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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF KEIKO ONO AOKI,

Appellant,

-against-

No. 28

DEVON AND STEVEN AOKI,

Respondent.

20 Eagle Street
Albany, New York 12207
February 10, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: Next up is number 28
2 on the calendar, matter of Aoki v. Aoki.

3 Rebuttal time, sir?

4 MR. WAXMAN: Five minutes, if the court
5 please. May it please the court. This court should
6 reverse the Appellate Division's decision and re-
7 instate the Surrogate's findings of fact and decree.
8 The Appellate Division improperly limited the
9 doctrine of construction - - - constructive fraud to
10 cases where a fiduciary is a "party to or has an
11 interest in the subject transaction".

12 There is no prior case anywhere, in any
13 jurisdiction, that has ever announced such a
14 limitation, nor has any case ever held the doctrine
15 inapplicable to facts like those here, where, as
16 Surrogate Glen found, the fiduciaries had an
17 undisclosed conflict of interest and used knowledge
18 that they derive from their fiduciary relation to the
19 detriment of their client and for the benefit of
20 others.

21 JUDGE GARCIA: Mr. Waxman - - -

22 MR. WAXMAN: Judge Garcia.

23 JUDGE GARCIA: Isn't this a very different
24 set of facts than where this constructive fraud
25 doctrine has ever been applied before? I mean, you

1 could say, party/party or there are parties and a
2 fiduciary, but here we have really none of the
3 parties and a fiduciary and a would-be beneficiary
4 under a will.

5 So I - - - I'm having some trouble
6 understanding, as a concept, how this equitable
7 doctrine would apply here. Wouldn't a remedy be for
8 the client to go after the fiduciary who has had this
9 conflict?

10 MR. WAXMAN: So the answer, Judge Garcia,
11 is there have been such cases, and I think you need
12 to go no further than the Supreme Court's decision in
13 Adams v. Cowen, which - - - in which there was an
14 administrator of an estate who, exercising what the
15 Court - - - the Supreme Court found - - - the Sixth
16 Circuit in the Supreme Court found was undue
17 influence, induced one of the legatees to give up his
18 legace - - - legacy in order to benefit the other
19 legatees.

20 The other legatees were innocent; they were
21 in fact heedless of what had happened. But the
22 Supreme Court affirmed the lower court and required
23 that the doctrine of constructive fraud put the
24 burden on the parties, in that case the third party
25 legatees, to prove that this was a release that, had

1 the undue influence not been exercised, would have
2 been exercised in any event. And the Third
3 Department's decision just in New York, in Callahan
4 v. Callahan, is exactly the same way; there was undue
5 influence applied by a lawyer representing another
6 party for the benefit of that party, and that shifted
7 the burden.

8 But I do want to - - - I think your - - -

9 JUDGE GARCIA: But just to go back to
10 Callahan, that's a very different case. Right?
11 Callahan is - - - is a prenuptial?

12 MR. WAXMAN: Well, Callahan is a case - - -
13 no, well, Callahan is not a prenuptial case; Callahan
14 is a case in which the marriage was dissolving - - -

15 JUDGE GARCIA: Right.

16 MR. WAXMAN: - - - and the husband's
17 lawyer, who was acting for the husband - - - the wife
18 knew it, unlike in this case - - -

19 JUDGE GARCIA: Right.

20 MR. WAXMAN: - - - the wife - - - the wife
21 knew it, but nonetheless, he essentially played on
22 their long-term friendship and the trust that she had
23 put in him to relinquish her property rights for a
24 pittance.

25 He had no interest; he was not a party in

1 outlier cases, though? I mean, some - - - they go -
2 - - Adams goes back over 100 years, right? I mean -
3 - -

4 MR. WAXMAN: Well, sure, I mean - - -

5 JUDGE STEIN: - - - it's been there on the
6 books, but - - - but, you know, how many times has
7 Adams been cited? I don't know, I haven't - - - I
8 haven't done that search; you probably have, though.

9 MR. WAXMAN: Well, I probably have, I don't
10 remember, but I - - - I think, Judge Stein, your
11 point underscores something; the instances in which
12 the party alleging the constructive fraud defense
13 will actually be able to prove the predicates in
14 order to invoke the burden shifting, is very rare. I
15 mean, Cowee, this court's decision in Cowee, 1878,
16 Judge Hand, for the court, you know - - - there are a
17 handful of cases that have found constru - - - that
18 constructive fraud applies whether the fiduciary or
19 the family member or the banker or whoever it is that
20 has a fiduciary responsibility that deploys it
21 against his or her client, are very rare. This is a
22 hard thing to show and the - - -

23 JUDGE FAHEY: What about the effect of
24 Rocky's EBT? It seems that his EBT effectively
25 undermined the theory that he didn't know what he was

1 doing when he signed the releases.

2 MR. WAXMAN: Did you say the BPT?

3 JUDGE FAHEY: The EBT, the examination
4 before trial that was done on the civil case of Mr. -
5 - - Harry Aoki (ph.). It seemed that he outright
6 acknowledged that he knew what he was signing in
7 September 2002 and December of 2002 - - -

8 MR. WAXMAN: I - - - I understand what
9 you're asking.

10 JUDGE FAHEY: Yes.

11 MR. WAXMAN: So if you look at actually the
12 page of his deposition testimony that the other side
13 is relying on and that the Appellate Division, I
14 believe, also relied on, you will see that he stated
15 under oath on no uncertain terms that he had - - - as
16 - - - as Surrogate Glen found, twice he had no idea
17 that he was forever giving up his right to do this.
18 In fact, what hap - - - on the - - - the very
19 colloquy, Judge Fahey, that you're referring to,
20 there was a question that said - - - I asked of him,
21 did Norman Shaw tell you what the release was all
22 about? Answer, yes; estate and will is specialty of
23 like yourself"; that's on page 12 of the record on
24 appeal. The - - - the - - -

25 JUDGE FAHEY: What - - - what do you say

1 that that means?

2 MR. WAXMAN: There's no - - - the Surrogate
3 didn't - - - didn't in any way discredit the
4 assertion that Rocky knew that he was signing a
5 release.

6 JUDGE FAHEY: Uh-huh.

7 MR. WAXMAN: And didn't discredit Mr.
8 Shaw's testimony that when he came out and said, if
9 you sign this, it means that you won't - - - you'll
10 only be able to leave this to your descendants. Her
11 decision doesn't in any way depend on discrediting or
12 disbelieving that; the point here is, as Surrogate
13 Glen found, this was a man who, as a result of - - -
14 that - - - that Dornbush knew as a result of a
15 thirty-year relationship, always believed that he
16 could always change his mind, and in fact, he was
17 constantly being asked to sign amendments to the BPT,
18 to his will, and to other legal documents.

19 JUDGE STEIN: Mr. Waxman, in talking about
20 what we're looking at here, I just want to be clear
21 about something, and that is that the Appellate
22 Division limited its review to the summary judgment
23 motion; as I understand, it did not review the trial
24 evidence that the Surrogate did. So are we limited
25 to reviewing that here, and if we find that it - - -

1 it ruled incorrectly, then we have to send it back so
2 that it can review the trial evidence?

3 MR. WAXMAN: I am not sure that the premise
4 to your question is correct, that is, what in the
5 very first paragraph they say, you know, appeal
6 following non-jury trial reversed on the law, but
7 what - - -

8 JUDGE STEIN: But I thought it reviewed the
9 summary judgement that was brought up for appeal by
10 the final judgment. And maybe I'm wrong, but that's
11 just - - -

12 MR. WAXMAN: No, I - - - I don't think
13 you're wrong and I don't think that it matters. I
14 mean - - - and in fact, I think this is a case - - -
15 this is a case in which however you do - - - whether
16 you determine that the Appellate Division erred on
17 where the burden of proof is assigned or not, the - -
18 - the Surrogate's meticulously supported findings of
19 fact have to be affirmed.

20 The Appellate Division's discussion at
21 headnotes 5 and 6 of the facts of this case bear no
22 resemblance to the detailed findings of fact that the
23 Surrogate made after reviewing - - - after listening
24 to, among others, Attorney Dornbush, Attorney Shaw -
25 - -

1 JUDGE STEIN: Yeah, but that's my point, is
2 that if - - - if that's not what the Appellate
3 Division was talking about, then don't we have to
4 give the Appellate Division that opportunity if we
5 think that there was a question of fact that - - -

6 MR. WAXMAN: So - - -

7 JUDGE STEIN: - - - that - - - in such that
8 - - -

9 MR. WAXMAN: So, Judge Stein, I - - - you
10 have two choices in front of you, and I acknowledge
11 that. You can always say they got the law wrong and
12 we want them to go back and look at the facts again.

13 You can also - - - and we, in this case,
14 urge that you do what, for example, was done in Cowee
15 and what you have done in many cases, which is to
16 say, there is a recitation of the facts by the tri -
17 - - by the finder of fact, and there is a recitation
18 of facts - - - and let me just - - - by the Appellate
19 Division, and we are in as good a position as the
20 Appellate Division, based on the very clear and
21 frankly not very lengthy record in this case, to
22 evaluate - - - and I'm quoting from this court's
23 decision last month in Pegasus Aviation - - - to
24 determining whether the evidence of record more
25 nearly comports with the trial court's findings or

1 those of the Appellate Division.

2 And I do think that - - - just to the
3 premise of your question, again, I don't want to
4 fight the hypothetical, but the court says, look,
5 it's not available as a matter of law because you
6 have to be a party or have an interest if you're the
7 duper. It then goes on and talks about what the
8 facts are without any reference to the record
9 whatsoever.

10 JUDGE ABDUS-SALAAM: So do we have to
11 overrule Cowee if we decide in your favor?

12 MR. WAXMAN: No, Cowee is - - - I mean, we
13 are relying heavily on Cowee for the articulation of
14 the relevant rule.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MR. WAXMAN: I probably - - - that probably
17 needs more explanation, but I'll - - -

18 CHIEF JUDGE DIFIORE: On rebuttal.

19 MR. ROSE: Good afternoon. May it please
20 the court. David Rose on behalf of respondents,
21 Devon Aoki and Steven Aoki.

22 The Appellate Division here properly
23 assessed application of New York's rule of
24 constructive fraud in this case. And in articulating
25 that settled standard, it set forth and identified a

1 rule that already provides for the inherent
2 flexibility that equity allows and often requires in
3 order to reach just results.

4 However, on this record, the Appellate
5 Division found no basis to say that Rocky's lawyers
6 were in any way interested in or benefited by the
7 release transaction.

8 JUDGE STEIN: Who were the parties to the
9 releases?

10 MR. ROSE: Well, it was a unilateral
11 document. It was a testamentary document - - -

12 JUDGE STEIN: But who were the interested
13 persons in the release?

14 MR. ROSE: Sure. Rocky certainly, and
15 beneficiaries under the trust who could be appointees
16 - - - or actually anybody who could be an appointee
17 of the power of appointment.

18 JUDGE STEIN: What about the - - -
19 trustees?

20 MR. ROSE: No. Not the trustees. The
21 trustees are not parties to it - - - and in fact, to
22 the extent that Rocky identified purely - - - the
23 release limited Rocky's ability to give to his
24 descendants a loan, it wasn't in any way something
25 that could benefit the trustees as trustees.

1 And so, given this subsisting New York
2 rule, constructive fraud has no application to this
3 case. I would also - - -

4 JUDGE PIGOTT: Let's assume for a minute
5 that there is fraud, just for the sake of argument.
6 You're saying, tough, right? Can't - - - you know,
7 so he - - - so they stole the money. You can't - - -
8 you can't do anything about it.

9 MR. ROSE: No, And I would just
10 respectfully ask, Judge Pigott, are you speaking
11 about actual fraud or constructive fraud?

12 JUDGE PIGOTT: Constructive fraud.

13 MR. ROSE: Constructive fraud? In this
14 instance, there was no constructive fraud - - -

15 JUDGE PIGOTT: I'm saying - - - I'm saying
16 there was.

17 MR. ROSE: - - - but if there were - - -

18 JUDGE PIGOTT: Yeah.

19 MR. ROSE: - - - if there were constructive
20 fraud, under these facts, we would still prevail, I
21 submit, because - - -

22 JUDGE PIGOTT: No, I'm - - - I want to - - -
23 - what the Appellate Division said that the doctrine
24 is unavailable where the allegedly offending
25 fiduciary was neither a party to, nor had an interest

1 in the subject transactions. So if you have someone
2 who is neither a party to, or has an interest in, are
3 they free to - - - to commit fraud?

4 MR. ROSE: No, they're not free to commit
5 fraud, and there would be a remedy. And what the
6 remedy would be in this instance is not invalidation
7 of the releases, but rather a claim by Rocky as the
8 client, let's say, or some other defrauded client - -
9 -

10 JUDGE FAHEY: Well, would the estate have a
11 claim for either breach of fiduciary duty or legal
12 malpractice, then, if there was a claim?

13 MR. ROSE: If the statute of limitations
14 still existed, yes.

15 JUDGE FAHEY: Right.

16 MR. ROSE: Yes, in this case - - -

17 JUDGE FAHEY: So that would address that
18 problem?

19 MR. ROSE: Correct.

20 JUDGE FAHEY: I see.

21 JUDGE PIGOTT: Why would it - - - why would
22 it do that? I mean, in other words - - - I mean,
23 we're talking about, you know, a rather ongoing
24 enterprise here that is important, you know, maybe
25 not just financially, but in terms of legacy, et

1 cetera, and we're saying, so, someone stole your
2 name, somebody stole your title, somebody stole you -
3 - - your business; sue your lawyer.

4 MR. ROSE: Well, I would submit that there
5 would be a remedy. You could sue the lawyer and - -
6 -

7 JUDGE PIGOTT: I don't think that's enough;
8 that's my point.

9 MR. ROSE: Right.

10 JUDGE PIGOTT: And - - - and that's why I'm
11 wondering - - - and - - - I don't know if Judge
12 Abdus-Salaam was thinking the same thing, but when it
13 says that - - - that - - - if - - - unless you're a
14 party to or have an interest in the transaction,
15 there's no claim, it just seems odd to me.

16 MR. ROSE: I don't think that there is not
17 a claim. I think that there certainly is a claim,
18 there's a path to relief for an aggrieved principal
19 or an agreed client. But I would note here, we don't
20 have an aggrieved principal or an aggrieved client.

21 JUDGE RIVERA: Well - - - well, but your
22 point is you can't undo the result of the fraud. All
23 you can do is perhaps get some other kind of monetary
24 compensation, but you can't undo what's, in this case
25 the release; that's your point about the claim and I

1 think the - - - the questioning is whether or not
2 that's sufficient and appropriate.

3 MR. ROSE: Correct. Because it wouldn't -
4 - - it wouldn't have been a constructive fraud in
5 that case, because the doctrine is - - - is
6 longstanding and it's well-articulated by this court
7 throughout many, many years and in many, many
8 decisions.

9 And I would go - - - as I was addressing
10 Judge Pigott's question, and I think hopefully this
11 addresses yours, Judge Rivera, there is a path for an
12 aggrieved fidu - - - aggrieved principal to seek
13 relief and obtain relief. But here we don't have an
14 aggrieved principal because Rocky never sought to
15 invalidate these releases. He never claimed that he
16 was misled or deceived in any way.

17 JUDGE PIGOTT: Well the Surrogate - - - the
18 Surrogate invalidated them, right?

19 MR. ROSE: The Surrogate did.

20 JUDGE PIGOTT: Right. And - - - and what
21 the Appellate Division is saying is because the - - -
22 the parties who did that - - - who committed the
23 fraud are not parties to the - - - to the - - - to
24 the documents, there's no claim. And that - - - that
25 - - - I just don't understand that.

1 MR. ROSE: Well, the Appellate Division did
2 not say that there was any fraud committed. In fact,
3 the Appellate Division found quite the opposite.
4 They found 180 degrees to the opposite by noting very
5 specifically that there is nothing in the record to
6 indicate that the attorneys concealed anything from
7 Rocky. That they - - -

8 JUDGE PIGOTT: Well, that's a separate
9 matter. I - - - I'm just talking about what I - - -
10 I don't want to repeat it again.

11 MR. ROSE: Sure.

12 JUDGE PIGOTT: They seem to say that as a
13 matter of law, what I've been reading here is - - -
14 is true. And it just seems to me that if you've got
15 a Surrogate that invalidated those - - - those
16 documents, what's wrong with that? I mean, I know
17 you don't like it, but it would seem to me that - - -
18 that that's not an outrageous finding when you say,
19 well, you know, your lawyer - - - the lawyer, you
20 know, stabbed his client in the back. And it seems
21 to me if you've got the ability to fix it rather than
22 say, well, you know, it goes to your lawyer who may
23 or may not have, you know, the - - - the ability to
24 give it back to you, and particularly in a situation
25 like this where you're talking about, as I said, a

1 legacy, you know, a restaurant chain and all this
2 other stuff.

3 MR. ROSE: Well, I think the analysis
4 starts with the fact that there was no stabbing in
5 the back and that all the objective evidence - - -

6 JUDGE PIGOTT: Well, that goes - - - see, I
7 get that. But my - - - my sense is that if the
8 Second Depart - - - if the Appellate Division is
9 wrong, summary judgement should not have been
10 granted, then - - - then what the Surrogate said is -
11 - - stands; you're invalidated.

12 MR. ROSE: I think - - - I think a problem
13 with that would be, again, given the record here,
14 that you would be judicially second guessing and
15 judicially overriding, after the fact, Rocky's
16 manifest expressed conduct.

17 JUDGE PIGOTT: Okay, let's - - - let's hold
18 that thought for a minute, because what I want to say
19 is, if they're wrong on the - - - on the law with
20 respect to this summary judgment thing - - - just
21 pretend - - -

22 MR. ROSE: Sure.

23 JUDGE PIGOTT: - - - all right, then the
24 Surrogate's decision is the factual basis upon which
25 the decision was then made. So you don't have to go

1 back and argue the facts that he was or wasn't
2 stabbed in the back; she already made that
3 determination.

4 MR. ROSE: Well, that was - - - that
5 determination was made at trial.

6 JUDGE PIGOTT: Yeah, right. So we'd
7 reinstate - - -

8 MR. ROSE: Not a summary judgement.

9 JUDGE PIGOTT: So we'd reinstate that the -
10 - - the Surrogate's decision.

11 MR. ROSE: No, because I would - - - I
12 would argue that first - - -

13 JUDGE PIGOTT: Okay.

14 MR. ROSE: In the first instance, the
15 Surrogate could not determine on summary judgment
16 that there was a conflict or that there was any
17 stabbing in the back. All she could find, at most,
18 was that there was an issue of fact as to that.

19 JUDGE PIGOTT: Well, didn't she invalidate
20 the - - - the documents - - - I'm looking for the
21 name.

22 MR. ROSE: At trial, she - - - at trial,
23 but there was never any finding at trial, by the way,
24 of a conflict of interest. That was - - - there was
25 never a trial finding of a conflict of interest.

1 JUDGE PIGOTT: If she - - - if she - - - if
2 she invalidated the releases and then this - - - and
3 that gets overturned because this court - - - this -
4 - - the Appellate Division says that under our law
5 she couldn't do that, and we say that she could, then
6 aren't they invalid?

7 MR. ROSE: No, they're not invalid because
8 again, the Appellate Division never reviewed the
9 trial record.

10 JUDGE PIGOTT: So - - - I'm not suggesting,
11 I have no idea what my colleagues are going to do,
12 but - - - but - - - so what we would do then is say
13 they're wrong in this law and we would remit it to
14 the Appellate Division for further findings not
15 inconsistent with that, and then you would be arguing
16 that.

17 MR. ROSE: Correct.

18 JUDGE PIGOTT: Okay.

19 JUDGE STEIN: What if - - - if
20 theoretically, there was a question of fact as to
21 whether these attorneys were acting as agents of the
22 children, right; now, the children, as beneficiaries
23 or potential beneficiaries, are interested parties,
24 correct?

25 MR. ROSE: Yes.

1 JUDGE STEIN: Okay, so if - - - if we or
2 somebody else found a question of fact as to whether
3 they were acting as agents of the children, would
4 that then give them - - - put them in the position of
5 a - - - of an interested party and therefore the
6 constructive fraud doctrine would apply?

7 MR. ROSE: No, it would not - - -

8 JUDGE STEIN: Why not?

9 MR. ROSE: Because in this case, Rocky's
10 interest and his children's interest were completely
11 aligned. They were seeking to - - - Rocky was
12 seeking to achieve something for his children. And
13 the mere fact that the - - -

14 JUDGE STEIN: Well - - - well, I'm saying
15 what if there is a question of fact about all of
16 that?

17 MR. ROSE: If there's a question of fact as
18 to whether the lawyers were doing any bidding, let's
19 say, on behalf of the kids, the fact that there still
20 though was an alignment of interest - - - I think
21 your question went to the doing the bidding as
22 opposed to the alignment of interest - - - there's no
23 conflict here, because Rocky sought the same thing.

24 JUDGE STEIN: Right, but that - - - that
25 assumes what Rocky's interests are. I'm saying, we

1 don't assume what Rocky's interests are, we just - -
2 - let's assume that there isn't - - - that the
3 interests aren't consistent.

4 MR. ROSE: If the interest - - -

5 JUDGE STEIN: In that case, would the
6 attorneys then potentially be agents of the children
7 and then - - - and be interested parties for purposes
8 of the constructed trust doctrine - - - constructive
9 fraud doctrine?

10 MR. ROSE: They could be, but it would have
11 to be that bad. In other words, it would have to be
12 that grotesque of a deception of the client to do the
13 bidding of the kids for and against Rocky; but that's
14 not the case we have here.

15 JUDGE STEIN: But under those
16 circumstances, you would agree that constructive
17 fraud might apply.

18 MR. ROSE: It could apply, but again,
19 that's not what we have here, and - - - and I think
20 the facts of this case underscore why, specifically,
21 constructive fraud doesn't apply here. And that is
22 you have Rocky's participation in every aspect of the
23 process leading up to the release. Their position
24 depends entirely upon this alleged scheme to go
25 behind Rocky's back and work in secret. But that's

1 just - - - there's nothing in the record to support
2 it; it's frankly completely made up when you look at
3 the fact that Rocky was the proponent of the post-
4 nuptial agreement from the beginning. He arranged
5 two dinners; not one, but two.

6 JUDGE STEIN: Well - - - but the lawyers
7 did get out of the case, I don't remember if Shaw or
8 Dornbush or both, but got out of the case as some
9 point feeling like there might be some conflict
10 there; isn't that correct?

11 MR. ROSE: What happened was in 2003, after
12 Keiko had her lawyer draft up a codicil for Rocky and
13 sought an opinion with regard to its validity, it
14 became pretty clear that there was going to be a
15 problem.

16 Keiko now knew about the releases which she
17 hadn't know about before because Rocky never told her
18 about them, and it looked like there was going to be
19 a problem. And so Dornbush and Shaw actually - - -
20 and I think this underscores their loyalty to Rocky -
21 - - they said, we can't get involved in any matter
22 that is going to potentially involve your father or
23 adverse interest relative to your father, so he's now
24 represented by Keiko's layer, we're going to pass you
25 off to somebody else because we - - - we're not going

1 to take a position that's adverse to him in any way.
2 And in fact, they only transitioned the kids, not in
3 their individual capacity, but as trustees. In other
4 words, two of the kids were trustees and - - -

5 JUDGE STEIN: But it rec - - - they
6 recognized, at least at that point, that their
7 interest might be adverse.

8 MR. ROSE: At that point in time - - -

9 JUDGE STEIN: And that their loyalties
10 might be in question.

11 MR. ROSE: Well, that was in 2003, after
12 this divide had occurred. Back in 2002, when that
13 situation didn't exist at all, there was no reason
14 for them at all - - - to think that there would be
15 any conflict. And in fact, there wasn't; they were
16 serving Rocky's interest alone. And I would point
17 the court to two memoranda, specifically, that are in
18 the record, written by Norman Shaw in the lead up to
19 the releases but prior to the execution.

20 One is called Action Plan for Rocky's
21 Consideration, and the other is called Discussion
22 Outline for Meeting with Rocky Aoki. And in both of
23 those memoranda, again, well before the releases were
24 signed, the lawyers are laying out various
25 alternatives for Rocky - - - for him to consider.

1 And if you look at the second one - - -

2 JUDGE RIVERA: I think you're missing - - -
3 you're missing the point, right. The point of the
4 Surrogate's finding, the point that they're trying to
5 make which is, fine, he knew about the releases, they
6 told him about the releases. What they didn't tell
7 him is, like every other time, you can't change your
8 mind; that's the point.

9 MR. ROSE: Well, that may be the point, but
10 the - - -

11 JUDGE RIVERA: But did the memos go to that
12 issue?

13 MR. ROSE: Sure. They may - - - they may
14 be making that point, and the Surrogate may have
15 thought that that was what had happened, but it's
16 just so belied by Rocky's own objective conduct in
17 never claiming that in any way he did not know what
18 he was signing.

19 JUDGE RIVERA: He never - - - he never
20 indicated that he didn't know that he could change
21 his mind.

22 MR. ROSE: He - - - there was a - - - there
23 was an affidavit that he had signed that had been
24 drafted by - - - again, by Keiko's lawyer just after
25 she found about the releases, but that was executed

1 by him in 2003. He died in 2008 without ever having
2 taken any steps.

3 JUDGE RIVERA: Yeah, but he made - - - he
4 did assert in this affidavit, did he not, that he did
5 not know that he could change his mind.

6 MR. ROSE: Well, first the affidavit is
7 hearsay - - -

8 JUDGE RIVERA: That he could change his
9 mind - - -

10 MR. ROSE: Sure.

11 JUDGE RIVERA: - - - but he couldn't do
12 anything about it, excuse me.

13 MR. ROSE: It was a hearsay affidavit
14 drafted by Keiko's lawyer; it had a specific purpose
15 and intent. But what is notable is - - - and here
16 again, when they keep talking about this fact that
17 there was this scheme behind Rocky's back, before we
18 even get into what Rocky understood, the fact of the
19 matter is, Rocky knew he signed a release, and he
20 knew that whatever he would sign, whether it was a
21 post-nuptial agreement or a release, would benefit
22 his children over Keiko. That's what he was seeking
23 to do.

24 And that, I think, obliterates any notion
25 what there was something going on that he was not

1 aware of. Again, I'll come to your point though,
2 specifically about the notion of it being
3 irrevocable; if it was Rocky's prerogative - - - not
4 Keiko's, not the Surrogate's, and in fact, it was
5 Rocky's obligation, under settled law, if he thought
6 he had been deceived, to seek to invalidate those
7 releases if he was unaware of what he was - - - he
8 had done, if he thought he had been misled or
9 deceived by his layers in any way, and if he did not
10 truly intend for those releases to remain valid and
11 effective, and for the BPT to pass to Devon and
12 Steven. The fact of the matter is, he never did.

13 JUDGE PIGOTT: Well, that - - - that was my
14 second idea about malpractice. I - - - it was hard
15 to figure out what lawyers was doing - - - were doing
16 what, because you have an affidavit from him saying,
17 you know, this is all a mistake and nothing happens.
18 What - - - what - - -

19 MR. ROSE: I think it's because Rocky
20 didn't want anything to happen. I think - - -

21 JUDGE PIGOTT: Why did he do the affidavit?
22 And why did - - - why did the Surrogate reach what -
23 - - the decision she did?

24 MR. ROSE: I - - - I - - - with respect to
25 the Surrogate, I think she got it wrong - - - she

1 just got it wrong, and with regard to the affidavit,
2 again, think about when those releases came to light
3 after Rocky hadn't told Keiko about them, and the - -
4 - the immense pressure that must have been rained
5 down on him when he said, yeah, I signed it but I
6 didn't know I couldn't change my mind.

7 JUDGE PIGOTT: I get - - - I get that
8 point, but doesn't that go both ways? Like, you say,
9 well, he signed it, he knew - - - he signed it. And
10 then when - - - when he signs an affidavit, well, he
11 didn't know what he was signing. You know, it - - -
12 it just raises more facts and some kind of - - -

13 MR. ROSE: I think - - - I think people - -
14 - people - - -

15 JUDGE RIVERA: And what - - - and what is
16 our review of that finding?

17 MR. ROSE: I think people say a lot of
18 things and we all - - -

19 JUDGE RIVERA: Yeah, but what is our review
20 of that finding?

21 MR. ROSE: Of the finding - - - of which
22 finding, Your Honor?

23 JUDGE RIVERA: Let's say with the Surrogate
24 for the moment, if any.

25 MR. ROSE: What is your review of the

1 Surrogates finding?

2 JUDGE RIVERA: Of any - - - if this
3 particular finding, this conclusion that she reaches
4 based on the facts that she has them in front of her
5 - - -

6 MR. ROSE: Right, well - - -

7 JUDGE RIVERA: - - - that he did not know.

8 MR. ROSE: She reached that conclusion at
9 trial. And what is before this court is whether
10 there was any basis to even get past summary
11 judgment. We submit that there is not and we submit
12 that the most compelling evidence of what went on
13 here was the fact that Rocky never sought to
14 invalidate his releases and he should not be
15 judicially second-guessed now that he has died.

16 Thank you very much.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 Sir?

19 MR. WAXMAN: Just a couple of points, one
20 of which will be Cowee. But on the - - - just on the
21 factual record here. First of all, on the conflict
22 of interest, the so-called supposed conflict of
23 interest.

24 There are not - - - there are two findings
25 by the Surrogate that there was a conflict of

1 interest. There is a finding that pages 726 and 727
2 of the record, that was her summary judgment finding,
3 and at page 36, at trial, where she said, if
4 anything, the trial evidence reinforces the charge of
5 conflict of interest in violation of their
6 professional responsibility to Rocky.

7 And, you know, if there were any doubt
8 whatsoever, if you needed to check her work, you
9 could look at one of the many pieces of evidence that
10 she cited in order to support it; it's page 628 of
11 the record, it is a memo - - - a self-serving memo
12 that was written by Mr. Shaw in August of 19 - - - of
13 2003, in which in the middle paragraph - - - I won't
14 take the court's time to - - - he goes through
15 precisely and recounts the facts that established
16 beyond peradventure that there was actually a con - -
17 - an undisclosed conflict of interest under which
18 these attorneys were operating at the time they
19 researched the question of how to advance the
20 children's testamentary interest, and presented it on
21 their behalf to Rocky and got him to sign it.

22 The point that my friend is arguing that
23 seemed persuasive to the Appellate Division, and
24 again, Judge Stein, just going to your questions, the
25 Appellate Division did what they were asked - - -

1 they addressed what they were asked to address on
2 appeal. And they went ahead and made all sorts of
3 assertions of fact that were - - - that had to have
4 been based on the trial record in the case, because
5 that's where there was, to some extent, evidence or
6 not. But in any event, they answered the legal
7 question they were asked to answer. And if they
8 thought they were being asked to answer a question
9 about whether this should have proceeded beyond
10 summary judgment, that's what they did.

11 But on the issue of this delay, where Rocky
12 supposedly didn't do anything - - -

13 JUDGE STEIN: Just to clarify - - - my
14 understanding, again, is that they - - - they were -
15 - - they were asked to answer that question, they did
16 answer that question, they said it shouldn't have
17 gone past summary judgment, and that's where it
18 ended.

19 MR. WAXMAN: That's - - -

20 JUDGE STEIN: And - - - and I can't point
21 to the record, but I - - - I think I recall that they
22 said that that's what they were doing. But I'm - - -

23 MR. WAXMAN: I - - - I think so too, which
24 means - - - which makes it a huge puzzlement what
25 actually went on after they said that, at headnote 4

1 of their opinion, and gave the In re O'Hara (ph.)
2 case as their precedential example.

3 I - - - I don't - - - the factual
4 recitation that they then proceed on is so thoroughly
5 divorced from the Surrogate's findings in this case
6 or from the - - - what would of been the relevant
7 facts, which is, were the - - - were the lawyers
8 parties or did they have an interest, that it's - - -
9 it's difficult for me to understand what they do
10 reflect.

11 But on this point that they thought was
12 persuasive, which is that Rocky died five years later
13 and he had never, quote, done anything, what's
14 interesting is - - - I mean, Surrogate Glen engaged
15 with those facts. She acknowledged that that was an
16 argument that could lead her to a different
17 conclusion. And what she found was that, in fact,
18 Rocky did do something when his lawyer and - - -
19 these constant references to Mr. Manson as Keiko's
20 lawyer and not Rocky's lawyer were addressed and
21 refuted by the Surrogate, when he discovered, and
22 Rocky discovered for the first time about this, Rocky
23 changed his - - - did the 2003 codicil, and in fact,
24 on the advice of separate trust and estate's counsel,
25 drafted an amendment to his will in 2007 in which he

1 addresses this.

2 He says, number one, it is my wish to leave
3 the stock in the BPT as follows. If contrary to my
4 wish, these releases are effective, then this. But
5 he also included in the will, at counsel's advice, a
6 so-called in terrorem clause that disinherited any
7 beneficiary that challenged the terms of his will.

8 And that's the way that Rocky dealt with
9 the fact that, as Surrogate Glen found, he did not
10 want to spend his remaining years throwing fuel on
11 the fire between his children on the one hand and his
12 wife on the other.

13 Let me just - - - I know I my white light
14 is on so I have to deal - - - address Cowee. We
15 embrace Cowee; we think that Cowee actually states
16 what the relevant rule is and - - - with my white
17 light on I won't quote the relevant passage, but
18 Surrogate Glen, in her opinion, does quote the
19 relevant passage which does state the standard.

20 Now, the other side argues, takes some sort
21 of talismanic significance from the following
22 sentence: "Whenever, however, the relations between
23 the contracting parties appear to be of such
24 character as to render it certain that they do not
25 deal on terms of equality but that either on one side

1 from superior knowledge of the matter derived from a
2 fiduciary relation, or from overmastering influence,
3 or on the other from weakness, dependence, or trust
4 justifiably reposed, unfair advantage in a
5 transaction is rendered probable, there the burden is
6 shifted, the transaction is presumed void, and it is
7 incumbent upon the stronger party to show
8 affirmatively that no deception was practiced, no
9 undue influence was used, and that all was fair,
10 open, voluntary and understood."

11 It turns out - - - it was all one sentence.
12 They're deriving talismanic significance from the
13 words "between the contracting parties", and they
14 say, aha, well, the lawyers weren't contracting
15 parties. That is not at all what is meant by this.
16 You - - - the fiduciary, and I think - - - I think
17 Judge Garcia, this goes back to your first question -
18 - -

19 JUDGE GARCIA: Then I want to just - - -
20 and I know your light is on - - -

21 MR. WAXMAN: I just - - -

22 JUDGE GARCIA: - - - going back to that
23 situation - - -

24 MR. WAXMAN: Yeah.

25 JUDGE GARCIA: - - - on Adams, wasn't one

1 of the parties in the Adams case actually the person
2 who signed this release under the will? So you had
3 one of the parties there, right?

4 MR. WAXMAN: Well - - -

5 JUDGE GARCIA: Here, it's a very different
6 situation even from Adams; isn't it?

7 MR. WAXMAN: No, the - - - it in - - - I -
8 - - may I just make my point about - - - about this
9 quote and then I'll answer Adams, because I'm afraid
10 I may forget. The point about Cowee, Judge Abdul-
11 Rahman (sic), is that the fiduciary doesn't have to -
12 - -

13 JUDGE ABDUS-SALAAM: Judge isn't here, but
14 anyway, go ahead.

15 MR. WAXMAN: The - - -

16 JUDGE ABDUS-SALAAM: It's Abdus-Salaam, not
17 - - -

18 MR. WAXMAN: Abdus-Salaam, I'm sorry. The
19 fiduciary doesn't have to be a party for the, quote,
20 "relations between the contracting parties to be
21 unequal because of superior knowledge of the matter
22 that's derived from the fiduciary relation." And in
23 Adams - - -

24 JUDGE GARCIA: Does someone have to be a
25 party?

1 MR. WAXMAN: Excuse me?

2 JUDGE GARCIA: Does someone have to be a
3 party?

4 MR. WAXMAN: There has to - - -

5 JUDGE GARCIA: I mean, in Adams, someone
6 was a party, right?

7 MR. WAXMAN: Yeah - - -

8 JUDGE GARCIA: Someone who signed that
9 document was a party to that case - - -

10 MR. WAXMAN: So the document - - -

11 JUDGE GARCIA: - - - saying the will was
12 overborn, equitable constructive fraud. Here, you
13 don't have that. The person who was a party never
14 brought the action, which is, I think, the point that
15 was made.

16 MR. WAXMAN: I apologize again.

17 JUDGE ABDUS-SALAAM: That's all right,
18 counsel, but that was my point that Judge Garcia - -
19 - so I'm piggybacking on what he said.

20 MR. WAXMAN: Okay, so here is the point.
21 In Adams v. Cowee, what you had - - - you had the
22 legatees under of a will - - - under a will. They
23 were all children of the deceased. The - - - the
24 deceased had made certain loans to one of the
25 children during that child's lifetime, and the

1 administrator of the estate, who was the fiduciary,
2 got that legatee to sign a release of his legacy for
3 the benefit of the other legatees; not for the
4 benefit of the administrator, not because the
5 administrator is going to - - - was going to get more
6 legal work or anything, simply because the
7 administrator thought that it was fair that he give
8 up his share for the benefit of the other legatees.
9 There was no - - - the - - - the administrator wasn't
10 a party in interest, he didn't have - - - he had no
11 skin in the game.

12 JUDGE GARCIA: But the son who signed it
13 did.

14 MR. WAXMAN: The son who signed it was the
15 legatee.

16 JUDGE GARCIA: And he was in the action, in
17 the Adams case.

18 MR. WAXMAN: The - - - he - - - yes. Well,
19 he hadn't died yet, he basically said, that was an
20 instance of - - - my will was overborn by a fiduciary
21 in whom I reposed trust who used his superior
22 knowledge to get me to do this.

23 JUDGE GARCIA: Right.

24 MR. WAXMAN: And he hadn't died in that
25 particular instance, but the salient point, with

1 respect to the Appellate Division's rule in Cowee, is
2 that the fiduciary was not a party and had no
3 pecuniary interest in the transaction, and yet, as it
4 should, the doctrine of equitable fraud applied.

5 Thank you.

6 CHIEF JUDGE DIFIORE: Counsel, before you
7 bring this to a close, I have one last question. Was
8 there a proceeding that Mr. Aoki could have brought
9 to challenge the trust?

10 MR. WAXMAN: I mean, I guess he could have
11 sued his lawyers. I - - - I - - - I'm not sure.

12 CHIEF JUDGE DIFIORE: Okay. Thank you,
13 sir.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Keiko Ono Aoki v. Devon and Steven Aoki, No. 28 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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