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## **Interference with contract and the “manager’s privilege”:**

*Huynh v Vu, 2003*

**Roger Bernhardt**

**In suit by broker against seller’s husband, who managed seller’s property, for tortious interference with seller’s performance of contract, husband was entitled to assert defense of “manager’s privilege.”**

*Huynh v Vu* (2003) 111 CA4th 1183, 4 CR3d 595

In 1998, Buyer requested Broker’s help in buying a commercial property in Oakland. Broker contacted Husband, who he thought was the owner of the property; actually, Wife (Seller) was the sole owner of the property, which Husband managed. Husband indicated his interest in selling, and requested a written offer. Broker sent Husband, at the office address shared by Husband and Seller, a standard form real estate purchase offer, signed by Buyer, offering to purchase the property for \$1.1 million. The offer also provided for Broker to receive a commission of 6 percent.

Broker then learned that Seller was the true owner of the property, and Husband did not have a power of attorney or any other written authority from Seller to act on her behalf in connection with the sale of the Property. When Broker contacted Seller about the transaction, however, she often referred him to Husband, and Broker’s communications with Seller generally went through Husband.

Seller’s counteroffer increased the price to \$1.3 million, and reduced Broker’s commission to 3 percent. The counteroffer also added the following condition: “Escrow to close 90 days from Seller’s acceptance. [P] Contract extension, if any, after the expiration date have [sic] to be agreed by Seller in writing, or contract to be null & void at Seller [sic] choice.” Buyer accepted the counteroffer on November 16, 1998, and Broker opened an escrow the following day. The 90-day period was thus set to expire either in mid-February 1999, as Broker understood it, or on March 5, 1999, according to Seller’s testimony. From mid-November 1998 to mid-February 1999, Broker unsuccessfully requested that Seller and Husband provide (1) documentation about the income and expenses associated with the property, which was necessary for Buyer to obtain financing, and (2) tenant estoppel certificates.

On March 4, 1999, Buyer closed escrow on his sale of a commercial property in San Francisco, planning to shelter his capital gain on that sale from federal income tax liability by designating the property he was purchasing from Seller as replacement property in a tax-free exchange under IRC §1031. When Broker told Husband of the need to close the escrow, Husband responded that he and Seller needed additional time to coordinate the sale of Seller’s property with a separate §1031 exchange that Seller was planning. Husband requested an extension. On March 5, Broker took an extension letter to Husband, who filled in the blank with the number 45 to indicate the number of days the escrow was to be extended, and signed both his own and Seller’s name.

Buyer continued to make efforts to close the transaction, because April 19 was the deadline by which he had to make a final designation of the replacement property for his §1031 exchange.

Even after April 19 came and went without escrow having closed, Buyer continued to believe that the contract remained in effect, and still wanted to close escrow. On April 27, Seller communicated her intent to exercise her right to cancel the agreement, based on the provision in the counteroffer requiring that escrow close within 90 days. Seller then presented Buyer a “take-it-or-leave-it” offer to sell for \$1.425 million with no provision for a commission to Broker. Buyer reluctantly accepted because of his §1031 situation.

Broker sued Seller for his commission on the sale, and also sued Husband for intentional interference with Seller’s performance of the contract. The jury awarded Broker \$42,750 against Seller, \$15,000 in compensatory damages, plus \$173,250 in punitive damages against Husband. Husband appealed, claiming that the trial court had erred in refusing to instruct the jury on his “manager’s privilege” defense.

The court of appeal reversed, holding that Husband was entitled to assert the common law manager’s privilege as a defense to Broker’s tortious interference claim, since the evidence at trial could support the conclusion Husband’s advice to Seller was primarily intended to further Seller’s interest and not his own. The court stated that the manager’s privilege to induce an otherwise apparently tortious breach of contract is extended to a manager with impersonal or disinterested motives to counsel the principal to breach a contract with a third party that the manager reasonably believes to be harmful to the principal’s best interests. After rejecting Broker’s argument that the privilege applied only to managers of business entities and not to a manager acting on behalf of a natural person, the court determined the scope of the privilege (111 CA4th at 1198):

[W]hen a manager stood to reap a tangible personal benefit from the principal’s breach of contract, so that it is at least reasonably possible that the manager acted out of self-interest rather than in the interest of the principal, the manager should not enjoy the protection of the manager’s privilege unless the trier of fact concludes that the manager’s *predominant* motive was to benefit the principal. Thus, in a case such as the instant one, where the manager had a material, albeit indirect, personal financial interest in the transaction, we are of the opinion that the predominant motive test should be applied.

Thus, in applying the “predominant motive” test, the trial court erred in refusing the requested instruction because it was reasonably probable that Husband would have been exonerated under the manager’s privilege if the jury had been instructed to consider it.

**THE EDITOR’S TAKE:** This is a puzzling decision. From the court’s description, these were a pair of rapacious sellers who were doing all they could to hold up closing a sales transaction in order to extort a higher price from their buyer, who had an IRC §1031 deadline hanging over his head. At the same time, they were trying to avoid paying their broker the already reduced commission they had promised him. The jury’s award of \$173,250 in punitive damages to the broker on a \$42,750 commission certainly seems to support the court’s jaundiced view of the sellers’ behavior.

The broker’s difficulty, as far as I can tell, was that he could not expect to get punitive damages under a simple breach-of-contract claim, so he sought to overcome that obstacle by seeking his contract damages from the wife, who held title to the property, and claiming the

tort damages from the husband, who seemed to make all the real decisions about the property.

That was a neat strategy, and had it worked it might well have served to deter future married owners from holding title in one spouse's name while the other one runs the show: If you're the decision-making spouse, that arrangement does keep the property from being reached by your own creditors, but the protection against title-based liability might well be outweighed by your exposure to your mate's creditors for liability in tort. That risk is enhanced by the court's adoption of the "predominant motive" test as the standard to apply: A decision-making husband is immune only if his predominant motive in telling his title-holding wife to breach was to benefit her rather than himself. If his advice to breach was based as much on his own interest as hers, he has failed that standard and can be liable for inducement of the breach.

But—and here is where the puzzlement starts—what good does that restrictive standard do in a community property situation, where all benefits are legally shared by both spouses? The court's declaration that there was ample evidence that the husband did clear this high standard is all speculation that could apply to every marriage. The court stated that, even if the husband was trying to "enhance whatever community property interest he had in the proceeds, . . . that motive was fully congruent with the interests of Seller as the other member of the marital community" (111 CA4th at 1200); but that view appears to revert to an absolute immunity in all marital cases. If the property was community property, the wife clearly would benefit as much as the husband, making his motive equal but not predominant. If it was her separate property, he doesn't benefit at all, making his motive of protecting her per se predominant. Only if the property was his separate property, held in her name for convenience only, might he fail the "predominant motive" test—but then, as the true principal in the transaction, he should be liable for breaching the contract rather than for inducing her breach of the contract. All of which leaves me wondering why the court bothered to erect the high "predominant motive" standard if it intended to convert it into a de facto absolute privilege standard in marital cases?

My final puzzlement is why the judgment was only reversed and not remanded. If the error is that the case was sent to the jury without instructions on the manager's privilege, should not the remedy have been to send it back to them with a proper instruction? The appellate court seems to be saying that a properly instructed jury would have found that the manager's privilege applied—so why bother going through those motions a second time? That tends to confirm the suspicion I raised in the previous paragraph that the manager's privilege now appears to be an absolute privilege in marital situations. —*Roger Bernhardt*