

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2009-P-1838

No. SJC-10722

PSY-ED CORP. AND JOSEPH VALENZANO, JR.,
Plaintiffs, Defendants-in-Counterclaim,
and Appellants,

v.

STANLEY D. KLEIN AND KIMBERLY SCHIVE,
Defendants, Plaintiffs-in-Counterclaim, and Appellees,

STANLEY D. KLEIN,

Third-Party Plaintiff and Appellee,

v.

DAVID HIRSCH, ROBERT STRIANO, DONALD CHADWICK,
ROBERT K. HOPKINS, JR. AND C. KENNETH MEHLING,
Third Party Defendants and Appellants.

On Appeal from Judgments of the
Superior Court for Middlesex County
In C.A. Nos. 99-6140, 02-5213

Brief on Behalf of David Hirsch, Donald S. Chadwick,
and Robert Striano,
Third Party Defendants-Appellants.

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Statement of Issues Presented.

1. Whether Judge Houston's Findings of Fact compel entry of judgment in favor of the Director Defendants on intentional interference with contractual relations?
2. Whether the correct legal standard was applied to the Director Defendants for intentional interference with a contract between the corporation for which they were directors and Klein?
3. Whether Judge Houston's Findings of Fact are sufficient to support liability by the Director Defendants for tortious interference with contractual relations under the correct legal standard?
4. Whether Klein was entitled to emotional distress damages against the Director Defendants?
5. Whether Klein was entitled to an award of attorneys' fees against the Director Defendants?
6. Whether the award of attorneys' fees to Klein was properly computed?

7. Whether the award of damages under the Note were recoverable and properly computed against the Director Defendants?
8. Whether the third-party directors are entitled to a new trial on liability and damages?

Statement of the Case.

A. *Nature of the Case.*

This matter is essentially a dispute between a corporation, its officers and directors against two former employees, one of whom was a shareholder and director. The dispute started in 1999, when Psy-Ed Corporation ("Psy-Ed") and its President, Joseph Valenzano ("Valenzano"), sued defendants Stanley Klein ("Klein"), who was a former director and shareholder, and Kimberly Schive ("Schive"), a former employee, for defamation, civil conspiracy, tortious interference, and other wrongs. (A. 52-65). Schive and Klein counterclaimed against Psy-Ed and Valenzano. (A. 109, 137). In addition, Klein brought a third-party complaint for damages against individual members of Psy-Ed's Board of Directors. (A. 109-129).

B. Proceedings and Disposition in the Court Below.

Plaintiffs Psy-Ed Corporation d/b/a Exceptional Parent and Joseph Valenzano, Jr. filed their complaint against defendants Stanley Klein and Kimberly Schive on December 17, 1999. (A. 17). The complaint asserted six counts against both defendants. (A. 52-65). Plaintiffs filed a first amended complaint on April 14, 2000. (A. 66-83). The six counts asserted against both defendants in this complaint comprise violation of G.L. c. 93A, § 11; slander, slander per se and libel; business defamation; civil conspiracy; tortious interference with contractual relations and tortious interference with advantageous business relations. (A. 66-83).

By pleading dated June 7, 2000, defendant Stanley D. Klein filed his amended answer, counterclaims and third-party claims. (A. 109-129). Third-party defendants were Kenneth Rossano and John/Jane Does Number 1-10, collectively directors of Psy-Ed who allegedly wrongfully voted to have the company withhold payments due to Klein under a Note between Klein and Psy-Ed. (A. 109). Klein asserted ten counterclaims and third party claims. Although he did not caption the counts, nine counts were asserted

against the Director Defendants: tortious interference with contractual relations, aiding and abetting abuse of process, negligent misrepresentation, intentional misrepresentation, breach of fiduciary duty, third party beneficiary of breach of fiduciary duty, conspiracy, violation of G.L. c. 12, §§ 11H and 11I and violation of G.L. c. 93A, § 11. (A. 122-126).

By February, 2001, the John/Jane Doe Defendants were identified as David Hirsch, Robert Striano, Donald Chadwick and Harry J. Diven, Jr. (A. 305-8). Mr. Diven died and Robert K. Hopkins, Jr. and C. Kenneth Mehrling were substituted in his place as party defendants. (A. 29, 685-88). Three of these parties, David Hirsch, Robert Striano and Donald Chadwick are hereafter referred to as Director Defendants".

Klein filed a second complaint (civil action no. 02-5213) against Psy-Ed and Valenzano on December 12, 2002. (A. 355-363). There are no counts asserted against the Director Defendants in this complaint. The 2002 case was consolidated with the first filed action for all purposes. (A. 44).

Klein's claims for negligent and intentional misrepresentation against the Director Defendants were

dismissed on August 1, 2002. (A. 343). The trial of the remaining claims, counterclaims and third-party claims took place over six days in June 2006. (A. 17). On August 18, 2006, Judge Houston filed a decision that set forth his findings of fact and conclusions of law on liability issues only, ordered that there be a further hearing on damages, and retired from the bench. (A. 1418-44).

In his written decision, Judge Houston clearly and explicitly found in favor of the Director Defendants on four of the remaining five counts that Klein brought against them.¹ (A. 1444). He expressly ruled in the Director Defendants' favor on the counts of aiding and abetting abuse of process, conspiracy, violation of G.L. c. 12, § 11I and violation of G.L. c. 93A, § 11. (A. 1436-41, 1444). In doing so, he noted that Klein failed to satisfy his burden of proving the requisite degree of involvement in the decision to bring the lawsuit, and failed to provide sufficient evidence to establish the Director Defendants' "substantial assistance" necessary to

¹ Judge Houston noted that it was unclear whether the claims of breach of fiduciary duty and breach of contract remained, but that Klein did not pursue them when he filed his proposed rulings of law.

commit a civil conspiracy to commit the tort of intentional interference. (A. 1439). He found specifically that when the Board voted to stop payment on the corporation's Note with Klein, the Director Defendants lacked the required "improper motive and means", which Judge Houston found to be attributable solely to Valenzano. (A. 1439).

Judge Houston's decision on Klein's claim that the Director Defendants tortiously and intentionally interfered with Klein's agreement with Psy-Ed was not so clear, however. Judge Houston discussed the elements of the tortious interference claim only against counterclaim defendants Psy-Ed and Valenzano and made explicit findings only against those two defendants-in-counterclaim. (A. 1433-34). He also stated, however, in what appears to have been a mistake, that in addition to finding against the defendants-in-counterclaim, plural, he was also finding against an unidentified "third-party defendant," singular. (A. 1434). Not only did he fail to make any fact findings to support liability on the part of any of the individual Director Defendants, but also, as noted above, Judge Houston could hardly have been clearer in holding that Klein had failed to

prove one of the essential elements of the tortious interference claim. He specifically held that Klein had failed to prove improper means or motive against any of the Director Defendants. Houston decision, p. 22. (A. 1439).

Post-trial motions were argued before Judge Hamlin in a non-evidentiary, lengthy argument on January 4, 2008. (A. 17). Although the errors and inconsistencies in Judge Houston's decision regarding the Director Defendants were brought to Judge Hamlin's attention (A. 1453-70), she made no correction. Instead, in her decision dated March 12, 2009, she awarded Klein emotional distress damages of \$125,000 on the count against the Director Defendants (as well as the abuse of process count against Psy-Ed and Valenzano) (A. 2394-95), erroneously relying on Judge Houston's finding that Mr. Valenzano had personal animus against Klein and asserting that Judge Houston impliedly found Klein to be credible in this regard. (A. 2358). Moreover, without statutory or case support, Judge Hamlin concluded that Klein was entitled to an award of attorneys' fees on his "counterclaims," did not address whether he was entitled to attorneys' fees on his third party claims

against the Director Defendants, and ordered a total award of attorneys' fees in the amount of \$527,962.73. (A. 2395). The docket entry notes that this judgment is assessed "jointly and severally" against Psy-Ed and Valenzano, Hirsch, Striano, Chadwick and Mehrling.² (A. 35-36). A Notice of Appeal was filed on behalf of the Director Defendants on April 9, 2009. (A. 2441).

The Director Defendants submit that under Judge Houston's findings, they clearly prevailed on the tortious interference count, and judgment therefore should have been entered in their favor on all counts against them. In the alternative, to the extent that Judge Houston's self-contradictory decision might otherwise be construed as finding one (or more) of the Third-Party Defendants liable for tortious interference, the judgment must be set aside because such a finding would be contrary both to Judge Houston's subsidiary findings and to the strict standard recently reiterated by the Supreme Judicial Court for tortious interference claims made against a corporation's directors with respect to contractual obligations of the corporation. Judge Hamlin's award

² As no judgment has been entered against Director Defendants Kenneth Rossano and Robert K. Hopkins, Jr., there is nothing for them to appeal.

of emotional distress damages, attorneys' fees, and damages for payments not made under the Note against the Director Defendants is unsupported by the facts and law and must be reversed or a new trial ordered.

Statement of Relevant Facts.

Stanley Klein had been one of the founders of Psy-Ed, which published a magazine. (A. 1420). When Psy-Ed experienced financial problems, Valenzano was approached to invest in and run the company. (A. 1420). He agreed. Klein thereafter had several disagreements with the Board of Directors of Psy-Ed, such that the company decided not to renew his employment contract. (A. 1421). The contract expired in June 1997, although Klein continued to work for the company until August 1997. (A. 1423). Klein also remained a shareholder, and for a period of time, a director. (A. 1424).

Klein launched a proxy fight after his termination. (A. 1424). His proposed slate of directors was defeated at Psy-Ed's shareholders' meeting on September 30, 1997. (A. 1425). Klein and Psy-Ed entered into a separation agreement in March 1998, pursuant to which the parties exchanged

releases, Klein sold back his shares, and the company gave him some cash and a promissory note. (A. 1426).

In February 1997, a former Psy-Ed employee named Kimberly Schive filed a discrimination complaint against Psy-Ed and Valenzano at the MCAD. (A. 1428). Psy-Ed and Valenzano claimed that this discrimination complaint was without any basis. During his employment Klein had submitted under oath an affidavit that supported Psy-Ed's and Valenzano's position regarding Schive's claim. (A. 1428). Klein's settlement agreement included an obligation on Klein's part to continue to cooperate in the defense of Schive's claim. (A. 1003-04). Unbeknownst to Psy-Ed, however, before signing the settlement agreement, and just six days after he lost his proxy fight, Klein had provided to either Schive or her attorney a second affidavit that contradicted his first affidavit and supported Schive's discrimination claim. (A. 1428). Valenzano and the company did not learn of the second affidavit until September 1999. (A. 1429).

The two affidavits are decidedly different. The June 13, 1997, affidavit, signed while Klein was still employed by the company, contains the following statements:

¶ 8. "I am sorry to know that my former colleague [Schive] has filed this [MCAD] Charge against *Exceptional Parent* and Joe Valenzano, personally. Our whole purpose and focus at *Exceptional Parent* is to assist individuals with disabilities and provide support for their families and the health care professionals who assist and treat them."

¶ 9. "Our Company is very tolerant of individual differences, and we have worked to facilitate a comfortable working environment for all employees."

¶ 10. "I recommended to Joe Valenzano that we hire her [Schive] and Joe enthusiastically supported and authorized her hire. Since she was deaf, we conferred with her about the best TTY system and purchased it."

¶ 13. "Kim [Schive] sometimes did not want to accept my editorial content decisions with which she disagreed, but I tried to address those situations in a productive manner."

¶ 14. "I asked Kim to work on moderating the manner in which she sometimes managed our staff. In my opinion, Kim had very high editorial standards and I thought that sometimes she reacted in an unproductive manner to mistakes made by staff members and editorial interns. Kim tended to be very direct and 'spoke her mind.' In response to complaints about this, I asked her to make a special effort to treat everyone in the office with respect even when they made what Kim considered to be 'terrible' mistakes. Kim agreed that she was a perfectionist and that she could be demanding, critical and difficult as a result."

¶ 15. "On the rare occasion when someone traveled to the Brookline office from the New Jersey office, the meetings would include the extra person or persons from New Jersey, but the group size was still small. Without exception, everyone treated Kim a professional manner. For example, during meetings, if she asked for something to be repeated, we would repeat the statement or conversation in a respectful manner. Kim was never the subject of ridicule, jokes or any other form of inappropriate or unprofessional behavior in any meeting I attended."

¶ 18. "Joe Valenzano never expressed to me any discomfort with Kim because of her deafness. I did discuss with Joe several times over the past three years various management problems I had with Kim and other staff members, and Joe thought that I should handle some management issues differently."

¶ 19. "I have no recollection of Joe Valenzano ever behaving 'harshly, angrily and with sarcasm' towards Kim. I am not aware of Joe Valenzano creating any 'hostile work environment.' Joe works in the New Jersey office and he was rarely in the Brookline office. I recall perhaps only one or two meetings in the Brookline office in which Joe, Kim and myself were in attendance. Therefore, Joe and Kim had extremely limited contact. I do not recall any time that Joe Valenzano or anyone else ever did anything other than try to repeat a part of a conversation she missed."

¶ 20. "Kim did complain to me a couple of times about Joe Valenzano's direct style of management and she may have perceived his directness in making business and editorial decisions

negatively. I may have said that Joe (like myself) did not have experience working with a deaf person and, therefore, might be uncomfortable. However, based upon my observations, Joe never did or said anything which could possibly be construed as unprofessional or discriminatory against Kim on the occasions I observed them interact. Kim tended to react negatively to anyone who disagreed with her on issues important to her, particularly editorial decisions."

¶ 26. "Kim had recently moved her residence to a suburb further from the office and the discussion of a part-time position came up in that context. Additionally, such a position for Kim made sense to me because her strengths and skills were in editing rather than people management and Kim certainly agreed with this."

¶ 33. "To my knowledge, her [Kim's] disability played no part in any decision made with respect to her employment. To the contrary, she was the only employee in the Brookline office to receive an offer of a continuing role with the Magazine following the consolidation."

(Ex. 235-47).

The affidavit dated October 6, 1997, contrasts markedly with the first affidavit signed just four months before. It states in part:

¶ 5. "[F]rom time to time, he [Valenzano] appeared impatient when it was necessary to repeat information on Kim's behalf and he did not seem to appreciate the great effort required by any deaf person to lip read in a group

meeting. Accordingly, I perceived that Mr. Valenzano seemed uncomfortable with Kim because of her deafness."

¶ 6. "While (as reference in paragraph 19 of my June 13, 1997 affidavit) I had no recollection of Mr. Valenzano behaving 'harshly, angrily and with sarcasm' towards Kim, in more recent conversations with a former employee as well as a former volunteer, they reminded me of several such occasions as they perceived them. . . . In addition, while I did not observe Mr. Valenzano creating a 'hostile work environment,' on one occasion when I returned from a business trip representing the Company, staff members did inform me that in my absence, Mr. Valenzano's behavior had been highly inappropriate and did create a hostile working environment."

¶ 7. "I was and remain concerned that the design of Kim's proposed job description(s) was unfairly influenced by an inaccurate view of her talents because of her disability."

¶ 10. "It is not correct to state that Kim 'would not accept [my] editorial decisions.' When she disagreed with me, I always listened because of my high regard for her abilities and her knowledge of the disabilities field. . . . I may have described this collegial give and take and it may have been perceived by Mr. Valenzano as challenging and disrespectful. In fact, he suggested more than once that I not tolerate such behavior by Kim and get rid of her."

(Ex. 248-51).

In December 1999, shortly after learning of the second affidavit, Psy-Ed and Valenzano filed, but did not serve, a lawsuit against Klein and Schive, alleging that Klein and Schive had defamed Psy-Ed and Valenzano and acted in concert to harm Psy-Ed's business and Valenzano's reputation. (A. 1429). Up to approximately that point Klein had still been receiving payments from Psy-Ed under the promissory note issued as part of the March 1998 settlement. (A. 1427, 1429). At a meeting on December 23, 1999, the board of directors of Psy-Ed (which no longer included Hopkins) voted (over the dissent of director Kenneth Rossano) to discontinue payments to Klein under the promissory note "until such time as the Board authorized any future payments to him based on the opinion of Boston counsel and their assessment and evaluation of alternative scenarios and their estimate of legal costs associated." (A. 1429-30).

In January 2000, still acting "on recommendations by counsel," the Board voted to proceed with the suit against Klein and Schive that had been filed but not served. (A. 1430). Judge Houston expressly found in his opinion that both the cessation of payments to Klein and the filing, service and prosecution of the

litigation were undertaken on the advice of the corporation's then outside counsel. (A. 1429-30).

Klein alleged first that he had a binding contractual right to payments from Psy-Ed and that when Psy-Ed, acting through its board, voted to suspend those payments, this somehow constituted tortious interference by the corporation with its own contract and tortious interference by Valenzano, even though he was only acting on Psy-Ed's behalf as its Chief Executive Officer. (A. 123). Second, Klein and Schive both contend that the lawsuit that Psy-Ed and Valenzano brought against them constituted an abuse of process, although no ulterior motive was ever established. (A. 123, 325). Finally, Schive contended that the filing of the lawsuit constituted retaliation against her for pursuing her claims of discrimination at the MCAD. (A. 325).

Klein's third-party complaint included five claims against the Third-Party Defendants that survived until trial. (A. 1418-44). He alleged first that he had a binding contractual right to payments from Psy-Ed and that when Psy-Ed, acting through its board, voted to suspend those payments, this somehow constituted tortious interference with contract on the

part of the Director Defendants, even though they were merely acting on Psy-Ed's behalf. (A. 123). The exact language of Klein's counterclaim for tortious interference was as follows: "In the Note, Dr. Klein has a contract with the Company, which Valenzano, Rossano, and/or one or more of the Directors knowingly induced the Company to break, through interference which was intentional, and improper in motive or means." (A. 123)

Summary of Argument.

Judge Houston's findings of fact, which are not clearly erroneous, compel entry of judgment in the Director Defendants' favor on tortious interference with contractual relations, even under the legal standard that he applied. (pp. 19-23) The correct legal standard, set forth in *Blackstone v. Cashman*, 448 Mass. 255 (2007), requires that corporate directors act with actual malice serving no corporate purpose before they may be found liable for tortious interference with a contract between the corporation and a third party. (pp. 23-25) The facts found by the trial judge are insufficient to meet the *Blackstone* standard. (pp. 25-27)

No emotional distress damages can be awarded against the Director Defendants for tortious interference with contractual relations. (pp 31-33) Judge Hamlin is not competent to assess the credibility of Klein and award him emotional distress damages based solely on a review of the trial transcript and exhibits. (pp. 27-32)

The law does not support an award of attorneys' fees against the Director Defendants for tortious interference with contractual relations. (pp. 33-34) Attorneys' fees were not supported by admissible evidence and were not properly computed. (pp. 34-36)

The damages awarded as payments not paid by the corporation under the Note with Klein were not properly computed, represent a windfall to Klein and cannot be awarded against the Director Defendants under the facts as found by Judge Houston. (pp. 36-43)

Pursuant to Mass. R. App. P. 16(j), the Director Defendants adopt by reference the briefs of the co-appellants Psy-Ed Corporation, Joseph Valenzano and Kenneth Mehrling to the extent arguments therein apply with equal force to the Director Defendants.

Argument.

A. *Applicable Standard of Review.*

The standard of review by the Appeals Court of a judgment of the trial court in a jury-waived trial is generally one of deference. The Appeals Court will accept the factual findings of the trial court and not disturb those findings unless they are clearly erroneous. Mass. R. Civ. P. 52(a); *Yankee Microwave, Inc. v. Petricca Communications Systems, Inc.*, 53 Mass. App. 497, 504 (2002). Findings are deemed clearly erroneous when, based on a review of the entire evidence, it is clear that a mistake has been made. *Id.* (citations omitted).

Review of the applied legal standard is not subject to such deference. Findings of fact or conclusions of law that are based on the incorrect legal standard will be set aside. *Id.* (citations omitted).

B. *Judge Houston's Findings of Fact Compel Entry of Judgment in the Director Defendants' Favor for Tortious Interference with Contractual Relations.*

Judge Houston concluded that in order for Klein to recover on his count of tortious interference with contractual relations, Klein was required to prove, among other matters, that the Director Defendants

intentionally interfered with the corporation's performance under its contract with Klein and that they did so with improper motive or means. (A. 1433). The judge's findings of fact establish that Klein failed to meet his burden. First, Judge Houston noted only that Klein proved that the "decision to suspend payments was motivated by personal animus on the part of Valenzano." (A. 1434). Judge Houston made no finding at this section of his decision as to whether this alleged personal animus was attributable to other Board members; to the contrary, he found later in his opinion that Valenzano's alleged personal animus against Klein was *not* shared by or attributable to other Board members. (A. 1439).

In the concluding portion of this section of his opinion, Judge Houston stated that "the defendants-in-counterclaim [i.e. Valenzano and Psy-ed] and third-party defendant [in the singular] intentionally interfered with Klein's Settlement Agreement." (A. 1434). The Court did not identify which, if any, of the several Director Defendants it may have been referring to when it said that "third party defendant" (singular) had intentionally interfered with the contract. There had been no discussion of any

particular individual among the Director Defendants, except that the Court had noted that Rossano was one of the signatories to the Klein settlement agreement. (A. 1433). But the court also found, correctly, that Rossano had actually voted against suspending payments to Klein - so he could hardly have been the third-party defendant to whom the Court was referring.³ (A. 1429-30).

The Court's discussion of the civil conspiracy count resolves the confusion by establishing that Valenzano's allegedly wrongful motive was not attributable to any of the Director Defendants, that the Court did not find or mean to find any of the Director Defendants liable for tortious interference, and that they actually prevailed on the tortious interference claim. The Court stated that according to Klein's conspiracy theory, a "common plan existed by which Psy-Ed, Valenzano, and the Board members committed the tort of interference with contractual relations." (A. 1438-39). Judge Houston then *rejected* this claim, expressly holding that the Board members had **not** committed the tort of civil conspiracy

³ The Court had also correctly noted in the decision that another of the Director Defendants, Hopkins, had resigned from the Board in September 1999. (A. 1429).

of interference with contractual relations. (A. 1439). Rather, Judge Houston held, Klein "has not produced sufficient evidence at trial to establish the Board's 'substantial assistance' to the decision to intentionally interfere with Klein's promissory note." (A. 1439). More specifically, the Court stated that the Director Defendants had "ultimately voted to stop payment on the note, *but the required 'improper motive and means' is attributable solely to Valenzano.*" (A. 1439) (emphasis added).

Judge Houston thus found that Klein had failed to prove, as against the Director Defendants, the element of improper motive or means the judge deemed necessary to a finding of liability on a theory of tortious interference. Judge Houston's statement in the earlier section of the decision, to the effect that the "third-party defendant" was liable for tortious interference, can only be viewed as an internal error that is superseded by the more detailed factual findings made on the civil conspiracy count, in which Judge Houston explicitly found that the Director Defendants were not guilty of tortious interference, because improper motive had not been established. These detailed, express findings by Judge Houston

compel an order directing entry of judgment in favor of the Director Defendants on the count of tortious interference with contractual relations.

C. *The Trial Court Applied an Incorrect Legal Standard to the Count of Tortious Interference with Contractual Relations.*

It is a fundamental principle of the law concerning tortious interference that the tortfeasor has to interfere with a contract to which the tortfeasor is not a party. Despite the trial court's holding to the contrary, it is well-settled that one cannot tortiously interfere with one's own contract. See, e.g., *Saint Louis v. Baystate Med. Center, Inc.*, 30 Mass. App. Ct. 393, 404 (1991); *Appley v. Locke*, 396 Mass. 540, 543 (1986); *Cardone v. Boston Regional Medical Center, Inc.*, 60 Mass. App. Ct. 179 (2003).⁴

A corporation can act only through its directors, officers and agents. When board members vote to take action concerning a corporate contract, they are not thereby acting separately from the corporation so as to expose themselves to tort liability for the corporation's breach of contract. Otherwise, every

⁴ This fundamental error of law was brought to Judge Hamlin's attention in post-trial motions, but the judge denied the Director Defendants' motion on this point, as well as Judge Houston's failure to apply the *Blackstone* standard, without comment. (A. 2436).

breach of contract case would also be a tort claim against the individual officers or directors who authorized the breach. The directors' "freedom of action directed toward corporate purposes should not be curtailed by fear of personal liability."

Blackstone v. Cashman, 448 Mass. 255, 262 (2007) (quoting *Steranko v. Inforex, Inc.*, 5 Mass. App. Ct. 253, 273 (1977)).

For this reason, the bar to establish a tortious interference by a corporate officer with a contract to which his corporation is a party is high. In *Blackstone*, the Supreme Judicial Court emphasized that under Massachusetts law, to find personal liability for tortious interference on the part of a corporate director based on the director's official corporate votes or action, the plaintiff must prove that the director acted with "actual malice," defined as "a spiteful, malignant purpose, unrelated to the legitimate corporate interest." *Id.* at 263, 270.

As noted above, Judge Houston actually intended in his findings to exonerate the third-party defendants with respect to the tortious interference claim. But assuming *arguendo* that his decision is construed as intending to find against one or more of

the directors, the finding is infected by legal error and must be set aside because the Court failed to apply the standard of liability set forth in *Blackstone*.

D. *Under the Blackstone Standard, the Trial Court's Findings and the Evidence at Trial Compel a Judgment in Favor of the Director Defendants on the Tortious Interference Claim.*

The trial court did not find that any of the Director Defendants voted to cut off payments to Klein due to actual malice against Klein. To the contrary, the trial court expressly found that the alleged personal animus against Klein was solely attributable to Valenzano and not attributable to the others. (A. 1434, 1939).

There is no evidence in the record that can supply evidence of any actual malice unrelated to a corporate purpose on the part of any Director Defendant.⁵ In the board minutes regarding the directors' actions, there is a statement that the board had voted to suspend payments to Klein until such time as he signed a settlement agreement with one

⁵ It would, in fact, be improper for Klein to suggest that any other trial evidence does support a finding of actual malice, as there is no indication in the trial court's findings that any other evidence related to this issue was determined to be credible to the fact finder.

Larry Qualiano. (Ex. 60). To the extent any of the Director Defendants voted to suspend payments to Klein out of the desire to have Klein join in the settlement agreement, to which Psy-Ed and all of the other directors were parties, this cannot be said to be a "spiteful, malignant purpose," nor could it be deemed to be a purpose "unrelated to a legitimate corporate interest." The corporation had a strong and legitimate interest in avoiding litigation costs that it would incur if the Qualiano settlement fell apart or if it were required under its bylaws to indemnify Klein or other directors against claims that Qualiano pursued.

The trial court stated that if payments were withheld to coerce Klein into signing the settlement, this would constitute improper means, because, the court stated, "economic coercion is an example of 'improper means.'" (A. 1434). The court was confusing means and motives. Coercion, as an improper means in the context of a tortious interference claim, refers to the use of economic threats to coerce a third-party to break a contract with the plaintiff. *E.g.*, Restatement (Second) of Torts § 766 cmt. k (1979). For example, a third party that threatened to

cease placing advertisements with Psy-Ed if Psy-Ed continued to honor the note to Klein might be guilty of tortious interference. Here, it was the corporation itself that is alleged to have used economic threats (refusing to pay Klein) to coerce him into signing a contract. (A. 1434). No third party was involved. The Director Defendants did not use "improper means" to cause the corporation to breach its alleged obligations to Klein; rather, they used the entirely proper means of a board vote, a vote that was grounded in the advice of corporate counsel. (A. 1429-30, Ex. 60).

E. *The Award of Damages Against the Director Defendants is Replete with Errors and Must be Reversed.*

This matter comes before this Court after a circuitous journey through the Superior Court. Judge Houston tried the matter without a jury, issued his findings of fact and conclusions of law as to liability, indicated that a further hearing would need to be held as to damages, and then retired. (A. 1418-44, 2357). Several months later, Judge Hamlin heard oral argument on all post-trial motions, including motions by Klein and Schive for awards of damages and attorneys' fees. Judge Hamlin heard no witnesses and

took no evidence. Despite the failure of the court to supplement the evidentiary record, Judge Hamlin concluded that she had sufficient evidence, based in part on reading the trial transcript, to award damages and attorneys' fees and enter final judgment. (A. 2356-66, 2398-408). This procedure was in violation of the Director Defendants' rights as well as Mass. Rule Civ. P. 63.

Judge Hamlin purported to complete Judge Houston's work under the authority of Mass. R. Civ. P.

63. That rule provides:

If by reason of death, sickness, resignation, removal, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may, on assignment by the Chief Justice of such court, or in case of disability of such Chief Justice, by the senior justice present and qualified to act, perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial. (emphasis added)

The Massachusetts rule is virtually identical to the former iteration of Fed. R. Civ. P. 63.⁶

As federal cases construing the equivalent federal version of Rule 63 as well as state cases from other jurisdictions make clear, Rule 63's provision that a judge may do what is necessary to finish a case once findings of fact and conclusions of law have been filed also carries with it a negative implication that a new judge cannot make her own findings of fact and conclusions of law, based on a paper record, to the extent that such findings of fact and conclusions have not yet been filed. Rather, in such circumstances, a new trial is required. *E.g., Emerson Electric Co. v. General Electric Co.*, 846 F.2d 1324, 1325-36 (11th Cir. 1988) (if the presiding judge has yet to issue his

⁶ Up to 1991, Fed. R. Civ. P. 63 provided: "If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial." In 1991, the rule was substantially reworded in a way that made it clear that where the trial judge had not finished his work, a party could insist on recalling any witness whose testimony was material and disputed.

findings of fact and conclusions of law, a successor judge must retry the case); *Townsend v. Gray Line Bus Co.*, 767 F.2d 11 (1st Cir. 1985) (same); *Semaan v. Allied Supermarkets, Inc.*, 774 F.2d 1164 (6th Cir. 1985), (*per curiam*) (unpublished).

In the case at bar, Judge Houston entered his findings of fact and conclusions of law only on liability issues. (A. 1444). He did not enter his findings on damages, and he specifically stated that a further hearing would need to be conducted on damages. (A. 1444). Judge Hamlin committed reversible error by making further findings of fact on damages and entering final judgment without an evidentiary hearing.

This exact situation was addressed in Ohio, in the case of *Lakengren Property Owners Association, Inc. v. Stevenson*, 1981 Ohio App. Lexis 14515 (1981). There, the trial judge had conducted a bifurcated bench trial. He rendered his liability decision and then held a hearing on damages, but became ill before deciding the damages. A successor judge reviewed the record and resolved the damages issues. On appeal, the Ohio Court of Appeals reversed, holding that a substantially identical version of Rule 63 prohibited

the successor judge from making findings on damages issues when the successor judge had not heard from the witnesses.

Rule 63 does not provide to Judge Hamlin the authority to fill in gaps in Judge Houston's findings by reviewing the record and making her own findings and conclusions. As indicated by *Lakengren*, doing so is a violation of the Director Defendants' rights and is clear reversible error.

1. Error in Award of Emotional Distress Damages.

The fundamental nature of Judge Hamlin's error is clearly demonstrated in her award of \$125,000 to Klein for emotional distress damages. (A. 2395). While Judge Hamlin recites at length from Klein's testimony as reported in the transcript, contrary to Judge Hamlin's statement, there was no express or implied finding by Judge Houston that Klein's testimony in this regard was credible. He simply made no reference at all to Klein's history and made no finding, express or implied, that Klein suffered any emotional distress. Judge Hamlin is the only judge who credited any emotional suffering to Klein. She is not competent, however, to assess Klein's credibility and

to make a finding concerning the monetary value of the emotional distress that he suffered based solely on the cold transcript even if he was not cross-examined on these matters. See, e.g., Smith & Zobel, 7 Massachusetts Practice Rules Practice, § 63.2

"Successor Judge (2d ed. 2007) ("[I]f the original judge. . . in a non-jury case departs without having made findings the successor judge must order a new trial. If the nature of the case is such that the successor judge would have to assay witness credibility, any proceeding further will probably amount to an abuse of discretion.") *Miaskewicz v. LeTourneau*, 12 Mass. App. Ct. 880, 991 (1981) (rescript) (weighing credibility of witness inappropriate for other than trial judge).

Second, while emotional distress damages may be awarded in certain cases involving tortious interference, this is not such a case. The case of *Draghetti v. Chmielewski*, 416 Mass. 808, 819 (1994), involved the plaintiff's loss of a job due to interference with his employment. Naturally, a plaintiff who loses a job is likely to suffer from emotional distress. Here, however, the alleged interference involved a purely commercial matter,

payment of a promissory note. (A. 1433-34). There is no cited support for Judge Hamlin's conclusion that an individual deprived of the proceeds of a promissory note in a business transaction can recover emotional distress damages.

2. Error in Award of Attorneys' Fees.

The award of attorneys' fees suffers from similar defects. There is no statutory or case law support for the conclusion that attorneys' fees are recoverable against the Director Defendants for tortious interference with contractual relations and none is cited by Judge Hamlin. Massachusetts has long followed the black letter "American Rule" regarding the availability of attorneys' fees. "Our traditional and usual approach to the award of attorney's fees for litigation has been to follow the 'American Rule': in the absence of statute, or court rule, we do not allow successful litigants to recover their attorney's fees and expenses." *John T. Callahan & Sons, Inc. v. Worcester Ins. Co.*, 453 Mass. 447, 449 (2009) (citation omitted).

The narrow exception to the American Rule does not support the award of attorneys' fees to Klein. In *M.F. Roach Co. v. Town of Provincetown*, 355 Mass. 731

(1969), the plaintiff proved that a corporation intentionally interfered with a contract between the plaintiff and the Town of Provincetown. The court agreed that the plaintiff could recover its attorneys' fees as an element of damages against the corporation, but only those fees necessitated in prosecution of the claim against the Town. *Id.* at 733. Since Klein did not pursue a breach of contract against Psy-Ed, none of his attorneys' fees are collectible against the Director Defendants.

Assuming, *arguendo*, that some attorneys' fees may have been awardable to Klein, the amount awarded by Judge Hamlin improperly awards the attorneys' fees Klein incurred in connection with the entire case. Klein provided no evidence of the fees that he incurred specifically in defending against the allegedly abusive process, as distinguished from the myriad other activities that Klein's attorney was engaging in on behalf of his client, including

prosecution of counterclaims.⁷ Neither Klein nor Judge Hamlin made any effort to parse out those attorneys' fees that would be collectible under the *Roach* exception from those that are not; the award of *all* of Klein's claimed attorneys' fees, increased by a lodestar multiplier, is clear error.

No award of attorneys' fees is proper in this case in addition because Klein failed to introduce at trial any admissible evidence concerning his attorneys' fees. He cannot make up for this omission after the trial ended, and certainly not by the submission of post-trial affidavits concerning the entire attorneys' fees that he expended in the case at large. The evidence had to be timely disclosed in pretrial proceedings, it had to be timely offered and admitted into evidence at trial, subject to rebuttal and examination. Failure to follow these elementary principles of due process deprived the Director

⁷ Even Klein did not claim that he was entitled to an award of attorneys' fees for tortious interference with contractual relations. Instead, he merely stated he was entitled to attorneys' fees for abuse of process, requested entry of judgment against the Director Defendants and other defendants of all his attorneys' fees as enhanced, and ignored the fact that the Director Defendants were not liable to Klein for abuse of process. (A. 1750-51)

Defendants of their rights of cross-examination and rebuttal.

3. Error in Award of Damages on Promissory Note.

Judge Houston noted only in his Findings of Fact that *Klein claimed* damages in the amount of \$124,174.71 in principal unpaid on the Note from the corporation, with interest from December 31, 1999. (A. 1431). Judge Hamlin's reliance on this sum in an award in Klein's favor against the Director Defendants is an error of law and fact.

As a matter of law, Klein is not entitled to any compensatory damages under the Note on his tortious interference claim because he failed to show that he suffered pecuniary harm by virtue of the alleged interference with contract. *Chemawa Country Golf, Inc. v. Wnuk*, 9 Mass. App. Ct. 506, 510 (1980). Klein failed to meet his burden for at least three reasons.

First, Klein has failed to prove that he mitigated damages by timely suing Psy-Ed in the appropriate forum to collect on the Note. Second, he failed to prove that Psy-Ed lacked valid defenses to the Note, including its claim that it was the victim of fraudulent inducement. Third, and most obviously,

Klein failed to prove that Psy-Ed would have and could have made the quarterly payments called for by the Note in the absence of the alleged interference.

It is elementary that a plaintiff in a tort action has a duty to mitigate damages. "One who suffers a tortious wrong cannot remain absolutely supine when in a position to act for his own relief and claim as damages the consequences of his inaction. This is a general principle of the law of damages applicable alike to actions of tort and of contract." *Lowrie v. Castle*, 225 Mass. 37 (1916).

The rule applies with equal force in cases alleging tortious interference with contract. *Tosti v. Ayik*, 400 Mass. 224 (1987) (plaintiff whose employment was tortiously interfered with obliged to mitigate damages); *Steranko v. Inforex, Inc.*, 5 Mass. App. Ct. 253 (1977) (same).

The Note included a provision for Klein to recover his costs of collection in the event of a breach. (A. 1017). Yet he failed to prove that he made any reasonable efforts to enforce the Note through a contract claim against Psy-Ed in the proper venue.

Had Klein mitigated his damages by suing Psy-Ed on the Note, then at most, assuming his claim under the note was valid and that the note was collectible, the directors' vote to cease payments to Klein would have caused him to undergo some attorneys' fees to enforce the Note, fees that he could recover against the company under the terms of the Note (assuming Psy-Ed had the resources to pay a judgment) as part of his judgment. Since Klein did not attempt to mitigate his alleged damages by bringing a straight-forward action to enforce the Note, the doctrine of mitigation of damages prevents him from claiming that the Director Defendants caused him his damages on a theory of tortious interference.

Psy-Ed's counsel advised Psy-Ed's Directors not to make further payments under the Note (Ex. 60-61), presumably on the basis that Psy-Ed had defenses to the Note, including the defense that Klein had fraudulently induced Psy-Ed to enter into the Settlement Agreement of which the Note was part. Judge Houston failed to decide whether Psy-Ed's defense to paying the note was valid. Without such a ruling, it is impossible to determine whether the alleged interference with the Note caused any damages

to Klein. If Psy-Ed had valid defenses to the Note, then Klein cannot show that he would have recovered on the note even in the absence of the alleged tortious interference.

Judge Houston determined that the promissory note called for Psy-Ed to make nine additional quarterly payments each in the amount of \$13,797.19. (A. 1430). In or around late December 1999, Psy-Ed, acting by a vote of a majority of its directors, who were in turn acting on advice of corporate counsel, ceased making any further payments. (A. 1429-30). Even if one of the Director Defendants could somehow be said to have had bad motives unrelated to a corporate purpose in so voting, Klein failed to prove that Psy-Ed would have paid the Note in the absence of interference by a tortfeasor having bad motives.

Judge Houston found that outside counsel representing the corporation was advising that the Note not be paid. (A. 1430). The facts available to the corporation gave it lawful non-tortious reasons for not paying Klein even if the non-payment turned out to be a breach of contract.

Moreover, even if Psy-Ed had been inclined to pay the Note, Klein offered absolutely no evidence that

Psy-Ed had the means to make the quarterly payments called for by the Note. He introduced no evidence as to Psy-Ed's finances in December 1999, or afterwards, nor did he establish that any funding that Psy-Ed may have received after 1999 from investors or others would still have been made and available had the funds been earmarked for payment of the Note. The absence of any evidence that Psy-Ed could have and would have honored the obligation and paid the note in the absence of the alleged interference is fatal to Klein's claim.

The case is exactly analogous to a legal malpractice action in which a plaintiff sues an attorney for failing to obtain a settlement or judgment. In such a case, it is settled law that the plaintiff must prove not only that the attorney was negligent in failing to obtain the settlement or judgment, but also that the defendant had the means to satisfy the settlement or judgment.

For example, in *Shimer v. Foley, Hoag & Eliot LLP*, 59 Mass. App. Ct. 302 (2003), the court summarized the law as follows:

A plaintiff in a malpractice action, who asserts that his attorney's negligence prevented him from obtaining a judgment to which he was entitled,

bears the burden of proving that he "could have collected something" on the judgment. *Jernigan v. Giard*, 398 Mass. at 723. See *Poly v. Moylan*, 423 Mass. at 148. . . . Even with admission of the evidence of the Synthes offer supporting his claim for damages, Shimer must still demonstrate that Synthes had the financial ability to pay the amounts to which it agreed in order to establish that FHE's negligence caused him an actual loss.

Here, the same reasoning applies. In order to prove that the alleged interference caused Klein an actual loss, Klein was required to prove that Psy-Ed had the "financial ability to pay the amounts to which it agreed." He offered no such evidence.

Furthermore, his failure to sue Psy-Ed on the Note in the proper forum - the simplest way to collect on the Note and recover costs of collection if Psy-Ed were solvent - would support an inference that he knew that the Note was likely uncollectible. Klein's failure to sustain his burden of proving that Psy-Ed would have paid the Note over the ensuing nine quarters in the absence of any alleged interference precludes him from recovering any damages in relation to the Note.

As a matter of fact, no trial judge made a finding that the amount Klein claimed as due under the

Note was properly computed.⁸ As noted previously, Judge Houston stated only that the sum of \$124,174.21 plus interest from December 31, 1999, resulting from the wrongful acts of the Director Defendants, Psy-Ed and Valenzano, was a claim by Klein. (A. 1431) It was error from Judge Hamlin to state that these are findings of fact by Judge Houston.

Klein's computation is clearly incorrect. Klein claimed (without any supporting evidence) that had there been no interference, he would have continued to receive quarterly payments over roughly a two year period after December 1999. (A. 1431). He then sought an award of all of the principal payments in an accelerated manner, as of December 1999, and claimed interest be added to those amounts from that date. (A. 1431). This is more than he would have received had the note been paid according to its terms.

Obviously, even if Klein had proven that all of the payments would have been made over the two years after December 1999, he would have to discount the

⁸ Judge Houston included in his decision some figures concerning the amounts that Psy-Ed owed to Klein under the promissory note, but he did not specifically make any rulings concerning the damages, if any, that Klein suffered by virtue of the alleged tortious interference with payment of that Note. (A. 1430, 1444).

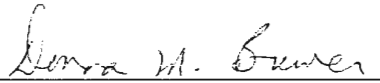
payments back to their present value as of December 1999 if he is going to add interest from that date. He cannot receive the loss of payments that were not due until 2000 or 2001 and then, without discounting them to present value, receive interest to these amounts as of December 1999. Yet this is in sum what the judgment on the Note has accomplished. Klein is thus in a better financial position under the judgment than he would have been had the Note been paid under its terms. He is not entitled to a financial windfall for a tortious interference with a contract. *Charles River Construction Co., Inc. v. Kirksey*, 20 Mass. App. Ct. 333, 345 (1985).

Conclusion.

For all of the foregoing reasons, the Director Defendants David Hirsch, Donald S. Chadwick and Robert Striano respectfully request that this Court reverse the judgment of the Superior Court or remand the matter for a new trial on liability and damages.

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Respectfully submitted,

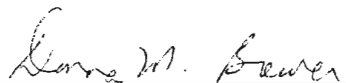


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**CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 16(k) OF
THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I, Donna M. Brewer, do hereby certify that the appellants' brief, related exhibits and record appendix comply with the requirements of Rules 16, 18 and 20 of the Massachusetts Rules of Appellate Procedure.



Donna M. Brewer