

STATE OF MICHIGAN
COURT OF APPEALS

In re ESTATE OF DANIEL K. WALLACE.

BYRON P. GALLAGHER, JR. Personal
Representative of the ESTATE OF DANIEL K.
WALLACE,

Appellee,

v

TRACY L. WALLACE and TL AUGUST, LLC,
doing business as GOMINIS OF WILLIAMSTON,

Appellants.

Before: M.J. KELLY, P.J., and SHAPIRO and PATEL, JJ.

PER CURIAM.

Tracy L. Wallace and TL August, LLC, doing business as GoMinis of Williamston, appeal by right the probate court’s \$525,860 judgment in favor of Byron P. Gallagher, Jr., as personal representative of the Estate of Daniel K. Wallace.¹ We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

Before his November 2011 death, Daniel was the sole member of Wallace Storage Center, LLC, GoMinis of Michigan, LLC, and Summit Asset Management, LLC (the LLCs),² which he

¹ We will refer to parties who share the same surname by their given names.

² GoMinis of Michigan is an estate asset. GoMinis of Williamston is the name under which TL August does business. They are separate entities.

operated with Tracy, his ex-wife. Daniel's membership interests in the LLCs became assets of his estate upon his death.

Daniel's will nominated Tracy as the personal representative, granted his tangible personal property to Tracy, and designated the trustee of The Daniel C. Wallace Trust No. 1 as the recipient of his residual property. Tracy was identified as the successor trustee and sole beneficiary under the trust.³ In January 2012, Tracy was appointed the personal representative of Daniel's estate. The couple's two children were identified as heirs, and a supplemental declaration identified Tracy as the successor trustee and beneficiary.

For seven years after Daniel's death, Tracy continued to operate the LLCs and manage the estate. But the probate court found that Tracy failed to pay creditors' claims as ordered by the court. Accordingly, in August 2017, the probate court removed Tracy as personal representative, appointed Gallagher as the successor personal representative, and ordered Gallagher to provide a final accounting and satisfy claims against the estate.

In September 2018, Gallagher filed a complaint on behalf of the estate and the LLCs⁴ against Tracy and TL August.⁵ Pertinent to this appeal, the complaint alleged that Tracy had breached her fiduciary duties to the estate, which included the LLCs as assets. Following discovery, Gallagher moved for summary disposition. Gallagher presented evidence that Tracy had paid nonbusiness expenses from business expense accounts, failed to account for rents the LLCs received, failed to settle creditor claims, and had not filed taxes for the estate. Tracy and TL August did not present any evidence to refute the findings and conclusions of Gallagher's financial expert. They responded that Tracy did not owe fiduciary duties to creditors or the LLCs. They also argued that the estate's beneficiaries did not want Gallagher to pursue the litigation.

The probate court determined that Tracy breached her fiduciary duties to the estate, which included the LLCs as assets. But because the court determined there were genuine issues of material fact regarding damages, it ordered a bench trial on damages only.

At the bench trial, Tracy testified that she operated the LLCs in the same manner as Daniel had because her attorney instructed her to simply continue doing what Daniel had done. She admitted the LLCs' funds were comingled—deficiencies in an LLC account were covered with funds from another LLC account. But she claimed that no one objected to her methodology. She also acknowledged the estate had more liabilities than assets. She further admitted she failed to disclose some assets that should have been in the estate's inventory statement. But she defended

³ The trust documents were not provided to the probate court until the May 2021 trial on damages, which was more than a year after liability was established. Daniel purportedly signed the trust as the trustee and settlor. But the trust was not dated, and Daniel's signature was not witnessed or notarized.

⁴ Summit Asset Management Corporation was also a plaintiff, but its claims were voluntarily dismissed.

⁵ Tracy established TL August in 2014. Gallagher asserted that TL August operated the LLCs' assets to the detriment of the estate and its creditors in order to benefit TL August and Tracy.

her actions by claiming the estate's attorneys failed to properly advise her. She maintained she was simply trying "to be able to keep the boys a legacy of their dad."

One of Daniel's sons testified that Tracy "picked up where my dad left off." He also asserted he did not consent to the litigation. The probate court accepted an offer of proof that Daniel's other son would have testified that he did not consent to the litigation either. But the court opined that the children's wishes were irrelevant to the issue of damages.

Gallagher testified extensively about his efforts to determine the estate's assets and liabilities. Rent revenue was unaccounted for. All of the assets were not disclosed on the estate's inventory. Although approximately 2000 properties were listed in the estate's inventory, all but three of those properties were lost due to non-payment of taxes or foreclosures while Tracy managed the estate. Creditors filed approximately \$4.8 million in claims against the estate. Gallagher determined the estate was insolvent—its assets were less than its liabilities.

Because financial records had not been properly kept, Gallagher hired Ryan Lowe, an expert in tax preparation and forensic accounting, to piece the financial information together. Lowe reconstructed the financial transactions of the LLCs and TL August. He entered bank statements and transactions into accounting software, reconciled them, and categorized them into various income and expense categories. Lowe compiled and summarized the financial records in his report, which was admitted into evidence over appellants' hearsay objection. Lowe provided detailed testimony regarding his analysis of the financial records and his calculations.

According to Lowe, the largest sources of loss to the estate were the use of the LLCs' accounts to pay for personal expenses, and various checks that were written to Tracy or "cash" from the LLC accounts.⁶ These personal expenses included automobile expenses, mortgage payments, utility payments, moving expenses, insurance premiums, and rent payments on Tracy's apartment. Lowe testified that Tracy's non-deductible personal use of the estate's funds resulted in taxable income to the estate for each year that Tracy managed it. Because Tracy did not file any income tax returns for the estate, Lowe included the penalties and interest for the unfiled returns in his calculations of the estate's losses. Lowe's calculations also included TL August's profit from the sale of storage pods it had purchased after Wallace Storage defaulted on the loan.⁷ Based on his analysis of the financial records, Lowe opined that Tracy's personal misuse of estate funds resulted in a \$525,860 loss to the estate. But this was a "very conservative opinion on loss" because he credited all legitimate expenses and expected compensation.

⁶ Tracy admitted that she sometimes wrote checks out to "cash" for herself from the LLC accounts, but she was unable to offer a specific explanation for the checks.

⁷ After the probate court removed Tracy as the personal representative, but before Gallagher accepted his appointment, Wallace Storage defaulted on a loan for a set of storage pods, resulting in foreclosure. TL August purchased the pods after the redemption period expired, and later sold the pods to a third party for a profit.

The probate court found that the estate was entitled to a judgment of \$525,860 against Tracy and TL August. Relying on Lowe’s detailed analysis of loss, the court found

Tracy L. Wallace did not properly settle the estate but operated the estate to extract cash and assets for her personal use or to benefit her family. Tracy L. Wallace testified that she was not provided any guidance from the lawyers she hired other than to continue to operate the family business as usual. She apparently interpreted this to include writing checks to herself and to cash, making payments to an American Express card used for personal items, withdrawing funds for personal housing expenses, paying personal State Farm car insurance for family, paying for health insurance for her family, paying personal fuel charges and making personal auto payments. Once removed from her position as Personal Representative, she continued to administer the estate and manage the LLCs for her personal benefit.

Importantly, after being removed as Personal Representative she orchestrated a transfer of storage pods from the estate to Defendant TL August LLC, who then sold the pods for a profit.

* * *

. . . [E]veryone concedes that the estate was insolvent at day one. . . . There would be no transfer of any legacy to the boys. Defendant Tracy Wallace stripped cash and assets and engaged in acts of defalcation while operating the business for over 5 years keeping the claimants at bay. Her breach of fiduciary duty damaged the estate significantly.

II. STANDARDS OF REVIEW

“We review de novo a trial court’s decision on a motion for summary disposition.” *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Woodring v Phoenix Ins Co*, 325 Mich App 108, 113; 923 NW2d 607 (2018). We consider all evidence submitted by the parties in the light most favorable to the non-moving party. *El-Khalil*, 504 Mich at 160. Summary disposition under MCR 2.116(C)(10) is only appropriate when there is no genuine issue of material fact. *Id.* “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).

When a probate court sits without a jury, we review its factual findings for clear error. *In re Conservatorship of Murray*, 336 Mich App 234, 239; 970 NW2d 372 (2021). “A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding.” *Id.* at 239-240 (quotation marks and citations omitted). “We defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court.” *Id.* (quotation marks and citations omitted).

III. BREACH OF FIDUCIARY DUTIES

Tracy and TL August argue the probate court erred in finding that Tracy breached her fiduciary duties. We disagree.

Tracy and TL August assert they cannot be held liable because Tracy did not owe fiduciary duties to the LLCs, the estate's creditors, or herself. The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, provides that a personal representative is a fiduciary. MCL 700.1104(e).

A personal representative is a fiduciary who shall observe the standard of care applicable to a trustee as described by [MCL 700.7803 (the prudent investor rule)]. 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. [MCL 700.7303(1).]

The following is required of a fiduciary relationship:

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. A fiduciary shall observe the standard of care described in [MCL 700.7803] and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, *including* the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; *care and prudence in actions; and segregation of assets held in the fiduciary capacity*. With respect to investments, a fiduciary shall conform to the Michigan prudent investor rule. [MCL 700.1212(1) (emphasis added).]

The prudent-investor rule requires a fiduciary to “invest and manage assets held in a fiduciary capacity as a prudent investor would,” which requires the fiduciary to “exercise reasonable care, skill, and caution.” MCL 700.1502(1). “A fiduciary shall invest and manage fiduciary assets solely in the interest of the beneficiaries.” MCL 700.1506. Upon Daniel's death, his membership interests in the LLCs became assets of the estate. As the personal representative, Tracy was obligated to manage the LLCs in a fiduciary capacity.

EPIC imposes specific duties on personal representatives. “The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in the personal representative's possession.” MCL 700.3709. A personal representative is required to pay claims allowed against the estate. MCL 700.3807(1). Additionally, a personal representative may settle claims against the estate. MCL 700.3813. And unless otherwise provided by a testamentary instrument or statute, EPIC prohibits a fiduciary from engaging in self-dealing:

[A] fiduciary in the fiduciary’s personal capacity shall not engage in a transaction with the estate that the fiduciary represents and shall not invest estate money in a company, corporation, or association with which the fiduciary is affiliated, other than as a bondholder or minority stockholder. A fiduciary in the fiduciary’s personal capacity shall not personally derive a profit from the purchase, sale, or transfer of the estate’s property. [MCL 700.1214.]

“If the exercise or failure to exercise a power concerning the estate is improper, the personal representative is liable to *interested persons* for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust.” MCL 700.3712 (emphasis added). A trustee is liable for either “[t]he amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred” or “[t]he profit the trustee made by reason of the breach.” MCL 700.7902(a) and (b). MCL 700.1105(c) explicitly includes creditors as interested persons:

“Interested person” or “person interested in an estate” includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, *creditor*, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent [Emphasis added.]

A personal representative can be held liable to an estate’s creditors for losses that result from breaches of fiduciary duties.⁸ Although a personal representative does not owe fiduciary duties to creditors, if breaches of fiduciary duties cause a loss to the estate, the personal representative is liable to interested persons—including creditors—for the resulting losses.

To the extent Tracy and TL August argue Tracy did not owe a fiduciary duty to herself because she was the sole beneficiary of the estate, we find that this argument is unpreserved because it was not raised in response to the motion for summary disposition.⁹ “Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court’s attention.” *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008). At the time the probate court ruled on liability, Daniel’s sons and Tracy were identified as the heirs to the estate.

⁸ Tracy and TL August rely on language from *In re Duane V Baldwin Trust*, 274 Mich App 387, 401-402; 733 NW2d 419 (2007), aff’d in part, rev’d in part 480 Mich 915 (2007), to argue that a personal representative cannot be liable to a creditor because a creditor is not a fiduciary. We note that the language they rely on was expressly rejected by our Supreme Court. See *In re Duane V Baldwin Trust*, 480 Mich 915, 915; 739 NW2d 868 (2007).

⁹ This Court will generally decline to address an unpreserved issue unless a miscarriage of justice will result from failing to consider it, the question is one of law and the facts necessary for its resolution have been presented, or resolving the issue is necessary to properly determine the case. *Autodie, LLC v Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014). This Court reviews unpreserved issues in a civil case for plain error affecting the party’s substantial rights. *Whitmer v Bd of State Canvassers*, 337 Mich App 396, 412; 976 NW2d 75 (2021). An error is plain if it is clear or obvious, and it affects substantial rights if it affected the outcome of the lower court proceedings. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

Tracy did not present the trust document that purportedly named her as the sole beneficiary until the trial on damages began, which was well after the probate court determined Tracy had breached her fiduciary duties. Because the probate court opined that the trust was not relevant to its determination of damages, it did not address the validity of the trust. Accordingly, we decline to address this unpreserved issue.

Tracy and TL August also assert MCL 700.1510 statutorily shifted responsibility for any breaches of fiduciary duty to Tracy's prior attorneys because she relied on their advice to continue operating the businesses as Daniel had done. A fiduciary may "delegate investment and management functions." MCL 700.1510(1). The fiduciary must exercise "reasonable care, skill, and caution in" selecting the agent, establishing the parameters of the delegation, and monitoring the agent's performance. MCL 700.1510(1). If the fiduciary complies with these requirements, she will not be liable "for a decision or action of the agent to whom the function was delegated." MCL 700.1510(2). In this case, there was no evidence that Tracy delegated her investment and management functions to her attorneys. Rather, the record establishes that it was Tracy's actions or decisions that damaged the estate. Accordingly, MCL 700.1510 is inapplicable.

Relying on MCL 700.1212 and 700.1503, Tracy and TL August contend dismissal is warranted because the beneficiaries did not consent to litigation against Tracy and TL August. But neither of these statutes mandate that beneficiaries must consent to the personal representative filing a lawsuit.

The record establishes that Tracy failed to file tax returns, failed to maintain records, used estate funds for personal expenses, and profited from a sale of estate property to her own company. In response to Gallagher's motion for summary disposition, Tracy and TL August did not present any evidence that Tracy maintained financial records and rent rolls, maintained the property, filed tax returns, or operated the businesses without commingling funds. Once the party moving for summary disposition has identified issues in which there are no disputed issues of material fact, the burden is on the nonmoving party to show that disputed issues exist. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Because Tracy and TL August failed to meet this burden, we conclude that the probate court did not err in holding that Tracy breached her fiduciary duties.¹⁰

IV. DAMAGES

Tracy and TL August challenge the probate court's damage award because it included tax penalties that had not yet been assessed. Generally, a person is liable for all damages resulting from conduct, provided that those damages are not remote, contingent, or speculative. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 524; 687 NW2d 143 (2004). A party asserting a claim

¹⁰ Tracy and TL August also assert that Tracy could not be held liable for conversion or embezzlement pursuant to MCL 700.1205(4). But the probate court did not grant summary disposition on that claim. Because this argument does not address a basis of the probate court's decision, we decline to address it. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004).

for damages “has the burden of proving its damages with reasonable certainty.” *Id.* at 525 (quotation marks and citation omitted).

Lowe testified that Tracy’s non-deductible, personal use of funds resulted in taxable income to the estate from 2011 to 2018. Because income tax returns were not filed, Lowe calculated that the tax penalties and interest would be \$127,050. But there was no evidence that either the Internal Revenue Service or the State of Michigan had actually assessed tax penalties or interest against the estate. The estate’s *potential* future liability for tax penalties and interest is uncertain and speculative. See *Ensink*, 262 Mich App at 525. We find that the probate court clearly erred in surcharging Tracy \$127,050 for tax penalties and interest, and vacate that portion of the judgment.

Additionally, Tracy and TL argue a new trial on damages is warranted because the probate court’s decision was based on Lowe’s report, which they contend was “clearly” hearsay. But they provide little analysis and have neglected to provide any relevant legal authority for this argument. We conclude they have abandoned this argument by failing to include it in the statement of questions presented, failing to support the argument with legal authority, and failing to provide any record discussion.¹¹

V. GALLAGHER’S CONDUCT

Tracy and TL August assert Gallagher breached his fiduciary duties to the beneficiaries in various ways. Because they did not bring a counterclaim against the estate or Gallagher, we decline to address these arguments.¹²

¹¹ “It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotation marks and citation omitted). And an issue is waived when it is not contained in an appellant’s statement of questions presented. *Seifeddine v Jaber*, 327 Mich App 514, 521; 934 NW2d 64 (2019); see also MCR 7.212(C)(5) (stating that an appellant’s brief must contain “[a] statement of questions involved, stating concisely and without repetition the questions involved in the appeal.”).

¹² A counterclaim may seek to “diminish or defeat the recovery sought by the opposing party.” MCR 2.203(C). This Court need not resolve an unpreserved issue that is not necessary to a proper determination of the case. See *Autodie*, 305 Mich App at 431.

VI. CONCLUSION

Affirmed in part, and vacated in part. We remand for entry of a judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Douglas B. Shapiro

/s/ Sima G. Patel