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TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002601-MR

DWIGHT V. CAVE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 00-CI-007402

GEORGE R. O'BRYAN — APPELLEE

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: KNOPF, TACKETT AND VANMETER, JUDGES.

VANMETER, JUDGE. This is an appeal from a summary judgment entered by the Jefferson Circuit Court dismissing appellant Dwight V. Cave's claim of legal malpractice against appellee George R. O'Bryan. For the reasons stated hereafter, we reverse and remand for further proceedings.

In July 1997, Claude W. Cave ("Claude") sought legal assistance from O'Bryan to implement an estate plan.[1] Claude's

[1] The record reveals that the value of the real estate was $80,000. Although the record does not clearly disclose the value of Claude's personal estate, appellant's allegation that Doris' renunciation reduced his share from one-

plan, as evidenced by his will and a deed,[2] both of which were executed on August 12, 1997, was to leave his residential real property to his wife, Doris, and the remainder of his estate, essentially his personal property, to three sisters and two nephews, including appellant.[3] The deed prepared by O'Bryan conveyed the real property from Claude, individually, to Claude and Doris as joint tenants with right of survivorship.

Claude died August 2, 1999, and his will was admitted to probate on August 30, 1999. On January 28, 2000, Doris executed and recorded a release under KRS 392.080[4] renouncing her interest in Claude's will. Because title to the real estate passed to Doris at Claude's death under the deed's survivorship clause, the real estate was not an issue in the renunciation. Thus, by renouncing her interest in the will, Doris became

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fourth to one-eighth and damaged him by $14,000 indicates that the personal estate's value was approximately $112,000 ($14,000 x 8).

[2] *See also* Appellant's Deposition, April 16, 2002, pp. 14-17 (appellant testified that Claude told him that appellant would get some money under the will, while Claude's widow, Doris, would get the house and lot).

[3] The record discloses that Doris, Claude's second wife, was married to him approximately fifteen years, and that Claude did not have children. Apparently one sister predeceased Claude, since appellant's complaint alleges that he would have received one-fourth (¼) of the remainder but for Doris' renunciation of the will.

[4] KRS 392.080(1) states in pertinent part:

> When a husband or wife dies testate, the surviving spouse may . . . release what is given to him or her by will, if any, and receive his or her share under KRS 392.020 as if no will had been made, except that in such case the share in any real estate of which the decedent . . . was seized of an estate in fee simple at the time of death shall be only one-third (1/3) of such real estate.

entitled to receive, pursuant to KRS 392.020, one-half (½) of Claude's personal property, thereby effectively reducing the shares intended for his sisters and nephews, including appellant.[5] Therefore, instead of Doris receiving a house and lot worth $80,000, and Claude's surviving sisters and nephews receiving approximately $112,000 or $28,000 each, Doris received property worth $136,000,[6] while Claude's sisters and nephews received $56,000 or $14,000 each.[7] If the real property had been left to pass under the will, Doris' renunciation would have resulted in her receipt of property worth $82,666.[8] As this amount is approximately the value of the house and lot, she would have had little incentive to renounce the will.

In November 2000, appellant filed a complaint with the Jefferson Circuit Court alleging that O'Bryan had negligently failed to advise Claude that the shares intended for the

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[5] KRS 392.020 states:

> After the death of the husband or wife intestate, the survivor shall have an estate in fee of one-half (1/2) of the surplus real estate of which the other spouse . . . was seized of an estate in fee simple at the time of death . . . . The survivor shall also have an absolute estate in one-half (1/2) of the surplus personalty left by the decedent. . . .

[6] The house and lot, valued at $80,000, plus one-half (½) the personal property, valued at $56,000, equals $136,000.

[7] In percentage terms, under Claude's original plan, Doris would have received 42% of Claude's estate and his sisters and nephews 58%. Because of the deed and renunciation, Doris received 71% of Claude's estate, and his sisters and nephews received 29%.

[8] One-third of the house and lot, $26,666, plus one-half (½) the personal property, $56,000, equals $82,666. KRS 392.020 and 392.080(1).

beneficiaries would be reduced if Doris renounced her interest in his will, and that if he had been advised of that risk, Claude would not have executed the deed giving Doris a right of survivorship. The circuit court granted O'Bryan's motion for summary judgment because no "apparent evidence" existed to refute O'Bryan's contention that he met the standard of care owed to Claude. The court also held, based on *Coffey v. Jefferson County Board of Education*, Ky. App., 756 S.W.2d 155, 156 (1988), that appellant lacked standing to bring the legal malpractice claim since he was not O'Bryan's client.[9] This appeal followed.

Appellant raises two main arguments on appeal: (1) even though he was not O'Bryan's client, he has standing to bring the malpractice action because an attorney who provides estate planning services, such as O'Bryan, owes a duty of care to the testator's intended beneficiaries; and (2) the circuit court erroneously held that no evidence exists to prove O'Bryan's negligence. We agree with both contentions.

[9] In *Coffey*, a defendant in a negligence action entered into an agreed judgment for damages and then attempted to assign his subsequent legal malpractice claim against his attorney. This court held the assignment void as against public policy and upheld the trial court's judgment in favor of the former attorney, stating that a legal malpractice claim cannot be maintained without proof that the alleged negligent conduct resulted in specific damage to the client. 756 S.W.2d at 156. Based on this language, the circuit court below imposed a privity requirement on appellant's attorney malpractice action. Our view is that *Coffey* cannot be read so narrowly.

Historically, the rule in many jurisdictions was that absent fraud, collusion, or privity of contract, an attorney was not liable to a third party for professional malpractice. *E.g., National Savings Bank v. Ward*, 100 U.S. 195, 200, 25 L.Ed. 621, 623 (1880). In Kentucky, the rule was stated slightly differently, as being that an attorney is not ordinarily liable to third persons for acts committed in the representation of a client, unless such acts are fraudulent or tortuous and result in injury to third persons. *Rose v. Davis*, 288 Ky. 674, 157 S.W.2d 284, 284-85 (1941).[10]

Contrary to the circuit court's ruling in the present case,[11] appellate courts in recent decisions have not required privity as a prerequisite for attorney liability. In *Hill v. Willmott*, Ky. App., 561 S.W.2d 331 (1978), a physician filed a malpractice action against the attorney who represented the

[10] *Overruled on other grounds, Penrod v. Penrod*, Ky., 489 S.W.2d 524, 528 (1972). The facts of *Rose* involved a claim by a husband against his former wife's attorney.

[11] The holdings in *Coffey v. Jefferson County Board of Education*, Ky. App., 756 S.W.2d 155 (1988), and *Mitchell v. Transamerica Insurance Co*., Ky. App., 551 S.W.2d 586 (1977), do not mandate a different result. The facts of *Mitchell* involved a claim against a Kentucky attorney who let a Kentucky statute of limitations expire. Ultimately, the plaintiffs settled with the original tortfeasor in an Indiana court, for *more* than the Kentucky attorney had attempted to settle the case in Kentucky. The court in *Mitchell* noted that while malpractice was assumed, not every malpractice case carries a right to a monetary judgment, absent a showing that the attorney's wrongful conduct deprived the client of something to which he or she otherwise would have been entitled. 551 S.W.2d at 587-88 (citing *Thompson v. D'Angelo*, 320 A.2d 729 (Del. Super. 1974)). The facts of *Coffey* involved a collusive assignment of a legal malpractice claim, which this court held was void as against public policy. In addition, the facts of the case disclosed no proof of damages to anyone as a result of the alleged malpractice. *Coffey* relied on *Mitchell* for the holding that proof of damages is required.

plaintiff in a malpractice suit against him. In discussing whether the adverse party's attorney owed a duty to the non-client plaintiff, the court stated that "'[a]n attorney may be liable for damage caused by his negligence to a person **intended to be benefited** by his performance irrespective of any lack of privity . . . .' (Emphasis added). We believe this to be a proper statement of the law in this Commonwealth." 561 S.W.2d at 334 (quoting *Donald v. Garry*, 19 Cal.App.3d 769, 771, 97 Cal.Rptr. 191, 192 (1971)). The court in *Hill* ultimately concluded that an adverse party in a prior lawsuit was not an intended beneficiary of the attorney's services. *Id.* at 335.[12]

Subsequently, in a malpractice action in *Seigle v. Jasper*, Ky. App., 867 S.W.2d 476 (1993), a panel of this court rejected the attorney's defense of lack of privity of contract. The case was filed by real estate purchasers whose lender required a title examination. The attorney who performed the examination had an ongoing relationship with the lender and directed his title opinion to that lender, even though the purchasers paid for the title examination through loan closing costs paid to the lender. Relying on *Hill*, 561 S.W.2d at 334, this court reversed a summary judgment in favor of the attorney, holding that an attorney may be held liable to a third party who

[12] The court noted that the attorney possibly could have been subject to a malicious prosecution action by the adverse party, but that cause of action had not been pled in the case.

was intended to be benefited by his performance, despite a lack of privity. 867 S.W.2d at 483.

In *Sparks v. Craft*, 75 F.3d 257, 261 (6th Cir. 1996)(applying Kentucky law), the mother of a motorist who died in an automobile accident brought a legal malpractice action against the attorney who represented her son's estate but had allowed the statute of limitations to expire. In affirming the district court's holding that the mother had standing to sue in her personal capacity, the Sixth Circuit Court of Appeals stated: "[I]t is icing on the cake to point out that there is no privity requirement for legal malpractice actions in Kentucky. Even certain persons who are not a lawyer's clients can recover for damages caused by the lawyer's negligence." *Id.* at 261 (citing *Hill*, 561 S.W.2d at 334; *Seigle*, 867 S.W.2d at 483).

As Kentucky law clearly permits intended beneficiaries to hold attorneys liable for damages caused by negligent performance, irrespective of privity, the question is thus reduced to the application of this rule to claims by will beneficiaries against estate planning attorneys. The clear trend among courts is to hold that estate beneficiaries are intended to benefit from the services rendered by attorneys to their clients. *See, e.g., Stowe v. Smith*, 184 Conn. 194, 198, 441 A.2d 81, 83-84 (1981) (failure of attorney to prepare estate plan according to decedent's wishes would inflict injury on

intended beneficiary); *McLane v. Russell*, 131 Ill.2d 509, 519-20, 546 N.E.2d 499, 504 (1989) (beneficiaries under a will were "intended beneficiaries" of the attorney-client relationship); *Walker v. Lawson*, 526 N.E.2d 968 (Ind. 1988) (beneficiary under a will has standing to bring a malpractice action against attorney who drafted the will); *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987) (an attorney "owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary documents"); *Donahue v. Shughart, Thompson & Kilroy, P.C.*, 900 S.W.2d 624, 628 (Mo. 1995) (attorney's duty to advance client's interest is served by recognizing liability to intended beneficiary of a testamentary transfer).

Therefore, in light of current Kentucky law, we conclude an attorney owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the estate planning client, notwithstanding a lack of privity.[13] Applying this "intent to directly benefit" standard to the facts alleged in the present case, O'Bryan owed a duty of care to appellant as a third-party beneficiary who was directly and specifically identified in Claude's will. Given that O'Bryan

[13] We do not address the issue as to whether persons not named in estate planning documents could bring a claim against the estate planning attorney. That issue is not before us because appellant clearly was named in Claude's will and clearly was intended to benefit from O'Bryan's performance.

owed a duty of care to Claude's identifiable will beneficiaries who were not his clients, it follows as a matter of law that the circuit court misapplied *Coffey* to this case.[14]

Next, appellant argues the circuit court erroneously held that no evidence exists to prove O'Bryan's negligence. We agree. First, the record discloses that appellant's expert witness would testify at a trial as to the standard of care owed by attorneys in estate planning, the consequences of joint ownership of real property with the right of survivorship, and the risk that a spouse may renounce a will and take personal property bequeathed to third parties, especially when beneficiaries are related to the spouse only by affinity. O'Bryan seems to argue that he only prepared the documents as directed by Claude, who the record indicates had only a third grade education. Based on the standard for summary judgment as expressed in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 483 (1991),[15] we do not believe it would be impossible for appellant to produce evidence at trial warranting judgment in his favor. On the one hand, the will and deed

[14] The existence of a duty presents a question of law to be determined by the court. *Mullins v. Commonwealth Life Insurance Co.*, Ky., 839 S.W.2d 245, 248 (1992).

[15] The Kentucky Supreme Court in *Steelvest, Inc. v. Scansteel Service Center, Inc.*, Ky., 807 S.W.2d 476, 480 (1991), stated: "The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. It clearly is not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try."

clearly expressed an estate plan which was ultimately frustrated by Doris' renunciation of the will. On the other hand, O'Bryan provided self-serving testimony that he was merely the scrivener of documents who acted at the direction of a client, albeit one with only a third-grade education.[16] Additionally, for reasons not made clear in the record, appellant was never given the opportunity to depose Doris. Clearly, issues of material fact exist which are suitable for determination by the finder of fact, and summary judgment was inappropriate.

The Jefferson Circuit Court's summary judgment is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

[16] O'Bryan argues that Claude's estate plan was frustrated by Doris' renunciation, rather than by any negligence on his part. While that may be true **postmortem**, any negligence occurred at the time the estate plan was implemented. Doris had an absolute right to renounce the will, but in doing so she was entitled to only one-half of the personalty and one-third of the realty. As noted previously, if the real property had passed under the terms of the will instead of by the deed, Doris would have had little incentive to exercise her right to elect against the will. Claude's plan then would have been carried out. The effect of the deed, however, was actually to encourage Doris to renounce the will. O'Bryan stated in his deposition testimony that he advised Claude that a survivorship deed would pass the property to Doris without having to go through probate, and Claude directed the preparation of the deed "because he wanted there to be no problems or hassles when he died." This testimony, however, ignores the fact that a specific devise, properly drafted, also passes property without having to go through probate. *See Stewart v. Morris*, 313 Ky. 424, 231 S.W.2d 70, 71 (1950) (court held "the interest of a devisee vests the instant of testator's death"); 2 James R. Merritt, Kentucky Practice, Probate Practice and Procedure § 1341 (1984) ("A classic example of a nonprobate asset is land which passes directly to the heir or devisee"). In addition, if Claude wanted "no problems or hassles", a properly drafted *anti-terrorem* clause would have gone a long way to insuring that none of the will beneficiaries caused any "problems or hassles."

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