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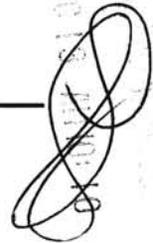
No. 70434-6-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SUSAN E. SHOLLY, LORNA L. STEWART,
and LINDA A. MULLINS
appellants

v.

CYNTHIA WORTH and JOHN WAY and WORTH LAW
GROUP, P.S., INC., a Washington Professional Services
Corporation, d/b/a WORTH LAW GROUP
Respondents.

OPENING BRIEF APPELLANTS



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ATTORNEYS FOR APPELLANTS

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I. INTRODUCTION

Petitioners appeal from the trial court's entry of summary judgment.

The underlying case arises out of the negotiation of a settlement agreement concerning the trust and the estate of the Petitioners' late father, James Stewart. Mr. Stewart had remarried later in life and wanted to provide for his second wife, Dorothy Dunson, while ensuring his desire that his daughters, the Petitioners, inherited his separate property.

After Mr. Stewart died, a dispute arose between Petitioners and Ms. Dunson, and her daughter, Barbara Dunson.

In order to resolve this dispute, Petitioners hired the Respondents to represent them. A TEDRA petition was filed. Respondents requested an accounting and financial records from the Dunson's attorney, Mike Regimbal, but he failed to respond. Respondents moved to compel the production of those documents, but Respondents had not obtained the necessary financial documents prior to the date that the mandated mediation was scheduled.

Petitioners participated in the mediation, which occurred in January 2010, and were advised by Respondents that they should settle the

matter. They did so. Following the mediation, Petitioners learned that their father had more substantial separate assets to which they had interests in, that weren't disclosed. However, Petitioners followed the advice of their attorneys and agreed to settle.

Petitioners rightfully assumed, as lay people, that Respondents had procured everything necessary to advise them to make a full and reasoned decision at the TEDRA mediation. Unfortunately, that wasn't the case.

Petitioners filed suit on August 11, 2011. The trial court issued its summary judgment order dismissing Petitioners' case in this matter on May 3, 2013.

In response to Respondents' summary judgment motion, plaintiff submitted the Declaration of attorney Carolyn Hicks who opined that the Respondents had breached the standard of care in their representation of the Petitioners. Petitioners also submitted the report of Neal Beaton, an economic expert to establish damages related to, and caused by the breach at issue. Petitioners also submitted their own declarations detailing how they became aware, after the mediation, that they had lost substantial inheritance by agreeing to the mediated settlement recommended by Respondents.

II. ASSIGNMENTS OF ERROR.

1. The trial court erred in granting Respondents' motion for summary judgment when Petitioners submitted sufficient evidence to raise questions of fact to allow the case at issue to proceed to trial.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Did the trial court err in its application of Civil Rule 56 when Petitioners presented evidence that Respondents breached the standard of care by failing to adequately conduct discovery with regard to the assets that Petitioners would have inherited and advised Petitioners to settle the case without knowing the extent of their inheritance from their late father, and where the Petitioners themselves submitted declarations as to their loss along with the report of Neal Beaton, their economist?

IV. STATEMENT OF THE CASE.

The Petitioners herein are all sisters and the daughters of James Stewart. (CP 70). Mr. Stewart remarried to Dorothy Dunson later in life, Dorothy Dunson is not the mother of the three Petitioners. (CP 70).

Prior to his death, Mr. Stewart established the Stewart-Dunson Revocable Living Trust ("Trust"), dated November 26, 1996. (CP 372). The essential terms of the Trust provided that Mr. Stewart's separate property should ultimately revert to his three daughters. (CP 374).

A dispute between Ms. Dunson and Petitioners arose with regard

to administration of the Trust and the estate of James Stewart following his death. (CP 70).

Petitioners retained the services of Respondents, to resolve this dispute, (CP and a TEDRA application was ultimately filed on November 24, 2009. (CP 70).

As part of the TEDRA case, Respondents requested that the attorney representing Ms. Dunson, Michael Regimibal, provide an accounting and financial records to be able to ascertain the extent of the Petitioners' interest in their father's Trust. Mr. Regimibal failed to provide the requested information. (CP 371-375).

Respondents then advised the Petitioners to proceed to a TEDRA mediation without the benefit of having the knowledge of their father's separate property interest in the Trust. (CP 364- 366; 367-368; 369-370)

Petitioners followed the advice of their attorneys and agreed to settle, based upon the representation that their attorneys were prepared to handle the mediation. (CP 364- 366; 367-368; 369-370).

Petitioners agreed to settle at the mediation, but subsequently discovered that their interests in their father's trust substantially exceeded the amount of they agreed to settle for because Respondents hadn't procured all the necessary information with regard to Petitioner's interest

in their father's Trust and estate. (CP 359-363; 364- 366; 367-368; 369-370).

V. ARGUMENT.

A. **This Court engages in *de novo* review of the trial court's grant of an order of summary judgment.**

An appellate court reviews summary judgment orders *de novo* and performs the same inquiry as the trial court, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. Hisle v. Todd Pac. Shipyards Corp., 151 Wash.2d 853, 860, 93 P.3d 108 (2004) (citing Kruse v. Hemp, 121 Wash.2d 715, 722, 853 P.2d 1373 (1993)). The grant of summary judgment is appropriate only where there is "no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one that affects the outcome of the litigation." Owen v. Burlington N. Santa Fe R.R., 153 Wash.2d 780, 789, 108 P.3d 1220 (2005) (citing Hisle, 151 Wash.2d at 861, 93 P.3d 108).

A plaintiff, if he is the nonmoving party, must create an issue of fact in order to avoid summary judgment and an affidavit asserting any supportable, relevant fact inconsistent with the defendant's position will be sufficient to do so. The defendant's task, to show that there are no

disputed facts, is necessarily much more difficult. In contrast to the plaintiff's situation, the mere fact that the defendant does assert some relevant facts will not necessarily meet his burden. The defendant's task of showing that there are no disputed facts means that the facts asserted in his affidavit, together with the plaintiff's allegations taken as true, must support only inferences in the defendant's favor. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, (1989).

B. Law on Legal Malpractice.

A legal malpractice claim requires proof of four elements by a preponderance of the evidence: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred. Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992).

1. Duty

There is no question with regard to the existence of an attorney client relationship. Defendants concede that an attorney client relationship existed at all material times with all three plaintiffs.

2. Breach of the Standard of Care

Plaintiffs' expert Karolyn Hicks has analyzed the facts of this matter and opined that that the defendants breached the standard of care. Ms. Hicks opinions as to the breach of the standard of care create a question of fact for the trier of fact to resolve.

C. Causation

General principles of causation are no different in a legal malpractice action than in an ordinary negligence case. Sherry v. Diercks, 29 Wn. App. 433, 437, 628 P.2d 1336 (1981). To recover, the plaintiff must demonstrate that he or she would have achieved a better result had the attorney not been negligent. *Id.* at 438, 628 P.2d 1336.

Proximate cause consists of two elements: cause in fact and legal causation. City of Seattle v. Blume, 134 Wn.2d 243, 251, 947 P.2d 223 (1997). "Cause in fact refers to the 'but for' consequences of an act, that is, the immediate connection between an act and an injury." Blume, 134 Wn.2d at 251-2, 947 P.2d 223.

The "but for" test requires a party to establish that the act or omission complained of probably caused the subsequent injury. Nielson v. Eisenhower & Carlson, 100 Wn. App. 584, 591, 999 P.2d 42 (2000). Legal causation rests on considerations of policy determining how far a

party's responsibility should extend. Blume, 134 Wn.2d at 252, 947 P.2d 223. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact. Id. Proximate cause may be determined as a matter of law only when reasonable minds could reach but one conclusion. Kim v. Budget Rent A Car Systems, Inc., 143 Wn.2d 190, 203-04, 15 P.3d 1283 (2001).

Whether sufficient evidence supports proximate cause represents an issue of “factual proximate cause rather than legal proximate cause.” Physicians Ins. Exch. v. Fisons Corp., 122 Wn. 2d. 229, 314 (1993). The courts may therefore determine proximate cause (including in a transactional legal malpractice case involving estate planning as a matter of law) “only when the facts are undisputed and inferences there from are plain and incapable of reasonable doubt or difference of opinion.” Daugert v. Pappas, 104 Wash. 2d 254, 257-8 (1985) (“The trier of fact decides whether the client would have fared better but for such mishandling.”) As a result, proximate cause almost always represents an issue for the jury to decide. Physicians Ins. Exch. 122 Wn. 2d at 314.

Washington courts have established that the fact finder must determine what the plaintiff would have done but for the defendant's negligence, the plaintiff establishes proximate cause through inferences

drawn by the fact finder. Daugert v. Pappas, supra 104 Wn. 2d at 257-8; Bishop v. Jefferson Title Co., 107 Wn. App. 833, 848-9 (2001); Hetzel v. Parks, 93 Wn. App. 929, 939-41 (1999).

In Brust v. Newton, 70 Wn. App. 286, 290-94 (1993) the court held “it is for the trier of fact to decide whether the client would have fared better but for the attorney’s mishandling of his case. It is also for the trier of fact to decide the extent This premise is especially true whereas here, on summary judgment, all reasonable inferences must be drawn in favor of the non-moving party. e.g., Young v. Key Pharmaceuticals, 112 Wn. 2d 216, 226 (1989).

In the matter at bar, the Petitioners submitted the Declaration of Karolyn Hicks establishing a question of fact as to the breach of the standard of care. Petitioners also submitted their own declarations attesting to the losses they suffered that were proximately caused by the advice they received, and their attorneys’ failure to conduct the requisite discovery to allow them to make an adequate decision. Moreover, Petitioners submitted the report of their economic expert, Neal Beaton .

VI. CONCLUSION

For the foregoing reasons, set forth above, the trial court’s grant of

summary judgment should be reversed.

Petitioners submitted ample evidence giving rise to a question of fact with regard to the breach of the standard of care, both in their declarations, as well as the declaration of Karolyn Hicks. In addition, they also submitted ample testimony regarding the causation and damages elements.

DATED this 12th day of December 2013.

Respectfully submitted:

PARKER LAW FIRM, PLLC

By: 

Jeffrey T. Parker
WSBA No. 22944
Attorney for Appellants/Cross-Respondents

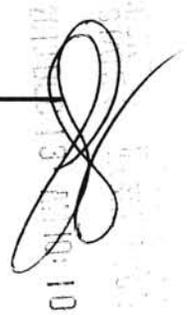
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DECLARATION OF SERVICE



2013 JUN 10 10:10 AM
WSBA

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STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Jeffrey Parker, deposes and states as follows:

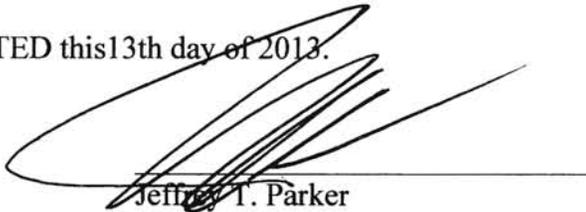
I am over the age of eighteen, competent to make the statements contained herein and I have personal knowledge of the same. My declaration is made under oath, pursuant to the penalty of perjury under the laws of the State of Washington.

1. I am the attorney for Appellants above named.

2. On December 13, 2013, I caused to be served upon Cozen & O’Conner, attorneys of record for defendants herein, one copy of the the Opening Brief of Appellants in this matter, by directing legal messengers to serve the same upon counsel for Respondent, Cozen & O’Conner at the address of

COZEN O’CONNER
1201 Third Avenue
Seattle, WA 98101

DATED this 13th day of 2013.



Jeffrey T. Parker