

A08-576

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Sharon Bender,

Appellant,

vs.

Mary Swenson,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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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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CERTIFICATE AS TO BRIEF LENGTH

Respondent's counsel certifies that Respondent's Appellate Brief meets the length limitation and type size limitation of Minn. R. App. Proc. 132.01, subd. 3. The Memorandum was typed in 13-point Times New Roman Font using WordPerfect 12 and contains 7311 words. The word count of the word processing program has been applied specifically to include all text, including headings, footnotes and quotations.

STATEMENT OF THE ISSUES

I. Does the record contain sufficient evidence of a fiduciary relationship and subsequent breach of that relationship?

The trial court held in the affirmative

Toombs v. Daniels, et al., 361 N.W.2d 801, 809 (Minn. 1985)

Stark v. Equitable Life Assur. Society, 285 N.W. 466, 470 (1939)

Johnson v. Schmitz, 119 F.Supp.2d. 90, 97-98 (D.Conn. 2000)

II. Did the trial court abuse its discretion in awarding attorney fees to Respondent for Appellant's untimely motion to amend the scheduling order and delay the trial date?

A review of the entire procedural process establishes that the trial court did not abuse its discretion in awarding attorney fees.

Mears Park Holding Corp. V. Morse/ Diesel, Inc., 426 N.W.2d 214, 217-18 (Minn. Ct. App. 1988)

Minn. Stat. § 549.21

Minn. R. Civ. P. 11

III. Was Appellant prejudiced by the revival of the fiduciary duty claim?

The trial court found revival to be warranted with no prejudice to Appellant.

IV. Does Respondent hold a property interest subject to protection under Minnesota law?

The trial court held in the affirmative.

Bonito Boats, 489 U.S. 141, 149 (1989)

Tate v. Scanlon, 403 N.W.2d 666, 671 (Minn. Ct. App. 1987)

STATEMENT OF THE CASE AND FACTS

The Findings of Fact, Conclusions of law and Order for Judgment include a comprehensive and thorough recitation of the facts at issue in this case and those pertinent to all issues on appeal. (Resp. App. 1-22). Therefore, Respondent avers to those facts and sets forth the following statement of the case.

Respondent commenced the underlying action on April 14, 2005. (Complaint, dated March 25, 2005). Appellant filed her answer on May 20, 2005. (Answer, dated May 20, 2005). The answer did not raise any affirmative defenses with respect to either subject matter or personal jurisdiction. (See *id.*) Respondent first noticed Appellant Bender's deposition on July 25, 2005. This notice was later amended on August 17, 2005. (First Amended Notice of Taking Deposition, dated August 17, 2005). The deposition was set for September 27, 2005. (See *id.*) Appellant Bender filed an amended answer on September 17, 2005 in which she alleged a lack of subject matter and/or personal jurisdiction. Along with the amended answer, Appellant's attorney notified Respondent's attorney at the time that he would not comply with any discovery request until jurisdiction was resolved.

On September 15, 2006, Appellant moved the court for an order dismissing the complaint pursuant to Minnesota Rules of Civil Procedure 41.02(1). On September 29, 2006, Appellant Bender's motion was denied. Pursuant to the parties' request, the Court also stayed discovery until November 22, 2006, during which time the parties would

attempt to resolve the matter. (Resp. App. 23-24). The court further provided that if the matter were not resolved in the next sixty days, the parties would submit their informational statements no later than November 22, 2006. (See id.) If the matter were not resolved by November 22, 2006, discovery would proceed and the court would issue a scheduling order. (See id.) The matter was not resolved. Respondent informational statement was served on November 15, 2006. Appellant served her informational statement on November 24, 2006.

On December 12, 2006, a scheduling order was duly filed. Pursuant to the scheduling order, ADR was to be completed within 160 days from the scheduling order. Mediation was the ADR method set by the court. If ADR were to be deemed inappropriate in the action, a stipulation, signed by all parties, and a proposed order waiving the ADR process had to be received by the court no later than 30 days from the scheduling order date. (Scheduling Order, dated Dec. 12, 2006). April 20, 2007 was set as the last day of discovery and June 20, 2007 was the last day on which dispositive or evidentiary motions could be heard. (Scheduling Order, dated Dec. 12, 2006). The trial was set for August 20, 2007 at 9:00 a.m.

The scheduling order specifically provided that it could be amended upon a motion for good cause shown. Any motion to extend any deadline contained in the scheduling order; however, had to be heard before the expiration of that deadline.

Respondent re-served a new notice of taking a deposition of Sharon Bender on March 5, 2007. (Amended Notice of taking Dep., dated March 5, 2007). The notice set the deposition for April 16, 2007. On April 13, 2007, at approximately 12:30 p.m., Respondent's attorney was informed by Appellant's attorney that Sharon Bender would not sit for her deposition. Appellant's attorney also refused to agree upon a mediator or a date for mediation as provided in the trial court's scheduling order. In response, Respondent brought a motion to compel discovery and mediation on April 16, 2007, to compel the taking of Sharon Bender's deposition and to force Appellant to comply with the scheduling order of the district court filed on December 12, 2006. (Motion to Compel Discovery and Mediation, dated April 16, 2007). Appellant opposed the motion and moved for a protective order.

On April 16, 2007, the parties agreed to dismiss, without prejudice, Respondent's second cause of action regarding defamation and Respondent's fourth cause of action regarding intentional infliction of emotional distress. (Dismissal, dated April 16, 2007). The parties also agreed to have the matter tried to the court without a jury. (See *id.*)

On May 17, 2007, the Honorable Douglas Meslow ordered that Appellant's deposition be taken via telephone within thirty days of the date of the order. (Resp. App. 25-26). Respondent Swenson's deposition could be taken within thirty days of Appellant's deposition. The Court also ordered that the parties engage in mediation on August 14, 2007. Appellant's deposition was taken by telephone on June 13, 2007 and

Respondent Swenson's deposition was taken in person on July 6, 2007. Appellant refused to mediate and instead brought a motion to extend the dates for dispositive motion, the trial date and the date for mediation. Appellant brought the motion on July 11, 2007, well after the last date for dispositive motions to be heard, which date was June 20, 2007. (Def.'s Motion to Continue Trial Date, Extend Dispositive Motion Deadline and Extend Mediation Deadline, dated July 11, 2007).

Appellant's motion to extend deadlines was denied by the Court. On August 3, 2007, the Honorable Nancy J. Logering denied Appellant's motion for continuance of a trial date, extension of the time for mediation and for extension of the time in which dispositive motions could be heard. (Resp. App. 27-28). Judge Logering also awarded Respondent \$1,500 in attorney fees. (See id).

On or about August 9, 2007, the parties entered a Stipulation for Voluntary dismissal without Prejudice regarding several causes of action in Respondent's Complaint. (Resp. App. 29-30). The parties agreed to dismiss without prejudice Respondent's defamation cause of action; tortious interference with prospective business advantage; the cause of action for intentional infliction of emotional distress; the cause of action for intentional interference with contract and the claim for breach of fiduciary duty. (See id.) On August 16, 2007, Respondent's counsel realized that the fiduciary duty cause of action was mistakenly included in the voluntary dismissal. Consequently, Respondent's counsel sent communication to the court asking that the dismissal not be

executed in its current form. (Resp. App. 33). The Court signed the Order on August 15, 2007. (Order re: Voluntary Dismissal of Claims, dated August 15, 2007). Appellant denied that the cause of action was mistakenly included.

On August 10, 2007, Appellant brought a Motion in Limine, Motion for Amended Findings and Motion for Summary Judgment or Dismissal. (Def.'s Motion in Limine, dated August 10, 2007). Appellant's motion in limine requested that Respondent not be allowed to testify to or present evidence on the claim of conversion. (See *id.*). Appellant also moved for summary judgment on the conversion claim and moved to vacate the attorney fee award granted in the August 3, 2007 Order. (See *id.*) Respondent responded to the Motion in Limine and asked the Court to deny the motion as it was a disguised attempt to get a summary judgment motion in front of the court, despite the Court's denial of an extension for dispositive motions. (Plaintiff's Response to Motion in Limine, dated August 20, 2007). The Court heard the parties argument on these issues on August 20, 2007. On September 14, 2007, the Honorable Nancy J. Logering, issued an order denying Appellant's motion for summary judgment, denying Appellant's Motion in Limine, and granting Respondent's motion to revive the claim for breach of fiduciary duty. (Resp. App. 34-36). Respondent's counsel was also ordered to serve and file an affidavit complying with Minn. Gen. R. Prac. 119.02 within thirty days of this Order. In granting the motion to revive the breach of fiduciary duty claim the Court found that:

The breach of fiduciary duty claim was originally pled in the compliant. Defendant had notice of said claim since she received service. Defendant had ample time to

prepare to defend said claim. The revival of the breach of fiduciary duty claim will not unduly prejudice Defendant.

(Resp. App. 35). Due to a conflict on Judge Logering's calendar, the case was reassigned to the Honorable John C. Hoffman and the trial rescheduled for September 24, 2007.

(Resp. App 44).

The trial was held on September 24-26, 2007, in Anoka County. The Honorable John C. Hoffman issued Findings of Fact, Conclusions of Law and an Order for Judgment on February 23, 2008. (Resp. App. 1-22). The Court found that, although Respondent had a protectable property interest, she failed to prove her intellectual property was novel. (Resp. App. 16-17). The Court found that Bender did breach her fiduciary duty to Swenson and awarded Swenson a judgment against Bender in the amount of \$60,000. Swenson was also awarded her costs and disbursements. The Court also affirmed the \$1,500 attorney fee award. (Resp. App. 22). Respondent's attorney filed the attorney fee affidavit on October 5, 2007. (Resp. App. 37-41). The Court affirmed the attorney fee award on October 15, 2007. (Resp. App. 42-43). On October 15, Appellant's attorney requested reconsideration of the attorney fee issue. (Resp. App. 45) Respondent's attorney responded to counsel's letter reiterating Appellant's attorney's actions that justified the attorney fee award. (Resp. App. 46-47) Judge Logering denied Appellant's request for reconsideration. (Resp. App.48). Appellant now appeals Judge Hoffman's entry of judgment and requests that the Court of Appeals reverse the district court's decision.

STANDARD OF REVIEW ON APPEAL

On appeal from a judgment where there has been no motion for a new trial, review by the court is limited to determining whether the evidence sustains the findings of fact and whether the findings support the conclusions of law and judgment. Gruenhagen v. Larson, 246 N.W.2d 565, 569 (Minn. 1976). The appellate court shall not set aside findings of fact, whether based on oral or documentary evidence, unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01. If a trial court's findings are reasonably supported by the evidence, they are not clearly erroneous and must be affirmed. Citizens State Bank of Hayfield v. Leth, 450 N.W.2d 923, 925 (Minn. Ct. App. 1990). An award of attorney fees is reviewed using an abuse of discretion standard. Blattner v. Forster, 322 N.W.2d 319, 321 (Minn. 1982). An appeal may be taken from an appealable order within sixty days of written notice of its filing. Minn. R. App. P. 104.01.

ARGUMENT

I. Bender Breached her Fiduciary Duty by Misappropriation of Respondent's Ideas and by Sabotaging Respondent's Dissertation Committees which Contributed to Respondent Failing to Finish Her Degree.

In the absence of a motion for a new trial, the areas of appellate review are “limited to a consideration of whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment.” Olson v. Mullen, 68 N.W.2d 640, 643 (Minn. 1955). Since Appellant did not move for a new trial, the Appellate Court lacks jurisdiction to review whether a professor or teacher owes a fiduciary duty to students in the state of Minnesota. The Court also lacks jurisdiction to review whether an independent reviewer of a PhD thesis owes a fiduciary duty to a student in the State of Minnesota. Finally, the Court also lacks jurisdiction to review whether the trial court erred in its assessment of damages to the Appellee. Therefore, the trial court's findings should be affirmed.

If the Court finds these issues reviewable, the record establishes a fiduciary relationship existed between Appellant and Appellee and that Appellant breached that duty.

A fiduciary relationship exists “when confidence is reposed on one side and there is resulting superiority and influence on the other.” Toombs v. Daniels, et al. 361 N.W.2d 801, 809 (Minn. 1985) (citing Stark v. Equitable Life Assur. Society, 285 N.W. 466, 470 (1939)). Whether a fiduciary duty exists is a question of fact. Id. Minnesota has also

recognized that the relations and duty involved in a fiduciary relationship need not be legal, but may be “moral, social, domestic, or merely personal.” See id. Even inviting confidence could be a legally sufficient basis for finding a fiduciary relationship. See id. While a relationship may not be fiduciary per se, the facts of the case might create such a relationship.

Fiduciary relationships are characterized by a unique degree of trust and confidence between parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. See Dunham v. Dunham, 528 A.2d 1123 (1987). Minnesota courts recognize that a person who stands in a fiduciary relationship has a duty to disclose material facts. See Vacinek v. First National Bank of Pine City, 416 N.W.2d 795, 799 (Minn. Ct. App. 1987). Although Minnesota courts have not classified the student-professor relationship as fiduciary per se, such a fiduciary relationship has not been foreclosed. A review of relevant case law shows that Minnesota courts have refrained from defining “fiduciary relationship” in precise detail or in such a manner as to exclude new situations.

Additionally, other jurisdictions have found such relationships to exist. For instance, in Johnson v. Schmitz, the United States District Court for the District of Connecticut stated that:

Given the collaborative nature of the relationship between a graduate student and a dissertation advisor who necessarily shares the same academic interests, the Court can envision a situation in which a graduate school, knowing the nature of this relationship, may assume a fiduciary duty to the student.

Johnson v. Schmitz, 119 F.Supp.2d. 90, 97-98 (D.Conn. 2000); See also Dunham v. Dunham, 528 A.2d 1123 (1987) (finding a fiduciary relationship could be found to exist between brothers where the younger brother continually placed trust and confidence in the older brother, as an attorney, for legal and non-legal advice). A Minnesota District Court has already found Bender to have breached her fiduciary duty to Respondent. (Resp. App. 20-21) The court based this finding on the fact that Respondent and Bender enjoyed a uniquely close relationship as professor and student. (Resp. App. 14, 20-21) Courts have recognized that the “relationship between students and those that teach them is built on a professional relationship of trust and confidence, rarely seen outside the academic community.” Schneider v. Plymouth State College, 744 A.2d 101, 105-06 (N.H. 1999). As a dissertation committee member, Appellant was in a position of power and authority over Respondent. It was reasonable for Respondent to place a high degree of trust and confidence in Appellant Bender. Their relationship was of a fiduciary nature.

Appellant Bender set herself up as Respondent’s ultimate confidant in this process. Appellant was chosen to serve on a committee whose only purpose was to assist Respondent. In fact, every faculty member who sat on her committee had only one purpose -- to assist Respondent. Respondent Swenson trusted the faculty to be honest and forthright in their process. She expected to be treated as any other student. She trusted that Appellant would use her knowledge and experience to smoothly guide Respondent

through the dissertation process. Respondent was specifically introduced to Appellant because of their similar dissertation and research interests. Respondent had no reason to believe she could not trust Appellant. She acted as the ultimate confidant, always seeming to have Respondent's best interests at heart.

Appellant encouraged Respondent to trust her in sharing her dissertation ideas. She berated other committee members in an effort to gain Respondent's trust. (Resp. App. 50-55)¹. While gaining Respondent's trust, Appellant was telling committee members not to trust Respondent and sabotaging the grading process. (Resp. App. 13). As a Capella faculty member and dissertation committee member, Appellant had a duty to represent Respondent's interests. The dissertation committee was created for no other purpose than to assist Respondent. As a member of the committee, Appellant was not entitled to act for her own benefit. Obviously, Appellant's sole motivation was personal gain through the stealing of Plaintiff's ideas. The District court found that the evidence reflected that Swenson relied heavily on Bender's knowledge and authority in refining her original thesis, reforming her doctoral committee, and in performing her research and writing. (Resp. App. at p. 13-14,19-21). Appellant breached her fiduciary duty by putting her own interest above her duty to help Plaintiff successfully complete her degree.

¹ The Academic Standards Committee Report and Grievance Committee Report were both trial exhibits in the trial court action.

Appellant also breached her duty when she misappropriated Respondent's ideas.

Appellant obviously believes there should be no consequence for her actions.

In fact, through discovery and deposition in Swenson v. Capella, Court File No. 27-CV-07-24917², the record establishes that during the second or Vogele Welch committee, Bender was advising Respondent that she could do a qualitative study despite the committee's chair's requests to keep the quantitative methodology. (Resp. App. 3, 49). Bender also advised Swenson to replace Dr. Garvey House as one of the committee members because he was a quantitative researcher and potentially could be an obstruction to doing a qualitative study. (Resp. App. 49) Never going through this process before and having no reason to doubt the advice, Plaintiff changed her methodology and replaced Dr. House with Chapman. This decision infuriated the committee chair and colored Respondent's entire dissertation process for the rest of her time at Capella. (Resp. App. 49).

A fiduciary duty claim includes causation as a necessary element. Padco, Inc. v. Kinney & Lange, 444 N.W.2d 889, 891 (Minn. Ct. App. 1980). A fiduciary duty claim alleges the same elements as a negligence claim. Id. Minnesota applies the substantial factor test for causation. George v. Estate of Baker, 724 N.W.2d 1, 10 (Minn. 2006). According to the law of negligence, which applies with equal force to fiduciary duty

² Smisek v. Commissioner of Public Safety, 400 N.W.2d 766 (Minn. Ct. Ap. 1987); Gustafson v. Cornelius Co., 724 F.2d 75 (8th Cir. 1983). Both cases stand for the proposition that courts can take judicial notice of another proceeding on appeal.

claims, an act is a direct or proximate cause of harm if the act were a substantial factor in the harm's occurrence. Id.

The Honorable John C. Hoffman held that:

The Court is astonished that Capella's Academic Standards Committee arrived at the conclusion that Bender did not sabotage Swenson's completion of her dissertation. The very letter Bender sent to Chair Jerry Halverson belies such a conclusion: it not only accuses Swenson of plagiarism, but goes so far as to recommend "expelling" her and warns that she is a "scary" person who could do further harm with a Capella degree. In light of this letter, the Court views the Committee's ultimate conclusion about Bender with great suspicion. It cannot help but wonder if the University did not fall short of finding that Bender had sabotaged Swenson's degree because it was worried about the prospect of litigation, which is also referenced by Bender's letter to Chair Halverson.

(Resp. App. 20-21). The Court went on to award Swenson \$60,000 as damages for Bender's breach of fiduciary duty. (Resp. App. 21). It is reasonable to attribute Respondent's failure to obtain her PhD degree to Appellant. There was sufficient evidence to show Respondent lost approximately \$60,000 because of Appellant's breach.

Appellant argues that she could not possibly have contributed in anyway to Respondent's lost degree because she was not on a dissertation committee after 2003. This is the exact opposite argument set forth by Capella University in Swenson v. Capella, Court File No. 27-CV-07-24917. In fact, Capella cites Appellant Bender's continued involvement in the dissertation process as one of the primary reasons Respondent failed. (Resp. App. 52-55). Respondent was heavily criticized and ultimately failed the dissertation process because Capella could not concretely determine whether

she wrote her own dissertation paper. (Resp. App. 51-53). Respondent testified to the fact that she continued to seek Appellant's editing skills well into 2004. Not until she discovered Appellant's breach and misappropriation of her ideas in early 2005 did she end their relationship. (Resp. App. 15). Consequently, contrary to Appellant's argument, she did not cease her involvement with Respondent's dissertation process in June 2003.

In fact, when Respondent appealed her failing grade and grieved Appellant's misappropriation of her ideas and inappropriate behavior during the dissertation process, Appellant wrote a letter to the committee chair "suggesting" Respondent's expulsion. (Resp. App. 13, 20-21).

Appellant misses the mark in her argument regarding guaranteeing Respondent's degree. (App. Brief at p. 10). Respondent never argued that Appellant was responsible for guaranteeing that she obtain her PhD degree. Rather, Appellant did owe Respondent a duty to act with integrity, honesty and in Respondent's best interests. Appellant's duty also included refraining from stealing Respondent's ideas and passing them off as her own. In some sort of twisted effort to support her misappropriation of Respondent's ideas, Appellant attempted to paint Respondent as a "scary" person who could not possibly be responsible for her dissertation paper. (Resp. App. 13).

Appellant also argues that her duty to Respondent could not have been any greater than the duty owed by other committee members. Again, Appellant fails to accurately reflect the actual situation. Appellant and Respondent were very close. Respondent

relied almost exclusively on appellant's advice and suggestions during her entire time at Capella. (Resp. App. 51-55). Appellant set herself up as the ultimate authority on the dissertation process and caused Respondent to distrust all other dissertation committee members. Appellant was absolutely in a position of power and authority over Respondent. There was an exceptionally high degree of trust and confidence between Respondent and Appellant. Respondent considered Appellant to have superior knowledge, skill and expertise regarding the dissertation process. Respondent only attempted to "get rid" of other committee members when Appellant suggested they should be removed. Appellant advised Respondent she could get rid of any member anytime she wanted to. (Resp. App. 3-4, 49). This was not truthful advice and was ultimately cited in the expulsion decision. Capella itself ultimately decided that Appellant acted inappropriately in her relationship with Respondent. (Resp. App. 49).

A Capella Grievance Committee found that Appellant acted in an unprofessional and unethical manner in her relationship with Swenson. (Resp. App. 13, 54-55). The Committee found that the parties' unusually close friendship and extracurricular professional interests impaired Appellant's ability to maintain the professional objectivity required of a faculty member serving on Swenson's dissertation committee. (Resp. App. 13, 51-55) The Academic Standards Committee further found that Appellant's negative comments about Respondent's dissertation committee contributed to her resistance to taking supervision from that committee. (Resp. App. 14, 52) The committee found that

between 2001 and 2004 Respondent “increasingly became dependent” on Appellant’s guidance. (See Id.)

In addition to the Bender related findings, the Committee made findings regarding Respondent’s work product. The Committee concluded that Respondent “evidenced a dependence on Dr. Bender’s editing of her proposal and draft dissertation to the degree that it is questionable how much Ms. Swenson is primarily responsible for these documents.” (Id). Factual evidence in Swenson v. Capella, further supports Judge Hoffman’s Findings of Fact and Conclusions of Law. So it seems Appellant is the only person of the opinion that her involvement in Respondent’s dissertation committee was not a contributing factor in Respondent’s ultimate failure.

The evidence before Judge Hoffman fully supports his finding of a fiduciary relationship and a breach of that duty. Appellant and Respondent shared a uniquely close relationship which Respondent heavily relied on during her entire tenure at Capella. Appellant’s fiduciary duty extended to refraining from stealing a student’s ideas and research and claiming them as her own. No other committee member committed this breach. Appellant’s sabotage of Respondent’s dissertation process and misappropriation of her ideas was a breach of her fiduciary duty and the district court should be affirmed on this issue.

II. The Trial Court Appropriately Awarded Attorney Fees Against Appellant for an Untimely, Frivolous Motion to Extend Deadlines

Minnesota Rules provides that if a paper is signed in violation of Minn. R. Civ. P. 11 i.e., without determining that the position advanced in the pleadings is sound, the court, upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. Minn. R. Civ. P. Rule 11; see also Mears Park Holding Corp. v. Morse/Diesel, Inc., 426 N.W.2d 214, 217-18 (Minn. Ct. App. 1988). The imposition or denial of sanctions of necessity involves a fact-intensive inquiry into the circumstances surrounding the activity alleged to be in violation of Minn. R. Civ. P. 11. The perspective of a district court is singular. See id. The trial judge is in the best position to review the factual circumstances and render an informed judgment as he is intimately involved with the case, the litigants, and the attorneys on a daily basis. Id. Deference must be given to a trial court's efforts to regulate the courtroom and perception of whether the litigation process has been abused.

An abuse of discretion standard leaves the factual inquiry and eventual determination as to whether a party has violated Rule 11 to the trial court. A discretionary standard of review for Rule 11 cases also corresponds with Minnesota's abuse of discretion standard for an award of attorney fees under Minn. Stat. § 549.21. What constitutes "reasonable expenses" and a "reasonable attorney's fee" within the context of

Minn. R. Civ. P. 11 must be considered in tandem with the rule's goals of deterrence, punishment, and compensation. In this respect, "reasonable" does not necessarily mean actual expenses. See id.

Minnesota Statutes § 549.21 provides that:

Upon motion of a party, the court in its discretion may award to that party costs, disbursements, reasonable attorney fees and witness fees if the party or attorney against whom costs, disbursements, reasonable attorney and witness fees are charged acted in bad faith; asserted a claim or defense knowing it to be frivolous; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the court. To qualify for an award under this section, a party shall give timely notice of intent to claim an award.

An award of attorney fees under this statute can only be upset upon a finding of abuse of discretion by the trial court. Blattner v. Forster, 322 N.W.2d 319, 321 (Minn. 1982).

Plaintiff commenced her action in April 2005. Respondent's attorneys noticed the deposition of Appellant Bender for August 9, 2005. (Notice of Taking Depo., dated July 25, 2005). The deposition was later moved to September 27, 2005. (First Amended Notice of Taking Depo., dated August 17, 2005) Respondent served an amended answer on September 17, 2005, in which an affirmative defense was alleged with respect to lack of subject matter and/or personal jurisdiction. (Amended Answer, dated September 17, 2005). In a cover letter to Respondent's attorney at the time, defendant's attorney indicated that he would not comply with any discovery in this matter until the issue of jurisdiction was resolved. Appellant subsequently moved the court for an order dismissing Respondent's complaint pursuant to Minn. R. Civ. P. 41.02 (1). On

September 29, 2006, the court issued an order denying Appellant's motion to dismiss. (Resp. App. 23-24) Pursuant to the parties request, the court stayed discovery until November 22, 2006, during which time the parties would attempt to resolve the matter. (See id.). The court also provided that if the matter were not resolved by November 22, 2006 the parties would submit informational statements and discovery would proceed forward. (See id.) The matter was not resolved. The parties then served informational statements.

On December 12, 2006, a Scheduling Order was duly filed in the above-entitled matter. (Scheduling Order, dated December 12, 2006). Pursuant to the Order, ADR was to be completed 160 days from the scheduling order date. Mediation was the designated ADR method. April 20, 2007 was to be the last day of discovery and June 20, 2007 was the last day on which a dispositive, or evidentiary motion could be heard. (See id.) Trial was set for August 20, 2007.

The Scheduling Order provided that it could be amended upon a motion for good cause shown. Any motion to extend any deadline contained in the Scheduling Order; however, had to be heard before the expiration of that deadline. Appellant's deposition was noticed for April 16, 2007. (Resp. App. 56-57) On April 13, 2007, at approximately 12:30 p.m., Respondent's attorney was informed by Appellant's attorney that Respondent Bender would not sit for her deposition. Respondent also refused to agree upon a mediator or a date for mediation as provided in the court's scheduling order. Respondent

then noticed a motion to compel discovery and mediation. (Plf's Motion to Compel Discovery and Mediation, dated May 1, 2007). The Motion was heard on May 14, 2007. Respondent requested that Appellant Bender be compelled to participate in a deposition and to comply with the scheduling order of the district court. The court filed an order on May 17, 2007, allowing Appellant's deposition to be taken via telephone and ordering the parties to engage in mediation on August 14, 2007. (Resp. App. 25-26) Appellant's counsel refused to engage in mediation on August 14, 2007, as ordered, and instead brought a motion to extend the dates for dispositive motion, the trial date and the date for mediation. Appellant brought this motion only six days prior to the set trial date.

Appellant's motion was especially egregious due to the fact that it was less than one week before trial and Appellant was still in possession of discovery documentation she testified to in her deposition but refused to produce. Appellant's counsel continuously refused to abide by the Scheduling Order. (Resp. App. 46-47). It took eleven months to take Appellant's deposition. Appellant refused to comply with discovery and gave incomplete discovery responses. Appellant refused to agree to a mediator and schedule mediation. (See *id.*) In a continued attempt to delay the process, Appellant brought a motion to extend deadlines.

Respondent's memorandum in opposition to Appellant's Motion to extend deadlines clearly set forth a request for attorney fees. (Plf's Memo in Opp. to Def.'s Motion, dated July 19, 2007). The reason for this request was set forth in the

memorandum. Appellant acted in bad faith in attempting to assert a frivolous claim to extend deadlines for the sole purpose of delaying the proceedings. Appellant's attorney gave no compelling reasons as to why he did not bring a dispositive motion within the allowed deadlines. His argument that Appellant was entitled to summary judgment was specious at best. More importantly, his arguments could have been brought within the deadlines set by the court. His frivolous delay tactic cost Respondent approximately \$2,184; however, the court awarded \$1,500 in attorney fees. The trial court did not abuse its discretion in awarding Respondent those attorney fees. In orders dated September 14, 2007 and October 3, 2007, the Honorable Nancy J. Logering, affirmed the attorney fee award. (Resp. App.34-36, 42). In the September 14, 2007 Order, Judge Logering instructed Plaintiff's counsel to submit an affidavit in accordance with Minn. Gen. R. Prac. 119.02, within thirty days of the Order. (Resp. App. 34-36).

Appellant's counsel continued to ask for reconsideration of the attorney fee issue well past the time limits for doing so. (Resp. App. 45). That request was denied. (Resp. App. 48) Appellant again asked that the award be vacated during the trial in this matter. The trial court affirmed the attorney fee award. Two separate district court judges, in no less than three separate motions, have considered the attorney fee award. The award was consistently affirmed. There was several examples of Appellant's counsel's acts of bad faith and delay during the lengthy litigation process. Accordingly, the award of attorney fees was not an abuse of discretion and should be affirmed.

III. Appellant was Not Prejudiced by the Reinstatement of the Fiduciary Duty Claim.

Minnesota Rule of Appellate Procedure 104.01 subdivision 1 states that an appeal may be taken “from an appealable order within 60 days after service by any party of written notice of its filing.” Minn. R. App. P. 104.01, subd. 1. Additionally, “an order is not appealable unless in effect it finally determines some positive legal right of the appellant relating to the action.” Wienzierl v. Lien, 209 N.W.2d 424, 424 (Minn. 1973). Appellant did not appeal the Order reinstating Respondent’s breach of fiduciary duty claim within sixty days after service of written notice of its filing. The time has now expired for this issue to be appealed. Furthermore, if the September 14, 2007 Order were not a final Order, then it is not appealable regardless of when the appeal is filed. See id.

If this Court determines the reinstatement of the breach of fiduciary duty claim is reviewable, the trial court’s reinstatement of a voluntarily dismissed cause of action should be reviewed under the abuse of discretion standard. This is the same standard of review used by the appellate court when reviewing a trial court’s decision whether or not to relieve a party from a judgment. See Dale Schultz v. M.C. Milam, 410 N.W.2d 845, 848 (Minn. Ct. App. 1987)(noting that Rule 60.02 relief is not limited to default judgments); see also Howard v. Frondell, 387 N.W.2d 205, 207-08 (Minn. Ct. App. 1986). An abuse of discretion standard leaves the factual inquiry and eventual determination as to whether an issue should be reinstated to the trial court. The trial court is in the best position to judge the prejudice to either party and credibility of argument on

either side. See Mears, (discussing trial court's position regarding credibility, evidence and whether the litigation process is being abused).

Mr. Hansen's egregious and disrespectful allegations regarding reinstatement of the fiduciary duty claim are quite disturbing. It is especially disheartening in light of the fact that Appellant was in no way prejudiced or inconvenienced by the reinstatement of this claim. The parties signed a voluntary dismissal without prejudice on or about August 9, 2007. (Resp. App. 29-30). The Court signed the order on August 15, 2007 dismissing all claims except conversion. (Order, dated August 15, 2007). Respondent's attorney immediately recognized he had mistakenly included the fiduciary duty claim. On August 16, 2007, Respondent's counsel sent a letter to the Court identifying his mistake and requesting that the order not be signed in its current form. (Resp. App. 33) The dismissal did not occur until August 15, 2007, well after the close of the discovery period and only five days before trial. Appellant had conducted discovery as if all claims remained for trial. There was nothing further as far as discovery or motions Appellant could have done after the dismissal or revival of the issue.

Appellant made a motion requesting that Respondent's counsel's request for reinstatement of the fiduciary duty issue be denied. The trial court determined that:

the breach of fiduciary duty claim was originally pled in the complaint. Defendant has had notice of said claim since she received service. Defendant has had time to prepare to defend said claim. The revival of the breach of fiduciary duty claim will not unduly prejudice Defendant.

(Resp. App. 34-36). The Court concluded that revival of the claim was warranted. (Id.)

The trial court was in the best position to determine the credibility of Respondent's attorney's argument regarding the mistaken dismissal of the fiduciary duty claim. Where there was no prejudice and no burden upon Appellant in revival of a claim there can be no abuse of discretion. There was no final determination on some legal right of Appellant in reinstating the issue. Consequently, the district court's decision should be affirmed.

IV. The Trial Court's Conversation Analysis is Sound and Should be Affirmed.

A party bringing an appeal must have standing, which has been interpreted to mean that the party must have been adversely affected by the judgment or order so that the parties will present a controversy to the Court of Appeals. See Twin Ports Convalescent, Inc. v. Minnesota State Board of Health, 257 N.W.2d 343, 346 (Minn. 1977). Appellant was not adversely affected by the trial court's judgment regarding whether a state common law claim for conversion of intellectual property in the absence of a contract exists in Minnesota. Nor was Appellant adversely affected regarding the issue of whether state common law intellectual property claims are pre-empted by Federal law because the trial court did not rule for Respondent on these issues. In fact, the trial court specifically stated it would not decide the preemption issue as the issue was not ripe in light of Respondent's failure to prove her idea was novel. (Resp. App. 17). Accordingly, these issues are not reviewable by the Court of Appeals.

Additionally, Minnesota Rules of Appellate Procedure 103.01(i) states that an appeal may be taken to the Court of Appeals “from an order which denies a motion for summary judgment if the trial court certifies that the question presented is important and doubtful.” Minn. R. App. P. 103.03(I). The trial court did not certify the question of whether there is Federal preemption of state common law intellectual property claims. Accordingly, the trial court’s denial of Appellant’s motion for summary judgment is not an appealable order. Should this Court determine the issues are reviewable, the trial court’s analysis is sound and should be affirmed on appeal.

In Minnesota, abstract ideas are not generally protectable property interests. In Tate v. Scanlon, the Court held that: “in order for an abstract idea to be the subject of an express or implied contract or to be otherwise protected by the law, it must be novel and concrete.” Tate v. Scanlon, 403 N.W.2d 666, 671 (Minn. Ct. App. 1987). The Tate decision is not completely contrary to the United States Supreme Court decision in Bonito Boats. In that case, the Supreme Court held that the federal patent scheme creates a limited opportunity to obtain a property right in an idea. See Bonito Boats, 489 U.S. 141, 149 (1989)(discussing Pennock v. Dialogue, 2 Pet. 1 (1829)). The Supreme Court has repeatedly recognized that not all state regulation of potentially patentable but unpatented subject matter is *ipso facto* pre-empted by the federal patent laws. See e.g. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979) (holding that State law is not displaced merely because the contract

relates to intellectual property which may or may not be patentable; the states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law). The Court's consistent analysis is that states cannot interfere with the enjoyment of an unpatented idea which has been freely disclosed by its author to the public at large.

See id.

Respondent did not "freely disclose" her ideas to the public at large. She included her ideas and research in a dissertation paper as part of the academic process. Respondent did not expect to need a patent for ideas presented in this limited and closed process. There is good argument why this is a limited area for which the state can offer protection to the author of the idea. This is an abstract idea and research that was submitted to a committee of three for the sole purpose of consideration of a grade. It was not intended for public disclosure and certainly was not intended to be misappropriated by a member of that dissertation committee. Accordingly, this appears to be a limited exception to the federal patent laws that could be appropriately protected by the trial court.

Similarly, the idea protected in Tate was not one that had been publicly disclosed. It was an idea for a system communicated to Scanlon intended to be further developed and then released as a new product. See Tate v. Scanlon, 403 N.W.2d 666 (Minn. Ct. App. 1987). Again, there was sufficient evidence to support the jury's determination that this was an idea that could be protected. Similarly in this case, Respondent did not have an idea that would otherwise remain unprotected as a matter of federal law but rather an

idea she had not yet submitted to the patent process when Appellant stole the ideas. Respondent was ultimately awarded a utility patent. (Resp. App. 15). The trial court made substantial findings of fact regarding Bender's misappropriation of ideas. After days of testimony and review of hundreds of documents, the trial court found sufficient evidence of Appellant's misappropriation; however, there was insufficient evidence to find Respondent's ideas novel. (Resp. App. p. 17). More importantly, contrary to Appellant's argument, the trial court did not determine that the ideas were conclusively free of federal preemption. In this case, the court determined the issue need not be reached since there was insufficient evidence that the idea was novel. Accordingly, it seems the court was correct in leaving the preemption issue for another day.

CONCLUSION

The district court's determination regarding breach of fiduciary duty was reasonably supported by the evidence. The evidence clearly established that Respondent relied almost exclusively upon Appellant during the dissertation process and this confidential relationship created a fiduciary duty. Appellant breached that duty on several occasions. Appellant used her position as Respondent's confidant to misappropriate her ideas for financial gain. She also used her power and authority to disrupt Respondent's dissertation committees which ultimately resulted in Respondent's expulsion from Capella University. The trial court's findings of fact and conclusions of law should be affirmed on this issue.

Regarding the attorney fee award, two separate district court judges have reviewed the \$1,500 award of attorney fees on at least three occasions. It was not an abuse of discretion to award those fees in light of Appellant and Appellant's counsel's bad faith delay tactics and continuous refusal to cooperate without court intervention. The attorney fee award was not an abuse of discretion and should be affirmed. Similarly, revival of the breach of fiduciary duty cause of action resulted in no prejudice and was not an abuse of discretion. There was no final determination of a legal right that even entitles Appellant to review this issue. Also, Appellant's time for appealing this issue, if such appeal is allowed, has past. Therefore, the trial court should be affirmed on this issue.

Finally, the district court's determination that Respondent held a protectable property interest is supported by the record and relevant case law. More importantly, Appellant was not adversely affected by this judgment and it is therefore not a proper subject for appeal. Accordingly, the district court's Order should be affirmed in its entirety.

Dated: July 10, 2008

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