

No. SC93853

In the Supreme Court of Missouri

Eric Williams,
Plaintiff/Appellant,

v.

William L. Hubbard, Limited Admin. Ad Litem of the Estate of Betty Margaret
Reynolds, Kenneth Nelson, and Sandra Nelson,
Defendants/Respondents.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Kathleen A. Forsyth
Circuit Court No. 10P8-PR00688-02
On Transfer from the Court of Appeals for the Western District

Joint Substitute Brief of Respondents Kenneth and Sandra Nelson

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STATEMENT OF FACTS

This appeal arises from plaintiff Eric Williams' failed attempt to recover the non-probate¹ assets of his second cousin, Betty Reynolds, that transferred to defendant Sandra Nelson ("Sandy") when Betty died. Betty's assets included (1) cash and personal property (probate assets not at issue); (2) a beneficiary deed leaving a family farm to plaintiff (a non-probate asset that is not disputed); (3) funds in various accounts held in joint tenancy with Sandy, which are non-probate assets that plaintiff alleged were transferred under undue influence, but no longer seeks on appeal; and (4) three UMB certificates of deposit ("CDs"), which are non-probate assets held in joint tenancy or payable-on-death to Sandy and the only assets involved in this appeal. The trial court entered summary judgment on all plaintiff's claims finding that "the undisputed facts show that Plaintiff has suffered no harm and has no right to any of the [disputed or no-longer disputed, non-probate] assets. *See Crocker v. Crocker*, 261 S.W.3d 724, 727 (Mo. App. 2008)." (LF 706). In his Substitute Brief, plaintiff claims standing only as to the three UMB CDs and concedes that he cannot recover the assets from the other non-probate accounts.

¹ We use the term "non-probate" literally, referring to any assets that transfer upon the owner's death, but not through probate. *See Black's Law Dictionary* at 1079 (7th Ed. 1999) (defining "non probate" as "[o]f or relating to some method of estate disposition apart from wills").

A. Betty asks Ken to draft her will.

The Nelsons and Betty enjoyed an unquestionably close relationship. (LF 337, 359-360). It grew from the life-long friendship between Betty and Sandy’s mother, Norma Lamp. Betty – who never married or had children of her own – treated Sandy like a daughter, even referring to herself at times as “Mom II.” (LF 360).

In 2000, Betty asked defendant Kenneth Nelson (“Ken”), Sandy’s husband and an attorney, for help with some discrete estate-planning tasks. In March 2000, Betty executed a beneficiary deed she had asked Ken to draft, which transferred a family farm to plaintiff when Betty died.² (LF 360). And in May 2000, she executed a will Ken drafted for her. (LF 180, 360).

As Ken was working on the will, Betty provided him with a list of her financial holdings, including notations as to joint ownership or payable-on-death beneficiaries. (LF 361-63). The 2000 will named Louise Baughman (another long-time friend of Betty’s), Norma Lamp (Sandy’s mother), and plaintiff as equal beneficiaries. (LF 360). It also named Ms. Baughman as personal representative. *Id.* At the same time, and again at Betty’s request, Ken drafted a durable power of attorney, naming Ms. Baughman as attorney-in-fact. (LF 360).

In June 2006, Betty asked Ken to amend her will. (LF 368-69). She sent Ken a specific list of changes, including that Sandy be named as her personal representative and

² Betty herself had become the owner of this family farm through a beneficiary deed. (LF 286).

as attorney-in-fact under a durable power of attorney. (LF368-69). She also asked that Sandy and plaintiff be named as equal beneficiaries under her new will. Betty executed those documents on or around June 28, 2006. (LF 368-69). Ken never again provided estate planning advice or services, or any other legal counsel, to Betty. (LF 369-70).

B. Beginning in at least 2000, almost all Betty's assets were non-probate assets.

Plaintiff admits that when the 2000 will was drafted and executed, Ms. Baughman and Mrs. Lamp were named as either the joint owner or payable-on-death (sometimes referred to as "POD") beneficiary on all of Betty's financial assets. (App. Sub. Br. at 7; LF 361-64). At the time, those assets totaled approximately \$431,495. (LF 361, 363). Plaintiff was never named on any of these assets. (LF 361-64). And as plaintiff explains, those accounts are the source or "origin" of all the non-probate assets at issue in this appeal. (App. Sub. Br. at 11).

According to the list Betty provided Ken in 2000, she had most of her money in three accounts at the Kansas City Police Credit Union where she worked. In each case there was either a joint owner or a payable-on-death beneficiary. Under account number 61420, Betty had \$2,033 in a savings account, \$100,000 in a CD, and \$98,826 in an IRA. (LF 361). The signature card for account number 61420, dated April 20, 2000, lists Betty as the owner and Ms. Baughman as the payable-on-death beneficiary. (LF 361-62). Under account number 61421, Betty had \$2,030 in a saving account, \$100,952 in one CD, and \$41,398 in another CD. *Id.* The signature card for account number 61421, dated April 20, 2000 lists Betty as the owner and Ms. Baughman as the joint owner with

right of survivorship. (LF 362). Under account number 61422, Betty had a savings account worth \$2,078 and a CD worth \$25,084. (LF 361). The signature card for account number 61422, dated February 7, 2000, lists Betty as the owner and Norma Lamp as the joint owner. (LF 362).

Betty also listed a handful of other accounts that were jointly owned. She indicated a balance of \$10,901 in a Bank of America checking account that was jointly owned. (LF 361). She also listed an account with AARP – Scudder worth \$8,977 that was jointly owned (LF 362-63), and two mutual funds with American Century that were also jointly owned. (LF 362-65). The balances of the American Century accounts in 2000 were \$21,663 and \$17,572 respectively. (LF 362-63).

C. There were POD beneficiaries or joint owners on Betty’s non-probate assets – both disputed and no-longer disputed – from 2000 until her death.

At various times after June 2006, Betty replaced Ms. Baughman and Mrs. Lamp with Sandy as joint owner or payable-on-death beneficiary of Betty’s non-probate assets. (LF 363-66). It is undisputed that either Ms. Baughman or Mrs. Lamp was the joint owner or payable-on-death beneficiary on these assets before Sandy was so designated. (App. Sub. Br. at 7; LF 361-65). Plaintiff admits too that “the beneficiary or joint ownership designation on these accounts remained unchanged until after Betty Reynolds executed her will on June 28, 2006”, and that “had Betty Reynolds died while the 2000 will was in effect, the will would have only applied to untitled personal property [which is not disputed], stated by Betty to be worth less than \$5,000.” (App. Sub. Br. at 7).

In June 2005, Betty opened a checking account (#9837648701) at UMB bank, depositing \$5,985 and naming Ms. Baughman as payable-on-death beneficiary. (LF 364). A year later she removed Ms. Baughman as payable-on-death beneficiary and named Sandy as joint owner with right of survivorship. (LF 365). Similarly, on July 10, 2006, she replaced Ms. Baughman with Sandy as the payable-on-death beneficiary for the assets in Credit Union account number 61420. (LF 364).

In April 2008, Betty opened two CDs at UMB bank. (LF 365-66). She opened CD account number 15295951310, depositing \$24,000 and made Sandy joint owner with right of survivorship. (LF 365). The same day she opened CD account number 10762641310 with the same ownership structure, though the amount is not listed. (LF 365). Finally, on August 17, 2009, Betty opened CD account number 1471864131, depositing \$202,916 and named Sandy as the payable-on-death beneficiary. (LF 365). Around the same time she opened the first of the UMB accounts (April 29, 2008), Betty changed the ownership of the assets in her American Century accounts from jointly owned by Betty and Ms. Baughman to jointly owned by Betty and Sandy. (LF 364). When Betty died, her non-probate assets totaled approximately \$456,455. The table below shows where those assets were held, their original ownership status, and when that ownership status changed:³

³ The information for this table is found at (LF 361-66; App. Sub. Br. at 11).

D. No-Longer Disputed Assets.

Account	Amount	Ownership at Death	Origin	Date of Change
Credit Union IRA	\$60,329.11	Joint - Sandy	POD - Baughman	July 10, 2006
Credit Union IRA	\$1,138.14	Joint - Sandy	POD - Baughman	July 10, 2006
UMB Checking Account	\$2,483.81	Joint - Sandy	POD - Baughman	July 20, 2006
American Century Growth Fund	\$16,208.08	Joint - Sandy	Joint - Baughman	April 29, 2008
American Century Select Fund	\$13,226.21	Joint - Sandy	Joint - Baughman	April 29, 2008

E. Disputed Non-Probate Assets.

Account	Amount	Ownership at Death	Origin	Date of Change
UMB CD #1 #1471864131	\$202,916.99	POD - Sandy	Joint – Baughman/Lamp	August 17, 2009
UMB CD #2 #10762641310	\$118,684.86	Joint-Sandy	Joint ⁴ - Baughman/Lamp	April 25, 2008
UMB CD #3 #15295951310	\$41,468.75	Joint-Sandy	Joint – Baughman/Lamp	April 25, 2008

⁴ Plaintiff admits that funds for the three UMB CDs were transferred from closed accounts at the Credit Union, Bank of America, or AARP, which he also admits all had joint owners or payable-on-death beneficiaries. (App. Sub. Br. at 9-10).

F. Plaintiff sues the Nelsons.

Betty died in April 2010. (LF 359). Her farm, a non-probate asset that is not disputed here, transferred to plaintiff by beneficiary deed. (LF 360). The non-probate assets in dispute, as well as those that plaintiff has conceded, transferred to Sandy per the joint ownership and payable-on-death designations. (LF 365-66). Plaintiff then filed this suit in 2011, alleging five counts. (LF 22-31). Count 1 asks the probate court to declare Betty's non-probate assets to be part of the estate, alleging that the transfers to Sandy were procured through undue influence. (LF 22-23). Count 2 seeks to set aside the transfers based on this same undue influence allegation. (LF 24-25). Similarly, Count 3 seeks a constructive trust in plaintiff's favor for the assets allegedly wrongfully transferred.

Counts 4 and 5 are against Ken only. (LF 25-26). Plaintiff alleges that Ken breached a fiduciary duty (Count 4) or committed legal malpractice (Count 5) by not explaining the effects of non-probate transfers to Betty, and by drafting a will that named his wife as a beneficiary. (LF 28-29). On both counts plaintiff seeks as damages the assets that were transferred to Sandy. (LF 26-30).

After a year of discovery, including more than a dozen depositions, written discovery, and the production of thousands of pages of documents, the Nelsons each moved for summary judgment.⁵ (LF 07). They argued that, because plaintiff was never

⁵ While Ken and Sandy filed separate motions for summary judgment, plaintiff's appeal does not distinguish between them. The Nelsons have thus filed this joint brief.

named as a joint owner or a payable-on-death beneficiary on any of the assets he seeks to recover, and because those assets had always been set to transfer outside the probate process even before Sandy was ever named on them, plaintiff could not recover on any of his claims here. (LF 58-62; 306-311). Alternatively, the Nelsons argued that, because plaintiff admittedly had no evidence they ever tried to persuade Betty to do anything, it was impossible for him to prevail on any of his undue-influence-based claims. *Id.*

Ken also sought summary judgment on plaintiff's tort claims. *Id.* He argued that since plaintiff had no standing to recover any of the assets at issue, plaintiff could not prove that Ken's allegedly tortious conduct caused him any harm.

The trial court held that plaintiff could never recover any of Betty's non-probate assets, either under the will or as damages, and granted summary judgment in the Nelsons' favor on all plaintiff's claims. (LF 706-07).

Plaintiff appealed to the Court of Appeals, which reversed in part. The court agreed with the Nelsons that an immediately preceding joint owner or payable-on-death beneficiary has standing to recover the assets – not an heir of estate – if he or she has been deprived of that expectancy through undue influence. (App. at 14-16). The court thus affirmed the trial court's judgment as to the non-probate assets in the UMB checking account, the two Police Credit Union IRAs, and the two mutual funds with American Century, all of which are no longer disputed. *Id.*

William Hubbard was appointed as the administrative ad litem in this case, but as a neutral party he has no interest in this appeal and is not participating in it.

Still, though Plaintiff had never produced any evidence to support the theory, the Court hypothesized that Betty *might* have at some point intended to divest the immediately preceding joint owners' expectancy. Under this theory, if the transfers to Sandy are set aside for undue influence, the funds might revert to the estate if plaintiff could prove that Betty – free from undue influence – intended to divest the expectancies of Ms. Baughman and Mrs. Lamp. The court reversed the judgment just as to the three UMB CDs, holding that they could be the basis for a constructive trust in plaintiff's favor or the measure of damages on plaintiff's tort claims. *Id.* at 17. The Nelson's sought transfer, which this Court granted.

SUMMARY OF THE ARGUMENT

The latest incarnation of plaintiff's appeal is undone by the same fundamental fact that has always stood in his way: When Betty decided to name Sandy as the joint owner or payable-on-death beneficiary of nearly all her financial assets, she divested Ms. Baughman and Mrs. Lamp of their expectancy interests as the previous joint owners and payable-on-death beneficiaries in those same assets. Because plaintiff admittedly never had any interest in these non-probate assets, as a matter of law he cannot recover them in this lawsuit. The trial court's summary judgment correctly found that plaintiff had no standing to recover the assets at issue under his undue-influence-based claims in Counts 1-3, and, for the same reason, he cannot prove the causation element of his tort claims against Ken in Counts 4 and 5.

In his Substitute Brief, plaintiff narrowed his appeal considerably. He originally argued that he has standing to recover all the non-probate assets that transferred to Sandy (set out in the table above on page 6). But now that the Court of Appeals has found that he was only entitled to try and prove he could recover assets in the three UMB CDs (affirming the summary judgment as to the other five accounts), and this Court has granted the Nelsons' application for transfer, plaintiff only contends the trial court erred in finding he had no standing to recover assets in the three UMB CDs.

Plaintiff's stripped-down argument in Points I, II, and IV, nevertheless fails because there is still no evidentiary support for it anywhere in this record. He claims standing to recover the assets in UMB CDs 1-3 because in his view Betty *might* have divested Ms. Baughman and Mrs. Lamp of their interests in those assets without having

been influenced by the Nelsons. He thus maintains in Point I that the trial court erred in finding he had no standing to recover as an heir under Betty's will. In Point II, plaintiff likewise argues that these assets could be the measure of damages under his tort claims against Ken. In Point IV, plaintiff argues that he is entitled to a constructive trust, but that remedy is only available if he had some enforceable interest in the disputed assets and thus the decision on Point I also disposes of Point IV.⁶

The Nelsons' motions for summary judgment established facts showing that plaintiff's claims all failed as a matter of law because someone other than plaintiff had an interest in the assets at issue. Plaintiff did not produce any factual support showing how he might prevail. Each of his points on appeal must fail because summary judgment was warranted here.

In any event, plaintiff could never have developed factual support for his new theory because it is fundamentally inconsistent with his entire case. Plaintiff has always maintained that the Nelsons' alleged undue influence affected *all* Betty's decisions after 2006, including her decision to transfer funds that were jointly owned or payable on death with Baughman and Lamp into UMB CDs 1-3. If the Nelsons' used undue influence to convince Betty to extinguish the expectancies held by Baughman and Lamp, those two would have a claim to those assets, not plaintiff. This inescapable conclusion further defeats Points I, II, and IV. The trial court's judgment should be thus affirmed.

⁶ Point III states no basis for reversal at all.

ARGUMENT

I. Summary judgment was proper because plaintiff cannot establish that he was entitled to Betty’s disputed non-probate assets, which is a fundamental element of each of his claims. (Response to Point I).

A. Standard of Review.

On transfer after an opinion by the Missouri Court of Appeals, this Court “review[s] the cause as though on original appeal.” *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 127 (Mo. 1985); Mo. Const. art. V, § 10; Mo. R. Civ. P. 83.04 and 83.09. Review in this Court is of the trial court’s judgment, not the Court of Appeals’ decision. *See* Mo. R. Civ. P. 83.09.

The trial court’s summary judgment decision is reviewed *de novo*. *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 46 (Mo. banc 2009). Summary judgment is appropriate where (1) the facts make it impossible for the plaintiff to prove any one element of his claim, or (2) “after an adequate period of discovery, [plaintiff] has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of his elements.” *Pool v. Farm Bureau Town & Country Ins. Co. of Missouri*, 311 S.W.3d 895, 906 (Mo. App. 2010). While the record is viewed in the light most favorable to the non-moving party, *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993), “this Court will affirm the grant of summary judgment under any appropriate theory.” *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 664 (Mo. banc 2010). In fact, “the trial court’s judgment can be sustained on any ground as a matter of law, even if different than the one posited in

the order granting summary judgment.” *Rice*, 301 S.W.3d at 46 (quoting *ITT Commercial*, 854 S.W.2d at 387-88).

B. Plaintiff has no standing to recover any share of the disputed non-probate assets.

In Counts 1-3 of his petition, plaintiff asked the trial court to award to him the assets in Betty’s eight accounts, all of which transferred to Sandy outside the probate process under § 362.470.1 and § 461.031.3.⁷ He admits that he was never a joint owner or payable-on-death beneficiary on any of the disputed non-probate assets. (App. Sub. Br. at 7). Plaintiff similarly concedes that these assets originated by transfer of non-probate

⁷ Betty’s assets at issue were spread across eight accounts: Three UMB CDs, a UMB checking account, two Police Credit Union IRAs, and two mutual funds with American Century. All but one UMB CD, transferred to Sandy under the rules of joint tenancy and § 362.470.1, which provide that jointly held deposit accounts transfer to the joint owner upon the depositor’s death. *See Dickinson v. Dickinson*, 87 S.W.3d 438, 442 (Mo. App. 2002); *Braden v. von Stuck*, 950 S.W.2d 489, 492 (Mo. App. 1997) (noting pursuant to § 362.470.1 “the presumption of joint tenancy with right of survivorship is conclusive”). The other UMB CD transferred to Sandy as the named payable-on-death beneficiary under § 461.031.3, which likewise provides that when the owner dies, the “property passes by operation of law to the beneficiary.” *See In re Estate of Goldschmidt*, 215 S.W.3d 215, 220 (Mo. App. 2006) (noting that absent undue influence non-probate transfers by beneficiary designation control over wills).

assets in which either Ms. Baughman or Mrs. Lamp had an expectancy interest. (App. Supp. Br. at 11).

Plaintiff nevertheless contends that he is entitled to the assets as an heir under Betty's will because he believes they were transferred to Sandy by undue influence. (LF 77, 79-80). To have standing, then, plaintiff must establish that the assets he seeks would be part of the estate if the transfers to Sandy are set aside. *In re Estate of Stroetker v. Caskey*, 934 S.W.2d 35, 36 (Mo. App. 1996) (holding plaintiff must show he "is sufficiently affected by the action he is challenging to justify consideration by the court of the validity of the action," and "that the action violates the rights of the particular party who is attacking it and not of some third party."); *see also Roberts v. BJC Health Sys.*, 391 S.W.3d 433, 438 (Mo. banc 2013).

C. Plaintiff concedes he has no standing to recover the assets in five of the eight accounts.

The trial court entered summary judgment finding that the joint owners and POD beneficiaries who preceded Sandy would – if they could prove undue influence – have standing to recover the assets at issue here, not plaintiff. On appeal plaintiff resisted this premise, arguing that as an heir of Betty's will, he had standing under Counts 1-3 to recover the assets in all eight accounts. But now in Point I of his Substitute Brief, plaintiff no longer claims standing as to five of the accounts, which we refer to here as the no-longer disputed, non-probate assets. Point I states in full:

The Western District Court of Appeals correctly held that appellant has standing to pursue his claim that three UMB Bank certificates of deposit were obtained by Sandra Nelson by undue influence of Sandra Nelson and Kenneth Nelson.⁸

(App. Sub. Br. at 16). Plaintiff concedes in Point I that he has no standing to recover the assets in Betty's UMB checking account, her two Credit Union IRAs, or her two American Century mutual funds. *See* Mo. R. Civ. P. 83.03(b) (any material "in the court of appeals brief that is not included in the substitute brief is abandoned"). Plaintiff never explains why these non-probate assets should be treated differently than the non-probate assets he still contests.

Point I narrows the issues for this Court. The only remaining assets in dispute are in UMB CDs 1-3. With Point I's concessions, plaintiff has also accepted the governing law in this case: That non-probate designees like Ms. Baughman and Mrs. Lamp have a legal and enforceable expectancy in the property at issue, regardless of whether it takes the form of joint ownership or a payable-on-death designation. *See Crocker v. Crocker*,

⁸ Plaintiff's first point relied on fails to identify how or why the trial court erred as required by Mo. R. Civ. P. 84.04(d). (App. Sub. Br. at 14). Instead he tries to defend the Court of Appeals' Opinion, even though this Court treats appeals on transfer "the same as on original appeal." Mo. R. Civ. P. 83.09. Plaintiff's other three points suffer the same flaw. (App. Sub. Br. at 14-15). These points relied on present nothing for this Court to review. The trial court's judgment should be fully affirmed for this reason alone.

261 S.W.3d 724, 727 (Mo. App. 2008) (involving POD beneficiary designation via beneficiary deed); *Skidmore v. Back*, 512 S.W.2d 223 (Mo. App. 1974) (involving jointly owned savings account). When a non-probate expectancy is severed because someone else has been granted an overriding expectancy by virtue of undue influence, the original designee has standing to recover the asset at issue. See *Crocker*, 261 S.W.3d at 727; *Skidmore*, 512 S.W.2d at 231.

In *Crocker*, the defendant procured a beneficiary deed in his favor through fraud. The distribution of the property was controlled by the immediately preceding beneficiary deed, which named the plaintiff as beneficiary, not by the will. See *Crocker*, 261 S.W.3d at 728.

The same principle applied to joint accounts governed by § 362.470 in *Skidmore*. There a father and his daughter were joint owners of a savings account. The son later used undue influence to convince his father to close that joint account and transfer the money to a new savings account jointly owned by the father and son. *Skidmore*, 512 S.W.2d at 231. The court held that the daughter was entitled to the funds because she had an “expectancy” as the prior joint owner, which controlled the disposition of the money. *Id.* at 231.

D. Plaintiff’s argument that the assets in the three UMB CDs should be treated differently than the assets in the other five accounts ignores the record.

Having conceded that Ms. Baughman and Mrs. Lamp enjoyed an expectancy to the funds in UMB CDs as joint owners, plaintiff’s only argument for standing is that

Betty must have intended to extinguish those expectancies before naming Sandy as the joint owner and POD beneficiary of the UMB CDs. Plaintiff argues this narrow avenue gives him standing here and necessitates reversal.

Plaintiff has produced no evidence, or even alleged, that the undue influence was somehow limited to the opening of the UMB CDs in Sandy's name, and that it did not also infect the extinguishment of Lamp's and Baughman's interests. Plaintiff's argument is pure speculation, which under Mo. R. Civ. P. 74.04, cannot defeat summary judgment.

Faced with the Nelsons' properly supported summary judgment motions, plaintiff was required to produce actual evidence from which a jury could reasonably decide in his favor. *ITT Commercial*, 854 S.W.2d at 387 (holding that "[t]he non-movant *must* supplement the record" with evidence that raises a genuine dispute of material fact. (emphasis original)). Guessing about theoretical possibilities is not enough to avoid summary judgment. *ITT Commercial*, 854 S.W.2d at 387. To be genuine, the dispute of fact must be "real and substantial," not mere "conjecture, theory and possibilities." *Id.* A plaintiff can no longer avoid summary judgment by clinging to the "slightest doubt" as to the existence of some material fact. *Id.* at 379.

Hargis v. JLB Corp., 357 S.W.3d 574, 584 (Mo. banc 2011) reiterated the non-moving party's burden under Rule 74. In *Hargis*, this Court affirmed summary judgment in the defendants favor because the undisputed record showed that it was not engaged in the unauthorized practice of law merely by gathering and transmitting data to be included in the plaintiff's loan documents. *Hargis*, 357 S.W.3d at 581. Though it was possible for the defendant to have practiced law without a license if it "had paid a third party" to

draft the legal documents, summary judgment was justified because there was nothing in the record supporting that theory. *Id.* at 584. The Court emphasized “that summary judgment must be granted or denied based on the record before the Court, not based on speculation that evidence not in the record must exist.” *Id.* at 584, n.9.

Here, plaintiff clings to a similarly abstract possibility. Even now, after more than a year of discovery, after volumes of summary judgment briefing, after full briefing and argument at the Court of Appeals, and after the Court of Appeals suggested how plaintiff might prove standing, plaintiff fails to muster any evidence about how or when or under what circumstances Betty transferred the disputed assets into the UMB CDs.

Plaintiff could not have responded to the Nelsons’ summary judgment motions with factual support even if he had tried. The notion that Betty decided to transfer the disputed assets free of undue influence directly contradicts every aspect of plaintiff’s case.

In his petition, plaintiff alleged, and has argued since, that the undue influence started when the second will was executed in June 2006 and infected *all* Betty’s decisions thereafter:

- that Betty Reynolds began a “sequence of changing all of her deposits into a survivorship status with Sandra Nelson, within a few days of executing her last will and testament” (LF 624); and

- that the Nelson's alleged undue influence arose from the "transfer and re-titling" of the accounts; and that "the change of beneficiary designation was procured by defendant[s]...as a result ofundue influence." (LF 23, 26).

Plaintiff has also consistently conceded that as of June 2006, when he alleged the undue influence began, Betty's "accounts and investments were still held jointly with Louise Baughman and Norma Lamp." (App. Sub. Br. at 8). Finally, plaintiff maintains that Betty transferred funds jointly owned by Ms. Baughman and Mrs. Lamp into the first two UMB CDs in April 2008, over two years after the alleged "sequence" of undue influence began (the final CD was not opened until in August 2009). (LF 365-66).

All these admissions and arguments make it impossible for plaintiff to prove that the Nelsons' alleged undue influence infected *only* Betty's decision to establish the UMB CDs and name Sandy as joint owner and payable-on-death beneficiary, but not Betty's decision to transfer the assets jointly owned by Baughman and Lamp into those CDs. Indeed, Plaintiff makes no effort to explain how or why or when Betty might have made that latter decision. Nor is there any documentary or other evidentiary support for it. Plaintiff merely suggests it's possible.

Given this lack of evidence, the authority cited by plaintiff is of no help to him. The cases he relies on stand for the unremarkable proposition that an owner like Betty has the power to divest a joint tenant by closing the joint account. *See Burkholder ex rel. Burkholder v. Burkholder*, 48 S.W.3d 596, 600 (Mo. banc 2001); *Auffert v. Auffert*, 829

S.W.2d 95, 97 (Mo. App. 1992); *Carroll v. Hahn*, 498 S.W.2d 602, 605 (Mo. App. 1973). None of those cases involve this situation, where plaintiff's own allegations are that the owner allegedly divested those prior expectancies under undue influence.

In the end, the undisputed record, built on the only evidence available and plaintiff's own admissions, shows that like *Skidmore* and *Crocker*, the expectancies held by Baughman and Lamp were severed by the alleged undue influence that led to the creation of the UMB CDs. There is no evidence even hinting at any other version of events.

Summary judgment plays a critical role of culling meritless and speculative cases from the dockets. To hold as plaintiff urges here would essentially revive the "slightest doubt" standard for summary judgment this Court long ago abandoned in *ITT Commercial* and would rob Rule 74 of its effectiveness. Summary judgment was proper here because plaintiff lacks standing to recover the disputed assets. The trial court's judgment should be affirmed.

E. Section 461.033.5 cannot save plaintiff's claims.

Plaintiff also argues that Section 461.033.5 gives him standing. But that statute has no application here. It provides that "a transfer during the owner's lifetime of the owner's interest in property . . . terminates the beneficiary designation with respect to the property transferred." By its own terms Section 461.033.5 only applies where the owner has transferred *her full interest* in the property to a third person before her death, thus necessarily making it impossible for that interest to transfer to a payable-on-death beneficiary. Because Betty retained her interest in all the disputed assets until she died,

Section 461.033.5 is irrelevant. *Compare Hammack v. Coffelt Land Title, Inc.*, 348 S.W.3d 75, 83 (Mo. App. 2011) (holding void a beneficiary deed on property the owner transferred before death).

Plaintiff argues more broadly that under Section 461.033.5, the reasoning in *Crocker* is inapplicable to the two UMB CDs that were jointly owned by Sandy because *Crocker* dealt with beneficiary deeds, not joint deposit accounts. But nothing in *Crocker* suggests its reasoning should be limited to beneficiary deeds. As *Skidmore* – which plaintiff does not even cite – shows, the same result applies when a change in the joint ownership of assets under § 362.470 is the result of fraud or undue influence. *Skidmore*, 512 S.W.2d at 231.

Plaintiff also suggests that *Crocker* is inapposite because, “due to the fungibility of money, many times it would be absolutely impossible to determine from what source or sources a certain deposit came and in what amount or amounts.” (App. Sub. Br. at 18.) Again, this argument is defeated by *Skidmore*, where the court held that the previous joint ownership designation controlled the disposition of money from the fraudulently closed savings account.

In any event plaintiff is wrong. This case does not involve untraceable cash. Rather, it is very much possible to give the intended effect to prior beneficiary or joint ownership designations, and thus allow designees to protect their expectancies, by tracing the source of the assets that were allegedly transferred through undue influence. *Skidmore*, 512 S.W.2d at 231. This is especially true where, as here, the parties readily

agree where the funds at issue came from and who held the prior interest in them. (App. Sub. Br. at 6, 11).

Moreover, plaintiff's argument makes for bad policy. The preference in Missouri is to determine and enforce the intentions of grantors like Betty and protecting grantees' legal rights. The courts in *Crocker* and *Skidmore* recognized as much and ensured that a non-probate grantee whose expectancy has been extinguished through undue influence has a right to recover the disputed assets. Adopting plaintiff's view – particularly on this record – would deny future grantees that right.

In the end, because plaintiff has acknowledged that he was never named as the joint owner or payable-on-death beneficiary of any of the assets involved in this case, and because he concedes that the disputed non-probate assets contained a joint owner or payable-on-death beneficiary other than Sandy until the alleged undue influence occurred, it is impossible for plaintiff to make any claim to the assets here. The trial court's judgment in the Nelsons' favor should thus be affirmed.

II. Summary judgment is proper on plaintiff's breach-of-fiduciary duty and legal-malpractice claims because there is no evidence that Ken's alleged conduct actually caused the harm plaintiff claims to have suffered. (Response to Point II)

A. Standard of Review.

The Court reviews this point under the same standard as Point I.

In addition to Counts 1-3, plaintiff's petition included tort claims against Ken. Plaintiff asserts that Ken breached a fiduciary duty he owed Betty as her attorney in drafting the 2006 will, which named his wife Sandy as a beneficiary (Count 4), and that Ken committed legal malpractice by allegedly failing to advise Betty as to the effects of non-probate transfers and joint ownership accounts (Count 5).⁹ But the same basic facts and reasoning that justify summary judgment on Counts 1-3, also defeat the essential causation element of these tort claims.

B. There is no evidence of causation, a required element of both of plaintiff's tort claims.

To prevail on his tort claims, plaintiff must prove that Ken's conduct caused the damages he seeks. *See Mogley v. Fleming*, 11 S.W. 3d 740, 747 (Mo. App. 1999) (finding that causation is an element of legal malpractice); *Grewell v. State Farm Mut. Auto. Ins. Co.*, 162 S.W.3d 503, 508 (Mo. App. 2005) (holding that causation is element of breach-of-fiduciary duty claim). In all but the most obvious cases, these elements must be supported with expert testimony. *See Thiel v. Miller*, 164 S.W.3d 76, 85 (Mo.

⁹ Summary judgment was separately proper on plaintiff's malpractice claim because there is no evidence Ken failed to advise Ms. Reynolds about non-probate transfers. Indeed, plaintiff's own expert agreed that Ken repeatedly advised Ms. Reynolds about the effect of non-probate transfers and that Betty had experience with them having received the farm through a beneficiary deed and having worked at the Credit Union for decades. (LF 300, 366-373).

App. 2005) (rejecting malpractice claim because plaintiff could not establish that lack of durable power of attorney or conservatorship was proximate cause of higher estate taxes they paid). Plaintiff's own speculation about cause and damages is not evidence; he needs show that "but for" Ken's alleged conduct he would have received Betty's non-probate assets. *Thiel*, 164 S.W.3d at 85. Moreover, plaintiff must prove a causal link between the specific allegedly tortious conduct and the damages sought. *Thiel*, 164 S.W.3d at 85; *Grewell*, 162 S.W.3d at 508.

1. Fiduciary Duty. There is no causal link between the alleged breach of fiduciary duty and plaintiff's alleged harm. The sole basis for this claim is that Ken drafted a will that named his wife as a beneficiary. (App. Sub. Br. at 25-26). Because plaintiff does not challenge the validity of the will, he could only have been harmed if he had a protectable interest under the will that Ken's alleged conduct adversely affected. *See Grewell*, 162 S.W.3d at 508.

The only theory of damages plaintiff seems to make on his fiduciary duty claim is that his damages are the amount he would have received under the will had the non-probate transfers not been made to Sandy, and had Sandy not been named as his co-beneficiary. But as demonstrated above, *none* of those assets would have transferred under the will even had Sandy not been named as the new joint owner or POD beneficiary. Hence no set of facts could show that plaintiff had any interest as an heir in those assets. If any claim exists, it belongs to the prior joint owners or POD beneficiaries. There is no causal connection between the fact that plaintiff had to share

in the estate with Sandy and the assets Sandy received through Betty's non-probate transfer.

2. Legal Malpractice. Plaintiff's legal malpractice claim suffers the same fate. To protect against speculative damages, the allegedly negligent act must be legally connected to the damages sought. *Thiel*, 164 S.W.3d at 85; *Grewell*, 162 S.W.3d at 508. There is simply no evidence that Ken's alleged failure to advise Betty about the effect of joint ownership accounts and payable-on-death beneficiary designations proximately caused plaintiff's damages. *See Patterson v. Warten, Fisher, Lee & Brown, L.L.C.*, 260 S.W.3d 417, 420 (Mo. App. 2008) (finding summary judgment proper because plaintiff failed to raise any disputed facts to prove proximate cause).

Giving plaintiff's petition and briefing its broadest possible reading, and giving him the benefit of all possible inferences on this record, the only plausible damages theory he makes under the malpractice claim is that but for Ken's alleged failure to advise Betty about non-probate transfers, he would have received the assets that were transferred to Sandy.

Plaintiff's damages argument founders on the undisputed evidence. Plaintiff had to show two things: That but for Ken's alleged conduct Betty would have (1) decided not to name Sandy as the POD beneficiary or joint owner of her non-probate assets, *and* (2) extinguished all her non-probate designations that existed before Sandy was so named. There is no evidence either is true. And without this causation evidence, plaintiff's legal malpractice claim is speculative and cannot survive summary judgment.

In *Dean*, the court was faced with a similarly speculative theory of damages in a case brought by a legatee against the lawyer who drafted the will. The *Dean* court concluded that intent of the deceased was the true reason the plaintiff received a diminished share of the estate, not the lawyer's conduct. 963 S.W.2d at 465.

What was true in *Dean* is equally true here. The simple fact is that Betty had always designed her financial assets to pass outside the probate process to someone other than plaintiff. Even according to plaintiff, this only changed when Betty designated Sandy as joint owner and payable-on-death beneficiary. There is no hint in this record that she would have suddenly decided to remove all non-probate designations from her assets and allow them to be distributed under her will if Ken had supplied the allegedly missing advice.

Plaintiff's causation theory grows even more speculative when the timing of Betty's actions is considered. Betty designated Sandy as the joint owner or payable-on-death beneficiary of her non-probate assets *after* Ken's representation of her ended. He cannot be held liable for insufficiently advising a former client about actions she had yet to make when the relationship ended.

It is the rankest speculation to suggest that Betty would have made some other designation armed with Ken's counsel. Plaintiff cannot establish that he would have received half Betty's non-probate assets under the will because there is no way to prove, beyond blindly guessing, whether Betty would have decided not to name Sandy as a joint owner or payable-on-death beneficiary, and then would have chosen to undo all the non-probate designations that existed before Sandy had been so named. This conjecture

cannot support a prima facie case on Counts 4 and 5. *See ITT Commercial*, 854 S.W.2d at 387.

Plaintiff tries to save his tort claims by arguing that he does not need to identify his causation theory. According to plaintiff, his damages “are not limited to the subject investment accounts. A jury may determine general damages based on many factors that appellant could prove at trial.” (App. Br. at 30). This argument misunderstands plaintiff’s burden. As explained, to survive summary judgment in a case like this the plaintiff must make some showing as to how the alleged breach harmed him. *See Thiel*, 164 S.W.3d at 82 (“The measure of damages would be the amount a client would have received but for the attorney’s negligence.”). Yet beyond what was just discussed, plaintiff points to no evidence of causation or damages that would allow a jury to find in his favor.

Plaintiff’s reliance on *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. banc 1995) is similarly misguided. *Donahue* merely held that a plaintiff can establish the attorney-client relationship element of a legal malpractice claim by showing that the decedent intended to use the attorney for the plaintiff’s benefit as an heir under the will. But the existence of the attorney-client relationship is not the issue here. Rather, plaintiff’s tort claims fail for want of causation evidence.

Because there is no evidence that he could have recovered the assets at issue had Sandy not been named in the will and had Sandy not received the disputed assets, plaintiff cannot prevail on either Count 4 or Count 5. The trial court’s summary judgment on these claims should also be affirmed.

III. The judgment should separately be affirmed because plaintiff cannot produce any evidence of undue influence. (Response to Point III).

A. Standard of Review

Point III was not included as a point in plaintiff's Appellant's Brief filed in the Court of Appeals. Plaintiff instead seems to be responding to an argument the Nelsons made in their Respondents' Brief as an alternative ground for affirming the trial court's summary judgment. Because this Court exercises *de novo* review, "the trial court's judgment can be sustained on any ground as a matter of law, even if different than the one posited in the order granting summary judgment." *Rice*, 301 S.W.3d at 46 (quoting *ITT Commercial*, 854 S.W.2d at 387-88).

B. Plaintiff admits he has no evidence the Nelsons ever pressured Betty to do anything.

Apart from a lack of standing, plaintiff's first three counts all fail as a matter of law because there is no evidence of undue influence. Plaintiff concedes that he "has no evidence that the Nelsons pressured Betty to do anything." (LF 352, 371). This admission makes it impossible for plaintiff to prove undue influence here. And without undue influence, plaintiff cannot have the assets that transferred to Sandy declared part of the estate (Counts 1 & 2) or recover them through a constructive trust (Count 3). The trial court's judgment on Counts 1-3 should be affirmed on this separate ground.

Having conceded that he has no direct evidence of undue influence, (LF 352, 371), plaintiff relies on the presumption of undue influence that can arise where the beneficiary

of a non-probate transfer had a fiduciary or confidential relationship with the decedent. *See Goldschmidt*, 215 S.W.3d at 221. Still, before the rebuttable presumption arises to defeat summary judgment, plaintiff must point to some independent evidence of undue influence. *See Dickinson*, 87 S.W.3d at 444 (refusing to apply presumption because circumstantial evidence provided no basis to infer undue influence); *Robertson v. Robertson*, 15 S.W.3d 407, 413 (Mo. App. 2000) (finding the existence of a confidential relationship alone is not enough to create a presumption of undue influence). To make a prima facie case for undue influence in these circumstances, a plaintiff must show something more than a confidential or fiduciary relationship; there must be some independent evidence of undue influence. *See Watermann v. Fitzpatrick*, 369 S.W.3d 69, 76 (Mo. App. 2012); *Dickinson*, 87 S.W.3d at 442.

The simple fact that non-probate transfers benefitted Sandy and not plaintiff does not create a genuine issue of material fact. *See Dickinson*, 87 S.W.3d at 442 (explaining “mere suspicion of undue influence is insufficient” to overcome presumption created by § 362.470.1 transfers). Plaintiff instead has the burden to prove undue influence, which is influence that “by force, coercion or overpersuasion destroys the free” will of the benefactor. *Tobias v. Korman*, 141 S.W. 3d, 468, 475 (Mo. App. 2004); *Dickinson*, 87 S.W.3d at 442. But plaintiff concedes he has no evidence that the Nelsons tried to persuade Betty to name Sandy as joint owner or POD beneficiary. (LF 352, 371). This failure of proof alone warranted summary judgment here. *See J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638, 646-47 (Mo. App. 1994) (affirming

summary judgment where plaintiff failed to raise a dispute of fact with evidence that “shows two plausible but contradictory accounts of the essential facts.”).

Plaintiff instead argues that speculative statements made by Vera Kerr and Louise Baughman are enough to invoke the presumption of undue influence. (LF 338). But Mrs. Kerr contradicted herself and stated that Betty was strong willed and not likely to do anything she did not want to do. (LF 680). And Ms. Baughman’s statement was inadmissible speculation that had no basis in fact. (LF 683). These statements do not raise disputes of material fact. “A finding of undue influence cannot rest upon speculation and conjecture.” *Sweeny v. Eaton*, 486 S.W.2d 453, 456 (Mo. 1972).

Moreover, to the extent plaintiff relies on them, inadmissible hearsay statements Betty allegedly made (LF 352-53) cannot be used to find a dispute of material fact. *See Hammonds v. Jewish Hosp. of St. Louis*, 899 S.W.2d 527, 532 (Mo. App. 1995) (finding that “hearsay statement is insufficient to raise factual issue to defeat summary judgment.”). No admissible evidence raises a dispute of material fact here. More importantly, none of the evidence offered can overcome plaintiff’s fatal concession that there is no evidence Ken or Sandy actually tried to influence Betty to do anything. (LF 352, 371).

Not only is there an admitted lack of evidence that Ken and Sandy influenced Betty to transfer her assets to Sandy, none of the usual indicia of over-persuasion are present. Despite plaintiff’s suggestion, no credible argument can be made that Betty was somehow susceptible to undue influence by the Nelsons or anyone else. Indeed, plaintiff never tried to argue that Betty was incompetent. (LF 371).

Nor is there any reasonable basis to infer as plaintiff argues that Betty failed to appreciate that titling her financial assets in the way she did would result in those assets being transferred to people other than plaintiff.¹⁰ As plaintiff's expert, Professor Hanna, noted, Betty worked at the Kansas City Police Credit Union for decades before she retired and had experience with non-probate transfers. (LF 373). She made a practice of including joint owners or POD beneficiaries on her accounts throughout her life. (LF 361-66). She even transferred farm land to plaintiff on her death through a beneficiary deed, which operates to transfers real property outside the probate process, just as the other non-probate transfers did. (LF 300). In fact, that farm had been owned jointly by Betty and other beneficiaries whom she twice survived. (LF 286). Finally, as Hanna also noted, Ken advised Betty in his letters about the effect non-transfers would have on her estate. (LF 371-73).

The simple fact that Betty executed a will and designated most of her assets as non-probate transfers does not somehow show that she did not understand the effect of non-probate transfers. As one court noted, a mere "showing of motive, opportunity to exercise undue influence and an unjust result [is not] enough to make a jury case."

¹⁰ Plaintiff's sole evidence is a statement Betty allegedly made to Ms. Baughman that Betty did not think that Sandy would receive her money when she died. (LF 684). But again, this is unreliable, inadmissible hearsay that cannot be used to create an issue of material fact. *Hammonds*, 899 S.W.2d at 532.

McCormack v. Berking, 290 S.W.2d 145, 151 (Mo. 1956); *Dickenson*, 87 S.W.3d at 443 (“mere suspicion of undue influence is not enough”).

The overwhelming and undisputed evidence shows that Betty intentionally designed her financial holdings to transfer outside the probate process to people other than plaintiff. There is no dispute that the Ken and Sandy enjoyed a loving, family-like relationship with Betty. (LF359-60). That close relationship, not some manipulation by the Nelsons, explains why Betty distributed the assets the way that she did. The trial court’s summary judgment in the Nelsons’ favor on Counts 1-3 should be affirmed for this separate reason.

IV. Summary Judgment was proper on plaintiff’s constructive trust claim because as a matter of law he has no claim to any of the assets at issue here. (Response to Point IV).

Plaintiff’s fourth point relied on fails for the same reason as his first. As explained, he cannot show any right to recover the non-probate assets at issue in this case. His own admissions of fact defeat any argument that any of Betty’s funds would have transferred under the will had Sandy not been named on them. That being the case, there is no basis for a constructive trust in plaintiff’s favor. *See Lynch v. Lynch*, 260 S.W.3d 834, 838 (Mo. banc 2008) (holding that constructive trust is proper remedy “if Plaintiffs can prove . . . they are entitled to . . . assets”). Point IV should be denied for this reason alone.

Nor is there any other basis here for a constructive trust. Plaintiff vaguely argues that in some circumstances a constructive trust is remedy is available, but he makes no effort to explain or argue how that might be so in this case. The mere fact that it is an equitable claim does not mean the trial court erred in granting summary judgment on this record. *See, e.g., Abell v. City of St. Louis*, 129 S.W.3d 877, 882 (Mo. App. 2004) (affirming summary judgment in defendant's favor on plaintiff's constructive trust claim). Because plaintiff failed to explain how the trial court erred, and for the reasons set out above in response to plaintiff's first point relied on, this Court should reject Point IV and affirm the trial court's summary judgment on Count 3.

CONCLUSION

For the reasons stated here, the trial court's summary judgment should be affirmed in all respects.

**CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b)**

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word-count function of Word by which it was prepared, contains words 8,593, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the electronic copy of this brief filed with the Court is in PDF format and complies with Missouri Supreme Court Rules and is virus free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was filed electronically,
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