IN THE SUPREME COURT OF CALIFORNIA

Traci Southwell, Petitioner

vs.

Superior Court for Marin County,

Richard Helzberg and Kathleen McKinley, Real Parties In Interest.

PETITION FOR REVIEW

After a decision of the Court of Appeal,
First Appellate District,
Summarily Denying Petition For Writ Of Mandamus
A146319

From the Superior Court for Marin County,
The Honorable Paul M. Haakenson
Civil Case No. CIV-1403557

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ISSUES PRESENTED

The three issues raised in this petition are:

1. Whether a lawyer who undertakes an engagement with the express promise to act urgently and zealously because a child is in *extremis* then has a fiduciary duty to fulfill that promise?

2. When there are no "sham" allegations and no prior allegations are omitted, may a plaintiff plead new allegations to correct the description of legal services that are the subject of the complaint?

3. Is an attorney's express promise to act with urgency and zealousness actionable under a breach of contract theory or only as a negligence claim?

INTRODUCTION

This is a petition by Traci Southwell ("Southwell") for review of the summary denial by the Court of Appeal, First Appellate District, of Southwell's Petition for a Writ of Mandamus to reverse the decisions of the Honorable Paul M. Haakenson , Judge of the Marin County Superior Court, granting, in part, and denying in part, Respondents' Demurrers and Motions to Strike portions of Petitioner's Second Amended Complaint ("SAC").

Extraordinary relief is necessary in this case because: (a) Petitioner has been deprived of her right to plead the most substantial portion of her case; and (b) there are significant legal issues of statewide importance that are of first impression and writ relief is the appropriate procedure.

To place the legal issues in a proper context, it is necessary to begin with the story of what happened to Petitioner and her child.

Breach Of Duty By The First Attorney

Southwell is the mother of DD, a minor child. Southwell divorced her ex-husband in 2005 because of physical abuse and took sole physical custody of DD. Southwell and DD were residing in Yuba County, California, when on August 3, 2012, her ex-husband, who was living in Texas, petitioned in Yuba County Superior Court for full physical custody of DD and the transfer of jurisdiction of the child to Texas. Southwell engaged a local family law practitioner to represent her.

As set forth in her allegations in *Southwell v. Thomas*, Yuba County Superior Court Case No. YCSCCVCV 14-0000097 ("Yuba County Action"), the custody petition was based upon numerous false allegations against Petitioner. Southwell provided her attorney with ample evidence to refute all of these allegations, including school records, declarations of percipient

witnesses, and letters from teachers and family members. Southwell's attorney, however, never investigated the allegations and never contacted any of the witnesses supplied by Southwell. Instead, without telling Southwell, he secretly agreed to the custody terms in the ex-husband's petition and thereafter only provided feigned representation.

Why did he betray his client? At the outset of the case, the court appointed child's counsel *misinformed* Southwell's attorney that Southwell was a member of a disliked local religious orgainzation (*which she was not*). Believing this falsehood, he concluded that she was unfit to raise her child and that the minor should be sent to Texas where the ex-husband was associated with a fundamentalist Christian church.

This was just the beginning of a long list of serious wrongdoing as alleged in Southwell's amended complaint. The complaint includes allegations that Southwell's attorney: (a) never helped or advised Southwell about the court ordered mediation; (b) never challenged any of the false accusations against Southwell; (c) never attempted to cross examine or otherwise challenge the false information in the court mediator's report[1]; (d) never contacted any of the witnesses provided by Southwell; (e) never submitted a single piece of evidence on her behalf; (f) without her knowledge, he stipulated to the admission into evidence of any reports and evidence that the ex-husband wanted to put into the record; (g) forged Southwell's signature on a declaration filed with the Court. His final act of betrayal was to tell

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[1] Southwell had a right under *McLaughlin v. Superior Court*, 140 Cal. App 3rd 473 (1983) to an evidentiary hearing and the right to cross examine the author of the recommendations to the court. Southwell's attorney never advised her of this right and never requested any opportunity to do so.

Southwell that a hearing on a motion by the ex-husband to transfer jurisdiction to Texas under California Family Code §3247 was not important and that she did not need to attend. As to be expected, permanent jurisdiction over the child was transferred to Texas.[2]

Needless to say, Southwell has been emotionally crushed from losing her child. Without any opportunity to defend herself, Southwell has been ruthlessly attacked, and not just by her ex-husband, but secretly by her own attorney. She has always been a loving mother who put her son first. Suddenly, she was publicly humiliated and looked upon with disdain. Worst of all, she could not even visit her son or protect him from her ex-husband's abuse. All of this because of lies that her attorney refused to investigate or challenge.

The Yuba County action is now pending and is set for trial on April, 2016. Southwell pleaded negligence, breach of contract, and breach of fiduciary duty against her attorney. Included were claims for emotional

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[2] Chronology of custody action: ex husband files petition for custody on Friday, August 3, 2012. Southwell meets with an attorney (Thomas) on August 6th. There is a brief hearing on August 7th to formally appoint child's counsel and set mediation for the morning of Friday, August 10th. Southwell discloses the physical abuse by ex-husband in the mediation questionnaire and brings a support person to the mediation. Child's counsel and the mediator turn away the support person and force Southwell to sit next to her ex-husband. She is subjected to two hours of harangue about what a bad mother and person she is. The mediation ends at about noon. At 1:15 pm, the mediator files with the court a recommendation (prepared before the mediation and without ever talking to Southwell) that includes the false accusations and recommends full custody to the father. At 1:30 pm that day (August 10th) there is a meeting of all counsel in the court's chambers. Her attorney comes out and tells her that her child is going to Texas. The court signs temporary orders giving custody to the ex-husband that very day.

distress and punitive damages.[3] The Yuba County Superior Court struck everything but the negligence count and disallowed any emotional distress or punitive damages. Although Southwell sought a writ to allow her to plead the full extent of her claims and damages, extraordinary relief has been denied.[4]

Breach Of Duty By Respondents

Although emotionally devastated and very angry, Southwell was determined to fight to save her child who she knew was being physically and psychologically abused.[5] She searched for capable new legal counsel that would take immediate action to return her child to California.

As alleged in this action, *Southwell v. Helzberg*, Marin County Superior Court Case No. CIV-1403557 ("Marin County Case"), Southwell located Respondent Richard Helzberg who represented himself as an experienced family law attorney. Southwell told him what had happened and that DD was being abused and drugged. Southwell made it very clear that her new counsel would have to act with urgency and zealousness because DD's

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[3] Southwell argued that she was entitled to plead emotional distress damages under *Holliday v. Jones* (1989) 215 Cal. App. 3d 102, because her case was entirely personal, not economic, in nature.

[4] See the record in the Third District Court of Appeal, Case No. C077453. Copies of the pertinent documents from this matter were included by Respondent McKinley's Appendix submitted along with her Answer to the Petition sought by Southwell in this action.

[5] Southwell learned at Thanksgiving 2012, when DD was allowed a brief visit home, that he was being abused by her ex-husband, including being heavily medicated to mask his suffering. Southwell informed Thomas and child's counsel about this, but they did nothing. The child, after his return home from Texas, wrote a letter to the "judge" telling how he had been abused and that his lawyer (child's counsel) told him not to tell anyone about this.

situation was dire. Helzberg told her that he had the skills and promised that he would act urgently in the matter. Based upon these promises, Southwell engaged Helzberg to take over from her first attorney (Thomas).

Helzberg engaged Respondent Kathleen McKinley ("McKinely") to assist him with the matter, including acting as appellate co-counsel. On February 11, 2013, Southwell had a conference call with both Helzberg and McKinley so that Helzberg could introduce McKinley. Southwell again explained that her child DD was being abused and drugged and she emphasized the need to act immediately. Helzberg and McKinley both acknowledged the seriousness and emotional impact of the matter, promised to act as a team, and to proceed forthwith using all available means under the law. Southwell relied upon these promises and engaged Respondents.

For reasons that are unknown, Respondents did not move in the trial court to re-consider or otherwise challenge the transfer of jurisdiction to Texas, even though there were ample grounds to do so. They also did not file for any writ relief. Instead, after about six weeks they filed a notice of appeal which would take a year and a half to get through.

Ignoring the obvious suffering of their client and the even more imperative situation of the child, Respondents then filed for multiple extensions of time to file the opening brief. After these extensions were exhausted, the opening brief was due on September 6, 2013, but again, nothing had been filed by Respondents. On September 13, 2013, the Third District Court of Appeal sent a final warning letter to Respondents stating that the appeal would be dismissed unless the opening brief was filed by September 30, 2013. When Southwell learned that Respondents had not yet written the opening brief as of September 24, 2014, and in view of their utter

failure to act urgently and zealously as they promised, she hired new legal counsel and terminated Respondents.

Southwell's new counsel found numerous grounds in the record of the Yuba County Case for attacking the trial court's transfer of DD to Texas. He immediately proceeded to file appropriate motions in Yuba County Superior Court and in the state court in Texas. As a result, the child was returned to the full custody of Southwell with jurisdiction back in California in about 45 days (November 2013). In total, the child had been away from his mother for about 15 months, *nine of which occurred* while Respondents couldn't muster themselves to even get an opening brief on file.

The Pleading Of The Marin County Case

Southwell filed this action for professional negligence, breach of fiduciary duty, and breach of contract against Respondents. Included were requests for both emotional distress and punitive damages. Respondents filed demurrers and motions to strike, arguing that this case "sounds in tort" and that Petitioner's cause of action for breach of contract is merely duplicative of her action for negligence. Further, Respondents argued that it was not a breach of fiduciary duty when Respondents ignored their express promise to Southwell that they would act with urgency and as zealous advocates.

The trial court, following the "sounds in tort" concept, sustained the demurrers to the breach of contract and breach of fiduciary duty claims, leaving only the negligence claim. The full pleading record is contained on Petitioner's Appendix filed with her writ petition to the First District Court of Appeal.

Why This Petition For Review Should Be Granted

This is not a case about a missed deadline or a "missed" argument. It is

a case about Respondents' complete failure to keep their express promise to Southwell to act with urgency and zealousness for the sake of the child that they knew was in extremis.

Southwell has no viable remedy other than this Petition. If summarily denied, Southwell will be forced to go through discovery and then trial on a single theory of negligence instead of her real legal claims for breach of contract and breach of fiduciary duty. She will then have to appeal, go back through discovery, and have a new trial on the most important parts of her allegations against Respondents. This will be extraordinarily burdensome, emotionally and financially, upon a mother that has already had to expend every resource to regain the custody of her child that was lost through attorney misconduct.

The immediate plight of Petitioner is not the only reason to review the issues raised in this Petition. In cases throughout out this State, legal malpractice defense counsel have been able to convince trial court judges that alternative pleading is not appropriate in a legal malpractice case, and further, that there are only two narrow categories of fiduciary duty that are actionable. The consequence is that lawyers have, for all practical purposes, carved out for themselves a safe haven that no other professional enjoys. This is as embarrassing to the profession as it is outrageous to the public.

This Court needs to clarify certain of the rules for the pleading of legal malpractice cases for the benefit of bench and bar.

I. LEGAL BASIS FOR EXTRAORDINARY RELIEF

Where a demurrer and motion to strike deprives a party of their opportunity to plead the most substantial portion of their case, as it has in this case, extraordinary writ relief is the appropriate means to prevent a hollow trial and subsequent reversal. *North American Chem. Co. v. Super. Ct.* (1997) 59 Cal. App. 4th 764, 773; *Angie M. v. Super. Ct.* (1995) 37 Cal. App. 4th 1217, 1223.

Further, where, like in this case, there are significant legal issues of statewide importance and/or issues of first impression of general importance, writ review is the appropriate procedure. *Los Angeles Gay and Lesbian Center v. Superior Court* (2011)194 Cal. App. 4th 288, 299-300.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

II. THE THIRD CAUSE OF ACTION FOR BREACH OF CONTRACT

A. The Court Improperly Struck Petitioner's Breach Of Contract Claim

Southwell alleged in her Second Amended Complaint ("SAC") that Respondents entered into an oral agreement to perform the legal services competently, without delay, and to utilize all available means within the bounds of the law. SAC ¶ 27 (App. 192-193). As just explained, she made her selection of counsel because of the *express promise of Respondents that they would act urgently and zealously within the bounds of the law* to come to the aid of her minor child who was in dire circumstances.

Southwell correctly pleaded all of the elements to sustain a claim for breach of an oral agreement. She then specifically alleged that Respondents breached their express promise to act urgently by failing to do anything substantive in over nine months. Southwell further alleged that Respondents breached the implied covenants of good faith and fair dealing. SAC 31 (App. 193).

Respondents demurred to the breach of contract claim on the ground that it "sounds in professional negligence" and that Petitioner was just trying to "split" a single claim into two claims (App. 133-134; 156-157). The court ruled in favor of Respondents and struck the breach of contract claim against both Respondents (App. 4-5; 14-15).

It is obvious that Respondents' failure to do anything substantive in *nine months* is not a mere one-time negligent act such as missing a filing deadline. It was a breach of the engagement contract. Moreover, it was done

with a willful and callous disregard of their client who they knew to be in extremis.[6]

Southwell contends that the trial court ignored existing statutory and judicial law by applying the old common law concept of "sounds in tort" to prevent Petitioner from presenting her claims as alternative theories liability. The application of this archaic concept is being perpetuated by legal malpractice defense counsel because it "shoe horns" all manner of wrongdoing by attorneys under the rubric of negligence.

The consequence is that plaintiffs in attorney malpractice cases are prevented from recovering the proper measure of damages that they otherwise could obtain under a breach of contract or breach of fiduciary duty claim. That is exactly the situation here. If Petitioner is allowed to plead a breach of contract claim, she can claim the fees she paid to Respondents as damages. Otherwise, she may be limited to a theory of recovery based on the "value" of legal services provided. See the trial court's discussion of damages at App. 6-7; 15-17. The excess "value" measure of damages based upon negligence is onerous, complicated, and difficult for a plaintiff to prove. Legal malpractice defense counsel understands this and they perpetuate the "sounds in tort" anachronism because it makes for "cheap" settlements.

The California rule of alternative pleading is intended to make for a level playing field where the jury can decided right and wrong. That is our

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[6] Petitioner notes that California tort law might well be served by allowing claims to be stated as negligent acts, reckless acts or acts done with conscious disregard, and then intentional acts. Such a division of the tort law would greatly facilitate the determination of the appropriate type and amount of damages, thereby avoiding demurrers and motions to strike such as in this case and in Petitioner's action in Yuba County Superior Court against Richard Thomas that was referred to by McKinley.

system. The trial court's ruling on the demurrer is an inappropriate and unnecessary act of "gate keeping" that is not correct under the law. This Court needs to act on this Petition so that Petitioner's breach of contract claim can be presented to a jury.

B. Oral Contract May Be Pleaded By Its Intended Legal Effect

The basic rule of pleading in California is that of notice pleading. All that is required is the statement of facts constituting a cause of action. CCP §425.10. The facts to be pleaded are those upon which liability will depend. *Doe v. City of Los Angeles* (2007) 42 Cal. 4th 531, 549-550 ("*Doe*"). These are called "ultimate facts". *Careau & Co. Security Pacific Business Credit, Inc.* (1990) 222 Cal. App. 3d 1371, 1390 ("*Careau*"). A complaint will be upheld if it provides the defendant with notice of the issues sufficient to enable the preparation of a defense. *Doe* at 549-550.

The ultimate fact of the existence of a contract may be pleaded either in *hac verba* (word for word, typically done by attachment) or generally according to its intended legal effect. In this case, there was not a written agreement, but an oral agreement. The oral agreement was properly pleaded in SAC ¶ 27 (App. 192-193), as an agreement to provide the legal services described in SAC ¶ 7-8 (App. 185-186). This was a full and proper pleading of the intended legal effect as it concerns the allegations. See *Construction Protective Services, Inc. V. TIG Speciality Ins. Co.* (2002) 29 Cal. 4th 189, 198-199.

The plaintiff may plead satisfaction of the applicable terms or conditions precedent in the contract by alleging generally that "plaintiff has duly performed all conditions on his part." CCP §457; *Careau* at 1390. Petitioner has so pleaded in the SAC at ¶ 28 (App. 193). Petitioner has also

pleaded generally that all of the conditions required for Respondents' performance had occurred. SAC ¶ 29 (App. 193).

C. Petitioner May Plead In The Alternative

It is "hornbook" law in California that a plaintiff may plead the same facts under alternative legal theories. See Witkin, California Procedure, Fifth Edition, General Rules of Pleading, §§ 402-406; The Rutter Group, Civil Procedure Before Trial, Pleadings, § 6:242. Indeed, a plaintiff may plead either alternative versions of the facts or alternative legal theories based upon a set of facts. *Adams v. Paul*, 11 Cal. 4th 583 (1995), 593; *Crowley v. Kattleman*, 8 Cal. 4th 666, 690-691 (1994); *Mendoza v. Rast Produce Co.* (2006) 140 Cal. App. 4th 1394, 1402. Respondent's argument that Southwell cannot allege both a negligent count and also counts for breach of fiduciary duty and/or breach of contract based upon the same set of facts is entirely misplaced.

D. Petitioner Has Not Split A Single Claim; She Has Pled Alternative Legal And Factual Theories

Respondents also argue that the breach of contract claim is barred by the "primary rights doctrine" as applied in *Bay Cities Paving & Grinding, Inc. v. Lawyer's Mutual Insurance Co.* (1993) 5 Cal. 4th 854, 860 ("*Bay Cities*") (App. 142; 326). This doctrine is used by courts to determine whether a plaintiff has improperly sued a defendant twice for the same wrong. It is narrowly applied to prevent a plaintiff from dividing a single event of harm or injury into multiple actions to obtain duplicative recoveries. A careful look at *Bay Cities* reveals that this decision had nothing to do with alternative pleading, but instead, concerned a plaintiff's division of causal events into two separate causes of action to present multiple claims against

the attorney's professional liability policy. The court found that there was only a single liability event and only one insurance claim was proper.

As explained in *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal. App. 4th 1848 ("*Lilienthal*"), appellate decisions that discuss the "primary rights" doctrine" often use the term "cause of action" confusingly. When used in the context of the primary rights doctrine, the term "cause of action" has an entirely different meaning than when used in a discussion of "alternative pleading". Here is how the *Lilienthal* court distinguished the use of the term under the primary rights doctrine and the right to plead facts in the alternative:

> In a broad sense, a `cause of action' is the invasion of a primary right (e.g. injury to person, injury to property, etc.) ... However, in more common usage, `cause of action' means a group of related paragraphs in the complaint reflecting a separate theory of liability. Id. at 1853.

There is nothing in the SAC that could be interpreted as an attempt to "spilt" a claim against Helzberg or McKinley into two separate claims to obtain a double recovery. Unlike the plaintiff in *Bay Cities*, Southwell has not separated the factual events to create two separate claims. Rather, she has pleaded the same basic facts under different legal theories involving separate and different legal duties and obligations.

E. Petitioner Cannot Be Forced To "Elect" Her Remedy Until After A Jury Decision

The law is well established that a plaintiff cannot be forced to elect between different legal theories (e.g., breach of contract, negligence, or breach of fiduciary duty) until after the jury has decided the facts. See Witkin, California Procedure, Fifth Edition, General Rules of Pleading, § 406; The Rutter Group, Civil Procedure Before Trial, Pleadings, § 6:249.5.

The case of *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal. 3d 176 ("*Neel*"), is very illustrative for analysis of Respondent's Demurrer. First, the California Supreme Court made it clear that legal malpractice "constitutes both a tort and a breach of contract". Id. at 180-181. In addition, the facts of that case presented a situation where the lawyer could also be found to have breached a fiduciary duty. Id. at 188-189. The Supreme Court then found that plaintiffs could present evidence under all three theories and then "may elect" between possible remedies. Id. at 183 (see also FN13). See also *Stanley v. Richmond* (1995) 35 Cal. App. 4th 1070, were the plaintiff sued for all three: negligence, breach of contract, and breach of fiduciary duty and all three went to the jury. The court found that the plaintiff had made out a *prima facie* case for all three.

This case is conceptually identical to the foregoing examples. Petitioner must be allowed to plead her case in the alternative. There is no harm to the Respondents from this because she cannot obtain a double recovery.

F. **The Alleged Breaches Of Contract In The SAC**

There were three primary terms of the agreement that were breached: (a) that the Respondents act urgently, (b) that they act competently, and (c) that they do all they could within the bounds of the law (i.e., act zealously). Respondents were fully apprised of the extremis in which Southwell found herself and they expressly agreed to help her on these terms. If Respondents knew that their schedules were too busy to take on the matter and/or that they did not have the expertise required, they should have declined the engagement. California Professional Rules of Conduct, Rule 3-110. Respondents are experienced lawyers. They know how to negotiate and draft an engagement contract and they could have done so in this instance. They

did not. The onus was on them as legal professionals to define the scope of employment and the terms of their performance.

This is not a matter of mere negligence, like missing a filing deadline. Southwell hired Respondents because they gave their express promise to act urgently and zealously. Instead, they loitered about while Southwell's child *as being abused and drugged in Texas*.

III. THE SECOND CAUSE OF ACTION FOR BREACH OF THE FIDUCIARY DUTY OF LOYALTY

Southwell engaged Respondents *because they promised her that they would act urgently and zealously because of the extremis of her child*. Petitioner alleged in the second cause of action in the SAC at ¶¶ 19-22, that this is not only a breach of contract, but a breach of fiduciary duty (App. 190-191).

Respondents demurred to the breach of fiduciary duty claim on the ground that there are only two categories of fiduciary duty for which a lawyer has liability: the duty of loyalty and the duty of confidentiality, and that the factual allegations in the SAC do not fall within either category. Even further, Respondents argued that Petitioner's allegations in the second cause of action in the SAC was nothing more than a promise "to act in accordance with the standard of care; i.e., a promise to refrain from negligent conduct." (App. 139:23-24; 141-142).

This framed a straightforward question to the trial court: does a lawyer's express promise to act urgently and zealously as a condition of the engagement (and after being advised by the client of the seriousness of the on-going harm), create a fiduciary duty to abide by that promise? The trial court agreed with Respondents, finding that there are no facts pleaded that

show a breach of the duty of loyalty or the duty of confidentiality and that the allegations are nothing more than professional negligence (App. 4-5; 14).

Although Petitioner does not think it matters what label is used, i.e., duty of loyalty, confidentiality, or some other, she labeled the claim as one for the breach of the duty of loyalty.[7] See SAC ¶ 20, (App. 190).

Respondents present the boiler plate defense argument that only the duty to protect a client's confidences and the duty of loyalty are actionable as "fiduciary" duties. Further, Respondents argued that the duty of loyalty only encompasses two possible scenarios: (a) when a lawyer undertakes or becomes involved in something that is adverse to the client's interests, and (b) when a lawyer obtains a personal advantage over the client (App. 21-22; 30-33; 133-134; 154-155). Respondents argue that they did not violate either of these narrow categories, and therefor, negligence was the only available legal theory.

Southwell contends that when a lawyer makes an express promise that is a prerequisite to receiving the engagement (e.g., to act urgently and zealously) and the client relies on that promise, then that lawyer's promise creates a fiduciary duty to fulfill that obligation.[8] If for some reason the lawyer is subsequently unwilling or unable to fulfill that promise, the lawyer has a fiduciary duty to immediately inform the client so that the client can decide whether to continue the engagement or to seek new counsel. For

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[7] Essentially the same issue was argued in the demurrers to the FAC, except that Petitioner did not use the label of duty of confidentiality. The trial court ruled sustained the demurrers.

[8] Of course, the express promise of a particular outcome is not actionable. Here, the express promise was to act urgently and zealously, not to wait around nine months doing nothing while the minor was in extremis.

example, if a person hires lawyer to seek a temporary restraining order as soon as possible, but the lawyer does nothing toward that end, then Petitioner contends that there is a breach of the engagement contract and a breach of the lawyer's fiduciary duty.

Respondents reply that a promise to act urgently and zealously is nothing more than a promise to abide by the usual standard of care. In this case, it was of critical importance to Southwell that her lawyers act immediately because her child was being abused and seriously over medicated. *These were matters of life, and perhaps death, and every day counted.* Southwell sought legal counsel that would take immediate action and Respondents promised to act without delay. She would have engaged someone else if she had known that Respondents' promise to act urgently and zealously meant nothing more than they would not miss any statutory deadlines and would "fit" the matter into their schedule as they thought convenient. Respondents' position is simply callous and misplaced.

Take the example where a lawyer is hired by a woman to obtain a restraining order to stop an ex-husband from beating her. Does the lawyer have a duty to act immediately? Or can he ignore the exigency and do the work in a few weeks or a few months when it better fits into his/her schedule? Maybe in nine months, as in this case? Doesn't that lawyer have a fiduciary duty to tell his client that he is too busy to handle the matter urgently and recommend that she find another lawyer that could help her immediately?

Simply put: if the circumstances of the engagement necessitate urgent and zealous action and the lawyer promises to act urgently and zealously, Petitioner contends that a fiduciary duty to the client is created: it does not matter what name or category is used.

A. Professional Rule Of Responsibility 3-110(A) Is A Guidepost To An Attorney's Fiduciary Duty To Act Timely, Competently, And Zealously

While the Professional Rules of Conduct do not, *per se*, create liability for an attorney, the Professional Rules are very important in defining the nature and boundaries of the fiduciary obligations of an attorney. *Stanley v. Richmond* (1995) 35 Cal. App. 4th 1070, 1087 ("*Stanley*"). In *Stanley*, the Court of Appeal described the importance of the Professional Rules this way:

> The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, "together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client." *Mirabito v. Liccardo* (1992) 4 Cal. App. 4th 41, 45; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal. App. 3d 884, 890. *Stanley* at1087.

Earlier decisions have also used the Rules of Professional Responsibility for finding that there was a fiduciary duty on the part of a lawyer to perform their duties with diligence and competence. For example, the Supreme Court in *Grove v. State Bar of California* (1967) 66 Cal. 2d 680, 683-684, pointed to Business & Professions Code §6103 and §6106, for the proposition that habitual disregard of client interests is a breach of duty and grounds for disbarment.

Similarly, in deciding an attorney fee request, the *U.S. Bankruptcy Court, In Re Wilde Horse Enterprises, Inc.* 36 B.R. 830, 844-845 (1991 C.D. Cal.), relied upon former California Rule of Professional Conduct, Rule 6–101(2),[9] for its finding that a lawyer had a fiduciary duty to act with

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[9] Former Rule 6-101(2) was replaced in 1989 with the current Rule 3-110(A) which reads, in pertinent part, as follows: A member shall not intentionally, recklessly, or repeatedly, fail to perform legal services with

competence and diligence:

> Competent representation of one's client is a part of an attorney's ethical responsibility to his or her client; failure to act competently wilfully or habitually, such as by the failure to use reasonable diligence and his or her best judgment and skill in the application of one's learning, is a breach of the attorney's fiduciary duty to the client. See Rules of Professional Conduct of the State Bar of California, Rule 6–101(2).

Southwell's allegations of breach of fiduciary duty show that Respondents violated Rule 3-110(A) not just once, but day after day for nine months, by repeatedly failing to timely act, by failing to act competently, and by failing to act zealously. Rule 3-110(A) embodies a significant fiduciary duty and provides clear guidance in finding that a lawyer has a fiduciary duty to act urgently, competently, and zealously. If the lawyer cannot fulfill these obligations, then the lawyer should not take (or keep) the engagement.

B. Existing California Appellate Authority On The Duty To Be A Zealous Advocate

The Supreme Court has expressed in the most unequivocal terms that being a zealous advocate is a fundamental duty and that breach of this duty is viewed with the greatest seriousness. In *People v. McKenzie* (1983) 34 Cal. 3d 616, 631 ("*McKenzie*"), an attorney was recused for refusal to actively participate in his client's defense. This Court stated:

> The duty of a lawyer both to his client and to the legal system, is to represent his client zealously within the bounds of the law.' quoting from Hawk v. Superior Court (1974) 42 Cal. App.3d 108, 126. ... More particularly, the role of defense attorney requires that counsel 'serve as the accused's counselor and advocate with courage, devotion and to the utmost of his or her learning and ability.

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competence.

The Supreme Court expanded on this duty of as follows:

> Once an attorney has been assigned to represent a client, he is bound to do so to the best of his abilities under the circumstances despite the not uncommon difficulty of that task, particularly in the context of criminal trials. (See rule 6–101(2), Rules Prof. Conduct of State Bar. This duty is not affected by the fact that a client may be uncooperative or that, as in this case, a trial court's ruling on a substantive motion appears to be arbitrary or incorrect. The existence of these admittedly adverse conditions does not relieve counsel of the duty to act as a vigorous advocate and to provide the client with whatever defense he can muster. Any other course would be contrary to the attorney's obligation "faithfully to discharge the duties of an attorney at law to the best of his knowledge and ability." (Bus. & Prof. Code, § 6067.) [Emphasis Added.] McKenzie at 631.

In *Kotlar v. Hartford Fire Insurance Company* (2000) 83 Cal. App. 4th 1116, 1123 ("*Kotlar*"), the Court of Appeal followed the holding in *McKenzie*. In finding that a lawyer's fiduciary duty to a client is a "fiduciary relationship of the very highest character", the *Kotlar* decision observed that "an attorney must represent his or her clients zealously within the bounds of the law." Id. at 1123.

A situation analogous to, but much less egregious than this case, was presented to the Suprme Court in *Blair v. State Bar* (1989) 49 Cal. 3d 762 ("*Blair*"). Here, an attorney in a personal injury action willfully failed to provide the services for which he was engaged, causing the loss of the client's right to pursue the action. This Court made its feelings about the attorney's failure to be a zealous advocate very clear:

> Petitioner has stipulated to three separate instances of willful failure to perform services and willful failure to communicate with his clients. We have repeatedly made clear that such behavior is "serious misconduct" that constitutes "basic violations of petitioner's oath and duties as an attorney." *(Franklin v. State*

> *Bar* (1986) 41 Cal. 3d 700, 710, 224 Cal. Rptr. 738, 715 P. 2d 699.) Even the ultimate sanction of disbarment is appropriate when there has been a pattern of misconduct, as found by the State Bar in this case. " 'Habitual disregard by an attorney of the interests of his or her clients combined with failure to communicate with such clients constitute acts of moral turpitude justifying disbarment.' " (*Kent v. State Bar* (1987) 43 Cal. 3d 729, 735, 239 Cal. Rptr. 77, 739 P. 2d 1244, quoting *McMorris v. State Bar* (1983) 35 Cal.3d 77, 85, 196 Cal. Rptr. 841, 672 P. 2d 431; *Martin v. State Bar,* supra, 20 Cal. 3d at p. 722. *Blair* at 650.

In *Blair*, there were only three instances when the attorney failed to act for his client. In this case, the allegations in the SAC show that Respondents ailed for nine months to get done the work that they promised to Southwell. They could have declined the engagement, but they did not. They took Petitioner's money and then let her child suffer irreparable harm.

IV. RIGHT TO AMEND PLEADINGS

The sham pleading doctrine is not to be used to prevent honest corrections of error in pleadings, but is to prevent the abuse of process. *Deveny v. Entropin, Inc.* (2006) 139 Cal. App. 4th 408, 426 ("*Deveny*"). The trial court did not make any finding of a sham pleading and accepted the declaration of Petitioner's counsel as having been made in good faith. However, the trial court has misunderstood the holding in *Deveny* and erroneously excluded Petitioner's amended claims. This is a serious error that needs to be corrected now so that Southwell has a fair opportunity, as required by due process, to gather evidence and present that evidence to a jury.

A. The Allegations Of The SAC Are Consistent And Made In Good Faith

In the FAC, Petitioner alleged in ¶ 8 that: "Helzberg contracted and/or otherwise engaged with McKinley to provide appellate co-counsel services to Helzberg" (App. 387). In ruling on Respondent McKinley's demurrer to the FAC breach of contract claim, the trial court found that, as pleaded, McKinley only had a duty to assist with the appeal and that Southwell's allegations of delay in filing the opening brief did not show any causal link of harm. Hence, Petitioner failed to allege sufficient causal connection between the failure to timely file the opening brief and the continued loss of custody of Petitioner's minor child (App. 214-216). Leave to amend was granted.

As set forth in the declaration by Southwell's legal counsel (App. 125-127), counsel for Petitioner went back to Southwell and carefully and properly interviewed her a second time regarding the engagement of McKinley. Counsel learned new facts that materially altered the allegations about the nature of the services that Southwell understood McKinley was to provide, and further, that she had direct communication with McKinley at the outset of the engagement (a telephone conference of all parties) about the nature of her child's predicament and the need to act urgently. Based upon this telephone conference, Southwell had understood at that time (February 2013) that McKinley would be actively engaged as part of her legal team with responsibility in determining what could be done about the minor's situation and then doing whatever legal work was necessary. Based upon this new information, the SAC was amended accordingly. (SAC ¶ 8, lines 22-27, App. 186).

Respondent McKinley argued that the new allegations in the SAC were "sham" allegations made in bad faith and should be disregarded. The trial court did not find that the allegations made as a "sham", that they were

inconsistent, and consequently, could not be pleaded (App. 5-6; 15-16).

Respondent McKinley cited to *Deveny v. Entropin, Inc.* (2006) 139 Cal. App. 4th 408, 425 ("*Deveny*"), for the law regarding the pleading of a sham allegation. Petitioner agrees that *Deveny* is a leading case that sets forth the applicable law. However, Respondent failed to set forth the complete holding of *Deveny*. In *Larson v. UHS Of Rancho Springs, Inc.* (2014) 230 Cal. App. 4th 336 ("*Larson*"), the Court of Appeal placed the *Deveny* decision in proper context and recounted *the general rule is that a plaintiff is free to amend to correct a pleading so as to state a viable cause of action*. *Larson* at 343. However, the court observed that there is an exception to this general rule when a plaintiff omits facts that create a defect in the cause of action. In addition, the plaintiff must explain any apparent inconsistency with the prior pleading. *Larson* at 343-344.

Respondent McKinley did not argue that Petitioner omitted any previously pleaded facts, but instead, that she has pleaded sham facts. Petitioner argued that the new allegations were not a sham and supported this with the declaration of her counsel. Further, Southwell did not omit any facts that were alleged in the FAC, as discussed in *Larson*, *supra*, and the new allegations are not inconsistent with the former. Specifically, Petitioner pleaded new facts about when and for what purpose McKinely was engaged. Petitioner clearly remembered that McKinley was not just someone that was a mere contractor to Helzberg with whom she did not interact, but that McKinley would be assisting Helzberg with the whole matter.

In any event, if McKinley wanted her role to be limited to that of a mere contractor, then she should have prepared a written engagement letter to that effect . Similarly, McKinley knew that if she wanted to limit her

responsibility she should communicate only with Helzberg about the case. McKinley did neither, and thus, Petitioner's amended pleading in the SAC is proper and the trial court should be overruled.

B. The New Factual Allegations Clarify The Attorney-Client Relationship Between Southwell and McKinley

The main concern of the trial court was that Respondent McKinley was only alleged in the FAC to be an appellate co-counsel without responsibility for anything but filing an appellate brief. At oral argument, Petitioner discussed the trial court's mis-perception of the factual allegations in this regard and requested leave to amend because the allegations of the FAC were not intended to be so construed. See the Declaration of Patrick H. Dwyer accompanying the Petitioner's Opposition to McKinley's Demurrer to the SAC (App. 125-128).

Southwell has consistently contended that McKinley was engaged as Helzberg's "co-counsel". From the inception of her engagement, she understood this to mean that Respondents Helzberg and McKinley were both obligated to Southwell for the same purposes of as defined in the FAC and later the SAC at ¶¶ 7-8 (App. 185-186). That purpose was to regain custody over Petitioner's child and bring him back from Texas as quickly as possible. Whether the best approach to her problem was a new motion in the trial court, a writ petition, or an appeal, Southwell looked to both McKinley and Helzberg for legal advice as to what should be done.

Petitioner amended the allegations in the SAC to clarify the professional obligations of McKinley as she understood them at the commencement of the engagement. Dwyer Declaration, ¶ 3-7 (App. 125-128). The purpose of McKinley's engagement was to assist Helzberg in reviewing the entire trial court record and try to find grounds to challenge the order transferring jurisdiction over the child to Texas. Petitioner understood that Helzberg and McKinley would work as a team towards this end. Petitioner

was aware that McKinley would be assisting with whatever appellate work had to be done, but at the outset of the engagement Southwell needed a recommendation as to what should be done: i.e, file a writ petition, file a motion(s) in the trial court, and/or file an appeal. She understood that McKinley would be reviewing the entire case and working with Helzberg as a team so that they could give her the best legal advice. Southwell also understood that two legal minds are better than one and that she was in a very difficult position and needed all of the help she could get. Indeed, this is what happened because McKinley and Helzberg both gave her legal advice.

McKinley's argument that, as "appellate" counsel, she was only obligated to prepare and file a brief, is flawed. Appellate briefs are not created out of thin air – they are based upon factual and/or legal errors in the underlying record. Appellate attorneys must look through that record to find the grounds for appeal (if any) and then go back to the client to discuss what they found and what course of action they recommend: e.g., a writ, an appeal, or perhaps a motion in the trial court, or in some cases, tell the client that there is no remedy.

A review of the allegations in SAC ¶13 (App. 188-189), which are the same as in the FAC, reveal that Petitioner is alleging that McKinley failed to act either urgently (as promised) or competently in almost every respect: failure to make a competent factual investigation (SAC ¶ 13(a)); failure to make a competent review of the legal issues (SAC ¶ 13(b)); failure to recommend and then prepare new trial court motions and/or a writ petition (SAC ¶ 13(c)); failure to competently advise Petitioner about jurisdiction over the child in Texas (¶ 13(d)); failure to report to either the Texas or California courts about the abuse of the child (SAC ¶ 13(e)); and failure to report the

conflict of interest between Respondent's legal counsel and the child's therapist (SAC ¶ 13(f)). Indeed, Southwell has consistently alleged that McKinley did almost nothing, that what she did was professionally incompetent, and that it took *nine months* for McKinley to do nothing. She did, however, timely accept payment from Petitioner.

As originally pleaded, McKinley was engaged on or about January 29, 2013, just one day after the trial court's order transferring jurisdiction to Texas and just five days after Helzberg was engaged. FAC and SAC ¶¶ 7-8 (App. 386-387; 185-186). That McKinley was informed of the urgency of the situation and had agreed to act without delay has been pleaded since the beginning. FAC and SAC ¶ 8 (App. 387; 186).

After this Court's Decision, Southwell met with her counsel to review the facts about when and for what purpose Respondents Helzberg and McKinley were engaged. Dwyer Declaration, ¶ 2-5 (App. 125-127). Based upon her best recollection and corroborating documents, counsel for Southwell prepared the factual additions to the SAC ¶8, lines 22-27 (App. 186), alleging the substance of the telephone conference as recalled by Petitioner. Southwell personally reviewed the SAC and signed the verification. Dwyer Declaration, ¶ 3-7 (App. 126-128).

The allegations by Southwell are not inconsistent with any prior allegation. The new allegations explain and elucidate the facts of the attorney-client relationship as recalled by her and corroborated by the available documents. Simply put: there was no sham upon the trial Court.

CONCLUSION

Although it will be an unfortunate waste of judicial resources to send this case to trial in its present form and then later have to appeal because of the issues presented here, the far greater harm will be the emotional injury to Petitioner . She will have to endure discovery and trial and then go through the entire process all over again. Ms. Southwell needs to get this litigation completed for the sake of her child and herself. She needs to heal the wounds.

A decision by this Court on the legal issues raised here will be very helpful to the bench and bar. Attorneys should be held to the same rules of pleading as other professionals, not special rules that protect legal malpractice carriers.

The bar holds a special public trust and each and every time a lawyer enters into an engagement with a client they must abide by their promises and ethical duties. These promises and ethical duties are the foundation of the attorney's fiduciary duty to their client and attorneys must be accountable in a court of law when they are breached.

Petitioner respectfully requests that this Court grant her the requested relief or such other relief as the Court deems appropriate.

Respectfully Submitted,

November 9, 2015

_____

Patrick H. Dwyer,
Attorney for Petitioner

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 entire Petition (i.e., Introduction through Section V) is approximately 7950.

_____
Patrick H. Dwyer,
Attorney for Petitioner

Date: November 9, 2015

PROOF OF SERVICE

I hereby certify under penalty of perjury that I am at least 18 years of age, not a party to the action, and that a copy of Traci Southwell's Petition for Review, in the matter of Traci Southwell v. Richard Helzberg and Kathleen McKinley, et al., Case No. CIV-1403557 was served as follows.

By United States first class mail, postage pre-paid, to:

1. Court of Appeal, First Appellate District, 350 McAllister Street, San Francisco, CA 94102;

2. The Superior Court for the County of Marin, 3501 Civic Center Drive, San Rafael, California 95903.

By electronic email (as per stipulated agreement of all counsel) to:

3. Jennifer L. Supman
Manning & Kass, Ellrod, Ramirez, Trester LLP
Counsel for Respondent Richard Helzberg
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4. Jessica Macgregor
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Counsel for Respondent Kathleen McKinley
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MacGregor, Jessica <jmacgregor@longlevit.com>

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

_____

Patrick H. Dwyer
November 9, 2015
Location: Penn Valley, CA 95946