# STATE OF MICHIGAN

# COURT OF APPEALS

In re Estate of JAMES RICHARD MOORE.

JULIE ANN SCHAFFER, Personal Representative of the Estate of JAMES RICHARD MOORE,

Appellee/Cross-Appellant,

V

JAMES PATRICK MOORE,

Appellant/Cross-Appellee.

UNPUBLISHED
December 22, 2011

No. 298100
Oakland Probate Court
LC No. 2001-278056-DA

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Appellant James Patrick Moore ("Moore") filed a petition in probate alleging that appellee Julie Ann Schaffer (Schaffer"), personal representative of the estate of James Richard Moore, deceased, fraudulently misinformed him regarding his legal obligation to repay a mortgage loan that was secured by a mortgage on real property that the decedent and Moore owned as joint tenants with rights of survivorship. The probate court granted Schaffer's motion for summary disposition and awarded Schaffer frivolous case sanctions against Moore only. Moore appeals as of right. Schaffer cross-appeals, challenging the probate court's refusal to impose sanctions against Moore's counsel as well as Moore. We affirm the probate court's summary disposition decision and award of sanctions, but modify the sanctions award to provide that sanctions are imposed against both Moore and his attorney.

The decedent is the father of Moore and Schaffer, who are half-siblings. The decedent owned residential real property located at 6439 Bedview Drive in Saline, Michigan. On December 23, 1996, he quitclaimed the property from himself to himself and Moore, as joint tenants with full rights of survivorship. On March 3, 1998, the decedent borrowed $122,000 from Great Lakes Bank and granted Great Lakes Bank a mortgage on the Bedview property as security for the loan. The decedent was the sole signatory of the promissory note and mortgage. The decedent subsequently refinanced the mortgage loan through TCF Bank. The decedent never resided in the Bedview home. Moore lived in that home and made all the mortgage payments pursuant an arrangement with the decedent.

The decedent died in 2001 and Schaffer was appointed personal representative of his estate. Schaffer did not list the TCF Bank loan as a debt of the estate. Instead, she advised Moore that upon the decedent's death, Moore became legally obligated to pay the mortgage note, property taxes, and homeowner's insurance on the Bedview property. Moore did not question Schaffer's advice and continued to pay the monthly mortgage payments until 2007. Moore approved Schaffer's petition to close the decedent's estate in 2003.

In 2007, TCF Bank initiated foreclosure proceedings against Moore after he ceased making the monthly payments. Moore alleges that he learned during the proceedings that he was not legally obligated to pay the mortgage because he was not a party to the original promissory note or mortgage agreement. That lawsuit was resolved through a settlement.

Moore subsequently filed a petition to reopen the decedent's estate, which the probate court granted. In 2008, Moore initially filed this action against Schaffer, alleging that she fraudulently misinformed him of his obligation to repay the mortgage loan when she knew that the debt should attach to the estate, in Oakland Circuit Court. In 2009, his lawsuit was dismissed because of a lack of subject-matter jurisdiction, and thereafter, Moore filed the current action in the Oakland Probate Court. Schaffer moved for summary disposition on the ground that Moore's action was barred by the six-year limitations period for fraud, and further, that Moore could not establish a claim for fraud because he possessed all the relevant information concerning the decedent's mortgage loan. The probate court granted Schaffer's motion for summary disposition. Following summary disposition, citing to MCL 600.2591, MCR 2.625(A)(2), and MCR 2.114(E), Schaffer moved for sanctions against Moore and his attorney. Attached to Schaffer's motion for sanctions was an itemized list totaling $18,924.21, which purported to represent the actual costs of $3,591.71 and attorney fees of $15,332.50[1] incurred as a result of Moore's "frivolous action." Included in the total $18,924.21 sought were expenses incurred in defending against Moore's initial action filed in the circuit court. The probate court granted Schaffer's motion for sanctions and awarded the complete $18,924.21; however, the probate judge specified that the sanctions were only imposed against Moore and not his attorney.

## I. SUMMARY DISPOSITION

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Grimes v Dep't of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). Although the probate court did not specify the subrules under which it granted summary disposition, Schaffer moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact with respect to Moore's claim for fraud. Schaffer also moved for summary disposition on the ground that Moore's action was barred by the applicable statute of limitations.

[1] Schaeffer's motion for sanctions has these amounts flip-flopped, but the itemized attachment clearly shows that the $15,332.50 was for attorney fees, while the $3,591.70 was for other costs.

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations.[2]

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating the motion, this Court considers the affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Where the proffered evidence fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law, summary disposition is properly granted. MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568. When reviewing a motion under MCR 2.116(C)(7), this Court must consider all documentary evidence submitted by the parties and accept the allegations in the complaint as true unless they are contradicted by the documentary evidence. *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

Claims of fraud are subject to a six-year limitations period pursuant to MCL 600.5813. *Badon v Gen Motors Corp*, 188 Mich App 430, 435; 470 NW2d 436 (1991). Although Moore relies on representations that were made more than six years before he filed his complaint as the basis for his fraud claim, he contends that his action was timely filed pursuant to MCL 600.5855, which provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Moore argues that he did not discover his cause of action until 2007, when he learned during the TCF Bank foreclosure proceeding that he was not legally liable for the mortgage loan because he was not a party to the promissory note or mortgage agreement. However, Moore's alleged discovery of his legal obligations in 2007 does not establish the applicability of MCL 600.5855. In *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 48; 698 NW2d 900 (2005), this Court stated:

> Generally, for fraudulent concealment to postpone the running of a limitations period, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. . . . Mere silence is insufficient. . . . If liability were

[2] Although Schaeffer did not specifically cite MCR 2.116(C)(7) as a basis for her motion, a court may review a motion for summary disposition under the correct subrule. *Spiek v Mich Dep't of Transp*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998).

> discoverable from the outset, then MCL 600.5855 will not toll the applicable period of limitations. [Citations and internal quotations omitted.]

In this case, Moore does not identify any affirmative act by Schaffer that somehow concealed his cause of action or prevented him from discovering that he had a potential cause of action against Schaffer for fraud. Instead, he argues that it is not necessary to show any affirmative act of concealment because Schaffer had a fiduciary duty to provide accurate information regarding the estate.

As personal representative of the decedent's estate, Schaffer owed Moore a fiduciary duty to "discharge all of the duties and obligations of a confidential fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions." MCL 700.1104(e); MCL 700.1212(1). In *Brownell v Garber*, 199 Mich App 519, 529; 503 NW2d 81 (1993), this Court analyzed the application of MCL 600.5855 in the context of a legal malpractice action, in which the defendant-attorney owed a fiduciary duty to the plaintiff-client. This Court recognized three possible situations under which a legal malpractice claim could arise, and discussed the applicable limitations period for each situation, to wit:

> 1. The case in which the malpractice is not fraudulently concealed and is apparent at the time it is committed. In such a case, the two-year period begins to run when the act of malpractice occurs. MCL § 600.5805(4).
>
> 2. The case in which the act of malpractice is not fraudulently concealed, but the fact that the act constitutes malpractice is not apparent at the time it occurs. In such a case, if the two-year malpractice period of limitation has already run, the plaintiff has six months from the date the claim is discovered or should have been discovered within which to bring an action. MCL § 600.5838(2).
>
> 3. The case in which an act of malpractice *is* fraudulently concealed. Under MCL § 600.5855, the plaintiff has two years from the date the claim is discovered or should have been discovered within which to bring an action.

The Court held that fraudulent concealment could only occur if the attorney was aware of his malpractice, reasoning that "[i]t would be illogical to hold that attorneys who fail to appreciate that they have breached the standard of care have a duty to disclose such a breach notwithstanding their ignorance thereof." *Id.* at 528-529.

Applying the principles of *Brownell* to this case, it follows that Moore could avail himself of the two-year provision in MCL 700.5855 only if Schaffer affirmatively concealed a cause of action for fraud, or if she knew that she gave him incorrect information and concealed that knowledge from him. If Schaffer merely failed to appreciate that her information was incorrect, it "would be illogical to hold" that she had a "duty to disclose [her error] notwithstanding [her] ignorance thereof." *Id.* at 529.

Moore contends that Schaffer knew as early as 2001 that the mortgage loan debt attached to the estate and that Moore was not legally liable for the debt because he was not a party to the

promissory note or mortgage contract. Although Moore asserts that Schaffer acted in her capacity as personal representative of the decedent's estate when she arranged for TCF Bank to send mortgage statements to him and when she billed the estate for services pertaining to the Bedview mortgage, Schaffer's involvement in these matters does not show that she was aware of or understood the specific legal obligations surrounding the Bedview mortgage. Moreover, Moore knew that Schaffer was not an attorney. Schaffer was charged with the responsibility of winding up the decedent's affairs, which included addressing matters relating to jointly owned property. Further, Moore's reliance on TCF Bank's records from 2001 indicating that Moore was not liable is misplaced because there is no evidence that this information was relayed to Schaffer. Accordingly, there is no factual support for Moore's claim that he may invoke the tolling provision of MCL 600.5855.

Furthermore, regardless of what Schaffer knew, Moore cannot establish a claim for fraud because there was no misrepresentation of material factual matters unknown to Moore. The elements of common-law fraud are: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *Cummins v Robinson Twp*, 283 Mich App 677, 695-696; 770 NW2d 421 (2009), quoting *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). "There can be no fraud where a person has the means to determine that a representation is not true." *Cummins*, 283 Mich App at 696, quoting *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). Here, Moore knew that the decedent was the sole signatory of the promissory note and mortgage. Moore also knew that the decedent had deeded the Bedview property to himself and Moore as joint tenants with rights of survivorship. Thus, Moore had full knowledge of the underlying material facts. Any inaccurate advice by Schaffer did not involve a misrepresentation of the material facts. Even if Schaffer misinformed Moore regarding the legal significance of the pertinent facts, she did not misrepresent the facts themselves.

For these reasons, the probate court did not err in granting Schaffer's motion for summary disposition.

## II. SANCTIONS

Moore also challenges the probate court's order imposing frivolous case sanctions against him. A trial court's award of sanctions is generally reviewed for an abuse of discretion. *LaVene v Winnebago Indus*, 266 Mich App 470, 473; 702 NW2d 652 (2005). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *In re Baldwin Trust*, 274 Mich App 387, 397; 733 NW2d 419 (2007), aff'd 480 Mich 915 (2007). But a trial court's finding that a claim is frivolous for purpose of awarding sanctions is reviewed for clear error. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 195; 565 NW2d 887 (1997).

As noted above, Schaffer moved for sanctions under MCL 600.2591, MCR 2.625(A)(2), and MCR 2.114(E). MCL 600.2591 provides, in pertinent part:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

* * *

(3) As used in this section:

(a) "Frivolous" means that at least 1 of the following conditions is met:

(*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.

(*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(*iii*) The party's legal position was devoid of arguable legal merit.

MCR 2.625(A)(2) similarly provides that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." In addition, MCR 2.114 provides, in pertinent part:

(D) The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that

(1) he or she has read the document;

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(E) If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

To determine whether a claim is frivolous, the claim must be evaluated at the time it was made. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). The court must examine "the particular facts and circumstances of the claim involved." *Id.* at 95. The purpose of imposing sanctions is "to deter parties and attorneys from filing documents or

asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005) (internal quotations and citation omitted). However, sanctions should not be used to "penalize[ ] a party whose claim initially appears viable but later becomes unpersuasive." *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991).

We disagree with Moore's argument that the probate court's decision to reopen the estate establishes that his claim was not devoid of arguable legal merit. Although MCL 700.3959 provides that "good cause" is necessary to reopen a previously administered estate, in this case, when the probate court allowed the estate to be reopened, it expressly refrained from commenting on the merits of Moore's claim. Specifically, the probate court stated, "[W]hether there's fraud or not, whether the statute of limitations bars any claims, and the petition ought to be dismissed based upon what you've argued here today, I'll reserve until the personal representative is appointed, and I'll listen to your pleadings at that time." Thus, the probate court's preliminary finding that Moore established good cause to reopen the estate expressly did not conclude that his claims were in any way meritorious.

The probate court did not clearly err in finding that Moore's claims were devoid of arguable legal merit. The premise of Moore's claim was that Schaffer could be liable for fraud by relating an erroneous legal conclusion drawn from facts that were equally known to Moore. While Moore defends this premise by arguing that he was unsophisticated regarding mortgages, and that he relied on Schaffer to execute her duties as personal representative fairly, the indisputable and critical fact is that Moore *knew* that he had never contracted with the lender or any other party to repay the mortgage loan taken out by the decedent. Moore's admission that he paid the monthly mortgage payments on the Bedview mortgage before the decedent's death as a form of rent to the decedent further shows his knowledge and belief that he did not have a legal obligation of repayment to the creditor before the decedent's death. In addition, Moore never presented any evidence that Schaffer affirmatively did anything to conceal or prevent him from discovering any material fact relating to his legal obligations. Under these circumstances, the probate court did not clearly err in finding that Moore's claim was frivolous.

Moore also argues that the probate court erred in including, in its award of sanctions, the costs incurred in an initial action filed in circuit court, before the probate court action was filed. The circuit court action was dismissed for lack of subject-matter jurisdiction because the probate court had jurisdiction over Moore's claim. MCL 600.2591(1) allows the trial court to award "the costs and fees incurred by [the prevailing party] *in connection with the civil action.*" (Emphasis added.) MCL 600.2591(2) provides that the costs and fees awarded "shall include all reasonable costs *actually incurred* by the prevailing party." Moore's initial circuit court action was virtually identical to his subsequent action in probate court. Accordingly, the costs and fees incurred by Schaffer in the initial circuit court proceeding were "actually incurred" and were incurred "in connection with" Moore's claims to recover his mortgage payments. Accordingly, we find no error.

## III. SCHAFFER'S CROSS-APPEAL

Schaffer argues on cross-appeal that the probate court erred by imposing sanctions against Moore alone, and not also against his attorney. We agree. To the extent this issue involves the interpretation and application of a statute, we review the issue de novo as a question of law. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010).

Where statutory language is clear and unambiguous, this Court must presume that the Legislature "intended the meaning expressed in the statute." *McCormick v Carrier*, 487 Mich 180, 191; 795 NW2d 517 (2010). This Court interprets court rules according to the same principles that govern interpretation of statutes. *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011).

The probate court did not specify under which statute or court rule it was awarding sanctions. However, because the sanctions awarded included expenses incurred as a result of the initial circuit court action, we find that the probate court necessarily relied on MCL 600.2591.[3] MCL 600.2591(1) provides that if the court finds that an action or defense is frivolous, the court "shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party *and* their attorney." (Emphasis added.) MCR 2.625(A)(2) incorporates by reference the provisions of MCL 600.2591. "The term 'and' is defined as a conjunction, and it means 'with; as well as; in addition to[.]" *Amerisure Ins Co v Plumb*, 282 Mich App 417, 428; 766 NW2d 878 (2009), quoting *Random House Webster's College Dictionary* (1997). Accordingly, where a court awards costs and fees to a prevailing party under MCL 600.2591(1), those costs and fees are to be assessed "against the nonprevailing party ['as well as' or 'in addition to'] their attorney." Thus, sanctions for filing a frivolous action *must* be imposed against both the filing party and the party's attorney.[4] Therefore, we affirm the probate court's award of sanctions, but modify the award to provide that sanctions are imposed against both Moore and his attorney.

---

[3] As noted, *supra*, MCL 600.2591(1) allows the trial court to award "the costs and fees incurred by [the prevailing party] in connection with the civil action." MCR 2.114 does not contain such language. In other words, the probate court could not have intended to award sanctions in connection with the civil action had it been relying on MCR 2.114 when it awarded sanctions in Schaeffer's favor.

[4] We note that Moore concedes in his brief that, should this Court agree that sanctions were warranted, those sanctions should also be imposed against his counsel pursuant to MCR 2.114(D). Although we do not rely on MCR 2.114(D), nevertheless, this concession remains applicable for the principle that sanctions must also be assessed against counsel under these circumstances.

Affirmed as modified. Schaffer, the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio