

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

BETTY MINOR,)	No. ED101131
)	
Plaintiff,)	
)	
JOSEPH McCARY and)	Appeal from the Circuit Court
JOHN MICHEAL McCARY,)	of St. Charles County
)	0911-CV11957
Appellants,)	
)	
vs.)	Honorable Nancy L. Schneider
)	
DAVID W. TERRY, KATHLEEN)	
SCHILLER, JACQUELYN)	
HIGHFILL, and)	
FELLOWS, BLAKE & TERRY, L.L.C.,)	
)	
Respondents.)	Filed: October 28, 2014

Joseph (“Joe”) McCary and John Micheal (“Mike”) McCary (collectively “Appellants”) appeal the grant of summary judgment in favor of David W. Terry and Fellows, Blake & Terry, L.L.C. (collectively “Terry”¹) and the grant of summary judgment in favor of Kathleen Schiller and Jacquelyn Highfill on Appellants’ cross-claims.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

Division Four holds:

- (1) Terry did not owe Appellants a duty either as clients or non-client beneficiaries. Terry did not take clearly inconsistent positions in his motion to join and his motion for summary judgment. Therefore, Appellants’ judicial estoppel point has no merit. Because Appellants presented no evidence that Terry did not fulfill his statutory obligations under section 537.095 RSMo 2000, Appellants’ argument that Terry did not comply with the terms of the statute has no merit. Based on the foregoing, the trial court did not err in granting summary judgment in favor of Terry on Appellants’ breach of fiduciary duty and legal malpractice claims. Accordingly, we affirm this portion of the trial court’s judgment.

- (2) Because Schiller and Highfill complied with their statutory duties under section 537.095 RSMo 2000, the trial court did not err in granting summary judgment in favor of Schiller

¹ Terry was named as a defendant in this case in his individual capacity. His law firm, Fellows, Blake & Terry, L.L.C. was also named as a defendant, but only through Terry’s actions as its agent. As such, all references to “Terry” collectively refer to Terry individually and his law firm Fellows, Blake & Terry, L.L.C.

and Highfill on Appellants' negligence count. Accordingly, we affirm this portion of the trial court's judgment.

(3) Because there exist unresolved issues of material fact and Appellants had the right to rely on Schiller and Highfill's alleged misrepresentations, the trial court erred in granting summary judgment on Appellants' fraud count. Consequently, this portion of the trial court's judgment is reversed and remanded for proceedings consistent with this opinion.

(4) Because Appellants did not present evidence of an agreement to defraud, the trial court's grant of summary judgment in favor of Schiller and Highfill on Appellants' conspiracy to defraud count was not in error. Accordingly, we affirm this portion of the trial court's judgment.

Opinion by: Robert M. Clayton III, J.
Patricia L. Cohen, P.J., and Roy L. Richter, J., concur.

Attorney for Appellant: Jane C. Hogan and Adam A. Karp

Attorneys for Respondent: Richard C. Wuestling IV, Susan M. Dimond, Frank A. Conard

THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.