## Attorney Liability to Non-Clients:
## Two Scenarios Related to Aiding and Abetting Alleged Client Wrongdoing

Willamette Valley American Inn of Court

Team Johnnie

November 16, 2016

(1) Janet Hoffman & Sarah Adams, *'Through a Glass, Darkly' or the Lawyer Who Ends Up a Client*, OREGON STATE BAR LITIG. J., Winter 2009.

(2) Applicable Statutes
   a. ORS 59.115
   b. ORS 59.127
   c. ORS 59.135
   d. ORS 59.137

(3) Applicable Case Law
   a. *Prince v. Brydon*, 207 Or 146 (1988)
   b. *Granewich v. Harding*, 329 Or 47 (1999)
   c. *Reynolds v. Schrock*, 341 Or 338 (2006)

(4) Thomas M. Tongue, *Lessons from Securities Litigation*, PROF. LIABILITY FUND IN BRIEF, June 2009.

# 'Through a Glass, Darkly' or the Lawyer Who Ends Up a Client

from *Oregon State Bar Litigation Journal*, by Janet Hoffman, Sarah Adams, Winter 2009

Click to download "'Through a Glass, Darkly' or the Lawyer Who Ends Up a Client"

**"After a case has been tried and the evidence has been sifted [...], a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay."**[3]

As litigators we pride ourselves on our ability to take the "sand and clay" we are initially given and develop it to persuade others that our client's position is correct. We view it as our professional duty to use our skill and credibility on another person's behalf. Ultimately, through passion and dedication we end up believing in our client's case, even when our friends and colleagues express skepticism.

The difficulty lawyers face is to know when to step back and question the facts and circumstances when immersed in the work of zealous advocacy. Of course, many lawyers say, "If I have to investigate my own clients before acting on their behalf, I don't want them as clients." Or, put another way, "I am entitled to trust my client and what he has told me."

These sentiments are understandable. But, without such investigation, we risk that the opinion letter we draft, the affidavit we provide, the demand letter we send, or the recommendation we give to withhold from production privileged documents, will be viewed in a different—even criminal—light. When facts that we represented as true turn out to be false, these routine acts of representation could become the grounds for a criminal indictment (against the lawyer and/or the client) or the basis for a disciplinary action by the Bar.

Generally, under Bar disciplinary rules, attorneys are not sanctioned for statements made in reliance on a client's misrepresentation. However, an attorney may face criminal liability for such statements even when the attorney had no knowledge of the client's deception.

RECENT PUBLICATIONS

The Juror as Audience: The Impact of Non-Verbal Communication at Trial

In the Yashanee Vaughn Case, Protecting the Right to Effective Legal Counsel: Guest Opinion

Presenting and Challenging Expert Testimony: Winning the Battle and the War

Below is a brief survey of the regulations and criminal doctrines that counsel should be aware of when deciding whether it is necessary to obtain more facts before advocating on a client's behalf.

## I. Criminal and Regulatory Proceedings

Even if you have no knowledge that your client has given you false information, you are still at risk of criminal prosecution if you make misrepresentations to the court, opposing counsel or third parties in reliance on false information from your client. Prosecutions of lawyers have been brought absent evidence of deliberate misrepresentations, including prosecutions for mail and wire fraud, money laundering, racketeering, obstruction of justice, and perjury, among others.

For example, in *U.S. v. Beckner*, the government charged a former U.S. attorney and prominent trial lawyer with four counts of aiding and abetting his client's wire fraud, obstruction of justice, and perjury. He was convicted on the aiding and abetting counts based solely on actions that most of us would consider routine representation: an argument in a brief that securities law did not apply to certain notes, rejection of an associate's proposal that the firm interview investors, a decision not to produce documents based on assertion of a Fifth Amendment privilege, and a misquoted comment in a newspaper.[4] Indeed, reversing his conviction on appeal, the Fifth Circuit observed that the conviction was based solely on "what trial counsel is supposed to do."[5]

Joseph Collins, an established transactional lawyer at Mayer Brown, is currently facing similar charges for actions he took during his representation of the now-bankrupt commodities broker Refco. The indictment accuses him of preparing misleading documents sent to investors, filing materially false statements with the SEC, and structuring transactions designed to improperly shuffle debt between Refco and third parties for accounting purposes.[6] Mr. Collins faces charges of securities fraud, wire fraud, and filing false statements with federal regulators.

As *Beckner* illustrates, investigations and prosecutions of lawyers based on their representation of clients are not limited to far-fetched or extreme circumstances. To avoid misuse of such actions, the Justice Department instituted internal procedures that govern the investigation and prosecution of attorneys based on their representation of clients.[7] Worrisome to counsel, these procedures contemplate nonprosecution agreements with clients under investigation in exchange for testimony against their attorneys.[8]

### A. Mail and Wire Fraud

Although mail and wire fraud are probably the last thing on your mind when you are preparing a letter, e-mail or filing for a client, these federal crimes carry hefty maximum prison sentences and fines,[9] and, as interpreted, do not require an actual intent to defraud or actual knowledge of the misrepresentation.[10] Under Ninth Circuit precedent, both the intent and knowledge elements of these crimes can be shown by recklessness.[11] Nor is it necessary to show that the perpetrator of the fraud expected to profit or benefit personally from the fraud.[12] As a result, mail and wire fraud present surprisingly low hurdles for prosecution and should concern attorneys who communicate with third parties on behalf of their clients.[13]

Consider the following scenarios:

A lawyer helps a long-time client prepare a letter to one of the client's lenders. The lawyer knows the letter will be e-mailed to the lender who will rely on information in the letter to decide whether to call certain loans to the client. The lawyer does not fact-check the letter, relying instead on the client and its accountant for the facts.

A lawyer drafts an opinion letter knowing it will be mailed to investors in his client's business. The letter is designed to calm investor's fears. The lawyer relies on facts about the client's business supplied by the client who the lawyer knows is desperate and under extreme stress at the time. The lawyer knows the client will likely go under if the investors balk.

What is the likelihood that the attorney will be held liable for mail or wire fraud when the facts in these scenarios ultimately turn out to be false or misleading? *The issue turns on what is reckless and what can be inferred from the lawyer's relationship with the client.*

Courts define reckless as a conscious disregard of a substantial and unjustifiable known risk.[14] The question then is what quantum of information tips a lawyer off that the situation is not what is being represented by the client. In other words, is the lawyer disregarding information that should lead him to doubt the truthfulness and accuracy of the client's statement? Cases in non-attorney contexts suggest that, such things as relying on a client's memory of a key date or other detail without checking to see if the client verified the accuracy of her memory could constitute disregarding a known risk that the client's recollection is inaccurate. Relying on a client's extravagant claims without any further investigation may also constitute a reckless disregard for the truth.[15] In such circumstances, if the lawyer proceeds without investigation and it turns out the client's representation is inaccurate, both the client's and the lawyer's credibility are damaged and both may be subject to fraud charges.

In holding that specific intent to defraud may be proved by a showing of recklessness, the Ninth Circuit has also effectively modified the good faith defense generally available to require some level of investigation or diligence (*i.e.,* no recklessness). Other circuits continue to recognize the traditional good faith defense—*i.e.,* an honest belief in the truth or a showing of honest mistake excuses otherwise fraudulent conduct.[16] Courts in the Ninth Circuit, however, have held that a defendant is not entitled to a good faith instruction because it would be duplicative of a proper instruction on specific intent—in other words, if specific intent is proven, good faith is necessarily disproven.[17] Thus, because specific intent can be proven by recklessness alone, good faith is disproven by recklessness.

Of course, the government can prove actual knowledge of the misrepresentation by circumstantial evidence. Reviewing courts have held that evidence that a lawyer had a particularly close relationship with the client was sufficient to prove knowledge of the client's fraud, despite no direct evidence of the lawyer's knowledge. In one wire fraud case, the court suggested that knowledge of a client's misrepresentation may be inferred by the jury from "an intimate association with the client's activities," such as that of an in-house lawyer.[18] But, in that case, where the lawyer was outside trial counsel, the court concluded that the evidence was not sufficient to support an inference that the lawyer knew about the client's fraud. There, the court observed that the lawyer was not a confidant or everyday advisor to the client, that he specifically disclaimed sophistication in the matters later called into question (SEC matters), and that he sought assistance from other lawyers with expertise in those matters.[19] Similarly, another reviewing court held that a lawyer's act of simply "papering a

deal" or acting as a mere "scrivener" was insufficient to infer knowledge of a client's misrepresentation.[20] In contrast, a lawyer's acts of vouching for and promoting his client have been sufficient to support a jury's inference of knowledge.[21]

The line between a lawyer who papers a deal and a lawyer who vouches for a client can be murky, however. In *Schatz v. Rosenberg*, where the court held that merely papering a deal could not support inferred knowledge of the client's underlying misrepresentation, the lawyer had drafted a contract that included client misrepresentations but had not participated in contract negotiations or solicitations. Other courts have held that the evidence was insufficient when the attorney's involvement was limited to revising or reviewing documents[22] or drafting documents where general misstatements contained therein could not be "specifically attributed" to the lawyer.[23] On the other hand, the evidence was sufficient to support an inference of knowledge in *Bonavire v. Wampler*, where the lawyer made personal affirmative representations about the client such as vouching that he was an "honest straightforward businessman."[24]

The risk a lawyer will be held to have knowledge of a client misrepresentation increases the more the lawyer is personally involved in the deal. In *Bonavire*, the court noted that the lawyer not only vouched for the client but also acted as the escrow agent for the parties.[25] When a lawyer is also a friend of, investor in, or partner with the client, or receives fees in the form of shares in the client company the likelihood of inferred knowledge increases even more.[26] It is no surprise that multiple cases have successfully been brought under those circumstances.[27]

In summary, because the mens rea elements of mail and wire fraud may be satisfied by a showing of recklessness or inferences drawn from the lawyer's relationship with the client or the lawyer's acts of promoting or vouching for the client, a lawyer should conduct sufficient independent investigation and analysis of the client's facts to feel confident in them before presenting them to third parties. The greater the lawyer's connection to the client, the higher the risk to the lawyer if the representations turn out to be inaccurate. Lawyers who have a pecuniary interest in the client's venture, a long-term relationship, a friendship or other particularly close relationship with the client are particularly at risk of being deemed to have acted recklessly or to have knowledge of or motive to participate in the fraud.

### B. Other Criminal Statutes

**a. Securities Fraud**[28]

As is the case under the federal mail and wire fraud statutes, a lawyer can face liability under the state and federal securities laws without actual knowledge of the fraud or misrepresentation. Under federal securities law, the accused must have the intent to defraud buyers or sellers of securities and knowledge of the misrepresentation.[29] However, as in the mail and wire fraud context, the Ninth Circuit has held that reckless disregard for the truth satisfies these elements.[30]

Oregon law is more expansive than federal securities law in its scope. In Oregon, the attorney who drafts fraudulent securities offering material can be criminally liable under the Oregon Securities Fraud statute, ORS § 59.115(3).[31] Although the statute does not specify the culpable mental state required for a criminal conviction, the Oregon Court of Appeals has affirmed a criminal conviction where the prosecution plead and proved knowing misrepresentation.[32] However, the far lesser mens rea of negligence may also be sufficient. Arguably, because the

securities statute is outside the criminal code and contains no mental state, ORS 161.605(3) applies, which allows criminal liability based on criminal negligence only.[33] Each criminal violation of the Oregon Security Fraud statute constitutes a Class B felony punishable by up to 10 years in prison and a $250,000 fine.[34]

**b. Obstruction of Justice**

Consider the following scenario: A client company asks if it can delete some flippant internal e-mails. No action has been filed against the client, but the client and the lawyer are aware of a weblog that has accused the CEO of insider trading and inflating reported revenue. The client assures the attorney that the accusations are unfounded and were made by a disgruntled employee. Concluding that the e-mails are not relevant to the accusations, are highly prejudicial, and deleting them is consistent with the client's document retention policy, the attorney tells the client that it is alright to delete the e-mails. Ultimately both criminal and SEC actions are brought against the client and, in the face of a government subpoena, the client says, "my lawyer told me I could destroy the records."

Is the lawyer guilty of obstruction of justice? If so, the lawyer could face up to 20 years in prison.[35]

Traditionally, obstruction of justice required a corrupt intent to obstruct a pending official proceeding.[36] Clearly, the lawyer in the above scenario would not be guilty of traditional obstruction. But, as modified by Sarbanes-Oxley, obstruction in many contexts no longer requires a pending proceeding[37] and, where the obstruction is of a federal agency investigation, it no longer requires a corrupt intent.[38] Under the obstruction actions created by Sarbanes-Oxley, it is sufficient that the defendant contemplated the possibility of a proceeding at the time the obstruction occurred.[39] And, in the context of non-pending federal agency proceedings (*e.g.,* SEC investigations), the defendant need not have acted with corrupt intent.[40] Under this laxer standard, the lawyer in the scenario above could face liability because the lawyer knew a proceeding was theoretically possible (in light of the disgruntled employee's complaint on the weblog) and nevertheless recommended deleting the e-mails. Although the lawyer did not intend to destroy relevant evidence, the lawyer intended to delete prejudicial e-mails, thus possibly satisfying the lesser mens rea (*i.e.,* by intentionally impeding fact finding, albeit of irrelevant facts).[41]

A corrupt intent is still required to prove obstruction in other contexts (*e.g.,* judicial investigations and proceedings and pending agency proceedings).[42] The Supreme Court has defined "knowingly corruptly," the mens reain Section 1512(b)'s witness and jury tampering prohibition, as consciousness of wrongdoing, where wrongdoing is wrongful, immoral, depraved, and evil acts. [43] Despite this, an Oregon attorney was convicted of obstruction (but granted a new trial) based only on circumstantial evidence of knowledge.[44] There, the attorney received a call from a client who was in jail pending a criminal trial. The client asked the attorney to wind up the affairs of a small business unrelated to his crime. The client provided a list of instructions to relay to one of his employees, which included the location of a hidden envelope that he wanted destroyed. The attorney passed on the information and was subsequently arrested and prosecuted for obstruction of justice. The attorney argued that he thought he was legitimately helping his client secure his property and business assets in anticipation of a lengthy sentence; he testified that "none of the flags were up," that he thought the letter was a love letter. The government's theory of criminal intent was that any reasonable person, especially an attorney, would have known he was being asked to impair or destroy evidence when someone in

jail calls him and requests that something be destroyed. The government did not argue that the attorney assisted in the destruction of the envelope to advance any personal interest of the attorney.[45]

A financial stake in the client's business can be particularly problematic if the attorney is later accused of obstruction. Not only can the financial interest provide evidence of corrupt intent, it may provide a basis for viewing otherwise routine acts of representation as obstruction. In *U.S. v. Cueto*, a federal agent working undercover as a corrupt state liquor agent had solicited a bribe from the client as part of a sting operation on the client's illegal gambling operation. The attorney reported the corrupt state agent to the state, asked the state prosecutor to file charges against the agent, and subsequently filed a civil complaint in state court alleging the agent was corrupt. Referring to the attorney's financial interest in the client's illegal gambling operation, the court concluded that the attorney's motions and filings constituted obstruction.[46]

The law does provide a safe harbor under 18 U.S.C. § 1515(c): an attorney cannot be prosecuted for providing lawful, bona fide, legal services. But this safe harbor may provide little help when corruptly impeding legal process is by definition unlawful and otherwise legal motion practice can be "corrupt" in the wrong context. Particularly in agency investigations, where corrupt intent is not required, the risk that an attorney's presumably lawful, bona fide advice (*e.g.,* that a client need not produce a privileged document) may constitute obstruction is worrisome.

## II. Bar Disciplinary Proceedings

The Oregon Rules of Professional Conduct prescribe the ethical standards for Oregon lawyers. Under the Rules a lawyer cannot assist a client in illegal conduct (Rule 1.2); a lawyer cannot make a materially false statement or omission of fact or law to a third person (Rule 4.1); a lawyer cannot knowingly make a materially false statement to a tribunal (Rule 1.6); and, broadly, a lawyer cannot engage in conduct involving dishonesty or misrepresentation (Rule 8.4).[47]

The Rules of Professional Conduct do not directly address whether or to what extent an attorney must investigate the accuracy of a client's statements. The Rules require actual knowledge of a misrepresentation, but recognize that knowledge may be inferred from the circumstances.[48] Mere recklessness by an attorney as to the accuracy of his own statement will not subject him to discipline, however.[49]

Clearly, an attorney has actual knowledge when the client has informed the attorney of a fact.[50] The question is what circumstances trigger an inference of knowledge. In the following two examples, actual knowledge was not inferred from the circumstances:

Upon hearing his client's mother testify that his client was not the father of her child, an attorney got "an inkling" that paternity was in question and believed further investigation was warranted. Later, without conducting any independent investigation, the lawyer prepared and filed an affidavit for his client, in which the client averred that he was the father. The court concluded that the evidence did not establish that the lawyer knew he was making a misrepresentation and therefore the conduct did not constitute disciplinable conduct.[51]

After conducting only a "cursory" review of a filing, an attorney filed bankruptcy schedules that contained material errors. The attorney considered his role in the filing to be minimal; he did not prepare the filing, sign it, or review the attached

bankruptcy schedules for accuracy. He also had not participated in the client's business operations. The court concluded that the evidence did not establish that the attorney acted "knowing that his conduct was culpable" and therefore the conduct was not disciplinable.[52]

However, the court did conclude that the following evidence was sufficient circumstantial evidence of a knowing misrepresentation in a letter drafted by an attorney to constitute disciplinable conduct: (1) the lawyer had participated in the negotiations underlying the representations in the letter; (2) the lawyer personally vouched for the information in the letter (the letter began with a statement that the accused lawyer's signature was intended to confirm the representations contained in the letter); and (3) the lawyer admitted that he had read the letter in its entirety with an eye toward confirming the truth of the legal matters it contained and the representation at issue was conspicuously listed and legal in nature.[53]

In summary, a mere suspicion or inkling of a client misrepresentation is not sufficient to trigger a duty to investigate under the Rules. Nor do the Rules generally sanction reckless or careless reliance on client representations.[54] As in the criminal context, however, knowledge may be inferred where a lawyer has vouched for the client or the representation at issue.

## III. Practice Tips

Traditionally, the Oregon Bar has enjoyed a congenial relationship with state and federal prosecutors. Many of the cases discussed above come from other jurisdictions. However, to protect both themselves and their clients, lawyers should undertake reasonable precautions to assure that the representations they make to third parties on their clients' behalves are accurate.

In relying on your client's statements, especially under exigent circumstances and tight time constraints, you will provide the maximum protection to your client and yourself if you step back and question the facts, viewing them as critically as the lawyer on the other side would. Talk to the key players, review the main documents and determine for yourself if what you are being asked to say or do on your client's behalf makes sense in terms of the big picture. This assessment does not undercut the lawyer's duty of zealous advocacy. Rather, it allows the lawyer to better serve the client. Your client may not always have the clearest sense of the facts or what statements are in their best interest, especially when they are betting their company's or their financial future. It is easy to rush in and advocate for a factual position that—with time to investigate—turns out to be inaccurate. Such misrepresentations imperil both the client's and the lawyer's credibility and create possible criminal exposure. It is best in the words of the old cliché to "Stop, Look and Listen" to all the facts before crossing the street.

Of course, even after taking the precaution of stopping, looking and listening to the facts, a lawyer may still unwittingly act as a spokesperson for a client misrepresentation—whether in court or to the press, shareholders, potential investors, or some other third party. Recent fraud and obstruction cases provide examples of steps lawyers can take to minimize the risk that routine acts of representation will result in prosecution and conviction. For example, you should keep detailed log notes of your clients' statements, the investigations you conduct, and the expert opinions you obtain. You should carefully avoid stepping over the line from advocacy to vouching. If you do become aware your client has implicated you as the lawyer in a fraud or has committed perjury or violated a discovery rule, you must counsel your client of the need to immediately correct the misrepresentation or violation and you must insure the misrepresentation or

violation has in fact been corrected. If your client refuses to grant you authority to correct the misrepresentation or violation, you should withdraw. In any event, if you believe your client intentionally used you to perpetrate a fraud, there is a conflict of interest that warrants withdrawal. During a judicial proceeding, when a misstatement occurs, counsel must take steps to immediately correct the misstatement or move to withdraw. If not allowed by the court to withdraw, counsel must ensure that the misstatement is not integrated as part of trial counsel's advocacy. Lawyers with personal, financial, long-term, or other close relationships with their clients should undertake these steps with extra care.

---

[1] 1 Corinthians 13:12.

[2] Thanks and credit also go to Erin J. Snyder and Adam Gibbs for their assistance with preparation of this article.

[3] Nix v. Whiteside, 475 U.S. 157, 190 (1986) (Stevens, J. concurring).

[4] U.S. v. Beckner, 134 F.3d 714 (5th Cir. 1998). Donald Beckner's client was under investigation by the SEC for fraudulently soliciting investments. The SEC obtained a preliminary injunction preventing the client from soliciting funds unless he used his own assets for security. In apparent compliance, the client continued fund raising by granting collateral mortgages on his residence. In response to suggested irregularities, Mr. Beckner took corrective action, but did not interview investors. Later, after learning that his client was improperly withholding investor files from the SEC, Mr. Beckner withdrew from the representation.

[5] 134 F.3d at 721. Mr. Beckner was tried *three times* for wire fraud based on these actions before his conviction was reversed on appeal.

[6] Indictment,U.S. v. Collins, Cr. 01170-LBS-1 (S.D.N.Y Dec. 17, 2007).

[7] *See, e.g.,* United States Attorney's Manual (USAM) at 9-2.032, 9-13.420 (notice, search warrant and subpoena requirements); Dec. 10, 1999 Blue Sheet from Assistant Attorney General James K. Robinson (recusal considerations); Department of Justice Criminal Resources Manual at §§ 2306-2307 (civil and criminal forfeiture requirements related to attorneys' fees).

[8] USAM at 9-2.032. *See* U.S. v. Wallach, 935 F.2d 445, 458 (2d Cir. 1991) (overturning conviction of lawyer based on perjured client testimony).

[9] 18 U.S.C. §§ 1341 and 1343. The statutory maximum for mail and wire fraud is 20 years and/or a $250,000 fine (30 years and/or $1 million fine if a bank is involved).

[10] The mail and wire fraud statutes expressly require a scheme to defraud using the mails or wires and a specific intent to defraud. *Id.* §§ 1341 and 1343.

[11] *See, e.g.,* U.S. v. Munoz, 233 F.3d 1117, 1136 (9th Cir. 2000); U.S. v. Beecroft, 608 F.2d 753, 757 (9th Cir. 1979). Of course, evidence of willfulness would also suffice for conviction. Such willfulness is found where there is a "high probability" of fraudulent conduct coupled with a deliberate avoidance of the truth. U.S. v. McDonald, 576 F.2d 1350, 1358 (9th Cir 1978).

[12] *See, e.g.,* DeMier v. U.S., 616 F.2d 366, 369 (8th Cir. 1980) (citing Calnay v. U.S., 1 F.2d 926 (9th Cir. 1924)).

[13] In *Collins*, the four counts of wire fraud are based on four e-mails: one from the law firm's Chicago office to its New York office, attaching a redline version of a letter from the client to an investor, and three others from the law firm to representatives of investors. Indictment at 51-52, *supra* note 6. Although the indictment alleges intent to defraud and knowledge of misrepresentations, it does not reveal what facts the government will rely on to prove those elements.

[14] U.S. v. Albers, 226 F.3d 989, 995 (9th Cir. 2000) (recklessness is deliberate disregard of a substantial and unjustifiable known risk); Farmer v. Brennan, 511 U.S. 825, 837 (1970) ("The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.").

[15] *See* U.S. v. Petry, 67 Fed. App'x 433, 434 (9th Cir. 2003) (defendant's failure to confirm terms of his restraining order prior to buying a handgun was reckless); U.S. v. Cusino, 694 F.2d 185, 187 (9th Cir. 1982) (inventor's failure to confirm claim that invention amplified energy by a 9:1 ratio was reckless).

[16] *See, e.g.*, U.S. v. Alkins, 925 F.2d 541, 550 (2d Cir. 1991); U.S. v. Williams, 728 F.2d 1402, 1404 (11th Cir. 1984) (failure to give jury instruction that good faith is a complete defense is error where any evidentiary basis exists for defense). Where good faith is recognized as a complete defense, the prosecution has the burden of disproving the defendant's good faith.

[17] *See, e.g., Cusino*, 694 F.2d at 188; U.S. v. Shipsey, 363 F.3d. 962, 967 (9th Cir. 2004).

[18] *Beckner*, 134 F.3d at 720.

[19] *Id.*

[20] Schatz v. Rosenberg, 943 F.2d 485, 495 (4th Cir. 1991).

[21] Bonavire v. Wampler, 779 F.2d 1011, 1014-15 (4th Cir. 1985).

[22] Renovitch v. Kaufman, 905 F.2d 1040 (7th Cir. 1990).

[23] Friedman v. Arizona World Nurseries, Ltd., 730 F. Supp. 521, 533 (S.D.N.Y. 1990)
[24] 779 F.2d at 1014.

[25] *Id.* at 1016.

[26] There is no express prohibition on such intermingling of business and professional relations between attorney and client. The Oregon Rules of Professional Conduct prohibit an attorney entering into a business transaction with a client where their interests will be adverse (ORPC 1.8(a)). The Rules also prohibit acquiring a proprietary interest in ongoing litigation (ORPC 18(i)).

[27] *See, e.g.*, U.S. v. Wolf, 820 F.2d 1499, 1503 (9th Cir. 1987); U.S. v. Olano, 62 F.3d 1180 (9th Cir. 1987).

[28] For a detailed treatment see, Marc I. Steinberg, *The Corporate/Securities Attorney as a "Moving Target,"* 46 Washburn L. J. 1 (Fall 2006).

[29] 15 U.S.C §§ 78j(b) and 78ff; 17 C.F.R § 240.10b-5.

[30] U.S. v. Tarallo, 380 F.3d 1174, 1188-89 (9th Cir. 2004). Attorneys may also be liable under the Securities Exchange Act in SEC enforcement actions and third-party civil actions. 17 C.F.R. § 240.10b-5. Although the Supreme Court reaffirmed last term that there is no private cause of action for aiding and

abetting securities fraud, secondary actors such as attorneys can be *primarily* liable under the Act in both the civil and enforcement contexts. Stoneridge v. Scientific-Atlanta, 128 S.Ct. 761, 771 (2008). Moreover, attorneys can be liable for aiding and abetting securities fraud in the SEC enforcement context. Primary liability can attach to a lawyer who makes a directly attributable statement (such as in an opinion letter) or who drafts an SEC document that the client subsequently files, even if the filing is not signed by or attributed to the lawyer. S.E.C. v. Wolfson, 2008 WL 4053027 at *10 (10th Cir. Sept. 2, 2008). In enforcement actions under section 10b-5, the SEC must prove that the lawyer (or other secondary actor) caused misstatements or omissions to be made with knowledge that those misstatements would reach investors. *Id.*

[31] O.R.S § 59.115(3). To prove a violation or civil liability under the Oregon securities fraud statute, the prosecutor or plaintiff need only prove that the defendant made a negligent misrepresentation or omission (as well as the other elements of the offense); no intent to defraud is required. State v. Pierre, 30 Or. App. 81, 86
(1977).

[32] State v. Jacobs, 55 Or. App. 406, 414 (1981).

[33] *See id.* (observing without further discussion that prosecutor elected to bring criminal charges pursuant to O.R.S. 161.105(3) provision); *see* O.R.S. § 165.105(3) ("the culpable commission of [an offense defined by a statute outside the Oregon Criminal Code] may be alleged and proved, in which case criminal negligence constitutes sufficient culpability").

[34] O.R.S. §§ 59.991, 59.995, 161.605, and 161.625.

[35] *See* 18 U.S.C. § 1519 (providing for fines and a maximum prison term of 20 years); *see also id.* § 1512(k) (penalty for conspiracy to commit Section 1512 obstruction subjects conspirators to same penalties as those proscribed for the underlying offense).

[36] Under the traditional obstruction statute,18 U.S.C. § 1503, a grand jury authorized investigation (U.S. v. Aguilar, 515 U.S. 593 (1995)) or civil suit (U.S. v. Lundwall, 1 F.Supp.2d 249 (S.D.N.Y. 1998)) must be underway at the time the obstruction occurred. The defendant also has to know or have notice of the proceeding. U.S. v. Frankhauser, 80 F.3d 641, 650 (1st Cir. 1996).

[37] 18 U.S.C. §§ 1512(f) and 1519.

[38] *Id.*§ 1519 (including knowingly destroying a document with the intent to impede an investigation).

[39] *Id.*§§ 1512(f) and 1519 (no pending proceeding required); *see also* Arthur Anderson LLP v. U.S., 544 U.S. 696, 707-708 (2005) (holding that Section 1512 obstruction, which imposes liability for knowingly corruptly obstructing a non-pending official proceeding, requires that the proceeding must have been contemplated by defendant).

[40] 18 U.S.C. § 1519.

[41] *See id.* § 1512(f)(2) (the document need not be admissible or free from a claim of privilege).

[42] *See, e.g., id.* §§ 1503 (corrupt intent required to obstruct pending judicial proceedings), 1505 (corrupt intent required to obstruct administrative and congressional proceedings and inquiries) and 1512(c) (corrupt intent required to obstruct pending or non-pending judicial proceedings).

[43] *Arthur Andersen*, 544 U.S. at 705; *see also id.* at 705 n.9 (observing that definition of knowingly corruptly may not apply to Sections 1503 or 1505, where the word "corruptly" is not modified by the word "knowingly") and 707 ("corrupt" conduct cannot be innocent).

[44] U.S. v. Kellington, 217 F.3d 1084 (9th Cir. 2000).

[45] *Compare* U.S. v. Cueto, 151 F.3d 620, 631 (7th Cir. 1998) (facts showing attorney's financial interest in client's illegal operation established corrupt intent to obstruct investigation of that operation).

[46] *Id.*

[47] ORPC 1.2, 4.1, 1.6, and 8.4(a)(3) respectively. ORPC 8.4(a)(3) does not specify a mental state. However, this rule—almost identical in substance to former DR 1-102(A)(3) and (4)—has been interpreted to require knowledge. *See, e.g.*, Formal Opinion No. 2005-34, *In re* Hoffman, 14 D.B. Rptr. 121 (2000).
[48] ORPC 1.0(h).

[49] *See, e.g., In re* Skagen, 342 Or. 183, 203-204 (2006) (recklessness as to accuracy of billing statement not dishonest conduct under ORCP 8.4).

[50] *In re* Hawkins, 305 Or. 319, 324 (1988) (client told attorney of factual errors on consent form, which the attorney did not correct prior to filing).

[51] *In re* Trukositz, 312 Or. 621, 630-632 (1992).

[52] *In re* Conduct of Cobb, 345 Or. 106, 125 (2008).

[53] *In re* Conduct of Fitzhenry, 343 Or. 86, 105-06 (2007).

[54] *Cobb*, 345 Or. at 125 (discussing DR 1-102(A)(3) and observing that careless or reckless conduct may bring exposure to other forms of liability, but is insufficient to trigger discipline).

1000 S.W. Broadway, Suite 1500 Portland, OR 97205 P 503-222-1125 F 503-222-7589

**59.115 Liability in connection with sale or successful solicitation of sale of securities; recovery by purchaser; limitations on proceeding; attorney fees.**

(1) A person is liable as provided in subsection (2) of this section to a purchaser of a security if the person:

(a) Sells or successfully solicits the sale of a security, other than a federal covered security, in violation of the Oregon Securities Law or of any condition, limitation or restriction imposed upon a registration or license under the Oregon Securities Law; or

(b) Sells or successfully solicits the sale of a security in violation of ORS 59.135 (1) or (3) or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

(2) The purchaser may recover:

(a) Upon tender of the security, the consideration paid for the security, and interest from the date of payment equal to the greater of the rate of interest specified in ORS 82.010 for judgments for the payment of money or the rate provided in the security if the security is an interest-bearing obligation, less any amount received on the security; or

(b) If the purchaser no longer owns the security, damages in the amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it and less interest on such value at the rate of interest specified in ORS 82.010 for judgments for the payment of money from the date of disposition.

(3) Every person who directly or indirectly controls a seller liable under subsection (1) of this section, every partner, limited liability company manager, including a member who is a manager, officer or director of such seller, every person occupying a similar status or performing similar functions, and every person who participates or materially aids in the sale is also liable jointly and severally with and to the same extent as the seller, unless the nonseller sustains the burden of proof that the nonseller did not know, and, in the exercise of reasonable care, could not have known, of the existence of facts on which the liability is based. Any person held liable under this section shall be entitled to contribution from those jointly and severally liable with that person.

(4) Notwithstanding the provisions of subsection (3) of this section, a person whose sole function in connection with the sale of a security is to provide ministerial functions of escrow, custody or deposit services in accordance with applicable law is liable only if the person participates or materially aids in the sale and the purchaser sustains the burden of proof that the person knew of the existence of facts on which liability is based or that the person’s failure to know of the existence of such facts was the result of the person’s recklessness or gross negligence.

(5) Any tender specified in this section may be made at any time before entry of judgment.

(6) Except as otherwise provided in this subsection, no action or suit may be commenced under this section more than three years after the sale. An action under this section for a violation of subsection (1)(b) of this section or ORS 59.135 may be commenced within three years after the sale or two years after the person bringing the action discovered or should have discovered the facts on which the action is based, whichever is later. Failure to commence an action on a timely basis is an affirmative defense.

(7) An action may not be commenced under this section solely because an offer was made prior to registration of the securities.

(8) Any person having a right of action against a broker-dealer, state investment adviser or against a salesperson or investment adviser representative acting within the course and scope or apparent course and scope of authority of the salesperson or investment adviser representative, under this section shall have a right of action under the bond or irrevocable letter of credit provided in ORS 59.175.

(9) Subsection (4) of this section shall not limit the liability of any person:

(a) For conduct other than in the circumstances described in subsection (4) of this section; or
(b) Under any other law, including any other provisions of the Oregon Securities Law.

(10) Except as provided in subsection (11) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.

(11) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (10) of this section if the action under this section is maintained as a class action pursuant to ORCP 32.

[1967 c.537 §13(1), (2), (3), (4), (5), (7); 1985 c.349 §13; 1987 c.158 §10; 1987 c.603 §6; 1989 c.197 §5; 1991 c.331 §15; 1991 c.762 §1; 1993 c.508 §28; 1995 c.93 §27; 1995 c.696 §9; 1997 c.772 §9; 2003 c.576 §318; 2003 c.631 §1; 2003 c.786 §1]

**59.127 Liability in connection with purchase or successful solicitation of purchase of securities; recovery by seller; limitations on proceeding; attorney fees.**

(1) A person is liable as provided in subsection (2) of this section to the person selling the security, if the person:

(a) Purchases or successfully solicits the purchase of a security, other than a federal covered security, in violation of any condition, limitation or restriction imposed upon a registration under the Oregon Securities Law; or

(b) Purchases or successfully solicits the purchase of a security in violation of ORS 59.135 (1) or (3) or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading (the seller not knowing of the untruth or omission), and if the person does not sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

(2) The seller may recover:

(a) Upon a tender of the consideration paid for the security, the security plus interest from the date of purchase equal to the greater of the rate of interest specified in ORS 82.010 for judgments for the payment of money, or the rate provided in the security if the security is an interest-bearing obligation;
(b) Damages in the amount that would be recoverable upon a tender, plus any amount received on the security, less the consideration paid for the security; or
(c) If the purchaser no longer owns the security, damages equal to the value of the security when the purchaser disposed of it plus interest on such value at the rate of interest specified in ORS 82.010 for judgments for the payment of money from the date of disposition, less the consideration paid for the security.

(3) Every person who directly or indirectly controls a purchaser liable under subsection (1) of this section, every partner, limited liability company manager, including a member who is a manager, officer or director of such purchaser, every person occupying a similar status or performing similar functions, and every person who participates or materially aids in the purchase is also liable jointly and severally with and to the same extent as the purchaser, unless the nonpurchaser sustains the burden of proof that the nonpurchaser did not know, and, in the exercise of reasonable care, could not have known, of the existence of facts on which the liability is based. Any person held liable under this section shall be entitled to contribution from those jointly and severally liable with the person.

(4) Notwithstanding the provisions of subsection (3) of this section, a person whose sole function in connection with the purchase of a security is to provide ministerial functions of escrow, custody or deposit services in accordance with applicable law is liable only if the person participates or materially aids in the purchase and the seller sustains the burden of proof that the person knew of the existence of facts on which liability is based or that the person's failure to know of the existence of such facts was the result of the person's recklessness or gross negligence.

(5) Any tender specified in this section may be made at any time before entry of judgment.

(6) Except as otherwise provided in this subsection, no action or suit may be commenced under this section more than three years after the purchase. An action under this section for a violation of subsection (1)(b) of this section or ORS 59.135 may be commenced within three years after the purchase or two years after the person bringing the action discovered or should have discovered the facts on which the action is based, whichever is later. Failure to commence an action on a timely basis is an affirmative defense.

(7) Any person having a right of action against a broker-dealer, state investment adviser or against a salesperson or investment adviser representative acting within the course and scope or apparent course and scope of the authority of the salesperson or investment adviser representative, under this section shall have a right of action under the bond or irrevocable letter of credit provided in ORS 59.175.

(8) Subsection (4) of this section shall not limit the liability of any persons:

(a) For conduct other than in the circumstances described in subsection (4) of this section; or
(b) Under any other law, including any other provisions of the Oregon Securities Law.

(9) Except as provided in subsection (10) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.

(10) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (9) of this section if the action under this section is maintained as a class action pursuant to ORCP 32.

[1975 c.300 §2; 1985 c.349 §14a; 1987 c.158 §11; 1987 c.603 §7; 1991 c.762 §2; 1993 c.508 §29; 1995 c.93 §28; 1995 c.696 §10; 1997 c.772 §11; 2003 c.576 §319; 2003 c.631 §2; 2003 c.786 §2]

**59.135 Fraud and deceit with respect to securities or securities business.**
It is unlawful for any person, directly or indirectly, in connection with the purchase or sale of any security or the conduct of a securities business or for any person who receives any consideration from another person primarily for advising the other person as to the value of securities or their purchase or sale, whether through the issuance of analyses or reports or otherwise:

(1) To employ any device, scheme or artifice to defraud;

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading;

(3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or

(4) To make or file, or cause to be made or filed, to or with the Director of the Department of Consumer and Business Services any statement, report or document which is known to be false in any material respect or matter.

[1967 c.537 §14]

**59.137 Liability in connection with violation of ORS 59.135; damages; defense; attorney fees; limitations on proceeding.**

(1) Any person who violates or materially aids in a violation of ORS 59.135 (1), (2) or (3) is liable to any purchaser or seller of the security for the actual damages caused by the violation, including the amount of any commission, fee or other remuneration paid, together with interest at the rate specified in ORS 82.010 for judgments for the payment of money, unless the person who materially aids in the violation sustains the burden of proof that the person did not know and, in the exercise of reasonable care, could not have known of the existence of the facts on which the liability is based.

(2) Any person who directly or indirectly controls a person liable under subsection (1) of this section and every partner, limited liability company manager, including a member who is a manager, officer or director or a person occupying a status or performing functions of a person liable under subsection (1) of this section, is jointly and severally liable to the same extent as a person liable under subsection (1) of this section, unless the person who may be liable under this subsection sustains the burden of proof that the person did not know and, in the exercise of reasonable care, could not have known of the existence of the facts on which the liability is based.

(3) Any person held liable under this section is entitled to contribution from those persons jointly and severally liable with that person.

(4) Except as provided in subsection (5) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.

(5) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (4) of this section if the action under this section is maintained as a class action pursuant to ORCP 32.

(6) An action or suit may be commenced under this section within the later of:

(a) Three years after the date of the purchase or sale of a security to which the action or suit relates; or
(b) Two years after the person bringing the action or suit discovered or should have discovered the facts on which the action or suit is based.

(7) Failure to commence an action or suit under this section on a timely basis is an affirmative defense.

[2003 c.631 §4; 2003 c.786 §3]

KeyCite Yellow Flag - Negative Treatment
Distinguished by Klein v. Oppenheimer & Co., Inc., Kan., March 24, 2006

307 Or. 146
Supreme Court of Oregon,
En Banc [*].

Jan PRINCE, Plaintiff (Below),
and
Brad Littlefield, Petitioner on Review,
v.
Ian BRYDON, Zed W. Braden, James L. Brooks, and Roy King, Defendants (Below),
and
John R. Hansen, Jr., Respondent on Review.

TC 8312–07715; CA A41261; SC S34927.
|
Argued and Submitted May 4, 1988.
|
Decided Nov. 30, 1988.

Investor brought action against limited partnership's attorney seeking to recover the losses the investor suffered from purchasing unregistered securities in the limited partnership. The Circuit Court, Multnomah County, William C. Snouffer, J., granted summary judgment for the attorney and the investor appealed. The Court of Appeals, Richardson, P.J., affirmed, 89 Or.App. 203, 748 P.2d 158. Investor appealed. The Supreme Court, Linde, J., held that attorney's work had materially aided the sale of unregistered securities.

Reversed and remanded.

West Headnotes (4)

**[1] Securities Regulation**
Persons Liable

Whether one's assistance in the unlawful sale of a security is "material" does not depend on one's knowledge of the facts that make it unlawful; it depends on the importance of one's personal contribution to the transaction. ORS 59.115(3).

9 Cases that cite this headnote

**[2] Securities Regulation**
Persons Liable

A drafter's knowledge, judgment, and assertions reflected in the contents of the sale documents are "material" to a security sale, for purposes of liability for sale of unregistered security.

5 Cases that cite this headnote

**[3] Securities Regulation**
Persons Liable

Attorney for Idaho partnership, which sold unregistered limited partnership units in Oregon, did "materially aid" the sale of the unregistered units, where attorney had drafted the limited partnership agreement and major portions of the partnership's offering circular, and had given an opinion on the partnership's tax status, which was included in information provided to prospective investors, and thus attorney could be held liable unless he established lack of knowledge as an affirmative defense. ORS 59.115(3).

12 Cases that cite this headnote

**[4] Securities Regulation**
Persons Liable

The affirmative defense of a nonseller who "materially aids" in the unlawful sale of securities is a showing by the nonseller that he did not know, and could not have known by exercising reasonable care, of the existence of the facts that made the sale of securities unlawful. ORS 59.115(3).

6 Cases that cite this headnote

**Attorneys and Law Firms**

**1370 *147 Gary M. Berne, Portland, argued the cause for petitioner on review. With him on the petition

were Robert J. McGaughey and Stoll, Stoll, Berne, Fischer, & Lokting, P.C., Portland.

Ridgeway K. Foley, Schwabe, Williamson, Wyatt, Moore & Roberts, Portland, argued the cause for respondent on review.

**Opinion**

***148** LINDE, Justice.

Plaintiff, Brad Littlefield, seeks to hold defendant John R. Hansen, Jr. (the other parties named in the title are not involved in this appeal) liable for losses that plaintiff suffered as a result of purchasing in Oregon a limited partnership in an Idaho partnership that had not been registered as a "security" as required under the Oregon Securities Act, ORS 59.055. Hansen's role was that of a lawyer preparing documents and performing other legal services for the ****1371** partnership, and the issue is whether he can be held liable as one who "participates or materially aids" in the unlawful sale of the security under ORS 59.115(3) unless he establishes lack of knowledge as an affirmative defense. The circuit court granted summary judgment for defendant, and the Court of Appeals affirmed. *Prince v. Brydon,* 89 Or.App. 203, 748 P.2d 158 (1988). We reverse that decision and remand the case to the circuit court for further proceedings.

As summarized in the opinion of the Court of Appeals, the partnership was formed in 1980 in Idaho to mine and sell barite for the oil industry. Defendant, an Idaho lawyer, was the partnership's attorney and advised it concerning the requirements for private placement of limited partnership units, one of which plaintiff bought in Oregon. "Defendant drafted the limited partnership agreement and major portions of the offering circular. He also gave an opinion on the tax status of the partnership, which [the partnership] included in the information that it provided prospective investors." 89 Or.App. at 206, 748 P.2d 158. Hansen knew that a partner who lived in Oregon intended to sell units there, but there is disagreement whether he told this partner about the requirements of Oregon Law. *Id.*

ORS 59.115(3) provides:

> "Every person who directly or indirectly controls a seller liable under subsection (1) of this section, every partner, officer, or director of such seller, every person occupying a similar status or performing similar functions, and every person who participates or materially aids in the sale is also liable jointly and severally with and to the same extent as the seller, unless the nonseller sustains the burden of proof that the nonseller did not know, and, in the exercise of reasonable care, could not have known, of the existence of the facts on which the liability is based."

***149** The Court of Appeals noted that the words of the statute apply to defendant:

> "A lawyer who prepares the legal documents necessary for the creation of the entity whose securities are sold, prepares the offering statement for that sale or gives an opinion on the entity's tax status—all of which are routine parts of a securities practice—has materially aided in the sale. Without those actions, a sale cannot occur."

89 Or.App. at 206, 748 P.2d 158. In the court's view, however, the law should not be taken literally, and more than preparation of documents was needed for liability for "participating" or "materially aiding" under the statute.

The Court of Appeals recognized that in our only previous Securities Act decision involving a lawyer, the lawyer's services in the preparation of securities had made him potentially liable under ORS 59.115(3). *Adams v. American Western Securities,* 265 Or. 514, 510 P.2d 838 (1973). But the court found language in *Adams* from which it concluded that the decision rested on the lawyer's actions beyond those performed in his role as a lawyer, and it therefore distinguished the present case from *Adams* on grounds that defendant gave legal advice but did not know of or aid a "scheme to make illegal sales in Oregon." 89 Or.App. at 207, 748 P.2d 158. We do not believe *Adams* made that distinction.

**[1]** **[2]** **[3]** ORS 59.115(3) makes one who is not himself the seller of a security liable for an unlawful sale if he "participates or materially aids in the sale."

  

"Participate" and "materially aids" are separate concepts, not synonyms. A person may participate without materially aiding or materially aid without participating. Whether one's assistance in the sale is "material" does not depend on one's knowledge of the facts that make it unlawful; it depends on the importance of one's personal contribution to the transaction. Typing, reproducing, and delivering sales documents may all be essential to a sale, but they could be performed by anyone; it is a drafter's knowledge, judgment, and assertions reflected in the contents of the documents that are "material" to the sale.

One passage in *Adams* referred to federal cases under ORS 59.115(3) (before its 1967 amendment) and under Section 10(b) of the Securities Exchange Act of 1934, ****1372** 15 USC § 78j(b), and said, in passing, that "some statements in those ***150** opinions may be overly broad, if literally applied." 265 Or. at 527–28, 510 P.2d 838. The quoted passage on its face only stated a possible question, not a conclusion. Perhaps more important, the *Adams* opinion (265 Or. at 530, 510 P.2d 838) observed that if a lawyer who prepared important documents and corporate minutes and supervised the printing of debentures were not covered by ORS 59.115(3),

> "any lawyer or anyone else who, with full knowledge of the unlawful 'solicitation of an offer to purchase' an unissued and unregistered security, proceeds to make the further arrangements necessary for issuance and delivery of such a security, would have a complete defense, regardless of whether the security was ever subsequently registered."

The point of the quoted sentence is that if such acts by a lawyer did not constitute "material aid" in the sale, the lawyer would not be liable even if he had full knowledge of the unlawful transaction. The sentence in no way implies that "material aid" depends on knowledge.

**[4]** Knowledge becomes an element of liability only in the form of an affirmative defense, to be proved by a nonseller, that he "did not know, and, in the exercise of reasonable care, could not have known, of the existence of the facts on which the liability is based." [1]

The drafters took pains to make clear that the relevant knowledge is of "the existence of the facts," not of the unlawfulness of a sale. These provisions may place upon persons besides a seller's employees or agents who materially aid in an unlawful sale of securities a substantial burden to exonerate themselves from liability for a resulting loss, but this legislative choice was deliberate. The 1967 revision of the Oregon Securities Act substituted, in ORS 59.115(3), the words "every person who participates or materially aids in the sale" for the words "every employee of such a seller * * * and every broker-dealer or agent who materially aids in the sale" in section 410(b) of the Uniform Securities Act, on which the revision was based. The possible liability of a lawyer who ***151** prepares a prospectus was raised in Senate Judiciary Committee hearings on the revision in the 1965 session, and the witness for the drafters responded that the bill "makes clear that a person who does not know of a violation is not liable." The defense against strict liability, in short, was to be a showing of ignorance, not the professional role of the person who renders material aid in the unlawful sale. Accordingly, it was error to grant defendant summary judgment as a matter of law.

The decision of the Court of Appeals and the judgment of the circuit court are reversed, and the case is remanded to the circuit court for further proceedings.

**All Citations**

307 Or. 146, 764 P.2d 1370, Blue Sky L. Rep. P 72,935

Footnotes

* Lent, J., retired effective September 30, 1988.

1 We take the drafters to have meant "could not have known by exercising reasonable care," not that a defendant might have taken reasonable care to be unable to know, as the words literally say.

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Reynolds v. Schrock, Or.App., February 16, 2005

329 Or. 47
Supreme Court of Oregon.

William R. GRANEWICH, II, Petitioner on Review,
v.
Ben HARDING; Jeannie Alexander-Hergert; Founders Funding Group, Inc., an Oregon corporation, Defendants,
and
Michael J. Farrell; and Martin, Bischoff, Templeton, Langslet & Hoffman, a partnership, Respondents on Review.

(CC 9401-00097; CA A88174; SC S45041)
|
Argued and Submitted March 4, 1999.
|
Decided July 9, 1999.

Minority shareholder brought suit for breach of fiduciary duty against corporation, corporation's controlling shareholders, and corporation's attorneys, based on actions allegedly taken to "squeeze out" minority shareholder. The Circuit Court, Multnomah County, Michael H. Marcus, J., dismissed complaint against attorneys for failure to state claim. Minority shareholder appealed, and the Court of Appeals affirmed, 150 Or.App. 34, 945 P.2d 1067. Petition for review was allowed, and the Supreme Court, Gillette, J., held that allegations that attorneys had known of and participated in scheme to "squeeze out" minority shareholder, which resulted in breach of fiduciary duties of controlling shareholders, stated valid claim against attorneys for joint liability.

Court of Appeals reversed in part, Circuit Court reversed in part, and remanded.

West Headnotes (13)

**[1] Pretrial Procedure**
Construction of pleadings

In determining sufficiency of complaint, court accepts as true all well-pleaded allegations in the complaint, and gives plaintiff the benefit of all favorable inferences that may be drawn from the facts alleged.

21 Cases that cite this headnote

**[2] Conspiracy**
Nature and Elements in General
**Conspiracy**
Joint or several liability
**Torts**
Aiding and abetting

Neither "conspiracy," nor "aid and assist," is a separate theory of recovery; rather, conspiracy to commit or aiding and assisting in the commission of a tort are two of several ways in which a person may become jointly liable for another's tortious conduct.

17 Cases that cite this headnote

**[3] Torts**
Persons Liable

One is subject to liability for harm resulting to a third person from the tortious conduct of another if he (1) does a tortious act in concert with the other or pursuant to a common design with him, or (2) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (3) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person. Restatement (Second) of Torts § 876.

25 Cases that cite this headnote

**[4] Conspiracy**
Nature and Elements in General

Conspiracy is not, standing alone, a tort.

1 Cases that cite this headnote

**[5] Conspiracy**
Nature and Elements in General

  

**Criminal Law**
Aiding, abetting, or other participation in offense

Conspiracy and aiding and abetting are two separate and distinct notions in the criminal context. ORS 161.155, 161.450.

2 Cases that cite this headnote

[6] **Fraud**
Persons liable

One who knowingly aids another in the breach of a fiduciary duty is liable to the one harmed thereby.

8 Cases that cite this headnote

[7] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Principle that one who knowingly aids another in the breach of a fiduciary duty is liable to the one harmed thereby extends to lawyers.

14 Cases that cite this headnote

[8] **Conspiracy**
Joint or several liability

Theory behind joint liability for tortious conduct by persons acting in concert is that persons acting in concert are liable for all the acts done in furtherance of the conspiracy.

2 Cases that cite this headnote

[9] **Conspiracy**
Joint or several liability

Civil conspiracy does not merely allow possible tortfeasors to be held liable for a co-conspirator's tort; it makes joint tortfeasors of those who conspire to commit the tort.

7 Cases that cite this headnote

[10] **Torts**
Concerted action in general

Defendant need not personally have committed a tortious act as a prerequisite to liability for acting in concert with another person who did commit that tortious act.

8 Cases that cite this headnote

[11] **Conspiracy**
Persons Liable

**Torts**
Persons Liable

When a plaintiff alleges and proves that several defendants conspired to commit a tort upon him, all defendants involved in the conspiracy can be held liable for the overt act which is committed by one of the defendants pursuant to the conspiracy; however, if a conspiracy is not proved, only those defendants who are alleged and proved to have personally committed a tortious overt act against the plaintiff can be held liable.

3 Cases that cite this headnote

[12] **Torts**
Concerted action in general

Plaintiff need not make showing that each actor's conduct itself constituted a tort before liability may attach for acting in concert.

1 Cases that cite this headnote

[13] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Allegations by minority shareholder that attorneys representing corporation had entered into agreement with controlling shareholders to take such actions as necessary to "squeeze out" minority shareholder and deprive him of value of his stock in corporation, in breach of fiduciary duties of controlling shareholders, that multiple unlawful steps were taken in furtherance of that goal which harmed minority shareholder, and that attorneys knew object and provided substantial assistance to controlling shareholders, stated claim against attorneys

  

for joint liability, based on their alleged participation in breach of fiduciary duties owed to minority shareholder.

6 Cases that cite this headnote

****790** On review from the Court of Appeals. *

**Attorneys and Law Firms**

***49** James R. Cartwright, Portland, argued the cause and filed the brief for petitioner on review. With him on the brief were Wendy M. Margolis and Cosgrave, Vergeer & Kester, LLP, Portland.

Thomas W. Brown, Portland, argued the cause and filed the brief for respondents on review. With him on the brief were Wendy M. Margolis and Cosgrave, Vergeer & Kester, LLP, Portland.

Michael A. Greene, Portland, filed briefs for amicus curiae Oregon Trial Lawyers Association. With him on the March 16, 1998, brief was B. Carlton Grew, Portland. With him on the September 15, 1998, brief were Richard H. Braun and Rosenthal & Greene, PC, Portland.

Thomas W. Sondag, of Lane Powell Spears Lubersky LLP, Portland, filed the brief for amicus curiae Oregon Association of Defense Counsel.

Before CARSON, Chief Justice, and GILLETTE, VAN HOOMISSEN, DURHAM, and KULONGOSKI, Justices. **

**Opinion**

***50** GILLETTE, J.

This is a civil action for damages based on allegations that the controlling shareholders and directors of a closely held corporation breached their fiduciary duties to plaintiff, a minority shareholder and director, through a corporate "squeeze-out." Plaintiff named as defendants the majority shareholders and directors, the corporation itself, the corporation's lawyer, and that lawyer's firm. As the case comes to us, all claims against the corporation and the shareholders have been dismissed, and only the allegations concerning the lawyers' role in the alleged squeeze-out are at issue.

The amended complaint alleges, among other things, that the controlling shareholders and directors amended the corporate by-laws to exclude plaintiff from the corporation and issued new shares of stock to themselves to dilute plaintiff's ownership interest in the corporation. The complaint also alleges that the lawyers are liable directly to plaintiff for breach of their own fiduciary duties to him as a director by assisting in those actions and that they are jointly liable with the majority shareholders and directors for breach of their fiduciary duties to him as a minority shareholder and director. The trial court dismissed the amended complaint as to the lawyers under ORCP 21 A(8) for failure to state a claim. A divided Court of Appeals, sitting *en banc*, affirmed that judgment, holding that the lawyers owed no direct fiduciary duty to plaintiff and that they could not be liable vicariously for the majority shareholders' and directors' alleged breach of fiduciary duty, if the lawyers themselves owed no such duty to plaintiff. *Granewich v. Harding,* 150 Or.App. 34, 945 P.2d 1067 (1997).

Plaintiff seeks review of only that part of the Court of Appeals decision that affirmed the trial court's judgment dismissing his claim against the lawyers. We limit our review accordingly. Because the case comes to us on an ORCP 21 A motion to dismiss, our only task at this stage is to determine whether the complaint adequately states a claim against the lawyers for joint tort liability ****791** for the alleged actions of the controlling shareholders and directors. We conclude that the amended complaint states a legally cognizable claim against ***51** the lawyers as joint tortfeasors. We therefore reverse that part of the decision of the Court of Appeals.

**[1]** In determining the sufficiency of plaintiff's complaint, we accept as true all well-pleaded allegations in the complaint and give plaintiff the benefit of all favorable inferences that may be drawn from the facts alleged. *Fearing v. Bucher,* 328 Or. 367, 371, 977 P.2d 1163 (1999).

The amended complaint alleges the following facts: Founders Funding Group, Inc. (FFG) was incorporated in 1992. By early 1993, plaintiff and defendants Harding and Alexander-Hergert each owned one-third of the shares of FFG stock. Plaintiff, Harding, and Alexander-Hergert all were directors and officers of FFG as well as its employees. All three agreed initially that each would receive inadequate compensation for their respective

  

services to the company but that each would receive the same amount of compensation from FFG, with the expectation and agreement that each ultimately would receive ample compensation for his or her efforts. They also agreed that each would be employed continually and perpetually by the corporation, with salaries and benefits commensurate with their services to it.

After a short time, FFG's business became substantially more successful and profitable. The complaint alleges that, at that point, Harding and Alexander-Hergert devised a plan to squeeze plaintiff out of the corporation. On May 5, 1993, they met with plaintiff and informed him that they had removed him as a director of FFG, relieved him of his executive position, and terminated him as an employee, all effective immediately. Plaintiff objected on the grounds that he had not received proper notice of any shareholders' or directors' meeting as required by FFG's by-laws, that his position as a director was protected by the cumulative voting requirements of the by-laws, that the actions of Harding and Alexander-Hergert represented a breach of the agreement between plaintiff and the others that each would be employed perpetually and continually by FFG, and that those actions represented a breach of the fiduciary duty that Harding and Alexander-Hergert owed to plaintiff by virtue of their ownership of two-thirds of the corporation's stock and their holding of two out of three positions on FFG's board of directors.

***52** Soon thereafter, Harding and Alexander-Hergert, in their corporate capacities, met with and hired lawyer Farrell and his law firm, Martin, Bischoff, Templeton, Langslet & Hoffman (collectively, the lawyers), to provide legal services to the corporation. The complaint alleges that the lawyers then entered into an agreement with Harding and Alexander-Hergert to assist them in depriving plaintiff of his position as a director, of the value of his shares of stock, of his further employment with and compensation from FFG, and of the benefits of participating in the corporate affairs of FFG. The complaint alleges that, at all material times, the lawyers knew that the purpose of that agreement was to violate Harding's and Alexander-Hergert's fiduciary duties to plaintiff. Additionally, the complaint alleges that FFG itself "had no legitimate corporate interest in resolving the disputes between plaintiff * * * and defendants Harding and Alexander[-Hergert] in a manner which favored defendants Harding and Alexander[-Hergert] over plaintiff * * *."

The lawyers are alleged to have assisted Harding and Alexander-Hergert by drafting and sending two letters to plaintiff, at Harding's and Alexander-Hergert's request, containing statements that the lawyers knew to be false concerning the effectiveness of Harding's and Alexander-Hergert's previous efforts to remove plaintiff from the corporation. It also is alleged that, in their further efforts toward the same end, the lawyers knowingly provided legal assistance to Harding and Alexander-Hergert that substantially assisted Harding and Alexander-Hergert in breaching the fiduciary duties that they allegedly owed to plaintiff. Specifically, the complaint alleges that the lawyers assisted Harding and Alexander-Hergert in exercising actual control of the management and policies of FFG in ways inconsistent with their claimed fiduciary duties by calling special meetings, amending corporate by-laws, ****792** removing plaintiff as a director, and taking other actions to dilute the value of plaintiff's FFG stock. Finally, the complaint alleges that the lawyers' actions were outside the scope of any legitimate employment by FFG and that plaintiff suffered damages as a consequence of those actions.

The foregoing allegations concerning the role of the lawyers are set out or incorporated by reference in two claims ***53** for relief in the amended complaint. In analyzing the sufficiency of the specific allegations, the Court of Appeals considered whether those allegations constituted a legally cognizable claim under either a "conspiracy" or an "aid and assist" theory of joint liability. *Granewich,* 150 Or.App. at 38-49, 945 P.2d 1067.

As a preliminary matter, defendant lawyers argue that the Court of Appeals erred in considering the "aid and assist" theory and urge this court not to address it, on the ground that plaintiff neither mentioned "aid and assist" as a separate theory of recovery in the complaint nor argued it below. Therefore, defendant lawyers argue, the matter is not preserved. [1]

**[2]** Defendant lawyers' argument is not well taken. For reasons explained more fully below, neither "conspiracy" nor "aid and assist" is a separate theory of recovery. *See Bonds v. Landers,* 279 Or. 169, 175, 566 P.2d 513 (1977) (so explaining with respect to "conspiracy"); *Bliss v. Southern Pacific Co.,* 212 Or. 634, 642, 321 P.2d 324 (1958) (same).

  

Rather, conspiracy to commit or aiding and assisting in the commission of a tort are two of several ways in which a person may become jointly liable for another's tortious conduct.

**[3]** Section 876 of the *Restatement (Second) of Torts* (1979) (*Restatement*) sets out three ways in which persons acting in concert may be held accountable for each other's tortious conduct:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> "(a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> "(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> "(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately ***54** considered, constitutes a breach of duty to the third person."

Each of the three foregoing statements already is reflected in existing Oregon case law governing the liability of persons acting in concert. Therefore, to state that this court recognizes section 876 as reflecting the common law of Oregon breaks no new ground. For example, this court's decision in *Sprinkle v. Lemley,* 243 Or. 521, 414 P.2d 797 (1966), embodies the principle set out in subsection(a) of section 876. *Sprinkle* was a case in which a patient injured by a doctor's negligence sued both the general practitioner who treated her for her injuries and the specialist called in to assist him. The court there stated that persons acting in concert can be liable to a third person for harm resulting from the other's negligence, but one is not liable for the acts of another if each is acting independently. *Id.* at 528, 414 P.2d 797 (citing generally to a substantially similar prior version of section 876, *Restatement of Torts,* (1939) § 876).

Additionally, as early as the turn of the century, the court stated in *Perkins v. McCullough,* 36 Or. 146, 59 P. 182 (1899), that

> " 'all who aid, command, advise, or countenance the commission of a tort by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner as they would be if they had done the same tort with their own hands.' "

*Id.* at 149, 59 P. 182 (quoting *Judson v. Cook,* 11 Barb. 642 (N.Y. 1852)). That principle is reflected in section 876(b) of the *Restatement,* a prior version of which this court ****793** quoted with approval in *Lemons v. Kelly,* 239 Or. 354, 359, 397 P.2d 784 (1964).

Finally, the principle articulated in subsection(c) of section 876 of the *Restatement* is exemplified by this court's decision in *Blank v. Far West Federal Savings,* 281 Or. 397, 575 P.2d 148 (1978). The plaintiff in *Blank* was a real estate broker with an exclusive listing agreement who contractually was entitled to a commission from the sale of certain real estate. Each defendant agreed to a scheme to induce plaintiff to cancel the agreement before the closing of a sale on the property to avoid paying the commission. The court held that ***55** each defendant participated in all or different acts of the fraud, either by failing to disclose the imminent sale or by affirmatively averring that no such sale was pending. *Id.* at 408, 575 P.2d 148. All were obligated to deal truthfully and fairly with plaintiff and all, therefore, jointly were liable to plaintiff for the harm done to him. *Ibid.*

**[4]** The court did not employ the words "conspire" or "conspiracy" in *Lemons, Sprinkle,* or *Perkins,* nor did it expressly examine or purport to delineate in any of those cases whether particular elements that must be pled to state a claim for relief under a "conspiracy" theory were present. As noted, *Bonds* and *Bliss,* among other cases, hold that a "conspiracy" is not, standing alone, a tort. Nonetheless, each case proceeded under the same fundamental assumption for assessing the liability of persons acting in concert, *i.e.*, that, under certain circumstances, it is permissible to impute the tortious acts of one defendant to others acting in concert with that defendant.

**[5]** We conclude that persons acting in concert may be liable jointly for one another's torts under any one of the three theories identified in *Restatement* section 876.[2] *See Gabriel v. Collier,* 146 Or. 247, 255, 29 P.2d 1025 (1934) (conspiracy allegations serve "to connect a defendant with the transaction and to charge him with the acts and declarations ***56** of his co-conspirators, without which he would not be implicated").[3] It follows that the Court of Appeals did not err in considering whether the lawyers

  

jointly could be liable for the breach of fiduciary duty, either by doing a tortious act in concert with the others, as described in section 876(a) of the *Restatement,* or by knowingly providing substantial assistance to the others in their commission of that tort, as described in section 876(b). We turn to that issue.

**[6]** **[7]** There is no Oregon law directly addressing whether someone can be held liable for another's breach of fiduciary duty. Legal authorities, however, virtually are unanimous in expressing the proposition that one who knowingly aids another in the breach of a fiduciary duty is liable to the one ****794** harmed thereby.[4] That principle readily extends to lawyers.[5] None of those authorities even implies that liability for participants in the breach of fiduciary duty is confined to those who *themselves* owe such duty.

***57** **[8]** **[9]** **[10]** Nothing in this court's prior decisions compels a different conclusion in this case. Indeed, the theory behind joint liability is that persons acting in concert are liable for all the acts done in furtherance of the conspiracy. As the minority opinion in the Court of Appeals correctly notes, "[c]ivil conspiracy does not merely allow *possible* tortfeasors to be held liable for a co-conspirator's tort; it makes joint tortfeasors of those who conspire to commit the tort." *Granewich,* 150 Or.App. at 51, 945 P.2d 1067 (Armstrong, J., concurring in part and dissenting in part) (emphasis in original). Indeed, it especially would be odd for the law to afford beneficiaries of *fiduciary* relationships less protection from the malfeasance of third parties than would be available to the victims of other kinds of tortious conduct. We hold, therefore, that a defendant personally need not have committed a tortious act as a prerequisite to liability for acting in concert with another person who did commit that tortious act.

In reaching a contrary conclusion, the Court of Appeals found dispositive the absence of any duty flowing directly from the lawyers to plaintiff. That court stated that "because the tort of breach of fiduciary duty depends on a duty that the law implies from a fiduciary relationship between the parties, it necessarily follows that a fiduciary relationship must exist between the plaintiff and all joint tortfeasors." *Granewich,* 150 Or.App. at 41, 945 P.2d 1067. That conclusion was based, in part, on the court's interpretation of section 876(a) of the *Restatement,* which provides that an actor's liability can be based on the commission of "a tortious act in concert with" another. According to the Court of Appeals, even if Harding's and Alexander-Hergert's acts were imputed to the lawyers, the lawyers' conduct still cannot be viewed as tortious as to plaintiff, because the lawyers themselves owed no fiduciary duty to plaintiff.

That analysis is faulty for two reasons. First, interpreting the term, "tortious act," in the way that the Court of Appeals' majority did requires, in the traditional tort law vernacular, that the actor owe a duty of care to the third person. Thus, that interpretation erroneously fuses together the elements of liability set out in subsection 876(a) with those in subsection 876(c), which outlines liability for persons who ***58** assist in the accomplishment of a tortious result in circumstances where their "own conduct, separately considered, constitutes a breach of duty to the third person." Such an approach would render subsection (c) surplusage.

**[11]** **[12]** Second, the Court of Appeals' analysis relies on the premise that, under subsection 876(a), each actor's conduct itself must constitute a tort before liability attaches. ****795** That reliance is misplaced. This court previously has suggested that a plaintiff need not establish that each person acting in concert himself committed a tort. In *Still v. Benton,* 251 Or. 463, 466, 445 P.2d 492 (1968), the court stated that,

> "[w]hen a plaintiff alleges and proves that several defendants conspired to commit a tort upon him, all the defendants involved in the conspiracy can be held liable for the overt act which is committed by one of the defendants pursuant to the conspiracy. If a conspiracy is not proved, only those defendants can be held liable who are alleged and proved to have personally committed a tortious overt act against the plaintiff."

That statement necessarily assumes that not all persons acting in concert need to have committed an overt tortious act against the plaintiff.[6]

The Court of Appeals also declined to rule that lawyers can be held liable as co-conspirators merely for aiding

  

and assisting in the commission of the tort of breach of fiduciary duty, on the ground that it unduly would interfere with lawyer-client relations if lawyers could be held liable for actions performed on behalf of their clients that only indirectly result in their clients' breach of their fiduciary duties. *Granewich,* 150 Or.App. at 48, 945 P.2d 1067. In that regard, we note that the Court of Appeals interchangeably refers to Harding and Alexander-Hergert and to the corporation as the lawyers' clients. The complaint, however, alleges that the corporation ***59** hired the lawyers, that the corporation had no interest in the dispute between plaintiff and Harding and Alexander-Hergert, and that the work that the lawyers performed was outside the scope of any legitimate employment on behalf of the corporation. We must accept those allegations as true for purposes of our analysis. Under that circumstance, the lawyers stand in no different position in relation to plaintiff than anyone else, and their status as lawyers is irrelevant. [7]

**[13]** Viewed in light of the foregoing discussion, the amended complaint adequately alleges joint liability on the part of defendant lawyers as persons acting in concert with Harding's and Alexander-Hergert's alleged breach of their fiduciary duties to plaintiff, if it contains allegations that give rise to the inference either that the lawyers did a tortious act pursuant to an agreement with the others to breach their fiduciary duties or that the lawyers knowingly provided substantial assistance in the breach of the others' fiduciary duties.

We conclude that the amended complaint contains such allegations. The complaint alleges that the lawyers entered into an agreement with Harding and Alexander-Hergert to take such actions as may be necessary to squeeze plaintiff out of FFG and to deprive plaintiff of the value of his FFG stock, objectives that are alleged to be in breach of Harding's and Alexander-Hergert's fiduciary duties to plaintiff as majority shareholders and directors. The complaint further alleges that Harding and Alexander-Hergert undertook multiple unlawful steps in furtherance of those objectives and that plaintiff was damaged as a result. In addition, the amended complaint alleges that the lawyers knew that the object to be accomplished was the breach of Harding's and Alexander-Hergert's fiduciary duties to plaintiff, that the lawyers provided substantial assistance to them in their efforts in that regard, and that plaintiff was damaged as a result.

***60** The amended complaint states a claim against the lawyers for joint liability, based on their alleged participation with other defendants in breaching fiduciary duties owed ****796** to plaintiff. The trial court erred in ruling to the contrary, and the Court of Appeals erred in affirming that ruling.

The decision of the Court of Appeals is reversed in part. The judgment of the circuit court is reversed in part. The case is remanded to the circuit court for further proceedings.

**All Citations**

329 Or. 47, 985 P.2d 788

Footnotes

* Appeal from Multnomah County Circuit Court, Michael H. Marcus, Judge. 150 Or.App. 34, 945 P.2d 1067 (1997).

** Leeson and Riggs, JJ., did not participate in the consideration or decision of this case.

1 Defendant lawyers' position apparently arises out of the fact that plaintiff employed the label, “conspiracy,” in the headings preceding the two claims for relief. The label, however, is irrelevant; what matters, for our purposes, is the specific allegations following those labels.

2 The fact that “aiding and assisting” is not a theory of recovery separate from the theory of liability for persons acting in concert that we have discussed perhaps is best illustrated by extending one of the examples that the Court of Appeals borrowed from the *Restatement* to explain the concept of joint liability for tortious acts done in concert, in the context of its discussion of the adequacy of the complaint's allegation under a conspiracy theory. The court posited the following:

> “A, B, C, and D come together to E's house at night to rob. A breaks E's front door, B ties E up, C beats E and D steals and carries away E's jewelry. A, B, C and D are all subject to liability to E for all damages caused by the trespass to land, the false imprisonment, the battery and the conversion.”

  

*Granewich,* 150 Or.App. at 41, n. 5, 945 P.2d 1067 (quoting *Restatement (Second) of Torts* (1979) § 876(a), illustration 1). We would add that, if another individual, F, also agrees to the plan, then drives A, B, C, and D to E's house, waits outside while they commit trespass, false imprisonment, battery and conversion, and drives A, B, C, and D away from E's house, F also is liable equally for all the others' torts, even though his role can be described only as knowingly providing substantial assistance in the commission of those torts. In that light, defendant lawyers' complaint that plaintiff did not cite cases supporting an "aid and assist" theory either to the trial court or to the Court of Appeals is irrelevant.

3 In concluding that the "aid and assist" theory, as it was described by the Court of Appeals below, is merely a subcategory of a broader theory of vicarious *tort* liability, we are mindful that "conspiracy" and "aiding and abetting" are two separate and distinct notions in the *criminal* context. *See, e.g.,* ORS 161.155 (establishing criminal liability for aiding and abetting in the planning or commission of a crime); ORS 161.450 (describing criminal conspiracy).

4 *See, e.g., Restatement (Second) of Torts* (1979) § 874, comment c ("A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused"); *Restatement (Second) of Trusts* (1959) § 326 ("A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust"); 5 Scott and Fratcher, *The Law of Trusts* § 506 (4th ed 1989) ("When a person in a fiduciary relationship to another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary").

5 4 Scott and Fratcher, *The Law of Trusts* (4th ed 1989) § 326.4 ("If a trustee in the administration of the trust employs an attorney or other agent, and the trustee commits a breach of trust, the agent is not under a liability to the beneficiaries of the trust for participation in the breach of trust, unless he knew or should have known that he was assisting the trustee to commit a breach of trust"). That principle is consistent with the rule that lawyers generally are not liable to third parties for acts committed in good faith in performance of their professional activities as lawyers for clients, but that they may not knowingly assist in the commission of a tort. *See, e.g., Wampler v. Palmerton,* 250 Or. 65, 74-75, 439 P.2d 601 (1968) (agent generally immune from liability for action taken within the range of his authority for the benefit of the principal); Mallen and Smith, *Legal Malpractice* § 6.4 (4th ed 1996) (wrongs attributed to lawyer as client's agent in providing advice to further client's objectives do not support a conspiracy, but lawyer may be liable for assisting in the commission of a tort).

6 Our example of the participants in the break-in, set out in note 2, *ante,* serves to illustrate the point. F, whose participation is confined to agreeing to the unlawful scheme and driving the others to and from E's house, is fully liable for all of his co-conspirators' "tortious overt acts," notwithstanding the fact that he himself committed no tort. If, however, a conspiracy is not proven (for example, if E cannot show that F knew what A, B, C, and D planned to do), then only those who themselves committed tortious overt acts (A, B, C, and D in the foregoing example) are liable to E.

7 We do not suggest, by drawing this distinction, that it necessarily matters that the corporation, rather than Harding and Alexander-Hergert, was the client. We note only that, on those allegations, the dilemma posed by the Court of Appeals is not presented.

341 Or. 338
Supreme Court of Oregon,
En Banc.

Diane REYNOLDS, as Personal Representative of the Estate of Clyde G. Reynolds, Respondent on Review,
v.
Donna SCHROCK, fka Donna Frechette, Defendant,
and
Charles R. Markley; and Greene & Markley, P.C., an Oregon professional corporation, Petitioners on Review.

(CC C991357CV; CA A119200; SC S52503).
|
Argued and Submitted March 6, 2006.
|
Decided Sept. 8, 2006.

**Synopsis**

**Background:** Investor brought action alleging breach of fiduciary duty against joint venturer in real estate investment, and against attorney who represented joint venturer. Investor and joint venturer settled, and the Circuit Court, Washington County, Marco Hernandez, J., entered summary judgment in favor of attorney. Investor appealed. The Court of Appeals, 197 Or.App. 564, 107 P.3d 52, reversed, and the Supreme Court allowed attorney's petition for review.

**Holdings:** The Supreme Court, en banc, Balmer, J., held that:

[1] lawyers have qualified privilege for assisting client's breach of fiduciary duty to third party, provided they are acting within scope of lawyer-client relationship, and

[2] attorney's conduct fell within privilege.

Decision of the Court of Appeals reversed and judgment of the circuit court affirmed.

West Headnotes (4)

**[1] Fraud**
Persons liable

A person who acts in concert with or gives substantial assistance or encouragement to a fiduciary who breaches a duty to a third party may be liable for the resulting harm. Restatement (Second) of Torts, § 876.

6 Cases that cite this headnote

**[2] Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Lawyers enjoy qualified privilege against joint liability for assisting client's breach of fiduciary duty to third party; for third party to hold lawyer liable, third party must prove that lawyer acted outside the scope of the lawyer-client relationship. Restatement (Second) of Torts, §§ 876, 890.

15 Cases that cite this headnote

**[3] Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Attorney's conduct in advising his client concerning settlement agreement with joint venturer and disposing of joint venture's property was privileged as it fell within permissible scope of attorney's role as client's attorney, and thus attorney was not liable to joint venturer for client's breach of fiduciary duty.

5 Cases that cite this headnote

**[4] Attorney and Client**
Duties and liabilities to adverse parties and to third persons

Joint venturer who alleged that attorney was jointly liable for his client's breach of fiduciary of fiduciary duty had burden of negating attorney's qualified privilege as

  

part of affirmative case, i.e., that attorney's conduct fell outside permissible scope of his role as client's lawyer.

9 Cases that cite this headnote

**1063 On review from the Court of Appeals. *

**Attorneys and Law Firms**

Thomas W. Brown, of Cosgrave Vergeer Kester LLP, Portland, argued the cause and filed the brief for petitioners on review. With him on the brief was Wendy M. Margolis, Portland.

James E. Leuenberger, Lake Oswego, argued the cause for respondent on review. Terrance L. McCauley, Estacada, filed the brief for respondent on review.

George A. Riemer, General Counsel, Lake Oswego, filed the brief for amicus curiae Oregon State Bar.

**Opinion**

BALMER, J.

*340 This case requires us to determine whether a lawyer may be liable to a third party for aiding and abetting a client's breach of fiduciary duty, and, if the lawyer may be so liable, what circumstances must exist to impose liability. Plaintiff [1] sued defendant for breach of fiduciary duty, and he also sued defendant's lawyer for his role in that alleged breach. The trial court entered summary judgment in the lawyer's favor, and the Court of Appeals reversed. *Reynolds v. Schrock,* 197 Or.App. 564, 107 P.3d 52 (2005).

We allowed the lawyer's petition for review and now reverse the decision of the Court of Appeals. We hold that a lawyer may not be held jointly liable with a client for the client's breach of fiduciary duty unless the third party shows that the lawyer was acting outside the scope of the lawyer-client relationship. Because there is no evidence in the summary judgment record that the lawyer in this case was acting outside the scope of that relationship, the lawyer was entitled to judgment as a matter of law. We therefore reverse the decision of the Court of Appeals and affirm the trial court's summary judgment in favor of the lawyer.

## I. FACTS

We take the facts from the Court of Appeals opinion and the record. Because this case comes to us on summary judgment, we review the facts in the manner most favorable to plaintiff, the nonmoving party. ORCP 47 C. Plaintiff was a naturopathic physician, and defendant Donna Schrock was one of plaintiff's patients. Plaintiff and Schrock bought two parcels of land together. In 1999, Schrock filed two separate actions against plaintiff. The first action concerned the jointly owned land, and the second alleged that, in the course of the doctor-patient relationship, plaintiff had engaged in improper sexual conduct with Schrock. The two actions were consolidated, and the parties later settled them in an agreement negotiated and drafted by their respective lawyers, *341 including Schrock's lawyer, defendant Charles Markley. The settlement agreement provided, in part, that plaintiff would transfer his share of one of the two jointly owned properties (the "lodge property") to Schrock and that Schrock and plaintiff together would sell the second property (the "timber property") and transfer the proceeds to plaintiff. If the proceeds of the timber property sale were less than $500,000, then Schrock would pay plaintiff the difference and Schrock would grant plaintiff a security interest for that amount in the lodge property to secure the payment. If the proceeds of the timber property sale equaled or exceeded $500,000, then Schrock would owe plaintiff nothing and **1064 plaintiff would have no security interest in the lodge property.

After the parties signed the settlement agreement, plaintiff transferred his interest in the lodge property to Schrock. Markley then advised Schrock that, in his opinion, nothing in the settlement agreement expressly required her to retain the lodge property in anticipation of the possible creation of a security interest in plaintiff's favor. [2] Schrock, with Markley's assistance and without plaintiff's knowledge, sold the lodge property to a third party before the parties sold the timber property. Markley asked the escrow officer handling the sale to keep the sale confidential. Markley also advised Schrock that she could revoke the consent that she had given earlier to plaintiff's plan to sell the jointly owned timber property. In Markley's view, plaintiff had failed to provide Schrock with information about the value of the timber property

  

prior to arranging to sell it, contrary to a requirement in the settlement agreement, and that breach freed Schrock from any obligation to consent to the sale of the timber property. Based on Markley's advice, and with Markley's assistance, Schrock revoked her consent to the sale of the timber property.

## II. PROCEEDINGS BELOW

Plaintiff sued Schrock and Markley over their actions in connection with the implementation of the settlement agreement. As to Schrock, plaintiff alleged, among ***342** other things, that the settlement agreement had created fiduciary duties between Schrock and plaintiff as joint venturers. Plaintiff asserted that Schrock, by selling the lodge property and revoking her consent to the sale of the timber property, had breached her fiduciary duty to plaintiff and the implied covenant of good faith and fair dealing that was part of the settlement agreement. [3] He further alleged that Schrock had converted his interest in the lodge property by selling that property and retaining the proceeds.

Plaintiff's complaint alleged that Markley was jointly liable with Schrock because he had aided and abetted Schrock's torts by giving her "substantial assistance and encouragement" in the commission of the torts and acting "in concert with [her] pursuant to a common design * * *." He also alleged that Markley had interfered with the contract (the settlement agreement) between plaintiff and Schrock. Plaintiff and Schrock later settled, leaving Markley as the only remaining defendant.

Markley moved for summary judgment, and the trial court granted his motion, stating, in part:

> "[T]he only evidence is that Mr. Markley advised his client of what she could do given the language of the agreements. * * * [T]here is no evidence that he was doing anything other than acting as Ms. Schrock's lawyer. Mr. Markley had no duty to the plaintiff. * * * [His] duty runs only to his client."

On appeal, plaintiff assigned error to the trial court's judgment in Markley's favor on the "joint-liability tort claims"—that is, the claims that Markley was jointly liable with Schrock for breach of fiduciary duty and conversion. [4] The Court of Appeals affirmed the trial court's judgment in Markley's favor on the conversion claim. *Reynolds,* 197 Or.App. at 578–79, 107 P.3d 52. The court, however, reversed the judgment on ***343** the breach of fiduciary duty claim. The Court of Appeals held that this court's precedents did not exempt a lawyer from liability for assisting in a client's breach of fiduciary duty and that the Court of Appeals' case law suggested that a lawyer for a fiduciary could be liable for knowingly aiding or assisting a fiduciary in a breach of duty. *Id.* at 573–74, ****1065** 107 P.3d 52. As noted, Markley sought review, which we allowed. [5]

## III. ANALYSIS

The material historical facts in the summary judgment record are essentially undisputed, [6] and the parties focus their arguments on the applicable legal standard. The trial court's determination that Markley was entitled to judgment as a matter of law is a legal question that we review for errors of law. *Schaff v. Ray's Land Sea Food Co., Inc.,* 334 Or. 94, 98–99, 45 P.3d 936 (2002). Where necessary, we view the facts and all reasonable inferences that may be drawn from them in the light most favorable to the adverse party—in this case, plaintiff. *Id.* at 99, 45 P.3d 936.

### A. *Liability for Assisting a Breach of Fiduciary Duty*

We begin our analysis, as do the parties, with this court's decision in *Granewich v. Harding,* 329 Or. 47, 985 P.2d 788 (1999). That case provides a reasonable starting point because it involved claims for breach of fiduciary duty, including a claim against a lawyer for assisting others in ***344** breaching fiduciary duties that they owed to the plaintiff. Plaintiff argues that *Granewich* describes the elements required to state a claim and holds that a lawyer in Markley's position may be liable for assisting in a client's breach of fiduciary duty. In our view, however, *Granewich* does not provide a complete answer to the questions that this case raises.

The plaintiff in *Granewich,* a minority shareholder in a corporation, alleged that the corporation's two majority shareholders had breached their fiduciary duty to him by effectuating a corporate "squeeze-out." The plaintiff also

  

asserted a separate claim against the corporation's lawyer, alleging that the lawyer had assisted the other defendants in that squeeze-out. This court held that the lawyer could be liable for aiding and abetting the other defendants' breach of fiduciary duty, even though the lawyer had no independent fiduciary duty to the plaintiff. However, the *Granewich* opinion specifically noted that the defendant lawyer in that case had represented the *corporation,* not the other defendants (the majority shareholders), and that the plaintiff had alleged that the lawyer's actions had fallen "*outside the scope* of any legitimate employment *on behalf of the corporation.*" *Id.* at 59, 985 P.2d 788 (emphasis added). Therefore, in *Granewich,* this court did not consider or answer the question that is at the core of this case: whether, and under what circumstances, a third party may assert a claim against a lawyer, acting in a professional capacity, for assisting a *client* in breaching the client's fiduciary duty.

The Court of Appeals recognized that *Granewich* left that question unanswered. However, based on two explanatory s in *Granewich,* the Court of Appeals interpreted that case as holding that "an attorney may be liable for assisting a client's tortious conduct * * *." *Reynolds,* 197 Or.App. at 574, 107 P.3d 52. First, the court relied on a in which this court stated that "[w]e do not suggest * * * that it necessarily matters that the corporation, rather than [the majority shareholders], was the client." ****1066** *Granewich,* 329 Or. at 59 n. 7, 985 P.2d 788. However, that simply conveyed this court's reluctance to answer a question that was not before it, and it was not an indication that the lack of a lawyer-client relationship in that case was irrelevant. [7] Second, the Court of Appeals ***345** observed that, in another, this court quoted a treatise stating that a lawyer could be liable for the torts of the lawyer's client under certain circumstances. *Reynolds,* 197 Or.App. at 572, 107 P.3d 52 (quoting *Granewich,* 329 Or. at 56 n. 5, 985 P.2d 788). The Court of Appeals then went on to explain that *dicta* in its opinion in *Roberts v. Fearey,* 162 Or.App. 546, 556, 986 P.2d 690 (1999), supported its ultimate determination that Markley could be liable. *Reynolds,* 197 Or.App. at 573–74, 107 P.3d 52.

Although *Granewich* left unanswered the question of when a lawyer representing a client may be liable for the client's torts, that case usefully describes the circumstances in which a person who assists another in committing a tort ordinarily may be liable for resulting harm to a third party. *Granewich* stated that section 876 of the *Restatement (Second) of Torts* (*Restatement* ) "reflect[s] the common law of Oregon" on that subject. 329 Or. at 54, 985 P.2d 788. Section 876 provides:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> "(a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> "(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> "(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

The parties agree that plaintiff's allegations do not state a claim under subsection (c) because plaintiff does not assert that Markley's "own conduct, separately considered, constitute[d] a breach of duty to [plaintiff]." The parties further agree, for purposes of this court's review, that Schrock owed a ***346** fiduciary duty to plaintiff and that she breached that duty. The specific issue thus is whether plaintiff can recover from Markley for acting in concert with Schrock or substantially assisting her in breaching the fiduciary duty that she owed to plaintiff. [8]

**[1]** Under *Granewich* and the *Restatement,* a person who acts "in concert with" or "gives substantial assistance or encouragement" to a fiduciary who breaches a duty to a third party may be liable for the resulting harm. Markley argues, however, that that general rule does not apply when a lawyer, in the context of a lawyer-client relationship, advises a client who breaches a fiduciary duty to a third party. The *Restatement* labels any such exemption from liability that the law otherwise would impose as a "privilege." *See Restatement* § 890 ("One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege * * *."). We therefore consider whether the fact that Markley was acting as Schrock's lawyer when he engaged in the challenged conduct created a ****1067** privilege that protects Markley from liability. If that status does create such a privilege, then we must consider the circumstances in which the privilege applies.

B. *Privilege Against Joint Liability for a Lawyer Assisting a Client's Breach of Fiduciary Duty*

**[2]** This court has not considered previously what privileges, if any, protect a person from liability for substantially assisting another in a breach of fiduciary duty. However, several cases have considered privileges as they relate to claims for interference with contractual relations brought against advisors or agents who acted on behalf of another person or entity. [9] Those cases are instructive, because, like the present ***347** case, they involve claims against a person for actions on behalf of a client or principal that allegedly harmed a third party.

In *Wampler v. Palmerton,* 250 Or. 65, 439 P.2d 601 (1968), the plaintiff sued a corporation's financial advisors for intentional interference with contractual relations for advising the corporation to breach its contract with the plaintiff. This court noted that the advisors owed a "duty of advice and action" to the corporation and that imposing liability on those advisors would paralyze the corporation's ability to act and to secure advice on how to act. *Id.* at 74–75, 439 P.2d 601. The court therefore recognized a privilege against liability for corporate advisors who act in good faith and for the benefit of the corporation. *Id.* at 75, 439 P.2d 601. Indeed, the court noted, the privilege protects the advisor from liability "even though plaintiff argues that the defendants intended to cause the corporation to take an unfair advantage of the plaintiff by means of the breach of contract." *Id.* at 76, 439 P.2d 601.

This court followed *Wampler* in *Straube v. Larson,* 287 Or. 357, 600 P.2d 371 (1979), where it considered an intentional interference claim by a radiologist against a hospital chief administrator who had recommended that the hospital suspend the radiologist's hospital privileges and other medical staff members who allegedly had conspired in seeking the suspension. The defendants claimed that they had acted to fulfill their duty to the hospital to ensure the proper care for patients. *Id.* at 369, 600 P.2d 371. This court applied the reasoning of *Wampler* and concluded that, if the defendants had acted in good faith and in the hospital's interest, then they had what "amount[ed] to the application of a qualified privilege" against liability. *Id.* at 369–71, 600 P.2d 371. [10] The court also addressed the issue of which party had the burden of proving that the defendants' acts came within the scope of the privilege and ***348** held that the plaintiff had "the burden of negating [that] qualified privilege * * * as part of his affirmative case." *Id.* at 371, 600 P.2d 371.

In *Welch v. Bancorp Management Advisors,* 296 Or. 208, 214, 675 P.2d 172 (1983), this court again considered the issue of when an agent can be liable in tort for actions that the agent takes on behalf of its principal and that cause harm to a third party. In that case, a real estate developer alleged that a lender had agreed to provide financing for a project but had breached that agreement based on "misrepresentations" and "false advice" given to the lender by its investment committee. *Id.* at 211, 675 P.2d 172. The developer sought to recover from the investment committee members for tortious interference with the financing agreement. Relying on its earlier decisions in *Wampler* and ****1068** *Straube,* this court held that the investment committee had been acting as the agent of the lender and therefore was immunized from tort liability if its actions had been within the scope of its authority:

> "An agent acting as a financial advisor is thus privileged to interfere with or induce breach of the principal's contracts or business relations with third parties, as long as the agent's actions are within the scope of his employment and taken with an intent to further the best interests of the principal."

*Welch,* 296 Or. at 218, 675 P.2d 172; *see also id.* at 216–17, 675 P.2d 172 ("[T]he proper test is whether the agent acts within the scope of his authority and with the intent to benefit the principal.").

This court, in the cases described above, protected from liability defendants who owed duties to an entity or person and who, in the course of performing those duties, harmed a third party. This court recognized a qualified privilege in those cases because it was necessary to protect important relationships between the defendant and the entity or person—the financial advisor and the corporation in *Wampler,* the staff and the hospital in *Straube,* and the investment committee and the lender in *Welch.* That is, this court, in exercising its common-law authority to define tortious conduct, implicitly concluded that the effective performance of the duties arising from those relationships required ***349** that the person performing those duties have a qualified privilege from tort liability. [11]

The principle underlying the cases just discussed—that, for individuals and corporations to obtain the advice and assistance that they must receive from their agents, the agents must have some protection from tort liability to third parties—assists us in determining the rule that should be applied in this case. Not every relationship between a person who breaches a contract or a fiduciary duty and one who substantially assists in such a breach necessarily justifies recognition of a privilege against liability. However, we think that the lawyer-client relationship is one that does.[12] That is true, in our view, because safeguarding the lawyer-client relationship protects more than just an individual or entity in any particular case or transaction; it is integral to the protection of the legal system itself. *See Restatement (Third) of the Law Governing Lawyers* (*Restatement of Lawyers*) ch 2, Introductory Note (2000) (citing "the importance to the legal system of faithful representation"); *id.* § 121 comment b (conflict rules protect "interests of the legal system" by preventing compromise of process of adversary litigation). Myriad business transactions, as well as civil, criminal, and administrative proceedings, require that the client have the assistance of a lawyer. And a variety of doctrines, from the rules against conflicts of interest to the confidential nature of lawyer-client communications, demonstrate the ways in which the legal system protects the lawyer-client relationship.

Moreover, as was true in *Wampler, Straube,* and *Welch,* a third party's claim against the lawyer that puts the ***350** lawyer at odds with the client will compromise the lawyer-client relationship. A lawyer who is sued for substantially assisting a client's breach of fiduciary duty becomes subject to divided loyalties. As this court has recognized, lawyers cannot serve their clients adequately when their own self-interest—in these examples, the need to protect themselves from potential tort claims by third parties—pulls in the opposite direction. *See,* ****1069** *e.g., In re Jeffery,* 321 Or. 360, 898 P.2d 752 (1995) (conflict of interest for lawyer to represent client in criminal case in which lawyer also was implicated); *see also Restatement of Lawyers* § 121 comment b (conflict compromises client's expectation of effective representation). Moreover, allowing a claim against the lawyer may raise issues of lawyer-client privilege, if the preparation of an adequate defense for the lawyer would require the disclosure of privileged communications. *Cf. State ex rel OHSU v. Haas,* 325 Or. 492, 500, 942 P.2d 261 (1997) (purpose of lawyer-client privilege " 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice' " (quoting *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981))); *Restatement of Lawyers* § 121, comment b (conflict rules prevent use of confidential client information against client's interest); *see also* ORS 9.460(3) (lawyer shall "[m]aintain the confidences and secrets of the attorney's clients * * * ").

To summarize the discussion above, this court's earlier decisions hold that a person may be jointly liable with another for substantially assisting in the other's breach of a fiduciary duty owed to a third party, if the person knows that the other's conduct constitutes a breach of that fiduciary duty. *Granewich,* 329 Or. at 57, 985 P.2d 788. Our tort case law also makes clear, however, that, if a person's conduct as an agent or on behalf of another comes within the scope of a privilege, then the person is not liable to the third party. In this case, we extend those well-recognized principles to a context that we have not previously considered and hold that a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship is protected by such a privilege and is not liable for assisting the client in conduct that breaches the client's fiduciary duty to a third party. Accordingly, for a third party ***351** to hold a lawyer liable for substantially assisting in a client's breach of fiduciary duty, the third party must prove that the lawyer acted outside the scope of the lawyer-client relationship.

Several features of the rule regarding the circumstances in which a lawyer's conduct may be privileged are particularly important. First, the rule places the burden on the plaintiff to show that the lawyer was acting outside the scope of the lawyer-client relationship. *See Straube,* 287 Or. at 371, 600 P.2d 371 (plaintiff has burden of negating qualified privilege).

Second, the rule protects lawyers only for actions of the kind that permissibly may be taken by lawyers in the course of representing their clients. It does not protect lawyer conduct that is unrelated to the representation of a client, even if the conduct involves a person who is a client. Because such unrelated conduct is, by definition, outside the scope of the lawyer-client relationship, no important public interest would be served by extending the

qualified privilege to cover it. *See Welch,* 296 Or. at 216–17, 675 P.2d 172 ("[T]he proper test [for a privilege against liability for interference with contract] is whether the agent acts within the scope of his authority and with the intent to benefit the principal.") For the same reason, the rule does not protect lawyers who are representing clients but who act only in their own self-interest and contrary to their clients' interest. Similarly, this court would consider actions by a lawyer that fall within the "crime or fraud" exception to the lawyer-client privilege, OEC 503(4)(a), and Rule of Professional Conduct 1.6(b)(1), to be outside the lawyer-client relationship when evaluating whether a lawyer's conduct is protected.

The Court of Appeals, in this case, like other courts that have considered similar claims by nonclients against lawyers, struggled to reconcile the client's need for a lawyer's confidentiality, advice, and assistance with the desire to hold lawyers accountable for "affirmative conduct that actually furthers the client's breach of fiduciary duty, done by the attorney with knowledge that he or she is furthering the breach." *Reynolds,* 197 Or.App. at 576, 107 P.3d 52.[13] For that ****1070** reason, the ***352** court held that, although a lawyer could be jointly liable under the principles of *Restatement,* section 876(a) and (b), for assisting a client that breached its fiduciary duty, "a strict and narrow construction best protects the attorney-client relationship without conferring on attorneys a license to help fiduciaries breach their duties." *Id.*

The Court of Appeals' "strict and narrow construction" formulation, however, provides insufficient guidance to lawyers and lower courts. Similarly, the court's distinction between a lawyer's advice to a client and the lawyer's other assistance to a client—such as drafting a letter or an agreement—fails to recognize the lawyer's role in actual transactions. In this case, for example, Schrock's right to receive legal advice from Markley is unduly cramped if Markley's potential tort liability to third parties prevents him from drafting transactional documents or making telephone calls necessary for Schrock to act on that advice. For that reason, we think that a test for liability that focuses on whether the lawyer's actions fall outside the scope of the lawyer's ***353** representation of his or her client provides a better balance between the important interests at stake.

Courts in other jurisdictions also have limited a lawyer's joint liability for the wrongdoing of his or her clients to protect the lawyer-client relationship. In *Chem–Age Industries, Inc. v. Glover,* 2002 SD 122, 652 N.W.2d 756, 774–75 (2002), the South Dakota Supreme Court concluded that a lawyer could not be jointly liable for aiding a client's breach of fiduciary duty if the lawyer was "[m]erely acting as a scrivener for a client" and that liability could be imposed only if the lawyer "rendered 'substantial assistance' to the breach of duty, not merely to the person committing the breach." 652 N.W.2d at 774. The Massachusetts Supreme Judicial Court rejected claims by trust beneficiaries that a trustee's lawyers could be liable for assisting the trustee's breach of fiduciary duty, holding that the beneficiaries had to "show that the [lawyer] knew of the breach and actively participated in it such that he or she could not reasonably be held to have acted in good faith." *Spinner v. Nutt,* 417 Mass. 549, 556, 631 N.E.2d 542, 546 (1994). In a case involving the liability of an accountant for aiding and abetting a client's breach of fiduciary duty, the Minnesota Supreme Court, quoting *Restatement* section 876(b), noted that "most courts have recognized that 'substantial assistance' means something more than the provision of routine professional services" and found that allegations that alleged only that the accountant provides such "routine services" were insufficient to meet the "substantial assistance" requirement. *Witzman v. Lehrman, Lehrman & Flom,* 601 N.W.2d 179, 189 (Minn.1999).

In our view, the test that we hold applicable here—whether the lawyer's conduct fell outside the permissible scope of the lawyer- ****1071** client relationship—often will lead to the same result as the tests adopted in the cases described above. It does so, however, in a more predictable and useful way, because it focuses on the scope of the lawyer-client relationship—and the legal rules, such as OEC 503(4)(a), that help define that scope—rather than on the fine line between "advice" and "assistance" or between "substantial assistance" and other assistance. We acknowledge that the test does not identify a bright line between liability and immunity, but it ***354** nevertheless uses concepts tied directly to the lawyer's role in representing the client and existing sources of law regarding the scope of that role.[14]

C. *Application of the Privilege*

**[3]** **[4]** We now return to the facts of this case. Like the parties and the courts below, we assume for these purposes that Schrock breached a fiduciary duty to plaintiff and that Markley knowingly provided substantial assistance to her or acted in concert with her in so doing. We focus on whether Markley, as Schrock's lawyer, has a qualified privilege from liability to plaintiff for assisting in that breach of duty. Here, plaintiff had "the burden of negating [the] qualified privilege * * * as part of his affirmative case." *Straube,* 287 Or. at 371, 600 P.2d 371. On summary judgment, therefore, plaintiff had the burden of producing evidence that would show that Markley's conduct was not privileged because it fell outside the permissible scope of his role as Schrock's lawyer. *See* ORCP 47 C (on summary judgment, "[t]he adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial").

Taken in the light most favorable to plaintiff, the summary judgment record shows that Markley took four actions that plaintiff asserts are relevant to his claims. First, Markley advised Schrock that the settlement agreement did not require her to retain the lodge property in anticipation of the possibility that plaintiff's security interest would attach to it and assisted her in selling it. Second, he called the escrow officer and asked her not to tell anyone about the pending sale of the property. Third, he assisted Schrock in revoking her consent to sell the timber property. Finally, he ***355** accepted substantial fees for performing legal work for Schrock, including the foregoing three actions.

Nowhere has plaintiff suggested, and nothing in the record indicates, that any aspect of Markley's advice and assistance to Schrock fell outside the scope of the lawyer-client relationship or the assistance that a lawyer properly provides for a client. There is no credible claim that Markley's conduct violated any applicable statute. [15] No evidence in the summary judgment record suggests that Markley's or Schrock's conduct was criminal or fraudulent. Whether or not Markley's interpretation of the agreement was correct—a determination that we need not make here—the purpose of the privilege requires that lawyers be able to assess the legal problems that their clients bring to them and discuss the full range of available solutions. Moreover, lawyers must be able to assist their clients in implementing those solutions, to the extent that that assistance falls within the legitimate scope of the lawyer-client relationship. Although courts may not always agree with the legal advice that a lawyer provides, protecting a lawyer from liability to ****1072** a third party for advising a client is essential to the administration of justice. *Cf. In re Hockett,* 303 Or. 150, 160, 734 P.2d 877 (1987) ("A lawyer must be able to advise and assist clients in their affairs without fear of discipline if he [or she] is wrong in interpreting close questions of law. He or she must be given some latitude to be wrong.").

Plaintiff argues that we should interpret Markley's acceptance of fees as a self-interested act that fell outside the scope of the qualified privilege. We disagree. Whether Markley took no fee or an hourly fee or a contingent fee is irrelevant to the central question whether his actions fell within the scope of the lawyer-client relationship. If anything, Markley's acceptance of a fee supports his claim that he was acting as Schrock's lawyer, although there is no evidence here that he was *not* acting as her lawyer.

***356** The summary judgment record reveals no evidence from which a reasonable jury could find that Markley acted outside the scope of the lawyer-client relationship in his representation of Schrock. Markley's conduct therefore falls within the scope of the privilege that we have described above. The trial court was correct in granting Markley's motion for summary judgment.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

**All Citations**

341 Or. 338, 142 P.3d 1062

Footnotes

* Appeal from Washington County Circuit Court, Marco A. Hernandez, Judge. 197 Or.App. 564, 107 P.3d 52 (2005).

1 This action was brought by Clyde Reynolds. During the litigation, Clyde Reynolds died, and the personal representative of his estate was substituted as plaintiff. For convenience, we refer to Clyde Reynolds and his estate collectively as "plaintiff."

  

2 We express no view regarding the correctness of Markley's advice to Schrock on that or the other legal issues as to which she consulted him.

3 Both the claim for breach of fiduciary duty and the claim for breach of the covenant of good faith and fair dealing arose from the duties that plaintiff and Schrock allegedly owed one another as a result of the settlement agreement. The parties and the courts below treated the claims as a single claim for breach of fiduciary duty, and we do as well.

4 Plaintiff did not appeal the trial court's ruling in Markley's favor on the interference with contract claim.

5 Plaintiff did not cross-petition for review of the Court of Appeals' ruling in favor of Markley on the conversion claim, and the parties do not discuss that claim in their briefs. For that reason, we do not address that issue.

6 One factual matter that the parties dispute is whether plaintiff was actually harmed by Schrock's sale of the lodge property. Markley asserts that there is no evidence in the record that plaintiff suffered "actual" harm from the sale because the record does not show whether the timber property sold for less than $500,000, which was a precondition of any additional financial obligation of Schrock to plaintiff and therefore of any security interest. Plaintiff disagrees. In addressing whether Markley can be held liable for substantially assisting in Schrock's breach of fiduciary duty, we assume, for purposes of this case, that Schrock did in fact breach a fiduciary duty that she owed to plaintiff, including causing plaintiff actual harm.

The parties also disagree as to whether the settlement agreement itself granted plaintiff a security interest in the lodge property, with plaintiff claiming that it did and Markley that it did not. We agree with the Court of Appeals that plaintiff's security interest always was contingent and "never came into existence." *Reynolds,* 197 Or.App. at 579, 107 P.3d 52. In any event, given our disposition of the case, that asserted factual dispute is not material.

7 Indeed, as commentators discussing *Granewich* have emphasized, the context of that case—the squeezing-out of a minority shareholder in a closely held corporation—is one in which the legal obligations of the corporation, the majority shareholder(s), and the minority shareholders (and the lawyers representing each) are complex and rapidly changing. *See, e.g.,* Comment, *Redefining Obligations in Close Corporation Fiduciary Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty in Squeeze–Outs,* 58 Wash & Lee L Rev 551 (2001) (discussing *Granewich* and other cases involving squeeze-outs; advocating redefinition of lawyers' obligations when representing majority shareholders). In *Granewich,* this court decided only the issue before it: a claim against the corporation's lawyer for substantially assisting the majority shareholders in their breach of fiduciary duty.

8 The Court of Appeals treated subsections (a) and (b) of *Restatement* section 876 as requiring similar, although not identical, showings of affirmative conduct by Markley for him to be jointly liable with Schrock for her breach of fiduciary duty. *Reynolds,* 197 Or.App. at 576, 107 P.3d 52. We do as well, for purposes of the issues decided in this case. We therefore do not consider Markley's other arguments concerning the differences between the elements required to establish liability under those two subsections.

9 In some cases, this court has referred to section 890 of the *Restatement,* quoted in the text, in the course of determining whether a privilege exists in particular circumstances. *See, e.g., Comini v. Union Oil Co.,* 277 Or. 753, 756, 562 P.2d 175 (1977) (quoting *Restatement* and concluding that oil company's interference with contract between distributor and buyer of distributor's business was privileged due to the consent of the parties to such interference). In other cases, such as those discussed in the text, this court has decided whether a privilege exists as a matter of Oregon's common law and without reference to the *Restatement.*

10 Applying that standard, this court affirmed summary judgment for two of the defendants but reversed the summary judgment entered in favor of two other defendants, because there was evidence that those defendants had acted "to satisfy private grudges" rather than on behalf of the hospital and, therefore, did not come within the scope of the privilege. *Straube,* 287 Or. at 370, 600 P.2d 371.

11 Although the cases described in the text involved agents and advisors other than lawyers, decisions in other jurisdictions apply the same qualified privilege from tort liability to claims brought against lawyers for their actions on behalf of clients. *See, e.g., Schott v. Glover,* 109 Ill.App.3d 230, 64 Ill.Dec. 824, 440 N.E.2d 376 (1982) (illustrating proposition); Randy R. Koenders, Annotation, *Attorney's Liability in Tort for Interference with Contract to which Client was Party,* 85 A.L.R.4th 846, 1991 WL 741712 (1991) (collecting cases).

12 The arguments for and against permitting claims against a lawyer for substantially assisting a client's breach of fiduciary duty are discussed in Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation,* 1994 U Ill L Rev 889 (1994), and Comment, *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty,* 28 St Mary's LJ 213 (1996).

13 The *Restatement of Lawyers* also describes those competing policy interests multiple times but provides virtually no useful guidance to courts deciding cases where those interests conflict:

  

> "Lawyers regularly act in disputes and transactions involving nonclients who will foreseeably be harmed by inappropriate acts of the lawyers. Holding lawyers liable for such harm is sometimes warranted. Yet it is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on the one hand and, on the other hand, detriment to a nonclient resulting from a lawyer's fulfilling the proper function of helping a client through lawful means. Making lawyers liable to nonclients, moreover, could tend to discourage lawyers from vigorous representation. Hence, a duty of care to nonclients arises only in the limited circumstances described in the Section. Such a duty must be applied in light of those conflicting concerns."

*Restatement of Lawyers* § 51 comment b; *see also id.* § 56 comment b ("[A]mong the circumstances relevant to liability or defense under the general law are some that commonly attend lawyers practicing law, such as the fiduciary duties lawyers owe to clients and the powers, duties, and responsibilities that lawyers have in the legal system. Thus, courts considering the civil liability of lawyers must consider how a ruling that affirms or precludes liability would affect the vigorous representation of clients within the limits of the law, including, for example, the candid expression to clients of the lawyer's views on any matter within the scope of the representation. Courts must also take care, in construing liability provisions and professional rules, to avoid subjecting lawyers to inconsistent obligations."); *id.* § 56 comment c ("The social benefit of proper legal advice and assistance often makes it appropriate not to hold lawyers liable for activities in the course of a representation [.] * * * On the other hand, a lawyer is not always free of liability to a nonclient for assisting a client's act solely because the lawyer was acting in the course of a representation[.]").

14 In *Schott v. Glover,* 109 Ill.App.3d 230, 64 Ill.Dec. 824, 440 N.E.2d 376 (1982), the Illinois Court of Appeals adopted an approach similar to the one that we take today in a case involving a breach of contract claim against a bank and a related interference with contract claim against the bank's lawyer. The court held that the claim against the lawyer was insufficient because it failed to allege that the lawyer was acting outside the scope of the lawyer-client relationship. The lawyer's fiduciary duty to the bank meant that he was "privileged, in his capacity as the bank's attorney, to perform the acts and give the advice alleged" as to the bank's contractual obligations to the plaintiff. 64 Ill.Dec. 824, 440 N.E.2d at 380.

15 Plaintiff asserts that Markley's and Schrock's actions constitute theft under ORS 164.015, which provides, in part, that a person "commits theft when, with the intent to deprive another of property or to appropriate property to the person or to a third person, the person: (1) [t]akes, appropriates, obtains or withholds such property from an owner thereof * * *." The facts do not support plaintiff's claim that Markley's or Schrock's actions constituted theft.

IN BRIEF

THIS ISSUE

June 2009

Issue 108

Oregon State Bar

PROFESSIONAL LIABILITY FUND

www.osbplf.org

*Malpractice Prevention Education for Oregon Lawyers*

# Lessons from Securities Litigation

Choose your clients carefully. That is the golden rule when it comes to representing clients who are doing securities offerings. The risks faced by attorneys who represent clients doing securities offerings were evidenced by the recent $6.2 million settlement paid by a Reno law firm that represented a Bend-based real estate investment operation.

The securities laws present unique challenges and risks for attorneys practicing in Oregon. First, the term "security" is broadly defined; hence, the securities laws cover a wide range of investments. Second, attorneys who "materially aid" in their client's securities offerings can be held jointly and severally liable for their client's violation of the securities laws. Due to a combination of these factors, well-intentioned attorneys can find themselves subject to claims brought on behalf of investors who invested in their client's failed business transactions.

To protect yourself from liability, you must be able to identify what constitutes a security. This is not an easy task given that the term "security" is broadly defined. Most attorneys readily identify stock as a security. However, the definition of a security includes many other forms of investment, including promissory notes and "investment contracts." The courts have defined certain rules for determining when a promissory note constitutes a security, but those rules start with the presumption that the promissory note is a security. Transactional attorneys should also evaluate whether their client's deals may constitute an "investment contract" and thus a security. In general, an "investment contract" is formed when there is an investment of money in a common enterprise with the expectation of profits derived from the efforts of others. A wide variety of transactions have been classified as "investment contracts," including the sale of fractional interests in race horses – *Marshall v. Harris*, 276 Or 447 (1976); undivided interests in real property – *State of Oregon v. Jacobs*, 55 Or App 406 (1981); and interests in master music recordings – *Cleveland v. Jerden Industries, Inc.*, 1985 US Dist LEXIS 23747 (Or Dist Ct 1985). In recent years, the structures used to finance real estate transactions have become increasingly elaborate and creative. You should review these types of transactions carefully to determine whether a security may have been created. A number of good summaries explain what constitutes a security, including those found in Chapter 15 of *Advising Oregon Businesses* (Oregon CLE 2001, Supp 2007) and Chapter 6 of *Fundamentals of Real Estate Transactions* (Oregon CLE 1992, Supp 2001). However, even with careful research, you may still be uncertain whether or not a particular transaction involves a security. In these situations, it is prudent to take the safe path and assume the transaction involves a security.

Being able to identify a security is critical. If a security is sold in violation of the Oregon securities laws, the investor has a right of rescission against the seller of that security. Essentially, this right allows the investor to recover the amount of the investment, statutory interest, and potentially attorney fees. ORS 59.115(3) provides that every person who materially aids in the sale of a security is jointly and severally liable with, and to the same extent as, the seller. The Supreme Court of Oregon, in *Prince v. Brydon*, 307 Or 146 (1988), held that an attorney who had advised his client concerning the requirements for private placements of limited partnership interests, drafted the limited partnership agreement, and prepared

*Continued on page 2*

portions of the offering circular had "materially aided" in the sale of a security as contemplated in ORS 59.115(3). The reasoning is that an attorney "materially aids" in the sale of the security by having his or her "knowledge, judgment and assertions" reflected in the offering documents. *Id.* at 149.

If you materially aided in the sale of a security, you can avoid liability by sustaining the burden of proof that you did not know and, in the exercise of reasonable care, could not have known of the existence of facts on which the liability is based. This "due diligence" defense provides a measure of protection. However, it is important to consider that securities claims arise after an investment has failed. Against the backdrop of a failed deal and with the benefit of hindsight running in favor of the investor, you can face a difficult challenge proving that your actions were, in fact, reasonable.

What can you do? First, accept that ignorance is not an excuse. Ignoring the requirements of the securities laws places you at great peril. This is true whether you consider yourself a "securities lawyer" or not. If the deal involves a security and you do not feel sufficiently competent to handle the matter, refer the securities work to another attorney.

Second, insist that your client structure the offering in a manner that complies with the securities laws and fully cooperate in disclosing the risks associated with the proposed securities transaction. This can become an issue when a client is desperate for capital or otherwise unwilling to pay the legal fees necessary to comply with the applicable securities laws. It can also become an issue when a client is under time constraints to close a transaction. In these situations, you cannot escape liability by merely advising your client of the risks associated with not complying with the securities laws. If your client refuses to structure the offering in a manner that complies with the securities laws, you should walk away from the deal.

Third, keep in mind that although certain elements of the securities laws provide very clear guidance on what is required, many of the rules involve inherently subjective determinations. For example, a person may not sell a security by means of an untrue statement of material fact or omit a material fact necessary in order to make the other statements made, in light of the circumstances under which they are made, not misleading. ORS 59.115. What is "material" is a subjective determination. Due to these subjective determinations, it is not possible for you to completely insulate yourself from a claim. This is especially true when the investor can look back with the benefit of hindsight and question why certain disclosures were or were not made. While experience and careful research can help mitigate a large portion of these risks, such risks cannot be eliminated either for you or your client. Given that securities work will always involve some inherent level of risk, the golden rule is to choose your clients carefully. If you do not feel confident about the offering or have reservations about the client, you should strongly consider passing on the work.

Similarly, encourage your clients to select their investors carefully. Both you and your client should feel confident that the investor is sufficiently sophisticated and knowledgeable to understand the risks involved with the particular investment. In addition, both you and your client should consider whether the investor can afford to lose the investment and how the investor might react to such loss.

To summarize, keep the following rules in mind to help minimize your potential exposure to liability under the securities laws:

- Know how to spot a security.
- Do not ignore the securities laws.
- Insist that clients comply with the securities laws.
- Encourage your clients to select their investors carefully.
- Choose your clients carefully.

Thomas M. Tongue
Schwabe Willliamson & Wyatt PC