

1994

Jo-Ann Kilpatrick, George L. Gonzales, Joseph C. Lee, Davaid B. Lee, Marilyn D. Lee, Sidney W. Foulger, Clayton F. Foulger, Bryant F. Foulger, Brent K. Pratt, and MWT Corporation v. Wiley, Rein & Fielding, and Richard E. Wiley : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Kilpatrick v. Wiley, Rein & Fielding*, No. 940579 (Utah Court of Appeals, 1994).
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IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

JO-ANN W. KILPATRICK, GEORGE L.
GONZALES, JOSEPH C. LEE,
DAVID B. LEE, MARILYN D. LEE,
SIDNEY W. FOULGER, CLAYTON F.
FOULGER, BRYANT F. FOULGER,
BRENT K. PRATT, MOUNTAIN WEST
TELEVISION COMPANY, a Utah
general partnership, AND MWT
CORPORATION, a Utah Corporation,

Appellants,

vs.

WILEY, REIN & FIELDING, a
professional law partnership, and
RICHARD E. WILEY,

Appellees.

Case No. 940579-CA

PRIORITY 15

(Oral Argument Requested)

BRIEF OF APPELLEES

APPEAL FROM THE ORDER OF THE THIRD JUDICIAL
DISTRICT COURT, HONORABLE GLENN K. IWASAKI
PRESIDING, SALT LAKE CITY, STATE OF UTAH

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FILED

MAY 15 1995

COURT OF APPEALS

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FOR THE STATE OF UTAH

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I. LIST OF ALL PARTIES

All the parties to this action are listed in the caption.

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IV. REQUEST FOR ORAL ARGUMENT

This appeal arises from a summary judgment for the Defendant lawyers on the grounds of proximate cause in a \$23 million legal malpractice action of some complexity. The appeal presents important issues on the potential scope of lawyer liability. Plaintiff-Appellants, in seeking reversal, have for the first time proposed a new rule of proximate cause in legal malpractice actions -- a "things would have been different" rule of proximate cause, that would make lawyers nothing less than guarantors of their clients' business and legal expectations. The Appellants' proposed rule is contrary to Utah law and the Restatement. Appellees, therefore, respectfully request oral argument.

V. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to sections 78-2-2(4) and 78-2a-3(2)(k) of the Utah Code, and Rules 3(a) and 4, of the Utah Rules of Appellate Procedure.

VI. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did Plaintiffs demonstrate a genuine issue of fact on the essential element of proximate cause when all the damages Plaintiffs specified and claimed arose out of seven business transactions between Plaintiffs and Northstar Communications, Inc. ("Northstar"), and Allstate Insurance Company ("Allstate"), non-party business entities, and every element of those seven business transactions of which Plaintiffs complained and for which Plaintiffs claimed damage was exclusively the product and result of business decisions and directions by those non-party business entities and not the Defendant lawyers?

2. Did Plaintiffs demonstrate a genuine issue of fact on the essential element of proximate cause when all the damages Plaintiffs claimed were premised on the award of the FCC license for Channel 13 to Plaintiffs, and on the uncontroverted facts Plaintiffs, after one year of seeking a financial partner to buy out competing applicants for Channel 13 including the competing applicant who had been awarded the license by the FCC, never obtained a commitment or even a proposal that would have provided the financing necessary to buy out the competing applicants and obtain the license on which Plaintiffs based their damage claims -- Plaintiffs simply failed to demonstrate a reasonable likelihood that, absent the Defendant lawyers' breach of duty, they would have achieved the better business result for which they claimed damages?

3. Did Plaintiffs demonstrate a genuine issue of fact on the essential element of proximate cause when a finder of fact could only conclude that Plaintiffs had their own lawyer every step of the way in their dealings with Northstar and Allstate from July of 1986 until this action was filed, and had their own legal representation in all seven business transactions with Northstar and Allstate for which they claimed damages?

4. Did Plaintiffs demonstrate a genuine issue of fact on the essential element of proximate cause by argument, accusation and speculation as to whether the Defendant lawyers had used or misused confidential information of Plaintiffs when, on the clear uncontroverted record after two years of discovery, there was absolutely no showing of any use or misuse of confidential information of Plaintiffs?

The standard of review for each of these issues is the same standard as that used by the trial court in ruling on a motion for summary judgment -- the Appellate Court reviews the facts, and the inferences drawn therefrom, in a light most favorable to the losing party. If the Appellate Court concludes there is no genuine issue as to any material fact, the Appellate Court reviews the trial court's conclusions of law for correctness. See Hunt v. ESI Engineering Inc., 808 P.2d 1137, 1139 (Utah Ct. App.), cert. denied, 826 P.2d 651 (Utah 1991); English v. Kienke, 774 P.2d 1154, 1156 (Utah Ct. App. 1989), aff'd, 848 P.2d 153 (Utah 1993).

VII. DETERMINATIVE AUTHORITY

Rule 56(c) of the Utah Rules of Civil Procedure.

VIII. STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURT BELOW.

This is an appeal from a summary judgment awarded to the Defendant lawyers in a legal malpractice action. (R. 12375-82.)¹ Plaintiffs sought more than \$23 million in damages relating exclusively to their failed business expectations from a venture to acquire a VHF license for Channel 13 in Salt Lake City. (R. 20-38, 7173.) Simply put, Plaintiffs lost because they failed to demonstrate a genuine issue of fact on the essential bridge of proximate cause between their claims of fault and damage. (R. 12375-81.)

1. The principle documents and testimony cited in the Defendant lawyers' brief are in their Addendum ("Defs.' Add.") filed herewith. The documents and testimony in the Addendum are arranged according to their record number, and are indexed by name and record number for the Court's convenience. Both the record number and Addendum exhibit number are cited at pages 5-13 of this Brief; thereafter, the cite generally is only to the record number.

Defendants Richard Wiley and his firm, Wiley, Rein & Fielding ("Wiley Rein"), are, of course, lawyers. (R. 21, 3390.) The Defendants, as Plaintiffs correctly contend, represented Plaintiffs in a venture to acquire the VHF license for Channel 13 in competitive proceedings before the FCC. (R. 3390-91, 3410, 3419-25.) Two of the Plaintiffs -- David Lee and Clayton Foulger -- are also lawyers, a fact Appellants failed to point out. (R. 3425, 10446; C. Foulger Dep. at 5-6.) Lee is the senior partner in the Washington office of the Salt Lake firm of Jones, Waldo, Holbrook & McDonough where, since September 1987, he has been the partner of his old classmate Barry Wood, the lawyer who primarily represented Plaintiffs in their quest for an FCC license from 1981 to December 1986. (R. 3419-25.) Mr. Wood, who did the FCC work, is not a party Defendant, but Mr. Wiley, who only performed .25 hours of legal services for Plaintiffs in that entire six-year period, is. (R. 20, 3390-91, 3410, 3419-25.)

Fundamentally, this is a lawsuit against lawyers by Plaintiffs, two of whom are lawyers and all of whom were represented by their own lawyers, for breach of lawyers' duties -- conflict of interest -- that seeks as damages, business damages for Plaintiffs' failed business expectations that were proximately caused, if damages they be, by Northstar and Allstate, business entities that are not parties to this action. Plaintiffs lost because, while there were controverted facts on the issue of breach of professional duty, there was no genuine issue of fact that any demonstrated breach of duty by the Defendant lawyers proximately caused the damages Plaintiffs claimed.

The Defendant lawyers were awarded summary judgment on the issue of proximate cause. The Court will note that Plaintiffs, with all their polemics, have failed to point out the uncontroverted facts germane to the correctness of that ruling. (R. 3327-37.) The critical facts, controverted and uncontroverted, are:

1. The uncontroverted fact was that by January 1986, Plaintiffs had lost their quest to acquire the VHF license for Channel 13. Plaintiffs formed a venture to participate as a competing applicant for the award of Channel 13 commencing in 1981. Plaintiffs were unsuccessful. By the end of 1985, an administrative law judge had entered a decision awarding the license to another applicant. This decision had been affirmed by the FCC, and Plaintiffs' only remaining hope was the unlikely prospect of further appeal. (R. 3420-22 (Defs.' Add. Ex. 4), R. 5319-21.)

2. The uncontroverted fact was that Barry Wood and his firm, Wiley Rein, represented Plaintiffs in their quest for Channel 13 before the FCC. (R. 3410 (Defs.' Add. Ex. 3), 3420-24 (Defs.' Add. Ex. 4).)

3. Plaintiffs demonstrated a genuine issue of fact as to whether the Defendant lawyers, in view of their representation of Plaintiffs, had breached their professional duties by representing Northstar with regard to its interest in providing financing in Plaintiffs' Channel 13 venture without Plaintiffs' informed consent to that conflicting representation. In July 1986, at a time when Plaintiffs were actively engaged in pursuing financing to buy out the competing applicants for Channel 13 including the winning applicant, the Defendant lawyers, through Barry Wood, incontrovertibly requested Plaintiffs' consent to the Defendant

lawyers' representation of Northstar. The request the Defendant lawyers made was that they would represent Northstar in its dealings with Plaintiffs, but continue to represent Plaintiffs before the FCC. The Defendant lawyers thus sought Plaintiffs' consent to represent Northstar in its dealings with Plaintiffs, while representing both Northstar and Plaintiffs' interest before the FCC where they shared a common interest. (R. 3390-91 (Defs.' Add. Ex. 1), 3411-12 (Defs.' Add. Ex. 3), 3422-24 (Defs.' Add. Ex. 4), 10726-27, 10738-39, 10744-45, 10789-90, 10864, 10883.)

Barry Wood unequivocally testified he obtained Plaintiffs' consent. (R. 3423-24 (Defs.' Add. Ex. 4), 10651-71, 10690-91.) Plaintiff Joseph Lee testified he refused to consent to the Defendant lawyers' representation of Northstar. (R. 4959-60.) Mr. Wood's testimony was confirmed by the facts: (1) Plaintiffs immediately went out and retained their own lawyer, Ralph Hardy, of the Washington law firm of Dow, Lohnes & Albertson ("Dow Lohnes"); (2) Mr. Hardy, from July 15, 1986 on, represented Plaintiffs for over four years in every transaction in which Plaintiffs and Northstar had adverse interests while the Defendant lawyers, in those transactions, represented Northstar; and (3) in that entire four-year period, Plaintiffs' new lawyers never once complained or intimated that the Defendant lawyers had any conflict of interest in their representation of Northstar. (R. 3412-13 (Defs.' Add. Ex. 3), 3424-25 (Defs.' Add. Ex. 4), 3451 (Defs.' Add. Ex. 5), 3457-60 (id.), 3559 (Defs.' Add. Ex. 6), 3565-66 (id.), 3568-70 (id.), 3696-97 (Defs.' Add. Ex. 7), 3702-04, 7278, 7451-568 (Defs.' Add. Ex. 11), 7469-8294, 8339-9495, 9624-9777, 9827-9954, 10054-248, 10458, 10744-46, 10799-800, 10808-09, 10864-66, 10883, 10903-04, 10981-82; Defs.' Add. Ex. 11 (Vol I) at 143-47, 166, 195, 221-28; id. (Vol. II) at 7-8, 19, 41, 45-46) But, the Defendant lawyers conceded, for purposes of

their motion for summary judgment, that Mr. Lee's testimony created a genuine issue of fact on the issue of breach of professional duty. (R. 3330-31.)

4. Incontrovertibly, all Plaintiffs' damages, every dime claimed, arose out of seven business transactions between Plaintiffs, Northstar and Allstate. Incontrovertibly, all Plaintiffs' damages with regard to these seven transactions were specified by Plaintiffs in answers to interrogatories, answers Plaintiffs never sought to amend. Incontrovertibly, all damages sought by Plaintiffs were founded on the fundamental assumption that Plaintiffs were successful in acquiring the license for Channel 13 or, to put the matter conversely, if Plaintiffs had not been successful, Plaintiffs would not have sustained any of the damages they claimed. (R. 20-38, 3997, 7173 (Defs.' Add. Ex. 9), 7180-98; Pls.' Deps. filed pursuant to Court Order at R. 3843-44.)

The seven business transactions, the only transactions, between Plaintiffs on one side and Northstar and Allstate on the other side were: (1) the "MWT Ltd. Transaction" -- the initial arrangement between Northstar, Allstate and Plaintiffs late in November 1986 to provide the financing necessary to acquire the Channel 13 license through settlements with the competing applicants and for construction and initial operation of Channel 13, which is reflected in a Credit Agreement and the MWT Ltd. Amended and Restated Agreement of Ltd. Partnership, dated as of November 18, 1986; (2) the "Adams Transaction" in the fall of 1987 -- MWT Ltd.'s purchase of Channel 20, an independent UHF station in the Salt Lake market, from Adams T.V. of Salt Lake City, Inc. ("Adams"), for \$30 million and the financing of that purchase

through a \$22.5 million senior secured note to Aetna Life Insurance Company ("Aetna"); (3) Northstar's conversion from a limited partner to the sole general partner of MWT Ltd. pursuant to the MWT Ltd. agreements in May 1988; (4) Northstar's suspension of payments under Plaintiffs Jo-Ann Kilpatrick's, Sidney Foulger's and George Gonzales' employment contracts with MWT Ltd. in January 1989, and the similar suspension of Plaintiff Joseph Lee's employment contract in June 1989; (5) a 1988 dispute over whether MWT Ltd. should pay 25% interest and sign a management contract with Farragut Communications Inc. ("Farragut"), the holding company of Northstar, which had been organized in November 1987, to obtain loans from Allstate to meet MWT Ltd.'s then delinquent obligations to Adams and Aetna; (6) MWT Ltd.'s sale of Channel 13 to Fox Television Stations Inc. ("Fox"), for \$41 million in April 1990; and (7) MWT Ltd.'s cash calls on December 30, 1991, calls which were never paid, to make up deficiencies in each partner's capital account upon MWT Ltd.'s dissolution, again as provided in the MWT Ltd. Amended and Restated Agreement of Limited Partnership. (R. 20-38, 3327-29, 3997; Pls.' Deps. filed pursuant to Court Order at R. 3843-44.)

The damages arising from these seven transactions claimed by Plaintiffs, as specified in their answers to interrogatories, were: (1) the fair-market value of a 40% interest in Channel 13 in 1987 - \$9,530,000; (2) lost cash disbursements from the operation of Channel 13, 1987-1993 -- \$4,377,000; (3) 40% of the difference between the 1993 fair-market value of Channel 13 and the fair-market value of Channel 13 in 1987 -- \$5,986,000; (4) Plaintiffs' lost capital contributions to the Channel 13 venture -- \$239,446; (5) Plaintiffs' expenses on the Channel 13 venture -- \$10,848.76;

(6) legal expenses paid by Joseph Lee to Van Cott, Bagley, Cornwall & McCarthy for its preparation of Lee's employment contract with Channel 13 and gifts of MWT Ltd. & MWT Corp. ownership interests -- \$3,000; (7) amounts not paid by MWT Ltd. under employment contracts with Channel 13, 1989-1992 -- \$939,145.71; (8) Mr. Gonzales' loss of a car under his employment contract with Channel 13, 1989-1991 -- \$14,400; (9) Mr. Gonzales' IRA penalty regarding the termination of his employment contract with Channel 13 -- \$1,900; and (10) cash calls made by Northstar on December 30, 1991, again, calls that were never paid -- \$2,007,132.82. (R. 7173 (Defs.' Add. Ex. 9), 7180-98.)

All these claimed damages relate exclusively to Plaintiffs' failed business expectations with regard to their Channel 13 venture with Northstar and Allstate, and frame the fundamental issue of proximate cause: Did the fault shown proximately cause the damages claimed?

5. The Defendant lawyers put an uncontroverted and uncontradicted record before the lower court which established that every element -- every single thing -- of which Plaintiffs complained and for which they sought damages with regard to the seven business transactions between Plaintiffs, Northstar and Allstate, was solely the product and result of the business decisions and directions by Northstar and Allstate, business entities which are not parties to this litigation, and were not the product or result of any decision or direction by any of the Defendant lawyers. In the MWT Ltd. Transaction, for example, Plaintiffs complained of their proportionate ownership interest, the amount of financing, and the right of Northstar to convert to become the general partner of MWT Ltd. Each of these elements,

however, was solely the product of decisions made by the management of Northstar and Allstate, and the Defendant lawyers had nothing to do with determining Plaintiffs' relative ownership, the amount of financing, or Northstar's right of conversion under the MWT Ltd. Transaction. (R. 3334-36, 3392-96 (Defs.' Add. Ex. 1), 3404-06 (Defs.' Add. Ex. 2), 3413-16 (Defs.' Add. Ex. 3), 3450-60 (Defs.' Add. Ex. 5), 3556 (Defs.' Add. Ex. 6), 3559-62 (id.), 3565-71 (id.), 3696-3706 (Defs.' Add. Ex. 7), 7271.)

6. There was simply no genuine issue of fact that Plaintiffs were represented by their own lawyers every step of the way from July 1986 through the sale of Channel 13 to Fox in April 1990 with regard to all their dealings with Northstar and Allstate. Plaintiffs were represented by their own lawyers, Dow Lohnes, and a senior partner of that firm, Ralph Hardy, in every one of the seven business transactions between Plaintiffs, Northstar and Allstate. Dow Lohnes and Ralph Hardy's competence in the discharge of their responsibilities was unquestioned by Plaintiffs. (Pls.' Br. at 45.) Some Plaintiffs denied, however, that Dow Lohnes and Ralph Hardy represented Plaintiffs as their lawyer and denied, in particular, Dow Lohnes and Ralph Hardy represented Plaintiffs as their lawyers in the MWT Ltd. Transaction in November 1986. (Id. at 13.) But, Dow Lohnes and Ralph Hardy's representation of Plaintiffs in every transaction is incontrovertibly established by: (1) Ralph Hardy's testimony; (2) Dow Lohnes' billing records; (3) the role performed by Dow Lohnes in each of the transactions; (4) the documents drafted and reviewed by Dow Lohnes including the settlement agreements between Plaintiffs and the other competing applicants for Channel 13; (5) the letters written by Dow Lohnes to the Defendant lawyers, Northstar and Allstate; and (6) what is

literally a stack of exhibits that is two feet thick which reflects, exhibit after exhibit, the legal services performed by Dow Lohnes for Plaintiffs. (R. 3412-13 (Defs.' Add. Ex. 3), 3423-25 (Defs.' Add. Ex. 4), 3451 (Defs.' Add. Ex. 5.), 3457-60 (id.), 3559 (Defs.' Add. Ex. 6), 3565-66 (id.), 3568-70 (id.), 3696-97 (Defs.' Add. Ex. 7), 3702-04, 7282-83, 7451-8291 (Defs.' Add. Exs. 11-12), 8339-9495 (Defs.' Add. Ex. 12), 9624-9777, 9827-9954, 10054-248, 10237-48 (Defs.' Add. Ex. 12), 10458, 10694-95, 10704, 10706, 10745-47, 10757, 10760-61, 10774, 10776, 10780-81, 10785, 10787-89, 10792, 10794-95, 10799-800, 10808-09, 10862-64, 10883, 10903-04, 10981-82; Def's Add. Ex. 11 (Vol. I) at 143-47, 166, 195, 221-28; id. (Vol. II) at 7-8, 19, 41, 45-46.)

Indeed, every exhibit, every document relating to the services of Dow Lohnes, supports the conclusion that Dow Lohnes and Ralph Hardy provided Plaintiffs with legal representation and not merely financial advice. There is not one exhibit, not one document, not one piece of paper, to the contrary. There was no genuine issue of fact as to whether Plaintiffs had their own lawyers because no reasonable finder of fact could find other than that Plaintiffs had their own competent legal representation in their dealings with Northstar and Allstate. Plaintiffs' attempt to raise an issue of fact as to whether they had their own legal representation not only fails, but shows Appellants' desperate attempt to sustain this malpractice action against these Defendant lawyers.

7. Plaintiffs failed to demonstrate there was a reasonable likelihood they could have obtained the necessary financing for Channel 13 from CPL or any source other than Northstar and Allstate. Plaintiffs thus failed to establish a genuine issue of fact that there was a reasonable likelihood that Plaintiffs, in the absence of the Defendant lawyers' alleged breach of their professional duties, could have obtained the better business

result, the acquisition of Channel 13, for which Plaintiffs claimed damages. CPL never made a commitment to provide financing to Plaintiffs. It only made a proposal. (R. 7080 (Defs.' Add. Ex. 8).) CPL's proposal would have only provided CPL funds of \$2 million, which was not enough to even fund the settlements with the competing applicants, and Plaintiffs incontrovertibly rejected the CPL proposal with the advice of Dow Lohnes and Ralph Hardy. (R. 3434-43 (Defs.' Add. Ex. 4), 5447-48, 7080 (Defs.' Add. Ex. 8), 7208-30 (Defs.' Add. Ex. 10), 7284-86, 7481-87 (Defs.' Add. Ex. 11), 7508-09 (id.), 7806, 8278-92 (Defs.' Add. Ex. 12); J. Lee Dep. at 189-93; Dep. Exs. D-225-26 (Defs.' Add. Exs. 13-14); Defs.' Add. Exs. 16-17.)

8. The uncontroverted record established that the Defendant lawyers never used or misused any confidential information of Plaintiffs. After two years of full discovery, Plaintiffs simply failed to raise any genuine issue of fact as to whether the Defendant lawyers had used or misused any confidential information in any of the dealings between Plaintiffs, Northstar and Allstate. The Defendant lawyers put in a clear and categorical record that they never used or misused any confidential information. Plaintiffs never controverted or contradicted that record and were never able to point to one single piece of confidential information used or misused by the Defendant lawyers. The information Northstar and Allstate received regarding Plaintiffs were received from Plaintiffs as Plaintiffs attempted to persuade them to finance the Channel 13 venture. Furthermore, all the information relative to Plaintiffs was a matter of public record which Plaintiffs had made in pursuit of their application for the Channel 13 license before the FCC. Plaintiffs simply failed to point to one single piece of information that was not part of the public record or that

Plaintiffs themselves had not directly made available to Northstar and Allstate. Certainly, in seeking millions of dollars of financing to pay for settlements with competing applicants, Plaintiffs disclosed the terms of those settlements to the business parties they were requesting to finance the settlements. (R. 3391-92 (Defs.' Add. Ex. 1), 3413 (Defs.' Add. Ex. 3), 3415 (id.), 3421 (Defs.' Add. Ex. 4), 3424 (id.), 3453 (Defs.' Add. Ex. 5), 3560-61 (Defs.' Add. Ex. 6), 3698-99 (Defs.' Add. Ex. 7), 7524-32 (Defs.' Add. Ex. 11), 7538-39 (id.), 10453-56, 10591-92, 10550-51, 10606, 10627, 10636, 10700-01, 10755.)

B. STATEMENT OF FACTS.

1. The FCC Proceeding For Channel 13.

In 1980, the FCC approved a new VHF drop-in channel, Channel 13, in the Salt Lake market. (R. 3555.) The individual Plaintiffs ("Mountain West Partners" or "Partners"), organized Mountain West Television Company ("Mountain West"), a Utah general partnership, to seek the license for Channel 13 as a competing applicant in the comparative hearing process before the FCC. (R. 3410, 3420-21.) There were four other competing applicants. (R. 3421, 3555.)

In the FCC proceedings, Mountain West presented Plaintiff Joseph Lee, a long time figure in the Utah broadcasting industry, as the person providing Mountain West with broadcasting experience, and the Foulger Group, successful Washington, D.C. businessmen with Utah connections, as providing the financial resources for the Mountain West application. (R. 7237-58; Dep. Ex. D-10.) The Foulger Group filed detailed financial information with the FCC. (R. 7237-58, 7524-25, 10591-92.) All the Partners filed detailed personal information. (R. 23-24, 7524, 10453-54, 10606, 10627, 10700-01; Dep. Ex. D-10.)

In May 1985, the FCC Administrative Law Judge awarded the Channel 13 license to Salt Lake City Family Television, Inc. ("Family"), and ranked Mountain West second. (R. 3421; Dep. Ex. D-10.) The FCC Review Board affirmed the award to Family in December 1985. (R. 3422.) These adverse decisions left Mountain West with two alternatives: (1) the unlikely prospect of further appeal, or (2) settling with the other applicants. (R. 5319-21.)

2. The 1986 Settlements And Search For Financing.

After losing, the Partners decided to attempt to buy out the four other competing applicants to obtain the Channel 13 license. (R. 3422, 7475-77.) They also decided to seek a financing partner to pay for these settlements and provide additional financing for the Channel 13 venture, even though the Foulger Group had that capability.² (R. 3422, 7248, 7369, 7475-77; Defs.' Add. Exs. 15.)

During 1986, the Mountain West Partners engaged in extensive efforts to find financing, contacting numerous sources including Neuberger & Berman, J. H. Foster & Company, Halcyon Investments, Communications Partners Ltd. ("CPL"), American Television of Utah (Skaggs), Belo, First Chicago, and Northstar. (R. 3422-23, 7284-86, 7481-88, 7806, 7826-29, 8278-81; J. Lee Dep. at 189-93; Defs.' Add. Ex. 16.) Northstar and other potential investors, from the inception, made it clear they would only consider providing financing for the Channel 13 venture on the condition Mountain West reach global settlements with the competing applicants. (R. 3558, 3697, 10812.) No

2. Sidney Foulger and the other members of the Foulger family who are Plaintiffs are affluent and sophisticated businessmen who, among other things, are the principal owners of the Crossroads Mall in Salt Lake City, Utah. (R. 7248, 10585; Defs.' Add. Ex. 15.)

one was going to provide financing unless they could be assured of obtaining the license. (Id.)

Pursuant to their plan to settle and seek outside financing, the Partners negotiated settlements with the other applicants during the summer and fall of 1986. (R. 3434-41, 3558, 7204-30; Defs.' Add. Exs. 13-14.) The Foulger Group, through Plaintiff Brent Pratt, spearheaded the negotiations. (R. 7529-30, 10674-780, 10812.) Barry Wood and Dow Lohnes represented Plaintiffs in the settlement negotiations, and reviewed the settlement agreements before execution. (R. 7366-69, 7533-39, 7807-27, 7850-53, 8113-8133, 8189-95, 8198-99, 8282-86; Defs.' Add. Ex. 11 (Vol. I) at 166.) Mountain West agreed to pay Family, the winning applicant, \$2 million and the other three applicants \$1 million each.³ (R. 3434-41, 3649, 7204-30; Defs.' Add. Exs. 13-14.)

Plaintiffs did not make any claim or seek any damages for the settlement agreements. (R. 20-38.) They did not do so for good reason. First, there was no conflict of interest regarding the agreements with competing applicants. Second, without the settlement agreements, Plaintiffs would never have acquired the Channel 13 license -- the foundation for all Plaintiffs' damage claims. (R. 7173, 7180-98.) Third, Plaintiffs' expert, Mr. Schutz, testified the terms of the settlement agreements were reasonable. (D. Schutz Dep. at 56.) Indeed, if Plaintiffs had paid too much in

3. The Family settlement, which was signed on October 6, 1986, required the \$2 million be put in escrow by November 17, 1986, or a \$150,000 penalty would be imposed and the settlement voided. (R. 7208-30.) The other settlement agreements required \$1.3 million of the total be paid the earlier of December 31, 1986, or ten days after Mountain West was awarded the license. (R. 3430-44; Defs.' Add. Exs. 13-14.)

settlement, overpayment would have been an independent cause for the failure of the Channel 13 venture.

3. The Seven Business Transactions Between Plaintiffs, Northstar And Allstate.

The MWT Ltd. Transaction

In the early summer of 1986, Northstar, a company engaged in the business of acquiring and operating broadcast properties, became interested in entering into a financing arrangement with Mountain West to acquire the Channel 13 license. (R. 3552, 3555-58.) Northstar was backed financially by Allstate.⁴ (R. 3694-95.) At that time, William Lincoln, one of the founders of Northstar, was its President, and Katherine Glakas ("Glakas"), another founder, was the Vice President. (R. 3551-53.) The Allstate representative responsible for dealing with Northstar in 1986 was Paul Renze ("Renze"). (R. 3694-95.)

During the summer and fall of 1986, Lincoln, Glakas and Renze had discussions with the Mountain West Partners and their lawyer, Ralph Hardy. (R. 3450-51, 3556-58, 3696-97, 7487-88, 7490-94, 7503, 7505, 8279-85.) Northstar and Allstate, however, did not commit to provide any financing for the Channel 13 venture until the end of November 1986, after the Mountain West Partners had settled with the competing applicants. (R. 3450-53, 3556-60, 3696-98, 7366-69, 7507, 7514-20; Defs.' Add. Ex. 11 (Vol. I) at 145-47.)

In November 1986, Northstar and the Partners began face-to-face negotiations at Wiley Rein's law offices in Washington, D.C.

4. At the time of the MWT Ltd. Transaction, Allstate owned all the preferred stock of Northstar, which was convertible into 80% of the common stock. Lincoln, Glakas and several other third parties owned all the issued common stock. Although Allstate had not converted its preferred stock to common stock, Allstate required its approval for any deal with Northstar because it provided Northstar's funding. (See R. 10688-89.)

(R. 3451, 3558-59, 3697, 7507, 7514-20, 8285-87.) The Mountain West Partners--Clayton Foulger, David Lee and Brent Pratt, two of whom were lawyers--and their three Dow Lohnes lawyers--Hardy, David Wild and Timothy Kelley, sat on one side of the table. On the other side were the Northstar principals, Lincoln and Glakas, with Northstar's three Wiley Rein lawyers--John Quale, Marilyn Strailman and Timothy Danello. (R. 3451, 3558-59, 7514-20, 10767.) Renze did not attend, but was in constant contact with Lincoln by telephone. (R. 3558, 3697.)

At these negotiations, the Mountain West Partners, Northstar's management, and Allstate finally reached an agreement. Their agreement is reflected in a Credit Agreement and a Partnership Agreement ("MWT Ltd. Transaction"). (R. 3606-93.) Under the terms of the MWT Ltd. Transaction, a newly formed limited partnership, MWT Ltd., was to own the Channel 13 license. Northstar would own 49% of MWT Ltd., and the Mountain West Partners and their newly organized corporation, MWT Corp., would own 51%. (R. 3562-63.) Initially MWT Ltd.'s sole general partner was MWT Corp., but Northstar had the option, after the station went on the air, to convert to the general partner. (R. 3653-55, 3661-63.)

In return for its 49% interest, Northstar and Allstate were to provide \$6 million in financing. (R. 3563, 3700-01.) Northstar was also required, if additional funding was necessary after it became the general partner, to use its "best efforts" to secure non-recourse financing. (Id.) The Foulger Group also agreed to provide financing to MWT Ltd. Sydney Foulger agreed to provide \$2.7 million in financing in return for a 21% Class A limited partnership interest. (Id.) The Mountain West Partners and their

corporation, MWT Corp., were required only to contribute Mountain West's **application** for the Channel 13 license in exchange for their Class B interest, and their attorneys' fees were paid by their financing partners, Northstar and Allstate. (R. 3649, 3701.)

On November 20, 1986, Northstar, Allstate and Mountain West consummated the transaction. (R. 3561, 7519.) On December 18, 1986, pursuant to the settlement agreements and the MWT Ltd. Transaction, the FCC awarded the Channel 13 license to MWT Ltd. (R. 3564.)

The Adams Transaction

At a meeting in Salt Lake in February 1987, Clayton Foulger unexpectedly announced Sidney Foulger would not provide the \$2.7 million in financing he had previously agreed to. (R. 3454, 3564, 3702, 7231.) His decision surprised everyone. (*Id.*) Without these funds, MWT Ltd. did not have the money to build the station.⁵ (R. 3564, 3702, 10479.)

Two days after Mr. Foulger's announcement, Plaintiffs, who controlled MWT Corp., the general partner of MWT Ltd., Lincoln and Renze met with Plaintiffs' lawyer, Ralph Hardy, in Salt Lake to consider their options. (R. 3565, 3702-03, 7232-36.) All the participants, including the Mountain West Partners, unanimously decided to put Channel 13 on the air by acquiring the assets of Channel 20, an independent UHF station already serving the Salt Lake market. (*Id.*) That afternoon, Ralph Hardy, on behalf of MWT Corp. and MWT Ltd., sent an offer to the owner of Channel 20,

5. Northstar--still a limited partner--had met all its financing commitments for the Channel 13 venture. It was difficult to obtain further financing for the construction of a stand-alone station, particularly in Salt Lake where there were 3 VHF stations and an independent UHF station, Channel 20, already on the air, and a new UHF station--Channel 14--had been approved, but not built. (R. 3564-65, 7540-41.)

Adams, to purchase Channel 20 for \$30 million. (Id.; R. 7549-50, 8354-56.) The Defendant lawyers were not consulted or even present at the Salt Lake meetings. (R. 3565, 3702-03, 7232-36.) Hardy not only drafted the initial offer for Channel 20, which Plaintiff Joseph Lee signed on behalf of MWT Corp., but Dow Lohnes represented MWT Corp. and MWT Ltd. in all negotiations to purchase Channel 20. (R. 3425, 3454-55, 3565-66, 3703, 7545, 8354-56, 8359-9116, 9414-72.)

The Mountain West Partners, Ralph Hardy, and Lincoln all looked for financing for the purchase. (R. 3455, 3566, 3703-04, 7547-48, 7550-52, 9414-72.) The best offer they received was a \$22.5 million secured senior note from Aetna. (Id.; see R. 10911-69.) The terms of the Aetna financing required that Northstar exercise its option to become the general partner, and the employment contracts between the Mountain West Partners and MWT Ltd. be subordinated to the Aetna debt. (R. 7291-300, 7309-10, 7316-20, 9160, 10928.)

MWT Ltd.'s purchase of Channel 20 for \$30 million and the financing for that purchase through Aetna closed in October 1987 (the "Adams Transaction"). (R. 7321-28, 10905-10, 10911-69.) The Channel 20 acquisition permitted MWT Ltd. to put Channel 13 on the air in November 1987 with an established market and good independent programming. (R. 3454, 3456, 3564, 3567, 3705, 7540-41.)

Northstar's Conversion to General Partner

Northstar, as required by the Aetna financing, exercised its option to become the sole general partner of MWT Ltd. in December 1987. (R. 3457, 3569-70, 3705-06.) Upon FCC approval, Northstar became the sole general partner of MWT Ltd. in May 1988, and paid an additional \$500,000 to MWT Ltd., as required by the MWT Ltd. Transaction. (Id.)

25% Interest Notes/Farragut Management Fee

Between 1987 and 1990, Salt Lake's economy generally, and the television market in particular, experienced a downturn. (See R. 10189.) Channel 13 did not generate sufficient cash flow to meet MWT Ltd.'s obligations to Aetna and Adams. (R. 3404, 3457, 3570.) Northstar made extensive efforts to find additional financing for Channel 13, but was unable to find any source other than Allstate due to the requirement that any new MWT Ltd. debt be subordinated to its obligations to Aetna and Adams. (R. 3570.) Northstar was not only unable to find any outside source of financing, but Plaintiffs, including the Foulger Group, refused to infuse any funds into MWT Ltd. or relinquish any of their ownership in MWT Ltd. as a means to attract further financing. (R. 3405, 3457, 3570.)

Allstate, concerned about Channel 13's deteriorating financial circumstances and Plaintiffs' intransigence in assisting in a resolution of Channel 13's financial problems, demanded as a condition to any further financing that MWT Ltd. pay a management fee to Farragut, the holding company for Northstar, and also pay 25% interest on any further loans. (R. 3404-05, 3458, 3570, 10981-82.) With no other source of funds to meet its obligations, MWT Ltd. agreed to Allstate's financing terms. (Id.; R. 3395-96.) Allstate then extended further loans to MWT Ltd. to meet its Aetna and Adams' obligations. (R. 3405.) MWT Ltd., however, did not, in fact, pay the Farragut management fee or 25% interest to Allstate. (R. 3395-96; c. Foulger Dep. at 230; J. Lee Dep. at 500-02.)

Employment Contracts

In June 1987, Plaintiffs Joseph Lee, Sidney Foulger, Jo-Ann Kilpatrick and George Gonzales all entered into employment contracts with MWT Ltd. (R. 3567-68, 9773-74.)

In January 1989, when MWT Ltd. could not meet its obligations to Aetna and Adams, Northstar, as MWT Ltd.'s general partner, suspended payment under the Gonzales, Foulger and Kilpatrick employment contracts; in May 1989, Northstar suspended payment under Lee's employment contract. (R. 3568.) Northstar suspended payment under Plaintiffs' employment contracts because it was required to do so by the terms of the Aetna financing, terms agreed to by Plaintiffs. (Id.; R. 7291-7300, 10928.) By 1989, Aetna and Adams had declared defaults on MWT Ltd.'s financing obligations, and were threatening to accelerate MWT Ltd.'s \$30 million debt. (R. 3396, 10168-69; see R. 10230; J. Lee Dep. at 507.)

Sale of Channel 13 to Fox

Faced with MWT Ltd.'s mounting financial crisis, Northstar put Channel 13 on the market in January 1989. (R. 3459, 3571.) Northstar gave Plaintiffs almost a year to bid on Channel 13 for themselves or to find their own buyer. (R. 3396, 3459-60, 3571.) Plaintiffs did neither. (Id.; see R. 10182-91.) MWT Ltd. was unable to meet its obligations to Adams and Aetna. They demanded payment. (Id.) Allstate refused to lend MWT Ltd. any more money, and Plaintiffs continued to refuse to put any funds into MWT Ltd. or dilute their interest in MWT Ltd. to attract new financing from a third party. (Id.)

Northstar, faced with the option of either selling Channel 13 or placing it in bankruptcy, accepted a \$41 million offer from Fox,

and closed the sale to Fox in April 1990. (R. 3396, 3459-60.) The \$41 million price was incontrovertibly a fair price for Channel 13. (R. 3396, 7566-67; Defs.' Add. Ex. 11 (Vol. II) at 41; Dep. Ex. D-220.) After the \$41 million payment, Northstar and Allstate still lost approximately \$2.5 million in the Channel 13 venture. (R. 3460.)

Cash Calls

After the sale to Fox closed, Northstar dissolved MWT Ltd. (R. 7259-62.) On December 30, 1991, Northstar sent Plaintiffs cash calls to make up the deficiencies in their capital accounts as required by the Partnership Agreement. (Id.) Plaintiffs did not pay the calls, and Northstar has taken no action to collect them. (R. 7184, 7190-98.)

4. Plaintiffs' Legal Representation In FCC Proceeding And Seven Business Transactions With Northstar and Allstate.

Wiley Rein represented Mountain West in its quest for the Channel 13 license from April 1981 to December 19, 1986, when the FCC awarded the license to MWT Ltd. pursuant to the settlement agreements and MWT Ltd. Transaction. (R. 3410, 3420-22, 3424-25.) During that period, Wiley Rein represented Plaintiffs before the FCC, represented them in settlement negotiations, and assisted Plaintiffs in their search for financing. (Id.; R. 5448, 10637-42, 10674-80.) From December 19, 1986, until September 1987, Wiley Rein continued to provide legal services to MWT Ltd. before the FCC. The Wiley Rein lawyer who represented Mountain West and MWT Ltd. was Barry Wood. (R. 3390, 3410, 3420-25.)

In the fall of 1987, Wiley Rein's representation of Plaintiffs ended. (R. 3410, 3425.) In September 1987, Barry Wood left the firm and joined David Lee in Jones Waldo's Washington, D.C. office. (Id.) When Wood left, he took Plaintiffs' files and purchased their

accounts receivable from Wiley Rein with Plaintiffs' consent. (Id.; R. 7199-7203.) From that point forward, Wiley Rein only represented Northstar, and only represented MWT Ltd. after Northstar became MWT Ltd.'s general partner in May 1988. (R. 3410.) Wiley Rein's total legal fees to Plaintiffs and MWT Ltd. for all services throughout the FCC proceedings up to the time Wood left were approximately \$140,000. (See R. 3649, 7282-83.)

After Wiley Rein requested Plaintiffs' consent to its representation of Northstar in the summer of 1986, Plaintiffs in all their dealings with Northstar were represented by Dow Lohnes and Ralph Hardy. Northstar, in turn, in its dealings with Plaintiffs, was represented by Wiley Rein. Plaintiffs concede in their brief Dow Lohnes did its job and was not negligent. (Pls.' Br. at 45.)

There was no genuine issue of fact that Dow Lohnes and Ralph Hardy from July 15, 1986, when they commenced their representation of Plaintiffs, until this action was filed, represented Plaintiffs as their lawyer and did so because Wiley Rein represented Northstar. (R. 3412-13, 3423-25, 3451, 3454, 3457-60, 3559, 3565-66, 3568-70, 3696-97, 3702-04, 7282-83, 7460-8294, 8339, 8880, 9492-95, 9624-9777, 9827-9954, 10054-248, 10458, 10694-95, 10704, 10706, 10745-47, 10757, 10760-61, 10774, 10776, 10780-81, 10785, 10787-89, 10792, 10794-95, 10799-800, 10808-09, 10862-63, 10883, 10903-04, 10981-82; Defs.' Add. Ex. 11 (Vol. I) at 143-47, 166, 195, 221-28; id. (Vol. II) at 7-8, 19, 41, 45-46.)

Ralph Hardy unequivocally testified he represented Plaintiffs as a lawyer and was retained by Plaintiffs in the summer of 1986 because "a client of Wiley, Rein was a party that they were talking to about providing financial support and that, because of that, it would be necessary for their group to have an independent or a

different--you know, a lawyer to represent them . . ." (R. 7476 (emphasis supplied).) Dow Lohnes and Ralph Hardy are only engaged in the profession of law. Ralph Hardy explicitly testified that the only business, occupation and profession in which he and Dow Lohnes are engaged is the practice of law -- "All of my involvement with Channel 13 was as a lawyer." (R. 7469-70, see 7464, 7466.) Dow Lohnes' billing records confirm that Dow Lohnes represented Plaintiffs as their lawyer. From 1986 to 1990, Dow Lohnes billed and Plaintiffs paid over \$300,000 in attorneys' fees. (R. 8278-92, 9414-95, 10237-48.) Finally, Dow Lohnes performed the services and functions of Plaintiffs' lawyer. It negotiated under Plaintiffs' lead, it drafted documents, it wrote letters explicitly stating that it was representing Plaintiffs, and it directed legal action on their behalf. (R. 7460-8294, 8339-9495, 9624-9777, 9827-9954, 10054-248, 10862-63, 10903-904, 10981-82.)

Ralph Hardy and Dow Lohnes performed extensive legal services in connection with the MWT Ltd. Transaction and Mountain West's search for financing. In July 1986, Ralph Hardy traveled to Dallas to meet with the principals of CPL, and traveled to Chicago to meet with Allstate; in October 1986, he met with lawyers for the Skaggs family to negotiate financing to acquire the Channel 13 license. Dow Lohnes performed detailed economic analysis of Northstar's and CPL's written proposals. It gave Plaintiffs advice with regard to settling with competing applicants and reviewed the settlement agreements before they were signed. Dow Lohnes negotiated with Lincoln, Glakas, and Renze over operation and control issues, and the business terms of the Credit and Partnership agreements, including the amount and timing of funding, the respective

ownership interests of the parties in MWT Ltd., and Northstar's right and timing of conversion. Dow Lohnes lawyers, including Hardy, David Wild and Tim Kelley, attended the November face-to-face negotiations, and assisted in drafting the Credit Agreement and Partnership Agreement. (R. 3412, 3450-51, 3557-59, 3696-97, 7278-79, 7514-21, 7526-30, 7537-39, 7573-8269, 8278-87, 10582-83.)

When the MWT Ltd. Transaction concluded and Dow Lohnes' legal work was completed, Plaintiffs paid Dow Lohnes over \$75,000 for those services. (R. 8278-94.) The transmittal letter enclosed with the check stated: "Enclosed is a check #1006 for legal services rendered through December 1986." (R. 8293-94 (emphasis supplied).) This letter was signed by Plaintiff Jo-Ann Kilpatrick.⁶ (Id.)

Ralph Hardy and Dow Lohnes also performed extensive legal services in connection with the Adams Transaction for MWT Corp. and MWT. Ltd. and charged over \$175,000 for those services. (R. 9414-92.) Dow Lohnes drafted the offer to Adams, negotiated with Adams' attorney for the purchase of Channel 20, and drafted the purchase agreements. Dow Lohnes negotiated and drafted the agreements providing for Aetna's financing, including the subordination agreement. (R. 3412, 3425, 3454-55, 3565-66, 3702-03, 7545-54, 8339-9495.) Dow Lohnes was listed as MWT Corp.'s lawyer in the purchase agreements. (R. 8880.)

Plaintiffs were represented not just by Ralph Hardy and Dow Lohnes in the MWT Ltd. Transaction and the Adams Transaction, they were also represented by Ralph Hardy's brother, David Hardy, a lawyer in Salt Lake. (R. 8295-319, 9496-623.) In fact, David Hardy

6. Furthermore, Plaintiffs gave a financial statement to Northstar and Allstate before the MWT Ltd. Transaction closed representing Mountain West owed Dow Lohnes over \$30,000 for attorneys' fees. (R. 3621, 8134.)

incorporated MWT Corp. for Plaintiffs, and reviewed the draft and final Credit Agreement and Partnership Agreement with Plaintiffs before Plaintiffs signed the agreements in David Hardy's law office in Salt Lake. (See id.) David Hardy billed and Plaintiffs paid for his services. (R. 8319-21.)

Indeed, Plaintiffs did not dispute that, after the Adams Transaction, Dow Lohnes and Ralph Hardy represented Plaintiffs in every transaction between Plaintiffs and Northstar. (R. 3331-34, 4002, 9624-9777, 9827-9954, 10054-248.) Some Plaintiffs denied, however, that Dow Lohnes and Ralph Hardy represented them as their lawyer in the MWT Ltd. Transaction, claiming Hardy acted only as a financial advisor to the Foulgers.⁷ (R. 4002, 5077.) That testimony is absolutely incredible in the face of the record the Defendant lawyers presented. In fact, Plaintiff Clayton Foulger--a lawyer, Sidney Foulger's son and Brent Pratt's brother-in-law--testified that Ralph Hardy and Dow Lohnes represented them as lawyers in the MWT Ltd. Transaction and helped draft the Credit and Partnership agreements.⁸ (R. 7278-79.)

7. Plaintiffs' claim that Dow Lohnes only represented MWT Ltd. in the Adams Transaction is sheer nonsense and contrary to the record. Plaintiff MWT Corp. was the general partner of MWT Ltd. at the time of the Adams Transaction and Dow Lohnes represented MWT Corp. Ralph Hardy testified, and the Dow Lohnes billing records reflect, Dow Lohnes represented Plaintiffs in the Adams Transaction. (R. 7545-48, 8339-9495.)

8. Mr. Foulger testified at his deposition:

Q. Mr. Hardy was present at all these meetings, wasn't he?

A. Yes, he was.

Q. Actively representing the interests of Mr. Foulger and the Foulger group; isn't that true?

A. Mr. Foulger. At that time we weren't involved, as you know.

Q. But actively representing Mr. Foulger's interests?

A. Yes.

Q. As a lawyer?

A. Yes.

Q. Did Mr. Hardy participate in the drafting and negotiation of each one of these documents that relate to the MWT, Ltd. transaction set forth in Exhibit 2?

A. He did. (R. 7278.)

There was no genuine issue of fact that in every transaction between Plaintiffs and Northstar, Dow Lohnes represented Plaintiffs, and Wiley Rein represented Northstar. There is not one exhibit, one document, one piece of paper that contradicts or controverts the inescapable conclusion that Dow Lohnes and its senior partner, Ralph Hardy, provided independent, competent and vigorous representation in all Plaintiffs' business dealings with Northstar. The one thing Dow Lohnes did not do is object or protest that any of the Defendant lawyers had a conflict of interest in representing Northstar. (R. 3412, 7521-23, 7555-56; Defs. Add. Ex. 11 (Vol. II) at 7-8.)

5. Northstar And Allstate's Management Made The Decisions And Directed The Events In The Business Transactions Of Which Plaintiffs Complain And For Which They Seek Damages.

Northstar and Allstate's managers categorically testified that they, and they alone, made the decisions in all seven transactions between Northstar, Allstate and Plaintiffs, with the exception of the sale to Fox and the cash calls. Lincoln, Renze, Glakas, and Richard Doppelt ("Doppelt"), categorically testified that every single element in those business transactions was the product and result of the decisions and directives that they made, and not the product or result of anything the Defendant lawyers did. (R. 3404-06, 3450-60, 3556-71, 3696-706; see R. 3392-96, 3413-16.) Their testimony was uncontroverted.

With regard to the MWT Ltd. Transaction, Lincoln and Renze categorically testified they, and they alone, determined the amount and timing of Northstar's funding, the respective ownership interests in MWT Ltd. and Northstar's conversion rights reflected in the Credit Agreement and Partnership Agreement. Wiley Rein

simply drafted the documents that Northstar, its client, directed it to draft. (R. 3451-53, 3559-64, 3697-3701; see R. 3392-93, 3413-14.)

With regard to the Adams Transaction, the purchase of Channel 20 for \$30 million and the financing of that purchase through Aetna were Plaintiffs' deal, and Plaintiffs with their own lawyer, Ralph Hardy, negotiated, drafted and finalized the deal. MWT Ltd. Corp. was MWT Ltd.'s general partner and controlled MWT. Ltd. While Lincoln and Renze supported those decisions, they did not make them. Wiley Rein was not even at the meeting in Salt Lake when Plaintiffs, Northstar and Allstate with Plaintiffs' lawyer, Ralph Hardy, made the decision to purchase Channel 20. (R. 3454-56, 3565, 7543, 10905-10; see R. 3393-94, 3414-15.)

With regard to Northstar's conversion to general partner, Lincoln and Renze decided, pursuant to the terms of the MWT Ltd. Transaction that Northstar would elect to become the general partner of MWT Ltd. in December 1987, and would become the general partner in May 1988. (R. 3394-95, 3415, 3457, 3569-70, 3705-06.)

With regard to the 25% interest/management fee, Allstate, based on Doppelt's recommendations, made the decision to require MWT Ltd. to pay 25% interest and sign a management contract with Farragut as a condition to lending MWT Ltd. money. (R. 3404-05, 3416, 3458, 3570-71.) Northstar had no alternative but to sign the notes to keep MWT Ltd. afloat. (R. 3395-96.)

With regard to the suspension of payments, Lincoln and Doppelt made the decision to suspend payments under the Mountain West Partners' employment contracts because the Aetna subordination agreement Plaintiffs signed required suspension. (R. 3394, 3415, 3568-69.)

Lincoln made the decision to put Channel 13 up for sale. (R. 3571.) The Northstar Board made the business decisions to sell Channel 13 to Fox and issue the cash calls. (R. 3396, 3405, 3416, 3459-60, 3571.)

6. Richard Wiley, As A Northstar Director And Farragut Shareholder, Did Not Make The Decisions Or Direct The Events In The Seven Business Transactions Of Which Plaintiffs Complain And Seek Damages.

Richard Wiley was a director of Northstar from July 7, 1986, until January 31, 1992; from November 1987 until the sale to Fox, he was a director and small shareholder of Farragut.⁹ (R. 3390, 3553-54.) The elements in the seven business transactions of which Plaintiffs complain were not the product or result of Mr. Wiley's role as a director of either corporation, and certainly were not the product of his role as a shareholder of Farragut. The uncontroverted fact was all those transactions would have occurred and did occur as the result of Northstar and Allstate's management, regardless of Wiley's vote, except the sale of Channel 13 to Fox and the cash calls. (R. 3404-06, 3450-60, 3556-71, 3696-706.) In every instance when Wiley voted, there was always an independent majority of the Board who voted to approve management's decisions and the transactions, except the sale to Fox and the cash calls. (R. 3393-96, 3456-57, 3459, 3564, 3567, 3569-71.) The decision to sell Channel 13 to Fox and the cash calls were business decisions made by Northstar's Board at a time when Wiley Rein was not representing any Plaintiff. (R. 3396, 3406, 3410, 3425, 3459-60.)

9. In November 1987, Wiley purchased 10% of Farragut's common stock. (R. 3553-54.) Wiley received no proceeds from the sale of Channel 13 to Fox. (R. 3396.)

In the MWT Ltd. Transaction, Northstar's Board did not vote to ratify the transaction or the Partnership or Credit agreements reflecting that transaction until after the business terms had been decided and agreed to by the Mountain West Partners, Lincoln and Renze.¹⁰ (R. 3393-94, 3567.) In the Adams Transaction, Northstar's Board did not vote on the transaction. (R. 3394, 3567.) With regard to conversion and the employment contracts, the Northstar Board only voted to ratify the actions previously taken by Northstar's management. (R. 3394-95, 3568-70.) With regard to the 25% interest/management fee, the Northstar Board authorized Lincoln to sign the 25% interest notes because there was no other financing available to pay the Aetna and Adam's obligations then due. (R. 3395-96.) With regard to the sale of Channel 13, the Northstar Board voted to ratify Lincoln's decision to put Channel 13 on the market. (R. 3571.)

Wiley voted to sale Channel 13 to Fox, and his vote was necessary to authorize the transaction by Northstar. (R. 3396.) Wiley voted for the transaction because he believed that the only alternative was to sell Channel 13 to Fox or place it in bankruptcy. Prior to the sell, Wiley did everything he could to keep Channel 13 from being sold; he repeatedly requested that Allstate provide further financing, but Allstate refused. (R. 3396; see R. 10185.) Wiley asked Plaintiffs and their lawyer, Ralph Hardy, to help with a financing plan to pay Adams and Aetna, but Plaintiffs refused. (R. 3459-60.) Wiley thought there was no

10. At this time, there were six members of the Northstar Board; at the time of Northstar's conversion to general partner, the suspension of payments under the employment contracts, Allstate's demand for 25% interest notes and the decision to put Channel 13 on the market, there were four members of the Board; by the time Channel 13 was sold to Fox, only Wiley and Glakas remained on the Board. (R. 3393-96)

alternative and authorized the sale. (R. 3396, 10185-87.) At the time of his vote, Wiley Rein was not representing any Plaintiff. (R. 3410.)

After Channel 13 was sold, Wiley and Glakas, the only remaining Northstar Directors, voted for Northstar to dissolve MWT Ltd. because the sale had disposed of substantially all MWT Ltd.'s assets. (R. 7259-62.) Then, as required by the Partnership Agreement, Northstar issued cash calls to all the MWT Ltd. partners, including Northstar, because there were deficits in the partners' capital accounts. (Id.; see R. 3659-60.)

7. There Was No Showing Of A Reasonable Likelihood Plaintiffs Would Have Acquired The Necessary Financing For Channel 13 From CPL Or Any Other Source.

Plaintiffs in their brief repeatedly assert that, in the summer of 1986, they obtained \$10 million commitments in financing for the Channel 13 venture from both Northstar and CPL. (Pls.' Br. at 9, 23, 38.) Plaintiffs' assertions are made out of whole cloth. If Plaintiffs received \$10 million commitments from Northstar and CPL, where are they? They certainly are not in Plaintiffs' record.

The fact is, after one year of actively seeking financing, the only commitment Plaintiffs received was from Northstar for \$6 million of direct financing in late November 1986. (See R. 3453, 3556-61, 3573-693, 3696-99; J. Lee Dep. at 189-93; Defs.' Add. Ex. 16.) Plaintiffs never received a commitment from Northstar until the Credit and Partnership agreements were signed in late November 1986. (See id.) Plaintiffs never had a commitment from CPL or any other party. (R. 5447-48, 7080, 7284-86, 7472-78, 7481-87, 7806, 8125-33, 8198-99, 8278-91; Defs.' Add. Ex. 16.)

Plaintiffs did receive a proposal, not a commitment, from CPL that was not definite or specific as to its terms. (See R. 7080.) More importantly, CPL was only willing to put-up \$2 million of CPL money to finance the Channel 13 venture. (See id.) That amount would not have even financed the settlement agreements. (R. 3434-41, 3649, 7208-30; Defs.' Add. Exs. 13-14.)

Furthermore, Plaintiffs testified they rejected the CPL proposal because they did not trust one of the CPL principals, and because CPL wanted a 70% interest.¹¹ (R. 7277, 7284-85.) Mountain West did not attempt to reinstate the CPL proposal when Northstar allegedly changed the deal in November 1986. Mountain West did not attempt to contact CPL when there was an issue as to whether they wanted to purchase Channel 20. (R. 5153-54.)

8. There Was No Showing The Defendant Lawyers Used Or Misused Confidential Information Of Plaintiffs.

The Defendant lawyers put in a clear record that they never used or misused any confidential information concerning Plaintiffs in their representation of Northstar. (R. 3390-92, 3413, 3415, 3424, 3453, 3560-61, 3698-99.) All information Lincoln, Glakas and Renze had regarding Plaintiffs was disclosed by Plaintiffs in the FCC proceedings to obtain the license and by Plaintiffs and their counsel, Dow Lohnes, directly to Lincoln, Glakas and Renze in the course of Plaintiffs' attempt to persuade those business entities to become their financing partner.¹² (R. 3421, 3698-99, 7524-32, 10606,

11. There is also evidence Plaintiffs rejected the CPL proposal because CPL would not agree to let Joseph Lee manage the station. (Defs.' Add. Ex. 17.)

12. The information Wood had with regard to Mountain West's settlement with West Valley was a matter of public record before the FCC, and the terms and conditions of the settlements with Family and West Valley had been disclosed to Lincoln, Glakas and Renze by the Mountain West Partners and their lawyer, Hardy, in the course of the November face-to-face negotiations. (R. 3421, 3424, 3698-

10627, 10636, 10700-01, 10453-54, 10591-92, 10550-51.) Lincoln and Hardy testified that, as a matter of common business practice, Northstar and Allstate would not have entered into an agreement with Mountain West to provide \$6 million in financing for Channel 13 without knowing Plaintiffs' financial position, Plaintiffs' business plans, and the terms and conditions of the settlement agreements Northstar and Allstate had been asked to finance. (R. 3561, 7531-32.) That record was uncontroverted.

Moreover, neither Wiley nor any Wiley Rein lawyer representing Northstar in the seven business transactions had any confidential information concerning Plaintiffs. (R. 3391-92, 3413, 3424.) The FCC pleadings, the general correspondence from Wood, and the letters concerning Plaintiffs' legal bills which Wood routed on occasion to Quale and Wiley contained no confidential or privileged information. (See Pls.' Br. at 3 n.2.) Wood did not represent Northstar in the MWT Ltd. Transaction, and testified he knew of no confidential information regarding Plaintiffs in his possession at the time of that transaction. (R. 3424.)

Wiley Rein did not represent Adams in the Adams Transaction, and it was uncontroverted Wiley Rein did not disclose any information concerning Plaintiffs to Adams. (R. 3515.)

9. Plaintiffs' Attempts To Put-up Other Straw Men Are Immaterial To The Issue Of Proximate Cause.

Several straw men postulated by Plaintiffs in their brief are untrue and immaterial to proximate cause. For example:

99, 7524-32, 10453-54, 10550-51, 10591-92, 10606, 10627, 10636, 10700-01.) The Foulger-Pratt financial statement was on file with the FCC, and Sidney Foulger provided his financial statement to Northstar and Allstate's management during the negotiations to assure them he had the financial wherewithal to meet a \$2.7 million obligation. (R. 3561, 7748.) The other Mountain West Partners were not going to put-up any money.

1. Plaintiffs' assertion Wiley Rein represented Adams with regard to the possible purchase of Channel 13 and the sale of Channel 20, and that John Quale represented Adams in those matters is a deliberate attempt by Plaintiffs to mislead the Court. (See Pls.' Br. at 4.) In early 1986, Wiley opened a file for Adams concerning whether a third party who was not an applicant for Channel 13 could purchase the Channel 13 license from the successful applicant. (R. 5552-53, 5620-22.) Wiley Rein spent less than 3 hours on the matter, and no further work was done after February 1986, consistent with Wiley Rein's representation of Plaintiffs. (See R. 5620-21.) Russ Eagan, not John Quale, was the lawyer responsible for the Adams representation. (R. 5553; see R. 6348.) Quale only spent a total of .50 hours in early 1986 on Adams' matters. (See R. 5620-21.)

2. Plaintiffs' assertion Allstate was a client of Wiley Rein in the summer of 1986, and their implication Wiley Rein represented Allstate in the transactions at issue are false. (See Pls.' Br. at 6.) Wiley Rein never represented Allstate in any of the transactions at issue, and only represented Allstate on a few insurance claims beginning in 1988. (R. 3391, 3406, 3412, 3706, 5610, 5633, 5764-67, 7350-52.)

3. Plaintiffs made a number of false and misleading assertions regarding Wood. For example:

a. Wiley Rein red-lining dispute. Plaintiffs make much ado about a dispute between Wiley Rein and Wood regarding Wiley Rein's representation of Northstar in the MWT Ltd. Transaction. (See Pls.' Br. at 15-16.) The dispute, however, had nothing to do with any conflict of interest. It related to an accusation that Wiley Rein had altered the Credit Agreement after the negotiations, but

before it was signed. (R. 6452-56.) The accusation was untrue, as conclusively demonstrated by a red-lined version of the Credit Agreement Wiley Rein sent to Plaintiffs' lawyer in Salt Lake--David Hardy, who is Ralph Hardy's brother. (Dep. Ex. D-69.) John Quale was upset with Wood because he had initially sided with Plaintiffs with regard to the accusation. (R. 6452-55, 10868-70.) There was no basis for the accusation, and Quale did not believe a Wiley Rein lawyer should be accusing his partners of improper conduct without the facts. (Id.) An investigation shortly after the MWT Ltd. Transaction resulted in Wood's censorship, but had nothing to do with a conflict of interest. (R. 10885-98.) Statements made in the investigation are not adverse to the Defendant lawyers but, in fact, confirm they obtained Plaintiffs' consent to Wiley Rein's representation of Northstar, and that Plaintiffs agreed to and did retain their own lawyer--Dow Lohnes. (R. 10864, 10876, 10883, 10886.)

b. Wood's representation. Plaintiffs' implication Wood represented Plaintiffs and Northstar in negotiations in the MWT Ltd. Transaction is categorically false and certainly is not supported by the record cited. (See Pls.' Br. at 13.) Wood did not represent Northstar in the MWT Ltd. Transaction negotiations, and Wood so testified. (R. 3422-24; see R. 3557.) Wood did not represent Plaintiffs in the negotiations, and Wood so testified. (R. 3422-24.) The only services Wood performed with regard to the MWT Ltd. Transaction were: (1) giving the parties historical information as to the status of the FCC proceeding; (2) performing work toward regulatory approval of the MWT Ltd. Transaction after it closed; and (3) working toward settling with competing applicants. (R. 3410-12, 3430-33, 3422-24.)

c. Wiley Rein's representation of Northstar. Plaintiffs' assertions Wood told Wiley Rein it could not ethically represent Northstar, and objected to Wiley Rein's representation of Northstar are false and contrary to the record they cite. (See Pls.' Br. at 5, 14, 16.) Wood testified he never objected to Wiley Rein representing Northstar, and never told Wiley Rein its representation of Northstar was unethical. (R. 7361-63, 10643-50, 10690-91.) Plaintiffs' sole support for its assertion is a memorandum purportedly containing Wood's "beliefs" which the Defendant lawyers moved to strike because it was written in connection with attempts to settle this matter while Wood was practicing law with David Lee, was inadmissible hearsay and contrary to the record. (R. 7130-33, 7373-94.)

d. Plaintiffs' settlement agreements. Plaintiffs' assertion that "Wood knew they were in a terrible position because they had to pay \$2 million . . . and had no financing alternative available at the time . . ." is false and misleading. (See Pls.' Br. at 14 n.5.) The record shows that Wood testified it was Plaintiffs' fault, not Wiley Rein's fault, that they found themselves in the position of having to make a \$2 million escrow payment to Family without the financing commitment they wanted from Northstar and Allstate. (R. 5477.) He testified Mountain West had made the decision, on it own, to sign the settlement agreements without a firm financing commitment, contrary to Wood's warning not to do so. (Id.) As a consequence, Mountain West was in the position that it either had to find alternative financing or accept Northstar and Allstate's offer.

e. Date of Wiley Rein meeting. Plaintiffs' assertion "on June 11, 1986," Mr. Wiley, Mr. Quale and Mr. Wood met to

discuss the firm's representation of Northstar is false and not supported by the record cited. (See Pls.' Br. at 5.) There is absolutely no evidence Wiley, Quale and Wood met on that date to discuss Wiley Rein's representation of Northstar. (See R. 7364.)

IX. SUMMARY OF ARGUMENT

Unquestionably, proximate cause is an essential element of Plaintiffs' legal malpractice claim. Proximate cause requires not only "but for" causation, it requires "substantial" causation. The fault shown must be the "substantial" cause of the damages claimed. That is the fundamental rule of proximate cause in Utah in all tort actions, including actions for breach of fiduciary duty.

The Utah Supreme Court, moreover, has squarely held that to prove proximate cause in a legal malpractice action, the plaintiff must show that, in the absence of a defendant lawyer's breach of duty, there is a reasonable likelihood the plaintiff would have achieved the better business or legal result for which the plaintiff claims damages. The "reasonable likelihood" rule requires that a plaintiff's damage claim be grounded in reality and not speculation and fantasy about what might have been.

The uncontroverted facts show there was no genuine issue of material fact on the essential element of proximate cause. First, every element in the seven business transactions of which Plaintiffs complained and sought damages were the exclusive product and result of the decisions and directives of Northstar and Allstate, non-party business entities, and not the result of any breach of duty by the Defendant lawyers. Second, it was incontrovertible that Plaintiffs had their own independent counsel, Dow Lohnes, every step of the way in every business transaction

between Plaintiffs and Northstar and Allstate. Third, Plaintiffs failed to show any reasonable likelihood that, in the absence of the Defendant lawyers' alleged breach of duty, conflict of interest they would have obtained the better business result, including the license for Channel 13, for which they claimed damages.

The lower court correctly applied Utah's rules of proximate cause in awarding the Defendant lawyers summary judgment. That is why Plaintiffs, for the first time, now contend there is a different rule, a new rule of proximate cause, for claims based on breach of fiduciary duty as opposed to claims based on negligence. Plaintiffs are wrong; the rules are the same. Plaintiffs simply propose a new rule because their legal malpractice claim is barred by the rules of proximate cause.

Plaintiffs propose a "chain of events" or a "different course of action" rule of proximate cause in breach of fiduciary duty cases. Essentially, Plaintiffs propose a "things would have been different" rule. Plaintiffs' new rule is contrary to Utah law and the Restatement, and would base the requisite causal connection between fault and damage on speculation and remoteness. Plaintiffs' new rule would make lawyers the guarantors of their client's legal and business expectations regardless of the likelihood those expectations would have been realized in the absence of the lawyer's fault.

Finally, Plaintiffs have not pointed to one piece of confidential information the Defendant lawyers used or misused in their representation of Northstar or, for that matter, one single piece of confidential information the Defendant lawyers even had at the time of any of the seven business transactions. It was

uncontroverted that all information Northstar and Allstate had concerning Plaintiffs was information they obtained directly from Plaintiffs or which was part of the public record Plaintiffs filed with the FCC.

The Court, therefore, should affirm the lower court's summary judgment because there was no genuine issue of material fact on the essential element of proximate cause.

X. ARGUMENT

A. IN UTAH, THE FUNDAMENTAL RULE IS THAT PROXIMATE CAUSE, AN ESSENTIAL ELEMENT OF A LEGAL MALPRACTICE CLAIM, REQUIRES NOT ONLY "BUT FOR" CAUSATION, BUT "SUBSTANTIAL" CAUSATION.

Proximate cause is an essential element of a legal malpractice claim, and courts have not hesitated to grant summary judgment on the issue of proximate cause despite a prima facie showing of breach of duty. See, e.g., Williams v. Barber, 765 P.2d 887 (Utah 1988); Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894 (Utah 1978); Yusefzadeh v. Ross, 932 F.2d 1262 (8th Cir. 1991); Johnson v. Jones, 652 P.2d 650 (Idaho 1982); Stansbery v. Schroeder, 412 N.W.2d 447 (Neb. 1987); see also Holmes v. Securities Investors Protection Corp., 503 U.S. 258, 117 L. Ed 2d 532, 543-45 & nns.10-12, 556 (1992); Fausett v. American Resources Management Corp., 542 F. Supp. 1234, 1240 (D. Utah 1982); Prosser & Keeton on Torts § 41 (5th ed. 1984 & Supp. 1988)[hereinafter "Prosser"]; Restatement (Second) of Torts §§ 9, 431 & cmt. e, 874 & cmt. b, 910 (1965).

Proximate cause, at a minimum, requires "but for" causation. That is, a plaintiff must present evidence from which a reasonable jury could find "but for" a defendant's wrongful conduct, the

plaintiff would not have suffered cognizable injury. Prosser § 41; see Mitchell v. Pearson Enter. 697 P.2d 240, 245 (Utah 1985); Barber, 765 P.2d at 889; Dunn, 584 P.2d at 896; Yusefzadeh, 932 F.2d at 1264; Johnson, 652 P.2d at 655; Stansbery, 412 N.W.2d at 450.

Proximate cause, however, not only requires "but for" causation, it also requires "substantial" causation. The fault shown must be the "substantial" cause of the damage claimed. That is the fundamental rule in Utah. Mitchell, 697 P.2d at 245-46; see Barber, 765 P.2d at 889; Dunn, 584 P.2d at 896-97; see also Prosser § 41; Restatement (Second) of Torts § 431 & cmts. a & e (1965).

"Substantial" causation is required to show proximate cause because, without it, there would be infinite liability for every wrongful act. Without it, every wrongful act could be said to be the cause of any event, no matter how remote. Prosser § 41; Holmes, 117 L. Ed. 2d at 543 n.10, 544-45, 556.

B. APPLICATION OF THE UTAH RULE ON PROXIMATE CAUSE TO THE SEVEN BUSINESS TRANSACTIONS DEMONSTRATES THERE WAS NO GENUINE ISSUE OF FACT ON THE ESSENTIAL ELEMENT OF PROXIMATE CAUSE.

If Plaintiffs were injured by any of the seven business transactions of which they complain and seek damages, it was not "but for" any legal malpractice of the Defendant lawyers. Not a single element, decision or event in any of the seven transactions about which Plaintiffs complain and seek damages would have changed or been different had Wiley Rein not engaged in the alleged breach of duty, conflict of interest. The result in each of the seven business transactions would have been the same if Wiley Rein had resigned and not represented Northstar. The results would have been the same if Wiley Rein had represented Plaintiffs. If

Plaintiffs wanted to sue someone regarding the seven business transactions, they should have sued their business partners-- Allstate and Northstar.

If Plaintiffs were injured by reason of any of the seven business transactions of which they complain and seek damages, it was "but for" the terms, decisions and actions dictated and directed by the business non-parties. The Defendant lawyers did not decide, dictate or direct the business transactions between Plaintiffs, Northstar and Allstate. Northstar, Allstate and Farragut--business non-parties--made every decision and dictated every term and action in all seven business transactions which Plaintiffs claim caused them damages. Lincoln, Glakas, Renze and Doppelt testified that Northstar and Allstate, not the Defendant lawyers, dictated and directed every term and action in the business transactions, including the amount and timing of funding, Northstar and Plaintiffs' ownership interests in MWT Ltd., and Northstar's right to convert to general partner in the MWT Ltd. Transaction. That testimony was uncontroverted. (R. 3404-06, 3450-60, 3556-71, 3696-706; see R. 3392-96, 3413-16)

Plaintiffs have admitted that Northstar and Allstate, not the Defendant lawyers, made the decisions about which they complain.¹³ For example, Plaintiffs' brief states: "Defendants' June 1986

13. Plaintiffs' brief is replete with admissions that Northstar and Allstate made the decisions of which Plaintiffs complain and for which they seek damages. For example, Plaintiffs state: "When Plaintiffs objected to the purchase [of Channel 20], Northstar's representatives stated that if Plaintiffs did not go along with the decision to purchase Adams' Channel 20, Northstar and Allstate would not provide even the funding they had agreed to at the squeeze down. Based on that ultimatum, the [Mountain West] Partners again concluded they had no alternative but to accede once again to Northstar's decision." [Pls.' Br. at 16 (citation omitted).] Plaintiffs further state: "Allstate decide to sell [Channel 13]. . . . Northstar and Farragut . . . decided to sell the station to Fox." [Id. at 20-21 (emphasis supplied).] Sidney Foulger testified it was Northstar and Allstate that caused his damage. (R. 7271.)

breaches set in motion a chain of events in which Northstar/Allstate . . . forced their decisions on Plaintiffs. Absent Defendants' breaches of full disclosure and consent in June 1986, none of the events in that chain, including the decisions of Northstar/Allstate, could have occurred." (Pls. Br. at 39-40 (emphasis supplied).)

As a matter of law, Plaintiffs cannot hold the Defendant lawyers responsible for the business decisions of Allstate and their client, Northstar.¹⁴ See Purdy v. Pacific Auto. Ins. Co., 203 Cal. Rptr. 524, 534-35 (Cal. Ct. App. 1984); accord Franko v. Mitchell, 762 P.2d 1345, 1355 (Ariz. Ct. App. 1988).¹⁵ Lawyers are not principals; they are simply agents of their clients, and cannot be held responsible for the business decisions of those clients. In fact, a lawyer has no right or duty to compel his client or a third party to make a particular business decision, or to prevent his client from implementing a business decision with which he disagrees. A client has the right to make its own business decisions and to implement those business decisions through its counsel. Purdy, 203 Cal. Rptr. at 535.

Moreover, if Plaintiffs were injured as the result of these business transactions, it was "but for" Plaintiffs' own voluntary

14. This rule applies even when the lawyer represents both parties to the transaction. See Purdy, 203 Cal. Rptr. at 534-35. In this case, however, the Defendant lawyers did not engage in simultaneous adverse representation, contrary to Plaintiffs' assertion.

15. The only two authorities Plaintiffs cite, In re D.H. Overmyer Telecasting Co., 77 B.R. 128 (Bankr. N.D. Ohio 1987) and Johnson v. Miller, 596 F. Supp. 768 (D. Colo. 1989), are not to the contrary. Both these cases involve illicit conduct by a party. In Overmyer, the party was a client of the lawyer. In Johnson, the party was not a client. The issue in both cases, unlike here, was whether the lawyer should have foreseen the illicit conduct of another and avoided it. Here, non-party business entities made business decisions, and it was those business decisions that were the direct cause of Plaintiffs' claimed damages, not the Defendant lawyers.

decisions and actions, not "but for" the Defendant lawyers' alleged breach of duty, conflict of interest. See Dunn, 584 P.2d at 897. If Plaintiffs were unhappy with Northstar's offer and the business terms Northstar and Allstate demanded in the MWT Ltd. Transaction, they could have walked away; they could have financed the settlements themselves to obtain the Channel 13 license. (See R. 7248; Defs.' Add. Ex. 15.) They chose not to.

The decision to purchase Channel 20 was under Plaintiffs' control; Plaintiff MWT Corp. was the general partner of MWT Ltd. at the time it purchased Channel 20, and the purchase would not have occurred without Plaintiffs' consent and participation. The Defendant lawyers were not even present at the meeting when Plaintiffs, Northstar, Allstate and Plaintiffs' lawyer, Ralph Hardy, made the decision to purchase Channel 20. If Plaintiffs had wanted to build Channel 13 instead of purchasing Channel 20, nothing stopped them from doing that. Sidney Foulger could have provided the financing he had agreed to provide in the MWT Ltd. Transaction, or Plaintiffs could have found someone to buy out Northstar and Allstate. (R. 3454-67, 3565, 3701-05, 10905-10; see R. 3606-93; Defs.' Add. Ex. 15.) Again, they chose not to.

Finally, if Plaintiffs had wanted to avoid the sale of Channel 13 to Fox, they could have done so. Plaintiffs had over a year to find a buyer for Channel 13 or to purchase the station themselves. To prevent the sale, Plaintiffs could have agreed to equity financing for MWT Ltd.'s debts to Adams and Aetna, or could have agreed to Allstate's financing terms instead of objecting and threatening to sue. Plaintiffs, however, did none of these things, and Channel 13 was sold to Fox for an admittedly good price rather

than being put in bankruptcy.¹⁶ (R. 3395-96, 3404-06, 3457-60, 3570-71, 10182-91.)

C. WILEY'S ROLE AS A DIRECTOR OF NORTHSTAR AND A DIRECTOR AND SHAREHOLDER OF FARRAGUT AFTER NOVEMBER 1987 WAS NOT A "BUT FOR" CAUSE OF PLAINTIFFS' DAMAGES AND WAS NOT A BREACH OF WILEY'S PROFESSIONAL DUTIES TO PLAINTIFFS.

Each term, decision and action relating to the seven business transactions about which Plaintiffs complain and seek damages was made by the management for Northstar and Farragut, Lincoln and Glakas, except the sale of Channel 13 to Fox and the cash calls. Each management decision and transaction was approved by an independent majority of the Northstar Board, except the sale of Channel 13 to Fox and the cash calls. Richard Wiley, as a single board member, did not make those decisions, direct those actions, or impact the Board's decisions. If Wiley had resigned from the Northstar Board, had not been present, or had voted against the transactions, the results would have been the same.¹⁷ Wiley, moreover, owed no professional duty to Plaintiffs as a director of Northstar or Farragut with regard to any of the seven business transactions; he had no duty to do what Plaintiffs demanded in their own best interest. (R. 3393-96, 3404-06, 3413-16, 3450-60, 3556-71, 3696-706, 3992-96.)

16. No one coerced Plaintiffs or forced them under duress to enter into any of the seven business transactions, particularly the MWT Ltd. Transaction. Legal coercion and duress require a plaintiff to show that a defendant's conduct placed him in such fear that he was deprived of his free will. See Heglar Ranch Inc. v. Stillman, 619 P.2d 1390, 1391 (Utah 1980); Wiesen v. Shout, 604 P.2d 1191, 1192 (Colo. Ct. App. 1979); Bohm v. Commerce Union Bank, 794 F. Supp. 158, 164 (W.D. Pa. 1992); see also Federal Sav. & Loan Ins. Corp. v. Ziegler, 680 F. Supp. 235, 237-38 (E.D. La. 1988). There is no such showing here and, indeed, Plaintiffs have made no legal argument that they were claiming coercion or duress.

17. In fact, that is exactly what happened in the Adams Transaction. Wiley was not even at the Board meeting when the other five directors voted to ratify Lincoln's consent. (Dep. Ex. P-25.)

In the MWT Ltd. Transaction, an independent majority of the Northstar Board voted to ratify the deal that had already been reached by Plaintiffs, Northstar's management and Allstate. (See id.) In the Adams Transaction, the decision to buy Channel 20 and finance that purchase through Aetna, insofar as Northstar and Allstate were concerned, was a decision of management and Plaintiffs, who controlled MWT Ltd. and authorized the deal. (See id.) With regard to Northstar's conversion to general partner, an independent majority of the Northstar Board voted to ratify Lincoln's decision to convert Northstar to general partner, as required by the Aetna financing which Plaintiffs had signed. (See id.) With regard to the suspension of payments under the Mountain West Partners' employment contracts, the Northstar Board took no action on Lee's contract, and an independent majority of the Board ratified Lincoln's suspension of the other Mountain West Partners' payments, as required by the Aetna financing. (See id.) With regard to the 25% interest notes demanded by Allstate, an independent majority of the Board authorized Lincoln to sign the notes with Allstate to keep Channel 13 afloat. (See id.) With regard to the sale of Channel 13, an independent majority of the Board voted to ratify Lincoln's decision to put Channel 13 on the market. (R. 3571.)

It is true Wiley voted to sell Channel 13 to Fox. But Wiley and the only other Northstar director, Glakas, were faced with the Hobson's choice of either selling the station or putting it in bankruptcy. Allstate had refused to lend MWT Ltd. any more money despite Wiley's repeated requests, and Plaintiffs had refused to cooperate by obtaining financing or diluting their own interest to obtain financing. Plaintiffs had been given one year to purchase

the station themselves or find another buyer, but had done neither. Faced with the choice between selling Channel 13 at an admittedly good price or putting the station in bankruptcy, Wiley voted to sell the station to maximize the sale proceeds. (R. 3396, 3406, 3459-60.)

With regard to the cash calls, Wiley and Glakas simply voted for Northstar to fulfill MWT Ltd.'s obligation under the Partnership Agreement to issue cash calls to all the partners, including Northstar, because there were deficits in their capital accounts upon MWT Ltd.'s dissolution. (See R. 3659-60, 7259-62.)

Finally, Wiley Rein did not represent Plaintiffs with regard to any of these transactions and, with the exception of the MWT Ltd. Transaction, was not representing Plaintiffs on any matter when the Northstar Board voted to approve the transactions and management decisions. Wiley Rein was not representing any Plaintiff on any matter when Wiley became a director and shareholder of Farragut.¹⁸ (R. 3390, 3410, 3412-13, 3424-25.)

D. UNDER UTAH LAW, A PLAINTIFF IN A LEGAL MALPRACTICE ACTION MUST DEMONSTRATE A REASONABLE LIKELIHOOD THAT, ABSENT THE LAWYER'S BREACH OF DUTY, THE PLAINTIFF WOULD HAVE ACHIEVED THE BETTER BUSINESS OR LEGAL RESULT FOR WHICH THE PLAINTIFF CLAIMS DAMAGES; "BUT FOR" CAUSATION ALONE IS LEGALLY INSUFFICIENT.

The Utah courts have squarely held that a plaintiff in a legal malpractice action must present evidence from which a reasonable jury could find that, in the absence of the breach of duty claimed, there is a reasonable likelihood that the better business or legal

18. Incidentally, Plaintiffs and their lawyer, Ralph Hardy, knew Wiley was a member of the Northstar Board well before Plaintiffs entered into the MWT Ltd. Transaction--"I [Ralph Hardy] think I knew that very early on"--and never complained of his role. (R. 7357-58; Defs.' Add. Ex. 11 (Vol. II) at 46.) In fact, the FCC reports which Plaintiffs signed and filed clearly stated Wiley was a director of Northstar and was a director and shareholder of Farragut. (R. 7338-39, 7357-58.)

result for which the plaintiff claims damages would have been achieved. Barber, 765 P.2d at 889; see Dunn, 584 P.2d at 896.

In Barber, the defendant lawyer breached his duty by failing to timely file an answer on behalf of his client resulting in a default judgment. The client's motion to set aside the default was denied. The client then sued the lawyer, claiming the amount of the default judgment as damages. The Utah Supreme Court held that the plaintiff was not entitled to the default damages absent a showing of a "reasonable likelihood" of prevailing on the merits in the underlying action had the lawyer timely filed an answer. Clearly there was "but for" causation--but for the failure to file an answer, there would have been no default judgment. But the Supreme Court required more than "but for" causation. The Supreme Court ruled, as a matter of law, that a plaintiff in a legal malpractice action must prove proximate cause, and can only prove proximate cause if the plaintiff shows, in the absence of defendant's malpractice, there is a reasonable likelihood the plaintiff would have achieved the better legal or business result for which he sought damages. 765 P.2d at 889

The Barber rule is clearly the rule in Utah. It was squarely applied by the Utah Supreme Court in Dunn, a decision before Barber which upheld a directed verdict for a defendant lawyer in a legal malpractice action. 584 P.2d at 897. In Dunn, the defendant lawyer committed legal malpractice when he failed to properly serve a summons and complaint on plaintiff's husband in Florida in connection with a divorce action in Utah in which plaintiff was seeking custody of her children. The plaintiff sought damages after losing custody in a Florida divorce action brought by her

husband. The plaintiff sought as damages the loss of custody of her children in the Florida divorce action and the cost of legal counsel in Florida. The Utah Supreme Court found that the lawyer's failure to properly serve the plaintiff's husband had delayed the Utah divorce proceeding, but ruled, as a matter of law, that plaintiff failed to show the likelihood of a better legal result if defendant had properly served the summons and complaint. In short, the Court found that proximate cause was too speculative:

A finding of such damages cannot properly be based on speculation and conjecture. [Damages] can be awarded only if there is a basis in the evidence upon which reasonable minds acting fairly thereon could believe with reasonable certainty that [plaintiff's injury and damage were] proximately caused by the negligence of the defendant.

584 P.2d at 896. The Barber rule is not just the rule in Utah; it is followed in other jurisdictions as well. See Yusefzadeh, 932 P.2d at 1265; Johnson, 652 P.2d at 655; Stansbery, 412 N.W.2d at 452.

Under Utah law, therefore, proximate cause in a legal malpractice action requires more than "but for" causation. It requires the plaintiff to show there is a "reasonable likelihood" that, absent the lawyer's malpractice, the plaintiff would have achieved the better business or legal result on which his damage claim is based. This rule limits a plaintiff's damages to those better business or legal results for which there is a reasonable likelihood such results could have been achieved by the client with proper representation. The "reasonable likelihood" rule bars the lawyer from simply being made a guarantor of the client's expectations by requiring that those expectations be grounded in reality.

In this case, Plaintiffs presented no evidence from which a reasonable jury could find a reasonable likelihood that, in the absence of the Defendant lawyers' claimed breach of duty, conflict of interest, Plaintiffs would have achieved the better business result for which they seek damages.¹⁹ Fundamentally, Plaintiffs' damage claim is that they would have succeeded in their Channel 13 venture if they had taken a different course--if they had gone with CPL instead of Northstar. (Pls.' Br. at 17, 37-39.) Plaintiffs assert this claim even though they clearly knew of Wiley Rein's representation of Northstar for four years and did nothing about it. Plaintiffs' claim and its underlying assumptions are based on pure speculation and are contrary to the record. Speculation does not create an issue of fact. See Tyger Constr. Co. v. Pensacola Constr. Co., 29 F.3d 137, 142-145 (4th Cir. 1994), cert. denied, 115 S. Ct. 729 (1995); Joy v. Bell Helicopter Textron, 999 F.2d 549, 568-69 (D.D.C. 1993).

If Plaintiffs had not done the deal with Northstar and Allstate, there is absolutely no showing Plaintiffs would have acquired the Channel 13 license. The uncontroverted fact is that the acquisition of the Channel 13 license is the premise of all

19. Spector v. Mermelstein, 485 F.2d 474 (2d Cir. 1973) is not on point. Spector is not a legal malpractice case involving claims of conflict of interest, as in this case. More importantly, in Spector the damages plaintiffs sought for the defendants' breach of duty, unlike this case, were directly and substantially tied to the information the attorney did not disclose. Specifically, the damages plaintiff claimed were the outstanding principle and interest on a defaulted loan. The defendant attorney did not disclose to his client that the debtor was in serious financial difficulty, and did not have the ability to repay the loan. Plaintiff, therefore, presented evidence from which a reasonable fact finder could conclude that, with this information, it was likely plaintiff would not have made the loan.

Plaintiffs' damage claims.²⁰ (R. 7173, 7180-98.) Settling with the other applicants and having the financing to do that, therefore, are indisputably essential to those damage claims because Plaintiffs had lost their application for the Channel 13 license and could only have obtained the license by settling with the other applicants. (R. 3421-22; see R. 5319-21, 7475-77.)

There is no reasonable likelihood Plaintiffs would have obtained financing from any source, other than Northstar and Allstate, to acquire the license for Channel 13. Plaintiffs spent a year trying to find a partner to finance the settlements with the other competing applicants. Their efforts were unrestricted--Wiley Rein did nothing "to impede or hinder the plaintiffs' or Dow Lohnes & Albertson's attempt to find another purchaser or further financing . . ." (Defs.' Add. Ex. 11 (Vol. II) at 45-46.) After a full year of working at it, the only offer Plaintiffs had which provided the money to buy out the competing applicants was the financing commitment from Northstar and Allstate in November 1986 for \$6 million in direct financing. Plaintiffs never had another offer or firm commitment. (R. 3649, 5447-48, 7080, 7284-87, 7481-87, 7508-09, 7806, 8278-91; J. Lee Dep. at 189-93; Defs.' Add. Ex. 16.)

The only other response that even amounted to a proposal was from CPL. Despite Plaintiffs' claims, however, the CPL proposal did not remotely begin to provide enough money to buy out the competing applicants. CPL proposed to put only \$2 million of its own funds in the Channel 13 venture, not the \$10 million Plaintiffs

20. For example, Plaintiffs claim as damages the value of a 40% interest in the Channel 13 license in 1987, lost cash disbursements from Channel 13 from 1987 through 1993, the value of 40% of the difference between the present fair-market value of Channel 13 and the value in 1987, and the payments under Plaintiffs' employment contracts with Channel 13. Each of these damages is based on and assumes Plaintiffs acquired the Channel 13 license. (R. 7173, 7180-98.)

claim. Look at the CPL proposal. (R. 7080.) CPL's proposed investment was \$3 million less than required to pay the settlements alone, and \$4 million less than the \$6 million Northstar and Allstate committed to provide.²¹ Even Plaintiffs admit it would have taken \$8 million to get the job done. (Pls.' Br. at 23, 38.) If CPL only proposed to pay \$2 million and that proposal was \$3 million short of paying for the settlements alone, there is no showing of a reasonable likelihood Plaintiffs would have acquired the license in a deal with CPL. (R. 3429-44, 3649, 7204-30; Defs.' Add. Ex. 8, 10, 13-14.)

Furthermore Plaintiffs, with their own lawyer, Ralph Hardy, rejected the CPL "proposal" for other reasons--they did not trust one of the CPL principals and CPL wanted a 70% interest. They rejected the proposal while they knew Wiley Rein represented Northstar. Plaintiffs did not even attempt to reinstate the CPL proposal when Northstar allegedly changed the deal. Plaintiffs did not go back to CPL when there was an issue as to whether they wanted to purchase Channel 20. The fact is, Plaintiffs had no other financing alternative except the Northstar deal. (R. 5153-54, 7277, 7284-85, 7471-82, 8278-84.)

Moreover, Plaintiffs' claim that they would have taken a different course of action is a self-serving conclusion and opinion that is contrary to the record.²² The breach of duty alleged here

21. Furthermore, CPL also wanted to control the venture and wanted a larger ownership percentage than Northstar required. (R. 7284-85; Defs.' Add. Ex. 17.) Northstar received a 49% interest for its \$6 million. (R. 3563.)

22. Joseph Lee's conclusory opinion in his affidavit that Plaintiffs would have gone elsewhere had they know of Defendant lawyers' conflicts of interest, and Brent Pratt's conclusory opinion in his affidavit that Plaintiffs would have accepted CPL's "firm commitment to provide financing of \$10 million or pursued other commitments" are self-serving conclusions and opinions without testimonial foundation and contrary to the record, and the Defendant lawyers moved to strike that testimony. (R. 7130-33, 7373-94.)

is based on the Defendant lawyers' alleged failure to get Plaintiffs' informed consent, not on the Defendant lawyers' failure to tell Plaintiffs that Wiley Rein represented Northstar. Plaintiffs knew for over four years Wiley Rein represented Northstar in its dealings with Plaintiffs. All they had to do was look across the table. Plaintiffs knew and did nothing about it because they had their own lawyer. (R. 3412, 3558-70, 10458; Defs.' Add Ex. 11 (Vol. I) at 227; id. (Vol. II) at 7-8.)

Plaintiffs acknowledged Wiley Rein informed them of the Northstar representation before Plaintiffs rejected the CPL proposal and entered into the MWT Ltd. Transaction. Joseph Lee's testimony proves this point. Lee testified Wood told him in the summer of 1986 that Wiley Rein was going to represent Northstar, but that Plaintiffs did not consent to that representation. (R. 4960-63.) However, Plaintiffs did not fire Wiley Rein or get financing from someone other than Northstar. Instead, they went out and got their own lawyer, Dow Lohnes, to represent them in their dealings with Northstar. Dow Lohnes represented Plaintiffs from July 15, 1986, until this action was filed, a period which includes Plaintiffs' rejection of the CPL proposal and consummation of the MWT Ltd. Transaction. These facts are indisputable and incontrovertible, and are established by Ralph Hardy's testimony, Dow Lohnes' billing records, Plaintiffs' payment of Dow Lohnes' legal bills totaling more than \$300,000, and all the work Dow Lohnes performed, including the documents it drafted and reviewed. (See R. 3412-13, 3423-25, 3451, 3457-60, 3559, 3565-66, 3568-70, 3696-97, 3702-04, 7282-83, 7451-8291, 8339-9495, 9624-777, 9827-954, 10054-248, 10458, 10694-95, 10704, 10706, 10745-47, 10757, 10760-61, 10774, 10776, 10780-81, 10785, 10787-89,

10799-800, 10808-09, 10862-64, 10883, 10903-04, 10981-82; Defs.' Add. Ex. 11 (Vol. I) at 143-47, 166, 195, 221-28; id. at (Vol. II) at 7-8, 19, 41, 45-46.)

E. AS A MATTER OF LAW, A PLAINTIFF REPRESENTED BY HIS OWN INDEPENDENT COUNSEL IN A TRANSACTION CANNOT PROVE ANY DAMAGES HE CLAIMS WERE PROXIMATELY CAUSED BY A CONFLICT OF INTEREST BREACH OF DUTY BY ANOTHER LAWYER.

As a matter of law, a plaintiff represented by his own independent counsel in a transaction cannot prove any damage he sustained from that transaction was proximately caused by another attorney's breach of duty for conflict of interest. See Wilhelm v. Pray, Price, Williams & Russell, 231 Cal. Rptr. 355, 359 (Cal. Ct. App. 1986); Purdy, 203 Cal. Rptr. at 534-35; see also Hurlbert v. Gordon, 824 P.2d 1238, 1244-45 (Wash. Ct. App. 1992); In re W. Byron Schlag, 96 B.R. 597, 601-602 (W.D. Pa. 1989).²³

The best authority for this rule is Plaintiffs' own ethics expert, Ronald E. Mallen. Mr. Mallen in his treatise acknowledges this is the rule:

Although advice from other counsel does not excuse the obligation of disclosure, deficiencies in the adequacy of the disclosure by the lawyer may be overcome where the client had the assistance of independent counsel. In fact, there does not appear to be any civil damage action in which an attorney was held liable for the consequences of representing conflicting interests where the client received advice from an independent lawyer.

Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 12.13 at 730 (3d ed. 1989) (emphasis supplied).²⁴

23. Plaintiffs' cases are not conflict of interest cases and are not to the contrary. The Defendant lawyers do not claim Dow Lohnes was negligent, or that Dow Lohnes' negligence caused Plaintiffs' damage, which is the situation in the cases cited by Plaintiffs, particularly, Cline v. Watkins, 135 Cal. Rptr. 838, 66 Cal. App. 3d 174, 176 (1977). See also authorities cited at pp. 44-45 of Plaintiffs' Brief. Here, Plaintiffs were represented by very able lawyers to whom they looked for guidance and advice in each of the transactions.

24. The testimony Plaintiffs cited of Mr. Mallen as their expert in this case is nothing more than inadmissible speculation and conjecture without any testimonial foundation and is contrary to Mr. Mallen's own treatise.

The rationale for this rule is that the plaintiff's own lawyer provides precisely what the plaintiff has been deprived of by reason of an improper conflict--independent legal services and advice. The plaintiff, therefore, has not been caused any injury as a result of improper conflict. In a commercial transaction, a party's primary protection comes from the representation provided by its own attorney. See Wilhelm, 231 Cal. Rptr. at 358-59; see also Hurlbert, 824 P.2d at 1245.

Plaintiffs had their own lawyer in each of the business transactions of which Plaintiffs complain and for which they seek damages. Dow Lohnes and Ralph Hardy represented Plaintiffs as their lawyer. No reasonable juror could find to the contrary.

The fact Dow Lohnes represented Plaintiffs as lawyers in each of the transactions is established by the testimony of Ralph Hardy, Dow Lohnes' billing records, Plaintiffs' payment of those legal fees, Dow Lohnes' work product including correspondence stating Dow Lohnes represented Plaintiffs, and the testimony of every participant in these transactions except some Plaintiffs who claim Ralph Hardy was acting only as a financial advisor to the Foulgers in the MWT Ltd. Transaction. Even Plaintiff Clayton Foulger admitted Dow Lohnes was acting as a lawyer at the November 1986 face-to-face negotiations and helped draft the agreements. (See R. 7878.)

Dow Lohnes is a law firm and Hardy is a lawyer. The only business, occupation and profession in which they are engaged is the practice of law. Dow Lohnes and Ralph Hardy do not give financial advice. In the lower court there were over 200 exhibits showing Dow Lohnes, as lawyers, represented Plaintiffs. (See R. 7451-

8294, 8339-9495, 9624-777, 9827-9954, 10054-248, 10862-64, 10883, 10903-04, 10981-82.) Hardy, a "good friend" of David Lee and the Foulgers, testified all the work he did in connection with Channel 13 was as a lawyer:

Q. Mr. Hardy, at any time either before or after the filing of the Complaint in this action, did you ever tell David Lee that you had performed work or services for anyone relating to Channel 13 or to matters involving Channel 13 in any capacity other than as a lawyer?

A. No.

Q. You're sure of that?

A. All of my -- All of my involvement with Channel 13 was as a lawyer.

(R. 7469-70.)

In the face of this record, the lower court properly ruled that there was no genuine issue of fact as to whether Dow Lohnes and Hardy represented Plaintiffs as lawyers in each of the business transactions of which Plaintiffs complain and seek damages. Merely controverting a fact does not create a genuine issue of material fact.

For there to be a genuine issue of material fact, a plaintiff must present evidence from which a reasonable juror could find for the plaintiff. Simply presenting "some evidence," as Plaintiffs did here, is not enough. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. ___, 125 L. Ed. 2d 469, 484 (1993) ("in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . . and likewise to grant summary judgment . . ."); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986) (reaffirming from previous cases the concept that "in every case, before the evidence is left to the jury, there is

a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.").²⁵

The fact Plaintiffs had their own lawyer in every one of the business transactions of which Plaintiffs complain and seek damages is an independent ground for determining no proximate cause and affirming the lower court's decision. However, even if the Court were to hold that, because of Plaintiffs' testimony, there is a genuine issue of fact as to whether Dow Lohnes and Ralph Hardy represented Plaintiffs, which there is not, there is still no genuine issue of fact on the issue of proximate cause.

F. THE LOWER COURT CORRECTLY APPLIED UTAH'S RULES OF PROXIMATE CAUSE IN AWARDING DEFENDANT LAWYERS SUMMARY JUDGMENT.

The lower court correctly applied Utah's rules of proximate cause in awarding summary judgment for the Defendant lawyers. Plaintiffs really admit that. Plaintiffs admit that the District Court correctly applied Utah's rule of proximate cause because, for the first time on this appeal, Plaintiffs contend that this Court should adopt a new rule of proximate cause in breach of fiduciary duty cases. Plaintiffs claim that there is a different rule, a more liberal rule, of proximate cause in breach of fiduciary duty cases than in negligence cases. Plaintiffs propose a "chain of events" or a "different course of action" rule of proximate cause.

25. This is not a case where the lower court impermissibly weighed two sets of conflicting affidavits as the court did in Draper City v. Bernardo, 256 Utah Adv. Rep. 22 (Utah January 19, 1995). Here, Plaintiffs, after two years of discovery, presented insufficient evidence from which a reasonable jury could find for Plaintiffs.

Essentially, Plaintiffs propose a "things would have been different" rule. (See Pls.' Br. at 17, 23-25, 40.)

Plaintiffs' proposed rule is not the law, and would not make good law. First, Utah Supreme Court authority holds that proximate cause in breach of fiduciary duty cases requires not only "but for," but "substantial" causation, and "substantial" causation requires a showing of a reasonable likelihood that, in the absence of the lawyer's alleged breach of duty, a plaintiff would have achieved the better business or legal result for which the plaintiff seeks damages. Those are Utah's rules of proximate cause, rules applied in breach of fiduciary duty legal malpractice cases. See Barber, 765 P.2d at 889; Dunn 584 P.2d at 896-97; see also Mitchell, 697 P.2d at 245-46; Fausett, 542 F. Supp. at 1240.

Second, the uniform rule is that the rules for proximate cause are the same for negligence, breach of fiduciary duty and even intentional torts. Restatement (Second) of Torts § 431 & cmt. e (1965); Prosser § 41; Holmes, 117 L. Ed. 2d at 556 (Scalia, J., concurring); Fausett, 542 F. Supp. at 1240. Indeed, a fiduciary's breach of the duty of care -- negligence -- is a breach of a fiduciary duty. See Barber, 765 P.2d at 889; Dunn 584 P.2d at 896-97; Restatement (Second) of Agency § 379 & cmt. b (1965).

In fact, the Restatement explicitly rejects any distinction between the standard of proximate cause in negligence cases and the standard of proximate cause in other tort cases. Section 431 of the Restatement of Torts squarely provides:

The actor's negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law relieving the actor from liability because of the manner in which he negligence has resulted in the harm.

Restatement (Second) of Torts § 431 (1965). Comment "e" to that provision explicitly states:

Although the rules stated in this section are stated in terms of the actor's negligent conduct, they are equally applicable where the conduct is intended to cause harm, or where it is such as to result in strict liability.

Id. § 431 cmt. e; accord id. § 874 & cmt. b (fiduciary liable for harm resulting from breach of duty in accordance with § 910); id. § 910 (one injured by another's tort entitled to damages for harm "legally caused" by tort).

Plaintiffs' "chain of events" or "different course of action" rule of proximate cause, moreover, would thwart the fundamental policy behind the requirement of proximate cause. The policy of proximate cause requires a substantial causal connection between fault and damage before the risk of loss is shifted on the basis of fault. Tort law is not simply a morality play, a lecture on legal ethics; it requires that damages only be awarded on the basis of fault when the fault is a substantial cause of a plaintiff's damage. To do otherwise would allow recovery on the basis of remoteness and speculation.

That is precisely what Plaintiffs' new rule does. It would be the very antithesis of proximate cause. It would subject lawyers to large damage awards, not on the basis of whether their fault caused the damage, but on the basis of speculation and the potential prejudice of juries against lawyers. It is a huge and unwarranted risk to impose upon the legal profession. Plaintiffs' new rule would make lawyers the guarantors of their clients'

business and legal expectations regardless of whether the lawyer's fault substantially caused a plaintiff harm and regardless of whether there was any reasonable likelihood that, in the absence of the lawyer's fault, the plaintiff would have realized the better result for which he claims damages.

Plaintiffs' new rule is just a new version of Mother Goose's Nursery Rhyme No. 191--"For want of a nail . . . the kingdom was lost."²⁶ It is a nice rhyme, but a bad rule of proximate cause, and the United States Supreme Court has said so.

Life is too short to pursue every human act to its most remote consequences; "for want of a nail a kingdom was lost" is a commentary on fate, not the statement of a major cause of action against a blacksmith.

117 L. Ed. 2d at 556 (Scalia, J., concurring). It is also a rule that has consistently been rejected by the courts and legal commentators. See Mitchell, 697 P.2d at 246; Dunn, 584 P.2d at 896; Hawaii Corp. v. Crossley, 567 F. Supp. 609, 630-31 (D. Hawaii 1983); Smith v. State Compensation Ins. Fund, 749 P.2d 462, 464 (Colo. Ct. App. 1987); Prosser § 41; Robert Cooter, Torts as the Union of Liberty & Efficiency: An Essay on Causation, 63 Chicago-Kent L. Rev. 523 (1987); Continuing Legal Education: Another Important Tort Basic, 12 Cal. Lawyer 63 (Nov. 1992).

The New York rule Plaintiffs cite from Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994), is distinguishable

26. The entire rhyme reads:

FOR WANT of A NAIL the shoe was lost,
For want of the shoe, the horse was lost,
For want of the horse, the rider was lost,
For want of the rider, the battle was lost,
For want of the battle, the kingdom was lost,
And for the want of a horse-shoe nail!

Mother Goose's Nursery Rhymes 191 (Walter Jerrold Ed, Alfred A. Knopf Inc. 1993)(1903).

from this case both in terms of legal doctrine and facts. Milbank is a case applying New York, not Utah, law. The Milbank court applied a New York rule in which "but for" causation is not required in corporate or principal opportunity cases. The New York rule is a rule of restitutional damage. That is not the law in Utah. Utah does not loosen the "normally stringent requirements of causation and damages" in breach of fiduciary duty cases. See Barber, 765 P.2d at 889; Dunn, 584 P.2d at 896.

Milbank also is distinguishable factually. Milbank is a corporate or principal opportunity case. This case is not. In Milbank, the lawyer promised in writing that once a conflict arose, the lawyer would not represent the client's former agent. The lawyer then broke that promise and joined the former agent in: (1) using the client's funds to take the clients opportunity; (2) misusing the client's confidential information to do so; and (3) joining with the former agent in making the deal possible that deprived the client of a profitable business opportunity. The lawyer was simply a joint tort-feasor with the former agent and liable with the agent for the opportunity they usurped.²⁷

Finally, Plaintiffs' new standard of proximate cause is based on a number of fallacious assertions. For example, Plaintiffs' assertion that "the breach itself may create circumstances which prevent the client from establishing the

27. The other authorities Plaintiffs cite likewise are not on point. The sections of the Restatement of Agency Plaintiffs cite have nothing to do with causation or the type of damages Plaintiffs claim. Those sections either relate to an agent's duty (§§ 387-398), or the remedies available for breach of duty including nominal damages, discharge and disgorgement of profits (§§ 399-407). Diamond v. Oreamuno, 248 N.E.2d 910 (N.Y. 1969) and Abkco Music Inc. v. Harrisongs Music Ltd., 722 F.2d 988 (2d Cir. 1983), simply stand for the proposition that an agent must disgorge any profit or opportunity it gained at the principal's expense in violation of the agent's fiduciary duties.

'reasonable likelihood' of a better result" is fallacious. Plaintiffs had a duty to show a reasonable likelihood of success and, clearly in this case, nothing prevented them from doing that. Plaintiffs may dispute that they consented to Wiley Rein's representation of Northstar, but the record clearly shows they knew of that representation and retained their own counsel who represented them in their search for a financing partner and dealings with Northstar.

Plaintiffs' assertion that "strict 'but for' causation and claims based on breach of fiduciary duty is conceptually inconsistent with the purpose of the remedy" is also fallacious. That is not the law in Utah, and the fact Plaintiffs need to avoid the "but for" and "reasonable likelihood" standard demonstrates there is no proximate cause.

Finally, Plaintiffs' assertion that "the applicable standard requires Plaintiffs to show only that the course of action they took resulted in loss, and that Defendants' breaches were 'a substantial factor' in leading plaintiffs to take that course of action" is fallacious. This standard is handmade by Plaintiffs in this case, and has never been advanced or accepted by any court, including those in the cases Plaintiffs cite.

G. THERE WAS NO USE OR MISUSE OF CONFIDENTIAL INFORMATION.

Legally and factually, Plaintiffs failed to demonstrate any use or misuse of confidential information by the Defendant lawyers. First, Plaintiffs' claim that there is an irrebuttable presumption of receipt and misuse of confidential information simply is not the law. Plaintiffs deliberately attempt to confuse a motion to

disqualify with a civil legal malpractice action for damages.²⁸ (See Pls.' Br. at 3, 85-86.) In a legal malpractice action, unlike a motion to disqualify, no presumption exists. In a legal malpractice action, a plaintiff must prove: (1) the lawyer had confidential information; and (2) that confidential information was misused. See R. Mallen & J. Smith, Legal Malpractice §§ 12.16, 13.23 (3d ed. 1989).

Second, there is absolutely no factual showing the Defendant lawyers used or misused any confidential information. The Defendant lawyers put in a clear record that they never used or misused any confidential information. Plaintiffs never controverted or contradicted that record and never pointed to one piece of confidential information that was used or misused by the Defendant lawyers in their representation of Northstar.²⁹ Plaintiffs' claim of use and misuse is simply a sideshow to cover-up their inability to show proximate cause.³⁰ (R. 3390-92, 3413, 3424, 3453, 3560-61, 3698-99.)

28. The law is, in motions to disqualify, there is an irrebuttable presumption the lawyer received relevant confidential information where the two matters are substantially factually related. However, even in motions to disqualify, there is no presumption of misuse. The only cases Plaintiffs cite, Brown v. Board. of Zoning Adj., 486 A.2d 37 (D.C. 1984), and Abkco Music, Inc. v. Harrison's Music, Ltd., 722 F.2d 988 (2d Cir. 1988) are not to the contrary. Brown is a disqualification case. In Abkco, the agent admitted he had used and misused confidential information, and the language which Plaintiffs quote demonstrates that point: "Klein himself acknowledged at trial that his offers . . . were based, at least in part, on knowledge he had acquired as Harrison's business manager . . ." (Pls.' Br. at 48.)

29. Plaintiffs' claim of use and misuse of confidential information is nothing more than inadmissible speculation and conjecture for which there is no testimonial foundation, including the testimony they quote from their expert, Ron Mallen.

30. The fact there was no use or misuse of confidential information may well go to breach of duty instead of proximate cause. In any event, if there was no use or misuse, it did not proximately cause any damage with regard to the damages Plaintiffs claim.

Not only was there no showing of use or misuse, there was no showing the Defendant lawyers even had any confidential information regarding Plaintiffs.³¹ No lawyer representing Northstar had any confidential information, and Barry Wood testified that he knew of no confidential information he had regarding Plaintiffs at the time of the MWT Ltd. Transaction. (R. 3390-92, 3413, 3424.) It was uncontroverted that Northstar and Allstate got all their information regarding Plaintiffs from only two sources--the public record before the FCC, and from Plaintiffs as they attempted to persuade those companies to finance the Channel 13 venture. (R. 3453, 3560-61, 3698-99.) Plaintiffs have not pointed to one piece of information that was not part of the public record, or that they did not give directly to Lincoln, Glakas and Renze. Finally, Lincoln and Hardy testified, as a matter of common business practice, no one would have entered into the MWT Ltd. Transaction with Mountain West without knowledge of the Mountain West Partners' financial position, their business plans or the terms and conditions of the settlement agreements that were being financed. (R. 3561, 7531-32.)

Consequently, Plaintiffs' assertion that the trial court "overlooked the fact that misuse of confidential information was a separate breach from Defendants' breach of duties of loyalty, full disclosure and informed consent" is flat wrong. The fact is, the lower court properly ruled there was "no showing the Defendant

31. Plaintiffs generally stated that the Defendant lawyers obtained "detailed financial information concerning the partners' personal background, experience, financial capability, business activities, market information, strengths and weaknesses, start-up and programming strategies and other matters. They also gave the Firm their personal financial statements, which showed that the [Mountain West] Partners had limited financial strength." (See Pls.' Br. at 3, 48.)


lawyers breached their professional duties to Plaintiffs by using, misusing, or abusing any confidential information of Plaintiffs on any occasion." (Pls.' Add. Ex. 3, at 2.)

XI. CONCLUSION

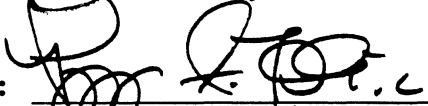
Plaintiffs failed to demonstrate a genuine issue of fact on the essential element of proximate cause. Every element in the seven transactions of which Plaintiffs complain and seek damages was the product and result of the decisions and directions of Northstar and Allstate, non-party business entities, and not the Defendant lawyers. It is indisputable Plaintiffs had their own independent counsel in all the transactions between Plaintiffs, Northstar and Allstate. Plaintiffs failed to show any reasonable likelihood that, absent the alleged breach of duty, conflict of interest, they would have obtained the better business results for which they claim damage. Plaintiffs' proposed new rule of proximate cause in breach of fiduciary duty cases is not the law in Utah, and would base the requisite causal connection between fault and damage on speculation and remoteness. The District Court's summary judgment on the essential element of proximate cause, therefore, should be affirmed.

DATED: May 15, 1995.

By:


Daniel L. Berman

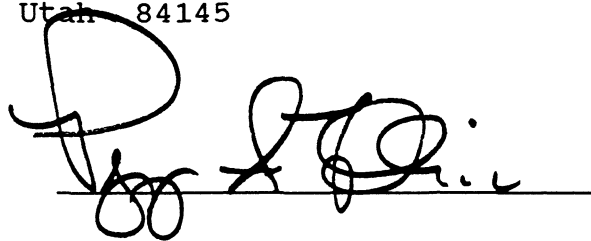
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CERTIFICATE OF HAND-DELIVERY

I hereby certify that on May 15, 1995, a true and correct copy of the foregoing BRIEF OF APPELLEES AND ADDENDUM (VOLUMES I & II) were hand-delivered to the following:

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A handwritten signature in black ink, appearing to read "Reed L. Martineau", is written over a horizontal line.