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Supreme Court No. 92419-8

SUPREME COURT OF THE STATE OF WASHINGTON

No. 45250-2-II

**COURT OF APPEALS STATE OF WASHINGTON
DIVISION II**

**JENNIFER LINTH AND THE ESTATE OF CAROLYN LINTH;
THE EVELYN PLANT TRUST, AND THE FRANKLIN AND
EVELYN PLANT GREEN POINT FOUNDATION,**

Appellants.

v.

**CARL GAY AND ROBIN A. GAY, HUSBAND AND WIFE, AND
THE MARITAL COMMUNITY COMPOSED THEREOF;
GREENAWAY & GAY, A WASHINGTON LEGAL
PARTNERSHIP; GREENAWAY, GAY & ANGIER, A
WASHINGTON LEGAL PARTNERSHIP; GREENAWAY, GAY &
TULLOCH, A WASHINGTON LEGAL PARTNERSHIP; and
DANIEL W. DORAN and CAROL DORAN, HUSBAND AND WIFE,
AND THE MARITAL COMMUNITY COMPOSED THEREOF,**

Respondents.

ANSWER OF RESPONDENT GAY TO APPELLANT'S PETITION FOR REVIEW

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I. IDENTIFICATION OF THE ANSWERING PARTY

The answering party is Respondents Carl Gay and Robin Gay, Greenaway & Gay, Greenaway Gay & Angier, and Greenaway, Gay & Tulloch (hereinafter “Mr. Gay”).

II. REASONS WHY REVIEW SHOULD BE DENIED

The Court of Appeals correctly decided this matter and its decision is consistent with prior state of Washington appellate court decisions. The Court of Appeals evaluated and applied the law as stated and discussed in both *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994) (“hereinafter “*Trask*”) and *Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1275 (2013), review denied, 177 Wn.2d 1025 (2013) (hereinafter “*Parks*”), and in accordance therewith determined that Mr. Gay did not owe the appellants any duty, thus affirming the trial court’s decision to summarily dismiss all the claims of appellants. To hold that Mr. Gay owed the appellants a duty would contravene an attorney’s duty to his client.

Appellants’ Petition for Review largely centers on a 2004 unpublished, non-applicable Division I decision, *Moen v. Driscoll*, discussed *infra* at page 12. Appellants, for the first time since Mr. Gay filed summary judgment in the trial court in 2013, now argue to this Court

that the Division II court's decision below in the instant case conflicts with this 2004 unpublished opinion.

Setting aside for the moment appellants' improper citation of an unpublished case, that case cited by appellants did not analyze an attorney's duty to non-client beneficiaries, or whether beneficiaries who later joined the suit were proper parties to that litigation.

The decisions of the trial and appellate courts below are entirely consistent with Washington law and Washington State policy with respect to duties owed by lawyers. Therefore, there is no need for the Supreme Court to accept review of this matter.

III. COUNTER-STATEMENT OF THE CASE

In mid-2000, after a decade of being her lawyer, Carl Gay was asked by Evelyn Plant to prepare a Trust for the disposition of certain assets which included a large parcel of real estate known as "Green Point", consisting of Mrs. Plant's residence and the surrounding 66 acres at the mouth of Siebert's Creek east of Port Angeles. (CP at 69, Ex. B). A trust document was prepared and formally executed by Mrs. Plant on July 22, 2000. (*Id.*). One month later, Mrs. Plant, at the urging of appellants, decided to make changes to her Trust and an Amendment to the Trust was prepared in draft form by Mr. Gay. A copy of that draft was obtained that afternoon from Mr. Gay's office by Dan Doran, the future trustee of the

Trust, who delivered the draft to Mrs. Plant. Doran obtained Mrs. Plant's signature on the Amendment on August 22, 2000, and later had the signature notarized. (CP at 87, Ex. E)

The Amendment contained changes to the Trust, including the creation of a Foundation to hold title to Green Point, and also referenced an Attachment which was to set forth certain provisions for the plan of administration, management, and control of the Foundation and the restrictive beneficial use of Green Point for religious purposes. (*Id.*). However, at the time Mrs. Plant signed the Amendment, there was no Attachment to the Amendment and no written foundation plan yet existed. This Attachment containing "the Foundation plan" was to be drafted by appellant Jennifer Linth's sister, Claudia Smith, but the Foundation plan was to be ultimately subject to the review and approval of Mrs. Plant. (CP at 267). Therefore, the Trust Amendment was not properly executed at the time that Mrs. Plant signed the Amendment because the Attachment (containing the foundation plan) was not yet in existence.

Mrs. Plant died unexpectedly on January 1, 2001. At the time of her death, the Attachment to the Trust Amendment had neither been created by Claudia Smith nor approved by Mrs. Plant. Therefore, the administrative details of the Foundation were unknown.

Without the referenced Attachment containing the Foundation plan, the Amendment to Mrs. Plant's Trust was incomplete and subject to challenge, especially by those whose interests were affected by either the adoption or non-adoption of the Amendment. In early 2001, appellant Jennifer Linth, with the assistance of her sister, Claudia Smith, presented successor trustee Doran with a proposed Foundation plan, but Doran rejected that plan since it was entirely inconsistent with Mrs. Plant's wishes and essentially placed the Linth family in control of Green Point in perpetuity.

Conflict intensified between those parties affected by disputes over the validity or non-validity of the Amendment, including the appellants. As of the summer of 2004, trustee Doran was primarily represented by attorney S. Brooke Taylor, as Mr. Gay's involvement sharply declined and ended by the end of that year. (CP at 351).

In October of 2004, after months of negotiations involving the appellants, successor trustee Doran, multiple other charitable residuary Trust beneficiaries, and counsel for all beneficiaries and fiduciaries, a non-judicial dispute resolution agreement ("NDRA") was agreed upon and the original was filed in the trial court on May 2, 2005. (CP at 474, Ex. A). While under the advisement of multiple attorneys, the appellants signed the NDRA, along with all the affected parties. (*Id.*). The NDRA states

that the primary asset of the Trust, Green Point, is to be sold and the proceeds divided among the contending parties. (*Id.*). At that time, Doran resigned as Trustee and Glenn Smith, the husband of Claudia Smith and the brother-in-law of appellant Jennifer Linth, became successor Trustee. (*Id.*)

In recent years the appellants have attempted to rescind the NDRA. (CP at 372, Ex. 2). Their repeated attempts have failed and the negotiated NDRA still controls disposition of the Trust. Despite the appellants' ongoing dissatisfaction with Mr. Gay, successor trustee Doran, and the NDRA signed by appellant Jennifer Linth over ten years ago, Ms. Linth remains in residence at the subject property. (CP at 275).

IV. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. The Court of Appeals' Decision is Consistent with Washington Caselaw.

1. Mr. Gay Did Not Owe a Duty to the Appellants as Third Party Beneficiaries in Drafting His Client's Trust.

The Court of Appeals' Decision is divided into two (2) time periods: the appellants' allegations of negligence *before* Mrs. Plant's death, and the appellants' allegations of negligence *after* Mrs. Plant's death. With respect to the trial court's and the Court of Appeals' determinations that Mr. Gay did not owe a duty of care to the appellants as beneficiaries of the Trust during the drafting and completion of estate

planning documents, those courts relied upon the *Parks* decision of the Court of Appeals, Division I. The appellants' Petition attempts to distinguish the facts in this case from those in the *Parks* matter. However, their attempt fails.

In *Parks*, attorney Finks was retained by his client, Balko, to prepare an amendment to Balko's will. Accordingly, there was an existing will to which changes were to be made regarding the disposition of property. *Parks*, 173 Wn. App. at 367. A draft of the will was presented to Balko and Balko signed it, but he failed to do so in the presence of witnesses, and this fact, as well as the consequent non-enforceability of the signed instrument, was known to attorney Finks. *Id.* at 369-70. As such, there were now intended and known beneficiaries named in the new, improperly executed, will. Over one year passed yet during that interval, attorney Finks failed to have the newer will draft formally executed. *Id.*

Upon Balko's death, a beneficiary, Mr. Parks, was deprived of the benefits he would have received from Balko's estate had the subject will amendment been properly and timely executed. *Id.* at 371-72. Parks brought a malpractice claim against attorney Finks, contending that Finks owed a duty to him, a non-client beneficiary of the estate of Balko. *Id.* at 373.

In the instant case, as in *Parks*, the Trust documents were not properly executed before Mrs. Plant's death. Therefore, the Court of Appeals held that *Parks* controls the instant case because the circumstances parallel the *Parks* matter and Mr. Gay did not owe a duty to the non-client third party appellants. (Decision at 8).

In their petition, the appellants attempt once again to manufacture a distinction between *Parks* and this matter by stating that Mrs. Plant properly executed the Trust whereas in *Parks*, Balko did not properly execute the will. Despite the appellants' belief that Mrs. Plant's trust was properly executed, that cannot be said to be true. Mrs. Plant did, admittedly, sign a draft of the Trust Amendment without the knowledge of Mr. Gay. However, when she signed the Trust Amendment, the referenced Attachment was not included nor was it even drafted. An Amendment to a Trust cannot be said to be "properly executed" when the document is not complete. Indeed, it was not properly executed, as the Court of Appeals below so found. (Decision at 8). In addition, Mrs. Plant did not sign the Trust Amendment in front of a notary. (CP at 598). She signed it at home and Doran, the successor trustee, took the signed Amendment to the bank where he used to work and had her signature later

notarized there.¹ (*Id.*) Thus, this matter is on point with *Parks* as the Court of Appeals found.

In following the *Parks* decision, the Court of Appeals focused on *two* of the *Trask* factors: (5) the policy of preventing future harm, and (6) the extent to which the profession would be unduly burdened by a finding of liability. The appellants also claim that the Court of Appeals erred because they lost sight of the point in the representation in which the alleged negligence occurred and on that basis they attempt to distinguish the *Parks* decision once again.

The appellants advance the novel argument that when Mr. Gay was representing Mrs. Plant, the appellants' interests were "aligned" with Mrs. Plant and, thus, there was no conflict for Mr. Gay. This basic misunderstanding of the distinction between parties and their relationships with one parties' attorney highlights the problem with appellants' Petition. Importantly, the *Parks* decision addresses the question whether a duty is owed to a third party. The *Parks* court found that imposing upon a lawyer

¹ The appellants make the additional claim in their petition that after she signed the Amendment and her signature was later notarized "there was nothing more required from Mrs. Plant". However, there was certainly more required from Mrs. Plant. Specifically, she had to review and approve the foundation plan to be incorporated in the attachment to her signed Amendment, which had never been completed, and which is also the crux of the dispute with the appellants. The Attachment was supposed to be her vision for the Foundation that she was to establish. She was certainly supposed to do more after she signed the document.

a liability to a third party beneficiary resulting from the lawyer's failure to fully complete a client's estate plan could diminish "the attorney's duty of loyalty to the client and impose an untenable burden on the attorney-client relationship." *Parks* at 388-89. Therefore, the court found that "the risk of interfering with the attorney's duty of undivided loyalty to the client exceeds the risk of harm to the prospective beneficiary." *Id.* at 388-89.

Whereas a testator and the beneficiary of a will have a mutual interest in ensuring that an attorney drafts the will non-negligently, a prospective beneficiary may be interested in the will's prompt execution, while the testator or testatrix may be interested in having sufficient time to consider and understand his or her estate planning options.

Id. at 384 (quoting *Sisson v. Jankowski*, 148 N.H. 503, 509, 809 A.2d 1265 (2002)).

The appellants attempt, again, to make a distinction between a prospective beneficiary and an actual beneficiary. The Court of Appeals addressed this and noted that the appellants cited no authority to support the distinction between prospective and actual beneficiaries and therefore did not consider this argument. (Decision at 8). In the Petition for Review, the appellants have still not cited any authority that the distinction between prospective beneficiary and actual beneficiary is consequential, even if the appellants were assumed to be actual beneficiaries. Thus, this

Court should not consider their argument. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(6).

Even if the appellants' claimed distinction was evaluated, there is simply no evidence before the Court to determine that the appellants were any more of an actual beneficiary than Mr. Parks. For example, the appellants claim that their inheritance failed because the Trust Amendment failed. Therefore, how can it be said that they were actual beneficiaries of the Trust Amendment any more than Mr. Parks was an actual beneficiary of Mr. Balko's will. The effect of the testamentary documents' failing was the same regardless of whether or not the appellants were labeled prospective or actual beneficiaries. In addition, because Mrs. Plant's Trust was an inter-vivos trust, Ms. Linth's interest in the Trust and the Amendment to the Trust was also prospective; it could have been revoked or altered at any time by Mrs. Plant.

2. The Appellants, as Third Party Beneficiaries, Were Not Owed Any Duty from Mr. Gay as the Attorney For The Trustee or Trustor.

The Court of Appeals, relying on *Trask*, also determined that Mr. Gay did not owe the appellants a duty after Mrs. Plant's death, while he was the attorney for the Trustee, Mr. Doran. Specifically, the Court cited to the fact that when alternative avenues of recourse are available to the beneficiaries, Washington Courts do not find duties owed by an attorney

to a third party beneficiary. (Decision at 10). Indeed, here the appellants, as admitted in their Petition, have other available avenues of recourse, including bringing an action against the Personal Representative/Trustee Dan Doran, which they have done. Thus they can hold Mr. Doran, the individual responsible for Mrs. Plant's estate decision-making, accountable for decisions they believe were not in their best interests as beneficiaries. In addition, the appellants utilized legal remedies during the administration of Mrs. Plant's Estate by hiring attorneys to represent their interests as third party beneficiaries and actively participated in negotiations for settlement of the Estate, culminating in the NDRA, and from which agreement they have continued to benefit.

Overall, the appellants have utilized other forms of recourse to protect their interests in Mrs. Plant's Trust: a lawsuit involving the Trustee Mr. Doran and negotiation of their interest in the estate which was settled in 2005 through the NDRA.

Returning to consideration of the existence of a duty owed by Mr. Gay to the appellants, the Court of Appeals noted the appellants have failed to cite to any relevant authority to even suggest that Mr. Gay owed them a duty. While the appellants indicate that the Court of Appeals decision below incorrectly focused on Mr. Gay's duty to Doran and not Mr. Gay's duty to Mrs. Plant, they again have provided no authority that

such a distinction is relevant or makes any difference. Furthermore, Mr. Doran would be the individual to pursue a claim on behalf of Ms. Linth because he was the Personal Representative, not third party-beneficiaries with ulterior motives and an inherent conflict with Mrs. Plant.

B. The Court of Appeals' Decision Does Not Conflict With Any Other Appellate Decision in Washington

Washington Courts have consistently held that attorneys do not owe a duty to a non-client beneficiary except under unique circumstances which are not applicable here. However, the appellants represent that *Moen v. Driscoll*, 122 Wn. App. 1038, 2004 WL 1658976 (Wn. App. Div. 1 2004) (hereinafter "*Moen*"), an unpublished Division I decision, creates a conflict among the Court of Appeals because it holds that attorneys owe a duty to non-client beneficiaries of a will which has been properly executed by the client/testator, but which fails due solely to the attorney's breach of duty to his client. Even if the appellants were allowed to cite to and rely upon a non-published opinion such as *Moen*, that case does not hold what the appellants represent nor are the facts similar enough to create an alleged "conflict" among Divisions of the Court of Appeals.

As the Court is aware, *Moen* is an unpublished Court of Appeals Decision which holds no precedential value. In the *Condon* matter, an appellant cited an unpublished Washington State Court of Appeals

Decision in her motion for discretionary review in violation of GR 14.1. *Condon v. Condon*, 177 Wn.2d 150, 165, 298 P.3d 86 (2013). This Court “strongly disapproved” of the appellant’s citation there and cited the *Woodall* Decision, which states that “[u]npublished opinions have no precedential value and should not be cited or relied upon in **any manner.**” *Id.* at 166 citing *Skamania County v. Woodall*, 104 Wn. App. 525, 536 n. 11, 16 P.3d 701 (2001) (emphasis added). This Court in *Condon* did not consider the unpublished cases cited by the appellant. *Id.*

Here, the appellants cite to the *Moen* opinion in their Petition in an attempt to show a conflict, which, upon careful review, does not exist. In a footnote, the appellants state that RAP 13.4(b)(2) does not require a conflicting decision to be published. However, an opinion which is unpublished cannot be said to be in conflict with a published opinion because the unpublished decision holds no precedential value and cannot be relied upon in Washington State Courts. *Supra Woodall*, at 536 n. 11. Therefore, this Court should not consider the *Moen* case because it is an unpublished decision which should not be relied upon in any matter.

If this Court elects to consider *Moen*, it is clear that *Moen* does not stand for the proposition which the appellants assert. In *Moen*, Mary Bracelin hired an attorney, James Driscoll, to draft a living trust. *Moen*, 2004 WL 1658976 at 1. Unfortunately, Ms. Bracelin passed away before

she was able to fully execute the trust because she had not completed an “Attachment” which itemized the assets used to fund her trust, even though the trust was signed. *Id.* at 3. After her death, one of her daughters, Ms. Steel, who was also a beneficiary to Ms. Bracelin’s trust, became the Personal Representative. *Id.* However, Ms. Steel resigned and the court appointed attorney Bruce Moen as the Personal Representative. *Id.* After Ms. Bracelin’s death, Mr. Moen, as the Personal Representative of Ms. Bracelin’s Estate, filed a lawsuit against Mr. Driscoll for professional negligence for his alleged negligence in drafting the estate plan documents for Ms. Bracelin. *Id.* Later joining in the lawsuit against Mr. Driscoll were certain third party beneficiaries to Ms. Bracelin’s trust. *Id.* Indeed, a court commissioner determined that it was Mr. Moen who was authorized to file the lawsuit to file the malpractice claim. *Id.* at n. 3. While the record on appeal was unclear, the parties indicated that the trial court granted summary judgment on Mr. Driscoll’s argument that the Deadman’s Statute (RCW 5.60.030) prevented the admission of the plaintiff’s necessary evidence. *Id.* at n. 2.

In reversing the trial court, the Court of Appeals held that there were genuine issues of material fact as to causation of the plaintiffs’ damages and that the Deadman’s Statute did not bar necessary evidence which created a genuine issue of material fact. *Id.* at 4, 6.

The issue whether an attorney owed a duty to third party beneficiaries was not before the *Moen* court. Aside from the problem of citing to unpublished authority, appellants fail to connect the *Moen* facts to the issues in the present case.

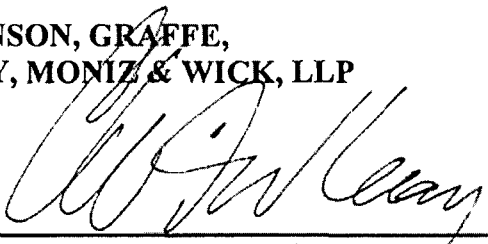
V. CONCLUSION

The trial court and the Court of Appeals ruled correctly: Mr. Gay did not, and could not, owe the appellants a legal duty in this matter. These decisions are consistent with Washington State law and policy. The Court of Appeals' opinion is not in conflict with any appellate decision. In fact, it is consistent with all prior Washington appellate opinions when addressing the issues presented in the instant case. Given the foregoing arguments and the record below, it is clear that this matter does not rise to the level of review for this Court. Mr. Gay respectfully requests that appellants' Petition for Review be denied.

Respectfully submitted this 19th day of November, 2015.

**JOHNSON, GRAFFE,
KEY, MONIZ & WICK, LLP**

By: _____


**Christopher Keay, WSBA # 13143
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CERTIFICATE OF SERVICE

I, Kimberly Blackwood, hereby certify under penalty of perjury under the laws of the State of Washington that I am over the age of eighteen, not a party to this lawsuit, am an employee with the law firm of Johnson, Graffe, Keay, Moniz & Wick, LLP, and that on the 19th day of November, 2015 that I served a true and correct copy of the Brief of Respondent Gay, on counsel or parties of records as noted in the service list below:

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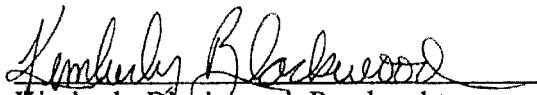
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Linth v. Gay, Supreme Court Case No. 92419-8.

Please see the attached for filing; Answer of Respondent Gay to Appellant's Petition for Review.

Thank you.

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