FILED
12/12/2023
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 19, 2023 Session

KIM WILLIAMS v. THE LEWIS PRESERVATION TRUST

Appeal from the Chancery Court for Rhea County
No. 18-CV-11127 Melissa Thomas Willis, Chancellor

No. E2023-00085-COA-R3-CV

This is a negligent misrepresentation action in which the plaintiff filed suit against the attorney responsible for transferring her mother's assets into an irrevocable trust. The plaintiff alleged that she approved the transfer because she was erroneously advised that the terms of the irrevocable trust would require distribution upon her mother's passing. The trial court granted summary judgment dismissal in favor of the defendant attorney. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J. and FRANK G. CLEMENT, JR., P.J., M.S., joined.

Charles Stephen Michels, II, Nashville, Tennessee, for the appellant, Kim Williams.

William R. Hannah, Chattanooga, Tennessee, for the appellee, the Estate of Norman Eugene Sabin.

OPINION

I. BACKGROUND

Robert and Elizabeth Lewis (collectively "Decedents") had four children, David, William ("Bill"), Robert Jr. ("JR"), and Kim Williams ("Kim" or "Plaintiff").[1] Robert passed away in March 2015, and Elizabeth passed away in November 2016. The children

[1] Our reference to those in the Lewis family by first name is for clarity purposes only.

are now adults and are involved in a dispute over the distribution of Elizabeth's estate. This is the second appeal to this court involving matters pertaining to the distribution of the estate. *See Williams v. Lewis Preservation Trust*, No. E2022-01034-COA-R3-CV, 2023 WL 4542621 (Tenn. Ct. App. Jul. 14, 2023) ("*Williams I*").

A panel of this court provided the following background pertinent to this appeal:

> While alive, [Decedents] owned and operated a rental property business which the parties refer to as "Lewis Rentals." They also owned real property associated with that business.
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> In 2012, Robert and Elizabeth executed several documents. On January 16, 2012, they created the Revocable Family Wealth Trust (or, the "Lewis Living Trust"). All four children were listed as beneficiaries; however, the trust provided that upon distribution, Kim's share must be placed in trust and overseen by her siblings. [Decedents] were the original trustees of the Lewis Living Trust, while sons David, JR, and Bill were named successor trustees in that order. [Decedent's] attorney, Norman Sabin, was made special co-trustee. The Lewis Living Trust contained a no-contest clause.
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> [Decedents] also executed documents transferring Lewis Rentals and the real property on which the business sits into the Lewis Living Trust. The Lewis Living Trust provided that upon the death of either Robert or Elizabeth, the surviving trustor would make two separate allocations from the trust: the surviving spouse's contributive share would be transferred to the Administrative Survivor's Trust ("Survivor's Trust"), and the deceased spouse's contributive share would be transferred to the "Family Trust." . . .
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> * * *
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> Also, on January 16, 2012, Elizabeth executed a Property Power of Attorney (the "POA") naming Robert as her attorney-in-fact. David, JR, and Bill were then listed as Robert's successors. On November 2, 2013, Robert wrote a handwritten letter, purportedly to David. Regarding Lewis Rentals, the letter provides, "after I am gone let Bill run it and if [Elizabeth] needs the money give her half of it otherwise let Bill keep most if not all of it." While the parties do not seem to dispute that Robert wrote the letter, it is unsigned. Additionally, Robert made handwritten changes on the Lewis Living Trust in 2014, amending the provisions regarding Kim's distribution. The handwritten changes specifically provide that, as opposed to having her distribution placed in trust as initially indicated, Kim is to be "treated exactly as the other three for distribution." Both Robert and Elizabeth signed these handwritten amendments to the Lewis Living Trust; accordingly, the parties

agree the handwritten and signed changes on the Lewis Living Trust were effective amendments.

Robert passed away on March 22, 2015. Upon Robert's death, son David became Trustee of the Lewis Living Trust as well as Elizabeth's attorney-in-fact pursuant to the 2012 POA. While the timeline of Elizabeth's decline is unclear from the record, it is undisputed that by the time of Robert's death in 2015, she lacked capacity and was in a memory-care facility.

Following Robert's death, David met with his parents' attorney, Mr. Sabin, to assist with administering the Lewis Living Trust and managing Elizabeth's remaining assets which, per the Lewis Living Trust, were to be placed in the Survivor's Trust. On the advice of Mr. Sabin, David used the POA to create an irrevocable trust, the "Lewis Preservation Trust" (the "Preservation Trust"). The assets of the Survivor's Trust, which contained Elizabeth's contributive share of the Lewis Living Trust, were placed in the Preservation Trust. As such, the Preservation Trust effectively replaced the Survivor's Trust. According to David and Mr. Sabin, this was done primarily to shelter Elizabeth's remaining assets in the event that Elizabeth required government assistance in her final years. On September 3, 2015, a staff member from Mr. Sabin's office emailed all four Lewis children explaining that Mr. Sabin's office was "working on creating an irrevocable trust for [Elizabeth]" incorporating Robert's handwritten changes. The staffer asked that all four beneficiaries sign off on the changes, which they did.

The Preservation Trust was created on October 19, 2015, and signed by David as both Elizabeth's POA and as Trustee of the Preservation Trust. The Preservation Trust included Lewis Rentals, the real property on which Lewis Rentals sits, and a bank account. Bill was also named as a trustee of the Preservation Trust, and both Elizabeth and Bill were made lifetime income beneficiaries of Lewis Rentals. As relevant, the Preservation Trust also provided Bill a right of first refusal to operate and profit from Lewis Rentals[.]

* * *

Article Four of the Preservation Trust then provides that the residue of the trust is to be distributed equally to the four beneficiaries. The Preservation Trust also contained a no-contest clause.

Elizabeth passed away on November 15, 2016. Following her death, the relationship between the siblings deteriorated. Emails contained in the record reflect that David's understanding of the Preservation Trust was that

> "the business will continue to reside in the Lewis Preservation Trust, and will continue to be run by Bill as long as he is willing to put up with it. If, when, the business is sold, we will all split the proceeds." On the other hand, Kim's position was, essentially, that all of the remaining assets were to be immediately liquidated and split equally between the four siblings.

Williams I, 2023 WL 4542621, at *1-4 (footnote omitted).

Plaintiff filed suit against the Preservation Trust, the Lewis Living Trust, David, and Bill (collectively "Respondents"). She alleged as follows:

> (1) the terms of the Lewis Living Trust did not allow the creation of the Preservation Trust because David used a general power of appointment to create same; 2) David breached his fiduciary duty of good faith in creating the Preservation Trust and naming Bill a trustee; and 3) David breached his fiduciary duties by failing to produce accountings for the Preservation Trust and the Lewis Living Trust.

2023 WL 4542621, at *4. Respondents brought a counter-claim against Plaintiff, requesting enforcement of the no-contest clauses in both the Preservation Trust and the Lewis Living Trust to exclude Plaintiff from any distributions. The trial court ruled in favor of the Respondents, holding that David did not violate any fiduciary duties in his creation of the Preservation Trust as Elizabeth's attorney-in-fact. The court also enforced the no-contest provisions against Plaintiff, disqualifying her from any future distributions.

Upon appeal to this court, we affirmed the trial court's conclusion that David was within his power as Elizabeth's attorney-in-fact to create the Preservation Trust; however, we ultimately held that genuine issues of material fact remained regarding whether David "gave due consideration to Elizabeth's estate plan and known desires by giving Bill a lifetime right to operate Lewis Rentals and keep the profits therefrom." *Id.*, at *13. We vacated the enforcement of the no contest provisions and directed the trial court to consider David's alleged failure to provide sufficient accountings upon remand.

During the pendency of her claims against Respondents, Plaintiff sought permission to file an amended petition against Mr. Sabin. The trial court permitted an amendment to her petition to pursue her claim against Mr. Sabin in his individual capacity but did not permit an amendment to pursue claims against his law firm.[2] In the amended petition, Plaintiff asserted a claim against Mr. Sabin for breach of a fiduciary duty to a non-client,

[2] Plaintiff's claim against Mr. Sabin was considered separately from her claims against Respondents.

which was also set forth as negligent misrepresentation.[3] She alleged that between August 27, 2015, and October 23, 2015, Mr. Sabin never advised her that she was not his client or that her interest conflicted with David's. She asserted that she received an email on September 3, 2015, from Mr. Sabin's office advising her of the creation of the Preservation Trust but assuring her that the terms would follow that of the Lewis Living Trust and Robert's additional handwritten notes. The email further advised that

> I will make sure the irrevocable trust that we are creating for your mother tracks the revocable trust your parents previously created including the changes your father handwrote on the original trust documents. I just need for you all to sign off saying that you are not contesting the changes your father wrote on the original trust documents. I have attached a document for you all to sign and get notarized. . . . I have also included copies of the pages of the original trust documents that he wrote on. I've included them because in the document you'll sign and notarize [and] you'll verify that the handwriting is in fact your father's handwriting . . . I'm doing this to ensure that we are complying with the law and to add an extra layer of protection just in case the issue of your father writing on the original trust documents were to reach a court room.

Plaintiff alleged that an unsigned letter that reflected Robert's intent to allow Bill to run Lewis Rentals "as long as he desired" was not included in the documents for her review. She claimed that Mr. Sabin made this change without her approval or otherwise advising her that the letter existed. She claimed that after the Preservation Trust was finalized on October 19, 2015, Mr. Sabin's employee informed her, on October 23, that she was not his client and that he could no longer speak or meet with her. However, on October 26, Mr. Sabin's employee also informed her that the distributions would be made outright upon Elizabeth's death. This email provided, in pertinent part, as follows:

> I do remember you wanting to talk about how to protect your distributions when they are made. This is a good idea since upon your mother's death the distributions are to be made outright and are not to be put in Trust. Although I could, with an informed consent waiver to meet with an adverse party signed by both you and David, meet with you and discuss these things it would actually make more sense for you to meet with an attorney in Colorado. I am not licensed in Colorado and thus cannot practice law there, but furthermore estate planning laws differ from state to state and therefore you would be better off discussing your estate plan with an attorney in Colorado who is familiar with its laws.

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[3] Plaintiff also pursued claims of legal malpractice and the unauthorized practice of law. She later abandoned these claims, which were ultimately dismissed by the trial court with prejudice.

In her complaint, Plaintiff asserted that she could have acted prior to the finalization of the trust on October 19 and avoided costly and extensive litigation had she been advised of the true nature of the changes providing a present and future interest in Lewis Rentals to Bill. She notes that any claim to set aside the Preservation Trust is subject to the following no contest clause:

> If any beneficiary shall in any manner, directly or indirectly, attempt to contest or oppose the validity of this Trust Agreement, including any amendments thereto, or if any beneficiary commences or prosecutes any legal proceedings to set this Trust Agreement aside, then in such event such beneficiary shall forfeit his or her share, cease to have any right or interest in the Trust Property, and shall be deemed to have predeceased me without surviving issue.

On October 15, 2021, Mr. Sabin moved for summary judgment, claiming that no genuine issues of material fact remained when (1) he did not make any misrepresentations; (2) any reliance upon his statements was unreasonable; (3) Plaintiff did not repose trust or confidence in him; and (4) he did not have the ability to assert dominion and control over her. In support of his motion, he attached numerous documents and affidavits, including portions of Plaintiff's deposition testimony, in which she detailed her educational background and professional work history. In her deposition, she confirmed that she graduated from the University of Tennessee Knoxville with a Bachelor of Science in accounting in 1986. She was hired upon graduation by a large accounting firm, Ernst & Whinney,[4] as staff auditor. Thereafter, she worked for Blue Cross & Blue Shield as an insurance specialist and then at Morgan Stanley as a financial advisor. While serving as a financial advisor, she secured two professional licenses as an insurance producer.

Plaintiff acknowledged in her deposition that after her father died, Mr. Sabin advised her to hire an attorney to assist her in protecting her inheritance for the benefit of her son in the event that she passed away. She acknowledged that Mr. Sabin never sent her a bill for his communications with her and that he only billed the estate for his time spent. She admitted that she disagreed with him on occasion and believed he did not pay attention to details in his handling of the Lewis Living Trust. When asked multiple times why she believed Mr. Sabin owed her a fiduciary duty, she finally responded as follows:

> My basis was my conversation with my father for his -- just generally in this realm of the world seeing things happen and not knowing any details, it also seemed to make sense that that's what my father expected and that's what I expected. So, my basis was really what my father was telling me.

Mr. Sabin also attached an affidavit in which he attested as follows:

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[4] Ernst & Whinney later merged and became what is now known as Ernst & Young.

> On at least one occasion, I met with Kim Williams in my office to discuss the status of the administration of her parents' estates. I told her that I was meeting with her because I had the permission of David Lewis, the Trustee of the Lewis Living Trust, my client. I made sure that she understood that she was not my client and that I was not acting and could not serve as her attorney.
>
> In September or October 2015, Kim Williams asked that Sabin & Associates, PLLC and I undertake to represent her in connection with her own estate planning. When she made this request, she acknowledged that we did not and could not represent her in her capacity as a beneficiary of the Trusts, but wanted to engage us to represent her after the distributions from the Trusts were completed and the probate proceedings were concluded. We declined. In so doing, we explained to her that we could not undertake to represent her because, as a beneficiary of the Trusts, she was an adverse party of a current client. We also advised her that she should seek counsel in Colorado, the state of her residence.

The action proceeded to a hearing on the motion for summary judgment, after which the court ruled in favor of Mr. Sabin,[5] holding that Plaintiff's belief that she was owed a duty was based upon her conversation with her late father and not based upon any representations made by Mr. Sabin. The trial court noted that any reliance upon Mr. Sabin's advice was unreasonable when he advised Plaintiff to hire her own counsel. This appeal followed.

II. ISSUE

We consolidate and restate the issues raised on appeal into the following dispositive issue: Whether the court erred in granting summary judgment dismissal of the plaintiff's misrepresentation claim.

III. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

[5] Mr. Sabin died during the pendency of his motion. His estate was ultimately substituted as the respondent to Plaintiff's remaining claim.

When a party moves for summary judgment but does not have the burden of proof at trial, the moving party must either submit evidence "affirmatively negating an essential element of the nonmoving party's claim" or "demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015). "[I]f the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)).

When a party files and properly supports a motion for summary judgment as provided in Rule 56, the nonmoving party "'may not rest upon the mere allegations or denials of [its] pleading.'" *Rye*, 477 S.W.3d at 265 (quoting Tenn. R. Civ. P. 56.06). Rather, the nonmoving party must respond and produce affidavits, depositions, responses to interrogatories, or other discovery that "set forth specific facts showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06; *see also Rye*, 477 S.W.3d at 265. If the nonmoving party fails to respond in this way, "summary judgment, if appropriate, shall be entered against the [nonmoving] party." Tenn. R. Civ. P. 56.06.

We review a trial court's summary judgment determination de novo, with no presumption of correctness. *Rye*, 477 S.W.3d at 250. Therefore, "we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Id.* In reviewing a summary judgment motion on appeal, "we are required to review the evidence in the light most favorable to the nonmoving party and to draw all reasonable inferences favoring the nonmoving party." *Shaw v. Metro. Gov't of Nashville & Davidson Cnty.*, 596 S.W.3d 726, 733 (Tenn. Ct. App. 2019) (citations and quotations omitted).

IV. DISCUSSION

Plaintiff argues on appeal that the record does not establish Mr. Sabin advised her to hire an attorney to protect her interests in the creation of the Preservation Trust. Rather, Mr. Sabin advised her to hire counsel to protect any future inheritance for the benefit of her son in the event of her passing. She asserts that Mr. Sabin, through his associate, assured her numerous times that the Preservation Trust would follow the terms of the Lewis Living Trust, e.g., that the assets would be distributed upon Elizabeth's passing. She provides that had she been apprised of the actual terms of the Preservation Trust, she could have challenged said terms prior to Elizabeth's passing. Instead, she was provided with a copy of the Preservation Trust well after Elizabeth passed and approximately 20 months after its creation in violation of Tennessee Code Annotated section 35-15-813(b)(2), which provides that either a copy of the trust documents or an abstract of the provisions contained

therein must be provided within 60 days of the funding of the trust.

The Tennessee Supreme Court has provided the following guidance regarding the essential elements of a misrepresentation claim:

> Tennessee has adopted Section 552 of the Restatement (Second) of Torts "as the guiding principle in negligent misrepresentation actions against other professionals and business persons." *Bethlehem Steel Corp. v. Ernst & Whinney*, 822 S.W.2d 592, 595 (Tenn. 1991). Section 552 provides, in pertinent part, as follows:
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> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
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> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
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> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. Restatement (Second) of Torts, § 552 (1977).

Robinson v. Omer, 952 S.W.2d 423, 427 (Tenn. 1997). In discussing the requirements for recovery under Section 552, our Supreme Court has provided

> that liability in tort will result, despite the lack of contractual privity between the plaintiff and defendant, when:
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> (1) the defendant is acting in the course of his business, profession, or employment, or in a transaction in which he has a pecuniary (as opposed to gratuitous) interest; and
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> (2) the defendant supplies faulty information meant to guide others in their business transactions; and
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> (3) the defendant fails to exercise reasonable care in obtaining or

communicating the information; and

(4) the plaintiff justifiably relies upon the information.

Id. (emphasis added); *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 431 (Tenn. 1991); *accord Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 130 (Tenn. 1995). Section 552 is the most widely adopted standard of negligent misrepresentation in attorney liability cases and economic negligence cases generally. *See* Jay M. Feinman, "Attorney Liability to Nonclients," 31 Tort & Ins. L.J. 735, 742 (1996). The Tennessee Supreme Court has recognized that an attorney may be liable for misrepresentations absent any attorney-client relationship. *See Collins v. Binkley*, 750 S.W.2d 737, 739 (Tenn. 1988); *Stinson v. Brand*, 738 S.W.2d 186, 190 (Tenn. 1987).

Viewing the evidence in the light most favorable to Plaintiff, the record reflects that Plaintiff was advised prior to the creation of the Preservation Trust to hire counsel to protect her own interests. She likewise confirmed that Mr. Sabin did not bill her for their meetings and correspondence but that Mr. Sabin billed the estates for his time through David. The statements complained of, e.g., that the assets would be distributed upon Elizabeth's passing and not placed in a trust, were also not erroneous. The Preservation Trust held Elizabeth's tangible personal property, bank account, the property on which Lewis Rentals operated, and Lewis Rentals. The Preservation Trust provided Bill with a right of first refusal to operate Lewis Rentals, which would remain in the current Preservation Trust if he exercised his option. However, Elizabeth's tangible personal property and other funds were subject to distribution upon her passing, along with Lewis Rentals and the property in the event that Bill denied his right of first refusal. Neither Mr. Sabin nor his employee could foresee whether Bill would accept his right of first refusal.

While the existence of the right of first refusal was an important fact, Plaintiff did not testify that she "made a reasonable inquiry into the [terms of the Preservation Trust], that [s]he was denied the opportunity to investigate, or that [s]he could not have learned the [pertinent fact] through reasonable diligence" prior to the creation of the Preservation Trust. *Rountree v. Chowan Cnty*, 796 S.E.2d 827, 832 (N.C. App. 2017); *see also McNeill v. Nofal*, 185 S.W.3d 402, 411 (Tenn. Ct. App. 2005) (finding no justifiable reliance when the plaintiff failed to investigate). Plaintiff even testified that she did not trust Mr. Sabin's work, which she characterized as "sloppy." Accordingly, we hold that, given Plaintiff's education, employment history, and understanding of such matters, the material facts simply do not support Plaintiff's claim that she justifiably relied upon the information provided by Mr. Sabin.

V. CONCLUSION

For the reasons stated above, we affirm the decision of the trial court. The case is remanded for such further proceedings as may be necessary. Costs of the appeal are taxed to the appellant, Kim Williams.

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JOHN W. MCCLARTY, JUDGE