IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRET MICHAEL WHEELER,	)	**No. 28734-3-III**
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
SARA M. CALLOWAY and ERICK CALLOWAY, wife and husband d/b/a WWW.SARAMCALLOWAY.COM,	)	
	)	**UNPUBLISHED OPINION**
Appellants.	)	
	)	

Sweeney, J. — The trial judge here summarily struck a declaration offered by Sara Calloway in opposition to Bret Wheeler's motion for summary judgment, after concluding that the information was similar to a declaration previously stricken by another judge in an earlier proceeding. Neither the court nor counsel for the moving party delineated exactly how or why her declaration was the same as the earlier declaration or why the two declarations were inconsistent with her deposition.

Once the court struck those declarations, it was then an easy step to grant Mr. Wheeler summary judgment and award $339,482.62 in damages, plus prejudgment

interest and costs and fees, for a total judgment of $509,810.25. We conclude that the court erroneously struck Ms. Calloway's declarations with no showing, or specific explanation of how or why they were inconsistent with earlier deposition testimony. And those declarations articulate a defense to Mr. Wheeler's various causes of action. We, therefore, reverse the summary dismissal and remand for trial on the merits.

FACTS

Ms. Calloway's defense was summarily dismissed and so we must view the facts of this dispute in a light most favorable to her. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 256, 616 P.2d 644 (1980). She is the nonmoving party. When so viewed, the factual backdrop for this appeal is the following.

Prior to August 2006, Ms. Calloway was employed by Group Northwest, Inc. (GNI), an agency that wrote insurance benefits packages. Ms. Calloway was licensed and appointed to write health insurance policies for health clients of GNI. During this period, Mr. Wheeler was engaged in a wholly independent business called Packard & Wheeler Offices that wrote life insurance policies. GNI and Mr. Wheeler had an agreement that he would be paid a commission on health insurance policies written for clients whom he referred to GNI. Ms. Calloway was the agent at GNI who serviced the clients for these health insurance policies.

Mr. Wheeler and Ms. Calloway tried to form a limited liability company in August 2006. They were unsuccessful. They then agreed, orally, to split net commissions for policies Mr. Wheeler had previously received commissions for from GNI. They also agreed, again orally, to split new commissions for new health insurance policies Ms. Calloway wrote after August 1, 2006. Mr. Wheeler agreed to promote Ms. Calloway's health insurance business and he agreed to introduce Ms. Calloway to his life insurance clients. They operated on this informal oral arrangement for about 18 months. Mr. Wheeler and Ms. Calloway again tried to formalize their business relationship in February 2008 but again could not agree on the terms of any arrangement.

Ms. Calloway told Mr. Wheeler that they must either dissolve or renegotiate their arrangement. And she sent a letter to Mr. Wheeler summarizing the available options and again expressing a desire to formalize their business relationship in some fashion. Their business relationship finally broke down on February 13, 2008. Ms. Calloway agreed to continue paying Mr. Wheeler "a commission for all of his referrals, but not at the rate of 50%." Clerk's Papers (CP) at 39.

Mr. Wheeler requested that Ms. Calloway remain silent about the dissolution of their business relationship. But he had, nonetheless, contacted 95 percent of the health insurance clients that she was the agent of record for. And he told Ms. Calloway that 95

percent of the health insurance clients would be going with him. CP at 40. Mr. Wheeler then registered a new business with the Washington State Department of Revenue called Packard and Wheeler Group Benefits, LLC, on February 21, 2008. Later that month, Mr. Wheeler threatened to change the locks and prevent Ms. Calloway's access to those files that she was responsible for servicing. She, on the advice of her lawyer, then removed those health insurance files she was responsible for servicing because of concerns that she would be locked out and those files would be exposed in violation of various state and federal insurance laws that required confidentiality of the information in those files.

DISCUSSION

The Court Abused Its Discretion by Striking Ms. Calloway's Declaration

Our review is de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) ("The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion."). But even if the standard of review here was abuse of discretion, we would still be inclined to conclude the court abused its discretion because we are unable to find tenable grounds or reasons for the court's decision to completely strike Ms. Calloway's declarations.

Certainly, rather than strike the whole declaration, the court should have stricken

those portions that it found objectionable. *See Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003). Here the court struck the declaration because a similar declaration had been struck by another judge as inconsistent with earlier deposition testimony. But what is left unsaid in this record is how or why these declarations are inconsistent and, just as significantly, how any of that bears on the current litigation and this appeal.

Mr. Wheeler did not identify the testimony at issue in his motion. It was only at the summary judgment hearing that counsel for Mr. Wheeler identified one specific inconsistency in Ms. Calloway's testimony:

> As to the new declaration, which is the same as the old, you don't need to look past the first page to figure out why the court struck it in the first page. Last line: Sara Calloway says, The oral agreements provided we would split new commissions. That is in direct contradiction to the answer to the complaint where she agreed and acknowledged through her attorney at the time, Mr. Swindler, that the agreement was to split all profits and commissions.

Report of Proceedings (RP) (Oct. 9, 2009) at 12-13. No other inconsistencies, however, were identified.

The judge agreed and struck the declaration but did not specify or identify which portions of the new declaration were objectionable. Nor did the judge identify why the previous declaration had been stricken. He apparently placed the two declarations side-

by-side, concluded they were similar, and that ended the inquiry. The judge's decision to strike the declaration led inexorably to the summary grant of judgment against her.

The earlier declaration of Ms. Calloway had been filed about a year prior in support of a motion for reconsideration on a preliminary injunction. That declaration is not part of this record on appeal, nor is the motion for reconsideration or the first motion to strike. The motion to strike was heard by a different judge. That judge issued a letter ruling which concluded that Ms. Calloway's declaration "do[es] not contain newly discovered evidence which could not have been earlier presented through the exercise of due diligence. . . . Moreover, the declaration of Ms. Calloway contradicts her earlier statements in deposition and/or declaration." CP at 228-29. That ruling also failed to identify the inconsistent deposition or declaration statements; nor did it provide any guidance as to which specific portion of the declaration is conflicting and specifically how. The ruling took a wholesale approach by dismissing the entire declaration. The written order striking the declaration of Ms. Calloway is likewise of little help in determining what exactly was contradictory. Ms. Calloway's deposition is part of this record.

The only contention expressed by Mr. Wheeler's counsel during the summary judgment hearing was that Ms. Calloway initially stated that the parties agreed to split *all*

profits and commissions and then later in her declaration stated that the parties only agreed to split *new commissions*. RP (Oct. 9, 2009) at 12-13. In Ms. Calloway's answer to interrogatory 17 she states, "The sharing of net commissions began August 2006 and ended February 25, 2008." CP at 310. And in her deposition Ms. Calloway also agreed that the money that was paid to her and Mr. Wheeler was split 50/50. CP at 268 (Calloway Dep. at 43, line 15). In comparison, the second paragraph of Ms. Calloway's declaration states:

> Following an unsuccessful attempt to create a limited liability company with Bret Wheeler in August 2006, we entered into an oral agreement that provided I would split *net commissions* for policies he previously received commissions from Group Northwest, Inc. Also, the oral agreement provides we would split *new commissions* for new health insurance policies I wrote after August 1, 2006 (50/50) with Bret Wheeler; Wheeler's consideration for this split was that he agreed to promote my health benefit business to introduce me to his life insurance clients which he services out of Packard & Wheeler offices.

CP at 38-39 (emphasis added). The contradiction is vague at best. Ms. Calloway states that the parties agreed to split both the net commissions for policies Mr. Wheeler previously received and also new commissions she received.

The remaining portions of Ms. Calloway's declaration, appears to support, or at least not contradict, her prior testimony. The third paragraph of Ms. Calloway's declaration states, "Again, in February 2008 Bret Wheeler and I discussed formalizing the

business arrangement. But, we did not agree to terms." CP at 39. In Ms. Calloway's answer to interrogatory 22 she states that there was never a written contract between the parties regarding the partnership. CP at 313. Her deposition does not address the partnership formation dates.

But the fourth paragraph of Ms. Calloway's declaration does:

> On or about February 12, 2008, I expressed to Bret Wheeler that the oral agreement was dissolved and/or must be renegotiated. Attached hereto as Exhibit A is a true and correct copy of a letter confirming the oral agreement was dissolved and/or must be renegotiated.

CP at 39. Ms. Calloway does not mention the discussion with Mr. Wheeler or her letter in her answers to interrogatories. Her deposition testimony also does not appear to address the meeting or the letter.

The fifth paragraph of Ms. Calloway's declaration states:

> On or about February 13, 2008, Bret Wheeler and I had a meeting to discuss options for formalizing the business arrangement. Bret Wheeler brought a typed agenda to the meeting which outlined a number of options. Attached hereto as Exhibit B is a true and correct copy of the typed Agenda, which Wheeler brought to the meeting.

CP at 39. Ms. Calloway does not mention the February 13 meeting or the agenda in her answers to interrogatories. Her deposition also does not mention the meeting or Mr. Wheeler's agenda for their meeting.

The sixth paragraph of Ms. Calloway's declaration states:

> On or about February 13, 2008, we ultimately agreed that the business arrangement was irretrievably broken. I agreed to continue paying Wheeler a commission for all of his referrals, but not at the rate of 50%.

CP at 39. Ms. Calloway again does not mention the February 13 meeting in her answers to interrogatories. Her deposition also does not mention such an meeting. Her deposition testimony does, however, reference the initial agreement to split the money 50/50. CP at 268 (Calloway Dep. at 43, line 15).

The seventh paragraph of Ms. Calloway's declaration states:

> On or about February 25, 2008, Wheeler told me that we need to have a "clean split". Wheeler indicated he would be hiring staff to service "his clientele". Both parties indicated our desire that Andrea Brown work for our new respective businesses.

CP at 39. In Ms. Calloway's answer to interrogatory 17 she states, "The sharing of net commissions began August 2006 and ended February 25, 2008." CP at 310. In her deposition she states the partnership dissolved February 25, 2008. CP at 267 (Calloway Dep. at 39, line 14). She also discloses a John Packard who was at the meeting on February 25, 2008, where Mr. Wheeler allegedly agreed to a "clean split." CP at 43-45, 215, 267 (Calloway Dep. at 39, line 19).

The eighth paragraph of Ms. Calloway's declaration states:

> Attached hereto as Exhibit C is a true and correct copy of a letter I sent dated February 25, 2008, which confirmed the February 13, 2008 meeting.

CP at 39. The letter is not addressed in the answers to interrogatories or the deposition testimony.

The ninth paragraph of Ms. Calloway's declaration states:

> Unbeknownst to me and despite Wheeler's request that I remain silent about our business dissolution, prior to the February 25, 2008 meeting, Wheeler has already contacted 95% of the health insurance clients for whom I was the agent of record. In fact, Wheeler indicated to me that "95% of the health insurance clients would be going with him."

CP at 40. This information is not addressed in the answers to interrogatories or the deposition testimony.

The tenth paragraph of Ms. Calloway's declaration states:

> On February 21, 2008, Wheeler registered a new entity with the Department of Revenue for Washington State called Packard and Wheeler Group Benefits, LLC. Also, Wheeler incorporated the Packard and Wheeler Group Benefits, LLC on February 21, 2008. This was an entity wholly independent from any business relationship I had with Mr. Wheeler. Attached hereto as Exhibit D is a true and correct copy of a form printed from the Washington Secretary of State website, which indicates Packard & Wheeler Group Benefits, LLC was registered on February 21, 2008.

CP at 40. This information is not addressed in the answers to interrogatories or the deposition testimony. The formation of the new entity is corroborated by a printout from the Washington Secretary of State.

The eleventh paragraph of Ms. Calloway's declaration states:

> On or around February 26, 2008, Bret Wheeler threatened to change the locks and prevent my access to the files for which I was responsible to

> service.

CP at 40. There is no mention of this comment by Ms. Calloway in either her deposition or her answers to interrogatories.

The twelfth paragraph of Ms. Calloway's declaration states:

> As a result of Wheeler's actions, on or about February 26, 2008, I was faced with an impossible choice – (1) leave all health insurance files I serviced in the offices, and run the risk of directly violating state and federal insurance laws, being locked out of the business and exposing those files to violations of my client duties; or (2) take the file and attempt to negotiate proper handling of the information contained therein and the terms of the business split with Wheeler at a later time.

CP at 40. In Ms. Calloway's answer to interrogatory 23 she states, "At the advice of my previous attorney, I removed client files of which I was the writing agent of record, insurance carrier enrollment materials, and an HP printer." CP at 314. And in her deposition testimony she discusses at length how she removed files from the office. CP at 271 (Calloway Dep. at 56, lines 10-13).

The thirteenth paragraph of Ms. Calloway's declaration states:

> In order to avoid any violation of state and federal insurance laws, on or around February 27, 2008 I removed the files of health insurance clients for whom I acted as the agent of record. Upon receipt of valid written or electronic authorization to do so, or Court Order, I have transferred all files to Bret Wheeler.

CP at 41. Again, in Ms. Calloway's answer to interrogatory 23 she states, "At the advice

of my previous attorney, I removed client files of which I was the writing agent of record, insurance carrier enrollment materials, and an HP printer." CP at 314. And in her deposition she states that the files were removed on February 27 or 28, 2008. CP at 273 (Calloway Dep. at 64-65, lines 25-12).

The fourteenth paragraph of Ms. Calloway's declaration states:

> Attached hereto as Exhibit E is a true and correct copy of a letter dated March 19, 2008, which I sent to clients serviced during the partnership period.

CP at 41. In Ms. Calloway's deposition she admits that she sent letters out to every client account. CP at 272 (Calloway Dep. at 58, lines 10-14).

The major dispute here was over the existence of a partnership. Ms. Calloway first argued the nonexistence of a partnership and then her new counsel conceded that a partnership was in fact formed. And her latest declaration admits a relationship was formed. But the questions are when was it formed and when did it end. The previously stricken declaration then should not control Ms. Calloway's right to present facts in response to this motion for summary judgment. If portions of the declaration are objectionable then only those individual portions should be excluded and not the entire declaration.

We conclude that the court's decision to strike the declarations that Ms. Calloway

offered in opposition to Mr. Wheeler's motion for summary judgment was error, under any standard of review.

Grant of Summary Judgment

We review an order granting summary judgment de novo; so we engage in the same inquiry as the trial court. *Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 392, 879 P.2d 276 (1994). Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). As was already noted, we must view the facts and any inferences in a light most favorable to the nonmoving party. *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999).

The court here granted summary judgment to Mr. Wheeler after striking Ms. Calloway's declaration opposing the motion. The court was then free to reject Ms. Calloway's central argument that the partnership ended on February 25, 2008, along with her statutory duties under the Revised Uniform Partnership Act (RUPA), chapter 25.05 RCW. The court also ignored her argument that the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, has never been applied to business partners in this jurisdiction.

Breach of partnership claims

A partnership was formed between Mr. Wheeler and Ms. Calloway sometime around August 2006. The parties apparently assumed equal compensation and had equal responsibility. *Compare* CP at 6 *with* CP at 38-39. And Ms. Calloway apparently took approximately 200 client files from the partnership office on February 27, 2008. CP at 7. The question is when was the partnership actually dissolved and then to what extent did Ms. Calloway still owe duties to the partnership.

Under RUPA "[a] partner has the power to dissociate at any time, rightfully or wrongfully, by express will." RCW 25.05.230(1). A partner's dissociation is wrongful only if it is in breach of an express provision of the partnership agreement, or in the case of a partnership for a definite term or particular undertaking, before expiration of the term or undertaking. RCW 25.05.230(2). Here, there was no partnership agreement, let alone any express provisions or definite terms.

Ms. Calloway asserts in her declaration that she and Mr. Wheeler had a series of meetings in an attempt to organize in some formal way. Those efforts failed. According to her declaration, Ms. Calloway then notified Mr. Wheeler of her intent to end any partnership. Ms. Calloway introduced a series of letters she sent to Mr. Wheeler as evidence of the meetings and her intent to dissociate. She suggests that Mr. Wheeler also wanted a "clean split." CP at 39. Mr. Wheeler argues that the partnership had not ended

at all times material to this dispute. In support of his argument, Mr. Wheeler relies on a finding made by the previous judge on the injunction motion. That judge found that "'[t]he partnership of Packard & Wheeler Benefits Division has not been formally dissolved and wound up [as of October 3, 2008].'" CP at 512. The trial court's factual finding is not binding on this court; we conduct a de novo review for material issues of fact. CR 56(c). When all of these facts are viewed in a light most favorable to Ms. Calloway, it is likely she dissociated from the partnership on February 25, 2008, and Mr. Wheeler agreed to the separation.

A partnership is dissolved, and its business must be wound up, once a partner dissociates. RCW 25.05.300(1). And after dissolution, the partnership will continue to exist only for purposes of winding up the business. RCW 25.05.305(1). If the partnership did, in fact, cease to exist on February 25, 2008, as Ms. Calloway asserts, then it at least raises the question as to whether there was any agreement remaining to violate. This evidence, and the reasonable inference from it, presents a genuine issue of material fact sufficient to overcome the defendants' motion for summary judgment.

Breach of fiduciary duty claims

The next question is whether Ms. Calloway breached any duties to the partnership after she dissociated. Ms. Calloway argues that all of her fiduciary duties to the

partnership ended when she dissociated from the partnership because she did not participate in the winding up.

A partner owes a partnership a duty of loyalty and a duty of care. RCW 25.05.165. A partner's duty of loyalty to the partnership and other partners is limited to the following:

> (a) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
> (b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and
> (c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

RCW 25.05.165(2). Further, partners must refrain "from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." RCW 25.05.165(3).

A partner's duty of loyalty to refrain from competing with the partnership terminates upon dissociation. RCW 25.05.235(2)(b). And a partner's duty of loyalty to provide an accounting and to refrain from dealing with the partnership as a party having an adverse interest to the partnership continue, but "only with regard to matters arising and events occurring before the partner's dissociation, unless the partner participates in winding up the partnership's business."

RCW 25.05.235(2)(b), (c).

Here, Ms. Calloway argues that she was free to compete for the former partnership clients no later than February 25, 2008. And she asserts that because she has been actively excluded from the winding up of the partnership her duties are limited to "matters arising and events occurring before" her "dissociation." RCW 25.05.235(2)(c). A trier of fact could easily find that Ms. Calloway was not a part of the winding up of the partnership and was, therefore, free to continue dealing with her clients in direct competition with the dissolving partnership.

Violation of Computer Fraud and Abuse Act claims

The trial court also granted summary judgment and the associated costs and attorney fees on the alleged violation of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030.

A plaintiff "may establish a civil cause of action under the CFAA by demonstrating that a person has (i) 'knowingly and with intent to defraud,' (ii) accessed a 'protected computer,' (iii) 'without authorization,' and as a result (iv) has furthered the intended fraudulent conduct and obtained 'anything of value.'" *Pac. Aerospace & Elecs., Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1195 (E.D. Wash. 2003) (citing 18 U.S.C. § 1030(a)(4)). A "protected computer" includes a computer "which is used in or affecting

interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2)(B).

Ms. Calloway argues that the CFAA does not apply to business partners. She contends that Mr. Wheeler incorrectly relies on *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121 (W.D. Wash. 2000) to argue that the CFAA has been expanded to include such claims. She asserts that not only is the *Shurgard* case not binding on this court but also argues that it relies on a previous version of the CFAA. Br. of Appellant at 24.

In *Shurgard*, an employer of former employees alleged to have misappropriated trade secrets stored on the employer's computer sued the competitor who allegedly received the proprietary information through e-mails. The e-mails were sent by the former employees while still employed. Relying on various subsections of the CFAA, including 1030(a)(4), the *Shurgard* court found that the employee's misappropriation of trade secrets and the transmission of that information to a competitor via e-mail fell within the scope of the CFAA. The court concluded that liability under the CFAA was appropriate where a person "intentionally accesses a computer without authorization." 18 U.S.C. § 1030(a)(2).

Unlike the employees in *Shurgard*, Ms. Calloway had unlimited access to the computers as a partner/owner of the business. Under the CFAA, one "exceeds authorized

access" if, when accessing a computer with authorization, it uses the access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter. 18 U.S.C. § 1030(e)(6). In other words, a person must have either: (1) never been granted access to the computer yet still obtains access without permission, or (2) been granted access but loses authorization to access the computer when there is a breach of loyalty. *Shurgard*, 119 F. Supp. 2d at 1125-26.

Here again, there remain genuine issues of material fact as to whether Ms. Calloway dissociated, whether the partnership was dissolved, and whether she even owed a duty of loyalty to refrain from competition. If she did dissociate and the partnership was dissolved, then she did not owe the duty of loyalty to refrain from competition and the act of taking her client files would not be a violation of the CFAA. Furthermore, we do not know whether Congress intended that the simple act of erasing files from an individual computer operated within a dissolved partnership would trigger liability under the CFAA. *See* 18 U.S.C. § 1030. We therefore refuse to expand the scope of the CFAA.

Unjust enrichment claims and conversion claims

The genuine issues of material fact that remain also implicate Mr. Wheeler's claims of unjust enrichment and conversion. Ms. Calloway was authorized to access the

files she serviced in her capacity as a partner. She was also authorized to continue servicing those files after she dissociated herself from Mr. Wheeler. Additionally, Ms. Calloway did collect commissions on the accounts. But, a question remains whether it occurred at the expense of Mr. Wheeler. Both issues relate back to the question of when the partnership was dissolved and whether Ms. Calloway still owed duties to the partnership regarding her own accounts.

Damages and attorney fees

Ms. Calloway also challenges the damages and attorney fee calculations. The same summary judgment standards apply.

Mr. Wheeler submitted a declaration in support of his damages calculations using various assumptions related to predicted gross sales, the business sales value, equalization calculations, chargeable expenses, lease obligations, and certain out-of-pocket expenses. Notably, Mr. Wheeler used a three-year multiplier based on gross sales in determining the business value of his partnership with Ms. Calloway. Ms. Calloway filed a responsive declaration showing a significantly different business valuation approach with tax documents and e-mail correspondence from other insurance professionals. She also used a much lower multiplier than Mr. Wheeler. The factual differences are significant. We cannot say reasonable minds would reach but one conclusion regarding damages. We

therefore conclude the trial court also erred in summarily awarding damages and the related attorney fees.

We reverse the court's decision to strike Ms. Calloway's declaration, and associated sanctions, reverse the summary judgment, vacate the awards for damages and attorney fees, and remand for trial.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

_____
Sweeney, J.

WE CONCUR:

_____
Brown, J.

_____
Siddoway, J.