

If this opinion indicates that it is “FOR PUBLICATION,” it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

BRAUN KENDRICK FINKBEINER, PLC,

Plaintiff-Appellant,

v

ESTATE OF MATTHEW G. SCOTT,

Defendant-Appellee.

UNPUBLISHED

March 21, 2024

No. 363756

Clare Probate Court

LC No. 22-018513-CZ

Before: M. J. KELLY, P.J., and BOONSTRA and CAMERON, JJ.

PER CURIAM.

In this dispute involving attorney fees, plaintiff appeals by right the probate court’s order granting summary disposition in defendant’s favor under MCR 2.116(C)(8) and (10).¹ For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

The material facts are not in dispute. Plaintiff is a law firm that represented Phillip Sprague, the former personal representative of defendant, during three probate court cases separate from the present case. One of these was decided via summary disposition, but the other two proceeded to trial. The outcome of that trial was appealed to this Court. In that decision, this Court set forth the pertinent background and facts:

Matthew G. Scott (Matthew) died on July 30, 2020, at the age of 82. His two sons, Christopher G. Scott (Christopher) and Matthew T. Scott (Tad), and their families survived him. After his father’s death, Christopher commenced two cases in the probate court by petitioning to set aside Matthew’s will and contest the validity of his estate planning documents and the disposition of his estate, and by petitioning to set aside Matthew’s trust and contest the validity of his estate

¹ For purposes of this appeal, the only portion of the probate court’s decision that is at issue is that involving subrule (C)(10).

planning documents after Christopher learned that Matthew appointed Sprague as the personal representative of the estate and as the successor trustee of Matthew's trust.

Matthew had significant health problems and periodically received medical care at the Mayo Clinic in Rochester, Minnesota during which he stayed with Christopher and his family. During July 2019, during such stay, Matthew fell down steps and suffered a traumatic brain injury which caused him significant physical and mental impairments. After months of hospital inpatient and outpatient care and rehabilitation, Matthew returned to Michigan and moved into an assisted living facility in Gladwin, Michigan, not far from his home, which he approved and selected with assistance from his family members. While living at the assisted living facility, Sprague, a neighbor who had worked for Matthew a decade earlier until they had a falling-out, renewed his acquaintance and frequently visited Matthew. Although Matthew initially appeared to enjoy his assisted living arrangement, over time his attitude and demeanor changed to the point that he displayed aggression and anger, and increasing paranoia about his living situation and closest family members. Staff at the facility noted that Matthew's demeanor changes correlated with Sprague's open hostility toward the facility and Matthew's sons which he communicated to Matthew. Sprague moved Matthew out of the assisted living facility to live with Sprague, and over his remaining months of life Matthew became isolated from his family.

During December 2019, Sprague arranged for Matthew to meet with lawyer, Joseph Barberi, to change his estate planning documents. In late February 2020, Matthew executed estate planning documents including an amended trust which designated Sprague as the successor trustee and a deed transferring his real property to himself from his trust with a provision that the property would be conveyed to Sprague upon Matthew's death. Matthew executed estate planning documents on July 9, 2020, while hospitalized just weeks before his death, including a new will and an amended and restated trust. The will appointed Sprague the personal representative of Matthew's estate and integrated the estate into the trust. The trust named Sprague as Matthew's successor trustee and provided for the distribution of money and a percentage of the value of the trust assets to Matthew's grandchildren, his church and Sprague, a combine and two tractors to Christopher, and a newly purchased skid loader to Sprague.

The petitions filed by Christopher alleged that Sprague influenced Matthew to distrust his sons and change his estate plan to benefit Sprague. After Matthew's death, Sprague took possession of Matthew's property, books and records, and his remains, and claimed the power to do so. The petitions asserted that the estate planning documents were invalid because Matthew lacked the capacity to create them and that all of the estate planning documents were the result of the undue influence Sprague imposed on Matthew to benefit himself. The petitions requested among other relief that the court set aside estate planning documents created after December 24, 2011, order Sprague to turn over all of Matthew's property including documents and records and copies of estate planning documents in his possession,

restrain Sprague from using estate or trust property for fiduciary fees, legal fees, or costs until the matters were decided or settled.

After the parties conducted extensive discovery and the trial court ruled on various motions, the cases were tried to a jury in a five-day trial during which 15 witnesses testified. After the parties' counsel's closing arguments, the trial court inquired and they affirmed their satisfaction with the jury instructions and approval of the verdict form. The trial court instructed the jury. At the conclusion of instructing the jury, the trial court asked the parties' counsel if they were satisfied with the instructions as given. The parties' respective counsel affirmed their approval. The jury deliberated until instructed to go home and return the next morning to reconvene and continue deliberating. The trial reconvened the next morning, and after several hours of further deliberation the jury reached its verdict. [*In re Scott Estate*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2023 (Docket Nos. 360651, 360652, 360653, and 360654), pp 2-3.]

The jury found that Matthew lacked capacity to make the changes to his estate plan and that these changes were taken as a result of Sprague's undue influence. Christopher petitioned for the removal of Sprague, which the probate court granted, and Christopher was installed as personal representative. Sprague appealed to this Court and raised a number of arguments, including the denial of his judgment notwithstanding the verdict, arguing that there was insufficient evidence to show that Matthew lacked capacity and that Sprague unduly influenced him. *Id.* at 5, 8. This Court rejected each of Sprague's arguments and determined that there was sufficient evidence to support the jury's verdict about capacity and undue influence. *Id.* at 8, 10.

In July 2020, which was before the jury's verdict, Matthew—through Sprague—initiated a case against Christopher to establish ownership of a Fidelity investment account, which was jointly held by Christopher and Matthew. Soon after the lawsuit was initiated, Matthew passed away, and Sprague continued the case on defendant's behalf. Christopher voluntarily removed himself from the account, and Sprague requested that the probate court formally declare the account as an estate asset. Christopher subsequently opposed this, arguing that Sprague had unduly influenced Matthew and that, if Christopher had known this, he would have not have relinquished his ownership interest in the account. Although the probate court recognized Christopher's arguments of undue influence, the probate court focused its analysis on whether Christopher had been improperly influenced or coerced to remove himself from the account. The probate court granted summary disposition in Sprague's favor because it determined there was no question that Christopher had voluntarily relinquished his ownership interest in the account, thereby making it an estate asset.

Throughout the 2020 cases, plaintiff represented Sprague, and the present case involves plaintiff's attempts to secure from defendant payment for its services. The amount and reasonableness of the fees are not at issue. Rather, the only issue is whether such fees may be recovered in the first place. Plaintiff's position rests on MCL 700.3720, which allows attorney fees to be recovered from the estate. Defendant argued that it was not responsible for these attorney fees because Sprague had not acted in good faith in defending the newly changed estate plan and pursuing the Fidelity account. Defendant highlighted that a jury had already found that Sprague unduly influenced Matthew, who lacked capacity to make the changes to this estate plan that

significantly benefited Sprague. Accordingly, defendant contended that Sprague necessarily did not act in good faith for purposes of § 3720 when he initiated and defended against litigation. The probate court agreed and granted summary disposition in its favor. Plaintiff now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Plaintiff argues that the probate court erred by concluding that the jury's finding of undue influence necessarily meant that Sprague did not act in good faith when pursuing and defending the three probate cases. At the very least, plaintiff contends that the case involving the Fidelity account provided some benefit to defendant and that the jury's verdict had no bearing on that case. As a result, plaintiff asserts summary disposition was not properly granted. "This Court reviews de novo a trial court's decision on a motion for summary disposition, as well as questions of statutory interpretation and the construction and application of court rules." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). A motion is properly granted under MCR 2.116(C)(10) when "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Dextrom*, 287 Mich App at 415. This Court "must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Id.* at 415-416.

"When interpreting a statute, we must ascertain the Legislature's intent," which is accomplished "by giving the words selected by the Legislature their plain and ordinary meanings, and by enforcing the statute as written." *Griffin v Griffin*, 323 Mich App 110, 120; 916 NW2d 292 (2018) (quotation marks and citation omitted). If a statute is unambiguous, it must be applied as written. *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 971 NW2d 584 (2018). A statute must be read as a whole, *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009), and we "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory," *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

B. DISCUSSION

MCL 700.3715 of the Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, provides in relevant part:

(1) Except as restricted or otherwise provided by the will or by an order in a formal proceeding, and subject to subsection (2) and to the priorities stated in section 3902, a personal representative, acting reasonably for the benefit of interested persons, may properly do any of the following:

* * *

(w) Employ an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative's

administrative duties, even if the attorney is associated with the personal representative, and act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.

Additionally, MCL 700.3720 provides: “If a personal representative or person nominated as personal representative *defends or prosecutes* a proceeding *in good faith*, whether successful or not, the personal representative *is entitled to receive from the estate* necessary expenses and disbursements including reasonable attorney fees incurred.” (Emphasis added.) However, when “the fiduciary was partially to blame for bringing about unnecessary litigation, the fiduciary [i.e., the personal representative] rather than the estate should be responsible for the attorney’s fees.” *In re Nestorovski Estate*, 283 Mich App 177, 204; 769 NW2d 720 (2009) (quotation marks and citation omitted; first alteration in original).

In *Nestorovski*, this Court held that § 3720 did not apply because the personal representative did not act in good faith when defending a will. *Nestorovski Estate*, 283 Mich App at 180, 204. In April 2001, the testator created and executed a will that gave the personal representative almost all of his assets. *Id.* at 180-181. The petitioner, one of the testator’s other children, challenged the validity of the April 2001 will on the basis of lack of capacity and undue influence, and the matter proceeded to arbitration. *Id.* at 181-182. The arbitrator determined that the testator lacked capacity to create the April 2001 will and that the personal representative unduly influenced him to create the will. *Id.* at 180-182. The arbitrator also recommended that no attorney fees be paid from the testator’s estate. *Id.* at 182. On appeal, the personal representative challenged the arbitrator’s recommendation that the estate not pay attorney fees. *Id.* at 203. Relying on § 3720, the personal representative contended that the estate was required to pay the attorney fees associated with the defense of the 2001 will. *Id.* at 203-204. However, this Court disagreed, reasoning that, “[g]iven the arbitrator’s well-supported finding that [the personal representative] exerted undue influence on [the testator], we conclude that MCL 700.3720 does not apply here because respondent did not defend the April 2001 will ‘in good faith.’ ” *Id.* at 204.

In other words, the *Nestorovski* Court held that a fact-finder’s findings regarding lack of capacity and undue influence equated to a lack of good faith for purposes of § 3720. *Nestorovski Estate* is analogous to the present case and is dispositive. Just like the arbitrator, the jury in the 2020 cases found that Sprague unduly influenced Matthew to modify his estate plan to significantly benefit Sprague as a beneficiary. Accordingly, just as in *Nestorovski Estate*, the probate court properly determined that Sprague’s undue influence necessarily meant that he could not have acted in good faith when he initiated and defended the 2020 cases. To hold otherwise would conflict with the plain language of the statute, which requires personal representatives to initiate or defend litigation in the estate’s best interest, not their own self-interests.

Additionally, we are unpersuaded by plaintiff’s attempts to distinguish the Fidelity account litigation from those two cases that went to trial. The jury found that, between February and July 2020, Matthew lacked capacity and that Sprague unduly influenced Matthew to changed his estate plan. Sprague pursued the Fidelity account in July 2020, which was during and after the period in which the jury already found that Sprague unduly influenced Matthew. Therefore, as a result of his undue influence over Matthew, Sprague stood to significantly benefit from the litigation regarding the Fidelity account because he was already an improper beneficiary of Matthew’s

estate. Accordingly, although the jury did not explicitly address the Fidelity account, it did not need to for purposes of the probate court's decision.

Plaintiff nevertheless argues that there is a distinction because Sprague's actions regarding the Fidelity account provided *some* benefit to defendant. Regardless of whether Sprague did provide some benefit to defendant, this did not change the fact that he was partially to blame for bringing about and defending improper litigation in the first place because doing so provided an improper benefit to himself. See *Nestorovski Estate*, 283 Mich App at 204. To hold otherwise would subject estates to payment of attorney fees for litigation initiated or defended in personal representatives' self-interests, i.e., bad faith, merely because some benefit was provided to the estates. Such an interpretation conflicts with the plain language of the statute.

Finally, plaintiff attempts to raise a collateral estoppel argument, contending that the probate court implicitly and improperly applied the doctrine. However, plaintiff failed to raise this argument in the probate court. Thus, we need not consider it. See *Tolas Oil & Gas Exploration Co v Bach Servs & Mfg, LLC*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 359090); slip op at 3 ("If a litigant does not raise an issue in the trial court, this Court has no obligation to consider the issue.").

III. CONCLUSION

The probate court did not err by determining that there was no genuine issue of material fact that Sprague did not act in good faith when he initiated and defended the 2020 cases. Sprague's actions occurred when he was unduly influencing Matthew, who lacked capacity to modify his estate plan to benefit Sprague. Accordingly, Sprague's actions were self-serving, and plaintiff was not entitled to attorney fees from defendant. Plaintiff's remedy is to seek such fees from Sprague.

Affirmed. Defendant may tax costs as the prevailing party. MCR 7.219(A).

/s/ Michael J. Kelly

/s/ Mark T. Boonstra

/s/ Thomas C. Cameron