Circuit Court for Montgomery County
Case No.: 420656V

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1185

September Term, 2017

TKA INC., ET AL.,

v.

CHRISTOPHER MCCAULEY BOWERS

Kehoe,
Berger,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: February 11, 2019

For the last seventeen years, at least, Christopher Bowers (appellee/cross-appellant) has been a martial arts instructor. He also teaches magic and runs magic camps for children. Those camps are sponsored by the Montgomery County Department of Recreation.

In 2001 Mr. Bowers began working, part-time, as a martial arts instructor for TKA, Inc., a small corporation that is in the business of providing martial arts instructions. TKA regularly does business with the Montgomery County and Howard County Departments of Recreation.

This appeal arises out of a third amended complaint Bowers filed in the Circuit Court for Montgomery County against TKA, Inc. ("TKA"); Dale Tompkins, President of TKA; and Kim Moake, Vice President of TKA (appellants/cross-appellees). Bowers complaint, insofar as is here relevant, contained four Counts: Count I – requesting a declaratory judgment; Count III – alleging tortious interference with what Bowers contended was a January 5, 2016 contract between Bowers and Montgomery County; Count V – alleging tortious interference by the defendants with an on-going business relationship between Bowers and Montgomery County; and Count VII – alleging defamation.

The case was tried before a jury in a three-day trial that began on May 30, 2017. At the conclusion of the plaintiff's case, the trial judge granted judgment in favor of the defendants as to Count VII, the defamation count. After the defendants' case concluded, the trial judge granted Bowers the declaratory judgment he requested. The court declared the rights of the parties to be as follows:

> If [d]efendant, TKA, Inc., had an enforceable non-compete agreement with the [p]laintiff, Christopher Bowers, the non-compete clause of that agreement expired three (3) years from October 18th, 2007.

The parties to this appeal do not take issue with the declaratory judgment that was granted.

At the end of the evidentiary phase of the trial, the defendants made a motion for judgment as to all remaining counts. The trial judge denied the motion as to Count III, which alleged that the defendant had tortiously interfered with a January 5, 2016 contract between Bowers and Montgomery County. The trial judge, however, granted defendants' motion for judgment as to Count V, which alleged tortious interference by the defendants with the business relationship between Montgomery County and Bowers.

The jury was instructed to consider two questions set forth on a special verdict sheet. The first question was: "Do you find that the [d]efendants intentionally interfered with the [p]laintiff's contract with Montgomery County?" The jury answered "yes" to that question. The second question concerned damages and the jury found that, as a result of the intentional interference with the January 5, 2016 contract, Bowers had suffered economic damages in the amount of $89,500, but had suffered no non-economic damages.

On June 9, 2017, the defendants filed three motions: Motion for Judgment Notwithstanding the Verdict, Motion for Remittitur and Motion for New Trial. Those motions were denied without a hearing on August 8, 2017. Defendants noted an appeal to this Court on August 17, 2017. Bowers filed a cross-appeal on August 28, 2017. The questions presented by defendants, which we have reordered are:

I. Did the trial court err in denying defendants' motion for judgment at the close of testimony when the appellee failed to prove legally sufficient evidence to support a damage award for intentional interference with an existing contract.

II. Did the trial court abuse its discretion in summarily denying appellants' motion for judgment notwithstanding the verdict after the jury returned an unsupported verdict of $89,500 as economic compensation for a potential contract with a gross value of $12,325.

III. Did the trial court abuse its discretion in summarily denying appellants' motion for remittitur after the jury returned an unsupported verdict of $89,500 as economic compensation for a potential contract with a gross value of $12,325.

Bowers, *pro se*, raises four issues that we have reordered. The issues, as phrased by Bowers, are set forth in the following statements:

I. That the Circuit Court erred in disallowing punitive damages and did not properly weigh evidence of *Actual Malice.*

II. That the Circuit Court was incorrect in disallowing damages for Defamation Per Se.

III. Mr. Bowers challenges the discretion of the court in making a letter from his counsel to TKA and their correspondence back inadmissible. This letter satisfies tort elements and demonstrates malicious intent.

IV. Mr. Bowers questions the understanding of the trial court of the *Master Service Agreement* contract between Mr. Bowers and the County. This misunderstanding of the *Master Service Agreement* gave rise to legal errors, including the inappropriate dismissal of counts and the court seeking to improperly reduce damages Mr. Bowers was entitled to.

I.

EVIDENCE INTRODUCED AT TRIAL

On April 27, 2001, Bowers signed an Employment Agreement ("Agreement") with TKA. The Agreement contained a restrictive covenant stating that for a period of three years after the termination of the employment relationship, Bowers was prohibited from competing with TKA's business at any location whose "ten (10) mile radius [would] invade or overlap any area within a ten (10) mile radius of any business location" of TKA. On October 17, 2007, Bowers resigned from TKA and ceased performing any work for them.

Almost four years later, on September 16, 2011, Bowers again began teaching martial arts for TKA. When Bowers rejoined TKA, he did not sign a new Agreement with them.

On September 8, 2014, Bowers once again resigned from TKA. He began teaching karate under the name "Zen Budo Karate." Shortly thereafter, Kim Moake (TKA's Vice President) phoned an agent of the Montgomery County Department of Recreation, an organization with which TKA regularly did business, and advised that Bowers had left the employ of TKA, and that he was currently subject to a non-compete agreement. There was no evidence introduced at trial, however, that she notified Howard County of the non-compete agreement even though TKA regularly did business with that county's Department of Recreation.

On June 30, 2015, counsel for TKA wrote the Montgomery County Department of Recreation a letter that said, in material part, the following:

> It has come to our attention that . . . Bowers has applied to teach martial arts through the Montgomery County Department of Recreation. Mr. Bowers is a former employee of [TKA] who is subject to a non-competition agreement. Mr. Bowers' agreement precludes him from offering martial arts instruction in Montgomery County in competition with [TKA].
>
> I will appreciate your office notifying us if Mr. Bowers has applied or does apply to instruct students in any martial arts program for or through the Montgomery County Department of Recreation.

On September 8, 2015**,** Bowers entered into a contract negotiated by Sara Swarr, a representative of Montgomery County, whom Bowers dealt with in regard to a program called "Excel Beyond the Bell" ("EBB"). In regard to the EBB program, Bowers' company was hired to teach martial arts for three (3) months at Montgomery Village Middle School, Argyle Middle School, and Roberto Clemente Middle School. The EBB program was open to students at the aforementioned middle schools. The EBB contract was documented by a direct purchase order and a letter of intent showing that the services were to be provided between September 28, 2015 and January 22, 2016. For those services, Bowers was to be paid $9,945.

On December 26, 2015, Bowers, and Sara Swarr, began to negotiate, by email, a contract for Bowers to provide karate instructors for the EBB program starting in January of 2016. Those emails were admitted into evidence at trial as plaintiff's Exhibit 9 and formed the basis for Bowers' tortious interference with contract claim (Count III).

The first email, dated December 26, 2015, was from Bowers and read in material part as follows:

> I would like to put us on the schedule for the class you suggested. We do have staff available for that particular class. . . . . I can come down in price

slightly but not much. Part of that is the cost of hiring new staff and additional uniforms, belts, and certificates that will be required, but I'm open to the discussion.

The cost if we do the same thing would be $13,333 or roughly $250 a class. I don't think that is far off from the $10,000 limit. We are just adding the one class.

What did you have in mind in terms of pricing?

Ms. Swarr replied in a December 29, 2015 email:

$225 gets us closer to the $10,000 mark but it[']s still above. I have seen contracts I have seen contracts around the [$]13,000 get approved and regretted. I would not like to chance it the 50/50 up in the air depending on which financial specialist gets your paperwork. You will also get 2 LOI's [letter of intent] even though when we break it out on 2 LOI's They will be submitted at the same time.

Please let me know.

[A]nd to confirm, you can [d]o 2 locations on the same day?

Less than two hours later, on December 29, 2015, Bowers sent an email, saying:

Yes we can do 2 locations on the same day, no problem. My second in command Kris Ruiz has been helping out every now and then at all three locations and is ready to teach a class of his own (the kids love him).

Just to be clear we mean 225 per class for the NEW class ONLY, correct?

Total value would be (I think, not sure) would be around $10,270[]?

If so that's fine.

Could you get me a total quote for all three?

The next day at 4:24 p.m., Ms. Swarr replied:

Chris I was asking for $225 across the board for all classes.

> [T]hat would be: $11,925 total.

About an hour later, Bowers sent an email to Ms. Swarr that read:

> That sounds very close to what we need. We need just $400 more to make this work budget wise for my company.
>
> So that would be $12,325.
>
> I'm sorry to give you such an exact number but I am crunching every penny here, and we would love to do the class.

Ms. Swarr responded that same day: "Ok . . . I think we can do that."

On January 2, 2016, Bowers sent an email saying:

> GREAT!
>
> Do you need to break it down into a fee per class and have me put in a[n] email of intent? Anything else I need to do?
>
> Thanks!

In addition to the EBB program, Bowers was interested in contracting with the Montgomery County Recreational Department to have his organization provide karate instructors for high school students. The anticipated karate program would be fee based, meaning that a fee would be paid for each student in attendance and the fee would be divided, in some fashion, between Montgomery County and Bowers' company. In regard to the possible fee based contract, Bowers dealt with Patricia Walsh, who was employed by the division in the Recreation Department that oversaw class programs offered in the Department's guide book. She testified at trial that she did planning for programs and decided what classes to have, and supervised the rosters and the enrollment in various programs. As part of her job she discusses with contractors, like Bowers, the prices they

would charge for their work, but, as part of her job, she did not negotiate the contract prices. In a fee based program, such as the one Bowers proposed, the county keeps a portion of the fee and the contractor keeps the rest. She had discussions with Bowers about a fee based program and discussed locations where classes might be held. But during their negotiation, nothing was decided as to where the classes were to take place, how many students were to attend, what fees would be charged or how the fees would be split.

Sometime, at the beginning of 2016, Ms. Walsh was told to break off negotiations with Bowers because TKA had informed the county that Bowers was bound by a non-compete agreement. During her testimony, the following exchange occurred:

> Q. [Counsel for Bowers]: In your opinion, the way the negotiations had been progressing, would it have resulted in a contract with Mr. Bowers, if not for you being told to stop the discussions?
>
> A. [Ms. Walsh]: Most likely, yes, we still would have to go through insurance.
>
> Q. [Counsel for Defendants]: Objection.
>
> THE COURT: Sustained. I'm sorry, when he objects, you have to stop speaking.
>
> [Ms. Walsh]: Oh sorry, I didn't hear that.

Bowers testified, without contradiction, that when he left TKA for the last time, he did not have a copy of the Agreement. He repeatedly requested that TKA send him a copy of the Agreement containing the non-compete clause but the defendant steadfastly refused to send him a copy until he hired a lawyer. During their testimony, the individual defendants gave no reason for their failure to send Bowers a copy of the Agreement.

Bowers' wife, Dannel Wilson, testified as to the emotional stress and mental anguish suffered by her husband as a result of TKA's actions in interfering with his business relationship with Montgomery County. According to Ms. Wilson, Bowers became anxious, had trouble sleeping, and his personality changed from sunny (his nickname was "sunshine") to moody and morose. In her words, her husband "became a shell of the man I married."

In her testimony, Ms. Moakes praised Bowers calling him a "good instructor," with good, creative ideas. She and Bowers "got along well." Both Moake and Tompkins testified that they bore no ill will toward Bowers.

Moake testified that the Agreement was prepared by a lawyer and she had "no reason to believe that it wouldn't have been done properly." She stressed that the Agreement was later reviewed by other counsel who did not voice any objections to it. There was no evidence introduced, however, showing that the lawyer who, on behalf of TKA, wrote the June 15, 2015 letter, or any other lawyer whom the individual defendants consulted, knew prior to the time that the defendants interfered with Bowers' contractual relationship with Montgomery County, that: 1) after Bowers signed the Agreement, he left TKA's employment for a period of almost four years before he rejoined that organization; or 2) when Bowers again became employed by TKA, he never signed a new employment contract.

Additional facts will be added below to answer the questions presented.[1]

II.

A. Preliminary Matters

In his appendix, Bowers attached numerous items, such as deposition excerpts, contracts and other material that were not introduced into evidence at trial. As an example, Bowers attaches to his appendix what he contends to be a master contract and in his argument he relies on provisions in that contract, even though the contract was never admitted into evidence. Appellants/cross-appellees have asked us to disregard those materials as well as any of Bowers' arguments based thereon. That request shall be granted.

Additionally, Bowers, in his reply brief, included a "Motion to Dismiss" appellants' appeal because "TKA does not have the legal basis for vacating or altering the judgment." He also asserts "TKA has no new arguments in response to Mr. Bowers' brief which proved that the elements of Tortious Interference With the January 5, 2016 Contract (Count 3) have been satisfied." Even if those assertions were true, which they are not, they would not provide a basis to dismiss an appeal. Therefore, that motion shall be denied.

[1] During oral argument, Bowers was asked by a member of this panel about a "master contract" that he had mentioned in argument. In his answer to the court's question, Bowers indicated that he contended that the defendants had interfered with a three-year master contract that he had been negotiating with the county prior to the defendants' interference with that prospective contract. In that regard, it appears that Bowers was talking about allegations that his attorney had made on his behalf in Paragraph 57 of Count IV of the Complaint. But at trial, Bowers' counsel withdrew that Count. Because Count IV was withdrawn, Bowers was not entitled to damages as a result of the alleged interference with the master contract.

B. First Issue Raised By Appellants/Cross-Appellees
Count III – Tortious Interference With Contract

To prove that a defendant has tortiously interfered with a contract, the plaintiff must prove six elements:

> (1) The existence of a contract or a legally protected interest between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render impossible the performance of the contract; (4) without justification on the part of the defendant; (5) the subsequent breach by the third party; and (6) damages to the plaintiff resulting therefrom.

Brass Metal Products, Inc. v. E-J Enterprises, Inc., 189 Md. App. 310, 348 (2009) (and cases cited therein).

At trial, counsel for Bowers claimed that the email exchange set forth in Plaintiff's Exhibit 9 amounted to a binding contract. He asserts that the defendants interfered with the EBB contract Bowers had negotiated with Ms. Swarr, on behalf of the Montgomery County Recreation Department. At trial, and in the briefs, the EBB contract is referred to as the January 5, 2016 contract and, for convenience, we will use that designation. But as far as we can determine from the record, nothing relevant to this case happened on January 5, 2016.

Appellants/cross-appellees argue that the trial judge erred in allowing Count III to go to the jury. They contend that their motion for judgment, which was made at the conclusion of the evidentiary phase of the trial, should have been granted. Two main reasons are advanced. First, they claim that, contrary to Bowers' contention that a January 5, 2016 EBB contract with Montgomery County existed, no such contract was proven to

exist. Second, even assuming, *arguendo*, that a contract existed, Bowers failed to prove, with reasonable certainty, what damages he suffered as a result of the breach of that contract.

The email chain between Ms. Swarr and Bowers showed: 1) although Ms. Swarr's job was to negotiate contracts for the county, in order for the contracts to be binding she needed approval of any contract she negotiated from one of the county's "financial specialists," see email from Ms. Swarr sent at 9:45 a.m. on December 29, 2015; 2) if a contract was approved by a "financial specialist," the county required that two letters of intent ("LOI") were to be signed; and 3) her email of December 30, 2015 was not definitive inasmuch as she said "I <u>think</u> we can do that," i.e., pay $12,325 for sessions lasting three months. What was needed in order to have a binding contract with Montgomery County was also shown by the prior EBB contract that the county entered into with Bowers. Introduced into evidence at trial was a purchase order evidencing the earlier contract that spelled out exactly what the county expected Bowers to do for the $9,945 payment they agreed to make. Also introduced was a letter of intent in regard to the $9,945 contract. That letter of intent was signed by both Bowers and by a representative of the county. Additionally, Bowers' last email to Ms. Swarr, dated January 2, 2016, showed that he was not sure, as of that date, what further information or paper work he needed to supply in order to have a binding contract.

Taking the evidence in the light most favorable to Bowers (Md. Rule 2-519), all he proved was that by January 2, 2016, he was close to having a binding contract with the

county but he did not prove he had such a contract inasmuch as there was no proof that the county had agreed to be bound by any agreement negotiated by Ms. Swarr. Under such circumstances, it is clear that if Bowers had sued Montgomery County for breach of the second EBB contract, based on Exhibit No. 9, he would have been unsuccessful.

Because proof of an existing contract with Montgomery County was an essential element that Bowers needed to prove in order for Count III to be considered by the jury, we hold that the trial judge erred in denying the defendants' motion for judgment as to that count.

Bowers, of course, disagrees with the above analysis. Citing Exhibit No. 9 as his only source, Bowers makes the following statement:

> On January 6 or 7, 2016, Ms. Swarr contacted Mr. Bowers and said that the County was reneging and he could not teach the EBB class because TKA had shown Montgomery County the April 27, 2001 contract falsely asserting that he was still subject to the three-year non-compete clause, notwithstanding that it had expired on October 17, 2010. She said that it was because TKA had shown the invalid contract to Montgomery County and threatened to enforce it.

Exhibit 9 does not show what happened after January 2, 2016 in regard to the EBB program.[2] And, at trial, on direct examination, Bowers' counsel asked him if he had had any further discussions with Ms. Swarr after January 2, 2016. Bowers answered "Yeah,

[2] Bowers, in an appendix to his brief, attaches several emails between himself and Ms. Swarr. That email chain starts on January 5, 2016 and ends on January 20, 2016. None of these emails were introduced into evidence at trial and Bowers should not have included them in the appendix. We note, however, that some of those emails, if they had been admitted into evidence, would have strengthened defendants' argument that there was no binding contract entered into between Ms. Swarr, on behalf of the county, and Bowers.

not in regard to completing the purchase order. We were done with our negotiations. There was nothing more to do on my end and I was just waiting for her to send the purchase order receipt. We did have discussions about something else after this."

Bowers went on to say that he never received the purchase order.

Next, the following short exchange occurred:

> Q. [COUNSEL FOR BOWERS]: Did you ever, did this second session of EBB lessons come to fruition?
>
> A. [BOWERS]: No.
>
> Q. [COUNSEL FOR BOWERS]: Why not? In your own words[.]
>
> A. [BOWERS]: TKA interfered with it.
>
> [DEFENSE COUNSEL]: Objection. Move to strike that, Your Honor.
>
> THE COURT: Overruled. That's his opinion that they interfered with it.
>
> Q. [COUNSEL FOR BOWERS]: And when you say TKA interfered, what exactly did they claim?
>
> A. [BOWERS]: They claimed that I was under a non-compete and that that's all that I know that they claimed.

Bowers' opinion, as expressed in the above exchange, plainly did not prove that he had a binding contract with Montgomery County because, *inter alia*, he never proved that Ms. Swarr's supervisor approved the contract.

Bowers also makes the following argument concerning the existence of a binding contract:

> TKA's claim that Mr. Bower[s'] contract with EBB is only based on "an email chain" is preposterous. Mr. Bowers had a Martial Arts program in place with EBB, and contract renewals with Montgomery County were a

> matter of course, as testified to by both Mr. Bowers and TKA. Secondly, Mr. Bowers, TKA, and the County all knew that Martial Arts programs are multi-year programs. This is why the County has a three[-]year Master Contract in place with each contractor, including both TKA and Mr. Bowers. Neither TKA nor Mr. Bowers has any other form of contract with the County, and all negotiations verbally or in writing thus create subcontracts which are incorporated into the Master Contract. Any time there is mutual agreement by both parties to provide services, these services incorporate under the Master Contract.

None of the words that we have underlined in the above quote are supported by anything in the record.

Bowers' next argument in support of his contention that a valid EBB contract existed with Montgomery County is as follows:

> The idea that each contract being renewed was up in the air is also preposterous. Taking a successful martial arts program and cancelling it represented serious harm to the Montgomery County EBB program and its underprivileged grant based students. The County clearly wanted a year's long program, as all Martial Arts programs are yearlong programs, operating continuously and in perpetuity. TKA's Master Contract has been going for Decades. Mr. Bowers has had a Master Contract with the County for more than a decade. The idea that the continuance of contracts with Montgomery County is up in the air is beyond preposterous. TKA has entered no evidence into the record demonstrating that Mr. Bowers'[] contract would end absent TKA's unlawful interference.

None of the alleged facts set forth in the underlined portion of the last excerpt are supported by anything in the record. Moreover, the defendants did prove that the first EBB contract expired on January 22, 2016 and that, if Bowers wanted to continue the EBB program, he needed to negotiate a new contract.

Even if Bowers had proven that actions of the defendants caused the breach of the EBB contract with Montgomery County, he would not have been entitled to succeed as to

Count III because he did not sufficiently prove damages (element six). In *Rite Aid Corp. et al. v. Lake Shore Investors*, 298 Md. 611, 621 (1984), the Court of Appeals expressly adopted Restatement (Second) of Torts § 774A. The *Rite Aid* Court said,

> Section 774A reduces Prosser's view to specifics. It provides:
>
> > "(1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for
> >
> > (a) the pecuniary loss of the benefits of the contract or the prospective relation;
> >
> > (b) consequential losses for which the interference is a legal cause; and
> >
> > (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.
> >
> > (2) In an action for interference with a contract by inducing or causing a third person to break the contract with the other, the fact that the third person is liable for the breach does not affect the amount of damages awardable against the actor; but any damages in fact paid by the third person will reduce the damages actually recoverable on the judgment."
>
> Comment a points out that "[T]his Section states only the rules applicable to the recovery of compensatory damages. Since the tort is an intentional one, punitive damages are recovered in these actions under appropriate circumstances."

Id. at 620 (footnote omitted).

Bowers failed to prove, with reasonable certainty, what pecuniary damages he suffered as a result of the (assumed) breach of contract. Gross receipts (in this case $12,325) that Bowers lost by not being able to provide the county with three months' worth of services, do not equal lost profits. From plaintiff's Exhibit No. 9, the email chain between Bowers and Ms. Swarr, we know that if the contract had been approved by the county, Bowers would have incurred, in his words, the cost of "hiring new staff" and the expense of additional uniforms, belts and certificates. The jury was given no information

as to what those costs were. Therefore, it is impossible to know what profits Bowers lost because of the alleged breach.

It is true, of course, that Bowers was not restricted to proof of lost profits. Bowers could have attempted to prove "consequential losses for which the interference [was] a legal cause." But Bowers produced no evidence concerning consequential damages. Moreover, the jury found that Bowers had suffered no non-economic damages, which meant that the jury rejected Bowers' claim for emotional distress or harm to his reputation caused by the (alleged) interference with the June 5th contract.

Bowers claims that his proof of damages was adequate. He first argues:

> At trial, the jury heard substantial testimony regarding the monetary losses Mr. Bowers suffered due to TKA's intentional interference. Mr. Bowers testified that he had already completed one contract starting in September 2015 for martial arts with Montgomery County in the amount of $9,995. The jury saw the correspondence between Mr. Bowers and Montgomery County negotiating a new contract for $12,325. The evidence showed that the new contract was larger than the previous one – it included more locations, more students and was worth more money. Also, Ms. Walsh testified that she would have continued to do business with Mr. Bowers if TKA had not interfered.[3]

Nothing in the argument just quoted rebuts the argument by the appellants/cross-appellee that Bowers failed to prove, with reasonable certainty, what damages he suffered due to the alleged breach of the January 5 contract. Bowers also argues:

> Moreover, Mr. Bowers has not had any further karate contracts with Montgomery County since the beginning of 2016 when the tortious

[3] The testimony of Ms. Walsh, quoted at page 8, *supra*, did not concern the EBB contract, but concerned a proposed fee based contract; therefore, that testimony was irrelevant to the issue as to whether Bowers had adequately proven damages for interference with the EBB contract alleged in Count III.

> interference with his January 5 contract occurred. In approximately a four-month period, Mr. Bowers had been awarded over $22,000 in contracts for teaching karate classes for Montgomery County ($9,995 for the class he taught in September 2015 and $12,325 for the class he would have taught but for TKA's tortious act). The jury had ample evidence before it of the monetary losses that Mr. Bowers suffered that reasonably flowed from TKA's tortious interference in the January 5, 2016 contract.

That argument concerns lost gross receipts. But the argument overlooks the fact that Bowers was not entitled to recover the amount of the gross receipts he would have received nor was it permissible to allow the jury to speculate as to what amount Bowers would have earned from future contracts with the county.

Because Bowers failed to prove that the defendant interfered with an existing contract with Montgomery County, we hold that the trial judge erred in failing to grant appellants'/cross-appellees' motion for judgment as to Count III. That holding makes appellants'/cross appellees' questions II and III moot.

C. Bowers' Cross-Appeal

I. Punitive Damages

Bowers asserts that the trial court erred, in regard to Count III, by failing to allow the jury to consider punitive damages. Because Bowers failed to prove that the defendants' tortiously interfered with a contract as alleged in Count III, he was not entitled to the award of damages of any type, including punitive damages, as to that count.

II. Defamation

In Count VII of Bowers' complaint, he alleges that the defendants defamed him "[i]n their communications to Howard County . . . [by making] statements claiming that

[p]laintiff was bound by a covenant not to compete and therefore [he] could not lawfully provide martial arts instruction services to Howard County." The trial court dismissed Count VII and for good reason. We say this because Bowers failed to prove that any defendant made the alleged defamatory statement to any agent of Howard County.[4]

III. Failure to Allow Bowers to Introduce Letters from Counsel

At trial, counsel for Bowers tried to have two letters admitted into evidence. The first letter (plaintiff's Exhibit 15), dated January 12, 2016, was from Bowers' counsel and was addressed to two of the appellants, Dale Tompkins and Kim Moake. At the beginning of the letter, counsel for Bowers, Philip B. Zipin, Esquire, stated that he and his firm had been retained by Bowers to bring a claim against TKA for unpaid wages under the Maryland Wage Payment and Collection Law, and for tortious interference with a contract. In regard to the tort claim, Mr. Zipin complained that despite several requests, TKA had failed to send Bowers a copy of the contract containing the non-compete clause. Mr. Zipin asked for a copy of the non-compete Agreement and opined that whether a non-compete contract existed or not, it was "highly unlikely that any actions by my client would run afoul of any legitimate restrictions against competition." Counsel then stated that "TKA has no legitimate interest in preventing Mr. Bowers [from] providing services to the clientele that my client is serving." He also wrote that TKA's conduct in misrepresenting

[4] In his brief, Bowers claims that he did prove that the defamatory statements were made by TKA to an agent of Howard County. In support of that claim, he relies on an excerpt from a deposition given by Kim Moake, TKA's Vice President. That deposition excerpt was not read to the jury or otherwise placed in evidence and therefore Bowers should not have made reference to that excerpt when he filed his brief.

Bowers contractual obligations must "cease and desist" and all reasonable steps must be taken by TKA to rectify the injuries suffered by Bowers.

The letter then segued into a discussion as to whether TKA had violated the Maryland Wage Payment and Collection Law. After that discussion, Mr. Zipin made a demand for $1,000 in attorney's fees together with $2,000 for wages allegedly owed. In addition, Mr. Zipin said that his client would like to settle the case.

Counsel for defendants objected to plaintiff's Exhibit 15 being admitted. He characterized the letter as one where plaintiff's counsel was just "flexing his muscle" and claimed that the letter contained inadmissible settlement discussions. Counsel for Bowers replied that the letter was not "marked as settlement communication." Counsel for Bowers also said that the letter supported Bowers' testimony concerning the efforts Bowers had made to obtain a copy of the contract. At the bench, the trial judge went over the letter sentence by sentence, and concluded that much of what was in the letter was irrelevant, concerned counts that had already been dismissed, or simply duplicated prior testimony. Accordingly, the court sustained defense counsel's objection.

Plaintiff's Exhibit 14 was a letter from counsel for the defendants, Dennis M. Ettlin, Esquire, in which he responded to Mr. Zipin's letter. In his reply letter (plaintiff's Exhibit 14), dated January 19, 2016, defense counsel enclosed a copy of the Agreement that included the non-compete clause. Mr. Ettlin stated that his client expected Bowers to comply with the terms of the contract and denied that TKA owed Bowers any back wages.

Bowers now contends that the trial judge committed reversible error in failing to admit plaintiff's Exhibit 14 and 15. The letter from Mr. Zipin was inadmissible for several independent reasons. First, much of it contained inadmissible hearsay concerning what Bowers had told Mr. Zipin. A trial judge does not have discretion to admit such evidence. Second, more than one-half of the letter concerned a claim that had been dismissed, i.e., the claim that TKA had violated the Maryland Wage Payment and Collection Law. That portion of the letter was both irrelevant and prejudicial. Third, much of the letter contained expressions of opinions by Mr. Zipin. His opinions were inadmissible because: 1) he was not shown to be an expert (*see* Md. Rule 5-703); and 2) the opinion of a witness like Mr. Zipin, who was not qualified as an expert, was inadmissible under Md. Rule 5-701, inasmuch as Mr. Zipin's testimony, as a non-expert, was not "rationally based" on the perception of the witness (*see* Md. Rule 5-701): instead, the lay opinions were based on what Bowers told Mr. Zipin.

The letter from Mr. Ettlin, was inadmissible because it contained irrelevant discussions about the alleged violation of the Maryland Wage Payment and Collection Law. Secondly, much of the letter contained inadmissible opinions or was cumulative.

In his brief, Bowers sets forth the reasons he contends that both letters should have been admitted:

> The impact, on the truth and justness of Mr. Bowers' case was severely impacted by the exclusion of Mr. Bowers' *Cease and Desist* letter [plaintiff's Exhibit 15]. The letter speaks crucially to intent, and the intent, specifically, of TKA deliberately causing Mr. Bowers economic harm, which demonstrates *actual malice*.

> The [c]ircuit [c]ourt did not perceive that anything in the letter was not already testified to and considered the letter redundant. However TKA capitalized on the suppression of the letter by sewing [sic] doubt as to if they knew about the contract or knew about specifics of the contract, both at trial and in the current appeal.[5]
>
> Mr. Bowers begging TKA to tell the county he should be allowed to teach classes, TKA refusing and continuing to interfere, completely demonstrates every element of both the [t]ort of *Tortious Interference with Business [R]elations and Tortious Interference with Contract.*
>
> It is absolutely essential in a new trial that a [j]ury see these two documents to see that TKA was made aware of Mr. Bowers' coming financial loss and was indifferent to the contract being cancelled. It is also essential that this appeals court take this evidence into account.

At trial Bowers' counsel was given a chance to explain why plaintiff's Exhibits 14 and 15 should be admitted. As already mentioned, counsel said the letter from Mr. Zipin was admissible because it corroborated Mr. Bowers' testimony that he had to hire an attorney to get a copy of the contract. This fact was already in evidence and was not disputed. Secondly, in regard to the letter from defense counsel to Mr. Zipin, counsel for Bowers maintained that the letter should be admitted because it corroborated Bowers' testimony as to when he first received a copy of the contract. But this too, was a matter not in dispute and was cumulative as to what Mr. Bowers had already said in his testimony. Notably, none of the reasons given by Bowers' counsel for admitting the letters are the same, or similar to, the reasons Bowers now raises in his brief. Compare Md. Rule 8-

[5] Mr. Zipin's letter did not mention any specific contract with which (his client claimed) the defendants were interfering.

131(a) (except for certain jurisdictional matters, ordinarily an appellate Court will not decide any issue that was neither raised nor decided below).

For the above reasons, we hold that the trial judge did not err when he ruled that plaintiff's Exhibits 14 and 15 were inadmissible.

IV. Dismissal of Count V – Tortious Interference with Business Relationship

In his brief, Bowers states, under the title "Questions Presented for Cross[-]Appeal by Mr. Bowers," the following:

> Mr. Bowers questions the understanding of the trial court of the *Master Service Agreement* contract between Mr. Bowers and the County. This misunderstanding of the *Master Service Agreement* gave rise to legal errors, including the inappropriate dismissal of counts and the court seeking to improperly reduce damages Mr. Bowers was entitled to.

In support of that statement, Bowers proceeds to argue that because he proved every necessary element needed to prove tortious interference with business relationship, the trial judge erred in granting judgment in favor of the appellants/cross-appellees as to Count V.

The appellants/cross-appellees, in their reply brief, interpret Bowers' cross-appeal as presenting the following issue:

> Whether the trial court erred in granting judgment in favor of defendants for tortious interference with business relationships when plaintiff produced no evidence of actual malice or unjustified acts.

At oral argument, Bowers agreed that appellants/cross-appellees had properly framed the issue presented. Under these circumstances, we shall resolve the issue as phrased by appellants/cross-appellees.

A claim for tortious interference with economic relations requires proof of four elements, which are:

> '(1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.'

Alexander v. Evander, 336 Md. 635, 652 (1994) (quoting *Willner v. Silverman*, 109 Md. 341, 355 (1909)). Maryland courts have emphasized that a plaintiff must prove both a tortious intent and that the alleged interference "was accomplished through improper means." *Lyon v. Campbell*, 120 Md. App. 412, 431 (1998) (citing *inter alia*, *Macklin v. Robert Logan Assocs.*, 334 Md. 287, 301 (1994)). Notably, however, as to Count V, Bowers was not required to prove that the defendants interfered with an existing contract he had with Montgomery County.

Appellants'/cross-appellees' claim that the trial judge was correct when he granted judgment in their favor as to Count V because, in their view, Bowers failed to prove "tortious intent and improper or wrongful conduct" on the part of the defendants. Citing *Macklin v. Robert Logan Assocs.*, 334 Md. 287, 301 (1994), appellants'/cross-appellees' assert: "[t]ortious intent alone, defined as an intent 'to harm the plaintiff or to benefit the defendant at the expense of the plaintiff,' is not sufficient to turn deliberate interference into a tort. The defendant must interfere through improper or wrongful means." Importantly, appellants/cross-appellees do not claim that Bowers failed to prove any other element of that tort.

Here, taking the evidence as we must in the light most favorable to Bowers (*see* Md. Rule 2-519(b)), tortious intent was shown. After all, Bowers proved that on several occasions, an agent of TKA contacted an agent of Montgomery County to report that Bowers was bound by a non-compete contract. TKA's agents did this, it can be inferred, because TKA directly competed with Bowers for the karate instruction business and hoped that it would be awarded the contract(s) that Bowers was negotiating. In fact, in one instance, an agent of TKA approached a karate instructor that worked for TKA and asked him if he was interested in teaching a class formerly taught by Bowers.

The parties are at odds as to whether Bowers proved that TKA's agents interfered through "improper or wrongful means." In *Alexander*, 336 Md. at 657, the Court said:

> [W]rongful or malicious interference with economic relations is interference by conduct that is independently wrongful or unlawful, quite apart from its effect on the plaintiff's business relationships. Wrongful or unlawful acts include common law torts and "'violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.'" *K & K Management v. Lee*, [] 316 Md. [137, 166 (1989)], quoting Prosser, *Law of Torts*, § 130, 952-953 (4th ed. 1971).
>
> In addition, "actual malice," in the sense of ill will, hatred or spite, may be sufficient to make an act of interference wrongful where the defendant's malice is the primary factor that motivates the interference.

(Some citations omitted.)

Bowers contends, *inter alia*, that TKA's acts of interference were "wrongful" within the definition set forth in *Alexander* because the statements constituted fraud. "'[F]raud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.'" *Martens*

Chevrolet v. Seney, 292 Md. 328, 334 (1982), quoting *Derry v. Peek*, 14 App. Cas., 337, 374 (1889) and citing *Cahill v. Applegarth*, 98 Md. 493 (1904).

The trial judge, when he granted judgment in favor of the defendants as to Count V, opined that Bowers had not "come remotely close to proving fraud" because the defendants "believed that they had a valid non-compete contract."

In our view, there was a jury issue presented as to whether the defendants, without regard as to whether the representation was true, made a careless and reckless representation that Bowers was bound by a non-compete agreement. The Agreement was not complicated in that Bowers only agreed not to compete with TKA "for a period of three (3) years after the effective date of the Employee's termination of employment with the Employer[.]" It was undisputed that Bowers' employment with TKA terminated on October 17, 2007 and both the individual defendants knew it. Therefore, Bowers' obligation not to compete lasted only until October 17, 2010. Because he did not sign a new employment contract with TKA when he rejoined the company on September 16, 2011, Bowers plainly was not bound by the non-compete covenant at any time here relevant.

Arguably at least, it could be inferred that both the individual defendants, Ms. Moakes and Mr. Tompkins, knew that their representations were false because, during the same period when they were making misrepresentations to Montgomery County about Bowers' obligations, they, on several occasions, refused to send Bowers a copy of the Agreement although they knew he didn't have a copy. At trial, the individual defendants

gave no explanation for this refusal. It could be inferred, rationally, that they refused to send him a copy because they knew that if they did, it would be clear to Bowers (and others) that he was not bound by a non-compete agreement.

But, even assuming, *arguendo*, that the misrepresentations were unintentional, Bowers presented sufficient evidence for the jury to infer that the representations were made with reckless disregard as to whether they were truthful or not.

The defendants knew Bowers work history with TKA, and therefore if they had even bothered to look at the Agreement before misrepresenting its content to Montgomery County, they would have known that Bowers had no obligation not to compete.

Appellants/cross-appellees stress the fact that Moake testified that the Agreement was drawn up by a lawyer and she had no reason to believe that it wasn't "prepared properly." As far as we can tell, the Agreement was "prepared properly." But that fact is unimportant because, by the terms of the Agreement, Bowers was free to compete with TKA at any time after October 17, 2010. And, significantly, neither Tompkins or Moake testified that, prior to telling Montgomery County that Bowers was bound by a non-compete agreement, they ever consulted with an attorney and advised that attorney that after Bowers signed the Agreement, there had been a nearly four-year hiatus in his employment before he went back to work for TKA without signing a new Agreement.

In their brief, appellants/cross-appellees argue that the evidence showed that they acted in "good faith" when they told Montgomery County that Bowers had a contractual obligation not to compete. Technically, good faith is not a defense to the allegation in

Count V. But in the context of the argument set forth in their brief, we interpreted "good faith" as shorthand for arguing that the defendants did not act recklessly or without care. A rational juror could conclude that the defendants did not act recklessly or carelessly. But, as we have said, a rational juror could conclude otherwise.

For the above reasons, we hold that a jury issue was presented as to whether the defendants' misrepresentations amounted to fraud.

APPELLEES/CROSS-APPELLANTS' MOTION TO DISMISS APPEAL IS DENIED. JUDGMENT AS TO COUNT VII AFFIRMED; JUDGMENTS AS TO COUNTS III AND V REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR A NEW TRIAL AS TO COUNT V; COSTS TO BE PAID 50% BY APPELLANTS/CROSS-APPELLEES AND 50% BY APPELLEE/CROSS-APPELLANT.