

NO. 43280-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____

DEPUTY

RACHEL MARGUERITE ANDERSON (formerly RACHEL M. RODGERS), an individual

Appellant,

v.

WILLIAM L.E. DUSSAULT and JANE DOE DUSSAULT, husband and wife, and the marital community composed thereof; BARBARA J. BYRAM and JOHN DOE BYRAM, wife and husband, and the marital community composed thereof; YEVGENY JACK BERNER and JANE DOE BERNER, husband and wife, and the marital community composed thereof; WILLIAM L. E. DUSSAULT, PS, a Washington professional service corporation; the DUSSAULT LAW GROUP, a Washington corporation; RICHARD MICHAEL McMENAMIN and SHARI L. McMENAMIN, husband and wife, and the marital community composed thereof; MCMENAMIN & MCMENAMIN PS, a Washington professional service corporation; ANDREA DAVY (fka ANDREA RODGERS) and JOHN DOE DAVY, husband and wife, and the marital community composed thereof; and WELLS FARGO BANK, N.A., a foreign corporation

Respondents.

**BRIEF OF APPELLANT
RACHEL MARGUERITE ANDERSON**

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I. INTRODUCTION

This appeal involves issues surrounding what plaintiff/appellant Rachel Anderson (“Rachel”) asserts were breaches of legal and fiduciary duties by defendants/respondents in their capacities as trustees and lawyers administering a special needs trust established for her benefit.

When she was six years old, Rachel was kicked in the face by a horse. In conjunction with her attorney Richard McMenemy (“McMenamin”) settling her personal injury claim for a net amount of \$187,160.66, McMenemy hired attorney William Dussault (“Dussault”) to prepare a special needs trust (“The Trust Agreement”) for safeguarding the amount Rachel was to receive from the settlement.

The Trust Agreement named Wells Fargo Bank, N.A. (“Wells Fargo”) to be the trustee of the trust fund for Rachel. The Trust Agreement further provided for a Trust Advisory Committee (“TAC”) to guide Wells Fargo in making distributions from the trust fund. The TAC was comprised of McMenemy and Rachel’s mother, Andrea Davy (“Andrea”).

Pursuant to The Trust Agreement, the two TAC members had to meet and unanimously agree on distributions from the trust fund, and a TAC member was ineligible to vote on approving a distribution if he or she would receive any direct or indirect benefit from that distribution. In

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the event a TAC member was ineligible to vote because of such a conflict, Wells Fargo was to be called upon to cast the deciding vote on the proposed distribution.

The Trust Agreement was approved by the Clallam County Superior Court. Wells Fargo then hired Dussault as its legal counsel for purposes of preparing the annual accounting reports to the court. Unfortunately, Andrea was given unsupervised access to the trust fund (and its checkbook) and she made withdrawals, distributions, or caused other losses totaling \$56,873 which directly or indirectly benefitted her. Neither Wells Fargo, McMenamin, nor Dussault monitored nor otherwise protected Rachel against Andrea's misuse of the trust fund nor timely sought restoration of the money improperly used by Andrea for her benefit, notwithstanding their individual duties to Rachel as the trust's sole beneficiary.

Upon becoming an adult, Rachel brought this claim against Wells Fargo, McMenamin, and Andrea for breach of fiduciary duties and against Dussault for legal malpractice. The trial court granted the summary judgment motions of Wells Fargo, McMenamin, and Dussault. Rachel appeals the trial court's dismissal of her claims against those defendants/respondents.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The trial court erred when it granted the motion for summary judgment of defendant/respondent Dussault.

Assignment of Error No. 2: The trial court erred when it granted the motion for summary judgment of defendant/respondent Wells Fargo.

Assignment of Error No. 3: The trial court erred when it granted the motion for summary judgment of defendant/respondent McMenamin.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it determined that plaintiff/appellant had failed to demonstrate there was any genuine issue of a material fact in conjunction with her claim against Dussault for legal malpractice as attorney for Wells Fargo but who owed a duty of care to plaintiff/appellant as beneficiary of the trust. (**Assignment of Error No. 1**)

2. Whether the trial court erred when it determined that plaintiff/appellant had failed to demonstrate there was any genuine issue of a material fact in conjunction with her claim against Wells Fargo for breach of fiduciary duties as trustee of the trust fund. (**Assignment of Error No. 2**)

3. Whether the trial court erred when it determined that plaintiff/appellant had failed to demonstrate there was any genuine issue

of a material fact in conjunction with her claim against McMenam in for breach of fiduciary duties as a member of the Trust Advisory Committee. **(Assignment of Error No. 3)**

IV. STATEMENT OF THE CASE

A. Substantive Factual History

1. Rachel Marguerite Anderson (formerly Rodgers, hereinafter “Rachel”), appellant herein, was born July 25, 1990. When she was six years old, she was kicked in the face by a horse. She was airlifted to Harborview Hospital in Seattle for life-saving surgery (major head trauma) and then transported to Children’s Orthopedic Hospital (now Seattle Children’s Hospital) where she underwent a series of reconstructive surgeries by a craniofacial plastic surgeon.

2. Respondent Richard McMenam in (hereinafter “McMenam in”) was hired by Rachel’s family to pursue a personal injury claim against the owners of the horse and on August 25, 1997, in Clallam County Superior Court cause no. 97-4-00203-6, the trial court approved a minor’s settlement for Rachel in the amount of \$300,000. CP 286. In conjunction therewith, the court also approved the establishment of a special needs trust (hereinafter “the trust”) for Rachel in accordance with a document entitled the TRUST AGREEMENT FOR THE RACHEL MARGUERITE RODGERS TRUST (hereinafter “The Trust

Agreement”). A copy of The Trust Agreement was attached as Exhibit 1 to Rachel’s trial court complaint and can be found at CP 476-496. McMenamín hired respondent William L. E. Dussault (“Dussault”) to prepare The Trust Agreement. CP 346.

3. The net amount of the settlement proceeds, after McMenamín’s attorney fees and other costs were paid, was \$187,160.66, as is shown in the July 7, 2011 opinion letter of R. Duane Wolfe, CPA (hereinafter “Mr. Wolfe’s letter”). A copy of Mr. Wolfe’s letter was attached as Exhibit 2 to Rachel’s trial court complaint and can be found at CP 497-504. Mr. Wolfe’s letter can also be found attached to his February 14, 2012 declaration at CP 123-133.

4. In accordance with The Trust Agreement, the net amount of the settlement proceeds (hereinafter “Rachel’s trust fund”) was entrusted to respondent Wells Fargo Bank, N.A. (hereinafter “Wells Fargo”) as trustee of the trust. The Trust Agreement stated “sole responsibility for management and investment of the corpus and income of this Trust shall be vested in [Wells Fargo], as Trustee, with the use and distribution of such disbursements as from time to time may be needed from the Trust subject to the sole direction, discretion and control of the Trust Advisory Committee”. CP 480. The Trust Advisory Committee (sometimes referred to herein as “the TAC”) consisted of McMenamín and Rachel’s

mother, respondent Andrea Rodgers (now Davy, hereinafter “Andrea”), who was divorced from Rachel’s father. CP 488. In McMenamín’s own words, “I was chosen as a member of the [Trust Advisory Committee] because of my knowledge and experience in assisting persons with disabilities and Andrea was chosen because of her personal interest in the plaintiff’s welfare.” CP 286. Wells Fargo, as trustee, hired Dussault (and others in his law firm, collectively “Dussault”) to be the bank’s legal counsel for purposes of preparing the annual accounting reports to the court pursuant to The Trust Agreement. CP 346.

5. By its express terms, The Trust Agreement was to be in the nature of a special needs trust for Rachel and exclusively for her benefit. CP 477-484. Rachel’s trust fund was to be “conserved and maintained for the special needs of [Rachel] throughout her lifetime”, as the “severity of [her] disability may cause her to require continuing support, assistance and supervision for the remainder of her life.” *id.* Because Rachel suffered multiple injuries, it was anticipated all the money in Rachel’s trust fund would be necessary to provide for her living needs for the rest of her life. CP 478, 484. As stated in The Trust Agreement, “Rachel is now and will continue to be for the foreseeable future a severely disabled individual.” CP 476. “It is impossible to predict what improvement or complications Rachel will experience over the next

twenty years. It is clear that due to the nature and degree of her disability and also because of her youth, [Rachel] is not and will not in the foreseeable future be capable of managing the funds provided in the settlement referred to above.” CP 477.

6. Rachel’s trust fund was restricted and could not be used to discharge the financial and basic support obligations of Rachel’s parents. CP 480-483. As trustee, Wells Fargo had a duty to monitor the payments from the trust to ensure all such payments go to the benefit of Rachel. CP 483. Wells Fargo had sole authority and responsibility for investment and financial management of Rachel’s trust fund and had all powers and authority of a trustee under the Washington Trust Act (chapter 11.98 RCW). CP 488, 490.

7. The two-member Trust Advisory Committee, consisting of McMenamin and Andrea, was solely responsible for determining what discretionary distributions were to be made from Rachel’s trust fund. CP 488, 493. Wells Fargo and the two members of the TAC were obligated to meet in person to confer on all matters concerning Rachel’s trust fund. CP 494. McMenamin and Andrea each had one (1) vote and *no disbursement* from Rachel’s trust fund could be made absent the unanimous vote of both TAC members. (emphasis supplied) CP 493. However, *if any distribution from Rachel’s trust fund would bring a direct or indirect benefit to a*

member of the Trust Advisory Committee, that member was not allowed to discuss or vote upon the proposed distribution. (emphasis supplied). *id.* In such event, where a TAC member was disqualified from discussing and ineligible to vote on a proposed distribution from Rachel's trust fund, *then trustee Wells Fargo expressly became a member of the Trust Advisory Committee for the purpose of casting the deciding vote.* (emphasis supplied). CP 494. As discussed in the next several paragraphs, there were multiple instances of payments from Rachel's trust fund which directly and indirectly benefitted Andrea and which violated The Trust Agreement's express restrictions on distributions.

8. On August 25, 1997, the day the court approved the settlement and implemented The Trust Agreement, Rachel was barely seven years old. Before she reached the age of nine in 1999, the sum of \$13,897.64 of Rachel's trust fund had already been spent by Andrea to buy and insure a brand new 1997 Mercury Tracer sedan (fn 1)

¹ Andrea had told Wells Fargo that she purchased a minivan and did not disclose she actually bought a "sporty" car. CP 58, 128, and 135. Prior to this purchase, Andrea's family car had always been an "old beater" (CP 58, 135). Andrea told her own mother, Janet Aiken, that "everything was now coming out of Rachel's trust money and "I [Andrea] don't have to pay for anything, just like this car." CP 135. Additionally, Andrea acknowledged receiving an under-the-table cash "kick back" from the dealer when she purchased the car. *id.* In 2005, Andrea used \$469.81 of the trust fund to purchase another new set of tires for the Mercury Tracer, and charged the trust \$421.80 to insure the car, even though Rachel had moved out of Andrea's home in 2004 (to reside with her father) and thus any further use of the car would not have benefitted Rachel. CP 59, 131-133. In 2007, Andrea purchased the car from The Trust for \$2,000. CP 59, 126, 128.

plus nearly \$300 of Rachel's trust fund was spent to upgrade this car with a new set of "better" tires. CP 58, 128, 135. In addition, more than \$1,000 had been reimbursed to Andrea for alleged travel expenses to take Rachel to medical appointments (fn 2) and Wells Fargo Bank was paid \$3,727.99 in trustee fees. CP 132-133.

9. In 2000, before Rachel reached the age of ten, an additional \$2,800 of Rachel's trust fund had been spent for computer hardware and software (but with no internet access in Rachel's home) which enabled nine year old Rachel as well as her six year old brother to play one of only a couple computer games (circa 2000). CP 59-60, 128-129, and 136. However, even more egregious that year was Andrea's withdrawal of \$33,000 from Rachel's trust fund money which Andrea used to help purchase an interest in a different home to be titled in the sole name of Andrea's current paramour at the time, Joe Lancaster. The recorded title to this property did not reflect in any way that this investment of Rachel's trust fund was held in the name of the trust. CP 129.

2 Andrea charged (and the defendants/respondents evidently approved) a fee of \$100 every time she allegedly took Rachel to medical appointments. CP 58, 128, 133, and 135. However, all of Rachel's post-injury reconstructive and cosmetic surgeries had been completed by August 1997, prior to the court's approval of The Trust Agreement. CP 57, 135-136. Any medical appointment to which Andrea drove Rachel would have only been to Rachel's family practice doctor in Sequim, no more than 15 minutes from her home. CP 57-58, 135. The only time Rachel had to return to be seen by an out-of-town medical specialist was after Rachel turned 17 years old and had moved back to her father's home. It was her paternal grandmother who took her to Seattle for that final medical evaluation by her surgeon. CP 57, 135-136.

The trustee's fee that year for Wells Fargo's monitoring of trust expenditures by the TAC was \$1,981.77. CP 133.

10. Before Rachel reached the age of eleven in 2001, Wells Fargo charged another \$1,810.84 in fees, but the bank and McMenamin, as the only eligible voting members of the TAC, apparently expressed no objection to Andrea spending \$1,500 from the trust fund for "birthday gifts and remodeling" which included buying Rachel (and the other members of the household) an above-ground swimming pool, a guitar (which Rachel was not allowed to keep when she later moved to her father's residence), and new carpeting for the house still exclusively titled in Joe Lancaster's name. CP 131, 133. Throughout the years during which \$33,000 of the trust fund was "invested" in that house without the trust fund being named on the legal title, the trust was never paid any rent or otherwise compensated by Rachel's mother or Mr. Lancaster for the use of that money (fn. 3). CP 130.

3 Andrea's relationship with Lancaster was short-lived and Andrea and Rachel moved out of the house and back into the home of Walt Davy. CP 61. In 2002, Lancaster was compelled to deed a 31% portion of the property to the trust. The property was sold in February of 2005 and the trust received net sale proceeds of \$41,686 for its percentage interest. During a majority of the time the trust was a part owner of the property, Rachel lived elsewhere. Mr. Wolfe calculated the trust in fact lost \$20,195 by not receiving rent and interest from the property prior to its sale. CP 130.

11. Before Rachel reached the age of twelve in 2002, Wells Fargo was paid an additional trustee fee of \$2,764.96, Andrea reimbursed herself \$1,840.81 to maintain and insure her Mercury Tracer automobile, and another \$2,630.10 of Rachel's trust fund had been allegedly spent for additional new computer hardware and software (fn 4). CP 58-60, 128-129, 133, and 136. However, no new computer was brought into the home at that time and Rachel believes this \$2,630.10 was another "phantom" expense by Andrea for which she reimbursed herself with a payment from the trust checkbook without any scrutiny by Wells Fargo and McMEnamin as the only eligible voting members of the TAC or by Dussault when he reviewed Wells Fargo's accounting and prepared the annual report to the court. CP 58-60, 136.

12. In 2002, a week before Rachel turned twelve years old, McMEnamin resigned as a member of the Trust Advisory Committee (fn 5). CP 288. Prior to that resignation, there had been improper trust fund withdrawals, distributions, and other losses which directly or indirectly benefitted Andrea in the amount of \$56,873, plus \$10,285.56 for trustee

4 Andrea continued to use the trust checkbook to pay for household internet access even after Rachel moved back to her father's house. CP 58, 136.

5 On July 11, 2003, Judge Ken Williams dissolved the TAC and Wells Fargo became the sole trustee. CP 347.

fees, and an additional \$4,735.83 of legal bill payments to Dussault. CP 132. All of these withdrawals, distributions, and losses, which in the aggregate totaled \$68,711.24 (or nearly 37%, of the original net settlement proceeds which initially funded the trust), presumably were the result of a unanimous vote of the TAC consisting of both McMenemy and Wells Fargo, sitting as a voting member due to the obvious conflict of Andrea who, being in a position to either directly or indirectly benefit by those proposed distributions, had been deemed ineligible to vote by Wells Fargo and McMenemy. And for this and prior years, Dussault, the author of The Trust Agreement, reviewed Wells Fargo's account records and prepared and presented to the court this record of withdrawals, distributions, and losses from Rachel's trust fund without any prior notice to Rachel (fn.6), or anyone else on her behalf, including a guardian *ad litem*, who might have had the opportunity to scrutinize these distributions and appropriately bring them to the court's attention (fn.7).

6 Respondents will likely assert that beginning in August of 2001, Rachel (as an 11 year old) was effectively "represented" by her current lawyer, Carl Gay (who had corresponded with Dussault on behalf of Rachel's father and her maternal grandmother), and thus cannot now challenge the court's approval of the annual reports and accountings presented by Dussault. Rachel will address this anticipated issue in her reply brief.

7 As pointed out by Mr. Wolfe, the total amount of legal and trustee fees from 1997 to 2009 was \$41,686, while during that same period the trust fund had net income of only \$31,669. CP 132. Mr. Wolfe goes on to state that Dussault's annual reports to the court "were simply a rehashing of the final report prepared by [Wells Fargo] and had Dussault performed detailed report preparation some of the above noted problems would have come to light. CP 131. Mr. Wolfe also noted, with regard to Dussault's charges for additional attorney fees of over \$4,4000 in 2003, there "was no detail available to determine what these fees were paid for. For other excess billings, there were detailed statements available with the annual reports." id.

13. Rachel attained the age of eighteen on July 25, 2008. Prior to her 21st birthday, Rachel brought this breach of fiduciary duty action against Wells Fargo, as trustee, and against McMEnamin and Andrea, as members of the Trust Advisory Committee. In addition, she brought an action against Dussault for legal malpractice as Wells Fargo's lawyer but who owed fiduciary duties to Rachel as the sole beneficiary under The Trust Agreement.

B. Procedural History

1. Rachel filed her PLAINTIFF'S COMPLAINT FOR LEGAL MALPRACTICE AND BREACH OF FIDUCIARY DUTIES on July 22, 2011. CP 470-475. In her complaint, Rachel alleged Wells Fargo, McMEnamin, and Dussault (collectively "the defendants"), and each of them, owed fiduciary and other legal duties to Rachel as the beneficiary of the trust, that the defendants, and each of them, failed to discharge their fiduciary and other legal duties to Rachel as the beneficiary of the trust as more particularly set forth in Mr. Wolfe's letter (CP 497-504). As a proximate cause of the breach of fiduciary and other legal duties owed to Rachel by the defendants, Rachel suffered damages in an amount to be proven at trial. CP 473-474.

2. McMEnamin filed his ANSWER OF DEFENDANTS McMENAMIN on September 6, 2011. CP 465-469. Wells Fargo filed its

ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT FOR LEGAL MALPRACTICE AND BREACH OF FIDUCIARY DUTIES on October 7, 2011. CP 458-464. Dussault filed his DEFENDANT DUSSAULT, BERNER AND BYRAM'S ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM on October 26, 2011. CP 455-457.

3. Motions for summary judgment were filed respectively by Dussault (CP 452-453), McMEnamin (CP 321-343), and Wells Fargo (CP 143-166). Rachel filed a brief in opposition to the motions (CP 83-93). Reply briefs were filed respectively by Dussault (CP 24-31), McMEnamin (CP 45-55), and Wells Fargo (CP 32-44).

4. A hearing to consider the three (3) summary judgment motions was held on February 24, 2012, before The Hon. Jay B. Roof, Judge. The court issued its ORDER ON MOTION on February 28, 2012. Rachel timely filed her NOTICE OF APPEAL on March 28, 2012. CP 14-15.

V. ARGUMENT

A. Summary of Argument.

The trial court erred in granting the summary judgment motions of Dussault, Wells Fargo, and McMEnamin.

With regard to Rachel's claim against Dussault for legal malpractice, Rachel established that Dussault owed her a duty as a

non-client under the multi-factor test of *Trask v. Butler*, 123 Wash.2d 835, 872 P.2d 1080 (1994). Rachel produced substantial evidence that Dussault breached his duties and that she suffered damages as a proximate cause thereof. Dussault offered no independent expert testimony to rebut the expert opinion evidence of Gary Colley, Esq., who opined that under *Trask* and its progeny, Dussault owed a duty to Rachel as an intended and incapacitated beneficiary of the special needs trust and further opined Dussault breached that duty.

With regard to Rachel's claims against Wells Fargo and McMEnamin for breach of fiduciary duties in their respective capacities as trustee of the trust and member of the Trust Advisory Committee (fn 8), they both admitted in their answers to the complaint that they owed fiduciary duties to Rachel as beneficiary of the trust. Rachel produced substantial evidence they breached their duties and that she suffered damages as a proximate cause thereof. Neither Wells Fargo nor McMEnamin offered any independent expert testimony to rebut the expert opinion evidence of Duane Wolfe, CPA, who documented those breaches and damages.

Under the standard of review for a trial court's summary judgment decision, Rachel met her burden of producing substantial

⁸ Rachel is not suing McMEnamin for any legal malpractice.

evidence on all elements of her claims and the decision of the trial court to grant the summary judgment motions should be reversed.

B. Standard of Review.

In reviewing an order granting summary judgment, an appellate court undertake the same inquiry as the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party. *In re Guardianship of Karan*, 110 Wn.App. 76, 80-81, 38 P.3d 396 (Wash.App. Div. 3 2002). The inquiry is whether any genuine issue exists as to any material fact, and whether the moving party is entitled to judgment as a matter of law. *id.* Every reasonable inference is indulged in favor of the nonmoving party and all doubts are resolved in its favor. *id.*

A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Summary judgment is proper only if reasonable persons could reach but one conclusion from the evidence presented. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. *Johnson v. UBAR, LLC*, 150 Wn. App. 533, 537, 210 P.3d 1021 (2009). Questions of credibility are for the trier of fact. *Hudesman v. Foley*, 73 Wn.2d 880, 886-887, 441 P.2d 532 (1968).

Construing the evidence in the light most favorable to the nonmoving party, the court asks whether a reasonable jury could find in favor of that party. *Herron v. KING Broad. Co.*, 112 Wash.2d 762, 767-68, 776 P.2d 98 (1989).

C. Assignment of Error No. 1: The trial court erred when it granted the motion for summary judgment of Dussault.

Choosing not to provide any rationale for its ruling, the trial court granted Dussault's summary judgment motion which sought dismissal based upon a defense that Rachel had failed to state a claim for legal malpractice. Rachel had brought suit against Dussault in his capacity as the lawyer for Wells Fargo claiming that while not his client, he nevertheless owed her a duty of care to ensure the Trust Advisory Committee protocol for approving trust fund distributions was satisfied.

In opposition to Dussault's motion, Rachel produced the expert testimony of Clallam County lawyer Gary R. Colley. CP 138-142. Mr. Colley stated his opinion that under applicable case law, Dussault owed a duty of care to Rachel as the intended beneficiary of the special needs trust. CP 141. The authority cited by Mr. Colley was *Trask v. Butler*, 123 Wash.2d 835, 872 P.2d 1080 (1994) (hereinafter "*Trask*") and its more recent progeny, *In re Guardianship of Karan*, 110 Wn.App. 76, 38 P.3d 396 (2002) (hereinafter "*Karan*") and *Estate of Treadwell v. Wright*, 115

Wn. App. 238, 61 P.3d 1214, *review denied*, 149 Wn.2d 1035 (2003) (hereinafter “*Treadwell*”). Mr. Colley further opined that, assuming the truth of the facts stated in Rachel’s complaint and in Mr. Wolfe’s letter, Dussault breached that duty of care. *id.* Dussault produced no independent expert opinion to rebut these opinions of Mr. Colley.

The issue thus presented on this appeal is whether Rachel established that Dussault owed her a duty as a non-client and, if so, whether Rachel produced substantial evidence upon which a reasonable jury could find that Dussault breached that duty, proximately causing damages to Rachel.

Whether Dussault owed a duty to Rachel is a question of law which is reviewed *de novo*. *Treadwell* at 243. The general rule is that only an attorney's client may file a claim for legal malpractice. *Karan* at 81. But an attorney may owe a non-client a duty even in the absence of this privity. *id.* To determine whether a lawyer owes a duty to a non-client, which then creates standing to sue for malpractice, Washington applies a six-element test. *id.*

To establish whether the lawyer owes the plaintiff a duty of care in a particular transaction, the court must determine:

1. The extent to which the transaction was intended to benefit the plaintiff;

2. The foreseeability of harm to the plaintiff;
3. The degree of certainty that the plaintiff suffered injury;
4. The closeness of the connection between the defendant's conduct and the injury;
5. The policy of preventing future harm; and
6. The extent to which the profession would be unduly burdened by a finding of liability. *id.* At 81-82.

The threshold question is whether the non-client plaintiff is an “intended” beneficiary of the transaction. If not (i.e. the non-client is an “incidental” beneficiary), there is no further inquiry. *id.* In *Trask*, the beneficiary was deemed incidental (fn. 9) and the court denied him standing to sue the lawyer. In *Karan*, however, the court reversed the trial court’s finding the beneficiary (the ward in a guardianship) was an incidental beneficiary and instead determined, as a matter of law, that she was an intended beneficiary (fn. 10) who had standing to sue the guardian’s lawyer because he owed her a duty of care. *Karan* at 86.

9. In *Trask*, the beneficiary was an adult, competent beneficiary of a will, in an adversarial relationship with another adult beneficiary who was also both the personal representative of the deceased father's estate and attorney-in-fact for the surviving mother, and the lawsuit against the lawyer was over day-to-day judgment calls in managing the estate. *Trask* at 838.

10. Contrary to *Trask*, in *Karan* the “intended” beneficiary was: (1) a legally incompetent infant ward, (2) a non-adversarial relationship, and (3) legal services solely consisting of setting up the guardianship. *Karan* at 84.

Both parties in *Karan* ask for a bright-line rule that a guardian's lawyer either does or does not owe a duty of care to the ward. But the court said there is no bright-line rule nor should there be, as the lesson of *Trask* is that each case must be evaluated on its own facts. *Karan* at 83.

Like the ward in *Karan*, Rachel was a legally incompetent minor, the primary reason to establish the trust was to preserve Rachel's estate for her own use, not for the benefit of others, her relationship with Dussault, Wells Fargo, McMenamin was non-adversarial, and the relationship between Dussault and Wells Fargo was established to benefit Rachel solely for the purpose of ensuring The Trust Agreement (like a statute) operated as intended. Accordingly, Rachel meets the *Trask* test of being an intended beneficiary. The remaining *Trask* factors also supported a finding of duty owed by the fiduciary's lawyer to the person under a disability:

2. *Foreseeability of Harm.* It is foreseeable that failure to carry out the safeguards (in the instant case, the TAC protocol for prior approval of distributions from the trust) for the protection of Rachel will leave Rachel vulnerable to the kind of losses the ward incurred in *Karan*.

3. *Certainty Plaintiff Suffered Injury.* In *Karan*, the ward suffered harm through the loss of three-quarters of her estate. Here, Rachel suffered a loss of approximate 37% of the initial amount of her settlement.

4. Connection between Lawyer's Conduct and Injury. If established, the connection between the alleged conduct and the injury is direct. In *Karan*, the lawyer bypassed the statutory safeguards which protect a ward from a guardian's squandering the funds. Here, a reasonable jury could find that Dussault's failure to insist on his client (and McMenamain) following the TAC protocol was directly connected to Rachel's loss.

5. Future Harm. In matters involving the welfare of minors and other legally incompetent individuals, the courts assume a particular duty to protect the interests of the ward. *Durham v. Moe*, 80 Wash.App. 88, 91, 906 P.2d 986 (1995). Policy considerations favor finding a duty in the interests of preventing future harm. *In re Guardianship of Ivarsson*, 60 Wash.2d 733, 738, 375 P.2d 509 (1962). At all material times, Rachel was a minor and in need of protective safeguards for her estate. Her mother clearly had a conflict of interest by virtue of her pattern of self-dealing (and the likelihood she was judgment-proof). Rachel lacked the means and maturity to hire her own lawyer. Had the respondents truly had Rachel's best interests at heart, they should have, at a minimum, sought the appointment of a guardian *ad litem* for Rachel.

6. Burden on the Profession. Finally, *Trask* notes that imposing liability in that case would create an impossible ethical conflict for lawyers, because the interests of beneficiaries and the personal

representative of a deceased's estate are frequently at odds and the parties can be legal adversaries. *Trask* at 84. But that was not the case in *Karan* and that is not the case here. Contrary to *Trask*, in *Karan* the legitimate interests of the guardian were inseparable from those of the ward. Likewise, in the instant case, there are no opposing interests between Rachel and Wells Fargo; they both seek to ensure the trust beneficiary is protected through the proper safeguards, thus Dussault did not have an ethical conflict.

The profession will not be unduly burdened by finding a duty in this case. The obligation to protect the interests of a trust beneficiary in circumstances such as this does not put lawyers in an ethical bind. To require a lawyer to inform his trustee client of the need to ensure compliance with trust protocol in order to protect the beneficiary is not a burden on the profession.

Once a relationship giving rise to a duty of care is established under the *Trask* test, the elements of a malpractice claim are the same as for any other negligence action. *Karan* at 86. The other elements require a non-client plaintiff to show that the attorney breached that duty by an act or omission, the breach damaged the client, and the breach was the

proximate cause of the client's damages. *Hizey v. Carpenter*, 119 Wash.2d 251, 260-61, 830 P.2d 646 (1992).

The attorney's standard of care is that degree of skill, diligence, and knowledge commonly possessed and exercised by reasonable, careful, and prudent attorneys in the jurisdiction. *id.* at 261. A plaintiff must prove the four elements by a preponderance of the evidence. *Ang v. Martin*, 154 Wn.2d 477, 481, 114 P.3d 637 (2005). Circumstantial evidence is sufficient to establish a prima facie case of negligence, if it affords room for reasonable minds to conclude that there is a greater probability that the conduct relied upon was the proximate cause of the injury than there is that it was not. *Hernandez v. W. Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969). Proximate cause can be divided into two elements: cause in fact and legal cause. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 609, 257 P.3d 532 (2011). Cause in fact is the actual, "but for," cause of the injury. *id.* at 610. Establishing the cause in fact is generally left to the jury because it involves determining what actually occurred. *id.* A fiduciary duty from one person to another means that the fiduciary owes the highest duty of fidelity and good faith to the other person. *Stiley v. Block*, 130 Wash.2d 486, 499, 925 P.2d 194 (1996). Failure to exercise the degree of skill, care and learning expected of a reasonably prudent attorney in the state of Washington is negligence. *Id.* At 499.

Expert testimony is required to determine whether an attorney's duty of care was breached in a legal professional negligence action. *Geer v. Tonnon*, 137 Wn. App. 838, 850-51, 155 P.3d 163 (2007). Mr. Colley's unchallenged expert opinion satisfies Rachel's burden of production and she has likewise produced substantial evidence to support her negligence claim against Dussault.

Viewing the facts and logical inferences contained in the declarations in opposition to Dussault's motion under the appropriate standard of review in this case, a reasonable jury could conclude that Dussault breached his duty to Rachel and that as a proximate cause thereof she suffered damages. The trial court should be reversed and this matter remanded to afford Rachel the opportunity to present her case to that jury.

D. **Assignment of Error No. 2:** The trial court erred when it granted the motion for summary judgment of Wells Fargo; and

Assignment of Error No. 3: The trial court erred when it granted the motion for summary judgment of McMEnamin.

For purposes of argument, Rachel considers her claims against Wells Fargo and McMEnamin to both represent negligence actions against

persons who were acting in their fiduciary capacity as a trustee. Accordingly she will combine these two assignments of error into a single argument.

In granting the summary judgment motions of Wells Fargo and McMEnamin, the trial court again chose not to provide any rationale for its decision. In her complaint, Rachel brought a straightforward breach of fiduciary duty claim against both of these respondents and both of these respondents admitted, in their answers to paragraph 3.5 of that complaint (CP 474), that they owed a duty to Rachel in conjunction with the roles they played as fiduciaries in the administration of The Trust Agreement. CP 461 (Wells Fargo) and CP 467 (McMenamin). Accordingly, the focus of this court should be upon the issue of whether Rachel produced substantial evidence that Wells Fargo and McMEnamin breached the fiduciary duty each owed to Rachel and whether as a proximate cause thereof she suffered damages.

A long-established standard of care regarding the fiduciary duty of a trustee can be found at 76 Am. Jur. 2d Trusts section 349:

A trustee is a fiduciary of the highest order and is required to exercise a high standard of conduct and loyalty in the administration of the trust. The requirement of loyalty and fair dealing in good faith are at the core of every trust instrument,

whether specifically stated or not. Trustees must act with good faith, loyalty, fairness, candor and honesty toward the trust beneficiaries. Indeed, under some authority, trustees must act with the utmost good faith, scrupulous good faith, the highest degree of fidelity and good faith, absolute fidelity, or undivided or complete loyalty.

As in a lawyer-client relationship, a fiduciary duty from one person to another means that the fiduciary owes the highest duty of fidelity and good faith to the other person. *Stiley v. Block*, 130 Wash.2d 486, 499, 925 P.2d 194 (1996). In addition to the element duty (admitted by respondents), the three other essential elements to establish liability for breach of fiduciary duty are breach, causation, and damages. 29 David K. DeWolf, *Washington Practice, Washington Elements of an Action: Breach of Fiduciary Duties*, § 11:1 at 313-14 (2010-2011 ed.). See also *Senn v. Nw. Underwriters, Inc.*, 74 Wn. App. 408, 414, 875 P.2d 637 (1994). The applicable law regarding proving elements of negligence is discussed above with regard to Dussault.

Through her accounting expert, Mr. Wolfe (CP 123-133), Rachel has produced substantial evidence to establish the other three (3) elements of Rachel's negligence claim for breach of fiduciary duty. Mr. Wolfe has documented in detail the pattern of Andrea's misuse of the trust fund and the flagrant lack of "watchful eyes" by Wells Fargo and McMenamin. These respondents offered no independent expert analysis and opinion to

support their position that it was justifiably proper for Andrea to use money in the trust's bank account to directly or indirectly benefit herself at Rachel's expense. These expenditures (for which there are no records of approval by the Trust Advisory Committee) include such misuse as Andrea taking \$33,000 from the trust's bank account and giving it to her boyfriend to purchase residential property in his, not the trust's, name (and to lose the earning capacity of that amount for approximately five years), Andrea's spending over \$23,800 to buy and maintain her dream car, using nearly \$10,000 allegedly for home computer purchases, and various other phantom charges for cash payments to her or other misuse of the funds in her minor daughter's trust estate which, in the opinion of Mr. Wolfe caused Rachel to suffer damages of some 37% of her initial settlement amount.

The declarations of Mr. Wolfe, Rachel, Janet Aiken (Andrea's own mother), and Ken Chace, Rachel's father, present substantial probative evidence which dispute all of the factual allegations upon which Wells Fargo and McMEnamin base their defense and, at a minimum, upon which reasonable minds can differ and upon which a reasonable jury could find establish a prima facie case of negligent breach of fiduciary duty. As with Rachel's claim against Dussault, viewing the facts and logical inferences contained in the declarations in opposition to the motions of

Wells Fargo and McMEnamin under the appropriate standard of review in this case, a reasonable jury could conclude that Wells Fargo and McMEnamin breached their fiduciary duties to Rachel and that as a proximate cause thereof she suffered damages. The trial court should be reversed and this matter remanded to afford Rachel the opportunity to present her case to that jury

VI. CONCLUSION

There are, in reality, only two (2) logical inferences which can be drawn from the substantial evidence presented to the trial court. Both revolve around compliance with the protocol, established by Dussault as creator of The Trust Agreement, to be followed by the Trust Advisory Committee in acting upon a request to make a distribution from Rachel's trust fund.

1. The first logical inference is the protocol was scrupulously followed and each time Andrea requested a distribution, McMEnamin and Andrea, sitting as members of the TAC, met to discuss the proposal and to first determine whether such a distribution might benefit Andrea either directly or indirectly. Since all the distributions identified by Mr. Wolfe reflect, at a minimum, an *indirect* benefit to Andrea, a determination must have been made that she was ineligible to vote and, pursuant to the

protocol, Wells Fargo was called upon to cast the deciding vote. Thus each of these distributions, to which Rachel is finally able to object, was properly approved by Wells Fargo and McMenemy in accordance with the rigid requirements of the protocol. Under this logical inference, however, there is substantial evidence upon which a reasonable jury could find that both of these respondents breached their fiduciary duty to Rachel, proximately causing her the damages itemized by Mr. Wolfe. By failing in his due diligence to properly review the trustee's records in conjunction with preparing its annual report and by failing to ensure precise compliance with the TAC protocol, of which he was keenly familiar, Dussault likewise failed in his obligation to Rachel.

2. The other logical inference is grossly more disturbing, yet sadly more likely. This scenario yields a troubling recognition of flagrant breaches of legal and fiduciary duties. Under this inference, the protocol for TCA processing of distribution requests was never in fact even implemented. Andrea was simply entrusted with un-monitored control of the trust fund bank account and checkbook. There were no committee meetings held, no consideration of Andrea's potential conflicts of interest, no votes taken by eligible members, no proper oversight of expenditures regarding Rachel's trust fund, and no accountability until Wells Fargo and Dussault's ultimately realized their obligation to produce an annual report,

at which point nothing was done by any of the respondents to rectify the wrongdoing and promptly restore the funds to the trust.

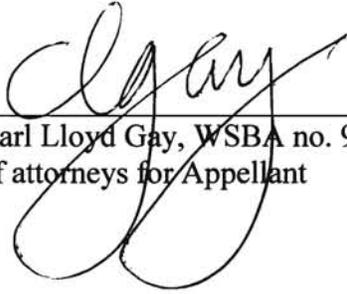
No reasonable trier of fact could conclude otherwise than under this second logical inference there were unquestionable breaches of legal and fiduciary duties for which the trust beneficiary paid dearly. There is no room for an alternate approach under The Trust Agreement for acting upon a request for a trust fund distribution than for the TAC to meet, discuss, and vote. If a meeting is not held and eligible TAC members do not take a vote, The Trust Agreement has been breached and the beneficiary has not been protected.

With all due respect, the trial court erred by not applying the appropriate standard of review and by granting the summary judgment motions. Rachel produced substantial evidence in opposition to those motions and the trial's decision should be reversed and this case remand for trial.

RESPECTFULLY SUBMITTED this 21 day of July, 2012.

Greenaway, Gay & Tulloch

By: _____


Carl Lloyd Gay, WSBA no. 9272
of attorneys for Appellant

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COURT OF APPEALS DIVISION II, STATE OF WASHINGTON

RACHEL MARGUERITE ANDERSON
(formerly RACHEL M. RODGERS),

Appellant,

vs.

WILLIAM L.E. DUSSAULT and JANE DOE
DUSSAULT, husband and wife, and the
marital community composed thereof;
BARBARA J. BYRAM and JOHN DOE
BYRAM, wife and husband, and the marital
community composed thereof; YEVGENY
JACK BERNER and JANE DOE BERNER,
husband and wife, and the marital community
composed thereof; WILLIAM L. E.
DUSSAULT, PS, a Washington professional
service corporation; the DUSSAULT LAW
GROUP, a Washington corporation;
RICHARD MICHAEL McMENAMIN and
SHARI L. McMENAMIN, husband and wife,
and the marital community composed thereof;
MCMENAMIN & MCMENAMIN PS, a
Washington professional service corporation;
ANDREA DAVEY (fka ANDREA
RODGERS) and JOHN DOE DAVEY,
husband and wife, and the marital community
composed thereof; and WELLS FARGO
BANK, N.A., a foreign corporation

Respondents.

Case No.: 43280-3-II

PROOF OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

ORIGINAL

1 I hereby certify that on the 2nd day of July, 2012, I served the foregoing BRIEF OF APPELLANT
2 RACHEL MARGUERITE ANDERSON and this PROOF OF SERVICE on the following
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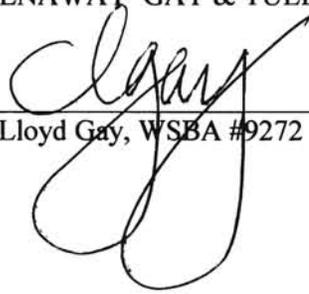
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21 I hereby declare under penalty of perjury under the laws of the State of Washington that
22 the foregoing is true and correct.

23 DATED this 2d day of July, 2012, at Port Angeles, Washington.

24 GREENAWAY GAY & TULLOCH

25 By: 
Carl Lloyd Gay, WSBA #9272