IN THE SUPREME COURT OF THE STATE OF OREGON

RYAN GAYLOR, Plaintiff-Relator, v. K. F. JACOBSEN & CO., INC.; and ROSS ISLAND SAND & GRAVEL, CO., Defendants-Adverse Parties.	Multnomah Count Circuit Court No. 120709372 SC No. S061320 **MANDAMUS PROCEEDING**

BRIEF OF AMICUS CURIAE - OREGON TRIAL LAWYERS ASSOCIATION

Appeal from the Order of the Multnomah County Circuit Court dated April 11, 2013
The Honorable John Wittmayer

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First Question Presented

May a court sanction an employee or his attorney where the employee makes a good faith report of fraud on an employer working for the government, because the employee retained non-confidential employer documents that prove the fraud?

First Proposed Rule of Law

Whistleblowers have a right to remove documents from the employer's premises without the employer's knowledge or consent to vindicate important societal interests on deterring and punishing fraud.

Second Question Presented

Without any indication in this record of a confidentiality or trade secret agreement signed by Relator and given that the Adverse Parties were committing fraud by having his agent falsify documents and water samples for a public works project, were the documents protected by the employment relationship?

Second Proposed Rule of Law

In the absence of any confidentiality or trade secret agreement and when an employer instructs his agent to commit a crime while working on a public work project, the agency principal relationship is destroyed by the bad faith of the

employer. In that situation, documents necessary to protect the employee and the public from dangerous conditions create an exception to the general rule that documents are protected by the relationship between the employee and employer for the employer's benefit.

Third Question Presented

If a discovery violation is found, may the court disqualify an attorney and the firm and order the documents to be returned to remedy the violation?

Third Proposed Rule of Law

The court may disqualify an attorney and the law firm from continued representation and order documents to be returned when necessary, but the court must make a record that it has considered and rejected for just reasons the least onerous sanction available to it. Failure to make such a record is error.

Nature of the Proceeding

Relator filed a whistle blower case in Multnomah County Circuit Court after being terminated from his job. The Adverse Parties sought documents during the discovery phase of the litigation. Relator's attorney sent a compact disc with documents the client provided. Based on those documents, Adverse Parties filed a motion for sanctions for a discovery violation arguing that the Relator had improperly taken the documents from the premises of his employer without

permission or knowledge.

The court held a hearing on the motion and ruled that Relator must return the original documents, destroy all copies of the documents and disqualified Relator's attorney and his law firm from representing the Relator. Relator filed a petition for mandamus seeking to rescind the order and this court issued the order. The trial court refused to rescind the order and this case proceeded to briefing.

Oregon Trial Lawyer's Association sought leave to appear in this court as *amicus curiae* and leave was granted on October 8, 2013.

Statement of Historical and Procedural Facts

Amicus accepts the Relator's statement of the historical and procedural facts and the excerpt of record as sufficient for this case.

Summary of Argument

Relator was placed in position where his employer asked him to engage in criminal conduct by falsifying documents and water samples. Although Relator had a duty of loyalty to his employer, a breach of the employer's duty to the Relator under Oregon laws was sufficient justification that Relator had a "right" to take the documents. That right is the right to protect oneself from possible criminal prosecution due to an employer's criminal conduct and the important public policy against contractors cheating on government contracts.

The trial court determined here that it didn't matter what the nature of the documents was. This is an oft recurring issue in the employment context. Employees often arrive at attorney's offices with their "evidence" in hand – documents they feel support their case and are important to proving their case – but that are printed emails, and other similar documents from their work computer. The trial court's broad and expansive holding would keep any employee from pursuing legal rights - rights that Oregon protects as important public interest - against an employer even when those documents are non-confidential, non-trade secret documents. If this is the standard, nearly every employment lawyer will be disqualified and the employee will lose his or her right to choose his or her counsel.

The trial court did not require the employer to show that it was prejudiced by the employee's disclosure of the documents to his attorney. Even if the document is somehow confidential, the employer still must show prejudice. Knowledge by the attorney of the information cannot be enough if the document is a discoverable document. An employer should have to show that the document is not otherwise available and not subject to discovery by some recognized privilege or other doctrine.

Argument

The trial court boiled this case down to a single question: whether the plaintiff had a right to remove the documents from the employer's premises? If the answer is yes, then the court erred. As will be shown, the correct answer is "yes." However, the court further qualified the question by adding "whether or not defendant had - a legitimate business reason or authority to use those documents for business purposes." Rec. 38-39. Amicus and the trial court part ways where the judge qualified the question by assuming away the Adverse Parties' bad conduct and its effect on the employment relationship between Relator and Adverse Parties.

It is well settled that Oregon Circuit Courts have authority to stop lawyers from improper acts during legal representation of clients and to grant relief using equitable principles. *State ex rel Bryant v. Ellis*, 301 Or 633, 724 P2d 811 (1986); *see also* ORS 1.010 (describing powers of the court to preserve and enforce order in its immediate presence) and ORS 9.460 (describing the duties of attorneys to maintain the causes confided to the attorney "only as are consistent with truth..."). That authority is sufficient to fashion a remedy to cure wrong doing during the discovery phase of a case up to and including dismissing pleading and providing judgment to a party. *Pamplin v. Victoria*, 319 Or 429, 877 P2d 1196 (1994).

Thus, the focus is not on whether the trial court has authority to sanction Relator; rather, it is on the effect of the Adverse Parties' conduct on the employment relationship with Relator as a manager.

An "employee" is one engaged in the business of his employer and not attending to his own business or pleasure separate and apart from such employment. *Lesser v. Great Lakes Casualty Co*., 171 Or 174, 182, 135 P2d 810 (1943) (quoting *Hoosier Casualty Co. v. Miers, et al.*, 217 Ind. 400, 27 NE 2d 342 (1940). The relationship of the employee and employer arises out of contract. 30 CJS Employer-Employee Relationship §6 (1992). An employee may be the agent, clerk, or servant of a natural person or a corporation. *State v. Monk*, 193 Or 450, 454, 238 P2d 1110 (1951). The relationship between employees and employers in the private sector are governed by the general law of contract, agency, relevant statutes and common law.

An employee owes a duty of faithfulness, honesty, and loyalty to the employer. agency relationship has the important characteristic of being a fiduciary relationship *i.e*., an agent is a fiduciary with respect to matters within the scope of his agency. This means that an agent is held to a very high standard of conduct in carrying out tasks for the principal. In addition to the general duty, employers are requiring written agreements to make clear the policies. Many of the agreements

are communicated regularly and enforced consistently and documented adequately. Issues on the duty of the employee arise more frequently than in years past due to employers relying upon non-compete covenants, confidentiality agreements and countersigned codes of ethics to define the obligations of employee to employer. Yet there are limits to the duty of loyalty. For example, it is not a violation of the duty of loyalty for an employee to seek employment with a competitor, so long as the job search is conducted outside of company time and not in violation of any written covenant against competition. Nor is it a violation of the duty of loyalty for an employee to use in his new employment the experience, knowledge, memory and skill which he gained in the old.

The Principal's Duties to the Agent

A principal's duties to an agent are not fiduciary in nature as fiduciary responsibilities run only from the agent to the principal. Nevertheless, a principal has several obligations to an agent. For example, a principal must perform his contractual commitments to the agent, must not unreasonably interfere with the agent's work, and must generally act fairly and in good faith towards the agent.

In order for an employee to be prohibited from using particular information as a trade secret or confidential information, that information must be more than the general skill and knowledge acquired by the employee in the course of

employment. Instead, in order to be protected against disclosure to or for competitors, the information must be the particular secret of the employer, not readily discoverable by ordinary means, and not merely the general secrets of the trade in which one is engaged. Thus, regardless of whether there is a written covenant against the employee's use or appropriation of trade secrets, the employee will be permitted to use his general skills and knowledge in later employment, but will not be permitted to use or reveal any information that could not be discovered by independent investigation.

Criminal prosecution for the misappropriation of trade secrets is the exception, and not the rule, particularly in cases where the employee initially came upon the information by lawful means. But in any case where a breach of the duty of loyalty can be established, the employee can be held liable in a civil action for any financial losses the employer can prove it suffered as a result of the employee's breach. The potential damages recoverable against the employee include not only the profits lost to the employee's misappropriation of business opportunities or trade secrets, but also, in the case of deliberate and knowingly wrongful conduct, punitive damages as well.

At one time, Oregon had a statute that dealt with employee theft. *Former*

ORS 165.005[1] criminalized embezzlement or conversion by employees of documents as larceny. *See State v. Rice*, 206 Or 237, 291 P2d 1019 (1956) (construing the repealed statute). *Former* ORS 165.005 was the Oregon Legislature's recognition that employers and employees have a relationship that requires confidentiality and loyalty and breach of that duty deserved a response.[2]

Here, the judge failed to appreciate that Relator was a manager for the Defendant. The title "manager" carries significant weight when considering the question posed by the trial court. Black's Law Dictionary defines Manager as:

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[1] *Former* 165.005 provided:

"Any officer, agent, clerk, employee or servant or any person, who embezzles or fraudulently converts to his own use, or takes or secretes with intent to embezzle or fraudulently convert to his own use, any money, property or thing belonging wholly or in part to such person, which is property within the meaning of ORS 164.310 and has come into his possession or is under his care by virtue of his employment, shall be deemed guilty of larceny and shall be punished as provided in ORS 164.310, whether or not he has any interest, divisible or indivisible, in such property. The fact that such officer, agent, clerk, employee or servant has mixed such property with the money, property or thing of another person, shall not constitute a defense in a prosecution under this section."

[2] Currently, the Oregon Legislature has criminalized behavior revolving around documents for both the employee and employer. ORS 165.075 *et seq.* codifies the business and commercial offenses including penalties for taking documents without authority and for falsifying reports. *See* ORS 165.080 (criminalizing the making or causing a false entry in the business records of an enterprise; altering, erasing, obliterating, deleting, removing or destroying a true entry in the business records of an enterprise; or failing to make a true entry in the business records of an enterprise in violation of a known duty imposed upon the person by law or by the nature of the position of the person; or prevents the making of a true entry or causes the omission thereof in the business records of an enterprise). Such conduct is a Class A misdemeanor.

> "One who has charge of corporation and control of its business, or of its branch establishments, divisions, or departments, and who is vested with a certain amount of discretion and independent judgment. *Braniff v. McPherren*, 177 Okl. 292, 58 P.2d 871, 872. A person chosen or appointed to manage, direct, or administer the affiars of another person or of a corporation or company. The designation of 'manager' implies general power and permits reasonable inferences that the employee so designated is invested with the general conduct and control of his employer's business. *U.S. Auto Ass'n v. Alexander Film Co.*, D.C.Mun. App., 93 A.2d 770, 771. * * *"

Black's Law Dictionary 865 (5th Special Deluxe Ed 1979).

Here, Relator was the quality control manager. As a manager, his duty was to control the output of the company. It is clear from the above that he was responsible to his employer to not commit theft or breach his duty of loyalty; however, when the employer is committing fraud, and seeks to have his employee participate in the fraud, as a manager, the duties implied under agency law no longer apply with equal force.

A manager of a private company doing a public work project is not precluded from removing from the employer's premises documents that form the basis of a whistle-blower discrimination. *See* ORS 659A.199 *et seq*. By having placed the responsibility for quality in Relator, the Adverse Parties conferred on him the discretion to do what was necessary to ensure that the important function of quality control was protected. That function is so important that even the removing of documents is tolerated to protect the public from poor quality.

The Oregon Whistleblower statute specifically protects employee reports of violations of law: "It is an unlawful employment practice for an employer to . . . retaliate against an employee . . . for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation." That is precisely what Mr. Gaylor did. The documents that he retained from his employer that prove the fraud are part and parcel of his report of information that he believed was "evidence" of a violation of law. Oregon law specifically protects exactly this activity and that specific statutory protection overrides any general common law duty of loyalty that the employer may claim. In fact, there is no duty of loyalty when it comes to covering up illegal acts. To suggest that an employer can effectively prevent the reporting that the Oregon Legislature specifically sought to encourage, by sanctioning the employee for providing documents that evidence the reported fraud, flies in the face of the statute's prohibition on any such retaliation. The seminal purpose of the whistleblower law is to encourage and protect people coming forward with exactly that kind of evidence.

There is good supporting law on exactly this principle in the context of federal false claims act cases, and federal courts have rejected the idea that a confidentiality agreement would override the public policy encouraging people to

come forward with evidence of fraud. The False Claims Act (FCA) encourages whistleblowers to come forward with claims of fraud on the government and expressly protects relators from retaliation for "lawful acts" taken "in furtherance of" an action under the FCA. 31 U.S.C. § 3730(h).[3] Therefore, it is therefore directly contrary to public policy to allow FCA defendants to retaliate against relators by asserting counterclaims against them in the FCA suit for simply doing precisely what Congress sought to encourage. *See United States v. Strauss*, 931 F Supp 248, 262-264 (S.D.N.Y. 1996)(dismissing counterclaims against relator for attorney's fees as premature and dismissing those for punitive damages as against public policy).

Like the FCA, Oregon Whistleblower statute was designed to protect and encourage the disclosure of fraud or crimes by persons with knowledge of fraud. Implicit in the purpose of the statute is an assumption that individuals who possess and are willing to disclose inside evidence of fraud – whether documents or other

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[3] Specifically, 31 U.S.C. § 3730(h) provides:

"Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole."

information – that their conduct is protected and a statutory right is conferred. Under the FCA, relators are required to disclose"substantially all material evidence and information the person possesses," 31 U.S.C. § 3730(b)(2); *United States ex rel. Green v. Northrop Corporation*, 59 F3d 953, 964 (9th Cir 1995), *cert den*, 518 US 1018 (1996).

Obligations imposed on employees must yield to the public interest. The United States Supreme Court has recognized that upon public policy grounds, agreements that purport to limit the right of a party to disclose matters of public importance are unenforceable. *Town of Newton v. Rumery*, 480 US 386, 392, 207 S Ct 1187, 1191 (1987) ("a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.").

Amicus urges the Court to articulate a clear public interest in the detection and exposure of potential fraud against the State of Oregon that documents retained by employees are protected, otherwise private employers can thwart public policy as embodied in statutes. The Ninth Circuit addressed this issue *Northrop Corp.*, supra. There, a private settlement agreement releasing Relator's claims against the company was unenforceable if it would interfere with the goals of the FCA. A similar result should accrue in this case.

In *Pamplin, supra.*, this Court announced that the sanction of a sanction of dismissal to enforce a court order "is appropriate only when it is 'just' and only when there is willfulness, bad faith, or other fault of like magnitude by the disobedient party," and that the sanction may not be imposed without special findings to permit the appellate court to assess the propriety of imposing that sanction. Disqualification of a lawyer and the law firm is among the most severe of the sanctions open to the trial court. Such findings should require findings of fact that there has been "willfulness, bad faith, or fault of a similar degree on the part of the disobedient party" and must explain "the analytical process by which the trial court concluded that dismissal is 'just' in view of [the historical] facts and in view of the other sanctions that are available." *Pamplin*, 319 Or at 435-37.

A sanction of disqualification is appropriate only when it is just and only when there is willfulness, bad faith, or other fault. *Id.* The word "only" signifies that there is no other manner in which to justify the sanction. *See Webster's Third New Int'l Dictionary*, 1577 (unabridged ed 1971) (defining "only" as being "one or more of which there exist no other of the same class or kind"). *Cf. State v. Mayfield*, 302 Or 631, 645, 733 P2d 438 (1987) (a trial court errs as a matter of law if it "fails to make a record which reflects an exercise of discretion").

In a civil case, a client has the right to counsel of his own choosing. *See*

generally State, ex rel. Russell v. Jones, 293 Or 312, 647 P2d 904 (1982) (discussing the right to counsel). By disqualifying the attorney, the trial court removed an important right that the client has without explaining how the Adverse Parties were prejudiced. The discovery process would reveal the same documents and thus, there is no prejudice to the Adverse Parties. The inevitable discovery removes the prejudice. *See State v. Miller*, 300 Or 203, 709 P2d 225 (1985) (discussing the inevitable discovery doctrine in a criminal cases).

Consequences of Trial Court's Ruling on the Return of the Documents

The trial court ruled that the documents were to be returned and all originals were to be destroyed. That decision has the potential to subvert the role of the civil justice system. It is possible that the trial court believed that the discovery process would allow the next attorney access to the documents. However, any request for production may be resisted by counsel on the ground that the documents are privileged or work product prepare in anticipation of trial. *See Brink v. Multnomah County*, 224 Or 507, 518, 356 P2d 536 (1960) (citing to *Hickman v. Taylor*, 329 US 495, 67 S Ct 385, 91 L Ed 45 (1947)). It is speculative whether an subsequent attorney could get access to the documents; however, it should be considered whether the trial court's decision violates the policy goal of trials in Oregon. "[A] trial is no longer a game of wits; it is a search for truth and justice." *State v. Cahill*,

208 Or 538, 582, 293 P2d 169, 298 P2d 214 (1956), *cert den*, 352 US 895, 77 S Ct 132, 1 L Ed 2d 87 (1956). By forcing the return of the documents, the trial court runs the risk that this civil case will be a game of wits.

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CERTIFICATION OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

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I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,618 words.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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PROOF OF SERVICE

I certify that I directed that the original copy of Relator's Opening Brief and

(Supplemental) Excerpt of Record be filed electronically with the Appellate Court Administrator for the State of Oregon on October 18, 2013.

I further certify that I directed that two copies of the Relator's Opening Brief to be served on the Attorney for Plaintiff-Relator and Defendant-Adverse Parties' attorneys on October 18, 2013 by United States mail, with postage prepaid, in an envelope addressed to:

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