STATE OF MICHIGAN

COURT OF APPEALS

MARGARET A. PANEK,

Plaintiff-Appellant/
Cross-Appellee,

v

JULIUS H. GIARMARCO, PETER J. BILL, and GIARMARCO & BILL, P.C.,

Defendants-Appellees/
Cross-Appellants.

UNPUBLISHED
November 25, 1997

No. 195159
Oakland Circuit Court
LC No. 95-502539-NM

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) and (10). We affirm.

This case involves a legal malpractice claim arising out of defendant Julius Giarmarco's preparation of a trust agreement for plaintiff's mother, Fonda D. Lampin. Plaintiff alleges that faulty drafting by defendant Giarmarco prevented the agreement from effectuating her mother's intent to leave the entire trust to her. As a consequence of defendant Giarmarco's alleged negligence, plaintiff's two nieces received part of the trust.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Int'l Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App 437, 442; 543 NW2d 25 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The sufficiency of the claim is tested on the pleadings alone, and all factual allegations in the complaint must be accepted as true. *Id.* The motion may be granted only when the claim "is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*

A motion pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Amorello v Monsanto Corp*, 186 Mich App 324, 329; 463 NW2d 487 (1990). Such motion may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law. *Id.* The party opposing the motion must show that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). In reviewing a motion made pursuant to MCR 2.116(C)(10), this Court must consider "the affidavits, depositions, admissions, pleadings, and any other evidence" favoring the opposing party. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Giving the benefit of any reasonable doubt to the nonmoving party, the court must determine whether a record might be developed that would present an issue upon which reasonable minds could differ. *Assemany v Archdiocese of Detroit*, 173 Mich App 752, 758-759; 434 NW2d 233 (1988).

Our Supreme Court recently held that an attorney owes a duty to a beneficiary named in a will to "draft a will that properly effectuates the distribution scheme set forth by the testator in the will." *Mieras v DeBona*, 452 Mich 278, 302; 550 NW2d 202 (1996). Stated another way, an attorney must draft the document so that it effectuates the testator's intent as expressed in the document. *Id.* at 299. To survive a motion for summary disposition, plaintiff must initially establish that she is a third-party beneficiary of the will by showing "that the primary purpose of the relationship between the defendant-attorney and the client was to benefit or influence the nonclient-plaintiff." *Id.* at 300 (quoting *McLane v Russell*, 131 Ill 2d 509, 514; 546 NE2d 499 (1989)).

The trial court dismissed plaintiff's complaint pursuant to 2.116(C)(8) because it concluded that Lampin's intent, as expressed on the face of the trust agreement, was effectuated. The trial court also dismissed the complaint under MCR 2.116(C)(10). While we agree with the trial court's reasoning, MCR 2.116(C)(8) was not the proper basis for dismissing the claim because interpreting the trust agreement required the trial court to go outside the scope of the pleadings. The trial court's reasoning was proper under MCR 2.116(C)(10), and this was the correct basis for dismissing plaintiff's claim.

Plaintiff contends that the trial court's decision was improper under MCR 2.116(C)(10) because the trial court failed to consider the evidence in the light most favorable to plaintiff. We disagree. The distribution arrangement under the trust is clear. Article Nine of the trust agreement mandated that the trust property be divided into two shares: one share for plaintiff, who was Lampin's living daughter, and one share for plaintiff's nieces, who were the living descendants of Lampin's deceased daughter. The fact that Lampin specifically named plaintiff in Article Two without naming her deceased daughter does not cause Article Two to conflict with Article Nine. Further, plaintiff's nieces were named specifically as beneficiaries in an amendment to the trust. We conclude that Lampin's intent, as expressed on the face of the agreement, was not frustrated. Therefore, because Lampin's intent was effectuated, summary disposition was proper. Contrary to plaintiff's argument, that result is not affected by the trial court's reliance on the affidavit of Alfred D. Brown, which buttressed rather than contradicted the intent expressed on the face of the agreement. See *Mieras, supra* at 303 (the rule against extrinsic evidence applies to proofs "that the testator's intent is other than set forth in the will.").

Because summary disposition was proper, it is not necessary to address defendants' argument on cross-appeal that plaintiff did not suffer any damages.

We affirm.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Robert P. Young