

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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| Peter W. Svaldi, by and through his Guardian Lorelei Lanier, Esq., | : | |
| | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 12AP-167 (C.P.C. No. 11CVA-03-2816) |
| | : | |
| Robert D. Holmes, Esq. | : | (REGULAR CALENDAR) |
| | : | |
| Defendant-Appellee. | : | |
| | : | |

D E C I S I O N

Rendered on December 27, 2012

Leeseberg & Valentine, Anne M. Valentine and Susie L. Hahn,
for appellant.

Lane, Alton & Horst, LLC, Rich Marsh and Ray S. Pantle,
for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiff-appellant, Peter W. Svaldi, by and through his guardian, Lorelei Lanier, appeals a judgment of the Franklin County Court of Common Pleas awarding summary judgment to defendant-appellee, Robert D. Holmes. For the following reasons, we reverse that judgment and remand this matter to the trial court.

{¶ 2} On the morning of August 14, 2008, Holmes, who is an attorney, received a telephone call from Anita Esquibel. Esquibel told Holmes that she had a neighbor, Svaldi,

who needed to change his will and/or power of attorney.¹ Holmes scheduled an appointment for Svaldi for later that day.

{¶ 3} Svaldi appeared for the meeting accompanied by Esquibel and another woman, Deborah Johnson. At the time of the meeting, Svaldi was 93-years old. Svaldi had a will that named a long-time family friend, Elizabeth Borman, as executor. Svaldi also had a power of attorney that designated Borman as his agent. Svaldi was concerned that Borman would force him to move to Illinois, where she lived, and enter an assisted-living community there. Holmes advised Svaldi that to prevent the move, he should select a different agent to exercise power of attorney on his behalf. Svaldi indicated that he wanted to name Johnson and Esquibel as his agents.

{¶ 4} Johnson explained that she and Esquibel managed Worthington Towers, where she and Esquibel lived together. Svaldi also lived at Worthington Towers. Johnson and Esquibel had known Svaldi for four to five years, during which they had regularly taken him to the grocery store and other locations.

{¶ 5} During the course of the meeting, Holmes asked Svaldi about his assets. Svaldi would not disclose the total value of his assets, but he explained that he owned various stocks and other investments, including real estate in Chicago. Given what Holmes knew about Svaldi, Holmes believed that Svaldi had approximately a million dollars in assets.

{¶ 6} Holmes agreed to draft a new power of attorney that designated Johnson and Esquibel as Svaldi's agents. Holmes also agreed to change Svaldi's will to name Johnson as executor and Esquibel as the alternate executor.

{¶ 7} On September 3, 2008, Holmes again met with Svaldi, Johnson, and Esquibel. At that meeting, Svaldi executed the new power of attorney and the revised will. Either at the September 3 meeting or the August 14 meeting, Holmes spoke with Svaldi alone to ascertain whether Svaldi really wanted to name Johnson and Esquibel as his executors and agents. Svaldi confirmed that he did.

¹ A "power of attorney" is " 'an authorization by one person, the principal, to another, the attorney-in-fact, granting to the attorney-in-fact the power to conduct the principal's business or personal affairs.' " *Kasick v. Kobelak*, 184 Ohio App.3d 433, 2009-Ohio-5239, ¶ 21 (8th Dist.), quoting 1 Anderson's, *Ohio Probate Practice and Procedure*, Section 30.01, at 509 (10th Ed.2009).

{¶ 8} The power of attorney that Holmes drafted gave Johnson and Esquibel the authority to manage, sell, and transfer Svaldi's assets. It also allowed Johnson and Esquibel to open and close bank accounts and sign checks on Svaldi's behalf. Additionally, the power of attorney provided that:

10. The holder of this Power-of-Attorney shall within thirty (30) days of appointment, or as soon thereafter as possible make an inventory of my estate assets and list any claims or obligations which I have or may have, giving me a copy, keeping a copy for herself, and leaving a copy with my attorney, Robert D. Holmes * * *.

11. The holder shall also file an annual account by January 31st of each year and deliver it to Robert D. Holmes, attorney, or any attorney licensed in Ohio, designated by me or by the holder of this Power-of-Attorney for safe-keeping.

{¶ 9} Holmes did not receive an inventory from Johnson or Esquibel within the 30-day period set by the power of attorney. On December 29, 2008, Holmes sent a letter to Johnson reminding her of the obligation to complete the inventory and provide Holmes with a copy of it. Neither Johnson nor Esquibel responded to the letter. Holmes did not again seek an inventory, even though neither Johnson nor Esquibel ever provided him with one. Holmes also failed to receive annual accountings from Johnson and Esquibel on January 31, 2009 and January 31, 2010. Holmes did not follow up with Svaldi, Johnson, or Esquibel to ascertain whether Johnson and Esquibel had completed the annual accountings.

{¶ 10} In March 2010, suspiciously large withdrawals from Svaldi's accounts prompted his bank to contact the Columbus Division of Police. The subsequent police investigation revealed that Johnson and Esquibel had stolen over \$800,000 from Svaldi.

{¶ 11} Svaldi filed a legal malpractice suit against Holmes on March 3, 2011. The complaint alleged that Holmes was negligent by: (1) "failing to verify the fitness of Ms. Johnson and Ms. Esquibel to perform under the [power of attorney]" and (2) "failing to monitor the performance of the holders of the [power of attorney] through receipt and review of the inventory and annual accounting of assets and obligations." (R. 3 at ¶ 11.)

{¶ 12} After the parties completed discovery, Holmes moved for summary judgment. Svaldi opposed the motion. The trial court decided the motion in Holmes'

favor, holding that Holmes owed no duty to Svaldi. The trial court reduced its decision to judgment on February 1, 2012.

{¶ 13} Svaldi now appeals the February 1, 2012 judgment, and he assigns the following error:

I. THE TRIAL COURT ERRED IN HOLDING THAT APPELLEE DID NOT OWE A DUTY TO APPELLANT.

{¶ 14} Summary judgment is appropriate when the moving party demonstrates that: (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 when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 15} By his only assignment of error, Svaldi argues that the trial court erred in concluding that Holmes owed him no duty. We agree.

{¶ 16} To establish a claim for legal malpractice, a plaintiff must demonstrate the existence of an attorney-client relationship giving rise to a duty, a breach of that duty, and damages proximately caused by that breach. *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, ¶ 25. The threshold inquiry is whether the attorney owed the plaintiff a duty of care because if no duty exists, no legal liability may arise. *Fishpaw v. Francisco*, 10th Dist. No. 05AP-861, 2006-Ohio-3450, ¶ 14. Whether an attorney owes the plaintiff a duty normally is a question of law for the court to determine. *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶ 22, citing *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989); *Future Lawn, Inc. v. Steinberg*, 6th Dist. No. L-08-1030, 2008-Ohio-4127, ¶ 30. Generally, a "duty" is an obligation on the part of the defendant to exercise due care toward the plaintiff due to the relationship between the two parties. *Wallace* at ¶ 23; *Fishpaw* at ¶ 14. Determining

whether a particular defendant owes a duty to a particular plaintiff is no easy task because:

There is no formula for ascertaining whether a duty exists. Duty " * * * is the court's 'expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' " Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall.

(Citations omitted.) *Mussivand* at 318.

{¶ 17} Our analysis of whether Holmes owed Svaldi a duty consists of two parts. First, we must determine whether an attorney-client relationship existed between the parties because "[a] claimant may not maintain a cause of action for malpractice against an attorney in the absence of an attorney-client relationship." *Wheeler* at ¶ 32. An attorney-client relationship arises "when a person manifests an intention to obtain legal services from an attorney and the attorney either consents or fails to negate consent when the person has reasonably assumed that the relationship has been established." *Id.* at ¶ 26. Here, neither party disputes that Svaldi was Holmes' client. Svaldi sought out Holmes for his legal expertise, and Holmes provided legal advice and drafted legal documents for Svaldi. Thus, we conclude that an attorney-client relationship existed between Holmes and Svaldi.

{¶ 18} We next turn to the second part of our analysis: the scope of Holmes' representation of Svaldi. "An attorney's duty to his or her client exists in relation to the scope of representation sought by the client and undertaken by the attorney." *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter, L.P.A.*, 148 Ohio App.3d 440, 2002-Ohio-3328, ¶ 34 (10th Dist.). *See also Pierson v. Rion*, 2d Dist. No. CA23498, 2010-Ohio-1973, ¶ 18-19 (examining a written contract for legal services to determine if the duty alleged was within the scope of representation); *Steinberg* at ¶ 33-34 (holding that an attorney had no duty to pursue a potential legal claim for his client when that claim was beyond the express scope of the representation); *Mann v. Clunk*, 5th Dist. No. 2005 00210, 2006-Ohio-1385, ¶ 13 (reversing summary judgment on a legal malpractice claim due to a question of fact regarding whether the scope of the representation included

the service that the plaintiffs claimed the attorney was negligent in not performing); Restatement of the Law 3d, The Law Governing Lawyers, Section 50, Comment d (2000) ("A lawyer must exercise care in pursuit of the client's lawful objectives in matters within the scope of the representation. The lawyer is not liable for failing to act beyond that scope."). Thus, an attorney only owes a duty to a client if the alleged deficiencies in his performance relate to matters within the scope of representation.

{¶ 19} Here, the complaint identified two alleged negligent acts. First, Svaldi claimed that Holmes was negligent in not ascertaining whether Johnson and Esquibel had the qualities necessary to serve as responsible agents. Svaldi, however, does not argue this theory of liability on appeal. We thus conclude that Svaldi has abandoned this theory, and we do not address it.

{¶ 20} Second, Svaldi claimed that Holmes was negligent in not monitoring Johnson and Esquibel through receipt and review of the inventory and annual accountings provided for in the power of attorney. On appeal, Svaldi contends that this duty to monitor arose when Holmes incorporated into the power of attorney the inventory and annual accounting requirements. In opposition, Holmes argues that no duty exists because the power of attorney did not explicitly impose on Holmes an obligation to perform any task. Because paragraphs 10 and 11 of the power of attorney only required action from Johnson and Esquibel, Holmes asserts that those paragraphs did not compel him to do anything on Svaldi's behalf. According to Holmes, his sole duty to Svaldi was to exercise appropriate care in drafting of the power of attorney and revising the will.

{¶ 21} The expert witnesses of both parties testified that provisions such as paragraphs 10 and 11 do not typically appear in powers of attorney. Holmes explained that he incorporated the inventory and accounting scheme into Svaldi's power of attorney because the designated agents were not Svaldi's relatives and, thus, lacked a familial duty to act in Svaldi's best interests. To protect Svaldi, Holmes sought to create transparency about the amount of Svaldi's assets at the origination of the power of attorney and the subsequent expenditure of those assets by Svaldi's agents. This transparency, in combination with the requirement that Holmes or another attorney receive the inventory and/or annual accountings, would allow a third-party to evaluate how Svaldi's agents

were expending his assets. Such an evaluation would serve to identify and stop the potential misappropriation or mismanagement of Svaldi's assets.

{¶ 22} However, for the scheme to fulfill its protective purpose, certain things needed to occur. First, Johnson and Esquibel had to create the inventory and annual accountings. Second, Holmes had to receive the inventory. Third, Holmes had to receive the annual accountings or, if Svaldi or his agents chose to submit the annual accountings to another attorney, that attorney would need the inventory and any previous annual accountings. Fourth, Holmes or the other attorney needed to review and compare the documents.

{¶ 23} We conclude that, by incorporating the inventory and accounting scheme into the power of attorney, Holmes expanded the scope of his representation of Svaldi beyond the mere drafting of legal documents. By setting up the inventory and accounting scheme, Holmes assumed a responsibility to attempt to make it work. Thus, Holmes had a duty to follow up with Johnson and Esquibel regarding their obligation to complete an inventory and the annual accountings and encourage Johnson and Esquibel to comply with the scheme.

{¶ 24} We note that this conclusion is consistent with both expert witnesses' opinions. According to Thomas J. Bonasera, Svaldi's expert witness, Holmes, in essence, set himself up as a "surrogate probate court." Thomas J. Bonasera deposition, at 26. Bonasera continued:

[Holmes] assumed the very heightened duty of responsibility to check on the inventory and * * * the proper accounting of those assets.

So by putting [the inventory and accounting scheme] in [the power of attorney], * * * he assumed some duties that he may not of otherwise have had.

Id. at 26-27. Jay E. Michael, Holmes' expert witness, concurred with Bonasera that Holmes set for himself "a standard * * * higher than the norm practitioner would do because this power of attorney is different than a normal power of attorney." Jay E. Michael deposition, at 22. Michael explained that:

[T]here should be follow-up. I think [Holmes] has an obligation to make certain that * * * the agent[s] [are] doing

what the document says; that the agent[s] [are] fulfilling * * *
their obligations * * *.

Id. at 27.

{¶ 25} Although we concur with Svaldi that Holmes widened the scope of his representation of Svaldi with the inventory and accounting scheme, we do not agree with Svaldi's broad characterization of the duty that resulted. In his appellate brief, Svaldi states that Holmes had a duty to "remain as a steward in the relationship between Mr. Svaldi and the holders of the [power of attorney]" and to "otherwise monitor" Johnson and Esquibel. Brief of Appellant, at 21-22, 27. We conclude that Holmes did not assume an overarching duty to supervise Johnson and Esquibel. Svaldi did not request and Holmes did not suggest that Holmes would serve as the guardian of Svaldi's financial well-being or the general overseer of Svaldi's agents. Moreover, neither justice nor good sense warrants the imposition of such a broad duty in these circumstances.

{¶ 26} Because we have concluded that Holmes owed Svaldi a duty, we sustain Svaldi's assignment of error. Both Svaldi and Holmes would have this court go on to consider the issues of breach and proximate cause. Those issues, however, exceed the parameters of Svaldi's assignment of error. Moreover, the trial court has yet to review either issue. We thus decline to decide them now.

{¶ 27} For the foregoing reasons, we sustain the sole assignment of error. We reverse the judgment of the Franklin County Court of Common Pleas, and we remand this case to that court for further proceedings consistent with law and this decision.

Judgment reversed; cause remanded.

DORRIAN, J., concurs.
FRENCH, J., dissents.

FRENCH, J., dissenting

{¶ 1} I respectfully dissent. I agree with the trial court that the September 2008 power-of-attorney reflected and defined the relationship between Holmes and Svaldi, and neither the parties' relationship nor the document imposed upon Holmes a duty to monitor the actions of Johnson and Esquibel.

{¶ 2} Paragraph 10 placed upon the holder of the power-of-attorney (Johnson or Esquibel) the duty, within 30 days or as soon thereafter as possible, to make an inventory

of Svaldi's assets and obligations, to give a copy to Svaldi, and to send a copy to Holmes. Paragraph 10 imposed no duty upon Holmes. But, even if we were to infer a duty upon Holmes to make a reasonable effort to ensure Johnson's compliance, Holmes met that duty in December 2008 by sending a letter to Johnson and reminding her of the obligation to make an inventory. Prior to that time, according to Holmes, he had no reason to suspect a problem. Because Johnson and Esquibel had followed up with him to ask about safety deposit boxes, and he was communicating with Svaldi on another matter, he knew that "everybody was cooperating, everything seemed to be going okay." (Holmes deposition at 53.) No reasonable reading of paragraph 10 requires more.

{¶ 3} Paragraph 11 placed upon the holder the duty to file an annual account and to deliver it to Holmes "or any attorney licensed in Ohio, designated by me or by the holder of this Power-of-Attorney for safe-keeping." Paragraph 11 imposed no duty upon Holmes. In fact, without Holmes' knowledge, Johnson could have met her duty by preparing the account and delivering it to another attorney.

{¶ 4} Under no circumstances did the Holmes-Svaldi relationship or the power-of-attorney itself require Holmes to review the inventory and account once he received them or to facilitate the evaluation of those documents, as the majority holds. Nor is there evidence that Svaldi asked Holmes to undertake these additional tasks. When asked whether Holmes' reason for including the account requirement was to "assist your client in monitoring" what Johnson and Esquibel might be spending, Holmes responded: "If I was retained to continue working there, I wanted them to have done an inventory, so that I can assist them, sure." (Holmes deposition at 54.) Holmes testified that Svaldi had retained him to handle other matters, but that Svaldi stopped communicating with him. At no time did Svaldi retain Holmes to perform any tasks relating to the inventory or an account, beyond the drafting of a power-of-attorney.

{¶ 5} In the absence of evidence to the contrary, I would decline to infer a duty upon Holmes beyond any duty that may be reflected in the power-of-attorney or the relationship between the parties. Because the majority has determined otherwise, I dissent.
