

STATE OF MICHIGAN
COURT OF APPEALS

LAETHEM EQUIPMENT COMPANY,
LAETHEM FARM SERVICE COMPANY,
MICHAEL T. LAETHEM, and MARK E.
LAETHEM,

UNPUBLISHED
November 20, 2007

Plaintiffs-Appellants,

v

CURRIE KENDALL, P.L.C.,

No. 272170
Saginaw Circuit Court
LC No. 05-055440-NM

Defendant-Appellee.

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal by delayed application for leave the grant of summary disposition in favor of defendant law firm for lack of subject-matter jurisdiction, pursuant to MCR 2.116(C)(4). Plaintiffs assert the trial court erred in determining that their claims of legal malpractice and breach of fiduciary duty arose out of the administration of their father's trust and, therefore, were within the exclusive jurisdiction of the probate court. We reverse and remand.

The factual background of this case is lengthy, encompasses multiple lawsuits¹ and involves a fairly complex dispute among family members regarding two John Deere farm implement businesses, Laethem Equipment Company and Laethem Farm Service Company, which were owned by the Laethem family through a family trust.² Francis Laethem was the

¹ *Laethem Equip Co v Deere & Co*, filed in the United States District Court, Eastern District of Michigan (Case No. 1:05CV10113); *Laethem v Laethem*, filed in the Tuscola Circuit Court (Case Nos. 03-21644-CZ and 93-27374-SE); *Laethem Equip Co v J & D Implement, Inc*, filed in the Tuscola Circuit Court (Case No. 05-022863-CK); *Laethem Equip Co v J & D Implement, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2007 (Docket No. 266648).

² Laethem Equipment Company is a Michigan corporation with its principal place of business located in Caro, Michigan. Until January 15, 2003, the Company was a John Deere dealer and operated a retail farm implement and equipment business. Laethem Farm Service Company is
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father of plaintiffs, Michael and Mark Laethem, and Kathryn Laethem. Francis established the Francis M. Laethem Trust and assigned all of his personal property, assets and interest in the two plaintiff companies to the Trust.³ All three siblings were named as trustees, with Mark and Michael operating the Laethem companies and Kathryn acting as the accountant. Anne Laethem, the wife of Francis, was designated as the primary trust beneficiary and was to receive the trust income during her lifetime.

Following the death of their father, Michael and Mark continued operating the Laethem companies. Purportedly, concerns arose regarding their management of the companies and wrongful attempts to transfer stock in the businesses to themselves for less than fair market value. Anne also asserted that she was not being paid income from the trust in accordance with the profits of the Laethem businesses. As a result, Kathryn retained defendant law firm on or about July 26, 2001. Defendant contends, by way of an affidavit, that it was retained by Kathryn solely to advise her in her capacity as a trustee of the Laethem Trust. Reportedly, defendant assisted Kathryn in negotiations with her siblings in July of 2001, in an attempt to reach an agreement regarding purchase of the Laethem businesses by Michael and Mark. However, an agreement was never reached regarding the price to be paid to acquire the companies.⁴

Following defendant's advice, on October 15, 2001, Anne removed Michael and Mark as trustees of the trust. Defendant then became involved in the representation of the companies. Shortly thereafter, defendant advised Kathryn to remove Michael and Mark as directors and officers of the companies and to install herself as the sole officer and director, but the brothers continued working for the companies. Plaintiffs contend that these actions led to the failure of the companies. We would note, however, that during this time period John Deere conducted a detailed audit of the companies, which revealed retail and warranty note irregularities and fraud in the operation of the companies resulting in substantial chargebacks, totaling thousands of dollars, being issued.

Through defendant, Kathryn engaged in negotiations with John Deere to identify a buyer for the Laethem companies. Although defendant contends this work was done solely as a representative of Kathryn, in her capacity as a trustee, in related litigation⁵ defendant acknowledged under oath having an attorney/client relationship with Laethem Equipment Company. In addition, defendant sought payment of fees incurred in its capacity as the attorney for the legal representative of Laethem Equipment Company. On January 28, 2003, Michael and Mark, through their attorney, presented a new offer to purchase the companies. Plaintiffs allege that while conducting negotiations with defendant to purchase the company, defendant was

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also a Michigan corporation with its principal place of business located in Fairgrove, Michigan. Until January 15, 2003, this company operated as a satellite John Deere dealership in conjunction with Laethem Equipment Company's dealership agreement with John Deere.

³ Francis died on January 4, 1993.

⁴ Although Kathryn contended the companies had not been sold to Michael and Mark, as the business accountant for the Trust, Kathryn allegedly filed tax returns reflecting the brothers' ownership, on an equal basis, of Laethem Equipment Company.

⁵ Tuscola County Circuit Court Case Nos. 93-27374-SE and 03-21644-CZ.

simultaneously negotiating for the sale of the companies and also represented competing John Deere dealerships operated by another family. Plaintiffs assert defendant was aware that John Deere was seeking to reduce the number of dealerships in their area and that defendant's actions resulted in the termination of the companies' dealership agreement with John Deere.

On January 15, 2003, defendant reportedly instructed Kathryn to fire Michael and Mark. In addition, arrangements were made to sell assets from the companies to J & D Implement, Inc., an Ohio corporation. Plaintiffs allege the Laethem companies' assets were being sold "at fire sale prices." Michael and Mark initiated a lawsuit in the Tuscola County Circuit Court in an attempt to secure a temporary restraining order (TRO) to prevent liquidation of the companies' assets. Despite a TRO being in place, Kathryn proceeded with defendant to consummate the deal to transfer assets to J & D Implement, Inc. A hearing was conducted on March 11, 2003, to determine whether remaining company assets should be sold. Defendant appeared on behalf of both companies and plaintiffs allege defendant elicited knowingly false testimony from Kathryn to secure the lifting of the TRO. Plaintiffs contend the court lifted the TRO and permitted additional assets to be sold at auction based on this allegedly false testimony. Plaintiffs further assert that the auction was mishandled resulting in the sale of the companies' assets at a significant loss.

Concurrently, Michael and Mark initiated a lawsuit in the circuit court against both the Trust and Kathryn, individually and as trustee and accountant for the Trust, alleging fraud, tortious interference with business relationships, defamation and business disparagement, conversion, accountant malpractice, false light invasion of privacy and seeking specific performance of an alleged agreement to purchase Trust assets and promissory estoppel.⁶ Despite interim rulings that Michael and Mark only had an agreement to purchase the businesses at some future point, but that the details regarding price had not been determined, the circuit court entered an order on November 1, 2004, granting Michael and Mark a default judgment on their request for specific performance. The trial court order stated, in relevant part:

This Court finds that Plaintiffs Mark and Michael Laethem are now and have been since January 4, 1993, the 50-50 shareholders of Laethem Equipment Company (LEC), Laethem Farm Service Co., (LFSC) and Canusa Equipment Company (Canusa), and in connection therewith, have had the right to the profits of, and the right to conduct the management of, and the right to hold themselves as owners of LEC, LFSC and Canusa since that date.

This Court further finds since January 4, 1993, Mark Laethem and Michael Laethem have each held 50% equitable ownership interests in all of the commercial property on which LEC operated in Caro, Michigan, and the real property known as the Buck Farm, and all parcels on which LFSC operated that were not titled to LFSC, and that pursuant to such interests, Mark Laethem and Michael Laethem had the right to control and manage all operations thereon.

⁶ Verified Complaint and Jury Demand filed in the Tuscola County Circuit Court, lower court case number 03-21644-CZ, Hon. Patrick R. Joslyn presiding.

Approximately one month later, a formal settlement agreement and release was executed, which reflected the trial court's ruling regarding ownership of the companies and memorialized additional agreements between the siblings, the Trust and its beneficiaries.

This appeal arises from a subsequent complaint filed by plaintiffs in the Saginaw Circuit Court against defendant alleging legal malpractice/professional negligence and breach of fiduciary duties, asserting that defendant acted adversely to the interests of its clients – Laethem Equipment Company and Laethem Farm Service Company. Defendant filed four separate, pre-answer motions for summary disposition, alleging (a) lack of subject matter jurisdiction under MCR 2.116(C)(4); (b) res judicata/release under MCR 2.116(C)(7); (c) absence of attorney-client or fiduciary relationship under MCR 2.116(C)(10); and (d) wrongful conduct rule, also under MCR 2.116(C)(10). Although expressing uncertainty regarding its ruling, the circuit court granted summary disposition in favor of defendant based solely on its determination that jurisdiction in this matter resided exclusively with the probate court in accordance with MCL 700.1302(b). Specifically, the trial court determined, citing MCL 700.1302(b) and (b)(v), that “[t]he Complaint alleges facts, circumstances and events which concern the ‘internal affairs’ or ‘the administration’ of a trust; and this proceeding will require determination of one or more questions ‘that arise[] in the administration or distribution of a trust.’” Finding plaintiffs’ arguments unpersuasive and lacking a legal basis for denial of summary disposition, the trial court ruled that a finding of concurrent jurisdiction under MCL 700.1303 was inapplicable.

On appeal, plaintiffs argue the trial court erred in granting summary disposition on the basis of subject matter jurisdiction contending the alleged breaches of fiduciary duty and malpractice did not arise from defendant's responsibilities to the trust. Plaintiffs contend that a fiduciary relationship can arise between an attorney and shareholders of a closely held corporation, and that such a relationship arose independently of the trust. In the alternative, plaintiffs suggest that MCL 700.1303 would give the probate court concurrent jurisdiction with the circuit court. Defendant responds that the trial court properly granted summary disposition because all of plaintiffs’ claims arise directly out of administration of the trust and its assets placing jurisdiction exclusively in the probate court.

This Court reviews de novo the issue of whether subject-matter jurisdiction exists as a question of law. *Midwest Energy Coop v Michigan Pub Serv Comm*, 268 Mich App 521, 523; 708 NW2d 147 (2005). Issues of statutory construction are also reviewed de novo. *Id.*

Circuit courts are deemed courts of general jurisdiction and “have original jurisdiction to hear and determine all civil claims and remedies except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.” MCL 600.605. Probate courts are vested with “exclusive legal and equitable jurisdiction” regarding “matter[s] that relate[] to the settlement of a deceased individual's estate,” MCL 700.1302(a), and “proceeding[s] that concern[] the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary,” MCL 700.1302(b).

The trial court determined that exclusive jurisdiction in this matter was with the probate court because plaintiffs’ claims arose from or were related to the administration of the Laethem Trust with the alleged wrongdoing by defendant impacting the distribution or value of Trust

assets. The trial court and parties all cited to and relied on *Manning v Amerman*, 229 Mich App 608, 612; 582 NW2d 539 (1998) in support of their respective positions. Plaintiffs assert that *Manning* is distinguishable and inapplicable because the malpractice claims against defendant are unrelated to the settlement of the Laethem Trust.

In *Manning*, this Court addressed the exclusive jurisdiction of the probate court regarding the adjudication of claims by beneficiaries of a trust against both the trustee and the attorney of the trustee, for a variety of claims including allegations of infliction of emotional distress and malpractice. *Manning, supra* at 609-610. Only the trial court's determination that the emotional distress and malpractice claims fell within the exclusive jurisdiction of the probate court were appealed to this Court. *Id.* at 610. To resolve the issue, this Court examined the statutory language granting exclusive jurisdiction to the probate court.⁷ The Court ruled that the statutory language gave "the probate court . . . exclusive jurisdiction over proceedings concerning the administration of trusts, including the determination of 'any question arising in the administration or distribution of any trust.'" *Id.* at 612, citing MCL 700.21(b)(v). Evaluating the plaintiffs' claims in the context of the statutory language, the Court determined "it is clear from the face of the complaint that plaintiffs' emotional distress and malpractice claims arose in the administration of a trust." *Id.* at 613. As a result, this Court concluded that the claims fell within the exclusive jurisdiction of the probate court.

The facts of this case are readily distinguishable from those existing in *Manning* and necessitate a determination that the circuit court has jurisdiction of this action. Plaintiffs and various defendants have been involved in ongoing litigation since at least 2003 regarding the ownership of the assets, which are the subject of this complaint. Notably, these prior actions have all been adjudicated within various circuit courts and defendant, as the attorney of record for Kathryn Laethem and the corporate entities has not previously objected to that jurisdiction. Further, defendant and plaintiffs have consistently treated and viewed the Laethem businesses as separate or independent entities from the Trust. By way of example, in the Tuscola Circuit Court (Case No. 03-21644-CZ), Michael H. Allen, an attorney with defendant firm, acknowledged while under oath in deposition when questioned about his professional relationship with Laethem Equipment Company:

Q. Did you or any other attorney in your firm ever have an attorney/client relationship with Laethem Equipment Company?

A. Yes.

Q. Did you represent Laethem Equipment Company?

A. Yes.

⁷ We note that at the time *Manning* was decided the relevant statutory provision was MCL 700.21, which was repealed by 1998 PA 386 and replaced by MCL 700.1302, which contains substantially similar in language.

Q. When was that relationship formed?

A. Again, guessing, sometime in 2001 or 2002.

* * *

Q. And are those bills on – well, tell me who you billed.

A. I believe I billed Laethem Equipment Company.

* * *

Q. And I take it that these bills are separate from the bills that you sent to Kathryn Laethem in your attorney/client relationship with her as a trustee?

A. That is correct.

Further, in this same litigation, when seeking the payment of attorney fees, an attorney appearing on behalf of defendant firm implicitly acknowledged its representation of Laethem Equipment Company as a separate entity, as distinguished from services provided to Kathryn Laethem as either trustee or a director of the corporation, when asserting, “being an attorney for [sic] shareholder is not the same as being an attorney of the officer of the corporation, or for the corporation itself.” Nowhere in the motion filed by defendant for payment of attorney fees was the Trust mentioned or indicated to be a client. Defendant’s firm acknowledged treating the Trust and companies as disparate or separate entities when it indicated that attorneys from the firm attended hearings “on behalf of Laethem Equipment Company, as well as the probate estate to determine what the assets were.” In arguing entitlement to the payment of attorney fees, defendant firm stated, in relevant part:

Whether or not the plaintiffs in this case believe that what took place was correct should not be the standard in determining whether or not attorney fees are paid as a result of services which were lawfully provided, and rightfully provided to the authorized representative of Laethem Equipment Company in good faith, and those proceedings were taking place to make a determination as to what assets existed, how we could best benefit the corporation by preserving those assets, and how we could best benefit the probate estate and Trust estate, and preserving those assets, and make sure there was no additional waste to any of the materials or assets that existed.

In fact, what we were trying to do was limit the loses [sic] that Laethem Equipment Company would sustain. Laethem Equipment Company is currently no longer a going concern as the Court is aware during the temporary restraining order, we were trying to deal with very difficult issues of how to dispose of assets in order to bring back top dollars [sic] to Laethem Equipment Company.

So the [sic] claim the issue in the matters that were undertaken by the law firm of Currie Kendall for the benefit of Laethem Equipment Company Inc., is specious.

More importantly, another circuit court had entered an order determining ownership of Laethem Equipment Company and Laethem Farm Services Company several months before this litigation was initiated. On November 1, 2004, the Tuscola Circuit Court (Case No. 03-21644-CZ) ruled that Michael and Mark Laethem were the owners of the corporations and that their ownership would be construed to have existed since 1993. The ruling appealed in this action suggests that the basis for determining that exclusive jurisdiction was in the probate court is because it was necessary to determine or administer ownership of the corporations as possible Trust assets. This is patently incorrect, as a ruling regarding ownership of the relevant assets had already been made months before this litigation initiated. For the current circuit court to indicate at this late juncture that it did not have jurisdiction over the pending claim results in a ruling that is inconsistent with the prior order of the Tuscola Circuit Court. For the trial court to suggest that the probate court would need to revisit the issue of ownership of the disputed assets would result in an unnecessary duplication of effort and a waste of judicial resources.

Finally, we would note that attributing exclusive jurisdiction of the subject matter of this litigation to the probate court is inconsistent with the positions taken by the parties in related litigation. Judicial estoppel is a doctrine “intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.” *Opland v Kiesgan*, 234 Mich App 352, 364; 594 NW2d 505 (1999) (citation omitted). Although this doctrine must be applied cautiously, *id.* at 363-364, Michigan has recognized the “prior success” model of judicial estoppel, which precludes “a party who has *successfully* and unequivocally asserted a position in a prior proceeding from asserting an inconsistent position in a subsequent proceeding.” *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994). In this instance, defendant has consistently permitted its various clients to be subject to the jurisdiction of the circuit court in matters regarding these companies and has affirmatively and successfully sought the intervention of the circuit court in obtaining payment of its attorney fees from Laethem Equipment Company. In this litigation, defendant has asserted through affidavit that the legal services performed were solely in its capacity as the counsel for the Trust and/or Kathryn Laethem as a trustee. In addition to being self-serving, the averments contained in this affidavit are directly in opposition to the representations previously made by members of defendant firm to the Tuscola Circuit Court. It is, therefore, inconsistent for defendant to contend that the circuit court lacks authority or jurisdiction regarding whether the legal services provided to Laethem Equipment Company are subject to liability after petitioning a court of the same jurisdiction to award attorney fees for representation provided to this same business entity. In raising the applicability of judicial estoppel, this Court is not ruling on the merits of plaintiffs’ claims regarding malpractice or breach of fiduciary duty and does not offer an opinion regarding the propriety of plaintiffs’ claims on behalf of both the corporations and as individuals as these matters are beyond the scope of this appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly