2012 WL 9162122 (Ky.App.) (Appellate Brief)
Court of Appeals of Kentucky.

ESTATE OF MABEL C. MOLONEY, Appellant,
v.
John D'arcy BECKER, Appellee.

No. 2011-CA-001773.
January 17, 2012.

Appeal from the Bracken Circuit Court
Action No: 04-CI-00091

Brief for Appellant, Estate of Mabel C. Moloney

Thomas A. Prewitt, Esq. (KBA #82510), Graydon Head & Ritchey LLP, 2400 Chamber Center Drive, Suite 300, Ft. Mitchell, KY 41017, Telephone: (859) 578-2426, Facsimile: (859) 578-2427, Email: tprewitt@graydon.com, Counsel for Appellant, Estate of Mabel C. Moloney.

***iii** STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION ..... i.
STATEMENT CONCERNING ORAL ARGUMENT ..... ii.
STATEMENT OF POINTS AND AUTHORITIES iii
STATEMENT OF CASE 1
ARGUMENT 8
I. Standards of Review 8
Barrett v. Commonwealth, 317 S.W.3d 49 (Ky. 2010) 8
Commonwealth v. English 993 S.W.2d 941 (Ky. 1999) 8
Mountain Water Dist. V. Smith, 314 S.W.3d 312 (Ky. App. 2010) 8
Hales v. Moore, 289 S.W.3d 567 (Ky. App. 2008) 8
Commonwealth Ky. Dept. of Corrections v. Chestnut, 250 S.W.3d 655 (Ky. 2008) 8
Moore v. Environmental Const. Corp., 147 S.W.3d 13 (Ky. 2004) 8
Taylor v. Kennedy, 700 S.W.2d 415 (Ky. App. 1985) 9
II. The Undisputed Evidence Compelled a Judgment Against Appellee on Liability, And The Trial Court Erred In Declining To Enter A Directed Verdict Or Judgment Notwithstanding The Verdict 9
Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965) 10
KRS 524.130 10
***iv** Carman v. Dunaway Timber, 949 S.W.2d 569 (Ky. 1997) 10
III. The Undisputed Evidence Supported Only One Conclusion As To Damages, And The Trial Court Erred In Not Directing The Verdict As To Damages 11
IV. The Trial Court Erred, As A Matter Of Law, In Permitting Appellee's Theoretical “Somebody Could Have Done Something” Defense 12
City of Covington v. Keal, 133 S.W. 2d 49 (Ky. 1939) 14, 15, 16, 17, 19
Wimsatt v. Haydon Oil Co., 414 S.W. 2d 908 (Ky. 1967) 15, 17, 20

WestlawNext © 2015 Thomson Reuters. No claim to original U.S. Government Works.

Stewart Dry Goods Company v. Boone, 202 S.W. 489 (Ky 1918) 16, 17, 20
V. The Trial Court Erred In Permitting Appellee To Offer Expert Testimony On Hypothetical Alternative Courses Of Legal Action 20
City of Covington v. Keal, 133 S.W. 2d 49 (Ky. 1939) 20
Wimsatt v. Haydon Oil Co., 414 S.W. 2d 908 (Ky. 1967) 20
VI. The Trial Court Compounded Its Errors By Erroneously Instructing The Jury On "the duty of Mabel C. Moloney and/or Ann Thomas, acting as Power of Attorney for Mabel C. Moloney. 21
See KRS 411.182 21
Jones v. Stern, 168 S.W.3d 419 (Ky. App. 2005) 21
Baker v. Webb, 883 S.W.2d 898 (Ky. App. 1994) 22
VII. The Trial Court Erred In Permitting The Jury To Consider Unrelated But Allegedly Beneficial Planning Work Performed By Appellee At Other Times Not At Issue In The Case. 22
KRE 403 22
VIII. The Trial Court Erred In Declining To Grant A New Trial. 23
***v** CONCLUSION 24
APPENDIX 25

*i INTRODUCTION

This is a negligence case, in which a **financial** planner engaged in the unauthorized practice of law by recommending and then personally preparing a defective Qualified Personal Residence Trust ("QPRT"), resulting in additional federal estate taxes. The Trial Court committed several legal errors, resulting in an erroneous verdict, which Appellant appeals.

*ii STATEMENT CONCERNING ORAL ARGUMENT

Because Appellant believes that oral argument will assist the Court with its analysis of the errors committed below, Appellant respectfully requests oral argument in this matter.

*1 STATEMENT OF THE CASE

Appellee, John D'Arcy Becker, is a **financial** planner from Mandeville, Louisiana. [Video Record Becker Day 1, 2:20:53 - 2:21:01]. He holds the designations CLU (Chartered Life Underwriter) and AEP (Accredited Estate Planner). [Video Record, Becker Day 1, 2:21:48 - 2:21:52; Becker Day 3, 3:39:01 - 3:39:04]. He sells life insurance and securities. Importantly, he is not licensed to practice law in Kentucky or any other state. He does not have a law degree and has never attended law school. [Video Record Becker Day 1: 2:22:37 - 2:22:54].

Appellant's decedent, Mabel Moloney, lived with her husband Lytle on a 181 acre farm in Bracken County, Kentucky (the "Farm"). They owned several other parcels of real estate, and by all accounts, they had amassed sufficient wealth that, without appropriate estate planning, would be subject to federal estate taxes upon death. [Video Record Becker Day 1, 2:31:51 - 2:32:01; 2:32:35 2:32:51; 2:33:58 -2:34:02].

Becker was introduced to the Moloneys in 1983. [Video Record Becker Day 1, 2:25:38 - 2:25:46]. He started doing **financial** planning for them, setting up a private annuity arrangement and handling some of their investments. [Video Record Becker Day 1, 2:27:40 - 2:28:08; 2:29:05 – 2:29:33; 2:29:44 - 2:29:47]. Mr. Moloney died in 1987, after which Becker continued to do **financial** planning for Ms. Moloney. [Video Record Becker Day 1, 2:28:47 - 2:28:58; 2:29:44 –2:29:47; 2:30:00 - 2:30:08; 2:30:57 - 2:31:26].

***2** In February, 1995, Becker recommended and prepared for Ms. Moloney a Qualified Personal Residence Trust ("QPRT"), the intended purpose of which was to pass the Farm from Ms. Moloney to her daughters, Ann Thomas and Donna McCoy, free of federal estate tax at her death. [Video Record Becker Day 1, 2:34:04 - 2:34:23; 2:35:28 - 2:35:49; Becker Day 3, 9:02:03 - 9:02:15; 9:08:01 -9:08:18; 9:08:33-9:08:46].

Becker admitted at trial that he had never before personally prepared a QPRT, a fact he did not tell Ms. Moloney. [Video Record Becker Day 1, 2:39:44 - 2:40:10]. He admittedly had little experience with QPRTs, having previously worked with only *one* client in Louisiana who had executed a QPRT, and in that one instance, the QPRT was prepared by an attorney, not Becker himself. Becker did not inform Ms. Moloney of his limited experience with QPRTs. [Video Record Becker Day 1, 2:40:12 - 2:40:36; 2:40:45 - 2:40:55; Becker Day 3, 9:03:56 - 9:04:00].

Nor did Becker advise Ms. Moloney that he could not legally prepare the QPRT. He did not tell her that she should have the QPRT prepared by a trained, licensed attorney. Nor did he suggest that she have the QPRT that he ultimately prepared reviewed by an attorney. [Video Record Becker Day 1, 2:37:14 -2:37:25; 2:38:11 -2:38:18; Becker Day 3,9:02:41 -9:03:48].

By all accounts, including Becker's, Ms. Moloney trusted Becker and relied upon him for advice after Mr. Moloney died. Becker relayed at trial that he had previously had the opportunity to advise Ms. Moloney to obtain the advice and services of an attorney for a particular project, such as a will, and that on each ***3** such occasion where he did so, she had complied with his advice and used an attorney. [Video Record Becker Day 1, 2:27:17 - 2:27:25; 2:31:21 - 2:31:26; 2:36:43 - 2:36:47; 2:37:06-2:37:08; 2:37:31 - 2:37; Becker Day 3, 9:04:03 -9:04:20; 9:05:13]. He testified that if he had told her to get an attorney in this instance, she would have listened to him. [Video Record Becker Day 3, 9:05:13]. He simply did not suggest that she do so.

Although he could not legally prepare a QPRT and had never before done so, Becker personally prepared the QPRT for Ms. Moloney, without the assistance of an attorney or anyone else. He did so based on a form that he picked up. He does not recall the origin of the form, just that is was a "form." [Video Record Becker Day 1, 2:38:04 - 2:38:10; 2:38:55 - 2:39:14].

Becker then personally carried the QPRT from Louisiana to Kentucky, where he met with Ms. Moloney and her daughter, Ann. After he obtained their signatures on the QPRT, the QPRT was sent to New Jersey, where it was executed by Ms. Moloney's other daughter, Donna. [Video Record Becker Day 1, 2:41:00

At the time he obtained Ms. Moloney's signature on the QPRT, Becker assumed it was a valid and enforceable Qualified Personal Residence Trust, as did Ms. Moloney. At the time he obtained Ms. Moloney's signature on the QPRT, Becker admittedly led Ms. Moloney to believe that the QPRT would be effective to transfer the Farm to Ms. Moloney's two daughters and to remove the entire Farm from her taxable estate. That was the intended purpose of the QPRT, and without question, Ms. Moloney relied on the QPRT as being appropriate for that ***4** intended purpose. [Video Record Becker Day 1, 2:45:54 - 2:46:18; Becker Day 3, 9:07:17-9:07:53].

In December, 1999, nearly five years after Becker prepared and Ms. Moloney executed the QPRT, Ms. Moloney's estate plan was reviewed by the trust department at Fifth Third Bank. The Bank raised questions about the QPRT. [Video Record Reiss Day 1, 3:04:45 - 3:04:58]. The initial questions centered on whether it was appropriate to include the entire 181 acres of the Farm in the QPRT, i.e., was a QPRT the right instrument to use for that purpose? It was not. [Video Record Reiss Day 1, 3:05:46 - 3:06:19; 3:09:48 - 3:10:00].

Then arose the question of the "term" of years the Trust would run. Tobe valid, a QPRT must extend for an express term of years, which the grantor must outlive. The term of the QPRT prepared by Becker extended for Ms. Moloney's entire life, an elementary and fatal defect to a QPRT. [Video Record Reiss Day 1,3:08:02 - 3:08:10; 3:08:37 - 3:09:04]. At trial, Becker's own expert identified these and numerous other defects in the OPRT, including the failure to arrange for a deed transferring the

property. Becker had no choice but to admit his errors. [[Video Record Gillman Day 2, 3:05:17 - 3:05:40; 3:07:19 - 3:07:24; Video Record Becker Day 1,2:48:16 - 2:48:33].

Having identified problems with the QPRT, the bank advised Ms. Moloney's daughter Ann and her grandson Lytle, who worked at the bank, to consult with tax and estate planning counsel regarding the QPRT. [Video Record Thomas Day 3, 9:31:52 - 9:32:05; 9:40:33 - 9:40:41]. They did, and they were told that the QPRT could not be fixed and that there was nothing that could be ***5** done. [Video Record Thomas Day 3, 9:40:05 - 9:40:27; 9:42:48 - 9:43:01]. The family's attorney prepared a new Last Will and Testament and a new Trust Agreement for Ms. Moloney, which she executed in July, 2000. [Video Record Thomas Day 3, 9:32:30 - 9:32:45].

When Ms. Moloney died in August, 2003, the Farm passed to her daughters, which was consistent with her donative intent originally expressed in the QPRT prepared by Becker. But because the QPRT was ineffective, the Farm was included in Ms. Moloney's estate for federal estate tax purposes, resulting in $142,901 in additional federal estate taxes. [Video Record Becker Day 3, 9:08:50 - 9:09:22; Thomas Day 3, 9:38:00-9:38:18; Video Record Galligan Day 2, 1:09:35 - 1:09:45; 1:10:15 - 1:10:25; 1:10:30 - 1:11:14].

It turns out that the Becker's QPRT suffered from at least 8 or 9 different fatal defects. As Becker's own expert characterized it, there were “lots” of errors in the preparation of the QPRT, any one of which would have rendered the QPRT ineffective. [Video Record Gillman Day 2, 3:05:17 - 3:05:40; 3:07:19 - 3:07:24]. Had there been one or two minor defects with the QPRT, it is “possible” that the IRS might have permitted it to be reformed, but by the time of trial, it was clear that the multitude of errors rendered reformation impossible. [Video Record Parrent Day 2, 10:19:04 - 10:19:50; 10:24:25 - 10:23:58].

Becker's very choice of the QPRT was erroneous. Quite simply, it was the wrong tool for the purpose intended, in that it could not have been used to remove the whole Farm from the estate. Importantly, the experts concurred that there were other appropriate tools available in 1995 to accomplish Ms. Moloney‘s ***6** goals. [Video Record Gillman Day 2, 3:25:58 - 3:26:18; Parrent Day 2, 10:10:45 -10:11:43].

Although the experts' characterizations of Becker's negligence varied from “ordinary” to “gross,” all concurred that Becker failed to meet the applicable standard of care. [Video Record Gilman Day 2, 3:07:30-3:09:44; Parrent Day 2, 10:15:15 - 10:15:32;10:46:07 - 10:46:44; Byers Day 2, 9:37:29 - 9:37:50; 9:39:28 - 9:39:58].

The experts similarly concurred that Becker's preparation of the QPRT constituted the unauthorized practice of law in Kentucky. [Video Record Gilman Day 2, 3:06:57 - 3:07:03; Byers Day 2 9:38:25 - 9:39:00; Parrent Day 2, 10:13:24 - 10:13:47]. This observation is consistent with the view of Kentucky's highest court, as expressed in *Frazee v. Citizens Fidelity Bank,* 393 S.W.2d 778 (Ky. 1965) (preparation of a trust document constitutes the practice of law).

Had the QPRT been effective for its intended purpose of transferring the Farm to Ms. Moloney's daughters and removing the Farm from Ms. Moloney's taxable estate, the estate would have paid $142,901 less in federal estate taxes. [Video Record Galligan Day 2, 1:09:35 - 1:09:45; 1:10:15 - 1:10:25; 1:10:30 - 1:11:14; Video Record Becker Day 1: 2:50:36 - 2:53:08 and Record at 7/28/2011 Joint Binder of Exhibits, Plaintiff's Exhibits 2, 3 and 4]. Becker offered no evidence to contradict the expert's calculations of taxes incurred due to the ineffective QPRT.

At trial, the jury returned a verdict finding that Becker was indeed negligent in recommending and preparing the QPRT. But the jury went on to find that ***7** Becker's negligence was not a substantial factor in causing the damages to the Estate. How could that be, given the uncontested and admitted facts outlined here? The answer lies in the Trial Court's legal errors in admitting evidence and instructing the jury, as outlined in the Argument.

*8 ARGUMENT [1]

The Judgment should be reversed because the Trial Court made several legal errors that led directly to the erroneous verdict.

I. Standards of Review.

The standard of review for evidentiary issues on appeal is an **abuse** of discretion. *Barrett v. Commonwealth,* 317 S.W.3d 49,61 (Ky. 2010). An **abuse** of discretion is when the trial court's decision is arbitrary, unreasonable, or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999).

Appellate review of a jury instruction is considered a question of law and is reviewed on appeal under a de novo standard. *Mountain Water Dist. v. Smith,* 314 S.W.3d 312, 315 (Ky. App. 2010). All issues of law are reviewed on a de novo basis. *Hales v. Moore,* 289 S.W.3d 567, 580-81 (Ky. App. 2008) and *Commonwealth Ky. Dept. of Corrections v. Chestnut,* 250 S.W.3d 655, 660 (Ky. 2008).

The standard of review of a denied Judgment Notwithstanding the Verdict is clear error. *See Moore v. Environmental Const. Corp.,* 147 S.W.3d 13, 16 (Ky. 2004). The Court must view the evidence presented to the jury, drawing all reasonable inferences most favorable to the verdict returned by the jury to see if a reasonable person could not have found as the jury did. *Id.* A directed verdict ***9** or judgment notwithstanding the verdict is appropriate when there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable persons could differ. *Taylor v. Kennedy,* 700 S.W.2d 415, 416 (Ky. App. 1985).

II. The Undisputed Evidence Compelled a Judgment Against Appellee on Liability, And The Trial Court Erred In Declining To Enter A Directed Verdict Or Judgment Notwithstanding The Verdict.

At the conclusion of all of the evidence, Appellant moved for a directed verdict on liability. [Video Record Trial Day 3; 7/28/11; 9:47:22-9:49:26; 9:49:37-9:54:34]. In support of that Motion at trial, and in support of a timely JNOV Motion, the undisputed evidence of record showed that:

• Appellee Becker violated the standard of care applicable to him as a **financial** planner, an estate planner, and a person preparing a QPRT. The evidence on this issue was undisputed and overwhelming. The QPRT he prepared suffered from 9 different defects. Defendant's own expert could only debate whether Becker's conduct amounted to “simple” negligence or something more than simple negligence, but he acknowledged that it was at least “ordinary negligence.” No one - not even Becker himself -defended his conduct in preparing the QPRT for Ms. Moloney. [Video Record Gilman Day 2, 3:07:30-3:09:44; Parrent Day 2, 10:15:15 10:15:32;10:46:07 – 10:46:44; Byers Day 2, 9:37:29 - 9:37:50; 9:39:28 -9:39:58].

• Three different experts, including Becker's own expert, testified without equivocation that Becker engaged in the unauthorized practice of law ***10** when he prepared the QPRT for Ms. Moloney. None of them had ever seen a non-lawyer in Becker's position prepare a QPRT. [Video Record Gilman Day 2, 3:06:57 - 3:07:03; Byers Day 2 9:38:25 - 9:39:00; Parrent Day 2, 10:13:24-10:13:47].

• As a matter of law, the preparation of such a trust document by a non-lawyer constitutes the unauthorized practice of law. *Frazee v. Citizens Fidelity Bank & Trust Co.,* 393 S.W.2d 778 (Ky. 1965). Appellee Becker admitted that he prepared the trust, admitted that he was not a licensed or trained attorney, and admitted that he sought no assistance from an attorney in preparing the QPRT. [Video Record Becker Day 1: 2:22:37 -2:22:54].

• The unauthorized practice of law is a violation of KRS 524.130. As a matter of law, violation of that statute constitutes negligence *per se. Carman v. Dunaway Timber,* 949 S.W.2d 569 (Ky. 1997).

[l]n order for a violation [of a statute, ordinance or regulation] to become negligence per se, the plaintiff must be a member of the class of persons intended to be protected by the regulation, and the injury suffered must be an event which the regulation

was designed to prevent. If both questions are answered in the affirmative, negligence per se is established and the applicable regulation defines the relevant standard of care.

Id., at 570.

• Ms. Moloney unquestionably fell within the class of persons the law prohibiting unauthorized practice is intended to protect. Appellant's injury, the additional taxes resulting from Becker's multiple errors in ***11** preparation of the QPRT, is precisely the kind of harm that the prohibition is intended to prevent.

On these undisputed facts, it was clear error for the Trial Court not to direct a verdict on liability or to grant Appellant's JNOV Motion.

III. The Undisputed Evidence Supported Only One Conclusion As To Damages, And The Trial Court Erred In Not Directing The Verdict As To Damages.

The *only* evidence offered on the issue of damages – Appellant's expert, Kathleen Galligan, CPA -- established that the failure of the QPRT to be effective for its intended purpose resulted in the Ms. Moloney's estate paying additional estate taxes of $142,901, based on a QPRT with an intended 7 year term. Defendant offered *no evidence* to the contrary.

At best, Defendant *argued* that the damages should be $126,120, based upon a theory that the QPRT was intended to have a 5 year term. But while the record contains evidence of an intended 7-year term, [2] there was *no* evidence whatsoever that Becker or Ms. Moloney ever intended a QPRT with a 5 year term.

On this undisputed evidence, it was clear error for the Trial Court not to direct the verdict or grant the Motion for Judgment N.O.V. Becker was negligent as a matter of law, and the damages flowing from that negligence were uncontradicted.

***12 IV. The Trial Court Erred, As A Matter Of Law, In Permitting Appellee's Theoretical "Somebody Could Have Done Something" Defense.**

At the close of all of the evidence, Appellant sought a directed verdict on the various defenses - mitigation, contributory negligence, intervening and superseding cause – that were encapsulated in Appellee Becker's argument that "somebody could have done something" to prevent the damages otherwise caused by Becker's negligence. [Video Record Trial Day 3; 7/28/11; 9:47:22-9:49:26; 9:49:37-9:54:34]. The Court overruled that Motion, allowing the cloud of causation issues to go to the jury even though there was no proper evidence to support Appellee's theory. Appellant had originally sought to prevent these errors by motion in limine, to no avail. [3]

The impact of erroneously allowing the jury to entertain the theory that someone could have done something to prevent the damages is seen directly in the verdict on the question of causation.

A. The Bank.

Appellee Becker initially sought to deflect responsibility for the increased estate taxes to the Bank, which first identified the defective nature of the QPRT Becker had prepared. (See Third Party Complaint, Record pp. 178-194). Becker argued that the Bank should have done something to prevent the harm, once it discovered the problem with the QPRT. The Trial Court correctly dismissed Beckers Third Party Complaint against the Bank on the morning of trial. [Video Record Day 1, 9:22:35 * 9:22:39]].

Nevertheless, Appellee continued during trial to press his case that the Bank could have done something more to "ameliorate" ***13** the impact of the failed QPRT. [Video Record Reiss Day 1, 3:15:38 * 3:16:52; 3:19:22].

B. Ms. Moloney.

Appellee suggested throughout the trial that Ms. Moloney was somehow responsible for her own plight because she failed to have an attorney, instead of Appellee Becker, prepare the QPRT. The record contains no evidence to support that conclusion, and it was error to allow that argument to be made to the jury. Ms. Moloney may very well have disliked attorneys, but there was no evidence whatsoever that she *ever* failed or refused to use an attorney when the circumstances merited it.

Becker himself testified that Ms. Moloney never failed to use an attorney when he, her "trusted advisor," suggested it. According to Becker, Ms. Maloney trusted him and relied upon him for counsel in estate planning matters. To the extent that she needed to have an attorney involved in a transaction, it was incumbent upon him in the role of adviser to so advise her. He admits that he did not. Rather, he wrongly told her *he* could prepare the QPRT, which he then did. [Video Record Becker Day 1, 2:27:17 - 2:27:25; 2:31:21 - 2:31:26; 2:36:43 -2:36:47; 2:37:06-2:37:08; 2:37:31 - 2:37; Becker Day 3, 9:04:03 - 9:04:20; 9:05:00-9:05:13].

There was simply no evidence to support any conclusion that Ms. Moloney violated any standard of care applicable to her. It was error for the Trial Court not to direct a verdict on this issue of contributory negligence.

***14 C. The Family.**

Appellee Becker also suggested that Ms. Moloney's family could have done "something" once they found out about the defective QPRT. That argument is not supported by the evidence and is impermissible under existing law.

The *undisputed* evidence established that the family consulted with tax and estate planning attorneys in the wake of their discovery of the QPRT's defects, and that they were advised that the QPRT's defects could not be fixed and that there was nothing that could be done to rectify the situation. A new Last Will and Testament and a new Trust Agreement were prepared for Ms. Moloney, providing for transfer of the Farm to Ms. Moloney's daughters upon her death, but the estate taxes intended to be avoided by the defective QPRT were ultimately incurred. As a matter of law, that consultation with legal counsel after discovery of the defective QPRT was the full extent of Ms. Moloney's and her family's duty to mitigate the effects of Becker's negligence.

In City of Covington v. Keal, 133 S.W. 2d 49, 52-52 (Ky. 1939), Kentucky's highest court held:

> It is well settled that if an injured person exercises reasonable care to minimize his damages by selecting a physician or surgeon to treat his injuries, he may recover damages to the full extent of his injuries even though the physician employed omits to use the most approved remedy, or the best means of care, or fails to exercise as high a degree of care or skill as another physician might have exercised.

The Court later extended that principal to cases involving legal advice, as distinguished from medical advice, sought by an injured party. We are not able to discern any reasonable basis for a different rule as respects legal advice ***15** obtained in an effort to mitigate harm caused by negligent legal practice." *Wimsatt v. Haydon Oil Co.*, 414 S.W. 2d 908, 912 (Ky. 1967). Although Ms. Moloney was the victim of the *unauthorized* practice of law, Appellee Becker assumed the duties of an attorney, illegal though it was, and therefore the principle applies equally to the damages he wrought by his negligent drafting and advice.

The principle that the original tortfeasor remains liable for total damages even when a subsequent professional fails to correctly apply a fix to the original harm is well established. The plaintiff in *City of Covington* fell on a mud covered sidewalk in Covington and broke her hip. Her treating physician "thought she had sprained the muscles or ligaments in her leg and made no other diagnosis." 133 S.W.2d at 52. After six weeks, other doctors took X-rays and discovered that plaintiff had a badly fractured hip

bone that had already healed with the bone out of position. *Id.* The defendant City argued that plaintiffs condition was due to her own negligence in failing to procure proper medical and surgical treatment. *Id.*

Naturally, the law recognizes that there would have been no harm at all without the *original* negligent act. Therefore, the High Court rejected the City's argument, holding as a matter of law that the original negligent act of the City was the proximate cause of the entire injury.

> [I]f the injured person uses ordinary care in endeavoring to be healed and in the selection and employment of medical and surgical help, but his injury is aggravated by the negligence or unskillfulness of the physician or surgeon employed, *the person causing the original injury will be responsible for the resulting damage to its full extent.* Any aggravation or increase of the ***16** injuries resulting from mistakes of the physician or his want of skill or a failure of the means employed to effect a cure are regarded as *a part of the immediate and direct damages which naturally flow from the original injury.* [Emphasis added].

Id. at 53. By like reasoning, Becker's original negligence – be it simple, ordinary, or gross – was, as a matter of law, the proximate cause of the entire injury suffered by Ms. Moloney's estate.

The *City of Covington* Court relied on *Stewart Dry Goods Company v. Boone,* 202 S.W. 489 (Ky. 1918), where the verdict was claimed to be excessive because the ultimate condition of the plaintiff "was the result of a failure to undergo a major operation which would have minimized his damages." *City of Covington,* 133 S.W.2d at 53. The Court in *Stewart Dry Goods* described that position as "not tenable." 202 S.W. at 491. According to the Court in *City of Covington,* "such obligation did not rest upon the plaintiff, for *his entire duty was to exercise ordinary diligence and prudence in selecting competent doctors and following their advice,* which he had done, and there was no evidence that the doctors who had treated him were otherwise than skillful." [Emphasis added]. *City of Covington,* 133 S.W.2d at 53.

As noted, the High Court in *Wimsatt* recognized that these principles originating in the medical treatment cases likewise apply to legal advice. Plaintiff in *Wimsatt* was the victim of legal malpractice. He fired his initial attorneys and hired subsequent counsel to pursue his underlying claim, as well as his malpractice claim against his original attorneys. In defense of the malpractice claim, the original attorneys sought to avoid the effect of their negligence by arguing that plaintiffs subsequent counsel failed to timely prosecute an appeal ***17** and that that failure was the actual cause of plaintiffs damage. Relying on City of *Covington,* the Court rejected that attempted dodge of responsibility:

Can the negligent attorneys now escape responsibility because it now appears that [the plaintiff] could have had his claim processed if he had pursued *the perfect course of legal action?* We do not think so, and find the situation at bar to be comparable with those cases which impose liability upon a tortfeasor for the entire damages sustained by one sustaining bodily injuries, even though it is shown that the medical treatment of those injuries may have been remiss.

The same reasons are applicable to the situation at bar as in personal injury cases. One basis for the rule is that the injured person is not skilled in medical science; he has done all that can be expected of him when he exercises ordinary care in selecting a competent physician. By parity of reasoning, it is noted that [the plaintiff] was not skilled in law; he was thrust into a precarious legal entanglement by the allegedly negligent action of his first attorneys, and in order to extricate himself from that situation he required legal advice. *There is no suggestion that he was negligent in the selection of his second attorney.* [Emphasis added].

Wimsatt, 414 S.W.2d at 912.

Although the harm to Ms. Moloney was caused by Appellee Becker's negligent, unauthorized legal practice, the principles and rule of *City of Covington, Stewart Dry Goods,* and *Wimsatt* apply equally here. Ms. Moloney used the services of Appellee Becker and was given negligent advice and a defective QPRT. When the defects were discovered, Ms. Moloney's family

consulted competent attorneys in the relevant area of expertise and were advised that there was no fix. [Video Record Thomas Day 3, 9:40:05 - 9:40:27; 9:42:48 –9:43:01].

Under the principles of *City of Covington*, Stewart Dry Goods, and Wimsatt, that should have been the end of the inquiry. But it wasn't. At trial, ***18** Appellee Becker called only one expert, Sheldon Gillman, an estate planning attorney from Louisville, Kentucky. Mr. Gillman was called not to defend Appellee's original negligent conduct or to challenge the calculation of the taxes incurred as a result of the defective QPRT; he did neither. Rather, he was called – over Appellant's objection [4] -- to provide some modicum of evidentiary support for Appellee's "somebody could have done something" defense.

Specifically, Mr. Gilman offered his opinion as to what he says he would have advised had he been the attorney consulted by the Moloney family back in 2000 when the defective QPRT was discovered. His remedy, developed 12 years after the fact and two years after being hired in this case, would have strung together five or six separate instruments and transactions, including (i) creation of a family limited partnership, (ii) separation of the title to the residence from the title to the Farm, (iii) establishment of an "intentionally defective grantor trust," (iv) transferring the limited partnership interest into that trust (v) in exchange for a promissory note, (vi) which would later be discounted by offer to a bank, and finally (vii) gifting of multiple interests in the intentionally defect trust to Ms. Moloney's grandchildren, spouses of grandchildren and great grandchildren. [Video Record Gilman Day 2, 2:33:13 - 2:33:57].

Mr. Gillman's suggestion was so complicated that he admittedly wouldn't even try to describe it to an **elderly** client like Ms. Moloney. [Video Record, Gilman Day 2, 2:33:58 - 2:34:09]. Moreover, his suggested remedy would not have achieved Ms. Moloney's intention, as it would have (1) required separation of the title to the residence from the title to the Farm, and (2) resulted in gifting of ***19** interests in the Farm to multiple "grandchildren, spouses of grandchildren, and great grandchildren," which was directly contrary to her established intention to pass the residence and the Farm to her two daughters. [Video Record Gilman Day 2, 2:42:13 - 2:42:25] This intention was established by the QPRT, the beneficiaries of which were Ms. Moloney's two daughters, and her July, 2000 Will and Trust, pursuant to which her two daughters inherited the residence and the Farm. There was no evidence whatsoever that Ms. Moloney ever intended to leave her Farm to her "grandchildren, spouses of grandchildren, and great grandchildren."

Like the "major operation" the plaintiff refused to undergo in *Stewart* and like the "perfect course of legal action" suggested by the defendants in *Wimsatt*, Mr. Gillman's complicated after-the-fact suggestion was an "obligation [that] did not rest upon the plaintiff." *City of Covington*, 133 S.W.2d at 53. Ms. Moloney's family sought the advice of competent counsel upon discovering Appellee's negligence. [Video Record Thomas Day 3, 9:40:05 - 9:40:27; 9:42:48 - 9:43:01]. And they then followed that advice, with Ms. Moloney executing a new Last Will and a new Trust Agreement. [Video Record Thomas Day 3, 9:32:30 - 9:32:45]. As a matter of law, that was the full extent of the family's obligation. As in *Wimsatt*, there is "no suggestion that [they were] negligent in [their] selection of [their] attorney." *Wimsatt*, 414 S.W.2d at 912. And there is certainly no evidence of such.

While there was no direct allegation that the lawyers hired by the family failed to pursue the "perfect course of legal action," *Id.*, at 911, that allegation ***20** was implicit in Appellee's argument and in Mr. Gillman's testimony that he would have offered different advice. As a matter of law, that argument is "not tenable." *Stewart Dry Goods*, 202 S.W. at 489.

The Trial Court erred in failing to direct the verdict on Appellee's asserted defenses of mitigation, contributory negligence, and intervening and superseding cause.

> Can the negligent [Becker] now escape responsibility because it now appears that [Appellant] could have [saved taxes] if [it] had pursued the perfect course of legal action? We do not think so...

Wimsatt, 414 S.W.2d at 912.

V. The Trial Court Erred In Permitting Appellee To Offer Expert Testimony On Hypothetical Alternative Courses Of Legal Action.

As noted in the immediately preceding section, the Trial Court permitted Appellee to call an expert, Mr. Gilman, to offer his opinion as to what he says he would have advised had he been the attorney consulted by the Moloney family back in 2000 when the defective QPRT was discovered. Appellant objected to that testimony for a number of reasons, principal among them the rule laid out in the *City of Covington* case and discussed previously. (Record pp. 709-733; 805-813). As a matter of law, Becker cannot escape responsibility for his negligence by arguing that Ms. Moloney's family could have saved additional estate taxes had they "pursued the perfect course of legal action." *Wimsatt,* 414 S.W.2d at 912. The perfect course of legal action is precisely what Mr. Gilman sought to lay out. It was plain error for the Trial Court to admit such testimony.

***21 VI. The Trial Court Compounded Its Errors By Erroneously Instructing The Jury On "the duty of Mable C. Moloney and/or Ann Thomas, acting as Power of Attorney for Mabel C. Moloney."**

Over Appellant's objection, the Trial Court instructed the jury not only as to Appellee Becker's duty, but also as follows:

INSTRUCTION NO. II

It was the duty of Mabel C. Moloney and/or Ann Thomas, acting as Power of Attorney for Mabel C. Moloney, to exercise that degree of care of a reasonably competent person acting under similar circumstances.

[Jury Instructions, Record pp. 835-837). It was error to so instruct the jury for a number of reasons.

First, as noted previously, there was no evidence whatsoever that Mabel Moloney violated any standard of care applicable to her. Although it was "suggested" that she did not like lawyers, the undisputed evidence from Becker himself was that Ms. Moloney trusted and relied upon him for advice and counsel on estate planning matters, that she employed an attorney anytime Becker suggested it, that she would have listened to him had he made that suggestion in this instance, but that he did not make that suggestion, convincing her instead that he could do the work. There was no evidence to justify an instruction as to Ms. Moloney's duty.

Second, at no point during the proceedings did Becker or anyone else assert any claim against "Ann Thomas, acting as Power of Attorney for Mabel C. Moloney." Nor was "Ann Thomas, acting as Power of Attorney for Mabel C. Moloney" ever named as a party. As a matter of law, it was plain error to instruct the jury on the duty of a non-settling non-party. KRS 411.821; ***22** *Jones v. Stern,* 168 S.W.3d 419, 423 (Ky. App. 2005); *Baker v. Webb,* 883 S.W.2d 898, 900 (Ky. App. 1994).

These errors in the instructions to the jury compounded the Trial Court's earlier error in allowing the admission of Mr. Gilman's testimony of what he would have done differently after-the-fact, as well as failing to direct the verdict on Appellee's defenses, for they specifically empowered Appellee to argue to the jury that "something should have been done, some action had to be taken" after the defective QPRT was discovered. [Video Record, Day 3 10:46:18 - 10:46:23].

It matters not that the jury never got to the question on the verdict form about whether "Mabel C. Moloney and/or Ann Thomas, acting as Power of Attorney for Mabel C. Moloney, failed to perform their duty." The impermissible argument authorized by the erroneous instruction was sufficient to allow the jury to conclude, erroneously, that Becker's failure to perform his duty was not a substantial factor in causing damage to the estate.

The Trial Court erred in instructing the jury, and that error was substantial.

VII. The Trial Court Erred In Permitting The Jury To Consider Unrelated But Allegedly Beneficial Planning Work Performed By Appellee At Other Times Not At Issue In The Case.

The Trial Court also erred in allowing Appellee Becker to testify regarding the various amounts of taxes he claims he saved the Moloneys through other transactions over the years. Plaintiff objected to this testimony on the grounds of relevance and undue prejudice under KRE 403. [Video Record, Becker Day 2 3:47:48 - 3:48:49],

***23** This case involved Appellee Becker's recommendation and preparation of a defective QRPT, the intended purpose of which was to transfer the Farm to Ms. Moloney's daughters, while saving estate taxes. Any other work or alleged tax savings Becker may have generated for the Moloneys in prior years on other matters does not tend to prove or disprove anything about the QPRT and its undisputed failure to achieve the intended tax savings. The undue prejudice of that testimony lies in the potential conclusion that Becker's prior "good" somehow outweighs the "bad" caused by his negligent preparation of the QPRT. It cannot be described as harmless error.

VIII. The Trial Court Erred In Declining To Grant A New Trial.

Given the miscarriage of justice that resulted from the numerous legal errors and a verdict that was unsupported by law or fact, it was an **abuse** of discretion and clear error for the Trial Court not to grant a new trial.

***24 CONCLUSION**

Plaintiff respectfully requests that this Court **REVERSE** the Trial Court's Judgment and **REMAND** this action to the Trial Court with instructions to **Enter Judgment in favor of Appellant** in the amount of $142,901, or alternatively a New Trial.

Footnotes

1 Per CR 76.12(4)(c)(v), the issues raised in this appeal were properly preserved at the trial court level via timely written Motions in Limine (Record pp. 709-733; 734-750; 805-813), oral objections on the scope of expert testimony (Video Record Trial Day 2, 7/27/11 3:47:57-3:48:31), jury instructions (Video Record Trial Day 3; 7/28/11; 9:54:19-9:54:25; 10:03:34-10:04:41), oral motion for directed verdict (Video Record Trial Day 3; 7/28/11; 9:47:22-9:49:26; 9:49:37-9:54:34) and written Motion for Judgment Notwithstanding the Verdict (Record pp. 850-870).

2 Record Vol. VII, (7/28/2011), Joint Binder of Exhibits With Both The Plaintiffs and Defendant's Exhibits (filed separately in binder), Plaintiffs Exhibits 2, 3 and 4.

3 Record pp. 709-733, 738-750.

4 Motion in Limine (Record pp. 709-733) & Supplemental Motion in Limine (Record pp. 805-813).

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.