

1989

Gillham Advertising, Inc., a Utah Corporation v. Tim Williams and Scott Rockwood: Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 890070 COURT OF APPEALS
STATE OF UTAH

GILLHAM ADVERTISING, INC.,)
a Utah Corporation,)

Plaintiff/Appellant,)

vs.)

TIM WILLIAMS and SCOTT)
ROCKWOOD,)

Defendants/Respondents.)

Case No. ~~880398~~ 890070-CA

District Court No. 87-07863

REPLY BRIEF OF APPELLANT

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, JUDGE JAMES S. SAWAYA

ARGUMENT PRIORITY CLASSIFICATION: 14b

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COURT OF APPEALS

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STATE OF UTAH

GILLHAM ADVERTISING, INC.,)	
a Utah Corporation,)	
)	Case No. 880398
Plaintiff/Appellant,)	
)	
vs.)	
)	District Court No. 87-07863
TIM WILLIAMS and SCOTT)	
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SUMMARY OF ARGUMENT

Agency fiduciary law encompasses the doctrine of corporate opportunity. The fiduciary duties a key employee owes his corporate employer is an area of law in transformation. In that transformation, the reasonable expectations of the parties in a corporate-fiduciary relationship are decisive in determining whether a key employee has breached any fiduciary duty owed his corporate employer. If a business opportunity is presented to a key employee, that employee cannot seize the opportunity for himself if: (a) the corporation is financially able to undertake it; (b) it is within the corporation's line of business, or (c) the corporation is interested in the opportunity.

In this case, Williams and Rockwood were key employees of Gillham. While working for Gillham, they took preparatory steps which culminated in exploiting Gillham's 10-year, lucrative advertising account with KSL. Those preparatory steps and seizing the KSL account were in breach of Williams' and Rockwood's duties to Gillham of (1) good faith, loyalty, and fair

dealing; (2) to disclose information relevant to the KSL account entrusted to Williams and Rockwood; and (3) not to put themselves in a position antagonistic to Gillham concerning the KSL account.

The issue of whether Williams and Rockwood were "key employees" or merely "ordinary employees" precluded the trial court from granting summary judgment in favor of Williams and Rockwood.

ARGUMENT

POINT I

UNDER DEVELOPING CASE LAW, WILLIAMS AND ROCKWOOD, AS KEY EMPLOYEES, BREACHED THEIR FIDUCIARY DUTIES TO GILLHAM.

The fiduciary duties a key employee owes his corporate employer is a developing area of law. A few exceptional cases have recognized the competing interests of the corporation, the individuals, and society that arise when key employees pursue business opportunities that the corporation claims belong to it. Those cases, and scholarly analysis of them, provide a framework for determining in this case whether Williams and Rockwood, as key employees, breached their fiduciary duties to Gillham.

In Competing Interests in The Corporate Opportunity Doctrine, 67 N. Carolina L. Rev. 435 (1989), Pat K. Chew, Assistant Professor at the University of Pittsburgh School of Law, argues that the corporate opportunity doctrine should acknowledge and protect legitimate individual and societal interests, as well as legitimate corporate interests. Second, Professor Chew argues that corporate opportunity disputes should be resolved in ways

that are consistent with the reasonable expectations of both the corporation and the fiduciaries. 67 N. Carolina L. Rev. at p. 439.

Professor Chew conducted a comprehensive review of corporate opportunity cases reported between April 1977 and April 1988. Her analysis revealed that these disputes usually occur in close corporations in a wide range of industries.

. . . The defendants are traditional corporate fiduciaries such as directors and officers, or, as is occurring more frequently, the defendants are non-traditional fiduciaries such as key employees. The opportunities these individuals pursue are often directly competitive to the corporation . . .

Ibid., pp. 436-437, fn. 2.

Professor Chew offers a solution that accommodates both legitimate corporate and non-corporate interests. She proposes that future disputes be resolved according to the expectations of both the corporation and the fiduciaries. In the optimal situation, the parties will have an express agreement on how they expect to resolve corporate opportunity disputes. In the absence of an agreement, the courts should determine what their reasonable expectations would have been. Ibid., p. 436.

Professor Chew identifies two corporate interests: (1) maintaining the integrity of the relationship between the fiduciaries and the corporation, and (2) avoiding the direct economic harm incurred when the corporation is deprived of an opportunity. Ibid., p. 441.

Professor Chew recognizes the necessity to maintain the integrity of the fiduciary-corporate relationship:

Corporate fiduciaries are in positions of trust. In order to fulfill their general responsibilities and make key decisions, they must have access to extensive and confidential information. They also have significant decision making authority to direct and implement major corporate policies. As representatives of the corporation, they are in contact with individuals and entities, including suppliers, distributors, and customers, that serve the corporations' operational needs. Because of their corporate positions and activities, fiduciaries are exposed to opportunities of interest to the corporation and of possible personal interest to themselves.

The corporation relies on fiduciaries to fulfill their duties in good faith and with integrity. The corporation provides them with access to information and contacts so that the fiduciaries can perform effectively, not so that they can exploit these resources for their own personal benefit. Although individuals assume fiduciary roles to serve their personal and professional objectives as well as the corporation's needs, the corporation is concerned that these personal interests may conflict with corporate interests--that fiduciaries will allow their personal interests to overcome their corporate loyalty and will betray the corporation's trust. The corporation does not want to have to speculate about or monitor the fiduciaries' honesty and fair-dealing. It wants assurance that when the fiduciaries make corporate decisions, those decisions are not tainted by personal interests.

Ibid., p. 442. She characterizes the typical fact pattern:

In the typical fact pattern the fiduciaries identify, investigate, negotiate, decide to pursue, and make preliminary plans for the opportunity. They then resign their fiduciary roles, actively begin a competing business, and ultimately develop the opportunity into a profitable venture. The fiduciaries usually have not signed non-competition agreements.

Ibid., p. 444. (Footnote omitted.) She acknowledges the negative consequences fiduciaries have suffered as the result of taking only preparatory steps while still employed by the corporation:

Moreover, courts have assumed implicitly that fiduciaries may have breached their duty even though only preparatory steps to start the business were taken during the fiduciaries' tenure, if those preparatory steps culminate in exploitation of the opportunity. [Energy Resources Corp. v. Porter, 14 Mass. App. Ct. 296, 438 N.E. 2d 391 (1982); Klinicki v. Lundgren, 298 Or. 662, 695 P.2d 906 (1985) (en banc); Nicholson v. Evans, 642 P.2d 727 (Utah 1982).] Prohibiting the fiduciaries' active competition against the corporation during their tenure is consistent with basic principles of the duty of loyalty. [H. Henn & J. Alexander, Laws of Corporations, 628 (3d ed. 1983).] The corporate opportunity doctrine, however, also impinges upon the fiduciaries' preparing to compete, making inquiries, and gathering information. These activities may be tainted by the fiduciaries' ultimate action of starting a competing business, and thus the doctrine exercises a chilling effect on them.

Ibid., p. 446.

Professor Chew identifies the individuals' legitimate rights:

. . . The fiduciary-corporate relationship is more analogous to an agency, employee, or partnership relationship in which both parties have recognized the duties and rights of the other and such rights and duties are flexibly negotiated. When the corporation and the fiduciaries enter into their relationship, they are concerned about protecting their own interests but acknowledge the existence and importance of the other party's interests. Neither party can afford to underestimate the other's bargaining position. Individuals who are being considered for director, officer, or key employee positions possess attributes such as experience, talents, or economic resources that are highly valued by the corporation. These individuals also are likely to have other options in which to invest their resources or talents. The corporation likewise has attributes such as institutional resources and status that are attractive to prospective fiduciaries.

Ibid., pp. 447-448. (Footnote omitted.) She recognizes that an increasing number of individuals are subject to the corporate opportunity doctrine:

To begin, the number of situations implicating the corporate opportunity doctrine is increasing. Businesses are becoming more diversified and, consequently, the opportunities in which they may have some interest, expectancy, or capability are increasing. Meanwhile, fiduciaries are becoming increasingly well educated; they are multifaceted individuals who are exposed to and interested in diverse ideas and opportunities. The proliferation of professional meetings, journals for every conceivable professional specialty, and telecommunication systems allowing an extensive and instantaneous horizon of contacts and ideas enhance innovative thinking and the generation of entrepreneurial ideas. Finally, the fast pace of technological development and the increasing concern with industrial productivity provide fertile ground for more opportunities.

. . . (V)arious courts have found key employees [See Science Accessories Corp. v. Summagraphics Corp., 425 A.2d 957 (Del. 1980); Wilmington Trust Co. v. Consistent Asset Management Co., No. 8867 (Del. Ch. March 25, 1987) (LEXIS, States Library, Omni file); Maryland Metals, Inc. v. Metzner, 282 Md. 31, 382 A.2d 564 (1978)] and majority shareholders subject to the doctrine. Several cases decided in Georgia illustrate the difficulty of these issues. In determining whether a chief engineer was subject to the state's business opportunity statute, the supreme court concluded that the law was applicable to directors and officers but not to "typical employees." It implied, however, that individuals other than directors and officers might be subject to the law if they were in fiduciary positions. The court did not elaborate on what constituted fiduciary status. A later Georgia case held that the statute should be read literally to apply only to directors and officers. The holding, however, was expansive in its application. A vice-president of sales, in the absence of evidence to the contrary, was presumed to be an "officer" and hence subject to the statute.

Ibid., pp. 449-450. (Footnotes omitted.) She points out problems that will arise as the corporate opportunity doctrine is extended to nontraditional fiduciaries:

The extension of the corporate opportunity doctrine to nontraditional fiduciaries raises several issues. First, courts are more likely to conclude that key employees are subject to the doctrine and its

restrictions if those employees have been endowed with **more trust and responsibility** (as suggested by access to confidential information and increased authority) and have invested significantly in the corporation (as suggested by their years with the corporation and an equity interest). Given this judicial propensity and a desire to avoid restrictions on their activities, **employees** may be hesitant to accept more trustworthy positions or to increase their corporate commitment. This result seems contrary to policy interests, which would be better served if individuals were rewarded rather than penalized for their increasing corporate roles and responsibilities.

Second, the evolving distinction between key **employees** who are considered fiduciaries and those who are not creates uncertainty for individuals with major corporate responsibilities. Many of these individuals are no doubt unaware that they may be subject to the corporate opportunity doctrine. This lack of notice is especially significant because of the disparity between the standard of conduct for nonfiduciaries and the standard for fiduciaries. In light of the potential consequences for **key employees**, corporations arguably should have a duty to inform those employees when the corporation considers them to be fiduciaries subject to the corporate opportunity doctrine.

Ibid., p. 451. (Footnote omitted.)

Professor Chew emphasizes the importance of societal interests as well, such as the successful development of opportunities and the development of entrepreneurial instances.

Traditional Tests

Professor Chew analyzes the traditional tests that have been employed by the courts in determining how restrictive the limitations on fiduciaries' activities should be. That analysis is summarized in Table 1 on the following page. She discusses the doctrinal confusion that appears in reported cases:

Some courts are clearly struggling with the inadequacies of the traditional tests. Some cases reflect an ambivalent, sometimes incomprehensible approach to corporate opportunity problems. The courts

TABLE 1

TRADITIONAL TESTS:
CORPORATE INTEREST AS EXCLUSIVE CONCERN

<u>Test</u>	<u>Key Inquiries</u>	<u>Consequences</u>
Line of Business Test	Is the opportunity in competition with corporation? Is the opportunity one to which the corporation could possible adapt its resources?	If yes, the fiduciaries are precluded from pursuing the opportunity.
Expectancy Test	Does the corporation have a contractual claim to the opportunity?	If yes, the fiduciaries are precluded from pursuing the opportunity.
Fairness Test	Would it be unfair to the corporation for the fiduciaries to pursue the opportunity?	If yes, the fiduciaries are precluded from pursuing the opportunity.
<u>Miller</u> Test	Is the opportunity in the corporation's line of business? If so, would it be unfair to the corporation for the fiduciaries to pursue the opportunity? (Combination of line of business test and fairness test.)	If both in the line of business and unfair, the fiduciaries are precluded from the opportunity.

cite traditional tests in an almost perfunctory way, but the test on which they actually rely is sometimes unrecognizable as the traditional tests cited. Because the traditional tests and the eventual results are not consistent, these courts often cannot provide logical, well-reasoned explanations for the results. They instead follow the routine of elaborately stating the facts, citing the tests, and announcing their conclusion. Unfortunately, the analytical step of explaining how the legal principles are applied to the facts to reach the indicated legal conclusion often is missing.

Ibid., pp. 465-466. (Footnotes omitted.)

Emerging Corporate Opportunity Models

Professor Chew identifies three emerging models: (2) the corporate capability model, (2) the corporate expectations model, and (3) the disclosure model. Those models are summarized in Table 2 on the following page. Each model is reviewed in detail for its strengths and weaknesses. Professor Chew notes:

. . . While the models have noteworthy benefits, they all have one fundamental shortcoming. The models focus exclusively on protecting the interests of the corporation; they do not acknowledge competing societal and individual interests.

Ibid., p. 469. (Footnote omitted.)

The Reasonable Expectations Test

Finally, Professor Chew explores an alternative to the traditional tests: the reasonable expectations test. Under this alternative, courts would resolve corporate opportunity disputes according to the expectations of the parties, as depicted in Table 3.

This approach is in contrast to the traditional approach, which bases liability on the defendants' fiduciary status and the protection of the corporate interest. This proposal also differs from other expectation-related approaches. Those approaches misconstrue the corporate-fiduciary relationship and

TABLE 2

EMERGING CORPORATE OPPORTUNITY MODELS

<u>Model</u>	<u>Key Inquiries</u>	<u>Consequences</u>
Corporate Capability Model	Was the corporation able (financially, legally, practically) to pursue the opportunity?	If not, then the fiduciaries probably would not be precluded from the opportunity.
Corporate Expecta- tions Model	Is the opportunity within the corporation's reasonable expectations?	If so, then the fiduciaries are precluded from the opportunity.
Disclosure Model	Did the fiduciaries disclose the opportunity and the corporation consent to the fiduciaries' taking of it?	If not, then the fiduciaries are precluded from the opportunity.

TABLE 3

PARTIES' REASONABLE EXPECTATIONS

Follow		
<u>Expectations of Corporation</u>	<u>Expectations of Fiduciaries</u>	
Corporation is likely to negotiate terms that protect the integrity of the corporate-fiduciary relationship and its competitive position.	Fiduciaries are likely to negotiate terms that protect their rights to compete and to start new businesses.) Fiduciaries' interests coincide with societal interests in promoting competition and entrepreneurship.

Determination of Specific Expectations

1. Context of overall relationship.
 2. Principles in Maryland Metals.
 3. Express agreement.
-

how corporations operate. Furthermore, they consider the corporation's interest predominant.

Ibid., pp. 491-492. She urges courts to begin with an understanding of the basic relationships between the corporation and fiduciaries.

. . . The corporate-fiduciary relationship is more analogous to an agency, employee, or partnership relationship where the duties and rights of both parties are recognized and flexibly negotiated. The courts should respect their understanding.

Ibid., P. 493. (Footnote omitted.)

Developing Case Law

Professor Chew refers to Science Accessories Corp. v. Summagraphics, 425 A.2d 957 (Del. 1980), as one of the exceptional cases where a court took the bold step of explicitly recognizing competing corporate and non-corporate interests in a corporate opportunity dispute.

In Science Accessories, the Delaware Supreme Court analyzed whether three employees had breached their fiduciary duties to their corporate employer. One employee was a nuclear physicist in charge of the research and development and engineering departments. One was chief engineer, and the third was supervisor of manufacturing. None were corporate officers or directors at the time of the alleged wrongdoing, which involved diverting a technological concept to the new corporation they formed. The Delaware court pointed out the duties a key managerial employee owes his corporate employer:

It is true, of course, that under elemental principles of agency law, an agent owes his principal a duty of good faith, loyalty and fair dealing. 3 CJS

Agency § 271; Restatement (Second of Agency, § 387 (1957)). Encompassed within such general duties of an agent is a duty to disclose information that is relevant to the affairs of the agency entrusted to him. There is also a corollary duty of an agent not to put himself in a position antagonistic to his principal concerning the subject matter of his agency. Restatement (Second of Agency §§ 381 and 393 (1957)).

However, agency law is not without its limitations as to both duty to disclose and duty not to act adversely to a principal's business. Thus, an agent is not under a duty to disclose to his principal information obtained in confidence, the disclosure of which would be a breach of duty to a third person. Restatement (Second) of Agency § 381, Comment e (1957); see also § 393, Comment c (1957).

Similarly, while an agent may not put himself in a position antagonistic to his principal, an agent is not thereby prevented from acting in good faith outside his employment even though it may adversely affect his principal's business. Restatement (Second) of Agency § 387, Comment b (1957). Further, an agent can make arrangements or plans to go into competition with his principal before terminating his agency, provided no unfair acts are committed or injury done his principal. Restatement (Second) of Agency § 303, Comment e (1957).

425 A.2d at p. 962.

The court identified the competing policy interests:

These principles and limitations of agency law carry over into the field of corporate employment so as to apply not only to officers and directors but also to **key managerial personnel**. See Cahall v. Lofland, Del.Ch., 114 A. 224 (1921); 3 Fletcher, Cyclopedic Corporations (Perm.Ed.1975) § 846. They reflect competing policy interests in the law as to employer-employee relationships. On the one hand there is ". . . concern for the integrity of the employment relationship [which] has led courts to establish a rule that demands of a corporate officer or employee an undivided and unselfish loyalty to the corporation." Maryland Metals, Inc. v. Metzner, Md.App., 382 A.2d 568 (1978), citing Guth v. Loft, Inc., Del.Supr., 5 A.2d 503 (1939). However, there is an off-setting policy "recognized by the courts . . . of safeguarding society's interest in fostering free and vigorous competition in the economics sphere . . . This policy in favor of free competition has prompted the recogni-

tion of a privilege in favor of employees which enables them to prepare or make arrangements to compete with their employers prior to leaving the employ of their prospective rivals without fear of incurring liability for breach of their fiduciary duty of loyalty." Maryland Metals, Inc. v. Metzner, *supra*, at 569.

The doctrine of corporate opportunity represents one aspect of the law's effort to reconcile these competing policy interests. Guth v. Loft, Inc., *supra*. 3 Fletcher, Cyclopedia Corporations (Perm.Ed.1975) § 861.1. See General Automotive Manufacturing Company v. Singer, Wis.Supr., 120 N.W.2d 659, 663 (1963) stating, "The doctrine of corporate opportunity is a species of the duty of a fiduciary to act with undivided loyalty." Thus, the law of corporate opportunity is clearly pertinent, if not decisive, to the issue of whether defendants breached any fiduciary duty owed SAC in their handling of the magwire digitizer concept while in SAC's employ. And SAC so argued below.

Ibid., pp. 962-963.

The court summarized the law regarding a key managerial employee's fiduciary duty to his corporate employer when a business opportunity is presented:

Briefly summarized, the law is that if a business opportunity is presented to a corporate executive, the officer cannot seize the opportunity for himself if: (a) the corporation is financially able to undertake it; (b) it is within the corporation's line of business; (c) the corporation is interested in the opportunity. Guth v. Loft, Inc., *supra*, and Johnston v. Greene, Del.Supr., 121 A.2d 919 (1956). However, as stated in Equity Corporation v. Milton, Del. Supr., 221, A.2d 494 at 497 (1966):

A corollary of the Guth rule is that when a business opportunity comes to a corporate officer, which, because of the nature of the opportunity, is not one which is essential or desirable for his corporation to embrace, being an opportunity in which it has no actual or expectant interest, the officer is entitled to treat the business opportunity as his own and the corporation has no interest in it, provided the officer has not wrongfully embarked the corporation's resources in order to acquire the business opportunity.

Ibid., p. 963.

The Delaware Supreme Court affirmed the trial court's finding that the concept in Science Accessories was not an opportunity available to the corporate employer, which was in poor financial condition. That ended the inquiry.

The question then becomes whether the Court's finding that Brenner's concept was not a corporate opportunity available to SAC ends the inquiry as to whether defendants fulfilled their fiduciary duty to SAC of disclosure and not to divert an opportunity to themselves. We think so, for this reason. The gist of SAC's claim that defendants had breached their fiduciary duty to SAC was that the breach occurred as a result of the defendants' acts of secreting and then diverting Brenner's magwire concept from SAC to themselves. That raised a clear corporate opportunity issue which the Trial Court found to be the dominant issue before it at time of trial. With that issue having been resolved by the Court against SAC based on express findings of fact that are not directly contested, SAC cannot now persuasively argue that the Trial Court's findings as to corporate opportunity are not also dispositive of the question of whether defendants breached their above-mentioned fiduciary duties to SAC. For the law of corporate opportunity sets the parameters of permissible employee conduct consistent with an employee's fiduciary duties to his employers of loyalty and fair dealing.

Ibid., pp. 963-964. (Footnote omitted.) The court observed:

Thus, the doctrine of corporate opportunity is but application of agency fiduciary law in a particular corporate fact setting.

Ibid., p. 964.

The Delaware Court did analyze the employees' conduct in light of the corporate employer's failure to prove their conduct caused it to suffer any actual damages. The court quoted language from Maryland Metals, Inc. v. Metzner, 382 A.2d 564 (Md. App. 1978):

The right to make arrangements to compete is by no means absolute and the exercise of the privilege may, in appropriate circumstances, rise to the level of a breach of an employee's fiduciary duty of loyalty.

. . . (T)he ultimate determination of whether an employee has breached his fiduciary duties to his employer by preparing to engage in a competing enterprise must be grounded upon a thoroughgoing examination of the facts and circumstances of the particular case. 382 A.2d at 569, 570.

Ibid., p. 965.

DISCUSSION

This case follows the typical fact pattern Professor Chew identifies. Williams and Rockwood identified, investigated, negotiated, decided to pursue, and made preliminary plans to pursue the KSL opportunity. They were discovered and fired. They then actively began their competing business and developed the KSL account into a profitable venture. Williams and Rockwood had not signed any non-competition agreement with Gillham.

Williams and Rockwood occupied positions of trust and met the criteria by which Professor Chew identifies a fiduciary. Williams and Rockwood assert they were merely "employees at will" and "although each were given 'Vice-President' titles, neither were ever corporate officers."

Whether Williams and Rockwood were key employees or ordinary employees was a factual issue before the trial court which precluded summary judgment. Resolution of that factual issue was essential to determine the duties Williams and Rockwood owed their corporate employer, Gillham. If key employees, they owed Gillham (1) a duty of good faith, loyalty, and fair dealing; (2)

a duty to disclose information relevant to the affairs of the agency entrusted to them; and (3) a duty not to put themselves in a position antagonistic to the affairs of the agency entrusted to them. If ordinary employees, their duty was only to render loyal and conscientious service during regularly scheduled hours.

Williams and Rockwood clearly diverted the lucrative KSL account to their new corporation. [Brief of Appellant, Controverted Fact No. 2; Gillham Facts #23, #66, #71, #77, #78; pp. 8, 19, 20, 21-22.] The KSL account was clearly an affair of the agency entrusted to them.

Their chief defense is that they developed their plan "on their own time." [Brief of the Respondents, p. 3.] Secondly, they argue that adapting Gillham forms to their own use did not constitute misuse of "Gillham business information." [R. 083, ¶ 21, R. 109-110.] Williams and Rockwood conveniently gloss over these facts:

1. Five of their corporation's six full-time employees were former Gillham employees (presumably with knowledge necessary to service Gillham's KSL account). [Brief of Appellant, Controverted Fact No. 2, Gillham Fact #78, p. 21.]

2. Prior to their termination, they prepared a budget (presumably derived from Gillham financial information) to submit to KSL for their new advertising agency take-over of the KSL account [#49, p. 16].

3. Prior to their termination, they held a number of

closed-door meetings (presumably to plan the business of their new advertising agency's business with KSL and others) in Williams' office [#43, p. 14].

4. Prior to their termination, they explored with Gillham employees the possibility of working for their new corporation [#36, p. 11; #40, p.12].

The particular information and employees necessary to service the KSL account was certainly "Gillham business information" which Williams and Rockwood had an affirmative agency duty not to misuse to Gillham's detriment. Williams and Rockwood do not argue that Gillham was not injured by the loss of the \$200,000 KSL account.

KSL had been Gillham's client for 10 or 12 years [R. 179, ¶s 10-11]. Williams and Rockwood had no right to seize KSL for themselves. Gillham was financially able to service the KSL account; there was no evidence to the contrary. The KSL account was certainly within Gillham's line of business. Gillham was undisputedly interested in continuing to service the KSL account.

Williams' and Rockwood's conduct in seizing the KSL account was clearly not within the parameters of permissible employee conduct consistent with their fiduciary duties as key employees. While key employees at Gillham, they breached their duty of good faith, loyalty, and fair dealing to Gillham. They did not disclose to Gillham KSL's willingness to go with any new agency they might form. They put themselves in a position antagonistic to KSL continuing as a Gillham account.

Genuine issues of material fact precluded the trial court from granting summary judgment in favor of Williams and Rockwood, particularly the issue of whether Williams and Rockwood were "key employees" or merely "ordinary employees." This Court should reverse the trial court's award of summary judgment and the award of judgment and costs that followed thereupon.

POINT II

USE OF GILLHAM'S KSL BUSINESS INFORMATION AGAINST GILLHAM IN VIOLATION OF THEIR FIDUCIARY DUTIES AS KEY EMPLOYEES PRECLUDED SUMMARY JUDGMENT IN FAVOR OF WILLIAMS AND ROCKWOOD.

Williams and Rockwood argue that because Gillham did not file affidavits in response to their Motion for Summary Judgment, the trial court's award of summary judgment was proper. Williams and Rockwood misconstrue Rule 56 of the Utah Rules of Civil Procedure.

Rule 56(e) provides, in pertinent part:

. . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Gillham's response [R. 176-197] identified controverted facts and set forth specific supplemental facts supporting controversy. Those supplemental facts were all supported by reference to the depositions which had been taken in the matter.

Gillham's response was clearly in accordance with Rule 56(e). The supplemental facts clearly supported Gillham's contention that Williams and Rockwood, as key employees, breached their fiduciary duties to Gillham. See also,, Christensen ex rel. Christensen v. Financial Serv. Co., 14 Utah 2d 101, 377 P.2d 1010 (1963); and Olwell v. Clark, 658 P.2d 585 (Utah 1982).

Misuse of Gillham Business Information

Williams and Rockwood argue that adapting Gillham forms to their own use did not constitute misuse of "Gillham business information." [R. 083, ¶ 21, R. 109-110.] Williams and Rockwood take a shallow view of the "Gillham business information" they diverted to their own corporation. As demonstrated in Point I above, five of their corporation's six full-time employees were former Gillham employees, presumably with knowledge necessary to service Gillham's KSL account. The budget they submitted to KSL for their takeover of the KSL account had to have been derived from Gillham financial information. They held a number of closed-door meetings in Williams' office (on Gillham premises, presumably during regular business hours and presumably to plan their new agency's business with KSL and others). They explored with Gillham employees the possibility of working for their new corporation.

The details of the KSL account cannot be said to have been generally known or available. As trusted employees, Williams and rockwood knew those details, however, and used those details to seize the KSL account from Gillham in breach of their fiduciary

duties regarding their business conduct in the use of the Gillham business and conducting themselves in a manner to benefit themselves individually and the business entity of Williams and Rockwood. [R. 006, ¶ 20.]

They used "Gillham business information" antagonistically against Gillham and to benefit themselves. The information they used was more than forms, and they know it.

Summary judgment was not appropriate and was improperly granted. This Court should reverse the trial court's award.

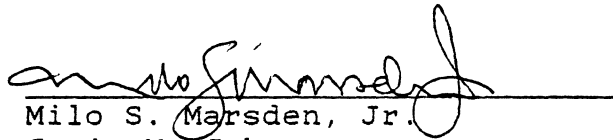
CONCLUSION

The genuine issue of whether Williams and Rockwood were "key employees" or merely "ordinary employees" precluded summary judgment in this case. If "key employees," under developing case law Williams and Rockwood breached their fiduciary duties to Gillham of (1) good faith, loyalty, and fair dealing; (2) to disclose information relevant to the affairs of the agency entrusted to them; and (3) not to put themselves in a position antagonistic to the affairs of the agency entrusted to them. While employed at Gillham, Williams and Rockwood clearly made preparations to divert the KSL account to the new agency they were forming. The KSL account was a business opportunity they had no right to seize. Gillham was financially able to service the KSL account. The KSL account was clearly within Gillham's line of business. Gillham was undisputedly interested in continuing to service the KSL account.

Summary judgment was inappropriate and improperly granted.

Williams and Rockwood misused more Gillham information than mere forms. This Court should reverse and remand this matter for trial.

DATED: June 28, 1989

A handwritten signature in black ink, appearing to read "Milo S. Marsden, Jr.", is written over a horizontal line.

Milo S. Marsden, Jr.
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CERTIFICATE OF SERVICE

Mailed a copy of the foregoing REPLY BRIEF OF APPELLANT to Mary Anne Q. Wood, HOLME, ROBERTS & OWEN, 50 South Main, Suite 900, Salt Lake City, Utah 84101, this 28th day of June, 1989.

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