

***Powell v. Miller: An Opinion Regarding an Attorney’s Liability
for Aiding and Abetting a Breach of Fiduciary Duty***

When the partnership between Paul Powell and Dean Evans fell apart, Powell sued his former partner for invasion of privacy and breach of fiduciary duty. He also sued Evans’s lawyer Lana Miller for aiding and abetting both torts. The trial court dismissed the claims against Miller, holding that this state does not recognize a cause of action against a lawyer for aiding and abetting a client’s breach of fiduciary duty. We disagree and would recognize the claim based on either a joint representation or substantial assistance theory. Even so, based on the plaintiff’s complaint, Miller may not be held liable because her acts were entirely within the scope of her duties as an attorney and because she did not substantially assist Evans with the alleged breaches. The plaintiff’s complaint does not state a cause of action under the standards we announce today. We affirm the trial court’s judgment.

I. Factual Background

It is fair to say that Paul Powell and Dean Evans lived in a dream world. The two were friends throughout college, where they obtained degrees in computer graphics and software engineering, respectively. While they were students, they began developing a complex role-playing video game called *Universe*. Players of the game would create a fictional persona, with the ability to own and develop virtual property that could be bought and sold within the game. *Universe* encompassed a comprehensive virtual world with its own system of currency and a simulated three-dimensional environment. The game would also serve as an advanced social networking tool, in that players anywhere would be able to interact with each other through the game and over the Internet. Upon graduating from college, Powell and Evans formed a partnership to foster continued

development of the game. They expected that the market potential of *Universe* was enormous and would easily eclipse the success of the market-leading game *Humanity*.

In the fall of 2004, Powell and Evans were close to completing a beta version of *Universe*, gearing towards selling its rights to a major software developer. Despite the promise of their years of hard work, the relationship between the two partners had begun to strain. Both had taken jobs to supplement their incomes while they developed the software. Powell's job increasingly required him to travel and spend time away from the project. Evans suspected that Powell was surreptitiously leaking trade secrets to *Universe's* competitors, including the developers of *Humanity*. Evans's suspicions were heightened when he read in trade journals that *Humanity* would soon be updated with features that seemed nearly identical to *Universe's* most advanced concepts.

Worried that his years of effort might come to naught, Evans sought the advice of his attorney Lana Miller. Miller advised Evans to make recordings of Powell's office and cellular telephone calls, so as to gather evidence of misconduct. Even after he wrote a special computer program to record all of Powell's calls, Evans was not able to gather any evidence of a leak. Nonetheless, Evans remained suspicious and told Miller that he wished to get out of the project as quickly as possible. Miller advised him to sell the partnership's rights to *Universe* and split the proceeds with Powell.

Soon thereafter, Evans sold the full rights to *Universe* to a San Jose, California, investor for \$500,000.00, half of which he distributed to Powell. Only two months later, the same investor resold the rights to a major software developer for \$2.5 million, plus an undisclosed percentage of profits. Powell then brought the present action against Evans and Miller.

II. Discussion

Dismissal for failure to state a claim should be granted if, assuming all of the facts in the plaintiff's complaint are true and all inferences are resolved in his favor, the defendant is entitled to a judgment as a matter of law. This case presents a number of novel legal questions, the first of which is whether the tort of aiding and abetting a breach of fiduciary duty should be recognized in this state. If so, we must then consider which (if any) of the plaintiff's allegations are sufficient to state the claim. We will review the trial court's decision de novo.

Aiding and abetting a tort is a form of "acting in concert," similar to a civil conspiracy. See *Granewich v. Harding*, 985 P.2d 788, 792 (Or. 1999) (citing RESTATEMENT (SECOND) OF TORTS § 876 (1977)). There are three basic elements to a claim for aiding and abetting the tortious conduct of another: (1) the primary actor tortiously causes an injury to the plaintiff; (2) the defendant knows that the primary actor's conduct is a breach of duty; and (3) the defendant substantially assists or encourages the primary actor in the achievement of the breach. *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). We agree that lawyers are not exempt from liability under this theory and will recognize the cause of action in this state. Nonetheless, we will carefully set out the standards for recovery so as to avoid impairing the lawyer-client relationship.

A. The Privity of Contract Rule

To fully understand the context of the Powell's claim against Miller for aiding and abetting, it is important to understand why Miller is not directly liable to him for legal malpractice or breach of fiduciary duty. Traditionally an attorney was not liable to

non-clients, unless there was fraud, collusion, or malice. *See, e.g., Kramer v. Belfi*, 482 N.Y.S.2d 898, 900 (N.Y. App. Div. 1984). This rule recognized that the lawyer-client relationship must be safeguarded to encourage honest and candid communication between an attorney and her client. When a lawyer may be held liable by a non-client, her ability to zealously advance her client's interests could be clouded by her own aversion to being sued.

Courts have relaxed the privity of contract rule in a few situations, such as where it is apparent that the client intended for the attorney's services to benefit a third party. *See Angel, Cohen and Rogovin v. Oberon Inv.*, 512 So. 2d 192, 194 (Fla. 1987). This exception has often allowed beneficiaries of a will to sue for a negligently drafted instrument. In *Goodman v. Kennedy*, the California Supreme Court announced a more extensive exception to the privity rule, which would require a balancing of six factors, including the extent and foreseeability of harm, the moral blame attached to the attorney's conduct, and the extent to which the transaction was intended to affect the plaintiff. 556 P.2d 737, 742 (Cal. 1976). We have declined to follow the lead of the California Supreme Court. Absent a statutory directive or compelling circumstances, we will continue to recognize the privity of contract rule.

Many of the same considerations behind our reluctance to weaken the privity of contract rule inform our decision of how to limit a lawyer's liability for aiding and abetting a breach of fiduciary duty. To protect lawyers from meritless claims, most courts have strictly construed the elements of aiding and abetting. An emerging consensus among the authorities is that a lawyer's assistance must be active, substantial, and more than mere negligence. *See Wells Fargo Bank v. Arizona Laborers, Teamsters*

and Cement Masons Local No. 395 Pension Trust Fund, 38 P.3d 12, 26 (Ariz. 2002); *Kansas Pub. Employees Ret. Sys. v. Kutak Rock*, 44 P.3d 407, 417 (Kan. 2002); RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 6.6 (2006). Substantial assistance means “something more than the provision of routine professional services.” *Witzman*, 601 N.W.2d at 189. We agree with the authorities that merely negligent conduct on the part of a professional does not amount to substantial assistance. Such a holding is necessary to protect the policies behind the privity of contract rule, and to prevent aiding and abetting claims from serving as a proxy for third-party malpractice actions.

The substantial assistance element has been criticized as a poor measure of the conduct undertaken by an attorney on behalf of her client. Sometimes an attorney’s giving of advice requires her to draft documents or deal with third parties so as to effectuate that advice. For these reasons, the Oregon Supreme Court in *Reynolds v. Schrock* deviated from the “substantial assistance” standard, and decided the proper test is whether the lawyer’s actions fell outside the scope of her representation of the client. 142 P.3d 1062, 1070 (Or. 2006). Under this privilege, the plaintiff will have the burden of proving that the lawyer acted outside the scope of the lawyer-client relationship. *See id.*; *Kansas Pub. Employees Ret. Sys.*, 44 P.3d at 418-19. While we agree with the Oregon Supreme Court that it is proper to recognize a “scope of representation” privilege, we disagree that it should be analyzed to the exclusion of the substantial assistance standard. Although the two tests will often yield the same results, we believe that if either test eliminates liability then the claim against a lawyer or other professional should be dismissed. *See Reynolds*, 142 P.3d at 1071.

B. Powell's Aiding and Abetting Claim

Turning to the facts of the plaintiff's complaint, we have held that Paul Powell must satisfy four elements to state a claim against Lana Miller for aiding and abetting a breach of fiduciary duty. First, he must allege that Dean Evans committed a tortious act, causing him injury. Second, he must allege that Miller knew that Evans's conduct was a breach of duty. Third, he must allege that Miller substantially assisted Evans to achieve the breach. Fourth, he must allege that Miller's conduct was outside the scope of her duties as a lawyer. Applying these four elements to this case, we conclude that the trial court properly sustained the Miller's motion to dismiss.

1. Evans's Tortious Acts

Much has changed since the time that Judge Cardozo declared that business partners are bound by fiduciary ties, "the punctilio of an honor the most sensitive" *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). In 1998, this state joined thirty-six other jurisdictions in adopting the Revised Uniform Partnership Act (the "RUPA"). The RUPA fundamentally changed the fiduciary obligations among partners. Now the only duties partners owe each other are the duties of care and loyalty as described specifically in the RUPA. REV. UNIF. P'SHIP ACT § 404(a) (1997). A partner's duty of loyalty is limited to: (1) holding partnership property and profits for the benefit of the partnership; (2) refraining from dealing with the partnership as or on behalf of an adverse party; and (3) refraining from competing with the partnership. REV. UNIF. P'SHIP ACT § 404(b). As for the duty of care, a partner is to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or knowing violation of the law. REV. UNIF. P'SHIP ACT § 404(c). Perhaps most significantly, a partner is not prohibited from engaging in self-

dealing, but rather, owes only a contractual duty of good faith and fair dealing. REV. UNIF. P'SHIP ACT § 404(d), (e).

Powell has alleged that Evans breached a fiduciary duty by prematurely selling *Universe* for less than its full value, and for tapping his phones without consent. Because Evans properly divided the profits with Powell, neither of these allegations would constitute a breach of the exclusive duties of loyalty listed in the RUPA. These allegations, though, are sufficient to state a cause of action for breach of the fiduciary duty of care, even under the lowered standards of the RUPA. A jury could reasonably find that Evans was at least grossly negligent in selling *Universe* for one-fifth of its full value.

We also take notice of the fact that it is a crime in every state and under federal law to record a telephone call without the consent of at least one party. *See* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, CAN WE TAPE?: A PRACTICAL GUIDE TO TAPING PHONE CALLS AND IN-PERSON CONVERSATIONS IN THE 50 STATES AND D.C. (2003), *available at* <http://www.rcfp.org/taping>. A jury could also reasonably find that this act was a “knowing violation of the law” under RUPA § 402(c). The plaintiff has sufficiently pleaded the first element of his claim.

2. Miller's Knowledge of the Breach of Duty

The knowledge element requires both knowledge of the client's status as a fiduciary and knowledge that the client's conduct violates a fiduciary duty. *Chem-Age Indus. v. Glover*, 652 N.W.2d 756, 775 (S.D. 2002). Constructive knowledge may be presumed when there is a long-term or in-depth relationship between the attorney and the fiduciary. *Witzman*, 601 N.W.2d 188. Courts may consider the nature of the client's

activity, the nature of the lawyer's assistance, and the lawyer's state of mind in determining whether the requisite degree of knowledge exists. *Id.*

We are satisfied that Powell's complaint against Miller satisfies the knowledge requirement. Miller must have been aware of the business partnership between Evans and Powell when she advised Evans to record Powell's telephone conversations and to sell the *Universe* game. As well, we are willing to presume that she knew the law regarding partners' fiduciary relationship and that the advised conduct would be a breach of Evans's fiduciary obligations. Miller would be entitled to rebut this presumption, perhaps based her own testimony as to possible misunderstandings of the applicable law. For pleading purposes, though, the second element of Powell's cause of action has been met.

3. *Substantial Assistance*

For a claim of aiding and abetting a breach of fiduciary duty, the lawyer's assistance must be active, substantial, and more than mere negligence. *Wells Fargo Bank*, 38 P.3d at 26. The ordinary performance of legal services is not enough, even if those services were performed negligently. Otherwise, an action for aiding and abetting would be nothing more than a clever way of getting around the privity of contract rule to make a third-party claim for legal malpractice.

Powell's complaint against Miller does not state the element of substantial assistance. Even though it is alleged that Miller advised her client to engage in conduct that was likely a breach of fiduciary duty, she did not herself engage in any of the conduct necessary to complete those acts. We do not feel that this leaves Powell without a remedy. He may still hold Evans liable for the breaches of fiduciary duty. If Miller

was negligent in giving legal advice, then Evans may, in turn, hold her liable for legal malpractice. Contrary to the concerns of the dissenting opinion, we are confident that the possibility of malpractice liability is enough to deter a lawyer from giving the sort of negligent advice that would lead to a client's breach of fiduciary duty.

4. Scope of Representation

Exercising independent professional judgment and rendering candid advice is essential to an attorney's role as a counselor of law. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2002). It is an attorney's duty and privilege to give honest advice, even when that advice turns out to be erroneous. Miller is alleged to have given erroneous advice, and nothing more. There is no allegation that she acted maliciously or fraudulently. The plaintiff has failed to overcome the scope of representation privilege.

As the dissent points out, the plaintiff's complaint does allege that Miller advised Evans to illegally wiretap Powell's phones, an act for which Evans could be held criminally responsible. We disagree with the dissent's contention that Miller's advice would fall within the "crime or fraud" exception the privity of contract rule. *See Reynolds*, 142 P.3d at 1069. For the purposes of these exceptions, we are to focus on the attorney's conduct, not the client's. Each person is entitled to seek the advice of legal counsel to avoid breaking the law. It is not alleged that Miller advised Evans to break the law for her own gain, and we are not inclined to infer criminal solicitation unless it is explicitly stated in the complaint. Once again, Miller may have been negligent in the advice she gave Evans, but it is not alleged that she committed crime in doing so.

The dissent further criticizes our adoption of both the substantial assistance and scope of representation standards as overprotective of lawyers and unnecessarily

complicated. It argues that our holding creates vast immunity for lawyers who participate in breaches of fiduciary duty. We believe the dissent's concerns are overstated. A non-client will be able to recover from a lawyer when the lawyer's harmful advice to her client was tainted by the lawyer's own self-interest. *See Weingarten v. Warren*, 753 F. Supp. 491, 496 (S.D.N.Y. 1990). Moreover, the dissent ignores the fact that we are dealing today with a partnership, one of the least rigorous forms of fiduciary duty. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51(4) & cmt. h (2000). In future cases involving fiduciaries such as trustees, guardians, and executors who owe the highest standards of care, we have no doubt that the principles stated today will serve the ends of justice.

III. Conclusion

Lana Miller allegedly advised her client Dean Evans to engage in conduct that would breach his fiduciary duties to his business partner. Despite the possibly erroneous nature of her advice, she was acting legitimately within the scope of her duties as Evans's lawyer and did not substantially assist him in any breach. The plaintiff's claim for aiding and abetting a breach of fiduciary duty was properly dismissed. We affirm the judgment of the trial court.

TOTAL WORD COUNT: 2906