

STATE OF MICHIGAN
COURT OF APPEALS

MONICA WELLS and CAMILO PEREZ,

UNPUBLISHED

Plaintiffs-Appellants/
Cross-Appellees,

v

No. 177586
LC No. 93-326465 NM

MANUEL L. PAPISTA and LAW
OFFICES OF MANUEL L. PAPISTA,

Defendants-Appellees/
Cross-Appellants.

Before: MacKenzie, P.J., and Cavanagh and T.L. Ludington*, JJ.

LUDINGTON, J. (concurring.)

I concur in the result reached by the majority. However, I write separately because I do not believe it is necessary to either accept or decline plaintiffs' invitation to extend the decision reached in *Mieras v DeBona*, 204 Mich App 703; 516 NW2d 154 (1994).

I believe the case is properly resolved by application of traditional legal principles applicable to all legal malpractice actions as applied to the special circumstance where the client's testamentary intent has been addressed by a probate court of this state in connection with its admission of the decedent's testamentary instruments to probate administration.

In the immediate case, defendant Papista represented Mrs. Jurincic and her former husband since 1966. Following Mr. Jurincic's death in 1988, defendant Papista drafted a new will for Mrs. Jurincic on April 12, 1990. The new will identified the Capuchin Mission Association as the primary beneficiary of her estate, though certain small bequests were made to certain family members as well. Ms. Jurincic executed a codicil to her will on November 18, 1991 that made additional bequests to beneficiaries, including the plaintiffs. She executed a second codicil on February 17, 1992 that deleted two specific bequests but that did not affect the disposition of the largest component of her estate, including the devise to the Capuchin Mission.

* Circuit judge, sitting on the Court of Appeals by assignment.

On October 22, 1992 defendant Papista met with Mrs. Jurincic, who was hospitalized with terminal cancer. Plaintiffs contend that they were present when Mrs. Jurincic orally instructed defendant Papista to revise her testamentary documents to reflect the plaintiffs as equal beneficiaries of her entire estate. Defendant Papista denies that the plaintiffs were present during his conversation with Mrs. Jurincic. He contends that he met separately with Mrs. Jurincic who instructed him to supplement her existing estate plan with two additional bequests for \$5,000 to each plaintiff.

Defendant Papista testified in a discovery deposition that he drafted the handwritten October 22, 1992 codicil at the hospital within one-half hour of his initial conference with Mrs. Jurincic, that he thereafter read the codicil to her, and had her execute the codicil with a cross or mark in his presence and that of Mrs. Jurincic's hospital roommate. Mrs. Jurincic died on January 14, 1993, some three months after the final codicil was prepared.

Following Mrs. Jurincic's death, defendant Papista submitted Mrs. Jurincic's April 22, 1990 will, her November 1991 codicil, her April 1992 codicil, and her October 1992 codicil to the Oakland County Probate Court for administration. Plaintiffs filed objections to admission of the will and codicils to probate administration pursuant to MCL 700.148; MSA 27.5148.

Plaintiffs' objections did not allege that the testamentary documents drafted by defendant Papista and signed by Mrs. Jurincic failed to materially comply with any of the statutory requirements for a valid testamentary disposition that have been established to verify a testator's intent. Importantly, the plaintiffs, who were not heirs at law to Mrs. Jurincic, did not allege that they ever inquired further of Mrs. Jurincic or defendant Papista after the alleged October 22nd oral instruction to confirm that Mrs. Jurincic had executed a testamentary instrument consistent with their understanding of her true intentions and revoking her prior testamentary instruments.

Plaintiffs' objections to Mrs. Jurincic's will and codicils did not challenge her mental capacity to execute the October 22 codicil except to the extent they alleged that "there is doubt as to whether she was able to read the codicil and understand its contents" in support of their request that the probate estate "be divided between Monica Wells and Camilo Perez." Indeed, it is noteworthy that plaintiffs' objections relied in principal part on Mrs. Jurincic's alleged October 22 oral statement of testamentary intent and therefore the existence of her mental capacity approximately one-half hour prior to her execution of the codicil they allege was negligently drafted.

Plaintiffs' objections did not allege that defendant Papista unduly influenced Mrs. Jurincic by inappropriate persuasion or coercion or that he misrepresented either the effect or terms of the codicil. Had the issues been raised and properly framed before the probate court, extrinsic evidence concerning the circumstances of Mrs. Jurincic's execution of the codicil as well as Mrs. Jurincic's alleged testamentary declarations may have been examined by the court. *Bruner & McNeal, Admissibility of Extrinsic Evidence in Will Cases: Michigan Case Law*, 7 Cooley Law Review 19 (1990). Ultimately, plaintiffs' objections were dismissed, and the will and codicils were admitted to probate. The probate court order was not appealed by plaintiffs.

This Court's decisions in *Ginther v Zimmerman*, 195 Mich App 647; 491 NW2d 282 (1992) and *Mieras, supra*, addressed but a single element of the plaintiff's cause of action in a legal malpractice case – the existence of an attorney-client relationship. Those cases did not alter plaintiffs' additional obligation to plead (1) the lawyer's negligent conduct that breached the duty of care, (2) a proximate causal relationship between the attorney's breach of duty and the injury sustained by plaintiffs, and (3) the fact of damages and plaintiffs' specific efforts to mitigate any resulting injury. *Basic Food Industries, Inc v Grant*, 107 Mich App 685; 310 NW2d 26 (1981); *McCluskey v Womack*, 188 Mich App 465; 470 NW2d 443 (1991).

The two-count complaint initiating the immediate legal malpractice case does not identify any factual basis for the summary contention that defendant Papista breached his duty of care in drafting the terms or content of the October 22 codicil. The codicil signed by Mrs. Jurincic does not provide for a revocation of her prior testamentary instruments; it clearly provides for \$5,000 bequests to the plaintiffs and not fifty percent of her estate to each of the plaintiffs. The complaint merely states the plaintiffs' conjecture that defendant Papista must have made a drafting error because they contend Mrs. Jurincic's "true intention" in signing the October 22 codicil remains an unresolved matter of fact.

Mrs. Jurincic's testamentary intent has been addressed and, in my opinion, resolved as a matter of fact as a result of the unappealed probate court order admitting the October 22 codicil and prior testamentary instruments to probate. Plaintiffs had a full opportunity to litigate the very issue or issues that are the cornerstone of their legal malpractice cause of action in the prior case. *Knoblauch v Kenyon*, 163 Mich App 712; 415 NW2d 286 (1987); *Schlumm v Terrance J O'Hagen, P.C.*, 173 Mich App 345; 433 NW2d 839 (1988).

I would affirm the trial court's order granting defendants' motion for summary disposition as a result of its finding that the doctrine of collateral estoppel barred the plaintiffs from attempting to relitigate Mrs. Jurincic's "true intentions."

/s/ Thomas L. Ludington