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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHRISTINA WOLFENDEN WOODS, Plaintiff and Appellant, v. WARD R. NYHUS, JR.& COMPANY et al., Defendants and Respondents.	B236917 (Los Angeles County Super. Ct. No. SC109330)

APPEAL from a judgment of the Superior Court of Los Angeles County, Geralde Rosenberg, Judge. Affirmed.

Robert S. Gerstein and Christopher Rolin for Plaintiff and Appellant.

Farmer & Ridley, and Richard D. Cleary for Defendants and Respondents.

INTRODUCTION

Christina Wolfenden Woods appeals from a judgment in favor of respondents Heike Thiel and her employer, Ward R. Nyhus, Jr. & Company, on appellant's complaint for breach of fiduciary duty and negligent infliction of emotional distress. Appellant alleged that respondents breached a fiduciary duty to her by falsely informing her father that she would not comply with his wishes for the disposition of his estate. The trial court granted summary judgment in favor of respondents, finding no such fiduciary duty existed. On appeal, appellant contends she presented evidence sufficient to demonstrate a triable issue of fact as to the existence of a fiduciary duty. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Appellant's father, Terry Wolfenden, initially retained respondents, certified public accountants (CPAs), to prepare his tax returns in late 2001 or early 2002. In 2003, Wolfenden engaged respondents to prepare income tax returns for his trust, the Wolfenden Trust. Sometime that year, Wolfenden also began a relationship with Angela Hannigan. He began living with Hannigan hours after his wife's death in 2003, and continued to do so until he died in 2009. At Wolfenden's request, respondents also prepared Hannigan's 2007 income tax returns.

In Spring 2007, Wolfenden introduced Thiel to appellant and his other daughter, Jeanine Meunier. Appellant testified that Wolfenden described Thiel as "the CPA in charge of the estate" and the "go-to" person concerning any problems "in the future." After being introduced to respondents by her father, appellant retained respondents to prepare her 2006 and 2007 income tax returns. In June 2007, Wolfenden gave Thiel power of attorney over two of his bank accounts, so Thiel could write checks for him if the need arose.

In August 2007, Wolfenden wrote a letter detailing his estate plans and what he wanted his daughters to do with his $15 million estate after his death. In the August 6, 2007 letter, Wolfenden stated he wanted his daughters to "honor [his] wishes." Throughout the letter, Wolfenden referred to Thiel as someone who "knows what I want," was familiar with his affairs, and could assist in carrying out his wishes concerning the disposition of his estate. Under the heading "Most Important," Wolfenden stated he wanted Hannigan to receive $72,000 after his death. He explained that "Angela has been real nice to me. I can have my trust changed to what I want. I will if I have to." Wolfenden read the letter to his daughters and, according to appellant, forced her to countersign the letter and write "I will honor this agreement" next to her signature.

Appellant and Hannigan had a conflict over Hannigan's treatment of Wolfenden. In the fall of 2008, appellant contacted Thiel on two occasions (a telephone call and a meeting) to discuss her concerns about Hannigan. According to appellant, during the telephone call, she told Thiel that "[i]t would be hard for me to give [Hannigan] the money because of her behavior toward me and my father." Appellant testified she contacted Thiel because "I thought she was representing the trust and representing, you know, the family and the trust . . . ." She hoped that Thiel would "be my advocate and speak up . . . for me in front of my father." Appellant could not recall Thiel saying anything to her during the telephone call, and Thiel did not say anything during the meeting, "just listening to what I had to say . . . ."

Shortly thereafter, Wolfenden amended his trust to provide gifts totaling $112,500 to Hannigan. He also opened a new joint bank account with Hannigan, which he funded with $540,000.

Appellant's father died on January 29, 2009. Two weeks later, appellant sued Hannigan to set aside the gift of the joint bank account. After settling with Hannigan, appellant filed a complaint against respondents for slander, breach of fiduciary duty, and negligent infliction of emotional distress (NIED).[1]

In her complaint, appellant alleged that respondents were CPAs whose clients included appellant, her father, the Wolfenden Trust, and Hannigan. Appellant further alleged that her father had encouraged her to contact Thiel "in connection with any problems [she] had concerning the administration of the Wolfenden Trust." She also alleged that her father "trusted [Thiel] as one that [*sic*] [appellant] should communicate with concerning family problems."

Appellant further alleged that in October 2008, she confided her concerns about "Hannigan's abusive attitude and misconduct toward her father" to Thiel. Appellant told Thiel that "she wanted her to act as a peacemaker and to assure her father that she was acting in his best interest." Appellant alleged Thiel subsequently told her father (1) that appellant would not honor her father's wishes to make certain payments to Hannigan after his death, (2) that appellant had seen a lawyer concerning her rights and duties under the Wolfenden Trust, and (3) that appellant "was not acting in the best interests of her father." Appellant asserted this conduct breached Thiel's fiduciary duty to her and caused her to suffer severe emotional distress because it undermined her relationship with her father. Specifically, appellant alleged respondents "had an obligation to act in good faith and in a manner in the best interest of [appellant] with such care including, reasonable inquiry as a professional in approaching [her] father, who was in ill

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[1] Appellant does not appeal from the order granting summary judgment on her cause of action for slander. Accordingly, we will not discuss that cause of action further.

physical health and failing mental capacity. In addition, [Thiel] was acting with a conflict of interest and cultivated her relationship with Wolfenden in violation of her fiduciary duty to [appellant]."

After filing an answer generally denying all of the allegations, respondents moved for summary judgment on the ground, inter alia, that appellant could not establish that Thiel or Nyhus owed any duty to her. Respondents asserted they were never hired by appellant to advise her about her father's affairs. Instead, they were hired by Wolfenden to advise him about matters concerning the Wolfenden Trust. In a declaration filed in support of the motion for summary judgment, Thiel denied making any of the statements attributed to her in the complaint. Thiel admitted preparing 2006 and 2007 income tax returns for appellant and her husband.

Appellant filed an opposition, contending she presented evidence that respondents owed a fiduciary duty to her, as (1) "she [had] reposed her trust and confidence in Ms. Thiel and her firm not only by virtue of their relationship to her as CPAs, but pursuant to her father's instructions to her and the [respondents] that she was to place her trust and confidence in them pertaining to the Trust," and (2) respondents owed a fiduciary duty to her, as she was a beneficiary of the Wolfenden Trust. Appellant further contended that Thiel voluntarily accepted a confidential relationship with appellant because appellant's father requested that Thiel do so at the Spring 2007 meeting and in the August 6, 2007 letter, and because Thiel failed to object when appellant confided in her.

In support of the opposition, appellant submitted a declaration from Dana A. Basney, a CPA who had previously testified concerning "accounting principles, conflicts of interest and fiduciary duties" (Basney Declaration). In the declaration, Basney asserted that "[t]he preparation of tax returns does not create a fiduciary

duty; however, involvement in managing finances, investments or acting as a trustee or under a power of attorney usually creates a fiduciary duty." Basney opined that "based upon my analysis of the facts and documents in this case, . . . a fiduciary relationship existed between Terry Wolfenden, the Wolfenden Trust and its beneficiaries, Plaintiff Christina Woods and her sister, Jeannie Meunier." The opinion was based upon the "fact" that respondents were "doing financial management [for the Wolfenden Trust] which created a fiduciary relationship between the Wolfenden Trust estate, as well as the trustee and the beneficiary." Basney did not opine as to the scope of the fiduciary duty, or whether Thiel breached that duty. Neither did he mention confidential relationships.

Respondents filed a reply, contending that they did not owe a fiduciary duty to appellant merely because they performed work for the Wolfenden Trust. They also objected to the Basney Declaration on the ground that it constituted an improper opinion on a question of law, and that it lacked foundation.

On August 16, 2011, the trial court granted the motion for summary judgment, finding that "there was no duty or fiduciary relationship between Plaintiff and Defendants except for the matters related to her 2006 and 2007 tax returns." The court sustained evidentiary objections to the entire Basney Declaration. Judgment was entered against appellant on October 11, 2011. Appellant timely appealed.

DISCUSSION

Appellant contends the trial court erred in granting summary judgment. For the reasons explained below, we disagree.

A. *Standard of Review*

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.

[Citation.]" (*Molko v. Holy Spirit Assn*. (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element *X*." (*Id*. at p. 853.)

An order granting summary judgment is reviewed de novo. "Although we independently review the grant of summary judgment [citation], our inquiry is subject to two constraints. First, we assess the propriety of summary judgment in light of the contentions raised in [appellant's] opening brief. [Citation.] Second, to determine whether there is a triable issue, we review the evidence submitted in connection with summary judgment, with the exception of evidence to which objections have been appropriately sustained. [Citations.]" (*Food Safety Net Services v. Eco Safe Systems USA, Inc*. (2012) 209 Cal.App.4th 1118, 1124.)

"'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.)

B. *Motion for Summary Judgment*

In her complaint, appellant alleged that Thiel breached her fiduciary duty to appellant by falsely informing Wolfenden that appellant would not comply with his wishes to make certain payments to Hannigan, and that the breach caused severe emotional distress. In the motion for summary judgment, Thiel presented a prima facie case that she owed no fiduciary duty to appellant because (1) she was never retained by appellant to advise her about family matters, and (2) she did not, as a matter of law, owe a fiduciary duty to a beneficiary of a trust. Appellant now contends she presented sufficient evidence to create a triable issue of act on the existence of a fiduciary duty. Specifically, she asserts there is direct evidence she reposed confidence in Thiel, indirect evidence that Thiel voluntarily accepted the confidential relationship, and expert opinion that there was a fiduciary duty. We disagree.

C. *Fiduciary Duty*

"'[Fiduciary]' and 'confidential' have been used synonymously to describe '". . . any relation[ship] existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation[ship] ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation[ship] the party in whom the confidence is reposed, if he [or she] voluntarily accepts or assumes to accept the confidence, can take no advantage from his [or her] acts relating to the interest of the other party without the latter's knowledge or consent . . . ."' [Citations.] Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client [citation], whereas a 'confidential relationship' may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship.

[Citations.] The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 382-383.) "'[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law.' [Citation.]" (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386.)

A fiduciary duty may arise from a legally recognized fiduciary relationship, such as an attorney-client relationship, or from a confidential relationship. Appellant does not contend she was in a legally recognized fiduciary relationship with respondents. Although appellant was a client of respondents for income tax return work, she does not rely on any fiduciary duty arising from that formal relationship in asserting her claims. Nor does appellant argue that any legally recognized fiduciary relationship between her and respondents arose from her status as a beneficiary of work done for the Wolfenden Trust. Rather, appellant contends that there was a confidential relationship between the parties, and that a fiduciary duty arose from that relationship which precluded Thiel from disclosing appellant's statement about Hannigan to Wolfenden.

"Because confidential relation[ship]s do not fall into well-defined categories of law and depend heavily on the circumstances, they are more difficult to identify than fiduciary relation[ship]s." (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 272 (*Richelle L.*).) Generally, a confidential relationship arises when one person reposes trust and confidence "in the integrity of another,"

and that other person voluntarily accepts the relationship. (*Barbara A. v. John G.*, *supra*, 145 Cal.App.3d at p. 382; accord, *Richelle L.*, *supra*, at p. 272, fn. 6.)

Here, appellant contends there was a confidential relationship because she reposed trust and confidence in Thiel by confiding her concerns about Hannigan to Thiel. However, "'[t]he mere fact that A receives the confidences of B does not turn A into B's fiduciary, nor does it create a relationship of trust and confidence. A "relationship" has to exist over a period of time, and the divulging of a single confidence -- even an important one -- does not create a relationship (even though it may be evidence that such a relationship exists).'" (*Richelle L.*, *supra*, 106 Cal.App.4th at p. 272, fn. 6.) Likewise, "[t]he mere placing of a trust in another person does not create a fiduciary relationship." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 13.)

Appellant also contends that Thiel voluntarily accepted a confidential relationship with appellant, but there is no admissible evidence to support this contention. Appellant does not claim that Thiel expressly agreed to act on her behalf with respect to her family's affairs. She asserts, rather, that Thiel listened to her. Appellant cites no case law, and we have found none, for the proposition that listening to a person creates a confidential relationship. (Cf. *Richelle L.*, *supra*, 106 Cal.App.4th at p. 280 [fiduciary duty can arise from formal counseling relationship].)

Nor did the oral and written statements by Wolfenden concerning Thiel create a confidential relationship between Thiel and appellant. According to appellant, Wolfenden introduced Thiel as the CPA for his estate and the "go-to" person concerning any problems in the future. Wolfenden's August 2007 letter clearly referred to Thiel as someone who "kn[ew] what [Wolfenden] want[ed]" concerning the disposition of his assets. These comments identify Thiel's primary

role as assisting in administering the estate *after* Wolfenden's death. As Wolfenden was both the trustor and sole trustee, he had total control over the disposition of the trust assets. Indeed, he cautioned appellant that "I can have my trust changed to what I want. I will if I have to." While Thiel may have had a fiduciary duty to disclose to her client Wolfenden any information relevant to the administration of his trust (including information that a successor trustee did not intend to fulfill his wishes as the trustor), she owed no duty to appellant. Moreover, even if Wolfenden's comments introducing Thiel were construed to define her role more broadly, they could not, standing alone create a confidential relationship between appellant and Thiel.

Citing *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139 (*Tri-Growth*), appellant contends Thiel owed a fiduciary duty to her because Thiel was able to obtain confidential information from appellant due to Thiel's work for Wolfenden. Appellant's reliance upon *Tri-Growth* is misplaced. That case involved a law firm that had represented various general partners who had formed a limited partnership (Tri-Growth) to acquire real property. When the partners formed Tri-Growth, one of its goals was to acquire all the parcels on a specific city block. Subsequently, one of the law firm's attorneys, Scott Burdman, became a limited partner of Tri-Growth, and Tri-Growth eventually purchased all but one parcel. In late 1986, Burdman inquired of a Tri-Growth partner concerning the negotiations for the remaining parcel. Burdman learned that the price had dropped and that the seller wanted to quickly close on the deal, but Tri-Growth wanted to close after the new year. Without informing his partners in Tri-Growth, Burdman's law firm purchased the parcel before Tri-Growth could. Plaintiffs asserted that the law firm was able to purchase the property only by using the confidential information extracted by

Burdman about Tri-Growth's inclination to delay the purchase. (*Id*. at pp. 1145-1149.) The appellate court concluded that "[i]n the unique context of the transaction involved here, there is a factual question as to the existence of a fiduciary relationship [citation], and whether defendants breached it." (*Id*. at p. 1151.) The instant case is easily distinguishable from *Tri-Growth*, as Thiel is not alleged to have actively sought confidential information from appellant to use for her personal gain. Rather, it was appellant who approached Thiel and confided in her.

Finally, the Basney Declaration did not create a triable issue of material fact as to the existence of a confidential relationship creating a fiduciary duty; accordingly, the trial court did not abuse its discretion in excluding the declaration. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599 (*Amtower*) [trial court's ruling on the admissibility of opinion evidence reviewed for abuse of discretion].) The trial court sustained respondents' objection to the Basney Declaration on the ground that it was improper opinion evidence and lacked foundation. (See *Amtower, supra*, 158 Cal.App.4th at p. 1599 ["Whether a fiduciary duty exists is generally a question of law. [Citation.]"]; *Asplund v. Selected Investments in Financial Equities, Inc*. (2000) 86 Cal.App.4th 26, 50 ["'[T]he question of the existence and scope of a defendant's duty is a legal question which depends on the nature of the . . . activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.'"].) Appellant contends Basney could properly opine on whether a fiduciary duty arose from the confidential relationship between appellant and Thiel, because "the existence of a confidential relationship is a question of fact." (*Barbara A. v. John G., supra*, 145 Cal.App.3d at p. 383.) However, Basney did not purport to opine on the existence of a fiduciary duty arising from a

confidential relationship between appellant and Thiel. Indeed, Basney never discussed confidential relationships or how the facts of this case demonstrated a confidential relationship between appellant and Thiel. Rather, Basney opined that Thiel owed a fiduciary duty to appellant that arose from her fiduciary relationship with "the Wolfenden Trust and its beneficiaries." This opinion was wrong legally, as an accountant cannot have a fiduciary relationship with a trust, which "'"'is not an entity separate from its trustee[].'"'" (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1132, fn.3.) Nor does an accountant have a duty to third party beneficiaries of work done for a client. (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 580-582; cf. *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 212 [attorney for trustee has no duty to beneficiaries of the trust].) More importantly, Basney's opinion that there was a fiduciary duty was based upon a legally recognized fiduciary relationship, that of accountant-client. "Where a legally recognized fiduciary relationship exists," the existence of a fiduciary duty is a question of law for the court. (*Barbara A. v. John G.*, *supra*, 145 Cal.App.3d at p. 383.) Thus, Basney was opining on an issue outside the scope of expert testimony, and his declaration did not create a triable issue of fact on the existence of a fiduciary duty owed to appellant.

Stanley v. Richmond (1995) 35 Cal.App.4th 1070 (*Stanley*) is not to contrary. In that case, the court concluded that an expert witness's testimony about the Rules of Professional Conduct and the common law of attorney fiduciary duty were sufficient to establish the existence of a fiduciary duty on the part of the attorney defendant. The *Stanley* court cited *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125 (*Day*) in support, but in *Day*, the appellate court held that "[t]he standards governing an attorney's ethical duties are conclusively established by the Rules of Professional Conduct. They *cannot* be changed by expert

testimony. If an expert testifies contrary to the Rules of Professional Conduct, the standards established by the rules govern and the expert testimony is disregarded. [Citation.]" (*Id*. at p. 1147.) In contrast, here, Basney never testified about confidential relationships and how accountants could enter into confidential relationships with nonclients. Accordingly, the trial court did not err in excluding the Basney Declaration.

Appellant has not shown the existence of a confidential relationship between herself and Thiel. Nor has she shown a triable issue of fact on this issue. Thus, respondents are entitled to summary judgment on the cause of action for breach of fiduciary duty. Because the cause of action for negligent infliction of emotional distress is a derivative tort, it falls with the breach of fiduciary duty cause of action. (*Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 984.) In short, the trial court did not err in granting summary judgment on these causes of action in favor of respondents.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.