

No. 70942

IN THE  
SUPREME COURT OF ILLINOIS

ROGER J. BALLA,

Plaintiff-Appellee,

v.

GAMERO, INC., GAMERO LUNDIA AB,  
GAMERO DIALYSATOREN KG,  
and DAVID MAUPIN,

Defendants-Appellants.

) Brief Of Amicus Curiae  
) In Support of Appeal  
) From the Appellate Court  
) of Illinois, First  
) District No. 88-2955  
)  
) There Heard on Appeal  
) from the Circuit Court  
) of Cook County, Illinois  
) No. 86 L 6148  
)  
) Honorable Dean L. Sodaro  
) Judge Presiding

BRIEF OF AMICUS CURIAE  
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## II.

## INTRODUCTION

This appeal presents for review by this Court a decision by the Appellate Court which fundamentally re-defines the role and status of in-house counsel. Prior to the Appellate Court's ruling, the relationship between in-house counsel and their corporate clients/employers had been treated the same as any other attorney-client relationship. However, the Appellate Court fundamentally alters this relationship by analyzing in-house counsel in the context of an employee-employer relationship, rather than under the rubric of an attorney-client relationship. Its decision thus does more than simply extend the applicability of the tort of retaliatory discharge; it has deep and broad implications for the standards of professional responsibility.

The issues presented by this appeal are of particular importance to the members of the American Corporate Counsel Association ("ACCA"). ACCA members are licensed attorneys, subject to all the obligations imposed by the profession. They are also corporate employees and, therefore, enjoy a particularly close relationship with their corporate clients. ACCA members are deeply concerned and troubled about the implications of treating in-house counsel differently than their fellow attorneys in private practice. Indeed, if this Court finds that corporate counsel may bring retaliatory discharge actions against their corporate clients/employers, it will establish a dual set of ethical standards for attorneys

and thereby undermine the integrity of the Illinois Rules of Professional Conduct.

### III.

#### ARGUMENT

**A. The Appellate Court's Decision Is Inconsistent With The Better-Reasoned Herbster Decision, And Should Thus Be Reversed.**

The decision of the Appellate Court mischaracterizes and directly conflicts with the well-reasoned holding in Herbster v. North American Co. for Life & Health Insurance.<sup>1</sup> Indeed, applying its analysis will lead to results that are in conflict with the clear, established precedent of this Court. Accordingly, the Appellate Court's decision should be rejected.

**1. Herbster Foreclosed The Possibility Of In-House Counsel Bringing Actions For Wrongful Termination.**

In Herbster, the appellate court affirmed a summary judgment for a corporate defendant who had been sued by its former in-house counsel after the attorney had been fired for allegedly refusing to destroy or remove discovery information. Despite the existence of the same public policy considerations present in other contexts,<sup>2</sup> the Herbster court concluded that in-house counsel are not entitled to bring such a cause of action. It recognized that this Court created the tort of

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<sup>1</sup>150 Ill. App. 3d 21, 501 N.E.2d 343 (2d Dist. 1986), appeal denied, 114 Ill. 2d 545, 508 N.E.2d 728, cert. denied, 484 U.S. 850 (1987).

<sup>2</sup>Id. at 344.

retaliatory discharge as a narrow exception to the general rule of employment at-will,<sup>3</sup> which "is still the law in Illinois."<sup>4</sup> Thus, the Court has been hesitant to expand the application of the tort too far.

Following this Court's direction not to expand the application of the tort too far, the Herbster court held that in-house counsel do not have a cause of action for retaliatory discharge. The Herbster court recognized that in-house counsel are not typical employees within the meaning of retaliatory discharge case law. The court stated:

[U]nlike the employees in the present retaliatory discharge cases, attorneys occupy a special place in our society. As professionals closely supervised by the Supreme Court of Illinois, their conduct is governed by State statutes and legal precedent. In representing clients in civil and criminal matters their authority is extremely broad. The attorney is placed in the unique position of maintaining a close relationship with a client where the attorney receives secrets, disclosures and information that otherwise would not be divulged to intimate friends.<sup>5</sup>

Thus, the court determined that it is impossible to separate the in-house counsel's "role as an employee from his profession."<sup>6</sup> Accordingly, because discharged in-house

<sup>3</sup>Id. at 344-45 (citing Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Kelsav v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978)).

<sup>4</sup>Id. at 345-46 (citing Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 478 N.E.2d 1354 (1985)).

<sup>5</sup>Id. at 346.

<sup>6</sup>Id.



counsel are, first and foremost, attorneys, they have no right to recover damages in addition to quantum meruit.

2. **The Appellate Court's Ruling, Despite The Court's Protestations To The Contrary, Is In Direct Conflict With Herbster And Supreme Court Precedent.**

In holding that Balla had standing to sue for retaliatory discharge, the Appellate Court developed an elaborate three-part analysis. However, the very existence of such an analysis demonstrates a fundamental inconsistency with Herbster, which flatly held that in-house counsel may not bring an action for wrongful termination. The Appellate Court attempted to harmonize its holding with Herbster by stating that "[t]he Herbster court's rationale was premised on the sanctity of the attorney/client privilege." Yet, the Herbster court explicitly rejected such a limitation:

The attorneys in their briefs and arguments focused on the privilege aspect of the relationship only. We find that all aspects are so necessary to our system of jurisprudence that extending this tort to the attorney-client relationship here is not justified.<sup>7</sup>

Indeed, applying the Appellate Court's analysis will lead to results that clearly conflict with and repudiate this Court's holding in Rhodes v. Norfolk & Western Railway Co.<sup>8</sup>

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<sup>7</sup>Id. at 348 (emphasis added).

<sup>8</sup>78 Ill. 2d 217, 399 N.E.2d 969 (1979). It is interesting that the Appellate Court failed even to address the Rhodes decision. It instead resorted to a New Jersey superior court decision. Parker v. M & T Chems., Inc., 236 N.J. Super. 451, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989).

In Rhoades, this Court held that a discharged attorney's recovery is always limited to quantum meruit:

[T]he client's right to discharge his attorney at will is not a breach of contract but a term of the contract implied by law because of the special relationship between attorney and client and . . . it would be anomalous and unjust to hold a client liable in damages for exercising that implied right.<sup>9</sup>

Indeed, requiring the client to pay damages in addition to quantum meruit "would make the right to discharge even without cause largely meaningless since the client's contractual financial responsibility to the discharged attorney would be unchanged. . . ." <sup>10</sup>

The Appellate Court failed to explain why discharged in-house counsel should be treated any differently than the outside counsel were treated in Rhoades. Indeed, there is no valid explanation. In-house counsel should thus have no tort cause of action for retaliatory discharge.

**B. In-House Counsel Should Be Treated The Same As Outside Counsel And, Therefore, Should Not Have A Cause Of Action For Retaliatory Discharge.**

**1. In-House Counsel Are Bound By The Same Duties As Outside Counsel.**

**a. All Attorneys Are Bound By The Same Set Of Ethical Strictures.**

Absolutely no distinction can be made between the standards

<sup>9</sup>Id. at 975.

<sup>10</sup>Id. at 974.

of conduct required of in-house and outside counsel. In-house counsel are, first and foremost, attorneys and thus subject to all of the obligations imposed by the rules of professional conduct.<sup>11</sup> Unlike other corporate employees, in-house counsel are members of a unique profession and play "a vital role in the preservation of society."<sup>12</sup> Indeed, in-house counsel wield all of the power and authority that accompany the special position that attorneys occupy in our society. Consequently, their role as corporate employees "does not diminish or change [their] obligation . . . to conduct [themselves] in accordance with the standards of professional conduct applicable to attorneys licensed by this court."<sup>13</sup>

Given the special role that attorneys play in society, the conduct of both in-house and outside counsel is closely monitored and regulated. Instead of resorting to government regulation, however, the legal profession is largely autonomous and self-governing. Indeed, this Court has the ultimate authority to regulate and discipline attorneys practicing in this state. When admitted to practice, all attorneys voluntarily submit to these unique professional ethical

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<sup>11</sup>Illinois Rules of Professional Conduct, Ill. Ann. Stat. ch. 110A, foll. ¶ 776 (1990).

<sup>12</sup>ABA, Annotated Model Rules of Professional Conduct 9 (1984) ("Preamble: A Lawyer's Responsibilities").

<sup>13</sup>Ill. Sup. Ct. R. 721(b). See also Union Co. v. United States, 449 U.S. 383 (1981); Doe v. A Corp., 709 F.2d 1043, reh'g denied, 717 F.2d 1399 (5th Cir. 1983).

responsibilities.<sup>14</sup> Moreover, these obligations are indispensable to the attorney-client relationship because clients repose a special trust and confidence in their attorneys.

**b. Permitting In-House Counsel To Bring Actions Based On The Tort Of Retaliatory Discharge Would Devastate The Attorney-Client Relationship And Betray The Very Ideals Sought To Be Fostered By Retaliatory Discharge Actions.**

This special trust is even more indispensable in the context of in-house counsel. In-house counsel have closer working relationships with their clients than do outside counsel. Indeed, they often play pivotal roles in the day-to-day operations of the corporation.

Expanding the tort of retaliatory discharge to encompass in-house counsel threatens to vitiate the attorney-client privilege, severely undermine the special trust and confidence that corporate clients place in their in-house counsel, and defeat the very goals sought to be advanced by retaliatory discharge actions. This Court created a cause of action for retaliatory discharge as a narrow exception to the doctrine of employment at-will to protect employees who "blew the whistle"

<sup>14</sup>For example, all attorneys have a duty to maintain the integrity of the profession, as well as a fiduciary duty to protect the interests of their clients. *Turner v. Black*, 19 Ill. 2d 296, 166 N.E.2d 588 (1960). These professional obligations necessarily limit some of an attorney's rights. Thus, for example, an attorney's express legal obligation to maintain client confidences limits his First Amendment rights. Rule 1.6(a), Illinois Rules of Professional Conduct.

on their employers and to provide further incentive for corporations to obey our laws.<sup>15</sup> Similarly, the attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients [to] promote broader public interests in the observance of law and administration of justice."<sup>16</sup>

However, extending this tort to cover in-house counsel would deprive them of the opportunity to police corporate activities and advise their corporate clients to comply with our laws. The corporate client would be confronted with the choice of continuing to employ and confide in in-house counsel with whom it has a significant disagreement, or discharging him and facing a wrongful discharge suit and the disclosure of privileged and confidential information. Faced with this "choice," the corporate client would undoubtedly respond by being less candid and forthright with in-house counsel for fear that he could subsequently use this information against the corporation in a retaliatory discharge suit.

Indeed, the corporation might be tempted to cut in-house counsel out of the corporate decision-making process entirely. Ironically, corporations would feel the greatest need to forego legal counsel when it was most needed, such as in those

<sup>15</sup>Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

<sup>16</sup>Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

situations that raise the most novel and challenging legal issues on which no consensus can be reached.

Concealing information from in-house counsel, however, would eliminate the value of his legal advice. The United States Supreme Court has recognized "that advice or advocacy . . . depends upon the lawyer's being fully informed by the client."<sup>17</sup> Indeed, without such candor, in-house counsel will be unable to explain laws to the corporation and ensure its compliance with them.

Alternatively, corporations would begin to rely more heavily on outside counsel, whom the corporations could subsequently discharge without worrying about potential retaliatory discharge suits. Indeed, this ability to discharge outside counsel with impunity further illustrates the folly of holding in-house counsel to a distinct set of ethical standards.

**c. The Damages Suffered By Discharged In-House Counsel Are No Different Than Those Suffered By Discharged Outside Counsel,**

The desire to extend the tort of retaliatory discharge to the in-house counsel context addresses only a portion of a broader problem: the "captive" attorney. In other words, all attorneys -- whether in-house counsel or private practitioners -- who are financially dependent upon one or a few major clients may be confronted with certain dilemmas as a result of the conflict between their financial needs and their ethical

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<sup>17</sup>*Id.*

obligations. In either situation, the attorney will have to suffer silently when discharged for obeying the law.

Thus, there is nothing unique about the nature or degree of injuries that discharged in-house attorneys may suffer. Indeed, discharged outside counsel may suffer more severe injuries. For example, an outside attorney, with all of the financial responsibilities that accompany a private practice, may suffer greater injuries when discharged by a major client than in-house counsel would suffer when discharged by a corporate employer. Under established precedent, however, this private attorney would be entitled to recover no more than quantum meruit.

**d. In-House Counsel, Like Outside Counsel,  
Must Withdraw Under Certain Circumstances,  
And Thus Cannot Suffer Tortious Damages  
When Discharged Under Those Circumstances.**

Unlike the typical corporate employee, an in-house attorney has an ethical duty to withdraw when continued representation of his client will result in a violation of the rules of professional conduct,<sup>18</sup> or when his effectiveness has been compromised and he is unable to represent his client adequately. For example, when an attorney and his client fundamentally disagree on the proper course of conduct in a particular circumstance, the attorney can lose the trust and confidence that is the bedrock of the attorney-client

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<sup>18</sup>Rule 1.16(a)(2), Illinois Rules of Professional Conduct; see also In re Leonard, 64 Ill. 2d 398, 356 N.E.2d 62, 65-66 (1976).

relationship.<sup>19</sup> Under these circumstances, the client may wish to terminate the relationship.<sup>20</sup> The attorney would then be ethically obligated to withdraw.<sup>21</sup>

Given these ethical constraints, an in-house attorney should not be permitted to bring a tort action for retaliatory discharge under circumstances in which he would otherwise have an ethical duty to withdraw. Indeed, recovery under these circumstances is limited to quantum meruit because as a matter of law, the in-house attorney can never suffer compensable tortious injuries.

**2. All Clients Have An Absolute  
Right To Discharge Their Attorneys  
At Any Time And For Any Reason.**

**a. The Attorney-Client Relationship  
Is Consensual.**

It is indisputable that the attorney-client relationship is entirely consensual. Indeed, the attorney "may do nothing which restricts the right of the client to repose confidence in any counsel of his choice."<sup>22</sup> Clients share highly sensitive

<sup>19</sup>This loss of faith in an attorney is sufficient to establish cause for an attorney's discharge. Tobias v. King, 84 Ill. App. 3d 998, 406 N.E.2d 101, 104 (1st Dist. 1980) (citing Fracasse v. Brent, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972)).

<sup>20</sup>"When an attorney elects not to . . . follow the client's wishes, he should not be surprised that his client no longer desires his services." Willy v. Coastal Corp., 647 F. Supp. 116, 118 (S.D. Tex. 1986), rev'd on other grounds, 855 F.2d 1160 (5th Cir. 1988).

<sup>21</sup>Rule 1.16(a)(4), Illinois Rules of Professional Conduct.

<sup>22</sup>Corti v. Fleisher, 93 Ill. App. 3d 517, 417 N.E.2d 764, 769 (1st Dist. 1981).



information with their counsel and rely heavily on their advice. They must at all times have the utmost faith in their counsel.<sup>23</sup>

Thus, a client has an absolute right to discharge its attorney at any time and for any reason. "This right is implied in every contract of employment and is deemed necessary because of the deeply embedded concept of the confidential nature of the relationship between the attorney and the client and the evil that would obviously be engendered by any friction or distrust."<sup>24</sup> Because this right is absolute, the decision to discharge an attorney should not be subject to the second-guessing of jurors.

**b. An Attorney's Status As In-House Counsel Does Not Eliminate The Client's Right To Terminate An Attorney-Client Relationship.**

There is no legitimate reason for vitiating the right of a client to discharge an attorney simply by reason of the attorney's status as in-house counsel. The Rules of Professional Conduct do not establish a caste system of attorneys or clients. Instead, the Rules explicitly permit all clients to discharge attorneys at will. Permitting in-house counsel to recover where outside counsel could not would

<sup>23</sup>Savich v. Savich, 12 Ill. 2d 454, 147 N.E.2d 85, 87 (1957) ("a client is entitled to be represented by an attorney in whose ability and fidelity he has confidence").

<sup>24</sup>Herbster v. North Am. Co. for Life & Health Ins., 150 Ill. App. 3d 21, 501 N.E.2d 343, 347 (2d Dist. 1986), appeal denied, 114 Ill. 2d 545, 508 N.E.2d 728, cert. denied, 484 U.S. 850 (1987).

establish two distinct sets of standards for attorneys, thus saying that although all attorneys are equal, some are more equal than others.

IV.

CONCLUSION

In holding that in-house counsel have a cause of action for retaliatory discharge, the Appellate Court fundamentally changed the relationship between in-house counsel and their corporate clients/employers. The ruling says to the corporate client that employed attorneys are not held to the same high professional standards as are retained counsel and that the client should entrust its secrets to such attorneys at its own risk. Consequently, in-house counsel should not be allowed to sue their corporate clients for retaliatory discharge. Accordingly, the Appellate Court's reversal of a summary judgment for appellants should be reversed.

RESPECTFULLY SUBMITTED, this 18<sup>th</sup> day of January 1991.

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