IN THE CIRCUIT COURT OF MACON COUNTY, MISSOURI

MARY KATHRYN CROCKER-WYSS Plaintiff,	)	
vs.	)	Case No. 23MA-CC00020
PHILIP BRISCOE, Personal Representative of the Estate of John Wilford Briscoe, JOSEPH A. BRANNON, and BRISCOE & BRANNON, Defendants.	)	

DEFENDANTS' SUGGESTIONS IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

COME NOW Defendants Philip Briscoe, Personal Representative of the Estate of John W. Briscoe, Joseph A. Brannon, and Briscoe & Brannon, pursuant to Rule 55.27, and herein submit their Suggestions in Support of their Motion for Judgment on the Pleadings.

Factual and Procedural Background[1]

An attorney-client relationship existed between Margaret Caldwell and Defendants. Defendant attorney John Briscoe drafted a 2010 Beneficiary Deed for Margaret Caldwell in which Ms. Caldwell named Plaintiff and Caldwell's sister (Rebecca Caldwell) as beneficiaries of particularly described real property. Thereafter, attorney Briscoe drafted a 2012 Beneficiary Deed in which Caldwell revoked the 2010 Beneficiary Deed and named Plaintiff as the sole

[1] The facts set forth herein are taken from Plaintiff's First Amended Petition and the exhibits thereto. Such facts are treated as true solely for the purpose of this motion.

beneficiary of the property particularly described therein.[2] The 2012 Beneficiary Deed did not include an 80 acre parcel that had been included in the 2010 Beneficiary Deed.

Margaret Caldwell died on August 26, 2020. The 188 acres of property identified in the 2012 Beneficiary Deed were transferred to Plaintiff. Through Caldwell's will, the other 80 acre parcel was distributed to Plaintiff, Caldwell's other daughter Rebecca, and Caldwell's grandchildren Champ and Cannon. Rebecca, Champ and Cannon sold their interests in the 80 acre parcel to Plaintiff.

In a letter dated August 23, 2021, Attorney Briscoe acknowledged that the 80 acre parcel was not included in the 2012 Beneficiary Deed. However, he did not recall whether Caldwell intended to omit the 80 acre parcel from the Beneficiary Deed, or whether it was mistakenly omitted.[3]

On October 24, 2022, Plaintiff filed her petition against attorney Briscoe and his law firm Briscoe & Brannon in Ralls County, Missouri. On April 20, 2023, venue was changed and the case transferred to Macon County, Missouri. On September 20, 2023, this Court granted Plaintiff leave to file her First Amended Petition, deemed filed on said date.

Plaintiff's First Amended Petition alleges that Defendants Briscoe, Briscoe & Brannon, and Joseph Brannon were negligent in using an incomplete and incorrect legal description in the 2012 Beneficiary Deed. Plaintiff contends that she was the intended sole beneficiary of the 80 acre parcel.

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[2] Plaintiff refers to the real property as "the Judy place." However, neither Beneficiary Deed describes the property as "the Judy place" or even references the name Judy.

[3] Attorney Briscoe died on January 1, 2024. Philip Briscoe as Personal Representative was named defendant in his stead. *See* Plaintiff's Motion to Substitute, filed on February 19, 2020, and Order sustaining said motion on February 22, 2024.

Plaintiff has not stated facts that, if true, would indicate that Defendants owed a duty to Plaintiff. Plaintiff does not allege that she was Defendants' client. Instead, Plaintiff claims the 2012 Beneficiary Deed should have been drafted to include an additional 80-acre parcel and that those 80 acres should have been left solely to Plaintiff.

I. Non-Clients have No Legal Malpractice Claim for Completed Testamentary Transfers

With limited exceptions, an attorney owes no duty beyond the client relationship in the way legal responsibilities are performed. *Meyer v. Carson and Coil*, 614 S.W.3d 618, 625 (Mo. App. W.D. 2020). One such exception permits non-client beneficiaries of a failed testamentary document to bring an action against the drafting attorney.

Plaintiff does not allege any "failure" of the 2012 Beneficiary Deed to transfer the property described therein. Rather, Plaintiff claims the 2012 Beneficiary Deed prepared for Margaret Caldwell was incomplete in that it failed to include an 80-acre parcel that Plaintiff contends should have been transferred solely to her. Instead, the 80-acre parcel was transferred by Caldwell's will to Plaintiff and three other individuals (Margaret's other daughter and two grandchildren).

Judgment should be entered in favor of Defendants because Plaintiff has affirmatively plead there was no valid, executed testamentary document identifying her as sole beneficiary of the 80-acre parcel, and therefore Plaintiff cannot establish that she falls within the narrow class of non-clients permitted to maintain a legal malpractice action. *See Donahue v. Shughart, Thompson & Kilroy*, 900 S.W.2d 624 (Mo. banc 1995) and *Johnson v. Sandler, Balkin, Hellman & Weinstein*, 958 S.W.2d 42, 49 (Mo. App. W.D. 1997). Nor has Plaintiff plead the 2012 Beneficiary Deed failed in its intended purpose. *See Donahue and Johnson, Id.*

Missouri does not recognize a cause of action by non-clients who claim a successful estate planning document should have included additional property for them.

The four essential elements of legal malpractice are: 1) an attorney-client relationship; 2) negligence or breach of contract by the attorney defendant; 3) proximate causation; and 4) damages to the plaintiff. *Donahue* at 626. At issue here is the first element: whether an attorney-client relationship existed between Plaintiff and Defendants. Plaintiff does not claim she had an attorney-client relationship with Defendants. With limited exceptions, an attorney owes no actionable duty to persons who are not party to the attorney-client relationship. *Meyer v. Carson and Coil*, 614 S.W.3d 618, 625 (Mo. App. W.D. 2020).

In *Donahue*, the Missouri Supreme Court carved a narrow exception to the attorney-client privity requirement by permitting non-client beneficiaries to sue the drafting lawyer for malpractice where an estate planning document failed because it was negligently prepared. *See also Johnson* at 49, (only "intended beneficiaries of failed testamentary transfers [have] some avenue of recovery in malpractice claims[.]"

The *Donahue* exception does not apply here because Plaintiff has not alleged any testamentary document identifying her as the sole beneficiary of the 80-acre parcel. Nor has Plaintiff alleged the failure of a testamentary document to transfer the 80-acre parcel.[4]

THE *DONAHUE* CASE

The *Donahue* facts involved two estate planning transfers that had been executed by the client, but failed. The *Donahue* client wrote checks to the two plaintiffs from the client's trust account and directed the lawyer to ensure that the proceeds of the checks were given to the plaintiffs when the client died. The client also signed a deed prepared by the attorney that upon

[4] Plaintiff alleges the 80-acre parcel was in fact distributed through Margaret Caldwell's will.

the client's death would have transferred half the interest in the client's home to one of the plaintiffs. After the client's death, these testamentary transfers were judged invalid, and thus "failed" to achieve the described transfer for the intended beneficiaries identified therein. The *Donahue* non-client plaintiffs alleged these transfers failed due to the malpractice of the client's lawyers.

Determining whether the attorney owed a duty to the non-client plaintiffs, the Missouri Supreme Court weighed six factors, including the existence of a specific intent by the client to benefit the plaintiff. The Court imposed on the attorneys a legal duty to the non-client beneficiaries of "failed testamentary transfers" where the failed testamentary document described the property and showed the non-client was an intended beneficiary under the document. The *Donahue* court found the client's "primary purpose in writing the checks and preparing and signing the deed was to benefit the plaintiffs[.]" *Donahue* at 629. Both the checks and the deed clearly created testamentary documents intended to transfer the property identified in the documents to the identified beneficiaries.

The *Donahue* court held that an attorney owed a duty to a non-client who was the intended beneficiary of a failed testamentary transfer. *See also Johnson, Id.* at 49 (trust amendments signed by the testator proved to be ineffective, thereby causing the intended beneficiary plaintiffs to lose their beneficial interest.) Under both *Donahue* and *Johnson*, non-client third-parties had standing to pursue a legal malpractice claim because the client's intent to benefit the third-parties was clearly indicated within the text of the estate planning document executed by the client.

Allowing a non-client to bring a malpractice action against an attorney could interfere with the attorney-client relationship. *Donahue* at 628; *Johnson* at 48. To address this concern, it must be evident that the attorney was to provide services specifically intended to benefit the non-client plaintiff. *Donahue* at 628-29. In *Donahue* and *Johnson*, as the intended beneficiaries named in the failed testamentary documents, the plaintiffs were allowed to proceed with their legal malpractice claims because 1) the testamentary documents identified the plaintiffs as the intended beneficiaries; and 2) the testamentary documents identified the property intended to have been transferred to the plaintiffs.

A client's intent to benefit a non-client is clear where the non-client is identified as a beneficiary of a signed testamentary document. *Alberts v Turnbull*, 641 S.W.3d 370, 375 (Mo. App. W.D. 2022) (the defendant attorneys owed no duty to "prospective beneficiaries" of an unsigned testamentary document.) The intent to benefit hinges on the client's execution of a testamentary document that includes the non-client as a beneficiary. *Alberts, Id.*

The question here is whether a non-client has standing to maintain a cause of action against the Defendant lawyers based on the 2012 Beneficiary Deed that does not identify the 80-acre parcel as property to be transferred by the Beneficiary Deed, and where there is no document identifying Plaintiff as the sole beneficiary of said parcel.

A client's intent to benefit a third-party must be determined from the four corners of the executed document. The Court in *Donahue* relied upon provisions of executed documents to determine the client's intent to benefit the plaintiffs with the property described therein. The *Donahue* and *Johnson* plaintiffs were able to maintain a cause of action because they were able to establish from the executed documents that they were the named beneficiaries of the specifically identified assets and property. In both *Donahue* and *Johnson*, the beneficiaries named in the testamentary documents were permitted to pursue their legal malpractice actions for the alleged negligence that caused the testamentary documents to fail and the beneficiaries to lose the intended property. *Donahue*, 900 S.W.2d at 629; *Johnson*, 958 S.W.2d at 52.

This Case Does Not Involve a Failed Testamentary Document

This case does not involve a failed testamentary instrument. Rather, Plaintiff contends that Defendants owed her a duty to ensure that the 80-acre parcel was included in the 2012 Beneficiary Deed. However, Missouri has never recognized such a duty. To do so would extend the limited exception recognized in *Donahue* and ignore the warnings discussed in *Donahue*.

The *Donahue* Court warned of two primary reasons against allowing a non-client to bring a legal malpractice action: 1) liability could extend to an unlimited class of individuals, and 2) liability could interfere with the attorney's loyalty to the client in advancing the client's interest. *Donahue* at 628. *See also Johnston* at 48.

Plaintiff is asking this Court to impose a duty upon the Defendant attorneys based on her speculation that client Caldwell would have executed a Beneficiary Deed naming Plaintiff as sole beneficiary of the 80-acre parcel. Plaintiff points to the 2010 Beneficiary Deed as support for such speculation, which would have transferred the 80 acres to both Plaintiff and Caldwell's other daughter Rebecca. However, "[I]t is [the] testator's intent at the time of executing the failed testamentary documents that is relevant, not as some prior point in time." *Alberts v Turnbull*, 641 S.W.3d 370, 376 (Mo. App. W.D. 2022).

The 2010 Beneficiary Deed that would have transferred a one-half interest in the parcel to Plaintiff was revoked by the 2012 Beneficiary Deed. The 2012 Beneficiary Deed did not include the 80-acre parcel, and attorney Briscoe noted that it may have been client Caldwell's intent to omit the 80-acre parcel from the 2012 Beneficiary Deed.

Plaintiff does not allege any failed testamentary instrument that otherwise would have transferred to her the 80-acre parcel. There is no testamentary document naming Plaintiff as the sole beneficiary of the 80-acre parcel. Instead, the parcel was distributed through Caldwell's will, with Plaintiff receiving a one-third share.

A client's intent to benefit a non-client is speculative where the testamentary document is unsigned. *Alberts*, *Id.* (the Western District Court of Appeals declined to impose a duty on attorneys to "prospective beneficiaries" that may have been made beneficiaries had a drafted testamentary document been signed by the client). Here, client Caldwell's alleged intent is even more wildly speculative as there exists no document naming her sole beneficiary of the 80-acre parcel.

Imposing a duty to a speculative, possible beneficiary would undermine the duty of loyalty an attorney owes to the client; invite claims premised on speculation regarding the client's intent; and create a potential conflict of interest to the client and the prospective beneficiary. *Alberts*, *Id*. The risk of improper speculation is particularly high with estate planning documents because the client is deceased and can no longer testify as to intent, thereby creating a temptation to manufacture false evidence that cannot be rebutted due to the death of the client. *Alberts* at 377. Even if the client previously voiced intent to family or friends, that intent can change over time. *Alberts*, *Id*.

Here, client Caldwell executed a testamentary document that disposed of the 80-acre parcel: her will. Any allegation that Caldwell wanted the parcel to be distributed solely to Plaintiff by a Beneficiary Deed is pure speculation and contrary to her executed testamentary documents. Thus, Plaintiff's claim fails under the first factor in the *Donahue* analysis and should be dismissed with prejudice. *See Alberts* at 377-378. Furthermore, the second and third factors of Donahue (foreseeability of harm and certainty of injury from attorney negligence) weigh against imposing a duty to a "prospective" beneficiary on property that was not identified in the 2012 Beneficiary Deed. *See Alberts*, Id. It is unknown whether Caldwell would have signed a Beneficiary Deed transferring the 80-acre parcel solely to Plaintiff.

Conclusion

Plaintiff's petition does not assert a claim under the privity exception permitted in *Donahue*. The limited exception that permits a non-client to maintain an action against an attorney requires a failed testamentary document which specifically identifies the property and the intended beneficiary. *See Donahue* and *Johnson*. Here, Plaintiff does not allege any failed testamentary document. The 2012 Beneficiary Deed on which Plaintiff's First Amended Petition relies does not identify the 80-acre parcel. Absent an executed and failed testamentary instrument specifically naming Plaintiff as the sole beneficiary of the 80-acre parcel, Defendants did not owe a duty of care to Plaintiff. As a matter of law, Plaintiff has failed to allege facts that would establish that Defendants owed her a duty of care, an essential element for her legal malpractice claim, and therefore the court should dismiss this action.

II. Plaintiff's Claims are Barred by the Statute of Limitations

Once a statute of limitations has run, the defendant acquires a substantive right to be free from further suit. *See Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341 (Mo. banc 1993).

In Missouri, legal malpractice claims are subject to the five-year statute of limitations outlined in §516.120(4), RSMo. The five-year period begins when the alleged malpractice occurs and damage is capable of ascertainment. §516.100, RSMo.

The 2012 Beneficiary Deed was signed by client Margaret Caldwell on July 3, 2012. At that time, client Caldwell should have been aware if the 2012 Beneficiary Deed did not convey the property she intended.[5] Thus, the statute of limitations for client Caldwell to have brought a malpractice action would have expired on July 3, 2017. Client Caldwell died on August 26, 2020, apparently without seeking to change the 2012 Beneficiary Deed or making any negligence claims against attorney Briscoe.

The beneficiary deed at issue in Plaintiff's Amended Petition was signed by decedent-client Margaret Caldwell and filed with the Recorder of Deeds on July 3, 2012. It is well settled that recording a deed charges interested parties with constructive knowledge of the recorded instrument. *Gibson v. Ransdell*, 188 S.W.2d 35, 38 (Mo. 1945); *Coleman v. Alderman*, 210 S.W.2d 994, 996 (Mo. 1948). Accordingly, Plaintiff had notice of the recorded beneficiary deed on July 3, 2012. To hold otherwise, and toll a statute of limitations until after the client dies, could create a statute of limitations decades in length.

The five-year statute of limitations under §516.120(4), RSMo., prohibited any action for malpractice that might have been brought after July 3, 2017. Judgment must be entered in Defendants' favor because Plaintiff's action was not filed until October 24, 2022 – after the statute of limitations had expired.

[5] A valid deed commences the statute of limitations clock. *See Roach v. Landis*, 1 S.W.2d 203, 205 (Mo. App. W.D. 1927) (a tax deed, good upon its face, sets the statute of limitations in motion).

Respectfully submitted,

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Certificate of Service

On this 28th day of February 2025, the undersigned hereby certifies that the foregoing SUGGESTIONS IN SUPPORT was served through the Court's electronic filing system to parties with counsel of record registered to file and receive notices through said electronic filing system.

Hamp Ford .
FORD, PARSHALL & BAKER