

Original

No 34805-5-II
Consolidated with 33725-8-II
Kitsap County Superior Court Cause Number 05 2 02226 6

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
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COLLEEN MULVIHILL EDWARDS,
Appellant,

v.

DENNIS MICHAEL EDWARDS, also known as MICHAEL DENNIS EDWARDS; JOHN D. MORGAN of LIEBERT, MORGAN & FLESHBEIM, formally known as MACDIEBERT LIEBERT & MORGAN; GUARDIANSHIP SERVICES OF SEATTLE, a professional trustee of the Colleen M. Edwards Special Needs Trust, their agents and employees; TOM O'BRIEN and JANE DOE O'BRIEN, individually and a married community; EDWARD GARDNER, individually; and VEDAH HALBERG, individually,

Respondents.

Brief of Respondents

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ORIGINAL

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INTRODUCTION

This Respondents' brief is filed on behalf of the following named defendants in Kitsap County Cause Number 05 2 02226 6: Guardianship Services of Seattle, its employees and agents, Tom O'Brien and Jane Doe O'Brien, individually and as a marital community, Edward Gardner and Vedah Halberg (hereinafter "GSS"). The only order which affects GSS, from which the plaintiff appealed, is the order entered on April 21, 2006. Therefore the issues addressed in this brief deal only with the plaintiff's appeal from the entry of summary judgment dismissing the claims against GSS.

ISSUE

Whether the Trial Court correctly granted summary judgment dismissing all claims against Guardianship Services of Seattle, a professional trustee of the Colleen M. Edwards Special Needs Trust, their agents and employees, Tom O'Brien, Edward Gardner and Vedah Halberg, where the plaintiff presented no facts in support of the claims made against these defendants?

STATEMENT OF THE CASE

In January 2002, the Kitsap County Superior Court entered a Decree of Dissolution of the marriage between Ms. Edwards and her then husband, Dennis Edwards. Part of the decree ordered that Mr. Edwards pay \$9,600.00 to Ms. Edwards as spousal support. Following the entry of the Decree, Ms. Edwards filed a motion in the trial court requesting that the court order the placement of the \$9,600.00 into a Special Needs Trust for her benefit. Colleen M. Edwards, by and through her mother and attorney in fact, Marion Mulvihill, executed the Special Needs Trust dated February 26, 2003. CP 1148.

At Ms. Edwards's request, Guardianship Services of Seattle was appointed Trustee of the Colleen Edwards Trust (hereinafter "Trust"). CP 1165. GSS took possession of the funds and placed them into the Trust. CP 1169.

The Trust was irrevocable and was created for the express purpose of maintaining the funds Colleen Edwards obtained in the divorce in order that she would continue to qualify for government benefits. CP 1151. The Trust provided:

The Trust shall be irrevocable, and the Beneficiary shall have no right or power to alter, amend, revoke or terminate the Trust, or any of its terms, or to designate the persons who shall

possess or enjoy the Trust property or the income therefrom. The Grantor and Beneficiary intends to and does relinquish absolutely and forever all possession and control of the Trust estate.

CP 1150. The Trust gave the Trustee absolute discretion over distributions to be made to the beneficiary:

This is a discretionary trust and the Trustee shall have the absolute and sole discretion to determine the amount and nature of any disbursements for the benefit of COLLEEN.

CP 1152.

The Trust also required the Trustee to provide annual accountings to the beneficiary. CP 1154. GSS provided two such accountings to the plaintiff; the first covered the period February 26, 2003 through September 30, 2004 and the second covered the period October 1, 2004 through February 28, 2005. CP 1146. The accountings detail the payments that were made on Ms. Edwards's behalf. These payments were primarily those requested by Ms. Edwards for expenses associated with caring for her dogs. During its tenure as Trustee, no additional funds or property were contributed to the Trust. CP 1163 – 1225.

GSS served as Trustee of the Trust until it resigned on January 21, 2005, at which time GSS sent a letter to Ms. Edwards advising her of its resignation. CP 1217. No successor Trustee was named in the Trust.

Therefore, upon court order, GSS deposited the remaining Trust funds into the registry of the Kitsap County Superior Court. CP 1207.

On September 15, 2005, Ms. Edwards filed a complaint against several individuals and entities, including GSS, alleging, as to GSS, personal injuries, abuse and neglect and breach of fiduciary duties and breach of contract. CP 1140.

On March 8, 2006, GSS filed its Motion for Summary Judgment seeking dismissal of all claims against it. CP 1137. The matter was set for hearing on April 21, 2006. CP 1226. Ms. Edwards filed her response and opposition to the Motion for Summary Judgment just two days prior to the hearing, April 19, 2006. CP 1235 – 1296. The Trial Court did, however, review and consider the response filed by Ms. Edwards. RP 8; CP 1305.

Following oral argument, the trial court dismissed all claims against GSS as a matter of law. CP 1304.

ARGUMENT

Ms. Edwards failed to produce any facts, which if proved, presented an issue for trial.

Although an order of summary judgment is reviewed by the Appellate Court *de novo*, the Appellate Court is to engage in the same inquiry as the Trial Court did when making its decision. *Enterprise*

Leasing, Inc. v. City of Tacoma, 139 Wn.2d 546, 551, 988 P.2d 961 (1999). In her Appellant's brief, Ms. Edwards makes numerous factual claims, some of which were not made at the trial court level, attempting to demonstrate actions of GSS which would give rise to a claim. However, as was the case with her response to the Trial Court, Ms. Edwards's statements are not supported by any affidavits or declarations. Civil Rule 56 requires that, "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e).

In response to GSS's Motion for Summary Judgment, Ms. Edwards did not submit **any** evidence supported by affidavit or declaration. Instead, she simply relied on the allegations stated in her complaint. Such a response is insufficient to overcome a Motion for Summary Judgment. Once a motion for summary judgment is made, the adverse party cannot rest upon the mere allegations of his own pleading, but must set forth "specific facts showing that there is a genuine issue for trial." CR 56(e).

Moreover, not only did Ms. Edwards not demonstrate any material issue of fact, the allegations in her complaint, even if true, did not rise to the level of a meritorious claim. A motion to dismiss for failure to state a

claim is properly granted if the court concludes that the plaintiff can prove no set of facts, consistent with her complaint that would merit relief. *Roe v. Quality Transportation Services*, 67 Wn. App. 604, 838 P.2d 128 (1992). In order to state a claim, Ms. Edwards must allege facts establishing that a specific right has been violated by the defendants. General conclusory allegations, such as made by Ms. Edwards in her complaint against GSS, are insufficient to support a claim. *Finley v. Rittenhouse*, 416 F.2d 1186, 1187 (9th Cir. 1969).

Because GSS submitted materials outside of Ms. Edwards's complaint (the Trust Agreement and Annual Accountings), the matter was treated as one for Summary Judgment. CR12(b)(6). However, the complaint, even on its face, did not state a claim upon which relief could be granted and Ms. Edwards presented no factually supported evidence in response to GSS's motion. Therefore, the court properly dismissed the matter.

Ms. Edwards claimed that GSS used "careless and improper procedures", causing her to suffer personal injury, medical negligent, assault and battery and civil rights violations. She did not, however, state any "facts" which would demonstrate any "careless and improper procedures" on behalf of GSS. In order to defeat a defense summary judgment motion, the plaintiff must raise a genuine issue of material fact

as to all challenged elements of the claims. *LaMon v. Butler*, 112 Wn.2d 193, 197, 770 P.2d 1027 (1989). Plaintiff's *prima facie* case must consist of specific material facts that would allow a jury to find that **each** element of the claim exists. *LaMon, supra* at 197. Ms. Edwards failed to present **any** such facts, therefore her case was properly dismissed.

Further, GSS prepared Annual Reports of its activities during the time it acted as trustee. At all times it acted within the authority granted to it under the Trust Agreement. Ms. Edwards presented no evidence to the contrary. Where the Trustee exercises the discretion granted under a Trust Agreement, the Court will not intervene on the basis of its inherent equity power to manage trust, unless it is necessary to prevent an abuse of that discretion. *Occidental Life Ins. Co. v. Blume*, 65 Wn. 2d 643, 399 P.2d 76 (1965); *Peoples Nat. Bank v. Jarvis*, 158 Wn.2d 630, 364 P.2d 436 (1961); *Monroe v. Winn*, 16 Wn.2d 497, 133 P.2d 952 (1943). The discretionary actions of a trustee under a trust agreement do not constitute an abuse of discretion granted to the trustee where there is no evidence of fraud, malice, bad faith, or arbitrary conduct, and where the actions of the trustee are fully consistent with the purpose and intent of the trust instrument. *Occidental Life Ins. Co. v. Blume, supra*.

The Annual Reports prepared by GSS detail the actions undertaken by the Trustee and evidence their consistency with the Trust purpose. As

stated in the Annual Reports, GSS exercised its discretion under the Trust Agreement for the benefit of Ms. Edwards and held the assets in trust so that Ms. Edwards could continue to qualify for governmental assistance. Ms. Edwards presented no evidence of fraud, malice, bad faith, or arbitrary conduct on the part of GSS. She presented no evidence tending to dispute the facts as stated in GSS's Annual Reports. All of the Trustee's actions were within its duties as Trustee. Because there were no material disputed facts presented by Ms. Edwards, the Trial Court correctly dismissed the claims made by her against GSS and this court should affirm the Order of Summary Judgment.

Issues raised for the first time on appeal should not be considered.

In her Appellate Brief, Ms. Edwards argues additional error by the Trial Court, which issues are not appropriately before this Court. She claims that the respondents failed to timely file a responsive pleading. Appellant's Brief, issue number 5. The Trial Court Order dated April 21, 2006, from which appeal was taken, makes no such finding and indeed no such argument was made by Ms. Edwards to the Trial Court.

Ms. Edwards also assigns error to the Trial Court's failure to allow her to proceed with discovery. Appellant's Brief, issue number 7. Again, no such discovery request was made to the Trial Court, nor was such a claim made during oral argument or in Ms. Edwards's written response.

Ms Edwards assigns error to the Trial Court in failing to accommodate her physical disabilities under the American with Disabilities Act. Appellant's Brief, issue number 11. Yet again, no such claim was made to the Trial Court and no request for additional time or accommodation was made by Ms. Edwards in oral argument.

RAP 2.5(a) enumerates issues which a party may appropriately raise for the first time on appeal. None of the additional issues raised by Ms. Edwards fall within this rule. Therefore, the court should not consider them.

CONCLUSION

Ms. Edwards has not presented any evidence which presents a material issue of fact for determination at trial. Therefore, the trial court properly dismissed all of her claims against GSS and Trial Court's Order on Summary Judgment should be affirmed.

DATED this 20th day of March 2007



Paulette Peterson, WSBA #17274
Attorney for Respondents

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

COLLEEN MULVIHILL EDWARDS,)
)
)
Appellant,)
)
v.)
)
DENNIS MICHAEL EDWARDS, also)
known as MICHAEL DENNIS EDWARDS;)
JOHN D. MORGAN of LIEBERT, MORGAN)
& FLESHBEIM, formally known as)
MACDIEBERT LIEBERT & MORGAN;)
GUARDIANSHIP SERVICES OF SEATTLE,)
a professional trustee of the Colleen M.)
Edwards Special Needs Trust, their agents)
and employees; TOM O'BRIEN and)
JANE DOE O'BRIEN, individually and a)
married community; EDWARD GARDNER,)
individually; and VEDAH HALBERG,)
individually,)
)
Respondents.)

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DECLARATION OF MAILING

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BY [Signature]

The undersigned declares and states as follows:

I am over the age of 18 and otherwise qualified to be a witness herein. On March 20, 2007, I caused to be deposited in the United States post office with first class postage prepaid, one copy of the Respondents' Brief to each of the parties listed below:

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Criminal

I declare under penalty of perjury under the laws of the state of Washington that
the foregoing is true and correct.


Paulette Peterson