STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of JAMES T. BARNES, SR., Deceased, and the JAMES T. BARNES, SR., REVOCABLE TRUST AGREEMENT under date of May 26, 1978.

UNPUBLISHED
June 27, 2000

BARBARA BARNES MANNING, JAY DAVID MANNING, SHANNON MANNING KRUGER, MELISSA MANNING PERSONS, and RACHEL CHRISTINE MANNING,

Plaintiffs-Appellants,

v

No. 211968
Wayne Probate Court
LC No. 96-562207-TI

JAMES THOMAS BARNES, JR., and HONIGMAN MILLER SCHWARTZ & COHN,

Defendants-Appellees,

and

RICHARD A. POLK, MARCUS PLOTKIN, PETER M. ALTER, LESLIE SMITH MOULTON, and PLOTKIN, YOLLES, SIEGEL, SCHULTZ & POLK,

Defendants.

Before: Griffin, P.J., Holbrook, Jr., and J. B. Sullivan*, JJ.

PER CURIAM.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiffs appeal as of right from the probate court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). Plaintiffs argue the probate court incorrectly held that plaintiffs' claims were barred by res judicata and the statute of limitations and that there was not an attorney-client relationship between plaintiff Barbara Barnes Manning and the defendant law firm. We affirm.

This case was brought by plaintiffs in an attempt to upset two separate, but related, probate court rulings entered in 1980 and 1986 regarding the trust and estate of James Thomas Barnes, Sr. (hereinafter "decedent" or "Barnes, Sr."). Plaintiffs include Barbara Barnes Manning ("plaintiff Manning"), decedent's daughter and Jay David Manning, Shannon Manning Kruger, Melissa Manning Persons, and Rachel Christine Manning, decedent's grandchildren. Defendants include James Thomas Barnes, Jr. (hereinafter "Barnes, Jr."), decedent's son and successor co-trustee of the James T. Barnes, Sr., Revocable Trust Agreement Under Date of May 26, 1978 (hereinafter "trust"), and the law firm of Honigman, Miller, Schwartz & Cohn.

The probate court succinctly set forth the extensive facts of this case in its opinion granting defendants' motion for summary disposition. We adopt that statement as our own for purposes of this appeal, without the need for reiteration, and proceed directly to consideration of plaintiffs' issues raised on appeal.

The gravamen of plaintiffs' complaint is that Barnes, Jr., breached his fiduciary duty to them in connection with the settlement agreements pertaining to the decedent's trust and estate approved by the probate court in its orders of June 26, 1980, and August 18, 1986. Plaintiffs claim defendant Honigman also breached attorney and fiduciary duties to them in the same transactions. Specifically, plaintiffs argue Barnes, Jr., with the help of defendant law firm, fraudulently breached his fiduciary duty to the trust and the beneficiaries by improperly utilizing trust assets, rather than his own and those by Midland Mortgage Company ("Midland"), to settle the debts of the trust and estate. Plaintiffs further contend, contrary to the probate court's determination, that defendants' fraud tolled the otherwise applicable statute of limitations and precluded applicability of the doctrine of res judicata. Thus, we must determine as a preliminary matter whether Barnes, Jr.'s actions as a trustee constituted fraud.

Pursuant to the 1980 agreement approved by the probate court, decedent's trust and estate were the sole debtors to Manufacturers National Bank of Detroit and Detroit Bank & Trust Company. The proceeds the trust could potentially receive from the redemption of its Midland stock was capped at $66.28 pursuant to a 1972 recapitalization agreement. Although Midland seemingly may have benefited from the lion's share of the proceeds after the unrelated sale of the Peoples Bank of Port Huron, it was Midland's success that ultimately gave full value to the trust of its Midland stock. Moreover, plaintiff Manning's signature was on every relevant document. Therefore, we agree with the probate court's ruling that all of the relevant documents and transactions were disclosed to plaintiff Manning; thus, there was no genuine issue of material fact regarding whether fraud occurred. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Res judicata bars a plaintiff from relitigating a prior action between the same parties when the evidence or essential facts are identical. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). The *Dart* Court outlined the following prerequisites to the application of res judicata: (1) the first action must have been decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id.*; *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375-376; 521 NW2d 847 (1994). Moreover, the *Dart* Court stated that "Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.*; *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

Addressing the first prerequisite, probate court orders are final orders and have the same res judicata effect as those of any other court. *Prawdzik v Heidema Bros, Inc*, 352 Mich 102, 110; 89 NW2d 523 (1958); *In re Humphrey Estate*, 141 Mich App 412, 429; 367 NW2d 873 (1985). Furthermore, it is not necessary that plaintiffs did not raise the claims that are the subject of the instant action as long as they could have been raised in the previous action. *Sprague, supra* at 313. Here, the probate court decided on the merits that the proposed 1980 settlement agreement was in the best interest of the estate and trust. Additionally, the court later approved the 1986 petition authorizing the redemption of the Midland stock. Accordingly, we hold that both probate court orders authorized the settlement agreements on the merits.

Addressing the second prerequisite, plaintiffs' claims could have been brought in either of the two prior probate court decisions. Plaintiff Manning had an opportunity to raise the issues she now asserts. Plaintiff Manning signed the 1980 settlement agreement as both a director and a shareholder of Midland, received the petition for the probate court order authorizing the settlement with the banks and notice of the hearing, and received a copy of the order authorizing the settlement.

With respect to the 1986 agreement, plaintiff Manning received a letter outlining the potential redemption; she signed a consent to the redemption of the stock as a director of Midland; she signed an agreement authorizing the termination of Barnes, Jr., and his issue's interest in the trust; she received a petition to the probate court detailing the transaction; and she received the notice of hearing for the closure of the estate and the resulting order. Plaintiff Manning could have claimed that the trust should not have had to pay the entire debt to the banks at the time the redemption was authorized by the probate court.

Addressing the third prerequisite, plaintiffs concede on appeal that the parties involved are the same. This Court therefore concludes that the three prerequisites for the application of res judicata are present. Plaintiffs nonetheless argue that misrepresentation or fraud creates an exception to the application of the res judicata doctrine. *Sprague, supra* at 313. However, given our holding that defendants did not act fraudulently, plaintiffs' argument is without merit.

Plaintiffs next contend the fraudulent concealment statute, MCL 600.5855; MSA 27A.5855, applies where, as alleged here, the one perpetrating the fraud conceals the existence of the claim from the harmed party. As noted *supra*, we hold defendants' actions did not constitute fraud. Absent an

allegation of fraud, there are two statute of limitations that could arguably be applied to the facts of the instant case. First, if a general breach of a fiduciary duty is alleged, MCL 600.5805; MSA 27A.5805 provides in pertinent part:

> A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> * * *
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> (8) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Second, if a specific allegation is made against the trustee, MCL 700.819; MSA 27.5819,[1] provides:

> Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary.

Thus, under MCL 600.5805; MSA 27A.5805, plaintiffs' action would have been barred three years after the injury, in this case three years after the August 20, 1986, redemption of the stock or possibly three years after the probate court issued the March 25, 1987, order closing the estate. By either date, the statute would have barred any action by plaintiffs as of 1990, four years before plaintiffs filed suit. Under MCL 700.819; MSA 27.5819, plaintiffs are barred from action within six months after receipt of the final account or statement if the trustee fully disclosed all relevant documents, or within three years if the trustee did not fully disclose all documents but acted in good faith. Thus, under either statute of limitations, plaintiffs claims were time barred in 1990. Accordingly, res judicata and the statute of limitations each barred plaintiffs' suit against defendant Barnes, Jr. We therefore conclude the

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[1] The text of this section was repealed effective April 1, 2000, under the provisions of MCL 700.8102; MSA 27.18102. However, the statute is nonetheless applicable to the instant matter. See MCL 700.8101(2)(d); MSA 27.18101(2)(d).

probate court did not err in dismissing the claims against Barnes, Jr., pursuant to MCR 2.116(C)(7). *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

Finally, plaintiffs contend the probate court incorrectly held that no attorney-client relationship existed between the defendant law firm and plaintiff Manning. In order to maintain an action for legal malpractice, plaintiffs have the burden of proving all of the following elements: (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 the extent of the injury. *Barrow v Pritchard*, 235 Mich App 478, 483-484; 597 NW2d 853 (1999). Plaintiffs argue defendant law firm held itself out as the legal representative for the beneficiaries. On the basis of plaintiff Manning's own admissions in her affidavit, the probate court held plaintiffs could not meet the burden of establishing the existence of an attorney-client relationship.

In her affidavit, plaintiff Manning stated the following with respect to John E. Amerman, attorney from defendant Honigman:

> 13. That I did not know that John Amerman was acting as my legal counsel on any of the transactions that I signed.
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> 14. That John Amerman never indicated to me he was acting on my behalf as legal counsel.
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> 15. That John Amerman never advised me one way of the other, and never advised me, period, regarding any of the transactions which I entered into. Further, that John Amerman never advised me to seek independent legal counsel regarding the trust.

Based on the positive assertions in plaintiff Manning's affidavit that Amerman did not act as her attorney, we agree with the probate court and hold an attorney-client relationship did not exist between Honigman (through Amerman) and plaintiff Manning.

Plaintiffs allege that two documents containing general recitations to the effect defendant Honigman was representing the trust, estate, and the beneficiaries created an attorney-client relationship between the defendant law firm and plaintiff Manning. Plaintiff Manning, however, did not allege in her affidavit that she relied on either of these documents or believed she had retained defendants to act as her counsel. We therefore hold plaintiffs' claims in this regard are without merit.

In the alternative, plaintiffs argue that, even if the probate court was correct that an attorney-client relationship did not exist, under Michigan law an attorney may have a duty to a third party under certain circumstances. Plaintiffs argue pursuant to the Michigan Supreme Court's decision in *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996), a lawyer owes a duty to the intended and specifically identifiable beneficiaries of a testator, to effectuate the intent of the testator as expressed in the will. In *Mieras*, the Court carefully restricted its holding to state that identified beneficiaries of a will may sue the attorney who drafted the will for negligent breach of the standard of care owed to a third-party beneficiary. *Id.* at 290 (opinion by Levin, J.). The Court reasoned that the personal representative in

the above situation is the client and the representative's interest is necessarily limited to the disposition of the estate. If the attorney who drafted the will negligently carried out the testator's intent and the testator's beneficiaries were subsequently harmed, the representative likely does not have an interest in who obtains the money to be distributed and thus would have no incentive to sue the attorney. *Id.* Accordingly, in this limited situation, the Court held the intended beneficiaries of the will must be able to maintain an action. *Id.*

In the instant case, the client is the trustee. If the attorney for the trustee commits malpractice in detriment to the trust, then the trustee is under an obligation to sue the attorney. If the trustee fails to bring a suit, the beneficiaries may have a cause of action against the trustee. Moreover, in *Mieras*, there was no actual or potential conflict between the interest of the testator and the beneficiary because the interests are the same. *Mieras, supra* at 302 (opinion by Boyle, J.). Here, on the other hand, the client's sole interest is in the administration of the trust and might be in conflict with the interests of the individual beneficiaries. In fact, that is exactly what has happened in the instant case. The trustee, by and through his attorneys, administered the estate in order to give benefit to the trust. Now, plaintiffs attempt to claim the attorneys were negligent in their administration. We conclude that the limited holding in *Mieras* does not apply to the instant case. Cf. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 259-262; 571 NW2d 716 (1997).

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joseph B. Sullivan