

ORIGINAL

IN THE SUPREME COURT OF OHIO  
CASE NO. 2012-1637

DEANA IVANCIC,

Appellee

On Appeal from the Lake County Court of Appeals, Eleventh Appellate District Case No. 2011-L-050

vs.

RAE ANN ENOS,

Appellee

DAVID H. DAVIES, ESQ. et al.

Appellants

APPELLEES' JOINT MEMORANDUM IN RESPONSE

ANTHONY SMITH (0002875)  
KARL & SMITH  
493 Front Street  
Berea, Ohio 44017  
Phone: (440) 891-8320  
E-mail: [pistaelite@aol.com](mailto:pistaelite@aol.com)  
Attorney for Appellee Rae Ann Enos

MARGARET MARY MEKO(0032902)  
THE MEKO LAW OFFICE LLC  
2778 SOM Center Road, Suite #202  
Willoughby Hills, Ohio 44094  
Phone: (440) 516-1500  
E-mail: [mmmeko@mekolaw.com](mailto:mmmeko@mekolaw.com)  
Attorney for Appellee Deana Ivancic

DAVID H. DAVIES (0016318)  
P.O. Box 1264  
Willoughby, Ohio 44096  
Phone: (440) 953-2000  
[ddavies@ohiobarrister.com](mailto:ddavies@ohiobarrister.com)  
Appellant Pro Se

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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR MATTER OF PUBLIC OR GREAT GENERAL INTEREST**

This case is a breach of fiduciary duty claim against an attorney handling the administration of an estate who misappropriated estate assets. Appellant is the attorney who engaged in egregious conduct in the manner in which he handled the estate and advised his client, Appellee Rae Ann Enos, administrator of her father's estate. This case was tried against Appellant in the Lake County Probate Court in a bench trial. Appellant was found liable for breach of fiduciary duty and ordered Appellant to: return misappropriated estate assets, return a portion of his fee for the administration of the estate and pay attorneys fees to the aggrieved Appellees. The Lake County Court of Appeals affirmed the Probate Court's decision.

Appellant has appealed to this Court alleging that the Court of Appeals has committed three errors which rise to the level of involving a substantial constitutional question and/or one of public or great general interest. None of these three alleged errors meet the requirements for review by this Court for the following reasons.

1. **Jurisdiction of the Probate Court:** Appellant urges this Court to accept this case for review because this Court's decision in *State ex rel. Lewis v. Moser*, 72 Ohio St. 3d 25 (1995) requires clarification. Appellant claims that the Court of Appeals erroneously cites *Moser* in support of its decision to affirm the Probate Court's ruling that it had jurisdiction. Appellant claims that the Court of Appeals misapplied the *Moser* decision because it does not directly address the issue of whether a probate court has jurisdiction over a claim for breach of fiduciary duty

against an estate attorney. Appellant contends that the definition of fiduciary in R.C. §2109.01 does not permit a breach of fiduciary duty claim to be brought against an estate attorney in probate court. And, Appellant claims that this Court should clarify its decision in *Moser* to address this issue.

However, Appellant has failed to cite any case authority to support his position that a probate court cannot exercise its jurisdiction over an estate attorney (like Appellant) who has breached his fiduciary duty. Nor has Appellant cited any authority which holds that the definition of fiduciary in R.C. §2109.01 does not permit a breach of fiduciary duty claim against an estate attorney. In fact, the 12th Appellate District is in accord with the Court of Appeals in finding that that a probate court has jurisdiction over a breach of fiduciary duty claim against an estate attorney. See *Gilpin v. Bank One Corp.* (2004), 2004-Ohio-3012 (12<sup>th</sup> District).

Thus, Appellant has not shown any conflict among the various appellate districts which requires review. Nor has Appellant shown any case authority or legal treatises which identify an issue or weakness in the *Moser* decision which has caused confusion or contradictory lower court decisions regarding breach of fiduciary duty claims and the jurisdiction of the probate court. As the result, Appellant cannot establish a basis for this Court's review.

2. Awarding of Attorney Fees: Appellant claims that the Court of Appeals erred in awarding attorney fees to Appellee Deana Ivancic under the "American Rule" because she is not a prevailing party. Interestingly, Appellant also concedes that "a case arguing the appropriateness of an award of attorney fees may not appear to be a case of great general importance since there are a number of cases

discussing the “American Rule”. Appellant argues that despite the well-established “American Rule”, the instant case presents a unique issue under this rule that this Court should review—that is not true. What the instant case actually involves is unique facts and circumstances which give rise to the award of attorneys fees. Thus, even if the Court of Appeals erred in affirming the award of attorneys fees in the instant case, its ruling on this issue would not have general application to other cases.

3. Effect of R.C. §2117.10 on the Requirements of R.C. §2117.06:

Appellant claims that this Court should review this case because the Court of Appeals used faulty reasoning when it affirmed the Probate Court’s ruling that R.C. §2117.06 controls the facts in this case, not R.C. §2117.10. Appellant argues that the validity of the lien was not challenged in the Probate Court and that the Court of Appeals misapplied the facts in the record in its ruling on this issue. The very nature of this argument does not rise to the level of a matter of public or great general interest—instead, it relates only to the unique facts and circumstances in the instant case. On the merits, Appellees did challenge the validity of the lien in the Probate Court and it was found invalid because there was no contingent fee agreement signed by Appellant’s client evidencing the \$50,000 debt underlying the lien.

STATEMENT OF THE CASE AND FACTS

Appellees submit the following additional facts which have been omitted by Appellant and are pertinent to this appeal.

A. The Validity Of The Lien Was Challenged In The Probate Court

Appellant claims that Appellees did not challenge the validity of his purported

mortgage lien for \$50,000 for attorneys fees in the Probate Court—that is not true. Appellees established the following facts challenging the validity of the lien at the trial in the Probate Court. During the administration of the estate, Appellant received a \$50,000 pay-off of a mortgage lien on estate real property outside the estate proceedings. Appellant never produced a contingent fee agreement signed by Raymond Griffith which supports this lien amount.

**B. Appellant Did Not Disclose The Lien To The Administrator Or The Probate Court**

Appellant did not submit his claim for \$50,000 in writing to the Administrator or the Probate Court for approval during the administration of the estate. Appellant did not provide a copy of the mortgage lien or purported contingent fee agreement to the Probate Court. The Probate Court file for the estate does not contain a copy of the Real Estate Settlement Statement which shows the \$50,000 “pay-off to Attorney Davies” after the sale of the estate real property. The Probate Court never held a hearing on Appellant’s claim during the administration of the estate because the Court did not know about the pay-off. The \$50,000 pay-off of the lien to Appellant was made outside the estate by the title company. Appellant admitted that in hindsight, it would have been a good idea to provide a copy of the mortgage lien to the Probate Court and his client.

**C. Appellant Did Not Give Independent Legal Advice To His Client Regarding The Lien And Claimed Debt**

The validity of the lien could not be determined during the administration of the estate because Appellant did not properly disclose it to the Probate Court and his client, Rae Ann Enos. As the result the validity of the lien had to be determined

in the Probate Court and it was found invalid. The following facts established in the instant case show that the validity of the lien could not be determined during the administration of the estate because: (1) Appellant had a conflict of interest by serving as the attorney for the administrator and being the estate's largest creditor, (2) Appellant admitted that the ability of the administrator to challenge his \$50,000 claim was an issue since he was both a creditor and attorney for the administrator, and, that maybe he should have referred the case to another attorney, (3) Appellant admitted that it is often true that the attorney for an administrator will attempt to negotiate a lesser amount of a creditor's claim—but that he did not do this regarding his claim against the estate, (4) Appellant did not provide any advice to the administrator that she could or should challenge his lien or dispute his debt, (5) Appellant did not obtain a waiver of conflict from his client even though he was a creditor of the estate and (6) Appellant admitted that in hindsight he should have obtained a waiver of this conflict from his client.

#### **ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW**

##### **OPPOSITION TO PROPOSITION OF LAW NO. I**

R.C. 2101.24[A][1][c] and [m] give the probate court exclusive jurisdiction: (1) “to direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates” and “to direct and control the conduct of fiduciaries and settle their accounts...”and (2) R.C. 2101.24[C] gives the probate court “plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code.” Courts construing these provisions have

found that a probate court has exclusive subject matter jurisdiction over a breach of fiduciary duty claim arising out of the administration of an estate. See, e.g., *Holik v. Lafferty* (2006), 2006-Ohio-2652; *Gilpin v. Bank One Corp.* (2004), 2004-Ohio-3012; *Rinehart v. Bank One* (1998), 125 Ohio App. 3d 719; *Johnson v. Allen* (1995), 101 Ohio App. 3d 181. Cf. *In re Guardianship of Jadwisiak* (1992), 64 Ohio St. 3d 176, 180; *Keith v. Bringardner* (2008), 2008-Ohio-950, ¶8 (pursuant to R.C. §2101.24[A][1], a probate court has exclusive jurisdiction to appoint and remove guardians, direct and control their conduct and extends to all matters “touching” the guardianship).

None of these cases, nor any case cited by Appellant, hold that a probate court cannot exercise its jurisdiction over an estate attorney (like Appellant) who has breached his fiduciary duty while handling the administration of an estate. Appellant has failed to cite to any cases that hold that the definition of fiduciary in R.C. §2109.01 prevents a breach of fiduciary duty claim against an estate attorney. In fact, in *Gilpin*, the 12<sup>th</sup> Appellate District is in accord with the Court of Appeals in holding that that a probate court’s jurisdiction extends to an estate attorney. *Gilpin* involved an attorney hired by an administrator to assist in the administration of an estate who failed to properly set up the estate account. The court found that the attorney owed a fiduciary duty to the estate and that the probate court had jurisdiction over the breach of fiduciary duty claim against the attorney.

#### OPPOSITION TO PROPOSITION OF LAW NO. II

Appellant claims that his Rule 12(B)(6) motion against Appellee Ivancic should have been granted pursuant to R.C. §5815.16. Clearly this issue is unique only to the instant case and does not rise to the level of an issue of public or great general

interest. Further, reviewing this issue would not even affect the outcome in this case as the Court of Appeals made clear in its decision:

**Ivancic's claims against Davies were wholly derivative of Enos' claims, i.e., they only existed by virtue of the privity she allegedly shared with Enos. Accordingly, even if Ivancic's claims had been dismissed, the result is the same. Enos raised the same claims in her capacity as Davies' client, and there can be no dispute that Davies owed Enos a fiduciary duty.**

**(Opinion, p. 30). And:**

**We need not address this issue further, however, as it is not outcome-determinative. Even if Ms. Ivancic's claim against Mr. Davies for breach of fiduciary duty had been dismissed, the result would have been the same.**

**(Opinion, p. 17). The Probate Court ordered Appellant to return \$51,500, i.e., 50,000 which he misappropriated from the estate and \$1,500 which is a portion of the fee he was paid for the estate administration. This \$51,500 is to be split among Appellees—the two beneficiaries of their father's estate. Appellee Ivancic will receive half of these monies whether her claim had been dismissed or not. Thus, this issue does not meet the requirement for review by this Court.**

### **OPPOSITION TO PROPOSITION OF LAW NO. III**

**Appellant argues that Appellee Deana Ivancic is not entitled to attorneys fees under the well-established "American Rule" because she is not a prevailing party. He further argues that the Court of Appeals erred in awarding attorneys fees because his conduct does not constitute bad faith, and, therefore, does not meet the this one exception to the "American Rule". Appellant's argument clearly reveals that the alleged error he is claiming pertains to facts that are specific to the instant case, and, would not have importance for other cases. Thus, even if the Court of Appeals**

erred in affirming the award of attorneys fees in the instant case, it would not would not have general application to other cases.

Further, on the merits of Appellant's argument, as set forth in opposition to Proposition of Law No. II, whether or not Appellee Ivancic's claim had been dismissed or not, it is not outcome determinative—the result would be the same. Appellee Ivancic is entitled to one-half of the \$51,500 which Appellant was ordered to return. Further, the record is replete with the misconduct engaged in by Appellant during the administration of the estate (See Statement of Case and Facts, supra) and as set forth by the Court of Appeals:

The trial court found that Mr. Davies' conduct did not preserve or augment Mr. Griffith's estate. Rather, as discussed previously, Mr. Davies' failures diminished the estate substantially...

(Opinion, p. 28). Finally, Appellee Ivancic's counsel was the lead trial counsel and performed the bulk of legal services necessary to bring about the judgment against Appellant. (Opinion, p. 9). Her counsel did the majority of the legal work which brought about the favorable decision against Appellant.

#### OPPOSITION TO PROPOSITION OF LAW NO. IV

Appellant claims that he can disregard the presentment of claim requirement in R.C. §2117.06(A) by relying on R.C. §2117.10. However, in order for R.C. §2117.10 to control, the lien must be valid as set forth in the statute:

The failure of the holder of a valid lien upon any of the assets of an estate to present his claim upon the indebtedness secured by such lien...shall not affect such lien if the same is evidenced by a document admitted to public record...(Emphasis added).

The nature of a mortgage lien is aptly stated in *Barnets v. Johnson* (2005), 2005-

Ohio-682 (§17):

**The dominant feature of a real estate mortgage is that it is security for an obligation to which it is collateral; therefore, the obligation secured is regarded as the primary obligation and the mortgage as merely incidental thereto... If the obligation is destroyed, the mortgage dies with it...for the incident cannot survive the thing to which it is incidental. (Emphasis added.)**

**Appellant's lien is merely incidental to the primary obligation, i.e., the claimed debt of \$50,000 for attorneys fees. There is no signed contingent fee agreement between decedent and Appellant validating this \$50,000 claim, therefore, the debt is not valid. Because the underlying debt is not valid, the lien is not valid. As the result, Appellant was required to present this claim under R.C. 2117.06(A).**

**Appellant cites one case in support of his position, i.e., *Estate of Cogan* (1997), 123 Ohio App. 3d 186, 703 N.E. 2d 858. However, this case is distinguishable. In *Cogan*, the executor of the estate was also an attorney and had a lien for attorneys fees in the amount of the \$5,500 on the estate real property. The real estate was sold for \$45,100, and after all the liens were paid off including the executor's lien, the estate was insolvent. One of the unpaid creditors challenged the payment of the executor's lien without court scrutiny and approval. The court found that court scrutiny was not necessary, however, its reasoning belies its finding:**

**Presumably, the executor's claim was proved to and allowed by the probate court when the executor presented the accounting of the estate to the probate court. The probate court did not object to the final accounting, and there is no evidence that the executor was hiding his claim or participating in any self-dealing, which is what R.C. 2117.01 attempts to prevent. Although the executor should have proceeded more cautiously by presenting his claim to the probate court, his status as a secured creditor and the lack of evidence of self-dealing preserves his claim. (Emphasis added.)**

**Cogan at 189. The evidence in the record clearly establishes that Appellant was engaged in self-dealing and attempting to hide his claim, unlike the attorney in Cogan.**

**CONCLUSION**

**Appellant has appealed to this Court alleging that the Court of Appeals has committed three errors which rise to the level of involving a substantial constitutional question and/or one of public or great general interest. None of these three alleged errors meet the requirements for review by this Court.**

**Respectfully submitted,**

*Anthony J. Smith*

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**ANTHONY J. SMITH (0002875)  
KARL & SMITH  
493 Front Street  
Berea, Ohio 44017  
Phone: (440) 891-8320  
E-Mail: [pistaelite@aol.com](mailto:pistaelite@aol.com)  
Attorney for Appellee Rae Ann Enos**

---

**MARGARET MARY MEKO(0032902)  
THE MEKO LAW OFFICE LLC  
2778 SOM Center Road, Suite #202  
Willoughby Hills, Ohio 44094  
Phone: (440) 516-1500  
E-mail: [mmmeko@mekolaw.com](mailto:mmmeko@mekolaw.com)  
Attorney for Appellee Deana Ivancic**

CERTIFICATE OF SERVICE

A copy of the foregoing Appellees' Joint Memorandum in Response was sent

U.S. regular mail to:

David H. Davies, Esq.  
P.O. Box 1264  
Willoughby, Ohio 44096

on this 23<sup>rd</sup> day of October, 2012.

  
\_\_\_\_\_  
MARGARET MARY MEKO (0032902)