STATE OF MICHIGAN

COURT OF APPEALS

JACOB S. STANKE, a minor, by his Next Friend, ISABELLA BANK AND TRUST, and ISABELLA BANK AND TRUST, as Trustee of the JACOB S. STANKE Trust Agreement,

Plaintiff-Appellant,

v

LINDA J. STANKE,

Defendant,

and

VARNUM, RIDDERING, SCHMIDT, and HOWLETT, L.L.P.,

Defendant-Appellee.

UNPUBLISHED
March 20, 2007

No. 263446
Isabella Circuit Court
LC No. 04-3305-NM

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Plaintiff Isabella Bank and Trust, as next friend for Jacob Stanke and trustee of the Jacob S. Stanke Trust, ("plaintiff") appeals as of right from an order of the circuit court granting summary disposition to defendant law firm, Varnum, Riddering, Schmidt and Howlett, L.L.P. (defendant). We affirm.

On April 27, 1996, then five-year old Jacob Stanke (Jacob) was injured at a "Mini Grand Prix" event. Shortly thereafter, Jacob's mother, Linda Stanke (Stanke), engaged defendant to pursue a personal injury claim on Jacob's behalf. On July 25, 1996, Stanke, through defendant, successfully moved to be appointed Jacob's next friend and on that same day, defendant filed a personal injury lawsuit against the organizers of the event and others on Jacob's behalf. The parties to that lawsuit agreed to settle following mediation. Defendant then moved the circuit court to approve the settlement, with the net proceeds to be placed in trust for Jacob. Defendant attached a copy of the trust document, signed by both of Jacob's parents and designating Stanke as trustee and Jacob's father, Jeffrey Stanke (Jeffrey) as successor trustee, to its motion. On May 1, 1998, the circuit court approved the settlement, authorized payment of defendant's

contingency fee and Jacob's outstanding medical bills from the proceeds, and authorized establishment of the Jacob S. Stanke Trust, pursuant to the trust document attached to defendant's motion "for Jacob's benefit to hold the remaining proceeds of the lawsuit."

Following the circuit court's approval of the settlement, with Jeffrey's consent, defendant filed a petition in the probate court to appoint Stanke as Jacob's conservator and to approve the transfer of the net settlement proceeds to her to be placed in trust for Jacob. Defendant attached copies of circuit court's order approving the underlying settlement and of the trust document establishing the Jacob S. Stanke Trust to this petition. On June 24, 1998, the probate court appointed Stanke as Jacob's conservator, approved use of the trust as a receptacle for the settlement proceeds, authorized the deposit of the proceeds into the trust, and ordered that an Acceptance of Trust be filed in lieu of a bond. On July 28, 1998, the circuit court entered a stipulated order of dismissal of the underlying personal injury lawsuit. The net settlement proceeds were transferred into Jacob's trust as ordered by the probate court and, on August 31, 2000, Stanke was discharged as Jacob's conservator.

On January 7, 2003, plaintiff filed the instant complaint on Jacob's behalf alleging that Stanke had wrongfully depleted Jacob's trust assets by more than $200,000 in violation of her fiduciary duty as trustee,[1] and that defendant committed legal malpractice in the manner in which it drafted the trust and handled matters before the probate court. Defendant filed three separate motions for summary disposition on various grounds, all of which the trial court granted. We agree with the trial court that the alleged acts of malpractice fall within the "attorney judgment rule" set forth in *Simko v Blake*, 446 Mich App 648; 532 NW2d 842 (1995) and *Estate of Mitchell v Dougherty*, 249 Mich App 668; 644 NW2d 391 (2002), and we affirm the trial court's order on that basis. Therefore, we need not address the remainder of the issues presented on appeal.[2]

This Court reviews a circuit court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Defendant filed its motion for summary disposition based on the attorney judgment rule pursuant to MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). However, where as here, the circuit court considered material outside the pleadings, we will construe the motion as having been granted pursuant to MCR 2.116(C)(10). *Driver v Hanley* (*After Remand*), 226 Mich App 558, 562; 575 NW2d 31 (1997). "A motion for summary disposition may be granted pursuant to MCR

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[1] Plaintiff obtained a default judgment against defendant Linda Stanke for the full amount of the trust funds she allegedly wrongfully depleted and she is not a party to this appeal.

[2] The first issue raised by plaintiff on appeal, whether the trial court properly determined that defendant represented Stanke, and not Jacob, in connection with the probate court proceedings is a complex one, which we need not resolve because regardless whether Jacob was defendant's client or Stanke was defendant's client we conclude that summary disposition was proper pursuant to the attorney judgment rule.

2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party is entitled to judgment as a matter of law if the claim suffers a deficiency that cannot be overcome." *Id.* (internal citations omitted).

In *Simko, supra* at 655-656, our Supreme Court explained that an attorney has an implied duty to exercise reasonable skill, care, discretion, and judgment in representing a client. Further, an attorney is obligated to act as an attorney of ordinary learning, judgment, or skill would act under the same or similar circumstances. *Id.* at 656. However, an attorney is not a guarantor of the most favorable possible outcome, nor must an attorney exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. *Id.* Thus, an attorney is not liable for what, in hindsight, were errors in judgment where the attorney made those judgments in good faith and in the honest belief that the decisions were well founded in the law and made in the best interest of the client. *Id.* at 658; *Mitchell, supra* at 677. Accordingly, while a gross error in judgment may be actionable, a mere error in judgment made in good faith is not. *Mitchell, supra* at 679. Therefore, where a plaintiff's allegations cannot support a breach of duty because they are based on mere errors of professional judgment and not breaches of reasonable care, summary disposition is appropriate. *Simko, supra* at 659.

Plaintiff asserts that defendant committed malpractice by: (1) constructing the trust in a manner that allowed Stanke to misappropriate funds; (2) asking the circuit and probate courts to approve the trust as drafted; (3) allowing Stanke to be appointed as trustee; and (4) not causing the probate court to pass on the sufficiency of a bond, a bond to be filed or hearing to be held regarding approval of the trust in the probate court. After reviewing the pleadings and documents attached to defendant's motions, the trial court concluded that each of the claimed errors was a matter of professional judgment, and thus, fell within the attorney judgment rule. We agree.

Defendant's recommendation to use a trust to manage Jacob's settlement proceeds in lieu of a bonded conservatorship was a matter of judgment – a conscious choice made by defendant in the course of the tort litigation. The actions taken by defendant complied with applicable law and court rules, and with the requirements imposed by the circuit and probate courts. Plaintiff presented no evidence that defendant's judgment in this regard was motivated by anything other than good faith, with the honest belief that its decisions were well-founded in applicable law and made in the best interest of defendant's client. Thus, the trial court properly concluded that errors made by defendant in this regard, if any, fall within the attorney judgment rule.

Similarly, plaintiff does not allege, and has not shown, that defendant knew or should have known that Stanke was not an appropriate choice to serve as trustee. Nor has plaintiff presented any evidence that defendant's conduct in connection with Stanke's appointment as trustee was motivated by anything other than good faith, with the honest belief that its decisions were well-founded in applicable law and made in the best interest of defendant's client.[3] As this Court noted in *In re Estate of Powell*, 160 Mich App 704, 711; 408 NW2d 525 (1987), "it is

[3] As noted in footnote 2, *supra*, this is true regardless whether defendant's client was Stanke or the then seven-year old Jacob.

almost routine to appoint parents to manage the interests of their minor children." Thus, there certainly was nothing inherently unreasonable, or grossly erroneous, in defendant's request to have Stanke serve in that capacity. Additionally, in *Persinger v Holt*, 248 Mich App 499; 639 NW2d 594 (2001), this Court held that a lawyer has no duty to dissuade a client from his or her selection of an agent or fiduciary. Accordingly, defendant had no duty to challenge Stanke's nomination as trustee.[4]

Finally, as for defendant's conduct in the probate court proceedings, as the trial court explained,"[a]lthough the [p]laintiff dislikes the filing of an Acceptance of Trust instead of a bond, it was a pleading judgment made by the [d]efendant, which was subsequently granted by the . . . [p]robate [c]ourt." As such, it, too, comes within the attorney judgment rule. *Simko, supra*.

In short, each of defendant's actions about which plaintiff complains were the result of conscious, good-faith judgments made by defendant in the course of litigation. Plaintiff presented no evidence that the alleged errors resulted from oversight or lack of skill, knowledge, research, investigation or preparation. Rather, as noted above, defendant acted in conformance with applicable court rules and complied with the requirements imposed by the circuit and probate courts. Plaintiff has not established that defendant acted other than in good faith, with the honest belief that its decisions were well-founded in applicable law and in the best interest of its client. Indeed, that two separate courts tacitly approved defendant's decisions regarding use of the trust as drafted with Stanke as trustee, in lieu of a bonded conservatorship or other method to manage Jacob's settlement funds, supports our conclusion that defendant's decisions in these regards were not clearly inappropriate, unreasonable or grossly erroneous.

Because plaintiff presented no evidence that defendant's errors, if any, were anything more than mere errors in judgment, there was no genuine issue of material fact regarding defendant's alleged negligence. For that reason, the circuit court properly granted defendant's motion for summary disposition pursuant to the attorney judgment rule under MCR 2.116(C)(10). Therefore, it is not necessary for us to resolve the remaining issues raised by plaintiff on appeal.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Bill Schuette

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[4] Again, this holds true regardless whether defendant was representing Stanke or Jacob at this point in the proceedings. If defendant's client was Stanke, there is no assertion that she was mentally incompetent to select herself to serve as trustee for Jacob. Similarly, if Jacob was defendant's client, Stanke's designation as trustee was approved and authorized by both his parents acting on his behalf.