

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA A. MCCLURE and THEODORE C.
BRICE,

Plaintiffs-Appellants,

v

FRIEDA K. VOGT, Personal Representative of the
Estate of MARY ANN HOLTZ,

Defendant-Appellee.

UNPUBLISHED
June 23, 1998

No. 190903
Genesee Circuit Court
LC No. 94-027400 NZ

BARBARA A. MCCLURE and THEODORE C.
BRICE,

Plaintiffs-Appellants,

v

FRIEDA K. VOGT, Personal Representative of the
Estate of MARY ANN HOLTZ, a/k/a MARY A.
HOLTZ BRICE, MARJORIE PYDYNKOWSKI and
JOHN SCHAADT,

Defendants-Appellees,

and

RONEY & COMPANY MONEY MARKET
ACCOUNT,

Defendant.

No. 190904
Genesee Circuit Court
LC No. 94-144257 CZ

In re Estate of MARY A. HOLTZ, Deceased.

FRIEDA K. VOGT, Personal Representative of the
Estate of MARY A. HOLTZ, Deceased, MARJORIE
PYDYNKOWSKI, JOHN SCHAADT, ELIZABETH
TOALE, and RONEY & COMPANY,

Appellees,

v

BARBARA A. MCCLURE and THEODORE
BRICE,

Appellants.

In re Estate of MARY A. HOLTZ, a/k/a MARY A.
HOLTZ BRICE, Deceased.

FRIEDA K. VOGT, Personal Representative of the
Estate of MARY A. HOLTZ, Deceased, MARJORIE
PYDYNKOWSKI, JOHN SCHAADT, ELIZABETH
TOALE, and RONEY & CO.,

Appellees,

v

BARBARA A. MCCLURE and THEODORE
BRICE,

Appellants.

Before: MacKenzie, P.J., and Holbrook, Jr., and Saad, JJ.

PER CURIAM.

No. 191366

Genesee Probate Court
LC No. 94-143778 SE

No. 194636

Genesee Probate Court
LC No. 94-143778 IE

This case involves consolidated appeals from the circuit and probate courts. In Docket Nos. 190903 and 190904, appellants (hereinafter “plaintiffs”) appeal as of right from the circuit court’s order granting defendants’ motion for summary disposition on plaintiffs’ thirteen-count complaint. In Docket No. 191366, plaintiffs appeal as of right from the probate court’s order denying their motion for summary disposition. In Docket No. 194636, plaintiffs appeal from the probate court’s order denying their petition to remove appellee Frieda Vogt as personal representative of the Estate of Mary A. Holtz. We affirm the orders issued by the circuit and probate courts. We further find plaintiffs’ appeals to be vexatious under MCR 7.126(C)(1)(a), and therefore remand this case to the circuit court for an award to defendants of their actual damages and expenses, including attorney fees, incurred as a result of plaintiffs’ appeals.

I. BACKGROUND OF DISPUTE

A. Origin and Initial Resolution

This case arises from a continuing dispute over certain monies and personal property that once belonged to plaintiffs’ father, Theodore G. Brice, who died on November 25, 1990. On April 16, 1988, Brice married Mary A. Holtz. During their marriage, Brice added Holtz’s name to a money market account worth approximately \$94,000, which was held with William C. Roney & Company (hereinafter the “Roney Account”), thereby making her a joint accountholder. Plaintiffs were the beneficiaries under Brice’s will, which was never amended to provide for Holtz. When Brice died, his daughter, plaintiff McClure, was appointed personal representative of his estate. While McClure served as personal representative, the estate asserted a claim of ownership over the Roney Account. There were also disputes between McClure and Holtz regarding certain items of personal property which had belonged to Brice, the proper funeral and burial arrangements for Mr. Brice’s cremated remains, and the payment of the funeral home’s bill. As a result of these disputes, plaintiff McClure was temporarily removed as personal representative on August 22, 1991.

Based on negotiations between their respective counsel, plaintiffs and Holtz entered into a settlement agreement which was filed with the probate court on November 22, 1991 (hereinafter the “Settlement Agreement”). The Settlement Agreement provided that Mrs. Holtz “shall retain ownership of the cash account held jointly with Theodore G. Brice at Wm. C. Roney and Co., the date of death balance of which was approximately \$94,000.00.” The Settlement Agreement also provided that Mrs. Holtz would receive a total of \$20,000 in full settlement of her claims against Brice’s estate, that plaintiffs would receive the contested items of personal property and remove them from Mrs. Holtz’s home, and that the Brice estate would pay the funeral home’s bill. On December 4, 1991, the probate court entered an order incorporating the provisions of the Settlement Agreement, including the sections addressing the Roney Account. Additionally, the probate court order noted “[t]hat on November 25, 1991, Barbara McClure did go to the Widow’s home and did remove the items owned by” Brice that were located at the home.

B. Renewal of Dispute

1. Initiation of present litigation

On December 25, 1993, Holtz died. In her will, Holtz left her entire estate in equal shares to her siblings, Frieda Vogt, John Schaadt, and Marjorie Pydynkowski. At some point before her death, Holtz added Pydynkowski's name as a joint accountholder to the Roney Account. Vogt was named personal representative of the Holtz estate and started independent probate proceedings.

Plaintiffs filed their original circuit court complaint against the Holtz estate and Vogt on February 25, 1994. This complaint sought declaratory relief regarding the ownership of the Roney Account. In their complaint, plaintiffs asserted that the Settlement Agreement was never intended to grant Holtz fee simple absolute title to the Roney Account, and alleged that Holtz violated the Settlement Agreement by failing to retain ownership of the account when she added Pydynkowski as a joint accountholder. In March 1994, each plaintiff filed claims against the Holtz estate asserting a claim in the Roney Account and claims of damages against Holtz or her estate. On May 2, 1994, Vogt filed notices that plaintiffs' claims would be disallowed.

On April 11, 1994, plaintiffs filed a complaint for declaratory relief in the probate court which was virtually identical to the complaint filed in circuit court, except that it named the remaining defendants/appellees, who were devisees and beneficiaries of the Holtz estate. Plaintiffs also petitioned the probate court for a temporary restraining order (TRO) and preliminary injunction to prevent defendants from dissipating or removing funds from the Roney Account.

On May 17, 1994, plaintiffs amended their circuit court complaint to allege four tort-related counts rather than a claim for declaratory relief, which remained before the probate court. On June 22, 1994, the probate court denied plaintiffs' request for a TRO or injunction. Then, on July 25, 1995, plaintiffs filed the final thirteen-count version of their complaint with the circuit court. The first eight counts were against Holtz or her estate, and alleged the following: (1) improper and intentional interference with an expectancy, arising from Holtz's wrongful control of the Roney Account, destruction of personal property belonging to Brice, and interference with Brice's remains and burial; (2) intentional infliction of emotional distress; (3) conversion of the Roney Account; (4) claim and delivery for return of the Roney Account; (5) fraud, arising from her failure to retain ownership of the Roney Account or to turn over certain items of personal property as required by the Settlement Agreement; (6) innocent misrepresentation, arising from the same allegations in count 5; (7) fraud/bad faith, arising from the same facts alleged in counts 5 and 6; and (8) breach of contract arising from the same facts alleged in counts 5 through 7. Counts 9 and 10 alleged counts for fraud and negligence against Vogt in her role as personal representative arising from her premature closing of the estate and disbursement of its assets. Counts 11 and 12 alleged counts against Vogt individually for unreasonable acts in her role as personal representative and for conversion arising from the transfer of assets from the estate. Count 13 is labeled "Declaratory Judgment," and does not name a specific defendant or assert any specific facts, but merely states that it re-alleges the general allegations of the complaint.

Following the advice of the probate court clerk, Vogt filed her closing statement with the probate court on October 12, 1994. No objections were received. Hence, the probate court clerk

issued a certificate of completion on November 14, 1994. In May 1995, plaintiffs petitioned the probate court to reopen the Holtz estate as a supervised estate and appoint plaintiff McClure as personal representative. Shortly thereafter Vogt also petitioned the court to reopen the estate. The probate court ordered the estate reopened and reappointed Vogt as personal representative. Thereafter, the previously distributed assets were returned to the estate.

2. Motions for summary disposition

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) of all claims pending in the circuit court. Defendants argued that plaintiffs' claims arising from Holtz's use or disposal of the Roney Account (Counts 1, 3, 4, 5, 6, 7, and 8) were barred by the Settlement Agreement, which fixed Holtz's fee simple absolute title to the Roney Account. Defendants also argued that since claims relating to Holtz's failure to turn over the contested items of personal property or interference with Brice's funeral arrangements were merged into the Settlement Agreement and subsequent order, that these claims were barred due to plaintiffs' failure to move for relief within one year. See MCR 2.612(C)(2). Defendants argued that the counts against Vogt (Counts 9 through 12) should be dismissed since plaintiffs had no legitimate claims against the Holtz estate. The circuit court agreed with defendants, and granted them summary disposition on all counts. Defendants subsequently moved for costs and sanctions pursuant to MCR 2.114(F) and MCR 2.625(A)(2). The circuit court granted defendants \$18,452 in attorney fees, denied plaintiffs' motion for a stay, and set plaintiffs' appeal bond at \$30,000.

While their circuit court action was pending, plaintiffs moved for summary disposition of their probate court petition in August 1995. In this motion, plaintiffs sought to remove Vogt as personal representative of the Holtz estate. As part of this attempt, plaintiffs challenged defense counsel's continued representation of Vogt, the estate, and the beneficiaries, asserting that this cross-representation gave rise to a conflict of interest in violation of MRPC 1.7 ("Conflict of Interest: General Rule"). The probate court denied plaintiffs' motion for summary disposition, but granted plaintiffs' request for court supervision of the Holtz estate. Further, the probate court decided that Vogt should continue as personal representative of the Holtz estate. Noting that plaintiffs' circuit court claims had been dismissed and that their request for a stay had been denied, the probate court concluded that plaintiffs lacked standing to seek appointment of a new personal representative. The probate court also observed that even if plaintiffs did not lack standing, their petition was denied for the reasons stated by the court's denial of plaintiffs' motion for summary disposition.

Plaintiffs also moved to disqualify defense counsel in the circuit court, which motion was denied because plaintiffs had already raised the issue in their appeal to this Court.

II. APPEAL FROM ACTIONS OF THE LOWER COURTS

A. Breach of Contract and Declaratory Judgment

Plaintiffs argue that the circuit court erred by granting defendants' motion for summary disposition on counts 8 and 13 of plaintiffs' complaint, which asserted, respectively, claims for breach of contract and declaratory judgment. "A trial court's grant of summary disposition is reviewed de novo. This Court examines the record to determine whether the prevailing party was

entitled to judgment as a matter of law.” *G & A, Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Plaintiffs argue that as it is used in the Settlement Agreement, the phrase “retain ownership” means that while Holtz was allowed to use the Roney Account during her lifetime, she was not allowed to give it to anybody else. In effect, plaintiffs argue that the “retain ownership” language means that Holtz was to hold the Roney Account in trust for plaintiffs. Given this reading of the Settlement Agreement, plaintiffs’ claim for breach of contract alleged that Holtz breached the terms of the Settlement Agreement by failing to retain ownership of the Roney Account. Additionally, plaintiffs claimed that Holtz had breached the Settlement Agreement by allegedly failing to turn over all tangible items of personal property belonging to Brice. Although it is unclear, plaintiffs’ request for declaratory relief apparently sought the determination that they were the rightful owners of the Roney Account.

“The initial question of whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law.” *Port Huron Ed Ass’n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996). “Contractual language is given its ordinary and plain meaning, and technical and constrained constructions are avoided.” *Nahra, supra* at 331. Paragraph 5 of the Settlement Agreement states that Holtz “shall *retain ownership* of the cash account held *jointly* with Theodore G. Brice at Wm. C. Roney and Co., the date of death balance of which was approximately \$94,000.00.” (Emphasis added.) The probate court’s December 4, 1991 order states that “[s]aid widow shall *retain ownership* of the cash account held *jointly* with Theodore G. Brice at William C. Roney and Company.” (Emphasis added.)

We disagree with plaintiffs’ reading of the relevant language in the Settlement Agreement. Paragraph 5 thereof clearly acknowledges that Holtz and Brice jointly held title to the funds deposited in the Roney Account. Further, the paragraph clearly indicates that upon the death of Brice, title to the jointly held funds vested in Holtz, the surviving joint owner. Nothing in the language of the Settlement Agreement or the probate court order indicates that Holtz received only a life estate in that account or that plaintiffs received a remainder interest in the account. Also, there is no language in paragraph 5 or any other section of either the Settlement Agreement or the probate court order that could reasonably be construed as imposing upon Holtz the requirement that the funds in the Roney Account be held in trust for plaintiffs. Therefore, given that Holtz’s title to the Roney Account was unencumbered, Holtz did not commit a breach of contract when she added Pydynkowski’s name as a joint accountholder. Accordingly, trial on this claim was not warranted, and summary disposition pursuant to MCR 2.116(C)(10) was proper given that there was “no genuine issue as to any material fact.”

Plaintiffs also argue that Holtz breached the terms of the Settlement Agreement when she failed to turn over certain items of personal property owned by Brice. We are not persuaded by plaintiffs’ argument. The Settlement Agreement provided that plaintiffs “shall remove all items of household furniture and furnishings and other tangible personal property belonging to . . . Brice located in the Widow’s home.” The December 4, 1991 probate court order settling the Brice estate repeats this language, and then states “[t]hat on November 25, 1991, Barbara McClure did go to the Widow’s home and did remove the items of personal property.” Because plaintiffs did not timely move to set

aside the probate court order, MCR 2.612(C)(2)¹, we conclude plaintiffs are bound by its provisions. Hence, the trial court's grant of summary disposition to defendants was appropriate.

B. Conversion and Claim and Delivery

Plaintiffs next argue that the circuit court erred by granting defendants' motion for summary disposition on counts 3 and 4, which asserted claims for conversion and claim and delivery. We disagree. Both of these claims were predicated on the assertion that plaintiffs had a legitimate interest in the Roney Account. As we just observed, pursuant to the Settlement Agreement and the December 4, 1991 probate order, plaintiffs had no such interest. Therefore, because Holtz owned the account, she could not be found liable for its conversion. Moreover, because plaintiffs have no legitimate interest in the account, they cannot seek its possession via a claim and delivery action.

C. Fraud, Misrepresentation, and Bad Faith

Plaintiffs also argue that the circuit court erred in granting defendants' motion for summary disposition on counts 5, 6, and 7, which asserted claims of fraud, misrepresentation, and bad faith arising from Holtz's failure to keep ownership of the Roney Account in trust for plaintiffs and by her failure to turn over all items of Brice's personal property as required by the Settlement Agreement. We find that the circuit court properly dismissed each of these claims. With respect to the Roney Account, plaintiffs' argument is predicated entirely on their reading of the Settlement Agreement. As previously noted, however, plaintiffs had no legitimate interest in the Roney Account. Accordingly, Holtz was not under an obligation to hold that money in trust for plaintiffs. As for the issue of Brice's personal property, we conclude that plaintiffs are bound by the terms of the December 4, 1991 order, which expressly states "[t]hat on November 25, 1991, Barbara McClure did go to . . . [Holtz's] home and *did remove the items owned by Brice.*" (Emphasis added.)

D. Interference with Expectancy

Plaintiffs also argue that the circuit court improperly dismissed count 1 of their complaint, which alleged that Holtz improperly interfered with two expectancies: (1) their expectancy that they would receive the Roney Account and certain items of personal property; and (2) their expectancy that they would arrange and control Brice's funeral and burial. Again, we disagree. As for the first cited expectancy interest, plaintiffs' claims are barred by the terms of the Settlement Agreement and the probate court order. With respect to the second, we initially question the premise underlying plaintiffs' assertion. Plaintiffs have not convinced us that their expectancy interest in arranging for Brice's funeral and burial was somehow superior to that of his widow. Assuming *arguendo* that plaintiffs can sue Holtz for interfering with their burial and funeral plans, we conclude that their claim is barred by the relevant statute of limitations. Under MCL 600.5805(8); MSA 27A.5805(8), such claims must be filed within three years.² The tort claim accrues and the limitations period for § 5805(8) begins to run at the time the wrongful acts occur. *Dunlap v Sheffield*, 442 Mich 195, 199; 500 NW2d 739 (1993). Here, the dispute over Mr. Brice's funeral and burial arrangements began shortly after his death on November 25, 1990. Thus, the three-year limitations period began to run some time in late November 1990 or early

December 1990. Plaintiffs' initial complaint in this action was filed on February 25, 1994, over three years later.

E. Negligence, Fraud, and Conversion Claims Against Vogt

Plaintiffs argue that the circuit court erred by dismissing counts 9, 10, 11, and 12, which alleged claims of negligence, fraud, and conversion against Vogt arising from her management of the Holtz estate. We find no error. Plaintiffs had no legitimate ownership interest in the Roney Account or other property held by the Holtz estate, nor do plaintiffs have any viable tort claims against the estate which could result in an award of money damages. There simply is no genuine issue of material fact that plaintiffs have an interest in the Holtz estate or its assets. Therefore, because plaintiffs are neither interested persons under MCL 700.346; MSA 27.5346, nor interested parties under MCL 700.347; MSA 27.5347, they lack standing to sue Vogt for her alleged acts of misfeasance in her role as personal representative of the Holtz estate. See *In re Makarewicz*, 204 Mich App 369, 375; 516 NW2d 90 (1994).

F. Conflict of Interest, and Vogt's Continued Service as Personal Representative of the Holtz Estate

Finally, plaintiffs argue that the circuit and probate courts erred by allowing defense counsel to represent all defendants in one action, and that the probate judge erred by allowing Vogt to continue to serve as personal representative of the Holtz estate. Whether defense counsel's representation of all defendants created an irreconcilable conflict of interest was not properly raised before the circuit court and so was never decided by that court. Accordingly, we will not consider whether the circuit court erred by refusing to consider this issue. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). As for the actions of the probate court, plaintiffs have not provided a transcript of the November 8, 1995 hearing on plaintiffs' motion for summary disposition. Because plaintiffs have not provided the necessary record to review, we consider these claims to be abandoned. *People v Thompson*, 193 Mich App 58, 61; 483 NW2d 428 (1992).

III. VEXATIOUS APPEAL

MCR 7.216(1) states, in pertinent part, that this Court "may, on its own initiative . . . , assess actual and punitive damages or take other disciplinary action when it determines that an appeal . . . was vexatious because . . . the appeal was taken . . . without any reasonable basis for belief that there was a meritorious issue to be determined on appeal." We conclude that such is the case with the appeal now before us. The circuit court found plaintiffs' claims meritless and frivolous, and awarded defendants attorney fees following dismissal of plaintiffs' complaint before that court. Plaintiffs' probate court action was equally without merit, arising from the same allegations asserted before the circuit court. On appeal, plaintiffs have not presented any arguably valid legal theories which would indicate that either the circuit or probate courts erred, but instead have merely reiterated the same assertions argued before those courts. Pursuant to MCR 7.216(C)(2), we remand to the circuit court for a determination of

defendants' actual damages and expenses, including reasonable attorney fees, incurred in defending against plaintiffs' appeals.

The circuit and probate court decisions are affirmed, and the matter is remanded to the circuit court for an award of damages and expenses incurred by defendants on appeal. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie

/s/ Donald E. Holbrook, Jr.

/s/ Henry William Saad

¹ The court rule states that when the asserted ground for relief from judgment is fraud, the motion for relief “must be made . . . within one year after the judgment, order, or proceeding was taken.”

² The subsection states: “The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for the injury to a person or property.”