

1989

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

Utah Court of Appeals

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BRIEF

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In the Utah Court of Appeals

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

Plaintiff/Appellant)

vs.)

TIM WILLIAMS and SCOTT)
ROCKWOOD,)

Defendants/Respondents.)

Case No. ~~880390~~

890070-CA

BRIEF OF THE RESPONDENTS

Appeal from the Third Judicial District Court,
Salt Lake County,
Judge Sawaya

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Priority 14b

FILED
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JURISDICTION STATEMENT

This court has jurisdiction for this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(h).

NATURE OF THE PROCEEDINGS

Respondents Tim Williams and Scott Rockwood ("Williams and Rockwood"), Defendants below, moved the district court for summary judgment in accordance with Utah Rules of Civil Procedure, Rule 56(c). Respondents prevailed and Appellant Gillham Advertising, Inc. ("Gillham"), Plaintiff below, now appeals.

STATEMENT OF THE ISSUES

The only issues on appeal are whether the court properly granted summary judgment and whether Williams and Rockwood' were properly awarded costs for depositions.

STATEMENT OF FACTS

Prior to March 26, 1987, Respondents Tim Williams and Scott Rockwood ("Williams and Rockwood") were working for Appellant Gillham Advertising, Inc. ("Gillham"). (R. 003 ¶4). Both were employees at will, having never signed employment agreements with Gillham or agreements not to compete. (R. 080 ¶4). Moreover, although each were given "Vice President" titles, neither were ever corporate officers. (R. 227, see also Corporation Annual Reports attached as Exhibits 1 and 2.¹). During their employment with Appellant, Williams and Rockwood worked on the KSL advertising account. (R. 080 ¶5). KSL had never signed a contract with Gillham agreeing to exclusively employ Gillham for its advertising needs. (R. 080 ¶7).

The undisputed testimony is that Williams and Rockwood were hoping to buy the Gillham business. (R. 103).

1. The Corporation Annual Reports filed by Gillham for 1986 and 1987 were attached as Exhibits A and B to Respondents' Reply to Plaintiff's Memorandum in Opposition to Motion for Partial Summary Judgment. These reports were not included in the record on file with the District Court. However, Respondents have moved to have the record supplemented to include the two documents.

They were dissatisfied with Richardson's management philosophy. (R. 116-117). They entered into negotiations with Richardson to buy Gillham, but came to believe he was not negotiating in good faith. (R. 156). Richardson himself admits that he had no intention of selling to Williams and Rockwood alone. (R. 118). He preferred to sell to all employees. (R. 114).

Williams and Rockwood decided to develop a plan on their own time for their own business if they were not successful in purchasing Gillham. (R. 144-145). They prepared a "To Do" checklist (R. 165-166) which included items which needed to be done prior to forming their own business. Some of these items were eliminated, others were accomplished on Williams and Rockwood's own time and some not attempted. (R. 148, 153). When a copy of the "To Do" checklist was found in the Gillham parking lot by a Gillham employee, Williams and Rockwood were fired by Richardson. (R. 121). After Respondents were fired they formed their own advertising agency called Williams and Rockwood Advertising. (R. 082 ¶15). They then presented a plan to KSL in an effort to obtain some of KSL's advertising business. (R. 083 ¶18). The effort was successful. (R. 083 ¶19).

Despite the fact that under Utah law Williams and Rockwood were free to make plans to form their own business on their own time prior to their termination, Williams and

Rockwood were sued by their prior employer based on alleged misuse of "confidential business information." (R. 002-R. 007). In his deposition, the Plaintiff admitted that no "confidential business information" had been misused. (R. 083 ¶21, R. 109-110). Defendants then promptly moved for summary judgment which was granted. (R. 248-249). This appeal followed.

ARGUMENT

Summary judgment is appropriate in cases where there exists no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law. Utah Rules of Civil Procedure Rule 56(c). The court below correctly found that this case presented no issues of material fact which would preclude summary judgment in favor of Williams and Rockwood.

I. APPELLANT'S CONCESSION THAT THERE HAS BEEN NO MISUSE OF GILLHAM BUSINESS INFORMATION MAKES SUMMARY JUDGMENT FOR RESPONDENTS APPROPRIATE ON ALL OF APPELLANT'S CLAIMS.

Appellant's complaint consists of four causes of action. In its First Cause of Action, Appellant alleges that Respondents breached their employment duty by using Gillham's business information to promote their own interests as a separate business entity rather than the interests of their

previous employer, Gillham Advertising, Inc. (R. 004 ¶11). The remaining three causes of action are varied allegations that Williams and Rockwood misused "Gillham business information" in forming their own business. (R. 004 ¶11, R. 005 ¶15, R. 006 ¶20, R. 007 ¶25). Thus each of Appellant's claims clearly rested on a fundamental premise that Respondents had misused "Gillham business information".

Utah law allows an employee to use his general knowledge, experience, memory and skill so long as he does not use or disclose any of the secrets of his former employer. Microbiological Resource Corp. v. Muna, 625 P.2d 690 (Utah 1981) citing Calman Unfair Competition, Trademarks & Monopolies, (3rd ed.), §§ 51.1 pp. 349-50; accord, Safeway Stores v. Wilcox, 220 F.2d 661, 665 (10th Cir. 1955). This rule encourages competition while protecting the individual's right to exploit his own skill and knowledge. Microbiological Resource Corp., 625 P.2d at 697. Thus before Appellant could prevail on a claim for misuse of business information, he would have had to prove that the information was secret or confidential.

Appellant below did not simply fail to meet its burden of showing that any information used was confidential, but, in fact, unequivocally conceded that there had been no

misuse of Gillham business information.² The information used by Williams and Rockwood did not contain knowledge not generally known; none involved communication under an express or implied agreement limiting their use; none qualified as secret and none were acquired in any wrongful manner. Because all claims set forth in Appellant's complaint were predicated

2. Q: Your obligation is to tell us the information which you alleged has been misused, you have to describe it. If you don't have it, under our interrogatories you had an obligation to describe it to us.

A: Okay. If you have provided us with everything that's been taken, then there is no Gillham business information --

Q: That has been --

A: -- that has been misused.

(R. 102: Richardson Depo. 77:15-23).

Q: But you cannot tell me right now a single piece of Gillham business information that has been misused; is that correct.

A: That's correct.

(R. 111: Richardson Depo. 65:6-9).

Q: Every one of your contentions in your complaint is based on misuse of, quote, "Gillham business information." We have asked you to identify for us what is the Gillham business information that you allege was misused.

In response to that, you've said you can't identify it unless you know what Scott and Tim took. We have given you everything that they took.

You now state that none of that is confidential --

A: (Mr. Marsden, Plaintiff's attorney)
Correct.

(R. 109-110: Richardson Depo. 59:22-60:5).

on the misuse of Gillham business information, those claims were no longer viable once Appellant conceded no misuse of information had taken place. Thus it was entirely proper for the trial court to grant summary judgment for Respondents.

II. APPELLANT DID NOT RAISE ISSUES OF FACT WHICH WOULD PRECLUDE SUMMARY JUDGMENT.

Appellant's brief sets forth an array of what it terms "Controverted Facts." That is a misnomer. As a general rule, the facts themselves although in the main irrelevant are not controverted. Simply calling these facts "controverted," does not make them so and does not create an issue of fact on which this court can reverse the lower court's grant of summary judgment. Appellant has also listed such facts out of order chronologically to create the impression that Williams and Rockwood solicited the KSL business before they were fired. They also have presented certain facts and record citations out of context in order to create an inaccurate or misleading impression. Exhibit 3 addresses each allegedly "controverted" fact individually to correct these inaccuracies.

An issue of fact cannot be created by a bare contention unsupported by the record. Massey v. Utah Power & Light, 609 P.2d 937 (Utah 1980). Moreover when a

party moves for summary judgment, and that motion is supported by affidavits, the opposing party must do more than simply rest on its pleadings. Franklin Financial v. New Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983) (party resisting Rule 56 summary judgment motion must file responsive affidavits raising factual issues, or risk court's conclusion that no factual issues exist); see also, Busch Corp. v. State Farm Fire & Cas. Co., 743 P.2d 1217 (Utah 1987).

Respondents filed two affidavits in support of their motion for summary judgment both containing Williams' and Rockwood's attestations that:

While employed at Gillham, I did not personally, nor did I participate with anyone else, in presenting a plan to perform advertising business for KSL, Utah County Journal, Digital Technology or any other client of Gillham Advertising.

(R. 075-076 ¶4, R. 082 ¶¶16-17, R. 167-168 ¶4).

Despite Appellant's contention that some kind of fiduciary duty was breached, Appellant has not presented evidence in support of that contention. In light of Respondents' affidavits, Appellant could not simply rest on allegations in its pleadings to resist the summary judgment.³

3. Appellant did file an affidavit below referencing a page from Keith Hill's Day-Timer. (Keith Hill was a former Gillham employee working for KSL who was also a friend of Respondents). However, Appellant offered no explanation of the ambiguous notation nor did Appellant's counsel inquire about the entry in Hill's deposition. This unexplained notation does not refute Williams' and Rockwood's unqualified testimony that they did not solicit Gillham's clients until after they had been terminated or Keith Hill's testimony that Respondents did not solicit KSL until

Footnote continued on next page.

The undisputed facts before the trial court were that Williams and Rockwood, while still Gillham employees, made certain preparatory efforts for creating a new advertising agency. Those efforts, however, did not include solicitation of Gillham clients or any act forbidden by law.

III. WILLIAMS AND ROCKWOOD DID NOT BREACH ANY DUTY OWED TO GILLHAM.

As noted above, all of Appellant's claims were based on misuse of Gillham business information. However, when Appellant became painfully aware that no business information had been misused, it attempted to breathe life into its complaint by basing a claim for breach of fiduciary duty on a phrase contained in Appellant's complaint taken out of context.⁴ See Plaintiff's Points and Authorities in Opposition to Defendants' Motion for Partial Summary Judgment, (R. 189-194). Appellant's complaint makes only a single reference to a breach of fiduciary duty by Williams and Rockwood. However, that duty is specifically described as regarding "their business conduct in the use of the Gillham

Footnote continued from previous page.

after they were fired. Hill Depo. p. 41 lines 12-16 (R. 224), and (R. 134-137).

4. Appellant has once again employed similar tactics in its appeal to this court. Appellant, in its brief, attempts to conjure up a cause of action for "intentional interference with economic relations." Such a claim is conspicuously absent from both Appellant's complaint and the record below. See discussion infra at IV.

business information." (R. 006 ¶19-20). Even if Appellant's complaint is interpreted as one for breach of fiduciary duty, however, the trial court properly found that no such duty had been breached.

A. The Preliminary Efforts Of Williams And Rockwood To Form A Competing Business Is Conduct Permitted By Utah Law.

The law does not forbid an employee from organizing a rival business while still employed by a potential competitor:

Even before the termination of his agency, [the employee] is entitled to make arrangements to compete except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of his employment immediately compete.

Restatement (Second of Agency), § 393 comment e (1958) (emphasis added); see also Las Luminarias of the New Mexico Council of the Blind v. Isengard, 92 N.M. 297, 587 P.2d 444 (1978); Mulei v. Jet Courier Service, Inc., 739 P.2d 889 (Colo. App. 1987). Utah has adopted the Restatement approach and further defines the right of the employee to include "the right to advise customers of the fact that he is going to quit; and that thereafter he will be working for a competitor." Crane Co. v. Dahle, 576 P.2d 870, 872 (Utah 1978).

The cases cited by Appellant do not support Appellant's proposition that Williams and Rockwood violated

any duty owed to Gillham because each case involved the solicitation of an employee's clients and undermining of the employer's business before the employment relationship ceased.

The defendants in Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d. 237 (N.Y. App. 1954), consisted of officers, shareholders and employees of the plaintiff advertising agency. Those defendants met together and agreed to either take over plaintiff's business or resign en masse and form a competing agency. When the president refused to sell the company, defendants threatened to resign, telling him that the plaintiff's customers had already been "presold" on the proposed new agency. The evidence before the court was that the president responded to the threat saying: "'In other words, you are standing there with a Colt .45, holding it at my forehead, and there is not much I can do except give up?', to which Hayes replied: 'Well, you can call it anything you want, but that is what we are going to do.'" Duane Jones at 241. The conduct which the court concluded was a breach of the duty owed by employees, included concerted, blatant and coercive solicitation of the plaintiff/employer's accounts for a competing corporation while still in plaintiff's employ, conduct which is reprehensible whether engaged in by officers, directors or regular employees.

Similarly, the defendants in Hoggan & Hall & Higgins, Inc. v. Hall, 18 Utah 2d 3, 414 P.2d 89 (1966), while serving

as directors and stockholders in the plaintiff corporation, solicited clients away from the plaintiff for the corporation they would be forming. Defendant Hall admitted that while still in plaintiff's employ he had contacted several of plaintiff's accounts, informed them that both he and the other defendant would be leaving and asked if the client would like Mr. Hall to continue to service those accounts. Id. at 91. Defendants thereafter resigned and took the files for the accounts they had solicited from plaintiff with them. Like the court in Duane Jones, the Hoggan court also found defendants liable to their former employer for their disloyal conduct.

Duane Jones, Hoggan and the instant case all involve advertising agencies. However, that is where the similarity ends. Williams and Rockwood were very interested in purchasing the Gillham agency. That interest was discussed with Mr. Richardson after Mr. Richardson had already expressed a desire to sell the agency to Gillham employees. Richardson Depo. 100:17-21. Richardson was not coerced into negotiations, but willingly engaged in those negotiation efforts with Respondents. When Williams and Rockwood became concerned that Richardson was not negotiating in good faith, Williams and Rockwood developed a contingency plan to create a new agency in case their attempt to purchase Gillham failed. However, according to Mr. Rockwood's testimony, Respondents'

"desire always was and still was to buy the agency."

(R. 160). The idea of creating a competing agency only came to fruition when Respondents were fired, and Respondents had no choice but to pursue their contingent plan.

Appellant has not presented this court or the court below with a scintilla of evidence that Williams and Rockwood solicited any Gillham accounts before leaving Gillham (let alone the kind of mass solicitation involved in the cases cited by Appellant). Post-termination solicitation of Gillham accounts, on the other hand, cannot constitute a violation of any alleged duty. Microbiological Research Corp., 625 P.2d at 700.⁵

B. Respondents Owed No Duty To Gillham Greater Than The Duty Of A Regular Employee.

Appellant attempts to sidestep Utah law--which clearly allows employees to act as Williams and Rockwood did--by alleging they were officers of the corporation owing a fiduciary duty of loyalty and good faith. The fact is Williams and Rockwood were not officers of the corporation. They were given titles, but were never made principals of the

5. The Mulei court refused to find violation of an employee's duty when the defendant solicited the former employer's customers for his new competing business, but did not actually begin competing until after he was fired. 739 P.2d at 893.

corporation.⁶ Moreover, even if they were officers, Appellant has failed to establish that they breached any duty owed by officers to a corporation.

1. Williams and Rockwood were not principals of Gillham.

Whether one is an officer owing a fiduciary duty is a question of law to be determined by the law of the state of incorporation. Lewis v. Knutson, 699 F.2d 230, 235 (5th Cir. 1983). Utah law defines officers of a corporation as follows:

The officers of a corporation shall consist of a president, one or more vice-presidents as may be prescribed by the bylaws, a secretary, and a treasurer, each of whom shall be elected by the board of directors at such time and in such manner as may be prescribed by the bylaws. Such other officers and assistant officers and agents as may be deemed necessary may be elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the bylaws. Any two or more offices may be held by

6. Q: Did you hold any other positions with Gillham?

A: I was also given the title of vice-president, but that was a title that didn't have anything to do with being a principal in the corporation.

Q: What duties, if any, did it have?

A: Make me feel good.

Q: Anything other than that?

A: Did not affect my responsibilities.

Q: Did you ever sign documents as vice-president?

A: No.

(R. 151), Rockwood Depo. 10:21-11:5.

the same person, except the offices of president and and secretary shall not be held by the same person.

Utah Code Ann. § 16-10-45. The law then requires corporations to list the names and addresses of all corporate officers in its annual report filed with the Division of Corporations:

(1) Each domestic corporation and each foreign corporation authorized to transact business in this state shall file, within the time prescribed by this chapter, an annual report setting forth:

. . .

(d) the names and respective addresses of the directors and officers of the corporation;

. . .

Utah Code Ann. § 16-10-121.

Pursuant to the above law, Gillham filed its Corporation Annual Report in 1986 and 1987, both times listing its only officers as: Lon Richardson, Jr., President; Ronald W. Griffiths, Vice-President; Nancy Mower, Secretary; and Lon Richardson, Jr., Treasurer. See p. 2 note 1, supra. The 1986 annual report was in effect the year the alleged actions took place. Neither that report, nor the report for the following year list either Respondent as a corporate officer. This evidence was before the lower court when it granted Respondents' motion for summary judgment and was not controverted by Appellant.

2. "Executive Officers" as defined by insurance law are not officers for purposes of finding a strict fiduciary duty.

Appellant recognizes the weakness in its argument that Williams and Rockwood were Gillham officers, and so, attempts to create a fact issue as to whether Respondents could be classified as "executive officers." Such a position is irrelevant to a discussion of whether Williams and Rockwood owed a fiduciary duty to the company.

Appellant's brief is replete with insurance cases in which the court is asked to determine whether an employee is an executive officer for purposes of insurance coverage. That situation is not analogous to the one at bar, nor does it give rise to an inference that such an "executive officer" owes a fiduciary duty to its employer. The public policy which lies at the heart of insurance cases is fundamentally different from the policy of holding an officer, shareholder or director to a fiduciary duty. A basic rule of insurance law is that the insurance policy is always construed against the insurer and in favor of the insured. P. E. Ashton Co. v. Joyner, 17 Utah 2d 162, 406 P.2d 306 (Utah 1965); Metropolitan Property & Liability Ins. Co. v. Finlayson, 751 P.2d 254 (Utah App. 1988). That construction naturally leads to a broader definition of what constitutes an "officer", which

construction will affect whether coverage is found in the case.

In contrast, the fiduciary duty is narrowly construed to apply only to officers, directors, and shareholders of a corporation. 3 Fletcher, Cyclopedic Corporations § 1011 (Perm. Ed. 1986); Lewis v. Knutson, 699 F.2d 230 (5th Cir. 1983); Fausett v. American Resources Management Corp., 542 F.Supp. 1234 (D. Utah 1982).

Appellant offers no authority in support of its proposition that executive officers as defined in insurance cases owe a fiduciary duty to a corporation similar to that duty owed by directors and officers. Respondent, on the other hand, does not suggest that employees owe no duty to the employer, but that the duty of an employee is not the same as the fiduciary duty owed by officers, directors, and stockholders.

3. "Key Employees" are not fiduciaries of a corporation.

Alternatively, Appellant has argued that Williams and Rockwood were "key employees" owing the same type of duty owed by directors, shareholders and officers. However, Appellant has never offered this court or the court below any Utah law which distinguishes between regular employees and so-called "key employees" for the purpose of finding a fiduciary duty.

Appellant offers only the case of Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (N.Y.App. 1954) for the proposition that even employees who are clearly not officers of the corporation owe the same strict fiduciary duty to their employer as do officers. That case, however, does not suggest that the duty owed by "key employees" is the same as the fiduciary duty owed by officers and directors. In fact, the standard used by the court against which the defendants' conduct was measured was "the standard required by the law of one acting as an agent or employee of another." Duane Jones at 245 quoting Lamdin v. Broadway Surface Adv. Corp., 272 N.Y. 133, 138 5 N.E.2d 66, 67 (emphasis added).

C. Williams And Rockwood's Conduct Was Appropriate Even If They Were Officers of Gillham.

Even if Williams and Rockwood were officers, their conduct did not violate any duty owed to Gillham. The duty of an officer is defined as follows:

Concern for the integrity of the employment relationship had led courts to establish a rule that demands of a corporate officer or employee an undivided and unselfish loyalty to the corporation. (cites omitted)

There exists, however, an exception to this general requirement of loyalty. Thus an employee does not violate his duty of loyalty when he merely organizes a corporation during his employment to carry on a rival business after the expiration of this term of employment. (cites omitted)

Las Luminarias, 587 P.2d at 449 (emphasis added); see also 3 Fletcher, Cyclopedia Corporations § 856 (Perm. Ed. 1986).

The "fiduciary" duty which Appellant seeks to impose is nothing in short of involuntary servitude. Under Appellant's theory Williams and Rockwood could not investigate other employment alternatives until after they were terminated. Such is clearly not the current state of the law. See Microbiological Research Corp., 625 P.2d at 700; Crane Co., 576 P.2d at 872-873.

The decision of the trial court was in accordance with well-settled Utah law and is not inconsistent with the law of other jurisdictions. In the face of undisputed facts concerning Williams' and Rockwood's preparations to create a new business while still in Appellant's employ, the court properly found that there was no evidence of a breach of fiduciary duty. Williams and Rockwood admittedly took preliminary steps to form their own advertising agency and also informed an employee of one of Gillham's clients, who was also their friend, of their prospects to buy Gillham or form their own business. However, Respondents never unequivocally committed themselves to the alternate plan. It is unclear whether these plans would have even been consummated if Respondents had not been summarily fired. If Appellant has been harmed, it has been by his own actions in firing these admittedly valuable employees.

Respondents' actions are permitted by Utah law which allows an employee to prepare to compete with an employer while still in his employ. Moreover, although Utah law under some circumstances, may forbid officers charged with fiduciary obligations from engaging in conduct which undermines his employer's business while still in his employ, the evidence that Respondents did not engage in such conduct has gone uncontested. Summary judgment was appropriate.

IV. APPELLANT HAS FAILED TO PLEAD OR OFFER EVIDENCE IN SUPPORT OF ITS SUPPOSED CLAIM FOR INTENTIONAL INTERFERENCE WITH ECONOMIC RELATIONS.

A. This Tort Claim Was Not Before The Trial Court And Is Not Properly Before This Court.

Utah law is unmistakably clear on the point that matters not raised in pleadings or addressed before the trial court cannot be raised for first time on appeal. Lane v. Messer, 731 P.2d 488 (Utah 1986). The Utah Supreme Court states:

Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation.

Bundy v. Century Equipment Co., 692 P.2d 754, 758 (Utah 1984),
quoting Simpson v. General Motors Corp., 24 Utah 2d 301, 303,
470 P.2d 399, 401 (1970).

Appellant ignores this fundamental concept in its appeal. Appellant's suggestion that a claim for intentional interference with economic relations was raised below is simply unsupported by the record. All of the claims contained in the complaint specifically seek redress for alleged harm stemming from misuse of Gillham's confidential business information. Even if, by some stretch of the imagination, this new claim could be implied from language contained in the complaint, summary judgment would still be appropriate because such a claim would, like all other claims in the complaint, be based on alleged misuse of Gillham business information. Appellant has already conceded that Williams and Rockwood have not misused such information. In light of that concession the lower court appropriately dismissed all of Gillham's claims.

The only other way this issue could possibly be before this court is if it was presented in arguments below. Neither Appellant's brief nor Williams' and Rockwood's briefs on the motion for summary judgment make a single reference to an allegation of intentional interference with prospective economic relations. Therefore it would be inappropriate to reverse the decision of the lower court on a basis not before it.

B. Respondents' Undisputed Conduct Was Not Tortious.

Although the claim for intentional interference with economic relations is not properly before this court the facts in this case do not support such a claim in any event. The Utah Supreme Court first recognized the claim of intentional interference with prospective economic advantage in Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293 (Utah 1983). In so doing, the court adopted the Oregon approach to the tort which "require[s] the plaintiff to allege and prove more than the prima-facie tort." Id. at 304. The elements which must be proven are:

- (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations,
- (2) for an improper purpose or by improper means,
- (3) causing injury to the plaintiff.

Id. The court held that mere instances of aggressive, or even abrasive tactics were not sufficient to show intentional interference, but a three-and-one-half years prolonged course of abusive conduct as was demonstrated in Leigh was sufficient.

Appellant's brief fails to allege facts which, if true, would support the elements of this tort. The undisputed facts upon which such a tort would be based are that Williams and Rockwood solicited a single Gillham client after they were

fired. Such conduct is clearly permitted by Utah law and is to be expected in a competitive society. Mulei, 739 P.2d at 893-894 (interference with contracts terminable at will by lawful means justified by privilege of lawful competition). Justice Oaks differentiated the tort of intentional interference with prospective economic advantage from legitimate competition with this language:

[T]his alternative takes the long view of the defendant's conduct, allowing objectionable short-run purposes to be eclipsed by legitimate long-range economic motivation. Otherwise, much competitive commercial activity, such as a businessman's efforts to forestall a competitor in order to further his own long-range economic interests, could become tortious. In the rough and tumble of the marketplace, competitors inevitably damage one another in the struggle for personal advantage. The law offers no remedy for those damages--even if intentional--because they are an inevitable byproduct of competition.

Leigh, 657 at 307.⁷

By alleging that Williams and Rockwood engaged in conduct rising to the level of tortious interference with economic relations, Appellant asks this court to adopt a harsh standard imposing tort liability on individuals who fairly compete with former employers simply because they successfully solicit clientele of that former employer. Such a result

7. Admittedly, Appellant was injured when KSL decided to hire Respondents' advertising agency. However, that injury by itself will not give rise to tort liability when clearly there was no improper purpose or means utilized by the defendant.

flies in the face of principles repeatedly established by the Utah Supreme Court that any duty to a former employer ceases after termination and those employees are free to compete with their former employer. Microbiological Research Corp., 625 P.2d at 695; Crane Co. v. Dahle, 576 P.2d 870, 872-873.

V. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON RESPONDENTS' COUNTERCLAIM FOR THE BONUS MONEY.

It is not clear on the face of Appellant's brief whether it is appealing the trial court's award of the \$4,000 unpaid bonus money to Mr. Rockwood. Appellant makes no mention of the court's decision on that issue until the conclusion of the brief when it states that "the trial court erred in awarding Rockwood the \$4,000 bonus money" and asks this court to reverse the district court's September 15 Order granting summary judgment on Respondents' counterclaim. Brief at 45.

Reversal of the trial court's decision on that counterclaim is inappropriate for two reasons. First, nowhere in Appellant's brief does Appellant offer any reasons as to how the court's decision on that issue constitutes error. Second, at the hearing before the trial court on the motion for summary judgment, Appellant's attorney conceded that Mr. Rockwood was entitled to the bonus money and agreed to pay the

full amount remaining due.⁸ The trial court accordingly ruled in Respondents' favor on the counterclaim from the bench. The order was entered three days later. Appellant then paid the bonus money to Mr. Rockwood on November 10, 1988. Appellant cannot now retract from that concession and ask this court to find error. For those reasons, the September 15 Order should be affirmed.

VI. DEPOSITION COSTS WERE APPROPRIATELY AWARDED TO WILLIAMS AND ROCKWOOD.

Appellant correctly states the standard governing entitlement to costs for depositions, but incorrectly applies that standard to the case at bar. The Utah law in that regard is that costs for depositions will not be awarded unless those depositions are necessary to the party's presentation of the case. Nelson v. Newman, 583 P.2d 601 (Utah 1978).

Further, the determination as to whether those depositions were necessary is committed to the discretion of the trial judge. Highland Construction Co. v. Union Pacific Railroad Co., 683 P.2d 1042, 1051 (Utah 1984). A finding of necessity does not require actual use of those depositions at a full-blown trial. In fact, use of the depositions to support a party's motion for summary judgment will suffice.

8. This concession was undoubtedly based on Mr. Richardson's testimony that he had not paid the bonus because he had "forgotten to do so." (R. 119).

Roy v. Neibauer, 623 P.2d 555 (Mont. 1981). Appellant's suggestion that costs should not have been awarded because there was no trial is absurd.

Appellant does not contend that the depositions were unnecessary to Williams' and Rockwood's motion for summary judgment. In fact the record will indicate how extensively Respondent relied on those depositions in presenting its case to the court.

Appellant also argues that the costs of the deposition transcripts should not be awarded because discovery through interrogatories would have been less expensive. What Appellant fails to mention is that all but one of the depositions was taken at Appellant's request--as Appellant's chosen method of discovery. Williams and Rockwood should not be forced to give up the costs awarded simply because Appellant selected an expensive method of discovery.

Clearly the district judge did not abuse his discretion in awarding costs of deposition transcripts to Williams and Rockwood. This court should, therefore, uphold the district judge's decision in that regard.

CONCLUSION

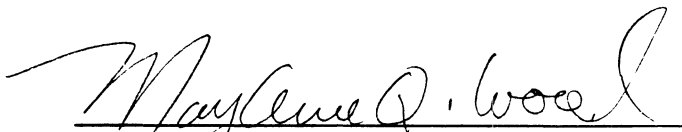
This lawsuit began as a series of claims against Williams and Rockwood for alleged misuses of Gillham business information. When it became clear that no such information had been misused, Williams and Rockwood immediately moved for summary judgment. This precipitated a change of tactics by Gillham, and, in response to the motion for summary judgment, Gillham raised a claim for breach of a fiduciary duty. However the trial court granted the motion by Williams and Rockwood finding no dispute of material fact as to both the four claims raised in the complaint and the breach of fiduciary duty claim raised in response to the motion for summary judgment.

Gillham has once again employed the same tactics in its appeal to this court. For the first time Gillham has alleged intentional interference with economic relations despite the fact that no such claim was before the trial court. This transparent attempt to breathe life into the complaint on which summary judgment was properly granted should not detain this court.

The court below properly granted summary judgment for Respondents on all counts, including the counterclaim. The award of costs was also appropriate. This court should therefore, affirm the lower court's decisions.

RESPECTFULLY SUBMITTED this 26th day of May, 1989.

HOLME ROBERTS & OWEN



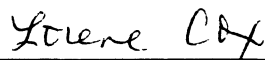
Mary Anne Q. Wood
Pamela B. Hunsaker

CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered,
a true and correct copy of the foregoing Brief of the
Respondents this 26th day of May, 1989, to the following:

Milo S. Marsden, Jr., Esq.
Jamis S. Johnson, Esq.
Marsden, Orton & Cahoon
68 South Main, Fifth Floor
Salt Lake City, Utah 84101

Virginia Curtis Lee, Esq.
1458 Princeton Avenue
Salt Lake City, Utah 84105



AL2/PBHP

Tab 1



DEPARTMENT OF BUSINESS REGULATION
DIVISION OF CORPORATIONS AND COMMERCE

CORPORATION ANNUAL REPORT

8705 2F
REV. 8-85
STATE OF UTAH

In compliance with Section 16-10-121 & 122 and Section 16-10-12 or 16-10-110, U.C.A., 1953 the following report, and if applicable the statement of change of registered office and/or agent is submitted (PLEASE TYPE OR PRINT CLEARLY)

016993 INC: 06/22/1925 D
1 EXACT CORPORATE NAME GILLHAM ADVERTISING AGENCY INC
REGISTERED AGENT RICHARD H OGAARD S/D
REGISTERED OFFICE 15 EAST 1ST SOUTH
SALT LAKE CITY UTAH 84111

2 IF NEW REGISTERED AGENT AND/OR OFFICE, PLEASE COMPLETE

New Registered Agent Nancy Mower [Signature]
(Registered agent's signature)
New Registered Office _____ City _____ State UTAH Zip _____
(Street Address)

(With the above change the address of the registered office and the address of the business office of the registered agent are identical)

3 INCORPORATED UNDER THE LAWS OF Utah (STATE OR COUNTRY)

4 IF INCORPORATED OUTSIDE THE STATE OF UTAH, GIVE THE ADDRESS OF THE PRINCIPAL OFFICE IN THE STATE OR COUNTRY OF INCORPORATION.

(Street Address) City _____ State or Country _____ Zip _____

5 TYPE OF BUSINESS CONDUCTED IN UTAH Advertising

6 NAMES AND RESPECTIVE ADDRESSES OF THE OFFICERS AND DIRECTORS OF THE CORPORATION.

	NAME	STREET	CITY, STATE, ZIP
President	Lon Richardson, Jr.	872 Woodruff Way	SLC Ut. 84108
Vice-President	Ronald W. Griffiths	8520 Kings Hill Drive	SLC Ut. 84121
Secretary	Nancy Mower	3613 South 5750 West	SLC Ut. 84120
Treasurer	Lon Richardson, Jr.	872 Woodruff Way	SLC Ut. 84108

7 DIRECTORS: (UTAH LAW REQUIRES AT LEAST 3 DIRECTORS.)

	NAME	STREET ADDRESS	CITY, STATE, ZIP
1	Lon Richardson, Sr.	1280 4th Avenue	SLC, Ut. 84103
2	Lon Richardson, Jr.	872 Woodruff Way	SLC, Ut. 84108
3	Zoe Ann Richardson	872 Woodruff Way	SLC, Ut. 84108

8 AUTHORIZED SHARES (DO NOT CHANGE THE INFORMATION LISTED.)

Number of Shares Authorized	Itemized By Class	Series, If Any Within A Class	Par Value Of Shares	Number of Shares Without Par value
2,500	COMMON		10.0000 .0000	

9 NUMBER OF SHARES ISSUED (MUST BE COMPLETED)

Number of Shares Issued	Itemized By Class	Series, If Any Within A Class	Par Value Of Shares	Number of Shares Without Par Value
			10.00	

10 STATED CAPITAL AS OF DATE OF THIS REPORT (Number of Shares Issued X Par Value) \$ 11,000 *

Under the penalties of perjury and as an authorized officer, I declare that this annual report and, if applicable, the statement of change of registered office and/or agent, has been examined by me and is, to the best of my knowledge and belief, true, correct, and complete

11 BY Lon R. Richardson, Jr.
Authorized Officer

12 President
Title or Position

(If Registered Agent and/or Registered Office has been changed on this form, said change must be authorized by a resolution adopted by the Board of Directors, and The President or Vice President must sign the report.)

13 DATE June 5, 19 86
Send Report &
Remittance to:

EE \$5.00 Make check payable to Annual Report Section

PURSUANT TO SECTION 16-10-121 AND 122, U.C.A., ALL CORPORATIONS MUST FILE THEIR ANNUAL REPORTS WITHIN THE 10TH OF THEIR ANNIVERSARY DATE. FAILURE TO DO SO WILL RESULT IN SUSPENSION OF THE CORPORATIONS CHARTER.

Annual Report Division
160 EAST 300 SOUTH 2ND FLOOR
P.O. Box 45801
Salt Lake City, Utah 84145-0801
(801)530-6012

Tab 2



DIVISION OF CORPORATIONS AND COMMERCIAL CODE

CORPORATION ANNUAL REPORT

REV. 8-85
STATE OF UTAH

In compliance with Section 16-10-121 & 122, and Section 16-10-12 or 16-10-110, U.C.A., 1953 the following report and if applicable the statement of change of registered office and/or agent, is submitted (PLEASE TYPE OR PRINT CLEARLY)

1 EXACT CORPORATE NAME 016993 INC: 06/22/1925 D
REGISTERED AGENT GILLHAM ADVERTISING AGENCY INC
REGISTERED OFFICE NANCY MOWER /S
15 EAST 1ST SOUTH
SALT LAKE CITY UTAH 84111

2 IF NEW REGISTERED AGENT AND/OR OFFICE, PLEASE COMPLETE

New Registered Agent

(Registered agent's signature)

New Registered Office

City

State

UTAH

Zip

(Street Address)

(With the above change, the address of the registered office and the address of the business office of the registered agent are identical.)

3 INCORPORATED UNDER THE LAWS OF Utah (STATE OR COUNTRY).

4 IF INCORPORATED OUTSIDE THE STATE OF UTAH, GIVE THE ADDRESS OF THE PRINCIPAL OFFICE IN THE STATE OR COUNTRY OF INCORPORATION.

City

State or
Country

Zip

(Street Address)

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Treasurer	Lon Richardson, Jr.	872 Woodruff Way	SLC	Ut.	84108

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8 AUTHORIZED SHARES (DO NOT CHANGE THE INFORMATION LISTED.)

Number of Shares Authorized	Itemized By Class	Series, If Any Within A Class	Par Value Of Shares	Number of Shares Without Par Value
2,500	COMMON		10.0000 .0000	--

NUMBER OF SHARES ISSUED (MUST BE COMPLETED)

Number of Shares Issued	Itemized By Class	Series, If Any Within A Class	Par Value Of Shares	Number of Shares Without Par Value
			10.00	--

14 STATED CAPITAL AS OF DATE OF THIS REPORT (Number of Shares Issued X Par Value) \$11,000*

Under the penalties of perjury and as an authorized officer, I declare that this annual report and, if applicable, the statement of change of registered office and/or agent, has been examined by me and is, to the best of my knowledge and belief, true, correct, and complete

*1400 Retired

1 BY Lon R. Richardson, Jr.
Authorized Officer12 President
Title or Position

(If Registered Agent and/or Registered Office has been changed on this form, said change must be authorized by a resolution adopted by the Board of Directors, and The President or Vice President must sign the report.)

13 DATE May 13, 19 87

Send Report &

Remittance to: Annual Report Division
160 EAST 300 SOUTH 2ND FLOOR
P.O. Box 45801
Salt Lake City, Utah 84145-0801
(801) 530-6012

E \$5.00 Make check payable to Annual Report Section

PURSUANT TO SECTION 16-10-121 AND 122, U.C.A., ALL CORPORATIONS MUST FILE THEIR ANNUAL REPORTS WITHIN THE MONTH OF THEIR ANNIVERSARY DATE. FAILURE TO DO SO WILL RESULT IN SUSPENSION OF THE CORPORATIONS CHARTER.

SSFRM2 FS. 11 85

DO NOT CHANGE OR ALTER THIS FORM

Tab 3

EXHIBIT 3

Uncontroverted Facts

Response

- | | |
|--|---|
| 1. Gillham is a Utah corporation engaged in the advertising business, having its principal place of business in Salt Lake City. [R. 002, ¶ 1; 079, ¶ 1] | 1. Respondents agree. |
| 2. Williams and Rockwood are residents of Salt Lake County. [R. 002, ¶¶ 2-3; 080, ¶ 2] | 2. <u>Id.</u> |
| 3. While with Gillham, Williams and Rockwood worked on the KSL advertising account. [R. 080, ¶ 5] | 3. <u>Id.</u> |
| 4. KSL had been a client of Gillham's for 10 or 12 years and, after First Security Bank, was Gillham's largest account. [R. 179, ¶¶ 10-11] | 4. <u>Id.</u> |
| 5. Keith Hill, a former Gillham employee, was the KSL employee in charge of KSL's advertising accounts. [R. 080, ¶ 6; 081, ¶ 9] | 5. <u>Id.</u> |
| 6. Hill was a friend of both Williams and Rockwood. [R. 081, ¶ 10] | 6. <u>Id.</u> |
| 7. While with Gillham, Williams and Rockwood discussed with Hill their plans to purchase Gillham or form their own business. [R. 081, ¶ 11] | 7. <u>Id.</u> Those discussions took place on Respondents' own time. [R. 081, ¶ 11 - also cited by Appellant] |
| 8. While with Gillham, Williams and Rockwood prepared a "To Do" checklist of things to be done to form their own business if their negotiations to purchase Gillham failed. [R. 082, ¶ 13] | 8. <u>Id.</u> |
| 9. In establishing their new business entity, Williams and | 9. Appellant has already conceded that any forms used by Williams |

Rockwood reviewed and incorporated certain forms from Gillham. [R. 083, ¶ 20]

and Rockwood did not constitute confidential business information. [R. 083 ¶ 21, R. 109, 110]

10. On March 27, 1987, after Gillham discovered the "To Do" checklist and discussed it with Williams and Rockwood, Gillham dismissed Williams and Rockwood. [082, ¶ 14]

10. This is not in dispute.

11. Soon thereafter, KSL transferred its advertising business from Gillham to Williams and Rockwood. [R. 083, ¶ 19]

11. Id.

12. In Count III of its Complaint, Gillham alleges Williams and Rockwood owed fiduciary duties to Gillham which they breached, thereby damaging Gillham. [R. 006, ¶¶ 18-21]

12. Count III actually reads that Williams and Rockwood "breached said fiduciary duties in that they failed to use the Gillham Business Information in such a manner as to benefit Gillham, but rather breached their fiduciary duties by using the information and conducting themselves in a manner to benefit themselves individually and the business entity of Rockwood and Williams." Complaint ¶ 20. [R. 005, ¶ 20]

Controverted Fact No. 1

1. Whether Williams and Rockwood were key employees and officers of Gillham or whether they were ordinary employees.

1. This is not a controverted fact, but is a question of law. Lewis v. Knutson, 699 F.2d 230, 235 (5th Cir. 1983).

Facts According to Gillham

1. Williams was Senior Vice-President, supervisor, and primary contact person at Gillham on the First Security account, Gillham's largest account, which it had serviced for 35 years. In 1986, Gillham's annual gross billings to First Security were about \$600,000 and amounted to about 40 percent of Gillham's income. First Security left Gillham in

1. Williams was not a principal of the corporation but was an officer by title only. [R. 227 see also argument re: fiduciary duty.]

March, 1987. [R. 178-179, ¶¶ 3-9]

2. As Vice-President and creative art director, Rockwood was responsible for Gillham's entire creative department consisting of two full-time writers, four full-time artists, and regular free lancers. [Deposition of Scott Rockwood, p. 9, lines 5-18]
2. Rockwood also was not a principal of the corporation but was a vice-president by title only. Id.
3. Williams and Rockwood did not punch a time clock at Gillham. They had tasks and deadlines and worked until they were done. Rockwood arrived at 8:00 a.m. or earlier and worked until 6:00 p.m. or 8:00 p.m. most nights, often working through lunch. [Deposition of Scott Rockwood, p. 61, line 15 to p. 62 line 9]
3. Respondent does not contest this fact, but simply points out it is not relevant to the issues before the court.
4. For several months prior to their termination, Williams and Rockwood discussed with Lon Richardson, Gillham's President and principal shareholder, the purchase of Gillham for about \$500,000 plus good will. Williams and Rockwood wanted control of Gillham in one (1) year; Richardson wanted to retain control for five (5) years. [R. 179, ¶¶ 12-16]
4. Id.
5. Williams recognized that Richardson had discretion in paying bonuses, depending on Gillham's profits. In March, 1987, Richardson paid Williams and Rockwood each \$1,000 as a bonus for 1986. [R. 179, ¶¶ 12-16]
5. Appellant's citation to the record does not support the fact alleged. Moreover this does not change the fact that Mr. Richardson promised Mr. Rockwood a \$5000 "incentive bonus." [R. 083-084 ¶¶ 22-25]
6. Because Williams and Rockwood felt their bonuses were too small, in mid-March, 1987, Williams prepared a "To Do" checklist of things to accomplish prior to their
6. Williams states, in a portion of the deposition referred to by Appellant, that the bonus issue was not the only precipitating event for Respondents' decision to plan to create a competing

departure from Gillham. [R. 181, ¶¶ 28-31]

advertising agency. As to the bonus issue he states "And I would say that that might have given us more motivation than we had before. But I wouldn't say that that was the event." Williams Depo. 20:23-25.

Facts According to Williams and Rockwood

1. Williams and Rockwood were employed by Gillham as employees at will. [R. 018, ¶ 4; 080, ¶ 4; 075, ¶¶ 2-3; 167, ¶¶ 2-3]

1. Although Williams and Rockwood have taken the position set forth opposite, Appellant's organization of facts should not be read to suggest that Respondents do not agree at all with the foregoing "Facts According to Gillham." In fact, as set forth above, Respondents do agree with most of the "Facts According to Gillham" but only seek to add the foregoing clarification. Moreover, it should be noted that Appellant has not taken issue with the opposite "Facts According to Williams and Rockwood."

Controverted Fact No. 2

2. Whether Williams and Rockwood, while employees and officers of Gillham, determined upon a course of conduct which, when subsequently carried out, resulted in benefit to themselves from the taking of the KSL account from Gillham in violation of fiduciary duties of good faith and fair dealing they owed Gillham.

Facts According to Gillham

In its Memorandum in Opposition Summary Judgment, Gillham asserted the following supplemental facts:

22. Defendants wanted the KSL business and directly solicited that business from Hill. (Deposition of Rockwood, p. 26,

22. Respondents admit this fact, but with the clarification that

lines 13-15; p. 28, lines 23-25). [R. 180]

any and all solicitation of the KSL business took place after termination. Rockwood depo. p. 24, lines 3-13; p. 25, line 15 through p. 26, line 15; affidavits of Williams and Rockwood.

23. Defendants eventually got the KSL advertising business away from Gillham. (Deposition of Rockwood, p. 30, lines 5-9). [R. 180]
24. Defendants, in leaving Gillham, knew they had to talk to Hill and present a plan to show their interest in handling the KSL business. (Deposition of Williams, p. 23, lines 1-6). [R. 180]
25. Defendants met with Hill prior to their termination. (Deposition of Rockwood, p. 18, lines 23-25). They talked about starting their own business. (Deposition of Rockwood, p. 19, lines 22-24; Deposition of Williams, p. 24, lines 15-18). [R. 181]
26. Defendants talked to Keith Hill and presented a plan. (Deposition of Rockwood, p. 17, lines 6-14). [R. 181]

23. Not controverted and not relevant.
24. However, Respondents did not present a plan to KSL until after they were terminated. [R. 075-076, R. 082 ¶¶ 16-17, R. 167-168]
25. Hill was a KSL employee acting as the contact person with Gillham. Hill depo. p. 13, lines 17-23. The primary purpose of his meetings with Respondents was to discuss KLS/Gillham business. Rockwood depo. p. 18, lines 18-19. Utah law does not prohibit employees from discussing future plans with the employer's clients. These efforts were made on Respondents' own time. [R. 081, ¶ 11] This fact remains uncontroverted. Furthermore, Appellant does not suggest that Respondents tried to solicit the KSL account prior to their termination.
26. The solicitation did not take place until after termination. In fact, in Appellant's citation to the deposition, Appellant cuts off the excerpts at the point the deponent (Mr. Rockwood) makes it absolutely clear that the solicitation did not take place until after he and Mr. Williams had been

terminated beginning where
Appellant left off:

Q. When did you do that?

A. Directly talking to Keith
about these plans would have
probably been approximately
- well, one of the last days
of March or first of April.

Q. It was before your
termination or after?

A. It was after.

Q. You had had no discussions
with this prior to your
termination?

A. Define "this", what do you
mean by "this"?

Q. About this item of
presenting a plan.

A. Presenting a plan, no, we
had no discussions.

Rockwood depo. p. 17, lines
15-25. Keith Hill also says in
his deposition that Williams
and Rockwood did not present a
plan until after their
termination:

Q. Its your testimony that they
didn't present any plan to
you prior to March 26th?

A. No written plan.

Q. An oral plan?

A. Not to my recollection.

Hill depo. p. 41, lines 12-16.
[R. 224]

27. Prior to Defendants'
termination, they discussed
with Keith Hill if he would be
interested in joining their new
agency and he responded yes.
(Deposition of Hill, p. 38,
lines 12-15). [R. 181]

28. In mid-March, 1987, Tim
Williams prepared a "To Do"
checklist of things to
accomplish prior to Defendants
departure from Gillham.

27. This fact is not relevant.

28. This conduct is not relevant
because even if there were a
dispute as to whether the
conduct took place it is not
material to this action.
Moreover, it is uncontroverted

- (Deposition of Williams, p. 16, lines 18-20). [R. 181]
29. The "To Do" checklist was prepared prior to Defendants' termination. (Deposition of Rockwood, p. 16, lines 1-4). [R. 181]
30. The "To Do" checklist is in Tim Williams handwriting. (Deposition of Williams, p. 16, line 17). [R. 181]
31. Defendants prepared the "To Do" checklist because they felt they were not fairly dealt with in the 1986 bonus money Gillham paid them in March, 1987. (Deposition of Williams, p. 20, lines 19-25). [R. 181]
32. Some of the checklist items were performed prior to termination. (Deposition of Rockwood, p. 16, line 18). [R. 181]
33. Defendants crossed off the "To Do" checklist items they had accomplished. (Deposition of Rockwood, p. 16, line 24). [R. 182]
34. Defendants crossed off items on the "To Do" checklist they in fact had accomplished. (Deposition of Williams, p. 26 line 18). [R. 182]
35. Defendants were following a time table on the "To Do" checklist. (Deposition of Williams, p. 28, line 17). [R. 182]
36. Prior to their termination, Defendants talked with Gene Yates, a Gillham employee about Defendants starting a new business and asked Gene Yates to come with them. (Deposition
- that these efforts took place on Respondents' own time. [R. 081 ¶ 11]
29. Id.
30. Id.
31. See p. 4 ¶ 6 supra.
32. See ¶ 30 supra.
33. Id. Respondents also crossed items off the To Do list which they decided not to do. [R. 221]
34. Id.
35. Id.
36. Respondents did not ask Mr. Yates to work for the agency they were planning to create. In fact, the portion of the deposition quoted by Appellant contains Mr. Rockwood's statement that "We didn't make

- of Rockwood, p. 40, line 18; p. 41, line 12), [R. 182]
37. Defendants had contacted an accountant for their new business prior to their Gillham termination. (Deposition of Rockwood, p. 36, line 6). [R. 182]
38. Defendants had obtained stationery for their new business and a logo prior to their Gillham termination. (Deposition of Rockwood, p. 38, lines 5, 15). [R. 182]
39. Defendants planned their expenses prior to their Gillham termination. (Deposition of Rockwood, p. 44, lines 2-14). [R. 182]
40. Defendants listed the Gillham employee, Dave Bodie, on the checklist as a potential employee for Defendants' new advertising agency. (Deposition of Rockwood, p. 46, lines 4-24). [R. 182-183]
41. Defendants looked at office space prior to their termination. (Deposition of Rockwood, p. 47, lines 10-15). [R. 183]
42. Defendants gathered incorporation and bylaw materials for their new advertising agency prior to their termination. (Deposition of Rockwood, p. 48, lines 1-22). [R. 183]
- him an offer. . . ." Rockwood Depo. 41:10.
37. See 28, supra.
38. Id.
39. Id.
40. Appellant has mischaracterized Rockwood's deposition as to this point. Mr. Bodie was not on the checklist as a potential employee for Respondent's new agency, but, as Rockwood explains in his deposition immediately following the portion quoted by Appellant, was on the list because:
- A. He was one of the people that we didn't feel would be able to go into this business with us.
- Rockwood Depo. 47:4-5.
41. Not relevant. See 28, supra.
42. Id.

43. Defendants copied a radio reel and "Home Equity Loan Blues" work produced at Gillham prior to their termination. (Deposition of Rockwood, p. 49, lines 13-25). [R. 183]
44. Defendants priced the cost of telephones before their Gillham termination. (Deposition of Rockwood, p. 55, line 20). [R. 182]
45. Lon Richardson showed Defendants the "To Do" checklist and it was obvious to Richardson that Defendants fully intended to leave Gillham and were in the process of doing so. (Deposition of Richardson, p. 134, lines 20-25; p. 135, lines 1-3). [R. 183]
46. Tim Williams and Scott Rockwood held a number of closed-door meetings in Tim Williams' office prior to termination. (Deposition of Richardson, p. 128, lines 22-23; deposition of Rockwood, p. 60, lines 4-25). [R. 183]
48. Defendants prepared a written business plan and financial statement prior to their termination. (Deposition of Rockwood, p. 43, lines 19-23). [R. 184]
49. Defendants prepared a budget to submit to KSL for their new advertising agency take over of the KSL account prior to their termination. (Deposition of Williams, p. 28, line 25; p. 29, lines 1-6). [R. 184]
43. The type of information used or copied by Respondents is not relevant to this dispute because Appellant has already conceded that Respondents did not use any confidential business information. [R. 083 ¶ 21, R. 109-110]
44. Not relevant. See 33, supra.
45. Id.
46. Id.
48. Id.
49. Appellant's structure of this sentence may give rise to an implication that Respondents planned to submit the budget to KSL before their termination. In fact, Respondents did not solicit KSL until after they were terminated. [R. 075-076, R. 082 ¶¶ 16-17, R. 167-168] This is uncontroverted. Moreover, the excerpt quoted

does not say that Respondents did, in fact, prepare a KSL budget, but only that they "knew that if we were to go into business that as part of the plan we presented to KSL that we would have to propose a budget." Williams Depo. 29:3-5.

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| 55. Defendants began preparations for their business presentation materials known as "leave behind" materials prior to their termination. (Deposition of Rockwood, p. 44, lines 15-25). [R. 185] | 55. <u>See</u> 43, <u>supra</u> . |
| 56. Prior to terminating Defendants, Lon Richardson met with Keith Hill's supervisor, William Murdock, at the KSL offices, and Keith Hill had already told William Murdock about the possibility of some of Gillham's employees not remaining with Gillham after the loss of the First Security Bank Account. (Deposition of Richardson, p. 130, lines 16-20). [R. 185] | 56. Not relevant. |
| 57. Defendants told Lon Richardson they were in the process of doing the things that were on the checklist and had done some of them. (Deposition of Richardson, p. 135, lines 10-14). [R. 185] | 57. <u>See</u> 28, <u>supra</u> . |
| 58. Lon Richardson reviewed the "To Do" checklist and determined that Defendants were planning to start their own agency and had begun the process. (Deposition of Richardson, p. 127, lines 6-8). [R. 185] | 58. <u>Id.</u> |
| 59. Defendants told Lon Richardson that the items that were crossed off on the checklist for the most part had been done. (Deposition of | 59. <u>Id.</u> |

- Richardson, p. 136, lines 4-8).
[R. 186]
60. Tim Williams called Keith Hill the morning following Defendants' dismissal from Gillham. (Deposition of Hill, p. 21, lines 5-12). [R. 186]
61. Defendants told Keith Hill they were alarmed that Lon Richardson had found the "To Do" checklist; they were amazed and it was a shocking situation for them. (Deposition of Hill, p. 24, lines 16-24). [R. 186]
62. Defendants told Keith Hill that Lon Richardson found the "To Do" checklist containing items Defendants were doing in preparation for starting their own advertising agency. (Deposition of Hill, p. 22, lines 2-6). [R. 186]
63. Defendants asked Keith Hill if he would be interested in them providing service. (Deposition of Hill, p. 23, lines 13-21). [R. 186]
64. Keith Hill's Day-Timer shows that on Wednesday, March 25, 1987, he met with Tim and Scott on an agency decision. Hill indicated a "go but without fuss of other agencies; OK on high-end creative and a la carte services." (Deposition of Hill, p. 39, line 23; p. 41, line 4; Affidavit of Milo S. Marsden, Jr.). [R. 186]
65. Keith Hill's Day-Timer indicates that he met with the Defendants on Saturday, March 28, 1987. (Deposition of Hill, p. 40, lines 15-17). [R. 187]
66. Keith Hill decided to give the KSL advertising work to Defendants' new agency the
60. Not relevant.
61. Id.
62. Id.
63. The conversation referred to opposite took place after Respondents had been terminated. [R. 135-138] [See also R. 075-076, R. 082 ¶¶ 16-17, R. 167-168, R. 135-138]
64. Not relevant.
65. See 60, supra.
66. Id.

Saturday after the Defendants' termination from Gillham. (Deposition of Hill, p. 28, lines 10-21). [R. 187]

70. Keith Hill's Day-Timer indicates, "Lon fires Tim and Scott" Thursday, March 26, 1987. (Deposition of Hill, p. 40, lines 4-11). [R. 187]
71. William Murdock of KSL called Lon Richardson in less than a week after Defendants' termination at Gillham and told Lon Richardson that he had decided to give the business to Defendants. (Deposition of Richardson, p. 153, lines 11-23). [R. 187]
76. Defendants employ six full-time employees; five of the six full-time employees were former Gillham employees. (Deposition of Rockwood, page 12, line 11.) [R. 188]
77. Gillham received approximately \$200,000 in fees from KSL during 1986. (Deposition of Rockwood, p. 69, line 22; p. 70, line 3). [R. 188]
78. Defendants' new agency received approximately \$120,000 from KSL in 1987 for the months April through December, 1987. (Deposition of Rockwood, p. 70, line 15). [R. 188]

Facts According to
Williams and Rockwood

In their Memorandum in Support of Motion for Summary Judgment, Williams and Rockwood assert as a material fact:

11. Williams and Rockwood discussed their plans to purchase Gillham or form their own business with Hill on their own time. (Deposition of Rockwood, p. 22

70. Not relevant.

71. The decision was made in response to post-termination solicitation. [R. 075-076, R. 082 ¶¶ 16-17, R. 167-168]

76. Not relevant.

77. Not relevant. See 60, supra.

78. Id.

Respondents' assertion that all activities and preparation for their competing advertising agency took place on their own time has not been contested by Appellant.

at line 21; p. 23 at line 1;
Deposition of Williams, p. 23
at line 10-22; Deposition of
Hill, p. 20 at lines 3-12).
[R. 081]

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