

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/21/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

CLYDE H. MEANS,) 1 CA-CV 10-0241
)
Plaintiff/Appellant,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ROBERT H. BROOKS, ESQ.,) Rule 28, Arizona Rules
) of Civil Appellate
Defendant/Appellee.) Procedure)
)
_____)

Appeal from the Superior Court in Mohave County

Cause No. CV2009-01624

The Honorable Lee F. Jantzen, Judge

AFFIRMED

Clyde H. Means
Appellant

Lovelock, NV

Broening Oberg Woods & Wilson PC
By Donald Wilson, Jr.
And Brian W. Purcell
Attorneys for Appellee

Phoenix

O R O Z C O, Judge

¶1 Clyde Means (Appellant) appeals from the superior court's grant of Robert Brooks' (Brooks) motion for summary judgment. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Appellant is currently incarcerated in a Nevada state prison. In September 2007, Appellant alleges he sent his cousin, Nora M. Hillemeier (Nora) funds in the amount of \$46,500. Nora was the trustor of the John F. Hillemeier and Nora M. Hillemeier Revocable Trust (the Trust) dated October 14, 1994, amended on January 28, 2000, and July 21, 2007. Nora died on October 30, 2007, and was predeceased by her husband, John Hillemeier. At the time of her death, there were minimal assets, significant debts, and a Will that transferred all of the assets and debts to the Trust. Brooks, a licensed Arizona attorney, represented Cloyce Brown (the Trustee) in his capacity as Successor Trustee of the Trust. Brooks prepared an Affidavit of Transfer of Title to Real Property, which transferred Nora's real property into the Trust in April 2008. A probate was never opened in connection with Nora's death.

¶3 In July 2008, Appellant contacted Brooks claiming he gave Nora \$46,500 for safekeeping and that the funds were to be returned to Brooks after his release from prison. Brooks inquired about the status of the funds and learned that John O'Neil (O'Neil), a cousin of Nora and Appellant, had Appellant's

power of attorney. The Trustee and Brooks also learned from Wells Fargo, that O'Neil had distributed those funds to various individuals as follows:

Dan W.	\$10,000.00
James N.	\$15,000.00
Cash	\$ 5,000.00
O'Neil	\$10,397.80
Wells Fargo	<u>\$ 2,740.79</u>
Total	\$43,138.59

¶4 After Brooks responded to Appellant's inquiry, Appellant filed an action against Brooks. Appellant alleged negligence, fraud, breach of contract, and legal malpractice against the Trustee and Brooks. Brooks, filed a motion for summary judgment arguing he owed no legal duty to Appellant, there was no contract claim between Appellant and himself, and disputing Appellant's fraud claim. The trial court granted Brooks' motion for summary judgment finding no evidence of fraud and that Brooks "[had] not violated any duty he had, specifically with regard to legal malpractice."

¶5 Appellant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) section 12-2101.B (2003).

DISCUSSION

¶6 Appellant's issue on appeal is whether the trial court erred in granting Brooks' motion for summary judgment. Because we find Brooks did not owe a duty to Appellant, we need not

address his other arguments regarding whether Brooks breached his duty and was therefore negligent.

¶17 We review a trial court's grant of summary judgment in the light most favorable to the party whom summary judgment was granted against. *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 140, ¶ 26, 128 P.3d 756, 763 (App. 2006). We will affirm the summary judgment only if there is no genuine issue as to any material fact and the party seeking judgment is entitled to judgment as a matter of law. *Id.*; see Ariz. R. Civ. P. 56(c)(1). We review all questions of law *de novo*. *Swanson v. Image Bank, Inc.*, 206 Ariz. 264, 266, ¶ 6, 77 P.3d 439, 441 (2003).

¶18 "As with all negligence claims, a plaintiff asserting legal malpractice must prove the existence of a duty, breach of duty, that the defendant's negligence was the actual and proximate cause of injury, and the 'nature and extent' of damages." *Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 12, 83 P.3d 26, 29 (2004) (citing *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986)). The existence of an attorney-client relationship imposes on the attorney a duty to exercise a degree of skill, care, and knowledge commonly exercised by members of the profession. *Phillips*, 152 Ariz. at 418, 733 P.2d at 303.

¶19 Appellant contends Brooks had an obligation and fiduciary duty to prevent O'Neil from withdrawing funds from the

Wells Fargo account using Appellant's power of attorney. The evidence presented, however, does not support this argument. Instead, the record indicates that in July 2008 Brooks first learned of Appellant's claim that he was owed \$46,500, which sums were allegedly given to Nora for safekeeping. Although not obligated to do so, Brooks did inquire about the status of the funds and learned that O'Neil had used Appellant's power of attorney to transfer the funds to various recipients including a distribution to O'Neil himself. Brooks did not have a copy of the power of attorney and Wells Fargo refused his request for a copy.

¶10 The evidence also indicates that Brooks was hired to represent the Trustee "solely in his capacity as Successor Trustee of the [Trust]." Appellant was not a client of Brooks, nor a beneficiary of the Trust. Furthermore, there was no express agreement between Appellant and Brooks. On this record, we are unable to identify any relationship or public policy that would impose a duty on Brooks to act for the benefit of Appellant. See *Gipson v. Kasey*, 214 Ariz. 141, 144-47, ¶¶ 18-31, 150 P.3d 228, 231-34 (2007) (explaining that duty may be based on public policy discerned from statutory or common law or on the relationship between the parties).¹

¹ Appellant argues that Brooks did not comply with the terms and conditions of Nora's Last Will, Article 2, Section 2.1 and

CONCLUSION

¶11 Finding Brooks owed no duty to Appellant; we affirm the trial court's grant of summary judgment in favor of Brooks.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

JOHN C. GEMMILL, Judge

Article 5 of the Trust. Article 5 of the Trust states in part, "that the Trustee shall determine if other adequate provisions have been made for payment of debts, expenses and taxes" of the Trustor and if not, Trustee was authorized to pay the expenses of the estate. The record before us contains a letter to Trustee from Appellant dated December 31, 2007 making a claim against the estate in the amount of \$46,500. While notice of this claim may have been provided to Trustee, he is not a party to this appeal. Therefore, even if this letter constituted a legitimate notice of claim to Trustee, which we do not decide in this appeal, this notice would not create a duty on the part of Brooks toward Appellant. See A.R.S. § 14-10801 (Supp. 2010) (the duty of administering the trust falls on the trustee in accordance with the trust's terms).