

Nos. A07-584, A07-788

State of Minnesota
In Court of Appeals

Brian Kidwell,

Respondent,

v.

Sybaritic, Inc.,

Appellant.

**BRIEF AND APPENDIX OF
APPELLANT SYBARITIC, INC.**

James H. Kaster (#53946)
Sophia B. Andersson (#350709)
NICHOLS, KASTER &
ANDERSON, P.L.L.P.
4600 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 256-3200

Attorneys for Respondent

Katherine A. McBride (#168543)
James R. Roegge (#92678)
Bradley J. Linderman (#0298116)
Erica G. Strohl (#279626)
MEAGHER & GEER, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
(612) 338-0661

Attorneys for Appellant

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

1. Minnesota law prohibits in-house counsel from bringing retaliatory-discharge claims that compromise the attorney-client relationship. Kidwell, Sybaritic's attorney, brought a whistleblower action, supporting his claim with confidential, privileged information concerning matters about which he was hired to advise.

A) Should the court have dismissed Kidwell's whistleblower suit as a matter of law?

The trial court held that Kidwell's suit was allowable.

B) Did the court commit prejudicial error in allowing Kidwell to introduce privileged matters to prove his whistleblower claim?

The trial court held the evidence was admissible.

Apposite authority:

Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991);
Michaelson v. Minnesota Mining & Manf. Co., 474 N.W.2d 174 (Minn. App. 1991) *aff'd mem.*, 479 N.W.2d 58 (Minn. App. 1992);
Lawler v. Dunn, 145 Minn. 281, 176 N.W. 989 (1920); and
Minn. R. Prof. Conduct 1.16(a)(3).

2. An attorney who breaches his fiduciary duty forfeits his right to compensation. Kidwell admitted he breached this duty, yet the court allowed him to recover post-breach compensation for work he never did. Was Kidwell entitled to recover post-termination wages and damages?

The trial court held "yes."

Apposite authority:

Rice v. Perl, 320 N.W.2d 407 (Minn. 1982);
Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209 (Minn. 1984);
Commercial Assoc., Inc. v. The Work Connection, Inc., 712 N.W.2d 772 (Minn. App. 2006); and
Minn. R. Prof. Conduct 1.16(a)(3).

3. To establish a prima facie whistleblower claim, the employee must make a good-faith report for purposes of exposing an illegality. A report made in the course of one's job duties is not protected, nor is one that contains information about which the employer is already aware. Attorney Kidwell reported on legal matters about

which he was hired to provide, and had already provided, to Sybaritic and that did not allege facts that ever proved to be violations of law.

A) Did Kidwell engage in statutorily protected conduct?

The trial court held "yes."

B) Did the trial court err when it not only failed to charge the jury that a complaint made within the normal course of that employee's job duties is not statutorily protected, but when it also instructed the jury that it could affirmatively consider Kidwell's job duties when considering whether he acted in good faith?

The trial court found that the instruction was proper.

C) Did the trial court err in failing to advise the jury that an employee does not engage in protected conduct if he reports violations already known to the employer?

The trial court held that its instructions adequately set out the law.

Apposite authority:

Obst v. Microtron, Inc., 614 N.W.2d 196 (Minn. 2000);

Grundtner v. Univ. of Minn., 730 N.W.2d 323 (Minn. App. 2007);

Gee v. Minnesota State Colleges & Univ., 700 N.W.2d 548 (Minn. App. 2005);
and

Freeman v. Ace Telephone Assoc., 404 F.Supp.2d 1127 (D. Minn 2005).

4. A party must demonstrate prejudice to be entitled to a new trial on improper-evidentiary-ruling grounds. The court allowed Kidwell to examine Sybaritic's president at length about a 24-year-old conviction under the guise that Kidwell was thus justified in believing Sybaritic was currently engaged in illegal activity. Did the court abuse its discretion, especially given that Kidwell never proved any illegality or even a threat thereof?

The trial court ruled that the evidence was properly admitted.

Apposite authority:

Uselman v. Uselman, 464 N.W.2d 130 (Minn.1990);

Minn. R. Evid. 403; and

Minn. R. Evid. 404.

5. To be excludable under Rule 408 as a settlement discussion, evidence must offer to compromise a disputed claim and it cannot be offered either to prove liability or

for a different, legitimate purpose. To counter Kidwell's claim that he was illegally fired, Sybaritic sought to introduce a letter sent to Kidwell nine days after he was terminated spelling out the legitimate reasons he was fired. Should the court have admitted the letter?

The trial court held the letter was a settlement discussion and thus not admissible.

Apposite authority:

C.J. Duffey Paper Co. v. Reger, 588 N.W.2d 519 (Minn. App. 1999);

Minn. R. Evid. 408; and

Minn. R. Evid. 401.

STATEMENT OF THE CASE

In this wrongful-discharge case, plaintiff Brian Kidwell, who was defendant Sybaritic, Inc.'s in-house general counsel, alleged that he was terminated in retaliation for the legal opinions he provided in an April 24, 2006 e-mail that he sent to Sybaritic's management and others. (A.62-65). The matters Kidwell discussed in that e-mail were things he learned about as Sybaritic's attorney and that he had previously brought to Sybaritic's attention. Moreover, Kidwell made this report after admittedly failing to perform assigned work and thus while in fear of being terminated. Kidwell was eventually fired after failing to complete additional assigned tasks and after Sybaritic learned that Kidwell had breached his fiduciary duty by sending the April 24 e-mail to a non-employee.

Kidwell brought an action against Sybaritic, alleging that it violated Minnesota's Whistleblower Act, Minn. Stat. § 181.932, when it terminated him in retaliation for the e-mail. (A.62-65). Sybaritic counterclaimed, alleging breach of fiduciary duty and loyalty and defamation. (A.52-61). Sybaritic also brought a \$2,000 conversion claim, a matter that is not on appeal.

Sybaritic moved for summary judgment, contending in part that Kidwell had not alleged facts sufficient to sustain a prima facie whistleblower action. (A.48-49). Kidwell moved for summary judgment on Sybaritic's counterclaims. (A. 49A & B). The Fourth Judicial District Court, the Hon. Kevin S. Burke, denied these motions. (A.42-47). The court also denied Kidwell's motion to amend the complaint to add a punitive-damage claim. (A.42).

Prior to trial, Sybaritic brought several motions in limine seeking to prohibit Kidwell from introducing documents protected by the attorney-client privilege. (A.30-31, 121-23;T.16-21, 32-47). The district court granted the motion as to some of the documents, but reserved its ruling on others until trial. (T.21, 37-47). Sybaritic also moved to exclude evidence that its owner and president, Steven Daffer, had been convicted of mail fraud and had his license to practice law suspended 24-years ago. (A.121-23). The court denied that request. (T.21).

The case was tried before a Hennepin County jury on September 25, 2006. After Kidwell admitted that he had breached his fiduciary duty to Sybaritic by revealing confidential communications to a nonemployee, the court directed verdict on that claim in favor of defendant. (T.776). The court nevertheless denied Sybaritic's motion to find that Kidwell's breach resulted in a forfeiture of his claimed damages. (T.771). Sybaritic dismissed its defamation claim before the case went to the jury.

During trial, the court admitted some of the documents that Sybaritic claimed were protected by attorney-client privilege, and it allowed testimony about the content of other not-admitted privileged documents. (T.189-207, 212, 217-22, 243, 258-67).

After five days of testimony, the jury returned a verdict finding that Kidwell had engaged in conduct protected by the Whistleblower Act, that he had done so in good faith, that his conduct was a substantial motivating factor in Sybaritic's termination decision, and that regardless of whether Kidwell had engaged in protected conduct, Sybaritic would not have terminated his employment when it did. (A.27-29). The jury awarded Kidwell \$65,000 in lost wages up to the date of trial, \$120,000 for future wages, and \$12,000 for past emotional distress. (A.27-28). The jury found, though, that Sybaritic suffered no damages as a result of Kidwell's breach of fiduciary duty. (A.28). Finally, the jury awarded Sybaritic \$2,000 on its conversion claim. (*Id.*).

Sybaritic brought motions for judgment as a matter of law [JAML], disgorgement and, in the alternative, a new trial. Kidwell moved for attorneys fees and costs under Minn. Stat. § 181.935. (A.23-24). In a February 6, 2007 order, the court denied Sybaritic's motions, granted Kidwell's motion for attorneys fees in the amount of \$138,410.50, and awarded Kidwell costs totaling \$9,916.40. (A.5). The court entered judgment as to the attorneys fees and costs on February 9, 2007 and later entered judgment in the amount of \$345,326.90, representing the entire award to Kidwell. (A.6, 21). Sybaritic appealed from both judgments and from the court's order denying its post-trial motions. (A.1-4). Kidwell filed a notice of review of the denial of his motion to add a punitive-damage claim. (A.22).

STATEMENT OF THE FACTS

I. Overview

Kidwell was Sybaritic's lawyer, and Sybaritic was his client. Kidwell had a checkered work history when Sybaritic hired him, and he had performance problems while at Sybaritic. He wrote a preemptive e-mail on the eve of his perceived termination from yet another job containing commentary about advice that he had already provided to Sybaritic as its lawyer and ominous warnings about improper-litigation activity that had not occurred and that he had no proof would occur, believing that this e-mail would be his ace in the hole against termination. At the same time, however, Kidwell also sent that privileged e-mail to his father in breach of his fiduciary duty.

Kidwell was not terminated that next day. Instead, Sybaritic's management met with him about the e-mail, assuring Kidwell that the company had followed, would continue to follow, his legal advice. No illegal conduct was ever discovered or reported to authorities. Three-weeks later, and after Kidwell failed to complete additional assigned tasks and after Sybaritic learned about his fiduciary-duty breach, Sybaritic terminated him.

II. Kidwell's Employment History

Immediately after passing the bar in 1983, Kidwell joined a St. Cloud, Minnesota law firm. (T.172-73). Six-years later, Kidwell joined the Leonard O'Brien firm, becoming a partner around 1991. (T.174). Kidwell left Leonard O'Brien nine-years later because he found the work "unrewarding," despite his salary of \$100,000/year. (T.320, 321).

Kidwell then practiced law out of his home for four months. (T.330). In June 2001, he became a claims attorney at Gulf Northland Insurance Company, earning \$52,000/year. (T.175). He was fired 10-months later. (T.335). Kidwell chose not to return to Leonard O'Brien because he "didn't want to be answerable to [his] partners for billable hour requirements" and other "kinds of issues that arise in a law firm setting." (T.333). Nevertheless, Kidwell then joined the Hellmuth & Johnson law firm as an associate, but he was asked to leave that firm seven-months later. (T.176, 343-344). Kidwell then practiced law out of his home again. (T.345).

In July 2004, Sybaritic hired Kidwell as its general counsel at a starting salary of \$50,000/year. (T.181). He was an at-will employee whose job was to provide legal counsel to Sybaritic and its owner, Steve Daffer. (T.351).

III. Sybaritic

Sybaritic is a Minnesota corporation located in Bloomington, Minnesota that manufactures and sells equipment and products, such as spa capsules, lasers, derma-brasion systems, and skincare treatments to spa and medical-spa industries. (T.472-474). The company holds in excess of 100 patents for the products it manufactures and sells nationally and internationally. (T.355).

IV. Kickback Scheme

Daffer first asked Kidwell to investigate whether some of the company's sales force were taking kickbacks from a leasing company that did business with Sybaritic. (T.183, 356). After Kidwell discovered that three salespersons were indeed getting

kickbacks and had previously lied about it, these three were placed on probation for 60 to 90 days and required to pay back the money they had received. (T.184-85, 357).

V. Mohammed Hagar

In the fall of 2004, Kidwell became concerned that Sybaritic's medical director, Mohammed Hagar, was engaging in the unauthorized practice of medicine. (T.187). Hagar was and is a licensed physician in Egypt, where he was born and educated. (T.658). He is not licensed to practice medicine in the United States. (T.486). Sybaritic hired Hagar, who had previously worked as a medical researcher, to provide training to those using Sybaritic's equipment. (T.660, 663, 486-487). He also did research on the company's products, wrote product literature and published studies about Sybaritic's products. (T.490, 190-191). Kidwell was concerned that Hagar may have been planning to test, or had already been testing, some of Sybaritic's spa equipment on employees and nonemployees and that his weekly articles could be construed as providing medical advice. (T.188, 190-91, 664).

Kidwell first brought his concerns to Sybaritic's attention in October 2004 in two memoranda outlining the issues and results of his legal research. (T.190-191; A.69-72). The weekly articles stopped immediately thereafter. (T.191). In January 2005, Kidwell again wrote to management about his continuing concern that Hagar's work could be construed as the unauthorized practice of medicine. (T.193-94; A.73-77). Kidwell then met with chief operating officer George Mertikas and Hagar about these matters, and they agreed to implement all of Kidwell's legal recommendations. (T.301, 491, 662, 665, 746). A few days later, Kidwell recommended that the company keep on file the licenses

of its professional employees. (T.199). Kidwell never followed up to learn if the company implemented his legal advice concerning Hagar. (T.375).

VI. Sybaritic West, L.L.C.

Kidwell was also asked to prepare legal documents that would make Sybaritic's California branch sales office a limited-liability company. (T.202-03, 364-65). The company's tax auditors recommended this move to avoid having Sybaritic, Inc. collect and pay California sales tax on products it sold here to customers in California. (T.482, 747, 614). Kidwell claims that he was the one who suggested it. (T.202). In any event, a separate corporation was formed. Kidwell assumed that after this change occurred, Sybaritic West collected sales taxes for products sold to California customers. (T.365).

In late 2004 or early 2005, and after the creation of Sybaritic West, Kidwell noticed that the company's website announced the opening of the Sybaritic San Francisco "branch office." (T.204). He immediately brought this to management's attention. (T.205, 368-69, 469-70, 481-83). Kidwell never followed up to see if the company heeded his advice. (T.369-70).

VII. NeoQi Litigation

The spa-product industry is a highly competitive one, and Sybaritic, like most companies in this business, was particularly concerned with intellectual-property issues. (T.355). One of Kidwell's primary responsibilities as general counsel was to monitor and assist with Sybaritic's litigation. (T.354). When Kidwell became Sybaritic's attorney, the company had already filed suit against NeoQi, an Estonian company that manufactured a product also being manufactured by Balteco, another Estonian company

that had entered into a distributor agreement with Sybaritic. (T.205-06; 358-59). Balteco's chairman left Balteco and established NeoQi, allegedly using stolen trade secrets to manufacture the same product he had been making for Balteco. (T.206). NeoQi then proposed entering into a distributor agreement with Sybaritic for that equipment. Because Balteco had not gotten its product into production yet, Sybaritic agreed. (T.206). NeoQi subsequently cancelled the agreement, and Sybaritic sued alleging breach of contract and theft of trade secrets. (T.205-06). The Sybaritic action was then split between two venues — federal court and arbitration. (T.359).

In October 2004, Kidwell hired attorney Tom Atmore to handle the NeoQi litigation in place of a prior firm, but Kidwell remained very involved in the case. (T.207, 209). To minimize litigation costs, Daffer asked Kidwell to take depositions in Estonia in April 2005 in place of Atmore. (T.210).

As Kidwell prepared for the Estonia depositions, he came across e-mails that, in his opinion, weakened the allegations that Sybaritic had made against NeoQi. (T.376). NeoQi's counsel did not have these e-mails, however, nor had he requested them even though the discovery deadlines were imminent. (T.378-379). Nevertheless, as Sybaritic's attorney, Kidwell advised Daffer about his concerns before leaving for Estonia. (T.210-14, 377-78). According to Kidwell, Daffer responded that opposing counsel was "going to have a hard time getting their hands on those e-mails." (T.224). Daffer testified that he asked Kidwell why Sybaritic should worry since there had been no discovery requests and that it was thus likely that these e-mails would never be admitted. (T.517-19). Kidwell nevertheless insisted that Daffer should take these

documents into account and consider settling with NeoQi for an amount that was less than it was currently offering. (T.518-19). Whether some of these e-mails were actually damaging was never proven because Kidwell never introduced them.

VIII. E-mail Virus

Before leaving for Estonia, Kidwell claims that he asked Brandon Carlson, Sybaritic's information-technology manager, to download the NeoQi e-mails onto a disk and then to provide a copy to Atmore. (T.214, 379). Carlson, on the other hand, recalls that it was Daffer who made that request and that Kidwell, Atmore and Jeff Nelson, Daffer's assistant, were all present in Daffer's office at the time. (T.690; A.78). This matches Daffer's recollection. (T.525). In any event, Carlson handed Atmore a disk with all of the NeoQi e-mails on them, including the few that had concerned Kidwell. (T.380, 724). Carlson handed Kidwell a copy of that disk at the same time and told Kidwell that he both copied the contents onto the Sybaritic laptop that Kidwell was taking to Estonia and put an icon on the desktop labeled "Estonia e-mails." (T.691, 702-03; A.78). Kidwell doesn't deny this, but testified only that he doesn't recall. (T.380). He acknowledged, though, that a well-prepared lawyer would have asked to have a copy of those e-mails before leaving for the depositions in Estonia and that he wanted to be well prepared. (T.381-82).

After Kidwell left for Estonia on April 9, Daffer returned from a business trip and noticed that he had hundreds of duplicate e-mails. (T.692). Daffer asked Carlson whether a virus had infected the system. (T.693). Daffer also informed Carlson that he had spoken to Kidwell while Kidwell was in Estonia and that Kidwell claimed that he did

not have access to the NeoQi e-mails. (T.702-03; A.78-79). Kidwell's comment came during one of several tense telephone conversations between Kidwell and Daffer while Kidwell was in Estonia about work assignments that Kidwell had not completed. (T.234, 382-86). Kidwell told Daffer that he had not been able to complete the work because he did not have access to those NeoQi e-mails. (A.78-79). Carlson assured Daffer that he had given Kidwell the same disk that Atmore had. (T.704; A.79).

After learning that the disk that Sybaritic had provided to outside counsel and that it had paid him to review also contained hundreds of duplicate emails, Daffer asked Carlson whether Atmore's computer system could get infected if he opened the corrupt disk, and Carlson acknowledged that this was a risk. (A.79; T.459). Daffer then instructed Carlson to find out whether Atmore had opened the disk and, if not, to retrieve it and provide him with another copy, eliminating only the virus and the duplicates. (T.694; Def.'s Ex 34). Atmore told Carlson that this was not necessary because his firm had sufficient anti-virus software, but Carlson nevertheless responded that Sybaritic wanted the disk back and that it would return another with the same information, minus the duplicates. (T.730-31).

Daffer also instructed Carlson to print a full set of all of the e-mails. (T.697; A.79). Carlson did so and gave them to Nelson. (T.697). Carlson was asked only to delete the duplicates and to make sure that he preserved all other information, which he did. (T.697-98).

Ultimately, while Carlson did find a virus attached to these e-mails, he concluded that this virus had not caused the replication problem, which was instead the result of

switching Daffer's e-mail system from Outlook Express to Outlook. (T.693, 704; A.79). Sybaritic ultimately returned a duplicate-free disk to Atmore. (T.727). As far as Atmore could determine, all of the original e-mails were also on this second disk. (T.727). There was never any proof at trial of any evidence tampering or any actual plan to do so.

IX. Kidwell's Estonia Trip

Before Kidwell left for Estonia, Daffer instructed Kidwell to prepare a timeline of the critical events leading to the NeoQi litigation. (T.233-34). Kidwell did not do this work. (T.382). Once in Estonia, Daffer and Kidwell had several heated phone conversations about Kidwell's failure to follow instructions, during which Daffer again asked Kidwell whether he prepared the requested timeline. (T.234, 383). Kidwell had not, but knowing that Daffer was already angry with him, he lied and told Daffer that he had. (T.234, 383-84). When Daffer then asked Kidwell to fax it, he knew that he could not and that Daffer, his client, would be upset with him both for not completing the timeline and for then lying about it. (T.234, 384-86). Kidwell admitted this was the first time he had lied to a client. (T.385). Immediately after this conversation, Kidwell called George Mertikas and told him, "[Y]ou've go to get Steve off of my ass" and that he didn't "have time for this bullshit." (T.386-87, 234).

Kidwell also testified that while he was in Estonia, he was denied access to his work e-mail account and that he telephoned Nelson to ask for an explanation. (T.230-31). Nelson told Kidwell that the company had changed the passwords for all employees as it regularly did for security reasons. (T.231). Carlson acknowledges that he sent out

this password announcement. (T.688). Nelson issued Kidwell a new password, but Kidwell claims that he was still unable to access the system. (T.231).

On April 19 and while Kidwell was in Estonia, but after his tense exchange with Daffer, Kidwell spoke by phone with Atmore who expressed his concern about Sybaritic's request that he return the NeoQi disk and Sybaritic's duty to preserve the content of all of those e-mails. (T.725). Atmore informed Kidwell that he was going to write a letter to Daffer about the duty not to spoliage evidence. (T.725, 228). Kidwell instructed Atmore to e-mail the letter to him rather than to Daffer, the person Kidwell was concerned might be destroying evidence and who would thus most need to see outside counsel's admonishment immediately. (T.228, 725; A.82-83). Atmore complied with Kidwell's wishes and sent him the letter exclusively via e-mail that same day — April 19. (T.729-30). Kidwell recalls having seen Atmore's e-mail while he was in Estonia, even though he also claims that he did not have access to his e-mail account. (T.395-96).

After Kidwell's conversation with Atmore and while he was in Estonia, he called Nelson and told him that he was concerned that Daffer might be destroying or concealing some of the NeoQi e-mails. (T.232). Kidwell claims that Nelson told him that he was not going to be given access to those disks and that Kidwell was going to have to make his own decision about what to do regarding this situation. (T.232-33, 404-05).

Nelson categorically denies that he said anything like this. (T.678). Kidwell's recollection also does not match that of Carlson's. (T.709-11). Carlson became so concerned when he heard that Kidwell was making accusations about illegal conduct that

he created a timeline of events in which he detailed a conversation he had with Nelson during which Nelson assured Carlson he would personally guarantee that the disk retrieved and the replacement disk would have exactly the same content, minus the duplicates. (A.78-81; T.709-10). Carlson also spoke to Daffer who assured him as well that no one was tampering with evidence. (T.711; A.81).

When Kidwell returned from Estonia, he never followed up with either Carlson or Nelson to determine if Atmore had indeed received all of the NeoQi e-mails. (T.679, 720). There was never any evidence that *any* e-mail had actually been destroyed or concealed or that there was actually *any* plan at *any* time to do so.

X. Kidwell Returns from Estonia

Kidwell returned from Estonia on Friday, April 22. (T.236). Although supposedly concerned about the imminent destruction of evidence, Kidwell did not go into the office or speak to anyone, including Daffer, that day about the e-mails. (T.399). In fact, even though Kidwell met Carlson twice that day — once to return his laptop and the other to return the power cord — he did not ask Carlson about the disk. (T.403, 719-20). Kidwell also did not speak with anyone from Sybaritic on Saturday, April 23. (T.403-04). Nor did he show anyone Atmore's letter that provided legal advice about evidence preservation.

On Sunday afternoon, however, Kidwell went to the office when no one was there. (T.237). He did not want to wait until Monday because of his grave concerns about the e-mails. (T.237). When he arrived at Sybaritic, though, he discovered that his office door was locked. (T.238, 402). He did not have a key. (T.238). Kidwell did not call

Nelson, who did have keys to the offices and who had let Kidwell into the building on a previous after-hours occasion. (T.676). In fact, Kidwell did not call anyone to ask why his door was locked. Instead, he returned home and began researching Minnesota's Whistleblower Act. (T.405).

As it turns out, Nelson had indeed purposefully, but innocuously, locked Kidwell's door while he was away in Estonia, as he regularly does while top personnel are out of the office for extended periods of time. (T.676).

XI. The Difficult-Duty E-mail.

That Sunday evening, April 24, Kidwell composed and sent an e-mail that he entitled "a difficult duty." (A.84-85). On the "to" line of the e-mail, it shows that Kidwell sent it to Sybaritic personnel, but it fails to show that he also sent a blind copy to Atmore or that he breached the attorney-client relationship by forwarding the e-mail to his father, who is not a Sybaritic employee. (T.240, 243, 271-72, 726; A.84).

The e-mail began with the following sentence about fulfilling his duty as Sybaritic's attorney:

I write to all of you with deep regret, but I cannot fail to write this email without also failing to do my duty to the company and to my profession as an attorney.

(A.84) (emphasis added). In fact, Kidwell testified that he sent the e-mail because "as the person responsible for the legal affairs of the company, that's what I had to do." (T.242). Kidwell's e-mail begins with the accusation that "Sybaritic is infected with a pervasive culture of dishonesty," citing the kickback scheme, the failure to confirm Mohammed Hagar's credentials or "curb his unauthorized practice of medicine," and the San

Francisco “branch office,” opening website announcement that he characterizes in the e-mail as “tax evasion.” (A.84-85). Kidwell next provided his legal opinion that the NeoQi e-mails weaken or perhaps destroy Sybaritic’s claims. (A.84).

Kidwell also wrote that he believed that the disk that Atmore received did not contain a virus, and he warned that the law prohibits “any attempt to corruptly alter, destroy or conceal” relevant evidence. (*Id.*). He also accused Sybaritic of “obstruction of justice” and insinuated that the company failed to obey a court order. A.84-85). Kidwell, admitted, however, that he did not know of any specific court order that Sybaritic failed to obey and that he was really referring to Fed. R. Civ. P. 26(a), which requires disclosure of all documents supporting a party’s claims or defenses. (T.428-29). Kidwell admits that he never did any research to determine whether the e-mails in question would fall within Rule 26. (T.430-31).

The e-mail also outlines Kidwell’s unproven belief “that Sybaritic intends to continue to engage in tax evasion, the unauthorized practice of medicine and obstruction of justice,” and he stated that it was his intention to advise the “appropriate authorities of these facts.” (A.85). Kidwell admits that before writing this e-mail, he did not do anything to determine whether the allegations in it were in fact true. (T.369, 373-74, 405; T.Daffer depo. at 77-78). He likewise did not mention Atmore’s previously sent letter providing similar advice about evidence preservation. Kidwell acknowledges, however, that he sent the e-mail from home that night because he knew he had to get it in the hands of Sybaritic’s management *before he was fired* if he was going to be able bring a whistleblower claim. (T.407).

At trial, Kidwell also admitted that he breached his fiduciary duty to Sybaritic by sending this e-mail containing confidential matters protected by the attorney-client privilege to his father. (T.271-72, 411-12).

Before leaving for work the next day, Monday April 25, Kidwell warned his wife that he would probably be fired from a job again. (T.164). When he arrived at work, Tony Daffer and Steve Chesley, two members of Sybaritic's management team, asked to meet with him about the e-mail. (T.248). The three reviewed each of the issues in detail, and Kidwell believed that Daffer and Chesley were taking his concerns seriously. (T.248-49, 621, 745-46; T.Daffer dep. at 77-78). Tony Daffer recalls that Kidwell conceded during that meeting that his accusations were either non-issues or minor issues that required some follow-up. (T.745-46). He also recalls that Kidwell admitted that he had not done any due diligence or research to determine if the allegations that he leveled were actually true. (T.Daffer depo. at 78). Kidwell admits this is the case. (T.369-70, 373-74, 399, 418-19).

With regard to the unauthorized-practice-of-medicine issue, Tony Daffer reminded Kidwell that they had discussed this in February and that while he believed Hagar's testing had ended, he would confirm that this was the case. (T.616-17, 746-47). Upon further inquiry, Daffer learned that Hagar's use of equipment had indeed been discontinued two-months previously. (T.617, 747).

As to the Kidwell's tax-evasion accusations, Tony Daffer and Chesley explained again that the formation of Sybaritic West was legitimate tax strategy, not tax evasion. (T.614-15, 748). Moreover, Tony Daffer and Chesley told Kidwell that while the website

branch-office reference was merely a marketing-department mistake and that Sybaritic West was operating as an independent company, they would follow up with the marketing department and eliminate any confusion on the website. (T.615, 747; T.Daffer depo. at 70). Kidwell acknowledged that his concerns about this matter were relieved after this meeting. (T.422).

The three next discussed the NeoQi e-mails and Kidwell's obstruction-of-justice claim, and, by the end of that meeting, Kidwell believed that all of his concerns had been addressed. (T.434). In fact, Kidwell discovered that he still had all of the original NeoQi e-mails on his own e-mail account. (T.418-19) He never checked, however, to see if the e-mails that had supposedly concerned him were still there. (T.419). Later that day, Kidwell received an e-mail from Atmore in which Atmore cautions Kidwell that it would be premature to make any disclosures to opposing counsel or the court about the NeoQi e-mails until he had more information. (A.86; T.434, 726). Atmore testified that he never concluded that Sybaritic should dismiss the NeoQi litigation in light of the supposedly unfavorable e-mails and that he does not recall Kidwell making that recommendation either. (T.726).

There were subsequent meetings that day about Kidwell's e-mail, some of which Steve Daffer attended. The ultimate goal of these meetings was to confirm the follow-up actions the company had taken with respect to Kidwell's accusations and to make sure his concerns were relieved. (T.Daffer depo. at 80). According to Chesley, Kidwell seemed satisfied at the end of the day, and he thanked Chesley and Tony Daffer for handling the process in a professional manner. (T.622). Kidwell testified that while everything had

not been completely resolved by the end of the day, the meetings had been productive and that a “framework” had been created in which they could all work toward resolution of these issues. (T.252, 433-34). Kidwell also acknowledged that he never again addressed the concerns in his e-mail or made any report to authorities. (T.434).

At one of the meetings, Steve Daffer, who admits that he was disappointed and upset by the e-mail, agreed to step aside as Kidwell’s supervisor and to let Chesley assume that role to allow Kidwell to get a fresh start and to help Kidwell and Daffer salvage their relationship. (T.529, 549-51, 573). Kidwell and others agree that at no time during any of these meetings did anyone discuss disciplining or terminating Kidwell because of the difficult-duty e-mail. (T.433-34, 567, 613, 754-55).

At the end of the day, Kidwell called his wife and told her that he was not going to be fired after all. (T.164, 252).

XII. Kidwell’s Termination

The next day, Kidwell called in sick. (T.253). On April 29, Kidwell attended a meeting with Atmore, Steve Daffer and Chesley to discuss the upcoming NeoQi arbitration and trial. (T.253-55). Prior to that meeting, Daffer had requested that Kidwell prepare a legal-research memorandum on some trade-secret issues. (T.255, 590-91, 727). Kidwell said he had done the research but that he had not brought it with him to the meeting. (T.255, 727). Daffer insisted that Kidwell get the memorandum from his office, but when Kidwell returned, he had to admit again that he had not done the requested work. (T.590-91, 622, 727, 256). During that same meeting, the group also

discussed some unpaid invoices from a Texas law firm. (T.254). This was likewise something that Kidwell was supposed to have, but had not, taken care of. (T.622-23).

That week, Kidwell also asked Chesley whether he could take a vacation the week of May 9. (T.256, 574). Although Chesley granted Kidwell's request, he thought it showed poor judgment given the May 24 NeoQi arbitration. (T.574). Because Chesley had not previously been involved in the company's legal matters, he asked Kidwell to prepare a litigation summary on all matters involving Sybaritic and then to meet with him before Kidwell went on vacation. (T.623-24, 626). Kidwell did not meet this deadline. (T.627).

On May 8, a Sunday, Kidwell e-mailed Chesley telling him that he was attaching the requested summary, but that it was not complete because he did not have access to his e-mail at home. (T.628; A.88). Kidwell told Chesley that he would stop into the office next week and update the report. (T.628; A.88). While Kidwell claims that he did, he never produced a completed litigation summary. (T.437-38).

In that summary, Kidwell did not reiterate the concerns that he raised in the difficult-duty e-mail. (A.89-95). Nor did he advise Sybaritic to amend any of its claims or to dismiss either the arbitration or the federal-court action. (*Id.*). Instead, Kidwell acknowledged that NeoQi's attorney had conducted only minimal discovery, that the discovery cutoffs were imminent, and that it appeared that both the arbitration and the federal-court action would go forward with no additional requests to produce the supposedly damaging e-mails. (A.90-91; T.438-441, 618-19, 642). He was still recommending settlement, but his only stated reason was that he was concerned that

Steve Daffer would be a witness in the NeoQi litigation and that evidence of his earlier conviction would prejudice Sybaritic's case, much as it did in this case. (T.619). In short, once the specter of termination disappeared, Kidwell no longer had any concerns about spoliation.

While Kidwell was on vacation, Chesley learned that the Texas law firm, which had threatened to withdraw from the case due to nonpayment, had reported that it had not heard from Kidwell about its invoices. (T.585, 588). To determine whether Kidwell had completed this task, Chesley searched through Kidwell's sent e-mails. (T.586-88, 632). He did not telephone Kidwell because Kidwell had already told him that he did not have access to his work e-mail account at home, and thus he would not have been able to locate that e-mail correspondence. (T.591-92). Moreover, after Kidwell's repeated lies about completed work, Chesley did not fully trust Kidwell to be truthful. (T.590-91).

During that search, Chesley noticed that Kidwell had sent the difficult-duty e-mail to a John Kidwell. (T.632). When Chesley learned who that was, he decided to terminate Kidwell for breaching the attorney-client relationship and because he felt that Sybaritic could no longer trust its general counsel. (T.632-33). Chesley then presented his plan to both Tony and Steve Daffer, who agreed after they heard all of the facts, although Steve Daffer was reluctant at first. (T.633, 755).

When Kidwell returned to work on May 16, Chesley told him that it was obvious that he was not happy in his job and that it was not working out for the company. (T.636). Kidwell never asked why he was fired and, as was Chesley's regular practice, he did not discuss the reasons. (T.648-49). Kidwell did not accept the offer to resign.

(267, 269, 637). Instead, he contacted an attorney that day, and, two-days later, he wrote to Sybaritic advising them that he was bringing a whistleblower claim. (T.446).

Nine days after Kidwell's termination, Sybaritic's attorney wrote to Kidwell, outlining the reasons for his termination, explaining that Sybaritic fired Kidwell because its "management team has no confidence or trust in [his] ability to act as its General Counsel * * * ." (A.96). The letter also provided specific reasons why Sybaritic terminated Kidwell, citing the above-described performance issues, as well as Kidwell's attorney-client-privilege breach. (A.97-98). The trial court refused to allow Sybaritic to introduce this document, referring to it in its post-trial order as an inadmissible "settlement discussion." (A.15).

ARGUMENT

I. Standard of Review and Summary of Argument.

The denial of a motion for judgment as a matter of law presents a legal question subject to de novo review. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999). JAML is proper when the plaintiff fails to establish an essential element of her claim, *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn.2001), or when the findings of the jury are contrary to applicable law. *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn.1990). Here, Kidwell's whistleblower action was barred as a matter of law, and the trial court erred in not dismissing it and entering judgment in favor of Sybaritic.

Because an in-house lawyer is bound to abide in his profession's ethically imposed duties of confidentiality and loyalty and because the employer occupies a concomitant position of vulnerability with respect to its relationship with counsel who has been privy

to its most private information, our courts have held that they will not allow in-house counsel to bring retaliatory-discharge actions that does violence to the integrity of the attorney-client relationship. This action did just that. Sybaritic's attorney-client relationship was continually compromised throughout this case as its confidential information was exposed by the very person it paid to advise on those matters.

Moreover, the trial court improperly allowed Kidwell to pursue his whistleblower action even though the law provides that an employee is not engaging in statutorily protected activity when it is that employee's job to bring to the employer's attention the same concerns raised in the alleged whistleblower report. Here, every matter discussed in that difficult-duty e-mail fell within Kidwell's responsibilities as Sybaritic's general counsel. As Sybaritic's attorney, Kidwell had a significant advisory and compliance role, and he was expected to anticipate potential legal problems and propose solutions. That is exactly what he did in the difficult-duty e-mail, and the law thus prohibits him from characterizing it as a whistleblower report. Nor can it be a report when, as here, the employer is already aware of the matters alleged in the report and when, as here, there is no evidence that anything reported constitutes a current violation of law. Kidwell's e-mail was not a statutorily protected report, and the trial court erred in not dismissing this action as a matter of law.

Finally, in addition to a variety of jury-instruction and evidentiary errors, the court improperly allowed Kidwell to receive lost wages after Sybaritic terminated him upon learning that he admittedly breached his fiduciary duty by disclosing confidential information to a non-employee. Minnesota law requires that once an attorney breaches

his duty to the client, and the client then discharges him, he must withdraw without the right to future compensation.

In summary, Kidwell's action for damages under the Whistleblower Act was barred as a matter of law, and the court erred in not entering judgment in favor of Sybaritic.

II. Kidwell's retaliatory-discharge claim is barred as a matter of law.

It has long been the rule in Minnesota that a client may discharge an attorney, with or without cause, at any time. *Lawler v. Dunn*, 145 Minn. 281, 283, 176 N.W. 989 (1920). Indeed, it is a fundamental tenet that an attorney serves only at the will of the client and that it is the client, not the attorney, who has exclusive control over the subject matter of the representation. *Blazek v. North Am. Life & Cas. Co.*, 265 Minn. 236, 121 N.W.2d 339, 342 (1963); *State of Ill. Ex rel Shannon v. Sterling*, 248 Minn. 266, 276, 80 N.W.2d 13, 20 (1956). The corresponding obligation is that the attorney must withdraw from representation once discharged. *See* Minn. R. Prof. Conduct 1.16(a)(3).

At the heart of these principles are the concepts that the attorney-client relationship is based on mutual trust and that the client has the absolute right to terminate that relationship if that confidence is compromised:

If the relationship is to work, the client must confide in the attorney, trusting that the attorney will keep confidences and will ably perform. If the client loses this confidence, whether justifiably or not, the client must be able, *without penalty*, to end the relationship. The legal matter under consideration, it must be remembered, belongs to the client, not the attorney.

Nordling v. Northern States Power Co., 478 N.W.2d 498, 501 (Minn. 1991) (emphasis added); See also *State ex rel Seifert, Johnson & Hand v. Smith*, 260 Minn. 405, 417, 110 N.W.2d 159, 167 (1961). (noting that “[s]ince the relationship of attorney and client is a confidential one, it must of necessity be based on mutual trust. Forcing such relationship upon the client against his will would not be conducive to an atmosphere of reciprocal confidence”).

It is on that basis that this court held that an in-house attorney could not bring a wrongful-discharge claim against the client-employer:

An attorney cannot properly bring a lawsuit against his client and transform confidential data generated in the course of representation into evidence against his client. Such conduct subverts the attorney-client privilege as well as the well-established principle that, as between an attorney and client, the power to terminate or modify the relationship must remain with the client.

Michaelson v. Minnesota Mining & Manf. Co., 474 N.W.2d 174, 178 (Minn. App. 1991) *aff'd mem.*, 479 N.W.2d 58 (Minn. App. 1992) (A.100). This court recognized in *Michaelson* that attorneys are duty bound not to disclose client confidences and to loyally serve the interests of her client. These duties “serve to fortify the client’s trust placed with the attorney and to ensure the public’s confidence in the legal system as a reliable and trustworthy means of adjudicating controversies.” *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 370 (5th Cir. 1998) (citation omitted). In fact, the purpose of the attorney-client privilege “is to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to

enable the attorney to act more effectively on behalf of his client.” *National Texture Corp. v. Hymes*, 282 N.W.2d 890, 896 (Minn.1979).

Importantly, and despite Kidwell’s contrary contention, the Minnesota Supreme Court in *Nordling* did not overturn *Michaelson* or these basic precepts when it addressed the issue of “whether an attorney’s status as in-house counsel alters the ordinary attorney-client relationship under which the client has the right to discharge its attorney at any time.” *Id.* at 500. Rather, the court’s more limited holding is that an in-house attorney can bring a breach-of-contract claim against his employer for allegedly violating provisions in the employee handbook, like any other employee of that company. The *Nordling* court held that the attorney could maintain such a claim because “[f]or matters of compensation, promotion, and tenure, inside counsel are ordinarily subject to the same administrative personnel supervision as other company employees.” *Id.* at 502.

But the court cautioned that it would only allow such wrongful-discharge suits by in-house counsel when it “can be done without violence to the integrity of the attorney-client relationship.” *Id.* The court therefore permitted in-house counsel to bring an action for breach of an employee-handbook provision because in that particular case, “the essentials of the attorney-client relationship [were] not compromised.” *Id.* Thus, because the employer’s alleged failure to comply with the progressive disciplinary steps set forth in the handbook given to all employees, including in-house counsel, formed the basis of the action and because “[t]he reasons for the discharge do not appear to implicate the company confidences or secrets confided to Nordling,” the court allowed the suit to proceed. *Id.* See also *Rand v. CF Industries, Inc.*, 797 F. Supp. 643 (N.D. Ill. 1992)

(allowing in-house attorney to bring age-discrimination action against former employer because claim was less likely to touch on matters sensitive to attorney-client relationship than issues arising in retaliatory-discharge suit); *Golightly-Howell v. Oil, Chemical & Atomic Workers Int'l Union*, 806 F. Supp. 921 (D. Colo. 1992) (allowing terminated in-house attorney to bring Title VII and breach-of-contract actions because claims do not implicate the attorney-client relationship) (citing *Nordling*).

Thus, plaintiff's lower-court assertions that *Nordling* "overruled" *Michaelson* and that *Nordling* holds that "an in-house attorney is not barred from bringing a claim for retaliatory discharge against an employer" is an unjustifiable distortion of *Nordling*. (Pl's Memo. in Opp. To Df.'s Motion for JMAL, etc. at 6). Moreover, it ignores the fact the supreme court accepted review of *Michaelson* while *Nordling* was pending and that it summarily affirmed *Michaelson* one month *after* deciding *Nordling*. 479 N.W.2d 58 (Minn. Jan. 31, 1992) (A.100).

Nor are the *Nordling* court's musings about the possibility that "privileged communications may at times become relevant" in a breach-of-contract suit — the only cause of action permitted by *Nordling* — evidence that the court held that it would allow a retaliatory-discharge case that compromises the very core of the attorney-client relationship. While the court in *Nordling* did note that the Rules of Professional Conduct allow a lawyer to reveal confidences in limited circumstances, those rules do not create a basis for liability. Minn. R. Prof. Conduct preamble ("[The rules] are not designed to be a basis for civil liability"). In *Nordling*, the supreme court quite clearly rejected

wrongful-discharge claims that compromise the essentials of the attorney-client relationship.

Kidwell's claim that he was terminated after advising the company regarding confidential matters about which he was hired to advise and counsel are not permitted by *Nordling* or any other Minnesota decision. The very essence of the attorney-client relationship is at issue here. Kidwell claimed that he was terminated for providing precisely the kind of advice that an in-house attorney is expected to offer and that he was indeed hired to provide as Sybaritic's general counsel. (A.84-85; T.242). In his difficult-duty e-mail, Kidwell discussed matters relating both to information that he gained solely through his role as Sybaritic's attorney and to confidential advice that he had previously provided to his client. (A.84-85). Thus, this lawsuit, to which this e-mail is integral, inevitably implicated "company confidences or secrets confided to [Kidwell]." *Id.* In other words, this is the very type of action that the supreme court in *Nordling* indicated it would not allow.

Indeed, throughout the trial, and over the repeated objections of defense counsel, the district court permitted Kidwell to breach the attorney-client relationship by allowing him to discuss confidential information and introduce undisputedly privileged documents. (T.189-207, 212, 217-22, 243, 258-62). The trial court's continuous struggle with what privileged documents it was going to allow into evidence once it permitted this action to go forward demonstrates the concerns that the *Nordling* court had about such actions and why it limited in-house counsel to actions that do not compromise that relationship. *Nordling*, 478 N.W.2d at 502. The *Nordling* court recognized the very danger that

occurred here — that “[a] retaliatory discharge claim is more likely to implicate the attorney-client relationship, raising issues not only of divulging client confidences, but confidences that relate to client wrongdoing.” *Id.* at 504.

Whistleblower suits by an attorney/employee engaged to provide the kind of advice that the attorney threatens to disclose to authorities necessarily requires that the attorney spurn his duty of confidentiality, which could lead to a chilling effect on both the relationship between employer and in-house counsel and the flow and exchange of information that is essential to that relationship. *See Balla v. Gambro, Inc.* 584 N.E.2d 104,109 (Ill. 1991) (noting that if such suits are permitted, “employers might be less willing to be forthright and candid with their in-house counsel”). Employers would be justifiably reluctant to even seek in-house counsel’s advice because, as is illustrated here, even when that advice was sought and followed, and even when there was no evidence of any actual or contemplated violation of law, the employer was nevertheless not insulated from a retaliatory-discharge claim by its attorney. Without the assurance that its in-house attorney will adhere to his duty of confidentiality, an “[e]mployer might be hesitant to turn to their in-house counsel for advice regarding potentially questionable corporate conduct knowing that their in-house counsel could use this information in a retaliatory discharge suit.” *Id.*

Moreover, allowing counsel to bring a whistleblower action involving the same advice the attorney is paid to give essentially creates a “super employee” immune from both the prevailing at-will doctrine and the concept that a client can terminate an attorney for any reason at any time. And that’s just what happened here. Sensing vulnerability,

Kidwell created the very issues he could claim to be blowing the whistle on. He spent more time researching the potential for a whistleblower claim than he did finding out if his suspicions had any factual basis — which they didn't.

In the end, employers, and ultimately the public, will suffer if companies become unduly circumspect in their dealings with house counsel and are either denied the benefits of effective legal advice or left with the sole option of seeking that advice from outside counsel rather than from employees/attorneys who have more intimate knowledge and understanding of their employers' business and personnel. Corporations can enjoy tremendous benefits from having in-house counsel because of the accessibility and perspective that in-house counsel provide, especially when addressing complex and sensitive legal issues. See Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 Ind.L.J. 479, 487 (1989). This is especially true today given the highly regulatory nature of most corporate businesses. In-house counsel are thus required to take on "a larger advisory and compliance role," requiring them to anticipate potential legal problems and advise on possible solutions. *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 491 (Cal. 1994). The public is better served, therefore, when corporations have someone ethically required to ensure compliance with laws and regulations.

An attorney's compulsory obligation to comply with the Rules of Professional Conduct, which includes mandatory withdrawal when discharged, provided another basis to deny in-house counsel the right to bring a retaliatory-discharge action. *Balla* 584 N.E.2d at 504. "An attorney's obligation to follow these rules should not be the

foundation for a claim of retaliatory discharge.” *Id.* The court there explained that if it were to allow such actions, “the burden and costs of obeying the Rules of Professional Conduct” would shift from the attorney to the employer/client, forcing that client “to bear the economic costs and burdens of their in-house counsel’s adhering to their ethical obligations.” *Id.* 505.

In response to plaintiff’s contention that this puts too high a financial and emotional burden on in-house counsel, who have no other source of income, the *Balla* court responded that “all attorneys know or should know that at certain times in their professional career, they will have to forgo economic gains in order to protect the integrity of the legal profession,” which the professional rules are intended to protect. *Id.* at 505. Thus, while the legal profession can bring great benefits, it also carries certain obligations that sometimes come at a cost.

Kidwell, too, was ethically bound to withdraw when discharged, and he should not expect compensation for doing what his professional obligations required of him. In other words, if Sybaritic, as the client, had the unfettered right to discharge Kidwell when it lost trust and confidence in him as general counsel, due in part to his admitted breach of his fiduciary duty, then Kidwell was duty bound to withdraw. Sybaritic should not have to bear the cost of Kidwell fulfilling his compulsory professional responsibility requirements. In short, as a matter of law, it cannot be retaliation if Kidwell was compelled to comply with his client’s wishes, and the trial court erred when it refused to dismiss this action. As such, defendant is entitled to JAML.

III. Once Kidwell breached his fiduciary duty, he was not entitled to recover unearned compensation.

Regardless of whether Kidwell was barred as a matter of law from asserting his retaliatory-discharge claim against Sybaritic, he was not entitled to damages because of his admitted fiduciary-duty breach.¹ As before, the analysis begins with the well-settled principle of Minnesota law that a client may discharge an attorney at any time, with or without cause. *Lawler*, 145 Minn. at 284, 176 N.W. at 990. Sybaritic did just that after it learned that Kidwell sent the difficult-duty e-mail to his father. The trial court nevertheless allowed Kidwell to profit from his admitted breach by refusing to find as a matter of law that Kidwell consequently forfeited his right to post-termination compensation even though he was ethically obligated to withdraw once discharged. But because Kidwell was duty bound to vacate his position as in-house counsel once discharged, Sybaritic should not have to bear the cost of Kidwell's mandatory professional obligation, regardless of his attempt to take shelter under the Whistleblower Act. Minn. R. Prof'l Conduct 1.16(a)(3).

This is particularly true in light of the long-standing rule that “[f]or a breach of [professional] duty, the attorney forfeits his or her right to compensation.” *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 215-216 (Minn. 1984) (*Perl II*) (citing *In re Estate of Lee*, 214 Minn. 448, 460, 9 N.W.2d 245 (1943); accord *Commercial Assoc., Inc. v. The Work Connection, Inc.*, 712 N.W.2d 772, 779 (Minn. App. 2006). The public

¹ After the trial court directed a verdict on Sybaritic's breach-of-fiduciary-duty claim, Sybaritic sought only to have the court find as a matter of law that Kidwell was not entitled to any *post-termination* compensation and damages. (T.770-71, 774-75). It was not seeking to have Kidwell disgorge everything he had previously earned at Sybaritic.

policy underlying compensation forfeiture “‘is a strong one,’ since fidelity to the client’s interests is basic to the trust which characterizes the attorney-client relationship.” *Perl II*, 345 N.W.2d at 215-216 (citing *Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982) (*Perl I*)). Therefore, regardless of whether a client has shown no loss due to the attorney’s breach of fiduciary duty, attorney fees are to be forfeited. *Perl II*, 345 N.W.2d at 215-216; *see also Perl I*, 320 N.W.2d at 410.

The trial court, however, got sidetracked in its examination of this issue when it considered fee-forfeiture caselaw in the traditional client/outside-counsel relationship where, unlike here, the attorney provided the contracted-for service to the client despite the breach, and the client, in turn, then paid the attorney *before* discovering the breach. *See, e.g., Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986) (*Perl III*). In *Perl III*, the supreme court examined whether an attorney who breaches his fiduciary duty should in every instance forfeit all previously acquired fees. The court’s analysis began with the recognition that fee forfeiture is a penalty, much like punitive damages, and that courts should apply punitive-damage-like factors when assessing the fee-forfeiture amount. *Id.* at 416. One such factor the court considered was whether the client had been damaged by the breach — i.e., whether the client could show that she would have received a higher settlement in the absence of the breach. *Id.* at 416 n.2. Underlying this discussion is the recognition that the breaching attorney had *earned* his fee by obtaining a settlement for his client and that it would be unfair, in the absence of the cited factors, to require total forfeiture. *Id.* at 415 (citing *Selover v. Hedwall*, 149 Minn. 302, 306-07, 184 N.W. 180, 181 (1921) (finding law firm entitled to compensation for work it had done

notwithstanding client's assertion that firm had breached its fiduciary duty because there was no evidence of fraud or bad faith); *see also Michaelson*, 474 N.W.2d at 178 ("the attorney cannot hold the client liable for damages due to the breach but rather is entitled only to the reasonable value of services rendered (quantum meruit)").

But Kidwell, unlike attorney Perl, was not being asked to forfeit fees already earned and received. Unlike the *Perl III* case, here there was no payment to forfeit or fee to scale. Instead, the issue before the trial court was one of law — i.e., whether an attorney who breaches his ethical duties by violating his client's confidences and is then fired should nevertheless get paid for work never done. Once Kidwell breached his fiduciary duty to his client, he forfeited his right to any further compensation, and it was error for the trial court not to direct a verdict on Kidwell's damage claims.

This is so even if Kidwell had established a legitimate whistleblower claim. For example, in *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364 (5th Cir. 1998), the court held that although in-house counsel's conduct could fairly be characterized as protected under Title VII, she was nevertheless not entitled to seek refuge under that statute once she "breached her professional duties of confidentiality and of loyalty when she revealed to a third party information relating to the representation of her client." *Id.* at 375. Thus, because this attorney, like Kidwell, "took no precautions to preserve the attorney-client relationship and instead acted with thoughtless indiscretion, demonstrating little regard for the ethical obligations inherent in the legal profession," the court denied her any protection under Title VII. *Id.* The Fifth Circuit reached this decision even though there had been "minimal disclosure of substantive information" on

the grounds that “[t]he employer-client need not tolerate baby steps of unethical conduct while anxiously wondering when and if the giant step will occur, and with what consequences.” *Id.* at 376-77. Here, too, the Whistleblower Act should provide “no shield” once the trust between attorney and client was breached. *Id.* at 377. The trial court thus erred in not finding that Kidwell was not entitled to recovery under the Act.

IV. Sybaritic is entitled to JAML because plaintiff failed to establish a prima facie whistleblower case.

Minnesota’s whistleblower law prohibits an employer from discharging or otherwise discriminating against an employee who “in good faith reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official.” Minn. Stat. § 181.932, subd. 1(a) (2004). To establish a prima facie retaliatory-discharge claim, “an employee must make the report for the purpose of exposing an illegality.” *Hitchcock v. FedEx Ground Package Sys., Inc.*, 442 F.3d 1104, 1104 (8th Cir. 2006) (citing *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000)). To “qualify as a report under the [Act], a report must ‘blow the whistle’ by notifying the employer of a violation of law that is a clearly mandated public policy.” *Skare v. Extendicare Health Servs., Inc.*, 431 F. Supp. 2d 969, 979 (D. Minn. 2006) (quoting *Cokely v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2001)). The court “may determine as a matter of law that certain conduct does not constitute a report for purposes of the Whistleblower Act.” *Cokely*, 623 N.W.2d at 630. Kidwell’s claim that he engaged in

protected conduct when he wrote the difficult-duty e-mail fails as a matter of law because this e-mail does not meet the requirements of a report under the Whistleblower Act.

A. Kidwell was fulfilling his job responsibilities when he wrote the difficult-duty e-mail.

It is well settled under Minnesota law that because an employee must make a report for the purpose of exposing an illegality to be protected under the Act, a complaint or concern that falls within the normal course of that employee's job duties is not statutorily protected. *See Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 330 (Minn. App. 2007) (citing *Michaelson*, 474 N.W.2d 180); *see also Gee v. Minnesota State Colleges & Univ.*, 700 N.W.2d 548, 556 (Minn. App. 2005) (holding plaintiff did not have whistleblower claim when stated purpose in reporting was to fulfill responsibilities as faculty advisor); *Skare*, 431 F. Supp. 2d at 979-80 (holding that report made in normal course of nursing home employee's job duties was not a statutorily protected report); *Freeman v. Ace Telephone Assc.*, 404 F. Supp.2d 1127, 1139 (citing *Erickson v. City of Orr*, No. A05-481, 2005 WL 2277395, at *7 (Minn. App. Sept. 20, 2005) and *Andrews v. Northwestern Travel Servs.*, No. C5-97-1766, 1998 WL 100608, at *4 (Minn. App. Mar. 10, 1998)). (A.101-12).

There can be no serious debate that Kidwell was acting within the scope of his duties as general counsel when he wrote his difficult-duty e-mail. Sybaritic hired Kidwell to be its "general counsel and inside attorney, responsible for litigation * * * ." and to oversee "any existing or future legal issue that Sybaritic is faced with * * * ."

(A.66-67). In fact, Kidwell admits that as Sybaritic's attorney, he was expected to provide legal opinions about legal matters affecting or involving Sybaritic. (T.353, 354-55). Kidwell likewise acknowledges that it was because he was Sybaritic's attorney that he had access to information about the NeoQi claims. (T.376-77). Kidwell moreover concedes that it was his job to advise his client about any discovery issues and to evaluate the likelihood of success of litigation. (T.376-78). Indeed, the e-mail starts with his concession that alerting management to these concerns was his "duty," albeit a "difficult" one, and that he could not "fail to write this email without also failing to do [his] duty to the company and to [his] profession as an attorney." (A.84).

Kidwell is no different than the plaintiff in *Grundtner*, the case in which this court recently affirmed a judgment in favor of the employer, finding that because plaintiff's position was "to ensure that the university did not engage in improper procurement methods," his reports concerning what he perceived to be improper procurement methods did not amount to protected activity. *Grundtner*, 730 N.W.2d at 330. As Sybaritic's attorney, Kidwell likewise had a duty to advise his client about the legalities of its conduct. His difficult-duty e-mail is nothing more than the fulfillment of that duty.

In that regard, the alleged report here is comparable to the report at issue in *Michaelson*. 474 N.W.2d 174. In that case, plaintiff, an in-house lawyer specializing in labor law, communicated recommended responses to complaints implicating equal-employment-opportunity issues. *Id.* at 180. Although the employer did not always follow the plaintiff's advice, this court found that because the communications, which may have included notice of illegal conduct, arose from the performance of the employee's regular

job duties, they could not form the basis of a retaliatory-discharge claim. *Id.* at 180-181. *See also Freeman*, 404 F. Supp. at 1140-41 (holding that co-CEO reporting what he considered to be tax avoidance was not statutorily protected conduct because it was plaintiff's job to report financial irregularities).

As Sybaritic's attorney, Kidwell was expected to render his legal opinion on all legal issues that arose within the course of Sybaritic's business and to provide advice with regard to applicable laws. He acknowledged that he was also required to work with Sybaritic's management to prevent, identify, and stop all illegal, or potentially illegal, conduct of the company because "as the person responsible for the legal affairs of the company, that's what I had to do." (T.242). In summary, the evidence leads to no other conclusion than that the difficult-duty e-mail was sent in the course of Kidwell's duties as general counsel and, as such, it is not statutorily protected conduct.

B. Sybaritic was already well aware of the concerns Kidwell raised in the difficult-duty e-mail.

Minnesota law is also clear that a protected activity is not reporting conduct about which the employer was already aware. *Obst*, 614 N.W.2d at 203; *see also Freeman*, 404 F. Supp.2d at 1139 (citing *Rothmeier v. Inv. Advisers, Inc.*, 556 N.W.2d 590, 593 (Minn. App. 1996), *review denied* (Minn. Feb. 25, 1997) (finding mention of suspected violation already acknowledged by employer not a report)). In other words, an employee must actually "blow the whistle" to be statutorily protected. *Obst*, 614 N.W.2d at 203 (Whistleblower Act does not cover conduct employer openly knows about and acknowledges). Here, Kidwell's difficult-duty e-mail is not a protected report because

there is ample undisputed evidence that Sybaritic knew about the kickback scheme and about Kidwell's unauthorized-practice-of-medicine and Sybaritic West concerns. There is also undisputed evidence that Sybaritic took steps to address these issues, in some instances months before the difficult-duty e-mail. In any event, Kidwell readily admits that he really wasn't attempting to blow the whistle as to these issues. (T.247, 369).

The evidence likewise establishes that the difficult-duty e-mail was not the first time Kidwell had raised his concern regarding the NeoQi e-mails. In fact, Kidwell the NeoQi e-mails with Steve Daffer and Atmore before sending the difficult-duty e-mail. (T.212, 224-28). In addition, while Kidwell was in Estonia, he called Nelson and told him that he was worried about the status of the NeoQi e-mails and that something might happen to them. (T.232-33). Of course, those allegations were false, and there is no evidence to support them.

Because Sybaritic was already aware of each of the issues raised in the difficult-duty e-mail, there was no whistle to blow with regard to these issues. *Obst*, 614 N.W.2d at 202-203. Therefore, as a matter of law, Kidwell did not establish that he made a report protected by the Whistleblower Act, and the district court thus erred when it denied Sybaritic's motion for JAML.

C. The difficult-duty e-mail does not implicate any violations of law.

To be protected conduct, Kidwell's e-mail had to report a violation or a suspected violation of a federal or state law or a rule adopted pursuant to law. *Abraham v. County of Hennepin*, 639 N.W.2d 342, 354-355 (Minn. 2002) (citing *Obst*, 614 N.W.2d at 204). Although the employee need not identify "the law or rule adopted pursuant to law that the

employee suspects has been violated * * * the alleged facts, if proven [must] constitute a violation * * * .” *Abraham*, 639 N.W.2d at 355. Thus, to constitute a report, the employer must have actually violated the law, not just be contemplating the possibility of future conduct that may or may not be illegal. Moreover, as a matter of law, a “non-specific reference to past practices not in conformance with the [law] is insufficient to implicate a current violation of law so as to constitute a report under the Minnesota Whistleblower Act.” *Cokley*, 623 N.W.2d at 631. But here there was neither proof that any law had been broken nor any proof that there was even the threat that an illegality was about to happen. The evidence does not demonstrate that Kidwell blew the whistle on anything real.

For example, the kickback scheme, which was not illegal but only a violation of internal-office policy, was resolved long before Kidwell wrote the e-mail, and thus his mention of this past incident did not implicate any current violation of law. (T.355-58;A.84).

The evidence likewise established that Kidwell’s unauthorized-practice-of-medicine comments did not involve any current violation of law. In fact, Kidwell admits that he never determined before sending the e-mail whether Hagar was still performing the same activities that Kidwell complained about in January, and he never did any research to confirm that those past activities would actually have constituted a violation of law. (T.375). In fact, the undisputed evidence establishes that at the time of the e-mail, all testing had been terminated for over three months. (T.301, 491, 662, 665, 746).

The same is true as to Kidwell's concerns regarding Sybaritic West. Although the e-mail accuses Sybaritic of tax evasion, he was unable to point to a single tax law that Sybaritic violated as a result of this mistaken reference by the marketing department, and he admitted that the issue surrounding the corporate separateness of Sybaritic West was a complex one as to which reasonable professionals could come to different conclusions. (T.365-67).

With regard to the NeoQi litigation, there was never any evidence that Sybaritic had engaged, or was actually about to engage, in improper-litigation practices, only Kidwell's unjustified assessment that this might occur, which ultimately proved to be incorrect. Kidwell's notion about a nonexistent virus was never substantiated, and there was never any evidence that anyone had either spoliated evidence or had even contemplated doing so. In fact, Kidwell had to admit that he had no idea whether any of the e-mails had actually been, or were going to be, destroyed when he sent the e-mail and he acknowledged that he actually had copies of these very e-mails on his own work e-mail account. (T.394-95, T.418-19). That Kidwell did not view this spoliation as an actual threat is buoyed by the fact that Kidwell never asked to see either the hard copies of the smoking gun e-mails or the disk that he so cavalierly accused Sybaritic of altering. At most then, the e-mail is merely legal advice to his client about what not to do in the future. But to constitute a report, the employee must allege facts which, if proven, constitute a current violation of the law. *Abraham*, 639 N.W.2d at 354-55. "[T]he statutory language speaks to conduct which has already transpired, and the fact that an avenue of action has been contemplated by the employer and rejected insulates that

conduct from the whistleblower proscriptions.” *Grundtner*, 730 N.W.2d at 330 (quoting *Petroskey* 847 F. Supp. at 133) (citing *Michaelson*, 474 N.W.2d at 180)).

Kidwell also admitted that could not identify any rule or court order that Sybaritic violated by not turning over documents that had never been requested by NeoQi’s counsel. (T.427-31). Indeed, after sending the difficult-duty e-mail and after learning that he would not be fired, Kidwell never advised Sybaritic to turn over these e-mails voluntarily or to dismiss its claims. Instead, he told Sybaritic that the NeoQi litigation would apparently proceed with “little or no discovery” and that NeoQi seemed to be willing to “let the chips fall where they may.” (A.90-91).

In summary, Kidwell presented no evidence that Sybaritic violated the law with regard to the issues raised in the difficult-duty e-mail, and thus he did not establish that he made a report for purposes of whistleblower protection. For this reason, this court should reverse the district court and enter JAML in favor of Sybaritic.

V. Sybaritic is entitled to a new trial because of the court’s jury instructions were erroneous and prejudicial.

A. The trial court protected-activity instruction misstated the law.

Although the trial court has broad discretion in issuing jury instructions, “if an instruction destroys the substantial correctness of the charge as a whole, causes a miscarriage of justice, or results in substantial prejudice, the error requires a new trial.” *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002) (citing *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974)). Here, Sybaritic requested that the court instruct the jury that for Kidwell’s

difficult-duty e-mail to constitute protected whistleblower activity, he must *not* be fulfilling responsibilities for which he was hired:

An employee does not engage in a protected activity if it was the employee's job to bring to the employer's attention or the attention of any governmental agency any activities that the employee in good-faith believed were in violation of any federal, state or local law.

(A.39; T.113-20). That, as has been shown above, is the law. *See Grundtner*, 730 N.W.2d at 330; *Gee*, 700 N.W.2d at 556; *Skare*, 431 F. Supp. 2d at 979-80; *Freeman*, 404 F. Supp.2d at 1139.

The district court, however, refused to give this instruction and, instead, told the jury that it *should* consider Kidwell's job duties when it determines whether he acted in good faith:

An employee does not engage in protected activity unless he made a report in good faith. To determine whether a report was made in good faith, you must look not only at the content of the report, but also at Mr. Kidwell's **job and** purpose in making the report at the time the report was made, not after subsequent events have transpired.

(T.868) (emphasis added). The trial court stated that the above instruction is "*nearly* a verbatim recitation" of the relevant case law. (A.14) (emphasis added). This is true. *See Obst*, 614 N.W.2d at 202; *Freeman*, 404 F.Supp.2d at 1139-40. But "*nearly*" isn't sufficient when the words added to the case-law extraction significantly alter the meaning of the instruction. Here, the court added the words "job and" to defendant's proposed instruction. In doing so, the court misstated the law. Thus, not only did the trial court fail to charge the jury that a complaint made within the normal course of that employee's job duties is not statutorily protected, it also instructed the jury that it could affirmatively

consider Kidwell's job duties when considering whether he acted in good faith. The jury's understanding of the law was therefore the complete opposite of what it actually is because it was instead told that if Kidwell was simply doing his job when he wrote and sent the difficult-duty e-mail, he was then proceeding in good faith and that he had thus engaged in protected conduct. But the law commands the opposite result and, as such, this instruction and the failure to give the one that Sybaritic requested, substantially destroyed the correctness of the charge as a whole, resulting in a miscarriage of justice and prejudicial harm to defendant. The only remedy for this error is to reverse the trial court and remand the case for a new trial. *See D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co. of Newark, New Jersey*, 535 N.W.2d 671, 675 (Minn.App.1995).

B. The trial court erred by failing to instruct the jury that an employee does not engage in protected activity if he reports violations already known to the employer.

Although the evidence established that Kidwell had previously advised Sybaritic about each of the concerns raised in the difficult-duty e-mail, the trial court refused to instruct the jury that it should consider this fact when determining whether Kidwell engaged in protected whistleblower activity. (A.13-14). As shown above, the law in Minnesota is that a "report" does not include an employee's statement to an employer when the employer was already aware of the alleged violation(s). *Obst*, 614 N.W.2d at 203; *see also Freeman*, 404 F. Supp.2d at 1139. As such, Sybaritic requested that the court give the following instruction:

An employee does not engage in a protected activity if he reports alleged violations of law that were already know by the employer.

(A.40). The court's failure to do so gave the jury an inaccurate statement of the relevant law such that defendant is entitled to a new trial. *Schlieman v. Gannett Minn. Broadcasting Co.*, 637 N.W.2d 297, 306 (Minn. App. 2001) (holding that if issue is submitted to jury on erroneous instruction and it does not appear as a matter of law that jury's determination was correct regardless of instruction, then court should grant objecting party new trial).

VI. The Court erred in admitting privileged communications between Sybaritic and Kidwell.

During this trial, Sybaritic's attorney-client privilege was repeatedly violated despite recurring objections by defense counsel.² In fact, what occurred was exactly the ill that the supreme court warned of in *Nordling* when it noted that "[a] retaliatory discharge claim is more likely to implicate the attorney-client relationship, raising issues not only of divulging client confidences, but confidences that relate to client wrongdoing." 478 N.W.2d at 504. Sybaritic recognized that if the trial court allowed Kidwell's claim to proceed, it would necessarily involve the introduction of privileged communications, and that this thus required the court to dismiss the action. (T.45-47). In fact, Sybaritic moved to exclude privileged documents that it considered potentially

² The privileged documents and testimony the court allowed had to do with testimony about Kidwell's work and legal analysis regarding the kickbacks, Hagar's alleged unauthorized practice of medicine, the formation of Sybaritic West, and the NeoQi litigation issues. (T.189-207, 21, 217-22). Moreover, the court admitted these privileged documents: the difficult-duty e-mail, Kidwell's litigation summary, and the April 19, 2005 Atmore letter. (A.84-85, 89-95, 82-83; T.243, 258-62). Neither the court nor Kidwell ever challenged Sybaritic's assertion that this information was privileged; instead, they conclude only that Kidwell was entitled to breach his duty of confidentiality and use information he obtained as Sybaritic's counsel to support his whistleblower claim.

helpful to the defense, explaining to the court that the mere existence of this lawsuit put it in an intolerable Catch-22 situation — its privileged communications would be made public and the only way to defend itself was to reveal additional privileged communications. (*Id.*; T-218). Indeed, at one point, the court seemed to understand that it was creating this dilemma when it admitted certain privileged documents and conversations and not others. (T.261-62) (“I philosophically very strongly believe that the attorney/client privilege needs to be preserved * * * and so I’m going to add to the frustration of counsel by saying that although I might let some stuff in, I’m still — I’m not comfortable here in just kind of opening up the door”).

The court nevertheless repeatedly allowed the admission of privileged information, justifying its decision on the basis of corporate wrongdoings at Enron and elsewhere. (T.218, 261-67). But in doing so, the court allowed the very type of action that the *Nordling* court warned it would not permit. The court’s justification for its ruling was based on one of the recently added exceptions to the confidentiality rules of professional responsibility:

A lawyer may reveal information relating to the representation of a client if * * * the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer’s representation of the client.

Minn. R. Prof’l Conduct 1.6(b)(8). But, again, these rules “are not designed to be a basis for civil liability” [Minn. R. Prof’l Conduct preamble], and the supreme court has already

held that it will not allow a claim by an in-house attorney against his employer to proceed if that claim “does violence to the integrity of the attorney-client relationship.” *Nordling*, 478 N.W.2d at 502. The trial court’s application of this permissive exception to the professional rules eviscerates *Nordling* and jeopardizes the integrity of attorney-client relationship for every employer who has in-house counsel. No confidential matters discussed between employer and in-house counsel would be protected if that attorney could reveal those matters under the guise of a whistleblower suit the moment that attorney’s job security is threatened. Moreover, a finding that this confidentiality exception opens the door to retaliatory-discharge actions by in-house attorneys undermines other essential components of the attorney-client relationship such as trust and loyalty.

Kidwell has also argued that the court properly allowed the introduction of privileged information because Sybaritic waived its privilege when it asserted its breach-of-fiduciary-duty claim. But that argument ignores two key points. First, Kidwell admits that he unjustifiably breached his duty to Sybaritic when he sent the difficult-duty e-mail to his father. To say that an attorney can breach one of his most sacrosanct fiduciary duties and claim that the client then waives its privilege as to anything related to that admitted breach when it attempts to hold the attorney accountable distorts and perverts the privilege. Second, even though defendant asserted a breach-of-fiduciary-duty counterclaim, that claim would never had existed but for the fact that the court allowed the whistleblower claim to proceed. Even more important, though, the sole necessary proof for Sybaritic’s counterclaim was that Kidwell sent confidential information to his

father, a fact Kidwell finally admitted at trial. Only the fact of the disclosure was necessary to prove this claim, not the actual confidential information contained therein. In short, Sybaritic waived nothing.

VII. The trial court's evidentiary errors entitle Sybaritic to a new trial.

The trial court abused its discretion when it admitted evidence of Steve Daffer's 24-year-old conviction for mail fraud on the basis that Kidwell introduced it to show that, at the time he sent the difficult-duty email, he believed that Sybaritic had a pattern of disregarding the law. (T.12-13). While the admission of "evidence rests within the broad discretion of the trial court," its ruling will be reversed when it is based on an erroneous view of the law or constitutes an abuse of discretion. *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn.1990). Entitlement to a new trial on improper-evidentiary-ruling grounds exists when the complaining party demonstrates prejudicial error. *Id.*

Even assuming that Kidwell offered this evidence to prove his good-faith, rather than Daffer's character, admitting it was still an abuse of discretion because it was overwhelmingly prejudicial to Sybaritic's defense of its case. Minn. R. Evid. 403 (stating that relevant evidence may be excluded where it is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."). Specifically, (and just as Kidwell likely intended) it caused significant damage to Daffer's credibility when he testified about the reasons for Kidwell's termination. *See, e.g.*, Minn. R. Evid. 404 (barring character evidence for purpose of proving action in conformity therewith). This prejudice is magnified by Kidwell's failure to actually prove there ever was a plan to engage in improper-litigation activity. Because the introduction

of this information, even if relevant, was unduly prejudicial considering its probative value, the trial court abused its discretion, and a new trial is warranted.

Additionally, the district court erred when it excluded a relevant letter from Sybaritic's counsel, written nine days after Kidwell's termination, extensively setting forth the reasons for Kidwell's termination. (A.96-99). The court found the letter to be an inadmissible settlement discussion under Minn. R. Evid. 408 because it included a few, easily redactable lines reiterating Sybaritic's severance offer in exchange for a release. But Rule 408 is a rule of exclusion, not discretion. Thus, if a statement does not violate the rule, the trial court does not have discretion to exclude it. *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519, 524 (Minn. App. 1999) (citation omitted). To exclude evidence under Rule 408 (1) the evidence must offer to compromise "a claim which was disputed as to either validity or amount"; (2) the evidence cannot be offered to "prove liability for or invalidity of the claim or its amount"; and (3) the evidence is not offered for another legitimate purpose. *Id.* (emphasis added). Here, while the letter does offer to compromise the claim, it was also offered for another legitimate purpose, i.e., to negate Kidwell's insinuation that Sybaritic's reasons for terminating him repeatedly shifted, a point that Kidwell belabored throughout trial in an effort to establish that his admitted breach of fiduciary duty was not a basis for his termination and that he was instead terminated in retaliation for sending the difficult-duty e-mail. *See* Minn. R. Evid. 408, cmt ("The rule does not immunize otherwise discoverable material merely because it was revealed within the context of an offer of compromise."). As a result, the evidence does

not fulfill the requisites necessary to exclude under Rule 408, and the trial court erred when it excluded it.

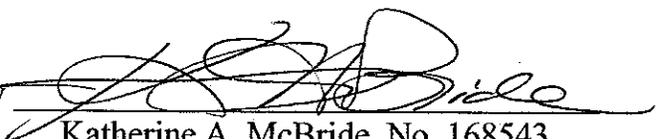
In summary, the court's prejudicial evidentiary errors entitle Sybaritic to a new trial.

CONCLUSION

Because Kidwell's retaliatory-discharge claim compromised the attorney-client relationship, because Kidwell failed to prove that he engaged in product conduct under the Whistleblower Act, and because he is not entitled to compensation once he breached his fiduciary duty, the trial court erred in denying Sybaritic JAML, and this court should reverse. In the alternative, Sybaritic is entitled to a new trial because it was prejudiced by the court's improper jury instructions, the admission of prejudicial evidence, and the exclusion of admissible evidence.

Respectfully submitted,

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By 
Katherine A. McBride, No. 168543
James F. Roegge, No. 92678
Bradley J. Lindeman, No. 0298116
Erica G. Strohl, No. 279626
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

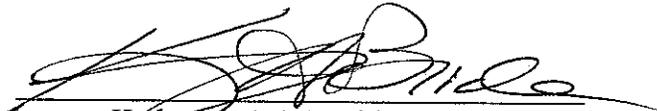
Attorneys for Appellant

1441260

CERTIFICATE OF COMPLIANCE

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Katherine A. McBride