FILED
Court of Appeals
Division II
State of Washington
1/17/2018 3:31 PM

CASE # 50685-8

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BRADFORD BALINT & DANICE BALINT,
husband and wife,

Appellants,

v.

MICHAEL J. WYNNE & MARY S. WYNNE,
individually and as husband and wife,
and MICHAEL J. WYNNE, P.S.,

Respondents.

APPELLANTS' REPLY BRIEF

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Table of Contests

I. REPLY TO ISSUES PRESENTED.....1

II. RESTATEMENT OF CASE.....1

III. ARGUMENT.....3

a)..... An Expert Witness is Not Required to Establish a Breach of Duty of Care.....3

b).... The Court Must Distinguish "Undue Influence" from "Testamentary Capacity".....7

c) An Attorney is Also Responsible to a Beneficiary.....12

IV. CONCLUSION.....14

Cases

Bowman v. John Doe 104 Wn.2d 181, 185 704 P.2d 140 (1985).....13

Dean v. Jordan 194 Wash.661, 79 P.2d 331 (1938).....8, 9

Geer v. Tonnon 137 Wn. App. 838, 851, 155 P.3d, 163 (2007).....3, 4, 5, 14

In re Beck's Estate 79 Wash.331, 140 P.340 (1914).....7, 9

Johnson v. Caughren 55 Wash.125, 104 P.170 (1909).....12

Kitsap Bank v. Denley and Lanterno found at 177 Wn.App.559, 312P.3d 711(2013).....9

Lynch v. Republic Pub. Co. 40 Wn 2d, 379, 243 P.2d, 636 (1952).....4, 12

McCutchon v. Brownfield 2Wn.App348, 467 P.2d 868 (1970).....10

Slack v. Luke 192 Wn.App, 909, 370. P.3d, 49 (2016).....5

Stangland v. Brock 109 Wn.2d 675,679-682, 747 P.2d 464 (1987).....13

Trask v. Butler 123 Wn.2d 835, 840, 841, 872 P.2d 1080 (1994).....13

Walker v. Bangs 92, Wn.2d 854, 601 P.2 1279 (1979).....3, 4, 5, 14

I.

REPLY TO ISSUES PRESENTED

Appellant's issues were that the trial court erred by finding Appellant's evidence insufficient concerning the breach of duty by a lawyer and that the trial court erred by requiring an expert witness to present testimony. Respondents responded by indicating that the dismissal was proper when Appellants failed to provide proper expert testimony for the complex legal malpractice allegations which were beyond the common knowledge of a layperson.

The issue then is whether the trial court erred in determining that the matter before it was so complex that a layman could not understand it and expert testimony was necessary.

Appellant submits that what makes it complex is Respondent's argument not the nature of the case itself.

II.

RESTATEMENT OF CASE

In its brief Respondent argues that the case is a legal complexity with issues of real estate law and state law, alleged duties to former clients. That is found in its introduction in Respondent's Brief p.1. And again in its Counter-Statement of Issues presented in Respondent's Brief p.2 where it asserts it is a "complex legal malpractice allegations". Further, Respondent

says there is a General Rule requiring expert testimony in all legal malpractice cases (Resp. Brief page 1 and12). Both those statements are not true. This case is not one of legal complexity. It is a question of whether Respondent Michael Wynne had a duty to protect either David Balint in his estate planning process or the beneficiary of the deed, Bradford Balint, his son. The question of undue influence was never addressed by attorney Wynne, yet all the criteria for undue influence were plainly visible on its face. Appellant must come back to the issue it faced when the trial judge picked one of two conclusions which is in juxtaposition of the second conclusion. The two lawyers can each take a separate side but until the judge rules, neither lawyer knows which position he would take.

On the night in question, it wasn't up to Appellant Bradford Balint to say to attorney Michael J. Wynne "are we going to talk about undue influence?". No, the duty is on the part of the attorney to know when the criteria are in play and to counsel either the beneficiary, as stated in Appellant's brief, or his own client, David Balint who had expressed to Mr. Wynne his desire for distribution of his estate outside the Will by use of a deed.

In reviewing Respondent's Brief, one can be struck by the fact that Respondent is consumed by the length of time it took from the acts of malpractice by Michael Wynne in 2005 to the Motion for Summary Judgement entered in this matter in 2016. He identifies the four years from

the time that Mr. Wynne committed his malpractice until there was resolution by a trial of the claim against Appellant by his brother Jason (Feb. 1, 2, 3, 2010). Then it took several months to get the final paperwork accomplished. It was a Stipulation to an Agreed Result which was filed in August, 2010. Then another six years passed while Mr. Wynne resided in a State Penitentiary for theft of Trust accounts of his clients. Hence the length of time between the malpractice events of late September of 2005 through the March 5, 2010 bench trial through the litigation in this case resulting in the entry of an Order Granting Summary Judgment is easily explained. But Respondent does not want to respect those explanations.

III.

ARGUMENT

a) An Expert Witness is Not Required to Establish a Breach of Duty of Care

The legal issue that Respondent clearly misstates is that the "General Rule" in the State of Washington requires expert testimony in a legal malpractice case. That is not the truth. Respondent cites *Geer v. Tonnon* 137 Wn. App. 838, 851, 155 P.3d, 163 (2007) and *Walker v. Bangs* 92, Wn.2d 854, 601 P.2 1279 (1979) as cases that state the general rule an expert is required.

In *Walker v. Bangs*, supra, the Washington Supreme Court indicated that "professional negligence in preparation and conduct of specific litigation involves matter calling for special skill or knowledge proper subjects for expert testimony". It then discusses whether expert testimony on the standard of care is mandatory in some cases but it states clearly "the general rule is to permit but not require expert testimony". This *Walker* case was unique because it involved maritime litigation where a federally enacted maritime law applied.

The *Geer v. Tonnan,* supra, the case revolved around the failure to bring a lawsuit within one year under the terms of a property insurance contract. The plaintiff in the case failed to notify this lawyer that there was a retroactive endorsement notice issued by the insurance underwriter. The court first held:

> "Expert testimony is often required to determine whether an attorney's duty of care was breached in a legal professional negligence action, because law is admittedly a highly technical field beyond the knowledge of the ordinary person." Citing *Lynch v. Republic Pub. Co.* 40 Wn 2d, 379, 243 P.2d, 636 (1952).

Because the Defendant failed to notify his own lawyer of this retroactive endorsement notice the court went on to hold:

> "As a result, experty testimony was necessary to establish that Tonnan breached the duty of care owed to Geer by failing to independently discover the existance of the endorsement, a fact that his

> client failed to disclose to him, in order to commence suit to enforce the endorsement against Lloyd's within the one year limitation. However, Geer failed to proffer any such expert testimony, thus, there was no evidence that attorney Tonnan breeched any applicable duty to Geer." *Geer v. Tonnan,* supra, p. 851.

The case went on to indicate that there was no evidence to connect the dots as to whether Geer's claim of damages was going to be available because he would have had to obtain a favorable judgment against Lloyd's. No expert testimony or any other evidence was brought forward to show that he would have won the case had he properly filed it.

On the other side of this legal conundrum is the case of *Slack v. Luke* 192 Wn.App, 909, 370. P.3d, 49 (2016). In this case the Division III of the Court of Appeals used *Walker v. Bangs,* supra, to analyze whether or not expert testimony was needed. The conclusion was: "however, the "general rule" is to permit but not require expert testimony. Id. Washington does not require expert testimony when a negligence charge is within the common knowledge of laypersons. Id (p. 916-917)." So rather than the exception being those cases in which the malpractice is within the general knowledge of layperson, in fact the general rule in Washington is to permit but not require expert testimony.

The *Slack* case is interesting because it involves a suit against a lawyer for not complying with a statute of limitations on a claim under the Washington Law Against Discrimination statute. The issue was whether

the underlying claim under the WLAD lawsuit would have merit or would it have been dismissed even if the lawyer had properly filed the case within the statute of limitations. The offending lawyer's counsel suggested strongly that the plaintiff needed to have an expert witness. The Court of Appeals stated that expert was not needed even though the trial judge indicated that it was. It expressed dissatisfaction with the requirement of an expert witness because the general rule was to permit but not require expert testimony. The question was whether the underlying claim had merit and that was a determination for the jury to make. They went on to affirm the trial judge's dismissal because there was no evidence that the underlying case would have succeeded.

The Court essentially ruled that the requirement of an expert witness to demonstrate the malpractice of the attorney was not necessary but went on to hold that when that legal malpractice defendant presents evidence that the unfiled lawsuit was without merit then the plaintiff must establish that the underlying case would survive its own motion for summary judgment. In the *Slack* case that could not happen. The WLAD case would have failed. In the case at bar, the so called underlying case, *Estate of Balint v. Balint,* had already been decided in favor of Jason Balint, the Appellant's brother.

b) The Court Must Distinguish "Undue Influence" from "Testamentary Capacity"

Respondent states that the fact that Bradford Balint testified on deposition that his father was mentally lucid at the time of the signing of the deed was detrimental to his underlying case. But in fact, we know that there is case law that states that while the mental capacity of the deceased to make a testamentary disposition through a will may have been approved, there still remains the issue of undue influence. There are two separate and distinct theories of why the deed signed by David Balint was voidable.

The question of undue influence and its legal definition starts with *In re Beck's Estate* 79 Wash.331, 140 P.340 (1914). In this case Annie Beck was a new citizen, she barely spoke English. Attorney Helwig prepared a Will at the behest of two of her sons who were the principal beneficiaries under the Will. The Court had a discussion over whether or not the beneficiaries that were instrumental in getting the Will prepared and signed was a question of undue influence. It turned out that the brothers actually gave the information to the lawyer and the lawyer drafted the Will without ever discussing it with the deceased. This Court ruled that where there was a beneficiary that actively procures the execution of the Will it raises a suspicion of undue influence.

That case then led to the seminal case of *Dean v. Jordan* 194 Wash.661, 79 P.2d 331 (1938) where there was a Will contest for both mental incapacity of the deceased as well as fraud and undue influence practiced by the beneficiary. After a long discussion on mental incapacity and insanity, this Court held that the testamentary capacity of the deceased was established. The fact that she signed the Will properly created a presumption that it was appropriate. This is the primary case that points out that there is a distinct question between the lack of testamentary capacity and undue influence. It also stated that undue influence is more than just "mere" influence. It set forth certain standards.

> " … The most important of such facts are: 1) That the beneficiary occupied a fiduciary or confidential relation to the testator; 2) that the beneficiary actively participated in the preparation and procurement of the will; and 3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations such as the age and condition of health and mental vigor of the testator, the nature and degree of relationship between the testator and the beneficiary, the opportunity for exerting undue influence, and the naturalness or unnaturalness of the will. The weight of any such facts will, of course, vary according to the circumstance of the particular care. Any one of them may, and variously should, appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will." *Dean,* supra, p. 672.

These are the factual issues which must be determined. Judge John Wulle previously ruled that these factors resulted in his conclusion that Bradford Balint and Danice Balint were unduly influencing the preparation and signing of the deed which transferred a substantial part of David Balint's Estate to them. Those are all factual matters that should have been determined by the jury. So where is the necessity of having an expert witness testify as to the determination of undue influence? Or, more importantly, an expert to say an attorney has breached a duty to explain undue influence to his client or a beneficiary.

In this case, Respondent Wynne knew that Bradford and Danice had moved onto the property with David; knew that they have procured a durable power of attorney; knew that they had been the ones to call him repeatedly to prepare the deed and at the last minute had him come to their home; he knew that the 9 acres was a substantial part of David's Estate with only a rental home being the other component. (CP 124) These are factual determinations that meet the criteria of *Dean v. Jordan, supra* and *Beck, supra.*

The criteria for undue influence is repeated in the case of *Kitsap Bank v. Denley and Lanterno* found at 177 Wn.App.559, 312P.3d 711(2013). This is a Division II Court of Appeals case. It sets forth the criteria for establishing presumption of undue influence and ultimately

rejected that the bank employee, Lanterno, had any sufficient connection with the deceased to raise the issue of undue influence.

In *McCutchon v. Brownfield* 2Wn.App348, 467 P.2d 868 (1970) the Court of Appeals held that "the existence of undue influence is a factual question."

All of these cases suggest that the fact that David Balint may have been lucid the night he signed the deed was immaterial to the question of undue influence.

Returning to the issues of this professional negligence by Wynne, there are obviously four elements to that assertion: 1) the duty of care on the part of the attorney; 2) an act or omission by the attorney in breach of the duty of care; 3) damage to the client; 4) proximate conduct between the attorney's breach and the damage incurred.

Apparently it is these four elements that Respondent deems it necessary to have an expert witness. The trial court agreed with Respondent on only one of those elements (CP 151). Appellant submits that the trial court was wrong. As established above that determination of undue influence is a factual question for the jury. Likewise, once the jury is given the instructions on that issue, this becomes an area where an expert witness is not necessary under the laws of the State of Washington. The layman jury can determine that there was relationship between

Michael Wynne and the Balints, both to the father and to the son. Laymen can determine that there was a potential conflict of interest between the father and the two sons that Mr. Wynne knew about. It is clear that Mr. Wynne did not discuss with Bradford Balint that the criteria of undue influence could be a problem for them. That is a breach anyone could know. That does not take an expert. Clearly there was damage to Brad and Danice Balint because they lost the property and they have incurred thousands and thousands of dollars in expenses. The trial judge (the Honorable Robert Lewis) affirmed three of the four elements of the legal malpractice case against Mr. Wynne by Appellant. He indicated that Plaintiffs (Appellants) have presented evidence of relationship between themselves and Michael Wynne that is sufficient to create a duty. He further states that the evidence presented by Appellants creates a material issue of fact on the issues of proximate cause and injury. It does not provide evidence of the breach of the standard of care (CP 151). So the only expert testimony that was needed was whether or not a jury could find that Michael Wynne breached a duty. Since the testimony would be clear by both Appellants and by Mr. Wynne that there was no discussion concerning undue influence, certainly, that could be a breach. And laymen or lay jury could understand what a breach of that duty is without an expert witness.

Respondent bases its argument on the recitation found in *Lynch v. Republic Pub. Co.,* supra. In that case the Washington Supreme Court stated:

> "Law is admittedly a highly technical field beyond the knowledge of the ordinary person. The competency of a judge is a question of fact upon which expert testimony should be of aid to a jury. The admissibility of expert opinion testimony is an exception to the general rule stated in the Johnson case, supra. It is not necessarily fatal to the admissibility of such testimony that it touches as issue before the jury." *Lynch v. Republic Pub. Co,* supra, p. 642.

The Lynch matter was discussing the <u>use</u> of expert testimony, not the <u>requirement</u> of expert testimony. Thus the quotation is taken out of context when used to point out that the law is a highly technical field and any and all issues of malpractice must be proven by an expert witness.

Likewise, if we go back to the underlying case that *Lynch* relies on, *Johnson v. Caughren* 55 Wash.125, 104 P.170 (1909) we find that the court is ruling on the applicability of opinion testimony. The general rule is that witnesses may not give opinions of fact which the court or jury are ultimately to determine. So the propriety of an expert testimony is whether it should be admitted not that it is required.

c) An Attorney is Also Responsible to a Beneficiary

At the same time we must not forget that the attorney may owe a duty not only to his client but to the non-client intended beneficiaries of the testamentary disposition. Normally, you would have to establish the attorney-client relationship. But if there is no real contractual relationship, two tests were previously applied in Washington to determine whether an attorney owes a duty to a non-client. In *Bowman v. John Doe* 104 Wn.2d 181, 185 704 P.2d 140 (1985) and in *Stangland v. Brock* 109 Wn.2d 675,679-682, 747 P.2d 464 (1987) a third party beneficiary test and a multi-factor balancing test were put into play. In *Trask v. Butler* 123 Wn.2d 835, 840, 841, 872 P.2d 1080 (1994) there are six criteria or factors put forward including: Who is the intended beneficiary? What's the harm, injury, suffering connection between the lawyer's conduct and injury or future harm and the burden of the profession.

In the case at bar there is some question about whether Bradford and Danice Balint are actual clients of Michael Wynne or are they merely the intended beneficiary of the testamentary disposition of David Balint. It is clear that David Balint is a client. Mr. Wynne was aware of all the factors outlined in *Trask* as it applies to the Balint family. He knew from talking to David that Bradford and Danice was the intended beneficiary. Since he was aware of there being other siblings to Bradford Balint he should have been aware of the potential harm if the beneficiary wasn't clearly the recipient.

IV.

CONCLUSION

The real issue before this court in the case at bar is whether the trial judge had faith in a system of a lay jury or whether he let himself be confused by Respondent's misrepresentation of the "general rule". Contrary to Respondent's assertion that this is a complex legal case, it really isn't. The question of facts are: whether there was a duty by Defendant Wynne to Bradford and Danice Balint and whether he breached that duty. The trial judge ruled favorably on that duty. After instruction, a layman could understand what undue influence is because there are simple criteria reported above. The fact that Bradford Balint continues to dispute Judge Wulle over whether his father was lucid or not, is not material to Michael Wynne's requirement to guard against the concept of undue influence.

Respondent in its Brief at page 7 would have you believe that the trial judge accepted the need for an expert as "the general rule". The judge did not say that. He simply stated that Wynne's actions were not so "obviously improper" that they demonstrated a breach of duty. We know requiring an expert is not the general rule. The facts of *Balint v. Wynne* are not nearly as esoteric or unique as the facts in *Walker v. Bangs, supra* or *Geer v. Tonnan, supra*. Failing to make a client or beneficiary aware of a significant principal of law that could affect the transaction is a concept within the common knowledge of laymen.

The trial court should be reversed and the matter remanded to set for trial.

Respectfully submitted this 17th day of January, 2018.

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January 17, 2018 - 3:31 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50685-8
Appellate Court Case Title:	Bradford Balint, et ux., Appellant v. Michael Wynne, Et ux., Respondents
Superior Court Case Number:	11-2-02942-9

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