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When is an Attorney's Breach of Fiduciary Duty in Missouri Not Legal Malpractice?

*Klemme v. Best*¹

I. INTRODUCTION

Within the last thirty years, Missouri plaintiffs and courts have broadened liability exposure for attorneys to allow causes of action for fraud, breach of contract, libel, breach of fiduciary duty, constructive fraud, loss of consortium, and other causes of action in tort.² This diverse array of claims has generated confusion about when attorney misconduct constitutes legal malpractice and when it does not.³ In 1995, the Missouri Supreme Court addressed this issue with respect to one cause of action, breach of an attorney's fiduciary duty, in *Donahue v. Shughart, Thomson & Kilroy, P.C.*⁴ In *Donahue*, the court said that when breach of fiduciary duty was the result of an attorney's negligent performance of professional services, the breach was solely a claim for legal malpractice.⁵ The holding in *Donahue* led some courts to conclude that breach of fiduciary duty was merely a claim for legal malpractice.⁶

In *Klemme v. Best*, the Missouri Supreme Court confronted misinterpretations of its *Donahue* holding.⁷ The court stated that a breach of fiduciary duty, *independent* of any legal malpractice, was actionable as a separate tort.⁸ The *Klemme* court pushed apart the separate causes of action by defining legal malpractice as founded on an attorney's duty to exercise due care⁹ and defining fiduciary duty as *additional* obligations of undivided loyalty and confidentiality.¹⁰ In *Klemme*, the supreme court thus established that, in Missouri, even if an attorney breaches his fiduciary obligations towards a client, that attorney may not have been negligent.

1. 941 S.W.2d 493 (Mo. 1997).

2. Francis M. Hanna & William C. Ruggiero, *Legal Malpractice Litigation in Missouri*, 48 J. MO. B. 97, 97 (1992).

3. See *infra* Section III.

4. 900 S.W.2d 624 (Mo. 1995).

5. *Id.*

6. *Williams v. Preman*, 911 S.W.2d 288 (Mo. Ct. App. 1995); *Klemme v. Best*, No. WD51503, 1996 WL 93540 (Mo. Ct. App. Mar. 5, 1996).

7. *Klemme*, 941 S.W.2d at 496.

8. *Id.*

9. *Id.* at 495. The court includes an attorney's duty to honor express contract commitments in the second element of malpractice.

10. *Id.*

II. FACTS AND HOLDING

Police officer Byron Klemme (Klemme) sued Robert Best (Best), an attorney who was hired to defend the City of Columbia,¹¹ Klemme, and six other police officers¹² in a 42 U.S.C. § 1983 action filed by the parents of Kimberly Linzie. Linzie was a nineteen-year-old girl who was shot and killed by Columbia police in July 1985.¹³ Prior to settlement of the Section 1983 suit, the Linzies filed a motion to dismiss Klemme as a defendant because the facts of the case did not support a claim against him.¹⁴ Klemme subsequently brought a claim for malicious prosecution in the Circuit Court of Cole County against Linzie's parents and, in an amended petition, against Best for breach of fiduciary duty and constructive fraud.¹⁵

Klemme alleged that when Best was retained by the city's self-insured municipal association (Missouri Intergovernmental Risk Management Association, or "MIRMA") to represent the city in the Section 1983 suit, he assumed representation of all defendants in the Linzie litigation.¹⁶ Klemme's petition alleged that an official investigation had revealed that Klemme was not present at the time of the Linzie shooting and that Best knew Klemme was not involved.¹⁷ The petition further alleged that when opposing counsel presented a draft copy of the Section 1983 complaint naming Klemme as a defendant, Best failed to assert that Klemme was not present at the time of the shooting.¹⁸ Klemme alleged that because Best did tell the Linzies' counsel that another police officer, Otto Earnhart, was not involved in the shooting, Earnhart was eliminated as a defendant in the final complaint.¹⁹ Klemme alleged that Best breached his fiduciary duty to Klemme because Best's failure to eliminate him as a defendant was deliberate and intentional and placed the interests of the City of Columbia and MIRMA above those of Klemme.²⁰

Best and his firm, Watson & Marshall, L.C., filed a motion to dismiss Klemme's claim, contending that Klemme's petition for breach of fiduciary duty and constructive fraud failed to state a cause of action²¹ and that such claims

11. *Id.* at 495.

12. *Klemme v. Best*, 941 S.W.2d 493 (Mo. 1997).

13. *Klemme*, 941 S.W.2d at 494-95.

14. *Id.* at 495.

15. *Id.*

16. *Klemme v. Best*, No. WD51053, 1996 WL 93540, at *1 (Mo. Ct. App. Mar. 5, 1996).

17. *Id.*

18. *Klemme*, 941 S.W.2d at 495.

19. *Klemme*, 1996 WL 93540, at *1.

20. *Id.*

21. *Id.* at *2.

were barred by the statute of limitations.²² In stating its reasons for dismissing Best and Watson & Marshall from Klemme's petition, the trial court said, "[P]laintiff has failed to allege facts which, if true, would make a submissible case against these defendants under any recognized theory of Missouri law."²³ The court also found that the factual allegations in Klemme's petition showed that, on their face, the claims against Best and Watson & Marshall were barred by the applicable statute of limitations.²⁴

Klemme appealed dismissal of his claim to the Missouri Court of Appeals, Western District.²⁵ That court concluded that Klemme had failed to state a cause of action for either breach of fiduciary duty or constructive fraud because *Donahue* and a case based on the holding in *Donahue, Williams v. Preman*,²⁶ had rejected these as separate torts in a suit for damages against an attorney.²⁷ Applying *Donahue* in *Williams v. Preman*, the court stated, "an attorney's breach of duty to a client during the course of representation of the client is legal malpractice, not breach of fiduciary duty as a separate tort."²⁸ The appellate court found that Klemme failed to state a cause of action for either breach of fiduciary duty or constructive fraud but did not reach whether Klemme had failed to state a cause of action for legal malpractice because the court concluded this claim was barred by the applicable statute of limitations.²⁹ After the opinion by the appellate court, the Missouri Supreme Court accepted transfer.³⁰

The Missouri Supreme Court affirmed the judgment of the district court because the applicable statute of limitations barred Klemme's claim.³¹ The court disagreed, however, with the determinations of both lower courts that Klemme had failed to state a cause of action.³² The court stated, "Klemme has alleged facts that constitute the tort of breach of fiduciary duty or constructive fraud against his attorney."³³ Labeling the district court's interpretation of *Donahue* as incorrect,³⁴ the supreme court stated that clients can sue their attorneys for

22. MO. REV. STAT. § 516.120 (1994).

23. *Klemme*, 941 S.W.2d 493, 495 (Mo. 1997).

24. MO. REV. STAT. § 516.120 (1994). *See infra* notes 155-61 and accompanying text.

25. *Klemme*, 1996 WL 93540, at *1.

26. 911 S.W.2d 288 (Mo. Ct. App. 1995).

27. *Klemme*, 1996 WL 93540, at *4.

28. *Klemme*, 1996 WL 93540, at *3 (citing *Williams*, 911 S.W.2d at 301).

29. MO. REV. STAT. § 516.020(4) (1994); *Klemme*, 1996 WL 93450, at *4. *See infra* notes 135-45 and accompanying text.

30. MO. CONST. art. V, § 10; Mo. Sup. Ct. R. 83.03; *Klemme v. Best*, 941 S.W.2d 493, 494 (Mo. 1997).

31. *Klemme*, 941 S.W.2d at 497.

32. *Id.* at 496.

33. *Id.*

34. *Id.*

torts other than legal malpractice.³⁵ The court's holding can be expressed as establishing two guidelines: (1) when the alleged breach can be characterized as both a breach of the standard of care (legal malpractice based on negligence) and a breach of a fiduciary obligation (constructive fraud), then the sole claim is legal malpractice; and (2) when the alleged breach is characterized as a breach of fiduciary duty, independent of legal malpractice, the separate claim of breach of fiduciary duty is actionable as a separate tort.³⁶

III. LEGAL BACKGROUND

Historically, the line in Missouri between legal malpractice and breach of fiduciary duty as causes of action has been blurred. Some courts and scholars have described the claims as distinct while others have classified breach of fiduciary duty as a form of legal malpractice.³⁷

A. Legal Malpractice

In Missouri, the four elements of a legal malpractice action are: (1) an attorney-client relationship existed; (2) the defendant acted negligently or in breach of contract; (3) such acts were the proximate cause of the plaintiff's damages; and (4) but for the defendant's conduct, the plaintiff would have been successful in prosecution of the underlying claim.³⁸

Definition of the first element, the attorney-client relationship, is well settled. This relationship is satisfied when a client engages counsel³⁹ through a formal or informal contract and an undertaking is implied, or is created by compensation of a third party, dual representation, or volunteering.⁴⁰ Missouri courts have both narrowly and broadly construed this relationship. In *Rose v. Summers*, for example, the Eastern District Court of Appeals refused to extend the attorney-client relationship to individual limited partners in a limited partnership because the partnership, not individual partners, had hired the attorney.⁴¹ In *Donahue*, however, the Missouri Supreme Court brought the state in line with current trends for third party beneficiary liability⁴² by extending the

35. *Id.*

36. *Id.*

37. Hanna, *supra* note 2, at 98.

38. *Donahue v. Shughart*, Thomson & Kilroy, P.C., 900 S.W.2d 624, 626 (Mo. 1995); *Boatright v. Shaw*, 804 S.W.2d 795, 796 (Mo. Ct. App. 1990).

39. *Rose v. Summers*, Compton, Wells & Hamburg, P.C., 887 S.W.2d 683, 685 (Mo. Ct. App. 1994).

40. See 1 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7.2, at 491-93 (4th ed. 1996).

41. 1 *Id.*

42. Daniel J. Reed, *Professional Liability Update*, 51 J. MO. B. 177, 177 (1995) (explaining that the court was inconsistent with current trend).

attorney-client relationship to intended beneficiaries of attempted testamentary transfers.⁴³ The court established a six-factor balancing test to determine when the legal duty of an attorney to a non-client exists.⁴⁴

The second element of legal malpractice, negligence by the attorney, is not as well settled in Missouri because courts broadly define legal negligence and often include breach of fiduciary duties within the definition of negligence. In *Cain v. Hershewe*, the Southern District Court of Appeals resorted to a dictionary to define legal negligence as "any professional misconduct or unreasonable lack of skill or fidelity in professional and fiduciary duties by an attorney."⁴⁵ In *Cooper v. Simon*, the Western District Court of Appeals stated that, in representing a client, an attorney "impliedly represented to his client that he will exhibit the skill and diligence ordinarily possessed and employed by well-informed members of the legal profession."⁴⁶ Courts frequently look to Rule 4 of the Missouri Rules of Professional Conduct⁴⁷ for guidance in determining the duty an attorney owes a client. The court in *Greening v. Klamen*, however, held that breach of the Rules of Professional Conduct, alone, did not form a basis for a cause of action in legal malpractice.⁴⁸ Except in cases in which an attorney admits he or she was negligent and that damages occurred as a result of the admitted negligence, legal expert testimony is necessary to prove the standard of care in a legal malpractice case.⁴⁹

43. "The legal profession will not be unduly burdened by being required to act competently toward identifiable persons that a client specifically intends to benefit when such persons have no other viable remedy and where such persons are not in an adversarial relationship to the client." *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. 1995).

44. The six factors are: (1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiff; (2) the foreseeability of the harm to the plaintiff as a result of the attorney's negligence; (3) the degree of certainty that the plaintiff will suffer injury from the attorney's misconduct; (4) the closeness of the connection between the attorney's conduct and the injury; (5) the policy of preventing future harm; and (6) the burden of the profession of recognizing liability under the circumstances. *Id.*

45. 760 S.W.2d 146, 149 (Mo. Ct. App. 1988) (citing BLACK'S LAW DICTIONARY 864 (5th ed. 1979)).

46. 719 S.W.2d 463, 464 (Mo. Ct. App. 1986).

47. MO. SUP. CT. R. 4 (1997). See Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."). See also Rule 1.4(a) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."); Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

48. 652 S.W.2d 730, 734 (Mo. Ct. App. 1983).

49. *Bross v. Denny*, 791 S.W.2d 416, 421 (Mo. Ct. App. 1990); *Cooper v. Simon*, 719 S.W.2d 463, 464-65 (Mo. Ct. App. 1986).

The third element, proximate cause, is critical in establishing legal malpractice. "The plaintiff, of course, must show a sufficient causal connection between the wrongful act and the alleged damages in order to be entitled to submit the alleged damage to the jury."⁵⁰ In *Lange v. Marshall*, for example, the appellate court reversed judgment for plaintiff on her suit for attorney malpractice resulting from a divorce settlement because she failed to establish any damages caused by her attorney's alleged malpractice.⁵¹ The plaintiff claimed that when the attorney jointly represented the plaintiff and her husband in negotiating a property settlement, he was negligent in failing to advise her of her marital and property rights.⁵² She claimed to have incurred extra expense in hiring a second attorney to achieve the property settlement she considered adequate.⁵³ The court found that the plaintiff had failed to show proximate cause because, even if the attorney had done what the plaintiff alleged he should have, the plaintiff failed to establish that she would not have incurred the expenses she did in achieving her final settlement.⁵⁴

The fourth element of legal malpractice is most often proven by establishing the legal viability of the plaintiff's underlying claim, the "case within the case."⁵⁵ Before a plaintiff can recover, he or she must prove that the original action had merit and would have been successful but for the attorney's negligence.⁵⁶ In *Bross v. Denny*, the plaintiff had to plead and prove that her underlying claim for a portion of her husband's military retirement benefits in a divorce settlement would have been successful if her attorney had not negligently failed to anticipate passage of pending federal legislation.⁵⁷ Plaintiff's expert attorney witnesses testified that passage of the Uniformed Services Former Spouses' Protection Act (USFSPA),⁵⁸ effective February 1, 1983, had entitled plaintiff to a portion of her husband's pension benefits because her divorce settlement was not final until March 4, 1983.⁵⁹ The trial court concluded that plaintiff had proven that she would have prevailed in her divorce settlement if the attorney had not been negligent. She succeeded in proving the legal validity of her "case within a case."⁶⁰

50. *Williams v. Preman*, 911 S.W.2d 288, 295 (Mo. Ct. App. 1995). See also *Cain v. Hersheve*, 760 S.W.2d 146, 149 (Mo. Ct. App. 1988) ("To recover for legal malpractice, a plaintiff must establish a lawyer's negligence, some loss or injury, and a causal connection between the negligence and the loss.").

51. 622 S.W.2d 237, 239 (Mo. Ct. App. 1981).

52. *Id.* at 238.

53. *Id.* at 239.

54. *Id.*

55. *Hanna*, *supra* note 2, at 98.

56. *Boatright v. Shaw*, 804 S.W.2d 795, 796 (Mo. Ct. App. 1990).

57. 791 S.W.2d 416, 421 (Mo. Ct. App. 1990).

58. 10 U.S.C.A. § 1408 (West 1983).

59. *Bross*, 791 S.W.2d at 418-19.

60. *Id.* at 421.

The requirement to establish the "case within a case," which arises in both civil and criminal cases, may offer the best defense available to an attorney charged with malpractice. If the attorney can establish that the claimant would not have been successful on the underlying claim, no matter how flagrant the attorney's negligence or wrong may have been, recovery may be denied.⁶¹ A defendant attorney, however, cannot offer the mere existence of a settlement in a civil suit as evidence that the underlying claim would have been unsuccessful but for the attorney's negligence.⁶² As the court in *Williams v. Preman* concluded, a settlement does not inevitably defeat the claim for damages in a malpractice suit.⁶³ In this case, Williams hired an attorney, Preman, to represent him in a bankruptcy.⁶⁴ When a creditor alleged that Williams had intentionally concealed assets and filed an objection to discharge, Williams hired a new attorney and settled with the creditor.⁶⁵ Williams then brought suit against Preman, alleging legal malpractice and breach of fiduciary duty, and claimed damages, including additional attorney fees and expenses.⁶⁶ Although the court did not find that Williams had made a submissible case on causation as to the inclusion of the settlement in the damages he claimed, the court did not rule out that an adequate showing of a justified settlement could be passed on to a defendant.⁶⁷

B. Breach of Fiduciary Duty

Five elements are necessary to establish the existence of a fiduciary duty in Missouri: (1) one party must be subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) the dominant party must possess or manage the subservient person's business, land, monies, or other things of value; (3) the subservient party must surrender independence to the dominant party; (4) the dominant party must habitually manipulate the actions of the subservient party; and (5) the subservient party must place trust and confidence in the dominant party.⁶⁸ Among relationships held to be fiduciary relationships are those between trustees and beneficiaries, guardians and their wards, agents and principals, and attorneys and clients.⁶⁹

61. *Brown v. Adams*, 715 S.W.2d 940 (Mo. Ct. App. 1986).

62. *Williams v. Preman*, 911 S.W.2d 288, 298 (Mo. Ct. App. 1995).

63. *Id.*

64. *Id.* at 292.

65. *Id.* at 293.

66. *Id.* at 294.

67. *Id.*

68. *Chmielecki v. City Prod. Corp.*, 660 S.W.2d 275, 294 (Mo. Ct. App. 1983).

69. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. b (1959).

A 1950 Missouri Supreme Court case, *Gardine v. Cottey*, recognized that an attorney has a fiduciary relationship with a client and established the parallel between breach of fiduciary duty and constructive fraud.⁷⁰ The *Gardine* court found that an attorney must represent, advise, and protect a client's interests to the exclusion of others' or be held liable for perpetrating a fraud upon the client.⁷¹ In *Gardine*, the attorney represented both parties in a divorce action.⁷² The attorney persuaded the wife to sign a property settlement he knew was unfavorable to her.⁷³ Reasoning that "sound public policy requires an attorney to not represent conflicting interests,"⁷⁴ the court held that the settlement was fraudulently procured by the attorney by collusive conduct and was void and unenforceable.⁷⁵ To define the fiduciary duty of protecting the client's interest, the court cited *Laughlin v. Boatmen's National Bank of St. Louis*, which provided:

The relation between attorney and client is highly fiduciary and of very delicate, exacting and confidential character, requiring very high degree of fidelity and good faith on attorney's part An attorney must faithfully, honestly and consistently represent the interests, and protect the rights, of his client. He is bound to discharge his duties to his client with the strictest fidelity, to serve the highest and utmost good faith towards him, and to obey his lawful directions.⁷⁶

The *Gardine* court concluded that a breach of fidelity to a client's interest was constructive fraud.⁷⁷ Until *Klemme v. Best*, Missouri courts did not use a formalized list of elements to establish breach of legal fiduciary duty or constructive fraud.⁷⁸ Instead, courts acknowledged and defined the nature of the duty and then applied the definition to the facts of the case if the court

70. 230 S.W.2d 731, 739 (Mo. 1950).

71. *Id.* at 740.

72. *Id.* at 739.

73. *Id.*

74. *Id.* at 740.

75. *Id.* at 739.

76. 163 S.W.2d 761, 765 (Mo. 1942).

77. *Gardine*, 230 S.W.2d at 739. See also *Fiske v. Buder*, 125 F.2d 841, 846 (8th Cir. 1942).

78. See *Fiske*, 125 F.2d at 846; *Donahue v. Shughart*, Thomson & Kilroy, P.C., 900 S.W.2d 624, 629-30 (Mo. 1995); *In re Oliver*, 285 S.W.2d 648, 655 (Mo. 1956); *Gardine v. Cottey* 230 S.W.2d 731, 738-40 (Mo. 1950); *Laughlin v. Boatmen's Nat'l Bank*, 163 S.W.2d 761, 765 (Mo. 1942); *In re Conrad*, 105 S.W.2d 1, 10 (Mo. 1937); *Williams v. Preman*, 911 S.W.2d 288, 300-01 (Mo. Ct. App. 1995); *Rose v. Summers*, Compton, Wells & Hamburg, P.C., 887 S.W.2d 683, 686 (Mo. Ct. App. 1994); *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo. Ct. App. 1988); *Shaffer v. Terrydale Management Corp.*, 648 S.W.2d 595, 605-06 (Mo. Ct. App. 1983).

determined that a duty was owed.⁷⁹ Damages specifically related to the breach of fiduciary duty often were not reached because the claim was joined with that of legal malpractice.⁸⁰

Because breach of fiduciary duty may be the sole claim in a legal disbarment proceeding, disbarment cases reveal most clearly how Missouri courts analyze breach of fiduciary duty claims. In *In re John R. Oliver*, an attorney was charged with converting and using money from a settlement he won for a client in a wrongful death suit.⁸¹ Oliver represented Jones, whose husband died in an automobile accident.⁸² After successfully prosecuting Jones's claim for the wrongful death of her husband, Oliver deposited the net proceeds of the \$8,000 settlement in his personal checking account and induced Jones to sign a waiver of her rights to death benefits and a power of attorney to Oliver to pay claims against her late husband.⁸³ Referring to the standard for attorney conduct set forth in *Laughlin*,⁸⁴ the *Oliver* court said, "It is well settled that the nature of a lawyer's profession necessitates the utmost good faith toward his client and the highest loyalty and devotion to his client's interests."⁸⁵ Because Oliver breached this fiduciary duty to Jones by misappropriating her settlement, Oliver was disbarred.⁸⁶

In a case not involving disbarment, *Shaffer v. Terrydale Management Corp.*, the Western District Court of Appeals determined that an attorney's breach of fiduciary duty was distinct from his breach of contractual duties.⁸⁷ Shaffer, an attorney, drew up a real estate trust as requested by his client, Gramlich. Shaffer became a minority shareholder in the trust.⁸⁸ Gramlich had instructed Shaffer to prepare the trust agreement for Terrydale Management Corporation (Terrydale) so that the corporation could redeem the stock of any shareholder who became inactive,⁸⁹ thereby keeping the trust a family project.⁹⁰ From 1972, when the trust became active, until 1979, when Shaffer no longer participated in Terrydale's affairs, Shaffer served in a variety of capacities at Terrydale, including that of director, officer, counsel, and consultant.⁹¹ In 1980,

79. See cases cited *supra* note 78.

80. *Williams*, 911 S.W.2d at 295-96; *Rose*, 887 S.W.2d at 683-86; *Cain*, 760 S.W.2d at 146-49.

81. 285 S.W.2d 648, 650 (Mo. 1956).

82. *Id.* at 649.

83. *Id.* at 649-50.

84. See *supra* note 76 and accompanying text.

85. *In re Oliver*, 285 S.W.2d at 655 (citing *In re Thomson's Estate*, 144 S.W.2d 79, 83 (Mo. 1940)).

86. *Id.*

87. 648 S.W.2d 595 (Mo. Ct. App. 1983).

88. *Id.* at 598.

89. *Id.*

90. *Id.* at 598, 600.

91. *Id.* at 597-98.

Gramlich's son informed Shaffer that, because he was no longer employed at Terrydale, the company was exercising its option vested in the stockholder agreement to purchase Shaffer's shares.⁹² Shaffer refused to redeem the stock, claiming that he did not meet the Internal Revenue Service's definition of "employee"⁹³ and that the option in the shareholder agreement applied only when an employee was terminated.⁹⁴ Shaffer brought an action for declaratory judgment to determine Terrydale's right to purchase his shares.⁹⁵

The trial court adjudicated Shaffer's claim as a right of contract.⁹⁶ The appellate court reversed the trial court because it erroneously interpreted the word "employment" in its construction of the shareholder contract and did not give effect to Shaffer's violation of fiduciary duty to Gramlich.⁹⁷ In its analysis of Shaffer's fiduciary duty, the appellate court established that Shaffer had formulated the stockholders agreement as an attorney for Gramlich and Terrydale,⁹⁸ was bound to scrupulous fidelity to Gramlich's cause,⁹⁹ and was precluded from any personal advantage from abuse of Gramlich's confidence.¹⁰⁰ The court said the very purpose of Shaffer's petition for declaratory judgment was a violation of his fiduciary duty.¹⁰¹ Shaffer's petition sought a vindication of a claim of right adverse to Gramlich which arose from the trust agreement Gramlich had entrusted to Shaffer.¹⁰² The court concluded that "[t]he claim by Shaffer, although based on a culminated contract, is governed not by principles of contract construction, but by the more exact standard of the duty of a lawyer to a client."¹⁰³ Because Shaffer and Gramlich had an attorney-client relationship, the court found that Shaffer was bound not to obtain self-advantage from subject-matter Gramlich committed to him unless Gramlich knew and consented to such an advantage.¹⁰⁴ Because Gramlich's express intent was to restrict stock ownership to persons active in participation of the business,¹⁰⁵ and because there was no evidence that Shaffer had disclosed to Gramlich that the Internal

92. *Id.* at 599.

93. *Id.* at 606.

94. *Id.*

95. *Schaffer*, 648 S.W.2d at 597.

96. *Id.* at 599.

97. *Id.* at 605-06.

98. *Id.* at 604.

99. *Id.* at 605.

100. *Id.*

101. *Id.* at 604.

102. *Id.*

103. *Id.* at 605.

104. *Id.*

105. *Schaffer*, 648 S.W.2d at 603.

Revenue Service definition would not pertain to Shaffer,¹⁰⁶ the court found that Shaffer had violated his fiduciary duty to Gramlich.¹⁰⁷

The *Shaffer* decision was significant because it distinguished breach of fiduciary duty from an attorney's contractual obligations and attributed fiduciary duty with a "more exacting standard" for attorney conduct.¹⁰⁸ By elevating Shaffer's obligation to meet his fiduciary duty over his obligation to meet contractual duties,¹⁰⁹ the court established that attorneys owe clients a duty of loyalty and confidence in addition to, and as important as, their duty of due care in providing professional services.¹¹⁰

Although the *Shaffer* court viewed fiduciary duty as independent of an attorney's duty to provide professional services, in other cases, breach of fiduciary duty and legal malpractice claims are joined. In these cases, the two claims often are analyzed concurrently because the plaintiff's alleged damages are indivisible. As a result, the distinction between the two claims may blur and breach of fiduciary duty may seem to be a claim for legal malpractice.

A case in which the two claims seem one, *Rose v. Summers, Compton, Wells & Hamburg, P.C.*, the Eastern District Court of Appeals based its legal malpractice analysis on the existence of a duty of loyalty and its constructive fraud analysis on a relationship of trust and confidence between attorney and client.¹¹¹ In *Rose*, three limited partners claimed that the attorney who represented the limited partnership represented them as individuals and was liable for malpractice and fraud by failing to ensure that the general partners did nothing to injure the partnership or the partners.¹¹² Referring to the first element of malpractice, the attorney-client relationship,¹¹³ the court then analyzed this element in terms of the "duty of loyalty,"¹¹⁴ words traditionally used to define fiduciary duty.¹¹⁵ The court stated, "We hold that an attorney representing a limited partnership owes a *duty of loyalty* to the limited partnership as an organization and not to the limited partners as individuals."¹¹⁶ After referring to Missouri Rules of Professional Conduct for support for its position,¹¹⁷ the court

106. *Id.* at 607.

107. *Id.* at 609.

108. *Id.* at 605.

109. A legal malpractice action is founded on an attorney's duty to exercise reasonable care or to honor express contract commitments. *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. 1997).

110. *Shaffer*, 648 S.W.2d at 605-06.

111. 887 S.W.2d 683, 686 (Mo. Ct. App. 1994).

112. *Id.* at 684.

113. *Id.* at 686 (citing *Boatright v. Shaw*, 804 S.W.2d 795, 796 (Mo. Ct. App. 1990)).

114. *Id.*

115. *Klemme v. Best*, 941 S.W.2d 493, 494 (1997).

116. *Rose*, 887 S.W.2d at 686-87 (emphasis added).

117. MO. SUP. CT. R. 4-1.13 (1993). Rule 4-1.13 provides that a "lawyer

refused to impose on the attorney a duty of loyalty to partners as individuals because it would place excessive burdens on attorneys and inevitably expose them to conflicting interests.¹¹⁸ In dismissing the partners' alternative claim that, as third parties, they were damaged by the attorney's breach of fiduciary duty, the court's finding did not distinguish that claim from a malpractice claim: "As previously stated, this count alleges legal malpractice."¹¹⁹ The court then refused to identify legal malpractice as one of the exceptional claims¹²⁰ that made attorneys liable to third parties.¹²¹

In the final part of its decision, the *Rose* court considered the claim of constructive fraud against the attorney as a claim separate from breach of fiduciary duty and malpractice.¹²² The court affirmed dismissal of this claim because it found no relationship of trust and confidence between the attorney and plaintiff partners.¹²³ In juggling the three causes of action, the *Rose* court treated breach of fiduciary duty as a type of malpractice and treated constructive fraud, a claim usually found synonymous with breach of fiduciary duty, as separate from malpractice.

The *Rose* decision epitomized some courts' indecision in classifying breach of fiduciary duty as either identical to or independent of legal malpractice. Missouri courts, however, have not been indecisive when defining breach of fiduciary duty as a failure of loyalty or confidence towards a client.¹²⁴ Courts consistently have found breach of fiduciary duty when an attorney obtained a personal advantage from the subject matter entrusted by the client¹²⁵ or when an attorney was disloyal, placing another's interests over that of the client's.¹²⁶

employed or retained by an organization represents the organization acting through its duly authorized constituents." The court reasoned that it would be inconsistent with this rule to hold that an attorney had a duty to the officers, directors, employees, and shareholders and thus to limited partners in a limited partnership who are comparable to shareholders in a corporation. *Rose*, 887 S.W.2d at 686.

118. *Rose*, 887 S.W.2d at 686.

119. *Id.* at 687.

120. These claims are fraud, collusion, or a malicious or tortious act. *Kennedy v. Kennedy*, 819 S.W.2d 406, 410 (Mo. Ct. App. 1991).

121. *Rose*, 887 S.W.2d at 687.

122. *Id.*

123. *Id.*

124. *See supra* Section III.B.

125. *See In re Oliver*, 285 S.W.2d 648 (Mo. 1956); *Shaffer v. Terrydale Management Corp.*, 648 S.W.2d 595 (Mo. Ct. App. 1983). *See also* 2 MALLEN § 14.1 *supra* note 40.

126. *See Gardine v. Cottey*, 230 S.W.2d 731 (Mo. 1950). *See also* 1 MALLEN, *supra* note 40, at 19.

IV. INSTANT DECISION

In *Klemme v. Best*, the Missouri Supreme Court distinguished breach of legal fiduciary duty and legal malpractice as separate and distinct causes of action.¹²⁷ However, the court held that, if a breach of fiduciary duty depended on an attorney's malpractice, the claim for malpractice subsumed the claim for breach of fiduciary duty.¹²⁸

The court first cited its recent decision in *Donahue v. Shughart, Thomson & Kilroy, P.C.*, which defined the four elements of a legal malpractice claim.¹²⁹ The *Klemme* court listed these elements as: (1) an attorney-client relationship; (2) negligence or breach of contract by the defendant; (3) proximate causation of the plaintiff's damages; and (4) damages to the plaintiff.¹³⁰ The court then set out five elements for breach of fiduciary duty: (1) an attorney-client relationship; (2) breach of a fiduciary obligation by the attorney; (3) proximate causation; (4) damages to the client; and (5) no other recognized tort encompasses the facts alleged.¹³¹ The court noted that the second and fifth elements of breach of fiduciary duty distinguished this claim from a legal malpractice action.¹³² The court gave as its rationale for the second element the finding in *Gardine v. Cottey* that "[a] breach of the standard of care is negligence, and a breach of fiduciary duty obligation is constructive fraud."¹³³ The court then attributed the fifth element of breach of fiduciary duty to its decision in *Donahue*.¹³⁴

In *Donahue*, two intended recipients of failed testamentary gifts brought a legal malpractice claim against the attorney of the decedent.¹³⁵ In their amended petition, the plaintiffs asserted two theories of legal malpractice, one of breach of fiduciary duty and one of breach of contract as third-party beneficiaries.¹³⁶ The Missouri Supreme Court affirmed the lower court's dismissal of the breach of fiduciary duty claim because the plaintiffs and the defendant did not have an attorney-client relationship that would give rise to the attorney's fiduciary duty.¹³⁷ The court explained that, because the attorney's breach of fiduciary duty to the decedent was a result of the attorney's negligent performance of

127. *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. 1997).

128. *Id.*

129. *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 626 (Mo. 1995).

130. *Klemme*, 941 S.W.2d at 495.

131. *Id.* at 496.

132. *Id.*

133. *Id.*

134. *Klemme*, 941 S.W.2d at 496.

135. *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 625 (Mo. 1995).

136. *Id.* at 626. See also *supra* notes 120-23 and accompanying text.

137. *Donahue*, 900 S.W.2d at 629.

professional services, the alleged breach of fiduciary duty was no more than a claim for attorney malpractice.¹³⁸

In clarifying that part of its *Donahue* decision, the supreme court, in *Klemme*, explained that, because the alleged breach of fiduciary duty in *Donahue* was dependent upon attorney negligence, this breach was subsumed by the action for attorney malpractice.¹³⁹ The court then clearly stated that *Donahue* did not “preclude an action for breach of fiduciary duty or constructive fraud where the alleged breach [was] independent of any legal malpractice.”¹⁴⁰

Emphatically stating that clients may sue their attorneys for torts other than legal malpractice,¹⁴¹ the court used the opportunity presented in *Klemme v. Best* to correct two lower court findings that would be barriers to such suits. The first barrier, relating to when a breach of fiduciary duty can occur, was erected in the Western District Court of Appeals’ misinterpretation of *Donahue* in *Williams v. Preman*.¹⁴² Citing *Donahue*, the *Williams* court found that when an attorney breached his or her fiduciary duty to a client during the course of representation, the breach was legal malpractice, but when the breach occurred outside the time frame of the representation, it was a breach of fiduciary duty.¹⁴³ The *Klemme* court overruled this interpretation of *Donahue*, stating that clients may sue their attorneys for torts other than legal malpractice and that a breach of fiduciary duty can occur at any time during the attorney-client relationship.¹⁴⁴

The second barrier to suits against attorneys attacked by the court was that regarding attorneys’ intent. The court corrected the false finding in *Arana v. Koerner*¹⁴⁵ that an attorney had to intentionally commit an act of misconduct in representing a client’s interests to give rise to a breach of fiduciary duty.¹⁴⁶ “Proof of an attorney’s intent is not required to establish breach of fiduciary duty or constructive fraud.”¹⁴⁷

The court concluded that *Klemme* had alleged facts which constituted a claim that *Best* had breached his fiduciary duty to *Klemme*.¹⁴⁸ Listing each element of the breach, the court found *Klemme* had an attorney-client relationship;¹⁴⁹ that *Best* had breached his fiduciary obligation by placing the

138. *Id.*

139. *Klemme*, 941 S.W.2d at 496.

140. *Id.*

141. *Id.*

142. *Williams v. Preman*, 911 S.W.2d 288, 301 (Mo. Ct. App. 1995), *overruled by Klemme v. Best*, 941 S.W.2d 493 (Mo. 1997).

143. *Id.*

144. *Klemme*, 941 S.W.2d at 496.

145. 735 S.W.2d 729, 735 (Mo. Ct. App. 1987).

146. *Klemme*, 941 S.W.2d at 496.

147. *Id.*

148. *Id.*

149. *Id.*

interests of the city of Columbia and its self-insured association above his;¹⁵⁰ that Best's breach proximately caused Klemme's damages;¹⁵¹ and that no other recognized tort encompassed Klemme's claim.¹⁵²

Although Klemme had argued that his claim for breach of fiduciary duty was governed by Missouri Revised Statutes § 516.120(5), which allows a claim of fraud to run upon "the discovery by the aggrieved party, at any time within ten years, of the facts constituting fraud,"¹⁵³ the court refused to apply this statute of limitations to Klemme's claim.¹⁵⁴ Acknowledging its duty to apply the plain and ordinary meaning to terms in a statute,¹⁵⁵ the court said that "fraud" in Section 516.120(5) did not mean "constructive fraud" and that the language in Missouri Revised Statutes § 516.120(4) applied to claims of breach of fiduciary duty or constructive fraud.¹⁵⁶ The court traced the moment when Klemme could have discovered Best's breach to February 1987, when Klemme retained separate counsel after he learned that Best was settling the federal suit and intended to include Klemme as a released party.¹⁵⁷ Acknowledging that Klemme could have discovered that Best had not sought Klemme's removal from the federal suit in February 1987, the court concluded that the five-year limitation under Section 516.120(4) began to run from that date.¹⁵⁸ Because Klemme did not bring his claim for breach of fiduciary duty or constructive fraud against Best until September 19, 1994,¹⁵⁹ over seven years after the breach was objectively capable of ascertainment, the court held that Klemme's claim was barred and affirmed the judgment of the trial court.¹⁶⁰

V. COMMENT

Missouri courts routinely have identified fiduciary duty as a distinct obligation of loyalty and confidentiality an attorney owes a client.¹⁶¹ And, just as routinely, courts have classified breach of fiduciary duty as a form of legal malpractice and as an independent cause of action.¹⁶² Close identification and

150. *Id.* at 495.

151. *Id.* at 496.

152. *Id.*

153. MO. REV. STAT. 516.120(5) (1994).

154. *Klemme*, 941 S.W.2d at 497.

155. *Id.*

156. *Id.* See also *Koester v. American Republic Invs., Inc.*, 11 F.3d 818 (8th Cir. 1993).

157. *Klemme*, 941 S.W.2d at 497.

158. *Id.*

159. *Id.* at 495.

160. *Id.* at 498.

161. See *supra* Section III.B.

162. See *Rose v. Summers, Compton, Wells & Hamburg, P.C.*, 887 S.W.2d 683 (Mo. Ct. App. 1994); *Cain v. Hershewe*, 760 S.W.2d 146 (Mo. Ct. App. 1988). See also

even intermingling of the two claims continued until the *Williams v. Preman*¹⁶³ and *Klemme v. Best*¹⁶⁴ courts interpreted the Missouri Supreme Court's holding in *Donahue* to mean that breach of fiduciary duty was no more than a claim for legal malpractice. To correct this misconception, the supreme court set out the separate elements of each cause of action. However, when the court stated that breach of fiduciary duty was distinguished from legal malpractice by its second element (breach of a fiduciary obligation, as opposed to negligence) and fifth element (no other recognized tort encompasses the facts alleged), the court created the apparent contradiction that breach of fiduciary obligation did not violate the standard of conduct an attorney owes a client.

Acknowledging that courts struggle with the close and often blurred relationship between legal malpractice based on negligence and breach of fiduciary duty, Ronald E. Mallen and Jeffrey M. Smith in their treatise, *Legal Malpractice*, fashioned a conceptual distinction that allows the claim of negligence and breach of fiduciary duty to co-exist under the umbrella of legal malpractice.¹⁶⁵ In *Legal Malpractice*, an authority cited by the supreme court in *Klemme*,¹⁶⁶ the authors describe this conceptual model:

The breach of fiduciary obligations, sometimes characterized as "constructive fraud," is an action in tort, not contract. The tort is a wrong that is distinct and independent from professional negligence but still is legal malpractice. One definitional approach is to include the fiduciary obligations within the standard of care. Although the attorney-client relationship imposes fiduciary obligations, negligent conduct alone does not implicate a breach of those obligations. The lawyer may have acted with undivided loyalty and preserved the client's confidences.

A better approach is to define the fiduciary obligations as setting a standard of "conduct," as distinguished from the standard of "care," which pertains to the requisite skill and knowledge. Thus, negligence concerns the standard of care, and a breach of loyalty or confidentiality concerns the standard of conduct. The essence of this approach is to use the model for negligence, substituting the particular fiduciary obligations for the duty of care. Thereby, rules of causation, damages, and the burden of proof remain the same.¹⁶⁷

supra Section III.

163. See *supra* notes 143-44 and accompanying text.

164. *Klemme v. Best*, No. WD51053, 1996 WL 93540, at *3 (Mo. Ct. App. Mar. 5, 1996).

165. See 1 MALLEEN, *supra* note 40, at 18.

166. The *Klemme* court cited Section 14.1 in Mallen's and Smith's treatise for a definition of fiduciary obligations as undivided loyalty and confidentiality. *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. 1997).

167. 1 MALLEEN, *supra* note 40, at 18.

Although Smith and Mallen recognize that some courts distinguish breach of fiduciary obligations from legal malpractice, the authors justify their model as the prevailing and better reasoned view because "legal malpractice encompasses any professional misconduct whether attributable to a breach of the standard of care or of the fiduciary obligations."¹⁶⁸ Their model, used as an analytical infrastructure, would hold attorneys in an action for malpractice to the two distinct duties which govern an attorney's relationship to a client: the duty of loyalty which is a duty of conduct; and the duty to use professional legal skills and knowledge, a duty of care.¹⁶⁹

The *Klemme* court found that Best violated his fiduciary duty to Klemme because he placed the interests of the City of Columbia and its self-insured association above those of Klemme.¹⁷⁰ Although the court did not reach whether Best also committed legal malpractice when it stated that breach of fiduciary duty independent of malpractice is a separate cause of action, the court implied that Best had not committed legal malpractice.¹⁷¹ But if negligence is the foundation of legal malpractice, and negligence is a failure to use the requisite legal skills and knowledge in representing a client,¹⁷² Klemme committed malpractice.

A careful analysis of the facts in *Klemme* reveals that Best failed to use both factual and professional knowledge in representing Klemme. Best knew the official investigation showed that Klemme should not have been a named defendant.¹⁷³ Best told opposing counsel that another named defendant, Otto Earnhart, had not participated in the Linzie shooting and, as a result of this representation, Earnhart's name disappeared from the final complaint.¹⁷⁴ Best also knew that he represented Klemme individually¹⁷⁵ and should have known that he owed Klemme the fiduciary duty of loyalty.¹⁷⁶ Even if the court defined "knowledge" as technical knowledge of the law, this definition would encompass knowledge of an attorney's fiduciary duty to his client. If Best failed to exercise his legal knowledge of the facts of the case and his knowledge of his professional duty of loyalty to Klemme, Best not only breached his fiduciary duty to Klemme, he was negligent and, using the court's own conceptual model, committed legal malpractice. Because knowledge of the duty of loyalty is legal

168. 1 MALLEN, *supra* note 40, at 4.

169. Mallen and Smith define the attorney's duty of care as one exercising the skill and knowledge ordinarily possessed by attorneys under similar circumstances. 2 MALLEN, *supra* note 40, at 550.

170. *See supra* notes 149-53 and accompanying text.

171. *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. 1997).

172. *See supra* note 131 and accompanying text.

173. *See supra* note 17 and accompanying text.

174. *See supra* note 19 and accompanying text.

175. *Klemme*, 941 S.W.2d at 495.

176. *See supra* note 76 and accompanying text.

knowledge, it follows that breach of fiduciary duty is failure to exercise “due care,” *i.e.*, negligence.

Although negligence and breach of fiduciary duty thus can be conceptually merged, this convergence is not satisfactory because an attorney can be negligent without breaching his fiduciary duty to a client. In Mallen and Smith’s words, “Although the attorney-client relationship imposes fiduciary obligations, negligent conduct alone does not implicate a breach of those obligations. The lawyer may have acted with undivided loyalty and preserved his client’s confidences.”¹⁷⁷ Mallen and Smith thus addressed the apparent need to keep the two causes of action distinct by creating a dichotomy of breach of the “duty of care” and of the “duty of conduct” as two forms of legal malpractice.

Although, in setting out the elements of fiduciary duty, the *Klemme* court adopted Mallen’s and Smith’s suggested structure (*i.e.*, substituting breach of fiduciary duty for negligence but using the same rules of causation, damages and burden of proof), the *Klemme* court did not recognize breach of fiduciary duty and negligence as separate causes of action for legal malpractice.¹⁷⁸ One explanation is that the court’s interpretation of the element of damages for each cause of action, although identically worded, differed conceptually. When the *Klemme* court listed the elements of legal malpractice, it stated that damages were “damages to the plaintiff” and cited its decision in *Donahue*.¹⁷⁹ But the element of damages in legal malpractice, as recited in *Donahue*, was: “but for the defendant’s conduct the plaintiffs would have been successful in prosecution of their [underlying] claim.”¹⁸⁰ The *Klemme* court’s description of damages in legal malpractice could have been merely an abbreviation of the “case within a case” wording in *Donahue* and not a change in meaning. Although the court concluded that *Klemme* had suffered damages due to Best’s conduct, the court did not describe those damages or discuss whether *Klemme* had been held to the “case within a case” legal malpractice standard of proof.

By using identical language in *Klemme* to describe damages for both breach of fiduciary duty and legal malpractice, the court created the following three possible interpretations: the plaintiff in a breach of fiduciary duty or legal malpractice claim need only demonstrate damages; or the plaintiff must meet the “case within a case” standard of proof for both causes of action; or the plaintiff with a legal malpractice claim must prove the “case within a case” while the plaintiff with a breach of fiduciary duty claim need only show damages.

Because many claims for breach of fiduciary duty are heard within the context of disbarment proceedings against attorneys¹⁸¹ or in conjunction with

177. 1 MALLEN, *supra* note 40, at 18.

178. *Klemme*, 941 S.W.2d at 496.

179. *Id.* at 495.

180. *Donahue v. Shughart*, Thomson & Kilroy, P.C., 900 S.W.2d 624, 626 (Mo. 1995).

181. *See supra* notes 81-86 and accompanying text.

other claims, including that of negligence,¹⁸² courts frequently do not analyze damages resulting only from breach of fiduciary duty. In *Williams v. Preman*, however, the trial and appellate courts subjected the plaintiff's claim of breach of fiduciary duty against his attorney to the "case within a case" standard of proof associated with damages in legal malpractice claims.¹⁸³ The supreme court in *Klemme v. Best* corrected the *Williams* court's misinterpretation of *Donahue*¹⁸⁴ but did not find error in the court's application of the "case within a case" standard of proof for damages in this breach of fiduciary duty claim.¹⁸⁵ The implication that can be drawn from the court's silence is that the standard for damages in a breach of fiduciary duty is the same as that for negligence: proof that the underlying claim would have been successful but for the attorney's breach.

If all elements of breach of fiduciary duty and legal malpractice due to negligence, then, are the same except for the underlying nature of the attorney's action, the utility of the Mallen and Smith model becomes evident. If the Missouri Supreme Court had adopted this model in *Klemme*, it would have provided a conceptually workable definition of legal malpractice as failure by an attorney to uphold the standard of care (application of skill and knowledge) or standard of conduct (fiduciary duty) owed to a client. The court also would have avoided the apparent contradiction inherent in the assertion that breach of an attorney's fiduciary duty is not negligent conduct.

VI. CONCLUSION

In *Klemme v. Best*, the Missouri Supreme Court established that a plaintiff can claim breach of fiduciary duty against an attorney as a separate cause of action if the breach is not dependent upon a claim for negligence. In setting out elements for breach of fiduciary duty and legal malpractice based on negligence, however, the court reached the unsatisfying result that breach of fiduciary duty is not negligent conduct by an attorney. An adoption of the model suggested by Mallen and Smith in their treatise on legal malpractice¹⁸⁶ would avoid this apparent contradiction. That model provides a more reasoned conceptual framework for legal malpractice by creating two co-existing subcategories: breach of the standard of conduct, based on an attorney's duty of loyalty and confidentiality, and breach of the standard of care based on an attorney's duty to use requisite legal skill and knowledge in representing a client.

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182. See *supra* notes 87-127 and accompanying text.

183. 911 S.W.2d 288, 294 (Mo. Ct. App. 1995).

184. See *supra* notes 143-45 and accompanying text.

185. *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo. 1997).

186. See *supra* notes 166-70 and accompanying text.

