STATE OF MICHIGAN

COURT OF APPEALS

CATHERINE ZANONI, LINDA C. GILLESPIE, and REBECCA KELLEY,

Plaintiffs-Appellants,

v

BANK OF AMERICA NA, Successor Trustee for the GEORGE J. MARKHAM, JR REVOCABLE TRUST & Personal Representative for the Estate of GEORGE J. MARKHAM, JR.,

Defendant/Cross-Plaintiff-Appellee,

and

C. REID HUDGINS III and KREIS ENDERLE HUDGINS & BORSOS, PC,

Defendants/Cross-Defendants-Appellees.

UNPUBLISHED
December 12, 2013

No. 309216
Calhoun Probate Court
LC No. 2009-001242-CZ

Before: WHITBECK, P.J., and WILDER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs, Catherine Zanoni, Linda C. Gillespie, and Rebecca Kelley (the daughters), appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of Bank of America (the bank) on their claim that the bank breached its fiduciary duties of confidentiality and impartiality. The daughters also appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendants, C. Reid Hudgins, III and Kreis, Enderle, Hudgins & Borsos, PC, on their claim that Hudgins's malpractice after the death of the settlor, George Markham, Jr., caused them to incur excessive attorney fees. Because we conclude that (1) there is no genuine issue of material fact concerning whether the bank breached its fiduciary duties to the daughters, and (2) the daughters have abandoned their claim that Hudgins's alleged malpractice was the proximate cause of their injuries, we affirm.

I. FACTS

A. BACKGROUND FACTS

George Markham created a trust in 1982 and "fully and completely amend[ed]" it in 2001. Hudgins provided George Markham with estate planning services and drafted the 2001 trust agreement. The trust agreement created a family trust for George Markham's daughters and a marital trust for Linda Markham, his wife. It provided that one-half the value of his gross estate would fund the family trust, and the residue would fund the marital trust. It also provided that his estate taxes would be paid from the residue.

Hudgins testified at his deposition that George Markham's intent in creating the trust was to minimize his estate taxes. According to Hudgins, when he was drafting the trust agreement, he spoke with George Markham about "maximizing the savings by having those paid out of the family trust." He believed that George Markham's intent was to have the family trust pay his estate taxes. Harold Fischer, George Markham's accountant of 20 years, stated that George Markham consulted him while Hudgins was preparing the trust documents and wanted to minimize estate taxes by paying them from the family trust.

George Markham died in 2008. The bank is the trust's successor trustee. Following George Markham's death, the bank retained Fischer to prepare George Markham's federal estate tax return. However, the bank's employees had trouble reconciling Fischer's draft of the tax return with the bank's review of the trust document. Frederick Rausch, a manager of the bank's trust group, testified that Fischer's draft estate tax return was inconsistent with the trust agreement because Fischer's draft return did not pay the estate taxes out of the trust's residue.

Rausch testified that the bank contacted Hudgins to have him explain the discrepancy between the trust agreement and what Fischer said that George Markham's intent had been. Frances Babbitt, an assistant vice president of the bank testified that after she asked Hudgins to review the trust agreement, he informed her that it did not reflect George Markham's intent. Hudgins testified that the trust's failure to assign the estate taxes to the family trust was a drafting error, the trust "doesn't say what it should say," and he failed to draft it so that estate taxes were paid from the proper trust.

Hudgins testified that he called a meeting to inform others that "the error in the document preparation . . . was going to result in a need to try to get the trust reformed[.]" Babbitt testified that Hudgins called the meeting and she was not aware that the daughters would not be present. Linda Markham testified that, at the meeting, Hudgins informed her of the mistake and informed Babbitt that he would petition the court to get a determination. According to Linda Markham, the meeting was short, solely for the purpose of information, and neither Hudgins nor the bank asked her for permission to fix the mistake.

After the meeting, the bank sent a letter to Linda Markham and the daughters, informing them that there was an issue in the document concerning the payment of estate taxes, and ". . . [u]pon the drafting attorney's review of this language, he found that the directives contained therein may be in conflict with the intention of Mr. Markham." Babbitt and Katherine Brewin, another bank employee, testified that the bank felt that it needed to get instructions from the

court in order to be able to follow the trust agreement. Brewin testified that the bank "could not ignore our knowledge that [George Markham's] trusted advisors informed us that the document that he executed did not reflect his true intent."

B. THE PETITION FOR DETERMINATION

In November 2008, the bank petitioned the trial court for a determination of George Markham's intent. Brewin testified that, as originally written, Hudgins's proposed petition stated its belief of George Markham's intention. Brewin testified that the bank had no conclusion about his intent, and it made significant changes to the petition.

The petition that the bank submitted to the probate court stated that George Markham's 2001 trust agreement provided that all estate taxes "shall be charged against and paid without apportionment out of the residuary Trust Fund as an administration expense . . . ." The petition asserted that Hudgins informed the bank that the trust agreement contained a scrivener's error—namely, that the estate taxes were supposed to be paid out of the family trust to minimize estate tax consequences. The petition requested the probate court to determine whether the trust contained a scrivener's error and, if so, whether it needed to be reformed. The parties dismissed the petition by stipulation in December 2009.

C. THE DAUGHTERS' ACTION AGAINST BANK OF AMERICA AND HUDGINS

The daughters filed their complaint in this action in December 2009, asserting that the bank breached its fiduciary duty of impartiality because the petition would have benefitted Linda Markham to their detriment. The daughters also asserted that Hudgins's negligent representation caused them to incur unnecessary taxes and administrative and litigation expenses.

D. THE BANK'S MOTION FOR SUMMARY DISPOSITION

The bank moved for summary disposition under MCR 2.116(C)(10), asserting that it fulfilled its fiduciary duties to the trust because the trust documents (1) were ambiguous and (2) contained a drafting error. It contended that, under those circumstances, MCL 700.7201(3) allowed it to request instructions and a determination to help it construe the trust.

The daughters responded that the bank breached its fiduciary duties by secretly consulting with Linda Markham and then filing a petition for determination to alter the trust's unambiguous language. The daughters asserted that these actions impermissibly favored Linda Markham over the other beneficiaries. The daughters also asserted that the bank breached its fiduciary duties by informing itself, as the trust's trustee, about information that it had learned in its separate capacity as the trust's personal representative.

The trial court determined that the bank had reason to file the petition because the trust documents were ambiguous and that those ambiguities "go to the very core of establishing what the split would be[.]" The trial court noted that MCL 700.7201(3)(e) authorized a trustee to petition the trial court for instructions regarding trust administration. The trial court ruled that the language of the petition did not favor one beneficiary over the others. The trial court ruled that there was no question of fact concerning whether the bank breached its fiduciary duty of impartiality to the daughters, and granted the bank's motion for summary disposition.

E. HUDGINS'S MOTION FOR SUMMARY DISPOSITION

After the trial court's ruling on the bank's motion, Hudgins moved for summary disposition on the basis that there was no question of fact concerning whether his alleged malpractice proximately caused the daughters' injuries. Hudgins asserted that, because the bank had properly filed the petition for determination, any advice that Hudgins gave to the bank regarding the petition could not have caused the daughters any damage and therefore cut off Hudgins's liability.

The daughters responded that Hudgins committed malpractice by negligently (1) disclosing privileged information, (2) taking sides between beneficiaries of the trust, and (3) setting in motion costly litigation. They asserted that Hudgins's malpractice caused the bank to file its petition and, therefore, their legal costs were all directly attributable to Hudgins's negligence.

After hearing the motion, the trial court ruled that the daughters' alleged injuries all flowed from the petition of determination. It concluded that, because the bank appropriately filed the petition, there was no proximate cause that flowed back to Hudgins for his alleged negligence. It therefore determined that there was no question of fact concerning whether Hudgins's alleged negligence proximately caused damage to the daughters, and granted his motion for summary disposition under MCR 2.116(C)(10).

II. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.[1] A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue.[2] We review de novo questions of law.[3]

III. BREACH OF FIDUCIARY DUTIES

A. LEGAL STANDARDS

As an initial matter, we note that the bank contends that they properly filed their petition for determination under MCL 700.7201(3)(e), which provides that a trustee may request instructions and a determination regarding questions of the construction or administration of a trust. The bank filed the petition for determination on November 5, 2008. MCL 700.7201(3)(e)

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[1] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[2] *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

[3] *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005).

did not go into effect until April 1, 2010.[4] Therefore, we will not rely on this section when deciding this case. Instead, we decide this case in light of the probate court's general power to answer questions and instruct a trustee regarding matters of a trust's administration or distribution.[5]

A fiduciary relationship is one of faith, confidence, trust, and reliance.[6] "[A] fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship."[7] Whether a trustee owes a duty is a question of law.[8]

"In general, the duties imposed on the trustee are determined by consideration of the trust, the relevant probate statutes and the relevant case law."[9] At the time of the actions in this suit, a trustee had "the general duty . . . to administer a trust expeditiously for the benefit of the beneficiaries."[10] The trustee also had "a continuing duty to administer the trust . . . to its sound, efficient management."[11]

B. APPLYING THE STANDARDS

First, the daughters assert that the bank breached its fiduciary duties when it violated the attorney-client privilege by informing itself, in its capacity as trustee, of information that it learned in its capacity as the estate's personal representative. We disagree.

We conclude that there is no genuine issue of material fact concerning whether the bank breached its fiduciary duties in this way because Hudgins was representing the bank when he informed it of the drafting error. The client is the holder of the attorney-client privilege, and may waive it.[12] Here, the trust specifically allows the trustee to employ attorneys. Hudgins represented the trust until May 2009, well after the meeting took place in September 2008.

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[4] 2009 PA 46, MCL 700.8204.

[5] MCL 700.1302.

[6] *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999); *The Meyer & Anna Prentis Family Foundation, Inc*, 266 Mich App at 43.

[7] *The Meyer & Anna Prentis Family Foundation, Inc*, 266 Mich App at 43.

[8] *Id*.

[9] *In re Green Charitable Trust*, 172 Mich App 298, 312; 431 NW2d 492 (1988).

[10] 1998 PA 386, amended by 2009 PA 46, MCL 700.7301. Under 2009 PA 46, MCL 700.7801 provides that "the trustee shall administer the trust in good faith, expeditiously, and in accordance with its terms and purposes of or the benefit of the trust beneficiaries, and in accordance with this article."

[11] 1998 PA 386, amended by 2009 PA 46, MCL 700.7305.

[12] *Leibel v Gen Motors Corp*, 250 Mich App 229, 240; 646 NW2d 179 (2002).

Therefore, any attorney-client privilege belonged to the bank as the trust's trustee, and it was within its rights to waive the privilege.

Second, the daughters assert that the bank breached its fiduciary duty of impartiality by filing the petition for determination, because it would have benefitted Laura Markham to the detriment of the daughters. We disagree.

As an initial matter, we note that whether the trust document is ambiguous on its face does not determine the propriety of the bank's decision to file the petition. In *Miller v National Bank of Detroit*, the settlor created trusts with the purposes of minimizing his federal income tax.[13] However, the settlor created his trusts improperly, resulting in an increased tax liability.[14] The Michigan Supreme Court ruled that the trial court properly reformed the trusts.[15] The Court reasoned that reformation was appropriate because "the only thing that motivated Mr. Miller in causing the trusts to be formed was his desire to minimize in a supposedly lawful manner his income tax," and therefore equity allowed reformation.[16] We note that *Miller* is consistent with MCL 700.7415, which was not in effect when the bank filed its petition, but which provides that the probate court may reform a trust if the settlor's intent was affected by a mistake of fact or law, even if the trust is unambiguous.

Here, Fischer and Hudgins informed the bank of a discrepancy between George Markham's intent and the trust document concerning estate taxes. George Markham clearly considered tax consequences when creating the trust, as indicated by its many references throughout the trust to the payment of taxes, including with specific references to United States Code sections. The bank's duties as trustee included effectuating the settlor's intent and efficiently administering the trust. As written, the trust's estate tax provision would result in the trust paying hundreds of thousands of dollars in additional taxes. This would not have been efficient for the trust as a whole. We conclude that the trial court did not err when it determined that reasonable minds could not differ concerning whether the bank breached its fiduciary duties by petitioning for a determination under these circumstances.

We also conclude that reasonable minds could not differ concerning whether the petition improperly favored one beneficiary over the others. A trustee has a duty to treat all beneficiaries impartially.[17] Here, the petition for determination presented to the trial court the facts as they were known to the bank, and asked it to determine *whether* reformation was proper and *if so*, how the trust should be reformed to effectuate George Markham's intent. The bank couched its petition in neutral language. Simply because the reformation would have detrimentally affected the daughters does not mean that the bank failed to treat them impartially.

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[13] *Miller v Nat'l Bank of Detroit*, 325 Mich 395, 399; 38 NW2d 863 (1949).

[14] *Id*.

[15] *Id*. at 401.

[16] *Id*. at 402; see *Stone v Stone*, 319 Mich 194, 199; 29 NW2d 271 (1947).

[17] *In re Butterfield Estate*, 418 Mich 241, 257; 341 NW2d 453 (1983).

Further, we are not convinced that the bank breached its duties of impartiality by attending the meeting at which Hudgins informed Linda Markham in person of the decision to petition for a determination. The daughters provide no evidence that would create a question of fact concerning the circumstances of the meeting. The witnesses consistently testified that Hudgins, not the bank, called the meeting, the bank was not aware that the daughters would not be at the meeting, the meeting was informational, and neither the bank nor Hudgins asked Linda Markham for input or advice concerning the petition. Further, the bank promptly informed the daughters by letter of its decision to file a petition for determination. The daughters provide no case law that a trustee who informs one beneficiary of a decision in person and others by letter breaches the trustee's duty of impartiality. Under the circumstances of this case, we conclude that the trial court properly determined that the meeting did not create a question of fact concerning the bank's impartiality.

Finally, the daughters contend that the bank breached its fiduciary duties by charging the trust for the litigation. The daughters provide no authority to support their assertion that engaging in litigation to determine a settlor's intent breaches a trustee's fiduciary duties. Parties abandon issues on appeal if they "merely announce their position and leave it to this Court to discover and rationalize a basis for their claims."[18] We decline to search for authority to support the daughters' position, and conclude that the daughters have abandoned this issue.

IV. LEGAL MALPRACTICE

A. LEGAL STANDARDS

Legal malpractice is a form of negligence.[19] In an action for legal malpractice, the plaintiff has the burden to prove

> (1) the existence of an attorney-client relationship;
>
> (2) negligence in the legal representation of the plaintiff;
>
> (3) that the negligence was a proximate cause of an injury; and
>
> (4) the fact and extent of the injury alleged.[20]

There are two prongs to proximate cause—cause-in-fact and legal cause.[21] To prove cause-in-fact, a plaintiff must show that "'but for' the defendant's actions, the plaintiff's injury would not have occurred.'"[22]

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[18] *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008).

[19] See *Basic Food Indus, Inc v Grant*, 107 Mich App 685, 690; 310 NW2d 26 (1981).

[20] *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993) (internal footnotes omitted).

[21] *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

B. APPLYING THE STANDARDS

The daughters assert that Hudgins committed malpractice after George Markham's death by causing the bank to file its petition of determination and thus causing costly litigation to ensue. We conclude that the daughters have abandoned this assertion because they have failed to address the basis of the trial court's decision.

Here, the trial court ruled that, even assuming that duty and breach occurred, "everything flows through the filing of the Petition for Determination[.]" It then ruled that, because the bank properly filed the petition, Hudgins's actions could not have caused the daughters' injuries.

Though the daughters' brief on this issue is lengthy, they do not address the basis of the trial court's decision. Other than a single bald assertion that the trial court mistakenly believed that the daughters' damages flowed from the petition for determination, the daughters do not address the trial court's critical determination that the proper filing of the petition cut off the "but for" chain of cause-in-fact. Further, the daughters' assertion is contrary to their previous assertion that, if Hudgins had properly handled the post-death legal representation of the trust, "there would never have been a Petition for Determination, there never would have been all of the expense and effort that is now associated with that." If a party does not address the basis of the trial court's decision, we need not even consider granting them relief.[23] We conclude that the daughters have abandoned this issue.

V. CONCLUSION

We conclude that the trial court did not err when it determined that there was no genuine issue of fact concerning whether the bank breached its fiduciary duties to the daughters. We also conclude that the daughters have abandoned their assertion that the trial court improperly granted Hudgins's motion for summary disposition concerning the proximate cause element of their legal malpractice claim.

We affirm.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Amy Ronayne Krause

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[22] *Id*. at 163.

[23] *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).