STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO.: WAL-24-0290

CAPITAL CITY RENEWABLES, INC. and
KIRIL LOZANOV,

Plaintiffs-Appellants,

v.

LILY BIRGITTA PIEL,

Defendant-Appellee

ON APPEAL FROM THE SUPERIOR COURT
WALDO COUNTY
DOCKET NO.: BELSC-CV-2022-00003

REPLY BRIEF OF APPELLANTS

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REPLY TO ARGUMENTS OF APPELLEE

I. CCR, Inc. and Kiril Lozanov Established Proximate Cause and Compensable Damages

Piel argues that all of Appellants' claims must fail because Appellants cannot establish proximate cause or compensable damages, that the failure to establish proximate cause is due to a superseding cause, and Appellants did not designate an expert witness to testify to their damages. All of Piel's arguments in this regard fail, as follows.

"Proximate cause requires a showing that 'the evidence and inferences that may reasonably be drawn from the evidence indicate that the negligence *played a substantial part* in bringing about or actually causing injury or damage and that the injury or damage was either a direct result *or a reasonably foreseeable consequence* of the negligence." *Johnson v. Carleton*, 2001 ME 12, ¶ 12, 765 A.2d 571 (emphasis added).

"Issues of foreseeability and proximate causation are generally questions of fact to be resolved by the jury." *Ames v. Dipietro-Kay Corp*., 617 A.2d 559, 561 (Me. 1992). "Moreover, each case must turn on its own facts and the jury as triers of the facts must apply its ordinary human experience to the facts revealed by the evidence." *Id.* As such, it would be inappropriate for a court to resolve a dispute on foreseeability or proximate cause at the summary judgment stage. At trial, a fact finder will be able to weigh the evidence and determine if, based on the evidence

presented, there was proximate cause, or whether the filing of the motion to modify was a superseding cause that relieves Piel from responsibility.

Even if the issue was appropriate on summary judgment, Piel's arguments would still fail. First, Piel attempts to cast all of Appellants' damages as related to the filing of the motion to modify by Sarah Lozanova, which is inaccurate. (Red Br. 21-28.) While Lozanov did first start to experience emotional distress and related conditions at the time the motion to modify was filed, the motion to modify related distress and associated damages are just one aspect of Lozanov's damages. The reason that Lozanov did not suffer emotional distress before the filing of the motion to modify is simply that he was not yet aware of Piel's actions. While Lozanova filed her motion to modify seeking a child support modification in July 2018, Lozanov did not become aware that it was Piel that had shared information with Lozanova triggering the filing until July 2019. (A. 19 ¶¶ 30, 33.)

Despite the timing of events, it is clear that Lozanov suffered damages as a direct result of Piel's actions and that his damages were a reasonably foreseeable consequence of Piel's actions. Lozanov had placed an enormous amount of trust in Piel by giving her access to his email account. (A. 78 ¶ 14.) Piel breached that trust by sharing information learned through her access to the emails and even forwarding emails to Lozanova. (A. 18-19, ¶¶ 26-28.) When Lozanov asked Piel if she had shared any information with Lozanova, she lied. (A. 19 ¶ 19.)

In his opposing statement of material facts, Lozanov makes clear the connection between Piel's actions and his damages. Lozanov stated that *Piel's actions* caused Lozanov to experience severe emotional distress and physical injury. (A. 81 ¶ 39.) Lozanov further stated that he sought treatment for his physical and mental injuries from multiple providers. (A. 105 ¶ 40.) He alleged that his productivity and ability to lead and manage CCR were affected, and he had to hire an additional assistant to help him perform his work duties. (A. 105 ¶ 41.) He also stated that his productivity and ability to lead and manage CCR was so reduced as a result of Piel's actions that CCR lost out on every other lead, costing it nearly half of its prior business opportunities. (A. 106 ¶ 43.) Although Piel denied this averment, she provided no citation to support her denial. (A. 106-107 ¶ 43.)

At the summary judgment stage, all reasonable inferences must be drawn in CCR's and Lozanov's favor. *Drilling & Blasting Rock Specialists, Inc. v. Rheaume*, 2016 ME 131, ¶ 29, 147 A.3d 824. Here, the reasonable inference can be drawn that Piel's outrageous breach of trust was a proximate cause of Lozanov's compensable damages—both related to and separate from the filing of the motion to modify. As a result, even if this court were to find that damages relating to the filing of the motion to modify specifically are not compensable or not proximately caused by Piel, Piel would not be entitled to summary judgment.

Second, Piel argues that she cannot be liable for Appellants' damages because the motion to modify and Lozanov's cross motion to modify were a superseding cause. (Red Br. 24.) "[T]he mere occurrence of an intervening cause does not automatically break the chain of causation stemming from the original actor's conduct. In order to break that chain, the intervening cause must also be a superseding cause, that is, neither anticipated nor reasonably foreseeable." *Ames v. Dipietro-Kay Corp*., 617 A.2d 559, 561 (Me. 1992).

Here, Piel cannot demonstrate that the family matter litigation was a superseding cause as a matter of law. Based on the nature of the relationship of the parties, it would be reasonably foreseeable that sharing information about a lucrative business deal with Lozanov's ex-wife would cause her to seek additional child support for their children by initiating a family matter action. Lozanov's own family matter filing was only filed in response to Lozanova's filing when he was already obligated to make financial disclosures. Finally, even if the court found that the family matter litigation was a superseding cause with regard to the damages relating to the motion to modify, it would not supersede causes of action for other damages that Lozanov suffered as a result of Piel's actions.

Further, Piel argues that Appellants were required to present expert testimony on the issue of damages, but then cites to case law that demonstrates that this is not the case. The case law cited by Piel specifically states: "*In most instances*, proof of

objective symptoms will require expert testimony to establish that the plaintiff's emotional injury qualifies for a diagnosis such as shock, post-traumatic stress disorder, or some other recognized medical or psychological disease or disorder." *Lyman v. Huber*, 2010 ME 139, ¶ 23, 10 A.3d 707 (emphasis added). (Red Br. 25.) Thus, the case law recognizes that not all cases require expert testimony. Moreover, the Appellants alleged other types of injury aside from emotional distress which Piel recognizes do not require expert testimony. Therefore, Piel's claim that Lozanov cannot establish any damages because no expert testimony has been presented fails.

In short, Lozanov has made out a prima facie case regarding proximate cause and compensable damages, and summary judgment on these grounds is inappropriate. When viewing the facts in the light most favorable to the Appellants, the arguments made by the Appellee fail.

II. CCR's Claims are not Barred by the Statute of Frauds

Piel argues that CCR's breach of contract claim fails because to the extent that any contract existed, it is unenforceable as a result of the statute of frauds because it was not to be performed within one year and therefore needed to be in writing. (Red Br. 36.) This argument misunderstands Maine's jurisprudence on the statute of frauds.

"Under Maine law [regarding] whether or not it would be possible for a contract to be performed within a year, the dispositive question is whether, under the

specific circumstances in question, the parties expressed or otherwise manifested an intent or understanding that the performance of the contract would take longer than a year." *Jones v. Adam*, 2007 Me. Super. LEXIS *9-10 (July 13, 2007) (citing *Great Hill Fill & Gravel Inc. v. Shapleigh*, 1997 ME 75 ¶ 5, 692 A.2d 928; *Marshall v. Lowd*, 147 A.2d 667, 671-72 (Me. 1958)). Raising the statute of frauds is an affirmative defense. *Baudanza v. Mood*, 496 A.2d 310, 311 (1985). As such, on summary judgment, Piel bore the burden of proving the affirmative defense. *Estate of Kay v. Estate of Wiggins*, 2016 ME 108, ¶ 11, 143 A.3d 1290. Because Piel introduced no evidence that the parties expressed or manifested an intent or understanding that the contract would take more than a year, she did not prove an affirmative defense based on the statute of frauds.

III. Lozanov had a Reasonable Expectation of Privacy in his Personal Emails

Piel argues that Lozanov had no reasonable expectation of privacy in his email account after supplying Piel access to that account. (Red Br. 32.) Piel argues that (1) Lozanov had no reasonable expectation of privacy because he had merged his work emails with his personal emails, and then gave Piel access and (2) other parties were copied on the emails. Both arguments are nonsensical. Piel admits that she agreed not to access any non-CCR email in exchange for access to the email account. As such, it was reasonable for Lozanov to maintain an expectation of privacy in those emails. Piel herself recognized that she had invaded Lozanov's privacy; when

Lozanov asked her if she had shared the contents of the email, she lied. Moreover, the fact that third parties were copied on the email does not remove Lozanov's reasonable expectation of privacy; if it did, no person would ever have any reasonable expectation of privacy in any email because there will always be another party with access to the email (the sender or the recipient).

Piel supports her arguments primarily by citing to cases that involve the privacy interests of *employees*. For example, Piel states "more to the point, as explained earlier, whether there is a reasonable expectation of privacy in emails turns on whether the emails are accessible by third parties." (Red Br. 34.) However, in making this argument, she cites to *Garrity v. John Hancock Mut. Life Ins. Co*., 2002 U.S. Dist. LEXIS 8343 *5 (D. Mass. May 7, 2002) and *McLaren v. Microsoft Corp.*, 1999 Tex. App. LEXIS 4103 (Tx. Ct. App. 5th Dist. May 28, 1999). Both *Garrity* and *McLaren* stand for the proposition that an *employee* had no reasonable expectation of privacy in e-mail messages transmitted over a company network accessible by a third-party. *Garrity* at *5; *McLaren* at *4. In *Garrity,* an employer had received a complaint about an employee's sexually explicit emails. The holding of the court was that "once defendant received a complaint about the plaintiffs' sexually explicit e-mails, it was required by law to commence an investigation" by reviewing the employee's emails. *Garrity* at *7. Thus, contrary to her assertions, the

cases cited by Piel do not support the broad contention that there is never an expectation of privacy in an email accessible by a third party.

Here, unlike in the cases cited by Piel, Lozanov was Piel's employer, not the other way around. Piel cites to no cases stating that employers have no reasonable expectation of privacy in their email accounts if accessed by employees. Obviously, there are policy rationales that undermine the proposition that an employee does not have a reasonable expectation of privacy from her employer in her work email (such as protecting other employees from harassment); those same policy rationales do not apply when an employee is accessing private emails of an employer.

Similarly, the Fourth Amendment case cited by Piel does not support her argument. In *Harper v. Werfel*, 118 F.4th 100 at *103 (1st Cir. 2004), a user's Coinbase account information had been revealed to the IRS in response to a so-called "John Doe" summons. The user argued that the IRS's investigative efforts infringed on his privacy in contravention of the Fourth Amendments. *Id.* There, the IRS has a legitimate interest in accessing the Coinbase account and used legal means—a summons—to do so. *Id.* In that context, the court explained the "third party doctrine"—that in a Fourth Amendment context, a person has no legitimate expectation of privacy in information voluntarily turned over to third parties. *Id.* * 107.

Here, Piel is not a law enforcement agent and had no legitimate interest in accessing Lozanov's emails. Moreover, she accessed the emails contrary to an agreement expressly reached with Lozanov. Lozanov had never voluntarily turned over the emails to her—in fact, he explicitly told her not to open the emails. Thus, the context and factual circumstances are highly distinguishable from a case involving a relationship between a financial entity and a customer where a federal summons has been issued.

In short, as described in Appellants' Blue Brief, the Appellants had a reasonable expectation of privacy in the emails accessed by Piel, and Piel's arguments to the contrary fail.

CONCLUSION

For the reasons set forth herein, Appellants believe that the trial court erred in granting Piel's Motion for Summary Judgment, specifically in finding that CCR and Lozanov failed to make a *prima facie* case on each of their claims, and that there were no genuine issues of material fact.

Appellants, Capital City Renewables, Inc. and Kiril Lozanov, respectfully request that the Superior Court's May 30, 2024, Order granting Defendant's Motion for Summary Judgment be vacated, and the matter remanded to the Superior Court for further proceedings.

Respectfully submitted this 27th day of December, 2024.

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CERTIFICATE OF SERVICE

Pursuant to Maine Rules of Appellate Procedure 7(c), the undersigned hereby certifies that on December 27, 2024, one electronic copy of the within and foregoing Appellant's Reply Brief was served on counsel for Appellee via email addressed to tssmith@lokllc.com, and that upon acceptance of this brief by the Maine Supreme Judicial Court, one copy will be served via mail addressed as follows:

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