# STATE OF MICHIGAN

# COURT OF APPEALS

SHAWLENE PERRY,

Plaintiff-Appellee,

v

GLENN M-D COTTON and GLENN M-D COTTON, PLC,

Defendants-Appellants.

UNPUBLISHED
June 16, 2015

No. 322069
Genesee Circuit Court
LC No. 13-099724-NM

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant Glenn M-D Cotton and his law firm appeal as of right the trial court's order granting summary disposition to plaintiff, Shawlene Perry, in her legal malpractice action, which alleges defendant failed to properly represent plaintiff's interests as a beneficiary of the estate of her brother, Curtis Lee, Jr. We affirm.

Defendant first argues that the trial court erred in granting summary disposition to plaintiff. Defendant claims that he did not commit legal malpractice because he did not have an attorney-client relationship with plaintiff and that he represented only Annie Lee, Curtis's wife and personal representative of the estate. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). A mere possibility that the claim might be supported by evidence at trial is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

In order to establish a claim of legal malpractice, a plaintiff has the burden of alleging and proving: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) the negligence proximately caused the injury to plaintiff; and (4) the fact and the extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). On appeal, defendant asserts that plaintiff failed to show the existence of an attorney-client relationship. According to defendant, he represented personal representative Lee only, and not the estate generally.

This Court has previously concluded that, "although the personal representative retains the attorney, the attorney's client *is the estate, rather than the personal representative*." *Steinway v Bolden*, 185 Mich App 234, 237-238; 460 NW2d 306 (1990) (emphasis added). "The fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and that the fees are paid out of the estate further supports this conclusion." *Id.* at 238. Furthermore, in *Steinway* this Court was particularly persuaded that the defendant-attorney acted as the attorney for the estate rather than just the personal representative because the pleadings and papers from the probate court referred to the defendant as the attorney for the estate. *Id.* Similarly, in this case, defendant's name is listed as the attorney for the estate on the pleadings in the probate court. Most compellingly, in defendant's own motion for disbursement in the probate case, he labeled himself as the attorney for the estate. Further, in his answer to plaintiff's complaint in the present case, he admitted that he represented the estate. Based on defendant's representations, we conclude that the holding in *Steinway* applies. Accordingly, we agree with the trial court that there was no genuine issue of material fact that defendant acted as the attorney for the estate in the probate court.

Defendant also contends that even if he represented the estate, his obligation only extended to heirs of the estate, and did not include the decedent's sister, who was the named beneficiary on the decedent's life insurance policy. We disagree. The personal representative is a fiduciary of the estate who is charged with settling and distributing the estate. MCL 700.3701; MCL 700.3703. Again, as discussed *supra*, defendant represented Lee in her capacity as personal representative, and therefore represented the estate. *Steinway*, 185 Mich App at 237-238. Based on defendant's representations, he did not represent Lee in an individual capacity. MCL 700.1212 provides that a "fiduciary stands in a position of confidence and trust with respect to each heir, devisee, *beneficiary*, protected individual, or ward for whom the person is a fiduciary." (Emphasis added.) Lee, in her capacity as personal representative of the estate, owed a fiduciary duty to the estate's successors. See *In re Baldwin Trust*, 274 Mich App 387, 401; 733 NW2d 419 (2007). "[A] personal representative may be held liable to interested persons for an improper exercise of his or her powers, or an improper failure to exercise powers, if there is a breach of fiduciary duty." *Id*., citing MCL 700.3712. We do not agree, as defendant suggests, without support, that Lee, as personal representative, and defendant, as the attorney for the estate, owed a fiduciary duty only to heirs of the estate, and not to defendant, a named beneficiary of the decedent's life insurance policy, and a clear interested party to the estate. MCL 700.1105(c).

Turning to the remainder of plaintiff's malpractice claim, the inquiry is whether defendant negligently represented plaintiff and whether the negligence proximately caused the injury to plaintiff. *Simko*, 448 Mich at 655. Pursuant to MCL 700.3703(1):

> A personal representative is a fiduciary who shall observe the standard of care applicable to a trustee as described by section 7803. A personal representative is under a duty to settle and distribute the decedent's estate in accordance with the terms of a probated and effective will and this act, and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred by this act, the terms of the will, if any, and an order in a proceeding to which the personal

> representative is party for the best interests of claimants whose claims have been allowed and of successors to the estate.

Plaintiff asserts that defendant violated the standard of care by failing to provide her with adequate notice of the hearing to distribute funds in the probate case. Plaintiff further asserts, and the trial court found, that defendant violated the standard of care by failing to disclose a conflict of interest and withdraw from representation.

First, we disagree that summary disposition was appropriate regarding whether defendant provided notice of the hearing to plaintiff. The Michigan Supreme Court has held that "the failure to disclose all relevant facts and information known by an attorney to his or her client has traditionally been regarded as breach of an attorney's ethical obligation." *State Bar Grievance Administrator v Estes*, 390 Mich 585, 600; 212 NW2d 903 (1973). However, there was a question of fact regarding whether defendant informed plaintiff of the hearing. Defendant claims that he notified plaintiff of the hearing, and a proof of service was filed with the probate court. While plaintiff claims she did not receive notice or a copy of the order distributing the funds, at summary disposition all factual disputes are resolved in favor of the nonmoving party. *Joseph*, 491 Mich at 206.

Second, we agree with the trial court that defendant violated the standard of care by failing to disclose a conflict of interest and withdraw from representation. In the trial court, defendant's attorney stated that defendant could not represent plaintiff's interest because he represented the estate and Lee, and Lee and plaintiff had adversarial interests. Defendant's attorney admitted that defendant could not have represented both the estate and Lee without a conflict, and defendant should have informed the court of that conflict once it arose. Later, defendant stated that Lee's interests and the estate's interests were the same. The trial court held that when defendant learned that the insurance proceeds were disputed, he should have advised Lee to hire an attorney to represent her in an individual capacity, and it was a conflict of interest for him to continue to represent Lee and the estate.

MRPC 1.7 prohibits representation of opposing parties in litigation. MRPC 1.7(b) provides that "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or a third person[.]" Here, defendant represented the estate and Lee in her capacity as personal representative. However, defendant also claimed to represent Lee in her individual capacity after the dispute arose with plaintiff, a beneficiary of the estate. "[A] lawyer representing the personal representative as fiduciary and as claimant could not counsel the personal representative regarding specific fiduciary obligations owed to the beneficiaries of the estate without affecting the duties of loyalty and confidentiality owed to the personal representative as claimant." *McTaggert v Lindsey*, 202 Mich App 612, 618; 509 NW2d 881 (1993). Defendant admittedly represented both the estate along with Lee's interests as a claimant, which was a conflict of interest. Accordingly, we conclude the trial court did not err in granting defendant's motion for summary disposition.

Defendant next argues that plaintiff's claim was barred by the two-year statute of limitations. We disagree. The question of whether a claim is barred by a statute of limitations is a question of law that this Court reviews de novo. *Scherer v Hellstrom*, 270 Mich App 458, 461; 716 NW2d 307 (2006).

"A legal malpractice claim must be brought within two years of the date the claim accrues, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006), citing MCL 600.5805(6). In Michigan, when a professional continues to render services the statute of limitations does not begin to run until the continuing services have ceased. *Levy v Martin*, 463 Mich 478, 489; 620 NW2d 292 (2001); MCL 600.5838.

Defendant contends that the statute of limitations began running on January 13, 2011, when the probate court issued the initial order distributing the insurance funds to Lee. According to defendant, the statute of limitations expired on January 13, 2011, and plaintiff did not file her legal malpractice complaint on January 22, 2013. However, defendant continued to represent plaintiff and the estate through June 23, 2011, when the probate court entered an order vacating its January 13, 2011 order to disburse funds. Thus, the statute of limitations for plaintiff's malpractice action did not begin to run until well after January 13, 2011; therefore, plaintiff's claim was not barred by the statute of limitations.

Affirmed. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood