

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 : Reply Brief

Utah Court of Appeals

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Recommended Citation

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

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, and
MWT CORPORATION, a Utah
Corporation,

Appellants,

vs.

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

Respondents.

Case No. 940579-CA

PRIORITY 15

UTAH COURT OF APPEALS

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DOCKET NO. 940579CA

REPLY BRIEF OF APPELLANTS

Appeal from the Third Judicial District Court of Salt
Lake County, Honorable Glenn K. Iwasaki Presiding

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FILED

JUN 28 1995

CURT OF APPEALS

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ARGUMENT

INTRODUCTION

This case was decided on summary judgment. On summary judgment, plaintiffs were entitled to have the court view the evidence and all reasonable inferences fairly to be drawn therefrom in the light most favorable to them. Morris v. Farnsworth Motel, 123 Utah 289, 259 P.2d 297, 298 (1953). Defendants place their own interpretation on carefully selected and omitted facts, rather than affording plaintiffs the presumption to which plaintiffs are entitled. Every citation to the record in plaintiffs' principal Brief supports the fact asserted.¹ Defendants' extensive and

¹The following is a short and incomplete list illustrating some of the areas in which defendants simply ignore disputed facts and draw inferences in their own favor instead:

a. Defendants contend there is "absolutely no evidence" that Wiley, Quale and Wood met to discuss the Wiley Firm's representation of Northstar on June 11, 1986. (Appellees' Brief, at 36-37.) The record unequivocally supports the fact that the meeting occurred on that date. (R. 4183, 4557, 6570, 6689, 7043.)

b. Defendants claim Wood did not represent Northstar or plaintiffs in the negotiations between plaintiffs and Northstar/Allstate or in reducing the venture to writing. (Appellees' Brief, at 36.) Wood's time sheets show he provided extensive services on behalf of plaintiffs in connection with such negotiations, and he also represented Northstar. (R. 4557-72, 5420-26, 6689-6752, 6683-6783, 6852-67.) His time sheets show he spent over 40 hours in representing plaintiffs during the three-day squeezedown in mid-November 1986. (R. 6773-75.)

c. Defendants state that plaintiffs' assertion that "Wood knew they were in a terrible position because they had to pay two million dollars . . . and had no financing alternative available at the time [of the squeeze-down]" is false. (Appellees' Brief, at 36.) Defendants then state that Wood testified that it was plaintiffs' fault they were subject to a \$2 million dollar liability under a buyout agreement with another station applicant. (Id.) Wood stated he knew plaintiffs were in a terrible position. (R. 5476-77.) In addition, the record shows plaintiffs first learned they were subject to personal liability during the mid-November squeezedown when Wood informed them, after he had negotiated the very agreements that subjected plaintiffs to liability. (R. 5099, 5159, 5025-26, 5159-

nevertheless selective recitation of facts simply underscores the point that the material facts are in dispute.

In June 1986, defendants undertook representation of Northstar, a clear conflict of interest which plaintiffs did not waive. This initial breach of defendants' duty set in motion a series of events out of which plaintiffs' injuries proximately, naturally and foreseeably flowed. Defendants are silent concerning those June 1986 breaches. They attempt instead to focus the Court's attention solely on subsequent events. Defendants ignore completely the factual question of whether the later events, on which they do

60, 5169-72, 5099, 5180-81, 5206-07.)

d. Defendants claim plaintiffs falsely stated that the dispute between Wood and the Wiley Firm following the November 1986 squeezedown "had nothing to do with the firm's [conflict of interest]." (Appellees' Brief, at 34.) That was precisely a focus of the dispute. Wood discussed the ethical issues relating to the conflict in detail in his memorandum to the Wiley Firm after the Firm had criticized him for representing plaintiffs during the squeezedown. (R. 6451-58, 6462-64, 6470-71.)

e. Defendants claim plaintiffs have misled the Court by stating that defendants represented Adams concerning the "possible purchase of Channel 13 and the sale of Channel 20." Defendants attempt to minimize their representation of Adams by stating that "Quale only spent a total of .50 hours in early 1986 on Adam's matter." (Appellees' Brief, at 34.) Not only do defendants admit such representation of Adams, but defendants' conflict record shows that when defendants were asked to represent Adams in connection with Channel 13, the matter "should appear as conflict." (R. 6291-92.) Moreover, through this representation, defendants knew Adams was interested in purchasing Channel 13, a fact defendants failed to disclose to their Utah clients, most likely because it would have impacted on Northstar's ability to acquire the station. (R. 4042-43, 5021-24.)

f. Defendants claim plaintiffs falsely stated that Allstate was a client of the Wiley Firm in the summer of 1986. (Appellees' Brief, at 34.) Mr. Wiley's personal billing summary shows Allstate as a client of the Firm as early as 1985 and that the Wiley Firm billed Allstate \$15,620.75 for legal services through September 1985. (R. 7048.) This was not disclosed to plaintiffs. (R. 4046.)

g. Defendants' misstatements of the record concerning the Northstar/Allstate and CPL commitments are discussed at length in text, infra.

focus, naturally and proximately flowed from defendants' initial breaches.

In order to grant summary judgment, the lower court had to decide that defendants' initial breaches of their position of trust did not set in motion a series of events which allowed defendants and their other clients to take unfair advantage of plaintiffs. This determination could not be made without resolving numerous factual disputes in favor of defendants.

Defendants also fail adequately to respond to the compelling policy reasons supporting the standard of causation plaintiffs advance. In a case such as this which involves an attorney's breach of fiduciary duties, the "but for" standard is incongruent with the purpose of the remedy. Even under the "reasonable likelihood" standard defendants advance, plaintiffs have shown many genuine issues of material fact concerning a better business result. Certainly, no other result could have been worse.

POINT I

CAUSATION²

A. Required Level of Proof.

Defendants fail to recognize that the causation standard applicable in breach of fiduciary duty cases is not the same as the standard applicable in mere negligence cases. Breach of fiduciary duty is not carelessness. It is intentional misconduct which the law treats as equivalent to fraud.

Attorneys hold the most sensitive position of trust recognized in the law. Attorney-client relations work best when the lawyer is the client's most trusted confidant. A client's remedy for a breach of that trust must respond to accommodate the devastation the breach causes. One effect may well be impairment of the client's ability to prove a better business result. Courts therefore recognize that when the highest duties of trust are involved, there must be a relaxed standard of causation. When the attorney self deals, appropriates a client opportunity for himself or for

²Defendants' claim that this point was raised for the first time on appeal is wrong. In their Memorandum in Opposition to Motion for Summary Judgment, plaintiffs advanced the standard by quoting at length from Spector v. Mermelstein, 361 F. Supp. 30 (S.D.N.Y. 1972), and the Second Circuit's affirmance at 485 F.2d 474 (2d Cir. 1973). Plaintiffs there advanced the identical standard they advance here: "The essential issue is whether the conduct of the defendant was a material element or a substantial factor in bringing about the loss." Id. at 480-81 (emphasis supplied). (R. 4023-26.) The issue was raised numerous times, stated in alternative ways, opposed by defendants and ruled upon by the district court. (R. 3365-67, 3937-39, 4007-08, 4016-29, 7142-57, 12725, 12729-30, 12736-39, 12740-53, 12754-55, 12763-67, 12783-84, 12786-88, 12803-05 and 12376-77.)

others, or advances the interests of one client to the detriment of another, it is the attorney, not the client, who should bear the risk of a deal gone bad or of uncertainty. Highlands Ins. v. National Union Fire Ins., 27 F.3d 1027 (5th Cir. 1994)³; Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537 (2d Cir. 1994); Spector v. Mermelstein, 361 F. Supp. 30 (S.D.N.Y. 1972), aff'd, 485 F.2d 474 (2d Cir. 1973).⁴

Contrary to defendants' claim, this standard has everything to do with preserving the right of a client to trust his lawyer, and nothing to do with the lawyer becoming guarantor of a venture. If this were a negligence case, defendants' argument might have merit. Here, however, defendants engaged in intentional misconduct which the law equates with actual fraud. When the lawyer chooses to

³In Highlands, National, a primary carrier, failed to disclose the full extent of its coverage to Highlands, the excess carrier in breach of its fiduciary duty. As a result, Highlands agreed to a settlement under the belief that its exposure was greater than it actually was. Highlands testified it would have acted differently had it been provided complete information. While a risk of similar liability existed, Highlands successfully argued that the risk was less than originally thought due to National's failure to disclose in violation of its fiduciary duty. (Likewise, plaintiffs here testified that with complete information, they would have pursued a different course.) The Highlands court applied the "substantial factor" standard but found sufficient evidence of causation under both standards. Id. at 1031 (citing Milbank).

⁴The situation is similar to that in an antitrust case in which the defendant's anticompetitive conduct makes it difficult to prove what business result would have obtained absent the illegal conduct. In such cases, the courts also recognize that strict "but for" causation should not be required. There, courts "observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 123-24 (1969).

defraud his client, it is appropriate to charge him with all losses which he substantially causes. Wiley, Rein & Fielding did not get itself into this position by accident. All plaintiffs must show is that the breach was a substantial factor in the outcome, and in the present case there are genuine issues of material fact in this regard. Requiring more would shift the risks of lawyer dishonesty from the lawyer to the client.⁵

B. Material Disputed Facts Concerning Causation.

Defendants refuse to recognize the seriousness of their breaches. They treat their breaches as though plaintiffs took a known risk in a simple arms-length business deal and lost.

⁵Most of defendants' cases are inapposite. Stansbery v. Schroeder, 226 Neb. 492, 412 N.W.2d 447, 499-500 (1987), Williams v. Barber, 765 P.2d 887 (Utah 1988), and Dunn, McKay, Burton, McMurray & Thurman, 584 P.2d 894 (Utah 1978) are malpractice claims based on negligence. Mitchell v. Pierson Enterprises, 697 P.2d 240 (Utah 1985) is a wrongful death case based on negligence. Johnson v. Jones, 103 Idaho 702, 652 P.2d 650 (Idaho 1982), did not define the standard of proximate cause. There, the trial court had found no attorney-client relationship, and thus no duty. Moreover, the plaintiff agreed the attorney had properly, fairly and competently drafted the contract as contemplated by the parties, which the other party had breached. Finally, plaintiff produced no evidence that would have satisfied either standard of causation. In Faucett v. American Resources Management Corp., 542 F. Supp. 1234 (D. Utah 1982), (1) the case did not include an attorney-client relationship, (2) defendant was not a fiduciary at the time of the alleged breach, and (3) the court did not define proximate cause. Moreover, the court's language supports the standard of causation plaintiffs advance: "Any action by a corporate officer which diminishes the value of that asset would be a breach of fiduciary duty for which the officer should be liable." Id. at 1241.

Yusefzadeh v. Ross, 932 F.2d 1262 (8th Cir. 1991), supports an assertion that a "but for" standard should apply in an attorney malpractice case based on breach of fiduciary duty. The facts, however, are easily distinguished. There, the attorney was not representing adverse interests, except his own. Moreover, plaintiff had no leads for financing a venture, and had been turned down by three potential sources. The attorney also had not induced the client to turn down any proposed commitments so he or another client would get the advantage. Finally, the attorney had not aided and abetted his client's adversary in reducing or withdrawing a commitment.

Defendants' argument suggests plaintiffs should never have relied upon their lawyers' inducements and should have preserved other options until the last minute.

By breaching their duty of full disclosure and informed consent in June 1986, defendants deprived plaintiffs of the right to make an informed decision concerning how the representation would proceed.⁶ Here, Wiley and his Firm made the decision, without their other clients' knowledge or consent, to represent Northstar/Allstate. Had plaintiffs been given full disclosure, the record is undisputed that defendants' representation of Northstar/Allstate and plaintiffs would have ceased immediately. (Appellants' Brief, at 8.) Plaintiffs would have known that the duty of loyalty defendants owed them was in jeopardy, and would have taken steps to protect themselves by seeking financing from other sources and by securing other counsel. (Id. at 5-8.)

The Wiley Firm in 1985 had given plaintiffs the assurance that in the event of a conflict in representing two clients, the Firm would withdraw from representing either client. (Id. at 4.) Even as of the present, no such withdrawal, formal or informal, written

⁶It remains undisputed that at no time leading up to or during the initial breaches of defendants' duties of full disclosure and informed consent were plaintiffs represented by other counsel. (Appellants' Brief, at 9-11.) Wood and the Wiley Firm continued to represent plaintiffs in all matters relating to Channel 13. (Id.)

or oral, occurred respecting any of plaintiffs' interests.⁷ After plaintiffs objected to defendants' request to represent Northstar/Allstate, plaintiffs understood the adverse representation would not occur, and had no reason to think defendants' duties of loyalty and confidentiality to them were in jeopardy. (Id. at 5-8.)

The undisputed evidence is that Wood and the Wiley Firm continued to represent plaintiffs throughout the summer and fall of 1986 and through the squeezedown. (Id. at 8-15.) The Wiley Firm's ongoing representation of plaintiffs was consistent with plaintiffs' understanding and belief that defendants would not represent Northstar vis-à-vis plaintiffs' interests. (Id.)

During the months of July through November 1986, plaintiffs continued to look to and rely on Wood and the Wiley Firm to serve as counsel for plaintiffs in all matters relating to Channel 13. Mr. Wood's time entries relating to legal services performed for plaintiffs show he had numerous discussions and meetings with Northstar and CPL representatives and plaintiffs in the summer of 1986. He was representing plaintiffs as he always had. (Appellants' Brief, at 8-10.)

⁷Surely, something as significant as withdrawal from representation after five years, and representing a new client against the long-standing client, would merit a confirmatory letter or at least a memo to the file. It simply has not happened.

Wood and the Wiley Firm represented and advised plaintiffs in the selection of Northstar over CPL. The record establishes, unequivocally, that Wood, as plaintiffs' attorney, induced plaintiffs to go with Northstar/Allstate based on their \$10 million commitment, advised them to reject the CPL commitment, and personally notified CPL of plaintiffs' decision. (Id.)

Wood and the Wiley Firm negotiated the \$5 million buy-outs of the other applicants, which, without plaintiffs' knowledge, resulted in plaintiffs' personal exposure and liability. (Appellants' Brief, at 10-11.)⁸ After plaintiffs learned at the squeezedown of the substantial changes that had been made in commitment, they also discovered for the first time that they were personally and unconditionally liable for at least \$1 million under one of the settlement agreements negotiated and prepared by the Wiley Firm on their behalf. Wood was the only lawyer in contact with the Utah clients during the squeezedown. (Appellants' Brief, at pp. 13-15.) He informed them of the changes and their personal exposure, and billed over 40 hours to plaintiffs during the November 1986 squeezedown.

⁸Why would Mr. Wood and the Wiley Firm negotiate agreements that exposed plaintiffs to such liability if no commitment from Northstar/Allstate existed? See discussion, infra at pp. 20-22, concerning Northstar/Allstate's commitment.

For the first time, during the squeezedown, plaintiffs learned that defendants' duty of loyalty to them had been compromised. (Appellants' Brief, at 12-15, 17.) Defendants note in their brief that Wiley, Rein & Fielding lawyers were sitting beside Northstar and that Ralph Hardy sat with the plaintiffs. They fail to note, however, that Wiley, Rein & Fielding lawyer Wood represented plaintiffs in that same meeting and billed 40 hours to them for services including the meeting during that three-day period. (R. 5204, 6773-75.)

Defendants failed their duty affirmatively to protect plaintiffs' interests and anticipate the very detrimental changes dictated by Northstar/Allstate. Moreover, defendants had advised and directed Northstar/Allstate in a manner which impaired plaintiffs' interests. This conduct directly violated both components of the duty of loyalty (see infra, Point II). Both David Lee and Wood objected to such conduct and reiterated that defendants owed ethical duties to plaintiffs. (Appellants' Brief at 13-14.)

Had defendants satisfied, rather than breached, these duties, the outcome would clearly have been different. (Id. at 8.) Defendants' breaches permitted Northstar/Allstate to withdraw the \$10 million commitment, deny they had ever made it, and change the terms of the transaction by, among other things, acquiring complete control of the venture. (Id. at 12-15.) Defendants' breaches de-

prived plaintiffs the opportunity to obtain the benefit of their bargain with Northstar. (Id. at 18.) Evidence establishes that even with \$8 million, plaintiffs could have bought out the other applicants and placed the station in operation, and plaintiffs' interest would today be valued at over \$20 million. (R. 6119-38.)

An additional factor defendants fail to address is the time-sensitivity of the squeezedown in relation to (1) plaintiffs' discovery that defendants had breached the duty of loyalty to them, (2) the requirement that partial payments of the multi-million dollar buy outs of other applicants be funded immediately, (3) plaintiffs' discovery that the Wiley Firm had exposed them personally and unconditionally on the agreements to buy out the other applicants, and (4) the absence of any alternative financing. What could plaintiffs do in such an emergency? Defendants' prior conduct had eliminated CPL and any other sources of funding from the equation. (Appellants' Brief at 10.) Thus, Wood advised plaintiffs they had no practical choice but to go forward with Northstar to avoid the otherwise imminent personal exposure. (Id. at 14.) Plaintiffs did so under extreme duress. (Id. at 14-15.)

C. Ralph Hardy's Role and Its Effect, If Any, Are Disputed.

Defendants' analysis concerning the effect of Mr. Hardy's involvement is extremely superficial. Defendants evaluate the seven

transactions, out of which plaintiffs' damages occurred, as completely independent of each other, rather than inextricably linked by the initial June 1986 breaches (prior to any Hardy involvement) and the repeated, ongoing breaches which compounded the effects of the initial breaches. The causal relationship between the breaches and their effects is clearly a fact question.

Defendants' conclusion that plaintiffs had independent counsel and advice during the critical events leading up to the squeezedown is disputed. Mr. Hardy was not involved in June of 1986, when defendants' conflict of interest arose. He was not involved in terminating the CPL financing commitment. He was not involved in exposing plaintiffs to millions of dollars of personal liability.

One cannot reconcile the Wiley Firm's continuing representation of plaintiffs with defendants' conclusion that Hardy was plaintiffs' lawyer at all critical stages. Defendants would have been representing plaintiffs on the very matters on which Hardy should also have been representing them. If Hardy's role was to protect plaintiffs' exclusive interests in an adversary relationship, as defendants contend, how could he do so when defendants were simultaneously serving as plaintiffs' lawyer and representative of their adversary?

Moreover, Hardy's hind-sight explanation concerning his role is clearly different from both plaintiffs' understanding and the

evidence. Plaintiffs were never advised that Hardy was their lawyer vis-à-vis Northstar/Allstate. There is no evidence that any of the plaintiffs ever entertained the thought of engaging him as their lawyer prior to the squeezedown, engaged him as their lawyer or were informed Hardy thought he was their lawyer before the squeezedown. Mr. Hardy never counseled with the Utah plaintiffs. They never counseled with him. All plaintiffs believed he was financial advisor to the Foulgers.⁹ (Appellants' Brief at 10-11.) It is undisputed that Hardy never advised plaintiffs concerning defendants' conflicts. (Id.)

Only when it became apparent to the Foulgers that defendants had subjected them and the other plaintiffs to personal liabilities in excess of \$1 million did the Foulger family ask Hardy to assume the role of legal counsel to protect the interests of Foulger. (R. 5186-94, 5167; Appellants' Brief, at 10-11.) Thus, to the extent defendants claim Mr. Hardy was plaintiffs' attorney for all

⁹In Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 727 (Utah App. 1990), the court stated a showing of an attorney-client relationship "is subjective in that a factor in evaluating the relationship is whether the client thought an attorney-client relationship existed." The court further observed "it is the intent and conduct of the parties which is critical to the formation of the attorney-client relationship." (Id. at 728.) Similarly, in Glover v. Libman, 578 F. Supp. 748, 757 (N.D. Ga. 1983), the court stated that in determining whether an attorney-client relationship exists, the focus must be on the subjective expectations of the client. In other words, the relationship "hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice." Accord, Green v. Montgomery County, 784 F. Supp. 841, 845 (M.D. Ala. 1992).

purposes in plaintiffs' dealings with Northstar/Allstate, there is a genuine issue of material fact.

Finally, even if Hardy did represent the plaintiffs, the record establishes that defendants obtained client information concerning plaintiffs' financial condition, personalities, employment, goals, strategies, and business practices, which was not available to other parties with whom plaintiffs did business. (Appellant's Brief, at 46-49.) While some information was publicly available from the FCC, defendants knew much more about plaintiffs than could have been discerned from review of a public record, and their personal knowledge of the plaintiffs meant they knew how to exploit the information they had. Knowing plaintiffs' vulnerabilities gave Northstar/Allstate leverage and the ability to exploit plaintiffs' and their business opportunity. The extent and egregiousness of defendants' breaches strongly imply the misuse of that confidential information. It is inconceivable that defendants would not have used the information for their own benefit and that of their other clients. The alleged involvement of other counsel does not relieve Wiley, Rein & Fielding of its duty to maintain plaintiffs' confidences and not to use those confidences against them. It also did not relieve Wiley, Rein & Fielding of the duty of loyalty affirmatively to protect, which it clearly breached.

POINT II

DUTIES OWED AND BREACHED

Although admitting for purposes of this motion that they had a conflict of interest, defendants spend substantial time in their brief attempting to deny or at least justify their misconduct. Defendants owed plaintiffs the following duties:

First, they owed a duty of full disclosure and informed consent concerning any adverse representation.¹⁰ Defendants concede at page 5 of their Brief a factual dispute concerning breach of their duty of full disclosure and informed consent on their decision to represent Northstar/Allstate against plaintiffs. This decision occurred at least by June 11, 1986. (See supra footnote 1.)

Second, defendants owed plaintiffs a duty of loyalty. Because defendants breached their duty of full disclosure and informed consent, they could never have obtained an informed and valid consent to the adverse representation. Defendants' duty of loyalty

¹⁰In Stansbury v. Schroeder, 226 Neb. 492, 412 N.W.2d 447, 499 (1987) (quoting Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal Rptr. 592, 595-96 (1966)), cited by defendants, the court explained:

The loyalty he owes one client cannot consume that owed to the other. Most descriptions of professional conduct prohibit his undertaking to represent conflicting interests at all; or demand that he terminate the three-way relationship when adversity of interest appears. Occasional statements sanction informed representation of divergent interest in "exceptional" situations. Even those statements demand complete disclosure of all facts and circumstances which, in the attorney's honest judgment, may influence the client's choice, holding the attorney civilly liable for loss caused by lack of disclosure.

to plaintiffs, arising from years of legal representation, thus remained intact and unchanged.

The duty of loyalty had two components. The first component was an affirmative duty to protect plaintiffs' interests and anticipate the adverse and detrimental plans of others (including Northstar/Allstate). The second component was a duty not to advise or direct any persons with whom plaintiffs transacted business in a manner which would or could impair plaintiffs' interests. After defendants failed to obtain consent to represent Northstar vis-à-vis plaintiffs, defendants admittedly were loyal to Northstar/Allstate and disloyal to plaintiffs. Clearly, defendants' failure to affirmatively protect plaintiffs' interests and defendants' representation of Northstar/Allstate against plaintiffs breached both components of the loyalty duty.

Third, defendants owed plaintiffs the separate duty of confidentiality. That duty strictly prohibited the use of any confidential information obtained during the representation for the benefit of defendants or their other clients. There is no conceivable way that defendants could represent both Northstar and the plaintiffs in the same transaction without breaching this duty.

A. Consequences of the Breaches of Duties of Loyalty.

Defendants' conclusion that it was Northstar/Allstate's conduct, and not theirs, which caused plaintiffs' damages, is incor-

rect. Defendants mistakenly argue they are not responsible for any damages caused by the predatory business decisions of their other clients. They imply that the business world is a war, it's risky, and one who enters the fray must be prepared to accept losses. One risk plaintiffs did not assume, nor were they required to under the rules of engagement, however, was that their own lawyers would defect, and would assist their adversary to defeat plaintiffs while preserving a facade of continuing to protect plaintiffs' interests as always before. The problem with defendants' conclusion is that defendants owed plaintiffs the dual duty of loyalty--the affirmative duty to protect and anticipate, and the duty not to assist another client in a manner which impaired plaintiffs' interests. The law, defendants' concessions and the undisputed evidence establish these duties.

Defendants cite two cases, Purdy v. Pacific Auto. Ins. Co., 157 Cal. App. 3d 59, 203 Cal. Rptr. 524 (1984), and Franko v. Mitchell, 158 Ariz. 391, 762 P.2d 1345 (Ariz. App. 1988), for the proposition that they are not liable for the conduct of their clients. These cases, and defendants' argument, miss the point. Plaintiffs do not attempt to hold defendants liable for the conduct of their clients. Rather defendants' conduct in breaching their duty of loyalty left plaintiffs exposed and permitted defendants and their other clients to take unfair advantage of plaintiffs.

Purdy makes this very point by contrasting the facts of a more analogous case. In Purdy plaintiff claimed the attorney had negligently failed to persuade his insurer to settle a claim within policy limits. There was no allegation of a breach of the attorney's duty of loyalty to the insured, only that the lawyer had negligently failed to "effectuate settlement." Most significantly, however, "[t]here were no allegations in the . . . cause of action against the lawyer defendants of conspiracy or of the commission of any intentional torts." By contrast, the Purdy court cited Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 201 Cal. Rptr. 528, 535-36 (1984):

In Betts, it was found that "The lawyers failed Betts by (1) lack of disclosure and sound advice; (2) after the excess verdict, when the conflict of interest was unmistakable, actively working to protect Allstate and persisting in manipulating Betts against her own best interests; (3) assisting in manufacturing a false record against the time when a bad faith lawsuit might be instituted; (4) rather than advising consultation of independent counsel as possible or desirable, resisting the efforts of such counsel to become informed when finally retained; (5) discouraging Betts' assignment of rights in exchange for personal release and influencing her instead in the direction of bankruptcy."

(Emphasis supplied.) In Betts, there was an unmistakable breach of the duty of loyalty in protecting the interests of Allstate over and against the interests of Betts. Defendants' conduct here in protecting the interests of Northstar over and against the interests of plaintiffs creates the identical causal relationship.

Franko is similarly distinguishable. There, the court found no cause of action by a non-client could be maintained absent a duty, such as "a unique fiduciary relationship." 762 P.2d at 1354. Such a relationship clearly existed here.

Plaintiffs have established, and defendants have not denied, that defendants, as lawyers for Northstar/Allstate, advised these clients on the very matters at issue prior to the clients' taking any course of action.¹¹ As a director of Northstar and Farragut, Wiley voted in favor of each specific action directed against plaintiffs, and the defendants represented Northstar/Allstate in implementing those decisions. Yet, defendants owed plaintiffs the affirmative duty to protect plaintiffs' interests, and to challenge any act or decision of Northstar/Allstate which, in any way, conflicted with or impaired plaintiffs' interests.¹²

As the lawyer for Northstar/Allstate and as director of Northstar and Farragut, Wiley and his Firm were in a position to influence decisions consistent with plaintiffs' interests, even if

¹¹The Wiley Firm's time records are telling. At each critical juncture, the Wiley Firm researched and advised these other clients before the clients followed the suggested course of action, which in every instance injured plaintiffs. (Appellants' Brief, at 12-23.)

¹²Indeed, after the squeezedown, defendants' ongoing duties of full disclosure informed consent, loyalty, and confidentiality to the plaintiffs arose due also to plaintiffs' status as limited partners of MWT, Ltd. Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985). Defendants' adverse representation of Northstar and MWT, Ltd. against plaintiffs' interests following the squeezedown (Appellants' brief at 15-23) clearly breached these duties, which further assured defendants' losses.

they were adverse to the interests of Northstar/Allstate. He never spoke in defense of plaintiffs' interests, however, while he was advocating the interests of Northstar/Allstate. Rather, he directly assisted these clients to undermine plaintiffs' interests. He then obtained indemnity from Allstate to protect him and his Firm against their own breaches of their duties to plaintiffs.

By being in both camps and representing conflicting interests, Mr. Wiley was forced to choose between which clients he would protect and which he would forsake, because the nature of the transaction prevented him from protecting both. He opted to protect the wealthier and more prestigious clients whom he represented, on whose boards he sat and in whom he held a financial stake.

B. Additional Consequences of Defendants' Breaches of Fiduciary Duty.

The further consequences of defendants' conduct are not as defendants represent. The evidence clearly establishes that defendants' conduct was a substantial factor in their losses, and that but for defendants' conduct, there would have been a better result.

(1) NORTHSTAR COMMITMENT: Northstar made a commitment of \$10 million. Without a commitment from Northstar, plaintiffs never would have accepted Wood's advice to turn down CPL's

commitment. Joe Lee, David Lee, Clayton Foulger, and Jo-Ann Wong Kilpatrick testified that Northstar had committed \$10 million based on the representations of Wood, their attorney. (R. 4969, 4972-73, 4985, 5049-51, 5102-04, 5115, 5203-04, 5245-46; see Appellants' Brief, at 8-10.)

It was Wood who advised plaintiffs to accept Northstar's \$10 million commitment and reject the CPL commitment. He advised plaintiffs that Northstar had committed \$10 million, and he was the one who telephoned CPL to say that plaintiffs would go with Northstar/Allstate.¹³ (Appellants' Brief, at 11.) The record shows that during the squeezedown, Mr. Wood was angered that over \$3 million of the commitment had "vanished." (Id. at 8-15.) In response to accusations that he had been disloyal to Northstar in attempting to ameliorate the obvious damage the adverse representations caused plaintiffs during the squeezedown, Wood stated:

Certainly my consultation with the Mountain West principals on the subject of our representation of Northstar did not include a warning that we would operate in an unprofessional fashion on behalf of Northstar in order to gain an advantage for Northstar over Mountain West. . . .

¹³If, in fact, Wood's representations and inducements concerning the Northstar commitment had been untrue, such a misrepresentation clearly would have caused plaintiffs substantial injury. They rejected the CPL commitment based on that representation. Having effectively taken away any opportunity for plaintiffs to accept that commitment, defendants now contend there never was such an opportunity. There is, at the very least, a genuine issue of material fact in this regard.

Finally, your January 9 memorandum raises the question of my comments at approximately 3 a.m. on November 15 on the subject of the \$3,000,000 that had vanished from the draft Partnership Agreement and Credit Agreement shortly before. Without belaboring the matter, it is obvious that everyone was tired and tempers were short. . . . Moreover, the problem was of a magnitude that it was producing a complete break-down of trust in Northstar and WR&F. It was not in the interest of the firm or Northstar to take clearly untenable positions as to the representations that had been made to induce the [plaintiffs] to negotiate with Northstar at that level, or the fact that the prior documents reflected those representations. Nor do I aspire to practice law on the hidden ball technique of negotiations, particularly when it is used in as sensitive a situation as this one.

(R. 6464, 6471.) There is at least a genuine issue of material fact whether, had defendants not breached their duties, plaintiffs could have enforced the commitment against Northstar.

(2) CPL COMMITMENT: CPL made a commitment of \$11 million. (Appellants' Brief at 9.) CPL's experience in the telecommunications industry dwarfed that of Northstar. (R. 7056.) CPL was an experienced and sophisticated company owning five television properties. As Wood explained in a July 14, 1986 letter to plaintiffs, some time before CPL made its commitment:

The Dallas people [CPL] are very interested. Their broadcaster investor has 5 TV stations already, with independent station (as opposed to network) experience in 2 of them. One of his U.H.F. independents makes more money than at least one of the affiliates.

(Id.; Appellants' Brief, at 8-10.)

The terms of CPL's later commitment, which were memorialized in CPL's "Memorandum of Understanding," showed that CPL had committed to put up financing of \$11 million. (R. 7065-94.) Based on CPL's representations of what it could and would do, CPL's managing partner explained:

You will notice that we have designed a \$10 million financing arrangement that will provide all of the money that we project is necessary for this venture, plus another \$1 million of a contingency reserve. Of this financing, the Mountain West Principals would be required to convert their existing investment into preferred stock of the continuing company, plus perhaps a nominal amount in common stock. Communications Partners would be responsible for arranging all the rest of the financing.

(R. 7091.)¹⁴ Based on Wood's representations concerning CPL's financial strength, there is no doubt CPL could have performed under its commitment. Had plaintiffs been given the right to make an informed decision to go with CPL or with another financing source, the record shows at least a genuine issue of material fact on the reasonable likelihood that plaintiffs would have been able to buy out the other applicants, obtain the license, put the

¹⁴Defendants assert that CPL's "proposal" was for \$2 million not \$10 million. (Appellees' Brief, at 12.) Defendants' claim in this regard is one of their more outrageous distortions of the record. Defendants are careful to state that CPL had committed only \$2 million of its own money, which, defendants claim, would never have closed the deal with competing applicants. What defendants fail to disclose, however, is that CPL was prepared to finance the remainder of its commitment. The implication is that somehow CPL's money would not have worked as well as Northstar's in obtaining the Channel 13 license and in putting the station in operation.

As it turned out, a significant portion of the reduced Northstar/Allstate commitment was financed by notes to buy out competing applicants. See, e.g., Defendants' Addendum, Exhibits 13 and 14.

station into operation and realize an interest valued at over \$20 million in the station. (R. 6119; Appellants' Brief, at 23-24, 37-39)¹⁵

CONCLUSION

The trial court's summary judgment is inconsistent with plaintiffs' right to have all facts and inferences drawn in their favor. Plaintiffs were entitled to submit these claims to a finder of fact. For these reasons, the trial court's order of summary judgment must be reversed, and the case remanded for trial.

DATED this 28 day of June, 1995.

SNOW, CHRISTENSEN & MARTINEAU

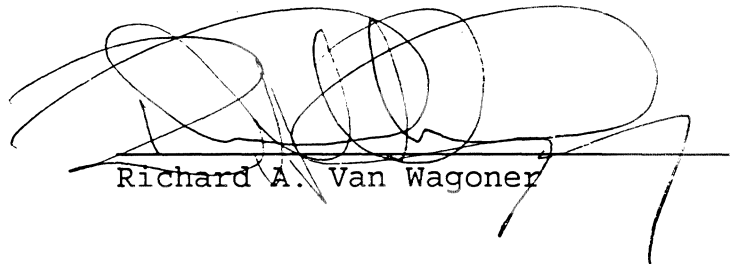
By 

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¹⁵CPL's commitment was no more viable than Northstar's only if defendants falsely assume that CPL would somehow have taken the same unfair advantage of plaintiffs. There is no evidence to this effect. Plaintiffs' clearly would have been much better off by accepting CPL's commitment.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 1995, I caused two true and correct copies of the Reply Brief of Appellants to be served by first class mail upon Daniel L. Berman and Peggy A. Tomsic, Berman, Gaufin & Tomsic, 50 South Main Street, Suite 1250, Salt Lake City, Utah 84144.



Richard A. Van Wagoner

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