FILED: September 8, 2006

IN THE SUPREME COURT OF THE STATE OF OREGON

DIANE REYNOLDS,
as Personal Representative of the Estate of
CLYDE G. REYNOLDS,

Respondent on Review,

v.

DONNA SCHROCK,
fka DONNA FRECHETTE,

Defendant,

and

CHARLES R. MARKLEY;
and GREENE & MARKLEY, P.C.,
an Oregon professional corporation,

Petitioners on Review.

(CC C991357CV; CA A119200; SC S52503)

En Banc

On review from the Court of Appeals.*

Argued and submitted March 6, 2006.

Thomas W. Brown, of Cosgrave Vergeer Kester LLP, Portland, argued the cause and filed the brief for petitioners on review. With him on the brief was Wendy M. Margolis.

James E. Leuenberger, Lake Oswego, argued the cause for respondent on review. Terrance L. McCauley, Estacada, filed the brief for respondent on review.

George A. Riemer, General Counsel, Lake Oswego, filed the brief for *amicus curiae* Oregon State Bar.

BALMER, J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

*Appeal from Washington County Circuit Court, Marco A. Hernandez, Judge. 197 Or App 564, 107 P3d 52 (2005).

BALMER, J.

This case requires us to determine whether a lawyer may be liable to a third party for aiding and abetting a client's breach of fiduciary duty, and, if the lawyer may be so liable, what circumstances must exist to impose liability. Plaintiff[(1)] sued defendant for breach of fiduciary duty, and he also sued defendant's lawyer for his role in that alleged breach. The trial court entered summary judgment in the lawyer's favor, and the Court of Appeals reversed. *Reynolds v. Schrock*, 197 Or App 564, 107 P3d 52 (2005).

We allowed the lawyer's petition for review and now reverse the decision of the Court of Appeals. We hold that a lawyer may not be held jointly liable with a client for the client's breach of fiduciary duty unless the third party shows that the lawyer was acting outside the scope of the lawyer-client relationship. Because there is no evidence in the summary judgment record that the lawyer in this case was acting outside the scope of that relationship, the lawyer was entitled to judgment as a matter of law. We therefore reverse the decision of the Court of Appeals and affirm the trial court's summary judgment in favor of the lawyer.

I. FACTS

We take the facts from the Court of Appeals opinion and the record. Because this case comes to us on summary judgment, we review the facts in the manner most favorable to plaintiff, the nonmoving party. ORCP 47 C. Plaintiff was a naturopathic physician, and defendant Donna Schrock was one of plaintiff's patients. Plaintiff and Schrock bought two parcels of land together. In 1999, Schrock filed two separate actions against plaintiff. The first action concerned the jointly owned land, and the second alleged that, in the course of the doctor-patient relationship, plaintiff had engaged in improper sexual conduct with Schrock. The two actions were consolidated, and the parties later settled them in an agreement negotiated and drafted by their respective lawyers, including Schrock's lawyer, defendant Charles Markley. The settlement agreement provided, in part, that plaintiff would transfer his share of one of the two jointly owned properties (the "lodge property") to Schrock and that Schrock and plaintiff together would sell the second property (the "timber property") and transfer the proceeds to plaintiff. If the proceeds of the timber property sale were less than $500,000, then Schrock would pay plaintiff the difference and Schrock would grant plaintiff a security interest for that amount in the lodge property to secure the payment. If the proceeds of the timber property sale equaled or exceeded $500,000, then Schrock would owe plaintiff nothing and plaintiff would have no security interest in the lodge property.

After the parties signed the settlement agreement, plaintiff transferred his interest in the lodge property to Schrock. Markley then advised Schrock that, in his opinion, nothing in the settlement agreement expressly required her to retain the lodge property in anticipation of the possible creation of a security interest in plaintiff's favor.[(2)] Schrock, with Markley's assistance and without plaintiff's knowledge, sold the lodge property to a third party before the parties sold the timber property. Markley asked the escrow officer handling the sale to keep the sale confidential. Markley also advised Schrock that she could revoke the consent that she had given earlier to plaintiff's plan to sell the jointly owned timber property. In Markley's view, plaintiff had failed to provide Schrock with information about the value of the timber property prior to arranging to sell it, contrary to a requirement in the settlement agreement, and that breach freed Schrock from any obligation to consent to the sale of the timber property. Based on Markley's advice, and with Markley's assistance, Schrock revoked her consent to the sale of the timber property.

II. PROCEEDINGS BELOW

Plaintiff sued Schrock and Markley over their actions in connection with the implementation of the settlement agreement. As to Schrock, plaintiff alleged, among other things, that the settlement agreement had created fiduciary duties between Schrock and plaintiff as joint venturers. Plaintiff asserted that Schrock, by selling the lodge property and revoking her consent to the sale of the timber property, had breached her fiduciary duty to plaintiff and the implied covenant of good faith and fair dealing that was part of the settlement agreement.[(3)] He further alleged that Schrock had converted his interest in the lodge property by selling that property and retaining the proceeds.

Plaintiff's complaint alleged that Markley was jointly liable with Schrock because he had aided and abetted Schrock's torts by giving her "substantial assistance and encouragement" in the commission of the torts and acting "in concert with [her] pursuant to a common design * * *." He also alleged that Markley had interfered with the contract (the settlement agreement) between plaintiff and Schrock. Plaintiff and Schrock later settled, leaving Markley as the only remaining defendant.

Markley moved for summary judgment, and the trial court granted his motion, stating, in part:

> "[T]he only evidence is that Mr. Markley advised his client of what she could do given the language of the agreements. * * * [T]here is no evidence that he was doing anything other than acting as Ms. Schrock's lawyer. Mr. Markley had no duty to the plaintiff. * * * [His] duty runs only to his client."

On appeal, plaintiff assigned error to the trial court's judgment in Markley's favor on the "joint-liability tort claims" -- that is, the claims that Markley was jointly liable with Schrock for breach of fiduciary duty and conversion.[(4)] The Court of Appeals affirmed the trial court's judgment in Markley's favor on the conversion claim. *Reynolds*, 197 Or App at 578-79. The court, however, reversed the judgment on the breach of fiduciary duty claim. The Court of Appeals held that this court's precedents did not exempt a lawyer from liability for assisting in a client's breach of fiduciary duty and that the Court of Appeals' case law suggested that a lawyer for a fiduciary could be liable for knowingly aiding or assisting a fiduciary in a breach of duty. *Id.* at 573-74. As noted, Markley sought review, which we allowed.[(5)]

III. ANALYSIS

The material historical facts in the summary judgment record are essentially undisputed,[(6)] and the parties focus their arguments on the applicable legal standard. The trial court's determination that Markley was entitled to judgment as a matter of law is a legal question that we review for errors of law. *Schaff v. Ray's Land & Sea Food Co., Inc.*, 334 Or 94, 98-99, 45 P3d 938 (2002). Where necessary, we view the facts and all reasonable inferences that may be drawn from them in the light most favorable to the adverse party -- in this case, plaintiff. *Id.* at 99.

A. *Liability for Assisting a Breach of Fiduciary Duty*

We begin our analysis, as do the parties, with this court's decision in *Granewich v. Harding*, 329 Or 47, 985 P2d 788 (1999). That case provides a reasonable starting point because it

involved claims for breach of fiduciary duty, including a claim against a lawyer for assisting others in breaching fiduciary duties that they owed to the plaintiff. Plaintiff argues that *Granewich* describes the elements required to state a claim and holds that a lawyer in Markley's position may be liable for assisting in a client's breach of fiduciary duty. In our view, however, *Granewich* does not provide a complete answer to the questions that this case raises.

The plaintiff in *Granewich*, a minority shareholder in a corporation, alleged that the corporation's two majority shareholders had breached their fiduciary duty to him by effectuating a corporate "squeeze-out." The plaintiff also asserted a separate claim against the corporation's lawyer, alleging that the lawyer had assisted the other defendants in that squeeze-out. This court held that the lawyer could be liable for aiding and abetting the other defendants' breach of fiduciary duty, even though the lawyer had no independent fiduciary duty to the plaintiff. However, the *Granewich* opinion specifically noted that the defendant lawyer in that case had represented the *corporation*, not the other defendants (the majority shareholders), and that the plaintiff had alleged that the lawyer's actions had fallen "*outside the scope* of any legitimate employment *on behalf of the corporation*." *Id.* at 59 (emphasis added). Therefore, in *Granewich*, this court did not consider or answer the question that is at the core of this case: whether, and under what circumstances, a third party may assert a claim against a lawyer, acting in a professional capacity, for assisting a *client* in breaching the client's fiduciary duty.

The Court of Appeals recognized that *Granewich* left that question unanswered. However, based on two explanatory footnotes in *Granewich*, the Court of Appeals interpreted that case as holding that "an attorney may be liable for assisting a client's tortious conduct * * *." *Reynolds*, 197 Or App at 574. First, the court relied on a footnote in which this court stated that "[w]e do not suggest * * * that it necessarily matters that the corporation, rather than [the majority shareholders], was the client." *Granewich*, 329 Or at 59 n 7. However, that footnote simply conveyed this court's reluctance to answer a question that was not before it, and it was not an indication that the lack of a lawyer-client relationship in that case was irrelevant.[(7)] Second, the Court of Appeals observed that, in another footnote, this court quoted a treatise stating that a lawyer could be liable for the torts of the lawyer's client under certain circumstances. *Reynolds*, 197 Or App at 572 (quoting *Granewich*, 329 Or at 56 n 5). The Court of Appeals then went on to explain that *dicta* in its opinion in *Roberts v. Fearey*, 162 Or App 546, 556, 986 P2d 690 (1999), supported its ultimate determination that Markley could be liable. *Reynolds*, 197 Or App at 573-74.

Although *Granewich* left unanswered the question of when a lawyer representing a client may be liable for the client's torts, that case usefully describes the circumstances in which a person who assists another in committing a tort ordinarily may be liable for resulting harm to a third party. *Granewich* stated that section 876 of the *Restatement (Second) of Torts* (*Restatement*) "reflect[s] the common law of Oregon" on that subject. 329 Or at 54. Section 876 provides:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> "(a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> "(b) knows that the other's conduct constitutes a breach of duty and gives

substantial assistance or encouragement to the other so to conduct himself, or

"(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person."

The parties agree that plaintiff's allegations do not state a claim under subsection (c) because plaintiff does not assert that Markley's "own conduct, separately considered, constitute[d] a breach of duty to [plaintiff]." The parties further agree, for purposes of this court's review, that Schrock owed a fiduciary duty to plaintiff and that she breached that duty. The specific issue thus is whether plaintiff can recover from Markley for acting in concert with Schrock or substantially assisting her in breaching the fiduciary duty that she owed to plaintiff.(8)

Under *Granewich* and the *Restatement*, a person who acts "in concert with" or "gives substantial assistance or encouragement" to a fiduciary who breaches a duty to a third party may be liable for the resulting harm. Markley argues, however, that that general rule does not apply when a lawyer, in the context of a lawyer-client relationship, advises a client who breaches a fiduciary duty to a third party. The *Restatement* labels any such exemption from liability that the law otherwise would impose as a "privilege." *See Restatement* § 890 ("One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege * * *."). We therefore consider whether the fact that Markley was acting as Schrock's lawyer when he engaged in the challenged conduct created a privilege that protects Markley from liability. If that status does create such a privilege, then we must consider the circumstances in which the privilege applies.

B. *Privilege Against Joint Liability for a Lawyer Assisting a Client's Breach of Fiduciary Duty*

This court has not considered previously what privileges, if any, protect a person from liability for substantially assisting another in a breach of fiduciary duty. However, several cases have considered privileges as they relate to claims for interference with contractual relations brought against advisors or agents who acted on behalf of another person or entity.(9) Those cases are instructive, because, like the present case, they involve claims against a person for actions on behalf of a client or principal that allegedly harmed a third party.

In *Wampler v. Palmerton*, 250 Or 65, 439 P2d 601 (1968), the plaintiff sued a corporation's financial advisors for intentional interference with contractual relations for advising the corporation to breach its contract with the plaintiff. This court noted that the advisors owed a "duty of advice and action" to the corporation and that imposing liability on those advisors would paralyze the corporation's ability to act and to secure advice on how to act. *Id.* at 74-75. The court therefore recognized a privilege against liability for corporate advisors who act in good faith and for the benefit of the corporation. *Id.* at 75. Indeed, the court noted, the privilege protects the advisor from liability "even though plaintiff argues that the defendants intended to cause the corporation to take an unfair advantage of the plaintiff by means of the breach of contract." *Id.* at 76.

This court followed *Wampler* in *Straube v. Larson*, 287 Or 357, 600 P2d 371 (1979), where it considered an intentional interference claim by a radiologist against a hospital chief administrator who had recommended that the hospital suspend the radiologist's hospital privileges and other medical staff members who allegedly had conspired in seeking the suspension. The defendants claimed that they had acted to fulfill their duty to the hospital to

ensure the proper care for patients. *Id.* at 369. This court applied the reasoning of *Wampler* and concluded that, if the defendants had acted in good faith and in the hospital's interest, then they had what "amount[ed] to the application of a qualified privilege" against liability. *Id.* at 369-71.[(10)] The court also addressed the issue of which party had the burden of proving that the defendants' acts came within the scope of the privilege and held that the plaintiff had "the burden of negating [that] qualified privilege * * * as part of his affirmative case." *Id.* at 371.

In *Welch v. Bancorp Management Services*, 296 Or 208, 214, 675 P2d 172 (1983), this court again considered the issue of when an agent can be liable in tort for actions that the agent takes on behalf of its principal and that cause harm to a third party. In that case, a real estate developer alleged that a lender had agreed to provide financing for a project but had breached that agreement based on "misrepresentations" and "false advice" given to the lender by its investment committee. *Id.* at 211. The developer sought to recover from the investment committee members for tortious interference with the financing agreement. Relying on its earlier decisions in *Wampler* and *Straube*, this court held that the investment committee had been acting as the agent of the lender and therefore was immunized from tort liability if its actions had been within the scope of its authority:

> "An agent acting as a financial advisor is thus privileged to interfere with or induce breach of the principal's contracts or business relations with third parties, as long as the agent's actions are within the scope of his employment and taken with an intent to further the best interests of the principal."

Welch, 296 Or at 218; *see also id.* at 216-17 ("[T]he proper test is whether the agent acts within the scope of his authority and with the intent to benefit the principal.").

This court, in the cases described above, protected from liability defendants who owed duties to an entity or person and who, in the course of performing those duties, harmed a third party. This court recognized a qualified privilege in those cases because it was necessary to protect important relationships between the defendant and the entity or person -- the financial advisor and the corporation in *Wampler*, the staff and the hospital in *Straube*, and the investment committee and the lender in *Welch*. That is, this court, in exercising its common-law authority to define tortious conduct, implicitly concluded that the effective performance of the duties arising from those relationships required that the person performing those duties have a qualified privilege from tort liability.[(11)]

The principle underlying the cases just discussed -- that, for individuals and corporations to obtain the advice and assistance that they must receive from their agents, the agents must have some protection from tort liability to third parties -- assists us in determining the rule that should be applied in this case. Not every relationship between a person who breaches a contract or a fiduciary duty and one who substantially assists in such a breach necessarily justifies recognition of a privilege against liability. However, we think that the lawyer-client relationship is one that does.[(12)] That is true, in our view, because safeguarding the lawyer-client relationship protects more than just an individual or entity in any particular case or transaction; it is integral to the protection of the legal system itself. *See Restatement (Third) of the Law Governing Lawyers* (*Restatement of Lawyers*) ch 2, Introductory Note (2000) (citing "the importance to the legal system of faithful representation"); *id.* § 121 comment b (conflict rules protect "interests of the legal system" by preventing compromise of process of adversary litigation). Myriad business transactions, as well as civil, criminal, and