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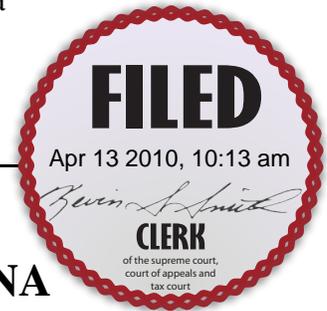
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**IN THE
COURT OF APPEALS OF INDIANA**

WENDY G. THOMAS, as Personal Representative)
of the Estate of WILLIAM T. DOLLARD,)
Deceased,)

Appellant-Plaintiff,)

vs.)

CAROL SPARKS DRAKE and PARR, RICHEY,)
OBREMSKEY & MORTON)

Appellees-Defendants.)

No. 06A05-0907-CV-427

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Matthew C. Kincaid, Judge
Cause No. 06D01-0705-CT-206

APRIL 13, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Plaintiff-Appellant Estate of William Dollard by Wendy Thomas, personal representative (“Estate”), appeals the trial court’s entry of summary judgment in favor of Defendants-Appellees Carol Sparks Drake (“Drake”) and Parr, Richey, Obremskey & Morton (“Law Firm”) (collectively “Appellees”).

We affirm.

ISSUE

Estate presents one issue for our review: whether the trial court erred by granting summary judgment in favor of the Defendants-Appellees.

FACTS AND PROCEDURAL HISTORY

William and Peggy Dollard executed joint and contractual wills on August 25, 1995. William and Peggy both had children from prior marriages, but they had no children together. Pursuant to their wills, upon the death of the surviving spouse their property would be divided into two equal shares. One share would then be divided between Peggy’s children, and the other share would be divided between William’s children. The wills of William and Peggy contained an identical paragraph VI, as follows:

ITEM VI

I hereby acknowledge the fact that at this time my [wife/husband] and I are executing Wills in which each of us is the recipient of the other’s estate with similar disposition of our property in the event of one of our respective

deaths. The execution of these Wills shall be considered as a contract between us. In the event of either of our respective deaths, the surviving party shall be prohibited from revoking, amending or altering such surviving party's will in violation of such contract.

Appellant's Appendix pp. 9 and 13.

Peggy died on May 11, 1997. Following Peggy's death, William employed Drake to assist him with the legal matters of Peggy's estate. During Drake's representation of William, Peggy's children raised concerns about William's compliance with the restrictions of the couple's joint wills. Based upon these concerns, Peggy's children secured judicial oversight of Peggy's estate in the Brown Circuit Court with the appointment of a special administrator and, later, the imposition of a constructive trust and appointment of a constructive trustee. In March 2005, the constructive trustee reported to the Brown Circuit Court that he was unable to complete an accurate inventory and accounting of Peggy's estate because he was not able to obtain the necessary information.

William died on May 12, 2005. Peggy's daughter, Wendy Thomas, was appointed personal representative of William's estate, and on May 11, 2007, the estate filed a complaint against Drake and Law Firm alleging legal malpractice. The basis of the malpractice action is William's alleged waste and distribution of assets after Peggy's death due to Drake's alleged failure to advise or proffer of negligent advice. It is further alleged that such dissipation breached the joint and contractual wills of William and Peggy. Drake and Law Firm subsequently filed a motion for summary judgment, which

Estate opposed. Following a hearing, the trial court denied the motion. However, in a later hearing, the trial court reconsidered its earlier ruling and granted summary judgment in favor of Drake and Law Firm on May 28, 2009. It is from this order of the court that Estate now appeals.

DISCUSSION AND DECISION

Estate contends that the trial court erred by entering summary judgment in favor of Drake and Law Firm. On appeal from a grant or denial of summary judgment, our standard of review is identical to that of the trial court: whether there exists a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Winchell v. Guy*, 857 N.E.2d 1024, 1026 (Ind. Ct. App. 2006); *see also* Ind. Trial Rule 56(C).

On appeal, the trial court's grant of summary judgment is clothed with a presumption of validity. *Monon Corp. v. Townsend, Yosha, Cline & Price*, 678 N.E.2d 807, 809 (Ind. Ct. App. 1997), *trans. denied*. Appellate review of a summary judgment motion is limited to those materials designated to the trial court. *Pond v. McNellis*, 845 N.E.2d 1043, 1053 (Ind. Ct. App. 2006), *trans. denied*. All facts and reasonable inferences drawn therefrom are construed in favor of the non-movant. *Id.* The party appealing the judgment carries the burden of persuading this court that the trial court's decision was erroneous. *Wells v. Auto Owners Ins. Co.*, 864 N.E.2d 356, 358 (Ind. Ct. App. 2007). More specifically, provided that Appellees negate at least one element of Estate's legal malpractice claim, the trial court's grant of summary judgment will be

upheld. *See Van Kirk v. Miller*, 869 N.E.2d 534, 541 (Ind. Ct. App. 2007), *trans. denied* (stating that as long as attorney and law firm negated at least one element of client's legal malpractice claim, trial court's grant of summary judgment to attorney and law firm would be upheld on appeal).

Here, the trial court stated in its order that there was a dispute surrounding the advice that was given by Drake and/or the inferences to be drawn from that advice. The court therefore concluded that summary judgment was not appropriate with regard to whether Drake negligently advised William. Nevertheless, in granting summary judgment for Drake, the court further determined that William's estate was not damaged by Drake's alleged negligence and that the real parties seeking redress in this action are the beneficiaries of William's estate rather than the estate itself.

The complaint filed by Estate states a claim for legal malpractice against Drake and Law Firm based upon Drake's representation of William following the death of Peggy and continuing until the death of William. The malpractice claim is William's claim against Drake. However, because William is deceased, the claim may be brought on behalf of William's estate by the estate's personal representative. *See Ind. Code* § 29-1-13-3.

In a legal malpractice action, the plaintiff-client (here, William) must prove four elements: (1) duty of the attorney (employment by the plaintiff-client); (2) breach of the duty (failure of the attorney to exercise ordinary skill and knowledge); (3) proximate cause; and (4) damages (loss to the plaintiff). *Gilman v. Hohman*, 725 N.E.2d 425, 428

(Ind. Ct. App. 2000), *trans. denied*. The crux of the malpractice action is that Drake, either by negligent advice or by failing to give any advice, caused William to waste or distribute his assets, thereby causing him to breach his joint and contractual will with Peggy. Although Estate has designated numerous items of evidence in opposition to Drake's motion for summary judgment, none of the designated evidence shows any damages or loss to William, and subsequently his estate, as a result of the alleged legal malpractice.

We pause to note that the loss supposedly experienced by William is distinct from any loss the beneficiaries of William's estate may have suffered due to his spending and/or use of his assets after the death of Peggy in alleged violation of their joint and contractual wills. However, the loss at issue in this complaint is strictly William's loss he supposedly suffered as a result of the alleged legal malpractice of Drake and Law Firm. The situation might have been different if the beneficiaries, dissatisfied with the reduced value of the estate assets, had brought a claim against William's estate for his alleged breach of the couple's joint and contractual wills. In that scenario, if a judgment were entered against Estate based upon William's alleged breach of the wills, Estate might have suffered damages in some amount. Those damages might then serve as the basis for an action by Estate against Drake and Law Firm for causing William to breach due to negligent or non-existent legal advice. However, this is not the situation at hand.

Estate cannot establish that William suffered any damages, which it must do to recover under the claim of legal malpractice as set forth in the complaint. William spent

money and used assets during his lifetime without any resulting loss to himself. Therefore, the trial court did not err in granting summary judgment for the Appellees because Estate failed to show any damages caused by Appellees' alleged malpractice. *See Van Kirk*, 869 N.E.2d at 541 (stating that as long as appellees negate at least one element of appellant's legal malpractice claim, trial court's grant of summary judgment will be upheld).

CONCLUSION

Based upon the foregoing discussion and authorities, we conclude that the trial court properly entered summary judgment in favor of Appellees.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.