

No. 2009-P-1838
No. SJC-10722

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

PSY-ED CORPORATION d/b/a EXCEPTIONAL PARENT and
JOSEPH VALENZANO, JR.,
Plaintiffs

v.

STANLEY KLEIN and KIMBERLY SCHIVE,
Defendants,

STANLEY KLEIN,

Defendant/Plaintiff in
Counterclaim/Appellee

v.

PSY-ED CORPORATION d/b/a EXCEPTIONAL PARENT and
JOSEPH VALENZANO, JR.,
Plaintiffs/Defendants in
Counterclaim/Appellants,

KENNETH ROSSANO, DAVID HIRSCH, ROBERT STRIANO, DONALD
S. CHADWICK, C. KENNETH MEHRLING and
ROBERT K. HOPKINS, JR.

Third-Party
Defendants/Appellants.

ON APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT

REPLY BRIEF OF THIRD PARTY DEFENDANTS-APPELLANTS DAVID
HIRSCH, DONALD S. CHADWICK, AND ROBERT STRIANO

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ISSUES PRESENTED IN REPLY

1. Whether Klein presented sufficient evidence to satisfy his burden of proof that the Director Defendants acted with actual malice necessary to recover on his claim of tortious interference with contractual relations.

2. Whether the Trial Court erred in awarding emotional distress damages and attorneys' fees against the Director Defendants.

3. Whether the Trial Court's judgment in favor of the Director Defendants and against Klein on his count for violation of G.L. c. 93A, § 11 should be affirmed.

DISAGREEMENT WITH STATEMENT OF FACTS

Appellee Stanley Klein ("Klein") continuously refers to "Appellants" collectively when discussing the alleged facts that support the Trial Court's judgment against Psy-Ed Corporation ("Psy-Ed"), Joseph Valenzano ("Valenzano"), and corporate directors David Hirsch, Donald S. Chadwick, Robert Striano and C. Kenneth Mehrling. Yet the claims against them are not identical, the elements differ, and the evidence that Klein introduced, or failed to introduce, against each

party varies widely. It is incorrect for Klein to claim on appeal that Psy-Ed, Valenzano, and Hirsch, Chadwick, Striano (hereinafter collectively "Director Defendants" and Mehrling are essentially all in the same position and to suggest that what is good against one is good against all. Nothing could be further from the truth.

Klein asserts that "Appellants" created the protracted litigation, Klein Brief,¹ p. 6, "Appellants" suffered four orders of sanctions, *id.* at 7 and 8, and "Appellants stunningly 'waived' nearly all claims against Schive and Klein" *id.* at 8-9, among other broad statements. Yet Klein is well-aware, and must concede, that the Director Defendants and Mr. Mehrling were never plaintiffs, never pursued claims against anyone and were never personally sanctioned.

Klein's repeated suggestion that the Director Defendants are somehow responsible for getting themselves sued is not substantiated by the record or a fair recitation of events. Moreover, it is wholly improper to suggest that sanctions over discovery can suggest liability on the part of parties who were not

¹ "Klein Brief" refers to the Brief of Appellee and Cross-Appellant Stanley D. Klein.

sanctioned. The fact that the litigation lasted several years does not mean that the Director Defendants' appeal should be denied.

Klein makes much of the fact that the litigation against him and Schive was filed after discussion by Joseph Valenzano with each board member and that the Board voted 5-1, with Board member Rossano dissenting, to suspend further payments on the promissory note ("Note") to Klein. Klein, however, has no claim against the Director Defendants based upon the filing or prosecution of the lawsuit. He never asserted a claim against them for abuse of process. The trial court ruled in the Director Defendants' favor on his claim of aiding and abetting abuse of process and no appeal of that ruling is pursued. (A. 1444) The only claim on which Klein is even arguably successful against the Director Defendants is the claim of tortious interference with contractual relations, a claim predicated on the vote to suspend the payments on the Note. If Klein was unable to establish that the Director Defendants acted with actual malice in so voting, then the Director Defendant's appeal must be granted.

REPLY ARGUMENT

- I. KLEIN HAS NOT SUSTAINED HIS BURDEN OF PROOF OF ACTUAL MALICE BY THE DIRECTOR DEFENDANTS FOR TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS.
- A. Klein repeats the Trial Court's error by applying the wrong principle of law.

Klein makes two principal arguments as to why the Trial Court was correct in finding the Director Defendants liable for tortious interference with contractual relations: Since *Blackstone* was not decided at the time that Judge Houston issued his decision it shouldn't apply, and *Blackstone's* requirement of "actual malice" is satisfied by proof of improper motives or means. Klein Brief, p. 32-33. Both arguments are incorrect.

In *Blackstone v. Cashman*, 448 Mass. 255 (2007), the Supreme Judicial Court clearly and unequivocally holds that in order to hold a corporate director liable for tortious interference with contractual relations between the corporation and its employee, the plaintiff must prove that the director acted with actual malice. *Id.* at 263. In so doing, the *Blackstone* court notes that the actual malice standard, as applied to corporate directors under the circumstances as found in this case, has been the

controlling principle for many years. "[W]e have explicitly affirmed the applicability of the actual malice standard in such circumstances no less than five times since our 1990 decision in *Geltman*." *Id.* at 262. Klein's suggestion, then, that this Court should excuse Judge Houston's erroneous application of the law because *Blackstone* had not then been published, deserves short shrift.²

The *Blackstone* decision similarly is clear that the "improper motive or means" test that Judge Houston applied is not the same as the actual malice standard that the law requires. Klein cites to *Draghetti v. Chmielewski*, 416 Mass. 808 (1994) and *United Truck Leasing Corp. v. Geltman*, 406 Mass. 811 (1990) for the proposition that "the same quality of ill will essential to improper motive . . . can also serve as a basis for the malice necessary to find a corporate official liable for tortious interference with the contract of her corporate entity . . ." Klein Brief, p. 33. The *Blackstone* Court provides the answer to this erroneous argument:

² The Appellants brought Judge Houston's error to the attention of the Court in post-trial motions for relief and specifically cited to *Blackstone* (A. 1467, 2327), but the Court merely denied the motions without comment. (A. 35, 2436 .

The dissent implies that this passage in King somehow suggests that the term "actual malice" has been used since Geltman solely to express Geltman-style "improper motive or means." We disagree. That would render meaningless the substantively higher burden implied by "a spiteful, malignant purpose."

Blackstone, 448 Mass. at 263. Klein's position, argued strenuously by the *Blackstone* dissenters, was answered further by the majority, "[the dissent] erroneously treats 'actual malice' as lacking any meaning or application independent of the 'improper in motive or means' standard. This argument produces a result that is plainly contradicted by our most recent precedent, *Weber [v. Community Teamwork, Inc.]*, 434 Mass. 761, 781 (2001)]." *Blackstone*, 448 Mass. at 266.

Noting that the actual malice standard applicable to corporate officials under circumstances like those found in the present case is, indeed, a higher standard and more difficult to prove, the *Blackstone* court finally puts paid to any analysis based on concepts of improper motive or means.

[W]hen applying the actual malice standard, we have engaged in a single analysis of the entirety of the defendant's relevant conduct. "Improper motive" and "improper means" become subsumed into the more stringent analysis implied by "actual malice." See, e.g. *Boothby [v. Texon, Inc.]*,

414 Mass. 466, 487 (1993)] (defining "actual malice" as "spiteful, malignant purpose" without separate mention of motive or means. Thus, the actual malice standard in effect replaces the disjunctive analysis "improper in motive or means" with a single question, whether the controlling factor in the alleged interference was actual malice.

Id. at 269-270.

Finally, to the extent that Klein suggests that the Director Defendants are liable because they did not prove they acted consistent with a legitimate corporate purpose, this suggestion is in error. Klein is required to prove that the Director Defendants acted with actual malice unrelated to a corporate purpose. The Director Defendants bear no burden of proof on this issue. *Id.* at 261, 267.

B. Klein fails to cite to any evidence in the record that would satisfy his burden of proving actual malice on the part of the Director Defendants.

Klein claims in error that the Trial Court "found" that the Director Defendants' vote to suspend payments on the Note was based on improper motives and not on a legitimate business decision. Klein Brief, p. 30. While the Trial Court states in its Rulings of Law that "Klein presented sufficient evidence" to show improper motives, the only evidence cited by the Trial

Court is that the decision to suspend was "motivated by personal animus on the part of Valenzano." (A. 1434) Klein cannot prove that the Director Defendants acted with actual malice against him by imputing to them the personal animus of Valenzano. Instead, he must prove that Hirsch, Chadwick or Striano personally acted against him with actual malice unrelated to a legitimate corporate purpose. *Blackstone*, 448 Mass. at 260-61 ("[W]e explained that the 'rule assigning liability to corporate officials only when *their* actions are motivated by actual, and not merely implied, malice . . .") (emphasis supplied); see also *id.* at 267 ("Blackstone had the burden of proving that Cashman acted with 'actual malice' 'unrelated to [a] legitimate corporate purpose.' *Boothby*, *supra* at 487.")

Klein utterly fails to cite to any evidence in the record that the Director Defendants had any actual malice when they voted to suspend payments to Klein. Similarly, there is no evidence to suggest that the Director Defendants' vote was not in furtherance to a legitimate corporate purpose. Each of the examples cited by Klein as proof of actual malice is limited to actions of Valenzano, not Hirsch, Chadwick or Striano.

Klein Brief, pp. 34-35. His claim that the Director Defendants "adopted and participated in Valenzano's vengeful campaign" and "failed to manifest any of the requisite objectivity or independence of thought" is unsupported by the evidence and insufficient as a matter of law. As Klein concedes, the evidence is that the Director Defendants voted to suspend payments upon the advice of corporate counsel, Klein's refusal to sign the Qualiano settlement that had been approved by the Board, and their judgment (about which they were "adamant" and not without reason) that the second Klein affidavit was inconsistent with Klein's first affidavit which he had signed as part of his obligation under the Settlement Agreement to cooperate in the corporation's defense of the Schive lawsuit. (EX0060-61; Tr. II/66:10-19; EX0012) None of these factors can support a finding of actual malice against Hirsch, Chadwick or Striano.

**II. CONTROLLING LEGAL PRINCIPLES DO NOT SUPPORT
KLEIN'S AWARD FOR EMOTIONAL DISTRESS DAMAGES
AND ATTORNEYS' FEES AGAINST THE DIRECTOR
DEFENDANTS**

Klein cites two cases for the proposition that he is entitled to an award of emotional distress damages for tortious interference with contractual relations.

In *Ratner v. Nobel*, 35 Mass. App. Ct. 137, rev. denied, 416 Mass. 1105 (1993), the jury had awarded the plaintiff non-pecuniary damages for tortious interference with contractual relations. The appellate court, while recognizing that such damages may be theoretically recoverable in certain situations, reversed the award since the plaintiff had failed to prove that all of the elements of the tort. *Id.* at 141. As shown above, Klein did not prove all the essential elements of tortious interference against the Director Defendants. The second cited case, *American Velodur Metal, Inc. v. Schinabeck*, 20 Mass. App. Ct. 460, rev. denied, 396 Mass. 1101 (1985), cert. denied, 475 U.S. 1018 (1986), whatever its broader application, is simply not a tortious interference with contractual relations case.

Klein argues incorrectly that Judges Houston and Hamlin found Klein to have suffered emotional distress as a result of his "unceremonious severance," the resultant "bitter dispute" and "tumultuous struggle." Klein Brief, p. 47. Tellingly, the only judge in a position to assess Klein's credibility, Judge Houston, made no such finding. To the contrary, in summarizing Klein's departure, he wrote merely: "Klein's attempt

to have Psy-Ed shareholders elect his slate of Directors failed at a shareholders' meeting on September 30, 1997. Klein no longer had any involvement in the company." (A. 1425). This is in stark contrast to Judge Houston's finding that "Schive credibly testified that she suffered emotional distress on account of EP and Valenzano's lawsuit."³ (A. 1429)

Were Klein's argument to prevail and the award of emotional distress damages against the Director Defendants be upheld, there would be no claim for tortious interference with contractual relations in which emotional distress damages would not be awardable. The Restatement (Second) of Torts § 774A(1)(c) (1979) states that emotional distress damages may be recoverable under the tort of tortious interference with contractual relations "if they are reasonably to be expected to result from the interference." Klein argues no such distinction.

³ Klein argues that there is no disputed issue of credibility because he was not cross-examined on his alleged emotional distress. It is well-settled that a fact-finder makes an assessment of credibility based on all the evidence, and credibility is not determined simply by the absence of cross-examination. *E.g.*, *Massachusetts Superior Court Civil Practice Jury Instructions* § 1.12 (MCLE, Inc. rev. ed. 2008).

Instead, he tosses in the entire history of his relationship with the company and the fact that he lost compensation as a result of the suspension of payments as reasons why his emotional distress is compensable. But one will always suffer a loss of money as a result of a tortious interference with contractual relations; that is an essential element of the tort. Klein's history with the company argues against the conclusion that his alleged emotional distress was caused by the action of the Director Defendants. Coupled with Judge Hamlin's unsubstantiated assessment of Klein's credibility, the award of emotional distress damages against the Director Defendants cannot stand.

Klein misreads the history of this case and the court's holding in *Lakengren Property Owners Assn., Inc. v. Stevenson*, 1981 Ohio App. Lexis 14515 (1981) in arguing that Judge Hamlin's assessment of damages and award of attorneys' fees should be upheld. Judge Hamlin made rulings on the reasonableness of Klein's request for attorneys' fees by finding his expert submissions to be credible based on the affidavits. It is clear under *Lakengren* that it was improper for her to make such findings.

The procedural history is clear that all parties understood that the Trial Court bifurcated the trial on liability and damages, a decision plainly within its discretion. *E.g., Dobos v. Driscoll*, 404 Mass. 634, 645, cert. denied sub nom. *Kehoe v. Dobos*, 493 U.S. 850 (1989). On the first day of trial, plaintiffs' counsel objected to Klein's presumed intention to put on an expert witness for attorneys' fees given that no expert witness had been timely disclosed. (Tr. I/13:9-24 to 15:1-12) In response, the Court directed Klein's counsel to make his expert Michael Gilleran available at the end of the day to plaintiffs' counsel for questioning. (Tr. I/16:15-21)

The next day, plaintiffs' counsel reported on the results of his questioning. The following colloquy occurred:

MR. REINHARDT: Actually, Your Honor, I've had some second thoughts after - I interviewed Mr. Gilleran yesterday afternoon pursuant to Your Honor's order, and I had another session scheduled with him for Saturday, but in the interim, I've had some second thoughts about Mr. Gilleran as a witness, and it seems to me that we need to determine whether or not the Court is going to award attorneys' fees before we start hearing evidence about the reasonableness of those fees.

THE COURT: Yes.

MR. REINHARDT: So, therefore, Mr. Gilleran wouldn't need to go on at this point in time.

THE COURT: Well, I'm just trying to figure out where we're going to fit all this in.

MR. FIELD: I understand, Your Honor. We'll have the same issue then with respect to Judge Todd on Ms. Rudavsky's case.

MR. REINHARDT: And I would make the same argument there as well, that - as I see it now, it would be very easy to schedule a morning at some point to bring those two in if, in fact, there's going to be a fee award.

THE COURT: Well, here's what I think I'm going to do. We'll resume tomorrow morning at nine-thirty. We'll go until one o'clock and, if need be, maybe a little bit over into two, but not a lot, and then we will complete the evidence on Monday, and I'll ask Mr. Powers to contact Ms. Rudavsky to get her ready to put in her evidence as far as I'm concerned Monday afternoon.

(Tr. II/177:8 to 178:19)

From this exchange, it is apparent that Judge Houston never intended Klein to be able to prove the reasonableness of his attorneys' fees by affidavit, and the parties expected there to be an evidentiary hearing. The defendants-in-counterclaim and third-party defendants have been unfairly prejudiced by Judge Hamlin's award of damages without holding an evidentiary hearing. If the Court determines that

Klein may be entitled to damages against the Director Defendants, a new trial on damages must be ordered.

REPLY ARGUMENT CONCERNING CROSS-APPEAL

I. **THE TRIAL COURT CORRECTLY RULED IN THE DIRECTOR DEFENDANTS' FAVOR ON KLEIN'S G.L. C. 93A, § 11 CLAIM**

A. **The Trial Court committed no error of law or misapplication of fact**

Klein does not actually dispute that the Trial Court ruled correctly when it held that a claim for violation of G.L. c. 93A, § 11 cannot be sustained when the claim arises out of the employer-employee relationship or the party's status as a shareholder versus the corporation. (A. 1440-41) The cases cited by the Court, in particular *Manning v. Zuckerman*, 388 Mass. 8 (1983) and *Szalla v. Locke*, 421 Mass. 448 (1995) are clear. Klein argues instead that the Court should consider the entirety of the circumstances, including circumstances predating by years the factual bases for his claims, to conclude that his claim arises out of "trade or commerce" under § 11. His argument is contrary to well-established law.

In order to qualify as arising out of trade or commerce, the activity in question must arise from a

business context. *Lantner v. Carson*, 374 Mass. 606, 611 (1978). Case law has identified several factors in distinguishing between a business context and one that does not affect behavior in the marketplace. Among those are the nature of the transaction, the status of the involved parties, and the particular activity in question. *All Seasons Servs., Inc. v. Commissioner of Health & Hosps. Of Boston*, 416 Mass. 269, 271 (1993). The analysis looks to the nature of the activity between the parties that allegedly gives rise to the complaint, not the totality of one party's activities as a corporation. "[W]e conclude that c. 93A requires that there be a commercial transaction between a person engaged in trade or commerce with another person engaged in trade or commerce. Once it has been established that a commercial transaction exists, then one may address whether the individuals were acting in a "business context" and apply the test discussed in *Begelfer v. Najarian*, 381 Mass. 177, 190-91 (1980)." *Szalla*, 421 Mass. at 451-52. Thus, Klein's suggestion that the numerous cases that find no G.L. c. 93A applicability are distinguishable because they involve start-ups, only a small number of shareholders, or because the employment relationship

still existed at the time the alleged 93A violation occurred is incorrect. See, e.g., *Informix, Inc. v. Rennell*, 41 Mass. App. Ct. 161, 162-63, rev. denied, 423 Mass. 1110 (1996).

Klein suggests that the Director Defendants in effect conceded the "trade or business" relationship by describing, in a different context, the activity as a "purely commercial matter." The two are not equated. Even if the parties are engaged in a commercial relationship (as any employment relationship could be characterized), the parties are not engaged in trade or commerce with one another such that their actions arise in a business context for purposes of G.L. c. 93A, § 11. See *Milliken & Co. v. Duro Textiles, LLC*, 451 Mass. 547, 564 (2008); *Szalla*, 421 Mass. at 452.

B. Klein did not prove that the Director Defendants engaged in conduct that rises to that necessary to constitute a violation of G.L. c. 93A, § 11

A violation of G.L. c. 93A, § 11 is predicated on unfair or deceptive trade or business practices "that would raise an eyebrow of someone inured to the rough and tumble world of commerce." *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 504

(1979). Klein cites to no evidence in the record that would support such a conclusion. He argues merely that the evidence in support of his tortious interference with contractual relations supports a c. 93A violation. The insufficiency of that evidence as to the Director Defendants is addressed above. But certainly there is no case that would support the conclusion that the only act of the Director Defendants, the vote of the Director Defendants, following advice of counsel, to suspend payments due Klein under the Note, could constitute an unfair or deceptive act or practice. Based on the evidence introduced at trial, Klein's claim of violation of G.L. c. 93A, § 11 against the Director Defendants fails as a matter of law.

C. A few factual errors by the Trial Court do not affect the correctness of the ruling.

As the Trial Court correctly noted, Klein's claim for violation of G.L. c. 93A, § 11 is based upon the suspension of payments due to him under the Note. (A. 1440). The Note was executed in connection with the Settlement Agreement and Release entered into between Psy-Ed and Klein. (EX0023) The Settlement Agreement and Release resulted in Klein releasing all claims

arising out of his ownership interest in and his employment by the corporation. (EX0035)

Judge Houston, while correctly concluding that a G.L. c. 93A, § 11 claim does not lie between a shareholder and a corporation, slightly erred in the description of the Settlement Agreement and against whom Klein's claim is asserted. "Even as a shareholder, the Settlement Agreement still represents a private transaction between the Board and Klein.

See *Szalla*, 421 Mass. at 452. The Court finds for the plaintiff in regards to the defendants' G.L. c. 93A counterclaim." (A. 1441) In fact, the Settlement Agreement was not "between the Board and Klein," but between Psy-Ed (executed on its behalf by Kenneth Rossano, Chairman of Board of Directors), Valenzano, and Klein. (EX0001, 0019-21) Also, since Klein is the only defendant who filed a counterclaim based on G.L. c. 93A, but it was asserted against "Defendants" in the plural, who are presumably all of the defendants-in-counterclaim and the third-party defendants, the Trial Court must have meant that he was finding in favor of the defendants-in-counterclaim and third-party defendants in regards to the plaintiff-in-counterclaim's G.L. c. 93A counterclaim.

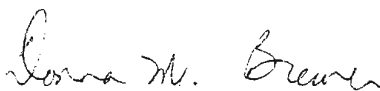
The Trial Court's Order accurately reflects the Court's meaning: "Counterclaim X (Klein): Judgment shall enter for the defendants-in-counterclaim and third-party defendants on Klein's claim of a violation of G.L. c. 93A, § 11." (A 1444)

CONCLUSION

For all of the reasons stated above and in Appellants' other briefs, the judgment for Klein as against the Director Defendants should be reversed, the judgment against Klein and in favor of the Director Defendants on his claim for violation of G.L. c. 93A, § 11 should be affirmed, or, at a minimum, the case should be remanded for further proceedings as to Klein's damages. Klein's summary request for his appellate attorneys' fees and should be denied because he has made no showing that the Director Defendants' appeal was frivolous, as required by G. L. c. 211A, § 15, and Mass. R. App. P. 25.

[Signature block on following page]

Respectfully submitted,
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By their attorneys,

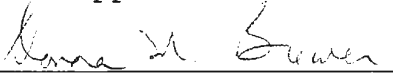


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CERTIFICATE OF COMPLIANCE (RAP 16K)

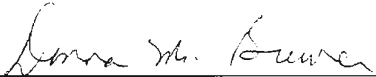
I, Donna M. Brewer, hereby certify that this
brief complies with all the rules of court that
pertain to the filing of appellate briefs.



Donna M. Brewer

CERTIFICATE OF SERVICE

Under penalties of perjury, I hereby certify that I caused two true copies of the above document to be served by hand or by first class mail, postage prepaid, upon the below listed attorneys of record on May 3, 2010.



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