

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

DORIS KITCHEN, et al., :
 :
 Plaintiffs-Appellants, : CASE NO. CA2011-06-048
 :
 - vs - : OPINION
 : 9/24/2012
 :
 VICTOR TEETERS, et al., :
 :
 Defendants-Appellees. :

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010CVC645

Charles T. Lester, Jr., 5247 Madison Pike, Independence, KY 41051-7941, for plaintiffs-appellants, Doris Kitchen, et al.

James A. Dearie, 12 East Warren Street, Lebanon, Ohio 45036, for defendants-appellees, Victor Teeters and Carleen Teeters

William M. Cussen, 632 Vine Street, Suite 900, Cincinnati, Ohio 45202, for defendant-appellee, Dr. Douglas Van Nest

Charles H. Rittgers, 12 East Warren Street, Lebanon, Ohio 45036, for defendant-appellee, Newtonsville Church of the Nazarene

HENDRICKSON, J.

{¶ 1} Plaintiffs-appellants, the nieces and nephews of Betty Traber, appeal a decision of the Clermont County Court of Common Pleas granting summary judgment in favor of

defendants-appellees, Victor Teeters, his wife Carleen Teeters (the Teeters), Dr. Douglas Van Nest, and the Newtonsville Church of the Nazarene (Church).¹ For the reasons stated below, we affirm the decision of the trial court.

{¶ 2} Appellants' claims arose out of the death of their aunt, Betty Traber, and appellees' dealings with Traber.² Traber attended the Church where Victor Teeters was the pastor. At this time, Dr. Van Nest was the district superintendent of the Southwest Ohio District of the Church of the Nazarene.

{¶ 3} Prior to Traber's death in December 2009, appellants became concerned about the Teeters involvement in Traber's health care and other personal affairs as Victor Teeter was named the executor of her estate and her health care power of attorney. Based on this concern, two of Traber's nieces, appellants, Doris Kitchen and Judith Wethington, held a family meeting in April 2008 with the Teeters and Van Nest.³ Appellants allege that at this meeting, they instructed Victor Teeters to remove himself from all of Traber's legal documents, and Van Nest assured them that the Teeters would indeed be removed from all legal documents. Van Nest and Victor Teeters then met with Traber and requested that she remove Victor Teeters as the executor of her estate and as her health care power of attorney. Van Nest testified that Traber agreed and stated that she would contact her attorney to make the requisite changes. From the record, it appears that thereafter Kitchen became the health care power of attorney, with Victor Teeters serving as the alternate power of attorney, and attorney Robert True became the executor of Traber's estate.

1. The remaining defendants, David P. Wilson, Dr. J.K. Warrick, Dr. David W. Graves, and Dr. Eugene R. Duarte, are not parties to this appeal as the trial court granted their motion to dismiss the complaint for lack of personal jurisdiction.

2. As Traber's nieces and nephews, appellants assert they are her legal heirs.

3. The parties stipulated below that only Kitchen and Wethington would provide testimony in this case as they were the only appellants with personal knowledge of the events relevant to the complaint.

{¶ 4} Appellants allege that the Teeters maintained possession of all of Traber's legal documents, including her will and health care power of attorney, and withheld such documents when requested by appellants. Appellants assert that as a result of the Teeters withholding these documents, appellants "were unable to provide properly for Traber's medical needs at the end of her life." Appellants also argue that by withholding these documents, the Teeters caused Traber's funeral to be postponed and "not held according to Traber's wishes." Appellants further contend that these events caused "an injury both to Traber, but also to [appellants] who had to suffer through the entire travesty." Appellants state that they instituted this action against appellees – specifically the Teeters – for their "improper interference with Betty Trabers [sic] health care and financial and personal life."

{¶ 5} On March 25, 2010, appellants filed a complaint asserting claims of negligence, intentional infliction of emotional distress, and breach of fiduciary duties against all four appellees. The complaint also alleged fraudulent concealment and fraudulent misrepresentation claims against the Teeters. Appellees' moved for summary judgment on all claims. The trial court granted appellees' motion for summary judgment on May 11, 2011. Appellants timely filed this appeal and challenge the trial court's decision granting summary judgment on the negligence claims.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND ITS DECISION SHOULD BE OVERTURNED.

{¶ 8} In their sole assignment of error, appellants assert that the trial court improperly granted summary judgment as several factual disputes remained at issue. Furthermore, they argue the trial court "improperly applied the elements of each legal claim."

{¶ 9} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Simmons v. Yingling*, 12th Dist. No. CA2010-11-117, 2011-Ohio-4041, ¶ 18, citing

Burgess v. Tackas, 125 Ohio App.3d 294, 296 (8th Dist.1998). Accordingly, we utilize the same standard in our review that the trial court uses in its evaluation of the motion.

{¶ 10} Under Civ. R. 56, summary judgment is appropriate when "(1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *Simmons* at ¶ 19, quoting *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 369-370 (1998). The party moving for summary judgment has the initial burden of producing some evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). The nonmoving party must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings. *Id.* at 293; Civ.R. 56(E).

{¶ 11} It is fundamental that a claim of negligence requires the plaintiff to demonstrate the existence of a duty, a breach of that duty, and an injury resulting proximately from the breach. *Zieger v. Burchwell*, 12th Dist. No. CA2009-11-077, 2010-Ohio-2174, ¶ 13. Duty refers to the relationship between a plaintiff and a defendant from which an obligation arises on the part of the defendant to exercise due care toward the plaintiff. *Howard v. Kirkpatrick*, 12th Dist. No. CA2008-11-040, 2009-Ohio-3686, ¶ 11, citing *Wallace v. Ohio Dept. of Commerce, Div. of Fire Marshall*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶ 23. A duty may be established by common law, legislative enactment, or the specific circumstances of a given case. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998).

{¶ 12} In granting summary judgment in favor of appellees on the negligence claims, the trial court noted that appellants had not identified any source for the alleged duties or any law conferring a duty upon appellees. Accordingly, the trial court found that appellees did not

owe a legal duty to appellants.

A. Appellees Victor and Carleen Teeters

{¶ 13} Appellants assert that the Teeters owed them a duty as Traber's "minister and spiritual advisors to be forthright about their dealings with Betty Traber's financial and health care initiatives." Construing the evidence most favorably for appellants, the nonmoving party, we find that reasonable minds could only conclude that there was no relationship between appellants and the Teeters. The record indicates that Victor Teeter was Traber's pastor and both Victor and Carleen had a relationship with Traber. However, none of the appellants had a relationship with the Teeters. Kitchen and Wethington testified that they were not members of the Church and neither of the Teeters was their pastor or provided any sort of spiritual guidance. As the trial court recognized, and we agree, appellants have not sued on behalf of Traber, only on their own behalf. Any duty that the Teeters may have owed to Traber as her pastor and spiritual advisors is not transferred to appellants merely because appellants are Traber's nieces and nephews. Accordingly, as there was no relationship between appellants and the Teeters, no duty was owed in this situation.

{¶ 14} Appellants also argue that during the April 2008 family meeting, the Teeters undertook a duty to "remove themselves from Traber's legal documents, including her healthcare power of attorney." However, only Traber herself, and not the Teeters, had the authority to remove Victor Teeters as her healthcare power of attorney. See R.C. 1337.12(A)(1) ("An adult who is of sound mind voluntarily may create a valid durable power of attorney for health care by executing a durable power of attorney"). Additionally, the record suggests that after the meeting, Kitchen became the health care power of attorney and Victor Teeters was only an alternate power of attorney. Appellants have not cited any evidence to the contrary.

{¶ 15} Furthermore, we note that appellants failed to support this argument with any

authority for the source of this alleged legal duty or provide any reference to the record that would support their position that the Teeters undertook a duty to remove themselves from Traber's legal documents. Pursuant to App.R. 16(A), it is appellants' duty to support the arguments in their brief with citations to authorities and to parts of the record. See *State v. Metcalf*, 12th Dist. No. CA2010-12-326, 2012-Ohio-674, ¶ 35. The failure to properly brief an assignment of error may result in the appellate court disregarding or overruling an assignment of error as allowed under App.R. 12(A). *Id.*

{¶ 16} Accordingly, we find that the trial court properly granted summary judgment to the Teeters as they did not owe any duty to appellants.

B. Appellee Dr. Van Nest

{¶ 17} Appellants also argue that Van Nest assumed a duty during the April 2008 family meeting to ensure that the Teeters were removed from Traber's legal documents. Again, appellants failed to cite to any legal authority or portions of the record to support this contention. See *Metcalf* at ¶ 35. Accordingly, we may disregard this argument.

{¶ 18} However, Van Nest has cited portions of the record which indicate that, in his position as the district superintendent, Van Nest had no supervisory power or control over Victor Teeters. Rather, as the district superintendent, he was charged with the responsibility of "complimenting and assisting the local church in fulfillment of its mission and objections." Also, Van Nest testified that he spoke with Traber about removing the Teeters from her legal documents, and Traber indicated that she would talk to her attorney about it. Van Nest testified that he took no other actions because he felt that it was a "personal decision" and left it up to Traber. Indeed, Van Nest had no legal power to force Traber to remove the Teeters from her legal documents. Traber alone had the authority to designate the beneficiaries of her will and name her healthcare power of attorney. See R.C. 1337.12(A)(1); R.C. 2107.02 ("A person who is eighteen years of age or older, of sound mind and memory,

and not under restraint may make a will").

{¶ 19} Based on the foregoing, we find appellants failed to establish Van Nest owed them any duty. We therefore find that the trial court properly granted summary judgment in favor of Van Nest.

C. Appellee Newtonsville Church of the Nazarene

{¶ 20} As to the Church, appellants argue that it is liable for the Teeters' actions under the theory of respondeat superior.⁴ However, because we found that the Teeters owed no duty to appellants, it necessarily follows that there can be no liability imposed on the Church. *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St. 3d 594, 2009-Ohio-3601, ¶ 22 ("[t]he liability for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. *If there is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions*"). Accordingly, the trial court properly granted summary judgment in favor of the Church.

{¶ 21} Having found that the trial court properly granted summary judgment to the Teeters, Van Nest, and the Church, appellants' sole assignment of error is overruled.

{¶ 22} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.

4. Although Appellants' brief refers to the actions of Van Nest rather than the Teeters, it is clear that appellants actually meant the Teeters and we address the argument as such.