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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001217-MR

GAIL MARTIN, AS CO-EXECUTRIX
OF THE ESTATE OF CORNELIUS MARTIN,
AND GAIL MARTIN INDIVIDUALLY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE KEN HOWARD, SPECIAL JUDGE
ACTION NO. 14-CI-00188

BELL, ORR, AYERS AND MOORE, PSC,
AND TIMOTHY MAULDIN, INDIVIDUALLY
AND AS CO-EXECUTOR OF THE ESTATE
OF CORNELIUS MARTIN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Gail Martin ("Gail"), both in her individual capacity and as Co-Executrix of the Estate of Cornelius Martin ("Cornelius")—her late husband—appeals from two orders entered by the Warren Circuit Court awarding summary judgment to Hon. Timothy Mauldin ("Mauldin"), the former Co-Executor of the

Estate and to Bell, Orr, Ayers and Moore, PSC ("BOAM")—the law firm with which Mauldin practices and the provider of legal services to the Estate. Gail alleged legal malpractice, excessive billing procedures and breach of fiduciary duty. Following review of the record, the briefs and the law, we affirm.

PROCEDURAL BACKGROUND

After completing high school and vocational school in Kentucky, Cornelius began working as an auto mechanic before becoming a shop foreman, a car salesman, and then completing the General Motors minority dealer program in Dayton, Ohio. Cornelius and Gail married in 1973, divorced in 1979, and remarried in 1984. In August 1985, Cornelius opened his first car dealership in Bowling Green, Kentucky. Gail did not immediately accompany Cornelius to Kentucky. She remained in Dayton where she worked to earn the down payment for the first of two homes they would build in Bowling Green. She never discussed estate planning with Cornelius.

At the age of fifty-seven, Cornelius died testate in a motorcycle accident on June 3, 2006. Mauldin had met Cornelius around 1986, and drafted a simple will for him when he had few assets. That will, executed by Cornelius on September 8, 1988, was filed for probate in Warren District Court on June 5, 2006.[1] The will named Gail and Mauldin as Co-Executors—a fact Gail knew prior

[1] *Estate of: Martin, Cornelius Allen*, Case No. 2006-P-00303. A notice of appeal was filed by the Estate in the probate case on October 10, 2017.

to Cornelius' death and did not oppose.[2] Cornelius had told her Mauldin would know what to do in the event Cornelius died.

From a single car dealership in 1986—purchased with help from his family—Cornelius built The Martin Automotive Group which at the time of his death included fifteen automobile dealerships and two motorcycle dealerships across six states. Cornelius also had significant real estate holdings and was the fixed-base operator providing all ground flight support at the Bowling Green-Warren County Regional Airport. His interests were diverse. His survivors were Gail and their three children,[3] none of whom was involved in or knowledgeable about the businesses. The Estate was burdened with approximately $100 million in debt.

Cornelius was the face of his business empire. He appeared in his own car commercials and was the sole guarantor of all dealership floor plan loans. As Cornelius' portfolio grew into a substantial estate, Mauldin urged him to update his will and take steps to minimize taxes. In December 1994, Mauldin mailed estate planning documents to Cornelius at his home.

Not considering himself to be an estate planning attorney, Mauldin asked other BOAM attorneys to prepare tax documents[4] which were sent to

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[2] The will did not specify who would serve as legal counsel for the Estate. Mauldin was not named as both Co-Executor and attorney for the Estate.

[3] The three children—all adults—are not parties to this action. There is no suggestion the purpose of this lawsuit is settling the Estate.

[4] It is suggested the proposed estate plan would have saved significant federal estate taxes.

Cornelius for review. Jim Weiss prepared some of those documents, but they were never executed. Beth Sigler followed up on the drafts, sending half a dozen letters to Cornelius stressing the consequences of inaction. At Cornelius' death, Mauldin located the unsigned documents in Cornelius' corporate office. Mauldin thought Cornelius delayed acting because he did not know what his family wanted to do with his vast business holdings. The children were young and there were marital issues to consider. Gail had consulted a divorce lawyer and had accused Cornelius of having an affair which he denied. At the time of Cornelius' death, he and Gail were living apart.

On learning of Cornelius' death, Mauldin went to the family home. Plans were quickly made for a small group to meet the next day to plan the future of Cornelius' property—especially the auto franchises for which Cornelius had named no successor. Cornelius' death triggered instant default on all franchise agreements including floor plan loans exceeding $70 million. At the family's request, Mauldin served on the board of directors for each corporation—twenty-six of them—charging nothing for serving in that capacity. As Co-Executor, Mauldin dealt with a wide variety of scenarios—key employees threatening to leave dealerships, the shutdown of General Motors, discontinuation of Saturn dealerships, sale of an airplane, a federal tax audit, and a federal estate tax obligation of $9.7 million. Under Mauldin's eye, all franchise agreements remained undisturbed and financing for the seventeen dealerships remained intact.

Under the terms of the will, after a few bequests to Gail and the children, all remaining assets were to be sold with one-half of the proceeds going to Gail, and the other half being divided equally among the three children. The family decided to retain some of the dealerships, but could not decide how to distribute the franchises they retained.

Mauldin had met Cornelius soon after Cornelius arrived in Bowling Green in the mid-1980's. Mauldin had performed legal work for Cornelius for twenty years. When a legal task outside Mauldin's expertise surfaced, Mauldin called on other BOAM attorneys to perform the task. BOAM being most familiar with Cornelius' vast holdings, Mauldin thought it appropriate to engage BOAM to serve as legal counsel for the Estate—Mauldin considered hiring no other law firm. Had a different firm been selected, precious time would have been spent familiarizing the new firm with Cornelius' extensive holdings whereas BOAM was already aware of the ventures because of its prior work. Time was of the essence.

Mauldin did not decide to hire BOAM alone. Throughout June and July of 2006, he discussed administration of the Estate with Gail. Mauldin testified anytime Gail felt strongly about an issue, he deferred to her. Gail was particularly concerned about costs associated with the Estate and wanted to cap them, but no one could accurately predict how much time and work would be required.

It was estimated the Estate would remain open three years. Delays in receiving tax documentation and family indecision about dividing assets extended the life of the Estate, as did ancillary probate proceedings in seven different states.

What was originally expected to close in 2009—three years post-death—was still open in 2017.

Ultimately, Mauldin proposed taking a Co-Executor's fee of three percent, from which he would directly pay BOAM for its legal work as attorneys for the Estate. Mauldin testified he did *not* serve as an attorney for the Estate. While Gail persists in characterizing Mauldin as both executor and lawyer for the Estate, the record indicates there was no dual representation. Without contradiction, Mauldin described his role and that of BOAM during his deposition:

> A: Well, first and foremost, let me say that both I and BOAM were going to do whatever work was necessary to further the interest of the estate and to work toward the best interest of the estate.
>
> My role was more centered on dealing with the lenders, dealing with manufacturers, dealing with people in corporate. I don't have my time records in front of me, but I tried to document what that was. We tried to set that out in some detail in the motion that we filed with the probate court on the fees and itemized, in a general sense, what I did and what members of the firm did. Beth's [Sigler] role and members of the firm were more focused on actual estate issues, the disclaimer, matters dealing with payment of the estate tax, matters dealing with the Treasury Department, the accountants, the business valuations and things of that nature.
>
> Q: Would you –
>
> A: But I would say – I mean, if someone contacted me out in the world concerning the estate and I needed – something had to be done in response to that phone call, I would do it if I was capable and had the knowledge to do it. If I felt that that task was better suited to Beth, I referred it to her and it got done.

> So this was not a situation where I might refuse to do something saying, well, I'm the executor, that's not my job. No, I just – I made sure things got done. I was also the point person, as far as corporate was concerned, as far as members of the public, as far as the manufacturers were concerned, as far as the lenders were concerned.
>
> So I was the person that got contacted by those entities, by those people. And if there was something that needed to be done in response to those contacts that required something of Beth's expertise, then I referred it to her. If it was something I could do, I did it. My job was to make sure things got done.

Mauldin prepared a letter of engagement stating in relevant part:

> As I have advised, KRS[5] 395.150 provides that the maximum fee for services rendered by an executor is five percent (5%) of the value of the personal estate of the decedent, plus five percent (5%) of the income generated by the estate collected by the executor, unless a greater amount is allowed by the probate court. The statutory executor's fee does not include fees for legal services rendered to an estate.
>
> For this matter, the **combined** charges for legal services rendered by Bell, Orr, Ayers & Moore, P.S.C. to the Estate and the services provided by the undersigned in my capacity as co-executor, shall be three percent (3%) of the value of the personal estate, plus costs. For purposes of this calculation, real estate owned by Cornelius A. Martin individually or in survivorship, individual retirement accounts 401K accounts and life insurance proceeds will be excluded from the personal estate. All other assets will be deemed to be part of the personal estate, including real estate owned at the time of death by any corporate entity owned by Mr. Martin, including, but not limited to, Martin Land Development Company, Inc. and Saturn of Dayton, Inc. Costs include, but are not limited to, items such as filing fees, service fees, travel expenses, long distance telephone charges,

[5] Kentucky Revised Statutes. (Footnote added).

> photocopying expenses and facsimile charges. The combined fee for legal and co-executor's services will be prorated and paid monthly over the thirty-six month period it is anticipated that the estate will remain open. If the estate is concluded in less than three years, any fee balance owed will become due and payable at that time.

(Emphasis in original.) When deposed, Mauldin explained his reasoning for selecting the terms used in the engagement letter.

> A: . . .
>
> As I've already explained, we were looking for a vehicle that Gail wanted in order to know what the expenses would be for the cost of administration going forward so there would be a cap on that.
>
> And in point of fact, the fact I was directing the payment of attorney's fees out of my executor fee made sure that BOAM's fees could never exceed what we agreed to pay them. They were never going to be able to bill over and above that. The agreement that Gail entered into was quite clear. The fee would be paid over 36 months and no further fees would be owed, despite the length of time the estate remained open, which we know turned out to be an additional four years.

When asked why he chose not to bill the Estate for legal services by the hour, Mauldin explained no one could realistically predict the number of hours required to administer Cornelius' complicated Estate and hourly billing would not cap the costs as Gail desired. Mauldin stated he proposed the three percent commission, as Co-Executor of the Estate, based on KRS 395.150. Gail agreed to the terms, signing the engagement letter on September 26, 2006.

Cornelius' gross estate amounted to $63 million, but Mauldin's three percent commission was charged against only $46 million of the personal estate;

nothing was charged against income[6] Mauldin collected for the Estate as Co-Executor. Gail chose not to take a fee as Co-Executor—any fee she could have received as Co-Executor would have been taxed, whereas she would take tax-free as a beneficiary. She renounced the will.

A commission of $360,000 was paid to Mauldin as Co-Executor of the Estate. BOAM was paid $1,041,789.54 in legal fees via checks written from the Estate. Both Mauldin and BOAM continued working on the Estate until 2013—when Gail asked both to resign. No fees[7] or commissions were paid to either beyond 2009. A total of $1.4 million was paid to Mauldin (and BOAM) for handling the Estate.

Mauldin testified he never represented himself as being anything but a Co-Executor of the Estate. He further stated he had an undivided loyalty to the Estate—eclipsing even his relationship with BOAM. In 2013, after asking Mauldin to resign as Co-Executor and BOAM to cease representing the Estate, Gail hired new counsel to advise her on the Estate. At a subsequent hearing, new counsel posed questions about administration of the Estate, but no deficiencies in Mauldin's or BOAM's work were documented.

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[6] Individual retirement accounts, 401K accounts, life insurance proceeds, and proceeds recovered from the wrongful death action stemming from Cornelius' fatal motorcycle accident were excluded from the personal estate when computing Mauldin's commission as Co-Executor.

[7] An additional $31,212.83 in legal fees was paid to out-of-state law firms. Probate attorneys were hired in West Virginia and Ohio where Cornelius had business ventures.

On December 27, 2013, in an attempt to settle his accounts with the Warren District Court as required by KRS 395.325(1) ("[i]f any fiduciary resigns or is removed, he shall upon the appointment of his successor settle his accounts"), Mauldin filed a periodic settlement coupled with a verified motion seeking approval of his fee as Co-Executor. Initially, Gail excepted and objected, but subsequently withdrew her objections to all but Mauldin's commission and BOAM's fee for legal services. This was the only periodic settlement Mauldin filed. He stated in his deposition the goal was to file only a final settlement to maintain privacy for the Estate. Each time a settlement was to be filed, an extension was requested—without objection—and granted by the District Court.

On February 14, 2014—while approval of the periodic settlement, Mauldin's commission, and BOAM's fee for legal services was pending—Gail filed a complaint in Warren Circuit Court alleging: negligent administration of the Estate by not filing periodic settlements; corrective litigation costs; and, legal malpractice and/or breach of fiduciary duty for charging excessive attorney/executor fees that constituted "an exorbitant amount in relation to the actual legal and administrative work performed."[8] The complaint did *not* address settling the Estate, nor did it allege breach of contract. Five days later, the District Court heard the motion to approve the commission and legal fees. Initially it reserved ruling, but after a second hearing, entered an order finding filing of the

[8] Claims of negligent estate planning and negligence in not objecting to accounting fees were raised and abandoned.

complaint in circuit court either divested it of jurisdiction, or at a minimum the circuit court action should conclude before the probate case resumed. Filing of the complaint was construed as an "adversary proceeding."[9] Mauldin and BOAM answered the complaint.

Gail was deposed on February 24, 2015. She recalled few specifics, often stating she lacked knowledge of particular facts and knew only what her attorneys had told her. She did, however, testify everything she had asked Mauldin and/or BOAM to do was done and no question she had posed was unanswered. Her criticism was Mauldin should have given her more choices, and Mauldin and BOAM should have been more proactive in forcing Cornelius to plan his Estate, and in forcing her and the children to make decisions. In her opinion, sending letters suggesting they act was insufficient. She acknowledged even though new counsel was working on the Estate, several franchises remained in the Estate and the family could not agree how to dispose of them. She testified she and all three children receive salaries from the Martin Management Group of which she is the

[9] KRS 24A.120 directs in relevant part:

> District Court shall have exclusive jurisdiction in:
>
> . . .
>
> (2) Matters involving probate, except matters contested in an adversary proceeding. Such adversary proceeding shall be filed in Circuit Court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal;
>
> (3) Matters not provided for by statute to be commenced in Circuit Court shall be deemed to be nonadversarial within the meaning of subsection (2) of this section and therefore are within the jurisdiction of the District Court . . . .

Chief Executive Officer although she has no responsibility for day-to-day operations. She confirmed she never complained to Mauldin or BOAM prior to filing the complaint, never questioned any charges made against the Estate even though she reviewed monthly bank statements and cancelled checks, and never requested a description of the specific legal work BOAM was performing. One of the last exchanges in her deposition went as follows:

> Q. Ms. Martin, in your own words, after going through these documents and looking through these various transactions that have occurred, I would like for you to explain to me what it is you believe that Tim Mauldin and the law firm of Bell, Orr, Ayers and Moore have done that is either improper or has prevented the estate of Cornelius Martin from being resolved and wrapped up?
>
> A. Mr. English, I can't explain that to you because I am not an attorney or I'm not a tax attorney and so I have people working on that. That's why we're sitting here today.
>
> Q. But in terms of what you believe in your position as the co-executor of the estate and also as the plaintiff in this action, you can't explain to me in your own terms what you believe they've done wrong?
>
> A. Right, Yes.

On November 20, 2015, Mauldin and BOAM moved for summary judgment. On January 27, 2016, the Circuit Court, with a special judge presiding, granted partial summary judgment to Mauldin and BOAM, leaving unresolved only three "compensation claims" alleging violation of SCR[10] 3.130 (1.7) in choosing BOAM to represent the Estate; violation of SCR 3.130 (1.5) for charging

[10] Rules of the Supreme Court of Kentucky.

excessive fees; and negligence for not advising Gail of the full spectrum of potential fee arrangements. The Circuit Court determined these claims were not time-barred and could be heard only in circuit court. The same order granted summary judgment on the alleged failure to file periodic settlements because there had been no proof of damage—Gail's expert had testified there was no damage and Gail herself had acknowledged receiving and reviewing monthly bank statements and cancelled checks. Finally, summary judgment was granted on a claim of causing payment of corrective litigation costs because there had been no showing of any error requiring correction.[11] The only claims surviving the summary judgment motion pertained to compensation.

Mauldin moved the Circuit Court to approve the periodic settlement and noticed the matter for a hearing. A few days later, Mauldin and BOAM moved the Circuit Court to reconsider its prior order finding the compensation claims were not barred by any applicable statute of limitations—a motion that would be denied after a hearing. In short order, Mauldin and BOAM moved the Circuit Court again to approve Mauldin's commission as Co-Executor of the Estate, arguing approval would obviate inquiry into the legal fees paid to BOAM because those fees were paid from Mauldin's commission. After a hearing on May 23, 2016, Mauldin and BOAM moved for partial summary judgment on the issue of fee computation methods.

[11] The Circuit Court characterized this claim as an argument for attorney fees.

In an order entered August 2, 2016, the Circuit Court again granted partial summary judgment to Mauldin and BOAM. The Circuit Court framed the question before it as, "whether disputes about the compensation of an executor/attorney of an estate amount to legal malpractice or breach of fiduciary duty under Kentucky law." The Circuit Court noted neither it nor the parties had located any published case—in Kentucky or elsewhere—affirming a negligence claim "based solely on a fee dispute" and ultimately concluded Kentucky does not recognize such a claim. The same order scheduled a bench trial for August 22, 2016, at which it would rule on motions to approve the periodic settlement and Mauldin's commission in "a probate-style hearing[.]" In prior hearings, the Circuit Court had expressed concern about conserving judicial resources and avoiding piecemeal litigation.

In the wake of summary judgment being entered on all but the compensation claims, BOAM moved to dismiss the circuit court action and remand the case to district court for determination of reasonable attorney and administrative fees. Gail agreed the case should return to Warren District Court because KRS 24A.120 vests jurisdiction over non-adversarial probate issues in district court. On August 10, 2016, the Circuit Court denied the defense motion, stating it retained jurisdiction over the "remaining claims for unethical conduct and unreasonable attorney fees" which "are not routine probate accounting matters" over which the district court typically exercises exclusive jurisdiction.

Attempting to prevent the Circuit Court bench trial—Gail wanted a jury trial—she petitioned this Court for a writ of prohibition and sought a writ of mandamus directing the Circuit Court to finalize its orders granting summary judgment.[12] While the petition was pending, Gail appealed the grant of summary judgment to this Court.

In preparation for the scheduled bench trial—which never occurred—Gail stated she was seeking compensatory damages of $1,401,789.54;[13] $672,858.98 in pre-judgment interest from 2009 at eight percent; consequential attorney's fees of $97,539.12; and, an amount of punitive damages to be determined by a jury. Her main goal—both then and now—appears to be arguing her case to circuit court jurors in hopes they will refund the full amount—and more—paid by the Estate to Mauldin and BOAM for seven years of complex work. This appeal followed.

ANALYSIS

[12] On August 19, 2016, a motion panel of this Court entered an order directing the Warren Circuit Court "to REFRAIN from conducting the planned bench trial until further order of this Court." On October 20, 2016, another panel of this Court entered a second order granting the petition for writ of prohibition and dismissing, as moot, the petition for writ of mandamus. The panel determined Warren District Court has exclusive jurisdiction over "[m]atters involving probate, except matters contested in an adversary proceeding." KRS 24A.120(2). Moreover, adversary proceedings must be authorized by statute. KRS 24A.120(3). Because no statute gives circuit court jurisdiction over a compensation issue in a probate matter, but KRS 24A.120(3) vests district court with jurisdiction over "[m]atters not provided for by statute to be commenced in Circuit Court[,]" jurisdiction over compensation for representatives of an estate—controlled by KRS 395.150—resides exclusively in district court.

[13] This is the full amount paid to Mauldin and BOAM between 2006 and 2009, even though their work continued until December 2013. Gail apparently assigns no value to the seven years of service provided by Mauldin as Co-Executor and by BOAM as the Estate's legal adviser.

Because this case reaches us by way of summary judgment, we state the applicable standard of review.

> On appeal from the granting of a motion for summary judgment, the appellate court must determine "whether the trial court correctly found that there were no genuine issues of any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR[14] 56.03. In considering a motion for summary judgment, the trial court must consider the evidence in a light most favorable to the non-moving party. *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper where the movant shows that the adverse party could not prevail under any circumstances. *Id*. Because summary judgment involves no fact finding, this Court will review the trial court's decision *de novo*. *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist*., 174 S.W.3d 440, 445 (Ky. 2005).

Davis v. Scott, 320 S.W.3d 87, 90 (Ky. 2010) (footnote added).

Our analysis begins with a claim underlying this entire appeal—whether Gail was wrongly denied a jury trial. Gail argues a jury trial must occur every time a party demands one or requests punitive damages.[15] We disagree.

First, as stated above, when the non-moving party cannot prevail under any circumstances, a jury trial—even though demanded, "sacred" and "inviolate," Kentucky Const. § 7; *see also* CR 38.01—is not required. Were we to

[14] Kentucky Rules of Civil Procedure.

[15] Gail argues a claim of punitive damages "must be decided by the jury." This is an inaccurate statement of the law. KRS 411.186(1) allows a judge to assess punitive damages "if jury trial has been waived."

endorse Gail's view, no case in which a party demands a jury trial could ever be dismissed. This would needlessly clog Kentucky courts and is not the law.

Second, a jury trial is required only when a "proper" demand is made. *Smith v. Bear, Inc*., 419 S.W.3d 49, 57 (Ky. App. 2013). Whether a jury trial will be needed or even desired is often unknown when a complaint is filed, but is routinely demanded by attorneys out of an abundance of caution. Consistent with *Steelvest* and *Scifres*, a "proper" claim must have substance—meaning the non-moving party could prevail at trial.

Third, CR 38.02 states, "[a]ny party may demand a trial by jury of any issue *triable of right* by a jury[.]" (Emphasis added.) The rule's specific wording dooms Gail's theory that every jury demand ends in a jury trial.

> [I]n civil cases, Kentucky law recognizes exceptions to the right to a jury, including causes of action at common law that would have been regarded as arising in equity rather than law. *Reese's Administrator v. Youtsey,* 113 Ky. 839, 69 S.W. 708 (1902); *see Steelvest, Inc. v. Scansteel Service Center, Inc.,* 908 S.W.2d 104, 108 ([Ky.] 1995). If the nature of the issues presented is essentially equitable, no jury trial is available. If the issues are predominantly legal in scope, however, a right to a jury trial exists. *See Meyers v. Chapman Printing Co., Inc.,* 840 S.W.2d 814 (Ky. 1992).

Daniels v. CDB Bell, LLC, 300 S.W.3d 204, 210 (Ky. App. 2009). Even though a jury may be demanded on an equitable claim, a jury will not be impaneled.

Fourth, despite a jury demand, trial need not occur when a "court upon motion or of its own initiative finds that a right of trial by jury of some or all of the issues does not exist under the Constitution or Statutes of Kentucky." CR

39.01(b). Here, the trial court concluded "[Gail's] negligence claims . . . do not exist under Kentucky law." As summarized above, Gail has misconceived the law. A jury trial is not required simply because she demanded one and requested punitive damages.

Before considering whether entry of summary judgment was proper, we *sua sponte* take Gail to task for non-compliance with CR 76.12(4)(c)(v). Preservation is critical because "[a] new theory of error cannot be raised for the first time on appeal." *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011), *as modified* Sept. 20, 2011 (citations omitted). Gail's brief does not specify whether or how she preserved the issues she asserts on appeal.

> Requiring an appellate brief to
>
> > contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). A statement of preservation is required

> > so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Gail includes numerous references to the record in her opening brief, but no statement of preservation. This absence is particularly noticeable regarding her discussion of dismissal of the legal malpractice and breach of fiduciary duty claims. Under this argument she poses three questions, two alleging violations of SCR 3.130(1.5)[16] and (1.7).[17] She claims the trial court never addressed these questions, causing us to wonder whether she raised them in the circuit court and if she did, whether she pressed for an answer. We have not been cited to a CR 52.04 motion showing she sought a finding of fact on an essential issue. As an appellate court, we will not search the record to fill in gaps Gail has left unanswered. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). We would be well within our authority to deny review for non-compliance, CR 76.12(8), but have chosen not to apply such a harsh sanction for an error which is rarely the client's fault. Counsel is warned such leniency may not be extended in the future.

[16] Gail alleged Mauldin and BOAM charged an excessive fee. KRS 395.150 allows an Executor's Commission of up to five percent of the gross estate without court approval. Mauldin charged only three percent.

[17] Gail alleged BOAM should not have represented the Estate because Mauldin, a BOAM shareholder, served as Co-Executor. The Model Rules "do not prohibit the fiduciary from appointing himself or his firm as counsel to perform legal work during the administration of the estate or trust because the dual roles do not involve a conflict of interest." 02-426 Lawyer Serving as Fiduciary for an Estate or Trust, ABA Formal Op. 02-426 (internal footnotes omitted).

Defense expert Hon. Glen Bagby echoed the ABA Opinion, testifying there is no prohibition on an executor hiring his firm as attorney for an estate, so long as the charge is reasonable and the attorney is not paid twice for the same work.

Rather than addressing multiple alleged rules violations separately, the Circuit Court concluded in its order entered January 27, 2016, "no civil cause of action can arise from violation of [the Kentucky Rules of Professional Conduct]. SCR 3.130 (XXI)." We agree with this conclusion. The rules give guidance and "establish standards of conduct" for attorneys; they "are not designed to be a basis for civil liability." *Id.* Gail's arguments are based on alleged rule violations and were properly dismissed.

A third compensation claim—which Gail maintains was incorrectly answered—is whether Mauldin was negligent in not advising her of the full spectrum of fee options resulting in the Estate paying more than $1 million to BOAM on a percentage basis when Gail contends it would have paid only $591,000[18] if charged by the hour. Mauldin and BOAM correctly argue no authority has been cited requiring an attorney to discuss alternative methods of computing fees with a client. SCR 3.130(1.5) discusses fees, prohibits an unreasonable fee, but does not specify how a particular fee is to be reached, although it does list eight factors to consider in determining a fee to be reasonable. We have not been cited to—nor have we located on our own—any rule, statute or case requiring an attorney to discuss with a client every type of fee arrangement available.

[18] Gail bases this amount on BOAM billing records. However, there was testimony BOAM did not record all activity because it was charging a flat fee and not by the hour. Thus, BOAM argues an hour for hour comparison is misleading.

Gail claims the Circuit Court erred in concluding Kentucky does not recognize a claim of legal malpractice or breach of fiduciary duty based solely on a fee dispute between an executor or attorney of an Estate and the client in a probate case. However, she cites no Kentucky case supporting her position. Mauldin and BOAM argue the reasonableness of the fee must be decided by the district court because this is a probate matter. They further argue if Gail is correct, every dispute over an executor's commission or an attorney's fee arising from an estate will give rise to a civil action for legal malpractice and breach of fiduciary duty coupled with a demand for a jury trial.

Several states have held allegedly "excessive legal fees cannot provide the sole basis for a malpractice claim." *Davis v. Findley*, 260 Ga.App. 443, 579 S.E.2d 848 (2003). The Circuit Court stated its research—and that of the parties—had revealed "no negligence claim based solely on a fee dispute has been approved in any published case law in Kentucky or nationally."

Both briefs and the Circuit Court opinion discuss *Estate of Sicotte v. Lubin & Meyer, P.C.,* 959 A.2d 236 (N.H. 2008), wherein a minor sustained birth injuries giving rise to a medical malpractice suit. The minor's parents signed an agreement to pay the law firm representing the minor's estate forty percent of the gross amount collected. The medical malpractice action settled for $2,250,000. When the petition to approve the settlement was heard, the law firm's motion for a contingent fee of one-third was approved. Nearly two years later, the estate moved for return of a portion of the attorney's fee claiming it had not been told any fee

exceeding twenty-five percent of a minor's estate required a showing of good cause. Nor were the parents told the estate could have paid for legal services by the hour rather than agreeing to a contingent fee. The trial court dismissed the motion without prejudice believing it could not reopen the fee issue when there had been no appeal. The estate then filed a legal malpractice suit alleging breach of contract; negligence; and, failure to train, supervise and properly instruct agents, directors and employees. The estate's alleged loss was paying an excessive legal fee for representation in the medical malpractice action which reduced the amount of the settlement paid to the estate. The estate sought return of the difference between the one-third contingent fee paid and the twenty-five percent fee it described as "fair, reasonable, standard and customary, plus interest[.]"

While the legal malpractice action in *Sicotte* was initiated by the minor's estate, it was not a probate case. Moreover, it turned not on the reasonableness of the fee charged, but on the estate's failure to disclose experts[19] needed to prove its case. It was determined to prove legal malpractice, the parents would have to establish had they been told they could "hire an attorney on an hourly basis, they would have retained alternate counsel who would have obtained a similar settlement or verdict at a lower cost." *Id.* at 240. Using *Sicotte* as a yardstick, Gail would have to show another firm would have agreed to represent the Estate at an hourly rate, produced the same amount of work, and achieved a

[19] Gail maintains she has experts to support her claims. However, much of their opinions are based on rule violations which we have already stated cannot be the basis for a legal malpractice claim.

similar result at a lower cost. She made no such showing. *Sicotte* does not convince us the Circuit Court erred in dismissing the malpractice and breach of fiduciary duty claims.

Both briefs and the Circuit Court opinion also discuss *Inn-Group Mgmt. Servs. v. Greer,* 71 S.W.3d 125 (Ky. App. 2002), which announced a "simple test" for determining who should decide the reasonableness of an attorney's fee.

> What constitutes a reasonable attorney fee is an issue of fact when the action is between an attorney and client to collect or defend a fee for representation. It is an issue of law when the attorney and/or client seeks to recover a reasonable attorney fee from an opposing or third party.

Id. at 130. *Greer* has been cited in several unpublished cases, but only once in a published decision, *Gibson v. Kentucky Farm Bureau Mut. Ins. Co*., 328 S.W.3d 195, 204 (Ky. App. 2010), *as modified* Dec. 3, 2010, where it was cited for the premise, "[i]t is the responsibility of the trial court, and not the jury, to determine the availability and amount of attorney fees." While a true statement, that is not the scenario we dissect today.

Greer tried to strike a balance between two lines of cases, neither of which overrules or distinguishes the other. Most importantly for our purposes, *Greer* did not concern an estate—it was an action by a hotel management company to collect attorney fees and costs from a third party to whom it had provided management services. *Greer* held the court, not a jury, should have determined the reasonableness of that attorney's fee because it was to be collected from a third

party—not a client. *Greer* offered no policy reason for allowing a jury to resolve a fee dispute between an attorney and client, and certainly offered no reason to take that approach in the context of an estate. *Greer* was also based on cases wherein the dispute concerned far more than a fee, such as whether the legal work claimed to have been done was performed. Here, there has been no claim Mauldin and BOAM failed to do anything they were asked to do or required to do. While we fully recognize no two attorneys would ever practice a case alike, s*ee Hodge v. Commonwealth*, 116 S.W.3d 463, 469 (Ky. 2003), *as amended* Aug. 25, 2003 and Sept. 5, 2003, *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009), there has simply been no showing Mauldin and BOAM made errors in handling this Estate.

The distinctions between *Sicotte* and *Greer* and the case at bar are too vast to ignore. We hold Kentucky does not recognize a claim of legal malpractice or breach of fiduciary duty based solely on a fee dispute between an executor or attorney of an Estate and the client in a probate case.

For a more practical reason, the negligence claims in this case could not go forward in Circuit Court. As this Court's order of August 19, 2016, directed, the reasonableness of the fee must be remanded to the Warren District Court for determination in the probate case. Were we to hold the negligence claims could go forward in Warren Circuit Court, we would create the potential for inconsistent results, which we will not do. *See MV Transp.*, *Inc. v. Allgeier,* 433

S.W.3d 324, 340 (Ky. 2014); *Booth v. CSX Transp., Inc.*, 334 S.W.3d 897, 902 (Ky. App. 2011).

Gail's final claim is failure to file periodic settlements resulted in corrective litigation expenses of $100,000. Mauldin and BOAM argue this claim is not properly before us because the lack of periodic settlements was not specifically mentioned in the prehearing statement filed pursuant to CR 76.03. While it is true the statement did not mention periodic settlements, it did mention corrective litigation costs. At this stage of this case, Mauldin and BOAM were clearly on notice of the nature of the claim and cannot cry foul.

Nonetheless, Gail cannot prevail on the claim. Mauldin testified the plan from the start was to file only a final settlement and the district court routinely granted extensions of time deferring timely filing of the periodic settlements. Additionally, Gail's own expert testified the lack of periodic settlements did not damage the Estate. There being no damage, there could be no cause of action.

> One of the essential elements of a good cause of action, whether based on an alleged breach of contract or on a tortious act, is a consequential injury or damage to the plaintiff, and in the absence of injury or damage to a plaintiff or his or her property, he or she has no cause of action, and no right of action can accrue to the plaintiff.

1 Am.Jur.2d Actions § 48 (footnote omitted).

There being no meritorious grounds on which to save this action, the award of summary judgment to Mauldin and BOAM is AFFIRMED.

ALL CONCUR.

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