contained in his supplemental declaration since July 2010—*nearly eighteen months prior to the due date for his response to the summary judgment motion.* He offered no excuse for his failure to submit the materials in a timely fashion.[42]

[42] "The realization that [the] first declaration was insufficient does not qualify the second declaration as newly discovered evidence." *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 91, 60 P.3d 1245 (2003); *see also Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010) (affirming denial of reconsideration of

In denying Tamosaitis's motion for reconsideration, the trial court disregarded his after-the-fact attempt to supplement the record. CP 2576-77. This was an appropriate exercise of the trial court's discretion. In *Brown*, the plaintiff filed a supplemental affidavit following the summary judgment hearing in an attempt to remedy its "broad, conclusory statements" regarding damages and thereby create a genuine issue of material fact on that element of a tortious interference claim. 48 Wn. App. at 558. The Court of Appeals affirmed the trial court's refusal to consider the untimely affidavit, noting that (as in the instant case) the plaintiff had "no excuse for failing to address the issues in prior materials submitted to the court," *id.* at 560, and holding that "whether to accept or reject untimely filed affidavits lies within the trial court's discretion." *Id.* at 559.

This Court should likewise disregard the late-filed materials. Where evidence available at the time of a motion for summary judgment is first presented *after* entry of summary judgment, a trial court does not abuse its discretion in rejecting a subsequent motion for reconsideration; the appellate court will consider only those facts considered by the trial court when it entered summary judgment, and will disregard

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summary judgment where declaration "could have been presented at the time the trial court was considering the original summary judgment motion").

"supplemental" materials. *Wagner Dev. Inc.*, 95 Wn. App. at 898 n.1; RAP 9.12.[43]

Even if Tamosaitis's untimely materials were considered, however, they would not create an issue of material fact on the pecuniary damages element of his tortious interference claim. Tamosaitis's assertion that URS failed to return to him $2,000 worth of textbooks kept in his WTP office does not state pecuniary loss in connection with an alleged lost business expectancy. To support a tortious interference claim, the alleged interference "must 'in fact cause injury to the . . . contractual relationship.'" *Cornish*, 158 Wn. App. at 225 (quoting *Leingang*, 131 Wn.2d at 157). Instead, Tamosaitis appears to allege a conversion of personal property on the part of his employer, URS. His late-filed materials are therefore irrelevant as well as untimely.

E. Ashley Took no Action that Could Be Construed as "Intentional Interference."

The trial court's ruling should be affirmed for an additional reason as to respondent Greg Ashley. Project Director Russo has testified that he alone made the decision to direct URS to remove Tamosaitis from the

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[43] In a footnote (App. Br. 43, n.10), Tamosaitis mentions an earlier case, *Bremmeyer v. Peter Kiewit Sons Co.*, 90 Wn.2d 787, 585 P.2d 1174 (1978). However, the *Bremmeyer* Court merely noted that certain materials were submitted after the trial court's preliminary oral ruling but *before* entry of the trial court's written order granting summary judgment. 90 Wn.2d at 789. The Court never addressed whether late-filed materials may be considered, *id.* at 790, which is the issue squarely addressed in *Brown* and *Wagner* and presented here.

WTP payroll on July 1, 2010. CP 1751. Tamosaitis has offered no evidence that Ashley participated in that decision.[44] Instead, Tamosaitis admits, his individual claim against Ashley is based solely on the fact that Ashley forwarded Tamosaitis's objectionable July 1 email to Russo with the cryptic cover message "trouble brewing" and "told Mr. Russo he would call him later to talk about it." CP 1679; *see also* App. Br. 38. That evidence is, as a matter of law, insufficient to support a tortious interference claim. Tamosaitis has offered no evidence whatsoever that Ashley made any suggestion regarding Tamosaitis's status at the Project, or that he did anything else that could conceivably be the basis for a separate claim against him.[45] Tamosaitis's speculation that Ashley somehow was part of the decision-making process cannot substitute for

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[44] Moreover, the "good faith" test set forth in *Olympic Fish Prods.*, cited by Tamosaitis at App. Br. 41, is entirely inapposite here. That case states a limited exception to the ordinary immunity of an officer for corporate acts, providing for individual liability if an officer fails to act in "good faith" in inducing his or her corporation to breach its own contract. Such an inducement to breach is not even an issue in this case. More importantly, Tamosaitis fails to mention the court's express definition of "good faith in this context" as meaning "nothing more than an intent to benefit the corporation." 93 Wn.2d at 739. Here, Tamosaitis does not dispute that Ashley and Russo were acting within the scope of their employment at all times—and in fact has affirmatively sought to hold BNI liable for their actions under the doctrine of *respondeat superior*. CP 33. Thus, even if the *Olympic Fish* "good faith" test had any relevance here, it is undisputed that Ashley and Russo meet the court's definition.

[45] Both Russo and Ashley were deposed, as well as many other witnesses. In addition, BNI electronically produced approximately 250,000 pages of documents. Nonetheless, Tamosaitis can point to no evidence that would justify a claim against Ashley as an individual defendant.

actual evidence.[46]

F. Having Voluntarily Dismissed BNI from his ERA Case, Tamosaitis Should Not Complain that he Lacks an Adequate Remedy for his Whistleblower Allegations.

Tamosaitis exercised his right to bring a separate action against URS, DOE, and BNI pursuant to the whistleblower protection provisions of the ERA, but then *voluntarily* dismissed BNI from that action. App. Br. 7. In light of that, his current assertion that if the trial court's ruling is affirmed he will be left without a remedy for his "whistleblower" allegations, App. Br. 2-4, is nonsense. Tamosaitis should not be heard to complain about the unavailability of a remedy he elected not to pursue against BNI.

To the extent Tamosaitis argues that a plaintiff claiming retaliation for alleged whistleblowing should be allowed to bring a tortious interference claim, that right already exists under Washington law—so long as the plaintiff can satisfy the legal requirements of such a claim. In

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[46] In *Woody v. Stapp*, 146 Wn. App. 16, 189 P.3d 807 (2008), the plaintiff accused his coworkers of conspiring against him merely "because at times he saw one or more of them together, sometimes behind closed doors, or overheard them mention his complaint." 146 Wn. App. at 23. The Court of Appeals observed that "[n]o evidence shows Mr. Woody's former co-workers made any false statements for the purpose of causing him to be terminated," and held that summary judgment dismissing his claims was proper. *Id.* at 23-24. "Mere allegations, argumentative assertions, conclusory statements, and speculation do not raise issues of material fact that preclude a grant of summary judgment." *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011) (*citing Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

this case, however, there is no way to shoehorn Tamosaitis's allegations into the legal framework of a tortious interference claim. If Tamosaitis truly believes himself to be a whistleblower, he has an adequate remedy in the ERA whistleblower claim he initially brought before the U.S. Department of Labor and subsequently re-filed in federal court—after *voluntarily* dismissing BNI.[47]

V. CONCLUSION

Walter Tamosaitis's own documentary and testimonial admissions demonstrate conclusively that he cannot maintain a tortious interference claim against BNI. The admitted facts simply do not fit the legal requirements of such a claim. The trial court's ruling should accordingly be affirmed on any or all of the grounds set forth herein.

DATED this 15th day of August, 2012.

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Attorneys for Respondents

[47] *Cf. Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn. 2d 168, 191, 125 P.3d 119 (2005) (holding that claimant's action under the ERA provided adequate protection for Washington public policy concerns, and declining to consider a common law whistleblower tort cause of action).

APPENDIX A

JOSIE DELVIN
BENTON COUNTY CLERK

JAN 09 2012

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF BENTON

WALTER L. TAMOSAITIS, PHD, an individual, and SANDRA B. TAMOSAITIS, representing the marital community, Plaintiffs, vs. BECHTEL NATIONAL, INC., a Nevada corporation; FRANK RUSSO, an individual; and GREGORY ASHLEY, an individual, Defendants.	Cause No. 10-2-02357-4 ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on Defendants' Motion for Summary Judgment. The Court having reviewed:

1. Defendants' Motion for Summary Judgment;
2. Declaration of Kevin C. Baumgardner and exhibits thereto;
3. Declaration of Frank Russo;
4. Plaintiffs' Opposition and declarations and exhibits submitted in conjunction with same;
5. Defendants' Reply and declarations and exhibits submitted in conjunction with same; and Plaintiffs' Supplemental Memorandum on Evidence at Summary Judgment;

0-000002503

and the files and records herein, and deeming itself fully advised; NOW THEREFORE IT IS ORDERED that Defendants' Motion for Summary Judgment is GRANTED, and Plaintiffs' claims against Bechtel National, Inc., Frank Russo, and Gregory Ashley are hereby dismissed in their entirety, with prejudice, and without costs to any party.

DATED this 9th day of January, 2012

Craig J. Matheson
Superior Court Judge

0-000002504

APPENDIX B

JOSIE DELVIN
BENTON COUNTY CLERK

FEB 29 2012

FILED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON AND FRANKLIN COUNTIES

WALTER L. TAMOSAITIS, PHD, and individual, and SANDRA B. TAMOSAITIS, representing the marital community, **Plaintiff,**	)	**CAUSE NO: 10-2-02357-4**
	)	**ORDER ON MOTION FOR RECONSIDERATION**
vs	)	
BECHTEL NATIONAL, INC., a Nevada Corporation, FRANK RUSSO, an indivisual, GREGORY ASHLEY, an individual **Defendant.**	)	

The Court, having considered the Motion for Reconsideration filed by the Plaintiff on the 23 day of February, 2012, and deeming itself fully advised in the premises:

DOES NOW THEREFORE, enter its Order on Reconsideration, as follows:

☒ Motion for Reconsideration is hereby:

Granted _____ Denied X Modified _____ (See Comments)

COMMENTS: _____

_____

_____

0-000002576

IT IS FURTHER ORDERED that the Court Administrator's Office shall forthwith send copies of this Order to the parties, or attorneys if represented, at their respective addresses of record.

DONE THIS 23 day of February, 2012

SUPERIOR COURT JUDGE

DECLARATION OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Respondents herein.

2. On August 15, 2012, I caused the foregoing Brief of Respondents to be filed with the court and served on the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☑ E-Mail
John P. Sheridan The Law Office of John P. Sheridan, P.S. Hoge Building, Suite 1200 705 Second Avenue Seattle, WA 98104	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☑ E-Mail
Howard M. Goodfriend Smith Goodfriend, PS 1109 First Avenue, Suite 500 Seattle, WA 98101	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☑ E-Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of August, 2012, at Seattle, Washington.

Mary Beth Dahl

Mary Beth Dahl

No. 87269-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WALTER L. TAMOSAITIS and SANDRA B. TAMOSAITIS, a marital community,

Plaintiffs/Appellants,

v.

BECHTEL NATIONAL, INC., FRANK RUSSO, and GREGORY ASHLEY,

Defendants/Respondents

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Craig J. Matheson)

Case No. 10-2-02357-4

RESPONDENTS' APPENDIX OF NON-WASHINGTON AUTHORITIES

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Respondents hereby submit the following non-Washington authorities cited in the Brief of Respondents:

Cases

1. *Adidas Am., Inc. v. Herbalife, Inc.*, 2011 U.S. Dist. LEXIS 85677 (D. Or. Aug. 1, 2011).

2. *All Star, Inc. v. Fellows*, 297 Ga. App. 142, 676 S.E.2d 808 (2009).

3. *Armer v. OpenMarket, Inc.*, 2009 U.S. Dist. LEXIS 72434 (W.D. Wash. July 27, 2009).

4. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

5. *Fullington v. AVSEC Services, LLC*, ARB No. 04-019, ALJ No. 2003-AIR-30 (ARB Oct. 26, 2005).

6. *Kane v. City of Bainbridge Island*, 2011 U.S. Dist. LEXIS 138848 (W.D. Wash. Dec. 2, 2011).

7. *Lee v. Caterpillar Inc.*, 2011 U.S. Dist. LEXIS 144959 (N.D. Ga. Dec. 2, 2011).

8. *Stephenson v. National Aeronautics and Space Admin.*, ARB No. 98-025, ALJ No. 94-TSC-5 (ARB July 18, 2000).

9. *Tech Plus v. Ansel*, 59 Mass. App. Ct. 12, 793 N.E.2d 1256 (2003), *rev. denied*, 440 Mass. 1108 (2003).

Other Authorities

10. 44 B Am. Jur. 2d Interference § 7.

11. Rest. (2d) Torts § 766, cmt. t.

12. Rest. (2d) Torts § 766B, cmt. c.

13. Wright & Miller, Fed. Pract. & Proc. § 2713.

DATED this 15th day of August, 2012.

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LEXSEE

ADIDAS AMERICA, INC. and ADIDAS AG, Plaintiffs, v. HERBALIFE INTERNATIONAL, INC., Defendant.

No. CV 09-661-MO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, PORTLAND DIVISION

2011 U.S. Dist. LEXIS 85677

July 29, 2011, Decided
August 1, 2011, Filed

SUBSEQUENT HISTORY: Injunction denied by Adidas Am., Inc. v. Herbalife Int'l, Inc., 2012 U.S. Dist. LEXIS 69858 (D. Or., May 18, 2012)

PRIOR HISTORY: Adidas Am., Inc. v. Herbalife Int'l, Inc., 2010 U.S. Dist. LEXIS 82991 (D. Or., Aug. 10, 2010)

COUNSEL: [*1] For Adidas America, Inc., Adidas AG, Plaintiffs: Daniel H. Marti, LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Stockton, LLP, Washington, DC; R. Charles Henn, Jr., LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Townsend & Stockton, LLP, Atlanta, GA; Stephen M. Feldman, LEAD ATTORNEY, Perkins Coie, LLP, Portland, OR; William H. Brewster, LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Stockton, LLP, Atlanta, GA.

For Herbalife International, Inc., Defendant: Kenneth R. Davis, II, LEAD ATTORNEY, Lane Powell P.C., Portland, OR; Leila Nourani, Merl John Carson, LEAD ATTORNEYS, PRO HAC VICE, Foley & Lardner LLP, Los Angeles, CA; Jon Martin Wilson, PRO HAC VICE, Foley & Lardner, Tampa, FL; Parna A. Mehrbani, Lane Powell, PC, Portland, OR.

For Herbalife International, Inc., Counter Claimant: Kenneth R. Davis, II, LEAD ATTORNEY, Lane Powell P.C., Portland, OR; Leila Nourani, Merl John Carson, LEAD ATTORNEYS, Foley & Lardner LLP, Los Angeles, CA; James E. Griffith, PRO HAC VICE, Foley & Lardner LLP, Chicago, IL; Jon Martin Wilson, PRO HAC VICE, Foley & Lardner, Tampa, FL; Parna A. Mehrbani, Lane Powell, PC, Portland, OR.

For Adidas America, Inc., Adidas AG, Counter Defendants: Stephen M. Feldman, Perkins Coie, LLP, [*2] Portland, OR.

For Adidas America, Inc., Adidas AG, Counter Defendants: Daniel H. Marti, LEAD ATTORNEY, Kilpatrick Stockton, LLP, Washington, DC; R. Charles Henn, Jr., LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Townsend & Stockton, LLP, Atlanta, GA; William H. Brewster, LEAD ATTORNEY, PRO HAC VICE, Kilpatrick Stockton, LLP, Atlanta, GA.

JUDGES: MICHAEL W. MOSMAN, United States District Judge.

OPINION BY: MICHAEL W. MOSMAN

OPINION

OPINION AND ORDER

MOSMAN, J.,

Adidas seeks summary judgment on Herbalife's two remaining counterclaims. The first is for intentional interference with contractual relations, business relations, or prospective economic advantage ("intentional interference"). The second is for violations of unfair competition law ("unfair competition") arising under California Business and Professions Code § 17200 ("§ 17200").

I previously found that Herbalife breached the 1998 Settlement Agreement ("1998 Agreement" or "the agreement") by placing its name and Tri-Leaf design trademark ("Tri-Leaf Mark") on the Galaxy MLS ("Galaxy") team's jerseys. This finding prevents Herbalife from satisfying all the required elements of its intentional interference counterclaim. The unfair competition claim necessarily fails because [*3] it is derivative of the intentional interference counterclaim. I find that Adidas is entitled to judgment as a matter of law and grant its motion for summary judgment.

BACKGROUND

Adidas and Herbalife decided in the 1998 Agreement that Herbalife would not use its Tri-Leaf Mark on items Adidas considered its core goods, such as sports apparel and footwear. Tr. [224] 5-6. Since 2005, Adidas has been the sole provider of Major League Soccer, LLC ("MLS") team uniforms, footwear, and other items. Answer to Compl. [114] 13. MLS and its teams sell sponsorship rights for team uniforms, including sponsor logos on uniforms if the sponsor is not an Adidas competitor. *Id.*

In March 2007, Herbalife entered into one of these sponsorship agreements with the owner of the Galaxy, Anschutz Entertainment Group ("AEG"). *Id.* at 10. The agreement allows Herbalife to place the Tri-Leaf Mark and Herbalife name on the front of all Galaxy jerseys. *Id.*

Adidas knew of Herbalife's sponsorship agreement with the Galaxy. *Id.* It printed Herbalife's logo and name on the Galaxy jerseys from 2007-2010. *Id.* at 12. Beginning in December 2009, Adidas challenged Herbalife's use of the Tri-leaf mark on the Galaxy jerseys, ultimately [*4] filing an action for trademark infringement and other claims. *Id.* at 10.

Herbalife responded with four counterclaims on April 5, 2010. Answer to Compl. [114]. The first and fourth counterclaims have already been dismissed. Op. and Order [159]; Op. and Order [223]. The intentional interference counterclaim asserts that Adidas's refusal to include Herbalife's name and logo on the Galaxy jerseys improperly obstructs Herbalife's economic relationship with the Galaxy. Answer to Compl. [114] 11. The unfair competition counterclaim argues Adidas unfairly and unlawfully disrupts Herbalife's branding and marketing efforts. *Id.*

DISCUSSION

The central issue in these motions is whether Herbalife's intentional interference and unfair competition counterclaims show a genuine dispute as to any material fact. I find Herbalife fails to satisfy all the elements of intentional interference and unfair competition counterclaims.

I. Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Rule 56(c)(1) says that a party arguing a fact that "cannot [*5] be or is genuinely disputed" must support the assertion by citing to particular parts of materials in the record or showing the cited materials do not establish the absence or presence of a genuine dispute. Fed. R. Civ. P. 56(c)(1). The Court may grant summary judgment "if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(3). The U.S. Supreme Court has said Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who 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." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

II. Intentional Interference Counterclaim

A. *Herbalife's Name and Logo on the Galaxy Jerseys Breach the 1998 Agreement*

The main contention between Adidas and Herbalife is about what I said and meant on the question of breach at the September 14, 2010, and February 24, 2011, hearings. Herbalife argues "the Court never made any finding as to whether use of the Herbalife Tri-Leaf logo on the Galaxy jerseys [*6] with the word 'Herbalife' constituted a breach of the 1998 Settlement Agreement." Opp'n to Summ. J. [230] 1. Adidas argues I found the Herbalife logo on the Galaxy jersey breached the 1998 Agreement. Reply Mem. in Supp. of Summ. J. [232] 1. Adidas is correct. I found in the February 24, 2011, hearing that Herbalife's placement of its name and Tri-Leaf Mark on the Galaxy jerseys violates the terms of the parties' 1998 Agreement.

At the September 14, 2010, hearing, I said, "I believe that the better of the two arguments actually ends up being Adidas's argument, the only one that better gives effect to the entire contract and its obvious purpose." Tr. [168] 21. I also said to the parties: "I've essentially told you that I think Adidas is right, and that's how this is going to go unless Herbalife comes up with something in discovery." *Id.* at 27. Herbalife did not come up with something in discovery. After hearing argument on February 24, I granted Adidas's motion for partial summary judgment on the breach counterclaim. Tr. [224] 25.

The context of the two hearings shows I ruled specifically on the issue of whether the Galaxy jerseys with Herbalife's name and logo violated the 1998 Agreement. [*7] The original September 24, 2010, hearing also considered other Herbalife product lines like sports apparel and footwear for the public. Tr. [168] 5-6. Discovery on those items is being produced. *Id.* at 8. My language about determining the scope of breach refers to the broader question of whether other Herbalife apparel items violate the 1998 Agreement. Tr. [224] 25.

The specific question of whether the Galaxy jerseys breached the 1998 Agreement became settled when Herbalife failed to uncover additional information. *Id.* I found that Herbalife's name and logo on the Galaxy jerseys violates the 1998 Agreement with Adidas, in part because Herbalife agreed the jerseys constitute sports apparel. Tr. [168] 8-9.

B. *Herbalife Fails to Establish All the Elements of Intentional Interference*

I grant summary judgment on Herbalife's counterclaim for intentional interference with economic relations because it fails to satisfy all the elements required under Oregon law. Under Oregon law, a plaintiff must prove all the intentional interference counterclaim elements.[1] Herbalife fails to satisfy two elements: (1) "improper means or for an improper purpose"; and (2) "by a third party."

> 1 "(1) the existence [*8] of a professional or business relationship (which could include, *e.g.*, a contract or a prospective economic advantage), (2) intentional interference with that relationship, (3) by a third party, (4) accomplished through improper means or for an improper purpose, (5) a causal effect between the interference and damage to the economic relationship, and (6) damages." *McGanty v. Staudenraus*, 321 Ore. 532, 901 P.2d 841, 844 (Or. 1995) (citing *Straube v. Larson*, 287 Ore. 357, 600 P.2d 371 (Or. 1979)).

1. Improper Means or for an Improper Purpose

Oregon courts use the *Restatement (Second) of Torts* (1979) to evaluate claims for intentional interference with economic relations. *Douglas Med. Ctr., LLC v. Mercy Med. Ctr.*, 203 Ore. App. 619, 125 P.3d 1281, 1287 (Or. Ct. App. 2006). The *Restatement* requires defendants to engage in some inherently wrongful action to find the intentional interference was accomplished through improper means or for an improper purpose.[2] The Oregon Supreme Court held that defendants might satisfy the *Restatement* by showing defendant's conduct was "wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession." *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 283 Ore. 201, 582 P.2d 1365, 1371 (Or. 1978).[3]

> 2 "If [*9] the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper." *Restatement (Second) of Torts* § 766 cmt. j (1979).
>
> 3 Further, "[c]ommonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." *Top Serv.*, 582 P.2d at 1371 n. 11.

Even if Adidas intentionally interfered with Herbalife's sponsorship agreement, Adidas has not done so through improper means or for an improper purpose. My prior finding that Herbalife, not Adidas, breached the 1998 Agreement is dispositive on this issue. Adidas is not acting by wrongful means because it seeks to enforce its rights under the 1998 Agreement. Rather, Adidas endeavors to advance its legitimate interest in manufacturing products in accordance with its own contractual [*10] and intellectual property interests. Advancing one's legitimate interest is not wrongful by statute, common law, or an established standard of Adidas's profession. Herbalife fails to satisfy all the elements of its claim, so Adidas is entitled to summary judgment.

2. By a Third Party

Even if Herbalife had established wrongful conduct by Adidas, Herbalife also fails to establish that Adidas was truly a "third party." Under Oregon law, "[t]he tort of intentional interference with economic relations 'serves as a means of protecting contracting parties against interference in their contracts from outside parties.' . . . The tort thereby protects the interests of a plaintiff from 'intermeddling strangers.'" *Wieber v. FedEx Ground Package Sys., Inc.*, 231 Ore. App. 469, 220 P.3d 68, 77 (Or. Ct. App. 2009) (quoting *McGanty*, 901 P.2d at 845). Parties not specifically named in the contract do not necessarily become "intermeddling strangers." The Ninth Circuit found that a defendant is not a stranger to a contract if the contract requires the defendant's cooperation. *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.*, 271 F.3d 825, 834 (9th Cir. 2001).[4] Where a defendant "has a legitimate interest in either the [*11] contract or a party to the contract, the defendant is not a stranger

to the contract itself or to the business relationship." 44B *Am. Jur. 2d Interference* § 7.

> 4 The court in *Marin* was analyzing California law, but I find the analysis persuasive here.

Herbalife disputes this interpretation of "stranger," arguing a stranger is synonymous with a non-contracting party. Opp'n to Mot. for Summ. J., [230] 17. Herbalife cites *Applied Equipment Corporation v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (Cal. 1994), for the proposition that the "tort duty not to interfere with the contract falls only on strangers--interlopers who have no legitimate [social or economic] interest in the scope or course of the contract's performance." *Id.* at 459. Herbalife argues that one must be a party to a contract to have a "legitimate interest" in a contract. I reject Herbalife's argument.

Adidas has a legitimate interest in Herbalife's contract with AEG. First, as the sole manufacturer of all MLS team jerseys including the Galaxy, Adidas's cooperation with the Galaxy and Herbalife is essential for Herbalife's sponsorship agreement. Answer to Compl. [114] 13. Adidas must manufacture the jerseys for performance of Herbalife's [*12] contract with AEG. Adidas demonstrated its clear involvement in and prior cooperation with the contract when it printed Herbalife's logo and name on the Galaxy jerseys from 2007-2010. *Id* at 12.

Second, even if Adidas were not the sole manufacturer of MLS jerseys, its 1998 Agreement with Herbalife creates a legitimate interest in Herbalife's use of the Tri-Leaf Mark. Adidas and Herbalife agreed Herbalife would not use its Tri-Leaf Mark on sports apparel that competes with core Adidas goods. Tr. [224] 5-6. This prior agreement alone gives Adidas justification to be legitimately interested in Herbalife's use of its logo. Adidas possesses both an "economic" and "social" interest in the scope and performance of Herbalife's contract, eliminating the possibility that it is a third party to the economic relationship.

C. There Is No Material Difference between Oregon and California Intentional Interference Law

Adidas and Herbalife dispute whether Oregon or California intentional interference law should be used to evaluate the counterclaim. Herbalife argues that California intentional interference law should apply because Adidas "illicitly disrupted" the contractual relationship between Herbalife [*13] and AEG.[5] Opp'n to Mot. for Partial Summ. J. [230] 19. Herbalife recommends California law because the contractual relationship is "overwhelmingly connected" to California via both parties' business contacts. *Id.*

> 5 Under California law, establishing a claim for intentional interference with contractual relations requires the plaintiff to prove: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515, 44 Cal. Rptr. 3d 517, 523 (Cal. Ct. App. 2006) (citing *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587 (Cal. 1990)).

I need not evaluate this argument.[6] Regardless of how significant the contacts are, Oregon conflict of law precedent directs courts to apply Oregon law if there is no material difference between the two (a "false conflict"). *Angelini v. Delaney*, 156 Ore. App. 293, 966 P.2d 223, 227 (Or. App. 1998) (citing *Erwin v. Thomas*, 264 Ore. 454, 506 P.2d 494 (Or. 1973)). A false conflict is present if the laws of both [*14] states on the same set of facts "would produce the same decision in the lawsuit . . . ." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 839 n. 20, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985).

> 6 To the extent this argument repeats Herbalife's earlier affirmative defenses of laches, waiver, and estoppel, I have already granted summary judgment on those defenses. Tr. [224] 25.

There is no material difference (relevant here at least) between the intentional interference law of Oregon and California, and I reach the same result regardless of which version I apply. Herbalife cites no authority for the proposition that, even under California law, a party who breaches a contract may sue the wronged party to that contract for exercising its legitimate interests under that contract. Herbalife's breach of the 1998 Agreement precludes that argument's validity. I implicitly found Adidas did not breach Herbalife's contract with AEG by ruling Herbalife breached the 1998 Agreement. If I found that Adidas's refusal to manufacture the Galaxy jerseys breached Herbalife's contract, it would effectively authorize Herbalife's intended Tri-Leaf Mark use in violation of the 1998 Agreement. I reject this position because it contradicts my earlier [*15] finding.

Herbalife fails to satisfy necessary intentional interference elements under California law, so I arrive at the same result regardless of which state's law I apply. The false conflict between the laws eliminates any need to measure the respective contacts to California and Oregon. *Erwin*, 506 P.2d at 497-98.

III. Unfair Competition Counterclaim

A. The Counterclaim Is Derived from the Intentional Interference Counterclaim

Herbalife's unfair competition counterclaim relies on California Business and Professions Code § 17200.[7] The success of Herbalife's unfair competition counterclaim depends on the validity of the intentional interference counterclaim.

> 7 The code defines unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code* § 17200 (West 2008).

In defending the unfair competition counterclaim, Herbalife explicitly outlines its dependence on the intentional interference counterclaim: "Adidas's intentional interference with Herbalife's contract with the Galaxy constitutes an intentional interference with economic relations under California (and Oregon) law. Consequently, Adidas's [*16] conduct is unlawful and violates the 'unlawful business act' prong of California's UCL." Opp. To Mot. for Summ. J. [230] 21. The unfair competition law borrows violations of other laws and treats them as independently actionable. *Cel-Tech Comm'n, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999). This is true for each of Herbalife's specific claims under the "unlawful" and "unfair" competition prongs of § 17200. *Ingels v. Westwood One Broad. Serv., Inc.*, 129 Cal. App. 4th 1050, 28 Cal. Rptr. 3d 933, 938 (Cal. Ct. App. 2005); *Cel-Tech*, 20 Cal. 4th at 187.

B. The Counterclaim Fails as a Matter of Law

The unfair competition counterclaim's validity hinges on the success of its intentional interference counterclaim both factually and legally. Factually, the unfair competition counterclaim requires that Adidas breached Herbalife's agreement with AEG. Legally, Herbalife would require a finding that Adidas violated intentional interference law because violation of another law is necessary to support § 17200 actions. *Ingels*, 28 Cal. Rptr. 3d at 938. My previous findings on the intentional interference counterclaim are dispositive. I found that Adidas did not breach Herbalife's AEG agreement because of Herbalife's [*17] 1998 Agreement breach. Further, I found that Herbalife failed to meet all the elements of the intentional interference counterclaim.

Herbalife's failure on the intentional interference counterclaim eliminates the unfair competition counterclaim. Herbalife fails to show a prior legal violation that would justify the § 17200 claim and the derivative nature of the claim prevents Herbalife from independently meetings its elements. Adidas is entitled to judgment as a matter of law.[8]

> 8 Even if Herbalife's intentional interference counterclaim succeeded, Herbalife would still fail on the unfair competition counterclaim. When evaluating §17200 violations, the Ninth Circuit requires claimants to allege the defendant engaged in business practices that are forbidden by statute, regulatory law, or court-made law. *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1044 (2010). For the purposes of § 17200, "court-made" law has been interpreted as "a violation of a prior court order." *Nat'l Rural Telecomm. Co-op. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1074 n.22 (C.D. Cal. 2003). Common law violations are insufficient to state a claim under § 17200. *Shroyer*, 622 F.3d at 1044. Therefore, [*18] Herbalife's common law intentional interference counterclaim would not be a valid basis for § 17200 liability, even if it had been successful.

CONCLUSION

Because I find Herbalife fails to show there is a genuine dispute as to any material fact, I GRANT Adidas's Motion for Partial Summary Judgment [9].

IT IS SO ORDERED.

DATED this 29th day of July, 2011.

/s/ Michael W. Mosman

MICHAEL W. MOSMAN

United States District Court

LEXSEE

ALL STAR, INC. v. FELLOWS et al.

A08A2014.

COURT OF APPEALS OF GEORGIA, SECOND DIVISION

297 Ga. App. 142; 676 S.E.2d 808; 2009 Ga. App. LEXIS 390; 2009 Fulton County D. Rep. 1260

March 27, 2009, Decided

PRIOR HISTORY: Business relations, tortious interference with. Gwinnett Superior Court. Before Judge Davis.
Fellows v. All Star, Inc., 272 Ga. App. 262, 612 S.E.2d 86, 2005 Ga. App. LEXIS 261 (2005)

DISPOSITION: [***1] Judgment affirmed.

PROCEDURAL POSTURE: A Georgia corporation sued defendants, a former and a current employee, alleging tortious interference with business relations and conversion. At a trial, the Georgia trial court directed verdicts (O.C.G.A. § 9-11-50) in defendants' favor on the tortious interference claims, and the jury returned defense verdicts on the conversion claims. On appeal, the corporation contested the directed verdicts and the admission of certain exhibits.

OVERVIEW: The Georgia corporation's sole owner collaborated with defendants to enter the amusement industry in Alabama, establishing a corporation there. The appeals court rejected the Georgia corporation's assertion that evidence that it was affiliated with the Alabama corporation demonstrated that it, too, had a business relationship with the Alabama corporation's customers. This assertion disregarded the legal significance of the undisputed fact that the Georgia corporation and the Alabama corporation were each a corporation. Also rejected was the Georgia corporation's characterization of the Alabama corporation as its agent, such that the Georgia corporation could be credited with the Alabama corporation's customers. The evidence failed to establish any business relationship as alleged. There was no merit in the Georgia corporation's claim that the cited evidence was not admissible because defendants' claims of entitlement to the funds were in the nature of recoupment, as defendants' positions with respect to retained funds were not in the nature of recoupment, but a defense. The trial court did not abuse its discretion in allowing the exhibits in support thereof.

OUTCOME: The judgment was affirmed.

COUNSEL: *Lamalva & Oeland, Paul J. Oeland IV*, for appellant.

Edmund A. Waller, for appellees.

JUDGES: PHIPPS, Judge. Johnson, P. J., and Barnes, J. concur.

OPINION BY: PHIPPS

OPINION

[*142] [**809] Phipps, Judge.

All Star, Inc. sued Shawn Fellows and David Awtrey, alleging they had committed tortious interference with business relations and conversion. At a trial, the court directed verdicts in the defendants' favor on the tortious interference claims, and the jury returned defense verdicts on the conversion claims. Thereupon, judgment was entered. [**810] On appeal, [1] All Star contests the directed verdicts and the admission of certain exhibits. For reasons that follow, we affirm.

1 This appeal is from a second trial concerning these parties. See generally *Fellows v. All Star*, 272 Ga. App. 262 (612 SE2d 86) (2005) (determining that Awtrey and Fellows were entitled to directed verdicts on All Star's claims of breach of noncompete agreements, which were held unenforceable as too broad; recognizing that All Star had pursued other claims, some of which, "e.g., tortious interference with business relationships, fraud, and theft by conversion, could exist independent of the noncompete agreements"; and thus remanding the case).

1. All Star challenges the directed verdicts.

> To support a verdict for tortious interference [***2] with business relations the evidence must show the defendant (1) acted improperly and without privilege, (2) purposely and with malice with the intent to injure, (3) induced a third party or parties not to enter into or continue a business relationship with the plaintiff, and (4) for which the plaintiff suffered some financial injury. [2]

In addition, the "stranger" doctrine applies to a claim of tortious interference with business relations and is the same as that applicable to a claim of tortious interference with a contractual relationship. [3] [*143] Regarding the latter, the Supreme Court of Georgia has instructed:

> [T]he plaintiff must establish that the defendant is a "third party," i.e., a "stranger" to the contract with which the defendant allegedly interfered. One is not a stranger to the contract just because one is not a party to the contract, as it has been held that the alleged interferer is not a stranger to the contract and thus not liable for tortious interference where the alleged interferer was the agent for one of the parties to the contract of insurance (i.e., the underwriter), and all the purported acts of interference were done within the scope of the interferer's duties as [***3] agent. [4]

2 *Arford v. Blalock*, 199 Ga. App. 434, 440 (13) (405 SE2d 698) (1991) (citation and punctuation omitted), approved as a correct statement of the law, *Wilensky v. Blalock*, 262 Ga. 95, 96 (2) (414 SE2d 1) (1992).

3 *Atlanta Market Center Mgmt. Co. v. McLane*, 269 Ga. 604, 609 (2) n. 2 (503 SE2d 278) (1998).

4 Id. at 608 (citations omitted).

In its appellate brief, All Star summarizes the theory that underlay its claims of tortious interference with business relations: [5]

> The uncontroverted evidence at trial was that Appellees, prior to ending their employment/association with Appellant solicited customers of Appellant, and caused these customers ([three Alabama businesses]) to discontinue their relationship with Appellant, and, instead, to start doing business with a competing entity started by Appellees.

Accordingly, an essential element of each such claim was the existence of a business relationship. [6] Awtrey and Fellows moved for directed verdicts on grounds that All Star had failed to show in its case-in-chief, inter alia, the existence of a business relationship as alleged. In addition, Awtrey and Fellows argued that, even if such a relationship had been shown, All Star had failed [***4] to demonstrate that they were strangers to it.

5 Neither opening statements nor closing arguments were transcribed in the record before us. In the pre-trial order, All Star states that Awtrey and Fellows "solicited customers of All Star and placed games with those customers, all to the detriment of All Star."

6 See generally *Atlanta Market Center Mgmt. Co.*, supra.

A directed verdict is authorized only when "there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict." [7] "[W]e review the trial court's grant of a directed verdict under the 'any evidence' standard, construing the evidence favorably [*144] to the nonmovant." [8]

7 OCGA § 9-11-50 (a); see *Dyer v. Souther*, 272 Ga. 263, 265 (2) (528 SE2d 242) (2000).

8 *Walls v. Moreland Altobelli Assocs.*, 290 Ga. App. 199 (659 SE2d 418) (2008) (citation omitted).

[**811] All Star, a Georgia corporation, was engaged in the business of placing amusement games (or machines) in various Georgia locations, including bars, restaurants, and convenience stores. Anticipating that state legislation would soon outlaw All Star's business, the corporation's sole owner, Larry [***5] Simmons,

sought to establish the same type of business in other states. Simmons discussed establishing such a business in Alabama with Awtrey and Fellows. Awtrey had formerly worked at All Star and was then living in Alabama. Fellows also had previously worked for All Star; he had served as vice-president of an association that lobbied to influence the anticipated Georgia legislation; and as of late 2000, he had been re-hired at All Star in a management capacity with responsibilities that included pursuing out-of-state opportunities. The three men orally agreed to operate a business together in Alabama.

In 2001, Simmons financed the start-up of D. R. Awtrey & Associates, Inc., d/b/a Alabama Amusements, which Awtrey incorporated in Alabama. The new corporation began obtaining amusement games from various sources. For example, it purchased approximately $ 40,000 to $ 50,000 of games from an unrelated company, Cadillac Games. In addition, Alabama Amusements purchased games from All Star, which had been manufactured by another of Simmons's corporations, Money Machines, Inc. There also was testimony that, with respect to Alabama Amusements acquiring games manufactured by Money Machines, "[m]ore [***6] often than not, they'd just take the games out of the warehouse," keeping track of them by a tagging system.

Initially, Awtrey was sole owner of Alabama Amusements and also served as its president. Because he lived in Alabama, his role was "the man on the ground running the operation," and his responsibilities included soliciting businesses for placement of games, placing the games in the procured customers' business locations, and collecting monies generated by those games. Awtrey understood that his compensation would include hourly wages, expenses, and commissions.

Fellows continued to work out of an office located in a building in Georgia, which housed offices for All Star, Alabama Amusements, and other corporations. [9] In addition to his work for All Star, Fellows handled various business matters for Alabama Amusements. He [*145] understood that for his work on the latter, he would be compensated through commissions.

> 9 Simmons owned corporations he had set up for similar operations in Texas and Arkansas, and these corporations also had offices in this same building.

Thus, in accordance with their agreement, Awtrey obtained customers in Alabama. Amusement machines were brought into the customers' [***7] business locations. Awtrey serviced the accounts, collecting money that had been generated by the machines. Fellows, too, participated in setting up the Alabama operations and thereafter servicing the Alabama customers. In addition, another individual employed by All Star (not Fellows) occasionally serviced routes in Alabama, replacing game machines, collecting money, and taking the collected money to personnel at the office building in Georgia. While All Star provided this individual with a vehicle to service the Alabama routes, there was evidence that he was paid out of Alabama Amusements' revenue for his work in Alabama.

Awtrey withheld from the monies he collected the wages he had earned, as well as expenses he had incurred. There was evidence that the remaining money was deposited into Alabama Amusements' separate bank account at Regions Bank, on which only Awtrey, Fellows, and Simmons had check writing authority.

At regular intervals, Awtrey would fax to Fellows "collection sheets," upon which Awtrey had recorded the amount of money collected from each machine, as well as the location of each such machine. In addition, Awtrey provided to Fellows written accounts of his hours worked, [***8] activities performed, and expenses incurred. There was evidence that Fellows was responsible for seeing that Alabama Amusements' taxes and other expenses were paid out of that corporation's revenue.

[**812] All Star's chief finance officer testified that All Star's revenue was "shuffled." When asked what he meant by that term, he responded: "At the time Georgia was doing really well, enabling us to, you know, save for -- you know, to buy games for Alabama, to get supplies for Money Machines in order to build the games. So, you know, I'd have to pay this guy for something, this supplier for something. That's what I meant by shuffled." Regarding All Star's health insurance plan, there was evidence that All Star added Awtrey to its list of covered individuals.

By early summer 2002, Awtrey was no longer Alabama Amusements' president, and Simmons wholly owned the corporation. Awtrey and Fellows had become dissatisfied because they were not paid commissions that they believed they had earned. They formed a separate company to engage in the same type of business as Alabama [*146] Amusements. For the new company, they secured the business of three customers with which Awtrey had placed games. Awtrey and Fellows [***9] then removed or caused the removal of previously placed machines from those three premises. The two then procured amusement games from companies other than All Star and Money Machines and placed them in those three locations. And in early July 2002, they resigned from Simmons's corporations.

At trial, after All Star rested its case, the defense argued that All Star had failed to establish essential elements of its claim, including the existence of any business relationship as alleged. In addition, the defense ar-

gued that even if such a relationship had been shown, neither Awtrey nor Fellows was a stranger to it and consequently neither of the two could be held liable.

With respect to the lack of any business relationship argument, the defense asserted that All Star had failed to establish that *it* had a business relationship with any of the three allegedly stolen Alabama customers. The defense asserted that the evidence was undisputed that All Star and Alabama Amusements were separate corporations and that the three Alabama businesses at issue had been customers of the latter. In addition, the defense asserted that there was no evidence that the three Alabama businesses had the alleged [***10] business relationships with All Star. Referencing All Star's evidence that All Star and Alabama Amusements shared office space within the same building and that "employees of one company helped out with [the other company]," the defense accused All Star of essentially attempting to pierce its own corporate veil to claim another corporation's customers and thus make out its claim. The defense protested that All Star was estopped under principles akin to those expressed in OCGA § 14-5-4; [10] in addition, the defense cited rules of law set forth in *Yukon Partners v. Lodge Keeper Group*, [11] such as the rule that the mere existence of some unspecified affiliation is not sufficient to pierce the corporate veil. [12]

> 10 "The existence of a corporation claiming a charter under color of law cannot be collaterally attacked by persons who have dealt with it as a corporation. Such persons are estopped from denying its corporate existence."
> 11 258 Ga. App. 1 (572 SE2d 647) (2002).
> 12 See id. at 6.

All Star's counsel responded, "[T]hat has been the argument since day one in this case." He added that the two corporate entities -- All Star and Alabama Amusements -- had not done a "particularly good job of remaining [***11] separate." Thus, he urged that a jury be allowed to "recognize that this operation in Alabama was acting as an agent or affiliate for All Star, Inc., in the state of Alabama," claiming "there's plenty of information that shows employees going [*147] back and forth, paperwork going back and forth, money going back and forth, trucks going back and forth, games going back and forth that would be sufficient for them to determine that while these two entities existed, that it is All Star."

After hearing extensive argument also on whether All Star had made the requisite showing under the "stranger" doctrine, the trial court denied the defendants' motions for directed verdict, rejecting these and their other grounds before recessing trial for the evening. The next morning, however, and with no mention on the record of any specific ground, the trial court announced, "I have [**813] decided to reverse my position with regard to the claim for tortious interference, and I will grant the directed verdict with regard to that claim." For reasons that follow, we find that the court's "reversal" was the correct ruling.

(a) *The Existence of a Business Relationship*. With no citation to the record, [13] All Star maintains [***12] in its appellate brief that it "operates under a different name, and, at times, through an affiliated corporation owned and controlled by [it] and or its President, Larry Simmons. This was the case of its operation in the state of Alabama." Notwithstanding this asserted premise, All Star presented no evidence that would have allowed for a finding of any alleged business relationship.

> 13 See Court of Appeals Rule 25 (a) (1).

There was no evidence that All Star was authorized to do business in any state other than Georgia. It was uncontroverted that All Star's sole owner collaborated with Awtrey and Fellows to enter the amusement industry in Alabama. To that end, a company was incorporated in Alabama, which conducted business as Alabama Amusements. Thereafter, Awtrey either performed or was in charge of the day-to-day field operations for Alabama Amusements. And in that role, Awtrey procured customers in whose respective business locations amusement machines were placed, collected money generated by placed machines, and retained from the collected money his earned wages and incurred expenses. This evidence showed that the three Alabama businesses were customers of Alabama Amusements; the [***13] evidence did not further show that the three Alabama business were also customers of All Star; nor did the evidence otherwise establish any business relationship between those three Alabama businesses and All Star.

We reject All Star's assertion that evidence that it was "affiliated" with Alabama Amusements demonstrated that it, too, had a business relationship with Alabama Amusements' customers. This assertion disregards the legal significance of the undisputed fact that [*148] All Star and Alabama Amusements were each a corporation. "The law of corporations is founded on the legal principle that each corporation is a separate entity." [14] "Great caution should be exercised by the court in disregarding the corporate entity." [15] "In any event, the mere existence of some unspecified 'affiliation' is not sufficient to pierce the corporate veil." [16]

> 14 *Hickman v. Hyzer*, 261 Ga. 38, 39 (1) (401 SE2d 738) (1991).
> 15 Id. (citation and punctuation omitted).
> 16 *Yukon Partners*, supra.

We must also reject All Star's characterization of Alabama Amusements as its agent, such that All Star can be credited with Alabama Amusements' customers. This characterization is another attempt to escape the ramifications [***14] of the well-founded legal principle of corporate separateness. Although All Star showed instances in which it disregarded its corporate separateness from Alabama Amusements, such acts can serve as no justification for the court also to disregard it for All Star's benefit. "The concept of piercing the corporate veil is based upon equitable principles. As a general rule, a party cannot invoke the aid of equitable principles when he does not come into court with clean hands. Yet, [All Star] seeks to assert [its] [ ]claim based upon [its own] abuse of the corporate form, a proposition we reject." [17] While "the law authorizes the formation of subservient corporations, the law would defeat its own purpose by disregarding its own creature merely because a parent corporation, or other sole owner, controls the subsidiary, or one-man corporation, and uses it and controls it to promote his or its ends." [18]

17 *Pantusco v. Wiley*, 274 Ga. App. 144, 146 (1) (616 SE2d 901) (2005) (footnotes omitted).
18 *Yukon Partners*, supra (citation omitted).

When construed most favorably for All Star, the evidence failed to establish any business relationship as alleged, and therefore, defense verdicts were demanded.

(b) [***15] *The "Stranger" Doctrine*. In reliance upon *Tom's Amusement Co. v. Total Vending Svcs.*, [19] Awtrey and Fellows argued that [**814] they were not strangers to the alleged business relationships and [*149] therefore not liable for tortious interference thereof. The record reveals that much of the motion hearing as to this element focused on *Tom's Amusement Co.* without any concern that "one judge of the three concurred in the judgment only. For that reason, it is not binding authority and is physical precedent only." [20] Nevertheless, our decision in Division 1 (a) renders moot whether All Star presented any evidence to satisfy the "stranger" doctrine.

19 243 Ga. App. 294 (533 SE2d 413) (2000) (physical precedent only). All Star concedes on appeal that "Awtrey was not a stranger to the relationship, as defined by *Tom's Amusement Company, Inc.*," pursuing this contention only as to Fellows. At trial, All Star presented evidence that Fellows was its employee. Fellows thus relied upon the following language in *Tom's Amusement Co.*: "Regardless of whether an employee is acting as an agent of his employer when engaging in the interference, he is not a stranger to the business relationship between his employer and [***16] the customers he personally services and thus cannot be held liable under a claim of tortious interference." Id. at 296 (2) (a).
20 *Carter v. State*, 222 Ga. App. 345, 346 (1) (474 SE2d 240) (1996); see Court of Appeals Rule 33 (a).

2. All Star contends that the trial court erred in allowing certain exhibits in evidence, which Awtrey and Fellows presented to defend against All Star's conversion claims.

All Star alleged that, having terminated their employment from Simmons's corporations, Awtrey and Fellows absconded with certain monies collected from machines Awtrey had been servicing in Alabama, as well as the balance in Alabama Amusements' bank account. Awtrey and Fellows maintained, however, that the amount taken was owed them by Alabama Amusements in commissions, pursuant to their earlier agreement with Simmons to be paid commissions based upon that corporation's revenue. They contended that the sums taken never belonged to All Star, relying on evidence that All Star was not registered to do business in Alabama; and that the funds retained by them were funds that had belonged to Alabama Amusements, the entity that was operating in Alabama.

There is no merit in All Star's argument that [***17] the cited evidence was not admissible because Awtrey's and Fellows's claims of entitlement to the funds were in the nature of recoupment, [21] which they had not pled in this case. [22] Awtrey's and Fellows's positions with respect to the retained amount were not in the nature of recoupment, but a defense. The trial court did not abuse its discretion in allowing the exhibits in support thereof. [23]

21 See OCGA § 13-7-2 ("Recoupment is a right of the defendant to have a deduction from the amount of the plaintiff's damages for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the contract upon which suit is brought.").
22 See generally *Burnham v. Cooney*, 265 Ga. App. 246, 248-250 (3) (593 SE2d 701) (2004).
23 Id.

Judgment affirmed. Johnson, P. J., and Barnes, J., concur.

LEXSEE

WILMA ARMER, et al., Plaintiffs, v. OPENMARKET, INC., et al., Defendants.

No. C08-1731RSL

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2009 U.S. Dist. LEXIS 72434

July 27, 2009, Decided
July 27, 2009, Filed

SUBSEQUENT HISTORY: Claim dismissed by Armer v. Openmarket, Inc., 2009 U.S. Dist. LEXIS 92265 (W.D. Wash., Oct. 5, 2009)

PROCEDURAL POSTURE: Plaintiff customers brought an action against defendants, cellular telephone carriers and a premium content provider. The customers alleged claims of unjust enrichment, tortious interference with contract, and violations of the Washington Consumer Protection Act (CPA), Wash. Rev. Code § 19.86.010 et seq., against the provider, and the provider filed a motion to dismiss all three claims under Fed. R. Civ. P. 12(b)(6).

OVERVIEW: The court denied the motion. The customers' allegations were sufficient to provide fair notice of the nature of their claims and the grounds upon which the claims rested, as required under Fed. R. Civ. P. 8. Further, the provider failed to show that a written agreement to arbitrate existed under 9 U.S.C.S. § 2, much less that it encompassed the customers' claims against the provider. The court also found that all claims stated causes of action. For the unjust enrichment claim, the provider was not a party to the contracts between the customers and carriers, and there was no evidence that recognizing an implied duty in these circumstances would contravene any provision of the express contracts. The fact that the customers had contracts with the carriers was irrelevant to claims against the provider. Thus, The unjust enrichment claim was thus, sufficient, and the customers had no obligation to plead facts to negate possible affirmative defenses in order to avoid dismissal, such as voluntary payment without protest. Finally, the CPA claim was sufficiently pleaded because a contractual relationship was not an element and the customers did not have to be residents to bring the claim.

OUTCOME: The court denied the provider's motion.

COUNSEL: [*1] For Wilma Armer, individually and on behalf of all others similarly situated, Plaintiff: Clifford A Cantor, LEAD ATTORNEY, SAMMAMISH, WA; Michael J Aschenbrener, LEAD ATTORNEY, PRO HAC VICE, KAMBER EDELSON LLC (IL), CHICAGO, IL.

For Gregory McNeill, Plaintiff: Clifford A Cantor, SAMMAMISH, WA.

For OpenMarket Inc, a Michigan corporation, Defendant: Charles Platt, Sanket J Bulsara, LEAD ATTORNEYS, PRO HAC VICE, WILMER CUTLER PICKERING HALE & DORR (NY), NEW YORK, NY; Jeffrey M Thomas, Mark A Wilner, GORDON TILDEN THOMAS & CORDELL LLP, SEATTLE, WA.

For Sprint Spectrum LP, a Delaware limited partnership, Nextel West Corporation, a Delaware corporation, Defendants, Cross Claimants, Cross Defendants: Amanda J Beane, Sarah J Crooks, LEAD ATTORNEYS, PERKINS COIE (SEA), SEATTLE, WA.

For OpenMarket Inc, a Michigan corporation, Cross Defendant: Sanket J Bulsara, LEAD ATTORNEY, WILMER CUTLER PICKERING HALE & DORR (NY),

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JUDGES: Robert S. Lasnik, United States District Judge.

OPINION BY: Robert S. Lasnik

OPINION

ORDER DENYING DEFENDANT OPENMARKET'S MOTION TO DISMISS

This matter comes before the Court on a "Motion to Dismiss Complaint by Defendant OpenMarket, Inc." Dkt. # 30. [1] Defendant argues that all of plaintiffs' claims should be dismissed because they (1) do not satisfy the notice pleading requirement of Rule 8, (2) are subject to arbitration, and (3) fail to state a claim upon which relief can be granted.

> 1 After this motion was filed, plaintiffs obtained leave to amend their complaint. A new operative pleading was filed on June 19, 2009. This Order evaluates the adequacy of the allegations contained in the Second Amended Complaint -- Class Action (Dkt. # 46).
>
> Having reviewed the papers submitted by the parties, the Court finds that this matter can be decided without oral argument.

In the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court's review is generally limited to the contents of the complaint. Campanelli v. Bockrath, 100 F.3d 1476, 1479 (9th Cir. 1996). The Court may, however, consider documents referenced extensively in the complaint, documents [*3] that form the basis of plaintiffs' claim, and matters of judicial notice when determining whether the allegations of the complaint state a claim upon which relief can be granted. United States v. Ritchie, 342 F.3d 903, 908-09 (9th Cir. 2003). Where consideration of additional documents is appropriate, the allegations of the complaint and the contents of the documents are accepted as true and construed in the light most favorable to plaintiff. In re Syntex Corp. Sec. Litig., 95 F.3d 922, 925-26 (9th Cir. 1996); LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 n.2 (9th Cir. 2000). No claim should be dismissed unless the complaint, taken as a whole, fails to give rise to a plausible inference of actionable conduct. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Defendant has placed before the Court a document entitled "Terms & Conditions" that was apparently printed on March 23, 2009, from the following internet address: http://www.sprintpcs.com/common/popups/popLegalTermsPrivacy.html. This document is not mentioned in the Second Amended Complaint. The contract on which plaintiffs' claims are based is described in the complaint as an agreement to pay Sprint a set monthly fee for a period [*4] of approximately 12 months in exchange for cellular telephone service. OpenMarket has provided no evidence that the thirteen-page "Terms & Conditions" applies to the cellular telephone plans purchased by plaintiffs, that it was in effect when plaintiffs acquired service, or that plaintiffs agreed to or accepted the terms. Plaintiffs have not alleged, and the Court will not presume, that their agreement with Sprint was identical -- or even substantially similar -- to the "Terms & Conditions" that were published on the website as of March 23, 2009. In these circumstances, OpenMarket has not shown that the document it submitted for the Court's consideration forms the basis of plaintiffs' claims or are the proper subject of judicial notice. The Court has not, therefore, considered the March 23, 2009, "Terms & Conditions" when determining whether the complaint, taken as a whole, gives rise to a plausible inference of actionable conduct.

I. ADEQUACY OF PLEADING

Without addressing the allegations of the complaint as a whole, OpenMarket argues that the pleading must be dismissed because plaintiffs have failed to allege "the amount of the charges, the total number of charges, the phone number [*5] that was charged, the date of charges, and the attempts to achieve a refund" from defendants. Motion at 9. Defendant also challenges the adequacy of the allegations related to the elements of plaintiffs' claims. See Motion at 13-14, 16-17, and 19. Pursuant to Fed. R. Civ. P. 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs are not, as OpenMarket would have it, required to plead detailed factual allegations such as the date and amount of each alleged overcharge. Twombly, 550 U.S. at 555. Rather, a plaintiff must simply avoid labels, conclusions, and formulaic recitations of the elements of a cause of action in favor of factual allegations that are "enough to raise a right to relief above the speculative level." Id. (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 234-236 (3rd ed. 2004) ("The pleading must contain something more . . . than . . . a statement of facts

that merely creates a suspicion [of] a legally cognizable right of action.")).

Having reviewed the allegations of the Second Amended Complaint, the Court finds that they are sufficient to provide 'fair notice' [*6] of the nature of plaintiffs' claims against OpenMarket and the 'grounds' on which the claims rest. See Twombly, 550 U.S. at 555 n.3. Plaintiffs have alleged facts regarding the aggregation business in which OpenMarket is engaged, the lack of safeguards to reduce the risk of unauthorized charges, and overcharges levied by OpenMarket and paid by plaintiffs. These allegations are not conclusory and satisfy Rule 8. [2]

> 2 OpenMarket cannot rely on Lowden v. T-Mobile USA, Inc., 2009 U.S. Dist. LEXIS 21759, 2009 WL 537787 (W.D. Wash. Feb. 18, 2009), for the proposition that plaintiffs are required to allege the specific dates and amounts of improper charges in order to satisfy Rule 8. Despite broad allegations of improper charges, the plaintiffs in Lowden failed to allege that they had been overcharged for calls and services. The court therefore concluded that plaintiffs' right to relief was speculative and that the improper charges claim should be dismissed. In this case, the named plaintiffs have alleged not only that OpenMarket's practices and policies resulted in unauthorized charges for mobile content to Sprint customers, but also that their cell phone accounts were improperly charged as a result of OpenMarket's actions. [*7] See Second Amended Complaint at PP 29, 31, 35, and 37.

II. ARBITRATION

Pursuant to the Federal Arbitration Act ("FAA"), a written agreement to arbitrate a dispute "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. For the reasons discussed above, OpenMarket has not shown that a written agreement to arbitrate exists, much less that it encompasses plaintiffs' claims against OpenMarket. [3]

> 3 Even if the Court were to assume that the March 23, 2009, "Terms & Conditions" accurately sets forth plaintiffs' agreement with defendant Sprint, OpenMarket has not shown that it is entitled to enforce the arbitration clause contained therein. The "Terms & Conditions" purportedly represent an agreement between Sprint and its customers. OpenMarket has not shown that it was a party to the contract or that it was an express or implied beneficiary of the agreement. According to its terms, the agreement to arbitrate does not encompass claims against third parties: it expressly limits arbitrable disputes to "any claims or controversies *against each other* related in any way . . ." to Sprint's services or the contract [*8] between the parties." Terms & Conditions at 35 (emphasis added to counteract OpenMarket's creative (and misleading) use of ellipses in its reply memorandum). Nor has OpenMarket shown that it was an "agent" or "affiliate" of Sprint or that plaintiffs are equitably estopped from opposing OpenMarket's efforts to compel arbitration. Unlike the situation in Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993), where plaintiff's claim against a third party was intimately founded on and intertwined with the underlying contract obligations, plaintiffs' causes of action against OpenMarket could proceed even if their contractual claim against Sprint were to fail.

III. FAILURE TO STATE A CLAIM

Plaintiffs have asserted claims of unjust enrichment, tortious interference with contract, and violations of the Washington Consumer Protection Act, RCW 19.86.010 *et seq.*, against defendant OpenMarket. Defendant seeks dismissal of all three claims under Fed. R. Civ. P. 12(b)(6).

A. Unjust Enrichment

Plaintiffs allege that OpenMarket has created a billing and collection system that is devoid of the checks and safeguards necessary to protect cell phone users from unauthorized [*9] charges for mobile content. Plaintiffs explain why erroneous or fraudulent billing can occur, how aggregators such as OpenMarket make money from every such billing, and how plaintiffs came to enrich OpenMarket through their payments to Sprint. Plaintiffs allege that, given its business model and practices, OpenMarket knew that some of the money it was collecting was unauthorized and that its retention of that money is unjust.

Defendant argues that the existence of a contract regarding the subject matter of plaintiffs' claims (namely charges for the provision of mobile content) bars a claim for unjust enrichment. Although a broad "subject matter" bar may exist in New York (see Vitale v. Steinberg, 307 A.D.2d 107, 111, 764 N.Y.S.2d 236 (N.Y.A.D. 2003)), Washington law is materially different on this point. In Washington, "[a] party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract." Chandler v. Wash. Toll Bridge

Auth., 17 Wn.2d 591, 604, 137 P.2d 97 (1943). [4] OpenMarket is not a party to the contracts between plaintiffs and defendant Sprint, and there [*10] is no evidence that recognizing an implied duty in these circumstances would contravene any provision of the express contracts. To bar a claim for unjust enrichment simply because a contract touching on the "subject matter" exists would be illogical. A claim for unjust enrichment is based on a theory of implied contract: in order to prevent a party from keeping benefits to which it is not entitled, courts are willing to infer a duty to return the benefits even in the absence of express consent or agreement. MacDonald v. Hayner, 43 Wn. App. 81, 85, 715 P.2d 519 (1986). The fact that plaintiffs have contracts with Sprint is irrelevant to their claim against OpenMarket. Plaintiffs have alleged facts supporting all of the elements of an unjust enrichment claim under Washington law: (1) a benefit conferred, (2) knowledge of the benefit, and (3) circumstances that would make it unjust for OpenMarket to retain the benefit. The service agreements with Sprint give plaintiffs no contractual rights against OpenMarket. This is exactly the situation for which an unjust enrichment claim was designed. If the Court were unwilling to imply a contract simply because plaintiffs have a contractual claim against Sprint, [*11] OpenMarket would be able to retain benefits to which it may have no right in law or equity.

> 4 USA Gateway Travel, Inc. v. Gel Travel, Inc., 2006 U.S. Dist. LEXIS 92560, 2006 WL 3761259 at *6 (W.D. Wash. Dec. 20, 2006), is not to the contrary. OpenMarket's citation to and summary of that case are misleading. Plaintiff's claim of unjust enrichment was dismissed in USA Gateway because the court found that a contract implied in fact existed between the parties and governed plaintiff's right to recovery.

Defendant also argues that plaintiffs' unjust enrichment claim fails because they voluntarily paid their cell phone bills without protest. The voluntary payment doctrine is an affirmative defense: plaintiffs are under no obligation to plead facts sufficient to negate every possible affirmative defense in order to avoid dismissal. To the extent the voluntary payment doctrine is applicable under Washington law, [5] factual determinations regarding voluntariness, fraud, compulsion, and protest must await the development of the record.

> 5 See Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 87, 170 P.3d 10 (2007) (open question whether doctrine applies only in the contract context).

B. Tortious Interference with [*12] Contract

Plaintiffs allege that they had a contractual relationship with Sprint pursuant to which Sprint would provide and bill for communications and related services and plaintiffs would pay for the services received. Plaintiffs further allege that OpenMarket's erroneous or fraudulent billing for unauthorized services caused Sprint to breach its contracts with plaintiffs by placing charges on their cell phone bills for products and services that were never provided. OpenMarket argues that these facts cannot support a claim of tortious interference because it is "a non-stranger" to the contractual relationship. "Recovery for tortious interference with a contractual relation requires that the interferor be an intermeddling third party; a party to a contract cannot be held liable in tort for interference with that contract." Houser v. City of Redmond, 91 Wn.2d 36, 39, 586 P.2d 482 (1978). The complaint contains no allegations regarding a contract with OpenMarket and instead portrays OpenMarket as an intermeddling third party that caused Sprint to breach its contracts with plaintiffs. Although the Court is not convinced that OpenMarket is the type of third-party against whom a tortious interference [*13] claim can be levied, its role is not adequately defined. OpenMarket is neither a party nor a total stranger to the contract: whether it was factually or legally incapable of interfering with plaintiffs' contracts with Sprint at the time of the relevant events must be determined later in the litigation.

C. Washington Consumer Protection Act ("CPA")

Plaintiffs allege that OpenMarket, as part of its business model, misleads the public and deceptively facilitates charges to consumer telephone bills for unauthorized mobile content. Plaintiffs further allege that they have been injured by OpenMarket's practices and that Washington has an interest in regulating the business activities of companies headquartered in the state.

Defendant argues that the CPA claim fails as a matter of law because (1) there is no contract between plaintiffs and OpenMarket (Motion at 20), and (2) out-of-state residents may not bring a claim under the CPA (Motion at 21). [6] Neither argument has merit. A contractual relationship is not an element of a CPA claim (see Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986), and the Washington Supreme Court has confirmed that "any person [*14] who is injured" may sue under the CPA, regardless of whether there is privity of contract (Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 312-13, 858 P.2d 1054 (1993)). [7] OpenMarket has not identified any authority limiting the remedies afforded by the CPA to Washington citizens. At least one court has determined that "[t]he CPA targets all unfair trade practices either originating from Washington businesses or harming Washington citizens." Kelley v. Mi-

crosoft Corp., 251 F.R.D. 544, 553 (W.D. Wash. 2008), rev. denied, No. 08-80030, 2008 U.S. App. LEXIS 28006 (9th Cir. 2008). Because the CPA is to be liberally construed (Indoor Billboard, 162 Wn.2d at 86), the Court agrees.

6 Defendant has abandoned its argument that its conduct is exempt from scrutiny under the CPA.

7 A statement to the contrary in Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 758, 87 P.3d 774 (2004), is unsupported by any citation or analysis. Where there is a conflict in the case law, this Court will follow the pronouncements of the Washington Supreme Court.

OpenMarket has failed to support its more general assertion that its interactions with plaintiffs were so tenuous and indirect that they cannot be the basis of a [*15] CPA claim. Defendant offers no case law in support of this argument and has not explained which of the elements of a CPA claim depends on the directness of the relationship between the parties.

For all of the foregoing reasons, OpenMarket's motion to dismiss is DENIED.

DATED this 27th day of July, 2009.

/s/ Robert S Lasnik

Robert S. Lasnik

United States District Judge

CELOTEX CORP. v. CATRETT, ADMINISTRATRIX OF THE ESTATE OF CATRETT

No. 85-198

SUPREME COURT OF THE UNITED STATES

477 U.S. 317; 106 S. Ct. 2548; 91 L. Ed. 2d 265; 1986 U.S. LEXIS 118; 54 U.S.L.W. 4775; 4 Fed. R. Serv. 3d (Callaghan) 1024

April 1, 1986, Argued
June 25, 1986, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: 244 U. S. App. D. C. 160, 756 F.2d 181, reversed and remanded.

PROCEDURAL POSTURE: Petitioner appealed the decision of the United States Court of Appeals for the District of Columbia Circuit, denying petitioner's motion for summary judgment in a wrongful death action where respondent alleged that her deceased husband had been exposed to petitioner's asbestos products.

OVERVIEW: Respondent alleged that the death of her husband resulted from his exposure to products containing asbestos that were manufactured by petitioner. The district court granted petitioner's summary judgment motion. The court of appeals reversed the district court, holding that petitioner's failure to support its motion with evidence to negate exposure precluded the entry of summary judgment in its favor, and the court of appeals reinstated the suit. On appeal, court held that petitioner did not have to adduce affirmative evidence to disprove respondent's claim. The court held that under the court of appeals ruling, petitioner could have never been granted summary judgment unless he could have produced a detailed chronology of the decedent's life and showed that the decedent never came into contact with one of its products. Respondent was in the best position to produce such information; therefore the burden should have rested on her.

OUTCOME: The judgment of the court of appeals was reversed and the case was remanded because the court concluded that petitioner could have won a summary judgment motion without introducing any evidence disproving respondent's claim.

SYLLABUS

In September 1980, respondent administratrix filed this wrongful-death action in Federal District Court, alleging that her husband's death in 1979 resulted from his exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September 1981, petitioner filed a motion for summary judgment, asserting that during discovery respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner's products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion. In July 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to *negate* such exposure, as required by Federal Rule of Civil Procedure 56(e) and the decision in *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summary judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pp. 322-326.

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who 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. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. Pp. 322-323.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. *Adickes* v. *S.H. Kress & Co., supra*, explained. Pp. 323-326.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action was commenced and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f). P. 326.

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance. Pp. 326-327.

COUNSEL: Leland S. Van Koten argued the cause for petitioner. With him on the briefs were H. Emslie Parks and Drake C. Zaharris.

Paul March Smith argued the cause for respondent. With him on the brief were Joseph N. Onek, Joel I. Klein, James F. Green, and Peter T. Enslein. *

* Stephen M. Shapiro, Robert L. Stern, William H. Crabtree, Edward P. Good, and Paul M. Bator filed a brief for the Motor Vehicle Manufacturers Association et al. as amici curiae urging reversal.

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a concurring opinion, post, p. 328. BRENNAN, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, post, p. 329. STEVENS, J., filed a dissenting opinion, post, p. 337.

OPINION BY: REHNQUIST

OPINION

[*319] [***271] [**2550] JUSTICE REHNQUIST delivered the opinion of the Court.

[***LEdHR1A] [1A]The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit in *In re Japanese* [**2551] *Electronic Products*, 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). [1] We granted certiorari to resolve the conflict, 474 U.S. 944 (1985), and now reverse the decision of the District of Columbia Circuit.

1 Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See *Fontenot* v. *Upjohn Co.*, 780 F.2d 1190 (1986).

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in

negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's *in personam* jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had [***272] "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional [*320] limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217. [2] Respondent [*321] appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's [**2552] summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." 244 U. S. App. D. C., at 163, 756 F.2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure, [3] and this Court's decision in [***273] *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 159 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U. S. App. D. C., at 163, 756 F.2d, at 184 [*322] (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[the] majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.*, at 167, 756 F.2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id.*, at 166, 756 F.2d, at 187.

2 JUSTICE STEVENS, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products *in the District of Columbia*. See *post*, at 338-339. According to JUSTICE STEVENS, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970-1971. See *ibid.*

JUSTICE STEVENS' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia *or elsewhere*." App. 217 (emphasis added). Unlike JUSTICE STEVENS, we assume that the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by JUSTICE STEVENS, and decided that "[the] District Court's grant of summary judgment must therefore have been based on its conclusion that there was 'no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period.'" *Catrett* v. *Johns-Manville Sales Corp.*, 244 U. S. App. D. C. 160, 162, n. 3, 756 F.2d 181, 183, n. 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares JUSTICE STEVENS' view of the District Court's decision.

3 Rule 56(e) provides:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affi-

davits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

[***LEdHR1B] [1B] [***LEdHR2] [2]We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure. [4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who 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. In such a situation, [*323] there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[The] standard [for granting summary judgment] mirrors the standard [***274] for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson* v. *Liberty Lobby, Inc., ante*, at 250.

4 Rule 56(c) provides:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

[**2553] [***LEdHR1C] [1C] [***LEdHR3] [3] [***LEdHR4] [4]Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment *"with or without supporting affidavits"* (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported [*324] claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose. [5]

5 See Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L. J. 745, 752 (1974); Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U. Chi. L. Rev. 72, 79 (1977).

[***LEdHR1D] [1D]Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the

pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

[***LEdHR5] [5]We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does [***275] not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

[*325] [***LEdHR1E] [1E]The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U. S. C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively [**2554] show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Id.*, at 159.We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing" -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes*, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to [*326] *facilitate* the granting of motions for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 U. S. App. D. C., at 167-168, 756 F.2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp. 28-29 (1983). It would surely defy common sense to hold that the District [***276] Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

[***LEdHR6] [6]Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), [6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

6 Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

[***LEdHR7] [7]In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was [*327] made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if [**2555] reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge

of local law is better suited than we are to make these determinations in the first instance.

[***LEdHR8] [8]The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule Civ. Proc. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

[*328] [***277] The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: WHITE

CONCUR

JUSTICE WHITE, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr. of Oral Arg. 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect [*329] of the case, I agree that the case should be remanded for further proceedings.

DISSENT BY: BRENNAN; STEVENS

DISSENT

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

This case requires the Court to determine whether Celotex satisfied its initial [**2556] burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. [1] This lack of [***278] clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

1 It is also unclear what the Court of Appeals is supposed to do in this case on remand. JUSTICE WHITE -- who has provided the Court's fifth vote -- plainly believes that the Court of Appeals

should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression from the Court to the contrary, JUSTICE WHITE's understanding would seem to be controlling. Cf. *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

[*330] 1

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p. 121 (2d ed. 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice para. 56.15[3] (2d ed. 1985) (hereinafter Moore) (citing cases). See also, *ante*, at 323; *ante*, at 328 (WHITE, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion [2] unless and until the court finds that the moving party has discharged its initial [*331] burden of production. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157-161 (1970); 1963 Advisory Committee's Notes on Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626.

2 The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore para. 56.15[3], p. 56-466; 10A Wright § 2727, p. 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, *Anderson* v. *Liberty Lobby, Inc., ante*, at 255, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright § 2721, p. 44; see, *e. g., Stepanischen* v. *Merchants Despatch Transportation Corp.*, 722 F.2d 922, 930 (CA1 1983); *Higgenbotham* v. *Ochsner Foundation Hospital*, 607 F.2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (1983), rev'd on other grounds *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), "[if] . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ." 723 F.2d, at 258.

[**2557] The burden of production imposed by Rule 56 requires the moving [***279] party to make a prima facie showing that it is entitled to summary judgment. 10A Wright § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence -- using any of the materials specified in Rule 56(c) -- that would entitle it to a directed verdict if not controverted at trial. *Ibid.* Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. *Ibid.*; Fed. Rules Civ. Proc. 56(e), (f).

If the burden of persuasion at trial would be on the *nonmoving* party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright § 2727, pp. 130-131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L. J. 745, 750 (1974) (hereinafter Louis). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Anderson* v. *Liberty Lobby, Inc., ante*, at 249.

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party -- who will bear the burden of persuasion at trial -- has [*332] no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante*, at 328 (WHITE, J., concurring). Such a "burden"

of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante*, at 323. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party [***280] has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production. [3] Thus, if the record disclosed that the [**2558] moving [*333] party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

> 3 Once the moving party has attacked whatever record evidence -- if any -- the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright § 2727, pp. 138-143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, *e. g., First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968).

The result in *Adickes* v. *S.H. Kress & Co., supra*, is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 U. S. C. § 1983 claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[if] a policeman were present, . . . it would be open to a jury, in light of the sequence that followed, [*334] to infer from the circumstances that the policeman and Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." 398 U.S., at 158. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. *Id.*, at 157-158.

The opinion in *Adickes* has sometimes been read to hold that summary [***281] judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n. 30 (citing cases). The Court of Appeals apparently read *Adickes* this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of *Adickes* was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different than the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her [**2559] decedent had ever been exposed to Celotex asbestos. [4] App. 170. Celotex supported this motion with a [*335] two-page "Statement of Material Facts as to Which There is No Genuine Issue" and a three-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See *id.*, at 171-176.

> 4 JUSTICE STEVENS asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. *Post*, at 339 (dissenting). The Court replies that what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." *Ante*, at 320, n. 2. In my view, it does not really matter which reading is correct in this case. For, contrary to JUSTICE STEVENS' claim, deciding this case on the ground that Celotex failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." *Post*, at 339 (STEVENS, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and well established, and deciding the case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable [error]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[at] the very least . . . demonstrate that there is a genuine factual dispute for trial," *id.*, at 143: (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, *id.*, at 160; [***282] (2) a letter from T. R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, *id.*, at 162; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, *id.*, at 164. Plaintiff also apparently indicated [*336] at that time that she intended to call Mr. Hoff as a witness at trial. Tr. of Oral Arg. 6-7, 27-29.

Celotex subsequently withdrew its first motion for summary judgment. See App. 167. [5] However, as a result of this motion, when Celotex filed its second summary judgment motion, the record *did* contain evidence -- including at least one witness -- supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr. of Oral Arg. 5-7. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence -- noting that it had already been provided to counsel for Celotex in connection with the first motion -- and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App. 188.

> 5 Celotex apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial [**2560] burden of production under Rule 56, and thereby rendered summary judgment improper. [6]

> 6 If the plaintiff had answered Celotex' second set of interrogatories with the evidence in her response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence plaintiff relied upon to support her claim was acquired by

Celotex other than in plaintiff's answers to interrogatories.

[*337] This case is indistinguishable from *Adickes*. Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production. [7]

7 Although JUSTICE WHITE agrees that "if [plaintiff] has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact," he would remand "[because] the Court of Appeals found it unnecessary to address this aspect of the case." *Ante*, at 328-329 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial before Celotex filed its second motion for summary judgment. Tr. of Oral Arg. 6-7. Under the circumstances, then, remanding is a waste of time.

[***283] JUSTICE STEVENS, dissenting.

As the Court points out, *ante*, at 319-320, petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia. [1] [*338] Respondent made an adequate showing -- albeit possibly not in admissible form [2] -- that her husband had been exposed to petitioner's product in Illinois. [3] Although the basis of the motion and the argument had been the lack of exposure *in the District of Columbia*, the District Court stated at the end of the argument: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period." App. 217 (emphasis added). The District Court offered no additional explanation and no written [**2561] opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language. [4]

1 See Motion of Defendant Celotex Corporation for Summary Judgment, App. 170 ("Defendant Celotex Corporation, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court")* (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.*, at 175 (Plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence *within the jurisdictional confines of this Court")* (emphasis added); Transcript of Argument in Support of Motion of Defendant Celotex Corporation for Summary Judgment, *id.*, at 211 ("Our position is . . . there has been no product identification of any Celotex products . . . that have been used *in the District of Columbia* to which the decedent was exposed") (emphasis added).

2 But cf. *ante*, at 324 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

3 See App. 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" was purchased by Celotex); *id.*, at 162 (letter from Anning-Johnson Co.) (confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); *id.*, at 164, 164c (deposition of Catrett) (description of his work with asbestos "in Chicago").

4 See *Catrett* v. *Johns-Manville Sales Corp.*, 756 F.2d 181, 185, n. 14 (1985) ("[The] discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the [*339] District Court's decision to grant summary judgment [***284] was palpably erroneous. The court's bench reference to "or elsewhere" neither validated that decision nor raised the complex question addressed by this Court today. In light of the District

Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground. [5]

5 Cf. n. 2, *supra*. The Court's statement that the case should be remanded because the Court of Appeals has a "superior knowledge of local law," *ante*, at 327, is bewildering because there is no question of local law to be decided. Cf. *Bishop* v. *Wood*, 426 U.S. 341, 345-347 (1976).

The Court's decision to remand when a sufficient ground for affirmance is available does reveal, however, the Court's increasing tendency to adopt a presumption of reversal. See, *e. g., New York* v. *P.J. Video, Inc.*, 475 U.S. 868, 884 (1986) (MARSHALL, J., dissenting); *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 715 (1986) (STEVENS, J., dissenting); *City of Los Angeles* v. *Heller*, 475 U.S. 796, 800 (1986) (STEVENS, J., dissenting); *Pennsylvania* v. *Goldhammer*, 474 U.S. 28, 31 (1985) (STEVENS, J., dissenting). As a matter of efficient judicial administration and of respect for the state and federal courts, I believe the presumption should be precisely the opposite.

I respectfully dissent.

REFERENCES

73 Am Jur 2d, Summary Judgment 15, 16- 19

28 Federal Procedure, L Ed, Pleadings and Motions 62:535-62:541, 62:589-62:612

1 Federal Procedural Forms, L Ed, Actions in District Courts 1:1731-1:1758

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Annotation References:

Reviewability of federal court's denial of motion for summary judgment. 17 L Ed 2d 886.

Propriety, under Rule 56(c) of the Federal Rules of Civil Procedure, of granting oral motion for summary judgment. 52 ALR Fed 567.

Sufficiency of showing, under Rule 56(f) of Federal Rules of Civil Procedure ,of inability to present by affidavit facts justifying opposition to motion for summary judgment. 47 ALR Fed 206.

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

LORRETTA JEAN FULLINGTON,

COMPLAINANT,

v.

AVSEC SERVICES, L.L.C.; SOUTHWEST AIRLINES CO; MIDAMERICA BUILDING MAINTENANCE CORP.; OCS GROUP OF COMPANIES,

RESPONDENTS.

ARB CASE NO. 04-019

ALJ CASE NO. 2003-AIR-30

DATE: October 26, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Kristina S. Holman, Esq., *Las Vegas, Nevada*
Sangeeta Singal, Esq., *San Francisco, California*

For the Respondents:
Gary C. Moss, Esq., *Piper Rudnick, LLP, Las Vegas, Nevada*
Angela Edwards Dotson, Esq., *Piper Rudnick, LLP, Los Angeles, California*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2003), and implementing regulations, 29 C.F.R. Part 1979 (2005). Loretta Fullington claimed that Southwest Airlines discriminated against her in violation of AIR 21 while she was a supervisor for AVSEC Services, L.L.C., which had cleaning contracts with Southwest and other airlines. An Administrative Law Judge (ALJ) recommended

dismissal of the claim against Southwest. [Recommended Decision and] Order (R. D. & O.). We adopt the recommendation and dismiss Southwest.

BACKGROUND

AVSEC terminated Fullington's employment on August, 27, 2002. Her initial complaint with the Occupational Safety and Health Administration (OSHA) claimed that, after she complained to the Federal Aviation Administration (FAA), AVSEC harassed her and eventually terminated her employment. *See* Discrimination Case Activity Worksheet, dated October 22, 2002. In an October 25, 2002 letter from her attorney to OSHA, Fullington also complained against Mid-America Building Maintenance Incorporated, Southwest Airlines, National Airlines, and American Airlines as additional respondents. Letter from Sangeta A. Singal to OSHA, dated October 25, 2002.

The October 25, 2002 complaint makes the following factual averments, which we take as true for the purposes of the motion to dismiss: Fullington was a Duty Manager for AVSEC, a janitorial and aircraft detailing company that held contracts with various airlines, including Southwest Airlines, National Airlines and American Airlines. AVSEC was a wholly owned subsidiary of Mid-America Building Maintenance.

As Duty Manager, Fullington was "responsible for supervising the cleaning crews and ensuring the work was properly performed and completed. Her duties also included assignment of shifts, employment discipline and retention, scheduling, and payroll performing tasks." Southwest and the other airlines "controlled and supervised the work of AVSEC employees" insofar as the airlines "generated memorandums, and critiqued, evaluated and directed the work done by AVSEC employees." Southwest filled out a "cleanliness report card" that evaluated the working areas of individual workers.

According to Fullington's complaint, AVSEC employees started performing in-airline FAA security checks for Southwest Airlines on July 1, 2002. Fullington was one of the Duty Managers held responsible for performing cabin seat security checks. Fullington became aware that "Southwest was not supposed to contract out security duties to AVSEC, a cleaning company, . . . that the manner in which the security checks were being performed was incorrect, and that important, standard security procedures were being massively sidestepped and ignored, all in grave violation of FAA guidelines." Letter from Sangeta A. Singal, at 2.

Fullington alleges that she then complained to an AVSEC accounts manager overseeing security responsibilities, an AVSEC regional general manager, and a Southwest supervisor. When they failed to take corrective action, she went to the FAA and "informed them of the security breaches." Fullington claims the FAA was not only "surprised" that AVSEC was performing security checks, but also found them to be "haphazard," "incorrect," or "not . . . done at all." Accordingly, the FAA instructed Fullington "on the correct way to perform the security checks" and initiated an investigation into her complaints.

On August 14, 2002, the AVSEC accounts manager who oversaw security reprimanded Fullington for taking too much time performing the security checks, performing them the wrong way, and taking time away from her supervisory duties. According to her, he threatened her job. She then made a complaint to the Department of Transportation (DOT) on August 16, 2002.

Fullington and the AVSEC accounts manager had a second heated exchange over compliance with FAA procedures on August 19, 2002, and he again threatened that she would be called before the regional general manager and would not like the outcome.

On August 22, 2002, the FAA met with the AVSEC regional general manager and a Southwest representative for three hours about Fullington's complaints. Immediately thereafter she says AVSEC suspended her. The regional general manager complained that her actions had caused him to spend three hours with the FAA and Southwest. He said, "[D]o you have any idea how that made me look or feel?"

Then, on August 27, 2002, DOT contacted AVSEC to discuss Fullington's safety complaints. And finally, on August 29, 2002, the AVSEC regional general manager terminated her employment. Her check, payable through August 29, 2002, was dated August 27, 2002.

Fullington then began seeking redress with OSHA. On April 25, 2003, OSHA dismissed Fullington's initial complaint against AVSEC. On May 6, 2003, Fullington appealed the OSHA decision and requested a hearing before an ALJ, and on May 22, 2003, the ALJ assigned the case for trial. On May 23, 2002, OSHA issued additional findings, dismissing Fullington's complaint against Southwest and the other airlines for failure to state a prima facie whistleblower case. Fullington did not file a new request for hearing and appeal from that decision. However, in a July 31, 2003 notice, the ALJ consolidated the complaints against AVSEC and Southwest.

On August 14, 2003, Southwest filed a motion to dismiss, which Fullington opposed. In the September 25, 2003 R. D. & O., the ALJ denied Southwest's motion to dismiss insofar as Southwest argued that Fullington had failed to file a timely objection to OSHA's May 23, 2002 additional findings. R. D. & O. at 2. The ALJ concluded that Fullington's first notice of appeal "substantially complied" with the requirements for filing a timely appeal under AIR 21. Southwest has not briefed that ruling on appeal. *See* Repsondent Southwest Airline Co.'s Reply to Complaintant Loretta Fullington's Appeal from the Administrative Law Judge's Grant of Respondent Southwest Airline Co.'s Motion to Dismiss and Denial of Complainant's Motion for Reconsideration of Respondent's Motion to Dismiss. Accordingly, we consider the timeliness of appeal issue waived. *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-00005, slip op. at 6 (ARB Dec. 30, 2004); *Development Res., Inc.*, ARB No. 02-046, slip op. at 5 (ARB Apr. 11, 2002).

In the R. D. & O., the ALJ also dismissed the complaint against Southwest on the ground that Fullington failed to articulate a prima facie case against Southwest.

Fullington "could qualify" as Southwest's employee, her complaints to supervisors and federal agencies about flight safety were protected activities under AIR 21, and her recitation of the facts showed that she was subjected to adverse action. *Id.* at 3-4. But the ALJ found that Fullington failed to allege other required elements of a prima facie case against Southwest, i.e., "Fullington's allegations do not give rise to the inference that Southwest knew of her protected activity or initiated her termination from AVSEC on account of her protected activity." *Id.* at 3.

Fullington filed a Motion for Reconsideration of the R. D. & O. on October 3, 2003, which Southwest opposed, and which the ALJ denied by order dated October 23, 2003. We now turn to the merits of Fullington's appeal.

ISSUE

The issue presented to us is whether Fullington's failure to state a claim against Southwest entitles it to dismissal from the case.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's recommended decision under AIR 21 § 42121(b)(3) and 29 C.F.R. § 1979.110. See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to ARB the Secretary's authority to issue final orders under, inter alia, AIR 21 § 42121). We review an ALJ's conclusions of law de novo, *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 03-AIR-4, slip op. at 2 (ARB Feb. 24, 2005); *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 5 (ARB Dec. 30, 2004), but under § 42121, we review the ALJ's findings of fact under the substantial evidence standard. 29 C.F.R. § 1979.110(b).

DISCUSSION

I. Elements of AIR 21 Whistleblower Complaint

AIR 21 provides that "[no] air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment," 49 U.S.C.A. § 42121(a), because the employee has engaged in certain protected activities. These protected activities include: providing to the employer or (with knowledge of the employer) the Federal Government "information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety . . . " 49 U.S.C.A. § 42121(a)(1). *See also* 29 C.F.R. § 1979.102.

The AIR 21 complainant must allege and later prove that she was an employee who engaged in activity the statute protects; that an employer subject to the act had knowledge of the protected activity; that the employer subjected her to an "unfavorable personnel action;" and that the protected activity was a "contributing factor" in the

unfavorable personnel action. 49 U.S.C.A. § 42121(a), (b)(2)(B)(iii). *Cf.* 29 C.F.R. § 1979.104(b)(1)(i)-(iv). If the employer has violated AIR 21, the employee is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv). *Cf.* 29 C.F.R. § 1979.104(d). *See, e.g., Negron,* ARB No. 04-021, slip op. at 6; *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 slip op. at 9 (ARB Jan. 30, 2004).

II. Fullington's Failure to State a Claim Against Southwest

We first consider whether it was legal error for the ALJ to have dismissed Fullington's AIR 21 complaint against Southwest. The rules governing hearings in whistleblower cases contain no specific provisions for dismissal of complaints for failure to state a claim upon which relief may be granted. *See* 29 C.F.R. Parts 18 and 24 (2005). It is therefore appropriate to apply Fed. R. Civ. P. 12(b)(6), the Federal Rule of Civil Procedure governing motions to dismiss for failure to state such claims. 29 C.F.R. § 18.1 (a). Under Fed. R. Civ. P. 12(b)(6), all reasonable inferences are made in the non-moving party's favor. *Cummings v. USA Truck, Inc.*, ARB No. 04-043, ALJ No. 03-STA-47, slip op. at 4 (ARB Apr. 26, 2005). Dismissal should be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* slip op. at 5 (citation omitted). *Cf.* 49 U.S.C.A. § 42121(b)(2)(B)(i) (OSHA will decline to conduct an investigation of a complaint unless the complainant "makes a prima facie showing" that protected activity was a contributing factor in a respondent's adverse action); 29 C.F.R. § 1979.104(b) (same).

The October 25, 2002 letter from Fullington's lawyer to OSHA constitutes her complaint against Southwest.[1] Drawing all reasonable inferences in Fullington's favor, we agree with the ALJ's determination that Fullington engaged in protected activity and that she suffered an unfavorable personnel action; disagree on whether the factual averments show that Southwest was in an employment relationship with her and was aware of the protected activity; and agree that Southwest did not take adverse action or cause AVSEC to take adverse action against her.

Under AIR 21, protected activities include providing to the employer or the Federal Government "information relating to any violation or alleged violation of any order, regulation, or standard of the [FAA] or any other provision of Federal law relating to air carrier safety . . . " 49 U.S.C.A. § 42121(a)(1). *See also* 29 C.F.R. § 1979.102. Fullington alleges that she became aware that AVSEC was performing security checks in violation of FAA guidelines and that she provided that information to an AVSEC accounts manager, an AVSEC regional manager, a Southwest supervisor, and later the

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[1] Although Fullington repeatedly refers to the October 25, 2002 letter as her first complaint, *see e.g.,* Complainant Loretta Fullington's Opposition to Respondent Southwest Airlines Co.'s Motion to Dismiss, September 2, 2003, at 2, it is in fact her second. Her first complaint, which OSHA dismissed on April 25, 2003, was against AVSEC.

FAA and DOT. If proven, those facts are clearly sufficient to establish that Fullington engaged in protected activity.

Fullington was subjected to an unfavorable personnel action. Under AIR 21, such an action includes discharge or other discrimination "with respect to compensation, terms, conditions, or privileges of employment." 49 U.S.C.A. § 42121(a). The AIR 21 regulations provide that it is a violation for a covered employer to "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has [engaged in protected activity]." 29 C.F.R. § 1979.102(b). Fullington contends that AVSEC harassed, threatened, suspended and eventually discharged her. Those allegations are without question enough to demonstrate that Fullington was subjected to an unfavorable personnel action. However, the question we subsequently address is whether those actions are attributable to Southwest.

Fullington alleges that Southwest had knowledge of her protected activity. Employer knowledge is an element of an AIR 21 retaliation claim. An employee must provide information relating to a violation to the employer or "with any knowledge of the employer" to the Federal Government. 49 U.S.C.A. § 42121(a)(1). *See also* 29 C.F.R. § 1979.102(b)(1). The ALJ concluded that Fullington did not allege that Southwest had knowledge of her complaints. R. D. & O. at 3-4. However, we disagree. Her complaint contends that she complained about security procedures to a Southwest supervisor and that on August 22, 2002, the FAA met with the AVSEC regional general manager and a representative of Southwest about Fullington's complaints. Letter from Sangeta A. Singal, at 2-3. Those contentions are sufficient to overcome a motion to dismiss on the issue of employer knowledge.

The last, and pivotal, issue is whether Fullington was an employee and Southwest was an employer subject to liability under AIR 21. AIR 21 provides that "No air carrier or contractor or subcontractor of an air carrier may discharge or otherwise discriminate against an employee" because of the employee's protected activities. 49 U.S.C.A. § 42121(a). *See also* 29 C.F.R. § 1979.104(b)(1)(i)-(iv). "Employer" is not defined in the statute or regulations, but the definition of "employee" in the regulations "means an individual . . . working for an air carrier or contractor or subcontractor . . . or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier." 29 C.F.R. § 1979.101. Although the statute refers to "employer" as the potentially liable party, the regulations speak in terms of "named person," 29 C.F.R. § 1979.104, which they define as "the person alleged to have violated the Act." 29 C.F.R. § 1979.101. We therefore conclude that there must be an employer-employee relationship between an air carrier, contractor or subcontractor employer who violates the Act and the employee it subjects to discharge or discrimination, but that the violator need not be the employee's immediate employer under the common law.

Our interpretation of the provisions of AIR 21 is consistent with the position we have taken in claims of unlawful discrimination arising under other whistleblower protection provisions. The crucial factor in finding an employer-employee relationship is whether the respondent acted in the capacity of an employer, that is, exercised control

over, or interfered with, the terms, conditions, or privileges of the complainant's employment. *See Lewis v. Synagro Techs., Inc.*, ARB No. 02-072, ALJ Nos. 02-CAA-12, 14, slip op. at 8 n.14, 9-10 (ARB Feb. 27, 2004) (environmental whistleblower acts) and cases cited therein. *See also BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003) (all actions under the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004)). Such control, which includes the ability to hire, transfer, promote, reprimand, or discharge the complainant, or to influence another employer to take such actions against a complainant, is essential for a whistleblower respondent to be considered an employer under the whistleblower statutes. *Lewis*, slip op. at 7. If a complainant is unable to establish the requisite control and thus an employer-employee relationship, the entire claim must fail. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 9 (ARB Jan. 31, 2001) (environmental whistleblower acts).

With an eye to these principles, we now discuss the allegations in Fullington's complaint. We disagree with the ALJ's conclusion that Fullington alleged sufficient facts to establish that Southwest controlled her employment with AVSEC, but agree with his ultimate conclusion that Southwest did not cause the termination of her employment. AVSEC was a janitorial company that had contracts for cleaning services with Southwest. AVSEC was a contractor and Southwest is an air carrier. Both are subject to the Act. AVSEC was Fullington's common law employer and Fullington contends that AVSEC harassed, threatened, suspended and eventually discharged her. Her contention that AVSEC took adverse action against her almost immediately after Fullington made safety complaints to the company and to federal agencies might state a prima facie case against AVSEC for an AIR 21 violation. 29 C.F.R. § 1979.104(b)(2) ("[I]f the complainant shows that the adverse personnel action took place shortly after the protected activity, [that] giv[es] rise to the inference that it was a factor in the adverse action.").

That is not the case, however, with respect to Southwest. Fullington was a Duty Manager for AVSEC crews cleaning Southwest airplanes. Fullington states that Southwest "controlled and supervised the work of AVSEC employees" to the extent the airline "generated memorandums, and critiqued, evaluated and directed the work done by AVSEC employees." Southwest filled out a "cleanliness report card" that evaluated the working areas of individual workers. But controlling the quality of a contractor's employee's work performance under the contract is not tantamount to having "the ability to hire, transfer, promote, reprimand, or discharge" that employee, as our case law requires. Fullington does not claim in her complaint that Southwest had the ability to hire or fire her. Nor does she recite any facts from which we could conclude that Southwest influenced AVSEC to take unfavorable personnel actions against her. From the fact that AVSEC took action against Fullington after she voiced safety concerns, we do not draw the inference that Southwest controlled the decision.

Thus, because Fullington failed to allege facts sufficient, if proved, to establish essential elements of her AIR 21 whistleblower complaint, viz., that Southwest was Fullington's employer under the Act and that it took or caused AVSEC to take, adverse action against her, we concur in the ALJ's dismissal of her whistleblower complaint for failing to state a claim on which relief can be granted.

III. Analysis under Summary Decision Standard

In deciding that Fullington did not state a prima facie case against Southwest, the ALJ reviewed more than just the allegations in her complaint. He also considered Southwest's Motion to Dismiss and Fullington's opposition. *See* R. D. & O. at 3-4. To the extent the ALJ and we rely upon factual allegations beyond those contained in Fullington's October 25, 2002 complaint, Southwest's motion to dismiss should be handled as a motion for summary decision pursuant to 29 C.F.R. §§ 18.40, 18.41. *See Mehan*, slip op. at 3; *Demski v. Indiana Mich. Power Co.*, ARB No. 02-084, ALJ No. 01-ERA-36, slip op. at 3 (ARB Apr. 9, 2004).

The standard for granting summary decision in whistleblower cases is the same as for summary judgment under the analogous Fed. R. Civ. P. 56(e). Summary decision is appropriate "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision" as a matter of law. 29 C.F.R. §§ 18.40, 18.41; *Mehan*, slip op. at 3; *Flor v. United States Dep't of Energy*, 93-TSC-0001, slip op. at 10 (Sec'y Dec. 9, 1994). If the non-moving party fails to show an element essential to his case, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Mehan*, slip op. at 3; *Rockefeller v. United States Dep't of Energy*, ARB No. 03-048, ALJ No. 2002-CAA-0005, slip op. at 4 (ARB Aug. 31, 2004), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

We have scrutinized Fullington's additional pleadings in light of the summary decision standard. Her filings with the ALJ and with us on appeal merely state in conclusory terms that Southwest had control over her work and illegally terminated her employment. *See, e.g.,* Complainant Loretta Fullington's Opposition to Respondent Southwest Airlines Co.'s Motion to Dismiss, September 2, 2003, at 5 ("Complainant Fullington alleges that Southwest Airlines qualifies as an employer party because it exercised sufficient control over her work."); Complainant Loretta Fullington's Motion for Reconsideration of Respondent Southwest Airline Co.'s Motion to Dismiss, October 3, 2003, at 7 ("Southwest Airlines exercised its employer power by illegally terminating Fullington's employment . . . . "); Complainant Loretta Fullington's Initial Appellate Brief, December 26, 2003, at 10 (Southwest Airlines "effected [sic] [Fullington's] terms and privileges of employment via her termination."). Although those allegations might have been sufficient to overcome a motion to dismiss if they had appeared in the complaint, they are not sufficient on summary decision to overcome Southwest's denials that it played any part in the termination of her employment.

Notwithstanding opportunities to do so, Fullington fails to recite any facts that would demonstrate that Southwest actually played a role in the adverse actions AVSEC took against her. Under the summary decision standard, she does not create a genuine issue of material fact that would entitle her to relief against Southwest.

CONCLUSION

Under either a motion to dismiss or summary decision standard, Fullington is not entitled to relief against Southwest. Therefore, we **AFFIRM** the ALJ's recommendation and **DENY** her complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

LEXSEE

ELYSE KANE, a single person, and ELYSE KANE, d/b/a KANE CONSTRUCTION AND CONSULTING, a sole proprietorship, Plaintiff, v. CITY OF BAINBRIDGE ISLAND, Defendant.

No. 3:10-cv-05731-RBL

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2011 U.S. Dist. LEXIS 138848

December 2, 2011, Decided
December 2, 2011, Filed

PRIOR HISTORY: Kane v. City of Bainbridge Island, 2011 U.S. Dist. LEXIS 51424 (W.D. Wash., May 13, 2011)

COUNSEL: [*1] For Elyse Kane, a single person, and doing business as Kane Construction and Consulting, a sole proprietorship, Plaintiff: Dawn F Reitan, INSLEE BEST DOEZIE & RYDER, BELLEVUE, WA;Matthew Derk Hartman, IMPACT LAW GROUP, SEATTLE, WA.

For City of Bainbridge Island, Defendant: Adam Rosenberg, KEATING BUCKLIN & MCCORMACK, SEATTLE, WA.

JUDGES: HONORABLE RONALD B. LEIGHTON, UNITED STATES DISTRICT JUDGE.

OPINION BY: RONALD B. LEIGHTON

OPINION

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [Dkt. #30]

INTRODUCTION

THIS MATTER comes before the Court upon Defendant City of Bainbridge Island's Motion for Summary Judgment. [Dkt. #30].

This is a case about a land use dispute involving Plaintiff's waterfront property on Bainbridge Island. When Plaintiff bought it, the property could not be developed because it lay completely within a wetland buffer. The City offered a use exception to allow some building on the property. Even when Plaintiff exceeded the limits of the exception by developing the property in an impermissible manner, the City retroactively approved many of the developments anyway.

Plaintiff was unsatisfied because the City did not allow all of her uses and other proposed developments. She appealed the City's decision, [*2] claiming it violated her property rights. A Hearing Examiner affirmed the City's decision. After a circuitous appeal and remand process, Plaintiff filed this suit against the City for damages, making a wide variety of claims. The City filed this Motion for Summary Judgment, seeking dismissal of all claims.

The Court has reviewed the materials submitted in support of and in opposition to the Motion. For the reasons below, the Court GRANTS Defendant's Motion for Summary Judgment.

BACKGROUND

Plaintiff Elyse Kane is a property developer, former Seattle environmental compliance officer, and the former owner of the Bainbridge Island property at issue in this case (the "Property"). Defendant City of Bainbridge Is-

land is a municipal corporation organized under the laws of the State of Washington.

1. State and Municipal Law at Issue

The City's municipal code establishes a process to evaluate and adjudicate applications for land use and property development. The Critical Areas Ordinance (CAO) includes requirements for the use and development of parcels within or adjacent to land designated as "critical areas" or "critical area buffers" according to the state's Growth Management Act (GMA) (Wash. Rev. Code § 36.70A). [*3] Wetlands of a certain size and value are considered critical areas under the act. The GMA applies to Kane's Property because it is located entirely within a designated wetland buffer. Because the Property is waterfront, the state Shoreline Management Act (SMA) (Wash. Rev. Code § 90.58) also applies via the City's Shoreline Master Plan (SMP). In regulating Kane's property use, the City applied the more stringent regulations of the CAO rather than the SMP.

2. Development of the Kane Property

In 2000, Plaintiff purchased four waterfront parcels on Bainbridge Island. In 2004, she sold one parcel to a private purchaser and offered the other three to the City for environmental conservation through its Open Space acquisitions program. After arms-length negotiations, the City purchased two parcels. Kane argues the land she sold to the City was encumbered by an implied non-exclusive access easement for the benefit of the parcel she retained. The City contends Kane did not retain any rights or easements on the two parcels sold to the City. Kane kept the remaining parcel, which is approximately 13,200 square feet in size. That parcel and her development of it is the subject of this action. The [*4] Property was entirely subsumed by a wetland buffer, set aside from development under the state GMA and the City's CAO. Consequently, Kane filed an application with the City for a Reasonable Use Exception (RUE) to allow residential development on the Property.

Over neighborhood opposition, the RUE was granted on June 12, 2004. Several conditions were imposed by the City, including limiting the house's footprint to 1,085 square feet, 225 square feet for the footprint of an open carport, and a driveway in conformance with the proposed site plan. The City's administrative decision allowed for 10,900 square feet to be deemed "impact area," or an area in which development of the Property could occur. To offset development in the impact area, the decision required that a corresponding 10,900 square feet of wetland buffer both on- and off-property be set aside as an undisturbed "enhancement area." The on-property portion of the enhancement area was determined to be 1,930 square feet. The City also required Kane to obtain an approved building permit "in substantial conformance with the [site] plans" before commencing any construction on the Property. [Decl. of Larry Frazier, Dkt. #31 at 8]. [*5] Kane did not challenge or appeal the conditions imposed by the administrative decision accompanying the RUE.

After the City issued the RUE, Kane built a home and developed her Property. Among other things, she constructed a driveway that diverged from the site plan and involved travel over the neighboring property. Using concrete pavers, Kane constructed a patio that was not on the site plan. She utilized a parking area inconsistent with the site plan. Kane also installed a shed and propane tank and parked a recreational vehicle on the Property. None of these improvements were explicitly permitted in the approved RUE and site plan.

3. Disputes and Amendments to the RUE

Kane's development and use of her Property led her neighbors to complain to the City, registering their concern about unlawful development. Rather than pursue code enforcement, the City allowed Kane to file an application to amend her existing RUE. The purpose was to obtain *post hoc* City approval for the disputed developments.

Kane now contends she filed the application to amend under duress. She alleges that City officials threatened code enforcement actions against her for uses of her Property she believes were legal. [*6] She notes that the RUE's original application form required identification of only the "structures" and "impervious surfaces" planned for construction. [Decl. of Elyse Kane, Ex. 16, Dkt. #44 at 36]. Kane argues that the RUE did not restrict the patio, parking area, shed, propane tank, or RV, because they were not were not "structures" or impervious surfaces. She also argues that an easement existed to allow access via a pre-existing driveway. Nevertheless, Kane filed an application to amend the RUE in October 2006, without challenge or objection.

Among other things, Kane's proposed modified site plan included changes to the existing approved driveway, inclusion of the cement-paver patio, and retention of the RV parking area and storage shed. The City's response memorandum approved most of the proposed amendments, including the patio. However, the City did not approve permanent RV parking or the shed. After receiving City approval for driveway modifications, Kane asserted that the approved driveway plan was insufficient. She appealed the City's decision to the Bainbridge Island Hearing Examiner on March 15, 2007. She contested several administrative decisions. She challenged the City's [*7] refusal to allow RV storage and shed. She challenged her obligation to move the propane tank as

close to the residence as possible and contested the requirement that she remove the gravel parking area behind the home and to replace it with native vegetation.

On April 27, 2007, the Hearing Examiner stayed the appeal so Kane could file a second application to amend the RUE. On February 27, 2008, she filed a second amendment, requesting relocation of the existing access and driveway to cross the adjacent parcel. Kane expressed concerns about driveway safety and a desire to comply with city code. She proposed transitioning the carport to storage use and building a replacement two-car garage on the landward side of the existing structure in order to accommodate parking off the new access area. On July 25, 2008, the City rejected these proposals. In its denial, the City said that the proposed amendment took for granted property rights Kane had sold away (namely, an access easement across the adjacent lot). It also noted that the house's footprint would exceed the maximum lot coverage permitted in the Code and that the proposals exceeded what was necessary under the RUE ordinance. Kane timely [*8] appealed the second decision as well.

4. Procedural Background

a. Appeal to the Bainbridge Island Hearing Examiner

In a consolidated appeal of the two denied amendment proposals, Kane and the City were represented by counsel during a three-day administrative hearing. Both parties called lay and expert witnesses and developed a substantial record.

On December 2, 2008, the Hearing Examiner issued an order affirming the City's decision and denying Kane relief. [Decision of the Hearing Examiner, Dkt. #39 at 15]. The Examiner concluded that Kane was barred by *res judicata* from contesting the denied amendments because she had not appealed the original approved RUE in 2004. [Dkt. #39 at 25]. The Examiner noted that *res judicata* would not apply if Kane could show a "substantial change" in the application conditions. However, the Examiner found no substantial change that would affect Kane's appeal, particularly rejecting Kane's argument that the existing driveway was unsafe. [Dkt. #39 at 25-26].

b. Appeal to Kitsap County Superior Court

On December 23, 2008, Kane petitioned the Kitsap County Superior Court for review under the state Land Use Petition Act (LUPA) (Wash. Rev. Code § 36.70C). She argued [*9] that the City misapplied the CAO to her property. The City responded that Kane's LUPA petition is procedurally barred because she failed to appeal the initial RUE in 2004. The court determined that Kane's petition could not be resolved by "the technical nuances of the CAO, [or] by the City's insistence that the RUE amendment process . . . is wholly insulated from judicial review." [Revised Memorandum Opinion, Dkt. #1 at 50]. The court determined that the dispute must be resolved according to the provisions of the SMA rather than the GMA. [Dkt. #1 at 50].

Two state court opinions clarified which statute governed land use regulations of a property, such as Kane's, that fell under both the GMA and SMA. After the City denied Kane's second amendment application but before the Hearing Examiner had ruled on Kane's appeal, the Washington Supreme Court decided *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 189 P.3d 161 (2008). Then, while Kane's petition was pending before the Superior Court, the Washington Court of Appeals handed down *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 152 Wn. App. 190, 217 P.3d 365 (2009) (*KAPO*).

In *Futurewise*, the Court's narrow plurality [*10] opinion held that waterfront property was governed only by the SMA. It cited the legislature's finding that "critical areas within the jurisdiction of the [SMA] shall be governed by the SMA." *Id.* at 245. In *KAPO*, the appellate court restated the narrowest plurality holding in *Futurewise*. It held that real property regulated under the SMA is regulated *only* by the SMA. *KAPO*, 152 Wn. App. at 198.

The Superior Court requested supplemental briefing to decide what impact *KAPO* had on the Kane matter. The City again argued that reaching the merits of Kane's LUPA petition would be impermissible because Kane did not appeal the original RUE. The City further argued that the SMP incorporates the CAO by reference, rendering *KAPO* moot. Kane agreed with the City on this point, arguing that the CAO and SMP cross-references suggest that "the protection of wetlands is the same under either law." [Dkt. #1 at 52].

The court disagreed. It determined that, were a conflict to arise like it did here, the City's CAO would effectively trump the SMP. The court viewed the CAO as contradicting *KAPO*: ". . . *KAPO* seems to dictate that it would be an erroneous application of law for the City's CAO to impose greater [*11] restrictions on Ms. Kane than those required by the SMP." [Dkt. #1 at 52].

The Superior Court found *KAPO* controlling. The court found that the Hearing Examiner erred in applying the GMA rather than the SMA after the Supreme Court rendered its *Futurewise* plurality opinion. It also found that the Examiner's application of the GMA constituted a failure to follow a prescribed legal process. The Superior Court vacated the Hearing Examiner's prior order and remanded the case, giving the City an opportunity to

apply the SMA. The court specifically did not revisit or reverse any of the Hearing Examiner's findings and conclusions. [Dkt. #1 at 56].

c. Action for Damages

Plaintiff then filed this action for money damages in Kitsap County Superior Court, disregarding the court's remand order. The City removed the matter to Federal Court pursuant to 28 U.S.C. §§ 1441 and 1446. Plaintiff asserts the following claims: federal claims under 42 U.S.C. § 1983 for violation of her Fourteenth Amendment rights; state claims under Wash. Rev. Code § 64.40 for acts of an agency that are arbitrary, capricious, unlawful, or exceed lawful authority; common law tortious interference with business expectations; negligence, [*12] including negligent supervision of employees and negligent infliction of emotional distress; promissory estoppel; and a partial taking.

The Defendant moves for summary judgment against Plaintiff on all claims and seeks attorneys' fees, as the prevailing party, under Wash. Rev. Code § 64.40.020(2).

DISCUSSION

1. Summary Judgment Standard

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. Fed. R. Civ. P. 56(c). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In other words, summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable fact finder could return a decision in its favor. *Triton Energy Corp. v. Square D Co.,* 68 F.3d 1216, 1220 (9th Cir. 1995). It is not the role of this Court "to scour the record in search [*13] of a genuine issue of triable fact." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.,* 55 F.3d 247, 251 (7th Cir. 1995)).

2. Federal Law § 1983 Claims

a. Substantive Due Process Claim

Plaintiff asserts a § 1983 claim, arguing that the City's property use restrictions violated her substantive due process rights under the Fourteenth Amendment. She contends that a protectable property interest was created by the issuance of the RUE and that any subsequent restrictions (viewed by the City as code enforcement) violated that interest. The City argues that its actions do not constitute "most egregious" official conduct required under the law.

To establish a substantive due process claim against the government for land use restrictions, a plaintiff must show "egregious or arbitrary government conduct," *Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188, 198, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003), that is "clearly arbitrary and unreasonable." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio Law Abs. 816 (1926). Only "the most egregious official conduct" can be considered arbitrary in the "constitutional sense." *County of Sacramento v. Lewis,* 523 U.S. 833, 845-46, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). To support [*14] a claim, government action must "lack any rational relationship to the public health, safety, or general welfare." *Crown Point v. Sun Valley,* 506 F.3d 851, 855-56 (9th Cir. 2007).

Plaintiff has failed to present any evidence that the City's conduct meets this standard, even viewed in the light most favorable to her. Where the City discovered non-conforming property developments, Plaintiff had the opportunity to amend the RUE to account for them rather than be subject to code enforcement. Such government conduct is manifestly reasonable and does not constitute the egregious official conduct necessary to sustain Plaintiff's claim. Defendant's Motion for Summary Judgment on Plaintiff's substantive due process claim is GRANTED.

b. Procedural Due Process Claim

Plaintiff asserts a § 1983 claim for violation of her Fourteenth Amendment procedural due process rights. Plaintiff argues that the City revoked property rights it previously gave her without offering her the chance to appeal under the municipal code. She argues that RUE enforcement during her appeal constituted a violation of her due process rights. The City argues that Kane has no right to a permit. It argues that Kane simply couches [*15] in due process language a desire to do whatever she wants with her restricted parcel. Defendant argues this is not a constitutional issue.

To demonstrate a violation of her procedural due process rights, Plaintiff must show the existence of an interest protected by the Constitution's due process clause and an inadequacy of available procedures to challenge the government's actions. *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 59, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999). Plaintiff has offered no evidence that

the property rights she claims actually belonged to her. She fails to present evidence that the appellate procedures she pursued were inadequate. The issue in her dispute was not about a deprivation of her property rights but whether or not her development was in conformity with the RUE. The City was within its rights to regulate her property use, and Kane was within hers to appeal. No procedural due process violation exists. Defendant's Motion for Summary Judgment on Plaintiff's procedural due process claim is GRANTED.

c. Equal Protection Claim

Plaintiff asserts a § 1983 claim for violation of her Fourteenth Amendment equal protection rights. Kane argues she was treated differently than other similarly situated [*16] parties who had been granted residential use of their property that abutting the adjacent wetlands. Kane also argues that neighboring vehicles were permitted to park on city property without threat of prosecution. She notes that responses to her questions regarding the parking situation yielded the cryptic response that "'arrangements' had been made" with her neighbors. [Dkt. #42 at 25]. The City argues that there is no evidence regarding who the other individuals similarly situated are, what their situations entailed, and how their cases differed from Kane. Without such evidence, the City argues Kane cannot support an equal protection claim.

If Plaintiff cannot show intentional discrimination, the claim fails. *N. Pacifica, LLC v. City of Pacifica,* 526 F.3d 478, 486 (9th Cir. 2008). Additionally, if Plaintiff cannot show she has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," *Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000), her claim similarly fails.

In this case, Plaintiff has provided no evidence of intentional discrimination and has failed to present evidence of others similarly situated whose [*17] treatment differed. The City rightly points out, echoing Justice Breyer (*Olech,* 528 U.S. at 565 (Breyer, J., concurring)), that Kane's situation is unique to her Property, her RUE, and her plan for developing that Property. Finding others who meet the "similarly situated" requirement is not easy, and Plaintiff has failed to offer such evidence. Defendant's Motion for Summary Judgment on Plaintiff's equal protection claim is GRANTED.

3. State Law § 64.40 Claim

Plaintiff seeks recovery under Wash. Rev. Code § 64.40 for arbitrary, capricious, or unlawful regulatory actions by the City. Kane claims the City's administrative decisions were unlawful and exceeded the City's authority, thereby depriving her of property rights to which she was lawfully entitled. The City argues, on the other hand, that the regulatory actions challenged by Plaintiff do not constitute "acts" under the meaning of the statute and therefore are not subject to liability.

Section 64.40 allows plaintiffs to sue the government for actions "which are arbitrary, capricious, unlawful, or exceed lawful authority" provided that such actions are unlawful or exceed lawful authority. Wash. Rev. Code § 64.40.020(1). Relief is only [*18] available if "the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority." *Id.* An agency "act" is "a final decision by an agency which places requirements, limitations, or conditions upon the use of real property in excess of those allowed by applicable regulations." Wash. Rev. Code § 64.40.010(6).

Plaintiff asserts that her damages action under § 64.40 contains inherent issues of fact which must be resolved to determine whether the government's actions meet the statutory requirements for arbitrariness, capriciousness, or unlawfulness. She raises examples of unresolved issues such as the City's threat of pursuing civil code enforcement against what Kane characterizes as legal uses of her property. Kane cites as issues of fact the requirement that she submit an RUE amendment application and also cites denial of those applications. However, Defendant is correct that these are not "acts" under the statute because they are not final determinations, nor were they appealed. Though Plaintiff may cite situations in which she felt the [*19] City did not follow proper procedures, she did not appeal or challenge them at the time. The questions she raises as issues of fact cannot be catalogued as "acts" under the statute.

The City correctly identifies the Hearing Examiner's final decision as the only "act" in this case subject to § 64.40 liability. As designed, the statute grants relief only where an "act" is appealed to conclusion. *Brower v. Pierce County,* 96 Wn. App. 559, 564, 984 P.2d 1036 (1999). Viewing the facts in the light most favorable to Plaintiff, there is simply nothing to show that the Hearing Examiner acted arbitrarily, capriciously, or with knowing illegality. Furthermore, there is no fact presented to show that the Hearing Examiner's decision itself was unlawful or exceeded lawful authority. The Superior Court found that the Hearing Examiner erred in applying the GMA rather than SMA. However, Defendant is correct that her error was ultimately a lack of awareness of the Supreme Court's non-binding plurality opinion in *Futurewise.* Notwithstanding that oversight, the Superior Court did not revisit or reverse any of the Examiner's findings of fact or conclusions of law. The Examiner's error does not satisfy the statute's [*20] re-

quirements of arbitrariness, capriciousness, or unlawfulness.[1] Defendant's Motion for Summary Judgment on Plaintiff's § 64.40 claim is GRANTED.

1 It is worth comment that Plaintiff disregarded the Superior Court's remand when it filed this action for damages. The Hearing Examiner has not had the opportunity to revise her decision in accordance with the Superior Court's findings. This Court will not reward Plaintiff's haste, since her grievances may well have been resolved on remand.

4. Tortious Interference with Business Expectations Claim

Plaintiff claims damages against the City for tortious interference with business expectations. Kane cites as her valid business expectancy the construction and sale of a single family residence on the Property. Plaintiff argues that delay and legal expenses resulting from the City's restriction of her property rights adversely impacted her ability to market and sell the Property once developed. She claims the City's actions made her unable to meet financing obligations, forcing a sale of the Property at a loss. The City argues that Plaintiff cannot establish a tortious interference claim, because the City exercised its legal interest in good faith. [*21] The City claims its interference was justifiable.

To establish a claim of tortious interference, a Plaintiff must show that a valid contract or business expectancy exists, that Defendant had knowledge of it, that Defendant intentionally interfered causing termination of the expectancy by an improper purpose or means, and must show damages. *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wn.2d 120, 136, 839 P.2d 314 (1992). "A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value." *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc.*, 114 Wn. App. 151, 158, 52 P.3d 30 (2002). "Exercising in good faith one's legal interests is not improper interference." *Leingang v. Pierce Cnty. Med. Bureau*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). A privilege to interfere may be established "if the interferor's conduct is deemed justifiable." *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 604-05, 564 P.2d 1137 (1977). To determine whether conduct is justifiable, a court will consider the nature of the interferor's conduct, the character of the expectancy, the relationship between the parties, the interest advanced by the interferor, and the social desirability [*22] of protecting the expectancy or the interferor's freedom of action. *Id.*

The City has the authority to regulate property development within the bounds of the law. Its duties exist not only in relation to Kane's property ownership. The City has a duty to the interests of her neighbors in seeing that the City's environmental regulations are upheld. In terms of the City's conduct, it offered to forgo code enforcement in response to developments that arguably violated the RUE. It allowed Kane to file amendment proposals, most of which the City approved. The nature of the expectancy is unclear. Viewing the facts in a light most favorable to the Plaintiff, she did not make clear to the City whether her intention was to sell the home or maintain it as a personal residence. Even so, the City's relationship with Kane is balanced by its relationship with her neighbors and other residents of Bainbridge Island. The City had a duty to all, which it pursued via enforcement of land use regulations. The interest advanced by the City was to respond to citizen complaints about Kane's property development and reasonably enforce its interpretation of the municipal code. It is manifestly certain that Kane's [*23] interest in developing her Property cannot outweigh the City's interest in ensuring enforcement of its land use laws. The City's interference was justifiable.

Defendant had a right to interfere for the purposes of protecting a wetland area and enforcing its own laws. Its interference did not constitute tortious behavior. The City's Motion for Summary Judgment on Plaintiff's tortious interference claim is GRANTED.

5. Negligence Claim

Plaintiff asserts a negligence claim against the City, arguing that it negligently implemented its land use regulations. Kane argues the City erroneously advised her regarding its authority to regulate her land use rights. She contends that the City had a special relationship with her, owing a duty to provide guidance regarding the application of city code. She claims the City failed that duty repeatedly. Defendant argues that the City is not liable for negligent permitting and that no special relationship exists. Furthermore, the City argues that Plaintiff has failed to identify any standard of care owed to applicants in a permitting process.

A duty of care may arise where a public official with a responsibility to provide accurate information fails to correctly [*24] answer a plaintiff's question when the plaintiff intended to benefit in some way from the information. *Taylor v. Stevens County*, 111 Wn.2d 159, 171, 759 P.2d 447 (1988); *see also Rogers v. City of Toppenish*, 23 Wn. App. 554, 596 P.2d 1096 (1979) (holding that a special relationship existed where a zoning administrator erroneously informed a property owner that his property was zoned for apartments). The special relationship exception requires direct contact between the public official and injured plaintiff, that an express assurance was given by the public official, and that the plaintiff justifiably relied. *Babcock v. Mason Cnty. Fire Dist. No.*

6, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). However, a government duty cannot arise from implied assurances. *Id.* at 789; *see also Vergeson v. Kitsap County,* 145 Wn. App. 526, 538, 186 P.3d 1140 (2008) (a government duty arises where a direct inquiry made by an individual is met with incorrect information clearly set forth by the government).

Plaintiff fails to identify specific instances of express assurances relied upon in dealing with the City and its land use code. Even with respect to the RUE amendment process, Kane has not offered evidence of an express assurance given by the City creating [*25] a special relationship. On that ground, general negligence claims fail. Additionally, Defendant is correct that Plaintiff has not identified a breach of any particular standard of care. That provides further grounds for dismissal of general negligence claims. *See, e.g., Gurno v. Town of LaConner,* 65 Wn. App. 218, 228, 828 P.2d 49 (1992) (affirming directed verdict after plaintiff failed to present evidence of an applicable standard of care and its breach). Defendant's Motion for Summary Judgment on Plaintiff's negligence claim is GRANTED.

6. Negligent Supervision Claim

It is unclear whether Plaintiff asserts a negligent supervision claim against the City. Plaintiff's Response to Defendant's Motion for Summary Judgment [Dkt. #42] does not address Defendant's arguments supporting summary dismissal of this claim. To the extent that Plaintiff intends to assert negligent supervision, that claim fails.

An employer is vicariously liable for acts of its employees that are within the scope of employment. *See Rahman v. State,* 170 Wn.2d 810, 815, 246 P.3d 182 (2011). A cause of action for negligent supervision only arises when an employee acts outside the scope of employment. *Briggs v. Nova Servs.,* 135 Wn. App. 955, 966, 147 P.3d 616 (2006).

Plaintiff [*26] offers no evidence that any agent of the City was acting outside the scope of employment during their interaction. Without such evidence, a negligent supervision claim fails. Defendant's Motion for Summary Judgment on Plaintiff's negligent supervision claim is GRANTED.

7. Negligent Infliction of Emotional Distress Claim

Plaintiff seeks damages for negligent infliction of emotional distress. She claims the City's arbitrary and capricious actions--including denial, delay, stonewalling, and allowing agents to execute municipal code without proper experience--caused her emotion distress. Kane claims medical expenses resulting from this distress. The City argues that Kane does not meet the necessary standard to establish a negligent infliction of emotional distress claim.

The tort of negligent infliction of emotional distress is a judicially-created, narrowly-tailored cause of action allowing recovery for family members who witness the injury or death of a loved one shortly after a physical accident. *Hegel v. McMahon,* 136 Wn.2d 122, 125-26, 960 P.2d 424 (1998); *Gain v. Carroll Mill Co.,* 114 Wn.2d 254, 261, 787 P.2d 553 (1990). The tort presumes a traumatic event, such as witnessing a "crushed body, the bleeding, the [*27] cries of pain, and, in some cases, dying words which are really a continuation of the event." *Colbert v. Moomba Sports, Inc.,* 163 Wn.2d 43, 55, 176 P.3d 497 (2008). Injuries must be manifested by objective symptoms. *Id.* at 50.

Plaintiff offers no evidence to support this claim. There was no physical accident, no traumatic event. She has presented no evidence of a dead or injured loved one. Without such evidence, her claim fails. Defendant's Motion for Summary Judgment on Plaintiff's negligent infliction of emotional distress claim is GRANTED.

8. Promissory Estoppel Claim

Plaintiff claims the City is liable on a theory of promissory estoppel for retroactively retracting her property rights. Kane argues that she relied upon City officials' representations and promises to develop her Property and in pursuing the RUE amendment process. She maintains that the City violated its promises by restricting her Property development and by denying several of her proposed RUE amendments. The City argues that Plaintiff is unable to offer specific evidence of representations on which she relied and argues that, even if she could cite a specific promise, there is no justifiable reliance. The City also maintains that there [*28] is no evidence of a promise revoked or a change in position.

Promissory estoppel applies where a promise is made which the promisor should reasonably expect to induce action or forbearance on the part of the promisee. *Greaves v. Med. Imaging Sys., Inc.,* 124 Wn.2d 389, 398, 879 P.2d 276 (1994). The promise must induce such action or forbearance. *Id.* Promissory estoppel applies where injustice can be avoided only by enforcement of the promise. *Id.* Courts are slow to apply estoppel principles to government entities when acting in their official capacities. *See, e.g., State v. Charlton,* 71 Wn.2d 748, 430 P.2d 977 (1967) (evidence must present unmistakable justification for imposition of the doctrine when a municipality has acted in its governmental capacity); *see also Bennett v. Grays Harbor County,* 15 Wn.2d 331, 341, 130 P.2d 1041 (1942) (estoppel must be clearly necessary to prevent an obvious injustice). No person is entitled to rely on representations of law. *Bennett,* 15

Wn.2d at 341 ("the public . . . cannot be estopped by unauthorized, illegal, or fraudulent acts or statements on the part of their officers and agents . . . .").

There is no evidence to support Kane's argument that promissory estoppel applies to the [*29] City's regulation of her non-conforming property developments. There is no evidence of a promise that her non-conforming developments would be acceptable under the RUE. Additionally, she presents no evidence that any city official promised that her proposed amendments would actually be accepted. Even if such a promise were made, the government agent would not have been authorized to make it, and Kane would not have been entitled to rely on it as a representation of law. There is no evidence here of a specific promise, let alone injustice requiring enforcement of one. For these reasons, Defendant's Motion for Summary Judgment on Plaintiff's promissory estoppel claim is GRANTED.

9. Partial Taking Claim

Plaintiff asserts a claim against the City for a temporary taking of her Property by land use regulation. Kane argues that she was denied reasonable use of her Property from the time the City threatened to pursue code enforcement for her non-conforming developments. She argues that a temporary taking resulted in the need to sell before the Property was fully developed. Defendant counters that the City's regulations were not so severe as to cause a taking. Arguing that no total taking occurred, [*30] the City contends that the Kane Property was not devalued as a result of City action, but rather increased in value. The City argues that a profitable use could be made of the parcel, and that Plaintiff's taking claim therefore fails.

This Court's threshold inquiry is whether or not the City's land use regulations denied Kane a "fundamental attribute of ownership." *Guimont v. Clarke,* 121 Wn.2d 586, 602, 854 P.2d 1 (1993). If Plaintiff fails to show a *per se* taking, the analysis shifts to determine whether the regulation is intended to safeguard the public interest, health, safety, environment, or fiscal integrity of an area, or whether the regulation seeks to provide a public benefit rather than prevent a public harm. *Id.* at 603. If the regulation seeks to safeguard a public interest or confer a public benefit, a court will then consider whether the regulation advances a legitimate state interest. If so, the court will balance the state interest against the adverse economic impact on the property owner. *Id.* Here, the *Penn Central* factors must be considered: first, the economic impact on the property; second, the interference with investment-backed expectations; third, the character of the government [*31] action. *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Under federal and state law, a land use regulation which affords an economic use--even after diminishing value--is not considered a taking. *See, e.g., Euclid,* 272 U.S. at 389-90; *see also Carlson v. City of Bellevue,* 73 Wn.2d 41, 435 P.2d 957 (1968).

There was no physical taking of the Kane Property. The issue, then, is whether, the land use regulations themselves constitute an effective taking. First, the City code did not deny Kane a fundamental attribute of ownership. She retained the right to possess, to exclude, to dispose, and to make some pecuniary use of her Property. That is evidenced by her development and lease of the Property. Because no *per se* taking exists here, this analysis will proceed to the second level of inquiry, following *Guimont.* The land use regulations at issue here are by their very nature designed to protect the environment. They serve a legitimate state interest in ensuring the natural surroundings remain healthy and that important ecosystems are not destroyed. The state's passage of numerous environmental protection laws reinforces the notion that a legitimate state interest is at play. Therefore, [*32] the question becomes whether the regulations meet the *Penn Central* standard.

When Kane purchased her Property it was completely encumbered by a wetland buffer, foreclosing any development. The administrative decisions Kane challenges here are subsequent issues arising from an initial RUE. Without that exception, Kane would have been prohibited from building on the Property. However, the exception granted by the City allowed Kane to develop her parcel. The ensuing conflict centered on whether or not property development had exceeded the bounds of the RUE. Plaintiff wants to claim adverse economic impact not only by the regulations but also by the delay resulting from the dispute over her non-conforming uses. That posture is inappropriate. The land use regulations themselves imposed no great loss of property value. If this protracted struggle led to an economic loss, it is an unfortunate result which nevertheless has no bearing on this Court's takings analysis. Similarly, the environmental regulations' interference with investment-backed expectations is negligible. Finally, the character of the City's action is in conformity with any government seeking to ensure its code is enforced or [*33] accommodated. Given that the City permitted an exception to the prior use restrictions, and given that Kane had the opportunity to amend the RUE, the City's action cannot be deemed over-burdensome.

Even after the regulations were imposed and the dispute carried forward, Kane was able to rent her Property, then sell it. Whether or not she took a loss does not alter the fact that she was able to make financial use of a parcel that would otherwise have been undevelopable. Even where an owner faces an economic loss, it is not enough

to sustain a taking claim. Defendant's Motion for Summary Judgment on Plaintiff's taking claim is GRANTED.

10. Attorneys' Fees

The City seeks fees as the prevailing party on Plaintiff's § 64.40 claim. Wash. Rev. Code § 64.40.020(2) provides that "the prevailing party in an action brought pursuant to this chapter *may be* entitled to reasonable costs and attorney's fees." (Emphasis added).

The statute provides no guidance as to when fees may be awarded and when they may not be. Nor do any reported cases interpreting the statute provide any such guidance. Perhaps recognizing that the statute could be read to allow fees (only) to a prevailing plaintiff, the City cites [*34] *Callfas v. Dep't of Constr. & Land Use*, 129 Wn. App. 579, 120 P.3d 110 (2005) for the proposition that a prevailing defendant may be awarded fees. In *Callfas*, the Washington Court of Appeals awarded fees to the prevailing defendant, stating without analysis: "Because the City is the prevailing party in this action, we grant its request for attorney's fees pursuant to RCW 64.40.020(2)." *Id.* at 598.

While the Plaintiff's claims are dismissed and are without merit, the City does not argue and this Court does not find that they are frivolous. The Court appears to have unfettered discretion in the matter under the statute, but there is no compelling reason to award fees in this case. The court will not award fees under this statute.

CONCLUSION

Defendant's Motion for Summary judgment on all of Plaintiff's claims [Dkt. #30] is GRANTED. Defendant's request for legal fees pursuant to Wash. Rev. Code § 64.40.020(2) is DENIED. The City's alternate Motion for Partial Summary Judgment [Dkt. #56] and the Parties' stipulated Motion to Continue the Trial Date [Dkt. #67] are DENIED as moot. The matter is terminated.

IT IS SO ORDERED.

Dated this 2nd day of December, 2011.

/s/ Ronald B. Leighton

RONALD B. LEIGHTON

UNITED [*35] STATES DISTRICT JUDGE

LEXSEE

JUSTIN LEE, Plaintiff, v. CATERPILLAR INC., Defendant.

1:11-cv-2130-WSD

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

2011 U.S. Dist. LEXIS 144959

December 2, 2011, Decided
December 2, 2011, Filed

COUNSEL: [*1] For Justin Lee, Plaintiff: Charlena L. Thorpe, The Law Office of Charlena Thorpe, Inc., Duluth, GA; Demetrius Tennell Lockett, Townsend Lockett & Milfort, LLC, Atlanta, GA.

For Caterpillar Inc., Defendant: John T. Murray, Seyfarth Shaw, LLP, Atlanta, GA.

JUDGES: WILLIAM S. DUFFEY, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM S. DUFFEY, JR.

OPINION

OPINION AND ORDER

This matter is before the Court on Defendant Caterpillar Inc.'s ("Caterpillar") Motion for Judgment on the Pleadings [4].

I. BACKGROUND

This action arises out of the termination of Plaintiff Justin Lee's employment by one of Caterpillar's contractors, Supply Chain Services International, Inc. ("SCSI"). Lee alleges that Caterpillar caused SCSI to terminate Lee's employment by falsely reporting to SCSI that Lee had been involved in an altercation at Caterpillar's assembly plant in Griffin, Georgia (the "Griffin Faciltiy").

Lee was an SCSI employee from April 21, 2008, to November 21 or 24, 2008. (Compl. [1-2] ¶ 5). [1] SCSI is a Caterpillar contractor that provides inspection services for incoming parts and outgoing engine assemblies at Caterpillar's Griffin Facility. (Id.). Lee worked for SCSI at the Griffin Facility inspecting Caterpillar engine assemblies [*2] prior to delivery to customers. (Id. ¶ 10).

1 Lee initially alleges he was an employee until November 21. Later, however, he alleges that SCSI terminated him as a result of information it received from Caterpillar on November 24, 2008. (E.g., id. ¶ 22).

On Friday, November 21, 2008, three Caterpillar employees reported an altercation at the Griffin Facility between Lee and Fredericka Hughes, a female employee of another Caterpillar contractor. (Id. ¶ 11, Ex. A). One employee reported hearing yelling and then seeing Lee yelling at Ms. Hughes and putting his hands in her face. (Id.). The second employee reported that she heard Lee yelling at someone and that a couple minutes later Ms. Hughes emerged from the area of the yelling. (Id.). This employee stated that Ms. Hughes had blamed herself for causing Lee to yell at her. (Id.). The third employee reported that Lee was "screaming and cussing" at Ms. Hughes. (Id.). After the purported altercation, Caterpillar escorted Plaintiff from the premises of the Griffin Facility.

Lee disputes the version of events reported by the Caterpillar employees. He alleges he was not involved in an altercation with Ms. Hughes and did not threaten her. (Id.). [*3] He also alleges that on the day of the purported incident, Ms. Hughes stated orally and in writing that she was not involved in an altercation with Lee and that Lee did not threaten her. (Id. ¶¶ 13-15). Caterpillar did not interview Lee regarding the incident. (Id. ¶ 16; Answer [3] ¶ 16). Lee contends that Caterpillar personnel were retaliating against him for citing numerous problems with Caterpillar engine assemblies that Lee discovered during his inspections. (Compl. ¶¶ 17, 24).

According to Lee, on Monday, November 24, 2008, Caterpillar reported to SCSI that Lee had been in an altercation at the Griffin Facility and had threatened Ms. Hughes. (Id. ¶ 18). Caterpillar also forwarded to SCSI

the statements by the three Caterpillar employees who witnessed the altercation. (Id. ¶ 19; Answer ¶ 19). Lee alleges that Caterpillar failed to inform SCSI that Ms. Hughes denied orally and in writing having the altercation with Lee. (Compl. ¶¶ 20-21). Lee contends these communications by Caterpillar were knowingly false. (Id. ¶ 23). He further alleges that SCSI, relying on Caterpillar's false or misleading communications, terminated Lee's employment. (Id. ¶ 22).

Lee filed his Complaint on May [*4] 27, 2011. The Complaint has a section called "Relevant Factual Background," followed by 25 paragraphs and his prayer for relief. The Complaint does not have separate counts or claims and does not state the cause of action under which Lee seeks relief. The Complaint simply claims that on November 24, 2008, Caterpillar made a knowingly false, non-privileged statement to SCSI that harmed Lee. Caterpillar construed the Complaint, which alleges all the elements of defamation, as stating a claim for defamation. It filed a motion for judgment on the pleadings, on the ground that defamation has a statute of limitations of one year and Lee filed his Complaint two and one-half years after the allegedly defamatory communication. Lee responded that fraudulent conduct by Caterpillar tolled the limitations period for his defamation claim. Lee also contends that his Complaint contains claims for negligence, fraud, negligent misrepresentation, and tortious interference with employment. Caterpillar replies that grouping these claims together and failing to distinguish between them violates Federal Rule of Civil Procedure 10(b) and that, in any event, the Complaint fails to state a claim upon which [*5] relief can be granted under any of these theories.

II. DISCUSSION

A. Legal Standard

"After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "A motion for judgment on the pleadings is subject to the same standard as is a Rule 12(b)(6) motion to dismiss." Provident Mut. Life Ins. Co. of Phila. v. City of Atlanta, 864 F. Supp. 1274, 1278 (N.D. Ga. 1994). In considering a motion for judgment on the pleadings, the allegations contained in the complaint must be accepted as true and the facts and all inferences must be construed in the light most favorable to the nonmoving party. See Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998). "[U]nwarranted deductions of fact," "conclusory allegations," and "legal conclusions," however, "are not admitted as true." Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009) (internal quotation marks omitted).

Ultimately, the complaint is required to contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Mere "labels and conclusions" are insufficient. Twombly, 550 U.S. at 555. [*6] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556). This requires more than the "mere possibility the defendant acted unlawfully." Sinaltrainal, 578 F.3d at 1261. "The well-pled allegations must nudge the claim 'across the line from conceivable to plausible.'" Id. (quoting Twombly, 550 U.S. at 570).

B. Limitations Period For Defamation Claims

"Georgia law is . . . clear that the statute of limitations for 'injuries to the reputation' must be filed within one year after the right of action accrues or it is time-barred." Douglas Asphalt Co. v. QORE, Inc., 657 F.3d 1146, 1153 (11th Cir. 2011) (citing Ga. Code Ann. § 9-3-33). A claim for libel or slander is one for injury to reputation. See Infinite Energy, Inc. v. Pardue, 310 Ga. App. 355, 713 S.E.2d 456, 463 (Ga. Ct. App. 2011); Ga. Code Ann. § 51-5-1 (defining libel). A defamation claim accrues on the date the allegedly defamatory communication is published. See McCleskey v. Vericon Res., Inc., 264 Ga. App. 31, 589 S.E.2d 854, 856 (Ga. Ct. App. 2003).

Lee alleges Caterpillar [*7] defamed him on November 24, 2008, when it told Lee's employer that Lee had been in an altercation with and threatened a female employee at the Griffin Facility. (Compl. ¶ 18). Lee's defamation claim therefore accrued on November 24, 2008, and he was required to file his claim by November 24, 2009. See Infinite Energy, 713 S.E.2d at 463-64 (defamation claim may be filed on one-year anniversary of accrual date). Lee did not file his Complaint until May 27, 2011, a year and a half after the limitations period on his claim expired.

Plaintiff alleges he did not become aware of the allegedly defamatory comments until May 28, 2010. (Compl. ¶ 28). This is irrelevant under Georgia law. "Actions for injuries to the reputation . . . must be brought within one year from the date of the alleged defamatory acts regardless of whether or not plaintiff had knowledge of the act or acts at the time of their occurrence." Brewer v. Schacht, 235 Ga. App. 313, 509 S.E.2d 378, 383 (Ga. Ct. App. 1998) (quoting Cunningham v. John J. Harte Assocs., Inc., 158 Ga. App. 774, 282 S.E.2d 219, 220 (Ga. Ct. App. 1981)); Metlife v. Wright, 220 Ga. App. 827, 470 S.E.2d 717, 718 (Ga. Ct. App. 1996) ("ignorance of the facts constituting a [defamation] cause of

action does [*8] not prevent the running of the statute of limitation").

Lee argues that fraudulent conduct tolled the limitations period for his defamation claim. Fraudulent conduct tolls the statute of limitations in two circumstances. [2] "The first circumstance is where the actual fraud is the gravamen of the action. In such cases the statute of limitations is tolled until the fraud is discovered or by reasonable diligence should have been discovered." Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 246 (Ga. 1980). This circumstance does not apply to this case. The Complaint does not allege that a fraud occurred. Although Lee argues that a cause of action for fraud may be inferred from the Complaint, the Complaint itself is focused on alleging the elements of defamation. No reasonable reading of the Complaint could allow a person to conclude that Plaintiff has alleged that fraud occurred, and the Complaint did not put Caterpillar on notice that Lee is claiming fraud. Moreover, as discussed below, see infra § II.C.2, the Complaint does not state a valid cause of action for fraud. Actual fraud is not the gravamen of Lee's cause of action and the statute of limitations was not tolled for that reason.

> 2 Only [*9] actual, as opposed to constructive, fraud tolls the statute of limitations. Shipman v. Horizon Corp., 245 Ga. 808, 267 S.E.2d 244, 246 (Ga. 1980).

"The second circumstance [that tolls the limitations period] is where the gravamen of the action is other than actual fraud . . . ." Id. "In such cases there must be a separate independent actual fraud involving moral turpitude which debars and deters the plaintiff from bringing his action. However, in these circumstances, silence concerning the underlying action cannot be a continuation of an original actual fraud because there is none." Id. In this case, Lee has not alleged or argued that Caterpillar committed a separate fraud that prevented him from filing this lawsuit within the one-year limitations period. He only argues that the defamatory communication was also a fraudulent statement. This is not sufficient to toll the limitations period.

There is nothing in this case to toll the limitations period for Lee's defamation claim against Caterpillar for the statements of November 24, 2008. Lee was therefore required to file his defamation claim by November 24, 2009. Because he filed his Complaint after that date, on May 27, 2011, judgment on the pleadings [*10] in Caterpillar's favor is required to be granted on Lee's defamation claim.

C. Lee's Alternative Theories Of Recovery

Lee contends in his response to Caterpillar's Motion for Judgment on the Pleadings that the Complaint also asserts claims for negligence, fraud, negligent misrepresentation, and tortious interference with employment. [3] This seems to violate the principle that separate claims for relief should be separately identified or placed in separate counts of the Complaint and for this reason these claims are required to be dismissed. See Anderson v. Dist. Bd. of Trustees of Cent. Fla. Cmty. Coll., 77 F.3d 364, 366 (11th Cir. 1996) (citing Fed. R. Civ. P. 10(b)); Cesnik v. Edgewood Baptist Church, 88 F.3d 902, 905 (11th Cir. 1996) (noting that it was improper for the plaintiff to assert nine discrete theories of recovery within single count of complaint).

> 3 The parties do not dispute that these theories of recovery, unlike Lee's defamation claim, are subject to a four-year limitations period and thus are not time-barred.

The parties, however, have briefed the adequacy of Lee's alternative theories of relief. The Court therefore will address the adequacy of Lee's new theories and consider [*11] whether they state claims upon which relief can be granted.

1. Negligence

Lee argues that Caterpillar acted negligently when it gave Lee's employer an allegedly false account of the incident between Lee and Ms. Hughes. To state a claim for negligence, a plaintiff must allege "the existence of a duty on the part of the defendant, a breach of that duty, causation of the alleged injury, and damages resulting from the alleged breach of the duty." Rasnick v. Krishna Hospitality, Inc., 289 Ga. 565, 713 S.E.2d 835, 837 (Ga. 2011). Lee has not alleged the duty on which his purported negligence claim is based and he has not alleged how Caterpillar breached that duty. There also does not appear to be any basis for Lee to allege the existence of such a duty or a breach thereof. See, e.g., McBride v. WSPA/Media Gen., Inc., No. 6:07-467-HMH-WMC, 2007 U.S. Dist. LEXIS 45301, 2007 WL 1795835, at *4 (D.S.C. June 21, 2007) (where only duty implicated in case is duty not to defame, plaintiff's "only colorable 'negligence' claim is for defamation"). Lee has not stated a claim for negligence upon which relief can be granted.

2. Fraud And Negligent Misrepresentation

Lee also argues that his Complaint asserts a claim that Caterpillar committed fraud [*12] by falsely stating to SCSI that Lee had an altercation with and threatened a female contractor at the Griffin Facility. Fraud has five elements: (1) "a false representation by a defendant"; (2) "scienter"; (3) "intention to induce the plaintiff to act or refrain from acting"; (4) "justifiable reliance by plain-

tiff"; and (5) "damage to plaintiff." Thompson v. Floyd, 310 Ga. App. 674, 713 S.E.2d 883, 891 (Ga. Ct. App. 2011) (quoting Crawford v. Williams, 258 Ga. 806, 375 S.E.2d 223 (Ga. 1989)). Caterpillar argues Lee cannot state a claim for fraud because he has not alleged that Caterpillar made any representation--let alone a false representation--to Lee or that Lee relied on any representation by Caterpillar.

Georgia follows "the familiar precept that actionable fraud must be based upon a misrepresentation made *to* the defrauded party, and relied upon *by* the defrauded party." Fla. Rock & Tank Lines, Inc. v. Moore, 258 Ga. 106, 365 S.E.2d 836, 837 (Ga. 1988). This precept is extended to circumstances of indirect fraud, where the misrepresentation is made to a third-party, knowing the third-party will repeat the falsehood to the plaintiff and the plaintiff will rely on the third-party. Id. As the Georgia Supreme Court has explained, [*13] fraud exists "where . . . A, having as his objective to defraud C, and knowing that C will rely upon B, fraudulently induces B to act in some manner on which C relies, and whereby A's purpose of defrauding C is accomplished." Id.

The Georgia Supreme Court has cited approvingly the formulation of this rule contained within the Second Restatement of Torts:

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

Fla. Rock & Tank Lines, 365 S.E.2d at 837 n.1 (quoting Restatement (Second) of Torts § 533 (1977)). In Florida Rock and Tank Lines, for example, the defendant misrepresented to Exxon that he intended to pay for gasoline, knowing that Exxon would repeat the misrepresentation to the plaintiff and that the plaintiff, relying on Exxon, would deliver the gasoline to defendant. Id. at 837.

Plaintiff does [*14] not allege in his Complaint that Caterpillar made any false statements to him or that he relied on any statements. He did not even learn of the allegedly defamatory statements until years later. Instead, the disputed statements were made to SCSI, and SCSI alone relied on the statements. This is not a case of indirect fraud because there are no allegations that SCSI repeated the statements to Lee or that it would have been possible for Lee to take any action in reliance on the statements. Lee's claim for fraud therefore fails.

Lee's claim for negligent misrepresentation fares no better. The elements of negligent misrepresentation are "(1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." Futch v. Lowndes Cnty., 297 Ga. App. 308, 676 S.E.2d 892, 896 (Ga. Ct. App. 2009) (quoting Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc., 267 Ga. 424, 479 S.E.2d 727, 729 (Ga. 1997)). This cause of action comes from the Restatement (Second) of Torts Section 522, which the Georgia Supreme Court adopted in Robert & Co. Assocs. v. Rhodes-Haverty P'ship, 250 Ga. 680, 300 S.E.2d 503, 504 (Ga. 1983) [*15] (quoting, adopting, and discussing Section 522).

A party who makes a negligent misrepresentation is only liable to those who reasonably relied on the false statement. The elements as described in Hardaway Co. indicate that a plaintiff must show that the plaintiff relied on the statement and that the plaintiff suffered economic injury as a result of that reliance. The notion that liability for negligent misrepresentation may extend to harms suffered by a party who did not rely on the misrepresentation is unprecedented. The Restatement rule also demonstrates that the plaintiff must rely on the false statement. It states, in relevant part: "One who . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information." Restatement (Second) of Torts § 552(1). Liability for negligent misrepresentation thus only extends to the pecuniary losses of those who justifiably rely on the misrepresentation.

The only disputed representation in this case was by Caterpillar to SCSI, and the only reliance in this case was by SCSI. Caterpillar made no representations to Lee, [*16] and Lee did not rely on any representations by Caterpillar. Lee therefore has not stated a claim for negligent misrepresentation against Caterpillar. [4]

> 4 There may be an additional problem with Lee's claim. A negligent misrepresentation claim requires that the defendant "supplie[d] information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest." Robert & Co. Assocs., 300 S.E.2d at 504. Negligent misrepresentation therefore "generally applies to professional or expert defendants," Asuamah v. Haley, 293 Ga. App. 112, 666 S.E.2d 426, 436 (Ga. Ct. App. 2008), rev'd in part on other grounds sub nom.

Cendant Mobility Fin. Corp. v. Asuamah, 285 Ga. 818, 684 S.E.2d 617 (Ga. 2009), or to information that is given in exchange for consideration, Restatement (Second) Torts § 552 cmt. d. In this case, Caterpillar was not providing expert or professional advice to SCSI and there are no allegations that it had a pecuniary interest in, or received consideration for, providing the information to SCSI.

3. Tortious Interference With Employment

Lee next contends that by causing SCSI to terminate Lee's employment, Caterpillar tortuously interfered with Lee's employment relationship [*17] with SCSI. A claim of tortious interference requires that "the plaintiff establish that the defendant is a 'third party,' i.e., a 'stranger' to the contract with which the defendant allegedly interfered." Atlanta Market Ctr. Mgmt., Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278, 283 (Ga. 1998). This exclusion "cover[s] those who benefit from the contract of others, without regard to whether the beneficiary was intended by the contracting parties to be a third-party beneficiary." Id. If a defendant has "a legitimate interest in either the contract or a party to the contract, the defendant is not a stranger to the contract." Disaster Servs., Inc. v. ERC P'ship, 228 Ga. App. 739, 492 S.E.2d 526, 529 (Ga. Ct. App. 1997). The stranger doctrine also applies to "all parties to a comprehensive interwoven set of contracts." Id. (quoting Jefferson-Pilot Commc'ns. Co. v. Phoenix City Broad., Ltd of Atlanta, 205 Ga. App. 57, 421 S.E.2d 295, 299 (1992) (purchaser of radio station was not a stranger to contract between radio station's sellers and seller's lenders)). Thus, "in order to be liable for tortious interference, one must be a stranger to both the contract at issue and the business relationship giving rise to and underpinning the contract." [*18] Id. "The Atlanta Market Center Mgmt. Co. ruling, 'in effect, reduces the number of entities against which a claim of tortious interference with contract may be maintained.'" Iraola & CIA, S.A. v. Kimberly-Clark Corp., 325 F.3d 1274, 1284 (11th Cir. 2003) (quoting Atlanta Mkt. Ctr. Mgmt. Co., 503 S.E.2d at 283). [5]

5 The Georgia Supreme Court also clarified that the "stranger doctrine" is the same for tortious interferences of both contractual and business relationships. Atlanta Mkt. Ctr. Mgmt. Co., 503 S.E.2d at 283 n.2.

Georgia courts have consistently held in circumstances analogous to this case that a business is not a stranger to the employment relationship between its contractor and the contractor employees who provide the contracted services to the business. See Kollman v. Int'l Bhd. of Elec.Workers, No. 1:01-cv-2955-TWT, 2003 U.S. Dist. LEXIS 15893, 2003 WL 22047882, at *7-8 (N.D. Ga. July 18, 2003) (construction company not a stranger to employment relationship between its subcontractor and subcontractor's employee); Atlanta Mkt. Ctr. Mgmt. Co., 503 S.E.2d at 280-283 (building owner was not a stranger to employment relationship between broker contracted to lease building space and broker's at-will employee [*19] delegated with responsibility of finding tenants for building); Nicholson v. Windham, 257 Ga. App. 429, 571 S.E.2d 466, 469 (Ga. Ct. App. 2002) (law firm where temporary worker was placed was not a stranger to contract between temporary worker and her temporary work agency); see also Iraola & CIA, S.A., 325 F.3d at 1277, 1283-84 (under Georgia law, manufacturer was not a stranger to employment relationship between foreign distributor of its products and distributor's employees); cf. Perry Golf Course Dev., LLC v. Hous. Auth. of City of Atlanta, 294 Ga. App. 387, 670 S.E.2d 171, 175-76 (Ga. Ct. App. 2008) (public housing authority was not a stranger to contractual relationship between members of an LLC formed to redevelop public housing); Pruitt Corp. v. Strahley, 270 Ga. 430, 510 S.E.2d 821, 822 (Ga. 1999) (nursing home facility was not a stranger to independent care provider's contracts with nursing home's residents).

Here, SCSI had a contract with Caterpillar to perform inspection services at Caterpillar's Griffin Facility. (Compl. ¶ 6). To fulfill its contract with Caterpillar, SCSI employed Lee, who was responsible for inspecting engine assemblies at the Griffin Facility. (Compl. ¶ 10). He worked at Caterpillar's facility providing [*20] services to Caterpillar. The purpose of Lee's employment relationship with SCSI was the fulfillment of SCSI's contractual obligations to Caterpillar, and the two sets of contracts and relationships were therefore interwoven. Lee's employment relationship with SCSI was also for the benefit of Caterpillar, so that Caterpillar would receive the services it required under the SCSI contract. Additionally, Caterpillar's allegedly defamatory statements were about Lee's conduct while he was at Caterpillar's facility performing services pursuant to Caterpillar and SCSI's contractual relationship. The alleged altercation between Lee and Ms. Hughes was relevant to the quality and efficiency of the performance of SCSI's contract, and it also concerned Lee's impacts on another vendor with which Caterpillar had a contract.

Taking the allegations in Lee's Complaint as true, there was an interwoven contractual and business relationship between Caterpillar, SCSI, and Lee. Caterpillar also was a beneficiary of and had a legitimate interest in Lee's employment relationship with SCSI. As a matter of law, therefore, Caterpillar was not a stranger to Lee's employment relationship with SCSI. As this is an [*21] "essential" element of a claim for tortious interference

with contractual relations, Atlanta Mkt. Ctr. Mgmt., 503 S.E.2d at 282, Lee has failed to state a claim for tortious interference with contractual relations upon which relief can be granted.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Caterpillar Inc.'s Motion for Judgment on the Pleadings [4] is **GRANTED**. This action is **DISMISSED.**

SO ORDERED this 2nd day of December, 2011.

/s/ William S. Duffey, Jr.

WILLIAM S. DUFFEY, JR.

UNITED STATES DISTRICT JUDGE

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter Of:

JUDY K. STEPHENSON,

COMPLAINANT,

v.

NATIONAL AERONAUTICS & SPACE ADMINISTRATION,

RESPONDENT.

ARB CASE NO. 98-025

ALJ CASE NO. 94-TSC-5

DATE: July 18, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Edward A. Slavin, Jr., Esq., *St. Augustine, Florida*
Lori A. Tetreault, Esq., *Lawrence, Mutch & Tetreault, P.A., Gainesville, Florida*

For the Respondent:
David A. Samuels, Esq., *NASA Lyndon B. Johnson Space Center*
Houston, Texas

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Clean Air Act (CAA), 42 U.S.C. §7622 (1994), which prohibits employers from discharging or otherwise discriminating against employees because they have engaged in certain protected activities. Complainant, Judy K. Stephenson (Stephenson), was an employee of Martin Marietta Corp. and worked at the Johnson Space Center in Texas under Martin Marietta's contract with Respondent, the National Aeronautics and Space Administration (NASA). Stephenson filed this complaint against NASA and Martin Marietta alleging that NASA violated the employee protection provision when it barred her from the Space Center and from discussing her work with NASA employees, which she asserted effectively prevented her from performing her job. She contended that NASA took these actions because she made complaints about the safety of using a chemical, ethylene oxide (ETO), to sterilize medical equipment that astronauts would employ on the space shuttle.

An Administrative Law Judge (ALJ) issued a Recommended Decision and Order (RD&O) dismissing the complaint on the ground that NASA was not Stephenson's employer and therefore could not be held liable under the CAA's employee protection provision. Under the automatic review provision in the regulations then in effect, this case is before the Administrative Review Board for final decision.[1/]

We accept the ALJ's recommendation and dismiss the complaint, although we do so for reasons other than those cited by the ALJ. As a preliminary matter, we once again conclude (contrary to the ALJ) that the ambit of the CAA's employee protection provision under some circumstances may extend to an employer which, like NASA, indisputably is not the direct or immediate employer of the employee alleging discrimination. We discuss this issue to provide future guidance on the proper analysis of this issue regarding the scope of the CAA employee protection provision. However, consideration of the entire record leads us to conclude that Stephenson's complaints about the use of ETO did not constitute activity protected by the CAA employee protection provision. And even were we to find that Stephenson did engage in protected activities, we would conclude that NASA did not take action against her because of those activities.

BACKGROUND

I. Facts

Stephenson, who has a Bachelor of Science degree in medical technology, worked in various jobs prior to being hired in April 1990 by GE Government Services, which later became Martin Marietta Services, Inc. (Martin Marietta). Her prior work experience included positions as a medical technologist in hospitals.

During her work in hospitals, Stephenson learned about using ethylene oxide (ETO) as a sterilizing agent for medical devices. ETO is a gas which is toxic to humans, causing a variety of reactions, including redness of the skin, burns, nausea, and vomiting. The chemical also is mutagenic, causing chromosomal aberrations. There have also been reports that chronic exposure to low levels of ETO causes other serious health problems, including spontaneous abortions, neurological problems, and breast cancer.

The dangers of ETO exposure are such that the substance is regulated by various Federal agencies. The Department of Transportation classifies ETO as a poison and requires that containers of ETO be labeled in transportation. The Food and Drug Administration has issued guidelines on the levels of ETO permitted in sterilized devices and drugs. The Occupational Safety and Health Administration of the Department of Labor regulates the allowable amount of ETO exposure for workers. And, most relevant to this case, the Environmental Protection Agency (EPA) has issued

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[1/] At the time of the ALJ's decision, the regulations governing complaints brought under the CAA's employee protection provision provided for automatic review of an ALJ's recommended decision by the Administrative Review Board. 29 C.F.R. §24.6 (1997).

a National Emission Standard for sterilization facilities that use one ton or more of ETO annually. The EPA's regulation limits the amount of ETO which may be emitted from a facility which uses it, based on how much ETO the facility uses and how it is emitted from the building in which it is used. *See* 40 C.F.R. §63.360 (1999).

Martin Marietta contracted with NASA's Life Sciences Directorate to provide support in the form of employees and work products. As a Martin Marietta employee, Stephenson worked on medical devices that were used in NASA's space flight program. In early November 1993, Martin Marietta assigned her to assemble peripheral venous pressure devices ("PVPDs" or "the devices"), which are used to measure blood pressure. PVPDs were to be used by astronauts during a planned shuttle flight in January 1994. In addition, some of the devices were to be used on paid human test subjects at NASA's Johnson Space Center.

The PVPD project, on which both Martin Marietta and NASA employees worked, was conducted in a location on the Space Center property that was nicknamed the "clean room." Stephenson and other workers removed three plastic medical parts from their individual, sterile packages and assembled them into the PVPDs. The workers placed the assembled PVPDs into a pail of tap water to determine if the devices leaked. The PVPDs next were placed on a table to air dry. After some period of drying, the PVPDs were sent to a local hospital for sterilization with ETO. After sterilization, the devices were ready to be used on humans, either in ground tests or on board the space shuttle.

Stephenson believed strongly that the assembly of PVPDs at the Space Center was being mishandled, and created health risks. She was dismayed that the workers were directed to remove the parts of the devices from their sterile packaging without observing standard medical practice. Stephenson knew that to prevent contamination with spores or bacteria it was important for a medical device to be in the cleanest possible condition before any resterilization. She also was concerned because the room in which the devices were assembled was not a clean room in the medical sense. The room did not have an operational air filter system. Also, the room's negative air flow system did not work properly to ensure that, when the door was opened, no outside air flowed into the room. Further, Stephenson believed it was improper that several employees' desks were in the room.

Stephenson believed that there is a high failure rate for sterilization with ETO and also that some ETO residues are left in medical devices after sterilization. She was concerned about whether the ETO residues were "off-gassed" properly after the PVPDs were sterilized.

Early in November 1993, Stephenson reported her concerns about the assembly and sterilization of the devices to a NASA project leader, Angie Lee. Stephenson asked to see the documentation approving the procedures that were being used. Stephenson followed up with a November 12, 1993 e-mail to Lee and to Dave Geaslin, her Martin Marietta supervisor, explaining further her objections about the methods used for PVPD assembly. Lee responded that she would convey Stephenson's concerns to another NASA employee who was working on the PVPD project, Jennifer Villarreal. Villarreal investigated and promptly informed Stephenson that the safety

committee had approved the PVPD assembly and sterilization processes, and that all of the ETO was removed from the devices.

Unconvinced by Villarreal's response, on November 12 Stephenson told NASA manager Bill Seitz about her concerns regarding the non-sterile method of assembling the PVPDs, the reliability of ETO sterilization, and the possibility that ETO residue was left on the medical hardware, resulting in the possibility that residual ETO could "off-gas" in the space shuttle. Seitz asked Stephenson to help him investigate her concerns. Stephenson agreed and called a sterilization company to get information regarding ETO sterilization. Learning from the company that freon was used as the carrier gas in ETO sterilization caused Stephenson additional concern about the process. She shared the information about freon with Seitz, who took all of Stephenson's concerns seriously and notified the NASA division chief, Catherine Kramer, about them.

A few days after speaking with Seitz, without authorization Stephenson took 75 assembled PVPDs that were drying on the worktable in the clean room and placed them next to the trash in the hallway outside the room. Stephenson intended to dispose of the devices. One hour later, Hugh Fitzgerald, a Martin Marietta employee, asked Stephenson if she had placed the PVPDs in the hall. Fitzgerald told Stephenson that NASA should be in charge of disposal of the devices because they were NASA's property. Stephenson agreed, retrieved the PVPDs, and placed them back on the table in the clean room.

Kramer was extremely upset when she learned that Stephenson had removed the devices from the clean room and placed them in the hall. Kramer had never heard of anyone throwing away flight hardware, even if possibly contaminated, except by using the proper procedures.[2/] Kramer held a meeting concerning Stephenson's action with Seitz and Richard Kitterman of Martin Marietta.[3/] Kramer told Kitterman that she did not want Stephenson handling any of the flight hardware.[4/] After that meeting, at Kitterman's direction Pat Hite issued a written reprimand to Stephenson for her unauthorized disposal of the PVPDs. The reprimand stated that flight hardware was to be handled under NASA procedures, which did not permit disposal without NASA approval and a completed

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[2/] The proper procedure would have consisted of asking quality assurance personnel to write a "TPS" or Discrepancy Report concerning the techniques being used and the possible off-gassing of toxic ETO. Any possibly contaminated hardware would not have been used in flight until the TPS or Discrepancy Report had been resolved.

[3/] Stephenson's immediate supervisor, Pat Hite, reported to Joe Mims, who in turn reported to Kitterman.

[4/] NASA supervisor Seitz agreed with Kramer that Stephenson acted inappropriately by disposing of the PVPDs, and that it was necessary to make sure that "this kind of thing didn't happen again." At the time he testified, Seitz no longer worked for NASA and readily admitted that he had not gotten along well with his former supervisor, Kramer. Despite his differences with Kramer, Seitz agreed with Kramer's decision that Stephenson had to be kept away from flight hardware to prevent any similar incidents from happening. Similarly, NASA's Villarreal was shocked by Stephenson's action; she had never heard of anyone destroying flight hardware.

Discrepancy Report form. The reprimand advised that "further misconduct will lead to disciplinary action up to and including discharge."

Upon receiving the written reprimand, Stephenson explained her actions to Hite and assured him that she still had the same concerns about using the PVPDs on the space shuttle. She asked to be reassigned to work on some other project. In a parallel action, Kramer decided that Stephenson should not be allowed to work on, or even to be near, NASA space hardware. Martin Marietta assigned Stephenson to work on the same devices, PVPDs, that were being assembled in the same way for use on the Russian space station, Mir. Stephenson's new work station was located at a Martin Marietta facility outside the Johnson Space Center.

In the meantime Villarreal completed a Discrepancy Report, explaining that there was a loss of traceability when the 75 PVPDs were moved without the proper documentation. As a result, NASA could not use the PVPDs on humans and Martin Marietta had to assemble new devices for use on the January shuttle flight. Martin Marietta reimbursed NASA about $4,700 to cover the cost of the unusable PVPDs.

Having not heard anything further about her complaints to NASA and Martin Marietta about the PVPD assembly and sterilization process, Stephenson spoke with an agent in the Inspector General's (IG) office of NASA in early December 1993. She told the agent that the ETO in the PVPDs was not "off-gassed" properly, and that it could affect the environment within the space shuttle. She also informed the agent that the shuttle crew might contract a blood infection if the PVPDs were not sterilized properly. She asked the agent to keep her name confidential because she feared retaliation. Nevertheless, the IG gave NASA a document that implicated Stephenson as the source for the IG's investigation into the PVPD sterilization process.

The next month, on January 13, 1994, Stephenson went to Building 36, her former work station at the Space Center, to borrow a book from a NASA employee. Stephenson stopped in the clean room to visit her co-workers there for a few minutes. Stephenson noticed that the other workers looked apprehensive when she walked into the room and perceived that she was not welcome there. Stephenson stayed only briefly, did not notice that there were PVPDs in the room, and did not touch anything.

Kramer soon learned about Stephenson's brief visit. In a subsequent meeting, Kramer told Kitterman that she did not want Stephenson in the clean room, in any part of the Space Center, or talking about work to NASA Life Sciences personnel.

In response to Kramer's concerns, Kitterman and other Martin Marietta employees issued a memorandum to Stephenson stating that, on Kramer's direction, Stephenson no longer had access to the Space Center and could not speak with NASA Life Sciences employees about her work. The memo further stated that these actions were not expected to hinder Stephenson's ability to perform her job. The next week, the memorandum was distributed throughout Building 36 at the Space Center. In response to the memorandum, Stephenson turned in her Space Center parking sticker and badge.

Stephenson felt that the restrictions placed on her by the Kitterman memorandum hampered her work. She was a member of a team of Martin Marietta workers that routinely met in Building 36, from which she was barred. She needed to talk to workers in the Life Sciences Directorate to get clear instructions on her assigned work, but could not do so. Nor could she use the technical library, which contained the instructions for and drawings of the devices on which she worked.

Stephenson complained to her superiors that the ban prevented her from attending meetings at the Space Center. On one occasion, a company-wide Martin Marietta meeting was held at the Space Center and a manager was assigned to escort Stephenson the entire time she was on Space Center property. Stephenson felt embarrassed about being seen with an escort. Less than a month after receiving the memorandum barring her from the Space Center, Stephenson filed this complaint.

II. Procedural History

This case has a tortured procedural history, spanning over six years. Stephenson initially filed this complaint solely under the employee protection provision of the Toxic Substances Control Act (TSCA). 15 U.S.C. §2622 (1994). The respondents were NASA, Martin Marietta, and five NASA employees ("individual Respondents"). She alleged that the various respondents had altered the terms and conditions of her employment because she raised concerns under the TSCA. After an investigation, *see* 29 C.F.R. §24.4, the Department of Labor's Wage and Hour Division issued a finding that the Respondents had not violated TSCA.

Upon receiving the adverse finding, Stephenson requested a hearing before an ALJ. Stephenson amended the complaint to name the DOL investigator as an additional Respondent and to allege that all of the Respondents had also violated the CAA.

Prior to a hearing, Stephenson and Martin Marietta reached a settlement, which the Secretary approved. Partial Decision and Order Approving the Settlement, June 19, 1995.

On its part, NASA sought dismissal of the TSCA claim on the ground that the United States had not waived its sovereign immunity under that statute. NASA also sought dismissal of all of the individual Respondents on the ground that they were not "employers" within the meaning of the employee protection provision. Finally, contending that Stephenson had not alleged any connection between her complaints about ETO and the purpose of the CAA – regulating air pollution – NASA sought dismissal of the CAA complaint for failure to state a claim upon which relief could be granted. Thereafter the ALJ issued orders recommending the dismissal of all of the individual Respondents and of the complaint against NASA. Recommended Order Dismissing Individual Respondents, June 21, 1994; Recommended Order Dismissing Complaint, June 27, 1994 (June 27, 1994 R.O.). The ALJ concluded that the United States had not waived its sovereign immunity under the TSCA, and that Stephenson had failed to state a CAA claim upon which relief could be granted. June 27, 1994 R.O.

A. *Remand Number 1*

On review, in a July 1995 decision, the Secretary[5] rejected the ALJ's recommended dismissal of the CAA claim, ruling that Stephenson stated a claim under the CAA:

> Admittedly, Complainant nowhere alleged discretely that she was subject to discrimination because of a complaint about the emission of dangerous substances into the atmosphere . * * *
>
> Rather, the complaint concerned astronauts being exposed, within the space capsule, to ethylene oxide and freon. On first impression the complaint appears concerned with occupational, rather than public, safety and health. Ethylene oxide and freon, however, are precisely the types of substances reasonably perceived as subject to CAA regulation, which is sufficient in these circumstances to bring the complaint within the purview of that Act. . . . I find that Complainant has stated a claim under the CAA.

Sec. Dec. and Ord. of Rem., July 3, 1995 ("July 3, 1995 Decision"), slip op. at 2-3. In the same decision, the Secretary granted NASA's remaining motions, dismissing all of the individual Respondents because they were not employers within the meaning of the CAA's employee protection provision. The Secretary also dismissed the TSCA complaint because the United States has not waived its sovereign immunity under that act except in a narrow set of circumstances involving lead-based paint, which is not at issue here.[6] *Id.* at 8. The Secretary remanded the case to the ALJ for a hearing on the sole remaining claim, Stephenson's complaint against NASA under the CAA. *Id.*

Before the ALJ, NASA moved to dismiss the CAA claim on the ground that Stephenson was not NASA's employee and that NASA could not be considered her employer for purposes of the CAA's employee protection provision. The ALJ granted the motion in a recommended decision. Rec. Ord. Grant. Mot. to Dis., Aug. 4, 1995.

B. *Remand Number 2*

On review of this second ALJ recommended decision, the Secretary initially rejected the ALJ's recommendation on procedural grounds and remanded for a hearing. Sec. Dec. and Ord. of Rem., Aug. 21, 1995 ("August 21, 1995 Decision"). However, the Secretary granted NASA's

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[5] Prior to 1996 the Secretary of Labor issued final agency decisions under the environmental statutes. On April 17, 1996, the Secretary issued Secretary's Order 2-96, which delegated that authority to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (1996). Final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing the reorganization were promulgated simultaneously.

[6] The United States has waived its sovereign immunity and made itself subject to the TSCA only for certain defined lead-based paint hazards. 15 U.S.C. §2688 (1994); *see Berkman v. United States Coast Guard Academy*, ARB Case No. 98-056, ALJ Case Nos. 97-CAA-2 and 97-CAA-9, Fin. Dec. and Ord., Feb. 29, 2000, slip op. at 13-14.

subsequent motion for reconsideration and vacated the decision. On reconsideration, the Secretary treated NASA's motion to dismiss as a motion for summary judgment, concluded that there were genuine issues of material fact concerning whether NASA's relationship with Stephenson was such that it might be held liable under the CAA whistleblower provision, and again remanded the case for further proceedings before the ALJ. Ord. of Rem., Sept. 28, 1995.

NASA then filed a motion for summary decision with the ALJ, asserting there existed no employment relationship between Stephenson and NASA, and therefore NASA could not be held liable for retaliation under the CAA employee protection provision. The ALJ granted that motion:

> [T]he theory of violation advanced by Complainant against NASA in her consolidated complaint is that NASA violated the prohibitions of 42 U.S.C. §7622 by causing Complainant's employer Martin Marietta Services to initiate certain specified adverse employment actions against Complainant. Such complaint simply cannot reasonably be construed as alleging that a co-employment or shared employment relationship exists under which NASA is also Complainant's employer.

Rec. Ord. Dismiss. Com. on Sum. Dec., Feb. 26, 1996 (R. O. D.), slip op. at 3 .

C. *Remand Number 3*

On review, the Administrative Review Board rejected the ALJ's February 26, 1996 R. O. D. The Board held:

> Without deciding the exact breadth appropriately accorded [the statutory terms "employer" and "employee"], we do conclude that, in a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions. A contracting agency which exercises similar control over the employees of its contractors or subcontractors may be a covered employer. . . . The issue of employment relationship necessarily depends on "the specific facts and circumstances" of the particular case, however.

Dec. and Ord. of Rem., Feb. 13, 1997 ("February 13, 1997 Order") at 3-4, citation omitted. Once again, the ARB remanded the case, this time "for the creation of a complete factual record for use in deciding the issues of coverage and liability." *Id.*

NASA asked the Board to reconsider the February 13, 1997 Order. The Board granted reconsideration and affirmed its February 13, 1997 Remand Order in an Order dated April 7, 1997. The Board further clarified its holding on the employment relationship issue:

> A [CAA employee protection provision] complaint requires an allegation of employment discrimination, *i.e.*, that an employer's action adversely affected a complainant's employment, *i.e.*, the compensation, terms, conditions or privileges of employment. In this sense, an "employment relationship" is essential to the complaint. The employment relationship may exist between the complainant and the immediate employer. In appropriate circumstances, however, protection may extend beyond the immediate employer.

April 7, 1997 Order, slip op. at 2.

III. The ALJ's Most Recent Decision

Following Remand Number 3 a five day hearing was held before the ALJ. NASA again argued that Stephenson had not established that the concerns she raised about ETO and freon were within the purview of the CAA, and that, because NASA was not Stephenson's direct employer, it could not be held liable under the CAA employee protection provision. The ALJ agreed in a Recommended Decision and Order (R. D. & O.). With regard to the employment relationship issue the ALJ made no reference to either of the ARB's orders remanding the case to him and held that "employees are protected from discriminatory acts committed only by *their employers*." R. D. and O. at 53 (emphasis added). The ALJ examined whether Stephenson was NASA's employee within the common law meaning of the term, and concluded that "Complainant has failed to establish that Respondent was her joint employer, exercised power, control, and authority over the terms and conditions of her employment, or controlled the manner and means by which the ultimate product was accomplished." *Id.* at 61.

With regard to whether Stephenson had engaged in protected activity when she complained about the possibility of off-gassing of ETO and freon in the space shuttle and in the laboratory, the ALJ concluded that the Secretary already had ruled, in the July 3,1995 Decision, that Stephenson stated a CAA claim: "The Secretary held that Complainant's consolidated complaint was sufficient to bring this matter within the purview of the Clean Air Act because it indicated her concern for the astronauts based on the potential exposure to ETO and Freon gas within the space capsule." *Id.* at 50. The ALJ found that the earlier ruling had a collateral estoppel effect and was the "law of the case" and could not be revisited. *Id.* Nevertheless, in a lengthy footnote, the ALJ noted that in enacting the CAA, Congress may not have intended to regulate "negligible amounts of ETO" released into a closed environment, such as a space shuttle or a laboratory. *Id.* at n.49. The ALJ also

stated that Stephenson's concern about the effects from intravenous use of the sterilized devices arguably was a medical or occupational health issue, rather than an environmental one. *Id.*

The ALJ recommended dismissing the complaint.

DISCUSSION

As our recitation of the procedural history of this case demonstrates, it is high time for this Board to bring this administrative adjudication to an end. We are constrained to note that never have there been so many remands to so little avail. In this – our last – decision in this case, we: (1) reiterate our prior rulings that there need not be a direct employer-employee relationship in order for there to be liability under the CAA employee protection provision and emphasize that those rulings are law of the case; (2) hold that collateral estoppel and the doctrine of law of the case did not prevent the ALJ from determining whether Stephenson engaged in protected activity when she complained about the possibility that ETO and freon would be released in the space shuttle, thus potentially endangering the astronauts; (3) find that Stephenson did not engage in activity protected by the CAA when she made those complaints; and (4) find that even if we were to assume that Stephenson engaged in protected activity, NASA did not take action against her because of that activity. Therefore, we dismiss the complaint.

I. The law of the case doctrine prohibited the ALJ from ruling that the CAA employee protection provision cannot cover an employer which is not the employee's employer within the common law definition of the term.

Twice in this case the Administrative Review Board has ruled that an employer who is not an employee's common law employer may nevertheless be held liable for retaliation under the CAA employee protection provision. We review this history and reiterate our construction of this aspect of the CAA.

From the inception of this case NASA has argued that the CAA should be construed to apply only to the direct or immediate employer of an employee who has engaged in protected activity and as a result has been subjected to adverse employment action. In his February 26, 1996 decision recommending summary judgment, the ALJ adopted this interpretation of the statute, relying upon the Supreme Court's decision in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S.Ct. 1344 (1992) (under ERISA), and the Secretary's decision in *Reid v. Methodist Medical Center of Oak Ridge*, 93-CAA-4 (Sec'y April 3, 1995), *aff'd sub nom Reid v. Secretary of Labor*, No. 95-3698 (6th Cir. Dec. 20, 1996), (unpublished decision available at 1996 U.S. App. LEXIS 33984). The ALJ concluded that "the prohibition[ ] contained in the employee protection provision of CAA applies only to Complainant's employer and the remaining question is whether NASA is Complainant's employer under common law principles applicable to master-servant relationships." February 26, 1996 Order, at 2. Applying those principles to the facts alleged, the ALJ ruled that "Complainant is not NASA's employee and Complainant's complaint against NASA under [the CAA employee protection provision] cannot be maintained." *Id.* at 3-4.

On review, the ARB rejected the principle underlying the ALJ's holding. In its February 13, 1997 Order the Board noted that it was clear that Stephenson was not "an employee [of NASA] in the common-law sense of the term." As we noted above, *supra* at 8-9, the relevant question, the Board held, is "whether [Stephenson] is protected under the CAA against retaliation by an entity which, *albeit not her direct or immediate employer, is nonetheless a covered employer.*" February 13, 1997 Order, slip op. at 2-3 (emphasis added):

> Without deciding the exact breadth appropriately accorded [the statutory terms "employer" and "employee"], we do conclude that, in a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that that employer does not directly compensate or immediately supervise the employee . . . . The issue of employment relationship necessarily depends on "the specific facts and circumstances" of the particular case, however.

Id. at 3-4, citation omitted. In response to NASA's subsequent petition for reconsideration, we reemphasized our holding. Noting that an "employment relationship" is essential to the complaint, we stressed that such a relationship usually exists "between the complainant and the immediate employer. *In appropriate circumstances, however, protection may extend beyond the immediate employer.*" Order, April 7, 1997, slip op. at 2 (emphasis added). "The underlying question . . . is . . . : did NASA *act* as an employer with regard to the Complainant[], whether by exercising control over production of the work product or by establishing, modifying or interfering with the terms, conditions or privileges of employment?" *Id.* at 4.

The ALJ did not refer to these ARB holdings in his decision on remand. Instead, he revisited the construction of the "employer" and "employee" language in the CAA employee protection provision. In doing so, the ALJ ignored the law of the case on this point, which we had already established. We first discuss the ALJ's construction of the CAA provision, and then demonstrate why it runs afoul of law of the case.

First, the R. D. and O. sets up a false dichotomy by framing the question as follows:

> Initially, it must be resolved whether Complainant may file a complaint against "*any person*" as defined by the Clean Air Act, or whether she can file a complaint against *only her employer.* If Complainant can only file a remediable complaint against an employer, it must be determined *whether Respondent is Complainant's employer* within the meaning of the Clean Air Act."

R. D. and O. at 52 (emphasis added). Next the R. D. and O. determines that the plain language of the statutory provision "suggests that Congress intended to protect employees from discriminatory acts of their employers." *Id.* The decision notes that the provision refers to "employee protection" and uses the terms "employee" and "employer," prohibits acts which all relate to employment

activities which "occur in an employer/employee relationship"; and the remedies provided, such as reinstatement and back pay, are employment-related "such that a complainant who successfully litigated her case against a non-employer could not be granted any or all of the remedies provided." *Id.* at 52.

> The R. D. and O. also resorts to the legislative history of the CAA for assistance in determining whether Congress intended to protect an employee from their employer *or* a non-employer . . . .
>
> > A House Committee Report indicates that the best source of information for a company's activity is its own employees. The history appears to focus the protection of the provision on workers who observe alleged environmental violations in their work places . . . . Furthermore, a second House Committee Report consistently refers to protecting employees from discriminatory acts in their employment . . . . In addition, the report repeatedly refers to an employee, and employer, and to employment related activities and remedies.

R. D. and O. at 52-53 (emphasis added).

Finally the ALJ concluded that the term employee in the CAA should be accorded its common law meaning, citing *Nationwide Mutual Ins. Co. v. Darden, supra*, and *Reid v. Methodist Medical Ctr. of Oak Ridge, supra.* The ALJ determined that Stephenson had failed to prove that she was an employee of NASA within that common law meaning. R. D. and O. at 54-61. In so ruling the ALJ ran afoul of the doctrine of law of the case.

The law of the case doctrine "is a prudential principle that 'precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided.'" *Field v. Mans,* 157 F. 3d 35, 40 (1st Cir. 1998)(*quoting Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd.*, 41 F.3d 764, 770 (1st Cir. 1994)). The aspect of law of the case which applies in this circumstance, referred to as the "mandate rule," "instructs an inferior court to comply with the instructions of a superior court on remand." *Field v. Mans, supra,* 157 F.3d at 40. *See Law v. Medco Research, Inc.*, 113 F.3d 781, 783 (7th Cir. 1997) (doctrine requires lower adjudicatory body to conform further proceedings in case to principles set forth in appellate opinion unless there is compelling reason to depart). The doctrine applies within administrative agencies as well. When this Board has ruled on a question of law, the law of the case doctrine binds an administrative law judge acting after a remand of the case. *See, e.g., Ruud v. Westinghouse Hanford Co.*, No. 1988-ERA-33, ALJ RD&O on Remand, Dec. 8, 1988, at 5.

Here the ALJ neither acknowledged the principles the Board articulated on the employer/employee issue in this case, nor did he conform his proceedings to them. In this case it has been undisputed from the outset that Stephenson was a common law employee of Martin Marietta, which was, in turn a contractor for NASA. However, we held that the reach of the CAA employee protection provision may, depending upon the specific facts of a case, encompass an

employee *who is not a common law employee of the respondent employer.* The ALJ's failure to look beyond the common law definition of employee in evaluating the evidence in this case was contrary to our specific holding.

As we discuss in the following section of this decision, Stephenson failed to prove that she engaged in activity which was protected by the CAA whistleblower provision. Therefore, we need not determine whether NASA's substantial involvement in Stephenson's work environment (*e.g.*, its bar on her working in, or even entering the Space Center complex, and NASA's action prohibiting Stephenson from talking with her NASA counterparts) rose to a sufficiently intense level of involvement and interference in Stephenson's employment that NASA might be held to come within the ambit of the CAA's whistleblower protection provision.

II. Collateral estoppel and law of the case do not apply to the Secretary's earlier ruling that Stephenson's complaint made a sufficient claim of protected activity under the CAA to survive a motion to dismiss.

In a perplexing ruling, the ALJ concluded that both collateral estoppel and law of the case prevented him from reexamining the issue whether Stephenson's activities were protected under the Clean Air Act:

> The doctrine of collateral estoppel precludes a party against whom an issue has been decided in a prior action from re-litigating its position in a subsequent proceeding. The doctrine of collateral estoppel is applicable in administrative proceedings. Because the Secretary has decided that Complainant has stated a claim under the Clean Air Act, this issue is moot and therefore, need not be discussed further since the Secretary's determination is accepted as the law of the case.

R. D. & O. at 50 (citations and footnote omitted). The ALJ therefore took it as a given that Stephenson had engaged in activity protected by the CAA when she complained about the possible off-gassing of ETO and freon in the Space Shuttle, and the possibility that an astronaut could become infected as a result of a failure to adequately sterilize the PVPDs. The ALJ erred.

First, the doctrine of collateral estoppel does not operate in this case to preclude fact finding on the issue whether Stephenson engaged in protected activity. As the Secretary has explained, "[c]ollateral estoppel, or issue preclusion, prevents the relitigation of issues that *were actually decided by a court and necessary to its decision if the parties had a full and fair opportunity to litigate them.*" *Sawyers v. Baldwin Union Free School District*, Case No. 85-TSC-00001, Sec. Fin. Dec. and Ord., Oct. 24, 1994, slip op. at 18 (emphasis added).[2/] At the time the Board rejected

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[2/] The Board has explained that four elements must be met for collateral estoppel to apply: "(1) the issues of both proceedings must be identical, (2) the relevant issues must have been actually litigated and decided in the prior proceeding, (3) there must have been 'full and fair opportunity' for the litigation of the issues in the prior proceeding, and (4) the issues must have been necessary to support a valid and final (continued...)

NASA's motion to dismiss, there had been no "full and fair opportunity" to litigate the issue whether Stephenson had engaged in protected activity. There had been a motion to dismiss *for failure to state a claim upon which relief could be granted*, an opposition to that motion, an ALJ order granting the motion, and a reversal of that order by the Secretary. All that the Secretary "actually decided" in his previous ruling with regard to Stephenson's allegations of protected activity was that the allegations in Stephenson's complaint were sufficient to survive a motion to dismiss for failure to state a claim.[8/] Therefore, collateral estoppel does not apply.

The doctrine of law of the case does not apply for similar reasons. Because neither the Secretary nor the Board had held that Stephenson had engaged in protected activity, there was no law of the case for the ALJ to apply.

We could at this point remand this case one more time, for a determination whether Stephenson engaged in protected activity under the CAA when she complained about freon and ETO and possible infections. However, we choose not to prolong this already protracted proceeding any further. Because pursuant to the APA we possess the authority to find facts *de novo*,[9/] and because the issue of protected activity in this case does not turn on any demeanor-based credibility determinations which are best suited to the ALJ who saw and heard the witnesses, we proceed to decide this issue.

III. The evidence establishes that Stephenson's complaints and other activities were not protected by the CAA.

To be protected under the whistleblower provision of an environmental statute such as the CAA, an employee's complaints must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec. and Rem. Ord., Jan. 25, 1994, slip op. at 5; *Crosby v. Hughes Aircraft Co.*, Case No. 85-TSC-2, Sec. Dec. and Ord., Aug. 17, 1993, slip op. at 26, *aff'd*, 1995 U.S. LEXIS 9164 (9th Cir. Apr. 25, 1995). The complainant must "have a reasonable perception that [the respondent] was violating or about to violate the environmental acts." *Id.* The issue is one of the reasonableness of the employee's belief.

7/(...continued)
judgment on the merits." *Agosto v. Consolidated Edison Co. of New York, Inc.*, ARB Case No. 98-007, ALJ Case No. 96-ERA-2, Ord. Of Consolidation and Fin. Dec. and Ord., July 27, 1999, slip op. at 8.

8/ Of course, on such a motion, "all reasonable inferences are made in favor of the non-moving party. . . ." *Tyndall v. United States Environmental Protection Agency*, Case Nos. 93-CAA-6 and 95-CAA-5, Sec. Dec. and Rem. Ord., slip op. at 3, and cases there cited. Further, "dismissal should be denied 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 4, *quoting Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980).

9/ In reviewing an ALJ's recommended decision, the Board acts with "all the powers [the Secretary] would have in making the initial decision. . . ." 5 U.S.C. §557(b).

The purpose of the CAA is to protect the public health by preventing pollutants from fouling the ambient air.[10/] Employee complaints about purely **occupational hazards** are not protected under the CAA's employee protection provision. *Minard*, slip op. at 5-6. *See also, Tucker v. Morrison & Knudson,* Case No. 94-CER-1, ARB Final Dec. and Ord., Feb. 28, 1997, slip op. at 5 (under environmental acts, complaint about violations that related only to occupational safety and not environmental safety were not protected). For example, in the case of asbestos, even though "the Environmental Protection Agency has regulated the manner in which asbestos is handled within workplaces during, among other things, renovation, to prevent emissions of asbestos to the outside air . . . ," if the complainant is concerned only with "airborne asbestos as an occupational hazard, the employee protection provision of the CAA would not be triggered." *Aurich v. Consolidated Edison Co. of New York, Inc.*, Case No. 86-CAA-2, Sec. Rem. Ord., Apr. 23, 1987, slip op. at 3-4. Thus, the key to coverage of a CAA whistleblower complaint is potential emission of a pollutant into the ambient air.

With this principle in mind, we turn first to ETO, the main subject of Stephenson's complaints to her superiors in Martin Marietta and NASA about the PVPDs. There is no question that ETO is toxic to humans. The issue is whether Stephenson's complaints were based upon a reasonable perception that the use of ETO to sterilize the PVPDs would result in emission of potentially harmful levels of ETO into the ambient air.

The evidence in the record established that, while the astronauts were in flight in the space shuttle, the PVPDs were to be attached to the vein by an intravenous catheter line. The PVPDs were to be used to detect blood pressure. As Stephenson explained it at the hearing, she had three concerns. Primary among them was her concern that residual amounts of ETO in the PVPDs would contaminate the atmosphere in the space shuttle: "I went ahead and told Bill Seitz that I had been assigned to do this project and that I had some real concerns . . . that there are ethylene oxide residues left on the [PVPDs], and then being in the unique space environment, what is the off-gassing of this, because ethylene oxide is poison." T. 182. When asked if she would raise the same concerns if she could do it over again, Stephenson replied yes, "[b]ecause it was a duty to help save astronauts' lives in health and safety." T. 246; *see also* T. 249, 267-68. She also was concerned with the safety and health of the paid subjects who used the devices in testing conducted at the Space Center. T. 250. Finally, Stephenson was concerned because the ETO "could affect me and my co-workers. I don't know what the level of ethylene oxide was on that hardware." *Id.*

All of Stephenson's statements at the hearing indicate a concern about the effects of potential exposure to ETO on the health of workers – astronauts on board the space shuttle, paid test subjects

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[10/] In the CAA "Congress established a comprehensive state and federal scheme to control air pollution in the United States." *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 764 (D.C. Cir. 1984). Thus, one of the stated purposes of the CAA is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §1857(b)(1). *See Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845-846 (1984). The CAA implementing regulations define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access. 40 C.F.R. §50.1(e) (1999). *See Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 65 (1975) ("[A]mbient air" "is the statute's term for the outdoor air used by the general public").

at the Space Center, or workers in the room at the Space Center where the devices were to be kept after sterilization. Moreover, there was no testimony from which it could be concluded that there was even a remote possibility of the escape of any significant amount of ETO into the ambient air. For example, the off-gassing of minute amounts of ETO in the space shuttle would not lead to a harmful emission into Earth's atmosphere,[11/] even when the space shuttle was on the ground. Even if there was some off-gassing from PVPD devices used by paid test subjects or stored at the Space Center, so little ETO would have been involved that even if it somehow escaped into the atmosphere outside the building, it could not be sufficient to come within the ambit of the CAA. Indeed, the EPA's National Emission Standard for ETO "does not apply to ethylene oxide sterilization operations at stationary sources such as hospitals, doctors offices, clinics, or other facilities whose primary purpose is to provide medical services to humans or animals." 40 C.F.R. §63.360(e) (1998).

Stephenson also raised a concern because freon was the carrier gas used in the ETO sterilization of the devices.[12/] T. 183. In a written memorandum, Stephenson stated her concern: "In ETO sterilization, the carrier gas i[s] FREON. Has toxic off-gasing been done to PV[P]D assemblies to be sure this is totally removed?" Appendix at 642. Stephenson's concerns about freon, like her concerns about ETO, were based on worker exposure because only very minute amounts of freon could possibly be vented outside the space shuttle or outside of the building in which the devices were stored or used by test subjects.

Finally, Stephenson also expressed concerns that the ETO sterilization process would not work satisfactorily, and that as a consequence astronauts could become infected from unsterile PVPDs. Thus, she talked to Bill Seitz "about the hardware being sterile, beside – you know, besides the non-aseptic technique of assembling it and that my doubts about the reliability of the ETO sterilization at St. John Hospital . . . ." T. 182. There is not even a colorable argument that this concern could have been related to pollution of the atmosphere subject to the CAA.

We conclude that Stephenson's concerns about the use of ETA and freon in the sterilization of the PVPDs were not "grounded in conditions constituting reasonably perceived violations" of the CAA. *Minard, supra,* slip op. at 5. Therefore Stephenson did not engage in activities that were protected by the CAA.

IV. Additionally, NASA did not bar Stephenson from the Space Center and from discussing work with NASA employees because Stephenson engaged in activity protected by the CAA.

We have concluded in section III above that Stephenson did not engage in activity protected by the CAA when she complained about possible exposure to ETO and freon, and possible contamination of the PVPDs. However, even if we were to reach the opposite conclusion we would

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[11/] Of course, when the space shuttle is in orbit it is not even in Earth's atmosphere.

[12/] The use and disposal of freon, a chlorofluorocarbon, is regulated by the EPA. 42 U.S.C. §7671g (1994).

dismiss Stephenson's complaint because NASA did not take action against Stephenson because of that activity.

We start with the undisputed fact that without authorization Stephenson moved 75 PVPDs into the hall outside the clean room and left them unattended for a time, thus breaking the chain of traceability of the devices. Because NASA could not account for what (if anything) happened to the devices while they were in the hall, it could not use the devices on the upcoming space shuttle (or on test subjects). Ultimately, NASA charged Martin Marietta $4,700 for the destruction of the devices as flight hardware. NASA was left with about two weeks to get newly constructed PVPDs aboard the space shuttle.

In light of the universally negative reaction among NASA managers to Stephenson taking matters into her own hands and disposing of the devices without proper authority or procedures, there clearly was a legitimate reason to order that Stephenson keep away from NASA flight hardware. Martin Marietta's subsequent reprimand underscores that the mistake Stephenson made was disposing of the devices without approval:

> Flight hardware is to be handled by established NASA procedures at all times and under no circumstances is it to be thrown away without approval from NASA and proper disposition of either a TPS or DR. In addition, you were also negligent in your failure to report your activities to your supervisor. As a result of your actions, expensive government hardware could have been destroyed and our ability to deliver the required hardware for the upcoming STS-60 mission was put at risk.

CX 14.

In the aftermath of the disposal incident, Martin Marietta assigned Stephenson to work other than preparing PVPDs for NASA space flights, but Stephenson continued to have access to the Space Center. However, a few months later, upon learning that Stephenson had visited the clean room during a time when PVPDs were present there, NASA's Kramer ordered that Stephenson not be permitted anywhere on Space Center property and barred her from discussing her work with employees of NASA's Life Sciences Directorate. *See* CX 2. We find that it was Stephenson's unexpected January 1994 visit to the clean room, in which new PVPDs were drying, that led NASA's Kramer to bar her from the entire Space Center. Kramer's reaction does not seem out of line in light of the fact that Stephenson had apparently disobeyed Kramer's previous order that Stephenson be kept away from flight hardware.

We are not persuaded that Stephenson's complaints regarding the PVPDs, ETO, and freon played any part in NASA's handling of Stephenson. Even though NASA employees assumed that Stephenson had raised the ETO sterilization issue with the NASA Inspector General, there is no evidence suggesting that NASA barred Stephenson's access to the Space Center because of her IG contact. To the contrary, several NASA employees testified that they understood Stephenson's

position in raising the issue, even as they condemned her unauthorized property disposal. For example, Villarreal testified:

> If [Stephenson] seriously believed what she says she believed, then she was right to go to the Inspector General. But she was not right to unilaterally decide that flight hardware was contaminated and that they should be disposed of, putting our manifest at risk.

T. 689. Villarreal continued:

> If I felt as strongly as [Stephenson] says she does about a safety concern, I would hope that I would pursue it as well. I personally would have gone straight to the Inspector General or straight to my boss and to the Inspector General. I would not have made the decisions that she made regarding flight hardware, but I respect that – I respect the gumption, if I can use that, to – that it would take to go to the Inspector General.

T. 697.

Moreover, NASA employees treated Stephenson's concerns about the PVPDs and ETO seriously and promptly set about investigating them. Hite "appreciated" Stephenson's safety concerns (T. 738), Lee conceded that Stephenson "was raising some very good points" (T. 805), and Seitz was interested in her concerns and promptly brought them to Kramer's attention. T. 1152. Stephenson did not wait for a response, however: one work day after she raised the PVPD/ETO issue with Seitz, Stephenson disposed of the PVPDs.

CONCLUSION

Stephenson did not engage in activity protected by the CAA. Moreover, NASA did not bar her from the Space Center and from communicating with NASA employees for reasons prohibited by the CAA employee protection provision. Therefore, Stephenson's complaint is **DISMISSED**.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

LEXSEE

TECH PLUS, INC., & another [1] vs. MICHAEL ANSEL & another. [2]

1 Betsy Piper.
2 Sumner Ansel.

No. 01-P-1293.

APPEALS COURT OF MASSACHUSETTS

59 Mass. App. Ct. 12; 793 N.E.2d 1256; 2003 Mass. App. LEXIS 884

June 9, 2003, Argued
August 21, 2003, Decided

SUBSEQUENT HISTORY: Review denied by Tech Plus, Inc. v. Ansel, 440 Mass. 1108, 799 N.E.2d 594, 2003 Mass. LEXIS 893 (2003)

PRIOR HISTORY: [***1] Norfolk. Civil action commenced in the Superior Court Department on August 6, 1996. Motions for summary judgment were heard by Ralph D. Gants, J., and the case was tried before Patrick F. Brady, J.
Tech Plus, Inc. v. Ansel, 1999 Mass. Super. LEXIS 84 (Mass. Super. Ct., 1999)

DISPOSITION: Affirmed in part, reversed in part and remanded.

PROCEDURAL POSTURE: Plaintiffs, a business product distributor and its representative, appealed from a judgment of the Superior Court Department, Norfolk (Massachusetts), which was entered as a judgment notwithstanding a jury verdict that had been in favor of the distributor and the representative against defendants, a former employee and his father, on claims that included intentional interference, disloyalty, and civil conspiracy.

OVERVIEW: The employee's father had a preexisting relationship with a major potential customer of a manufacturer's business equipment. The employee approached an executive of the manufacturer, telling the executive that he had heard the representative make anti-Semitic remarks and that he believed she might be homophobic, both of which allegations the employee believed would turn the executive against the distributor. In the end, the manufacturer made its own deal with the major customer, although it paid the distributor the commission it would have received, and the distributor sued its former employee and his father. The appellate court held that failure to show pecuniary loss doomed the claims for intentional interference and violations of Mass. Gen. Laws ch. 93A. The statements about homophobia were pure statements of opinion and not actionable, but the charges of anti-Semitism were presented as factual accounts of actual interactions, so the defamation claims should have survived a summary judgment motion. Since one defamation claim had survived, the representative's allied claim that she suffered from the employee's intentional infliction of emotional distress on her also survived.

OUTCOME: The court affirmed the judgment notwithstanding the verdict on the claim for interference with advantageous relations and the trial court's vacation of a verdict allowing recovery for unfair business practices, but it reversed the trial court's dismissal of claims for defamation and intentional infliction of emotional distress, and, in light of that reversal and reinstatement of claims, ordered a new trial on the issue of civil conspiracy.

COUNSEL: John R. Chayrigues & Peter J. Pingitore for the plaintiffs.

Joseph P. Dever for the defendants.

JUDGES: Present: Gelinas, Mason, & Kafker, JJ.

OPINION BY: MASON

OPINION

[**1259] [*13] MASON, J. The plaintiff, Tech Plus, Inc. (Tech Plus), is a business which acts as a sales representative for various manufacturers of high tech consumer products. After one of its clients, Lumina Office Products, Inc. (Lumina), refused to continue using its services in connection with a transaction Lumina had entered into with Staples Office Supply, Inc. (Staples), Tech Plus and its president and sole shareholder, Betsy Piper (Piper) brought this action against the defendants, Michael Ansel (Michael), a former employee of Tech Plus, and his father Sumner Ansel (Sumner).

The complaint alleged claims of intentional interference with advantageous business, contractual, and prospective business relations (intentional interference), violation of the employee duty of loyalty, defamation, intentional infliction of emotional distress, [***2] civil conspiracy [3] and violation of G. L. c. 93A. The defendants asserted counterclaims for abuse of process, breach of contract and the implied duty of good faith and fair dealing, negligence, discrimination, and violation of G. L. c. 93A.

3 This claim was referred to in the complaint as "Concert of Action."

Following discovery, a Superior Court judge allowed defendants' motion for summary judgment solely on the plaintiffs' claims of defamation and intentional infliction of emotional distress. He also allowed the plaintiffs' motion for summary judgment and dismissed the defendants' counterclaims.

A jury trial was then held before another Superior Court judge, and resulted in verdicts for the plaintiffs on their claims of intentional interference, violation of the employee duty of [*14] loyalty, and civil conspiracy. The jury awarded $ 17,000 to [**1260] Tech Plus for damage to its reputation caused by Michael's interference, $ 10,000 to Tech Plus for damage to its reputation caused by Sumner's interference, and $ 20,000 [***3] to Piper for emotional distress caused by Michael's interference. It also awarded Tech Plus an additional $ 2,200 on its claim against Michael for violation of the employee duty of loyalty. The judge separately found that the defendants' acts of intentional interference constituted wilful and knowing violations of G. L. c. 93A, entitling the plaintiffs to double damages under G. L. c. 93A, § 11, and an award of attorneys' fees.

Following the entry of judgments, however, the judge allowed a motion by defendants for judgment notwithstanding the verdict (JNOV) dismissing the plaintiffs' claims of intentional interference and civil conspiracy because the plaintiffs had failed to prove that they had suffered any actual economic harm or pecuniary loss as a result of the defendants' actions. [4] He also allowed a separate motion by the defendants to vacate the c. 93A judgment because the plaintiffs had failed to prove that they had suffered any actual loss of money or property within the meaning of G. L. c. 93A, § 11.

4 The judge denied the defendants' JNOV motion to the extent it sought to vacate the jury verdict on Tech Plus's claim against Michael for breach of the employee duty of loyalty, and the defendants have not appealed from the amended judgment that was entered on that claim, nor do the defendants appeal from the summary judgment entered on their counterclaims. Those portions of each judgment are affirmed.

[***4] The plaintiffs have appealed from the allowance of the defendants' motion for JNOV and motion to vacate the c. 93A judgment, and also appeal from the summary judgment dismissing their claims for defamation and intentional infliction of emotional distress. We conclude that the defendants' motions for JNOV and to vacate the c. 93A judgment were properly allowed and we direct the entry of an appropriate judgment reflecting that allowance. [5] However, we reverse the judgment dismissing the claims of defamation and intentional infliction [*15] of emotional distress and, in light of that reversal, direct a new trial on the claim of civil conspiracy.

5 It does not appear that any separate judgment was entered in accordance with the judge's allowance of the defendants' motions for JNOV and to vacate the c. 93A judgment. Nevertheless, we will deal with the merits of the matter. See *GTE Prods. Corp.* v. *Stewart*, 421 Mass. 22, 24 n.3, 653 N.E.2d 161 (1995).

The facts. We summarize the pertinent facts [***5] as shown by the portions of the trial transcript and other materials included in the record appendix.

Lumina is a California corporation engaged in the manufacture of various scanning and facsimile machines. In August, 1995, Stephen Cason, Lumina's vice president for retail sales, contacted Piper to request that Tech Plus represent it in connection with a new Lumina product called the Lumina 2000. The Lumina 2000 was a combination scanning and facsimile machine which could operate with the owner's existing printer and had certain unique and innovative features. Lumina previously had identified Staples, a large retailer of office products headquartered in the New England area, as one of its principal sales targets.

On August 5, 1995, Tech Plus and Lumina entered into a manufacturer's sales agreement appointing Tech Plus as its sales representative for Lumina office products in the New England area. In October, 1995, Tech Plus hired Michael as a sales representative.

[**1261] Following his hire, Michael indicated to Piper that both he and Sumner, who had previously sold products to Staples, knew Wayne Eckstein, an officer at Staples who was responsible for purchasing scanning and facsimile [***6] machines. Michael further indicated that he could arrange a meeting for Lumina with Eckstein if Piper wanted him to do so. Piper agreed with this proposal and a meeting was arranged for November 27, 1995.

Prior to the meeting, Piper, who had known Cason for several years and believed that he was homosexual, asked Michael if he believed that Cason's sexual orientation would be a problem for Eckstein. Michael responded that he did not believe that it would be a problem for Eckstein.

When the meeting was held, Cason presented the Lumina 2000 to Eckstein, and Eckstein expressed interest in having Staples test market the machine in certain of its stores in the New York area for a period of ninety days. Eckstein indicated that Staples would issue a purchase order for several of the machines in December, 1995, and would establish a tentative [*16] test roll-out date for January 1, 1996. He also indicated that he wanted Michael to be involved in the transaction.

Piper told Michael, however, that she would be the sales representative for Lumina on its transaction with Staples, and that he would be limited to handling such detail work as instructing the Staples store staff with respect to the capabilities [***7] of the Lumina 2000. Michael was disappointed with this decision and, accordingly, began to plan to leave Tech Plus.

On December 5, 1995, Cason received a telephone call from Michael but was unable to talk to him. A few days later, Cason received a telephone call from Eckstein. Eckstein stated during this call that he did not want Piper to be Lumina's sales representative on its transaction with Staples, but he did not indicate why he had reached that decision.

On December 13, 1995, Cason had a telephone conversation with Michael. During this conversation, Michael stated, among other things, that he was unhappy at Tech Plus and was planning to leave his employment there. He further stated that Piper "could not do anything" for Lumina on the Staples account and, in fact, was anti-Semitic, had made derogatory, anti-Semitic jokes and comments in his presence and was "constantly persecuting him" because of his Jewish heritage. He also stated that Piper was prejudiced against homosexuals and that she had asked him prior to the November 27 meeting at Staples whether Eckstein would have a problem with Cason being gay.

During this conversation, Michael further stated to Cason that, in contrast [***8] to Piper, he and his family had had a close personal relationship with Eckstein and Staples for many years and that he had been fully responsible for inducing Staples to enter into the transaction with Lumina. Michael stated that he was interested in working directly for Lumina as its sales representative on the transaction. When Cason did not respond by agreeing to hire him, Michael indicated to Cason that Cason could lose his job if he failed to hire Michael.

In the evening of December 13, 1995, Cason received a telephone call from Sumner. During this call, Sumner stated that Piper was "sick" and "mentally ill," and "lived with two hundred cats." He stated that Piper was anti-Semitic and was persecuting his son. He also stated that Eckstein wanted to take [*17] care of Michael because of the long relationship Michael and his family had had with him, and he urged Cason to use Michael, rather than [**1262] Piper, as the sales representative for Lumina's transaction with Staples. Sumner stated that, to the extent that Michael might not be able to handle all the responsibilities with respect to the transaction, he (Sumner) could "fill in the gaps."

On December 14, 1995, Michael told Piper that he [***9] was leaving Tech Plus. The next day, December 15, 1995, Cason telephoned Piper and reported what the Ansels had said to him about Piper being anti-Semitic and prejudiced against homosexuals. Piper denied being anti-Semitic and said that she had never taken any action against Michael because of his Jewish heritage. She also denied that she was prejudiced against homosexuals and told Cason she had asked the question about Eckstein prior to the November 27 meeting only because she had heard people speculate that Cason was gay and she knew that Eckstein could be volatile. Cason told Piper that she should not contact Staples, and that he would handle Lumina's transaction with Staples.

Thereafter, Staples placed a purchase order with Lumina for the test sale of the Lumina 2000 machines, and Lumina shipped several of the machines to Staples in response to that order. Lumina, however, served as its own sales representative with respect to these sales, and did not utilize the services of either Michael or Tech Plus. Nevertheless, Lumina paid Tech Plus all the commissions Tech Plus would have earned had it been retained as the sales representative for the transaction. Tech Plus, accordingly, [***10] did not lose any commissions, or otherwise suffer any economic loss, as a

result of being removed as sales representative for the transaction between Lumina and Staples.

Staples carried the Lumina machines for a period of ninety days in its stores in the New York and New Jersey area. However, sales of the machines failed to meet the agreed upon targets, and Staples accordingly declined to carry the machines beyond the initial ninety day test period.

1. *Allowance of motion for JNOV dismissing intentional interference claims.* The plaintiffs do not dispute that they failed to establish at trial any actual pecuniary loss as a [*18] result of the defendants' allegedly improper conduct. Nevertheless, they contend that the judge erred in allowing the defendants' motion for JNOV on their claims of intentional interference with their existing and prospective business relations because they were not required to show that they had suffered any such actual pecuniary loss in order to recover on such claims. In support of this argument, the plaintiffs assert that they need only demonstrate damages for emotional distress and harm to their reputation in order to recover for their intentional interference [***11] claims. We disagree. "It is clear, under decided cases, that the essence of the tort is damage to a business relationship or contemplated contract of economic benefit." *Ratner v. Noble*, 35 Mass. App. Ct. 137, 138, 617 N.E.2d 649 (1993).

In *Ratner v. Noble* (*Ratner*), *supra*, we held that a plaintiff could not recover on a claim for tortious interference with advantageous relationships where she had failed to show that she had suffered any pecuniary loss as a result of the defendant's actions. The plaintiff in *Ratner* was the president of a gay and lesbian alcohol and drug treatment center who asserted a claim of intentional interference with contractual relations against the defendant based on the defendant's alleged mailing of numerous anonymous letters intended to discredit her in the gay and lesbian community. The jury awarded the plaintiff $ 60,000 on this claim but we held that the verdict should have been set aside because the plaintiff had failed to show that the [**1263] mailings had caused her to lose her job or otherwise suffer any economic harm, as distinct from possible damage to her professional reputation within the gay and lesbian community. [***12] *Id*. at 138-139. In reaching this result in *Ratner*, we noted that there could be no recovery on a claim for tortious interference with advantageous relationships unless the elements of the tort had been made out, and that pecuniary loss was one of those elements. *Ibid.* See also *Walker v. Cronin*, 107 Mass. 555, 564-565 (1871); Restatement (Second) of Torts § 766 comment t (1979) ("The cause of action is for pecuniary loss resulting from the interference").

Here, just as in *Ratner*, the plaintiffs failed to show that they suffered any pecuniary loss as a result of the defendants' conduct. While the plaintiffs were removed as sales representatives [*19] on Lumina's transaction with Staples, they received all the commissions they would have received had they continued as sales representatives with respect to that transaction. There was no evidence that the plaintiffs suffered any other harm to their existing or prospective business relationships with Lumina, Staples or any other entity. Because the plaintiffs failed to prove an essential element of their claims of intentional interference, i.e., actual pecuniary loss as a result of the defendants' actions, the judge [***13] correctly allowed the defendants' motion for JNOV on those claims. [6] See *Lynch v. Boston*, 180 F.3d 1, 19 (1st Cir. 1999). Contrast *Draghetti v. Chmielewski*, 416 Mass. 808, 819, 626 N.E.2d 862 (1994) (upholding award of emotional distress damages to plaintiff who proved that defendant's interference had caused him to lose part-time job)

6 We reject the plaintiffs' argument that our decision in *Ratner* is not applicable here because the plaintiff in *Ratner* alleged interference only with social relationships, whereas here the plaintiffs alleged interference with an economic relationship. There is no indication in *Ratner* that the relationships were strictly social. In any event, we relied in *Ratner* on the plaintiff's failure to show that she had suffered any pecuniary loss, and not on the particular type of relationships contained in the allegations. *Ratner v. Noble*, *supra* at 138-139.

2. *Allowance of motion to vacate c. 93A* finding. To recover [***14] damages or attorney's fees under c. 93A, § 11, a plaintiff must show that he has suffered a "loss of money or property, real or personal." [7] "'Money' means money, not time, and . . . 'property' means the kind of property that is purchased or leased, not such intangibles as a right to a sense of security, to peace of mind, or to personal liberty." *Baldassari v. Public Fin. Trust*, 369 Mass. 33, 45, 337 N.E.2d 701 (1975). [8]

7 General Laws c. 93A, § 11, provides: "Any person who engages in the conduct of any trade or commerce *and who suffers any loss of money or property, real or personal,* as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two . . . may, as hereinafter provided, bring an action in the superior court. . . ." (Emphasis added).

8 Although the court in *Baldasarri* v. *Public Fin. Trust,* dealt with G. L. c. 93A, § 9, its con-

struction of the phrase "loss of money or property" as it appeared in that section has been held to apply to the same phrase as it appears in § 11 of the statute. See *Halper v. Demeter*, 34 Mass. App. Ct. 299, 304, 610 N.E.2d 332 (1993).

[***15] The plaintiffs contend that they established a loss of money [*20] or property in this case because they introduced evidence that Tech Plus had incurred long distance telephone call expenses both in responding to the defendants' wrongful acts, and also at the time the acts occurred. Specifically, [**1264] the plaintiffs refer to testimony by Piper that she discussed the Staples transaction with Cason on "multiple occasions" after he notified her of the statements the defendants had made. They also refer to testimony by Michael that his conversation with Cason on December 13, 1995, had occurred as a result of his "calling up" Cason.

The record does not demonstrate that the plaintiffs advanced this contention before the Superior Court judge. They are, therefore, barred from asserting it for the first time on appeal. See *Cottam v. CVS Pharmacy*, 436 Mass. 316, 323, 764 N.E.2d 814 (2002).

Even if the argument were properly raised, Piper did not testify that Tech Plus had incurred any separate, identifiable expense as a result of her conversations with Cason with respect to the Staples transaction following the events of December 13, 1995. Indeed, Piper did not indicate where those [***16] conversations had occurred, let alone that Tech Plus had incurred long distance telephone charges in connection with them. Nor was there any evidence that Tech Plus had incurred any separate, identifiable expense with respect to Michael's conversation with Cason on. December 13, 1995. Hence, the plaintiffs did not establish that they had incurred any long distance telephone call expenses either in responding to the defendants' acts, or at the time the acts occurred.

The plaintiffs also contend that they established a loss of money or property because they showed that Tech Plus had suffered damage to its reputation as a result of the defendant's conduct. They point specifically to a finding made by the judge that "for a period of at least several months, Tech Plus'[s] good name was under a cloud."

It is not clear from the record what evidence the judge was relying on in finding that Tech Plus's reputation was "under a cloud" for several months following the defendants' actions. However, such a temporary loss of reputation cannot by itself constitute a "loss of money or property" as those words are used in c. 93A, § 11, where, as here, the plaintiffs have [*21] failed to show that they [***17] suffered any tangible economic harm or pecuniary loss as a result of the defendants' actions. Compare *Baldassari v. Public Fin. Trust*, *supra* (word "property" as it appeared in G. L. c. 93A, § 9, did not include "such intangibles as a right to a sense of security, to peace of mind, or to personal liberty"); *Paul v. Davis*, 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976) ("reputation alone, apart from some more tangible interests such as employment, [is not] either 'liberty or property' by itself sufficient to invoke the procedural protection of the Due Process Clause"). We, therefore, reject the plaintiffs' argument that they were entitled to recover on their claims under c. 93A, § 11.

Finally, the plaintiffs contend that Piper showed that she had suffered a loss of money or property because she introduced evidence that she had incurred attorneys' fees in bringing this action and in defending against the defendants' counterclaims. A plaintiff, however, may not show that she has suffered a loss of money or property within the meaning of § 11 merely by showing that she has incurred attorneys' fees and other [***18] costs in bringing an action under the statute. See *Jet Line Servs., Inc.* v. *American Employers Ins. Co.*, 404 Mass. 706, 718, 537 N.E.2d 107 (1989). Rather, she must show that she was forced to incur such expenses as a result of the defendants' initiation of litigation which itself constituted a violation of the statute. See *Columbia Chiropractic Group, Inc.* v. *Trust Ins. Co.*, 430 Mass. 60, 63, 712 N.E.2d 93 (1999). [**1265] The plaintiffs made no such showing here and, hence, the attorneys' fees and other expenses they may have incurred in connection with this action did not by themselves constitute a loss of money or property within the meaning of § 11. See also *Halper v. Demeter*, 34 Mass. App. Ct. 299, 304-305, 610 N.E.2d 332 (1993).

3. *Allowance of summary judgment on plaintiffs' defamation claims.* In the memorandum of decision on the defendants' motion for summary judgment that dismissed the plaintiffs' defamation claims, the motion judge held that Michael's statements (which Sumner repeated) that Piper was anti-Semitic and had persecuted him because of his Jewish heritage were statements of opinion that were not susceptible [***19] of proof or disproof, and, hence, could not provide a basis for a defamation claim. See *Cole v. Westinghouse Bdcst. Co.*, 386 Mass. 303, 312-313, 435 N.E.2d 1021, cert. denied, 459 U.S. 1037, 74 L. Ed. 2d 603, 103 S. Ct. 449 (1982). In reaching this result, the judge [*22] recognized that the statements essentially alleged "that Piper discriminated against Michael in the conditions of his employment based on his religion," and that "we ask juries to reach a verdict on issues such as this in every discrimination case [brought under G. L. c. 151B]." Nevertheless, the judge reasoned that the statements of Michael and Sumner constituted nonactionable statements of opinion because "an allegation of discrimination, like an allega-

tion of bigotry, focuses on a person's state of mind," and "no one can see inside another's mind . . . ."

It is well settled that "an assertion that cannot be proved false cannot be held libellous." *Cole v. Westinghouse Bdcst. Co.*, *supra* at 312, quoting from *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), cert. denied sub nom. *Hotchner v. Doubleday & Co.*, 434 U.S. 834, 54 L. Ed. 2d 95, 98 S. Ct. 120 (1977). An allegation that [***20] a supervisor has harassed or otherwise discriminated against an employee in his or her employment, however, can be proved false. Indeed, as the judge himself recognized, we regularly ask jurors to decide such questions in a multitude of different cases brought under G. L. c. 151B and other anti-discrimination statutes. See, e.g., *College-Town, Div. of Interco, Inc.* v. *Massachusetts Commn. Against Discrimination*, 400 Mass. 156, 161-162, 508 N.E.2d 587 (1987); *Melnychenko v. 84 Lumber Co.*, 424 Mass. 285, 287-288, 676 N.E.2d 45 (1997).

We, therefore, conclude that the judge erred in determining that the alleged statements about Piper being anti-Semitic and having persecuted Michael because of his Jewish heritage constituted nonactionable opinion merely because they concerned Piper's alleged state of mind. See *Ward v. Zelikovsky*, 136 N.J. 516, 538, 643 A.2d 972 (1994) (accusation of bigotry may be actionable where it is made "in such manner or under such circumstances as would fairly lead a reasonable listener to conclude that [the person making the accusation] had knowledge of specific facts supporting the conclusory accusation"); [***21] Annot., Imputation of Alleged Objectionable Political or Social Beliefs or Principles as Defamation, 62 A.L.R. 4th 314, 465-475 (1988) (collecting additional cases). A given state of mind is a fact that can be proved like any other and, indeed, is proved in every criminal prosecution.

[*23] Nor can we discern any other proper basis for holding that the statements constituted nonactionable opinion. In deciding this question, we must consider "all the words used, not merely a particular phrase or sentence." See *Cole v. Westinghouse Bdcstg. Co.*, *supra* at 309, [**1266] quoting from *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). We must also consider "all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published." *Ibid.* See also Restatement (Second) of Torts § 566 comment e (1977) ("The circumstances under which verbal abuse is uttered affect the determination of how it is reasonably to be understood").

Here, there was evidence in the summary judgment record [9] that Michael not only had asserted generally that Piper was anti-Semitic but [***22] also, as purported factual support for that statement, had asserted that Piper had told anti-Semitic jokes in his presence and was "constantly persecuting" him because of his Jewish heritage. These latter statements plainly alleged that Piper had taken concrete (albeit unspecified) actions against Michael because of his Jewish heritage. See Webster's Third New International Dictionary 1685 (1993) (word "persecute" means "to cause to suffer . . . because of belief (as in a religion)"). "There was neither imprecision in meaning nor anything in the context of the [statements] that suggested that [the statements were] not factual." See *King v. Globe Newspaper Co.*, 400 Mass. 705, 717, 512 N.E.2d 241 (1987).

9 The summary judgment record included an affidavit and deposition testimony of Cason that was consistent with his subsequent trial testimony.

The plaintiffs also submitted evidence that Michael had made his statements to Cason in circumstances where Cason would reasonably believe that they [***23] had been uttered after Michael had had time for thought, and were deliberately intended to convey a serious charge of discrimination against Piper. Contrast *Ward v. Zelikovsky*, *supra* at 538-539 (spontaneous outburst by defendant at meeting of condominium owners that speaker "hates Jews" constituted mere verbal insult not intended to convey defamatory fact). Thus, the plaintiffs submitted evidence that Michael had made his statements to Cason not in response [*24] to any provocation from him, but rather as part of a calculated effort joined in by Sumner to dissuade Cason from continuing to use Piper as Lumina's sales representative on its transaction with Piper. They also submitted evidence that, as a result of Michael's charges, and Sumner's repetition of those charges, Cason telephoned Piper and, after asking her to respond to the charges, actually removed her as Lumina's sales representative on its transaction with Staples.

In view of all the foregoing circumstances, we conclude that Michael's alleged assertions that Piper was anti-Semitic, had told anti-Semitic jokes in his presence, and was constantly persecuting him because of his Jewish heritage constituted assertions [***24] of fact, rather than constitutionally protected expressions of opinion. They, therefore, could provide the basis for a defamation claim. See *King v. Globe Newspaper Co.*, *supra* at 717, and cases cited. See also *Ward v. Zelikovsky*, *supra* at 531-532 ("The higher the 'fact content' of a statement, the more likely that the statement will be actionable"); *Buckley v. Littell*, 539 F.2d 882, 884-885 & n.1 (2d Cir. 1976) (statement that journalist had lied about several persons constituted actionable assertion of fact, whereas state-

ment that journalist was a "fascist" did not); Restatement (Second) of Torts § 565 (1977).

Moreover, because the statements concerned a characteristic or qualification Piper needed to have to be a successful [**1267] sales agent, i.e., an ability to deal with, and attract as customers, persons of all religions and ethnic backgrounds, we conclude that they are actionable without proof of any special damages in the form of economic loss or harm. See *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 630, 782 N.E.2d 508 (2003). See also Restatement (Second) of Torts § 573 comment c (1977) ("Statements concerning [***25] merchants that question their solvency or honesty in business come within the rule stated in this Section [permitting recovery without proof of special harm], as do statements charging any other quality that would have a direct tendency to alienate custom"). Hence, unlike the situation with the intentional interference and c. 93A claims, the plaintiffs were not precluded from proceeding with their defamation claims merely because they could not produce any evidence that they had suffered economic harm as a result of the defendants' conduct. See [*25] *Ravnikar v. Bogojavlensky, supra*. We, therefore, conclude that the judge erred in allowing summary judgment dismissing the plaintiffs' defamation claims to the extent they were based on the alleged statements by Michael that Piper was anti-Semitic, had told anti-Semitic jokes in his presence, and had constantly persecuted him because of his Jewish heritage.

On the other hand, it is well settled that a statement of opinion is nonactionable if it is drawn from a disclosed fact that is either true or nondefamatory, regardless of whether the opinion was justified, so long as the statement does not imply the existence of other, [***26] undisclosed facts that are both false and defamatory. See *National Assn. of Govt. Employees, Inc.* v. *Central Bdcst. Corp.*, 379 Mass. 220, 227-228, 396 N.E.2d 996 (1979); *Fleming v. Benzaquin*, 390 Mass. 175, 187-188, 454 N.E.2d 95 (1983). Here, it was undisputed that Michael's alleged statement that Piper was prejudiced against homosexuals was based solely on his description of the conversation occurring prior to the meeting on November 27, 1995, in which Piper asked Michael whether Eckstein might have a problem with Cason being gay. The plaintiffs did not deny that this conversation had occurred, or contend that Michael's statement that Piper was prejudiced against homosexuals implied the existence of other, undisclosed facts about Piper that were both false and defamatory. In these circumstances, the judge properly concluded that Michael's statement that Piper was prejudiced against homosexuals constituted nonactionable opinion. See also *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 266, 612 N.E.2d 1158 (1993).

We also conclude that the judge did not err in holding that the plaintiffs could not recover on their defamation claims [***27] to the extent they were based on Sumner's statements that Piper was "sick" and "mentally ill" and "lived with two hundred cats." Viewed in the context in which they were made, these statements could not reasonably have been understood as assertions of actual fact about Piper, as distinct from "rhetorical hyperbole." See *Lyons v. Globe Newspaper Co., supra* at 266-267. See also *Bratt v. International Bus. Mach. Corp.*, 392 Mass. 508, 516 n.13, 467 N.E.2d 126 (1984). Moreover, it does not appear from the record that the plaintiffs made any claim before the Superior Court judge that the statement that Piper lived with "two [*26] hundred cats" was defamatory. Hence, the judge did not err in concluding that any such statement was nonactionable, even if it could reasonably be understood as an assertion of actual fact about Piper. See *Ravnikar v. Bogojavlensky, supra* at 629 n.3.

[**1268] 4. *Dismissal of other claims.* The motion judge dismissed Piper's claim of intentional infliction of emotional distress against the defendants based solely on his determination that the statements they allegedly made to Cason about Piper being anti-Semitic and [***28] having persecuted Michael because of his Jewish heritage were constitutionally protected statements of opinion. Because we have concluded that this determination was erroneous, we also conclude that he should not have dismissed this claim. Piper submitted sufficient admissible evidence in opposition to the defendants' motion for summary judgment to warrant jury findings both that the defendants' conduct was extreme and outrageous and that it had a "severe and traumatic effect upon [Piper's] emotional tranquility." See *Agis v. Howard Johnson Co.*, 371 Mass. 140, 145-146, 355 N.E.2d 315 (1976), quoting from *Alcorn v. Anbro Engr., Inc.*, 2 Cal.3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216 (1970). See also *Kelly v. General Tel. Co.*, 136 Cal. App. 3d 278, 287, 186 Cal. Rptr. 184 (1982) (holding that spreading of deliberately false statements that an employee in effect committed forgery constitutes extreme and outrageous conduct).

Also, as a result of the motion judge's dismissal of the plaintiffs' defamation claims, the plaintiffs were precluded from prosecuting their claim of civil conspiracy based on the alleged defamation, as they otherwise [***29] would have been permitted to do. See *Kurker v. Hill*, 44 Mass. App. Ct. 184, 188-189, 689 N.E.2d 833 (1998). Hence, because we have concluded that the defamation claims were improperly dismissed, the plaintiffs must be allowed a new trial of their claim of civil conspiracy. See *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107, 119, 731 N.E.2d 1075 (2000) (new trial warranted where issue was submitted to jury on erroneous instructions)

Conclusion. The case is remanded for entry of a judgment dismissing the claims of intentional interference and violation of G. L. c. 93A (counts 1-3 and 8 of the complaint and affirming the judgment on the duty of loyalty claim (count 4 of the complaint). The judgment dismissing the claims of defamation [*27] and intentional infliction of emotional distress (counts 5 and 6 of the complaint) is vacated and the claims shall be reinstated for further proceedings consistent with this opinion. A new trial shall also be held on the claim of civil conspiracy (count 7 of the complaint).

So ordered.

American Jurisprudence, Second Edition

Tom Muskus, J.D.

Interference
II. Elements and Factors to Be Considered
A. Overview

44B Am Jur 2d Interference § 7

§ 7 Interference by stranger to contract or relationship

A person must be a stranger to a contract to tortiously interfere with it. n1 A claim for tortious interference with contractual relations requires proof that the defendant is a stranger to the contract with which the defendant allegedly interfered and to the business relationship giving rise to the contract. n2 One contracting party does not have a cause of action in interference against the other contracting party for tortious interference. n3 A party cannot interfere with its own contracts, so the tort can be committed only by a third party. n4 Similarly, to be liable for tortious interference with business relations, one must be a stranger to the business relationship giving rise to and underpinning the contract. n5

One is not a stranger to the contract, for purposes of a claim for tortious interference, just because one is not a party to the contract. n6 For example, the intended third-party beneficiary of a contract, legally authorized to enforce the contract, cannot be held liable for tortious interference since he or she is not a stranger to the contract. n7 Where a defendant has a legitimate interest in either the contract or a party to the contract, the defendant is not a stranger to the contract itself or to the business relationship giving rise thereto and underpinning the contract. n8 All parties to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships. n9

The applicability of the "stranger doctrine" is the same for tortious interference with a business relationship as for tortious interference with a contractual relationship. n10

Observation: Where the defendant is the entity the third party hires to administer, operate, or promote the event that forms the basis for the business relationship between the plaintiff and the third party, the defendant is no stranger to that relationship and cannot be held liable for interfering therewith. n11

FOOTNOTES:

n1 In re Vesta Ins. Group, Inc., 192 S.W.3d 759 (Tex. 2006).

n2 Insight Technology, Inc. v. FreightCheck, LLC, 280 Ga. App. 19, 633 S.E.2d 373 (2006), cert. denied, (Oct. 2, 2006).

n3 Goolesby v. Koch Farms, LLC, 2006 WL 2925327 (Ala. 2006); Deflon v. Sawyers, 2006-NMSC-025, 139 N.M. 637, 137 P.3d 577 (2006), as corrected, (June 29, 2006).

n4 Trail v. Boys and Girls Clubs of Northwest Indiana, 845 N.E.2d 130 (Ind. 2006).

n5 Benefit Support, Inc. v. Hall County, 6 Fulton County D. Rep. 3209, 2006 WL 2865493 (Ga. Ct. App. 2006).

n6 Atlanta Market Center Management, Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278 (1998).

n7 Atlanta Market Center Management, Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278 (1998).

n8 Benefit Support, Inc. v. Hall County, 6 Fulton County D. Rep. 3209, 2006 WL 2865493 (Ga. Ct. App. 2006).

n9 Benefit Support, Inc. v. Hall County, 6 Fulton County D. Rep. 3209, 2006 WL 2865493 (Ga. Ct. App. 2006).

n10 Benefit Support, Inc. v. Hall County, 6 Fulton County D. Rep. 3209, 2006 WL 2865493 (Ga. Ct. App. 2006).

n11 Benefit Support, Inc. v. Hall County, 6 Fulton County D. Rep. 3209, 2006 WL 2865493 (Ga. Ct. App. 2006).

SUPPLEMENT:

Cases

The "stranger" doctrine, pursuant to which plaintiff alleging tortious interference must establish that defendant is a third party, i.e., a "stranger" to the contract with which defendant allegedly interfered, applies to a claim of tortious interference with business relations and is the same as that applicable to a claim of tortious interference with a contractual relationship. All Star, Inc. v. Fellows, 297 Ga. App. 142, 676 S.E.2d 808 (2009).

Liability for tortious interference with a contract requires that a defendant be both a stranger to the contract and the business relationship giving rise to and underpinning the contract; thus, all parties to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships. Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield of Georgia, Inc., 297 Ga. App. 28, 676 S.E.2d 428 (2009).

REFERENCE: West's Key Number Digest, Torts [westkey]210, 214 to 216, 219, 220, 222, 223
A.L.R. Index, Obstruction or Interference
A.L.R. Index, Torts
West's A.L.R. Digest, Torts [westkey]210, 214 to 216, 219, 220, 222, 223
Am. Jur. Pleading and Practice Forms, Interference §§ 4, 38
Restatement Second, Torts §§ 767, 774
West's Key Number Digest, Torts [westkey]222

Case Citations

Rules and Principles

Division 9 - Interference with Advantageous Economic Relations

Chapter 37 - Interference with Contract or Prospective Contractual Relation

Restat 2d of Torts, § 766

§ 766 Intentional Interference with Performance of Contract by Third Person

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

COMMENTS & ILLUSTRATIONS: Comment:

a. Cross-references. See the Special Note to this Chapter, immediately preceding this Section. In order for the actor to be held liable, this Section requires that his interference be improper. The factors of importance in determining this issue are stated and explained in § 767, which must be read closely with this Section. Sections 768-773 deal with special situations in which the application of these factors has produced more clearly identifiable decisional patterns.

This Section uses the expression, "subject to liability," as defined in § 5, meaning that the actor is liable if his conduct was a legal cause of the interference and he has no defense to the action.

This Section is concerned only with intentional interference with subsisting contracts. It does not cover contracts to marry, which are dealt within § 698. The rule for intentional interference with another's performance of his own contract with a third person is stated in § 766A. The rule for intentional interference with prospective contractual relations not yet reduced to contract is stated in § 766B. The rule for negligent interference with either existing or prospective contractual relations is stated in § 766C.

b. The rule stated in this Section does not apply to a mere refusal to deal. Deliberately and at his pleasure, one may ordinarily refuse to deal with another, and the conduct is not regarded as improper, subjecting the actor to liability. One may not, however, intentionally and improperly frustrate dealings that have been reduced to the form of a contract. There is no general duty to do business with all who offer their services, wares or patronage; but there is a general duty not to interfere intentionally with another's reasonable business expectancies of trade with third persons, whether or not they are secured by contract, unless the interference is not improper under the circumstances. When the interference is with a contract, an interference is more likely to be treated as improper than in the case of interference with prospective dealings, particularly in the case of competition, as stated in § 768.

c. Historical development. Historically the liability for tortious interference with advantageous economic relations developed first in cases of intentional prevention of prospective dealings, by violence, fraud or defamation -- conduct that was essentially tortious in its nature, either to the third party or to the injured party. (See § 766B, Comment *b*).

In 1853, the decision in Lumley v. Gye, 2 El. & Bl. 216, 118 Eng.Rep. 749, began the development of inducement of breach of contract as a separate tort. In that case a singer under contract to sing at the plaintiff's theatre was induced by the defendant, who operated a rival theatre, to break her contract with the plaintiff in order to sing for the defendant.

No violence, fraud or defamation by the defendant was alleged. The decision in favor of the plaintiff was rested largely on the analogy of the rules relating to enticement of another's servants. This case differed from earlier cases in that the means of inducement used by the defendant were not tortious toward the singer. Subsequent cases extended the rule of Lumley v. Gye to contracts other than contracts of service and to interference with advantageous business relations even when they were not cemented by a contract.

After Lumley v. Gye, some cases dealing with the liability for intentional interference in contractual relations by inducing breach of contract or refusal to deal in absence of contract tended largely to build on that case as if it were the foundation. But the foundation is further back. The significance of Lumley v. Gye lies in its extension of the rule of liability to nontortious methods of inducement. Particularly in view of subsequent interpretations of that case in England, it established no rule peculiar to contracts.

The liability for inducing breach of contract is now regarded as but one instance, rather than the exclusive limit, of protection against improper interference in business relations. The added element of a definite contract may be a basis for greater protection; but some protection is appropriate against improper interference with reasonable expectancies of commercial relations even when an existing contract is lacking. The improper character of the actor's conduct and the harm caused by it may be equally clear in both cases. The differentiation between them relates primarily to the scope of the justification or the kind and amount of interference that is not improper in view of the differences in the facts.

Likewise, the importance of the means of inducement relates primarily to the issue of whether the interference is improper or not. The predatory means in the early cases, intimidation and fraud, were tortious toward the plaintiff because they were calculated to, and did, affect the conduct of third persons to the plaintiff's damage. (See § 766A, Comment *b*). But other means may be equally calculated and effective to produce that result; and primarily the plaintiff is concerned with that result rather than with the means by which the third persons were caused to act. The plaintiff's interest in his contractual rights and expectancies must be weighed, however, against the defendant's interest in freedom of action. If the defendant's conduct is predatory the scale on his side may weigh very lightly, but if his conduct is not predatory it may weigh heavily. The issue is whether in the given circumstances his interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm that his conduct is designed to produce. In deciding this issue, the nature of his conduct is an important factor. (See § 767).

d. Types of contract. The leading case of Lumley v. Gye involved the inducement of the breach of a contract of employment. Early decisions in the American courts, cautious in their acceptance of what was regarded as a new principle, declined to extend it beyond service contracts. In nearly all jurisdictions these decisions have now been repudiated, and the rule stated in this Section is applied to any type of contract, except a contract to marry. On the special rule applicable to contracts to marry, see § 698.

e. Illegal agreements. On illegal agreements and those in violation of public policy, see § 774.

f. Voidable contracts. The word "contract" connotes a promise creating a duty recognized by law. (See Restatement, Second, Contracts § 1). The particular agreement must be in force and effect at the time of the breach that the actor has caused; and if for any reason it is entirely void, there is no liability for causing its breach. Furthermore, it must be applicable to the particular performance that the third person has been induced or caused not to discharge. It is not, however, necessary that the contract be legally enforceable against the third person. A promise may be a valid and subsisting contract even though it is voidable. (See Restatement, Second, Contracts § 13). The third person may have a defense against action on the contract that would permit him to avoid it and escape liability on it if he sees fit to do so. Until he does, the contract is a valid and subsisting relation, with which the actor is not permitted to interfere improperly. Thus, by reason of the statute of frauds, formal defects, lack of mutuality, infancy, unconscionable provisions, conditions precedent to the obligation or even uncertainty of particular terms, the third person may be in a position to avoid liability for any breach. The defendant actor is not, however, for that reason free to interfere with performance of the contract before it is avoided.

g. Contracts terminable at will. A similar situation exists with a contract that, by its terms or otherwise, permits the third person to terminate the agreement at will. Until he has so terminated it, the contract is valid and subsisting, and the defendant may not improperly interfere with it. The fact that the contract is terminable at will, however, is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach. (See § 774A).

One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he has no legal assurance of them. For this reason, an interference with this interest is closely analogous to interference

with prospective contractual relations. (See § 766B). If the defendant was a competitor regarding the business involved in the contract, his interference with the contract may be not improper. (See § 768, especially Comment *i*).

h. Inducing or otherwise causing. The word "inducing" refers to the situations in which A causes B to choose one course of conduct rather than another. Whether A causes the choice by persuasion or by intimidation, B is free to choose the other course if he is willing to suffer the consequences. Inducement operates on the mind of the person induced. The phrase "otherwise causing" refers to the situations in which A leaves B no choice, as, for example, when A imprisons or commits such a battery upon B that he cannot perform his contract with C, or when A destroys the goods that B is about to deliver to C. This is also the case when performance by B of his contract with C necessarily depends upon the prior performance by A of his contract withB and A fails to perform in order to disable B from performing for C. The rule stated in this Section applies to any intentional causation whether by inducement or otherwise. The essential thing is the intent to cause the result. If the actor does not have this intent, his conduct does not subject him to liability under this rule even if it has the unintended effect of deterring the third person from dealing with the other. (On purpose and intent, see Comment *j*).

i. Actor's knowledge of other's contract. To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract. Although the actor's conduct is in fact the cause of another's failure to perform a contract, the actor does not induce or otherwise intentionally cause that failure if he has no knowledge of the contract. But it is not necessary that the actor appreciate the legal significance of the facts giving rise to the contractual duty, at least in the case of an express contract. If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect from what it is judicially held to have.

j. Intent and purpose. The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition. The rule is broader, however, in its application than to cases in which the defendant has acted with this purpose or desire. It applies also to intentional interference, as that term is defined in § 8A, in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action.

The fact that this interference with the other's contract was not desired and was purely incidental in character is, however, a factor to be considered in determining whether the interference is improper. If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper. (See § 767, especially Comment *d*).

k. Means of interference. There is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract. The interference is often by inducement. The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus it may be a simple request or persuasion exerting only moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made. Or it may be a threat by the actor of physical or economic harm to the third person or to persons in whose welfare he is interested. Orit may be the promise of a benefit to the third person if he will refrain from dealing with the other.

On the other hand, it is not necessary to show that the third party was induced to break the contract. Interference with the third party's performance may be by prevention of the performance, as by physical force, by depriving him of the means of performance or by misdirecting the performance, as by giving him the wrong orders or information.

l. Inducement by refusal to deal. A refusal to deal is one means by which a person may induce another to commit a breach of his contract with a third person. Thus A may induce B to break his contract with C by threatening not to enter into, or to sever, business relations with B unless B does break the contract. This situation frequently presents a nice question of fact. While, under the rule stated in this Section, A may not, without some justification induce B to break his contract with C, A is ordinarily free to refuse to deal with B for any reason or no reason. The difficult question of fact presented in this situation is whether A is merely exercising his freedom to select the persons with whom he will do business or is inducing B not to perform his contract with C. That freedom is not restricted by the relationship between B and C; and A's aversion to C is as legitimate a reason for his refusal to deal with B as his aversion to B. If he is

merely exercising that freedom, he is not liable to C for the harm caused by B's choice not to lose A's business for the sake of getting C's.

On the other hand, if A, instead of merely refusing to deal with B and leaving B to make his own decision on what to do about it, goes further and uses his own refusal to deal or the threat of it as a means of affirmative inducement, compulsion or pressure to make B break his contract with C, he may be acting improperly and subject to liability under the rule stated in this Section.

Illustrations:

1. Upon hearing of B's contract with C, A ceases to buy from B. When asked by B to explain his conduct, A replies that his reason is B's contract with C. Thereupon B breaks his contract with C in order to regain A's business. A has not induced the breach and is not subject to liability to C under the rule stated in this Section.

2. Upon hearing of B's contract with C, A writes to B as follows: "I cannot tolerate your contract with C. You must call it off. I am sure that our continued relations will more than compensate you for any payment you may have to make to C. If you do not advise me within ten days that your contract with C is at an end, you may never expect further business from me." Thereupon B breaks his contract with C. A has induced the breach and is subject to liability under the rule stated in this Section.

m. Inducement by offer of better terms. Another method of inducing B to sever his business relations with C is to offer B a better bargain than that which he has with C. Here, as in the situation dealt with in Comment *l*, a nice question of fact is presented. A's freedom to conduct his business in the usual manner, to advertise his goods, to extol their qualities, to fix their prices and to sell them is not restricted by the fact that B has agreed to buy similar goods from C. Even though A knows of B's contract with C, he may nevertheless send his regular advertising to B and may solicit business in normal course. This conduct does not constitute inducement of breach of the contract. The illustration below is a case of solicitation that does constitute inducement.

Illustration:

3. A writes to B: "I know you are under contract to buy these goods from C. Therefore I offer you a special price way below my cost. If you accept this offer, you can break your contract with C, pay him something in settlement and still make money. I am confident that you will find it more satisfactory to deal with me than with C." As a result of this letter, B breaks his contract with C. A has induced the breach.

n. Making agreement with knowledge of the breach. One does not induce another to commit a breach of contract with a third person under the rule stated in this Section when he merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person. (Compare Comment *m*). For instrance, B is under contract to sell certain goods to C. He offers to sell them to A, who knows of the contract. A accepts the offer and receives the goods. A has not induced the breach and is not subject to liability under the rule stated in this Section. In some cases, however, B may be enjoined at the suit of C from performing for A, or B may be compelled specifically to perform the contract with C. (On the normal availability of injunctive relief, see Comment *u*). In some cases, too, as in the case of a contract for the sale of land, the purchaser acquires an equitable interest good against subsequent transferees of the vendor who are not bona fide purchasers. The rules relating to the protection of this interest against subsequent transferees are not within the scope of this Restatement.

o. Causation. The question whether the actor's conduct caused the third person to break his contract with the other raises an issue of fact. The reasonableness of the claimed reaction of the third person to the actor's conduct is material evidence on this issue, but it is not conclusive. Thus the fact that only a coward or a fool would have been influenced by the defendant's conduct is evidence that may warrant a finding that the third person was not in fact influenced by it. On the other hand, if other evidence establishes that the actor did in fact induce the third person's conduct, the actor is liable even though the third person was cowardly or foolish or otherwise unreasonable in permitting himself to be so influenced and is himself liable for his own misconduct. (See §§ 546-548).

p. The person protected. The person protected by the rule stated in this Section is the specified person with whom the third person had a contract that the actor caused him not to perform. To subject the actor to liability under this rule, his conduct must be intended to affect the contract of a specific person. It is not enough that one has been prevented from obtaining performance of a contract as a result of the actor's conduct. (Cf. § 766A). Thus, if A induces B to break a contract with C, persons other than C who may be harmed by the action as, for example, his employees or suppliers, are not within the scope of the protection afforded by this rule, unless A intends to affect them. Even then they may not

be able to recover unless A acted for the purpose of interfering with their contracts. (See § 767, Comment *h*). The rule does not require, however, that the person who loses the performance of the contract as a result of the conduct of the actor should be specifically mentioned by name. It is sufficient that he is identified in some manner, -- that he is the person intended by the actor and understoodby those whom the actor seeks to induce. Thus inducement to break a contract to purchase an identified brand of cigarettes, "Saspan," may subject the inducer to liability to the commercial source identified by that trade symbol, the "Russo-Germanic Alliance Co.," but not to other distributors who sell the product.

In some cases the expression of one's general opinions or advice may cause persons not to perform their contracts with another. Thus a prominent person's opinion that economic opportunities are greater in the West than in the East and his advice to young men in general that they "go West" may cause some yound man to leave an existing employment in breach of his contract and seek new fortune in the West. Again a person's lecture on the perils of eating meat may cause another to break his contract and cease buying meat from his butcher; or in a public lecture or private conversation, one may persuade others not to buy foreign or union made goods. The rule stated in this Section does not afford protection against harm thus caused. Only when the actor's conduct is intended to affect a specific person is the actor subject to liability under this rule.

q. Persons intended to be induced. When inducement of a breach of contract is involved, the situation is ordinarily one in which a single person is induced to commit a breach of a single contract. However, the situation may be one in which many persons are induced to act. Thus a boycott campaign may be intended to induce numerous persons to break their contracts with the plaintiff.

r. Ill will. Ill will on the part of the actor toward the person harmed is not an essential condition of liability under the rule stated in this Section. He may be liable even when he acts with no desire to harm the other. But the freedom to act in the manner stated in this Section may depend in large measure on the purposes of his conduct. Although the actor is acting for the purpose of advancing an interest of his own, that interest may not be of sufficient importance to make his interference one that is not improper and avoid liability. Satisfying one's spite or ill will is not an adequate basis to justify an interference and keep it from being improper. The presence or absence of ill will toward the person harmed may clarify the purposes of the actor's conduct and may be, accordingly, an important factor in determining whether the interference was improper.

s. "Malice." There are frequent expressions in judicial opinions that "malice" is requisite for liability in the cases treated in this Section. But the context and the course of the decisions make it clear that what is meant is not malice in the sense of ill will but merely "intentional interference without justification." Malicious conduct may be an obvious type of this interference, but it is only one of several types. Compare Introductory Note to Chapter 29 (Wrongful Prosecution of Criminal Proceedings). If the plaintiff is required to show malicious interference in this latter sense, however, it is sometimes held to impose upon him the burden of alleging and proving "lack of justification." (See § 767, Comment *k*).

t. Damages. On the elements of damages, see § 774A. The cause of action is for pecuniary loss resulting from the interference. Recovery may be had also for consequential harms for which the interference was a legal cause. (See § 774A).

u. Equitable relief. In appropriate circumstances under the general rules relating to equitable relief (see §§ 933-951), one may be enjoined from conduct that would subject him to liability under the rule stated in this section.

v. Relation to action for breach of contract. The fact that the plaintiff has an available action for breach of contract against the third person does not prevent him from maintaining an action under the rule stated in this Section against the person who has induced or otherwise caused the breach. The two are both wrongdoers, and each is liable to the plaintiff for the harm caused to him by the loss of the benefits of the contract. (Compare § 875). Even a judgment obtained against the third person for the breach of contract will not bar the action under this Section so long as the judgment is not satisfied. Payments made by the third person in settlement of the claim against him must, however, be credited against the liability for causing the breach and so go to reduce the damages for the tort. (See § 774A(2)).

REPORTERS NOTES: This is a part of § 766 as it appeared in the first Restatement. The word "purposely" has been changed to "intentionally and improperly."

On the cause of action under this Section in general, see the following recent cases: Edwards v. Travelers Ins. of Hartford, 563 F.2d 105 (6th Cir. 1977); Industrial Equipment Co. v. Emerson Electric Co., 554 F.2d 276 (6th Cir.

1977); Mason v. Funderburk, 247 Ark. 521, 446 S.W. 2d 543 (1969); Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631 (1941) (comprehensive opinion by Traynor, J.); Freed v. Manchester Serv., Inc., 165 Cal. App.2d 186, 331 P.2d 689 (1908); Harry A. Finman & Son, Inc. v. Connecticut Truck & Trailer Serv. Co., 169 Conn. 407, 363 A. 2d 86 (1975); Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan, 374 A.2d 284 (D.C. App.1977); Northern Plumbing & Heating, Inc. v. Henderson Bros., Inc., 83 Mich.App. 84, 268 N.W.2d 296 (1978); Dassance v. Nienhuis, 57 Mich.App. 422, 225 N.W.2d 789 (1975); Continental Research, Inc. v. Cruttenden, Podesta & Miller, 222 F.Supp. 190 (D.Minn.1963) (extensive treatment of whole subject of interference with contractual relations by Larson, J.); Downey v. United Weatherproofing, 363 Mo. 852, 253 S.W.2d 976 (1953); Bryant v. Barber, 237 N.C. 480, 75 S.E. 2d 410 (1958); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978); Calbom v. Knudtzon, 65 Wash.2d 157, 396 P.2d 148 (1964); Jasperson v. Dominion Tobacco Co., [1923] A.C. 709.

Cf. Herider Farms-El Paso, Inc. v. Criswell, 519 S.W.2d 473 (Tex.Civ.App.1975) (plaintiff forced to sell his business to defendant as result of defendant's tortious interference -- entering into the sale contract by plaintiff does not estop a tort action).

Comment d: Types of contract. A few American states still go no further than Lumley v. Gye and restrict the action to contracts of employment. See, e.g., Homa-Goff Interiors, Inc. v. Cowden, 350 So.2d 1035 (Ala.1977); National Safe Corp. v. Benedict & Myrick, Inc., 364 So.2d 169 (La. App.1978), remanded, 371 So.2d 792, but the vast majority of states no longer impose the restriction.

Comment f: Contract may be viodable or unenforceable.

E.g., statute of frauds: Buckaloo v. Johnson, 14 Cal.3d 815, 122 Cal.Rptr. 745, 537 P.2d 865 (1975); Keely v. Price, 27 Cal. App.3d 209, 103 Cal.Rptr. 531 (1972); Young v. Pottinger, 340 So.2d 518 (Fla.App.1977); Daugherty v. Kessler, 264 Md. 281, 286 A.2d 95 (1972); Bynum v. Bynum, 87 N.M. 195, 531 P.2d 618, cert. denied 87 N.M. 179, 531 P.2d 602 (1975); Clements v. Withers, 437 S.W.2d 818 (Tex. 1969); Scymanski v. Dufault, 80 Wash.2d 77, 491 P.2d 1050 (1971).

But cf. McCann v. Biss, 65 N.J. 301, 322 A.2d 161 (1974) (special statute for real estate agents).

Lack of consideration or mutuality: Allen v. Leybourne, 190 So.2d 825 (Fla.App.1966); Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 67 A.D.2d 658, 412 N.Y.S.2d 623 (1969).

Indefiniteness: Barlow v. International Harvester Co., 95 Idaho 881, 522 P.2d 1102 (1974). Contra: Eckles v. Sharman, 548 F.2d 905 (10th Cir. 1976).

Comment g: Contract terminable at will: Alpha Dist. Co. v. Jack Daniel Distillery, 454 F.2d 442 (9th Cir. 1972), appeal after remand, 493 F.2d 1355 (1974) cert. denied 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70 (1974); Hannigan v. Sears Roebuck & Co., 410 F.2d 285 (7th Cir. 1969), cert. denied 396 U.S. 902, 90 S.Ct. 214, 24 L.Ed.2d 178 (1969); State Farm Mut. Ins. Co. v. St. Joseph's Hospital, 107 Ariz. 498, 489 P.2d 837 (1971); Association Group Life Ins. v. Catholic War Veterans of U.S.A., 120 N.J.Super. 85, 293 A.2d 408 (1971); Smith v. Ford Motor Co., 289 N. C. 71, 221 S.E.2d 282 (1976); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978); Geib v. Alan Wood Steel Co., 419 F.Supp. 1205 (E.D.Pa.1976); Schwab v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, 483 S.W.2d 143 (Tenn. App.1972); Island Air, Inc. v. LaBar, 18 Wash.App. 129, 566 P. 2d 972 (1977).

Comment h. Inducing: In Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir. 1978), rev'd on other grounds, 443 U.S. 111 99 S. Ct. 2675, 61 L.Ed.2d 411 (1972) it was held that if the inducement is by speech, the constitutional limitations in defamation cases will apply.

Comment i: Knowledge of the contract. See generally. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631 (1941); Hunter Vending Co. v. D.C. Vending Co., 345 A.2d 142 (D.C.App.1975); Bolger v. Banley Lbr. Co., 77 Ill. App.3d 207, 395 N.E.2d 1066, 32 Ill.Dec. 685 (1979) (knowledge that real estate listing was exclusive); Daugherty v. Kessler, 264 Md. 281, 286 A.2d 95 (1972); Engine Specialties, Inc. v. Bombardier Ltd., 330 F.Supp. 762 (D.Mass.1971); Continental Research, Inc. v. Cruttenden, Podesta & Miller, 222 F.Supp. 190 (D. Minn.1963) (circumstantial evidence of knowledge of contract); Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F.Supp. 1176 (N.D. Miss.1970) (reason to know and wilful ignorance); American Cyanamid Co. v. Elizabeth Arden Sales Corp., 331 F.Supp. 597 (S. D.N.Y.1970); Frost Nat'l Bank v. Alamo Nat'l Bank, 421 S.W.2d 153 (Tex.Civ.App.1967); Calbom v. Knudtzon, 65 Wash.2d 157, 396 P.2d 148 (1964).

Comment j: Intent and purpose: See, generally, Sidney Blumenthal & Co., v. United States, 30 F.2d 247 (2d Cir. 1929); Gantry Constr. Co. v. American Pipe & Constr. Co., 49 Cal.App.3d 186, 122 Cal.Rptr. 834 (1975); Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan, 374 A.2d 284 (D.C.App.1977); Bergfield v. Stork, 7 Ill.App.3d 486, 288 N.E. 2d 15 (1972); Farmers Coop. Elevator, Inc. v. State Bank, 236 N. W.2d 674 (Iowa 1975); Araserv, Inc. v. Bay State Harness Horse Racing & Breeding Ass'n, 437 F. Supp. 1083 (D.Mass.1972); Rodriguez v. Dipp, 546 S.W.2d 655 (Tex.Civ.App.1977) (writ refused no error); Augustine v. Anti-Defamation League of B'nai B'rith, 75 Wis.2d 207, 249 N.W.2d 547 (1977) (must be intent to terminate contract, not mere desire that it be terminated).

Since this is an intentional tort, comparative negligence statute held not to apply. Carman v. Heber, 601 P.2d 646 (Colo.App. 1979).

Comment k: Means of interference. See the citations in the Note to § 767, comment c.

Comment l: Refusal to deal. See generally Hannigan v. Sears, Roebuck & Co., 410 F.2d 285 (7th Cir. 1969), cert. denied, 396 U.S. 902, 90 S.Ct. 214, 24 L.Ed.2d 178 (1969); Allied Int'l, Inc. v. International Longshoremen's Ass'n, 492 F.Supp. 334 (D.Mass. 1980); Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976).

Comment m: Offer of better terms. See Cumberland Glass Mfg. Co. v. DeWitt, 120 Md. 381, 87 A. 927 (1913); Meyering v. Russell, 393 Mich. 770, 224 N.W. 2d 280 (1974); Anchor Alloys, Inc. v. Non-Ferrous Processing Corp., 39 A.D.2d 504, 336 N.Y.S. 2d 944 (1972).

Comment n: Knowledge of breach. See generally, Middleton v. Wallich's Music & Entertainment Co., 24 Ariz.App. 180, 536 P.2d 1072 (1975); Zelinger v. Uvalde Rock Asphalt Co, 316 F.2d 47 (10th Cir. 1963); Mansfield v. B & W Gas, Inc., 222 Ga. 259, 149 S.E.2d 482 (1966); Bolger v. Banley Lbr. Co., Inc., 77 Ill.App. 3d 207, 32 Ill.Dec. 685, 395 N.E. 2d 1066 (1979); Ryan, Elliott & Co. v. Leggett, McCall & Werner, Inc. 8 Mass.App. 686, 396 N.E.2d 1009 (1979); Araserv, Inc. v. Bay State Harness Horse Racing & Breeding Ass'n Inc., 437 F.Supp. 1083 (D.Mass.1977); Hutchings v. Dave Demarest & Co., 52 Mich.App. 274, 217 N.W. 2d 72 (1974); Arabesque Studios, Inc. v. Academy of Fine Arts Int'l, Inc., 529 S.W.2d 564 (Tex. Civ.App.1975); Corinthian Corp. v. White & Bollard, Inc., 74 Wash.2d 50, 442 P.2d 950 (1968).

Comment o: Causation. See Avins v. White, 627 F.2d 637 (3rd Cir. 1980); Harrison v. Prather, 435 F.2d 1168 (5th Cir. 1970), cert. denied, 404 U.S. 829, 92 S.Ct. 67, 30 L.Ed.2d 58 (1971), reh. denied, 404 U.S. 960, 92 S.Ct. 306, 30 L.Ed.2d 278 (1971); Powell v. South Central Bell Tel. Co., 361 So.2d 103 (Ala.1978); Dryden v. Tri-Valley Growers, 65 Cal.App.3d 990, 135 Cal.Rptr. 720 (1977); Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan, 374 A.2d 284 (D.C.App.1977); Seaway Yacht Sales, Inc. v. Brunswick Corp., 242 So.2d 192 (Fla.1970); Tri-Continental Leasing Co. v. Neidhardt, 540 S. W.2d 210 (Mo.App.1976); Paul Hardeman, Inc. v. Bradley, 486 P.2d 731 (Okla.1971); Phez Co. v. Salem Fruit Union, 103 Or. 514, 205 P. 970 (1922); Arabesque Studios v. Academy of Fine Arts Int'l, Inc., 529 S.W.2d 564 (Tex.Civ.App.1975); Island Air, Inc. v. LaBar, 18 Wn.App. 129, 566 P.2d 972 (1972).

Comment p: Person protected. See Bowl-Mor Co., Inc. v. Brunswick Corp., 297 A.2d 61 (Del.Ch. 1972), appeal denied, 297 A.2d 67 (Del.1972); Hales v. Ashland Oil Inc., 342 So.2d 984 (Fla.App. 1977); Williamson, Picket, Gross, Inc. v. 400 Park Ave. Co., 63 A.2d 880, 405 N.Y.S.2d 709 (1978), aff'd, 47 N.Y.2d 769, 417 N.Y.S.2d 460, 391 N.E.2d 296 (1979).

A third party beneficiary of the contract has been allowed to sue. Reynolds v. Owens, 34 Conn.Sup. 107, 380 A.2d 543 (1977); Tamposi Assoc., Inc. v. Star Mkt. Co., Inc., 119 N.H. 630, 406 A.2d 132 (1974); Bitzke v. Folger, 231 Wis. 513, 286 N.W. 36 (1939).

But he must have been entitled to sue on the contract.

Willard v. Claborn, 220 Tenn. 501, 419 S.W.2d 168 (1967).

Comment q: Person intended to be induced. See Jackson v. Stanfield, 137 Ind. 592, 36 N.E. 345 (1894); Rouse Philadelphia, Inc. v. Ad Hoc '78, 274 Pa.Super. 54, 417 A.2d 1248 (1980).

On boycotts, see State of Missouri v. National Org. for Women, 620 F.2d 1301 (7th Cir. 1980); Jackson v. Stanfield, 137 Ind. 592, 36 N.E. 345 (1894); Rouse Philadelphia, Inc. v. Ad Hoc '78, 274 Pa.Super. 54, 417 A.2d 1248 (1980).

Comments r and s: "Malice" and ill will. On ill will and "malice" See Frank Coulson, Inc.-Buick v. General Motors Corp., 488 F.2d 202 (5th Cir. 1974); Leonard Duckworth, Inc. v. Michael L. Field & Co., 516 F.2d 952 (5th Cir.

1975); Edwards v. Travelers Insurance, 563 F.2d 105 (6th Cir. 1977); Gerstner Elec. Inc. v. American Ins. Co., 520 F. 2d 790 (5th Cir. 1975); DeVoto v. Pacific Fidelity Life Ins. Co., 618 F.2d 1340 (9th Cir. 1980), cert. denied, 449 U.S. 869, 101 S.Ct. 206, 66 L.Ed.2d 89 (9th Cir. 1980); Russell v. Croteau, 98 N. H. 68, 94 A.2d 376 (1953); Bynum v. Bynum, 87 N.M. 195, 531 P.2d 618 (1975), cert. denied, 87 N.M. 179, 531 P.2d 602 (1975); Levin v. Kuhn Loeb & Co., 174 N.J.Super. 560, 417 A.2d 79 (1980); Middlesex Concrete Products & Excavating Corp. v. Carteret Industrial Ass'n, 37 N.Y.2d 507, 181 A.2d 774 (1962); Straube v. Larson, 287 Or. 357, 600 P.2d 371 (1979); Smith Dev. Corp. v. Bilow Enterprises, Inc., 112 R.I. 203, 308 A.2d 477 (1973); Hutton v. Waters, 132 Tenn. 527, 179 S.W. 134 (1915); Light v. Transport Ins. Co., 469 S.W.2d 433 (Tex.Civ.App.1971); Calbom v. Knudtzon, 65 Wash.2d 157, 396 P.2d 148 (1964); Lorenz v. Dreske, 62 Wis.2d 273, 214 N. W.2d 753 (1974); South Wales Miners Fed. v. Glamorgen Coal Co., [1905] A.C. 239.

Comment u: Equitable relief. See New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196 (1st Cir. 1979); Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631 (1947); Walt Peabody Advertising Serv. v. Pecora, 393 F.Supp. 328 (D.C.Ky.1975); Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129 (S.D.Ohio 1974); Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978); Lumley v. Wagner, 1 De G.M. & G. 604, 42 Eng. Rep. 687 (1852) (companion case to Lumley v. Gye).

Law reviews. See Sayre, Inducing Breach of Contract, 36 sic article); Carpenter, Interference with Contract Relations, 41 Harv.L.Rev. 728 (1928) (also widely cited); Green, Relational Interests, 29 Ill.L.Rev. 1041 (1935), 30 Ill.L.Rev. 1 (1935); Harper, Interference with Contract Relations, 47 Nw.L.Rev. 873 (1953); Dobbs, Tortious Interference with Contractual Relationships, 34 Ark.L.Rev. 335 (1980); Estes, Expanding Horizons in the Law of Torts -- Tortious Interference, 23 Drake L. Rev. 341 (1974); Weber, The Reasons Behind the Rules in the Law of Business Torts, 38 Neb. L.Rev. 608 (1959); Developments in the Law -- Competitive Torts, 77 Harv.L.Rev. 888, 959-969 (1964); Note, Interference with Contractual Relations: A Property Limitation, 18 Stan.L.Rev. 1406 (1966); Note, Intentional Interference with Business Relation, 3 Rutgers L.Rev. 277 (1949); Note, Civil Conspiracy and Interference with Contractual Relations, 8 Loyola (L.A.) Rev. 302 (1975); Note, Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort, 93 Harv.L.Rev. 156 (1980). And see the extensive historical treatment and analysis of the cases by Larson, J., in Continental Research, Inc. v. Cruttenden, Podesta and Miller, 222 F.Supp. 190 (D.Minn. 1963).

British authorities: J. Heydon, Economic Torts (1973); J. Fleming, Torts 603-615 (4th ed. 1971); Stevens, Interference with Economic Relations -- Some Aspects of the Turmoil in the Intentional Torts, 12 Osgoode Hall L.J. 595 (1974); Heydon, The Future of Economic Torts, 12 U. West.Aust.L.Rev. 1 (1975); Heydon, The Defense of Justification in Cases of Intentionally Caused Economic Loss, 20 U.Toronto L.J. 139 (1970); Mills, The Tort of Inducement of Breach of Contract, 1 Auckland U.L.Rev. [No. 4] 27 (1971); Payne, The Tort of Interference with Contract, 7 Current Leg.Prob. 94 (1954).

CROSS REFERENCES: ALR Annotations:

Liability for interference with at will business relationship. 5 A.L.R. 4th 9.
Liability for interference with lease. 96 A.L.R.3d 862.
Liability of real-estate broker for interference with contract between vendor and another real-estate broker. 34 A.L.R.3d 720.
Liability of purchaser of real estate for interference with contract between vendor and real-estate broker. 29 A.L.R.3d 1229.
Liability of purchaser of real estate for interference with contract between vendor and another purchaser. 27 A.L.R.3d 1227.
Liability for procuring breach of contract. 26 A.L.R.2d 1227.

Digest System Key Numbers:

C.J.S. Agency § 10; Torts §§ 3, 42-44.
West's Key No. Digests, Torts 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral Overview

Case Citations

Rules and Principles

Division 9 - Interference with Advantageous Economic Relations

Chapter 37 - Interference with Contract or Prospective Contractual Relation

Restat 2d of Torts, § 766B

§ 766B Intentional Interference with Prospective Contractual Relation

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

COMMENTS & ILLUSTRATIONS: Comment:

a. Cross-references. See the Special Note to this Chapter, immediately preceding § 766. In order for the actor to be held liable, this Section requires that his interference be improper. The factors of importance in determining this issue are stated and explained in § 767, which must be read closely with this Section. In addition, § 768 deals specifically with the question of an interference by a competitor with a prospective contractual relation and when it is improper; it, too, must be read closely with this Section. Sections 769-773 deal with special situations in which application of these factors has produced more clearly identifiable decisional patterns.

This Section uses the expression, "subject to liability," as defined in § 5, meaning that the actor is liable if his conduct was a legal cause of the interference and he has no defense to the action.

This Section is concerned only with intentional interference with prospective contractual relations, not yet reduced to contract. The rule for the actor's intentional interference with a third person's performance of his existing contract with the plaintiff is stated in § 766. The rule for the actor's intentional interference with the plaintiff's performance of his own contract with a third person is stated in § 766A. The rule for negligent interference with either a contract or prospective contractual relations is stated in § 766C.

One other Section dealing with interference with prospective pecuniary benefit is closely related to this Section. It is § 774B, which concerns intentional interference with a legacy or gift.

b. Historical development and rationale. As early as 1621 the court of King's Bench held one liable to another in an action on the case for interfering with his prospective contracts by threatening to "mayhem and vex with suits" those who worked for or bought from him, "whereby they durst not work or buy." Garrett v. Taylor, Cro.Jac. 567, 79 Eng.Rep. 485. In 1793, the same court held one similarly liable who shot at some African natives in order to prevent them from trading with the plaintiff until the debts claimed by the defendant were paid. Tarleton v. McGawley, Peake N.P. 205, 170 Eng.Rep. 153. Precedent for these decisions is found as early as the fifteenth century, and even earlier. Thus in 1410 it was said that "if the comers to my market are disturbed or beaten, by which I lose my toll, I shall have a good action of trespass on the case." 11 Hen. IV 47; see also (1356) 29 Edw. III 18. An action for threatening plaintiff's tenants in life and limb "so that they departed from their tenures to the plaintiff's damage" was not uncommon, and there

was a special writ adapted to this complaint. See (1494)9 Hen. VII 7, and Reg.Brev. III -- quare tenentibus de vita et mutilatione membrorum suorum comminatus. In Keeble v. Hickeringill, (1706) 11 East 574, 103 Eng.Rep. 127, Holt, C. J., explains the "reason" and "principle" upon which liability in these cases was based and illustrates the application of the rule to a variety of situations.

In another line of cases liability was imposed upon one who diverted another's business by fraudulently palming off his own goods as those of the other, or by infringing another's trade mark or trade name. Liability was later extended to cases in which the diversion of business was accomplished by fraudulent misrepresentations of different types. Again, in an independent development, liability was imposed for loss of business caused by defamation of another in his business or profession or by disparagement of his goods. (See §§ 623A-629).

In all of these cases liability was imposed for interference with business expectancies and was not limited to interference with existing contracts; but in all of them the actor's conduct was characterized by violence, fraud or defamation, and was tortious in character.

In 1853 the decision in Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749, which involved inducement of the breach of an existing contract, imposed liability when the means of inducement were not tortious in themselves, and it was the intentional interference with the relation that was the basis of liability. (See § 766, Comment *b*). Later English decisions, and notably Temperton v. Russell, [1893] 1 Q.B. 715, extended the same principle to interference with business relations that are merely prospective and potential.

c. Type of relation. The relations protected against intentional interference by the rule stated in this Section include any prospective contractual relations, except those leading to contracts to marry (see § 698), if the potential contract would be of pecuniary value to the plaintiff. Included are interferences with the prospect of obtaining employment or employees, the opportunity of selling or buying land or chattels or services, and any other relations leading to potentially profitable contracts. Interference with the exercise by a third party of an option to renew or extend a contract with the plaintiff is also included. Also included is interference with a continuing business or other customary relationship not amounting to a formal contract. In many respects, a contract terminable at will is closely analogous to the relationship covered by this Section. (See § 766, Comment *g* and § 768, Comment *i*).

The expression, prospective contractual relation, is not used in this Section in a strict, technical sense. It is not necessary that the prospective relation be expected to be reduced to a formal, binding contract. It may include prospective quasi-contractual or other restitutionary rights or even the voluntary conferring of commercial benefits in recognition of a moral obligation.

On interference with noncommercial expectancies involving pecuniary loss, see § 774B and the Special Note following it. Of course, interference with personal, social and political relations is not covered in either Section.

d. Intent and purpose. The intent required for this Section is that defined in § 8A. The interference with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action. (See § 766, Comment *j*).

The interference, however, must also be improper. The factors to be considered in determining whether an interference is improper are stated in § 767. One of them is the actor's motive and another is the interest sought to be advanced by him. Together these factors mean that the actor's purpose is of substantial significance. If he had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper. Other factors come into play here, however, particularly the nature of the actor's conduct. If the means used is innately wrongful, predatory in character, a purpose to produce the interference may not be necessary. On the other hand, if the sole purpose of the actor is to vent his ill will, the interference may be improper although the means are less blameworthy. For a more complete treatment see § 767, especially Comment *d*.

e. Inducing or otherwise causing. The cause of action arising under the rule stated in this Section closely parallels that covered by § 766, and Comments *h, k, l* and *m* under that Section are applicable here so far as they are pertinent. The fact that the interference is not with a subsisting contract but only with a prospective relation not yet reduced to contract form is, however, important in determining whether the actor was acting properly in pursuing his own purposes. (See §§ 767 and 768). If the means of interference is itself tortious, as in the case of defamation, injurious falsehood, fraud, violence or threats, there is no greater justification to interfere with prospective relations than with existing contracts; but when the means adopted is not innately wrongful and it is only the resulting interference that is in question as a basis of liability, the interference is more likely to be found to be not improper.

f. Malice and ill will. On this, see § 766, Comments *r* and *s*.

g. Damages and equitable relief. On these, see § 766, Comments *t* and *u*.

REPORTERS NOTES: This Section is new. It has been separated out from § 766 in the first Restatement and, like the present § 766, revised to make the relationship to § 767 clearer.

See, recognizing this form of the tort of interference: Leo Spear Constr. Co. v. Fidelity & Cas. Co., 446 F.2d 439 (2d Cir. 1971); Thompson v. Allstate Ins. Co., 476 F.2d 746 (5th Cir. 1973); Kademos v. Equitable Life Assurance Soc. of the U.S., 513 F.2d 1073 (3rd Cir. 1975); Leonard Duckworth, Inc. v. Michael L.Field & Co., 516 F.2d 952 (5th Cir. 1975); Frank Coulson, Inc.-Buick v. General Motors Corp., 488 F.2d 202 (5th Cir. 1924); Morton Bldgs. of Neb., Inc. v. Morton Bldgs. Inc., 531 F. 2d 910 (8th Cir. 1976); Buckaloo v. Johnson, 14 Cal.3d 815, 122 Cal.Rptr. 745, 537 P.2d 865 (1975); Cal-Medicon v. Los Angeles Med. Ass'n, 20 Cal.App.3d 148, 97 Cal.Rptr. 530 (1971); Bowl-Mor Co. v. Brunswick Corp., 297 A.2d 61 (Del.Ch.1972), appeal dism., 297 A.2d 67 (Del.1972); Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan, 374 A. 2d 284 (D.C.App.1977); Twin Falls Farm & City Dist. Co., Inc. v. D & B Supply Co., 96 Idaho 351, 528 P.2d 1286 (1974); Smith v. Ocean State Bank, 335 So.2d 641 (Fla.App.1976); Farmers Coop. Elevator, Inc. v. State Bank, 236 N.W.2d 674 (Iowa 1975); Francis Chevrolet Co. v. General Motors Corp., 460 F. Supp. 1166 (E.D.Mo.1978), aff'd, 602 F.2d 227 (8th Cir. 1979); M & M Rental Tools, Inc. v. Milchem, Inc., 94 N.M. 449, 612 P.2d 241 (App.1980); Harris v. Perl, 41 N.J. 455, 197 A.2d 359 (1964); Morse v. Swank, Inc., 459 F.Supp. 660 (S.D.N.Y.1978); Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895 (1971); The School-master Case, Y.B.Hen. 4, f. 47, pl. 21 (1410).

Comment c: Type of relation. See Knudson Corp. v. Ever-Fresh Foods, 336 F.Supp. 241 (C.D.Cal. 1971) (employees not under contract); Gold v. Los Angeles Democratic League, 48 Cal.App.3d 365, 122 Cal.Rptr. 732 (1975) (interference with chance to be elected to office); Bowl-Mor Co. v. Brunswick Corp., 297 A.2d 61 (Del.Ch.1972), appeal dism., 297 A.2d 67 (Del.1972) (expectation that party with recourse against plaintiff would be paid); Rose Hall Ltd. v. Holiday Inns, Inc., 146 Ga.App. 709, 247 S.E.2d 173 (1978) (not sufficient that plaintiff would have only incidental benefit from contract); Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336 (Iowa 1977) (expectation of compromise of judgment); Anchor Alloys, Inc. v. Non-Ferrous Processing Corp., 39 A.D.2d 504, 336 N.Y.S. 2d 944 (1972) (employees at will).

Comment d: A number of cases have stated that the tort requires that the defendant have acted with the purpose of interfering with the plaintiff's prospective advantage. See Leo Spear Constr. Co. v. Fidelity & Cas. Co. of N.Y., 446 F.2d 439 (2d Cir. 1971); Crinkley v. Dow Jones & Co., 67 Ill.App.3d 869, 24 Ill.Dec. 573, 385 N.E.2d 714 (1978); Farmers Co-op. Elevator, Inc., Duncombe v. State Bank, 236 N.W.2d 674 (Iowa 1975); Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895 (1971); Burke & Thomas, Inc. v. International Org. of Masters, Mates & Pilots, 21 Wash.App. 313, 585 P.2d 152 (1978), aff'd, 92 Wash.2d 762, 600 P.2d 1282 (1979).

Others assert that the means used must be unlawful or independently tortious. See Spier v. Home Ins. Co., 404 F.2d 896 (7th Cir. 1968); Kecko Piping Co. v. Monroe, 172 Conn. 197, 374 A.2d 179 (1977); A & K Railroad Materials Inc. v. Green Bay & Western R. Co., 437 F.Supp. 636 (E. D.Wis.1977).

Others state that there must be either a purpose to interfere or use of unlawful means. See Anchor Alloys, Inc. v. Non-Ferrous Processing Corp., 39 A.D.2d 504, 336 N.Y.S.2d 944 (1970); Top Service Body Shop, Inc. v. All-state Ins. Co., 283 Or. 201, 582 P.2d 1365 (1978).

This Section requires only intent and improper interference making the latter depend on a balancing of the factors treated in § 767. For discussion, see Top Service, supra, and Adler, Barish, Daniels, Levin & Creskoff, v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978).

Comment e: Inducement not to enter into a contract is normally of a third party, not the plaintiff. See Goldstein v. Kern, 82 Mich. App. 721, 267 N.W.2d 165 (1978).

But preventing entry into the prospective relation may apply to either the plaintiff or a third person. See Byars v. Baptist Medical Centers Inc., 361 So.2d 350 (Ala.1978) (employment); Twin Falls Farm & City Dist., Co., Inc. v. D & B Supply Co., 96 Idaho 351, 528 P.2d 1286 (1974) (removal of sign indicating new location of plaintiff); Farmers Coop. Elevator, Inc., v. State Bank, 236 N.W.2d 674 (Iowa 1975) (funds cut off).

Comment g: Loss of prospective contractual relation must be proved with reasonable certainty. See generally, Marmis v. Solot Co., 117 Ariz.App. 499, 573 P.2d 899 (1977); Crinkley v. Dow Jones & Co., 67 Ill.App.3d 869, 24

Ill.Dec. 573, 385 N.E.2d 714 (1978); Harris v. Perl, 41 N.J. 455, 197 A.2d 359 (1964); Behrend v. Bell Tel. Co., 242 Pa.Super. 47, 363 A.2d 1152 (1976), vac'd on other grounds, 473 Pa. 320, 374 A.2d536 (1977).

For law review citations, see end of Note to § 766.

CROSS REFERENCES: ALR Annotations:

Liability of third party for interference with prospective contractual relationship between two other parties. 6 A.L.R.4th 195.
Liability of one who induces termination of employment of another by threatening to end own contractual relationship with employer. 79 A.L.R.3d 672.
What statute of limitations governs action for interference with contract or other economic relations. 58 A.L.R.3d 1027.
Liability of purchaser of real estate for interference with contract between vendor and another purchaser. 27 A.L.R.3d 1227.
Liability in tort for interference with attorney-client or physician-patient relationship. 26 A.L.R.3d 679.
Liability of one who induces or causes third person not to enter into or continue a business relation with another. 9 A.L.R.2d 228.

Digest System Key Numbers:

C.J.S. Agency § 10; Torts §§ 3, 42-44.
West's Key No. Digests, Torts 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceProspective AdvantageElements

Federal Practice & Procedure
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Federal Rules Of Civil Procedure
The Late Charles Alan Wright[a118], Arthur R. Miller[a119], Mary Kay Kane[a120], Richard L. Marcus[a121]

Chapter
8. Judgment
Rule
56. Summary Judgment
A. Summary Judgment—In General

Link to Monthly Supplemental Service

§ 2713 Comparison of the Summary Judgment Motion With Other Pretrial Motions

Primary Authority

Fed. R. Civ. P. 56

Forms

West's Federal Forms §§ 4722 to 4780

It is important to distinguish the motion for summary judgment under Rule 56 from the motion to dismiss described in Rule 12(b) or for a judgment on the pleadings under Rule 12(c). This section will compare the distinctive functions of each of these motions.

A motion under Rule 12(b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim from being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject-matter or personal jurisdiction,[1] improper venue,[2] insufficiency of process[3] or service of process,[4] or failure to join a party under Rule 19[5] only contemplates a dismissal of the proceeding, not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted addresses itself to the claim itself,[6] the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief. Unless the motion is converted into one for summary judgment as permitted by the last sentence in Rule 12(b), it does not challenge the actual existence of a meritorious claim.

A motion for judgment on the pleadings[7] is based on the contention that the moving party is entitled to a judgment on the face of all the pleadings. As is true of the motion under Rule 12(b)(6), the Rule 12(c) motion only entails an examination of the sufficiency of the pleadings. In contrast, a summary-judgment motion typically is based on the pleadings as well as any affidavits, depositions, and other forms of evidence relevant to the merits of the challenged claim or defense that are available at the time the motion is made.[8] The movant under

Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact so that the movant is entitled to a judgment on the merits as a matter of law.[9] Of course, a summary-judgment motion may be made on the basis of the pleadings alone,[10] and if this is done it functionally is the same as a motion to dismiss for failure to state a claim or for a judgment on the pleadings.[11]

It should not be surprising, given these similar, though distinct, functions, that there often is confusion in distinguishing among the motion for summary judgment, the motion to dismiss for failure to state a claim for relief, and the motion for a judgment on the pleadings. As a matter of practice many courts have ignored the differences among these devices. In view of the purpose of the rules to secure the just, speedy, and inexpensive determination of every action,[12] the courts naturally are reluctant to refrain from properly disposing of a motion merely because its form is incorrect. Indeed, in keeping with the spirit of the rules federal judges frequently have treated other pretrial motions on which outside matter is introduced as if they had been brought under Rule 56, even though there is no explicit provision in the rules for doing so. For example, a motion to strike that either is directed toward an insufficient defense[13] or in essence is a motion to dismiss for failure to state a claim for relief[14] has been handled as a summary-judgment motion when supported by extra-pleading material. Similarly, in one case a motion seeking relief by way of interpleader and for a discharge upon the payment of the disputed fund into court, which was met by affidavits in opposition, was treated as if it were a motion for summary judgment as to the propriety of granting interpleader.[15]

The desire to disregard labeling is most understandable and justified when a Rule 12(b)(6) motion to dismiss or a Rule 12(c) motion for judgment on the pleadings is involved. Since both these motions are directed towards defects related to the claim for relief, their functions are highly similar to that of the summary-judgment motion. Indeed, the Rule 12(c) motion is directed at exactly the same question as the Rule 56 motion—whether any genuine issue of fact is presented.[16] Nonetheless, matter outside the pleadings should not be considered on either Rule 12 motion—the Rule 12(b)(6) motion is determined on the basis of the face of the complaint;[17] the Rule 12(c) motion is restricted to the content of the pleadings.[18] This difference is an important one. Thus, simply by denying one or more of the factual allegations in the complaint or interposing an affirmative defense, defendant may prevent a judgment from being entered under Rule 12(c) since a genuine issue will appear to exist and the case cannot be resolved as a matter of law on the pleadings. The Rule 12 motion's usefulness therefore is severely limited.[19]

Under the federal rules as originally promulgated, a question was raised whether matter outside the pleadings could be presented on a Rule 12(b)(6) motion to dismiss.[20] Although some courts in the years following the adoption of the rules refused to permit a "speaking motion" of this type,[21] most concluded that the motion to dismiss and the motion for summary judgment were sufficiently similar[22] to justify the introduction of outside matter.[23]

In a similar vein, courts frequently ignored the distinction between motions under Rule 12(c) and Rule 56 and held that matters outside the pleadings could be considered on a motion for judgment on the pleadings by analogy to the summary-judgment procedure.[24] Thus, the question arose whether a document mislabelled as a "motion for summary judgment on the pleadings" should be treated as one for a judgment on the pleadings or one for summary judgment.[25] On the other hand, there does not appear to have been any doubt that motions under Rule 12(c) and Rule 56 could be considered together when both were made simultaneously; it was not necessary to treat them separately as if the first dealt only with issues of law and the second with issues of fact.[26]

In 1948, Rule 12 was amended to provide that when outside matter is presented to and not excluded by the

court on a motion under either Rule 12(b)(6)[27] or Rule 12(c)[28] it should be treated as one for summary judgment under Rule 56. Thus, for example, on a motion to dismiss a complaint for failure to state a claim for relief defendant may show that, even if the complaint is sufficient on its face, undisputed facts not appearing in the complaint entitle defendant to a summary judgment. Matters outside the pleadings may be considered only if they are not excluded by the court.[29] In most cases the district judge will prefer to utilize all the available material and therefore opt to treat the motion as one for summary judgment.[30]

Similarly, there is no question that under Rule 12(c), as amended in 1948, the label on the motion is irrelevant.[31] If the motion is accompanied by material outside the pleadings, it will be treated as a summary-judgment motion;[32] if it is not, it will be treated as a motion for judgment on the pleadings.[33] Indeed, one court has treated a motion for a partial judgment on the pleadings, for which there is no provision in the rules, as a summary-judgment motion with respect to part of a claim.[34]

Another distinction between Rule 12(b)(6), Rule 12(c), and Rule 56 motions is their timing. The defendant may make a Rule 56 motion or a Rule 12(b)(6) motion before answering.[35] A Rule 12(c) motion can be made only after the pleadings are closed.[36] Further, under certain circumstances, a Rule 56 motion may be made by plaintiff before the responsive pleading is interposed.[37]

The final point about motions under Rules 12(b)(6), 12(c), and 56 that should be noted is the effect an initial motion to dismiss or for a judgment on the pleadings may have on a subsequent summary-judgment motion and vice-versa. The ruling on a motion to dismiss for failure to state a claim for relief is addressed solely to the sufficiency of the complaint and does not prevent summary judgment from subsequently being granted based on material outside the complaint.[38] On the other hand, a Rule 56 motion may not be made on the same grounds and with the same showing that led to the denial of a previous motion to dismiss.[39] This also is true of a summary-judgment motion that is identical to an earlier motion for a judgment on the pleadings.[40] Of course, when a court decides to dismiss an action, on a voluntary or involuntary basis, pending motions for summary judgment against the claimant may be treated as moot and therefore not be decided.[41]

According to Rule 41(a)(1) the service of a summary-judgment motion by defendant cuts off plaintiff's right to dismiss the action without prejudice without leave of the court.[42] The rationale for this provision is that since a summary-judgment motion goes to the merits of the case, a voluntary dismissal by notice alone is inappropriate once the merits of the controversy have been brought before the court. Thus, a motion to dismiss supported by outside matter and thereby converted into a Rule 56 motion also is deemed to terminate plaintiff's right to a voluntary dismissal whereas a "naked" motion to dismiss is not.[43]

Turning to a comparison of summary-judgment motions and other Rule 12(b) motions, the most important and obvious difference is that the grounds supporting the other Rule 12(b) motions address questions unrelated to the merits of the dispute. Thus, the question that arises is whether, given their different purposes, these motions may be treated as summary-judgment motions if outside information is introduced.

In general, courts have ruled that summary judgment is an inappropriate vehicle for raising a question concerning the courts subject-matter jurisdiction,[44] personal jurisdiction or venue,[45] or a defect in parties.[46] As stated by one court,

> [A] motion for Summary judgment applies to the merits of a claim, or to matter in bar, but not to matter in abatement. Motions suggesting improper venue or lack of jurisdiction for failure to show jurisdictional amount present clearly matters in abatement only which must be raised not by a motion for summary judg-

ment, but by motions under Rule 12(b) ....[47]

Therefore, although some courts have entered summary judgment on jurisdictional grounds,[48] the general rule is that it is improper for a district court to enter a judgment under Rule 56 for defendant because of a lack of jurisdiction.[49]

The rationale for this conclusion, although somewhat metaphysical, is sound. If the court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action.[50] In addition, a dismissal for want of jurisdiction has no preclusive effect and the same action subsequently may be brought in a court of competent jurisdiction.[51] A summary judgment, on the other hand, is on the merits and purports to have preclusive effect on any later action.[52] The court's role on the two motions also is different. On a motion attacking the court's jurisdiction, the district judge may resolve disputed jurisdictional-fact issues.[53] On a motion under Rule 56 the judge simply determines whether any issues of material fact exist that require trial.[54] Nonetheless, since affidavits are available on both motions, if defendant erroneously objects to jurisdiction by means of a Rule 56 motion, the court may consider the affidavits submitted in connection with the jurisdiction motion in determining whether to dismiss the complaint.[55] This conclusion also is supported by the fact that under Rule 12(h)(3) the court may consider a question of subject-matter jurisdiction at any time and even raise it on its own motion.[56] Accordingly, the label attached to the motion should not prevent the court from deciding a summary-judgment motion challenging the court's subject-matter jurisdiction as a suggestion that the court dismiss the action on that ground.[57]

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[FNa119] University Professor, New York University. Formerly Bruce Bromley Professor of Law, Harvard University.

[FNa120] John F. Digardi Distinguished Professor of Law, Chancellor and Dean Emeritus, University of California, Hastings College of the Law.

[FNa121] Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law.

[FN1]

Lack of jurisdiction

See vol. 5A, §§ 1350, 1351.

[FN2]

Improper venue

See vol. 5A, § 1352.

[FN3]

DECLARATION OF SERVICE

The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys for Respondents herein.

2. On August 15, 2012, I caused the foregoing Respondents' Appendix of Non-Washington Authorities to be filed with the court and served on the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☑ E-Mail
John P. Sheridan The Law Office of John P. Sheridan, P.S. Hoge Building, Suite 1200 705 Second Avenue Seattle, WA 98104	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☑ E-Mail
Howard M. Goodfriend Smith Goodfriend, PS 1109 First Avenue, Suite 500 Seattle, WA 98101	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☑ E-Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of August, 2012, at Seattle, Washington.

Mary Beth Dahl

Mary Beth Dahl