

74607-3

74607-3

74607-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JULIE REZNICK and CAROL LORENZEN,

Appellants,

v.

LIVENGOOD ALSKOG, PLLC, et al.,

Respondents.

APPELLANTS' OPENING BRIEF

THE LAW OFFICES OF
ANN T. WILSON

Ann T. Wilson, WSBA #18213
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
(206) 625-0990

Attorney for Appellants
Julie Reznick and Carol Lorenzen

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUN 23 AM 10:52


TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR.....2

III. STATEMENT OF THE CASE3

IV. ARGUMENT.....7

 A. Standard of Review.....7

 B. The Court Erred by Dismissing Appellants’ Claim for
 Legal Malpractice.8

 C. The Court erred in not finding that there is a genuine
 issue of material fact as to whether Plaintiffs were
 intended beneficiaries of Defendant Judd’s erroneous
 advice to Ellen Lorenzen.11

 D. Allowing Appellants’ Claim Will Not Impose Any
 Undue Burden on the Legal Profession and Will Help
 Prevent Future Harm.....14

 E. Imposing a duty on Respondents in this case is not
 contrary to Washington law.....18

V. CONCLUSION.....20

TABLE OF AUTHORITIES

Cases

Chang v. Lederman, 172 Cal. App.4th 67, 82 (2009).....11

Dellen Wood Products, Inc. v. Wash. State Dept. Labor & Industries,
179 Wn. App. 601, 629, 319 P.3d 847 (2014).....17

Estate of Treadwell, 115 Wn. App. 238, 247, 61 P.3d 1214 (2003)9

Hall v. Kalfayan, 190 Cal. App. 4th 927, 937-38 (2010).....11

Hetzel v. Parks, 93 Wn. App. 929, 971 P.2d 115 (1999)10

In re Guardianship of Karan, 110 Wn. App. 76, 85, 38 P.3d 396
(2002).....10

Jones v. Allstate Insurance Company, 146 Wn.2d 291, 307, 45 P.3d
1068 (2002).....9

Lucas v. Hamm, 56 Cal.2d 583, 590, 360 P.2d 685 (1961)12, 15

Overton v. Conso. Ins. Co., 145 Wn.2d 417, 429, 38 P.3d 322 (2002).....8

Parks v. Fink, 173 Wn. App. 366, 376, 293 P.3d 1275 (2013)8, 11, 16

Paul v. Patton, 235 Cal. App. 4th 1088, 1097-1100, 185 Cal. Rptr. 3d
830 (2015).....12, 13

Schroeder v. Excelsior Management Group LLC, 177 Wn.2d 94, 104,
297 P.3d 677 (2013)8

Stangland v. Brock, 109 Wn.2d 675, 747 P.2d 464 (1987)1

Strait v. Kennedy, 103 Wn. App. 626, 630, 13 P.3d 671 (2000)13

Trask v. Butler, 123 Wn.2d 835, 872 P.2d 1080 (1998).....1, 2, 8, 18

Ward v. Arnold, 52 Wn.2d 581, 328 P.2d 164 (1958).....10

Statutes

RCW 11.12.04010, 15, 16

I. INTRODUCTION

The trial court erred when it granted Defendants' Motion for Summary Judgment. Washington law has recognized that an attorney can be liable for professional negligence to a non-client in the estate planning context since at least 1987 when *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 464 (1987) was decided. As the Washington Supreme Court clearly stated in the seminal case of *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1998), the facts of each case need to be examined to determine whether an attorney can be liable to a non-client.

It would not greatly burden the legal profession to require an attorney to read a 115 word statute and correctly advise a client as to its contents. In this case, Respondent Judd failed to do so and admittedly "made a mistake." The result of that mistake was that Ellen Lorenzen's residuary estate passed not as she intended to her sisters but instead to people from her past with whom her relationship had significantly changed long before her death.

This case is easily distinguishable from cases declining to impose a duty on an attorney to see that a client promptly executes new estate planning documents. Ellen Lorenzen did not fail to execute a new will or to revoke her 2005 Will herself. Instead, Respondent Judd told her the 2005 Will would be revoked if he tore it up and left her in her hospice room thinking she needed to do nothing further to ensure her estate was

distributed to her sisters. It was not until after Ellen's death that Mr. Judd learned from another attorney in his firm, that his advice to Ellen Lorenzen was erroneous.

There are genuine issues of material fact raised by Mr. Judd's Declaration and the Declarations of the other people present in Ellen's hospice room at the time of his meeting with Ellen, Plaintiff Julie Reznick and Anne Nogatch and Mr. Judd's actions after Ellen Lorenzen's death. Because there are genuine issues of material fact regarding what occurred at the hospice, summary judgment in this case was inappropriate.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by granting summary judgment when there are genuine issues of material fact regarding whether Ellen Lorenzen communicated her intent to leave her residuary estate to Appellants to Respondent Judd.

2. The trial court erred by granting summary judgment because the factors announced in *Trask v. Butler* militate a finding that Appellants have a cause of action for professional negligence against Respondents.

3. The trial court erred in granting summary judgment by treating as dispositive the fact that Ellen Lorenzen had not herself raised the idea of revoking her existing Will but instead responded affirmatively to Respondent Judd's suggestion that he destroy the will.

III. STATEMENT OF THE CASE

Appellants Julie Reznick (“Julie”) and Carol Lorenzen (“Carol”) and the decedent, Ellen Lorenzen (“Ellen”) were sisters. The three of them were born fairly close together with a total age span of just over three years. Ellen was the middle sister (CP 86). Ellen was not married and had no children. She died much too young on February 23, 2012 after an extended battle with cancer. Both of Ellen’s parents predeceased her (CP 86-87).

Respondent Hugh Judd is an attorney who was admitted to practice in Washington in 1967 (CP 96). Respondent Judd is of counsel to Respondent Livengood Alskog PLLC. Respondent Judd performed legal services for the Lorenzen family for several years including acting as attorney for Julie, Carol, and Ellen’s mother in conjunction with the sale of a business and representing Ellen as Personal Representative of the mother’s estate. Respondent Judd also drafted estate planning documents for Ellen and Julie and Julie’s then husband, Alan Reznick (CP 87).

Respondent Judd drafted a last will and testament for Ellen which she executed on November 17, 2005 (“the 2005 Will”) (CP 115-21). Under the terms of the 2005 Will, Julie and Carol each received a \$10,000 specific bequest. After payment of some other specific bequests, the 2005 Will provides that the residue of Ellen’s estate is to be distributed one-half to Ronald Brill and one-half to a trust for the benefit of Christopher Nagridge. Appellants believe that Ronald Brill was someone Ellen dated. At the time of Ellen’s death, Ronald Brill was living with another woman

(CP 87). Christopher Nagridge's mother, Nancy, was a college friend of Ellen's who Carol and Julie believe Ellen had lost contact with several years before her death (CP 87).

Ellen was initially diagnosed with cancer in the late 1990s. She lived with the cancer for several years and was unable to work for the last few years of her life. Because Carol knew that Ellen was worried about debts, Carol agreed to loan Ellen the sum of \$39,000 in late 2011 to relieve the financial burden from Ellen. This is apparently the transaction Respondent Judd references in his Declaration. However, it was a loan **from** Carol to Ellen not a loan to Carol from Ellen (CP 87, 90, 111-13).

In early 2012, Carol came to visit Ellen from Missouri where Carol is a professor at the University of Missouri (CP 86-87). The plan was that Carol would take a leave of absence from her job and take care of Ellen after returning to Missouri for a short period of time (CP 87). Ellen asked Carol to contact Respondent Judd regarding modifying her estate plan when Ellen was preparing for a blood transfusion (CP 87-88). Carol did so. Ellen and Respondent Judd then had a telephone conversation during which Ellen told Respondent Judd she wanted to think about what changes she wanted to make to her estate plan. The two of them arranged that Respondent Judd would meet with Ellen on February 22 (CP 53-54, 87).

Ellen took an unexpected turn for the worse while she was in University Hospital and was moved to Evergreen Hospice. Respondent Judd then arranged to meet with Ellen at Evergreen on the morning of February 23 at 9 am. He also arranged for Julie to bring financial

documents to the hospice at that time. When Respondent Judd arrived at the hospice, Julie was also there with the information Respondent Judd had requested. Respondent Judd went into Ellen's room to meet with her. At the time Respondent Judd was in Ellen's room with her, two other people were present: Julie and Anne Nogatch. (CP 49-50, 84). Anne Nogatch is a long time neighbor of the Lorenzen family who babysat all three daughters when they were young. She is also a nurse and had been employed by Evergreen Hospice for approximately six years on February 23, 2012. Although she was not assigned to care for Ellen, she came to her room after speaking with a distraught Julie (CP 83-84).

Anne Nogatch is firm in her conviction that Ellen was able to communicate with Respondent Judd at the time he met with her in her hospice room. Anne Nogatch has stated that she "clearly remember[s] Ellen's attorney asking if Ellen wanted to change her estate plan and disregard her previous will and divide her estate between her sisters. He indicated that Ellen should squeeze his hand if that is what she wanted. I clearly saw her squeeze his hand to indicate that she wanted her estate to go to her sisters" (CP 84). Respondent Judd asked Anne Nogatch to confirm that Ellen had communicate her desire to leave her estate to her sisters to him (CP 84).

When he left Ellen's hospice room, Respondent Judd called Carol. In that call, he reported to Carol that he had met with Ellen and that Ellen had confirmed that she wanted her estate to go to her sisters (CP 88).

During his Deposition, Respondent Judd admitted to giving Ellen incorrect advice regarding how she could ensure her estate passed to her sisters. In particular, he testified:

Q. And how did you believe revoking the will could be --

A. I made a mistake.

Q. What was your mistake?

A. I believed it could be torn up, and that that would accomplish the revocation.

Q. And who did you believe could tear it up?

A. I believed I could.

Q. And did you believe you could tear it up outside of Ellen's presence?

A. Yes.

Q. Did you believe it needed to be torn up before she died?

A. No.

Q. So you believed it could be torn up after her death, and that would be effective to revoke the will?

A. If so instructed by her, yes.

Q. When you left the room at the hospice, did you believe that you had been instructed to tear up the will by Ellen? . . .

A. I, at that time I did. . . .

Q. When you learned that Ellen had died, did you still believe that you could tear up her will and, effectively, revoke it?

A. Yes.

(CP 102, 104). Ellen died the afternoon of the same day Respondent Judd met with her at the hospice without further action to accomplish her intent having been taken (CP 88). Because of Respondent Judd's advice, Ellen would have had no reason to believe at the time of her death that further action was necessary to carry out her intent to leave her estate to her sisters.

Following Ellen's death, Respondent Judd proceeded as if Ellen's estate would pass to Julie and Carol through intestacy. He arranged for Julie and Carol to meet with Tom Windus, another attorney at Respondent Livengood Alskog to discuss probating Ellen's estate (CP 88). It was apparently Tom Windus who discovered Respondent Judd's mistake and who informed Respondent Judd that he could not revoke the 2005 Will (CP 105). Respondent Judd did not express any doubts to Carol and Julie regarding whether Ellen had communicated to him her intent that Carol and Julie should receive her estate (CP 88). After Respondent Judd or Tom Windus informed Carol and Julie that the 2005 Will could not be revoked, the two of them continued to communicate with Carol and Julie. Carol and Julie believed that Respondent Judd and Tom Windus were attempting to fix Respondent Judd's mistake and carry out Ellen's intent that Carol and Julie receive Ellen's estate. Carol and Julie believed that Respondent Judd was acting on their behalf when they requested that Respondent Judd communicate with Ronald Brill and the Nagridges regarding whether they would disclaim the bequests to them under the 2005 Will. Respondent Judd never communicated to Carol and Julie that he was doing so to protect himself or "the estate" (CP 88-89).

IV. ARGUMENT

A. Standard of Review.

Appellants Julie Reznick and Carol Lorenzen assign error to the trial court's grant of summary judgment to Respondents. The Court of Appeals

reviews de novo all grants of summary judgment. *Schroeder v. Excelsior Management Group LLC*, 177 Wn.2d 94, 104, 297 P.3d 677 (2013).

Summary judgment is only appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). All evidence must be viewed in the light most favorable to the nonmoving party. *Overton v. Conso. Ins. Co.*, 145 Wn.2d 417, 429, 38 P.3d 322 (2002).

B. The Court Erred by Dismissing Appellants’ Claim for Legal Malpractice.

To prove a claim for legal malpractice, Appellants must generally prove four elements:

- (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.

Parks v. Fink, 173 Wn. App. 366, 376, 293 P.3d 1275 (2013).

Traditionally, only a client could sue an attorney for malpractice. But privity of contract is no longer a prerequisite for a suit against an attorney for malpractice. *Trask v. Butler*, 123 Wn. 2d 835, 837, 872 P.2d 1080 (1994). In *Trask*, the Washington Supreme Court adopted a

multifactor balancing test for determining whether an attorney owes a duty to a non-client:

- (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 843. The *Trask* court was careful to admonish that each claim needs to be evaluated based on the particular facts at issue. *Id.* at 845. The threshold question is whether the particular transaction at issue was meant to benefit the plaintiff. If not, the other factors do not need to be considered. *Id.*

Since *Trask*, several Washington courts have applied the multifactor test to find a duty to a non-client intended beneficiary. *See, e.g., Jones v. Allstate Insurance Company*, 146 Wn.2d 291, 307, 45 P.3d 1068 (2002) (duty owed by insurance adjuster practicing law to nonclient intended beneficiaries of a transaction); *Estate of Treadwell*, 115 Wn. App. 238, 247, 61 P.3d 1214 (2003) (attorney for a guardian owes duty to

the nonclient ward because ward is intended beneficiary of transaction); *In re Guardianship of Karan*, 110 Wn. App. 76, 85, 38 P.3d 396 (2002) (“Here, the *Trask* factors establish a duty owed by Mr. Topliff [the attorney] to Amanda [his non-client ward].”); *Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999)(attorney owed duty of care to nonclient as intended beneficiary of transaction concerning attorney trust account).

In this case, there is no dispute that Appellants can satisfy the second through fourth factors. Instead, Respondents claim that Appellants cannot show that they were intended beneficiaries under the first factor and that the prevention of potential future harm is outweighed by the burden which would be imposed on the profession by a finding of liability. The trial court erred by accepting Respondents’ mischaracterization of the Appellants’ claim and the evidence with respect to the first, fifth and sixth factors.

Appellants’ claim is not that Respondent Judd owed them a duty of care to have Ellen Lorenzen’s 2005 Will revoked promptly (CP 31). Appellants’ claim is that Mr. Judd owed them a duty to correctly advise Ellen Lorenzen regarding how to make Appellants the primary beneficiaries of her estate including correctly advising her as to the requirements to effectively revoke a will under RCW 11.12.040. In that regard, Appellants’ claim is similar to the claim in *Ward v. Arnold*, 52 Wn.2d 581, 328 P.2d 164 (1958), in which the Washington Supreme Court held a widow stated a valid claim for malpractice against an

attorney by alleging that the attorney's erroneous advice that a will for her husband was unnecessary and she would receive the entire estate if her husband died intestate caused her to fail to have him execute a will.

C. The Court erred in not finding that there is a genuine issue of material fact as to whether Plaintiffs were intended beneficiaries of Defendant Judd's erroneous advice to Ellen Lorenzen.

Respondents relied on two California cases, *Hall v. Kalfayan*, 190 Cal. App. 4th 927, 937-38 (2010) and *Chang v. Lederman*, 172 Cal. App.4th 67, 82 (2009) for the proposition that a third party is only an intended beneficiary of an estate plan if there is a written, executed document indicating the client's intent to make the third party a beneficiary. This reliance is misplaced. In *Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1275 (2013) discussed further *infra* with respect to the fifth and sixth factors, the plaintiff contended that attorney Janyce Fink committed malpractice by failing to get the decedent to promptly execute a draft will.¹ In deciding whether Fink owed a duty to the plaintiff, the court stated that because material facts existed as to whether the plaintiff was an intended beneficiary, it would assume he was for purposes of summary judgment. The

¹ Fink's victory was pyrrhic in that she was disbarred shortly after the Court of Appeals decision. (CP 109). Plaintiff contended that his claim was actually that Fink had failed to have the draft will properly executed; a notion the court rejected under the particular facts of the case. *Parks*, 173 Wn. App. at 376 n.8.

Washington court did so despite the fact that the draft will at issue had not been executed.

Adopting Respondents' argument would limit third party malpractice claims to only those situations where an execution error caused a testamentary document to be invalid or a drafting error caused a bequest to fail at least in part. That is not the law even in California the jurisdiction in which the *Hall* and *Chang* cases were decided. In *Paul v. Patton*, 235 Cal. App. 4th 1088, 1097-1100, 185 Cal. Rptr. 3d 830 (2015), a California court recently allowed the plaintiffs to amend their complaint to state a claim despite the fact that there was "no executed trust instrument reflecting the decedent's alleged intent."

To narrow the class of intended beneficiaries who can maintain an action by imposing a written document requirement would run contrary to the underlying purpose of allowing intended beneficiaries to recover from an estate planning attorney who commits malpractice. The rationale for allowing intended beneficiaries to recover against an attorney who commits of breach of duty is that "the main purpose of the testator in making his agreement with the attorney is to benefit those beneficiaries and this intent can be effectuated only by giving the beneficiaries a right of action." *Id.* at 1098 (quoting *Lucas v. Hamm*, 56 Cal.2d 583, 590, 360 P.2d 685 (1961)). By definition, the claim against the attorney only arises once the client is no

longer living. Thus, the client could never bring a claim for legal malpractice.

This case is readily distinguishable from *Strait v. Kennedy*, 103 Wn. App. 626, 630, 13 P.3d 671 (2000), the one Washington case cited by Respondents for the proposition that the Appellants were not intended beneficiaries of Ellen Lorenzen's attorney-client relationship with Respondent Judd. *Strait* involved a claim by two daughters against their mother's marital dissolution attorney that the attorney's failure to timely finalize their mother's divorce caused them to lose portions of the inheritance they would have received if the divorce was finalized prior to their mother's death. *Id.* at 637. The effect on a client's estate of a marital dissolution action is clearly incidental to the primary purpose of the attorney-client relationship. That is in stark contrast to the purpose of an attorney's representation of an estate planning client which is to benefit the client's intended beneficiaries after the client's death. *Paul, supra*, at 1098. In this case, Respondent Judd's mistake caused Ellen to believe a particular result with respect to her estate would be accomplished. The entire point of the representation was to benefit Carol and Julie.

Respondents contend that there is no reliable manifestation of Ellen's intent with respect to her estate. That is simply not true. Two people were in the room at Evergreen Hospice other than Respondent Judd and Ellen,

Appellant Julie Reznick and Anne Nogatch (CP 84). Anne Nogatch has sworn in a Declaration that Ellen clearly manifested her intent to benefit her sisters to Respondent Judd (CP 84). Respondent Judd himself stated that Ellen had indicated that was her intent in a telephone call to Appellant Carol Lorenzen shortly after he left Ellen's room at the hospice (CP 88). In fact, Respondent Judd's actions following that meeting indicate that Ellen had indicated her intent to benefit her sisters to him. Respondent Judd called Appellant Carol Lorenzen. He also arranged for Carol and Julie to meet with Tom Windus to start a probate of Ellen's estate following her death. Finally, he agreed to discuss with Ronald Brill and the Nagridges whether they would agree to disclaim the residue of Ellen's estate which would have resulted in a benefit to Carol and Julie (CP 88-89). His Declaration submitted with Respondents' Motion for Summary Judgment contains doubts as to what he admits he believed at the time of his meeting with Ellen (CP 50). Those doubts are awfully convenient for him in light of Appellants' claim and, at most, raise an issue of fact. They do not provide conclusive proof that Appellants' cannot show they were intended beneficiaries of Ellen's estate.

D. Allowing Appellants' Claim Will Not Impose Any Undue Burden on the Legal Profession and Will Help Prevent Future Harm.

A balancing of the fifth and sixth *Trask* factors leads to the conclusion that the trial court erred in dismissing Appellants' legal malpractice claims against Respondents. Those factors are the policy of preventing future harm and the burden which would be imposed on the

legal profession by imposing liability. Appellants are not claiming that Respondent Judd committed legal malpractice by failing to get Ellen to promptly revoke her 2005 Will. Appellants' claim is that Respondent Judd committed legal malpractice by incorrectly advising Ellen that he could and would accomplish her intent to benefit Appellants by tearing up her 2005 Will outside her presence whether or not she was still living (CP 4). Respondents do not dispute that advice was erroneous. Nor do Respondents attempt to assert that RCW 11.12.040 is so complicated that Respondent Judd should not have been expected to properly advise a client as to its terms. *See Lucas, supra*, 360 P.2d at 690 (understanding of rule against perpetuities outside knowledge of an ordinarily skilled attorney). Defendants could hardly do so given that RCW 11.12.240 clearly provides:

(1) A will, or any part thereof, can be revoked:

(a) By a subsequent will that revokes or partially revokes, the prior will expressly or by inconsistency; or

(b) By being burnt, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking the same, by the testator or **by another person in the presence and by the direction of the testator. If such act is done by any person other than the testator, the direction of the testator and the facts of such injury or destruction must be proved by two witnesses.**

(2) Revocation of a will in its entirety revokes its codicils, unless revocation of a

codicil would be contrary to the testator's intent.

(Emphasis added).

Most of Respondents' argument regarding the sixth factor is based on *Parks v. Fink, supra* (CP 35-40). The *Parks* court declined to find that attorney Janyce Fink owed a duty to the plaintiff to ensure that the decedent promptly executed a new will after examining several cases from other states which declined to find a similar duty. As the *Parks* court stated, those rationales "are all identical-the potential conflict of interest such a duty would create for an attorney." *Parks*, 173 Wn. App. at 379. By contrast, in this case there is no potential conflict of interest which would be created by finding Respondent Judd had a duty to correctly advise his client Ellen Lorenzen regarding the requirements of RCW 11.12.040 and how to accomplish her intent. No competing duty to anyone else would be created by finding Respondent Judd owed a duty and that Appellants have a claim based on his failure to properly advise his client.

In declining to impose a duty of care when the alleged negligence concerns a failure to have a client execute a will promptly, the *Parks* court pointed to several policy concerns. The common thread in all of the policy concerns outlined in *Parks* is that imposing a duty on an attorney to ensure a client promptly executes a will would create a divided loyalty and create potential liability to unknown prospective beneficiaries. None of those concerns is applicable to this case. Appellants' claim is not that Respondent Judd did not ensure that Ellen Lorenzen promptly executed a

new will or that Ellen promptly revoked her 2005 Will. Appellants' claim is that Respondent Judd, as he has admitted, advised Ellen that revocation of her 2005 Will could and would be accomplished by Respondent Judd destroying the Will outside of her presence and even after her death and that his doing so would cause her to die intestate and her estate to pass to her sisters (CP 84, 102, 104).

Respondent Judd's erroneous advice required no further action on Ellen's part nor did it require the drafting of any future documents. Thus, none of the policy concerns identified in *Parks* are implicated by finding Respondent Judd owed a duty of care to the Appellants in this case. Therefore, the fifth *Trask* factor of preventing future harm militates a finding of a duty to Appellants. There is simply no undue burden imposed on the legal profession by requiring attorneys to know the law. That is a standard that even laypersons are held to. *See, e.g., Dellen Wood Products, Inc. v. Wash. State Dept. Labor & Industries*, 179 Wn. App. 601, 629, 319 P.3d 847 (2014).

The facts of this case fall into the category where a duty to intended beneficiaries should be recognized. Otherwise, no liability would be imposed on an attorney who failed to correctly advise his client as to the law. This is quite different than *Parks* and the cases relied on by that court where an attorney did not exert pressure on a client to execute or destroy a document. A finding of liability by Defendants in this case will help prevent future harm to other clients and their intended beneficiaries and will not impose any undue burden on the legal profession.

E. Imposing a duty on Respondents in this case is not contrary to Washington law.

As discussed in Section C, *supra*, there is at the very least a genuine issue of material fact as to whether Carol and Julie were intended beneficiaries of Ellen's estate and her attorney-client relationship with Respondent Judd. Anne Nogatch witnessed Respondent Judd's meeting with Ellen at Evergreen Hospice and has stated that Ellen clearly communicated her desire that her estate be distributed to her sisters (CP 84). Respondent Judd also called Carol following his meeting with Ellen on February 23 to inform her that Ellen intended that her estate pass to Carol and Julie (CP 88).

Respondent Judd himself has admitted that he made a mistake regarding revocation of the 2005 Will. He testified that:

Q. When you left the room at the hospice, did you believe that you had been instructed to tear up the will by Ellen? . . .
A. I, at that time I did. . . .

(CP 103). He continued to act as if he could tear up the 2005 Will which would cause Carol and Julie to be the beneficiaries of Ellen's estate until he was informed he could not by Tom Windus (CP 105).

Respondent Judd's testimony that he was acting on behalf of Ellen's estate not her sisters when he agreed to contact and did contact Ronald Brill and the Nagridges is nonsensical under Washington law (CP 107). *Trask* itself held that in the estate context, an attorney owes duties only to the personal representative not to "the estate or the estate beneficiaries." *Trask*, 123 Wn.2d at 845. There is no "estate" apart from

the personal representative for whom an attorney can be acting. Following Ellen's death, Respondent Judd's assertions that he was representing the "estate" are belied by his actions. For instance, he engaged in the following email exchange with Carol:

Hugh,
Isn't there anyway that as her attorney of record and with the hospice nurse's witness statement that a codicil could her will could be written? Or could you use the witness statements by you and the hospice nurse with the provision RCW 11.96A.125 to just make Ellen's final wishes be carried out? I understand what you are saying about having a lawyer approach the other people in the Will but you were also the one who met with Ellen and seemed pretty clear about her intentions. I think that having a family member talk to them wouldn't be productive either since we have not really met them. I see you as a dispassionate third party which I would think would hold more weight that someone who may benefit from them disclaiming their entitlements in the Will.

Defendant Judd's response was not that Carol and Julie should consult their own attorney. Instead, he responded:

. . .
Hi again,
I'm not sure if RCW 11.96A.125 applies; the notes following RCW 11.103.020 which limit its applicability to actions taken after January 1 of this year are somewhat ambiguous but potentially apply only to trusts. If 11.96A.125 applies, it may provide an avenue to challenge the 2005 Will. . . . I understand Tom has the beneficiaries' contact information, and by copy of this e-mail request that he provide it to me. I'll then get in touch with them. Would you prefer to be part of the conversation with me?

(CP 56). Nothing in that exchange suggests that Respondent Judd was doing anything other than advising Carol and Julie. In fact, he appears to be offering legal advice to Carol. Therefore, there is a very real question as to whether he owed duties to Carol and Julie following Ellen's death.

IV. CONCLUSION

For the reasons stated above, Appellants Julie Reznick and Carol Lorenzen request that the Court reverse the trial court's December 18, 2015 Order Granting Summary Judgment and remand this matter to the trial court.

RESPECTFULLY SUBMITTED this 23rd day of June, 2016.

THE LAW OFFICES OF
ANN T. WILSON

By: 
Ann T. Wilson, WSBA #18213
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
Phone: (206) 625-0990
Fax: (206) 464-0461
Email: ann@atwlegal.com

Attorney for Appellants
Julie Reznick and Carol Lorenzen

CERTIFICATE OF SERVICE

I, Richard M. Stewart, hereby certify that on June 23, 2016, I delivered by hand a copy of the foregoing document (*Appellants' Opening Brief*) on the parties listed below:

Christopher H. Howard, WSBA #11074
Virginia R. Nicholson, WSBA #39601
Kyler Marie Danielson, WSBA #48344
Averil Rothrock, WSBA #24248
Schwabe, Williamson & Wyatt, P.C.
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101-4010
Attorneys for Respondents

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

Dated this 23rd day of June, 2016.



Richard M. Stewart, Legal Assistant