IN THE COURT OF APPEALS OF IOWA

No. 9-1060 / 09-0923
Filed February 24, 2010

LEWIS H. CONVERSE,
Plaintiff-Appellant,

vs.

JAY H. HONOHAN and HONOHAN, EPLEY, BRADDOCK and BRENNEMAN, L.L.P.,
Defendants-Appellees.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs, Judge.

The plaintiff appeals from a district court ruling entering summary judgment in favor of the defendants in a legal malpractice action. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellant.

Brent B. Green and Kirk W. Bainbridge of Duncan, Green, Brown & Langeness, Des Moines, for appellees.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Potterfield, J. takes no part.

DOYLE, J.

Lewis Converse appeals from a district court ruling entering summary judgment in favor of attorney Jay Honohan and Honohan, Epley, Braddock, and Brenneman, L.L.P. in a legal malpractice action. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

The summary judgment record reveals the following undisputed facts: In April 2002, Jacqueline Duncan executed a will leaving $50,000 to a church and $50,000 to a hospital. She left the remainder of her estate to Ghezwa Duncan Reames, her granddaughter, and Lewis Converse, her nephew, in equal shares. The will was prepared by Duncan's lawyer, Jay Honohan.

On March 3, 2003, Honohan received a telephone call from Converse informing him that Duncan was in the hospital and was not doing well. He spoke to Converse's wife, Cindy, several days later. She asked him to prepare a power of attorney and a codicil to Duncan's will creating a spendthrift trust for Converse, who was experiencing financial difficulties.[1] Following that conversation, Honohan prepared a new will for Duncan, which was the same as her original will except that it created a spendthrift trust for Converse. Honohan also prepared a power of attorney naming Duncan's sister, Shirley Converse, as attorney-in-fact.

On April 2, Honohan brought the new will and power of attorney to the hospital for Duncan's review. Honohan's notes from that meeting indicate Converse told him that he should have been named as Duncan's attorney-in-fact, rather than his mother, Shirley. His notes also indicate Converse informed him

[1] Converse filed for bankruptcy on March 13, 2003.

Duncan wanted the bequests to the church and hospital removed, although Converse denies ever telling Honohan that. Honohan returned to his office and prepared a second draft of the will, which deleted the bequests to the church and the hospital and again created a spendthrift trust for Converse. He also corrected the power of attorney to name Converse as Duncan's attorney-in-fact.

Honohan returned to the hospital to visit with Duncan on April 3. His notes from that meeting indicate Duncan was "very weak and could not talk." In the presence of Converse, Cindy, and Shirley, Honohan explained the power of attorney to Duncan and, because she was unable to sign her own name, helped her mark that document with an "X." He then attempted to explain the new will with the spendthrift trust provision, but Duncan "shook her head no constantly."

Honohan went back to the hospital on April 9. This time, he asked Duncan's family to wait outside her hospital room while he met with her. He then tried to talk to Duncan about the details of the new will, but Duncan's "only response was to vigorously grit her teeth and shake her head no." Honohan left her hospital room and informed Converse that she would not sign the new will.

Duncan passed away on April 25, 2003. Her original will was probated without contest. Converse then sued Honohan and his law firm for malpractice,[2] alleging Honohan "failed to see to the execution by Ms. Duncan of a spendthrift trust, or take other steps to protect [Converse's] inheritance from his creditors." As a result, Converse alleged Duncan's "assets, which were intended by Ms. Duncan to be distributed to a spendthrift trust, so that Plaintiff would obtain

[2] His amended petition also contained a claim for intentional interference with an inheritance, which was dismissed by the district court on summary judgment. Converse has not challenged that ruling on appeal.

the benefit of the inheritance, were instead distributed to Plaintiff's bankruptcy trustee, and then distributed to his creditors."

Honohan filed a motion for summary judgment, which was granted by the district court. The court determined that although Honohan owed a duty of care to Converse as a direct and intended beneficiary of Duncan, that duty was not breached because "no evidence has been offered that Mrs. Duncan herself ever expressed to Mr. Honohan her alleged desire to have a spendthrift trust." Converse appeals.

II. Scope and Standards of Review.

We review rulings on summary judgment motions for correction of errors of law. *Estate of Leonard v. Swift*, 656 N.W.2d 132, 138 (Iowa 2003).

> If the record shows no genuine dispute of a material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. In assessing whether summary judgment is warranted, we view the entire record in a light most favorable to the nonmoving party. We also indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question.
>
> A fact question does not arise, however, when the only dispute concerns the legal ramifications flowing from undisputed facts.

Id. (citations omitted).

III. Discussion.

"An attorney is generally liable for malpractice only to a client." *Ruden v. Jenk*, 543 N.W.2d 605, 610 (Iowa 1996). The reasons for this rule include the following: (1) "if liability is permitted to a third party without regard to privity, the parties to a contract would lose control of their agreement"; (2) "the duty to the general public resulting from the abandonment of the privity requirement would

place a potentially unlimited burden on lawyers"; (3) "the rule of privity 'preserves an attorney's duty of loyalty to and effective advocacy for the client'"; (4) "adding responsibilities to nonclients creates the danger of conflicting duties"; and (5) "a relaxation of the strict privity rule would imperil attorney-client confidentiality." *Estate of Leonard*, 656 N.W.2d at 144-45 (citations omitted).

Despite those concerns, our supreme court has recognized that a third-party claim may be allowed "under severely limited circumstances." *Id.* at 145; *see also Holsapple v. McGrath*, 575 N.W.2d 518, 521 (Iowa 1998) (stating the rule is "carefully limited so as to not 'expose lawyers to a virtually unlimited potential for liability'" (citation omitted)). One such circumstance arises where the malpractice claimant is "a direct and intended beneficiary of the lawyer's services." *Ruden*, 543 N.W.2d at 610.

That rule is derived from the case of *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987), in which the court held "a lawyer owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments." The "thrust of any action brought by such an individual, whether couched in terms of contract or tort, necessarily will center on the existence and breach of this duty of care." *Schreiner*, 410 N.W.2d at 682 (citations omitted). Because Honohan does not contest the existence of such a duty, our inquiry will focus on whether the district court correctly held the undisputed facts established there was no breach.

The court in *Schreiner* explained that

> a cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence the testator's intent *as expressed in the testamentary instruments* is frustrated in whole or

> in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized.
>
> If the testator's intent, *as expressed in the testamentary instruments*, is fully implemented, no further challenge will be allowed. Thus, a beneficiary who is simply disappointed with what he or she received from the estate will have no cause of action against the testator's lawyer.

Id. at 683 (emphasis added) (internal citations omitted).

That standard presumptively limits our inquiry regarding Duncan's testamentary intent to what is expressed in her uncontested, probated, and therefore valid, will. Nothing in the will indicates Duncan intended to protect Converse's interest in her estate from his creditors through a spendthrift trust provision.

Even if we could go beyond the terms of the 2002 will, there is no evidence that Duncan instructed her attorney, Honohan, to establish a spendthrift trust provision for Converse. Converse and his wife claim they had private conversations with Duncan where she approved the concept. But Duncan refused to a sign a will containing such a provision when it was presented to her by Honohan on two different occasions at Converse's direction. *See Shivvers v. Hertz Farm Mgmt., Inc.*, 595 N.W.2d 476, 479 (Iowa 1999) ("[T]he intent to benefit required for a third-party beneficiary relationship cannot arise if the instructions from the lawyer's client conflict with the wishes of the third-party claimant."). Converse argues Duncan "react[ed] negatively" to the new will because it removed the specific bequests she had made to the church and hospital. Although we indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question, *Estate of Leonard*, 656 N.W.2d at 138, an inference is not legitimate if it is based on speculation or

conjecture. *Lewis v. State ex rel. Miller*, 646 N.W.2d 121, 124 (Iowa Ct. App. 2002). Any inference in this case that Duncan's intent regarding Converse's inheritance was other than what was expressed in her will and in her meetings with Honohan would be based on speculation and conjecture, and thus not a legitimate inference precluding summary judgment. An attorney who follows the client's expressed wishes should not be found liable in malpractice, even if the beneficiary claims to have had a separate discussion where the client requested something different.

As there is no evidence any act by Honohan frustrated Duncan's intent "as expressed in the testamentary instruments," *Schreiner*, 410 N.W.2d at 683, or in her meetings with him, we conclude Converse's legal malpractice cause of action against Honohan must fail. *Compare id.* at 683-84 (finding cause of action would survive a motion to dismiss where will and codicil drafted by counsel specifically devised one-half of certain real property to plaintiff, and then same counsel brought a partition action that resulted in the sale of the subject property, causing the devise to adeem) *with Holsapple*, 575 N.W.2d at 521 (holding in summary judgment proceeding that cause of action failed where will did not demonstrate the testator intended to gift the plaintiffs any property). The judgment of the district court is affirmed.

AFFIRMED.