IN THE SUPREME COURT OF CALIFORNIA

Traci Southwell, Petitioner

vs.

Superior Court for Yuba County,

Richard Thomas and Fruitman & Thomas, a professional corporation,
Real Parties In Interest.

PETITION FOR REVIEW

After A Decision Of The Court Of Appeal,
Third Appellate District,
Summarily Denying Petition For A Writ Of Mandamus
C077453

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INTRODUCTION

WHY REVIEW SHOULD BE GRANTED

This case presents four issues of great importance to all litigation attorneys and to the thousands of clients they represent daily in this state.

Petitioner Traci Southwell ("Southwell") filed an action for professional negligence, breach of fiduciary duty, and breach of contract in Yuba County Superior Court. The suit arose from her engagement of Respondent Richard Thomas ("Thomas") to represent her in a child custody petition filed by Southwell's ex-husband that sought full custody and re-location of the child to Texas.

Petitioner's allegations[1] show how Thomas not only abandoned her as a client from the outset of the engagement, he knowingly assisted Petitioner's ex-husband. The custody of the child was lost within days and jurisdiction over the child was transferred to Texas. Thomas was not merely negligent once, he engaged in a pattern of reprehensible conduct from start to finish.

Respondents demurred to the cause of action for breach of fiduciary duty, asserting that a lawyer has no fiduciary duty to be competent or a zealous advocate. Respondents also demurred to the breach of contract claim,

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[1] Petitioner assumes the application of the rule that all allegations are deemed true for purposes of deciding if a cause of action is stated. *Blank v. Kirwin* (1985) 39 Cal. 3d 311, 318.

asserting that it was merely duplicative. Respondents also moved to strike emotional distress and punitive damages. The trial court sustained the demurrers and granted the motions to strike, leaving a bare bones negligence action. Southwell has been left without means to either redress Thomas' misconduct or obtain any compensation for the serious personal harm she suffered as a result of Thomas' conscious disregard of her interests.

WHY REVIEW THESE ISSUES NOW

There are three reasons that make immediate review imperative:

First, these legal questions are of great importance throughout this state. The issue of zealous advocacy and competency as part of a lawyer's fiduciary duty affects every litigation attorney in this state. The issue of emotional distress damages pertains to any case where the nature of the engagement is primarily personal, not economic. The issue of punitive damages for attorney misconduct done in a "willful and conscious disregard" of a client is fundamental to the credibility of the bar and the ability of profession to regulate itself. Finally, the issue of alternative pleading based upon different legal theories is a fundamental rule of pleading that must be enforced uniformly throughout the state, regardless of the nature of the action, i.e., lawyers do not get special pleading rules.

Second, a decision now will save substantial judicial resources by avoiding a useless trial. The same issues will remain after trial and it makes no sense to proceed through the entire litigation process knowing that this case will be appealed on the same grounds.

Third, from the human perspective, Petitioner has already suffered immensely as the result of Thomas' behavior. Not only did she lose her child for over a year, she suffered serious financial loss and great emotional pain and now has to help her son recover from the physical and emotional abuse he endured while in Texas. Unless Petitioner is granted relief now, her financial and emotional losses will only mount.

BACKGROUND

Southwell Hired Thomas To Be A Zealous Advocate

On August 3, 2012, Southwell learned that her ex-husband, Mark Dunham, had filed a petition seeking full custody of their son, with re-location of the child to Texas. The petition was based upon entirely false allegations. Southwell, having divorced Dunham because of physical abuse against both her and the child, was understandably very upset. She was determined to fight the petition and knew that she needed a good lawyer. Plaintiff decided upon Thomas, *trusting that he would be a zealous and hardworking advocate on her behalf*.

Thomas Failed To Be A Zealous Advocate And Betrayed His Client

What happened next was an outrageous abandonment and betrayal of Petitioner by Thomas. It began with Thomas never investigating any of the factual allegations against Petitioner, even though she gave Thomas extensive witness and documentary information disproving the factual allegations against her. Thomas never made a single phone call, never contacted a single witness, never took a deposition, and then stipulated to the admission of any evidence that the ex-husband wanted to put into the record. Indeed, Thomas never submitted to the court a single piece of evidence on Petitioner's behalf.

Thomas's misconduct did not end there. At the outset, he made Petitioner prepare her own answer to the petition. Without the knowledge of Petitioner, Thomas stipulated to the admission (without objection and without prior review) of any evidence against Southwell that the ex-husband wanted to put into the record. Thomas further stipulated (without telling Southwell) that the ex-husband's witnesses could testify via telephone from Texas, thereby making effective cross examination impossible.

But the betrayal goes even further. As the critical hearing on the ex-husband's motion to transfer jurisdiction to Texas approached, Petitioner asked Thomas if the hearing was important and if she should attend. Thomas told her it was not important and she shouldn't bother. Then, he forged Southwell's signature on a purported declaration and filed it just before the hearing. Not only was this declaration a forgery, it did not contain any relevant facts based upon personal knowledge. Thomas never researched a single legal issue or the applicable law[2] regarding the motion to transfer jurisdiction. After losing this motion in a hearing lasting just minutes, Thomas never filed any motion to reconsider, writ petition, or even discussed with Petitioner how to appeal. Petitioner was simply left on her own.[3]

The result of Thomas' abandonment and betrayal was devastating. Petitioner lost custody of her son in just four days. In less than two weeks, the child was taken to Texas. In four months, without ever having an

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[2] Family Code §3427 was the statutory basis for the transfer of jurisdiction to Texas.

[3] There are even more items alleged in the Complaint and First Amended Complaint ("FAC").

evidentiary hearing on the allegations in the ex-husband's petition, the Yuba County Superior Court transferred jurisdiction over the child to Texas.

The Child Is Returned To Petitioner After Being Abused And Drugged

In September 2013, Southwell finally found new legal counsel that for the first time investigated the factual allegations against her. Within days, ample evidence was found disproving the ex-husband's allegations as baseless.[4] A full scale legal attack was initiated in California and Texas. In less than two months, the child was returned to the custody of Petitioner. Most unfortunately for the child, he had been abused and drugged during the 14 months he was forced to spend in Texas. He has been undergoing therapy since his return to Petitioner's custody.

THE COMPLAINT

The present action against Thomas was filed on February 3, 2014, in Yuba County Superior Court ("Complaint"). Petitioner alleged not only professional negligence (Count 1), but also breach of fiduciary duty (Count 2) and breach of contract (Count 3).

Duty To Be A Zealous Advocate

Respondents demurred to cause of action for breach of fiduciary duty, claiming that Petitioner had failed to state a cause of action as a matter of law. Respondents argued that an attorney only has two types of fiduciary duty, which are the duty of confidentiality and the duty of loyalty, and that Petitioner's claim for breach of fiduciary duty to be a competent and zealous advocate had no basis in law.

Petitioner responded that clients hire lawyers in a litigation matter to

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[4] Ironically, all that had to be done was use the very evidence that Southwell had given to Thomas at the start of the matter.

be a zealous advocate that is capable of competent representation. Whether this is considered as part of the "duty of loyalty" or is called out as a separate fiduciary duty to be "a competent and zealous" advocate does not matter. Although a client may not be able to hire the best lawyer because of cost or availability, a client does expect that "their" lawyer will use every skill and ability within their knowledge and experience to advance their cause. Moreover, Petitioner's allegations are not about a single act of negligence by Thomas, but an unbroken pattern of Thomas never even "trying" to act on behalf of Petitioner. On top of this, Thomas gave crucial help to the ex-husband that allowed into evidence, without review or objection, anything that the other side wanted to admit.

The trial court accepted Respondents' argument that Petitioner had failed to state a cause of action for breach of fiduciary duty as a matter of law and sustained the demurrer.

Emotional Distress Damages For Personal Harm

The Complaint contained a damage claim for emotional distress for both the negligence claim (Count I) and the breach of fiduciary duty claim (Count I). The Respondents filed a motion to strike these damages. Respondents argued that emotional distress damages are not recoverable in legal malpractice actions, except where the malpractice results in the loss of "personal liberty or sexual battery."

Petitioner pointed out that California law does allow for emotional distress damages for negligence by an attorney where *the nature of the harm from malpractice is personal, not economic*, citing to *Holliday v. Jones* (1989) 215 Cal. App. 3d 102 ("*Holliday*").

The trial court acknowledged the holding of the *Holliday* decision and

agreed that the mother child relationship was an *emotional*, not economic matter. Further, it commented that Southwell's loss was "extremely emotionally upsetting." However, it granted Respondents' motion to strike all emotional distress damages without leave to amend because it found that "[t]here is no current California authority allowing the recovery of emotional distress damages for legal malpractice in a child custody case causing the harm alleged herein."

Punitive Damages For Conscious Disregard Of Client's Interests

Respondents filed a motion to strike punitive damages from both the professional negligence and breach of fiduciary duty claims (Counts I & II). Respondents argued that punitive damages cannot be recovered for negligent acts, only for intentional acts. Respondents further argued that, taken individually, none of the specific allegations against Thomas amounted to more than mere negligence and that there were no ultimate facts that would support an award of exemplary damages.

Petitioner pointed out that, regardless of whether any of the individual acts were, by themselves, sufficient to support punitive damages, the allegations *as a whole* set forth an astonishing array of misconduct that amounted to a "course of conduct" that was "'despicable" and carried out recklessly and wantonly in conscious disregard for Plaintiff. In other words, Petitioner relied upon the *extraordinary nature, amount, and pattern of wrongful conduct* in the allegations as the basis for punitive damages.

The trial court agreed with Respondents' argument and found that "[n]one of the substantive acts alleged rise to the level warranting imposition of punitive damages."

Petitioner filed the first amended complaint ("FAC") with changes to

highlight that the claims for punitive damages were based upon the pattern of behavior in the allegations, not any individual act. Respondents made the same argument in a new motion to strike. Petitioner replied with a thorough explanation of the law of punitive damages and cited authority that separate events or acts, or a pattern of conduct, may be viewed in a cumulative manner to find the malice required by Civil Code §3294. The trial court again agreed with Respondents and summarily granted the motion to strike punitive damages.

The Right To Plead Alternative Legal Theories

Respondents demurred to the claim for breach of contract (Count III) on two grounds. First, Respondents argued that the pleading of Count III violated the "primary rights doctrine" (i.e., no splitting of claims). Second, Respondents argued that the breach of contract claim merely "restated" and were "duplicative" of the negligence claim in Count I, and therefore, could not be pleaded.

Petitioner argued that the Respondents' reliance upon the primary rights doctrine was misplaced because there was no claim splitting. In addition, Petitioner pointed out that California law permitted pleading in the alternative under different legal theories.

The trial court sustained the demurrer because it found the breach of contract claim to be duplicative of the first cause of action for negligence. [5]

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[5] A question not raised by the pleadings, but by the circumstances of this case, is whether a judge that a defendant practices before should be recused, and further, if the defendant is well known throughout a particular Superior Court, if the venue should be moved to a neutral county.

LEGAL DISCUSSION

I. DOES AN ATTORNEY HAVE A FIDUCIARY DUTY TO PERFORM SERVICES COMPETENTLY AND TO BE A ZEALOUS ADVOCATE?

A. Professional Rule Of Responsibility 3-110(A) Is A Guidepost To An Attorney's Fiduciary Duty To Act 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, this 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), for its finding that a lawyer had a fiduciary duty to act 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).

Former Rule 6-101(2)[6] was replaced in 1989 with the current Rule 3-110(A) which reads, in pertinent part, as follows:

> (A) A member shall not intentionally, recklessly, or repeatedly, fail to perform legal services with competence.

Petitioner contends that the allegations of breach of fiduciary duty show that Thomas violated Rule 3-110(A) not just once, but over and over, from start to finish of the engagement. Rule 3-110(A) embodies a significant fiduciary duty and provides clear guidance in finding that a lawyer has a fiduciary duty to act competently and zealously.

If at any time Thomas did not believe that Petitioner was being truthful or that she should not have custody of her son, then Thomas had an obligation to tell Petitioner that he could not represent her and follow Rule 3-

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[6] Former Rule 6–101(2), in pertinent part, read as follows: (2) A member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently.

700 regarding termination of the engagement. Thomas never did that, and consequently, he was obligated to do his utmost to represent Petitioner and never undermine her defense of the action.

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

This 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'.

This Court expanded on this duty of zealous representation 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 this 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 Complaint and FAC show that Defendants failed at every instance: the allegations lay out over a dozen failures to act on behalf of Southwell. In addition to these failures to act, Thomas knowingly helped Petitioner's ex-husband in four different ways.

Petitioner's allegations under the breach of fiduciary duty cause of action establish a pattern of behavior that would, if proven at trial, establish a breach of the Respondents' fiduciary duty. It should now be left for a jury to decide this matter.

II. ARE EMOTIONAL DISTRESS DAMAGES RECOVERABLE WHEN THE LEGAL ENGAGEMENT IS FOR A PERSONAL, NON-ECONOMIC MATTER?

A. Current California Judicial Authority

At present, California law on this question follows the rule laid down *Holliday* which allowed emotional distress damages for attorney negligence in a criminal case. *Holliday* held that emotional distress damages are allowed in an attorney negligence action when the subject of the representation was personal in nature, not economic. The "nature" of the harm found in *Holliday* was the loss of the client's liberty, which the Court of Appeal found to constitute serious emotional harm that was *personal* in nature, not economic. Consequently, recovery for emotional distress damages was appropriate.

In formulating its decision, the *Holliday* court carefully reviewed all of the current authority both in California and nationwide and concluded:

> After surveying the cases decided in other jurisdictions, we are satisfied the recovery of damages for emotional distress in a legal malpractice case—if

> it is to be limited at all—should turn on the nature of plaintiff's interest which is harmed and not merely on the reprehensibility of the defendant's conduct. Accordingly, in light of Holliday's liberty interest here, we believe California's general rule of damages applies and Jones should be liable for emotional distress damages he caused.

It has now been 25 years since the *Holliday* decision and in that time there has not been a single case challenging the decision's "personal" versus "economic" analysis or that has denied emotional distress damages to a victim of legal malpractice when the nature of the engagement was *personal in nature*. However, there has also been only application of the rule in peripheral circumstances such as sexual harassment of a client.[7]

B. The Personal Nature Of The Action That Respondents Were Engaged To Defend Warrants Emotional Distress Damages

Under *Holliday*, the question is very simple: is the "nature" of the harm experienced by the client primarily economic or personal. Most legal representation involves an economic matter, e.g., corporate, contract, securities, tax, or business issues. This case stands in complete contrast. The legal representation concerned the most personal of matters, the mother-child relationship. Southwell's ex-husband ferociously attacked her character and judgment as a mother. He made no allegations about money. The purpose of Respondent's engagement as Southwell's attorney was to refute these vicious and false accusations. There was nothing economic about the case. The "liberty" interest that was the basis for emotional distress damages in *Holliday* is not more "personal" in nature than the dismemberment of the

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[7] See *McDaniel v. Gile* (1991) 230 Cal. App. 3d 363, *infra*, p. 20.

parent-child relationship that occurred in this case.

Thomas knew exactly how important a personal matter this was. He knew that Petitioner did not care about money, only about the safety and well being of her child. Petitioner never asked Thomas to seek monetary damages. The foreseeability of personal harm to Southwell was undeniable from the first moment of the attorney-client engagement and was equal to or greater than the foreseeability of harm to the attorney in *Holliday*.

Finally, the causal connection between the alleged wrong and the alleged harm in this case is unquestionable. What did Thomas do? He willfully and consciously chose to do nothing for his client – simply nothing. Then he willfully and consciously lied to his client, secretly betraying her. This was the direct, immediate, and "proximate" cause of the harm suffered by Southwell.

C. Other Jurisdictions Follow *Holliday* And Have Extended The Availability Of Emotional Distress Damages To Child Custody Cases

Although there have been no California decisions involving emotional distress damages for the loss of a parent-child relationship due to attorney malpractice, there have been such cases in sister states. These decisions have followed the *Holliday* analysis and allowed emotional distress damages against an attorney where the harm involves the loss of custody.

1. *The Innes v. Marzano-Lesnevich Decision*

The most recent case is directly on point. It is a New Jersey decision allowing a parent to recover for emotional distress damages in an attorney malpractice case arising from a botched child custody case. *Innes v. Marzano-Lesnevich* (2014) 435 N.J. Super. 198, 87 A.3d 775 ("*Innes*"). The

Innes court, after a thorough and thoughtful review of cases from across the nation, followed the lead provided by *Holliday* and found that the parent-child relationship was exactly the type of personal harm that sustains emotional distress damages:

> In this case, Innes's testimony was sufficient to permit the jury to award him emotional distress damages proximately caused by defendants' breach of their duty. Unlike Gautam, supra, 215 N .J.Super. at 400, where "the relationship between the parties was predicated upon economic interest[,][and][t]he loss, if one occurred, was purely pecuniary[,]" the loss in this case was particularly personal in nature-the inability of a father to see his daughter for many years, and the likely prospect that he may never see her again. The New Jersey Supreme Court has long recognized that " '[t]he right to ... raise one's children [is an] essential, basic civil right[,] ... far more precious than property rights.' " N. J. Div. of Youth & Family Servs. v. A.W., 103 N.J. 591, 599 (1986) (first alteration in original) (quoting Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551, 558 (1972)). The emotional distress caused by the irreparable severance of the parent-child bond is expected, undoubtedly genuine and easily appreciated by the average person without the need for expert testimony. *Innes* at 21.

Not only did the *Innes* Court find the facts of that particular case imperative, it found that the very personal nature of the harm to the parent child relationship meant that there is no other adequate form of redress for the victim of attorney negligence in such cases:

> Furthermore, there is no other form of redress for defendants' tortious conduct in this case. Geler, supra, 358 N.J.Super. at 451. "Any other ruling would in effect immunize [defendants] from liability[.]" Berman, supra, 80 N.J. at 432. We therefore affirm the award of emotional distress damages to Innes. *Id.* at 22.

In addition, the *Innes* court also found that there was no requirement for enhanced proof of the particular and foreseeable consequences of the attorney's breach of duty under these facts. Here is what the *Innes* court concluded about the standard of proof to be required at trial:

> Under the particular facts of this case, plaintiffs were entitled to recover for emotional distress damages without enhanced proof based upon the particular, and foreseeable, consequence of defendants' breach of the duty owed, i.e., the complete, and potentially, permanent ***rupture of the parent-child bond***. [Emphasis added.] *Id.* at p. 20.

In conclusion, the *Innes* court dealt with the all too common argument, made here again by Respondents, that allowing emotional distress damage claims would cause the proverbial "flood" of uncontrollable litigation. The *Innes* court, at p. 20, dismissed that contention vigorously as follows:

> The nature of this particular harm [the loss of a parent-child relationship] mitigates against the reason for an enhanced standard of proof in the first instance—the elimination of spurious claims. In such " 'special circumstances,' 'an especial likelihood of genuine and serious mental distress ... serves as a guarantee that the claim is not spurious.'

2. **The *Miranda v. Said* Decision**

Another recent decision supporting emotional distress damages is the thoughtful and reasoned decision by the Iowa Supreme Court in *Miranda v. Said* (2013) 836 N.W. 2d 8 ("*Miranda*"). In *Miranda*, the Iowa Supreme Court conducted a thorough multi-jurisdictional review. Based upon this analysis, it found that damages for emotional distress were appropriate in a case of legal malpractice involving only a single instance of negligence by an immigration attorney.

In *Miranda*, the lawyer had advised his client that they could leave the country and later return when their son, born in the United States, became of age. The lawyer prepared documents that his client was to file when this occurred. When the child reached maturity, the papers prepared by the attorney were filed as he had directed. However, the U.S. Immigration office refused to allow the client to return to the states. An expert testified that the lawyer's "plan" had such a low probability of success that it was either negligent or possibly even knowingly illegitimate.

Just as in *Holliday*, The Iowa Supreme Court observed that the nature of the engagement was the most crucial factor. Here is what it said:

> ... the attorney-client relationship and the transaction undertaken by Said [the attorney who gave the negligent immigration advice] involved serious emotional distress.

Then by way of example, the *Miranda* court analogized to an earlier Oregon case, *McEvoy v. Helikson* (1977) 277 Or. 781, that held the loss of child custody to an out of state parent was the kind of legal matter for which an attorney should reasonably foresee that there could be substantial emotional harm to the client. Here is the *Miranda* court's analogy:

> It is generally foreseeable that emotional distress would accompany the prolonged separation of a parent and child. See McEvoy, 562 P.2d at 542, 544; see also Person, 183 Ill.Dec. 702, 611 N.E.2d at 1353 (holding plaintiff could obtain emotional distress damages for loss of custody of children resulting from attorney negligence). In McEvoy, as part of a divorce decree, a husband gained custody of a child subject to visitation rights by his ex-wife. 562 P.2d at 542. He was concerned that his ex-wife, a Swiss citizen, might take the child back to Switzerland, where he would be unable to see the child. Id. As such, the decree required the lawyer to obtain her passport when she visited the child. Id. When the lawyer failed to obtain the passport, the ex-wife

> took the child to Switzerland. Id. The court held that the actions of the ex-wife in taking the child was foreseeable and the father could recover damages flowing from the breach of duty, including emotional distress damages. *Id.* at 543–44.

The *Miranda* court based its decision on the finding that the nature of the engagement was personal in nature which made the foreseeability of emotional damages certain. The lawyer knew (or should have known) that his client's emotional well being was at the center of the matter for which he was engaged.

3. **The Vincent v. DeVries Decision**

In support of their motion to strike emotional distress damages, Respondents relied, in particular, upon the recent case out of Vermont, *Vincent v. DeVries*, 2013 VT 34; 72 A. 3d 886. However, this decision is easily distinguished because the nature of the underlying action was a real property litigation which involved only economic (i.e., a suit over real property), not personal interests. Hence, there was no reasonable foreseeability of emotional distress damages.

In fact, the *Vincent* Court reviewed with approval sister state decisions *that allowed emotional distress damages where the nature of the engagement involved significant emotional harm*. Here is what the *Vincent* court observed:

> However, following the general trend of narrowing the bar against damages for emotional injury in the absence of physical impact, some courts have concluded that emotional distress damages are recoverable "if the lawyer is contracted to perform services involving deeply emotional responses in the event of a breach." Miranda v. Said, No. 11–0552, 2012 WL 2410945, at *4 (Iowa Ct.App. June 27,

2012). Courts have applied this exception in cases in which the legal malpractice leads to a loss of liberty or of one's child, as contrasted with purely pecuniary loss. See, e.g., Lawson v. Nugent, 702 F.Supp. 91, 95 (D.N.J.1988) (holding that where plaintiff's relationship with attorney was predicated upon liberty interest, rather than purely economic interest, plaintiff was entitled to seek damages for emotional distress resulting from twenty extra months of confinement in maximum security penitentiary); Miranda, 2012 WL 2410945, at *6–7 (allowing claim for emotional distress damages where defendant immigration lawyer's negligence caused plaintiff(s) to leave country without right of reentry, forcing separation from their children for at least ten years); Person v. Behnke, 242 Ill.App.3d 933, 183 Ill.Dec. 702, 611 N.E.2d 1350, 1353–54 (1993) (allowing claim for noneconomic damages resulting from plaintiff's loss of contact with children for over five years); Miranda, 2012 WL 2410945, at *4; McEvoy v. Helikson, 277 Or. 781, 562 P. 2d 540, 544 (1977) (plaintiff could be entitled to damages for "anguish and mental (suffering) due to the loss of his minor child" (quotation omitted), superseded by rule on other grounds as recognized in Moore v. Willis, 307 Or. 254, 767 P.2d 62 (1988)). *Vincent* at 894-895.

4. **Other Notable Cases**

In addition to the cases already discussed, there are other leading decisions that support the imposition of emotional distress damages here, including *McDaniel v. Gile* (1991) 230 Cal. App. 3d 363, where the California Court of Appeal allowed emotional distress damages for sexual misconduct by a lawyer towards his client. In *DePape v. Trinity Health Systems, Inc.* (2003 Iowa) 242 F. Supp 2d 585, emotional distress damages were allowed when a client was negligently advised about immigration laws. Similarly, in *Person v. Behnke* (1993 Illinois) 242 Ill. App. 3d 933, 611 N.E.2d 1350, 1353–54, the court allowed a claim for non-economic damages resulting from plaintiff's loss

of contact with children for over five years.

D. Public Policy Favors Emotional Distress Damages

The *Holliday* decision has been the law in California since 1989. This decision allowed emotional distress damages in the context of a criminal conviction and consequent loss of "liberty" resulting from attorney negligence. Despite the large number of criminal cases in this state every year, concerns about a "flood" of emotional distress cases and rising malpractice insurance rates have proven unfounded. There has been no such flood and no such malpractice insurance meltdown. Simply put, *Holliday* did not open the proverbial "pandora's box" for emotional distress damages.

There is simply no logical reason that the *Holliday* "personal vs. economic" analysis should not be extended to allow emotional distress damages in attorney malpractice cases involving child custody. If there is any increase in the malpractice insurance rates for lawyers who practice in this field, that small "economic" effect will be far outweighed by the "personal" benefit to parents throughout this state through improved legal services.

III. CAN THE CONDUCT OF LEGAL COUNSEL BE SO WILLFUL AND CONSCIOUSLY IN DISREGARD OF THE CLIENT AS TO WARRANT PUNITIVE DAMAGES?

A. Applicable Law

The analysis for punitive damages in California begins with Civil Code §3294. The statute requires the plaintiff to allege facts that, when considered by the trier of fact individually and/or collectively, prove that the defendant has been guilty of oppression, fraud, or malice. Civil Code §3294(a). "Malice" is defined in CC §3294(c)(1) as conduct by the defendant that is either: (i)

"intended"; or (ii) *is "despicable" and carried out with a willful and conscious disregard for the plaintiff*. The latter is what Petitioner has alleged here.

If a complaint alleges conduct that raises a *question of fact* as to whether the requirement of CC §3294 has been met, then that question of fact is for the jury to decide. It is not necessary to plead specific intent to harm. See *Pfiefer v. John Crane, Inc.* (2013) 220 Cal. App. 4th 1270, 1299. Moreover, a plaintiff may prove the "willful and conscious disregard" of the defendant either through direct evidence or through indirect evidence from which the jury may infer such conduct. Here is how the *Pfiefer* Court put it:

> Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]

B. A Pattern Of Conduct May Be Used To Support Punitive Damages

Petitioner agreed that punitive damages are not allowed in the typical negligence action. However, Petitioner contends that where there is a *series of negligent acts that exhibit a pattern of wrongful behavior,* a jury could reasonably conclude that Respondents' conduct was willful and in conscious disregard of Petitioner's interests if there was "clear and convincing evidence" produced at trial. In other words, *a series of related acts that demonstrates a pattern of wrongful behavior provides a proper pleading of ultimate facts* that a jury may evaluate in the light of the evidence to find the requisite mental element for exemplary damages.

This position is supported in a number of California appellate decisions. For example, in *Hillenbrand, Inc. v Insurance Company of North America* (2002) 104 Cal. App. 4th 784, 820-821, the Court of Appeal stated the matter succinctly: "[a] pattern or practice of wrongful conduct is often introduced as evidence of malice or oppression to justify a punitive damage award." Furthermore, a series of seemingly unrelated acts, when viewed collectively to prove a standard of behavior or practice, can be used to prove punitive damages. *Hughes v. Blue Cross of Northern California* (1990) 215 Cal. App. 3d 832, 847. Here is the court's reasoning:

> In the case at bar, there was evidence that the denial of respondent's claim was not simply the unfortunate result of poor judgment but the product of the fragmentary medical records, a cursory review of the records, the consultant's disclaimer of any obligation to investigate, the use of a standard of medical necessity at variance with community standards, and the uninformative follow-up letters sent to the treating physicians. The jury could reasonably infer that these practices, particularly the reliance on a restrictive standard of medical necessity and the unhelpful letter to the treating physician, were all rooted in established company practice. The evidence hence was sufficient to support a finding that the review process operated in conscious disregard of the insured's rights.

Again, in *Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 181 Cal. App. 3d 1514, 1518 ("*Rosso*"), there was a petition for a writ of mandamus regarding a discovery issue concerning discovery of evidence to support a claim for punitive damages. In granting relief, the Court of Appeal observed that earlier "instances of alleged improper practices might arguably be relevant to plaintiff's claim for punitive damages."

C. Punitive Damages For Breach Of Fiduciary Duty

As shown above in Section I, Respondents were under the highest duty to act as a zealous advocate for Petitioner. This fiduciary duty provides the legal basis for the pleading of the claim for breach of fiduciary duty (Counts I & II).

It has been long established that a breach of fiduciary duty by an attorney will support punitive damages. See *Heller v. Pillsbury Madison & Sutro (1996)* 50 Cal. App. 4th 1367, 1390. However, the requirements of Civil Code §3294 must be met regardless of the type of underlying tort. *Id.* at 1390-1391.

Consequently, the question of whether punitive damages may be pleaded for breach of fiduciary duty is the same as that for the professional negligence claim and the foregoing arguments apply.

D. Decisions In Sister States Approve Punitive Damages For Negligence and Other Wrongful Attorney Conduct

The question of punitive damages for attorney negligence has been addressed in a couple of the sister state decisions cited above

In the *Miranda* case, discussed in Section II.C.2, above, the Iowa Supreme Court addressed this very issue in the context of an action for attorney negligence as follows:

> Punitive damages, however, are not available for conduct that is "merely objectionable." Coster, 468 N.W.2d at 811. A plaintiff seeking punitive damages must prove "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a) (2005). *Miranda* at 34.

This reasoning closely follows California law and really lays out the

same standard for punitive damages as in CC §3294(a). Indeed, when further defining "willful and wanton" misconduct, the *Miranda* court said:

> [c]onduct is "willful and wanton" when [t]he actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. [citations omitted] *Miranda* at 34.

Applying this statutory requirement to the facts in that case, the *Miranda* court found that there was ample pleading to support punitive damages when only a single instance of professional negligence, not breach of fiduciary duty, was alleged:

> Under this record, a reasonable jury could conclude that a lawyer acts with willful or wanton conduct by pursuing a course of action with knowledge that it is contrary to the plain language of the governing statute. In fact, the plaintiffs' expert testified extensively that Said's proffered strategy was meritless. Given the high stakes of an immigration application, advising clients to engage in a strategy that is meritless (with the singular hope that the official exercises discretion not apparent from the face of the statute), without similarly advising them of the significant risks attending the strategy, can be said to "manifest a heedless disregard for or indifference to the rights of others in the face of apparent danger or be so obvious the operator should be cognizant of it, especially when the consequences of such actions are such that an injury is a probability rather than a possibility. *Miranda* at 34.

Compared to the allegations by Petitioner in Counts I & II, the attorney conduct in *Miranda* was significantly less egregious. By comparison, punitive damages should be allowed to go to the jury in this case.

IV. MAY PROFESSIONAL NEGLIGENCE BE PLEADED

IN THE ALTERNATIVE AS A BREACH OF CONTRACT?

A. **A Plaintiff May Plead In The Alternative**

It is established 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* (1995) 11 Cal. 4th 583, 593; *Crowley v. Kattleman* (1994) 8 Cal. 4th 666, 690-691; *Mendoza v. Rast Produce Co.* (2006) 140 Cal. App. 4th 1394, 1402. Respondents' argument that Petitioner cannot allege both a count in negligence, and then alternatively, a count for breach of fiduciary duty and/or breach of contract is erroneous.

B. **The Primary Rights Doctrine Does Not Apply To Petitioner's Single Claim**

The Respondents also demurred upon the "primary rights doctrine" as applied in *Bay Cities Paving & Grinding, Inc. v. Lawyer's Mutual Insurance Co.* (1993) 5 Cal. 4th 854, 860. 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.

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

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

C. Petitioner Cannot Be Forced To "Elect" A 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.[8] See Witkin,

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[8] However, election is required before entry of judgment.

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, this 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. *Neel* at 188-189. This 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.

Petitioner's case is conceptually parallel to the foregoing examples and she should be allowed to plead in the alternative.

D. Double "Recovery" Distinguished From Alternative Theories And Election Of Remedies

Respondents were apparently concerned that Petitioner would somehow obtain a double recovery. However, it is also established law that alternative pleading does not entitle a plaintiff to a double recovery. See Witkin Ch. IX, Summary of California Law, Tenth Ed., Torts, §1550. The trial court can handle this issue by appropriate jury instructions and then, depending upon the verdict, by the election of remedies by Petitioner before judgment.

Petitioner cannot be forced by Respondents at the initial pleading stage

to "elect" a remedy (e.g., only a negligence action). While that may be an insurance carrier's dream scenario, there is no basis in California law to deprive Petitioner of her established right to pursue alternative causes of action and argue those theories to the jury.

CONCLUSION

Petitioner is not just seeking redress of her grievances, she is asking this Court, which bears ultimate responsibility for the administration of the legal profession, to affirm established rules of attorney conduct and further elucidate the fiduciary obligations of attorneys.

The average person depends upon the good faith of the attorney that represents them. That good faith requires the representation to be competent and zealous. If the attorney cannot or does not want to represent a client to the best of their ability, they must not take the engagement.

Attorneys are capable of determining at the outset of an engagement whether it is personal or economic in nature. Attorneys that don't want the responsibility for representing clients with personal matters can choose a different field of practice. Those that are willing can obtain adequate insurance. The field of criminal law has not been adversely affected by the damage rule set down in *Holliday*. Similarly, the field of family law will not be adversely affected by the extension of the *Holliday* rule.

There is no logical or policy reason why attorneys should be exempted from punitive damages if the criteria under CC § 3294(a) are met. Nor should they be exempt from the rule allowing alternative pleading.

Petitioner prays that this Court will take this opportunity to not only grant her relief, but to provide the necessary guidance to the legal profession.

Respectfully Submitted,

November 2, 2014

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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 body of this brief (i.e., Sections I through XI) is approximately 8108.

_____

Patrick H. Dwyer,
Attorney for Petitioner

Date: November 2, 2014

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 Thomas, et al., Case No. YCSCCVCV-14-0000097 was served as follows.

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

1. Christine E. Jacob, Sean R. Broderick, Hansen, Kohls, Sommer & Jacob, LLP, 1520 Eureka Road, Suite 100, Roseville, California 95661; and

2. The Superior Court for the County of Yuba, 215 Fifth Street, Marysville, California 95901.

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 the State of California that the foregoing certification of Patrick H. Dwyer is true and correct.

_____

Patrick H. Dwyer

November 2, 2014

Location: Penn Valley, CA 95946