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FILED  
ENFORCED  
2002 FEB 21 AM 11:25  
SACRAMENTO COURTS  
DEPT. #53 #54

5 Attorneys for Defendants PAIGE M. HIBBERT and HACKARD, HOLT &  
6 HELLER (erroneously sued and served as HACKARD, HOLD & HELLER)

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA ERNESTINA MUNIZ

9 FOR THE COUNTY OF SACRAMENTO 02 13:47:35 030 23.00

11 MARK J. BIXBY and MARX ) Case No. 01AS03432  
12 PRODUCTIONS, INC. and MJB BIXBY )  
13 CONSTRUCTION, INC., )  
14 Plaintiffs, ) DEFENDANTS PAIGE M. HIBBERT AND  
15 vs. ) HACKARD, HOLT & HELLER'S NOTICE  
16 ) OF DEMURRER AND DEMURRER TO  
17 ) PLAINTIFFS' SECOND AMENDED  
18 ) COMPLAINT  
19 PAIGE M. HIBBERT and HACKARD, )  
20 HOLD & HELLER and Does 1 to 20, ) [Filed Concurrently With  
21 Defendants. ) Defendants' Motion to Strike  
22 ) Portions of Plaintiffs' Second  
23 ) Amended Complaint]

18 Date Action Filed: 6/7/01

19 Date: March 14, 2002

20 Time: 9:00 a.m.

21 Dept: 54

22 Discovery Cutoff: None

23 Motion Cutoff: None

24 Trial Date: None

24 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

25 NOTICE IS HEREBY GIVEN that on March 14, 2002 at 9:00  
26 a.m. or as soon thereafter as the matter may be heard in  
27 Department 54 of the above-entitled Court, located at 720 9<sup>th</sup>  
28 Street, Sacramento, California 95814, defendants PAIGE M. HIBBERT

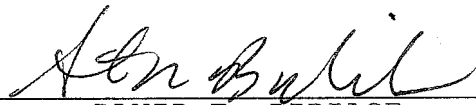
LAW OFFICES  
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1 and HACKARD, HOLT & HELLER (hereinafter collectively "defendants")  
2 will and hereby do demur to plaintiffs MARK J. BIXBY, MARX  
3 PRODUCTIONS, INC. and MJB BIXBY CONSTRUCTION, INC.'s (hereinafter  
4 collectively "plaintiffs") second amended complaint on file herein  
5 on the basis that the third and fourth purported causes of action  
6 in plaintiffs' second amended complaint fail to state sufficient  
7 facts to constitute a cause of action against defendants. Code of  
8 Civil Procedure § 430.10(e).

9 This demurrer is based upon this notice of demurrer, the  
10 attached demurrer to the second amended complaint, the attached  
11 memorandum of points and authorities, the second amended complaint  
12 on file herein, the entire records and files in this action, and  
13 upon such oral and documentary evidence as may be presented at or  
14 before the hearing on this demurrer.

15 **PLEASE TAKE NOTICE** that pursuant to Local Rule 3.04, the  
16 Court will make a tentative ruling on the merits of this matter by  
17 2:00 p.m., the court day before the hearing. To receive the  
18 tentative ruling, call the department in which the matter is to be  
19 heard at 448-8234. If you do not call the Court and the opposing  
20 party by 4:00 p.m. the court day before the hearing, no hearing  
21 will be held.

22 DATED: February 13, 2002 ANDERSON, McPHARLIN & CONNERS LLP

23  
24 By:   
25 DAVID T. DIBIASE  
26 STEVE R. BELILOVE  
27 Attorneys for Defendants PAIGE M.  
28 HIBBERT and HACKARD, HOLT & HELLER  
(erroneously sued and served as  
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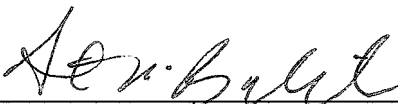
1 DEMURRER TO SECOND AMENDED COMPLAINT

2 1. Plaintiffs' third purported cause of action for  
3 breach of fiduciary duty fails to state facts sufficient to  
4 constitute a cause of action (Code of Civil Procedure § 430.10,  
5 subdivision (e)).

6 2. Plaintiffs' fourth purported cause of action for  
7 intentional infliction of emotional distress fails to state facts  
8 sufficient to constitute a cause of action (Code of Civil  
9 Procedure § 430.10, subdivision (e)).

10 Defendants PAIGE M. HIBBERT and HACKARD, HOLT & HELLER  
11 pray that this demurrer to each cause of action set forth above  
12 will be sustained without leave to amend.

13  
14 DATED: February 13, 2002 ANDERSON, McPHARLIN & CONNERS LLP

15  
16 By:   
17 DAVID T. DIBIASE  
18 STEVE R. BELILOVE  
19 Attorneys for Defendants PAIGE M.  
20 HIBBERT and HACKARD, HOLT & HELLER  
21 (erroneously sued and served as  
22 HACKARD, HOLD & HELLER)  
23  
24  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This is an action for legal malpractice, nothing more.  
4 Plaintiffs' allegation of negligence is repeated in every cause of  
5 action (second amended complaint, ¶¶ 9, 15, 25, and 35).  
6 Plaintiffs improperly attempt to manufacture two additional causes  
7 of action which is simply a transparent attempt to boot strap a  
8 claim for punitive damages onto a simple negligence case.  
9 Plaintiffs' claim is so outrageous they are trying to implicate a  
10 construction claim that has nothing to do with the alleged  
11 malpractice to support punitive damages (second amended complaint,  
12 p. 6, ¶¶22-24, p. 8, ¶33). The issue of plaintiffs' improper  
13 claim of punitive damages is addressed in defendants' motion to  
14 strike filed concurrently herewith.

15 The third and fourth causes of action are virtually  
16 identical to the same causes of action in the second amended  
17 complaint. The demurrer to plaintiffs' cause of action for breach  
18 of fiduciary duty was sustained because there were not sufficient  
19 facts stated to constitute a cause of action for breach of  
20 fiduciary duty. The facts alleged in the second amended complaint  
21 are virtually the same.

22 As to the cause of action for intentional infliction of  
23 emotional distress, in sustaining defendants' demurrer to the  
24 first amended complaint, this Court ruled:

25 While the allegations, accepted as true only  
26 for purposes of the demurrer, show improper  
27 conduct, it is not outrageous conduct, which  
28 is required for the tort of intentional

1 infliction of emotional distress.  
2 furthermore, emotional distress damages are  
3 not normally allowed in a legal malpractice  
4 action.

5 The allegations of the second amended complaint are a  
6 sham, and do not cure the defects noted by this Court.  
7 Accordingly, defendants' demurrer to the second amended complaint  
8 must be sustained without leave to amend.

9 **II. PLAINTIFFS' THIRD PURPORTED CAUSE OF ACTION**  
10 **FOR BREACH OF FIDUCIARY DUTY IS DUPLICATIVE OF**  
11 **PLAINTIFFS' FIRST PURPORTED CAUSE OF ACTION**  
12 **AND DOES NOT STATE FACTS SUFFICIENT TO**  
13 **CONSTITUTE A CAUSE OF ACTION**

14 Plaintiffs' third purported cause of action is for  
15 breach of fiduciary duty. Plaintiffs' third purported cause of  
16 action is subject to demurrer because it has been insufficiently  
17 pled and merely repeats the allegations of the first cause of  
18 action for negligence. To plead a cause of action for breach of  
19 fiduciary duty, plaintiffs must plead duty, breach of duty,  
20 causation and damages. See Stanley v. Richmond 35 Cal.App.4th  
21 1070, 1085 (1995). Breach of fiduciary duty is described as  
22 breach of the standard of conduct, as opposed to negligence, which  
23 is the breach of the standard of care. See Mallen & Smith, Legal  
24 Malpractice (5<sup>th</sup> Ed.), §14.2.

25 An attorney's fiduciary obligations are twofold: (1)  
26 confidentiality; and (2) undivided loyalty. See Day v. Rosenthal  
27 170 Cal.App.3d 1125, 1166 (1985). Courts look to whether the  
28 attorney used his or her position to advance the attorney's

1 personal interest, such as obtaining a financial gain through a  
2 business deal involving the client, or (2) the attorney  
3 represented an interest in conflict with that of the client. See  
4 Edwards v. Thorpe, 876 F.Supp. 693, 694 (E.D.PA 1995).

5 Plaintiffs' second amended complaint does not contain  
6 any meaningful allegations that defendants breached a fiduciary  
7 duty to plaintiffs. Plaintiffs' allegations regarding  
8 construction work are misleading and meaningless. Plaintiffs are  
9 not seeking damages related to the construction transaction in any  
10 fashion. The bottom line is that plaintiffs are seeking damages  
11 for the manner in which defendants handled the underlying action.  
12 See second amended complaint, ¶25, which is the same as ¶¶9, 15,  
13 and 35. All allegations regarding the construction work performed  
14 by plaintiffs are separate and apart from the primary allegation  
15 of this action. There is no legal connection.

16 The allegations in the third cause of action constitute  
17 nothing more than a repackaged cause of action for negligence.  
18 Plaintiffs are attempting to manufacture an additional cause of  
19 action which is merely duplicative of plaintiffs' first cause of  
20 action for negligence. Where a duplicative cause of action adds  
21 nothing by way of factual theory, it is proper for this Court to  
22 sustain a demurrer. See Award Metals, Inc. v. Superior Court 228  
23 Cal.App.3d 1128, 1135 (1991). Given that the allegations in  
24 plaintiffs' third purported cause of action do not rise to the  
25 level of a breach of fiduciary duty, and do nothing more than  
26 duplicate plaintiffs' first purported cause of action for  
27 negligence, this Court should sustain defendants' demurrer to  
28 plaintiffs' third cause of action without leave to amend.

1 III. PLAINTIFFS' FOURTH PURPORTED CAUSE OF ACTION  
2 FOR INTENTIONAL INFLICTION OF EMOTIONAL  
3 DISTRESS DOES NOT STATE FACTS SUFFICIENT TO  
4 CONSTITUTE A CAUSE OF ACTION

5 Damages for emotional injuries are not recoverable in a  
6 legal malpractice action if they are a consequence of other  
7 damages caused by the attorney's negligence. Camenisch v.  
8 Superior Court (1996) 44 Cal.App.4th 1689. Once again,  
9 plaintiffs' allegations of wrongdoing constitute nothing more than  
10 negligent acts (second amended complaint ¶¶9 and 15). The  
11 allegations contained in ¶¶33 and 34 are irrelevant and a sham.  
12 At best, the allegations set forth reasons for defendants' alleged  
13 conduct. The wrongful acts, however, remain the same negligent  
14 acts repeatedly alleged.

15 The ridiculousness of plaintiffs' allegations is  
16 demonstrated by their vague and conclusory nature. Plaintiffs  
17 fail to state exactly what "outrageous" and "unprivileged" conduct  
18 defendants committed (second amended complaint, p. 8, ¶33).  
19 Plaintiffs also fail to specify exactly what documents defendants  
20 supposedly asked plaintiffs to falsify (second amended complaint,  
21 p. 8, ¶34). Allegations attacking defendants' credibility must  
22 contain specific facts. Stansfield v. Starkey (1990) 220  
23 Cal.App.3d 59, 74. Plaintiffs' allegations are not supported by  
24 any facts and therefore must be accepted for what they are - an  
25 obvious attempt at "mudslinging" to support an improper claim for  
26 punitive damages.

27 Further, the essential elements of a prima facie case of  
28 intentional infliction of emotional distress are not adequately

1 pled. They are: (1) outrageous conduct by the defendant; (2) an  
2 intention to cause, or a reckless disregard of the probability of  
3 causing, emotional distress; (3) the suffering of severe emotional  
4 distress by the plaintiff; and (4) actual and proximate causation  
5 of plaintiff's emotional distress by the defendant's outrageous  
6 conduct. Davidson v. City of Westminster (1982) 32 Cal.3d 197,  
7 209, 185 Cal.Rptr. 252, 649 P.2d 894. Outrageous conduct has been  
8 defined as conduct that is "so extreme as to exceed all bounds of  
9 that usually tolerated in a civilized community," that is,  
10 "regarded as atrocious and utterly intolerable in a civilized  
11 community," or that "has gone beyond all reasonable bounds of  
12 decency." Id. at 209; Melovich Builders, Inc. v. Superior Court  
13 (1984) 160 Cal.App.3d 931, 936, 207 Cal.Rptr. 47; Christianson v.  
14 Superior Court (1991) 54 Cal.App.3d 868, 904-05, 2 Cal.Rptr.2d 79,  
15 820 P.2d 181.

16 Plaintiffs must plead facts regarding the alleged  
17 outrageous conduct on the part of defendants in order to properly  
18 state a cause of action for intentional infliction of emotional  
19 distress. Cochran v. Cochran 65 Cal.App.4th 488, 494 (1998);  
20 Deboe v. Horn 16 Cal.App.3d 221, 224 (1971). As noted above, the  
21 second amended complaint only contains allegations of negligent  
22 **conduct**. The remaining allegations are insufficient and

23 irrelevant to the resulting **conduct** alleged against defendants.

24 Plaintiffs must also plead facts which indicate the  
25 nature or extent of any severe emotional distress incurred as a  
26 result of defendants' conduct. Bogard v. Employers Casualty Co.  
27 164 Cal.App.3d 602, 617 (1985). No such allegations appear in the  
28 second amended complaint. Although plaintiff Bixby alleges severe



1 emotional distress, the second amended complaint does not set  
2 forth any facts indicating the nature and extent of any such  
3 distress incurred specifically as a result of defendants'  
4 allegedly outrageous conduct. The nature of this cause of action  
5 is demonstrated by plaintiffs' own allegations (p. 9, ¶37).  
6 Plaintiffs are apparently attempting to "blame" defendants for  
7 Bixby's need for anger management therapy, and for "threats" made  
8 by someone who is not a party to this action. Further, it is not  
9 clear whether this cause of action is on behalf of Mr. Bixby only.  
10 Obviously, the corporate plaintiffs cannot maintain this cause of  
11 action. The entire cause of action is improper, vague and  
12 ambiguous. Without any sufficient and proper facts, defendants'  
13 demurrer to plaintiffs' fourth cause of action must be sustained  
14 without leave to amend.

15 IV. CONCLUSION

16 For the foregoing reasons, it is respectfully requested  
17 that defendants' demurrer be sustained without leave to amend.

18 DATED: February 13, 2002 ANDERSON, McPHARLIN & CONNERS LLP

19  
20 By: Steve Belilove

21 DAVID T. DIBIASE  
22 STEVE R. BELILOVE  
23 Attorneys for Defendants PAIGE  
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25 HELLER (erroneously sued and  
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28