

COURT OF APPEALS
WASHINGTON

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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.

BRIEF OF PETITIONER

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I. Introduction

This is an appeal from an Order of Summary Judgment Dismissal. It is confined to the question of whether Defendant-Respondent Keith Miller (“Miller”) breached his common law fiduciary duty to Plaintiff-Appellant Paul M. Wolff Co. (“PMWC”).

The Order of Dismissal entered by the trial court was premised on the belief that California law should apply to the analysis. PMWC contends that it was error for the trial court to apply California law to a common law cause of action arising wholly in the State of Washington. Furthermore, PMWC contends that even if California law were applicable, breach of fiduciary duty is a claim that is recognized in California as well. Genuine issues of material fact remain as to this claim, and this Court should reverse the trial court Order of Dismissal with instruction to allow the matter to proceed to trial on the fiduciary duty claim.

II. Assignments of Error

1. The common law claim of Breach of Fiduciary Duty should have been analyzed under relevant Washington authorities, as opposed to California law.

Issues Pertaining to Assignment of Error

- a. Failure to allow the common law Breach of Fiduciary Duty claim to proceed under Washington law deprived PMWC of due process.
 - b. Washington law should control over California law even if the contract itself is deemed applicable to the issue of Breach of Fiduciary Duty.
2. The trial court erred in determining that the claim of Breach of Fiduciary Duty is not legally cognizable in California.

Issues Pertaining to Assignment of Error

- a. California recognizes the claim of Breach of Fiduciary Duty; whether Miller's relationship and duties suggest such a duty to PMWC is an issue of fact that must be resolved in favor of the nonmoving party.

III. Statement of the Case

PMWC is a Utah corporation with its principal place of business in Linden, Utah. *CP 1*, ¶1; *CP 13*, ¶1. Miller is a Washington resident. *Id.* Miller was employed by PMWC under the terms of an employment contract executed on July 24, 2004. Miller was employed as a “Management Level Trainee” for PMWC, and was assigned to a geographic area within the State of Washington. *CP 6*. The agreement specifies further that “[Miller is] employed by the Paul M. Wolff Co. in a capacity in which [Miller] may receive or contribute to confidential information,” and that such information, along with continued employment, salary and benefits, has value to Miller. *Id.* The Employment Agreement indicated that California law would apply to govern any disputes under it:

Company and I acknowledge and agree that the law of California shall govern the respective rights and obligations of parties in this employee agreement. If any provision of this employee agreement shall be voided by reason of a statute of law, as properly and judiciously applied to this employee agreement then this employee agreement shall be construed as if such provision is not contained therein and so far as such particular adjudication is concerned.

CP 11. As quoted, the contract also contained a severability clause. *Id.*

A substantial part of Miller’s job duties included evaluating and bidding for construction contracts. See, e.g., *RP 3:15-17*, *CP 6-12*. In September, 2008, Miller incorporated his own company, Final Concrete, LLC (“Final Concrete”). *CP 56*. Miller failed to apprise his employer, PMWC, of this. *CP 39:18-22*. Between September 2008 and January

2009, Miller evaluated and submitted bids for flooring projects on behalf of Final Concrete. *Id.* at 39:6-17. In January 2009, Miller abruptly resigned his position with PMWC without notice. *CP* 2, 3.

As a result of the above, PMWC brought an action against Miller for, inter alia, breaching his fiduciary duty as an agent of PMWC. *CP* 1-12. Included in the action were several claims related to Miller's employment contract. *Id.* However, because the contract claims were invalidated by a jurisdiction clause stating that California law would govern the contract. *CP* PMWC conceded as much in response to Miller's motion for summary judgment. *CP* 71. Nevertheless, PMWC maintained that its action for Breach of Fiduciary Duty, as a common law claim not connected with the employment contract, should be analyzed under a standard independent of that which was applied to the contract claims. See, e.g., *CP* 70-74; *RP* 16:14-20. The trial court disagreed, and stated that it was appropriate to apply common law as interpreted by California courts to the question of whether PMWC's claim of Breach of Fiduciary Duty should proceed to trial. *RP* 18:18-21.

IV. Summary of Argument

The common law claim of Breach of Fiduciary Duty should have been considered under applicable Washington law, as the claim did not arise out of the Employment Agreement at issue, and all material facts alleged in the claim took place in Washington. The claim at issue is no more justiciable under California law than would be a claim of negligence against Miller for breaching a duty of care to PMWC and causing physical damage to company property in Washington. The function of the Employment Agreement in the context of this lawsuit is to do nothing more than provide circumstantial evidence that Miller owed a fiduciary duty to PMWC as its agent.

Actions arising out of tortious conduct committed in Washington by a defendant who resides in Washington are subject to the law of Washington. See, e.g., *RCW 4.28.185(1)(b)*; *Tyee Constr. Co. v. Dulien Steel Prods.*, 62 Wn.2d 106, 115, 381 P.2d 245 (1963). The choice of law clause in the Employment Agreement here applies California law only in the event of a breach of contract (“Company and I acknowledge and agree that the law of California shall govern the respective rights and obligations of parties **in this employee agreement.**” *CP 11* (emphasis added)). The contract is silent as to rights and obligations of the parties that exist independent of the contract, so the only applicable law would be that of the forum where the action arose. One such independent obligation is that of Miller to act in accordance with his fiduciary duty to PMWC. There can be no argument that, if the contract did not exist, jurisdiction would lie

properly in Washington. Since the contract is inapplicable to this prima facie claim, it does not exist for all practical intents and purposes, and the matter should be considered against the backdrop of applicable Washington law.

Despite the above, the trial court should have allowed the Breach of Fiduciary Duty to go forward to trial even under California law.

V. Argument

A. Standard of Review

In reviewing an order of summary judgment, the Court of Appeals should engage in the same inquiry as the trial court. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995). “All facts and reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party; all questions of law are reviewed de novo.” *Id.*

Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *CR 56(c); Christensen v. Grant County Hosp. Dist. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). The Court must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 67, 42 P.3d 968 (2002); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

B. The common law claim of Breach of Fiduciary Duty should have been analyzed under relevant Washington authorities, as opposed to California law.

1. Failure to allow the common law Breach of Fiduciary Duty claim to proceed under Washington law deprived PMWC of due process.

The common law, together with the Constitution and the statutes enacted by the Legislature, comprise the “law of the land” in the State of Washington. See, e.g., *Anderson v. Pantages Theatre Co.*, 114 Wash. 24, 29, 194 P. 813 (1921). Availability of the law to the land to litigants is not only a prerequisite to, but the sum total of, what it means to enjoy fundamental due process of law:

The term “law of the land” is a broad principle. It is said, in 16 C. J. S. 1142, Constitutional Law, § 567, to be synonymous with “due process of law”:

Synonymous terms. The term “due process of law” is synonymous with “law of the land,” a phrase appearing in many of the state constitutions.

Int'l Bhd. of Boilermakers v. Int'l Bhd. of Boilermakers, 33 Wn.2d 1, 65, 203 P.2d 1019 (1949). The trial court in this matter decided that California law should apply to PMWC’s common law claim. In so doing, it denied PMWC the opportunity to avail itself of the law of the land in pursuing its action against Miller. As a result, the trial court effectively denied PMWC its right to due process of law.

The justification given for the California law application was that the employment contract executed by the parties contained a choice of law clause that stated “[T]he law of California shall govern the respective

rights and obligations of parties in this employee agreement.” *CP 11*. The trial court determined that, since Breach of Fiduciary Duty is a claim that arose out of the relationship between Miller and PMWC, the choice of law provision in the contract should control. This determination ignores the fact that, whether or not a contract of any kind had been executed by the parties, their relationship created a fiduciary duty on the part of Miller as the agent of PMWC.

The employment agreement at issue also contained the following severability clause:

If any provision of this employee agreement shall be voided by reason of a statute of law, as properly and judiciously applied to this employee agreement then this employee agreement shall be construed as if such provision is not contained therein and so far as such particular adjudication is concerned.

Id. In effect, since all of the language pertaining to Miller’s duty of loyalty to PMWC was voided by operation of California law, there is nothing in the contract that even arguably speaks to a fiduciary duty. Therefore, any discussion of a basic duty of loyalty on the part of Miller must necessarily be undertaken without regard to the contract. It is incongruous, then, to apply a choice of law clause in the contract to a claim that has nothing to do with the contract.

2. Washington law should control over California law even if the contract itself is deemed applicable to the issue of Breach of Fiduciary Duty.

If the employment agreement informs any part of the analysis in this matter, it should be confined to the fact that it provides anecdotal proof that the parties intended to enter into a fiduciary relationship. As discussed above, the language included certain loyalty requirements on the part of Miller. While those requirements were obviated by the body of laws that governs the contract, the intent was clarified that Miller should have a fiduciary duty to PMWC. If, however, the Court determines that the language of the contract was intended to control aspects of the relationship between the parties beyond those which were properly included therein, it should still determine that the choice of law clause is inapplicable to the claim of Breach of Fiduciary Duty.

The Restatement Second of Conflict of Laws addresses this scenario in Sections 187 and 188. Section 187 states as follows:

§ 187 Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Rest. 2d, Conflict of Laws, §§ 187; cited with approval by Rutter v. BX of Tri-Cities, 60 Wn. App. 743, 746-747, 806 P.2d 1266 (Div. 3, 1991) (emphasis added).

To begin with, it should be observed that subsection (1) of § 187 is inapplicable, since there can be no question that Miller's fiduciary duty to PMWC is not made explicit in the terms of the contract itself. As such, subsection (2) to § 187 is the proper starting point in the discussion.

The undisputed facts of this case establish that Miller is a Washington resident, and PMWC is a corporate entity with its principal place of business in Utah. The contract at issue was meant to govern the relationship of the parties, with Miller living and working in Washington. California has no substantial relationship to the parties, and there is no reasonable basis for California law to control, as none of the contemplated activities of the parties to the agreement were expected to take place in California. Therefore, according to § 187(2)(a) quoted above, the choice

of law clause in the contract should not be applied to the claim of Breach of Fiduciary Duty in this matter.

The choice of law clause in the employment agreement should be disregarded as well under § 187(2)(b). Washington courts have established over time the fundamental policy interest behind holding agents to their fiduciary duties. As the Supreme Court has stated:

That such a requirement so accords with common honesty between men, and a failure to observe it leads to such direful results, is so well established that it seems strange that it should be contended that one engaged in a position where confidence is the basis of the relation between client and the employee and that confidence results through the employer and is the foundation stone of his business, then the employee may, disregarding his employer's rights, visit ruin upon him.

Racine v. Bender, 141 Wash. 606, 611, 252 P. 115 (1927); cited with approval by *Perry v. Moran*, 109 Wn.2d 691, 698, 748 P.2d 224 (1987). Clearly, upholding the fiduciary obligation of an agent to a principal is a fundamental policy concern of the State of Washington. It is all the more so in this case, where Miller was tasked with procuring contracts and business for his employer in another state, with little direct oversight. Therefore, the only question remaining is whether or not, subject to § 188 of the Restatement, Washington law should apply. That section reads as follows, in relevant part:

§ 188 Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state

which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Rest. 2d, Conflict of Laws, § 188; Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn.2d 806, 809, 459 P.2d 32 (1969). Washington case authority has adopted this reasoning: “When one party timely invokes foreign law, and the foreign law truly conflicts with the law of the forum, the court must determine which jurisdiction has the ‘most significant relationship’ to the issue in dispute.” *Fluke Corp. v. Hartford Acc. & Indem.*, 102 Wn. App. 237, 248, 7 P.3d 825 (Div. 1, 2000). Given the undisputed facts of this case as presented, there can be no question that Washington has the most significant relationship to the transaction. The work done under the contract was to be performed in Washington by Miller. For its part, PMWC is headquartered in Utah. California has no connection to the contract outside of the choice of law clause. Consequentially, given that the claim does not arise from the explicit language of the contract, application of Washington law to the common

law claim of Breach of Fiduciary Duty is appropriate to the exclusion of any other body of laws, particularly those of California.

C. Even if the claim of Breach of Fiduciary Duty presented here was before a California court, it would properly be allowed to proceed to trial.

California Civil Code, § 22.2, provides that the “common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of this State, is the rule of decision in all the courts of this state.” No express statement by the California Legislature may be found that obviates the common law principal that an agent has a fiduciary duty to his or her principal, and that a cause of action may vest in the principal if that duty is breached by the agent.

Contrary to the trial court’s conclusion, California does recognize the common law claim of Breach of Fiduciary Duty, and it has done so under circumstances similar to those presented here. “[A]n employee may not transfer his loyalty to a competitor.” *Stokes v. Dole Nut Co.*, 41 Cal. App. 4th 285, 295, 48 Cal. Rptr. 2d 673 (1995). “During the term of employment, an employer is entitled to its employees’ ‘undivided loyalty.’” *Fowler v. Varian Associates, Inc.*, 196 Cal. App. 3d 34, 41, 241 Cal. Rptr. 539 (1987). An “employer has the right to expect the undivided loyalty of its employees. The duty of loyalty is breached, and may give rise to a cause of action in the employer, when the employee takes action which is inimical to the best interests of the employer.” *Stokes*, 41 Cal. App. 4th at 295. Miller’s duties were executive in nature, as he was given great freedom to cultivate relationships with potential clients on behalf of PMWC, and had little supervision in doing so. While Miller may dispute

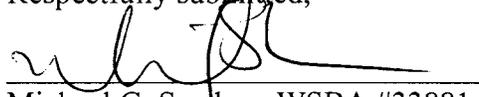
whether his title and responsibilities were sufficient to raise the claim of Breach of Fiduciary Duty under California law, it was error for him to receive the benefit of the doubt in the course of his Motion for Summary Judgment. Rather, per *CR 56(c)*, all factual issues and inferences were to be drawn in the light most favorable to PMWC, as the nonmoving party. As such, it was error to resolve this issue in Miller's favor.

VI. Conclusion

Based on the foregoing reasons, Appellant respectfully requests that the Order Granting Summary Judgment in this matter be overturned with regard to Plaintiff's claim of Breach of Fiduciary Duty.

February 23, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael G. Sanders", is written over a horizontal line.

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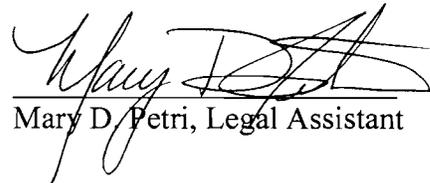
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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2011, I caused to be served a copy of the foregoing **BRIEF OF PETITIONER** on the following persons by Regular U.S. Mail at the following addresses:

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