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Jo-Ann W. Kilpatrick, George L. Gonzales, Joseph C. Lee, David B. Lee, Marilyn D. Lee, Sidney W. Foulger, Clayton F. Fougler, Bryant F. Foulger, Brent K. Pratt, and MWT Corporation, a Utah Corporation v. Wiley, Rein & Fielding, a professional law partnerhsip, and Richard E. Wiley : Brief of Appellant

Utah Court of Appeals

Gordon R. Hall; Reed L. Martineau; Rex E. Madsen; Richard A. Van Wagoner; Snow, Christensen & Martineau; Attorneys for Appellants.
Daniel L. Berman; Peggy A. Tomsic; Berman, Gaufin & Tomsic; Attorneys for Appellees.

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

BRIEF OF APPELLANTS

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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I. LIST OF ALL PARTIES

The persons listed in the caption consist of all parties to this action.

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IV. STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Ann. § 78-2-2, et seq. and Rules 3 and 4, Utah Rules of Appellate Procedure.

V. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Viewing the facts and inferences from the facts in the light most favorable to plaintiffs, are there material fact issues precluding summary judgment?

B. Did the trial court apply the wrong standard of causation to plaintiffs' claims of breach of fiduciary duty?

VI. STANDARD OF REVIEW OF SUMMARY JUDGMENT

The appeals court views the facts and inferences from the facts in a light most favorable to the party against whom summary judgment was entered, and reviews legal conclusions of the trial court for correctness. United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Christensen v. Burns International Security Service, 844 P.2d 992, 993 (Utah Ct. App. 1992). "Correctness" means no deference is given to the trial court's rulings on questions of law. State v. Pena, 869 P.2d 932, 936 (Utah 1994). Entitlement to summary judgment is such a question of law for which no deference is due the trial court's determination. Higgins v. Salt Lake County, 855 P.2d 231, 235 (Utah 1993).

VII. DETERMINATIVE AUTHORITY

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

VIII. STATEMENT OF THE CASE

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

Plaintiffs sued their Washington D.C. lawyers for intentional breaches of the fiduciary duties of loyalty and confidentiality. Defendants moved the trial court for summary judgment

on proximate causation. Defendants conceded, for the purpose of the motion, that (a) they owed plaintiffs fiduciary duties of loyalty and confidentiality, and (b) material fact issues existed on whether they had intentionally breached those duties, and whether plaintiffs sustained nearly $20,000,000 in damages.

The District Court heard oral argument on January 6, 1994, and granted defendants' Rule 56 motion in a bench ruling on January 7, 1994. (Appendix, Exhibit 2.) The Order was signed on March 7, 1994 (Appendix, Exhibit 3), and plaintiffs filed their Notice of Appeal on March 23, 1994.

B. STATEMENT OF FACTS.

Parties and Historical Background

Plaintiffs Jo-Ann Wong-Kilpatrick, George Gonzales, Joe Lee, Sidny Foulger (the "MWTC Partners"), and Mountain West Television Company ("MWTC"), were clients of defendant Wiley, Rein & Fielding, a Washington D.C. law firm specializing in communications law (the "Wiley Firm"). (R 4031, 4046.) In early 1981, the FCC announced it would make available through comparative hearing process a new VHF television license for Channel 13 in the Salt Lake City market.[1] (R 5039-42, 5272-73, 5290-91.) Barry D. Wood, a communications attorney with Kirkland & Ellis ("K&E"), approached plaintiff David B. Lee to pursue the license. (Id.) Based upon Mr. Wood's advice and under his counsel and direction as their attorney, the MWTC Partners joined as partners in MWTC, a Utah general partnership, to apply for the license. (R 7045, 5039-43, 5059-60, 5275-76, 5278-79, 5280-82, 5304-08.)

From 1981 to 1987, K&E and, later, the Wiley Firm, which was formed by certain former K&E partners, represented MWTC and its partners in all aspects of the Channel 13

[1]A VHF commercial channel had not been available in the Salt Lake market since 1953. Scarcity of frequencies and greater power and coverage potential made the superior VHF channel a unique and very valuable license in the top 40 TV markets.

application and the partnership's business. (R 5547-49, 5605, 5606-07, 5608-09, 4041.) The MWTC Partners developed a particularly close attorney/client relationship with Mr. Wood, who gave them ongoing legal and business advice necessary to pursue the Channel 13 permit. (R 4882-4983.) Mr. Wood requested, and the Utah Partners gave him and other members of the Wiley Firm, detailed, confidential 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 MWTC Partners had limited financial strength. (R 7043, 6072-83, 5146-47, 4982-85, 5280-81, 4034, 5175-77, 5265-67, 5199, 5201, 5212-13, 5214-15.)[2]

In 1985, Mr. Wood and the Wiley Firm represented MWTC and its partners at an FCC comparative hearing concerning the Channel 13 permit. (5281-82, 5304-08.) The FCC issued its decision in May 1985, ranking MWTC second of the five applicants. (R 6512-13, 5309-13, 5318-21, 5512-13.) The Wiley Firm appealed that decision on MWTC's behalf in January 1986. (Id.)

Adams Communications

In August 1985, Adams Communications ("Adams") approached the Wiley Firm and asked it to represent Adams in connection with various of Adams' television properties including Adams' UHF television station KSTU, Channel 20, in Salt Lake City. (R 6279-81, 6291-93, 5551-53, 5322-25, 5612-19.) When plaintiffs objected to such representation, Mr. Wood wrote to them, stating that the firm's representation of Adams did not then present a conflict of interest, but if MWTC and Adams ever had conflicting interests, the Wiley Firm would not represent either

[2]During the five-year period of legal representation, Mr. Wood had routed copies of correspondence and other documents to defendant Richard E. Wiley, the senior partner of the Wiley Firm, and to Mr. John C. Quale, the partner in charge of the MWTC account. (R 5297-5303, 6294, 6295, 6347, 6514, 7035, 7095, 7102, 7107, 7109, 5514-15, 5625, 5626 and 5636-39.) The purpose was to keep them current on what was happening in the Channel 13 matter. (Id.) Much of that information had been provided to Mr. Wood by the MWTC Partners and was considered privileged and confidential. (Id., see R 4609-4830, 4831-4954, 6072-83, 5515-16, 5175-76.)

party. (R 6289-90, 5511, 4041, 5020, 5041, 5064-65.) Contrary to Mr. Wood's express representations, the Wiley Firm began to represent Adams in January 1986, in the "possible purchase of Channel 13, Salt Lake City, and sale of KSTU-TV [Channel 20], Salt Lake City." (Id.) John Quale, an attorney at the Wiley Firm who had been the senior attorney on the MWTC account, represented Adams in the Channel 13 and Channel 20 matters. (Id., R 6348-50, 5620-21.) At no time, however, did the Wiley Firm disclose those representations to the MWTC Partners. (R 4042, 5021-24.)

Northstar Communications

In approximately February 1986, Northstar Communications ("Northstar"), a corporation in which Allstate Insurance Company ("Allstate") owned 80% of the stock, was formed to invest in communications properties. (R 5521, 5522, 5558.) Upon its inception, Northstar became a client of the Wiley Firm. (R 5557.) Subsequently, in the spring of 1986, Bill Lincoln and Katy Glakas, two of Northstar's officers, approached Mr. Wood concerning the possible acquisition of a financial interest in Channel 13. (R 7042, 5327, 5331, 5526-28.) Mr. Wood told them the Wiley Firm represented MWTC and the Firm would have a conflict in representing Northstar in the matter. (R 7042.) He stated that the Wiley Firm was representing MWTC to obtain financing at the time and that Northstar would have to secure other counsel in any dealings with MWTC. (R 7042, 5332-34.) Mr. Wood did feel it would be appropriate to introduce Mr. Lincoln and Ms. Glakas to the MWTC Partners, which he did. (R 4964.) He did not inform MWTC that Defendant Wiley was a director of Northstar, that Northstar had its corporate offices in the Wiley Firm, or that Northstar was a client of the Wiley Firm. (R 5328-29, 5330, 5335, 5045, 4961.)

During the spring of 1986, Mr. Wood and the Wiley Firm continued to represent MWTC and its partners. Mr. Wood's services included, among other things, frequent and ongoing conversations with the MWTC principals and with Mr. Lincoln and Ms. Glakas concerning

Northstar's and Allstate's possible investment in Channel 13, and a buy-out of the other applicants for the Channel 13 permit. (R 6619-6850, 4961-65, 5334-35.) He advised the MWTC Partners that the permit had "immense value," that independent stations were selling at "stratospheric prices," and that they should seek money from an investor to buy out the other applicants and to finance construction and start-up of the station. (R 6513, 7096, 5048-50, 5102.) He spent considerable time consulting with his partners at the Wiley Firm, meeting with potential investors, negotiating with other applicants, and performing other work to enable MWTC to obtain financing for the permit and to buy out the competing applicants. (R 6619-6850.)

The Wiley Firm's Decision to Represent Northstar

On June 11, 1986, Mr. Wiley and Mr. Quale went to Mr. Wood's office and "announced that the Firm would represent Northstar in this matter after all." (R 6570, 6689, 7043, 4183, 4557.) They stated that "this was necessary because Northstar . . . and Allstate would go to another firm for counsel and all of its business might then be handled by another firm." (R 7043, 5350-52, 5555, 5557, 5567.) Mr. Wiley emphasized that Northstar and Allstate "would be the bigger client, more important client." (R 5354, 5645.) Mr. Wood informed Mr. Wiley and Mr. Quale that the Wiley Firm could not represent Northstar against MWTC and that he had earlier told Mr. Lincoln that Northstar would have to secure separate counsel. (R 5350-53, 7042-43.) He also told them the Firm could not ethically represent anyone who would enter a deal with MWTC, because MWTC was a long-standing client of the Firm. (Id.) Mr. Wood recognized that the Wiley Firm had confidential information about the MWTC Partners and he did not feel that the decision to represent Northstar was appropriate or ethical. (R 7043.) As a young partner, however, he felt he had no choice in the matter. (Id.) Despite his objections, Mr. Wiley directed him to obtain the consent of MWTC. (Id., 5355-58.)

Barry Wood's Testimony Regarding Consent

Mr. Wood testified that following his meeting with Mr. Wiley and Mr. Quale, he telephoned Joe Lee and informed him that the Wiley Firm wanted also to represent Northstar "on the transaction" with MWTC and that the Firm wanted the MWTC Partners' consent to do so. (R 5378-82.) Mr. Lee said he would check into the matter. (Id.) He later called Mr. Wood and said that the partnership would not consent. (R 5381-5384.) Although Mr. Wood claims he then telephoned certain but not all of the other partners of MWTC who allegedly stated that the firm could also represent Northstar "on the deal," he admitted (1) he never disclosed to them what the nature and extent of the Wiley Firm's representation of Northstar would be or who in the Firm would be doing the work for Northstar; (2) he did not explain to them the conflicts that existed, the legal implications, the possible risks and effects on plaintiffs, or other circumstances relating to the proposed representation; (3) he did not tell them that Mr. Wiley had decided the Firm would represent Northstar because it perceived Northstar/Allstate as the more important clients and would not lose their business by referring the matter to another firm; and (4) he did not tell them that Allstate was also a client of the Firm, or that the Firm was representing Adams in matters relating to Channel 13. (R 4046, 5385-93, 5398-5411.)

Mr. Wood stated that he later met with Mr. Quale and related to him the conversations with some of the MWTC principals. (R 5413-5414.) He informed Mr. Quale that Joe Lee's son, David Lee, had strongly objected to such representation. (R 7044, 5414-17.) Mr. Quale decided that because David Lee was not an actual partner in MWTC at the time, his objection did not change the matter; the Firm would represent Northstar anyway.[3] (Id.) In a memorandum

[3]David Lee was one of the original partners of MWTC when Mr. Wood formed the partnership in 1981. Mr. Wood later stated in a memorandum that "in retrospect, it would have been a good idea to have attempted to obtain the consents of the partners in writing. Neither John Quale nor anyone else at Wiley, Rein ever suggested that I should do so or

prepared approximately eight months later, Mr. Wood stated that in June 1986 he was not aware that the Wiley Firm had assumed the role of general counsel to Northstar or that the Firm had promised to represent Northstar on all matters, even ones in which it "had a prior responsibility to an existing client [MWTC]." (R 6470.) He further admitted that he did not even know at the time he spoke to certain of the MWTC principals what the Wiley Firm would eventually do or what the consequences of the firm's action on behalf of Northstar would be. (R 5398-99.)

Testimony of MWTC Principals Regarding Consent

Plaintiffs Wong-Kilpatrick and Gonzales, two MWTC Partners, testified that Mr. Wood had never called them to obtain their consent. (R 5253-56, 5227.) They were never advised of the Wiley Firm's representation of Northstar until much later. (Id.) Joe Lee testified that Mr. Wood never told him the Wiley Firm could not represent him or MWTC in the negotiations with Northstar. He stated that Mr. Wood initially called him and asked if Mr. Lee would object to the Firm's simultaneous representation of Northstar and MWTC. (R 4958-60, 5009-12, 5017-18, 5019.) Joe Lee then spoke to his son David Lee, who was angered at the thought and said the Wiley Firm could not do so. (Id.) Joe Lee telephoned Mr. Wood and said the partnership would not agree. (Id.) David Lee also informed Mr. Wood that such representation would be a serious breach and that the partners would not consent. (R 5082-84.) Both David and Joe Lee then felt the matter was closed and the simultaneous, adverse representation would not take place. (R 5085-88.)

The MWTC Partners testified that if Mr. Wood had disclosed to them the conflicts, facts, risks and implications of the Wiley Firm's decision to represent Northstar against the MWTC

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needed to do so. It would, in fact, have been a futile exercise. Because of David's displeasure with the firm's switching sides, looking back I believe that he would have dissuaded all of the partners except for Sid Foulger from signing a document evidencing their consent to the change." (7044-45.)

Partners, they would have had no further dealings with the Wiley Firm or with Northstar/Allstate. (R 5235, 5236, 5240, 5130, 5131-32, 5133, 5134-35, 5138, 5148, 5036-37.) MWTC would have employed independent counsel to represent them in pursuing other contacts and in obtaining financing from other parties. (R 4972-73, 5027, 4031-33, 5130, 5131-32, 5133, 5134-35, 5138, 5148, 5036-37.) Instead, without knowledge of the conflicts of the Wiley Firm or of the extent and consequences of those conflicts, the MWTC Partners trusted and relied on the Wiley Firm to represent their interests fully and loyally as the Firm had done during the previous five years, including representation in negotiations with Northstar/Allstate. (R 5059, 5119, 4961, 4966, 5152.)

Wiley Firm's Continued Representation of MWTC

Following the failed attempt to obtain consent, the Wiley Firm and Mr. Wood, as shown by 1986 daily time entries and MWTC billing statements, continued to perform extensive legal services for MWTC and its partners, including numerous meetings, conversations and negotiations with Northstar concerning financing and the formation of a joint venture between MWTC and Northstar/Allstate. (R 5420-26, 6689-6752.)

In the summer and fall of 1986, Mr. Wood also had frequent meetings with other members of the Wiley Firm, the MWTC Partners, various potential investors, and the other applicants for the station construction permit. (R 6683-6783, 4557-72, 5427-48, 5100-01.) He worked extensively, as counsel for the MWTC Partners, to negotiate financing for them to buy out the other applicants, obtain the station permit, and put the station in operation. (Id.) His services were performed on almost a daily basis with respect to a wide variety of matters relating to Channel 13. (Id.) In short, during this critical period there was no reason for the MWTC Partners to believe that the scope of his representation of MWTC had changed in any way from what it had been before. (R 4033, 5089-90.) MWTC and its partners continued to rely fully on Mr.

Wood and the Wiley Firm as their attorneys, in all matters involving Channel 13. (R 5059, 5119, 4961, 4966, 5152.) Unknown to MWTC, however, Mr. Wood was performing legal work for Northstar in the fall of 1986, which was billed to Northstar. (R 6852-67.)

Mr. Wood, as counsel for MWTC, contacted Communications Partners Limited ("CPL"), a potential investor. (R 6671-6752, 4550-68, 5335-48, 5451-54.) He reviewed financing proposals from CPL and Northstar/Allstate, and discussed them with the MWTC Partners. (R 7049-55, 7056-59, 7060-65, 7066-71, 7072-79.) Northstar and CPL sent written financing offers to Mr. Wood and he transmitted them to the MWTC Partners. (Id.) He also gave the MWTC Partners legal and financial advice concerning the competing offers, and handled negotiations on behalf of MWTC with Mr. Lincoln and Ms. Glakas throughout the summer of 1986. (Id., 6683-6735, 4556-64, 5534-36.)

In the late summer of 1986, following a series of negotiations, both Northstar and CPL made commitments to MWTC to provide at least $10 million in return for a 60% interest in the Channel 13 venture. (R 4969, 4972-73, 4985, 5049-51, 5102-03, 5115, 4031-33, 4035-37, 5152, 5203, 5245, 5246.) Mr. Wood went to Utah and met with the MWTC Partners and counseled them to accept the Northstar offer. (R 5245, 5102-03.) They relied on Mr. Wood, who was acting as their attorney, in following that counsel. (Id.) Mr. Wood then personally informed CPL on behalf of his clients that MWTC would not go with CPL, but had decided to accept the Northstar offer. (Id., 5103-04, 5107-08, 5114-16, 5122.) In reliance on Mr. Wood as their attorney, the MWTC Partners looked to a large degree on contacts he told them he had and on his initiative to obtain financing. (R 5059, 5132, 5139, 4961, 4966, 5036-37, 5027, 4031-33, 5152.) Later, they relied on his recommendation that they accept the Northstar financing commitment. (Id.) Because of their reliance on the Wiley Firm and Mr. Wood, the MWTC Partners forewent the opportunity to obtain the committed financing from CPL or to pursue other financing sources.

After Northstar and Allstate had committed $10 million to the venture and Mr. Wood had informed CPL that MWTC had accepted the Northstar/Allstate commitment, Mr. Wood and the Wiley Firm, as counsel for MWTC, negotiated agreements to buy out the interests of the other station applicants in the fall of 1986. (R 6696-6783; 5105-06.) The agreements, drafted by the Wiley Firm, created certain deadlines and called for MWTC to buy out the other applicants for a total of $5 million, which was to come out of Northstar's $10 million commitment. (Id., 4035-36.) Unknown to MWTC was the fact that two of the complex agreements drafted by the Wiley Firm unconditionally and personally obligated the MWTC Partners to pay $3 million of the $5 million buyout price, regardless of whether funding from the Northstar commitment was ever realized. Mr. Wood counseled his clients to sign the agreements but did not explain the legal implications or liabilities arising under the agreements. (R 5109, 5110, 5111-12, 4971, 5180-81, 5208, 5154-55, 5156, 5159-60.)

Dow, Lohnes & Albertson

At some point in the summer of 1986, plaintiff Sidney Foulger and his family (the "Foulger Family") contacted Ralph Hardy, a close family friend and communications attorney at Dow, Lohnes & Albertson ("DL&A"), to seek an independent assessment of the station values and financial information given to MWTC by Mr. Wood. (R 4034-35.) The Foulger Family also sought Mr. Hardy's views and advice concerning financial issues relating to Channel 13. (Id.) His efforts were on behalf of the Foulger Family as a financial adviser only. (R 4035, 5080-81, 5076-78.) He did not serve as MWTC's counsel in connection with the dealings with Northstar/

Allstate or with the other permit applicants. (Id., 5094.) Also, Mr. Hardy never advised MWTC and its partners in any way regarding the Wiley Firm's numerous conflicts of interest.[4]

During July through November 1986, the MWTC Partners continued to look to and rely on the Wiley Firm and Mr. Wood to serve as counsel for MWTC and its partners in all matters relating to Channel 13. (R 4033, 4035, 5059, 5089-90, 5119, 4961, 4966, 5152.) Although they understood that Mr. Hardy was a financial consultant for the Foulger Family, they did not consider Mr. Hardy to be MWTC's attorney in any way. (R 5080-81.) Even Mr. Wood's time entries relating to legal services he performed on behalf of the MWTC Partners show he had numerous discussions and meetings with Northstar representatives and plaintiffs in the summer of 1986. (R 6683-6735.) Mr. Hardy is not shown as participating in those conversations or meetings. (Id.)

November 1986 Squeeze-Down Meetings

Once the Wiley Firm had prepared the agreements for the buyout of the other Channel 13 permit applicants, the Firm then simultaneously represented Northstar and MWTC in November 1986 in preparing and reducing to writing the agreements for the venture between Northstar and MWTC. (R 5455-60, 6266-69, 5650-52, 5662-64.) That venture consisted of a Utah limited partnership known as MWT, Ltd., formed under the direction of the Wiley Firm. (R 8301.) The new terms of the Wiley-drafted documents were contrary to the deal which had been previously agreed to and were very detrimental to MWTC and its partners. Among other things, without negotiation they arbitrarily reduced the committed $10 million to under $7 million. (R 7933, 5246-47.) They also provided that MWT Corporation, a Utah corporation formed under

[4]There is no evidence that Mr. Hardy was even aware of the nature, extent and risks to MWTC and its partners of the Wiley Firm's conflicts of interest arising as a result of that firm's simultaneous adverse representation of MWTC and its partners, Adams, Northstar, and Allstate, and of Mr. Wiley's personal business involvement as a director of Northstar.

the direction of the Wiley Firm for the MWTC Partners, would serve as the general partner of MWT, Ltd. for only a short time. (R 7856, 5556.) Northstar would then become the general partner with full management control of the station. (R 7856.) The MWTC Partners were thereafter to be limited partners only. (Id.)

These terms were contrary to Mr. Wood's prior advice and subverted the very purpose of the Wiley Firm's representation of plaintiffs during the previous six years. The MWTC Partners' desire and dream had always been to manage, operate and control the station themselves. (R 5289-92, 5336-37.) Now, unknown to them and contrary to representations made to the FCC, the Wiley Firm was representing Northstar to drastically reduce the commitment, to take away plaintiffs' control and make plaintiffs nothing more than a "public relations bridge to the Salt Lake City community." (R 6605.) Under the CPL commitment, which Mr. Wood advised MWTC to turn down, the MWTC Partners would have retained control of Channel 13. (R 7092-94.)

When a meeting was held at the Wiley Firm's Washington, D.C. offices in mid-November 1986 to close the transaction with Northstar/Allstate, the MWTC Partners expected to see written agreements that would memorialize the terms of the Northstar/Allstate commitment made in the late summer of 1986. (R 5466-69, 5025-26.) Instead, in the middle of the night they learned of the substantial changes that had been made in the agreements prepared by the Wiley Firm. The MWTC Partners 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 Mr. Wood on their behalf. (Id., 5470-73, 5180-81, 5202, 5204, 5206-07, 5155, 5159-60, 5025-26.) In proceeding with the buyout agreements with the other applicants, the MWTC Partners had relied on Northstar's commitment to provide $10 million and did not know

they were personally obligated for any of the buyout payments. (R 5169-70, 5171-72, 5099, 5207, 5208, 5154, 5157-58.) Mr. Wood did not inform them of their liability until the mid-November meeting to close the transaction. (Id.)

Because of the changes made in the Northstar/Allstate funding agreement, extensive discussions ensued around the clock over a three-day period. During the course of those discussions, the MWTC Partners and even Mr. Wood strongly objected that the commitment by Northstar/Allstate had been reduced from $10 million to less than $7 million. (R 5474, 5025-26.) The Foulger Family was particularly upset about Sidny Foulger's personal liability for $1 million under one of the buyout agreements and asked Mr. Hardy to do what he could to protect Mr. Foulger's interests. (R 5186-94, 5167.) Mr. Hardy did not serve as an attorney for MWTC or the MWTC Partners. (R 4034-35, 5184.) The MWTC Partners continued to regard and look to Mr. Wood as their attorney. Nothing in Mr. Wood's conduct or the scope of his representation of MWTC and its partners led them to believe otherwise. (R 6773-75, 5071-78, 5089-90, 4033.) Mr. Wood, in fact, recorded over 40 hours during those three days for his services as counsel for MWTC. (R 6773-75.)

Also, during the mid-November meetings to close the Northstar/Allstate financing transaction, three of the four MWTC Partners were in Salt Lake City. (R 5044, 5478.) It was Mr. Wood who telephoned them, explained the partnership documents to them, and gave them legal advice concerning the transaction. (Id., 5025-26, 5242-43, 5246-47, 5248-49.) It came as a shock to them that new terms were then being dictated. (R 4047.)

When the Wiley Firm confirmed to those present that the funding would be less than $7 million, David Lee objected to the changed terms and reminded the attorneys that the Wiley Firm was representing MWTC. (R 5090-98.) One of the Wiley Firm attorneys who was not then

aware of the Firm's representation of MWTC responded that the firm was not representing MWTC, but rather Northstar. (R 6273-74.) Mr. Wood then objected to what was happening and forcefully stated that MWTC was a client of the firm and had been a client since 1981. (R 6479, 6275-77, 5094-97.) He emphasized that the Wiley Firm owed duties to MWTC and that "the firm could not do this to their client." It would be unethical. (Id.)

When the MWTC Partners who were in Utah refused to go along with the changed deal, Mr. Wood (a) spoke to them by telephone, (b) informed them that one of the buyout agreements personally obligated them for $1 million, (c) asked if they wished to be liable for that amount, and (d) told them that they had no alternative but to go through with the changed deal. (R 5248-49, 5025-26.) He then assured them, despite the changes made to the agreements, they would still become millionaires. (R 4047.) The MWTC Partners testified that they had no choice. They had to sign the documents, and they did so under extreme duress.[5] (R 5097-98, 5248-49, 4971-75, 5025-26.)

Mr. Wood also acknowledged that $3 million of the total $10 million had vanished, contrary to the prior agreement and "representations that had been made to induce the MWTC Partners to negotiate with Northstar at that level." (R 6471.) Mr. Wood was so upset about the change that he challenged his own firm on the issue. (Id.) His objections did not change the matter. Because of the MWTC Partners' personal liability for the $1 million payment, coupled with the Monday due date for the $2 million payment and the pending appeal, there was no alternative but to accede to the changed terms dictated by the Wiley Firm and its other clients,

[5]Mr. Wood testified that he knew they were in a "terrible position" because they also had to pay $2 million to one of the other applicants on the Monday following the weekend meetings and they had no other financing alternatives available at the time. (R 5476-77.) Mr. Quale was aware that the MWTC Partners were personally liable for buyout payments owing to the other applicants and that the dealings between Northstar and the MWTC Partners at the mid-November meetings were being driven by the $2 million payment that was due the following Monday. (R 5659.)

Northstar and Allstate. (R 4974-80, 5262, 5162, 5170.) Even though the MWTC Partners then learned that the Wiley Firm represented Northstar against them, it was too late to seek other financing or other counsel. By that time they had also exhausted their funds. Mr. Wood had advised plaintiffs several months earlier to go with Northstar and had notified CPL of plaintiffs' decision to do so. (R 5245, 5107-08, 5116.)

Plaintiffs, through discovery in this case, learned that Mr. Wiley and the other directors of Northstar had approved and directed execution of the changed agreements prior to their signing. (R 6446-50.) Mr. Wiley's billings to Northstar show that he was paid for his time at the Northstar board meeting in which he approved what his Firm and its more prestigious clients were doing to MWTC and its partners. (R 4191, 4193.)

Post-November 1986 Events

Following execution of the changed agreements with Northstar for the formation of MWT, Ltd., Mr. Wood prepared and filed a petition with the FCC to substitute MWT, Ltd. for MWTC as the Channel 13 permit applicant. (R 5479, 5667-68.) The petition sought FCC approval of the arrangement between Northstar and MWTC, which gave Northstar the right to become the general partner and take control of MWT, Ltd. and Channel 13. (R 6514-67, 5669-77.) In addition, based on Mr. Wood's advice, the MWTC Partners resigned from their jobs to become involved full-time in the station's business. (R 4981.)

Following the mid-November squeeze-down, members of the Wiley Firm began to criticize Mr. Wood for his "misguided loyalty" to the MWTC Partners and his objections to what the Firm and Northstar/Allstate had done during the mid-November meetings. (R 6451-58, 5686-87, 5690.) The criticism focused on Mr. Wood's belief that Northstar and the Wiley Firm had breached duties owing to the MWTC Partners. (R 6451-58, 5493-96, 5691, 5692-93.) Mr. Wood

responded that MWTC had been a client of the Firm since 1981 and was still a client. (R 6462.) He then cited ethical rules governing the Firm's duties to MWTC (R 6462-64), and stated:

> Certainly my consultation with the MWTC 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 MWTC. (R 6464.)

Despite Mr. Wood's objections, the Wiley Firm continued to give legal advice to Northstar in all matters involving the MWTC Partners and the business of Channel 13. (R 6446-50, 7017-18, 4191-97.) Among other things, the Firm advised Northstar in early 1987 concerning the purchase by MWT, Ltd. of Channel 20 from Adams. (R 4196, 4197, 5703-05.) The Northstar board of directors also met to discuss the purchase. Mr. Wiley, as a member of the board of directors and as counsel for Northstar, and Mr. Quale were present. (Id.)

In late February 1987, the MWTC Partners, who were still represented by the Wiley Firm, learned about Northstar's decision to purchase Adams' Channel 20 for approximately $30 million, and to borrow and sign a purchase contract with another of the Wiley Firm's clients, Adams, for the entire purchase price.[6] (R 4043-44, 5066-67, 5259, 5195-96.) They did not know that the Wiley Firm had again been advising and providing legal services to Northstar in the matter contrary to plaintiffs' interests. (Id.) When plaintiffs objected to the purchase, 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. (Id.) Based on that ultimatum, the MWTC Partners again concluded they had no alternative but to accede once again to Northstar's decision. (R 4044-45, 5007, 5008, 5028-35.) In reliance on Mr. Wood's advice, Joe Lee had given up his job so he could become involved full-

[6]Northstar concluded that it would be advantageous to purchase an operating station and eliminate a competitor. Also, Northstar and Allstate did not wish to put further funds into the station. (R 5196.)

time with Channel 13, and the MWTC Partners were still personally liable for certain payments to the other applicants. (R 4044-45, 5028-35, 5291-92.) Thus, the Wiley Firm and Northstar again were in a position where they could take advantage of the MWTC Partners.[7]

Plaintiffs testified that Northstar's decision was a further link in a chain of events set in motion by the Wiley Firm's failure to make full disclosure of its conflicts of interests, the facts relating to those conflicts, and the resulting risks and consequences to MWTC and its partners. (R 5060, 5131-32, 5036-37; see also 11748, 11750-51, 11757, 11767, 11770, 11775.) Had the Wiley Firm made full disclosure in June 1986 concerning its conflicting interests and decisions, plaintiffs testified they never would have been in a position in which Northstar and the Wiley Firm could take advantage of them and the resulting circumstances. (R 5133, 5134, 5148, 5235, 5036-37, 5259, 5165.) MWTC would have dismissed the Wiley Firm in June 1986, and the decision of Northstar/Allstate to purchase Channel 20 from Adams never would have been made. (Id.) Had the MWTC Partners been given the chance to make an informed decision, they would have accepted the CPL funding commitment, or sought financing from another source which, as the evidence shows, would have enabled them to buy out the competing applicants, put the station in operation, and succeed in direct competition with Channel 20. (Id., 6119-38.) When Mr. Wood and the Wiley Firm failed to discharge their fiduciary duties of loyalty, full disclosure and consent, MWTC and its partners lost the opportunity to obtain funding from other sources. (Id., 11748, 11750, 11751, 11757, 11767, 11775.) They were then in a position where the Northstar/Allstate decision to purchase Adams' Channel 20, reached and carried into effect with defendants' assistance, could be forced upon them. (Id.)

[7]Mr. Quale acknowledged that he knew Joe Lee had left his job and needed funds. (R 5691.)

Subsequent Representation by the Wiley Firm of Various Parties

Ralph Hardy represented MWT, Ltd. as special counsel of record before the FCC, in the purchase of Channel 20 from Adams.[8] (R 9385, 8339, 8341, 8343, 8347.) He was not counsel for plaintiffs in connection with the purchase, as defendants mistakenly argued before the trial court. (Id.) Mr. Hardy was counsel to the limited partnership, MWT, Ltd., of which both the MWTC partners and Northstar were a part. Mr. Hardy's duties were to the partnership, not only to the MWTC partners. Mr. Wood and the Wiley Firm performed legal services on behalf of MWT, Ltd. and Northstar, and in connection with the Channel 20 purchase, behind the scene. The Firm advised Northstar concerning all aspects of the Channel 20 transaction, even though it continued to represent both the MWTC Partners and MWT, Ltd. in Channel 13 matters. (R 6807-50, 4059-4134.)

During this time, Mr. Wood continued to represent the MWTC Partners. (R 4059-4134, 5257-58, 4045-46.) He represented them through June 1987 in obtaining agreements from the other applicants to release the MWTC Partners from the payment terms of the buyout agreements. He also provided legal and business advice concerning the startup of the station and programming matters. (R 4573-4608.) He provided further services in early 1987 to obtain Allstate's agreement to assume the payment obligations of MWTC and its partners under the buyout agreements. (Id.)

At the same time, and without plaintiffs' knowledge, other attorneys in the Wiley Firm represented Northstar against the MWTC Partners in connection with the partners' employment contracts with Channel 13, and subsequently in connection with Northstar's decision to terminate

[8]The inference is that the Wiley Firm did not appear as counsel for MWT, Ltd. before the FCC in the purchase of Channel 20 from Adams because the Wiley Firm was counsel for Adams at the time. (R 5707.)

all further payments to MWTC Partners under those contracts. (R 6868-6982, 4195-4380, 5708-16.) No effort was made to obtain plaintiffs' consent to such representation. (R 4047.) In addition, the minutes of a Northstar board meeting show that Mr. Wiley and other board members, with Mr. Quale present as counsel for Northstar, directed Northstar to terminate payments to plaintiffs under their employment agreements. (R 6489-95.)

Mr. Wood left the Wiley Firm in September 1987. (R 11656.) Shortly thereafter, the Wiley Firm represented Northstar in connection with the "conversion" or substitution of Northstar for MWT Corporation as the general partner of MWT, Ltd. (R 4209-4300.) This procedure was dictated by the agreements forced upon plaintiffs during the mid-November 1986 meetings. (R 7856.) At approximately the same time, a new corporation, Farragut, was formed to own all of Northstar's stock. (R 5633-34.) Mr. Wiley became a 10% owner of Farragut's common stock and, thus, an owner of Northstar. As such, Mr. Wiley had an ownership interest in the general partner. (R 6356, 5633-34.) Allstate was the principal shareholder of Farragut. (Id.) As a result of the conversion, the MWTC Partners lost what little right they had to manage and control the station through the former general partner, MWT Corporation. (See R 6514-67.) The Wiley Firm and its clients, Northstar and Allstate, had succeeded in shifting total control of the station to Northstar. (Id.) Plaintiffs, in an effort to resist the actions of the Wiley Firm and their more powerful clients, sought Ralph Hardy's assistance. (R 5719.) Mr. Hardy, however, by this time was unable to do anything to stop or even delay the conversion, which was completed in May 1988. (R 4956.)

When MWT, Ltd. needed additional funds in 1989 to meet the partnership's debt obligations resulting from the purchase of Channel 20, the Wiley Firm simultaneously represented Northstar, Farragut and MWT, Ltd., even though MWT, Ltd. had interests adverse

to those of Northstar and Farragut. Allstate was also a client of the Wiley Firm and, in fact, had been a client since at least 1985. (R 7048.) The Firm's services were performed in connection with the preparation and execution of promissory notes from MWT, Ltd. in favor of Allstate, bearing interest at the rate of 25% per annum. (R 5717-35, 4373-4470.) Allstate insisted, as a condition of providing a 25% interest-bearing loan to MWT, Ltd. to meet the station's short-term debt, that MWT, Ltd. sign a management contract which further obligated MWT, Ltd. to pay Farragut $17,500 per month. (R 7113-27.) The minutes of a Northstar board meeting show that the directors, including Mr. Wiley, directed Northstar, as general partner of MWT, Ltd., to execute a 25%-interest note in favor of Allstate. (R 6489-6495.) Mr. Quale was also present at the meetings. (Id.)

Ralph Hardy assisted plaintiffs in an unsuccessful attempt to resist defendants', Northstar's, Allstate's and Farragut's actions. (R 5197-98, 5200, 5260-61.)

Sale of Channel 13 to Fox (1989-1990)

The Wiley Firm also represented both Northstar and MWT, Ltd. in the decision to sell Channel 13 to Fox, and in opposing plaintiffs' objections to the decision. (R 6584-93, 4373-4520, 5744-46.) Allstate decided to sell because it refused to provide further funding for the operation, and the station's income failed to reach the levels projected by Northstar in 1987 when it decided to purchase Adams' Channel 20. (R 7005-08.) The station's income could not satisfy the payments on the $30 million debt resulting from that purchase. (Id.) Mr. Wiley met with the only other remaining Northstar board member on January 26, 1989, and voted to sell the station. (R 6584-93, 6489-95, 4373-4520.)

But, before Mr. Wiley met with the Northstar board of directors to vote to sell the station, Mr. Wiley first personally obtained an indemnification agreement from his client

Allstate. (R 6501-07.) The agreement provided that Allstate would indemnify Mr. Wiley in any action against him by the limited partners. Allstate apparently agreed to indemnify Mr. Wiley so that, as a director of Northstar, he would violate his duty of loyalty to plaintiffs and vote to sell the station to protect Allstate's investment in Channel 13 and to reduce further risk to Allstate.

Once the indemnification was in place, Allstate directed Farragut to execute a consulting agreement with a broker, which required payment by MWT, Ltd. of $10,000 per month. (R 6992-95.) Allstate prepared that agreement, and the Northstar and Farragut directors, including Mr. Wiley, ratified it. (Id.) The broker was affiliated with Veronis Suhler & Associates, another client of the Wiley Firm, which later received a commission of nearly $600,000 in the sale of the station by MWT, Ltd. to Fox Broadcasting Company ("Fox"). (R 5762-63, 6992-95, 5611, 5742, 5539, 7019-21.)

Plaintiffs sought the assistance of Mr. Hardy to oppose the sale. (R 6997-7000.) Despite his objections, Northstar and Farragut, with the assistance of the Wiley Firm as their counsel, and Mr. Wiley, as one of two directors of each company, decided to sell the station to Fox.[9] (R 7001-03, 6496-98.)[10]

When plaintiffs later threatened suit against the Wiley Firm, Allstate amended its indemnification agreement to protect both Mr. Wiley and his Firm, against any claims by the limited partners of MWT, Ltd. (R 6508-09, 5597.) With the closing of the sale, the plaintiffs lost

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[9]The Wiley Firm also continued to represent Allstate in certain other matters. (R 5610, 5550.)

[10]It is difficult to conceive of a more entangled web of conflicts between a law firm and its clients. Mr. Wiley and the Wiley Firm owed conflicting fiduciary duties to their clients: Allstate, Adams, Northstar, Farragut, MWT, Ltd., Varoneous Sueller and the plaintiffs. In the sale of Channel 13 to Fox, each had a conflicting, adverse interest. Unfortunately for the plaintiffs, they were perceived as the lowest and least favored of the Wiley Firm clients. Thus, with indemnification from Allstate, Mr. Wiley breached his duties to plaintiffs.

everything, including (a) the value of the station license contributed to MWT, Ltd.,[11] (b) their capital contributions, (c) the opportunity to recoup their expenses, (d) the payments due under their employment contracts, (e) the increase that would have been realized in the value of their equity interest in the station, and (f) the opportunity to own, manage and realize the appreciation in value of the station. (R 6159-6264, 6110-15, 5005-06, 5209-10, 5164-66, 5268.) They received no proceeds from the sale. Also, approximately one and one-half years later, Northstar, upon the advice of the Wiley Firm, sent plaintiffs a "cash call" which supposedly obligated them, as limited partners, to pay over $2 million for the unpaid debts of MWT, Ltd. (R 6983-87.) This "cash call" was based on a provision the Wiley Firm placed in the MWT, Ltd. partnership agreement at the mid-November 1986 meetings. (Id.)[12]

The facts demonstrated that (a) had Northstar/Allstate honored their commitment to fund the MWT, Ltd. joint venture with $10 million to buy out the other permit applicants and to construct and operate the station, or had MWTC obtained even $8 million from an alternative source of funding, and (b) had Channel 13 gone into direct competition with Channel 20, rather than being forced by Northstar to buy out Channel 20 as a competitor, plaintiffs' interests in the station would have had a value of approximately $20 million at the time summary judgment was entered. (R 6119-38.)

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[11]The fair market value of the license contributed by the MWTC Partners was $9,530,000 as of January 1987. (R 6120.)

[12]The funds demanded were to be used to pay the creditors of MWT, Ltd., one of which was the Wiley Firm's favored client, Allstate. (R 6594-6603, 7019-21, 6983-87.) Another creditor was Farragut, which had claimed a management fee of $374,697. (Id., 7027.) The cash call to plaintiffs was also issued after the Wiley Firm had received nearly $200,000, and the escrowed funds from the sale had been disbursed to Allstate and Farragut. (R 7028-34.) Again, the Wiley Firm represented Northstar in preparing the escrow documents and in sending the escrowed funds to Allstate. (Id.) At no time did the Wiley Firm take action to terminate its representation of MWTC or its partners.

Instead, due to defendants' breaches of their fiduciary duties of full disclosure and consent, the MWTC Partners were unknowingly placed in a position where the Wiley Firm and its more powerful clients, Northstar and Allstate, could take advantage of them. Those breaches set in motion a series of events which ultimately led to the sale of the station to Fox. (R 11748, 11750-51, 11757, 11767, 11770, 11775.) Plaintiffs testified that had defendants made full disclosure to them in June 1986, they would have been able to make informed decisions as to how they would proceed with financing and legal representation, and they would have followed a different course. (R 5133, 5131, 5134, 5148, 5235, 5036-37, 5259, 5165.) As shown by the evidence, their decision would have been to obtain financing from another investor. (Id.) They had a commitment from CPL for $10 million plus a $1 million contingency, which they could have accepted had it not been for defendants' breaches. With even $8 million from CPL or another investor, the MWTC Partners could have bought out the competing applicants and placed the station in operation. (R 6133, 6135.) The station would have succeeded under such circumstances. (R 6119-38.)

IX. SUMMARY OF ARGUMENT

The trial court assumed the role of fact finder and weighed the evidence, which is improper on summary judgment. Defendants argued that as a matter of law there was not a "reasonable likelihood" that plaintiffs would have obtained a better business result absent defendants' breaches of fiduciary duties because (a) plaintiffs were represented by other counsel at all times, (b) it was defendants' other clients who made the business decisions that caused plaintiffs' loss, (c) the CPL offer was not better than the changed Northstar/Allstate documents forced on plaintiffs, and (d) defendants did not receive or misuse confidential information. The facts are materially disputed on each of these issues. Nevertheless, the trial court chose to adopt

defendants' characterization of the issues, imposed the wrong standard of causation, and then usurped the role of the jury by weighing and finding the facts.[13]

In so doing, the court ignored plaintiffs' evidence that plaintiffs were deprived of the opportunity to make informed decisions concerning financing alternatives when defendants breached their fiduciary duties of full disclosure and informed consent in June 1986. Had plaintiffs known of defendants' numerous conflicting interests and the facts and consequences of those conflicts, they would have pursued a different course of action. Because of such breaches, plaintiffs were placed in a position in which they had no opportunity to pursue other financing and in which defendants and their other clients could take advantage of plaintiffs. Each subsequent event and each subsequent breach by defendants was a cumulative, likely and foreseeable result of defendants' breaches in June 1986.

Also, because defendants' fiduciary breaches prevented plaintiffs from following a different course to obtain financing, it is irrelevant whether plaintiffs would have achieved a better result. Under such circumstances, the law requires only that plaintiffs show that defendants' conduct was a "substantial factor" in leading plaintiffs to pursue the course they

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[13]Even if the district court's "proximate cause" analysis is applied, the court erred in granting summary judgment in the face of disputed issues of fact. In its oral ruling, the court specifically noted that it was resolving disputed issues of fact. For example:

> Also, I find that plaintiffs were represented by independent counsel during the critical time. The court recognizes a dispute as to this finding, but is convinced upon the record before me that the logical conclusion is that of representation by the law firm of Dow, Lohnes, et al.

Also,

> Those factors and other contained in the exhibits and the arguments lead me to the conclusion that on its face, the CPL Proposal would not have been a better business result for plaintiffs, absent the legal malpractice of the defendants.

Also,

> It is the finding that even given the breach of duty, the plaintiffs have not shown the malpractice of defendants caused plaintiffs' injuries, by use or abuse of confidential information gained by defendants in the representations of plaintiffs.

(Appendix, Exhibit 2, pp. 6-9.)

followed and such course led to plaintiffs' loss. In short, plaintiffs were entitled to the benefit of their bargain which they lost as a result of defendants' breaches. The court, however, rejected plaintiffs' causation standard and erroneously applied a standard applicable to malpractice claims based on negligence, and held that plaintiffs must prove a "reasonable likelihood" that they would have achieved a better business result absent defendants' conduct. Even under that standard, plaintiffs would prevail on the facts.

The court further erred when it weighed the evidence under the erroneous causation standard it did apply. That error was compounded when the court weighed the evidence within the defective framework proposed by defendants. The court ignored the critical facts that once defendants breached their duties of full disclosure in June 1986, those breaches set in motion a series of foreseeable events over which plaintiffs had no control. Because of defendants' breaches, plaintiffs were vulnerable to whatever Northstar and Allstate, with defendants' assistance, chose to do. The focus here is not on who made decisions to force the will of Northstar and Allstate on plaintiffs, or whether plaintiffs retained other counsel in an attempt to resist such decisions, but whether defendants' deliberate breaches of their duties of full disclosure, loyalty and informed consent created the circumstances in which plaintiffs' subsequent vulnerabilities were exploited. The answer to that question requires the jury, not the court, to consider and weigh all relevant facts. The summary judgment, therefore, should be reversed.

X. ARGUMENT

GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT.

A. SUMMARY JUDGMENT STANDARD.

The summary judgment standard requires the trial court to

> liberally construe the evidence and all inferences that may be reasonably drawn from the evidence in favor of the party opposing the motion. . . . "The trial court must not weigh evidence or assess credibility" . . . . [A] court should not make findings of fact. . . .

Dubois v. Grand Central, 872 P.2d 1073, 1076 (Utah Ct. App. 1994). The Supreme Court recently emphasized:

> [A] trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist. . . .
>
> "[I]t only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact."

Draper City v. Bernardo, 256 Utah Adv. Rep. 22, 25 (Utah January 19, 1995). The summary judgment here violates these standards.

B. UNDER THE PROPHYLACTIC STANDARD OF CAUSATION APPLICABLE TO BREACH OF FIDUCIARY DUTY CASES, AND VIEWING THE FACTS AND INFERENCES FROM THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, MATERIAL FACT ISSUES PRECLUDE SUMMARY JUDGMENT.[14]

The legal standard of causation in a client's claim against an attorney for intentional breach of fiduciary duties is a question of first impression in this jurisdiction. For summary judgment purposes, defendants conceded they owed plaintiffs fiduciary duties which they

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[14]This issue was raised, inter alia, at R 3365-67, 3937-39, 4007-08, 4016-29, 7142-57, 12725, 12729-30, 12736-39, 12740-53, 12754-55, 12757-59, 12763-67, 12783-84, 12786-88, and ruled upon by the court at R 12803-05, 12376-77.

breached.[15] Defendants argued that plaintiffs must prove that "but for" defendants' conduct in breaching their fiduciary duties, a "reasonable likelihood" existed that plaintiffs would have obtained a better business result. Had plaintiffs sued in negligence, that causation standard would be correct. A different causation standard applies in claims for breach of fiduciary duty.

1. Fiduciary Duty. Fiduciary obligations set a standard of "conduct," as distinguished from the standard of "care." Mallen & Smith, Legal Malpractice § 11.1 (3d ed. 1989). While the law of fiduciary duty involves proof of elements of duty, breach, causation and damages, courts regard as proof of these elements a different quality of evidence than in negligence claims.[16] The distinguishing purpose of the remedy in a breach of fiduciary duty case is to "remove all incentive to breach--not simply to compensate for damages in the event of a breach." ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 995-96 (2nd Cir. 1983).

Attorney-client relationships are "confidential" within the meaning of fiduciary law. Margulies v. Upchurch, 696 P.2d 1195, 1200-02 (Utah 1985); cf. Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985). Legally and ethically, attorneys must represent clients with undivided loyalty, disclose fully and fairly any matters materially bearing upon their representation of the client's interests, preserve client confidences, and take no advantage whatsoever of their position of trust and confidence for themselves or third parties. Mallen & Smith, at 631 (citing Smoot v. Lund, 13 Utah 2d 168, 369 P.2d 933 (1962)).

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[15]The trial court characterized the defendants' conduct as "outrageous and egregious behavior." (R 12805.)

[16]Negligence claims are based on standards of care. Williams v. Barber, 765 P.2d 887, 889 (Utah 1988); Harline v. Barker, 854 P.2d 595, 598 (Utah Ct. App. 1993). An attorney must exercise reasonable care in handling the client's matters. Reasonable care is based on standards of competence and diligence in the profession. Id. at 599-600

In Smoot v. Lund, 13 Utah 2d 266, 369 P.2d 933, 936 (1962), the Court said the fiduciary duty is "of the highest order and he must not represent interests adverse to those of the client. . . . He is not permitted to take advantage of his position or superior knowledge . . . nor to conceal facts or law." Likewise, the relationship prohibits an attorney from securing any advantage, whether from or of the client. Omega Inv. Co. v. Woolley, 72 Utah 474, 271 P. 797 (1928). Affirming these concepts in recent years, the Court explained that "[t]he law has long recognized that an attorney is held to the highest duty of fidelity, honor, fair dealing and full disclosure to a client." Margulies v. Upchurch, 696 P.2d 1195, 1201 (Utah 1985). The Court characterized the duties at page 1204:

> The practice of law is a profession whose members are granted a special privilege of holding themselves out as having the education, the skills and the integrity to give help and guidance to others in their affairs. . . .
>
> This includes that the attorney will become unreservedly identified with his client's interests and protect his rights. It means not only in dealing with the client's adversary, but also that the attorney will adhere to the ideals of honesty and fidelity with the client himself; and that he will not use his position to take any unfair advantage of the special confidence which the client is entitled to repose in him.

Washington D.C. law recognizes identical duties and standards, tying them directly to professional standards. Resolution Trust Corp. v. Gardner, 798 F. Supp. 790, 797 (D.D.C. 1992). In Avianca, Inc. v. Corriea, 705 F. Supp. 666, 679-80 (D.D.C. 1989), the court explained:

> [When a conflict of interest exists, the] attorney [must] first affirmatively make a full disclosure "of all the facts, legal implications, possible effects, and other circumstances relating to the proposed representation," and thereafter gains the informed consent of his client. . . . ("'Full disclosure' includes a clear explanation of the differing interests involved . . . and the advantage of seeking independent legal advice. It also requires a detailed explanation of the risks and disadvantages to the client . . . including any liabilities that will or may foreseeably accrue to him.")

The attorney has the burden to establish that "he made a full, affirmative disclosure and acted with the utmost good faith." Id. at 680.[17] Full disclosure is required so that clients have full information upon which to base their decisions in every case involving conflicting interests. Matter of James, 452 A.2d 163, 167 (D.C. App. 1982).

2. Breach.[18] An attorney cannot represent two adverse clients simultaneously unless he satisfies two requirements, one of which is obtaining the clients' informed consent. Margulies, 696 P.2d at 1203-04. Representing one client against another client, absent proper consent and disclosure, constitutes a breach of fiduciary duty, violating most, if not all, legal duties recognized under the relationship. Lack of disclosure and informed consent deprives the client of the opportunity to make free decisions concerning the course of action it will pursue.

Breach of an attorney's fiduciary duty of undivided loyalty also occurs when the attorney obtains a personal advantage or an advantage for others, whether consisting of an acquisition from the client or usurpation of an interest in or (business) opportunity concerning the subject matter of retention, or when any circumstances exist which create adversity to the client's interest. Mallen & Smith, §§ 11.1, 11.18, 11.19, 11.20, 11.23, and 12.1[19]; Avianca, Inc. v. Corriea, 705 F. Supp. 666, 681 (D.D.C. 1989).

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[17]Lawyers have created a sanctuary by crafting rules concerning loyalty and confidentiality, and they have benefitted from these ethics-imposed privileges. Lawyers simply cannot have it both ways. They must choose between serving their clients or serving themselves. By stepping into the role, they make the choice. Society is best served by a system that protects and enhances client trust in attorneys and preserves full and frank communication.

[18]Breach is "constructive fraud" which requires no proof of intent, but only breach of the obligations implicit in the relationship. Blodgett v. Martsch, 590 P.2d 298, 302 (Utah 1978). Constructive fraud has the same legal consequence as actual fraud. Faulkenberry v. Kansas City Southern Ry. Co., 602 P.2d 203, 206 (Okl. 1979).

[19]In the context of a "confidential" relationship, "any transaction that benefits the party in whom trust is reposed is presumed to have been unfair and to have resulted from undue influence and fraud." Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985).

3. Causation and Damages. "Causation" in a breach of fiduciary duty case differs from that in a negligence action. The nature and purpose of the attorney/client relationship is to encourage the client to make full confidential disclosures to and rely completely on the attorney. This places the attorney in an unusual position of control and power. Breach of a client's trust and confidence is devastating, but most often difficult to measure. The breach itself may create circumstances which prevent the client from establishing the "reasonable likelihood" of a better result. Thus, "[a]n action for breach of fiduciary duty is a prophylactic rule intended to remove all incentive to breach--not simply to compensate for damages in the event of a breach." ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d at 995-96.

Strict "but for" causation in claims based on breach of fiduciary duty is conceptually inconsistent with the purpose of the remedy. 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. Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2nd Cir. 1994).

These are not new concepts. Restatement (Second) of Agency, §§ 387-407. Cases involving usurpation of business opportunities, insider trading, and other abuses of positions of trust and confidence are myriad. For example, in Diamond v. Oreamuno, 24 N.Y.2d 494, 498, 301 N.Y.S.2d 78, 81, 248 N.E.2d 910, 912 (1969), a corporate fiduciary who was entrusted with inside information sold stock which resulted in injury to the stock purchaser but not to the corporation. The court permitted the corporation's action for breach of fiduciary duty and damages, explaining:

> [T]he function of such an action, unlike an ordinary tort or contract case, is not merely to compensate the plaintiff for wrongs committed by the defendant but, as this court declared many years ago "to prevent them, by removing from agents

> and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others, or to which their agency or trust relates."

Fiduciary principles apply with greater force in the lawyer/client relationship. In Milbank, Tweed, Hadley & McCloy, v. Boon, 13 F.3d 537 (2d Cir. 1994), for example, the court held that the law firm had breached its duties to a client by representing her former agent against her. The client sued Milbank for breach of fiduciary duties, and the jury awarded $2 million, the difference between what the client, had agreed to pay for certain assets and the selling price of those assets to her former agent, another client of the firm. Id. at 542.

On appeal, Milbank's principal defense, like the defense asserted by the Wiley Firm herein, was proximate cause--its conduct, regardless of its egregiousness, made no difference in the outcome. Id. The Second Circuit rejected that argument, beginning with a discussion of ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983), a case involving a fiduciary relationship but not that of attorney-client. In ABKCO, certain of the Beatles' business affairs, including those of George Harrison, had been handled by ABKCO and Klein, its president. Harrison Interests claimed that Klein had later interfered with settlement negotiations between Harrison Interests and another company in a dispute. As the Milbank court explained:

> Klein's status as former business manager added special credibility to the advice and information that he gave to the hostile company, making it less willing to settle with Harrison Interests. . . . Although it was unclear whether Harrison Interests would have settled with the company without ABKCO's interference, Klein's intrusion made the settlement less likely.

Id., 13 F.3d at 543. The Milbank Court observed at page 543:

> "[A]n action for breach of fiduciary duty is a prophylactic rule intended to remove all incentive to breach--not simply to compensate for damages in the event of a breach." . . . Having found that ABKCO's conduct constituted a breach of fiduciary duty, "the district judge was not required to find a 'but for'

relationship between ABKCO's conduct and the lack of success of Harrison Interests' settlement efforts."

Applying these principles to an attorney's breach, the court stated at pages 543-44:

> [I]n ABKCO . . . we indicated that the situation was similar, "although not wholly analogous" to side-switching cases involving attorneys and their former clients. . . . There is an even more compelling reason to apply a prophylactic rule to remove the incentive to breach when the fiduciary relationship is that of an attorney and former client because of the attorney's unique position of trust and confidence. Furthermore, breaches of a fiduciary relationship in any context comprise a special breed of cases that often loosen normally stringent requirements of causation and damages. . . .
>
> Milbank promised in writing not to represent Chan or Mrs. Leo after Chan's agency was terminated. Milbank then turned around, without consent, to pursue on behalf of Chan an amendment to the same transaction that it had previously negotiated on behalf of Mrs. Leo. . . . This constitutes a serious breach of fiduciary duty where a "prophylactic rule" should apply; Mrs. Leo does not have to show strict "but for" causation or proximate cause. . . . She has to show [only] that Milbank's representation of Chan was at least a substantial factor in preventing her from acquiring the second stage assets. . . . Milbank cannot enjoy impunity by showing that Mrs. Leo's loss might have resulted from other possible causes. . . .
>
> We need not and cannot determine whether or not Mrs. Leo would have successfully completed the transaction without Milbank's conduct against her interests.

Moreover, where an attorney intentionally breaches his fiduciary duties to his client, establishing the element of reliance is sufficient to show causation. See Alta Health Strategies, Inc. v. Kennedy, 790 F. Supp. 1085, 1097 (D. Utah 1992). This principle is illustrated in the analogous fraud context. If the subordinate party takes or fails to take some course of action in reliance on the acts or omissions of the dominant party and the subordinate party incurs loss, causation exists, even though he may or may not have incurred a similar loss elsewhere absent the fraud. To prevail, the subordinate party has no onus to prove he would have done better absent the fraud, another party would not have committed the same fraud against him, or some

other event would not have caused a similar loss.[20] As explained in Lochhead v. Alacano, 697 F. Supp. 406, 419 (D. Utah 1988):

> [D]efendants argue that plaintiff cannot successfully claim he relied upon any misrepresentations or omissions and that, therefore, the causal connection for his state claim of common law fraud is missing. Reliance and causation can be very closely related. "[U]se of the concept of reliance as a means of finding a connection introduces the factor of causation. . . ." Plaintiff claims that if he had not relied on the misrepresentations and omissions in corporate records and merger documents, he could have taken steps to protect his legal rights. . . . Plaintiff could have exercised his rights to persuade others to his view, to vote against the merger transaction, or to seek an appraisal. . . . Thus, plaintiff may have been able to interrupt the causal cycle if any irregularities had been disclosed.

"Reliance," as a principle of causation, was illustrated in Spector v. Mermelstein, 361 F. Supp. 30 (S.D.N.Y. 1972). There the attorney failed to advise his client of facts which raised questions concerning the advisability of making a loan. The court explained at pages 39-41:

> If an attorney negligently or willfully withholds from his client information material to the client's decision to pursue a given course of action, or to abstain therefrom, then the attorney is liable for the client's losses suffered as a result of action taken without benefit of the undisclosed material facts. . . .
>
> It is enough to say that a reasonable man, advised by his attorney that a corporation to which he was contemplating a substantial loan was without sufficient income to repay and otherwise in precarious financial condition, probably would not have made the loan.

On appeal, the Second Circuit in Spector further explained this causal relationship:

> The essential issue is whether the conduct of the defendant was a material element or a substantial factor in bringing about the loss. . . .
>
> > "It is not enough that the defendant, in an effort to break the chain of causation, should prove that plaintiff's injury might have resulted from other possible causes, nor is it required of the

[20]It is no defense to a breach of fiduciary claim that defendants' conduct, with all appropriate disclosures, would otherwise have been a reasonable business judgment. Fogel v. Chestnutt, 533 F.2d 731, 750 (2nd Cir. 1975).

> plaintiff that he eliminate by his proof all other possible causes."
> . . .
>
> Thus Spector, having been led into making the $250,000 in loans without being advised of material facts . . . was placed in the position of seeing his money go down the drain . . . Mermelstein, by placing his client in this precarious position, was a substantial factor in bringing about Spector's loss . . . .

Spector v. Mermelstein, 485 F.2d 474, 480-81 (2nd Cir. 1973).

Under the principles enunciated above, material fact issues exist on whether defendants' conduct was a "substantial factor" in bringing about plaintiffs' losses. Had defendants not breached their fiduciary duties of full disclosure and informed consent in the first instance, the MWTC Partners could have evaluated their position "in light of defendants' conflicting interests" and made an informed decision concerning how to proceed and protect their interests. They would have pursued a different course of action.

Defendants claim that plaintiffs' losses resulted, in any event, from other circumstances or causes. Defendants cannot enjoy impunity by showing that plaintiffs' losses might have resulted from other possible causes. Indeed,

> [i]f proximate cause is ultimately a question of fairness and policy, imposing liability on these facts is both fair and good policy. Lawyers who fail to inform clients of their own interests, fail to advise clients to seek other counsel, unabashedly sell their clients the notion that an investment with them or their colleagues is a good and safe one, and use their clients as sources of investment funds [or television licensing opportunity], must accept responsibility for the outcome. Lawyers may not burrow their way into their clients' confidences and then exploit those confidences for their own ends.

Profit Sharing Trust for Marprowear Corp. v. Lampf, Lipkind, Prupis, Petigrow & Labue, 267 N.J. 174, 630 A.2d 1191, 1203 (1993) (emphasis supplied). In any event, it is a fact question.

Thus, plaintiffs need only show that (a) they relied upon defendants who undertook to represent them with undivided loyalty, (b) defendants' breaches were a substantial factor in

leading plaintiffs to pursue the course of action they took, and (c) such course of action resulted in a loss. At the very least, disputed issues of material fact exist as to each of these matters. The standard does not require plaintiffs to show a reasonable likelihood of a better business result. Any result other than what actually occurred is irrelevant to the inquiry. It was error for the trial court to apply a negligence causation standard and to grant summary judgment.

C. EVEN UNDER THE "REASONABLE LIKELIHOOD" STANDARD, AND VIEWING THE FACTS AND INFERENCES FROM THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, MATERIAL FACT ISSUES PRECLUDE SUMMARY JUDGMENT.[21]

In malpractice claims based on negligence, Utah Courts require proof that "but for" the attorney's negligence, there was a "reasonable likelihood" the outcome of the matter as to which the attorney was negligent would have been better. Williams v. Barber, 765 P.2d 887, 889-90 (Utah 1988). Harline v. Barker, 854 P.2d 595, 600 (Utah Ct. App. 1993) ("The client must show that if the attorney had adhered to the ordinary standards of professional competence and had done the act he failed to do or not done the act complained about, the client would have benefited") (emphasis added).[22] The trial court applied this standard. Plaintiffs' burden, at most, was to present a material fact question concerning the matter, under a preponderance standard.[23]

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[21]This issue was raised, inter alia, at R 3365-87, 3938-42, 4016-29, 7142-57, 12736-39, 12740-53, 12754-55, 12757-59, 12763-68, 12776-88, and ruled upon by the court at R 12803-07, 12376-77.

[22]By its terms, this proximate cause analysis applies to standards of care (competence), as distinguished from standards of conduct (loyalty and confidentiality).

[23]"Reasonable likelihood," in this specific context, has not been defined by Utah appeals courts. In Harline, this Court suggested it was based on whether a reasonable juror could conclude that but for the act or omission, the client would have been "helped." Id. at 601. "Reasonable likelihood" of ultimate success does not mean "that factually there be absolute assurance of ultimate success, but only that there be some reasonable hope." Stern v. Day, 1989 Del. Ch. Lexis 89, 96 (August 3, 1989). Cases in the criminal context give additional guidance. State v. Knight, 734 P.2d 913, 919 (Utah 1987), for example, suggests a standard akin to "may have made a difference in the outcome."

The trial court ruled as a matter of law that but for defendants' conduct there was no "reasonable likelihood" of a better business result. This ruling was erroneous in several respects. First, the court ignored critical facts in the record, some of which are undisputed. Second, the trial court weighed evidence and drew inferences in favor of defendants rather than in favor of the non-moving parties. Finally, in practical effect and based on the record before it, the trial court elevated the standard of "reasonable likelihood" to one of near certainty. "But for" defendants' breaches of their fiduciary duties, under the "reasonable likelihood" standard, there would have been a better business result than what occurred. At the least, genuine issues of material fact exist on the question, precluding summary judgment.

Discussion concerning the "reasonable likelihood" of a better business result is fact-intensive. Before examining what the business result might reasonably have been "but for" defendants' breaches, and to draw the proper comparison, the Court first must consider what the actual business result was.

ACTUAL BUSINESS RESULT: Defendants' breaches of their duties of full disclosure and informed consent in June 1986, and the chain of subsequent breaches and events resulted in plaintiffs' (a) entire loss of the license and all financial interest in the station, (b) loss of their capital contributions, (c) loss of employment benefits and opportunities, and (d) $2 million potential indebtedness based on the "cash call." In effect, plaintiffs lost the benefit of their bargain with Northstar. Is there evidence in the record upon which a fact finder could conclude that "but for" defendants' breaches, a "reasonable likelihood" exists that plaintiffs would have experienced a better result? Doing nothing but keeping their former jobs, plaintiffs would have experienced a better business result.

The facts in the record, and the reasonable inferences from those facts, considered in the light most favorable to plaintiffs, establish a "reasonable likelihood" that plaintiffs would have achieved a better business result but for defendants' breaches of their fiduciary duties of full disclosure, informed consent and loyalty.

NORTHSTAR: Had defendants not breached their fiduciary duties and created the conditions in which Northstar/Allstate could take advantage of plaintiffs' vulnerabilities, a jury could conclude that a "reasonable likelihood" existed that Northstar/Allstate could have been compelled to follow through with their original $10 million commitment. A jury could conclude that had the Wiley Firm represented plaintiffs faithfully and zealously in their dealings with Northstar, the Firm necessarily would have taken affirmative steps to safeguard plaintiffs' interests and that Northstar/Allstate would have honored their commitment. Instead, having themselves created the very conditions for the squeeze down, the Wiley Firm then helped Northstar/Allstate change the commitment and force the changes on plaintiffs. Northstar's own projections establish what the result would have otherwise been.[24] Under those projections, the result clearly would have been better than the losses and injury plaintiffs incurred.

CPL: A genuine issue of material fact exists concerning whether plaintiffs would have achieved a better business result had they accepted the CPL financing offer. Had defendants, in June 1986, disclosed to plaintiffs the conflicting representations and all facts and effects of such representations on plaintiffs' interests, plaintiffs would have altered their course of action by accepting the CPL offer or by seeking financing from other sources.

[24]Under Northstar's projections, plaintiffs' interest in the station would have had a value of between $13 million to $24.6 million by the end of 1991. (R 7059.)

CPL had agreed to put up $10 million plus a $1 million contingency "to permit MWTC to construct, own and operate [the station]." (R 7091-94.) Had Mr. Wood not advised the MWTC Partners to take the Northstar commitment and to turn down CPL, plaintiffs would have had a 40% interest in the venture instead of the 38% interest they ultimately acquired. (R 9829-34, 4038, 6530, 6554.) In addition, CPL did not require that control of the venture be given to CPL. (R 7091-94.) Even if plaintiffs had received only $8 million, which was sufficient to buy out the competing permit applicants and put Channel 13 into operation, the station would have succeeded in direct competition with Channel 20. The study prepared by plaintiffs' expert demonstrates that under such circumstances, plaintiffs' interest in the station would be approximately $20 million. Thus, the trial court erred by concluding, as a matter of law, that but for defendants' conduct, plaintiffs could not have achieved a better business result. Material issues of fact exist in this regard.

OTHER FINANCING: Finally, "but for" defendants' breaches of fiduciary duties of full disclosure in June 1986, plaintiffs could have settled with the other applicants or sought financing elsewhere. They testified they would have done so had they known of defendants' conflicting interests and the facts relating to those conflicts. Mr. Wood stated that the station was of "immense value." He advised plaintiffs that industry conditions for independent stations were excellent and he enclosed illustrations of the favorable market conditions. Two investors eagerly stepped forward, making commitments of $10 million and $11 million, respectively.[25] They projected a successful and lucrative venture based on their respective commitments. Barry

[25]It also came out that at one point Adams was interested in expanding its holdings of communication properties, which interest was directly adverse to that of Northstar. Absent the Wiley Firm's conflicting representations of Northstar, Adams and MWTC, MWTC could have been promptly and properly advised of Adams' interest and entered arms-length negotiations.

Wood advised plaintiffs to go with Northstar instead of CPL. Plaintiffs relied on this advice. Mr. Wood informed CPL's representatives of that decision. At that point, plaintiffs were unaware of defendants' numerous conflicts of interest and the facts and consequences of those conflicts. In reliance on defendants, therefore, plaintiffs did not pursue, nor with Northstar's $10 million commitment did they have a reason to pursue, other financing alternatives.

Based upon these facts, a fact finder could reasonably conclude that "but for" defendants' breaches in June 1986, there was a "reasonable likelihood" that plaintiffs could have obtained the $8 million to buy out the other applicants and put the station into operation. Had they been able to do so in the summer and fall of 1986, the station would have succeeded and plaintiffs had a "reasonable likelihood" of achieving a better business result.

D. DEFENDANTS CANNOT PASS RESPONSIBILITY FOR THEIR BREACHES TO THEIR OTHER CLIENTS; VIEWING THE FACTS AND INFERENCES FROM THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, MATERIAL FACT QUESTIONS EXIST ON WHETHER DEFENDANTS' BREACHES CAUSED PLAINTIFFS INJURIES, PRECLUDING SUMMARY JUDGMENT.[26]

The classic argument is made repeatedly by attorneys: "I am not the client, and I cannot be blamed for the conduct of my client if it injures someone with whom my client transacts." This argument, which the trial court accepted below, is wholly beside the point. Lawyers usually are not their own clients and generally do not simultaneously represent adverse interests. If an attorney owes no fiduciary duty to the person with whom his client transacts business or ventures, he generally cannot be found to have breached a duty to that non-client.

The trial court's ruling, however, overlooks the fact that defendants owed fiduciary duties to the persons with whom Northstar transacted business. Defendants' June 1986 breaches set

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[26]This issue was raised, inter alia, at R 3368, 3376-83, 3938-42, 4008-09, 7138-42, 12727-29, 12750-53, 12764-72, 12782-88, 12788-90, and ruled upon by the court at R 12805-06, 12377.

in motion a chain of events in which Northstar/Allstate, with the assistance of the Wiley Firm as their attorneys, 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. Thus, it is not Northstar's conduct that is scrutinized or is even necessarily blameworthy, but the attorney's breaches. The attorney's conduct becomes the centerpiece of the controversy. The degree of incestuousness of defendants' relationships with their more prestigious clients, and their personal interest in the outcome, are relevant insofar as they expose the degree of the defendants' breaches of the fiduciary duties they owed the plaintiffs.

In re D.H. Overmyer Telecasting Co., 77 B.R. 128 (Bankr. N.D. Ohio 1987), addresses the fallacy of defendants' argument and the trial court's summary judgment. There the attorney had represented both the debtor, Telecasting, and a creditor interest in negotiating a settlement that was ultimately disadvantageous to the debtor. The attorney conceded the malpractice and conflicts of interest, but contended that the breaches of duties were not the cause in fact nor the proximate cause of Telecasting's harm. He argued that "but for" his malpractice, the creditor client would have found an alternative method to accomplish the same end. The court responded:

> Arguing illusory occurrences as an attempt to sidestep the facts as they exist, is untenable. . . . It is not enough that the defendant, in an effort to break the chain of causation, should prove that plaintiff's injury might have resulted from other possible causes.

Id. at 171-72.

Like defendants herein, the attorney in Overmyer argued that it was not his conduct, but that of his unscrupulous other client, that proximately caused the loss. The court rejected that argument, stating at page 172:

> [E]ven if it was conceded that the actions of Overmyer were an independent and intervening force, [the attorney] could not be insulated since he could, or should have, foreseen the risk that Overmyer would attempt to defraud the Telecasting bankruptcy estate that [the attorney] represented. . . . Nothing indicates [the attorney] could not anticipate or foresee the actions by Overmyer. . . . Moreover, this Court has determined that [the attorney] affirmatively acted to preserve Overmyer's interest in the . . . settlement, undercutting any realistic notion that [the attorney] could not foresee Overmyer's continued transgressions with respect to the Telecasting estate.
>
> It is not a valid argument that Overmyer committed the frauds and took advantage of the settlement provisions offered by [the attorney], since [the attorney] had the duty to protect the creditors' interests against just the type of activities for which he is now found liable.

Similarly, the Court in Johnson v. Miller, 596 F. Supp. 768, 773 (D. Colo. 1989), enunciated the significance of the attorney's role in affirmatively protecting a client's interest by anticipating the illicit plans of others:

> Miller argues that any dissipation of Fund assets were [sic] caused by the actions of Chilcott and did not in any way involve Miller's legal representation. Thus, Miller claims that Chilcott's actions were superseding causes of the Fund's injuries. As an attorney, Miller's duty to his client may have entailed anticipating Chilcott's illicit plans and giving the Fund adequate warnings of Chilcott's actions or structuring the legal activities of the Fund in such a way as to prevent Chilcott's actions from dissipating the Fund's resources. Miller fails to demonstrate that his actions were free from causing the plaintiff's loss so as to sustain a motion for summary judgment.[27]

Despite the facts showing that Mr. Wiley counseled and, as a director, was actually involved in the corporate decisions that damaged plaintiffs, defendants argued that had Mr. Wiley "vanished" from the decision-making bodies of clients whose interests were adverse

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[27]Because clients typically seek the attorney's advice and counsel in matters relating to third parties, the attorney who breaches his fiduciary duty to one client simply cannot place the blame on another client for the first client's injury, especially when the attorney creates the circumstances and vulnerabilities which enable the second client to do what he did. That, however, is what defendants attempt to do here.

The facts here are significantly more egregious than those in Overmyer because of defendants' devastating and continuing breaches. Mr. Wiley did not simply represent separate clients in a conflicting situation, as the attorney did in Overmyer. He breached his duties in other ways. He engaged in self-dealing and actively promoted the interests of his wealthier clients.

to those of plaintiffs, the result would have been the same. He would have been outvoted had he dissented from what the other directors wanted to do. This argument ignores the true nature of decision-making on such boards where people are free to speak and persuade. It ignores Mr. Wiley's stature and influence, as well as the clear facts which show that Mr. Wiley and his Firm advised Northstar on the very matters at issue, and then, as a director, Mr. Wiley voted in favor of specific actions directed against plaintiffs.

It also ignores the fact that Mr. Wiley had affirmative duties to advance and protect the interests of his first clients, not simply sit passively while another client made decisions and took advantage of the first client. Mr. Wiley did not do so. Viewing the facts in the light most favorable to plaintiffs, therefore, material fact issues exist on whether defendants' breaches caused plaintiffs' injuries, precluding summary judgment.

E. THE QUESTION OF WHETHER OTHERS' CONDUCT MITIGATED THE EFFECT OF DEFENDANTS' BREACHES IS IRRELEVANT; VIEWING THE FACTS AND INFERENCES FROM THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, MATERIAL FACT QUESTIONS EXIST ON WHETHER DEFENDANTS' BREACHES CAUSED PLAINTIFFS INJURIES, PRECLUDING SUMMARY JUDGMENT.[28]

Defendants argued that despite their fiduciary breaches, plaintiffs were represented at critical stages by separate counsel, and defendants' breaches were thus superseded or ameliorated by others' conduct. Plaintiffs disputed both factual assertions, and although the trial court expressly recognized the factual disputes, it weighed the facts and took the matter from the jury.

[28]This issue was raised, inter alia, at R 3370-76, 4008-11, 7160-65, 12732-36, 12775, 12777-78, 12780, and ruled upon by the court at R 12805, 12376.

1. MATERIAL FACT ISSUES EXIST ON WHETHER PLAINTIFFS WERE REPRESENTED BY SEPARATE COUNSEL AT CRITICAL TIMES.

The question of what others may have done in an effort to ameliorate the effects of defendants' breaches is irrelevant to the initial proximate cause inquiry. However, to the extent the inquiry could be construed to present a question of superseding cause, the inquiry precludes summary judgment. The issue of whether plaintiffs were represented by separate counsel at critical times is fact-intensive.

The Wiley Firm had represented MWTC and its partners' exclusive interests over five years before Northstar came onto the scene. The Wiley Firm continued to represent plaintiffs' interests, uninterrupted, throughout 1986. The type and character of the services for plaintiffs never changed prior to the November 1986 squeeze-down, and there was no reason for plaintiffs to believe that the representation was any different than it had previously been.

During the mid-November 1986 squeeze-down, Mr. Wood called three of the plaintiffs, his Utah clients, and advised and counseled them on legal matters relating to events taking place in Washington, D.C. During and after the squeeze-down, Mr. Wood challenged attorneys in his firm concerning the fact that MWTC and its partners were clients of the Wiley Firm, that Northstar's commitment of $10 million had been reduced to less than $7 million at the November meetings, and that defendants owed duties to MWTC and its partners as clients of the Wiley Firm. He risked his employment due to what he perceived as the Firm's violations of professional duties to plaintiffs. Plaintiffs testified that Mr. Wood and the Wiley Firm were their attorneys and that plaintiffs relied on them as their attorneys at all critical stages. That representation remained uninterrupted.

Mr. Hardy came onto the scene sometime in the summer of 1986 when the Foulger Family sought his services as a financial advisor in reviewing information and projections given to MWTC by Mr. Wood. Although the MWTC Partners later learned he was an attorney, they understood he was a close friend of the Foulgers and was serving as a financial advisor to them. Plaintiffs testified Mr. Hardy was not their attorney until long after the squeeze-down. There are disputed issues of fact regarding these matters. It was improper for the trial court to weigh the facts and rule as a matter of law that Mr. Hardy was plaintiffs' lawyer at critical times.[29]

2. EVEN ASSUMING PLAINTIFFS WERE REPRESENTED AT CRITICAL TIMES, A FACT QUESTION EXISTS ON WHETHER THE SUBSEQUENT REPRESENTATION MADE ANY DIFFERENCE.

Defendants' argument is akin to claiming that Mr. Hardy's involvement constituted an independent intervening cause. An intervening cause is an independent event, not reasonably foreseeable, that completely breaks the connection between the defendants' fault and the plaintiffs' injury. Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah Ct. App. 1991) (and cases cited therein). Even assuming that Mr. Hardy somehow represented plaintiffs and worked to mitigate the effects of defendants' breaches, defendants remain liable for the effects of their breaches. There is at the very least a question of fact concerning whether subsequent representation of plaintiffs by other attorneys altered or could have undone the sequence of events set in motion by defendants' breaches in June 1986.

In order for a cause to supersede the attorney's breaches, (a) the superseding cause must occur after the original fault, (b) it must not be the consequence of the attorney's fault, (c) it

[29]There is no showing whatever that Mr. Hardy ever advised plaintiffs regarding the nature and extent of defendants' numerous conflicts of interest and the inherent risks, or even that he was aware of the nature, extent and risks of such conflicts. There is also no evidence of a retainer agreement or engagement letter.

must bring about a result that would not otherwise have followed from the original fault, and (d) it must not be reasonably foreseeable. E.g., Wartnick v. Moss & Barnett, 490 N.W.2d 108 (Minn. 1992); Gibralter Savings v. Commonwealth Land Title Ins. Co., 907 F.2d 844, 848 (8th Cir. 1990). As a matter of law, defendants cannot meet (b), (c) or (d).

Regardless of how defendants attempt to characterize Mr. Hardy's involvement, it lacks several characteristics of an intervening cause. First, it was in no way "independent" of defendants' breaches. To the extent Mr. Hardy was involved, it was directly because of defendants' breaches. Had defendants properly represented plaintiffs' interests, there would have been no need for another attorney to attempt to protect their interests. Second, the result of defendants' original fault followed despite Mr. Hardy's alleged involvement. Third, the need for Mr. Hardy's involvement was a clearly connected and foreseeable result of defendants' breaches. Finally no one claims that Mr. Hardy's conduct in attempting to ameliorate the effects of defendants' breaches was negligent. Thus, the question of independent intervening cause is irrelevant, and defendants must be held liable for the effects of their breaches.[30] At the very least, there are issues of material fact as to these matters.

Courts have addressed similar superseding cause arguments in the context of a legal malpractice claim. For example, in Ackerman v. Schwartz, 733 F.Supp. 1231 (N.D. Ind. 1989), certain investors sued attorneys who had written a tax opinion. Defendants contended that plaintiffs' injuries were caused by others' diversion of funds and not by their misrepresentations or omissions in the opinion. Plaintiffs claimed that absent the diversion of funds, they still would have lost. The court explained at pages 1238-39:

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[30]In a long history of cases, Utah appeals courts have recognized the fact-intensive nature of the superseding cause inquiry. See Steffensen v. Smith's Management Corp., 820 P.2d 482 (Utah Ct. App. 1991); Harris v. Utah Transit Authority, 671 P.2d 217 (Utah 1983); Jensen v. Mountain States Telephone & Telegraph Co., 611 P.2d 363 (Utah 1980).

> The plaintiffs have presented evidence that tends to show that, even absent the diversion of funds, misrepresentations . . . would have produced the same result. . . .
>
> The plaintiffs can establish a sufficient causal link between the misrepresentations or omissions in the opinion letter and the claimed losses if they can show that the subject of some of the alleged misrepresentations or omissions might have been relevant to the loss. . . . Whether these consequences were known to, or foreseeable by, the defendants . . . presents a genuine issue of material fact foreclosing summary judgment on causation grounds.[31]

Here, with or without Mr. Hardy's involvement, plaintiffs incurred loss as a direct and proximate result of defendants' breaches. As plaintiffs' expert Ronald Mallen testified, Mr. Hardy's representation of plaintiffs could not have ameliorated the devastating course of events created by defendants' initial breaches in June 1986, not to mention the ongoing breaches. (R 11743-44, 11748, 11750-51, 11757, 11767, 11770.) At the very least, a disputed issue of material facts exists on this question.[32]

F. VIEWING THE FACTS AND INFERENCES FROM THE FACTS IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS, MATERIAL FACT QUESTIONS EXIST ON WHETHER DEFENDANTS' BREACHED THEIR DUTY OF CONFIDENTIALITY TO PLAINTIFFS.[33]

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.

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[31]See also Cline v. Watkins, 135 Cal. Rptr. 838, 66 Cal. App. 3d 174, 176 (1977) (whether substitution of new counsel who fails to cure results of first attorney's fault relieves first attorney of liability is at the very least a question of fact based on foreseeability of second attorney's failure); cf. Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994) (retention of new attorneys in an effort to ameliorate the effects of defendants' breach was not relevant to the causation inquiry).

[32]See also In re D.H. Overmyer Telecasting Co., 77 B.R. 128 (Bankr. N.D. Ohio 1987) (discussed above); Johnson v. Miller, 596 F. Supp. 768 (D. Colo. 1989) (discussed above); Spector v. Mermelstein, 485 F.2d 474, 480-81 (2nd Cir. 1973) (discussed above).

[33]This issue was raised, inter alia, at R 3368, 3383-86, 3939, 3944-45, 4021-22, 7158-60, 12753-54, and ruled upon by the court at R 12804-05, 12376.

Liability for breach of the duty of loyalty, including full disclosure, does not depend solely on misuse of confidential information. As shown above, once defendants breached their duties of loyalty and full disclosure in June 1986, each subsequent breach by defendants, including their breach of the duty of confidentiality, was simply part of a chain of events set in motion by defendants' earlier breaches of their duties of full disclosure and informed consent. Because of the insidiousness of breaches of fiduciary duties, courts, including Washington, D.C. courts, recognize the existence of an irrebuttable presumption that counsel received information during the first representation that is relevant to the second representation where two related matters are handled by the same counsel. Brown v. District of Col. Bd. of Zoning Adj., 486 A.2d 37, 42 (D.C. App. 1984). In addition, plaintiffs testified they provided a considerable amount of confidential information to the Wiley Firm over a five-year period, and Mr. Wood so acknowledged.

The Wiley Firm admits it owed a duty of confidentiality to plaintiffs. Defendants, of course, deny obtaining or using any such information, despite the fact that as attorneys for Northstar, Allstate, Farragut, Adams, and MWT, Ltd., the Firm had a duty to obtain and use whatever information would be to those clients' advantage.[34]

The defendants in ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2nd Cir. 1988), made similar arguments which the court rejected. The court explained that an agent has a duty "not to use confidential knowledge acquired in his employment in competition with his principal." Id. at 994. The court explained that the information obtained through the

[34]In this regard Ronald Mallen stated it was inconceivable that defendants would not use information they had about plaintiffs. Failing to do so would be a breach of fiduciary duties to Northstar/Allstate. (R 11735-36.)

confidential relationship provides the agent tremendous leverage, not unlike the improper use of insider information, in bargaining against his principal:

> To a significant extent, the favorable bargaining position necessarily was achieved because Klein, as business manager, had intimate knowledge of the financial affairs of his client. Klein himself acknowledged at trial that his offers . . . were based, at least in part, on knowledge he had acquired as Harrison's business manager. . . .
>
> We find this case analogous to those "where an employee, with the use of information acquired through his former employment relationship, completes, for his own benefit, a transaction originally undertaken on the former employer's behalf."

Id. at 994-95.

As suggested by ABKCO, confidential information is a much broader concept than defendants will admit. It includes more than "secrets" or "confidences." It includes all information that the client conveys to the attorney, including inferences the attorney may draw from that information. One example is information concerning the financial vulnerability of a client, which can be used against the client. In the present case, there are disputed issues of material fact, regarding, among other things, whether (a) defendants knew that plaintiffs were unable financially to resist the defendants' and their other clients' actions at the squeeze-down and subsequently, (b) defendants knew plaintiffs were very concerned about their personal liabilities and had no choice but to accede to defendants' and their other clients' actions, and (c) defendants, therefore, could and did misuse that confidential information and exploit those vulnerabilities.

The facts also show that defendants obtained client information regarding plaintiffs' financial condition, personalities, employment, goals, strategies and business practices not available to other parties with whom plaintiffs did business. Indeed, because of their unusual

position of trust, the Wiley Firm had the ability to access, use, understand and manipulate circumstances and information in a manner beneficial to them and their other clients and detrimental to plaintiffs. As plaintiffs' expert Ronald Mallen stated, knowing plaintiffs' vulnerabilities, which included their inability to resist defendants' and their other clients' actions, gave Northstar/Allstate tremendous leverage for demands. Defendants then misused that information and leverage. Regarding the mid-November meetings, Mr. Mallen vividly described the significance of such information:

> It goes to what kind of deal they can do. It goes to how you can structure the deal to make them vulnerable. It goes to their personalities, how you can manipulate them.

(R 11735.)

A jury, based on the evidence and the reasonable inferences that can be drawn, could reasonably conclude that such information proved invaluable and was misused while dealing against plaintiffs on behalf of Northstar and Allstate, and while dictating the changes from the earlier Northstar/Allstate commitment. The trial court ignored much of the evidence and reasonable inferences of misuse of confidential information, and weighed other evidence submitted by defendants in concluding that there was no disputed issue of material fact on the question of misuse of confidential information. The summary judgment on this issue, therefore, must be reversed.

XI. CONCLUSION

The Order of Summary Judgment must be vacated and the case remanded for trial under the appropriate standard of causation.

DATED this 15th day of March, 1995.

SNOW, CHRISTENSEN & MARTINEAU

By _____

Gordon R. Hall
Reed L. Martineau
Rex E. Madsen
Richard A. Van Wagoner
Attorneys for Appellants

APPENDIX

1. Statement Regarding Calendar Assignment
2. Bench Ruling, 1/7/94
3. Order, 3/7/94

EXHIBIT 1

Statement Regarding Calendar Assignment

EXHIBIT 1

STATEMENT REGARDING CALENDAR ASSIGNMENT

Plaintiffs believe that the relevant standard of causation in a breach of fiduciary duty case against a lawyer is a question of first impression in Utah. Therefore, plaintiffs believe that the case cannot be resolved within existing and controlling precedent, and that the case is appropriate for assignment to the fully reasoned opinion calendar.

EXHIBIT 2

Bench Ruling, 1/7/94

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

JO-ANN W. KILPATRICK, GEORGE L. GONZALES, JOSEPH C. LEE, SIDNEY W. FOULGER, CLAYTON F. FOULGER, BRYANT F. FOULGER, BRENT K. PRATT, and MWT CORPORATION, a Utah corporation,	)	
Plaintiffs,	)	
vs.	)	CASE NO. 900901064 CV
WILEY, REIN & FIELDING, a professional law partnership, and RICHARD E. WILEY,	)	
Defendants.	)	

* * * * *

BEFORE THE HONORABLE GLENN K. IWASAKI

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Ruling of the Court)

SALT LAKE CITY, UTAH

JANUARY 7, 1994

COMPUTER-AIDED TRANSCRIPTION

A P P E A R A N C E S

FOR THE PLAINTIFF:

RICHARD A. VAN WAGONER
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145

FOR THE DEFENDANT:

DANIEL L. BERMAN
PEGGY A. TOMSIC
50 South Main, Suite 1250
Salt Lake City, UT 84144

SALT LAKE CITY, UTAH; JANUARY 7, 1994; A.M. SESSION

THE COURT: This is in the matter Kilpatrick, et al. vs. Wiley, Rein & Fielding and Richard Wiley, personally, case number 900901064. Appearances, please.

MR. VAN WAGONER: Richard Van Wagoner for the plaintiffs. Mr. Madsen, I guess he is in deposition. Mr. Martineau plans to be here.

THE COURT: Thank you, Mr. Van Wagoner.

MR. BERMAN: Dan Berman and Peggy Tomsic for the defendant, your Honor.

THE COURT: Thank you, Mr. Berman and Ms. Tomsic.

Before I begin my remarks on this matter, and this is for the purpose of stating my ruling on the motion that I heard yesterday, I want to give just some observations as to how this lawsuit has progressed before me.

It is obvious that I was fairly new to the bench when I was first hit with a barrage of motions in this matter and I took the opportunity to acquaint myself with the factual basis for this, as well as some of the legal issues. This occurred back, I believe, September of '92, something like that. And in my opinion, this is the kind of work, the kind of issues and the kind of presentations that make lawsuits an interesting endeavor, makes my job interesting. I think both parties have vigorously

supported their positions, have effectively argued their positions, worked over holidays, vacations and I only feel it is fair the court--if the parties and the attorneys are going to go the extra mile like that, then the court obviously is expected and should very well try to accommodate both parties in reaching a just resolution in this matter and I attempted to do so.

Although it was very laborious in the amount of pleadings and memoranda that was supplied to the Court, I found that it was absolutely necessary that I, at least, acquaint myself with the very legal issues that were involved in here and the manner which both sides have presented them to me. In that regard I appreciate the efforts by both plaintiffs' attorneys and defendants' counsel in this matter and the attempt to try to educate the court as to the issues and procedures involved here.

I just make those statements without any other indication prior to my ruling in this matter, but I do thank both sides for the manner which this case has been presented to me.

As to defendants' renewed motion to dismiss defendant Richard Wiley personally in this matter, that was submitted to me on memorandum and very brief argument on it, accordingly, I am going to deny the motion to dismiss Richard E. Wiley on the basis as I had denied it before.

If I am wrong in this matter, at least I am consistently wrong. That will be the ruling of the court.

Now, as to the dispositive motion for summary judgment or partial summary judgment on the issue of causation, there is no question that proximate cause and legal malpractice actions contains two prongs:

Number 1. It requires that the breach of the lawyers' duty claim be the "but for," that being the direct and substantial cause of the plaintiffs' injuries and loss. And it is required that the plaintiffs show in the absence of the legal malpractice, claimed a "reasonable likelihood" that the better business or legal result for which plaintiffs' claimed damages would have been achieved.

Defendants, for the purpose of this motion, concedes the relationship, a duty and breach of duty. If this action were solely for the establishment of ethical violations in legal malpractice, these concessions would lead to only one conclusion, i.e. the defendants committed legal malpractice.

However, as previously stated, proximate cause must be shown to exist. Very simply, defendants say that even given the legal malpractice, plaintiffs have not and cannot show a factual and legal nexus between the conceded actions of defendants and the damages to plaintiffs.

Plaintiffs on the other hand have said that the

factual concessions by defendants in and of themselves are sufficient to defeat defendants' motions. It is their position that given the breach of duty as owed to plaintiffs, and the fact that plaintiffs suffered economic injury, the damages were a direct result of the breach.

Plaintiffs further state that "but for" the initial and continuous breaches of duty, the plaintiffs would not be in their present situation and would not have been set upon and taken advantage of by defendants in defendants' efforts to promote their own selfish interests as well as interests of other bigger, wealthier clients at the expense of plaintiffs.

Plaintiff say that due to the relationship between plaintiffs and defendants, the defendants became intimately aware of plaintiffs strengths and most importantly weaknesses that the defendants exploited.

This vulnerability of plaintiffs has been generally alleged by the plaintiffs but with no specific factual references. There has been no factual showing that any confidential information gained by defendants' representation of plaintiffs was ever used, misused or abused.

It is necessary for plaintiffs not only to dispute but establish a factual basis as to genuine issue of material fact to defeat defendants' motion. Not used

pejoratively, but for want of better words, the plaintiffs appear to bootstrap conceded relationship, duty, and breach to proximate cause based solely upon the outrageous and egregious behavior of defendants. This is a legal and factual leap that the plaintiffs ask me to take to deny defendants' motion.

It is the finding that even given the breach of duty, the plaintiffs have not shown the malpractice of defendants caused plaintiffs' injuries, by use or abuse of confidential information gained by defendants in the representations of plaintiffs.

Also, I find that plaintiffs were represented by independent counsel during the critical time. The court recognizes a dispute as to this finding but is convinced upon the record before me that the logical conclusion is that of representations by the law firm of Dow, Lohnes, et al.

Even though plaintiffs urge me to examine the business dealings of business entities involved and find them to be one and the same as the defendants, the record is clear in that it is not the case. While there certainly was representation of the various nonparty business entities by defendants, the record does not support the plaintiffs' position that they and the defendants were and are one and the same. Even assuming that the first prong

of proximate cause has been established or controverted to the extent of denying defendants' motion, the "reasonable likelihood" component must be analyzed.

"Reasonable likelihood" is a somewhat self-defining term that does not include conjecture and/or speculation. Plaintiffs have said that if there was full disclosure by defendants of conflict, they would have fired defendants and pursued the much more attractive proposal by CPL without the hindering of the defendants. CPL's proposal was the only other possible alternative available to plaintiffs.

Analysis of the CPL proposal show that: 1) it was only a proposal. It was indefinite in a lot of aspects and conditions. And one can only specuclate if it would have gotten any better through further negotiations without the hindrance of defendants.

2) There was a significant difference in the total amount of money committed with serious questions of whether the $3.3 million necessary to buy competing bids would be available.

3) The control issue of 60 percent by CPL for its commitment versus 49 percent--the eventual 49 percent from Northstar for its commitment on its face questioned the better business deal.

Those factors and others contained in the

exhibits and the arguments lead me to the conclusion that on its face, the CPL proposal would not have been a better business result for plaintiffs, absent the legal malpractice of the defendants. Therefore, based upon my analysis, defendant's motion for summary judgment is granted.

Mr. Berman, Ms. Tomsic, please prepare the appropriate papers.

MR. BERMAN: Thank you, your Honor.

THE COURT: Anything further?

MR. VAN WAGONER: No, your Honor.

MR. BERMAN: Thank you very much.

THE COURT: With that, we are in recess.

(Proceedings concluded.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
: SS.
SALT LAKE COUNTY)

I, NORA S. WORTHEN, an official court reporter for the Third Judicial District Court in and for Salt Lake County, State of Utah, do hereby certify that I reported stenographically the proceedings in the matter of Jo-Ann W. Kilpatrick et al. vs. Wiley, Rein & Fielding, et al., Case No. 900901064 CV, and that the above and foregoing is a true and correct transcript of said proceedings.

Dated this 7th day of January 1994.

Nora S. Worthen, CSR, RPR
Utah License No. 22-106373-7801

EXHIBIT 3

Order, 3/7/94

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Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, 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, Plaintiffs, v. WILEY, REIN & FIELDING, a professional law partnership, and RICHARD E. WILEY, Defendants.	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Civil No. 900901064CV Honorable Glenn K. Iwasaki

This matter having come on for hearing on January 6, 1994 on Defendants' Motion for Summary Judgment, or in the alternative, for Partial Summary Judgment on the issue of proximate cause; the Court having reviewed the memoranda, affidavits, and exhibits filed by Plaintiffs and Defendants, having heard oral argument and being duly advised in the

premises; and the Court having issued an oral ruling on the record on January 7, 1994 granting Defendants' Motion for Summary Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. On the record it is incontrovertible that the Plaintiffs were represented during the critical time by their own lawyers Dow, Lohnes & Albertsons. Despite a factual dispute as to this finding, no reasonable jury could find to the contrary.

2. There is no showing that the Defendant lawyers breached their professional duties to Plaintiffs by using, misusing, or abusing any confidential information of the Plaintiffs on any occasion.

3. On the record it is uncontroverted that the Defendant lawyers were not and are not one and the same as Northstar Communications, Inc., Farragut Communications, Inc., or Allstate Insurance Company, business nonparties.

4. The Plaintiffs have not made a sufficient showing that any breach of duty or conduct by the defendant lawyers of which the Plaintiffs complain was the "but for" cause of any loss, injury or damage claimed by any Plaintiff.

5. The Plaintiffs have not made a sufficient showing that, in the absence of any breach of duty or conduct of the Defendant lawyers of which the Plaintiffs complain, there is a "reasonable likelihood" the better result with regard to each transaction for which the Plaintiffs claim damages would have

been achieved. Indeed, the record establishes that the proposal made by CPL in 1986 was the only other possible alternative available to Plaintiffs, and the CPL proposal on its face would not have been a better business result for Plaintiffs, absent the legal malpractice of Defendants.

6. Proximate cause is an essential element of the Plaintiffs' claims of legal malpractice.

7. Proximate cause requires that the breach of the lawyer's duty claimed be the "but for" -- direct and substantial -- cause of the Plaintiffs' injury and loss.

8. Proximate cause, in addition to a showing of "but for" cause, requires that the Plaintiffs show, in the absence of the legal malpractice claimed, a "reasonable likelihood" that the better business or legal result for which Plaintiffs claim damage would have been achieved.

9. Although the Plaintiffs have made an adequate showing that the Defendant lawyers breached their professional duties to the Plaintiffs, the Plaintiffs have failed to make a sufficient showing that any breach of duty or conduct by the defendant lawyers proximately caused any Plaintiff any loss, injury or damage.

10. There being no material issues of fact as to one of the essential elements of the Plaintiffs' claims of legal malpractice -- proximate cause, the Defendants' Motion for Summary Judgment be and the same is hereby granted.

DATED this 7th day of March, 1994.

BY THE COURT:

Honorable Glenn K. Iwasaki

APPROVED AS TO FORM:

SNOW, CHRISTENSEN & MARTINEAU

Attorneys for Plaintiffs

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL ORDER NOT ON FILE IN THE THIRD JUDICIAL DISTRICT IN SALT LAKE COUNTY, STATE OF UTAH.

DATE: March 10, 1994

DEPUTY COURT CLERK

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the within and foregoing ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ISSUE OF CAUSATION was hand-delivered this 10th day of March, 1994, to:

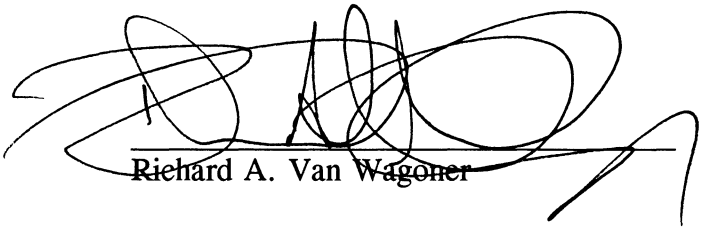
Harold G. Christensen, Esq.
Reed L. Martineau, Esq.
Rex E. Madsen, Esq.
Richard A. Van Wagoner, Esq.
Rodney R. Parker, Esq.
SNOW CHRISTENSEN & MARTINEAU
Attorneys for Plaintiffs
10 Exchange Place, Eleventh Floor
Salt Lake City, Utah 84111

Debbie Ashton

ORDRDSMS.385

CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of March, 1995, I caused two (2) true and correct copies of the BRIEF OF APPELLANTS to be hand-delivered to Daniel I. Berman and Peggy A. Tomsic of Berman, Gaufin & Tomsic, 50 South Main, #1250, Salt Lake City, Utah 84144, Attorneys for Respondents.



Richard A. Van Wagoner