

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

James R. Cunningham,	:	
	:	
Plaintiff-Appellant,	:	No. 08AP-1049
	:	(C.P.C. No. 05CVC-10-11770)
v.	:	
	:	
Paul R. Cunningham et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 8, 2009

White & Fish, LPA, and *Arnold S. White*, for appellant.

Lane Alton & Horst, LLC, *Rick E. Marsh* and *Melissa M. Ferguson*, for appellees *Stebelton, Aranda and Snider, LPA*, *James C. Aranda, Esq.*, and *Rick L. Snider, Esq.*

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, James R. Cunningham, appeals from a judgment of the Franklin County Court of Common Pleas granting the summary judgment motion of defendants-appellees, Stebelton, Aranda and Snider, LPA ("SAS"), James Aranda, and Rick Snider (collectively, "defendants") on plaintiff's claims of intentional interference with expectancy of inheritance ("IIEI"), legal malpractice, and conversion. Because the trial court did not err in granting summary judgment to defendants, we affirm.

I. Procedural History

{¶2} The parties do not dispute the basic facts underlying plaintiff's case. Sometime in August or September of 2004, plaintiff's brother, Paul R. Cunningham, contacted Rick Snider, a partner in the law firm of SAS, concerning an estate plan for plaintiff's and Paul's mother, Gladys Cunningham. After meeting with both Gladys and Paul, Snider prepared a Last Will and Testament, a General Warranty Deed, a Transfer on Death Deed, and a Health Care Power of Attorney. On October 13, 2004, Paul took Gladys to Snider's office, where she executed the documents. Gladys died of a heart attack nine days later. The October 13, 2004 will was filed with the Franklin County Probate Court on November 13, 2004, and Paul retained Snider to represent his interests before that court.

{¶3} Unbeknownst to Paul, plaintiff filed on November 9, 2004 an earlier will that Gladys executed on July 10, 1997. Consolidating consideration of both wills, the trial court on August 25, 2005 vacated the 1997 will and ordered Gladys' estate to be administered pursuant to the 2004 will. As a result, plaintiff filed this action, naming Paul, SAS, Aranda and Snider as defendants and asserting claims for IIEI, legal malpractice, and conversion. Plaintiff subsequently filed a will contest with the probate court.

{¶4} Plaintiff's action in the common pleas court was stayed pending the outcome of the will contest. On November 6, 2007, a settlement agreement resolving the will contest reinstated the terms of the 1997 will. After the trial court granted defendants' petition to lift the stay, defendants filed a motion for summary judgment on all of plaintiff's

claims. Plaintiff filed a response, and on September 16, 2008, the trial court granted defendants' motion.

{¶5} More specifically, with regard to plaintiff's IIEI claim, the trial court determined plaintiff failed to demonstrate he suffered damages since the reinstated 1997 will restored plaintiff's original expectancy. Similarly, the trial court concluded plaintiff suffered no damages when the beneficiary on one of Gladys' life insurance policies was changed, as the settlement agreement made plaintiff once again the beneficiary on that policy. On plaintiff's legal malpractice claim, the trial court decided plaintiff failed to demonstrate defendants owed any duty to him. Finally, the trial court ruled plaintiff's conversion claim lacked merit. Although plaintiff claimed defendants converted Gladys' lease refund by depositing it into the SAS client trust account, the trial court concluded not only that defendants remitted the money to Gladys' estate after the probate court appointed the estate's fiduciary, but that at the time of the alleged conversion, plaintiff had no legal right to the money because it was the property of the estate.

II. Assignments of Error

{¶6} Plaintiff appeals, assigning three errors:

[1.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND BY RULING THAT APPELLANT, IN SETTLING A WILL CONTEST, AS BENEFICIARY OF HIS MOTHER'S LIFE INSURANCE, BANK ACCOUNTS, REAL ESTATE, AND OTHER PROPERTY, COULD NOT THEREAFTER PROVE ANY DAMAGES FOR THE INTENTIONAL INTERFERENCE WITH EXPECTANCY OF INHERITANCE, INCLUDING HIS LOSS OF RENT, LOSS OF VALUE, LOSS OF INTEREST FOR 3 YEARS AND HIS MENTAL ANGUISH ALL OF WHICH WAS CAUSED BY THE FRAUD AND MALICE OF APPELLEES.

[2.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND BY RULING THAT APPELLANT'S SETTLEMENT OF A WILL CONTEST PREVENTED HIM FROM PROVING ANY DAMAGES FOR THE INTENTIONAL INTERFERENCE WITH EXPECTANCY OF INHERITANCE INCLUDING OVER \$100,000 IN ATTORNEY FEES INCURRED IN PROTECTING HIS RIGHTS AS BENEFICIARY OF HIS MOTHER'S ESTATE AND OF HER LIFE INSURANCE POLICIES ALL OF WHICH WAS JEOPARDIZED BY THE FRAUD AND MALICE OF APPELLEES.

[3.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND BY RULING THAT APPELLANT COULD NOT PROVE HIS ALLEGATIONS CONTAINED IN PARAGRAPH 51 OF THE COMPLAINT, BY REASON OF LACK OF PRIVACY BETWEEN APPELLANT AND THE ATTORNEY APPELLEES.

{¶7} An appellate court's review of summary judgment is conducted de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. We apply the same standard as the trial court and conduct an independent review without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107, *Brown*, supra, at 711. We must affirm the trial court's judgment if any of the grounds the movant raised in the trial court support the judgment. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶8} Summary judgment is appropriate only where (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. A

party seeking summary judgment "bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record * * * which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996-Ohio-107.

{¶9} For ease of discussion, we address plaintiff's assignments of error out of order.

III. Third Assignment of Error - Legal Malpractice Claim

{¶10} In his third assignment of error, plaintiff argues that the trial court erred in concluding the lack of privity between plaintiff and SAS bars plaintiff's malpractice claim. While conceding he was not SAS's client, plaintiff maintains the "special circumstances" exception to attorney immunity applies, vitiating the need for privity. The special circumstances exception was set forth in *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 76, and reaffirmed in *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012.

{¶11} Attorneys in Ohio are qualifiedly immune from liability to a third party arising out of actions they take in representing a client. *Hahn v. Satullo*, 156 Ohio App.3d 412, 2004-Ohio-1057, ¶69. In *Shoemaker*, beneficiaries of a will sued the testator's attorney for legal malpractice based on negligence. Finding no privity between the parties, the trial court granted the attorney's summary judgment motion. The beneficiaries appealed, but both the intermediate appellate court and the Supreme Court of Ohio upheld the trial court's decision. Despite maintaining the general rule that privity is required in order to bring a legal malpractice claim, the Supreme Court's decision noted special circumstances, such as fraud, bad faith, collusion or other malicious conduct, could

override the necessity for privity. *Shoemaker*, at ¶11. Because the appellants in *Shoemaker* had not pled fraud, bad faith, collusion or malice, the lack of privity was fatal to their claim.

{¶12} In contrast, plaintiff's complaint alleges in paragraph 47 that defendants "intentionally and through fraud, duress, undue influence and/or otherwise tortious means" interfered with plaintiff's inheritance and expected inheritance. (Complaint, 9.) Similarly, paragraph 51 asserts the acts and omissions of defendants in representing Gladys were "willful and with malice and in conscious disregard for" plaintiff's rights. (Complaint, 10.) Plaintiff further contends the record contains sufficient information to support the allegations and to overcome summary judgment, claiming the evidence demonstrates defendants were aware that Gladys was not competent to execute the 2004 will and, armed with that information, assisted Paul in his efforts to remove plaintiff as executor.

{¶13} "The contours of the malice exception for attorney immunity to third party claims are not brightly drawn." *Wilkey v. Hull* (S.D.Ohio 2009), 598 F.Supp.2d 823, 832 (pointing out that although *Simon*, supra, suggested an attorney acts maliciously if he or she acts with intent to defraud a third party, or with "malice" or "bad faith," the Ohio Supreme Court "did not amplify those terms"). This court defined "malice" in the context of legal malpractice actions to include those acts of an attorney taken with an ulterior motive separate and apart from the good-faith representation of the client's interests. *Ryan v. Wright*, 10th Dist. No. 06AP-962, 2007-Ohio-942, citing *Hahn*, supra, at ¶67. In this context, malice may also imply " '[a] condition of mind which prompts a person to do a

wrongful act willfully, that is, on purpose, to the injury of another without justification or excuse.' " *Id.* at ¶19, quoting *Moffitt v. Litteral*, 2d Dist. No. 19154, 2002-Ohio-4973, ¶82, quoting Black's Law Dictionary (6th ed.1990) 956.

{¶14} Plaintiff suggests defendants acted with malice because Gladys was not competent to execute complicated legal documents when she signed the 2004 will. Plaintiff further contends defendants' attempts, at Paul's request, to remove plaintiff as executor of Gladys' estate also demonstrate malice. Accordingly, plaintiff argues, "[i]t is clear that [defendants were] always working for Paul and not" Gladys. (Plaintiff's brief, 16.) In short, plaintiff argues that Gladys' incompetency made clear that executing the 2004 will served to benefit only Paul.

{¶15} Plaintiff's evidence fails to support his contentions. Even if a genuine issue of material fact exists with regard to Gladys' competency at the time she executed the 2004 will, plaintiff's evidence fails to create an issue of fact about whether defendants' actions were anything but a good-faith effort to represent their clients. The mere fact of Gladys' incompetence is not enough to demonstrate defendants acted with malice, as a mistake regarding Gladys' competency when she executed the 2004 will suggests negligence, not malice. See *Ryan*, at ¶20.

{¶16} Nor does plaintiff's evidence demonstrate a genuine issue of material fact that defendants intended to injure him. Defendants introduced evidence that they were unaware of the earlier will when they prepared, and had Gladys execute, the 2004 will, and nothing indicates defendants were aware of a plan, if any existed, to deprive plaintiff of his inheritance. Similarly, Snider's evidence, that in preparing the 2004 will he knew

only that plaintiff was Paul's brother, does not suggest a plan or intent to harm plaintiff. Plaintiff failed to produce any evidence disputing defendants' contentions that they acted only in accordance with the good-faith representation of their clients. Because plaintiff did not demonstrate that an exception to the privity requirement applies in this case, the trial court correctly found his legal malpractice claim is barred. Plaintiff's third assignment of error is overruled.

IV. First and Second Assignments of Error - Damages for IIEI

{¶17} Because they are related, we discuss plaintiff's remaining assignments of error together. In his first assignment of error, plaintiff contends that because an IIEI tort action is very different from a will contest, a settlement in one does not resolve the claims in another. Plaintiff's second assignment of error maintains the trial court erred in finding settlement of the will contest prevented him from proving damages for his tort claim. Together, these two assignments of error raise the question of what damages are available under an IIEI claim.

{¶18} The Supreme Court of Ohio first recognized the IIEI tort in *Firestone v. Galbreath* (1993), 67 Ohio St.3d 87. The requisite elements a claim of IIEI are: (1) the existence of a plaintiff's expectancy of inheritance, (2) a defendant's intentional interference with that expectancy, (3) the defendant's tortious conduct involving the interference, such as fraud, duress, or undue influence, (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the defendant's interference, and (5) damage resulting from the interference. *Id.* at 88.

{¶19} Before pursuing an IIEI claim, a plaintiff must first exhaust all appropriate probate procedures. *Firestone v. Galbreath* (Oct. 6, 1992), 10th Dist. No. 92AP-159. See also *Roll v. Edwards*, 156 Ohio App.3d 227, 2004-Ohio-767, ¶28. The rationale is that the probate proceedings may resolve the damages issue by simply validating the will through which the plaintiff claims an expectancy. *In re Estate of Goehring*, 7th Dist. No. 05 CO 35, 2007-Ohio-1133, ¶66. An exception to the rule allows a plaintiff to bypass probate if no remedy is available in the probate court or if that remedy would be inadequate. *Firestone v. Galbreath* (S.D. Ohio 1995), 895 F.Supp. 917, 926. Thus, "[c]ourts must look to whether the probate court can provide the plaintiff with adequate relief in the form of the actual damages which would be recovered in the tort action; punitive damages awards are not considered a valid expectation in this context." *Id.* Rather, the circumstances surrounding the tortious conduct must be what effectively precludes adequate relief in the probate court. *DeWitt v. Duce* (Fla. 1981), 408 So.2d 216, 219.

{¶20} No Ohio case speaks specifically about the type of damages available under an IIEI claim. In describing the elements of IIEI, Restatement (Second) of Torts, Section 774B, Comment e, suggests relying upon Section 774A of the Restatement to determine damages recoverable under the tort. That section, in turn, allows recovery for pecuniary damages, "consequential losses for which the interference is a legal cause," and "emotional distress or actual harm to reputation." Restatement (Second) of Torts, Section 774A. See also *Gray-Jones v. Jones* (2000), 137 Ohio App.3d 93.

{¶21} Some courts have rejected tort claims filed after settlement of the probate case as "a second bite at the apple." *Wilson v. Fritschy* (2002), 55 P.3d 997, 1002, citing

Robinson v. First State Bank (Ill.1983), 454 N.E.2d 288, 294. *Wilson* rejected the contention that, absent tort liability, a third-party non-beneficiary such as defendants in the present case might escape financial responsibility for his or her wrongs. As the court noted, "we simply may have to tolerate that consequence as a cost of protecting the integrity of the probate process." *Id.* at 1005. Explaining, the court stated that "[IIEI] did not arise out of a perceived need to punish alleged wrongdoers * * * [but] developed to protect valid testamentary expectancies and to provide a remedy when the probate process proved inadequate. * * * The proper focus of the tort is on the just distribution of estate assets; when that can be achieved in probate, the need for the tort disappears." *Id.*

{¶22} *Wilson* also rejected the claim that the existence of unrecoverable litigation costs, such as attorney fees, and the lack of punitive damages render probate remedies inadequate. Considering the recovery of legal costs not to be a valid expectation, *Wilson* followed *Jackson v. Kelly* (Ark.2001), 44 S.W.3d 328, 333, in concluding the inability to recover attorney fees in a probate proceeding did not provide grounds for a tort challenge after settlement of the probate matter.

{¶23} In contrast, some other cases indicate that traditional tort damages, such as punitive damages and attorney fees, can be recovered in an IIEI action, but those cases are factually distinguishable from the present case. *Sull v. Kaim*, 172 Ohio App.3d 297, 2007-Ohio-3269, upheld a judgment awarding prejudgment interest, punitive damages and attorney fees, in addition to compensatory damages, pursuant to a jury verdict finding the defendant had intentionally interfered with the plaintiffs' expectancy of inheritance. The wrongful actions in *Sull*, however, involved fraudulent inter vivos transfers premised

on the defendant's exercise of undue influence. The will was not challenged, and thus the court did not need to analyze the possibility of obtaining relief through the probate court.

{¶24} *Gay v. Ludwig*, 1st Dist. No. C-030604, 2004-Ohio-2177, held no error occurred in the calculation of compensatory and punitive damages, including attorney fees, after finding that a fraudulent inter vivos transfer improperly diminished the value of an estate. The lawsuit in *Gay* alleged both IIEI and breach of fiduciary duty, and the opinion is not clear about the basis for the award of damages. Because the damages, except for attorney fees, were awarded to the estate which was not a party to the lawsuit, the breach of fiduciary duty, and not IIEI, appears to underpin the decision in that case.

{¶25} *Weaver v. Fenwick* (July 2, 1997), 9th Dist. No. 17995, held a trial court did not err in awarding nominal and punitive damages on an IIEI claim arising out of an estate probated without acknowledging the rights of the deceased's common law spouse. The common law spouse was never notified about the probate matter and thus had no opportunity to participate in those proceedings.

{¶26} Lastly, in circumstances similar to those here, Iowa courts have awarded punitive damages and attorney fees in IIEI cases. See *Huffey v. Lea* (Iowa, 1992), 491 N.W.2d 518 (stating "[w]e are strongly committed to the rule that attorney fees are proper consequential damages when a person, through the tort of another, was required to act in protection of his or her interest by bringing or defending an action against a third party"). As the dissent in *Huffey* pointed out, Iowa represents a minority view in its treatment of IIEI cases, with only one other court allowing an IIEI suit following a successful will contest without an allegation that the will contest remedy was inadequate. The *Huffey*

dissent notes the majority position allows a plaintiff only to recover what he or she expected to receive under the will.

{¶27} Relying on *Roll*, supra, the trial court here decided that reinstatement of plaintiff's original expectancy is the only remedy available to him. Since the settlement in the probate court reinstated the earlier will and as a result afforded plaintiff his original expectancy, the trial court determined plaintiff suffered no damages. The trial court arguably reached the appropriate resolution. When an IIEI claim is based upon allegations that an invalid will has been presented to the probate court, the plaintiff, under the majority view, can recover only the expectancy bequeathed to the plaintiff under the valid will. While in other circumstances additional damages will be recoverable in an IIEI claim, those damages typically exist only when the plaintiff otherwise would lack a remedy in probate proceedings, such as when the plaintiff lacks standing in the probate court.

{¶28} Even if the trial court erred in concluding plaintiff suffered no damages, the error is harmless, as plaintiff failed to show defendants engaged in any wrongdoing. While defendants did not raise the specific issue in their motion for summary judgment on plaintiff's IIEI claim, defendants demonstrated the absence of culpable behavior on their part in moving for summary judgment on plaintiff's legal malpractice claim. Since both the IIEI and legal malpractice claims allege defendants engaged in the same misconduct, plaintiff had to present evidence demonstrating a genuine issue of material fact regarding defendants' wrongdoing.

{¶29} Plaintiff's legal malpractice claim failed because he did not raise an issue of material fact to support his allegations that defendants engaged in fraud, bad faith,

collusion or other malicious conduct. In so failing, plaintiff necessarily failed to present evidence demonstrating the requisite fraud, duress, or undue influence to support an IIEI claim. Because plaintiff failed to create a genuine issue of material fact as to defendants' culpability with regard to the drafting or administration of the 2004 will, and thus failed to support his claim of defendants' wrongdoing, summary judgment to defendants is appropriate. Plaintiff's first and second assignments of error are overruled.

{¶30} Having overruled plaintiff's three assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.
