

Nos. A07-584, A07-788

State of Minnesota
In Supreme Court

Brian Kidwell,

Appellant,

v.

Sybaritic, Inc.,

Respondent.

BRIEF AND APPENDIX OF RESPONDENT SYBARITIC, INC.

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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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STATEMENT OF LEGAL ISSUES

1. To establish a prima facie whistleblower claim, the employee must make a report for purposes of exposing an illegality. A report made in the course of one's job duties is not protected. Attorney Kidwell gave advice in an e-mail on legal matters about which he was hired to provide to Sybaritic, his client.

A) Did Kidwell engage in statutorily protected conduct?

The trial court held "yes," but the court of appeals held that Kidwell's e-mail did not constitute protected conduct under the Act because he wrote and sent the e-mail in fulfillment of his duties as Sybaritic's attorney.

B) Did the trial court commit prejudicial error 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. The court of appeals did not need to reach this issue but noted that the instruction "should not receive the benefit of any doubt."

Apposite authority:

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

Michaelson v. Minnesota Mining & Manufacturing Co. 474 N.W.2d 174 (Minn. App. 1991);

Skare v. Extendicare Health Servs., Inc., 515 F.3d 836 (8th Cir. 2008); and Minn. Stat. § 645.16

2. This Court has cautioned against wrongful-discharge actions by that do "violence to the integrity of the attorney-client relationship." Kidwell, like most in-house counsel, provided legal advice on a wide variety of matters, and Sybaritic, as the client, needed to be able to trust that advice and to terminate Kidwell, without fear of being sued, when it no longer could do so. Do whistleblower actions that arise out of the very advice in-house counsel was hired to provide do violence to the integrity of that attorney-client relationship?

The trial court and the court of appeals held that employee/attorneys are not barred per se from pursuing a claim against a former employer because attorneys can now reveal privileged communications to support this type of claim. The lower courts did not, however, consider whether such actions implicate, and do violence to, other aspects of the attorney-client relationship.

Apposite authority:

Nordling v. Northern States Power, 478 N.W.2d 498 (Minn. 1991);
Minn. R. Prof. Conduct 1.1, 1.3, 1.7(a)(2), 1.13, and 2.1.

3. 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." The Minnesota Court of Appeals never reached this issue.

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)

STATEMENT OF THE CASE

In this wrongful-discharge case, appellant Brian Kidwell, who was respondent 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. The matters Kidwell discussed in that e-mail were things he learned about as Sybaritic's attorney and that either he had previously brought to Sybaritic's attention or related to on-going legal advice that he was providing to Sybaritic. 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.34-36). Sybaritic counterclaimed, alleging breach of fiduciary duty and loyalty and defamation. (A.42-47).

Sybaritic moved for summary judgment, contending in part that Kidwell had not alleged facts sufficient to sustain a prima facie whistleblower action. (A.51-56). Kidwell moved for summary judgment on Sybaritic's counterclaims. (*Id.*). The Fourth Judicial District Court, the Hon. Kevin S. Burke, denied these motions. (*Id.*).

The case was tried before a Hennepin County jury on September 25, 2006. (A.57-59). 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.

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.57-59). 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.57-58). The jury found, though, that Sybaritic suffered no damages as a result of Kidwell's breach of fiduciary duty. (A.58).

Sybaritic brought motions for judgment as a matter of law [JAML], disgorgement and, in the alternative, a new trial. (A.60). Kidwell moved for attorneys fees and costs

under Minn. Stat. § 181.935. (A.61). 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.61-76). 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.62, R.A.21). Sybaritic appealed from both judgments and from the court's order denying its post-trial motions. (R.A.1-4).

The Minnesota Court of Appeals reversed the judgment in favor of Kidwell, holding that while Kidwell, as an in-house attorney, is not barred per se from pursuing a claim against his former employer under the Whistleblower Act, he nevertheless did not engage in conduct protected by the Act when he sent communication to his client in fulfillment of his job duties as the employer's attorney. (A. 18, 25).

Kidwell then petitioned asking this court, asking it to review the court of appeals' job-duty holding. (A.1). In addition to granting Kidwell's petition, this Court also granted Sybaritic's request for cross review of three issues 1) whether retaliatory-discharge claims that do violence to the attorney-client relationship should be barred as a matter of law; 2) whether an attorney who breaches a fiduciary duty is entitled to any unearned compensation following that breach and 3) whether the trial court's job-duty jury-instruction was prejudicial error requiring a new trial. (R.A. 51).

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 ongoing, 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, and 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

In between the time that Kidwell passed the bar in 1983 and his termination from Sybaritic in 2005, Kidwell worked as an attorney at five different places, including working from his home for a time. (T.172-76, 320-21, 330, 333, 335, 343-344). He was fired from one of those jobs and asked to leave another. (T.335, 343-44).

In July 2004, Sybaritic hired Kidwell as its general counsel whose job was to provide legal counsel to Sybaritic and its owner, Steve Daffer. (T.181, 351). Sybaritic is a Minnesota corporation that manufactures and sells equipment and products to spa and medical-spa industries. (T.472-474).

III. Kickback Scheme

At Daffer's request, Kidwell's first task as in-house counsel was 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 and advised Sybaritic that three salespersons were indeed getting kickbacks and had previously lied about it, these three were placed on probation and required to pay back the money they had received. (T.184-85, 357).

IV. Mohammed Hagar

In 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. (T.658). He is not licensed to practice medicine in the United States. (T.486). Sybaritic hired Hagar to provide training to those using Sybaritic's equipment, to do research on the company's products, write product literature and publish studies about Sybaritic's products. (T. 190-91, 660, 663, 486-487, 490). 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.104-107). 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.99-103).

After a meeting with management and Hagar, Kidwell's legal recommendations were implemented. (T.301, 491, 662, 665, 746).

V. Sybaritic West, L.L.C.

Kidwell was also asked to prepare legal documents that would make Sybaritic's California branch sales office a separate 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 advised his client to take this step. (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, Kidwell noticed that the company's website announced the opening of the Sybaritic San Francisco "branch office," which would have been incorrect under the new structure. (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).

VI. 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). In October 2004, Kidwell hired attorney Tom Atmore to handle the NeoQi litigation, but Kidwell, as inside counsel, 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 have to be produced, let alone 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.

VII. 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; R.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 didn't deny this, but testified only that he did not recall. (T.380).

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; R.A.78-79). Kidwell's comment came during one of several tense telephone conversations between Kidwell and Daffer while Kidwell was in Estonia about legal 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. (R.A.78-79). Carlson assured Daffer that he had given Kidwell the same disk that Atmore had. (T.704; R.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. (R.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 and to delete the duplicates, making sure that he preserved all other information, which he did. (T.697-98; R.A.79).

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; R.A.79). Sybaritic ultimately returned a duplicate-free disk to Atmore, which contained all of the original e-mails. (T.727). There was never any proof at trial of any evidence tampering or any actual plan to do so.

VIII. 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). Immediately after this conversation, Kidwell called George Mertikas and told him, “[Y]ou’ve got 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 testified 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; R.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. (R.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; R.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.

IX. 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 show anyone Atmore's letter.

On Sunday afternoon, however, Kidwell went to the office 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).

X. The Difficult-Duty E-mail.

That Sunday evening, April 24, Kidwell composed and sent an e-mail that he entitled "a difficult duty." (A.74-75). 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 and to his father, who is not a Sybaritic employee. (T.240, 243, 271-72, 726; A.74).

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.74) (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 comments about the kickback scheme, Mohammed Hagar and the California tax issue. (A.74-75). Kidwell next provided his legal opinion that the NeoQi e-mails weaken or perhaps destroy Sybaritic’s claims. (A.74).

Kidwell also warned that the law prohibits “any attempt to corruptly alter, destroy or conceal” relevant evidence, accusing Sybaritic of “obstruction of justice” and insinuated that the company failed to obey a court order. (A.74-75). 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 legal 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.75). 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; A.95). 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 to his father. (T.271-72, 411-12).

When he arrived at work the next day, 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 legal matters in detail, and Kidwell believed that Daffer and Chesley were taking his concerns seriously. (T.248-49, 621, 745-46; A.95). 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 legal research to determine if the allegations that he leveled were actually true. (A.95). Kidwell admits this is the case. (T.369-70. 373-74, 399, 418-19).

Kidwell also met with management about the legal advice that he previously had provided and Kidwell learned that all of his concerns about these old matters were resolved. (T. 422, 616-17, 746-47).

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, but he never checked to see if the e-mails that had supposedly concerned him were still there. (T.418-19). 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. (R.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 legal recommendation either. (T.726).

There were subsequent meetings that day about Kidwell's e-mail, and ultimately Kidwell seemed satisfied at the end of the day. (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 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).

XI. Kidwell's Termination

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 work that his client had requested of him. (T.590-91, 622, 727, 256). During that same meeting, the group also discussed some unpaid invoices from a Texas law firm — something else that Kidwell was supposed to have, but had not, taken care of. (T.254,622-23).

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 upcoming 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; R.A.88). Although Kidwell told Chesley that he would stop into the office next week and update the report, he never did. (T.628; T.437-38; R.A.88).

In that summary, Kidwell did not reiterate any of the concerns that he raised in the difficult-duty e-mail. (R.A.89-95). Instead, Kidwell acknowledged that NeoQi's attorney had conducted only minimal discovery, that 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. (R.A.90-91; T.438-441, 618-19, 642).

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). During that search, Chesley noticed that Kidwell had sent the difficult-duty e-mail to his father. (T.632). Chesley decided then to terminate Kidwell for that breach 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. (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 it 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 * * * ." (R.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. (R.A.97-98).

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 the 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). Statutory construction is also a question of law subject to de novo review. *Wilson v. Comm'r of Revenue*, 619 N.W.2d 194, 197-98 (Minn. 2000).

Here the question is whether Kidwell, Sybaritic's in-house counsel, made a statutorily protected report under Minnesota's Whistleblower Act when he sent an e-mail to Sybaritic's management team containing the very kind of wide-ranging legal advice that Kidwell was hired to provide to the company. This Court has held that to fall within the protections of the statute, the report must be made for purposes of exposing an illegality. *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 202 (Minn. 2000). Guided by that directive, the Minnesota Court of Appeals held that when Kidwell sent the e-mail, he was fulfilling the responsibilities of his position as in-house counsel and that consequently he did not make a protected report — i.e., one made for purposes of exposing an illegality. In other words, he was expected to anticipate potential legal problems and propose solutions and that is exactly what he did in sending this e-mail. At no time did Kidwell step outside his role as confidential legal advisor to come within the scope of the whistleblower statute. Thus, the court of appeals properly found that the trial court erred

by denying Sybaritic's post-trial motion for judgment as a matter of law. Additionally, this Court should find that the trial court improperly allowed Kidwell to recover damages even though it determined, as a matter of law, that Kidwell had 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. Because of its ruling on the whistleblower claim, the court of appeals never addressed this issue. This Court should find that in addition to Kidwell's failure to prove a whistleblower claim, he is precluded as a matter of law from recovering the damages that the jury awarded.

II. Because Kidwell's Disclosure Fell Within His Job Duty as Sybaritic's In-House Counsel, His Communication to His Client Was Not Conduct Protected Under Minnesota's Whistleblower Act.

A. This Court should find that a communication made within the scope of one's job duty is not made for purposes of exposing an illegality.

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) (2008). While section 181.932 contains a clearly stated good-faith requirement, that term is undefined. When "the words of a law are not explicit, the legislature's intent may be ascertained by referring to the occasion and necessity for the law, the mischief to be remedied, the object to be attained, and the consequences of a particular interpretation." *Matter of Welfare of D.L.K.*, 381 N.W.2d 435, 437 (Minn. 1986) (citing Minn. Stat. § 645.16). It is always the court's "goal in statutory

interpretation * * * to give effect to the intention of the legislature in drafting the statute.” *Education MN-Chisholm v. ISD No. 695*, 662 N.W.2d 139, 143 (Minn. 2003); *see also* Minn. Stat. § 645.16 (“The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature”).

This Court has already determined that to carry out the intent of the Whistleblower Act, the “good-faith” requirement calls for an inquiry into the purpose for which the report was made. *Obst*, 614 N.W.2d at 202. Thus, the “central question” to be determined is whether the report was made for purposes of exposing an illegality. *Id.* In this regard, the task before the Court here is quite different than it was in *Anderson-Johanningmeier v. Mid-Minn. Women’s Ctr., Inc.*, 637 N.W.2d 270, 275 (Minn. 2002), the case on which Kidwell heavily relies. Unlike here and in *Obst*, where this Court is and was concerned with interpreting an undefined term that actually exists in the statute, the appellant in the *Anderson-Johanningmeier* case asked the Court to “look beyond its text to search for an unexpressed public policy requirement.” *Id.* at 276. Thus, the Court’s determination that there was no stated public-policy requirement in the Act, and its refusal to read-in that prerequisite, was well justified. *Id.* Here, though, the Court has already determined that the good-faith constraint means that the report at issue must be made for purposes of exposing an illegality and, therefore, the only question is not whether the Court can interpret this open-ended term — it already has — but whether one is acting for purposes of exposing an illegality when the report at issue contains exactly the kind of information that the reporter is obligated to provide in carrying out his job duties. Whether a report was made in good faith is typically a question of fact, but courts

may decide as a matter of law that certain conduct does not constitute a report for purposes of the Whistleblower Act. *Fjelsta v. Zogg Dermatology, PLC*, 488 F.3d 804, 809 (8th Cir. 2007) (citing *Cokley v. City of Otsego*, 623 N.W.2d 625, 630 (Minn. App. 2001), *review denied* (Minn. May 15, 2002)).

Because this Court has not directly spoken on the job-duty issue, the court of appeals relied on its own precedent and that from the federal courts to determine as a matter of law that an employee cannot maintain an action under the Act “if the alleged report is a communication that was made to fulfill the employee’s job responsibilities.” *Kidwell v. Sybaritic*, 749 N.W.2d 855, 865 (Minn. App. 2008) (citing *Grundtner v. Univ. of Minn.* 730 N.W.2d 323, 330 (Minn. App. 2007); *Gee v. Minnesota State Colleges & Univ.*, 700 N.W.2d 548, 556 (Minn. App. 2005); *Michaelson v. Minnesota Mining & Manufacturing Co.* 474 N.W.2d 174, 180 (Minn. App. 1991) *aff’d mem.* 479 N.W.2d 58 (Minn. 1992)).

While the court of appeals in each of these three relied-on decisions determined that plaintiffs had not engaged in protected conduct for several independent reasons, one of those cited grounds was that the information that the reporter provided was of the very same kind that plaintiffs were obligated to provide to the defendant employers. *See, e.g., Michaelson*, 474 N.W.2d at 180 (holding that Michaelson “did not ‘report’ conduct, but rather gave his supervisor feedback, based upon his legal analysis, regarding proper proposed business decisions”); *Grundtner*, 730 N.W.2d at 330 (affirming judgment in favor of employer in part because “[i]t was [Grundtner’s] job * * * to ensure that the university did not engage in improper procurement methods”); and *Gee*, 700 N.W.2d at

556 (affirming judgment in favor of employer in part because plaintiff “made the inquiries to fulfill her responsibilities as a faculty advisor to the student organization”).

Kidwell and the dissenting opinion below contend that these decisions have no persuasive value on the job-duty issue because the plaintiffs in these cases did not report illegal conduct. The court of appeals, though, found this to be “a distinction without a difference.” *Kidwell*, 749 N.W.2d at 867. Using *Michaelson* and its attorney/plaintiff as an example, the lower court noted that “the operative facts” in both *Michaelson* and here “are indistinguishable; in each case, an in-house attorney provided legal advice to an employer and the employer took adverse employment action (or was alleged to have done so) based on the advice.” *Id.* In other words, the lower court recognized that any other result would necessarily cause all advice by in-house counsel — and, indeed, all compliance communications — to be protected “reports.” *Id.*

This is consistent with the reasoning used by Minnesota federal courts. Applying section 181.932, the Eighth Circuit held that even when the employee implicates or directly relays violations of the law to the employer, those employees are not a statutory whistleblower if it is that employee’s duty “to ensure compliance with applicable laws and to expose unlawful behavior internally.” *Skare v. Extencicare Health Servs., Inc.*, 515 F.3d 836 (8th Cir. 2008); *see also Freeman v. Ace Telephone Ass’n.*, 404 F. Supp.2d 1127 (D. Minn. 2005) *aff’d* 467 F.3d 695 (8th Cir. 2006). Thus, a nursing director, whose duties required her to make sure a nursing home complied with laws designed to protect vulnerable patients and to report internally any violations of those laws, could not receive protection under the Act for carrying out those responsibilities. *See Skare*, 515

F.3d at 838, 841.

Likewise, a Minnesota federal district court held that a chief executive officer, who had a fiduciary duty to report financial irregularities to his board of directors, was not making a protected report when he brought notice of suspected violations of law to the attention of the board. *Freeman*, 404 F.Supp.2d at 1141. “[T]o rule otherwise would be to open the door for all compliance discussions to be viewed as ‘reports’ that implicate the Act.” *Id.* See also *Haddox v. Ohio Atty. Gen.*, 2008 WL 3918077 *8-10 (Ohio App. 10 Dist. 2008) (adopting rationale in *Kidwell*, *Skare*, and *Freeman* and holding that deputy assistant attorney general did not make report protected by Ohio whistleblower act when carrying out functions of job) (R.A.47-48).

This same rationale has been adopted by courts applying various federal whistleblower laws, even though these statutes likewise do not explicitly exclude employees who are performing their job duties. See, e.g., *Sasse v. U. S. D.O.L.*, 409 F.3d 773 (6th Cir. 2005) (finding that employee who had fiduciary duty to investigate and prosecute environmental crimes was not protected under Clean Air Act, Clean Water Act, or Solid Waste Disposal Act when he carried out those responsibilities); *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1351-53 (Fed Cir. 2001) (“A law enforcement officer whose duties include the investigation of crime by government employees and reporting the results of an assigned investigation to his immediate supervisor is the ‘quintessential example’ of conduct that is not protected by the WPA[Whistleblower Protection Act]”); *Langer v. Dep’t. of Treasury*, 265 F.3d 1259, 1267 (Fed. Cir. 2001) (holding that assistant district counsel with IRS was not protected under WPA when

reporting an imbalance in number of Caucasians and African-Americans being investigated by IRS Criminal Investigation Division using grand jury procedures because he was merely carrying out required job responsibilities); *Willis v. Dept. of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (holding that employee with USDA who reported seven farms not in compliance with department's conservation plans was not protected under WPA because he was just doing his job).

Federal courts have likewise held that the anti-retaliation provision of the Federal Claims Act [FCA] — allowing recovery for retaliation resulting from reporting false claims against the government — will not apply when the alleged illegal activities that plaintiff reports are exactly the type of disclosures that plaintiff is required to undertake in fulfillment of his/her job duties. *See, e.g., Yuhasz v. Brush Wllman, Inc.*, 341 F.3d 559, 567 (6th Cir. 2003) (affirming dismissal of FCA claim by employee who claimed that manufacturer falsely certified that alloys used in aerospace and military applications met applicable standards because concerns raised were entirely within scope of his job duties); *Brandon v. Anesthesia & Pain Mgmt. Asscs., LTD.*, 277 F.3d 936, 945 (7th Cir. 2002) (affirming dismissal of FCA claim by anesthesiologist who reported Medicare fraud by other doctors because one of plaintiff's jobs was to ensure that billing practices complied with Medicare rules); *United States ex rel Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1523 (10th Cir. 1996) (affirming dismissal of FCA claim by one whose job entailed investigation of Medicaid fraud and noting that “the monitoring and reporting activities described in plaintiff's complaint were exactly those activities plaintiff was required to undertake in fulfillment of her job duties”).

The federal courts discussed above have ruled this way despite the fact the federal whistleblower statutes do not contain a “good faith” requirement, a constraint that, as this Court has explicitly found, demands consideration of the reporter’s purpose before whistleblower protection will apply. *Obst*, 614 N.W.2d at 202.

And while the employees in the federal cases cited above had compliance responsibilities equal in importance to the public as the persons listed in the amicus brief, those federal courts have nevertheless determined that extending protection in these situations “would be inconsistent with the WPA’s recognition of the importance of fostering the performance of normal work obligations and subjecting employees to normal, non-retaliatory discipline.” *Hoffman*, 263 F. 3d at 1352 (citations omitted). As the *Hoffman* court further explained, “[a]ny discipline [imposed after a job-duty disclosure] would be presumptively illegal under the WPA. We find it highly unlikely that Congress intended this result.” *Id.* at 1352 n.4.

Kidwell and the amicus party argue, however, that the protections of the Whistleblower Act will be eviscerated if this Court were to hold that an employee must be acting outside the scope of his employment to seek whistleblower protection. But neither the caselaw nor Sybaritic’s argument sweep that broadly. By limiting extension of the Act to employees performing their normal job duties, the Court would not expose the public to a heightened risk of corporate illegality as Kidwell suggests. To the contrary, it ensures that the risk will actually be less because it will encourage employers to hire employees, such as in-house counsel, who are readily available to advise about what the law does or does not permit. As has always been the case, if the employee steps

outside that advisory role by reporting potentially illegal conduct externally or by refusing to further a potentially illegal purpose, whistleblower protection may be implicated. *Skare*, 515 F.3d at 839 (noting that Skare had never filed any complaints with governmental agencies or employer's compliance hotline); *Hoffman*, 263 F.3d at 1354 (holding that employee who reports wrongdoing outside the normal channels is a disclosure protected by WPA).

Kidwell also warns that employers will attempt to circumvent the Act by re-writing every employee's job description to include a reporting requirement. This apprehension is unnecessary if this Court were to adopt the "practical inquiry" approach set out the United States Supreme Court in *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961 (2006). In *Garcetti*, a Los Angeles County deputy district attorney wrote two disposition memoranda recommending dismissal of charges in a case in which his research revealed that a search-warrant affidavit contained misrepresentations. *Id.* at 1956. As calendar deputy, Ceballos "exercised supervisory responsibilities over other lawyers," and investigating pending cases and writing this kind of disposition memo was an integral part of his job. *Id.* at 1960 (noting that "Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do"). Ceballos subsequently testified for the defense about the substance of his memorandums after his supervisors rejected his recommendation that to dismiss the case. *Id.* at 1956. When Ceballos was subsequently transferred to a different position at another courthouse, he brought a section 1983 claim, alleging that he was subject to an adverse employment action in retaliation for engaging in speech protected by the First Amendment.

In holding that Ceballos' memo was not protected speech, the Court noted that the "controlling factor" was that Ceballos' "expressions were made pursuant to his duties as a calendar deputy" and the fact that "his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance." *Id.* at 1959-60. The Court rejected the dissent's concern that employers would "restrict employees' rights by creating excessively broad job descriptions[,]" instructing instead that "[t]he proper inquiry is a practical one." *Id.* at 1961-62. That inquiry calls for courts to focus on the employee's actual job duties, rather than on inflated written job descriptions:

Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 1962. The *Garcetti* decision reflects the Court's common-sense realization that government offices could not function if every employment decision became a constitutional matter.

This Court should likewise adopt a practical approach. By limiting the job-duty exception to disclosures that fall squarely within the reporter's intrinsic employment functions, the Court can prevent employers from shielding themselves against the Whistleblower Act by issuing personnel manuals that include generalized and broad directives to report fraud or dishonest acts — as in the public-employees' example proffered by the amicus. (Amicus Br. at 8). Limiting the Act's reach to disclosures that fall outside the employee's regular job duties, on the other hand, will permit employers,

and the public indirectly, to benefit by employing indispensable legal advisors and compliance officers without those persons becoming un-disposable.

In summary, this Court should adopt the analysis applied by the federal courts and the lower court and hold that “when an employee performs the duties of his or her job, the employee acts not with the purpose of exposing an illegality but, rather only with the purpose of promoting the employer’s interests.” *Kidwell*, 749 N.W.2d at 866.

B. *Kidwell’s difficult-duty e-mail fulfilled an essential function of his job as in-house counsel and, thus, was not a report protected by the Whistleblower Act.*

As Sybaritic’s general counsel, Kidwell, like the federal employees discussed above, had both an advisory and a compliance role in the company. As the firm’s lawyer, he was expected to provide information and analysis on what the law requires or prohibits and to give compliance advice with respect to those laws and regulations. (T.181, 204, 377-78, 187-89, 196, 198). In fact, Kidwell testified that his duties as general counsel required him to work with Sybaritic’s management to identify, prevent and stop all illegal or potentially illegal conduct of the company. (T.242). That is exactly what Kidwell did in the difficult-duty e-mail. Like the plaintiff/attorney in *Michaelson*, Kidwell “gave his employer feedback based on legal analysis.” 474 N.W.2d at 180. Kidwell never stepped outside that advisory role by reporting his allegations to the authorities.

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). 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 because he was Sybaritic's attorney, he had access to information about the NeoQi claims. (T.376-77). And Kidwell 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.74).

In fact, Kidwell has conceded on several occasions that he sent the e-mail to Sybaritic's management to fulfill his duties as the company's attorney. (T.242 – "as the person responsible for the legal affairs of the company, that's what I had to do"); (Resp.'s Ct of App. Br. at 6 – "In broad terms, Kidwell felt that he was responsible for Sybaritic's legal affairs. As a result, when Kidwell learned about the improprieties he reported them to members of Sybaritic's management who were directly involved in the relevant issues, usually via written memoranda, e-mail or direct conversation") (citations omitted); (T.377-78 – conceding that advising one's client about its active litigation is one of the tasks that lawyers are expected to perform); (T.394 – testifying that he directed outside counsel to send any concerns about spoliation to him because it was his job to handle this matter as Sybaritic's general counsel). Regardless of the harshness or accuracy of Kidwell's assessments contained in the difficult-duty e-mail, that communication is, at its core, legal advice given by counsel to his client. In other words, the very thing Kidwell

was paid to provide. Who else but one's attorney can and should advise about the legal obligation to preserve relevant evidence regardless of whether there has been a discovery request for those documents? That Kidwell cited statutes and rules supporting his legal opinion only further demonstrates that he was doing the job that lawyers do. In fact, the court of appeals aptly noted that if the kind of advice that Kidwell provided to his client constitutes a report under the Act, "an in-house attorney might engage in protected activity every day because attorneys routinely work with laws and rules and routinely consider violations and suspected violations of laws and rules." *Kidwell*, 749 N.W.2d at 866.

Kidwell's only response to this is that because he drafted the e-mail at home and after regular business hours, this communication did not fall within his normal job duties. But as any lawyer knows, being an attorney is not a nine-to-five job. One does not stop being another's attorney after the normal work day and after one leaves the office's physical perimeters. If that were true, attorneys could avoid any disciplinary action simply by waiting to violate ethical rules until after the close of business day. In any event, Kidwell testified that he did legal work for Sybaritic while at home and on vacation. (T.263). Regardless of the hour when, or the physical location where, Kidwell drafted the legal analysis and advice contained in the e-mail, he was nevertheless supplying the service for which he was professionally trained and hired to provide. As such, the court of appeals properly determined that Kidwell was carrying out the very job for which he was hired when he sent the difficult-duty e-mail to Sybaritic's management team and that he, therefore, did not make a report for purposes of exposing an illegality.

C. *The court of appeals' holding does not create a de facto prohibition of all wrongful-discharge claims by in-house counsel.*

Kidwell also contends that while the court of appeals held that in-house attorneys are not barred per se from asserting a claim under the Whistleblower Act, its holding creates a de facto prohibition for corporate counsel. The court of appeals' holding, however, does not go that far. Nor is Sybaritic asking this Court to ban all retaliatory-discharge actions by corporate counsel. True, the lower court did recognize that attorneys are governed by rules of professional conduct that place demands on in-house counsel that may be different and greater than other types of employees and that typically will result in more expansive job-duty scope — i.e., the duty “to be competent, to be diligent, to use good judgment, to render candid advice, and to avoid conflicts of interest.” *Kidwell*, 749 at 866 (citing Minn. R. Prof. Conduct 1.1, 1.3, 1.7(a)(2), 2.1). But it is those very same professional obligations that make inside counsel so valuable.

Permitting an attorney to support a retaliatory-discharge claim on the basis of the advice he/she provided to a client would effectively eliminate the right of termination by a client who no longer trusts the quality or value of the advice that its counsel is providing for whatever reason. That is especially true here where the client followed that advice, and the attorney took no steps beyond giving that advice. Because Kidwell never stepped out of his role as Sybaritic's legal advisor, the court of appeals properly determined that he was not a whistleblower because he sent the e-mail “in fulfillment of the duties of the position of employment.” *Kidwell*, 749 N.W.2d at 867.

In this regard, the rule set out by the court of appeals is consistent with the ethical duties of an attorney who has an organization as a client. Minn. R. Prof. Conduct 1.13.

Rule 1.13(b) & (c), for example, requires in-house counsel to report internally any suspected violations of the law before disclosing confidential information to outside authorities, thus fulfilling the duty of candor and confidentiality. It is only after the client either “insists upon or fails to address in a timely and appropriate manner an action, or refusal to act, that is clearly a violation of the law” that the attorney can then disclose information to others. Minn. R. Prof. Conduct 1.13(c). In other words, the ethics rules have already contemplated a situation in which the attorney may need to forsake the role of confidential legal advisor and thereby act outside the scope of that attorney’s job duty. And while it is true that the Whistleblower Act does not require employees to make a report to an outside authority to receive protection under the Act, the unique nature of in-house counsel may demand that the attorney do so to make a report for purposes of exposing an illegality. Thus, Kidwell’s complaint that this is so fails to recognize that attorneys have a different role when employed by a client than most any other type of employee. That role comes with certain privileges, but it is also carries certain obligations that do not permit the sharing of confidential information except as a last resort. In-house counsel who reach that point will be able to support a whistleblower claim (assuming they meet the other prima facie requirements) because, at that juncture, they would then be making a report for purposes of exposing an illegality.

In any event, Kidwell stayed well within his role as Sybaritic’s attorney when he sent the difficult-duty e-mail to the company’s management team. In fact, and as the court of appeals found, much of the information contained in the e-mail — the kickback scheme as well as the-unauthorized-practice-of-practice-of-medicine and the tax-invasion

allegations — had to do with legal advice that he had given to the company some time ago and that Sybaritic had already acted on after receiving that advice from Kidwell, its lawyer. When Kidwell previously advised the company about these three matters, he was not making a report for purposes of exposing an illegality any more than he was doing so in the difficult-duty e-mail. And although the court of appeals found that one of the topics in the e-mail was an on-going concern that Kidwell had about pending litigation in which he was playing an active role for Sybaritic, the type of information that Kidwell provided in the e-mail — i.e., what is discoverable, what electronic data must be preserved, what the federal rules of procedure and contempt statutes require, and what the consequences for not following the law are — is exactly the kind of advice that attorneys give, especially in today’s world of complicated e-discovery issues.¹

¹ Because Kidwell never went outside the scope of his employment — i.e., he never did anything other than reiterate or expand on legal advice that he had already provided — several of the cases on which Kidwell relies are inapposite. For example, Kidwell never reported any conduct that he suspected was illegal to an outside regulatory agency [*see, e.g., Crews v. Buckman Lab. Int’l, Inc.*, 78 S.W.3d 852, 856 (Tenn. 2002) (where in-house counsel terminated after reporting that her superior had not completed licensing requirements)]; he was not attempting to cooperate with any outside investigation of the client’s alleged wrongdoing [*see, e.g., Heckman v. Zurich Holding Co. of Am.*, 242 F.R.D. 606 (D. Kan. 2007) (where in-house counsel was attempting to cooperate with outside investigation of insurer’s alleged compliance violations)]; and he was not terminated for refusing to engage in illegal activity that obviously fell outside his job duties. *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1033 (Mont. 2000) (where attorney claims he was ordered to prepare fraudulent patent application); *see also Parker v. M & T Chemicals, Inc.*, 566 A.2d 215, 220 (N.J. Super. 1989) (where attorney claimed he was discharged after refusing to join scheme to cheat competitor); *O’Brien v. Stolt-Nielsen Transp. Group*, 838 A.2d 1076, 1083 (Conn. Super. 2003) (where attorney sued for constructive discharge, alleging that he would have been criminally liable had he continued working for employer that was engaging in criminal conduct); and *GTE Prod. Corp. v. Stewart*, 653 N.E.2d 161, 166-67 (Mass. 1995) (allowing wrongful-discharge claim by in-house counsel in only “narrow and carefully delineated circumstances” such as when attorney is required to violate duties imposed by statute or the professional-

Nor can it be ignored that after spending the entire next day with his client addressing the issues that he raised in the difficult-duty e-mail, Kidwell never determined that any destruction of evidence had occurred. Nor did he uncover any actual plan to do so. Thus, the need to do anything other than advise his client of the laws and consequences for violating them never came to pass. For example:

- Kidwell learned that he had all of the NeoQi e-mails on the laptop he had with him in Estonia, and they were identified with a desktop icon labeled “Estonia e-mails.” (T.691, 702-03; A.78).
- Kidwell testified that while he was in Estonia, he did *not* have “sufficient evidence to know that [Sybaritic’s employees] were destroying documents.” (T.394). Yet he did nothing after returning and before writing the difficult-duty e-mail to determine whether Sybaritic had in fact violated, or was about to violate, a federal or state law. (T.399). Indeed, Kidwell admitted that he does not know if any e-mails were ever destroyed. (T.394).
- Hard copies of all of the e-mails were printed and available for review. Yet Kidwell did not ask to see those hard copies when he returned from Estonia on Friday April 22 or at any time before writing the April 24 e-mail, even though he was shown that very stack of printed e-mails in the meeting following the difficult-duty e-mail. (T.399, 679; R.A.79; A.94). Moreover, he realized when he got to his office on April 25 that he had still had the NeoQi e-mails on his desktop e-mail account. (T.418).
- Despite being Sybaritic’s attorney, Kidwell could not point to a single order or discovery request that would have required Sybaritic to turn these allegedly damaging e-mails over to opposing counsel. (T.426-31).
- After meeting about his difficult-duty e-mail, Kidwell never again recommended that Sybaritic produce the so-called damaging e-mails. In fact and only two weeks after the e-mail, Kidwell advised Sybaritic that *because* there had been no discovery requests for the supposedly damaging e-mails, opposing counsel would never “see” these e-mails, even though Kidwell’s difficult-duty e-mail accused Sybaritic of violating federal discovery rules for not producing them. Nor did he advise his client to amend or dismiss any of its causes of action in the NeoQi litigation, despite

conduct rules).

the fact that the difficult-duty e-mail accuses Sybaritic of making false allegations in its pleadings. (R.A.89-95).

In short, not only does the evidence conclusively demonstrate that Kidwell did not actually discover an illegality, but it also shows that at no time did he step outside his role as legal advisor. In other words, he did exactly what Rule 1.13 required him to do — bring concerns about possible illegalities to the attention of the client. Since he did not make a report for purposes of exposing an illegality, the court of appeals properly found that the district court erred by denying Sybaritic's post-trial motion for judgment as a matter of law.

III. Alternatively, This Court Should Find That Whistleblower Claims By In-House Counsel That “Do Violence to the Attorney-Client Relationship” Are Barred As a Matter of Law.

The lower court declined to find that in-house counsel are barred per se from bringing a whistleblower claim, noting that there is no “clear, binding authority” for doing so. *Kidwell*, 749 N.W.2d at 864. This Court has, however, cautioned against actions by the employee/attorney that do “violence to the integrity of the attorney-client relationship” and noted that a “retaliatory discharge claim is more likely to implicate the attorney-client relationship * * * .” *Nordling v. Northern States Power*, 478 N.W.2d 498, 502 (Minn. 1991). But because this Court in *Nordling* affirmed dismissal of the whistleblower claim on other grounds, it never directly determined whether attorneys should be barred per se from asserting this statutory cause of action. *Id.* at 504.

In *Nordling*, however, the Court 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.* There, 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*).

Months before the *Nordling* decision, the court of appeals affirmed summary judgment in favor of the employer in a retaliatory-discharge action brought by in-house counsel, stating:

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, 474 N.W.2d at 178. Despite this “clear language,” the court of appeals, ultimately disposed of the whistleblower claim on other grounds. *Kidwell*, 749 N.W.2d at 862 (referring to *Michaelson*, 474 N.W.2d at 178).

The lower court here declined to hold that either of these two decisions requires a finding that in-house counsel are barred per se from asserting a whistleblower claim

because both were based on the idea that such actions “subvert the attorney-client privilege” [*Id.* (quoting *Michaelson*, 474 N.W.2d at 178)], a premise that the court found “may no longer be valid because of a 2005 amendment to the Minnesota Rules of Professional Conduct” that now permit a lawyer to reveal confidential information when necessary to establish a claim. *Kidwell*, 749 N.W.2d at 863 (citing Minn. R. Prof. Conduct 1.6(b)). While it is true that the professional-responsibility rules now allow attorneys to reveal privileged communications to support a claim against a client, the duties that every attorney, including in-house counsel, owe to clients encompass much more than confidentiality. The court of appeals below delineated some of an “attorney’s most basic duties to his or her client — to be competent, to be diligent, to use good judgment, to render candid advice, and to avoid conflicts of interest. *Id.* at 866 (citing Minn. R. Prof. Conduct 1.1, 1.3, 1.7(a)(2), 2.1). Indeed, this Court pointed out in *Nordling* that these duties lie at the heart of the fiduciary relationship between the employer-client and the employee-attorney:

A client retains a lawyer to give sound advice even when that advice may not be what the client wants to hear. The knowledgeable client understands and, it is hoped, values in-house counsel’s independence, this quality of personal autonomy which is inherent in any profession that is truly a profession, and which is uniquely essential to the legal profession.

Nordling, 478 N.W.2d at 501. In other words, the attorney-client relationship involves much more than the giving and receiving of confidential information. Thus, the question now squarely before this Court is whether whistleblower actions that arise out of the very advice in-house counsel was hired to provide implicate, and do violence to, the integrity of that attorney-client relationship and should thus be barred. Sybaritic urges this Court

to find that such actions are barred as a matter of law.

In-house counsel typically are expected to, and in fact do, provide advice on a wide variety of matters. That was the case with Kidwell. A client needs to be able to trust that advice and to be free to follow or reject it after taking into account a variety of business factors. When that trust and confidence in the legal advice received is lost, the client must retain the inviolate right to terminate that relationship without fear that it will be sued. Otherwise, the risk of employing in-house counsel will outweigh any benefit the employer may get by having ready access to legal advice. What client would ever want to seek advice from in-house counsel if that advice — whether followed or not — could be used to make that attorney immune from termination? That is exactly what this Court reflected on in *Nordling*:

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, 478 N.W.2d at 501 (emphasis added).

Even consumer advocate Ralph Nadar, who is not known for discouraging litigation, acknowledged the important public-policy role that in-house counsel fill and why they must be treated differently from other types of employees:

* * * [I]f in-house counsel is going to have the credibility of being a full member of an independent profession, with independent professional responsibilities, then they have to approximate the ethical duties that are imposed on outside counsel. Otherwise, they will be treated as mere employees or business people and their professional role will be severely denigrated. If they fall to this status, they will not be able to support their corporate employer with adequate and independent advice.

S. Hackett and R. Nader, "Interview with Ralph Nadar," *ACCA Docket*, Fall 1994, pp.50.

This view recognizes that having in-house counsel has the added benefit of having a professional, who has his/her own ethical responsibilities, as part of the business team making decisions about the business's practice. But that benefit is directly proportional to the degree to which the corporate client can expect counsel to conform to his/her professional ethics. As Justice Cardozo noted in his oft-quoted statement: "Membership in the bar is a privilege burdened with conditions." *In re Rouss*, 116 N.E.2d 782, 783 (N.Y. 1917).

If employed counsel are not treated differently than other employees, and if they are permitted to support a claim based on the very advice that they were in a unique position to provide, then not only will the corporate employer suffer, but so will society. And that is because businesses will be reluctant to employ persons who, for all practical purposes, become exempt from termination by carrying out the functions for which they were hired, even though these are the very people who are in the best position to prevent corporate wrongdoing — whether that be intentional or unintentional.

Thus, while this Court has identified some types of wrongful-discharge cases that in-house counsel can bring without doing violence to the integrity of the attorney-client relationship — i.e., breach-of-contract claim for alleged failure to comply with progressive disciplinary steps — it should now clearly state that this action does not fall within that narrow category. As such, this Court should find that Kidwell's action was barred and that the lower courts erred when they failed to find that retaliatory-discharge claims by in-house counsel that do violence to the integrity of the attorney-client

relationship are barred as a matter of law.

IV. Sybaritic is Entitled to a New Trial Because of the Court's Jury Instructions Were Erroneous and Prejudicial.

Because the court of appeals held that Kidwell's e-mail did not constitute protected conduct under the Whistleblower Act as a matter of law, it did not need to resolve Sybaritic's argument that the trial court improperly instructed the jury. The court of appeals noted, however, that "the instructions should not receive the benefit of any doubt." *Kidwell*, 749 N.W.2d at 867 n.2.

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.

(R.A.39; T.113-20). That, as has been shown above, is the law. *See Obst*, 614 N.W.2d at 202. *See also 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.70) (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 the law requires 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. *Morlock*, 650 N.W.2d at 159.

In fact, the court of appeals commented that Kidwell's counsel "exploited the absence of a meaningful instruction on issue" by presenting the following "single, very simple question to the jury:"

'you are charged with deciding whether Brian Kidwell was terminated because of the difficult duty e-mail or whether he was terminated for legitimate reasons.'

Id. The lower court likewise noted that because of the trial court's ruling, "there was no instruction that the jury could have used to conclude that, under the whistleblower act, the difficult-duty e-mail was not an unlawful reason for termination." *Id.*

The only remedy for this error is to reverse the trial court and to remand the case for a new trial. *Id.* This is especially so if the Court agrees with Kidwell and determines that the job-duty issue is for the factfinder to determine, rather than an issue of law for the court to determine.

V. Once the Trial Court Found That Kidwell Breached his Fiduciary Duty, He Was Not Entitled to Recover Unearned Compensation as a Matter of Law.²

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.³ 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

² This was an issue that the court of appeals never addressed in light of its holding that Kidwell's e-mail did not constitute protected conduct under the Whistleblower Act.

³ 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.

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* (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 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*)). Unlike money damages that “are awarded as compensation for actual loss or injury, * * * a fee forfeiture is awarded to vindicate a client’s ‘absolute right’ to loyalty, regardless of actual damages sustained.” *Id.* (citing *Perl v. St. Paul Fire and Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984) (*Perl II*)). In fact, this Court has held that “[a] fee forfeiture is thus analogous to punitive or nominal damage.” *Commercial Assocs.*, 712 N.W.2d at 778-79 (citing *Gilchrist v. Perl*, 387 N.W.2d 412, 416 (Minn. 1986) (*Perl III*)). 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 then the client, in turn, paid the attorney *before* discovering the breach. *See, e.g., Perl III*, 387 N.W.2d 412. In *Perl III*, for example, this 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 this 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 (noting that “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 — i.e., the return of everything Sybaritic had previously paid to its general counsel. And 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. The only discretion that the trial court has after finding that an attorney breached his fiduciary duty is whether to award total or scaled fee forfeiture. *Commercial Assocs.*, 712 N.W.2d at 779 (citing *Perl III*, 387 N.W.2d at 417). Once the court here directed verdict on the breach-of-fiduciary-duty claim, it was required as a matter of law to also direct a verdict that Kidwell was not entitled to any further compensation. Its failure to do so was an error as a matter of law, entitling Sybaritic to judgment as a matter of law.

Kidwell contended below, however, that because the jury determined that Sybaritic would not have terminated him but for the fact that he sent the difficult-duty e-mail — special-verdict question number 5 — the jury in effect decided that Kidwell was not terminated because he breached his fiduciary duty and that he is therefore entitled to unearned compensation following that breach. But that argument presupposes that it was proper for the court in the first place to allow the jury to determine that Kidwell was entitled to any compensation once it determined that Kidwell breached his fiduciary duty. A breach of a fiduciary duty is not a causally based tort, and thus the jury’s findings that Kidwell would not have been terminated if he had not engaged in protected conduct is

irrelevant once the court found as a matter of law that Kidwell breached his fiduciary duty to Sybaritic.

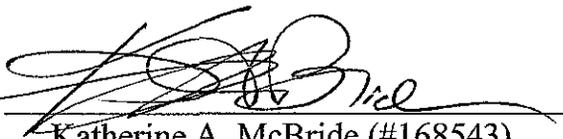
Nor should Kidwell be able to seek refuge in the Whistleblower Act when he simultaneously breached his duty of loyalty and confidentiality by sending that same e-mail to a nonemployee. This Court should follow the Fifth Circuit and find that any betrayal of a client's confidences that breaches the ethical duties of the attorney places that conduct outside the protection of federal employment/retaliation laws. *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 376-77 (5th Cir. 1998). In *Douglas*, the court held that although in-house counsel's conduct could fairly be characterized as protected under Title VII, she was 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. 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 by finding that Kidwell was entitled to recovery in spite of his breach.

CONCLUSION

Because Kidwell failed to prove that his e-mail was a report for purposes of exposing an illegality, the court of appeals properly determined that Kidwell did not engage in conduct protected by the Whistleblower Act. In the alternative, Sybaritic is entitled to JAML because Kidwell is not entitled to damages once he breached his fiduciary duty. In the alternative, Sybaritic is entitled to a new trial because it was prejudiced by the court's improper jury instructions.

Respectfully submitted,

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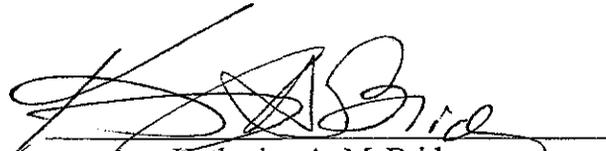
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CERTIFICATE OF COMPLIANCE

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