

STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss

Location: Portland

Docket No.: BCD-CV-11-28

KAILE R. WARREN, JR.,  
RENT-A-HUSBAND LLC,  
RENT-A-HUSBAND ENTERPRISES,  
LLC, and KW ENTERPRISES, INC.,

Plaintiffs,

v.

PRETI, FLAHERTY, BELIVEAU &  
PACHIOS, LLC, MARCUS, CREGG &  
MISTRETTA, P.A., and ACE  
HARDWARE CORP.,

Defendants

**ORDER ON PLAINTIFFS' MOTION TO AMEND COMPLAINT  
AND DEFENDANT ACE HARDWARE CORP.'S MOTION TO DISMISS**

This Order addresses Defendant Ace Hardware Corp.'s motion to dismiss the amended complaint pursuant to Rule 12(b)(6) of the Maine Rules of Civil Procedure, and the subsequent motion of Plaintiffs Kaile R. Warren, Jr., Rent-A-Husband LLC, Rent-A-Husband Enterprises, LLC, and KW Enterprises, Inc. to amend their complaint for a second time.

Defendant Ace's motion to sever the claims against it from those against the other two defendants, citing M.R. Civ. P. 20 and 21 is addressed in a separate order. The court held oral argument on all pending motions in this case on October 12, 2011.

Ordinarily Ace's motion to dismiss would be addressed before the Plaintiffs' subsequent motion to amend, but that motion was directed to Plaintiffs' first amended complaint, which would be superseded if Plaintiffs' motion to amend were granted. Accordingly, the court focuses initially on the motion to amend, solely to determine whether leave to amend would be

granted, without reference to the substantive sufficiency of the claims in the proposed second amended complaint. Then the court addresses the motion to dismiss, the question being whether any of the counts relating to Ace in either the first amended complaint or the proposed second amended complaint should be dismissed for failing to state a viable claim for relief against Ace.

1. *The Standard for Granting Leave to Amend*

After a responsive pleading is served, a plaintiff may amend its complaint “only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” M.R. Civ. P. 15(a); *see also Efstathiou v. Aspinquid, Inc.*, 2008 ME 145, ¶ 21, 956 A.2d 110, 118.<sup>1</sup> “Whether to allow a pleading amendment rests with the court’s sound discretion.” *Holden v. Weinschenk*, 1998 ME 185, ¶ 6, 715 A.2d 915, 917 (quoting *Diversified Foods, Inc. v. First Nat’l Bank of Boston*, 605 A.2d 609, 616 (Me. 1992)).

Courts should freely allow an amendment to a complaint except for bad faith, dilatory tactics, or undue delay resulting in prejudice to the opponent. *Longley v. Knapp*, 1998 ME 142, ¶ 19, 713 A.2d 939, 945. However, where “a proposed amended complaint would be subject to a motion to dismiss, the court is well within its discretion in denying leave to amend.” *See Glynn v. City of S. Portland*, 640 A.2d 1065, 1067 (Me. 1994).

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<sup>1</sup> Plaintiffs assert that Ace is not entitled to object to their motion to amend because its motion to dismiss is not a “responsive pleading” for purposes of Rule 15(a). The court is inclined to agree with Ace’s contrary position that a response of either an answer or a Rule 12 motion cuts off the complaining party’s right to amend without leave of court, especially when the complaining party has already amended once as of right. The court assumes therefore that leave to amend is required, albeit under the “freely given” standard of Rule 15.

<sup>2</sup> Counts IX to XIII are against all Defendants.

<sup>3</sup> Maine Rule of Civil Procedure 8 mirrors its federal counterpart, but Maine has yet to adopt federal pleading requirements for civil cases, contrary to Ace’s argument under *Ashcroft v. Iqbal*, 129 S. Ct 1937, 173 L. Ed 2d 868, (2009). Indeed, as the Supreme Judicial Court of Maine, sitting as the Law Court, has noted on occasion, Maine rules of procedure are not necessarily to be given the same interpretation as identically worded federal rules of procedure. *See e.g. State of Maine v. Dumond*, 2000 ME 95, ¶ 10, 751 A.2d 1014, 1017 (stating that although Maine Rule of Criminal Procedure 30(b) tracks the counterpart

The proposed amended complaint does not add any claims against any of the defendants; it purports instead to clarify what the Plaintiffs claim to be the connections between the asserted actions of the several defendants. Only Defendant Ace opposes the Plaintiffs' proposed amendment, on the ground that granting the motion to amend would be futile in light of its motion to dismiss pursuant to M.R. Civ. P. 12(b)(6). But for that contention, the court would grant the motion to amend, because it has been timely made and does not cause any cognizable prejudice to any party. Therefore, the analysis turns to Ace's motion to dismiss to determine whether any of the counts against Ace should be dismissed.

2. *Ace's Motion to Dismiss*

The counts pertaining to Ace are as follows:

- Count V: Defamation
- Count VI: False Light
- Count VII: Negligent Misrepresentation
- Count VIII: Intentional Misrepresentation
- Count IX: Intentional Infliction of Emotional Distress as to Plaintiff Warren<sup>2</sup>
- Count X: Negligent Infliction of Emotional Distress as to Plaintiff Warren
- Count XI: Vicarious Liability
- Count XII: Punitive Damages
- Count XIII: Economic Damages for Restitution
- Count XIV: Promissory Estoppel

"In reviewing  a motion to dismiss, [the court] consider[s] the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123, 127. The court will "examine the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830, 832). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id.*

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<sup>2</sup> Counts IX to XIII are against all Defendants.

The Maine Rules of Civil Procedure incorporate principles of notice pleading. *See e.g., Burns v. Architectural Doors & Windows*, 2011 ME 61, ¶ 21, 19 A.3d 823, 829. Rule 8 calls for “(1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief which the pleader seeks.” M.R. Civ. P. 8; *see also Bean v. Cummings*, 2008 ME 18, ¶ 8, 939 A.2d 676, 679 (discussing pleading requirements in light of recent United States Supreme Court decisions, and noting that Rule 9(b) identifies certain claims that require a heightened pleading standard such as fraud or mistake). Notice pleading requires the plaintiff to provide the opposing party with “fair notice of the claim.” *Polk v. Town of Lubec*, 2000 ME 152, ¶ 18, 756 A.2d 510, 514 (quoting *E.N. Nason, Inc. v. Land-Ho Dev. Corp.*, 403 A.2d 1173, 1177 (Me. 1979)).<sup>3</sup>

With that framework in mind, the analysis turns to the specific counts of the complaint.

#### **Count V: Defamation**

The Plaintiffs allege that Ace made defamatory statements to the investigators in State of Maine Office of Securities and the Maine Attorney General’s Office during the pendency of the criminal investigation against them. They allege that the statements were related to the “scope and extent of the relationship between [the parties]; the success of the Rent-A-Husband tested partnerships; and [ ] Ace’s interest in obtaining an ownership stake in Rent-A-Husband including, but not limited to, statements claiming Ace [ ] did not have a longstanding working partnership with Rent-A-Husband; that the Rent-A-Husband testing was not that successful;

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<sup>3</sup> Maine Rule of Civil Procedure 8 mirrors its federal counterpart, but Maine has yet to adopt federal pleading requirements for civil cases, contrary to Ace’s argument under *Ashcroft v. Iqbal*, 129 S. Ct 1937, 173 L. Ed 2d 868, (2009). Indeed, as the Supreme Judicial Court of Maine, sitting as the Law Court, has noted on occasion, Maine rules of procedure are not necessarily to be given the same interpretation as identically worded federal rules of procedure. *See e.g. State of Maine v. Dumond*, 2000 ME 95, ¶ 10, 751 A.2d 1014, 1017 (stating that although Maine Rule of Criminal Procedure 30(b) tracks the counterpart federal rule, Maine does not follow the federal rule’s same strict requirements); *Mondello v. General Elec. Co.*, 650 A.2d 941, 944 (Me. 1994) (stating that federal court interpretations of federal rules provide guidance, but are not binding, on Maine courts’ interpretation of counterpart Maine rules).

and that Defendant Ace was not seriously interested in a buy-in or buy-out of Rent-A-Husband and did not represent to Plaintiffs that it was.” (Compl. ¶ 163.) Ace claims that the statements were not defamatory, and further argues that they were absolutely privileged as they were made during a judicial proceeding.

In order to survive a motion to dismiss, a complaint for defamation must allege the following elements: a false and defamatory statement concerning another; an unprivileged publication to a third party; fault amounting at least to negligence on the part of the publisher; and actionability irrespective of special harm or the existence of special harm caused by the publication. *Cole v. Chandler*, 2000 ME 104, ¶ 5, 752 A.2d 1189, 1193; *Vahlsing Christina Corp. v. Stanley*, 487 A.2d 264, 267 (Me. 1985).

The Law Court has stated:

Any person has a qualified privilege to make statements to law enforcement or regulatory agencies regarding the conduct of others, where the person making the statement believes in good faith that the statement is true and indicates that a statutory standard administered by the agency may have been violated.

*Truman v. Browne*, 2001 ME 182, ¶ 15, 788 A.2d 168, 172. This conditional privilege, however, is lost where the defendant abuses the privilege. *Lester*, 596 A.2d at 69; *see also Cole*, 2000 ME 104, ¶ 7, 752 A.2d at 1194 (noting that “[w]hether the defendant abused his privilege is a question of fact”[; and o]nce it is determined that the defendant is entitled to the privilege, the burden shifts to the plaintiff “to come forward with evidence that could go to a jury that [the defendant] abused the privilege”) (citing *Riplett v. Bemis*, 672 A.2d 82, 87 (Me. 1996) and *Gautschi v. Maisel*, 565 A.2d 1009, 1011 (Me. 1989)).

As “[a] motion to dismiss a complaint for failure to state a claim should not be granted if the pleading alleges facts which would entitle the plaintiff to relief upon some theory, or if it avers every essential element of a claim,” *see Vahlsing Christina Corp. v. Stanley*, 487 A.2d 264, 267 (Me. 1985). Whether Ace’s allegedly defamatory statements were privileged is a question

of fact. Because the Plaintiffs have alleged the elements of a defamation claim, Ace's motion must be denied as to Count V.

### **Count VI: False Light**

Plaintiffs also allege that Ace made statements that portrayed them in a false light with the public.

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. Restatement (Second) of Torts § 652E (1977).

*Cole v. Chandler, supra*, 2000 ME 104, ¶ 17, 752 A.2d at 1197.

Plaintiffs allege that Ace made false statements to the media concerning the scope and extent of its business relationship with Plaintiffs; Ace's interest in obtaining an ownership stake in Rent-A-Husband; and Ace's knowledge of Rent-A-Husband investors, and allege further that these statements placed Plaintiffs in a light that would be highly offensive to a reasonable person. Further, Plaintiffs assert that Ace made the statements knowing they were false, or in reckless disregard of their falsity, and that the Plaintiffs suffered various forms of harm and damages as a result.

Ace argues that the only alleged offensive statement that Plaintiffs could possibly be referring to is its Media Statement issued in response to news reports in 2009 in which Plaintiffs made unfavorable statements about Ace. Ace asserts that its Media Statement was issued in order to protect its business reputation from these unfavorable statements, and requests that the court consider the attached documentation of these statements in making its decision.

The general rule is that only the facts alleged in the complaint may be considered on a

motion to dismiss. *Moody v. State Liquor and Lottery Comm.'n*, 2004 ME 20, ¶ 8, 843 A.2d 43, 47. However, Rule 12(b) states that “[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and *not excluded by the court*, the motion shall be treated as one for summary judgment.” M.R. Civ. P. 12(b) (emphasis added). Whether the court accepts documents, additional factual claims, and other evidence is a discretionary determination. In this case, for the court to accept and consider Ace’s additional materials or its characterization of the basis of Count VI as necessarily being limited to those statements would require Plaintiffs to be given leave to provide more material, and would in effect convert a Rule 12(b)(6) motion into a Rule 56 summary judgment procedure, without the benefit of the filings required by Rule 56 to help narrow or eliminate factual issues. Thus, the court declines to consider the extrinsic material tendered by Ace and limits review to the face of Plaintiffs’ pleading.

Assessing Count VI under the Rule 12(b)(6) standard, the court concludes that the Plaintiffs have adequately alleged a claim for false light. *See Burns*, 2011 ME 61, ¶ 21, 19 A.3d at 829 (noting Maine’s “forgiving” notice pleading standard, and recognizing that “an initial pleading may be presented in general terms,” however, “by the time the parties are addressing a motion for summary judgment, a plaintiff must be prepared to clearly identify the asserted cause or causes of action and the elements of each claim,” . . . [as w]ithout such definition, the parties may waste time and money litigating extraneous issues not generated by the pleadings”). Accordingly, Ace’s motion to dismiss must be denied as to Count VI.

### **Counts VII and VIII: Negligent and Intentional Misrepresentation**

In *Rand v. Bath Iron Works Corp.*, 2003 ME 122, ¶ 13, 832 A.2d 771, the Law Court addressed both claims for intentional misrepresentation and negligent misrepresentation.

To prevail on a claim for intentional misrepresentation,

the plaintiff must prove by clear and convincing evidence: (1) that the defendant made a false representation, (2) of a material fact, (3) with knowledge of its falsity or in reckless disregard of whether it is true or false, (4) for the purpose of inducing the plaintiff to act in reliance upon it, and, (5) the plaintiff justifiably relied upon the representation as true and acted upon it to the plaintiff's damage.

*Rand v. Bath Iron Works Corp.*, 2003 ME 122, ¶ 9, 832 A.2d 771, 773. "When a plaintiff alleges a failure to disclose rising to the level of a misrepresentation, the plaintiff must prove either (1) active concealment of the truth, or (2) a specific relationship imposing on the defendant an affirmative duty to disclose." *Fitzgerald v. Gamester*, 658 A.2d 1065, 1069 (Me. 1995).

The Law Court has adopted the following definition of negligent misrepresentation:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

*Rand v. Bath Iron Works Corp.*, 2003 ME 122, ¶ 13, 832 A.2d 771, 774 (emphasis omitted) (quoting Restatement (Second) Torts § 552(a)(1)).

Plaintiffs allege that Ace performed a successful corporate test of the pilot model partnership that resulted in further purchases of Rent-A-Husband franchises by Ace franchises. They also allege that Ace "repeatedly expressed to plaintiffs its interest and then its intention of purchasing Rent-A-Husband outright, or alternatively, of obtaining a controlling financial interest in Rent-A-Husband;" that at least two meetings were held between Ace and Warren on the subject; that Ace knew of Plaintiffs' efforts in raising business capital through a private offering, and that Ace met with investors as well as the SBA for purposes of securing funding to facilitate the proposed buy-in or buy-out. Plaintiffs allege that Ace made false representations to them for the purpose of inducing them to act or refrain from acting.



Plaintiffs also claim that once Ace stopped the buy-in and buy-out negotiations, it continued to communicate with the Plaintiffs through funding, advice, counsel, and research and advertising assistance. Plaintiffs claim that these representations caused them to take “innumerable steps and/or measures in its business to facilitate the Ace buy-in or buy-out,” and that when Ace decided not to pursue an ownership interest it caused a material change to the business and affected potential investors’ interest, resulting in the Plaintiffs’ loss of income and business opportunities.

Ace argues that the Plaintiffs’ claim is barred because it is based on an alleged promise of future performance. Although claims for intentional and negligent misrepresentation both generally require that the defendant’s misrepresentation be based on a past or existing fact, not merely a statement of opinion or a promise of future performance, in certain circumstances “the relationship of the parties . . . may transform into an averment of fact that which under ordinary circumstances would be merely an expression of opinion.” *Wildes v. Pens Unlimited Co.*, 389 A.2d 837, 840 (Me. 1978) (citing *Shine v. Dodge*, 130 Me. 440, 444, 157 A. 318, 319 (1931)). No such relationship is alleged here.<sup>4</sup> Therefore, were the Plaintiffs alleging only misrepresentation of future performance, Ace’s motion would likely be granted.

However, Plaintiffs allege that Ace intentionally or with reckless disregard or negligently supplied false information as to existing facts for Plaintiffs’ guidance in their

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<sup>4</sup> “In order to survive a motion to dismiss a claim for breach of fiduciary duty, the plaintiff must set forth specific facts constituting the alleged relationship with sufficient particularity to enable the court to determine whether, if true, such facts could give rise to a fiduciary relationship.” *Fortin v. Roman Catholic Bishop of Portland*, 2005 ME 57, ¶ 26, 871 A.2d 1208, 1218. A fiduciary duty is created when “one standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.” *Bryan R. v. Watchtower Bible and Tract Soc’y of New York, Inc.*, 1999 ME 144, ¶ 15, 738 A.2d 839, 845 (quoting RESTATEMENT (SECOND) OF TORTS 874 (1965)). The Plaintiffs have not established sufficient facts supporting the allegation that a fiduciary relationship existed between Plaintiffs and Ace simply because there were ongoing business discussions. See e.g., *Clappison v. Foley*, 148 Me. 492, 497-99, 96 A.2d 325, 327-28 (1953) (noting that where the complaint does not demonstrate evidence of a fiduciary relationship, but instead only conventional business dealings, the motion to dismiss must be granted).

business transactions, for the purpose of inducing the Plaintiffs to act and/or refrain from acting, and which did induce such reliance. Accordingly, Ace's motion must be denied as to Counts VII and VIII.<sup>5</sup>

**Count IX: Intentional Infliction of Emotional Distress as to Plaintiff Warren**

To prevail in an action for intentional infliction of emotional distress (IIED), a plaintiff must establish that:

(1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from [its] conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable [person] could be expected to endure it.

*Curtis v. Porter*, 2001 ME 158, ¶ 10, 784 A.2d 18, 22-23. "A person acts recklessly if [he] knows or should know that [his] conduct creates an unreasonable risk of harm to another person and the unreasonableness of [his] actions exceeds negligence." *Id.*

Moreover, severe emotional distress "means emotional distress, created by the circumstances of the event, that is so severe that no reasonable person could be expected to endure it." *Botka v. S.C. Noyes & Co.*, 2003 ME 128, ¶ 17, 834 A.2d 947, 952. Finally, in an IIED claim, the court determines "in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery." *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶ 16, 711 A.2d 842, 847 (internal quotations omitted) (citations omitted).

Plaintiff Kaile Warren's IIED claim is based on the allegations of misrepresentations regarding the purchasing of an ownership interest in Rent-A-Husband and the alleged

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<sup>5</sup> Ace's memorandum does not specifically assert that Plaintiffs' claim for intentional misrepresentation is insufficiently pleaded for purposes of M.R. Civ. P. 9(b). *See e.g.*, *Diversified Foods, Inc. v. First Nat'l Bank*, 605 A.2d 609, 615 (Me. 1992).

defamatory and false light statements Ace made about Rent-A-Husband. Ace's characterization of the circumstances as being insufficient may well prevail on a more fully developed factual record—after all, Plaintiff Warren's claim arises out of a business transaction or series of transactions rather than a situation that is by definition emotionally charged, such as a bereavement or a family conflict. *See Latremore v. Latremore*, 584 A.2d 626, 631 (Me. 1990) (finding that where the son was aware of the plaintiff parents' age and poor health, yet still made cruel remarks to them and sought to have his father committed, his conduct was extreme and outrageous); *Rubin v. Matthews International Corp.*, 503 A.2d 694, 699-700 (Me. 1986) (concluding that whether defendant's repeated misrepresentations to the plaintiff that the headstone she purchased would be delivered in time for the funeral of a loved one was extreme and outrageous conduct was an issue of fact for the jury).

On the other hand, Plaintiff Warren alleges much more than just the failure of a business plan—he asserts that Ace's actions contributed to his criminal prosecution and the destruction of his business. Viewed in a light most favorable to Plaintiff Warren, as it must be at this stage, Count IX states a cognizable claim for IIED. *Champagne*, 1998 ME 87, ¶ 16, 711 A.2d at 847 (citing *Loe v. Town of Thomaston*, 600 A.2d 1090, 1093 (Me. 1998)).

Accordingly, Ace's motion is denied as to Count IX.

#### **Count X: Negligent Infliction of Emotional Distress as to Plaintiff Warren**

In Count X Warren alleges a claim of negligent infliction of emotional distress (NIED).<sup>6</sup> There is no general duty to avoid negligently causing emotional harm to others. *Curtis v. Porter*, 2001 ME 158, ¶ 18, 784 A.2d 18, 25. In Maine, independent claims for NIED has been recognized only in so-called bystander situations or when a special relationship exists between the actor and the person emotionally harmed. *Id.* ¶ 19, 784 A.2d at 25-26. Plaintiff Warren

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<sup>6</sup> This claim also may well amount to surplusage in light of the IIED and defamation claims as there can only be one recovery for the same loss or damage. *See Theriault v. Swan*, 558 A.2d 369, 372 (Me. 1989).

has not alleged bystander status nor has he sufficiently alleged the existence of a special relationship on which to base an independent claim for NIED. Ace's motion is granted as to Count X.

**Count XI: Vicarious Liability**

Ace seeks to dismiss Count XI on the grounds that vicarious liability is not a separate and distinct cause of action, "but a theory of imputation by which an employer may be held responsible for the tortious acts of its employees." *Frank v. L.L. Bean, Inc.*, 352 F. Supp. 2d 8, 14 (D. Me. 2005) (citations omitted). "Since vicarious liability is only meaningful insofar as it is asserted in support of a valid cause of action," *id.*, Count XI fails to state a cognizable independent and freestanding claim, and must be dismissed under Rule 12(b)(6). Plaintiffs can still seek to hold Ace vicariously liable for acts or omissions of its employees and agents on those claims against Ace that survive dismissal.

**Count XII: Punitive Damages**

Ace also seeks to dismiss Count XII on the grounds that punitive damages constitute a remedy, not a separate cause of action, and that even when viewing the facts of the complaint in a light most favorable to the plaintiff, they would not support an award of punitive damages.

Ace "is correct that punitive damages is not a separate and distinct cause of action under Maine law. Rather, it is a type of remedy." *Frank v. L.L. Bean, Inc.*, 352 F. Supp. 2d 8, 14 (D. Me. 2005) (citing *Southport Marine, LLC v. Gulf Oil Limited Partnership*, 234 F.3d 58, 64 (1st Cir. 2000); *Connors v. Town of Brunswick*, Civil No. 99-331-P-C, 2000 U.S. Dist. LEXIS 12253, \*40 (D. Me. Aug. 16, 2000)). Accordingly, Count XII must be dismissed.

Plaintiffs have sought punitive damages in their prayers for relief, and may pursue an award of such damages on their IIED and intentional misrepresentation claims if the predicate showing of malice—express or implied—is made. *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985);

*see also Morgan v. Kooistra*, 2008 ME 26, ¶ 29, 941 A.2d 447, 455.<sup>7</sup>

### **Count XIII: Economic Damages For Restitution**

The Plaintiffs claim that the defendants “directly and/or proximately caused the actual damages to Plaintiffs of a Consent Judgment requiring Plaintiffs to pay a maximum of \$1,994,657.08 in restitution to the State of Maine.” Under Maine law, a restitution claim is premised on the equitable doctrine of unjust enrichment. Count XIII fails to allege that the alleged restitutionary payment to the State benefited or unjustly enriched Ace.

Thus, what purports to be an independent, freestanding claim in Count XIII is more properly characterized as an element of Plaintiffs’ alleged damages under some of their other counts against Ace. Ace’s motion is granted as to Count XIII, but Plaintiffs remain able to pursue recovery of the alleged restitution payment under at least some of their remaining theories of liability.

### **Count XIV: Promissory Estoppel**

Ace has also moved to dismiss the Plaintiffs’ promissory estoppel claim against it, alleging that it made no promises to the Plaintiffs, and even if it did, the promises alleged are barred by the Statute of Frauds because they could not have been performed in one year and they were not in writing.

The Law Court, in *Harvey v. Dow*, clarified that Maine has

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<sup>7</sup> Malice may be proven through evidence showing either that the party acted with ill will toward the claimant or that the party's conduct was so outrageous that malice can be implied. *Id.* at 1361. Thus, any lesser state of mind, such as gross negligence or recklessness, is insufficient to allow a punitive damages award. *Id.* at 1361-62 (noting that a gross negligence or reckless requirement "covers too broad and too vague an area of behavior, resulting in an unfair and inefficient use of the doctrine of punitive damages" that would "allow virtually limitless imposition of punitive damages," and would dull "the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct"). Accordingly, punitive damages are only available if a defendant acts with actual or implied malice. *Id.* Implied malice is defined as more than a "mere reckless disregard of the circumstances." *Id.* at 1361. The clear and convincing standard of proof aids in ensuring that punitive damages are not inappropriately awarded. *Batchelder v. Realty Res. Hospitality, LLC*, 2007 ME 22, ¶ 13, 914 A.2d 1116, 1124.

adopted the definition of promissory estoppel set out in the Restatement (Second) of Contracts, which states: A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. Restatement (Second) of Contracts § 90(1) (1981); *Bracale v. Gibbs*, 2007 ME 7, ¶ 14, 914 A.2d 1112, 1115.

2008 ME 192, ¶ 11, 962 A.2d 322, 325. Although “promissory estoppel applies to promises that are otherwise unenforceable, [it] cannot be applied to avoid the statute of frauds requirement . . .” *Daigle Commer. Group, Inc. v. St. Laurent*, 1999 ME 107, ¶ 14, 734 A.2d 667, 672 (noting that promissory estoppel cannot be used to avoid the statute of frauds in employment contracts exceeding one year) (internal citations and quotations omitted); *see also Wells Fargo Home Mortg., Inc. v. Spaulding*, 2007 ME 116, ¶ 23, 930 A.2d 1025, 1030. Plaintiffs assert that Ace’s alleged promises are not subject to the Statute of Frauds by alleging the doctrine of partial performance, specifically that Rent-A-Husband, in reliance on the promises made by Ace, gave up other business opportunities.

Part performance in reliance on an otherwise unenforceable contract can remove the contract from the ambit of the Statute of Frauds “if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement.” *Gage v. Stevens*, 1997 ME 88, ¶ 14, 696 A.2d 411, 416, quoting RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981); *see Busque v. Marcou*, 147 Me. 289, 294-95, 86 A.2d 873 (1952).

It is doubtful that the Plaintiffs can recover damages against Ace, because their remedy is likely limited to the benefit of the bargain or their expenditures incurred in reliance, as opposed to the value of alleged lost opportunities elsewhere. However, because Plaintiffs have alleged reasonably specific promises by Ace and detrimental reliance by them, the allegations of

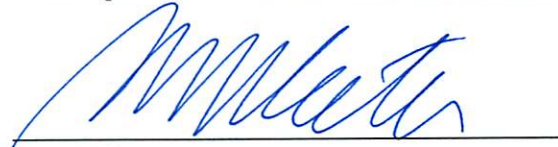
Count XIV could, if proved, entitle the Plaintiffs to relief of some kind. For that reason, Ace's motion is denied as to Count XIV.

For the reasons stated it is ORDERED AS FOLLOWS:

Plaintiffs' Motion to Amend is granted except as to Count X for negligent infliction of emotional distress, Count XI for vicarious liability, Count XII for punitive damages, and Count XIII for economic damages for restitution. Defendant Ace Hardware Corp.'s Motion to Dismiss is granted as to Counts X, XI, XII and XIII and is otherwise denied.

Pursuant to M.R. Civ. P. 79, the clerk shall incorporate this order into the docket by reference.

Dated: October 25, 2011

  
A. M. Horton  
Justice, Business and Consumer Court

Entered on the Docket: 10.25.11  
Copies sent via Mail  Electronically

**BUSINESS AND CONSUMER COURT**

Kaile R. Warren, Jr. et al v. Preti, Flaherty, Beliveau & Pachios,  
LLC et al  
BCD-CV-2011-28

*Counsel of Record*

Attorney Name

Party Name

Daniel Lilley, Esq.  
Tina Nadeau, Esq.

Kaile Warren, Jr. et al (Plaintiffs)  
Kaile Warren, Jr. et al (Plaintiffs)

John Aromando, Esq.

Preti, Flaherty, Beliveau & Pachios  
(Defendant)

Mark Porada, Esq.

Preti, Flaherty, Beliveau & Pachios  
(Defendant)

Peter DeTroy, Esq.

Marcus, Clegg & Mistretta  
(Defendant)

Russel Pierce, Esq.

Marcus, Clegg & Mistretta  
(Defendant)

Thimi Mina, Esq.  
Samuel Moulthrop, Esq.

Ace Hardware Corp (Defendant)  
Ace Hardware Corp (Defendant)