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Court of Appeals Distinguishes Legal Malpractice and Breach of Fiduciary Duty

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Division I of the Court of Appeals in *Paulsell v. Gaffney*, 2016 WL 7470061 (Wn. App. Dec. 19, 2016) (unpublished), recently underscored the differences between claims for legal malpractice and breach of fiduciary duty that can arise out of the same set of facts.

The lawyer in *Paulsell* had prepared a trust for a client in 1987 as part of the client's estate planning. Later, the client on his own wrote a new will that created uncertainty when the client died about which assets were trust assets and which were estate assets. The client's self-drawn will also named his widow and a son from a previous marriage as co-trustees. The widow and the son sought the lawyer's assistance in untangling the two sets of estate planning documents. The lawyer prepared a new trust and a "dispute resolution agreement" to address conflicts between the will and original trust. Later, a dispute arose between the widow and the son over the management of the second trust. A lawsuit followed in which the widow ultimately prevailed— incurring approximately \$500,000 in legal fees in the process.

The widow then sued the lawyer for both legal malpractice and breach of fiduciary duty. The legal malpractice claim was predicated on the substantive work that allegedly led to the dispute and sought the attendant litigation

expenses as damages. The breach of fiduciary duty claim, in turn, was framed around an asserted conflict by allegedly representing multiple parties in the preparation of the new trust (and related work) and sought disgorgement of the fees the lawyer had collected for that work.

The lawyer obtained summary judgment on both claims in the trial court. The Court of Appeals affirmed on the legal malpractice claim but reversed on the breach of fiduciary duty claim.

On the legal malpractice claim, the Court of Appeals held that the litigation expenses were not recoverable as consequential damages under the so-called “ABC Rule.” Under that rule, attorney fees are only recoverable as consequential damages in a legal malpractice case if the lawsuit giving rise to the fees was against someone unconnected to the original legal work at issue—in other words, the legal work involved triggered litigation with a third party. In this instance, the litigation was between parties for whom the work was done—the widow and the son—rather than a third party. The Court of Appeals, therefore, concluded that the ABC Rule did not apply and affirmed the dismissal of the legal malpractice claim for want of recoverable damages.

On the breach of fiduciary duty claim, the Court of Appeals found that there were sufficiently disputed facts on the conflict issue that precluded

summary judgment and reversed on that basis. The widow contended that the lawyer had improperly represented both her and the son while the lawyer argued that he only represented the trust. The Court of Appeals remanded the breach of fiduciary duty claim for resolution of the disputed facts at trial. In doing so, the Court of Appeals noted that a conflict under the RPCs can reflect a breach of the underlying fiduciary duty of loyalty and that disgorgement of the fees earned on a representation affected by a conflict is an available remedy.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.