

STATE OF MICHIGAN
COURT OF APPEALS

ROSEMARIE ZOBEL, as Trustee of the VICTOR
AND LILLIAN MILLER FAMILY LOVING
TRUST, and HAROLD J. HOUK, as Co-Personal
Representative of the Estate of VICTOR MILLER and
as Co-Trustee of the VICTOR E. MILLER
REVOCABLE TRUST,

Plaintiffs-Appellants,

v

FREDERICK J. PROST,

Defendant-Appellee.

UNPUBLISHED
March 27, 1998

No. 199025
Oakland Circuit Court
LC No. 96-511596-NZ

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs appeal as of right from the trial court order granting defendant summary disposition pursuant to MCR 2.116(C)(5) and MCR 2.116(C)(8). We affirm.

Plaintiffs first argue the trial court's order granting summary disposition to defendant, pursuant to MCR 2.116(C)(5), was improper because Harold Houk had the legal capacity to sue defendant as co-personal representative of Victor Miller's estate and co-trustee of the Victor E. Miller Revocable Trust. Plaintiffs maintain they were not required to obtain the consent of the third co-trustee and co-personal representative because the instant lawsuit did not pertain to the administration of the trust or estate. We disagree.

This Court reviews a trial court's grant or denial of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). In reviewing a summary disposition ruling made under MCR 2.116(C)(5), this Court must examine the whole record, including the pleadings, and any documentary evidence submitted by the parties, to determine whether defendant was entitled to judgment as a matter of law. *Wortleboer v Benzie Co*, 212 Mich App 208, 213; 537 NW2d 603 (1995).

The Michigan Supreme Court declared years ago in *Nichols v Pospiech*, 289 Mich 324, 334; 286 NW2d 633 (1939):

When the administration of a trust is vested in co-trustees, they all form but one collective trustee. They must, therefore execute the duties of the office in their joint capacity.

More recently, this Court reaffirmed that notion when it held that where there is more than one trustee or personal representative representing a trust or estate, they must all act jointly on all matters connected with the trust or estate. *Action Auto, Inc v Anderson*, 165 Mich App 620, 625; 419 NW2d 36 (1988). Moreover, MCL 700.164; MSA 27.5164, provides additional support for that holding, which states:

When all personal representatives appointed in a will are not authorized, for any reason, to act in that capacity, those personal representatives who are authorized shall have the same authority to perform every act and discharge every trust required and allowed by the will. Their acts shall be as valid and effectual for every purpose as if all were authorized and should act together.

This Court noted that the above statute would be unnecessary if a single co-personal representative could bind an estate by individual action. *Action Auto, supra* at 625, n 2. See also *Green v Nevers*, 111 F3d 1295 (CA 6, 1997).

In the instant case, Victor Miller's will did not authorize Houk to act in an individual capacity pertaining to any matters concerning the estate or trust. To the contrary, Miller specifically named three trustees and three personal representatives to represent those entities, implicitly suggesting they were all to act in concert and all decisions were to be made together. Nor did the probate court authorize Houk to act individually and disregard the language in the will. Certainly, we do not suggest Houk was obligated to seek the approval of defendant in filing this suit,¹ to which it is unlikely defendant would consent to sue himself; however, he did not provide any explanation for excluding the third co-trustee and co-personal representative from involvement in this action. Thus, because this claim was brought contrary to MCL 700.164; MSA 27.5164, and Michigan case law, we find the trial court did not err in granting summary disposition to defendant.

Next, plaintiffs contend the trial court erred in granting summary disposition to defendant pursuant to MCR 2.116(C)(8) because defendant owed a legal duty of care to the Victor and Lillian Miller Family Loving Trust and its named beneficiary, Victoria Miller Solis.² We disagree.

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings, alone, and thus, the motion may not be supported with documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). All of the factual allegations in the complaint are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts. *Id.* An MCR 2.116(C)(8) motion should be granted when the claim is so clearly

unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Abb Paint Finishing, Inc v Nat'l Union Fire Ins*, 223 Mich App 559, 561; 567 NW2d 456 (1997).

While we acknowledge that the Michigan Supreme Court recently declared that attorneys do owe a legal duty to named, intended beneficiaries of a will, based on a contractual, third-party beneficiary basis, despite the absence of an attorney-client relationship, *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996), we find that case to be factually distinguishable from the instant matter. Of particular significance is the fact that defendant was not responsible for preparing or drafting the trust document for which Zobel serves as trustee and under which she seeks relief. Nor did defendant represent the 1990 Trust or serve as trustee, both of which would have imposed upon him a fiduciary duty to the trust itself as well as the named beneficiaries. To the contrary, defendant was retained solely by Victor Miller to advise him concerning an entirely different document and transaction. There was no relationship between defendant and the 1990 Trust or its beneficiaries, because defendant's sole obligation was to Victor and the named beneficiaries of the 1993 Trust and will, neither of which named the 1990 Trust as a beneficiary.

Therefore, because defendant is only accountable to his client, and to the named beneficiaries of the documents he drafted (i.e. the 1993 Trust and will), we conclude he did not owe a legal duty to the 1990 Trust or the beneficiaries of that instrument. Accordingly, plaintiff Zobel failed to state a claim upon which relief could be granted, and summary disposition under MCR 2.116(C)(8) in favor of defendant was proper.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

¹ Defendant was also named as a co-trustee of the 1993 Trust, and co-personal representative of Victor Miller's estate.

² Victoria Miller Solis was the only child of Victor and Lillian Miller. She was mildly retarded and developmentally disabled, and was incapable of maintaining employment and being self-supportive. She relied on Social Security disability and her interest in the trust for financial support.