NO. 45250-2-II

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION TWO

JENNIFER LINTH
Appellant,

v.

CARL GAY,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR CLALLAM COUNTY

The Honorable Keith Harper, Judge

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Jennifer Linth, the Plaintiff below, hereby seeks review of the decision of the Honorable Keith Harper, Superior Court Judge of Clallam County, dismissing her malpractice claim against Carl Gay, the Defendant below, on summary judgment, based upon the court's opinion that Mr. Gay, an attorney representing first trustor Evelyn Plant, in drafting and amending her trust, and later after here death Dan Doran, the successor trustee, never owed any duty of care or loyalty to Ms. Linth, the principal and primary beneficiary of that trust. The decision from which appeal is taken was issued by Judge Harper on November 2, 2011.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting summary judgment dismissal of Linth's malpractice claim against attorney Carl Gay.

Issues Pertaining to Assignments of Error

1. Whether an attorney ostensibly representing a trustor owes a duty of care to the primary beneficiary of a fully executed trust with testamentary provisions, in drafting such document, to ensure the beneficiary's share of the estate is preserved and passed according to the legally appropriate wishes of the trustor?

2. Whether an attorney representing a trustee of a testamentary trust trying to resolve competing claims to the trust corpus caused by that attorney's own defective draftsmanship owes a duty of loyalty to the primary express trust beneficiaries, in interpreting and rendering legal opinions to the trustee as the validity and effects of such defective draftsmanship?

3. Whether an attorney who drafts a defective trust document, causing competing claims to the trust corpus, can later provide objective legal counsel to the trust on issues related to the defective document?

4. Whether an attorney representing a trustee of a testamentary trust trying to resolve competing claims to the trust corpus caused by that attorney's own defective draftsmanship breaches a duty of loyalty to the primary trust beneficiary by failing to disclose such conflict of interest and failing to secure a conflict waiver from the primary trust beneficiary?

5. Whether an attorney representing the trustee of a testamentary trust trying to resolve competing claims to the trust corpus caused by that attorney's own defective drafting has a duty of loyalty to the trustor to ensure that the trustor's express wishes to disinherit a party are honored?

6. Whether the trial court erred in concluding there was no issue of material fact as to whether Carl Gay owed a duty of reasonable care to Jennifer Linth in drafting the Evelyn Plant Irrevocable Trust?

7. Whether the trial court erred in concluding there was no issue of material fact as to whether Carl Gay owed a duty of loyalty and care to Jennifer Linth in representing the trustee and the trust, suffering from defects of his own making, after the death Evelyn Plant?

8. Whether the trial court erred in concluding that there was no issue of material fact as to whether Carl Gay owed a duty of loyalty to Jennifer Linth, a vested beneficiary of the Evelyn Plant Trust, following the death of Evelyn Plant?

III. STATEMENT OF THE CASE

Statement of Facts

The following were represented as uncontested facts at the summary judgment proceeding before Judge Harper:

1. Mrs. Evelyn Plant was competent to sign her trust and estate planning documents on July 22, 2000 and August 22, 2000, and until shortly before her death. CP 241.

2. Mrs. Evelyn Plant passed away on January 1, 2001. Here estate value was approximately $3 million. CP 37, *Ex. L.*

3. Mrs. Plant owned and lived on a remarkable piece of property commonly referenced as Green Point. CP 241.

4. Mrs. Plant was a widow since 1981. *Id.*

5. Mrs. Plant engaged Mr. Gay, an attorney at law specializing in estate planning, to assist her in estate planning in somewhere around 1995. CP 37, *Ex. A, (billing statements of Carl Gay, 1999); T (10-9-2001 email from. C. Gay to W. Olsen).*

6. Mr. Gay *always* knew that Mrs. Plant wanted to provide for Jenny Linth and that from early on she wanted Jenny to have some form of a life estate in Green Point; he repeatedly acknowledged his knowledge and belief in such fact and his full awareness of it in multiple documents both before and after the death of Mrs. Plant. CP 37, *Ex. A (Feb. 99 billing); B; E,, J-1, K, N, O, P, R, S, T, U, V, W, X, Z,A1,D1, E1.*

7. Mr. Gay, acting as attorney at law for Mrs. Plant, prepared a set of estate planning documents for Ms. Plant in the fall of 2000 which included a trust with testamentary provisions. *Id.* No other attorney participated in the drafting of these documents. CP 241.

8. The testamentary provisions of the July 22, 2000 trust provided Jenny Linth with the opportunity to live at the main residence at Green Point for a limited number of years at no cost, except to participate in the maintenance of the property, and then a life estate on a to be determined

from a "carve out" parcel on/from Green Point. She was also specifically provided the right to collect rents from the guest house on the property. CP 37, *Ex. B.*

9. The July 22, 2000 version of the trust, in it original form, had no reference to any foundation, foundation plan or exhibit to be attached somehow to the trust. *Id.* The trust originally provided for a residuary gift of the Green Point property to Crista Ministries. *Id.* Ms. Plant was designated as the trustee. *Id.*

10. Mrs. Plant signed the trust document on July 22, 2000 with Mr. Gay notarizing her signature. The signing occurred at Green Point. *Id., Ex. A (July 2000 CLG billing).*

11. Mrs. Plant never revoked the July 22, 2000 trust. CP 239.

12. On August 15, 2000 Mrs. Plant met with Claudia Smith, Louis Torres, Jenny Linth, Holly Johnson and John Linth to learn about a plan for a proposed nonprofit foundation for Green Point. On that day, after getting the information she felt she needed, she said "Let's do it". CP 37, *Ex. V, 2.*

13. On August 16, 2000 Mrs. Plant resigned as trustee of her trust and allowed Mr. Doran to succeed her. She also allowed him to act as her attorney-in-fact. She wanted Doran to "carry out the details of the project". *Id.*

14. By August 17, 2000 Mr. Gay had conversations with Mrs. Plant and Mr. Doran, her banker, about these changes to her estate plan. The foundation would supplant and replace the then currently named Green Point beneficiary, Crista Ministries; additionally, Mrs. Plant then wanted a broader life estate gift to be written in for Jennifer Linth. She was to be able to live on the property, for life, at no cost to Ms. Linth. *Id., Ex. C; EI.* A letter that Mr. Gay sent to Mrs. Plant anticipated an appointment at his office the next day, August 18, 2000 at 4 pm. The letter included a copy of the then proposed first amendment to the trust. *Id.*

15. Mr. Gay, acting as attorney at law for Mrs. Plant, is the only attorney who drafted the proposed amendment. CP 239.

16. The scheduled office meeting on August 18, 2000 is not reflected in the time records of Mr. Gay, which were extensive. CP 37, *Ex. A (August 2000 billing).* Further the Gay time records contain no other entries, *ever*, of any further communications with Mrs. Plant up to the date of her death on January 1, 2001. *Id* [1]

17. On August 21, 2000 Mr. Gay conducted an office meeting with Dan Doran and Claudia Smith. During the meeting Mr. Gay was informed

[1] Mr. Gay has asserted by declaration that Mrs. Plant's death was sudden and that he was not aware of her possible worsening condition. There is nowever an October 10, 2000 time entry on his bill that reflects a telephone call with Mr. Doran to discuss "hiring home health care employees".

of a need to make revisions to the proposed first trust amendment that he had drafted on or before August 17, 2000. *Id., Ex. A; D1; E1.*

18. By August 22, 2000 Mr. Gay had prepared another draft of the first amendment which contained an error, namely, the wrong middle initial for Mr. Doran. *Id., Ex. D&E.* The draft also contained an underscored blank for the dating of the document: "this ____ day of August, 2000". *Id.*

19. Mr. Gay, in drafting (or redrafting) the proposed first amendment included the following language about the establishment of a nonprofit foundation which would eventually receive Green Point:

trustee shall convey the Green Point residence, together with the sum of Fifty Thousand Dollars ($50,000.00), to a nonprofit corporation and tax-exempt private foundation to be created by trustee in accordance with the terms set forth on the document entitled "THE FRANKLIN AND EVELYN PLANT GREEN POINT FOUNDATION PLAN" (hereinafter "the Foundation plan"), a copy of which is attached

hereto marked Exhibit 1 and by this reference incorporated herein as though set forth in full. The gift of cash and the Green Point residence to the Foundation shall be subject to the following conditions, restrictions, and covenants to be contained in the trustee's deed to the Foundation:

(a) For a period of time measured by the

20. On August 22, 2000 Mr. Doran came to Mr. Gay's office, got the current draft of the amendment and brought it to Mrs. Plant, who signed it. *Id., Ex. A; D; E; V; D1, E1.* Mr. Doran corrected the errors with his middle initials on pages one and three of the document with interlin-

eations. Neither Mr. Doran nor Mrs. Plant inserted a date on the blank line for the date on page 1 of the document. Mr. Doran later that day returned the document to Mr. Gay, signed by Mr. Doran and Mrs. Plant. *Id., Ex. D, D1, E1.*

21. Mr. Gay revised the first page of the signed document to fix the error with Mr. Doran's middle initial; he could not do the same with the third page because of the signatures. *Id., Ex. E.* He also replaced the blank line for the date: "the 22nd day of August, 2000". According to his time records, presumably, this occurred on August 22, 2000, indicating that he had seen the document returned, in signed form from Mrs. Plant on that day. *Id. Ex. A (Aug. 2000 billing).*

22. The signed amendment provided for a life estate for Jennifer Linth in Green Point. *Id., Ex. A (see e.g. August billing); E; K*

23. Ms. Smith immediately began working on the foundation. *Id. Ex.F- J, V.* By August 30 she had presented a draft plan by email to Mr. Doran, which included a list of directors which included several members of the Linth family, to which Mr. Gay eventually claimed to be inconsistent with the intentions of Ms. Plant. Mr. Doran immediately sent an email to Ms. Smith that indicated that the plan looked acceptable and that it reflected a lot of work she had done. *Id., Ex. G.* He voiced no objection to the composition of the board which included Doran and Gay.

Id. Ex. V. Jennifer Linth was to be the lead person for the foundation, although there was some debate about how extensive her role was to be. *Id., Ex. F-J,V.*

24. There was a meeting held at Green Point on September 28, 2000, with Mrs. Plant present and participating, during which that plan was discussed. Mrs. Plant had no objections to the proposed membership of the foundation board. *Id.*

25. In November 2000 Mrs. Plant spoke with her longtime Pastor from her local church, Jon Fodge. Mrs. Plant's health was failing. She confided in the Pastor about several matters. One of them was that she had made arrangements for Jenny Linth for Jenny's life, so that she would be able to live at Green Point without any cost because Jenny Linth had helped her and so many other people without asking for anything in return. *Id,. Ex. C1.*

26. On November 28, 2000 Ms. Smith sent Doran an email containing a list of the foundation expenses to date, along with a budget and spreadsheets which included a list of directors which included the Linths. Mr. Doran did not object. *Id. Ex. I.*

27. As indicated above, Mrs. Plant passed away on January 1, 2001.

28. On February 21, 2001, Ms. Smith again contacted Mr. Doran and again provided him the same foundation plan again, to which there was no objection. *Id., Ex. J.*

29. Mr. Gay and Doran were in the process of forming the foundation in March of 2001, and Mr. Gay was then telling outside parties that Ms. Linth had a life estate in Green Point. *Id., Ex. J-1; K.*

30. With the oversight of Gay providing legal counsel to the estate and trust, the trustee made a series of large distributions to various beneficiaries, including Jennifer Linth, *before the estate tax issue was settled and paid Id., Ex.M.* These distributions were dubious as they threatened the ability of the trust to dispose of Green Point according to the wishes of Mrs. Plant. *Id., Ex N; S, W,Y.*

31. By July 2001 Mr. Gay was learning in no uncertain terms that the trust documents he had drafted were defective and that various parties were taking competing positions on their validity, including Crista Ministries who, by all accounts (including their own) had been effectively disinherited. *Id. Ex. O; X; Z.* Crista had been unaware of the apparent drafting issue until Mr. Gay disclosed it to them, apparently under the auspices that he had a duty to do so. CP 132, 143.

32. On or about July 11 and 13, 2001, Mr. Gay received correspondence from an estate planning attorney who Mr. Gay had

researched and determined to be an expert in estate planning matters, Dean Butler, from the Seattle law firm Stokes, Lawrence P.S.. Mr. Gay had previously arranged for Mr. Butler to be hired by the trust to review the validity of the first amendment that Mr. Gay had drafted. Mr. Butler's correspondence plainly stated and opined, in various places, that Mr. Gay likely had a conflict of interest in continuing to represent the trust in this matter because he had drafted the underlying documents – the July 22, 2000 trust and the August 22, 2000 First Amendment. CP 37, *Ex. P.*

33. Mr. Gay disregarded the conflict warnings in the Butler documents and continued to represent the trust. He never disclosed the Butler correspondence to Jennifer Linth. The bill for the Butler law firm was paid out of the trust. Mr. Gay never formally withdrew from representing the trust. CP 239.

34. By roughly October of 2001, Mr. Gay had decided that the document that he himself had drafted, namely the First Amendment, which granted a life estate to Ms. Linth, was defective and "failed" because the "Exhibit 1 to be attached" – a clause he himself drafted – did not occur before the death of Mrs. Plant. *Id.* This was inconsistent with the position originally taken by Gay following the death of Mrs. Plant, by the attorneys for Ms. Linth, and by the opinion and report of Mr. Butler,

who Mr. Gay had hired as an expert on that precise issue; Mr. Butler's bill was paid by the trust, and not by Mr. Gay. CP 37, *Ex. U.*

35. Ms. Linth's attorneys petitioned the court for some interpretation of the Gay documents. In response Gay, acting on behalf of unrepresented beneficiaries, insisted that they be notified of the action. *Id., Ex. Q, T.*

36. Ms. Linth has never received a life estate in Green Point in any form to this date..

37. Ms. Linth has incurred extraordinary attorney fees in litigating this matter against the trustee and his attorney Carl Gay. She was forced to spend her own money on attorney fees prior to June of 2001; virtually all of the $100,000 gift she received from Mrs. Plant in June of 2001 was necessarily spent on attorney fees to address the defective draftsmanship of the first amendment, and the fallout therefrom.

38. Ms. Linth remains indebted to various attorneys for the legal fees she incurred in the estate litigation following the exhaustion of the $100,000 gift from Mrs. Plant. CP 239.

39. The culmination of the Linth petition was a "global" settlement agreement, called the NJDRA (Non-judicial Dispute Resolution Agreement) which required Linth to abandon her life estate claim to Green Point. In lieu of it the property would be sold and some cash settlement made with Ms. Linth and the other estate claimants, including the

generally acknowledged disinherited Crista Ministries. The presupposition of the NJDRA was that the drafting of the estate plan was defective. CP 37, *Ex. Y*

40. A later settlement of the estate litigation specifically excluded this malpractice action against Mr. Gay by Ms. Linth. CP 239.

41. As of this date, Ms. Linth does not have a life estate in Green Point, notwithstanding the fact that she has lived there over the ensuing time and dutifully and faithfully maintained the property for the benefit of the trust with little or no compensation.

Procedural History

The complaint filed in the malpractice case alleged that Mr. Gay is liable to Ms. Linth because, inter alia, he defectively drafted the operative estate planning documents here, namely the trust and the first amendment, such that Ms. Linth was deprived of her life estate and, by consequence, the $100,000 gift she had received from Mrs. Plant. The complaint also alleges that he committed malpractice in the administration of the trust following the death of Mrs. Plant. CP 913.

Mr. Gay eventually moved for summary judgment on all claims brought by Ms. Linth arguing that Mr. Gay never had any legal duty toward Ms. Linth, as his duty was only to Mrs. Plant in drafting the trust and the first amendment, and only to the successor trustee, Mr. Doran,

following the resignation and death of Mrs. Plant. A hearing on this issue was conducted before Judge Keith Harper in the fall of 2013. Judge Harper granted the motion for summary judgment and dismissed all claims of Ms. Linth against Mr. Gay on October 18, 2013. CP 22. This appeal timely followed. CP 14.

IV. SUMMARY OF ARGUMENT

Carl Gay owed a duty of care to Jennifer Linth in drafting the Evelyn Plant irrevocable trust naming Jennifer Linth as its primary beneficiary. He owed that same duty of care when he redrafted that document with the so-called "First Amendment", especially as the redraft increased the substantial gift to Ms. Linth. Mr. Gay violated the duty of care with the his flawed drafting. That flawed drafting led to a decade of litigation that devoured all of the other benefits Ms. Linth was to receive from the trust; all of her money was spent on legal bills. Especially following the death of Mrs. Plant, Carl Gay owed a fiduciary duty of loyalty and care to not only the trustee of the irrevocable trust, but also to the Jennifer Linth, as the primary trust beneficiary. Mr. Gay violated these fiduciary duties by 1) continuing to represent the trustee despite the clear conflict of interest, 2) representing the trustee in the litigation directly derived from his own defective draftsmanship, 3) disclosing his "defective" drafting to disinherited third parties leading directly to claims by such parties effectively depleting the

estate, 4) charging the trust for his own services while suffering from a conflict of interest, 5) hiring an expert to review drafting issues of his own making and charging such expert fees to the trust, 6) failing to provide full and open disclosure to trust beneficiaries of some or all of the foregoing, and 7) engineering a settlement process and agreement that sought to insulate him from liability for his own defective drafting while simultaneously depriving Ms. Linth of a life estate on the subject property. Absent full disclosure of his conflicts of interests and waiver by all those so affected and impaired, especially Ms. Linth, Mr. Gay should have resigned from representing any party in this matter immediately upon his realization of any one of those conflicts. The trial court decision must be reversed because it failed to account for these facts, relying instead on an inappropriate application of certain legal standards concerning the scope of an attorney's duties in the estate planning setting.

V. ARGUMENT

1. The summary judgment standard.

A motion for summary judgment should not be granted unless the pleadings, depositions, and affidavits on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Hontz v. State, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986). The appellate court engages in the same inquiry as the trial court, and all

evidence and inferences are considered in the light most favorable to the nonmoving party. Id.

> In such cases facts and all reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. The burden is on the moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a strict standard. Since the plaintiff's evidence raised genuine issues of material fact with regard to whether the defendants acted negligently and whether such negligence, if any, was a proximate cause of the injuries, these issues are not properly decided on summary judgment.

Atherton Condominium Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wash.2d 506, 516, 799 P.2d 250 (1990); Osborn v. Mason County, 157 Wash.2d 18, 22, 134 P.3d 197 (2006).; Folsom v. Burger King, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt., 121 Wash.2d 152, 163, 849 P.2d 1201 (1993).

The non-moving party is entitled to all reasonable inferences from the evidence before the court at summary judgment. Scott v. P. W. Mountain Resort, 119 Wash.2d 484, 487, 834 P.2d 6 (1992). Compare Frisino v. Seattle School Dist. No. 1, 160 Wn. App. 765, 249 P.3d 1044 (Div. I 2011)(reversing summary judgment for dismissal of employment discrimination and retaliatory discharge claims for failure to properly evaluate reasonable inferences for non-moving party). Judgment as a matter

of law should "not be granted unless the court can say, as a matter of law, that there is neither evidence nor reasonable inference from the evidence sufficient to sustain the verdict."Pritchett v. City of Seattle, 53 Wash.2d 521, 522, 335 P.2d 31 (1959). Such a motion admits the truth of the opponent's evidence and all inferences that can be reasonably drawn therefrom, and requires the evidence be interpreted most strongly against the moving party and in the light most favorable to the opponent. ALCOA v. Aetna, 140 Wash.2d 517, 529, 998 P.2d 856 (2000); Goodman v. Goodman, 128 Wash.2d 366, 371, 907 P.2d 290 (1995). "The credibility of witnesses and the weight to be given to the evidence are matters which rest within the province of the jury; and, even if it were convinced that a wrong verdict had been rendered, this court would not substitute its judgment for that of the jury so long as there was evidence which, if believed, would support the verdict rendered." Burke v. Pepsi-Cola Bottling Co. of Yakima, 64 Wash.2d 244, 246, 391 P.2d 194 (1964). The judicial urge to take questions of fact from the jury must be resisted.

2. The trial court impoperly concluded there was no duty of care running from Gay to Linth concerning the drafting of the trust and its amendment, and the execution of such documents.

The trial court issued summary judgment against Ms. Linth by adopting the argument of the defense that Gay owed no duty to Ms. Linth.

The defense argument focused on the drafting of the trust and the first amendment. The defense cited a series of attorney malpractice cases discussing such duty in the context of estate planning generally. These cases do not apply to this estate planning setting, which involves the establishment first of an inter vivos irrevocable trust with testamentary provisions, with the testamentary provisions becoming operative shortly after (four months) the documents were signed by the trustor. Furthermore, these cases do not deal with a situation such as found here, where an amendment –whether effective or not – increased the gift to a beneficiary, here Jennifer Linth, the primary beneficiary of the estate planning. This rather simple set of observations, which ultimately must be considered uncontestable, became polluted over time by defense allegations, particularly in the summary judgment motion, that Mr. Gay allegedly had no duty to Ms. Linth because he had duty only to Mrs. Plant to ensure that her estate plan was not frustrated by the creation of a foundation with a board of directors populated by various members of the Linth family. This is beside the point for analyzing malpractice claims of Jennifer Linth, who in both cases (the original document and the amendment) was entitled to a life estate. Moreover, it is the reddest and smelliest of herrings as it seeks to move the duty discussion to the one adopted by Gay later on down the road, that the entire First Amendment

failed because of a dispute concerning the ultimate composition of the board of the foundation contemplated by the first amendment.

Estate beneficiaries may bring an action against an attorney drafting estate planning documents for errors in drafting those documents. Stangland v. Brock, 109 Wn.2d 675, 747 P.2d 464 (1987). This circumstance was distinguishable from the central authority cited by Defendant Gay, in support of the "no duty" argument, Trask v. Butler:

> In *Stangland v Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987), we acknowledged the right of an estate beneficiary to bring a cause of action against an attorney under the multi-factor balancing test and the third party beneficiary test for errors in drafting a will. In finding a duty for beneficiaries under the multi-factor balancing test we recognized "if the beneficiaries could not recover for the attorney's alleged negligence, no one could." *Stangland* at 681, 747 P.2d 464.

123 Wn.2d 835, 844, 872 P.2d 1080 (1994)(underlining added). On this point and principle, In re Karan, 110 Wn.App. 76, 38 P.3d 396 (2002) is in accord and instructive. In Karan the Washington Court of Appeals decided that an attorney was liable for defectively creating a guardianship, the net effect of which was to deprive the ward of a large chunk of $50,000 which was to be for the benefit of the ward. The court there determined that the attorney creating the guardianship did have a duty to the ward to create the guardianship according to statute and law, in that case with a bond and blocked account. The attorney neglected to create

either. Thus the attorney was liable for failing to complete the mechanical parts of setting up the guardianship such that the ward was deprived of the corpus of the guardianship when the guardian squandered the money.

This exception and analysis applies in this case, as everything that occurred in this matter following the death of Ms. Plant was attributable to vagaries of the estate planning documents prepared by Mr. Gay. By all accounts, Mrs. Plant wanted to provide for Jennifer Linth during Jenny's lifetime by giving her, ultimately, an enhanced life estate. By the terms of the first amendment she was to be able to live there without cost for her life, *and* she was to be able to reap the rents from the guest cottage. It must be emphasized here that this First Amendment *was signed* by Mrs. Plant and there is no suggestion that there was any undue influence or fraud or other illegality in the securing of that signature.

The Gay summary judgment motion twisted the facts here and tries to put the cart before the horse by arguing that the gift to Jennifer Linth is *subject to* the foundation plan. This presentation is false on its face. But regardless, if such be the case, then the *drafting of the document is flawed, thereby compromising the gift to Jennifer Linth.* In that case, the road of responsibility leads back to Mr. Gay, the one and only lawyer who drafted the document that created the problem *ab initio.* In other words, as Mrs. Plant knew she wanted Jennifer Linth to be cared for during her life by

living at Green Point, and Mr. Gay prepared (or attempted to prepare) the document that would have bestowed that gift upon her, he is responsible for flaw. There is no other attorney who participated in this estate planning. Mr. Gay crafted the document by himself. It is important to remember here that both versions of the trust at issue provided for Ms. Linth, and the First Amendment, in particular, provided her with a life estate *instead of* the original 5 year term for living at Green Point. [2]

Similarly, the "foundation plan" and "attachment" language of the First Amendment came from nobody but Mr. Gay. Why Mr. Gay chose those terms -- those words -- is anyone's guess. No other person did this work for Mrs. Plant. According to Mr. Gay, from the summer of 2001 when he learned that there was a conflict over this very language that he himself drafted -- this flaw, mistake, discrepancy or oversight – he decided such flaws were the kiss of death for the entire testamentary scheme of

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[2] The "incidental" beneficiary argument by Defendant Gay here is interesting from another perspective. In the original Clallam County action brought by Ms. Linth to replace the Trustee, Mr. Gay, acting on behalf of the Trustee, successfully argued for and secured an order finding that that all remainder beneficiaries of the trust and/or First Amendment be included in the litigation as indispensible and necessary parties. In fact, he took the position that even Crista Ministries, who by virtually all accounts was expressly excluded from any interest in the estate, had to be included as a necessary party. CP 37, Ex Q, X (CP 178, 180). He presented himself then as the vanguard of these unrepresented, more remote, contingent, and even disinherited trust beneficiaries to drive Ms. Linth's litigation costs higher and her litigation tasks from that point on considerably more onerous. In this setting, before Judge Harper and now before this court, Defendant Gay's asserts exactly the opposite, though the issue concerns Ms. Linth, the primary trust beneficiary.

Mrs. Plant, including her plans to provide for Jennifer Linth. He coupled the so-called failure of the First Amendment with failure of the gift of the full life estate to Jennifer Linth. There were perhaps a hundred different ways that this document could have been drafted, certainly without reference to a non-existent "Exhibit 1" that was to be "attached" or without reference to a yet-to-be-created "foundation plan". Had these terms been left out of the document, the estate dispute that erupted would not have happened. Again, this phenomenon existed because of one thing and one person, and this according to Mr. Gay himself: draftsmanship by Mr. Gay.

This case is quite similar to the Karan case in another particular, that of failing to follow through with what one would ordinarily expect of an attorney, especially in this setting, executing the estate plan. Though the argument is not accepted here, Mr. Gay's self-serving declarations have consistently tried to lay the blame for the "foundation plan not being completed" or the "foundation plan not being attached" on other people, including specifically Dan Doran and Claudia Smith, as though he had no role in the events surrounding the revisions to the estate plan. This is another red herring argument. First, one must remember that Mr. Gay drafted the First Amendment, including the operative and supposedly defective Exhibit 1/attachment clause. He therefore knew that there was a

presumption, if from nothing else his drafting, that there *should have been* foundation plan prepared and attached. Second, Mr. Gay knew and realized that Mrs. Plant signed the First Amendment without the attachment and exhibit. He received the signed original back from Mr. Doran on August 22, 2000, with the interlineation for the middle initial of Mr. Doran's middle initial; he then arranged to have the mistake corrected on page 1. At that time and place he must have looked at the document and seen that the plan/exhibit were not attached. Following that event, until Mrs. Plant's death on January 1, 2001, there is no evidence that Mr. Gay took any steps to assure that the plan and exhibit were completed. Also, during this time he had received information that Mrs. Plant's health was failing; his billing shows a phone call from Mr. Doran on that very fact, in which they discussed home health care for Mrs. Plant, well before January 1, 2001.

The central argument put forth by Mr. Gay on the duty issue stems from the relatively recent case of Parks v. Fink, 293 P.3d 1275 (2013), which Mr. Gay asserts is controlling and dispositive here. It is not for several reasons. That case involves a claim by a prospective estate beneficiary against a lawyer who had not ensured that his client signed and executed his revised estate plan, specifically a will prepared by the attorney, over an extended time, after the attorney delivered it to his client.

As a result the prospective beneficiary was excluded from the estate. In that case the court reasoned that the attorney had no duty to ensure the signing and execution because of the sensitive nature of estate planning between the person arranging the estate plan and potential estate beneficiaries. According to the court, correctly, there is much thinking and consideration that goes into estate plans, and the job of the attorney, at the drafting stage, is not to encourage or influence a testator one way or another. This includes ultimately the signing and executing of documents in an estate plan.

Here this argument cannot be made. Jennifer Linth is not a prospective beneficiary of this trust; she is an actual, real beneficiary. First, by *every* account, she was deeply loved by Mrs. Plant for many different reasons, not the least of which was attending to her in many, many capacities during her life. Second, Mrs. Plant expressly named Jenny Linth and provided for her to have an interest in Green Point in the first version of the trust on July 22, 2000. Third, Mrs. Plant signed this document, with Mr. Gay actually notarizing the signature, thereby memorializing her intent for all to see. Fourth, on August 22, 2000 Mrs. Plant named Jenny Linth in the First Amendment, this time giving her a larger gift than what she had given her 30 days before. Fifth, Mrs. Plant signed the First Amendment, again reiterating her affection and desire to

then ensure a gift to Jennifer Linth, thereby executing the trust. Sixth, these documents were not wills, and did not require the formal adoption procedures including the signatures of competent witnesses. Seventh, similarly, these documents constituted an irrevocable trust upon the death of Mrs. Plant.

Perhaps another way of saying all this is that in this case, Mr. Gay's duty to Mrs. Plant *included* his duty to correctly draft the trust documents so that Jennifer Linth would receive what Mrs. Plant wanted her to have. This of course simply has never happened.

Similar facts do not occur in the Parks case. In fact, the court there goes to great lengths to point this distinction out, in reviewing many cases from different states. This is important because under these circumstances there is no conflict with respect to the duty of loyalty vis-à-vis Jennifer Linth. There is no question, whatever may be said about the goings-on of the foundation and its board members, that Mrs. Plant wanted Jenny to be cared for, and specifically for her to have a life estate at Green Point.

3. The court failed to consider the possibility of malpractice occurring after the resignation and death Mrs. Plant.

The court should have distinguished the duty from Gay to Linth following the death of Mrs. Plant. The second major point Ms. Linth

urged upon the court in the summary judgment proceedings was that Mr. Gay had violated one or more fiduciary duties owed to her after Mrs. Plant resigned as trustee and, more specifically, after Mrs. Plant passed and the trust's testamentary provisions became effective. At that point the gifts to Ms. Linth, including the life estate, vested. This was a bullet dodged by the defense, and one which the court simply did not seem to take much interest in. The rejection of this argument, whether express or implied, is clearly error for several reasons.

First, as pointed out above, the main thrust of cases relied upon by the defense concerned the testator who did not complete the execution of his or her estate plan. Those cases simply do not apply to this part of this case.

Second, nothwithstanding that resolute fact, with respect to this argument, (the duties from Gay to Linth after the death of Mrs. Plant) the defense played the same broken record, that *because, unfortunately,* Mrs. Plant (or others) did not form the foundation before her death and *because, unfortunately,* the "foundation plan" referenced as "Exhibit 1" to the First Amendment was not then attached to the First Amendment, Mrs. Plant did not complete her estate plan and therefore all of it, or perhaps all of it, or perhaps only the First Amendment part of it, is invalid. Because all or part of it *may be invalid* then there can be no duty running from Carl Gay, as

the attorney for the estate and/or trust following the death of Mrs. Plant, to Jennifer Linth. This is an elaborate and deliberately deceptive nonsequitur, again designed to distract from the core issue, the duty Gay owed to Ms. Linth following the death of Mrs. Plant. But the basic and general validity of the estate plan vis-à-vis the trust was never questioned by any party. The estate was administered as a trust -- as opposed to intestacy -- with Mr. Gay representing the trustee, and providing legal services – ostensibly – not only to the trustee but also to the beneficiaries. While there may have been questions about who the "vested" beneficiaries were because of the defective documents, Ms. Linth was vested regardless, according to *both* documents, and moreover, according to the trust administration. Indeed, Mr. Gay and the trustee paid her more than $100,000 according to the trust provisions. In making such payment, certainly, he felt obligated to fulfill the intent of Mrs. Plant; the corollary to this is that in fact and law 1) he had a duty to ensure such payment was made and 2) *he believed* he had such duty as the attorney representing the trust.

Third, as pointed out elsewhere here, Mr. Gay adamantly insisted that Ms. Linth, in initiating litigation over the trust administration, include as indispensible parties everyone ever named in the estate plan, whether from the original document or the first amendment (except the

Foundation). His insistence included most ironically and radically Crista Ministries; Mr. Gay repeatedly openly admitted and argued that Crista Ministries had been disinherited by Mrs. Plant's signing of the First Amendment. Furthermore, after such parties were notified at the cost to Ms. Linth (including attorney fees) Mr. Gay took the position that all had to participate in all settlement discussions. When considering such facts, one must remember that all of this occurred 1) after the death of Mrs. Plant and 2) while Mr. Gay was representing the trust and trustee. The suggestion to the trial court that he did not owe any duty to Jennifer Linth at the same time simply cannot be reconciled.

Under these circumstances, the idea that Mr. Gay did not owe Jennifer Linth any duty with respect to trust administration after the death of Mrs. Plant is simply wrong. Yet that is what Judge Harper decided, somewhat implicitly, in granting summary judgment to the defense, that Mr. Gay *never* had any duty to Ms. Linth in representing the trust and the trustee.

The existence of a remedy against the trustee should not preclude a finding of duty toward the beneficiaries. The defense argued, and Judge Harper seemed to agree, that since the beneficiaries of the trust would have breach of fiduciary duty claims against the trustee, that they could not – or should not – be permitted to have any claim against the attorney

representing the trustee. This position, in this case, should be rejected, and the trial court reversed for several reasons.

First, as pointed out in the authorities set forth above, the existence of another remedy is not necessarily dispositive, but one factor to be considered in determining whether a duty should be imposed.

Second, it is not clear that the beneficiaries, and specifically Ms. Linth, have any true remedy against the then existing trustee. The trustee did not make the decisions that are the source of all that is wrong here, specifically the drafting decisions for the trust and the First Amendment. Similarly, the trustee did not make the decision to declare the First Amendment invalid. That decision, as demonstrated by the documents, was made by Mr. Gay. He was the person that communicated those decisions to opposing counsel and to Ms. Linth. The involvement of the trustee is literally nowhere to be found on this issue; his was a peripheral role, including most importantly, deferral to his legal counsel on such issues.

Third, the nature of the decision to declare the First Amendment invalid, and to decide not to form the foundation, and to force the matter into a TEDRA setting, presented unambiguously to all involved as an extremely complex legal problem. Mr. Gay in fact retained expert legal counsel, Mr. Butler, to evaluate the legal landscape. Mr. Butler produced

a complicated legal analysis. Other attorneys representing Crista Ministries, other beneficiaries and of course Ms. Linth, lobbied not the trustee, but Mr. Gay about how to reach what they considered to be the proper legal interpretation. Not surprisingly, they did not agree. Thus, when the dust settled, the trustee made no decision. It was left to Mr. Gay who did make the decision, and the trustee simply went along with his judgment.

4. The court improperly ruled on the issue of negligence.

Though the subject is certainly broached in various places above, this briefing does not reach the issue of whether certain acts engaged in by Mr. Gay constituted attorney negligence and therefore attorney malpractice. The upshot of the court's plenary ruling that there was no duty running, ever, from Mr. Gay to Ms. Linth, forecloses such analysis here. This displays the import of this ruling. Because legally, according to Judge Harper, no such duty ever existed between Gay and Linth, Ms. Linth is prevented from presenting arguments concerning the core problems in this matter, namely, that Gay suffered from a fundamental conflict of interest because of his drafting errors, and because he "stayed in the game" to try to fix his own problems. The injustice is patent.

Equally important is the notion that Ms. Linth never gets to present her claims of negligence to any fact finder as, summarily, she is not entitled

to. Judge Harper's decision under these circumstances encroaches on the traditional notions of negligence in summary judgment proceedings, that is, that the court should not substitute its judgment for that of a trier of fact.

> Did the trial court err in finding negligence as a matter of law on the part of the appellants and in limiting the new trial to the question of damages only?
>
> In approaching this question, we are bound by the following well-established rules of law. (1) Negligence is the failure to exercise reasonable or ordinary care. *Olmstead v. Olympia*, 59 Wash. 147, 109 P. 602 (1910). (2) Reasonable or ordinary care is that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances or conditions. *LaMoreaux v. Fosket*, 45 Wash.2d 249, 273 P.2d 795 (1954); *Chadwick v Ek*, 1 Wash.2d 117, 95 P.2d 398 (1939). (3) Negligence is never presumed but must be established by a preponderance of the evidence by the one asserting it. *Charlton v. Baker*, 61 Wash.2d 369, 378 P.2d 432 (1963). (4) The fact that an accident occurred does not in and of itself establish negligence. *Haydon v. Bay City Fuel Co.*, 167 Wash. 212, 9 P.2d 98 (1932). (5) Whether one who is charged with negligence has exercised reasonable care is a question of fact for the jury. *Scott v. Pacific Power & Light Co.*, 178 Wash. 647, 35 P.2d 749 (1934). (6) A trial judge cannot adjudicate a person guilty of negligence as a matter of law unless the following elements are present: (a) the circumstances of the case are such that the standard of duty is fixed and the measure of duty defined by law and is the same under all circumstances; and (b) the facts are undisputed and only one reasonable inference can be drawn therefrom. *Baxter v. Greyhound Corp.*, 65 Wash.2d 421, 397 P.2d 857 (1964); *Richardson v. Pacific Power & Light Co.*, 11 Wash.2d 288, 118 P.2d 985 (1941). (7) In order to hold that negligence has been proven by a plaintiff as a matter of law, the court must find that there is neither evidence nor reasonable inference therefrom to support a verdict for a defendant. *Miller v. Payless Drug Stores of Wash., Inc.*, 61 Wash.2d 651, 379 P,2d 932 (1963). (8) The evidence must be viewed by the court in the light most favorable to the nonmoving party. *Nelson v. Blake*, 69 Wash.Dec.2d 626, 419 P.2d 596 (1966); *Bunnell v. Barr*, 68 Wash.Dec.2d 764, 415 P.2d 640 (1966). (9) In passing upon the sufficiency of the evidence to establish negligence or the lack of it, the

> court cannot weigh the evidence and thereby resolve disputed issues of fact. *Lambert v. Smith*, 54 Wash.2d 348, 340 P.2d 774 (1959).

Gordon v. Deer Park School Dist. No. 414, 71 Wn.2d 119, 426 P.2d 824 (1967). Particularly instructive here is part (6)(a) of the above quotation that "the circumstances of the case are such that the standard of duty is fixed and the measure of duty defined by law and is the same under all circumstances". According to Judge Harper's ruling the standard is the same in all circumstances here, whether focusing on Mr. Gay's drafting of the trust and its First Amendment with testamentary provisions, before the death of Mrs. Plant, and after the death of Mrs. Plant when the testamentary provisions -- vis-à-vis the trust – came into play and when by all accounts the gifts to Jennifer Linth vested.

Yet here a trier of fact could easily conclude that Mr. Gay believed at the time that he he had a duty to all trust beneficiaries. As pointed out above, Mr. Gay acted according to his belief in as much at the time, to a fault of including Crista Ministries, which had been specifically disinherited. Judge Harper's decision fails to address these distinctions. In this setting, the application of the standards of legal duty are not so simple, and should have been presented to a fact finder. The summary judgment motion should therefore have been denied.

VI. CONCLUSION

The court errantly granted the summary judgment motion. The summary judgment should be reversed with instructions to proceed to trial.

DATED this 26th dav of June. 2014.

By: _____
THOMAS E. SEGUINE, WSBA # 17507
Counsel for Appellant

DECLARATION OF DELIVERY

I, Thomas E. Seguine, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to:

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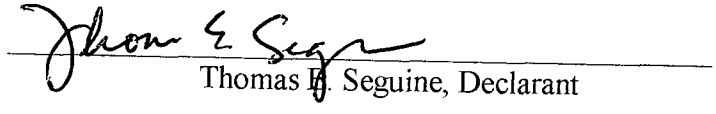
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Mount Vernon, Washington this 26th day of June, 2014.



Thomas E. Seguine, Declarant