IN THE SUPREME COURT OF CALIFORNIA

Andy and Maryclaire Daus,
Plaintiffs and Petitioners

v.

Andy Moore,
Defendant and Respondent.

PETITION FOR REVIEW

After a Decision Of The Court Of Appeal,
Third Appellate District,
C075019

From the Superior Court for Nevada County,
The Honorable Sean P. Dowling
Civil Case No. CU-78702

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ISSUES PRESENTED

Synopsis: majority shareholders sought advice from outside legal counsel about how to take all economic value of company for themselves. Attorney advised majority that they can take all economic value for themselves and then devised a specific plan to accomplish this without the knowledge of minority shareholders. Attorney prepared and participated in the scheme and has himself approved as new in-house counsel without disclosure to minority of his prior relationship with majority or disclosure of the purpose of corporate resolutions attorney drafted to effect scheme.

Court Of Appeal Decision: held that the majority shareholders had the power to do what they did, that there was no basis for holding outside legal counsel liable for actual fraud, and there was no basis for imputing a duty to legal counsel to disclose the scheme to minority or to otherwise hold legal counsel liable for constructive fraud or actual. This decision raises the following issues in this Petition:

1. IS A LAWYER LIABLE TO A THIRD PARTY WHEN THAT LAWYER GIVES WRONGFUL ADVICE TO A CLIENT WITH THE KNOWLEDGE AND TO HARM THAT THIRD PARTY?

2. DOES ACTUAL FRAUD BASED UPON CONCEALMENT REQUIRE THE PLEADING OF REASONABLE RELIANCE, OR INSTEAD, THAT THE PARTY HARMED MUST HAVE BEEN UNAWARE OF THE FACTS AND WOULD NOT HAVE ACTED AS HE DID IF HE HAD KNOWN OF THE CONCEALED OR SUPPRESSED FACTS?

3. DOES ACTUAL FRAUD BASED UPON CONCEALMENT REQUIRE THE PLEADING OF A SPECIAL DUTY TO DISCLOSE?

4. DO ALLEGATIONS BY MINORITY SHAREHOLDERS OF SPECIFIC ECONOMIC HARM RESULTING FROM LAWYERS SCHEME TO DEFRAUD THEM AND ALLEGATIONS THAT THEY WOULD HAVE TAKEN LEGAL ACTION TO STOP THE SCHEME HAD THEY KNOWN OF IT, SUFFICE TO ALLEGE HARM FOR ACTUAL AND CONSTRUCTIVE FRAUD?

GROUNDS FOR REVIEW

The grounds for review of the Third District Court Of Appeal Decision is to settle the foregoing important questions of law. Although there are a few decisions in the field, there are no decisions of this Court directly concerning the issues raised here. If these are addressed, attorneys across California will be better informed as to the boundaries of their advice to shareholders of close corporations.

INTRODUCTION

This is a Petition for Review of the decision by the Court of Appeal, Third Appellate District, on May 1, 2015 ("Decision"), upholding the ruling of the Honorable Sean P. Dowling, Judge of the Nevada County Superior Court, on July 26, 2013, sustaining the demurrer of Defendant Andy Moore ("Respondent") to the Second Amended Complaint ("SAC") filed by Plaintiffs Andy and Maryclaire Daus ("Petitioners").[1]

There are serious errors of both law and fact in the Decision. The most prominent are:

(a) The Court of Appeal relied substantially upon the misapplication of the element of "reasonable reliance" to Petitioner's claim for actual fraud. Although reasonable reliance is required in actual fraud cases based upon affirmative misrepresentation, it is the wrong test when the actual fraud is based upon concealment. The Court of Appeal should have applied the test of whether the party harmed was unaware of the true facts and would have acted differently if the truth had been known;

(b) the Court of Appeal dismissed the concept that a lawyer has liability to a third party when that lawyer knowingly and intentionally gives wrongful

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[1] Petitioners filed a Petition For Rehearing on May 22, 2015. The Court of Appeal, Third Appellate District, denied the petition on May 28, 2015. See Attachment 2. The SAC is part of the appellate court record.

advice to a client for the purpose of harming that third party: i.e., the Court of Appeal disregarded the possibility of imputing a special duty in lieu of privity; and

(c) The Court of Appeal ignored Petitioner's allegations of harm in the SAC, as well as Petitioner's allegations that they would have acted differently if the had known the truth.

Even more fundamental, however, is the Appellate Court's failure to understand the wrongfulness of the majority shareholder misappropriation of the entire economic value of the Company. The Court was of the opinion that the majority shareholders had the "votes" to do what they wanted and the Petitioners were just out of luck. In combination with this, the Court expressed the opinion that the Petitioners had failed to plead what they could have done differently and that they were not actually harmed. Under these misconceptions, the Court did not see how the actions of Respondent gave rise to liability.

FACTUAL SUMMARY

The facts of this case present a classic portrait of actual fraud in a corporate setting. Brian and Paula Howser and Vaughn Warringer are the owners of sixty percent of the shares (the "Majority") in a California close corporation called DC Tech ("Company") and Petitioners Andy and Maryclaire Daus own the remaining forty percent. All of the shareholders were directors of the Company. All of the shareholders worked for the Company since its inception in 2004, except for Maryclair Daus. The Company had always operated under an IRS "S" election enabling partnership taxation treatment for the Company's profits and losses. The working shareholders were paid salaries and the profits or losses of the Company were paid out each year *pro rata* based upon stock ownership to each shareholder. In 2010, Petitioner Andy Daus had to stop working for personal reasons. He recommended to the Majority that they hire a replacement for him and/or pay themselves some extra salary to make up for any additional work they might have to perform. The Majority, however, decided that if Petitioner Andy Daus was not going to work, then both Petitioners were no longer entitled to *any profit from the Company*. Simply put, the Majority decided to take for themselves all of the economic value of Petitioners' stock. Not knowing how to do this as a matter of "corporate procedure", the Majority sought the services of a

corporate attorney, Respondent Andy Moore ("Moore").

Rather than tell the Majority that they had a fiduciary duty to Petitioners that obligated them to treat Petitioners ownership interest equitably, Moore devised the plan whereby the Majority would set up a compensation committee, appoint themselves as the only members of the committee, and then pay themselves all of the profits of the Company as salary and bonus, leaving nothing for Petitioners.

Moore went even further: he designed the entire scheme whereby there would be a shareholder meeting to elect new officers, create new director compensation and contract committees, and then have the Majority elected as the Company officers and as the only members of these new committees. The Petitioners would then have the choice of owning valueless shares or selling for a "song".

Moore did not stop there. He wrote the agenda for the meeting, drafted the resolutions and arranged for the meeting to be held in his office. Moore never disclosed at any time before or during the shareholder meeting that he had an existing attorney-client relationship with the Majority and that he had advised the Majority how they could take the entire economic value of the Company for themselves. And one more thing: Moore had himself elected as new corporate legal counsel to be *paid by the Company*, not the Majority.

Had Petitioners known about the plan, they could of confronted the Majority before the shareholder meeting, and if that had been unsuccessful, they could have filed a straightforward action for declaratory and injunctive relief and prevented the Majority from carrying out the plan. See e.g., SAC ¶ 33, 86. This would have prevented the misappropriation of the Petitioners' share of the profits (over several hundred thousand dollars) and it would have prevented this law suit.

As it turned out, Moore's concealment of the true nature and intent of his plan completely mislead the Petitioners. They did not know learn what the Majority had done for almost three years, until well into discovery in this action when the email communications between the Majority and Moore were disclosed. When they learned what had been done, Petitioners amended the complaint to add Moore as a defendant.

OMISSIONS AND ERRORS IN THE APPELLATE DECISION

I. Imputing a Special Duty For Constructive Fraud By Lawyer

FIRST ISSUE: IS A LAWYER LIABLE TO A THIRD PARTY WHEN THAT LAWYER GIVES WRONGFUL ADVICE TO A CLIENT WITH THE KNOWLEDGE AND INTENT TO HARM THAT THIRD PARTY?

A. Essential Foundational Facts Were Ignored In The Decision

The Petitioners' allegations in the SAC against Respondent Moore are premised upon the doctrine established in *Jones v. H. F. Ahmanson & Co.*

(1969) 1 Cal. 3d. 93 ("*Jones*") that the Majority had a fiduciary duty not to deprive the Petitioners of their economic value in the Company.[2] Although the Appellate Court Decision nominally mentions *Jones* in its introduction, the decision thereafter ignores the relevancy of *Jones* to the facts of the case. Indeed, the tenor of Decision implied that the Appellate Court believed the Majority had done nothing wrong when they expropriated all value in the Company for themselves. For example, the Court commented that the "Howser[s] had the votes to pass the planned changes with or without Daus' votes." Decision at 10.

As the direct consequence, the Decision never considered the allegations in the SAC that the Majority asked Moore to find a way to deprive the Petitioners of all economic value in the Company. See e.g., SAC at ¶¶ 21, 67. Additionally, the Court never discussed the allegations that Moore responded to the Majority's request for advice by devising the plan to defraud Petitioners and then participated in the plan by holding the shareholder meeting in his office. See e.g., SAC at ¶¶ 74-76. These are important foundational facts for both actual fraud and constructive fraud because they establish that Moore knew from the outset that *the purpose of his*

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[2] The unlawfulness of the Majority's conduct is a crucial foundational fact. See e.g., SAC at 20-22, 35, 66, 83, 91.

engagement was to harm the Petitioners.

This Court needs to correct the Decision by substantively applying, not just acknowledging, the *Jones* doctrine that majority shareholders owe a fiduciary duty to minority shareholders and may not deprive minority shareholders of all economic value of their shares.[3] When the wrongfulness of the Majority's conduct is acknowledged, then the Petitioners claims against Respondent for *actual fraud* (Count VI) and *constructive fraud* (Counts V, VII) can be correctly analyzed. Moore's conduct in designing and then participating in the scheme that effected that Majority's breach of fiduciary duty violated both the *general duty* of any person not to defraud another and a *special duty* to the Petitioners because they were the object of his wrongful advice and actions.

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[3] As a corollary to this, this Court should also find that any "vote" by majority shareholders that deprives minority shareholders of their rightful value in a company is *void as a matter of public policy.* Contrary to the assertion in the Decision that the Majority had the "votes" to pass the items in the agenda, Petitioners contend that the votes of the Majority were *void* for being in violation of public policy (i.e., in violation of *Jones*), in violation of corporate law (only disinterested directors entitled to vote Cal. Corp. Code § 307(b)&(c), §310), and as a scheme to defraud. See., e.g., *Haro v. Ibarra* (2009) 180 Cal App. 4th 823, 834-835 (holding that assessment on shareholder was void where it was part of a scheme to defraud).

B. The Basis For Imputing A Special Duty Is Found In The Judicial Authority, The Professional Rules Of Conduct, And Public Policy

The Fifth and Seventh Causes of Action are premised on constructive fraud: i.e., that Moore had a *special duty* to Petitioners to fully disclose the purpose and details of his plan to have the Majority take all of the economic value of the Company for themselves. Petitioners presented three grounds for finding a special duty to support claims based on constructive fraud (Counts V and VII).[4]

First, the Court of Appeal has stated on multiple occasions that an attorney, in giving legal advice to a client, may also owe a special duty to a third party that is affected by that advice. In other words, a duty to a third party to disclose (or refrain from certain actions) may be imputed in the absence of privity because of the circumstances and/or nature of the advice. The decision is a *public policy* choice. See *Skarbrevik v. Cohen, England &*

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[4] The allegations on Counts V and VII are based upon an imputed special duty. Perhaps they may have been better entitled "Constructive Fraud". However, the substantive factual allegations establishing the basis for imputing a special duty would remain the same. As this Court has held on many occasions: "we are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the [f]actual allegations of the complaint are adequate to state a cause of action under any legal theory. The courts of this state have, of course, long since departed from holding a plaintiff strictly to the 'form of action' he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained. *Barquis v. Merchants Collection Association* (1972) 7 Cal. 3d 94, 103.

Whitfield (1991) 231 Cal. App. 3d 692,711("*Skarbrevik*"). As discussed in detail, below, Moore's conduct fulfills these criteria completely.

Second, Moore was obligated as an attorney under Professional Rules Of Conduct, Rule 3-210, not to give wrongful advice, and when he did so, it was with the intent to harm the Petitioners, thereby giving rise to a special duty to disclose (i.e., a duty to prevent the harm he intended).

Third, Moore had himself appointed as corporate counsel at the shareholder meeting, and as such, he had an express duty under Professional Rules Of Conduct, Rule 3-600 and 3-310 to make full disclosure of his prior representation of the Majority and the conflict created by his scheme to deprive Petitioners of all economic value in the Company.

The Decision, however, never addressed any criteria for imputing a special duty as explained in *Skarbrevik* and it summarily dismissed the Professional Rules with the oblique comment that these have "no relevance." Decision at 10-11.

1. Judicial Authority Supports The Imposition Of A Special Duty By Moore As A Matter Of Public Policy

In *Skarbrevik* at 700-707, the Court of Appeal reviewed the criteria to be used to impute a duty on the part of an attorney. It began at 701 with this preface:

> The question of whether an attorney may, under certain circumstances, owe a duty to some third party is essentially one of law and, as such, involves 'a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances. [Citation.]

The *Skarbrevik* Court then reviewed the policy concerns that might warrant the imposition of liability by imputing a duty:

> Determination of whether in a specific case an attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the forseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the [attorney's] conduct and the injury, and the policy of preventing future harm. [Citation.]

Focusing on the foreseeability of harm, the *Skarbrevik* Court then noted that:

> Limited exceptions to the privity rule have evolved in situations where the third party is the intended beneficiary of the attorney's services or the foreseeability of harm to the third party resulting from professional negligence is not outweighed by other policy considerations.

The following is an analysis of these four factors as applied to the allegations in this case:

> **Criteria: The extent to which the transaction was intended to affect the plaintiff**

Moore was asked by the Majority to find a way to get rid of Petitioners, or in the alternative, to strip Petitioners of any economic benefit. Inresponse, the SAC alleges that Moore designed the plan whereby the Majority would take all economic value of the Company for the purpose of harming the Petitioners. SAC ¶¶ 21-25.

Criteria: The foreseeability of harm

The harm to Petitioners was the very purpose of Moore's legal advice to the Majority and then his participation in the scheme. Thus, foreseeability of harm to Petitioners is conclusively established.

Criteria: The degree of certainty that the plaintiff suffered injury

The allegations in the SAC clearly assert that Petitioners were seriously harmed in excess of $71,600 for 2011, plus unknown amounts for 2012, 2013, and continuing into the future. SAC ¶¶ 79, 86, 93.

Criteria: The closeness of the connection between the attorney's conduct and the injury

Moore's advice and then participation was the direct cause of Petitioners' harm. But for Moore's harmful advice to the Majority, Petitioners would have continued to receive their *pro rata* share of the Company's earnings and this entire lawsuit would have been unnecessary.

Criteria: The policy of preventing future harm

The public policy factor is obviously met here. Lawyers must not be allowed to engage in such conduct because it does harm to innocent third parties and brings the profession into disrepute.

With all five criteria squarely met, the Court should have applied the *Skarbrevik* analysis and held that, assuming the truth of the allegations, Petitioners have properly pleaded causes of action based upon a special duty to disclose.

2. **Rule 3-210 Exists To Protect Third Parties**

Moore had an *imputed special duty* to the Petitioners under Professional Rule 3-210 which forbade him from *knowingly* giving wrongful legal advice. Here is the relevant language:

> A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid.

This Rule is obviously intended *to protect third parties from the consequences of knowingly giving wrongful advice*.[5] This case exemplifies why the Rule exists: Moore gave advice that he knew was wrongful and would help his clients to the detriment of the Petitioners. This conduct was

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[5] The Rule is not directed at negligent advice (for which a client has a cause of action against the lawyer), but is directed at knowing advice that places it squarely in the courtyard of an intentional tort.

an intentional tort directed at Petitioners, not an act of negligence towards his clients. Hence, to give any practical effect to the Rule, it must be construed to give rise to a special duty of care between the attorney and the third party that is knowingly harmed by its violation.

3. Moore Had A Special Duty Under Rule 3-600

Corporate counsel has a duty to avoid conflicts and act fairly and equally towards all shareholders, including the *duty to make full disclosure to all directors*.[6] This special duty is set forth clearly in Professional Rules Of Conduct, Rule 3-600 and Rule 3-310. Judicial authority fully supports such a duty and makes favoring some shareholders over another unlawful. See *Goldstein v. Lees* (1975) 46 Cal App. 3d 614, 622 ("*Goldstein*") where the Court of Appeal held that legal counsel for a company may not "act as proxy for one contending group of shareholders" against another. In so holding, the *Goldstein* court quoted the following comment from the Committee on Professional Ethics and Grievances of the American Bar Association in Opinion 86:

> In acting as the corporation's legal advisor he [legal counsel] must refrain from taking part in any controversies or factional differences which may exist among shareholders as to its control. When his opinion is sought by those entitled to it, or when it

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[6] In this case, both the Majority and the Minority were Directors.

> becomes his duty to voice it, he must be in a position to give it without bias or prejudice and to have it recognized as being so given. Unless he is in that position his usefulness to his client is impaired.

This construction of Rule 3-600D was agreed with in *Skarbrevik*, where the court reviewed both Business and Professions Code §6068(e) and the Professional Rules of Conduct, Rule 3-600D. In *Skarbrevik* at 711, the court found that "[t]he attorney [for the company] is obligated to explain to the organization's directors, officers, employees, members, shareholders, or other constituents the identity of the client for whom the attorney is acting, and shall not mislead such a constituent …"

Petitioners were directors and shareholders on an equal standing with the Majority under the law. Moore had himself made corporate counsel for compensation. Consequently, he had a duty under the Professional Rules to make full and fair disclosure to Petitioners before he had himself appointed as new legal counsel to avoid any conflicts.

II. Actual Fraud By Concealment Does Not Require Reasonable Reliance

SECOND ISSUE: DOES ACTUAL FRAUD BASED UPON CONCEALMENT REQUIRE THE PLEADING OF REASONABLE RELIANCE, OR INSTEAD, THAT THE PARTY HARMED MUST HAVE BEEN UNAWARE OF THE FACT(S) AND WOULD NOT HAVE ACTED AS HE DID IF HE HAD KNOWN OF THE CONCEALED OR SUPPRESSED FACT(S)?

A. The Elements Of Fraud By Concealment

The elements for pleading *actual* fraud either by misrepresentation or

by concealment were made clear by this Court in *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 638 ("*Lazar*"), where they were stated as follows:

> "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation *(false representation, concealment, or nondisclosure)*; (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (Emphasis added.)

1. Justifiable Reliance Is Replaced By Alleging That The Party Harmed Would Have Acted Differently If The Truth Were Known

Where the actual fraud is by *concealment*, the element of justifiable reliance is replaced by alleging that the party harmed must have been unaware of the facts and would have acted differently if that party knew the truth. *Levine v. Blue Shield Of California* (2011) 189 Cal. App. 4th 1117, 1126-1127 ("*Levine*"). See e.g., *Vega v. Jones, Day, Reavis, & Pogue* (2004) 121 Cal. App 4th 282, 291-292 ("*Vega*") (attorney may be held liable for concealment without privity or a special duty); *Kaldenbach v. Mutual Of Omaha Life Insurance Co.* (2009) 178 Cal. App. 4th 830, 850 ("*Kaldenbach*").

The Appellate Court apparently did not understand that there are different pleading elements for actual fraud by affirmative representation and actual fraud by concealment. Thus, in the Decision the Appellate Court *mistakenly focused* on what it perceived as Petitioner's failure to plead *reasonable reliance* when it should have been focused on the fact that

Petitioners, instead, *pleaded that they were unaware of the true facts and that they would have acted differently had they known the truth*.[7] As a consequence, Petitioner's claim for actual fraud was dismissed.[8]

Petitioners correctly pleaded that they would have acted differently had they known the truth. SAC ¶¶ 33, 86. Accordingly, the Court applied the *wrong test* in reaching the Decision.

III. Actual Fraud By Concealment – General Duty Not To Defraud

THIRD ISSUE: DOES ACTUAL FRAUD BASED UPON CONCEALMENT REQUIRE THE PLEADING OF A SPECIAL DUTY TO DISCLOSE?

A. The General Duty Not To Defraud, Not A Special Duty To Disclose, Is The Required Element

Our society imputes a general duty to each person not to harm another by some manner of deceit. This general duty was long ago absorbed into the common law as the foundation for an action for fraud. The general duty not to defraud subsumes an obligation (duty) to tell the whole truth and also an obligation (duty) to *disclose facts that, if known, would cause the person that*

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[7] Specifically, the Court found that Petitioners fail "to explain with particularity what actions he took in justifiable reliance on anything Moore did." Decision at 7.

[8] At oral argument, Petitioners were asked to identify what statement of Moore that they had relied upon. Petitioners responded by pointing out that the allegation was for concealment, and thus, it was not possible to allege such a fact.

otherwise would be harmed to act differently.

In this case, the Court of Appeal has overlooked the specific allegations that Moore devised the plan for the majority with the knowledge and specific intent to harm the Petitioners. SAC ¶ 83. If this be proved at trial, then a violation of the general duty not to defraud is proved and Petitioners have stated a valid cause of action for fraud. *It does not matter by what means the fraud is carried out*[9] *or by whom,*[10] *what matters is that there is knowledge by the perpetrator that the scheme may wrongfully defraud another of something of value (scienter) and that this plan was put into effect with the intent to accomplish that wrongful purpose.*

A good example, not nearly as egregious as the conduct alleged here, is

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[9] Petitioners directed the Court of Appeal's attention to *Wells v. Zenz* (1927) 83 Cal. App. 137, 140, where the Court of Appeal eloquently stated how an *actual* fraud can be perpetuated by *any manner of conduct:* "[f]raud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived."

[10] It does not matter that the fraudulent actor happens to be a lawyer: an attorney is not special and owes a general duty not to deceive another like everyone else. *See e.g., Vega at 291-292; Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal. App. 4th 54, 69 ("*Shafer*"); *Cicone v. URS Corp.* (1986) 183 Cal. App. 3d 194, 201-202 ("*Cicone*").

the decision in *Vega*. The Court of Appeal overruled a demurrer to a claim against a law firm for active concealment of material facts concerning the pre-acquisition financing by acquiring corporation by means of toxic stock. The Appellate Court began its analysis by re-affirmed the long standing principal that a lawyer is no different than any other person and has the dame general duty not to defraud as anyone else. *Vega* at 291, citing to *Shafer* and *Cicone*, *supra* note 10. Next, the *Vega* court found that the limitation of actions by a third party for negligence in giving advice to a client do not exist in the realm of fraud (i.e., the lack of privity does not bar an action for actual fraud). Then the court set forth in clear terms that a lawyer is liable for fraud for when the lawyer makes false statements during business negotiations: "[a]ccordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient."

In *Vega*, however, the gravamen of the action was an allegation of *concealment* of important facts about the nature of the stock being used by the acquiring corporation being represented by the defendant law firm. The law firm vigorously asserted, *as does Moore in this case*, that the plaintiff must allege the existence of a special duty to disclose. The *Vega* Court rejected this contention outright:

However, we can deduce no reason why a lawyer may be liable for

> one form of fraud but not the other. (See Lovejoy v. AT & T Corp. (2001) 92 Cal. App.4th 85, 97, 111 Cal. Rptr.2d 711 [it is established by statute " 'that intentional concealment of a material fact is an alternative form of fraud and deceit equivalent to direct affirmative misrepresentation,' " quoting Stevens v. Superior Court (1986) 180 Cal.App.3d 605, 608, 225 Cal.Rptr. 624]; ... Second, Jones Day's invocation of the principle that fraud based on nondisclosure requires an "independent duty of disclosure" is erroneous ... active concealment may exist where a party "[w]hile under no duty to speak, nevertheless does so, but does not speak honestly or makes misleading statements or suppresses facts which materially qualify those stated." FN9 (**35BAJI No. 12.37; Cicone v. URS Corp., supra, 183 Cal .App.3d at p. 201 ... Providing a disclosure schedule which deliberately omitted material facts seems clearly to fit this category.

Petitioners have correctly alleged, under the general duty not to defraud, that Moore devised a scheme to defraud them and then participated in this scheme for his own financial benefit. Just as described in both *Vega* and *Cicone*,[11] the telling of a partial truth or the act of a partial disclosure requires, pursuant to the general duty not to commit fraud, the obligation to

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[11] Although not discussed in these cases, the legislature enacted CC §1709 to make deceit (fraud) an actionable tort. It also enacted CC §1710 which defines deceit. In §1710(3), deceit includes the suppression of a fact by one who has a duty to disclose and the suppression of a fact by one who gives information of other facts which are likely to mislead if the concealed fact(s) is not disclosed.

Moore's conduct as alleged fits squarely within the latter part of the definition because he carefully disclosed certain facts (e.g., a meeting agenda), but did not disclose his advice to the Majority, the intent and purpose of the meeting, or the true nature of the agenda matters. This partial disclosure meets the definition actual fraud under §1710(3), and therefore, there is no need to plead a special duty to disclose.

tell the truth, the whole truth. No special duty needs to be alleged for actual fraud.

The Petitioners allegations (SAC ¶¶ 66-76, 83) make it clear that Moore *deliberately* failed to disclose his representation of the Majority, that he had devised a plan to deprive them of all economic value of the Company, and then *participated* in the scheme by drafting the shareholder meeting agenda, holding the meeting in his office, acting as secretary, and having himself appointed as new in-house counsel (for compensation). That agenda and the participation of Moore in the plan was a partial disclosure intended to mislead. If Moore had disclosed his prior representation and the purpose of the items in the meeting agenda, Petitioners would have been able to act accordingly to protect their financial interest. Thus, Petitioners alleged actual fraud by c*oncealment* and the Decision was misplaced.

IV. The Petitioners Were Seriously Harmed By Moore's Concealment

FOURTH ISSUE: DO ALLEGATIONS BY MINORITY SHAREHOLDERS OF SPECIFIC ECONOMIC HARM RESULTING FROM LAWYERS SCHEME TO DEFRAUD THEM AND ALLEGATIONS THAT THEY WOULD HAVE TAKEN LEGAL ACTION TO STOP THE SCHEME HAD THEY KNOWN OF IT, SUFFICE TO ALLEGE HARM FOR ACTUAL AND CONSTRUCTIVE FRAUD?

Pervasive throughout the Decision is the Court's opinion that Petitioners were not harmed. See e.g., Decision at pp. 7-8, 10.[12] There were two components to this perspective. First, as just discussed, the Court made it clear that it believed that the Majority had the power to do what it did regardless of whether Petitioners had known about the plan. Second, the Court indicated that Petitioners had not alleged any real harm as a result of the plan and Moore's conduct. Even further, the Court remarked that the Petitioners "fail to explain how ... [they] could have stopped or averted anything." Decision at 7.

These assumptions are wrong as a matter of law, see *Jones*, and they ignore the specific factual allegations to the contrary. Petitioners clearly alleged how they did not discover the plan for over two years after the scheme was effected and long after having to file a law suit against the Majority. SAC ¶¶ 27-33. Petitioners clearly alleged the economic harm that they suffered. SAC ¶¶ 79-80, 86-87, 93, 97.

It is obvious that if Petitioners had known the true purpose of the plan, i.e., that the Majority was creating a special compensation committee with

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[12] The Court appeared to ignore the factual allegations of financial harm to Petitioners and found that Petitioners fail to show "what harm flowed from the allegedly-false minutes". Decision at 8.

only themselves as members, and further, that they would use this committee to pay themselves all profits of the Company by means of bonuses and salary increases, Petitioners would have taken immediate action to stop the scheme by filing an action for declaratory and injunctive relief. In short, knowledge of the plan would have prevented the defalcation and would have limited any legal action to a much simpler action for declaratory and/or injunctive relief. This would have prevented the hundred of thousands of dollars in damage to Petitioners. These factual allegations and argument were presented by the Petitioners, but there were not adequately addressed by the Court.

The Court's erroneous perception of this issue may have derived from its incorrect use of the reasonable reliance element as discussed in Section II.a.1, above. If the Appellate Court had employed the test of whether the Petitioners would have acted differently if they had known the truth, then it may have more readily seen the validity of Petitioner's pleading of damage and harm.

CONCLUSION

When the Majority first approached Moore, he should have told them that what they wanted was unlawful. If the Majority persisted, Moore was obligated under the Professional Rules to decline any representation. Petitioners believe that, in fact, the prior corporate counsel was approached by the Majority before they approached Moore, but that he declined to give any unlawful advice. SAC at 23-24. Hence, the Majority sought out Moore.

Although the Decision acknowledges the *Jones* decision and that the majority has a fiduciary duty to the minority, the Court never develops this rule or applies it to the allegations in the SAC. This led to several errors in the Decision. Moreover, the Court did not really think through the conceptual and economic consequences of its Decision. Who would ever want to be a minority shareholder if corporate counsel was free to secretly advise majority shareholders to take all economic value for themselves? We would simply end up with only single shareholder companies.

The Appellate Court mistakenly focused on a "reasonable reliance" test when it should have focused upon Petitioners allegations about what they would have done had they known the truth.

Next, the Appellate Court mistakenly assumed that a special duty to disclose was required to support a claim for actual fraud by concealment.

However, the Appellate Court then ignored all of the allegations that, in fact, overwhelmingly establish a special duty by Moore to Disclose.

Finally, the Appellate Court simply refused to acknowledge the factual allegations of damage to the Petitioners and that the Petitioners could have stopped most of these damages from accruing had they known of the concealed facts.

Based upon the foregoing, Petitioners request that this Court grant this Petition For Review.

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Respectfully Submitted,

Dated: June 9, 2015

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Patrick H. Dwyer, Attorney for Petitioners

CERTIFICATE OF WORD COUNT

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this brief (i.e., Sections I through IV) is approximately 5460.

_____
Patrick H. Dwyer,
Attorney for Petitioners

Date: June 9, 2015

PROOF OF SERVICE

I hereby certify under penalty of perjury that a copy of the Petitioners' Petition For Review in the matter of Daus v. Andy Moore, Case No. 78702, appeal No C075019 was served on June 9, 2015, via U.S. First Class mail, postage prepaid, upon the following:

1. Counsel for Defendant and Respondent addressed as follows:

   Gregory S. Cavallo, Shopoff Cavallo & Kirsh LLP, 601 Montgomery Street, Suite 1110, San Francisco 94111; email address: Gregory Cavallo <greg@scklegal.com>

2. The Superior Court for the County of Nevada, Department 6, 201 Church Street, Nevada City, California 95959 (one copy).

3. The Court of Appeal, Third Appellate District, 914 Capitol Mall, 4th Floor, Sacramento, California 95814.

I declare under penalty of perjury under the laws of California that the foregoing certification is true and correct.

_____
Signature

_____
Print Name

Date: June __, 2015

Location: Penn Valley, CA 95946