

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001273-MR

GOLDBERG & SIMPSON, P.S.C.;
STEVEN A. GOODMAN;
AND WAYNE F. WILSON

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 05-CI-01229

PHILIP J. GOODMAN AND
JULIE GOODMAN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND MINTON, JUDGES; KNOPF, SENIOR JUDGE.¹

BARBER, JUDGE: This appeal arose from the Fayette Circuit Court's dismissal of a third-party complaint filed by Appellants, Goldberg & Simpson, P.S.C.; Steven A. Goodman (Steven); and Wayne F. Wilson (Wilson). The third-party complaint was against Appellee, Julie Goodman (Julie), and claimed she was liable to the Appellants due to her alleged

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

professional failings to her husband, who is an Appellee, Philip J. Goodman (Philip). The alleged failures are discussed later in this opinion. We first examine the facts which gave rise to this current appeal.

Steven and Philip are brothers. Steven is an attorney and a partner of Goldberg & Simpson. Their parents, Lawrence I. Goodman (Lawrence) and Leah Elkowitz Goodman (Leah), are deceased. Leah passed away in 1977 and her estate was probated thereafter. Lawrence remarried in 1981 to Evelyn Kossoff (Evelyn).² The couple remained together until Lawrence's death on February 20, 2004. Through Lawrence's will and revocable living trust, Evelyn was to receive nearly all of his estate. Also, Steven and Philip were each to receive the contents of specific safe deposit boxes. Lawrence's will and revocable living trust were prepared by Wilson while employed at Goldberg & Simpson.

Philip disagreed with the distributions and filed a complaint March 16, 2005, against Appellants alleging liability for several reasons. In essence, Philip claims that in 1982, his father, Lawrence, orally agreed to leave him one-half of his entire estate with the exception of his marital home. This agreement was made in exchange for Philip not pursuing legal action related to alleged wrongdoings committed by Lawrence and

² Lawrence's widow, Evelyn K. Goodman, is not a party to either suit. She is also the Executrix of Lawrence's estate.

Steven during the settlement of Leah's estate. Philip argues that Steven convinced their father not to honor the alleged oral agreement. Goldberg & Simpson and Wilson were named in relation to the preparation of the estate planning documents at issue.

In an effort to shield themselves from potential liability, Appellants filed a third-party complaint against Julie on April 8, 2005. Philip and Julie were married at the time of the alleged oral agreement between Philip and Lawrence. Coincidentally, Julie is an attorney.³ Appellants stated that Julie provided legal advice to Philip about claims he could assert against his father's estate. They also asserted that Julie failed to advise Philip to get a written agreement to leave property by will from his father and to file a timely claim against his father's estate. Appellant claimed Julie's failures and negligence were the direct and proximate results of Philip's damages.

Shortly thereafter, Julie filed a motion to dismiss the third-party complaint. Following a hearing and briefing by both sides, the circuit court dismissed the third-party complaint against Julie on May 16, 2005. It is this dismissal order that Appellants appeal.

Julie filed her motion to dismiss under CR 12.02(f). A dismissal pursuant to CR 12.02(f) for failure to state a claim

³ Julie has been licensed to practice law in the Commonwealth since 1980.

is proper only if it appears the pleading party could not prove any set of facts in support of his claim that would entitle him to relief. Wood v. Wyeth-Ayerst Laboratories, Division of American Home Products, 82 S.W.3d 849, 851 (Ky. 2002), (citing Pari-Mutuel Clerks' Union v. Ky. Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977)). In determining whether a complaint should be dismissed, the issue is a matter of law. Grand Communities, Ltd. v. Stepler, 170 S.W.3d 411, 417 (Ky.App. 2004), (citing James v. Wilson, 95 S.W.3d 875, 884 (Ky.App. 2002)). Thus, our review is *de novo*.

We must presume that all the factual allegations in the complaint are true and draw any reasonable inference in favor of the non-movant. Commonwealth, ex rel., Chandler v. Anthem Insurance Companies, Inc., 8 S.W.3d 48, 51 (Ky.App. 1999). The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. Id.

Following a review of Appellants' third-party complaint, it is clear that all of their claims are based on Julie's status as an attorney.⁴ In essence, Appellants contend

⁴ The following paragraphs from Appellant's 19 paragraph third-party complaint are particularly supportive:

6. The Third-Party Plaintiffs allege, upon information and belief, that the Third-Party Defendant, Julie Goodman, **provided legal advice to the Plaintiff**, Philip J. Goodman, concerning the estates of his mother and father.

8. The Third-Party Plaintiffs state, upon information and belief, that the Third-Party Defendant, Julie Goodman, as Plaintiff's wife and in her

that if Julie had given proper legal advice and performed the appropriate legal acts, then Philip would have suffered no damages.

capacity as **giving legal advice to Plaintiff**, was aware of Plaintiff's claim against the estate.

9. The Defendants/Third-Party Plaintiffs state, upon information and belief, that the Third-Party Defendant, Julie Goodman, **failed to advise the Plaintiff**, Philip J. Goodman, **that an agreement to leave property by will must be in writing**, and, therefore, if the allegations by Plaintiff, Philip J. Goodman, concerning oral representations by Lawrence I. Goodman are true (which the Defendants/Third-Party Plaintiffs deny), then the Third-Party Defendant, Julie Goodman, **failed to advise the Plaintiff**, Philip J. Goodman, **that a written contract was required** in order to enforce those alleged oral representations **or failed to procure such a written agreement**.

13. As a direct and proximate result of the **failure** of the Third-Party Defendant, Julie Goodman, **to advise the Plaintiff**, Philip J. Goodman, **of the requirement for a written contract** to will property **or to procure such a written agreement**, the Plaintiff, Philip J. Goodman, did not obtain an enforceable contract from Lawrence I. Goodman, to leave said Plaintiff, Philip J. Goodman, one-half of the estate of Lawrence I. Goodman, by will, if the allegations concerning the oral representations of Lawrence I. Goodman in the Complaint are true (which the Defendants/Third-Party Plaintiffs deny).

14. **As a direct and proximate result of this failure** on behalf of the Third-Party Defendant, Julie Goodman, **the damages which Philip J. Goodman claims** as a consequence of his Complaint, if any, **are the direct and proximate result of the failure** of the Third-Party Defendant, Julie Goodman, **to advise the Plaintiff to obtain a written contract** with respect to the alleged oral representations **or to procure such a written agreement**.

15. Defendants/Third-Party Plaintiffs further allege that the Third Party Defendant, Julie Goodman, has **continued to advise Plaintiff, in conjunction with other counsel**, concerning Plaintiff's claims against the estate of Lawrence I. Goodman.

16. The Defendants/Third-Party Plaintiffs state, upon information and belief, that the Third-Party Defendant, Julie Goodman, **failed to advise the Plaintiff**, Philip J. Goodman, **concerning timely filing of a claim** against the estate of Lawrence I. Goodman **or failed to obtain a timely claim** against the estate of Lawrence I. Goodman.

17. The Third-Party Plaintiffs also allege, upon information and belief, that Third-Party Defendant **failed to advise Plaintiff concerning statutes of limitation** which could prevent even a valid claim from being enforceable, against the estate of any other parties.

18. **As a direct and proximate result of this failure and negligence** by the Third-Party Defendant, Julie Goodman, **the damages which Plaintiff claims** as a consequence of his Complaint, if any, **are the direct and proximate result of the failure and negligence** of the Third-Party Defendant, Julie Goodman.

19. **As a consequence of these failures and negligence** on the part of the Third-Party Defendant, Julie Goodman, the Defendants/Third-Party Plaintiffs are **entitled to indemnity and/or contribution** for any and all damages which Plaintiff may recover from the Defendant/Third-Party Plaintiffs.

(Emphasis added.)

The relationship of attorney-client is a contractual one, either expressed or implied by the conduct of the parties. Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky.App. 1979). In other words, the attorney-client relationship can arise not only by contract, but also from the conduct of the parties. Lovell v. Winchester, 941 S.W.2d 466, 468 (Ky. 1997). Courts have found that the relationship is created as a result of the client's reasonable belief or expectation that the lawyer is undertaking the representation. Id. Also, an attorney-client relationship is personal in nature. American Continental Insurance Co. v. Weber & Rose, P.S.C., 997 S.W.2d 12, 13 (Ky.App. 1998), (citing Automobile Club Insurance Co. v. Lainhart, 609 S.W.2d 692 (Ky.App. 1980)). The personal nature permits a legal malpractice action to accrue only to the attorney's client. Id. at 14.

An attorney is not ordinarily liable to third persons for his acts committed in representing a client. Rose v. Davis, 157 S.W.2d 284, 285 (Ky. 1941). It is only where his acts are fraudulent or tortious and result in injury to third persons that he is liable. Id. at 284-285. Similarly, an attorney may be liable for damages caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity. Hill v. Willmott, 561 S.W.2d 331, 334 (Ky.App.

1978), (citing Donald v. Garry, 97 Cal.Rptr. 191 (Cal.Ct.App. 1971)).

We must determine whether an attorney-client relationship existed between Philip and Julie. Philip is not asserting that Julie was his attorney during any period of time at issue. Furthermore, Philip had counsel of record for issues related to each of his parent's estates. Ray Larson represented Philip in issues relating to the execution of Leah's estate and Jack Cunningham was Philip's attorney in relation to the execution of Lawrence's estate according to the record. However, before we make our determination there is another issue that must be resolved.

We are presented with a unique situation in that it is not an alleged client claiming an attorney-client relationship was established, rather a third party is making this assertion. As a result, we must determine whether a third party has standing to establish the existence of such an attorney-client relationship on someone else's behalf. We are unable to find precedent to support such a situation in our Commonwealth. We believe allowing third parties to assert the existence of an attorney-client relationship between two people is inappropriate. This is true particularly when both the individuals in the alleged relationship deny the same. The only person who has standing to claim an attorney-client relationship

existed is Philip and he has chosen not to do so at this time. Therefore, we do not believe Julie and Philip established an attorney-client relationship.

However, if we assume that Philip and Julie did form an attorney-client relationship, third parties are only allowed to sue an attorney retained by another if the attorney's acts are fraudulent or tortious and result in injury to the third person or if the attorney's negligence damaged the third person intended to be benefited by the attorney's performance. Appellants made no claim that Julie's acts with Philip were either fraudulent or tortious. They only assert that Julie was negligent in performing her attorney duties for Philip.

An attorney is liable to a third person for her negligence only if that person was intended to be benefited by her performance. Hill, supra, 561 S.W.2d at 334. In other words, the attorney must owe a duty to the third person.⁵ The question of duty presents an issue of law. Murphy v. Second Street Corporation, 48 S.W.3d 571, 573-574 (Ky.App. 2001). Again, our review shall be *de novo*.

Even when viewed in light most favorable to Appellants, none of Julie's acts for Philip were ever intended

⁵ In order to meet the burden of proof in a negligence action, one must establish: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury. Murphy v. Second Street Corporation, 48 S.W.3d 571, 573 (Ky.App. 2001), (citing Mullins v. Commonwealth Life Insurance Co., 839 S.W.2d 245, 247 (Ky. 1992)).

to benefit the Appellants in any way. The only person intended to benefit from Julie's alleged acts would have been Philip. With no duty owed to Appellants, we cannot find that Appellants could have a valid claim against Julie even presuming she acted as Philip's attorney. Thus, Appellants failed to state a claim upon which judgment could be granted. See CR 12.02(f).

While our reasoning differs somewhat from the circuit court, the end result is the same. Therefore, we affirm the circuit court's dismissal of Appellant's third-party complaint pursuant to CR 12.02(f).

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Robert Lyons, Jr.
Lexington, Kentucky

BRIEF FOR APPELLEE, JULIE
GOODMAN:

Katherine K. Yunker
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BRIEF FOR APPELLEE, PHILLIP G.
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