

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 41261-6

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

PAUL M. WOLFF CO., a foreign corporation, Appellant,

v.

KEITH MILLER, an individual, and FINAL CONCRETE, LLC, a
Washington liability company, Respondents.

REPLY BRIEF OF PETITIONER

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I. Argument

A. Respondent's Assertions Concerning Sufficiency of Evidence are in Error or are Procedurally Improper.

Respondents argue that, since they asked the trial court to rule on sufficiency of the evidence in their Motion for Summary Judgment, the fact that Petitioner herein has not taken up the issue in this forum constitutes a waiver of the argument. At the same time, Respondents make no attempt to argue that the trial court considered or ruled on the sufficiency of evidence arguments contained in their Motion for Summary Judgment. As the verbatim report and the order from which this appeal is taken establish, the trial court never made any findings or conclusions concerning sufficiency of evidence, having apparently determined that it was unnecessary to do so in light of its decision to apply California law to the fiduciary duty claim.¹ Since the trial court never reached the issue of whether sufficient evidence existed to allow the claim to proceed, no error could be assigned by either Petitioner or Respondents herein. The claim by Respondents that error needed to be inferred and then assigned in order to preserve the issue is unsupported by any authority. It is anticipated that, should this appeal be successful, this Court will remand the matter to the trial court for further proceedings, at which time the trial court and/or a finder of fact may analyze the evidence under Washington law. At that point, sufficiency of the evidence can be properly addressed.

¹ Petitioner does assert a secondary argument that the Court erred in summarily determining that, under California law, the claim of fiduciary duty is per se not legally cognizable. However, in so doing the trial court never reached any legal determinations concerning issues of material fact. As a result, the same has not been argued here.

Respondents go on to point out that this Court is free to determine whether sufficient evidence existed to defeat their Motion for Summary Judgment under a Washington analysis. While that may certainly be the case, it is also true that Respondents have assigned no error to the lower court's determination, and sufficiency of evidence has not been raised as an issue by Petitioner. In relevant part, *RAP 10.3(b)* states that "If a respondent is also seeking review, the brief of respondent must state the assignments of error and the issues pertaining to those assignments of error presented for review by respondent." Therefore, to the extent that any additional arguments have been set forth by Respondents in their brief on this issue, they are procedurally improper and should not be considered. The Court's consideration of the sufficiency of evidence, if any is to be applied, should be confined to the designated Clerk's Papers and to the Verbatim Report of Proceedings on file without consideration of further argument by counsel.

B. The Absence of a Fiduciary Duty Clause in the Contract Supports the Common Law (Not Contractual) Nature of the Claim at Issue.

Respondents characterize Petitioner's observation that no fiduciary duty clause exists in Mr. Miller's employment agreement as a concession. Rather than conceding the point, however, Petitioner relies on this fact in asserting that the claim should be allowed to proceed under Washington law pursuant to Restatement (3d) of Agency, §§ 187(2) and 188. Respondents go on to imply that, where a fiduciary duty is not clearly

spelled out in a contract between an employer and an employee, that no such claim can be maintained. Respondents therefore seek to establish a new rule of law by which no person in Washington can assert a common law claim of breach of fiduciary duty where a contract of any type exists. This flies in the face of the Supreme Court's reasoning as articulated in *Racine v. Bender*, 141 Wn. 606, 611, 252 P.2d 115 (1927) (quoted in Br. of Appellant, p. 12). Respondents fail to attempt a reconciliation of their position with binding Washington precedent, however. Instead, the only reference to *Racine* in Respondents' brief appears as a lead-in to a series of rhetorical questions that ignore the legal argument at issue and seek once again to convey Respondents' perspective on whether it was proper for Mr. Miller to be actively bidding flooring projects for his own business while he was supposed to be working in the same capacity for Petitioner.

C. Reply Regarding Choice of Law.

To be clear with regard to Petitioner's due process argument, the suggestion is not that due process does not exist in California. Rather, the argument—as taken directly from case authority, and explained in what were believed to be unequivocal terms—is that Petitioner is entitled to avail himself of the law of the land in seeking redress for a claim arising therein. The claim arose in Washington, and Washington common law should therefore control, as suggested by *Int'l Bhd. of Boilermakers v. Int'l Bhd. of Boilermakers*, 33 Wn.2d 1, 65, 203 P.2d 1019 (1949).

Respondents appear to quarrel with the notion that Washington law could apply to common law claims in cases where California law has been selected as the governing law for explicit contract terms. Respondents go so far as to contend that Petitioner's concession as to the applicability of California law to the contract renders Petitioner's stance on the applicability of Washington law to common law claims irrational. Respondents then assert that Petitioner has cited to no authority that would support its argument. To the contrary, it is Respondents' brief that contains no authority that would support what seems to be a tangled and nebulous theory. Petitioner, meanwhile, has cited to the Restatement 3d of Agency, §§ 187 and 188, and to Washington appellate authority to support the notion that claims arising between parties to a contract that are not based on the express terminology thereof should, under such circumstances as these, be interpreted under the law of the state in which the contract was performed.

Respondents base their next argument on a misinterpretation of Restatement 3d (Agency) §187(1). Respondents appear to read §187(1) to mean that if a justiciable issue can be thought of and written into a contract, then it must be governed by the choice of law provision, whether it is actually included or not. This reading violates common sense, and therefore, also violates a basic principle of statutory construction: "It is a rule of such universal application as to need no citation of sustaining authority that no construction should be given to a statute which leads to gross injustice or absurdity." *Lenci v. Seattle*, 63 Wn.2d 664, 671, 388

P.2d 926 (1964); quoting *In re Horse Heaven Irr. Dist.*, 11 Wn. (2d) 218, 226, 118 P. (2d) 972. It is impossible to conceive of a justiciable issue that cannot be expressly written into a contract between parties. To read Restatement (3d) § 187(1) so that any term that could have been—but was not—written into a contract beforehand must be governed by the choice of law provision would be to render the clause absurd. It would also render superfluous the language pertaining to alternative circumstances in § 187(2), as there would be no such thing as alternative circumstances. This violates yet another principle of statutory construction, as “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999); quoting *Stone v. Chelan County Sheriff’s Dep’t*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Tommy P. v. Board of County Comm’rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982).

It is clear that the word “issue,” as used in Restatement (3d) of Agency § 187(1), means “issue in dispute at the time of litigation,” not “issue that can be foreseen and included in the contract at the time of formation.” This is the only reasonable interpretation.

Respondents’ misinterpretation of Restatement (3d) of Agency § 187(1) appears to give rise to their next argument, which infers that wherever a fiduciary duty is not explicitly written into a contract, it may be concluded that the parties intended to do away with it. Respondents argue that since no authority suggests that loyalty, good faith and fair

dealing cannot be excised from a contract, the absence of those explicit terms must mean that they no longer apply in this instance. Respondents appear to have blurred the distinction between contractual and common law causes of action in making this argument. Should Mr. Miller wish to argue that the absence of a fiduciary duty clause in the contract obviated his obligation to act in accordance with his employer's best interests, he is of course free to do so before a finder of fact. However, the presence or absence of a fiduciary duty clause in a contract neither establishes nor eliminates any element of the claim that Mr. Miller breached his common law obligation to Petitioner. It would therefore be erroneous to premise dismissal of the claim on the fact that there is no contract term defining Mr. Miller's fiduciary obligation.

It should be noted also that Respondents take a somewhat bizarre stance on the issue of whether the parties intended to include loyalty in the definition of their relationship. On one hand, Respondents argue that Petitioner cannot enforce non-competition and other related clauses in the contract given the constraints imposed by California law. Again, Petitioner is forced to agree with this statement. However, on the other hand, Respondents argue that the parties intended to reduce Mr. Miller's duty of loyalty through their action of selecting California law to govern the contract. Respondents would apparently contend that the choice of law clause was an overt attempt by the parties to express their intention to bind Mr. Miller to a lesser duty of loyalty. In other words, after obtaining a significant break from what would otherwise be ironclad non-compete

language by virtue of another contract term that inadvertently voided it, Respondents now suggest that the parties intentionally sought to reduce Mr. Miller's duty of loyalty as much as possible. This view makes little sense, especially in light of Respondents' observation that "Covenants of non-disclosure and non-competition occupy the majority of the agreement." *Br. of Respondents*, p. 5.

Respondents have admitted that Mr. Miller was a resident of Washington at all times relevant to this matter. While his territory did technically include other states, it is beyond question that he was based in Washington. Furthermore, Final Concrete was exclusively a Washington company. *CP 38*. Whatever the purpose of Respondents' attempt to find some false equivocation between Washington, Alaska, and Oregon, it is clear that this action only properly lies in Washington. It is equally clear, as illustrated by *Racine v. Bender*, that the fiduciary relationship that exists between a person in Mr. Miller's position to an entity in Petitioner's position is representative of a fundamental policy that Washington has identified and protected for several decades. The elements of Restatement (3d) of Agency § 187(2) are therefore satisfied.

Respondents' conclusory statement concerning California having a substantial relationship to the parties rings hollow. Nothing beyond identification of the fact that Petitioner was once headquartered in California has been identified as the basis for this conclusion. Certainly no allegation could be made that Mr. Miller ever brokered a project in California, or that any part of his fiduciary responsibility might have been

properly manifested or carried out at any time in that state. Mr. Miller embodied a significant portion of Petitioner's presence in Washington while he was so employed. As long as Mr. Miller was employed by Petitioner to do business on its behalf in Washington, Petitioner was conducting business in Washington. The scope of issues presented herein concern Mr. Miller as a Washington resident, primarily conducting business in Washington, and Petitioner, as a corporate entity transacting business in the State of Washington.

Respondents misinterpret Petitioner's arguments with concern to the fundamental policy issue. Petitioner does not contend that California law does not comport with public policy. Rather, Petitioner contends that Washington has developed its own system of laws and precedent describing what, in Washington, stands as the fundamental policy concerning the fiduciary relationship between agents and principals under circumstances such as these. Restatement (3d) of Agency §187(2) identifies the potential for different jurisdictions to have varying expressions of fundamental policy. It is obviously not intended to be applied only when one state fails to comport with some ethereal objective iteration of "public policy." Given the previously articulated Washington fundamental policy concerns that are implicated, this portion of Restatement (3d) of Agency § 187(2) is satisfied, despite the fact that California has developed a distinct policy (which, as identified in Brief of Petitioner, should also provide a basis for adjudication of this claim).

D. Whether the Circumstances Identified by Petitioner are Sufficient to Merit a Breach of Fiduciary Duty Claim Under California Law Constitutes an Issue of Fact.

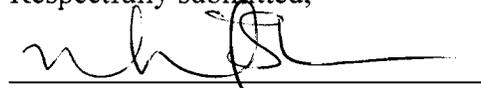
Respondents concede that California law does allow for a claim of breach of fiduciary duty. They merely argue that the trial court's decision should be upheld because Petitioner did not cite authority supporting the proposition that all of the language in the contract, together with the circumstances presented and Mr. Miller's title as a managerial trainee, were sufficient to create a fiduciary obligation. On the contrary, Petitioner has repeatedly cited authority in support of the position that, as the nonmoving party, all facts and inferences must be taken in the light most favorable to Petitioner. To the extent that the trial court and Respondents resolved any factual inferences in favor of Respondents and against Petitioner, Petitioner has consistently maintained that it is improper to do so. In finding that Mr. Miller was not employed in a sufficiently managerial capacity by Petitioner, despite his title, responsibilities, and lack of direct oversight, the trial court erred. In mistaking this inherently factual issue for a legal one, Respondents have also erred.

II. Conclusion

Petitioner, Paul M. Wolff Co., respectfully reiterates its request that the Order Granting Summary Judgment in this matter be overturned with regard to Petitioner's claim of Breach of Fiduciary Duty.

April 20, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on April ^{4th} 20¹¹, 2011, I caused to be served a copy of the foregoing **REPLY BRIEF OF PETITIONER** on the following persons by Regular U.S. Mail at the following addresses:

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