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No.: 66843-9

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

DAVID K. FRANK and PATRICIA L. FRANK, individually and
as a marital community, and David K. Frank, as Personal
Representative for the Estates of Kenneth and Catherine Frank,

Appellant,

v.

GEORGE AKERS, individually and as part of his marital
community; and MONTGOMERY, PURDUE, BLANKINSHIP &
AUSTIN PLLC, a Washington corporation,

Respondents.

Appeal from King County Superior Court
No. 09-2-22927-9 SEA

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

George Akers failed to change Ken and Catherine Frank's wills and as a result, their personal representative was unable to continue the rescission claim Ken and Catherine Frank had brought against the Frank Family Foundation while they were alive. Akers and his firm were able to convolute the issues at the trial court level and again seek to focus the Courts attention away from the clearly identified and factually supported evidence of the claims. Defendant George Akers and his firm seek to make light of the broad assignment of error, but it is really that simple. Although the defendant listed numerous issues in its multiple summary judgment motions, one small issue led to the Court broadly dismissing all claims of negligence against Mr. Akers. The Court should not have dismissed the claims of negligence because plaintiff presented evidence of the following:

(1) Duty: The defendants owed a duty to the plaintiff because Ken Frank had an attorney-client relationship with Mr. Akers and his firm; CP 354. The scope of the representation included reviewing the 1996 wills. See Declaration of David Frank; Declaration of Patti Frank. CP 357-358; CP 341-356

(2) Breach: A qualified expert witness Thomas Culbertson testified as to the standard of care and that Mr. Akers breached the duty by failing to meet that standard of care by failing to tell Ken Frank to change his will during the 2 years he was supposedly working to unwind the swindle and before Ken died; CP 341-346; CP 867-870, and

(3) Proximate Cause and Damage: "But for" the Mr. Akers' failure to tell Ken Frank to modify his will to disinherit the Foundation, for a full 2 years, when Ken Frank sued the professional defendants and Foundation, and then died shortly thereafter, the

Foundation (controlled by the very same professional defendants) inherited the claim against them and essentially dismissed it. "But for" the Akers' negligent failure to tell Ken to change his will, the children were unable to continue with the case, a case they likely would have won. CP 867-870

A. AKER'S DUTY INCLUDED REVIEWING THE 1996 WILLS

Aker's claims that he was not required to review the 1996 wills. Of course he was, that is what he was paid to do, and requested to do by his clients in order to try and rectify the damage done to their estate plan. Appellants presented evidence at the trial court and in the opening brief stating that Akers was asked and agreed to review the 1996 wills and the broad estate plan created by the Mary Gentry, Laurie McClanahan and John Clees. Akers met with David and Patti Frank, and with Ken and Catherine Frank, with the goal of seeking to rescind the gift of the Cranberry Lake property to the Frank Family Foundation. CP 347-356; CP 357-358. During their early meetings with Akers, the Franks also asked Akers to review Ken and Catherine's wills and other estate planning documents. Patti Frank testified as follows about the initial meetings with Mr. Akers:

it was also discussed that those same practitioners had advised David's parents on and developed a larger estate plan than the Foundation, including multiple trusts and wills. Therefore, it was discussed that George Akers was to review the wills and other estate planning documents, which were prepared by the same practitioners, including the wills prepared by Gentry, and to straighten them out as needed.

CP 357-358

Akers took possession of the wills but did nothing with them. He did not have the provision deleted. He did nothing to eliminate the ramifications of the wills' bequest of the Cranberry Lake property to the Foundation. CP 341-347; CP 867-870. Akers claims his representation did not include reviewing the wills. Taking the facts in the light most

favorable to the non-moving party (the appellant) David Frank and Patti Frank's testimony created a genuine issue of material fact for the jury to decide.

B. APPELLANTS PRESENTED FACTUAL SUPPORT FOR ALL FOUR ELEMENTS OF A LEGAL MALPRACTICE CLAIM

David and Pattie Frank presented competent evidence of each element of the claims below, and did so again in the appellate briefing. To support a claim of legal malpractice, the plaintiff must prove (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, 260-261 (1992). If an attorney client relationship is established, the elements for legal malpractice are the same as for negligence. *Id.* at 261. Proximate cause is determined by the "but for" test. *Griswold v. Kilpatrick*, 107 Wn.App. 757, 760 (2001). Although appellant does not wish to repeat its arguments in a reply, since the respondent simply ignored them, they will be repeated in briefly.

1. Mr. Akers owed a legal duty to the Franks because an attorney client relationship existed between Akers and the appellants. See Declaration of David Frank and Patti Frank wherein they state that they provided Mr. Aker's with Ken and Catherine Franks 1996 wills to review in the context of estate planning and trying to recover the Cranberry Lake Property.
CP347-356

2. Plaintiffs presented expert testimony from Attorney Thomas Culbertson that established the standard of care and that Mr. Akers breached the standard of care to the Franks by failing to take the following actions:

Have the Franks execute new wills (or codicils) leaving any interest they might have in the Cranberry Lake property to their intended beneficiary rather than to the foundation.

Since Defendants contend that Mr. Frank lost testamentary capacity after he retained them, have the Franks' son, as attorney-in-fact for his father, quit claim any interest (including any after acquired interest) in the Cranberry Lake property to Mrs. Frank, who still had testamentary capacity and who could still change her will.

Determine whether, in executing a revocation of their community property agreement, Mrs. Frank intended to relinquish her interest in Cranberry Lake (which seems unlikely given the bequest of her interest in it in her will). Assuming she never intended to relinquish her interest in it, have her sign a statement to that effect and change her will.

Rather than petitioning to the court to admit the wills to probate, seek to have the Franks' prior, 1991, wills admitted to probate, asserting that the newer wills were invalid for the same reasons the conveyances to the foundation were invalid.

File will contests in the probates seeking to invalidate the wills that were admitted (although they may have been barred from seeking to invalidate wills they had presented for probate on the grounds of judicial estoppel).

CP 867-870; CP 341-346

3. Mr. Akers breached the duty directly and proximately caused the plaintiffs damages by causing their rescission claim to be dismissed for lack of standing. See Order of Mason County Superior Court in underlying case. *See also Frank v. Frank Family Foundation*, 146 Wn. App. 309 (2008)(consolidated cases). *Id.*

4. Taking all the facts and inferences there from in the light most favorable to the plaintiff, a reasonable fact finder could have found that Akers' conduct proximately caused the Franks to lose an otherwise successful rescission claim against the Foundation and awarded the Franks the property or the value thereof.

CP 871-900; CP 703-866,70

Consequently, appellants raised genuine issues of material fact on each element of the claim. Appellants presented this same evidence in response to the summary judgment motions below. In short Aker's conduct caused eliminated the rescission claim from being litigated. This point must be emphasized, as it is clear from the trial court's orders, that the Court believed that the malpractice action was based upon Aker's failures in prosecuting the rescission case as opposed to eliminating the personal representatives ability to bring the case at all.

1. EXPERT TESTIMONY WAS CORRECTLY PRESENTED TO THE TRIAL COURT.

Defendant incorrectly alleges that plaintiff could not succeed in the trial court because plaintiff did not hire an expert to state how a judge or jury would have ruled on the underlying case. In short, defendant believes that you need not have a trial within a trial, but instead merely hire an expert to state, a judge or jury would have ruled in our favor. There is no need for such testimony, and presenting such testimony would violate the rules for expert testimony as no competent expert could actually opine what a judge or jury would do in a case.

Plaintiff presented expert testimony where it was necessary, i.e., for the standard of care and breach thereof. Qualified expert Thomas Culbertson testified that Aker's conduct in not reviewing, revising or taking other actions relating to the 1996 wills fell below the standard of care. CP 442-465. Plaintiff further presented evidence that the breach of that standard of care destroyed the personal representative's ability to litigate the case in the underlying action due to lack of standing. Plaintiff did not ask Culbertson whether or not Judge Hunt would have ruled in plaintiffs favor on the rescission claim because damages and proximate cause are for the jury to decide in a trial within a trial analysis.

Appellant presented the testimony, evidence and authority from the underlying case because in the "case within a case" analysis of a legal malpractice action damages and proximate cause are issues of fact for a jury. Washington courts hold that it is for the trier of fact to decide whether the client would have fared better but for the attorney's negligence, and the extent to which they would have done better. *Brust v. Newton*, 70 Wn. App. 286, 293-294 (1993). It is for the trier of fact (not an expert witness) to decide (1) whether the client would have fared better but for the attorneys mishandling of the case and (2) it is also for the trier of fact to decide the extent to which that is true. *Brust v. Newton*, 70 Wn. App. 286, 293-94 (1993). A mere conclusion of law from an expert that a jury would have ruled in appellants favor would be stricken as conclusory and improper. *Charlton v. Day Island Marina, Inc.*, 46 Wn. App. 784, 788 (1987); *see also Eriks v. Denver*, 118 Wn. 2d 451, 458 (1992).

The jury's task is to determine what a reasonable judge or fact finder would have done. *Brust*, 70 Wn. App. At 293. The jury's decision is based upon the facts and

evidence that could have been provided in the underlying action as opposed to what a hired expert may speculate as to what a reasonable judge or jury would have decided. Appellants duty on summary judgment was to present the evidence from the underlying case and allow the Judge to determine taking all evidence in the light most favorable to the appellant whether there a reasonable trier of fact could rule in their favor. Appellants met this burden on summary judgment. CP 871-900; CP 703-866. The case should be reversed and remanded for trial by jury.

C. APPELLANT PROPERLY IDENTIFIED THE ASSIGNMENT OF ERROR AND PRESENTED QUALIFIED COMPETENT EVIDENCE TO SUPPORT THE CLAIMS BELOW AND ON APPEAL.

This is a straight-forward malpractice case requiring proof of duty, breach, causation and damages. Plaintiff has met these burdens. Defendants are trying to reframe the issue, but it certainly should not stand up to appellate scrutiny under the facts and law. The trial court did not piecemeal little issues for dismissal. The trial court took an extremely narrow issue on the legal theory mistake and then broadly dismissed the entire negligence case for reasons clearly not spelled out in the actual order.

At several points in respondent's brief, they incorrectly claim that plaintiff somehow waived review or didn't raise issues on appeal. The trial court broadly dismissed all claims of negligence against Akers and his law firm on a motion for reconsideration. All the Orders were present in the notice of appeal, and the assignment of error was listed as dismissing the claim of negligence against Akers and his firm. That is what the trial court did. It stated that the claims of negligence of Akers were

dismissed. The third summary judgment motion brought by the defendant essentially clarified that all claims had been dismissed previously.¹

Respondent states that the probate issues alleged against Akers are somehow new and being raised for the first time on appeal. This is simply incorrect. Plaintiff presented its expert declarations in response to the first, second and third summary judgments. In the response to the second summary judgment motion (which led to the dismissal of the entire case) plaintiff presented Culbertson's declaration regarding Aker's breaches of the standard of care, (CP 867-870; CP341-346) and the Treacy declaration regarding the underlying case, (CP 871-900) and the declaration of Robert Windes, (CP 703-866) which attached much of the deposition testimony and documentary evidence that would have been used in the trial court below, had plaintiff not lost his standing to pursue the claim.

As is clear by the briefing, the defendant raised up to ten different issues in its motions for summary judgment, the vast majority of which were denied. The trial court did, however, broadly dismiss the claims of negligence against Akers, which rendered the decisions on every other issue meaningless and not ripe for appellate review. The issue for this court is whether there is factual and legal support for Duty (review and revise the wills) breach (Culbertson's expert testimony, causation (lack of standing) and damages (loss of rescission claims). Plaintiff presented competent evidence of each of these elements, and also produced much of the evidence it would have used in the underlying case, including its expert testimony.

¹ Indeed, the only thing additional in the third motion for summary judgment was the dismissal of a claim that the trial judge said remained, but that had never been plead or litigated or alleged by the plaintiff. Consequently, the trial judge dismissed the remaining claim and found that the previous orders had dismissed all other claims.

Plaintiff properly framed the issue, and has met its burden in defeating a motion for summary judgment.

D. THE APPELLATE COURT SHOULD TAKE NOTE OF WHAT THE DECISION IN *IN RE ESTAT OF FRANK*, 146 WN. APP. 309 (2008) DID AND DIDN'T DO

In *In re Frank*, 146 Wn. App. 309 (2008), was a consolidated appeal covering two issues: whether the 1996 will bequests to the Foundation had adeemed, (2) whether David Frank had standing to pursue rescission in the underlying case. The underlying non-probate case had not been developed and discovery had just begun. As this court surely aware, there was no clear Washington case law on point on the issues raised in the appeal, which is why this Court relied nearly entirely on out of state citations for its decision. In fact, this Court relied on some dicta, and then out of state authorities to find that Washington viewed ademption law in a manner that allowed the will provision to stand as the intervivos gifts occurred prior to the wills being executed. The Court then relied upon the case *Buder v Stock*, 343 Mo. 506, 121 SW. 2d 852 (1938) as the leading case on ademption and adopted it here, finding that *In re Estates of Doepke*, 182 Wash 556 (1935) supported the ademption analysis.

The rescission action in the Superior Court had just begun, no trial date had been set, discovery was just commencing and the facts had hardly been developed. However, since the Court upheld the Will (the will Aker's had two years to change, alter or amend) the Court dismissed the case for lack of standing. The Court stated as follows:

The trial court granted the Foundation's summary judgment motion, reasoning that even if David successfully rescinded the inter vivos deed conveyances, Cranberry Lake would be an estate asset and pass immediately back to the Foundation under article VII, section 2 of the wills. Neither party cites relevant

Washington case law, nor did we find any Washington cases on point. But a Tennessee case, *Ledbetter v. Ledbetter*, 188 Tenn. 44, 216 S.W.2d 718 (1949), addresses this issue and is illustrative of the proper outcome. ¶42 *In Ledbetter*, the plaintiffs alleged that the defendant, their brother, had wrongfully induced their incompetent mother to convey property to their brother. *Ledbetter*, 216 S.W.2d at 719. The siblings sought an order to set aside the deeds conveying the property. *Ledbetter*, 216 S.W.2d at 719. The brother responded that his mother executed a will naming him as sole beneficiary of the estate, then argued that even if the court were to set aside the inter vivos deed, the siblings would have no interest in the real property because he would inherit it under the will. *Ledbetter*, 216 S.W.2d at 719. He also argued that his siblings lacked standing to bring the action because they had no remedy. *Ledbetter*, 216 S.W.2d at 719. The court agreed and dismissed the action. *Ledbetter*, 216 S.W.2d at 721. ¶43 Here, as in *Ledbetter*, David has no remedy. Even if he were to succeed in rescinding the inter vivos deeds conveying Cranberry Lake to the Foundation, he would ultimately have no interest in the property because the Foundation would inherit it under article VII, section 2 of the wills. n10 Thus, he lacks standing to maintain the negligence action against the Foundation because he has no remedy. The trial court properly granted the Foundation's motion for summary judgment, dismissing it from the negligence action. We find no error.

In re Estate of Frank, 146 Wn. App. 309, 326-327 (Wash. Ct. App. 2008).

The Court's decision was very early on in the process and certainly should not be used as an attempt to make finding of fact relating to David's relationship with his parents etc. If Ken and Catherine Frank did not want the property to return to the family, then Akers never should have filed the lawsuit in the first place. Since he filed the lawsuit on the Franks behalf, the Court should assume that the intention of Ken and Catherine for purposes of this case was a return of the property.

E. THERE IS LEGAL AND FACTUAL AUTHORITY FOR THE RESCISSION CLAIM TO HAVE SUCCEEDED ON THE MERITS.

Certainly the Franks would have had a better chance of succeeding on the merits of the underlying rescission claim, had Aker's negligence not eliminated the ability to litigate the claim. Akers did not change the wills, and the rescission claim was lost. End of story. Now Akers argues that the underlying claim could not have succeeded on

the merits anyways, because the Washington case law on the subject is sparse but then on the other side of his mouth concedes that under Rule 11 the claims had a good faith basis in law and fact. The defense that the underlying action was dead on arrival, regardless of Aker's breaches of the standard of care is simply nonsense. One need only look at *In re Estate of Frank*, 146 Wn. App. 309 (2008) to realize that not every case has a predecessor case which covers on all four corners. Washington Courts, such as this one, utilize out of state authority all the time, and adapt it to fact patterns in cases here. As set forth above, the Franks actually lost each of their issues on appeal based upon out of state precedent being applied to the facts of the case.

In this case, plaintiffs have submitted numerous case law, and factual arguments which would justify the legal theories of misrepresentation, undue influence and mistake being used successfully to rescind the gift of property to the Foundation. Appellant will not burden this court with another recitation of those cases as they took up considerable briefing in the opening brief. Needless to say, there certainly existed enough case law to allow a finder of fact to decide whether the burden has been met.

The Franks hired an attorney (Akers) to help get their property back. Akers agreed to do so, but sat on their estate plan for over two years doing nothing. When they died the wills became their intent rather than the lawsuit they filed to get their property back. The Franks lost the rescission claim on procedural grounds, not factual or substantive ones. They lacked standing. George Akers caused that, and he should be held accountable for that. The Franks deserve their day in court on the rescission claim, and respectfully request that this court give it to them.

II. CONCLUSION

The Franks produced prima facie evidence establishing each of these elements. The case should not have been dismissed. The Franks deserved their day in court against those who took advantage of their elderly parents. The Franks would have had that day, if Mr. Akers told Ken to change his will or taken any of the other steps identified by qualified expert Thomas Culbertson to preserve the rescission claim. Mr. Akers needs to be held accountable for that. The case should be reversed and remanded so that the Franks may finally have their day in Court.

DATED this 1st day of August, 2011.

Respectfully submitted,

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