

IN THE NEW MEXICO COURT OF APPEALS

WILLIS S. MUNCEY,

Plaintiff-Appellee

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

MAY 06 2011

Ben M. Muncey

COPY

vs.

EYEGLOSS WORLD, L.L.C.,

Defendant-Appellant.

Ct. App. No. 29,813
Second Judicial District Court
No. CV-2005-07697
Honorable William F. Lang

PLAINTIFF/APPELLEE'S NOTICE OF ERRATA

BAUMAN, DOW & LEÓN, P.C.
Christopher P. Bauman, Esq.
Alberto A. León, Esq. (USPTO Reg. No. 38223)
P.O. Box 30684
Albuquerque, NM 87190
Phone: (505) 883-3191
Fax: (505) 883-3194

ROSE BRYAN, P.C.
Rose Bryan, Esq.
P.O. Box 1966
Albuquerque, NM 87103
Phone: (505) 247-4321
Fax: (505) 247-4441

Attorneys for Plaintiff/Appellee Willis S. Muncey

COPY

NOTICE OF ERRATA

Plaintiff/Appellee Willis S. Muncey (“Muncey”) hereby provides this Notice of Errata regarding his Response to Supplemental Brief. On the first sentence of the first full paragraph on Page 12 of the Response there is an editing error. In the final draft of the Response, counsel for Muncey wrote: “The conversion in this case was based on patient files as tangible property rather than a claim that EGW interfered with Dr. Muncey’s rights to just the ideas or data contained within the records.” *See* Affidavit of Rose Bryan, Esq. attached hereto as **Exhibit A**. For reasons unknown, this sentence was mistakenly changed to read: The conversion in this case was based on *patient claims regarding* confidential patient files as tangible property, rather than a claim that EGW’s interference with Dr. Muncey’s rights to the data contained within the records.” The highlighted words were erroneously and mistakenly inserted, and do not comport with the evidence presented at trial. Dr. Muncey has never, and does not now assert that the conversion of the patient confidential files was based on patient claims. Plaintiff/Appellee’s counsel apologizes for the error.

Respectfully submitted,

BAUMAN, DOW & LEÓN, P.C.

BY: 

Christopher P. Bauman, Esq.

Alberto A. León, Esq.

P.O. Box 30684

Albuquerque, NM 87190

Telephone: (505) 883-3191

Fax: (505) 883-3194

ROSE BRYAN, P.C.

BY: 

Rose Bryan

P.O. Box 1966

Albuquerque, NM 87103

Telephone: (505) 247-4321

Fax: (505) 247-4441

CERTIFICATE OF SERVICE:

I HEREBY CERTIFY that a true and correct copy of the foregoing response to the supplemental brief was served on the following counsel of record via e-mail and US first Class Mail on this 6th day of May, 2011:

Emil J. Kiehne, Esq.
Modrall, Sperling, Roehl, Harris
& Sisk, P.A.
500 Fourth Street, NW – Suite 1000
Albuquerque, NM 87102

Nathan Mann, Esq.
Gallagher, Casados & Mann, P.C.
317 Commercial Street, NE #200
Albuquerque, NM 87102

I FURTHER CERTIFY that a true and correct copy of the foregoing Response to Supplemental Brief was mailed to the following counsel record this 6th day of May, 2011:

Raymond A. Cardozo, Esq.
Reed Smithy, LLP
101 Second Street – Suite 1800
San Francisco, CA 94105-3649



Alberto A. León, Esq.

IN THE NEW MEXICO COURT OF APPEALS

WILLIS S. MUNCEY,

Plaintiff-Appellee

vs.

EYEGLOSS WORLD, L.L.C.,

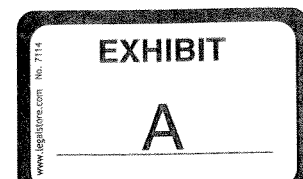
Ct. App. No. 29,813
Second Judicial District Court
No. CV-2005-07697
Honorable William F. Lang

Defendant-Appellant.

AFFIDAVIT OF ROSE BRYAN

AFFIANT, BEING DULY SWORN ON OATH, STATES:

1. I am Rose Bryan and over the age of 18 years old.
2. I drafted "Plaintiff/Appellee's Response to Supplemental Brief."
3. I emailed a final draft to Chris Bauman that contained the following language: "The conversion in this case was based on patient files as tangible property rather than a claim that EGW interfered with Dr. Muncey's rights to just the ideas or data contained within the records." See Attached Exhibit 1.
4. The brief filed with the Court included three words in addition to the above language: "The conversion in this case was based on *patient claims regarding* confidential patient files as tangible property, rather than a claim that EGW's interference with Dr. Muncey's rights to the data contained within the records."



5. This addition is a mistake/clerical error and does not reflect the affirmative argument being made by Plaintiff/Appellee. See Attached Exhibit 2.

6. The source of this addition is unknown.

FURTHER AFFIANT SAITH NOT.

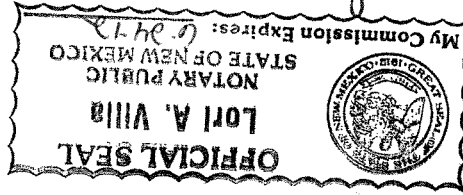

Rose Bryan

STATE OF NEW MEXICO]
] s/s
COUNTY OF BERNALILLO]

Subscribed to and sworn to before me this 6th day of May, 2011, by Virginia Duran.


Notary Public

My Commission Expires:
6-24-12



The conversion in this case was based on patient files as tangible property rather than a claim that EGW interfered with Dr. Muncey's rights to just the ideas or data contained within the records. The jury found that Dr. Muncey proved that EGW exercised either unlawful dominion and control or an unauthorized and injurious use of his patient medical files. [RP 609].⁴ Dr. Muncey proved the elements of his conversion claim when he presented facts regarding EGW exercising dominion and control over Dr. Muncey's patient files through their unlawful access, giving third parties access, reproduction, retaining the copies, as well as repeated concessions from EGW executives that the reason they copied the files was for use by a replacement optometrist. EGW erroneously focuses on the facts relied upon to prove conversion rather than the elements of conversion. Regardless, their allegation that Dr. Muncey's conversion claim is based solely on the copying or reproduction of the patient files and so is no different from a copyright claim ignores the full breadth of conduct found in the record below that made up EGW's wrongful and unauthorized acts of dominion and control.

2. HIPAA prevents the rights in medical records that are protected by a conversion claim under state law from being equivalent to the rights protected by a Copyright claim.

⁴ These were the only theories of conversion presented to the jury. The alternative theory of demand and refusal was not relied upon because EGW did not come into possession of the patient files lawfully.



Rose Bryan

From: Rose Bryan [rose.bryan@gmail.com]
Sent: Monday, May 02, 2011 7:22 PM
To: 'Christopher Bauman'
Subject: RE: Muncey v. Eyeglass World: Reply Brief

Dear Chris,

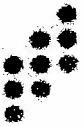
[REDACTED]

Unfortunately, one major concern that jumped out at me is their block quote of our brief on page 7 of their reply. I was shocked that they would so boldly misquote our language in order to make it fit their legal argument. Then I opened the final version and discovered that someone on your end changed the first sentence of a paragraph I sent you guys in a manner that completely changes the entire meaning of the statement being made by adding just three words to the sentence (and also makes our sentence just plain wrong). That's fairly disconcerting.

Rose

From: Christopher Bauman [mailto:cpb@bdllawfirm.com]
Sent: Monday, May 02, 2011 6:05 PM
To: Rose Bryan
Subject: FW: Muncey v. Eyeglass World: Reply Brief

BAUMAN, DOW & LEÓN, P.C.
Attorneys & Counselors at Law



Rose

I'm on the road, so don't have time to look at this. If you get a chance to review, give me a call on my cell (505) 710-3358. Thx

Christopher P Bauman, Esq.
Bauman, Dow & León, P.C.
7309 Indian School Road NE
Albuquerque, New Mexico 87110
Phone: 505.883.3191 Fax: 505.883.3194
IMPORTANT NOTICE

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. If the reader of this message is not the intended recipient or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination or copying of this communication is strictly prohibited. If you have received this electronic transmission in error, please delete it from your system without copying it, and notify the sender by reply e-mail or by calling (505) 883-3191, so that our address record can

