

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DEBORAH JO LAFAVE,

Plaintiff-Appellant/Cross-Appellee,

v

MICHAEL H. JACOBSON,

Defendant-Appellee/Cross-Appellant,

and

BEAR, STEARNS & CO., INC.,

Defendant.

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UNPUBLISHED

December 21, 1999

No. 213187

Kent Probate Court

LC No. 0163529

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the probate court order granting defendant's<sup>1</sup> motion for summary disposition. Defendant cross-appeals from the probate court order denying his motion for costs and attorney fees. We affirm in part and reverse in part.

On December 1, 1995, plaintiff filed a three-count complaint alleging breach of fiduciary duty, misrepresentation, and innocent misrepresentation. Specifically, plaintiff alleged that she married David Alan Finkelstein on January 15, 1988. Following the marriage, an irrevocable trust entitled "The Deborah Jo Stegehuis Trust" was created. The trust was primarily funded with assets consisting of stock and bonds, and defendant served as its trustee. On December 31, 1991, the trust purchased 5,000 shares of Cortech. In 1991, Finkelstein commenced divorce proceedings against plaintiff, but the pair reconciled. In 1993, the parties separated and activated the divorce proceedings. Defendant undertook the legal representation of Finkelstein and continued to serve as trustee of the trust. During the course of the divorce proceeding, defendant made representations regarding the value of the trust and number of stock shares. Although a stock split had caused the number of shares of Cortech stock to deplete to 2,500, defendant represented to plaintiff that she still had 5,000 shares. Shortly after

making this representation to plaintiff, defendant withdrew from representing Finkelstein in the divorce proceeding. However, plaintiff allegedly relied on defendant's representation in reaching an equitable property division in the consent judgment of divorce which entered on January 27, 1994. Following entry of the judgment, plaintiff requested that defendant, as trustee, distribute the assets of the trust for liquidation purposes, but defendant did not distribute the bulk of the assets, which included the Cortech stock. When the stock was finally turned over to plaintiff, the value of the stock had dropped significantly, causing a substantial loss to plaintiff. Although defendant filed both an answer and amended answer to the complaint, defendant did not raise the statute of limitations as an affirmative defense.

On December 5, 1996, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (C)(10). Specifically, defendant argued that exclusive jurisdiction of the claims against defendant rested in the probate court. Additionally, defendant argued that plaintiff had failed to mitigate her damages by seeking to modify the consent judgment of divorce based on a mutual mistake of fact. Defendant did not seek transfer of the litigation to the probate court, but outright dismissal. On January 29, 1997, the circuit court heard oral arguments regarding defendant's motion for summary disposition. The circuit court held that the probate court had exclusive jurisdiction of plaintiff's complaint. However, the trial court declined to grant defendant's motion for dismissal pursuant to MCR 2.116(C)(4), but rather ordered that the case be transferred to the probate court pursuant to MCR 2.227(A)(2), with plaintiff bearing the cost of the transfer fee. The circuit court also ordered that the entire file would be transferred to the probate court.

On May 14, 1997, defendant filed its second motion for summary disposition before the probate court based on the statute of limitations. Defendant asserted that plaintiff learned of all facts which gave rise to her complaint for breach of fiduciary duty and misrepresentation no later than July 22, 1994. However, plaintiff did not file suit until December 1, 1995. Pursuant to the six-month statute of limitation period set forth in MCL 700.819; MSA 27.5819, defendant asserted that plaintiff's complaint was barred. In opposition to the motion, plaintiff asserted that the six-month limitation period did not apply because defendant had never provided plaintiff with a final accounting or given a full disclosure of the state of the trust.

On June 17, 1997, the probate court heard oral arguments regarding defendant's second motion for summary disposition. The probate court held that plaintiff had filed her complaint in circuit court in order to avoid the six-month limitation period set forth in the probate code. The probate court held that a formal accounting was unnecessary to commence the statutory period, and defendant's resignation from the position and appointment of a successor was sufficient. Furthermore, the probate court held that plaintiff admitted in her deposition that she was aware of all of the facts necessary for bringing her complaint for seventeen months prior to the actual filing date.

On February 24, 1998, plaintiff filed a motion to set aside the order granting defendant's motion for summary disposition. Plaintiff argued that the statute of limitations period was not six-months, but three-years due to defendant's failure to provide an accounting. On April 23, 1998, the probate court heard oral arguments regarding plaintiff's motion to set aside the order and defendant's motion for attorney fees and costs. The probate court held that there was no doubt that defendant acted

improperly as a trustee by not advising plaintiff, in a timely manner, of the status of the trust. However, plaintiff learned in 1994 of the status of the trust. Once plaintiff acquired that knowledge, irrespective of the source, the statute began to run. The probate court went on to state that it no longer opined that plaintiff had filed the action initially in circuit court to avoid the statute of limitations. Lastly, the probate court denied defendant's motion for attorney fees and costs, holding that any award was discretionary, and in any event, defendant came before the court with unclean hands.

Plaintiff first argues that the trial court erred in holding that the six-month statute of limitations period applied. We agree. Our review of a trial court's order of summary disposition is de novo. *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998).<sup>2</sup> MCL 700.819; MSA 27.5819 provides:

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary.

If statutory language is clear and unambiguous, additional judicial construction is neither necessary nor permitted, and the language must be applied as written. *Ahearn v Bloomfield Twp*, 235 Mich App 486, 498; 597 NW2d 858 (1999). The primary goal of statutory interpretation is to give effect to the intent of the legislative body. *Ballman v Borges*, 226 Mich App 166, 168; 572 NW2d 47 (1997). Meaning should be given to every word of a statute, and no word should be treated as surplusage or rendered nugatory if at all possible. *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 574; 592 NW2d 369 (1999). Furthermore, a statute should be construed so as to prevent absurd results, injustice, or prejudice to the public interest. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). Interpretation and application of a statute presents a question of law which is reviewed de novo. *Id.*

In the present case, the probate court held that a final accounting was unnecessary to trigger the running of the six-month statute of limitations period, and defendant's withdrawal from representation of the trust was sufficient to trigger the statutory period. Furthermore, the probate court held that plaintiff's knowledge impacted the six-month limitation period. We disagree. Applying the rules of statutory interpretation and construction, any event of withdrawal is insufficient to trigger the commencement of the six-month limitations period. Rather the trustee must provide a "final account *or* other statement fully disclosing the matter *and* showing termination of the trust relationship . . . ." The statute does not set forth any exceptions or substitutions for this required action. In this case, defendant failed to provide a final account to plaintiff of the status of the trust. Alternatively, defendant could have withdrawn with

the condition that he provide a statement fully disclosing the matters surrounding the trust. While defendant did, in fact, withdraw from representation of the trust, he did not provide a statement fully disclosing the status of the trust. Instead, plaintiff, through her counsel, had to communicate with defendant's former law firm in an attempt to learn the status of her stock shares. The interpretation of the statute by the probate court would lead to injustice and absurd results. *McAuley, supra*. It would allow a trustee to remove himself from further representation of a trust without performing any disclosure functions. If a plaintiff was unable to determine whether a breach of fiduciary duty had occurred within six-months, there would be no sanction for the breach of fiduciary duty. Additionally, it appears that the knowledge of a plaintiff is irrelevant because there is no language in the statute to indicate that a plaintiff's knowledge has any bearing on the trigger date for the six-month period. *Ahearn, supra*. Plaintiff's complaint was timely filed within the three year statutory period due to defendant's failure to comply with the procedure for invoking the six-month statutory period.

Our statutory interpretation is consistent with the legislative intent in enacting MCL 700.819; MSA 27.5819. The House Legislative Analysis for 1978 PA 642 indicates that "If all beneficiaries had received the final account and there had been full discharge, the trustee would not be liable after three years from filing the final account." House Bill Analysis HB 4475, July 39, 1979. Accordingly, the probate court erred in applying the six-month statute of limitations where defendant failed to provide a final accounting or give a full disclosure with his withdrawal from representation.

Plaintiff next argues that the probate court erred in granting defendant's motion for summary disposition when the statute of limitations was not pled as an affirmative defense. Our holding that the six-month statutory period did not apply and that plaintiff was within the three year limitations renders this issue moot.<sup>3</sup>

On cross-appeal, defendant argues that the probate court erred in failing to award costs and attorney fees for defending in the wrong court as required by MCR 2.227(A)(2). We disagree. We review a lower court's interpretation of court rules de novo. *McAuley, supra*. Where the issues remain the same and the case proceeds uninterrupted, there are no additional expenses and the request for attorney fees is unreasonable. *Michigan State Employees Association v Civil Service Commission*, 177 Mich App 231, 238-239; 441 NW2d 423 (1989). Defendant contends that the present factual scenario is distinguishable because it, in fact, incurred additional expenses when it filed its motion for summary disposition. However, the motion for summary disposition was not based solely on subject matter jurisdiction, but also based on plaintiff's alleged failure to mitigate her damages. Therefore, defendant did not incur additional expenses in attending in the wrong court, and defendant did not seek transfer of the litigation to the probate court. Rather, defendant hoped to obtain outright dismissal of the litigation by

moving pursuant to MCR 2.116(C)(4) and (C)(10). Accordingly, the probate court did not err in refusing to award defendant costs and attorney fees. *Michigan State, supra*.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Janet T. Neff

<sup>1</sup> Defendant, Bear, Stearns & Co, Inc, reached a settlement with plaintiff and is not a party to this appeal. Accordingly, we refer to Michael H. Jacobson only as defendant.

<sup>2</sup> Defendant contends that plaintiff's motion to set aside the order of summary disposition should have been entitled a motion for reconsideration and the abuse of discretion standard of review should apply on appeal. Appellate review of the original grant of defendant's motion for summary disposition is appropriate. *Gavulic v Boyer*, 195 Mich App 20, 23-24; 489 NW2d 124 (1992).

<sup>3</sup> In *In re Crawford Estate*, 115 Mich App 19, 23-25; 320 NW2d 276 (1982), we held that the court rules regarding failure to plead affirmative defenses did not apply in probate proceedings because those rules had not been adopted by the probate court. However, since the *Crawford* decision has issued, MCR 5.001 was adopted which provides that "[p]rocedure in probate court is governed by the rules applicable to other civil proceedings, except as modified by the rules in this chapter." The viability of the *Crawford* decision is unclear because the terms used in the probate proceedings differ from the terms applied to civil proceedings, and court rules governing the discrepancy have not been created. 5 Martin, Dean & Webster, Michigan Court Rules Practice, Authors' Comment, pp 334-335. But see *In re Pitre*, 202 Mich App 241, 243; 508 NW2d 140 (1993). Because this issue is moot we decline to examine whether the adoption of MCR 5.001 indicates that MCR 2.111(F)(3) may be applied in probate proceedings.