

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of JOHN P. O'NEILL REVOCABLE TRUST.

JOHN F. MILLS, SUCCESSOR TRUSTEE,

Petitioner-Appellee,

v

JOHN P. O'NEILL, II, MARY K. O'NEILL, and
ELLEN F. O'NEILL,

Respondents-Appellees,

and

MICHAEL G. O'NEILL,

Respondent,

and

ANNE M. O'NEILL,

Respondent-Appellant.

UNPUBLISHED

September 26, 2013

No. 303629

Oakland Probate Court

LC No. 2009-325053-TV

In re Estate of MARY ANN O'NEILL REVOCABLE TRUST.

JOHN F. MILLS, SUCCESSOR TRUSTEE,

Petitioner-Appellee,

v

JOHN P. O'NEILL, II, MARY K. O'NEILL, and
ELLEN F. O'NEILL,

Respondents-Appellees,

No. 303631

Oakland Probate Court

LC No. 2008-317805-TV

and

MICHAEL G. O'NEILL,

Respondent,

and

ANNE M. O'NEILL,

Respondent-Appellant.

In re Estate of JOHN P. O'NEILL REVOCABLE TRUST.

JOHN F. MILLS, SUCCESSOR TRUSTEE,

Petitioner-Appellee,

v

JOHN P. O'NEILL, II, MARY K. O'NEILL, and ELLEN F. O'NEILL,

Respondents-Appellees.

and

MICHAEL G. O'NEILL,

Respondent-Appellant,

and

ANNE M. O'NEILL,

Respondent.

No. 303632
Oakland Probate Court
LC No. 2009-325053

MICHAEL G. O'NEILL,

Plaintiff-Appellant,

and

MARY K. O'NEILL, ELLEN F. O'NEILL, and
JOHN P. O'NEILL, II

Plaintiffs-Appellees,

v

JOHN F. MILLS and WILLIAMS, WILLIAMS,
RATTNER & PLUNKETT, P.C.,

Defendants-Appellees.

No. 303655
Oakland Probate Court
LC No. 2010-329160-CZ

Before: MURPHY, C.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

Appellants Michael G. O'Neill and Anne M. O'Neill appeal as of right various orders entered by the probate court arising out of a dispute concerning the performance of appellee John F. Mills in his fiduciary role as successor trustee of two trusts. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

John P. O'Neill and his wife Mary Ann O'Neill each had living revocable trusts, with John acting as the trustee of his trust and Mary Ann serving as the trustee of her trust during their respective lifetimes. They are now both deceased. John and Mary Ann had five children, all of whom are involved in this litigation and these consolidated appeals – John P. O'Neill, II (John II), Michael G. O'Neill, Mary K. O'Neill, Ellen F. O'Neill, and Anne M. O'Neill, who is disabled. The O'Neill siblings are all adults. When Mary Ann died in 2003, John became the successor trustee of her trust for a time, while maintaining his status as trustee of his own trust. John subsequently passed away in March 2007. Mills, an attorney employed by appellee Williams, Williams, Rattner & Plunkett, P.C. (WWRP), and one of John's former law partners, became the successor trustee of both trusts. The O'Neill siblings were beneficiaries under the trusts, entitled to specific cash devises and to a distribution of equal shares of the residuary estates, although ninety percent of Anne's share was to be held in a separate spendthrift trust for her benefit, which was designated as the Anne M. O'Neill Trust.¹

With respect to Mary Ann's trust, the sole asset held by the trust at the time of John's death was a parcel of improved real property located in Leelanau County referred to as the "Glen Lake property." Proceedings regarding Mary Ann's trust comprised lower court docket number 2008-317805-TV (Mary Ann's file). With respect to John's trust, it held a couple of bank

¹ Mills was also the trustee of Anne's trust. The planned distributions under Mary Ann's trust had been modified by John's exercise of a special power of appointment set forth in Mary Ann's trust, resulting in the directive to equally distribute her residuary estate to the five siblings.

accounts, two IRAs, and life insurance proceeds, and it had title to three parcels of improved real property: a house on Randall Court located in Birmingham (the Randall property); a condominium also located in Birmingham (the condo); and a cottage in Cheboygan.² Proceedings regarding John's trust comprised lower court docket number 2009-325053-TV (John's file).

In August 2009, Mills filed petitions to allow accounts covering March 2007 to June 2009 relative to both trusts and files, seeking approval of trustee and attorney fees, administrative expenses, completed distributions, and a proposed plan of distribution. He asked the probate court to approve \$107,279 in trustee fees and \$10,797 in outside attorney fees incurred in the administration of John's trust, as well as requesting approval of \$4,058 in trustee fees and \$3,595 in outside attorney fees incurred in the administration of Mary Ann's trust. The O'Neill siblings, except for Anne, objected to both petitions, accusing Mills of breaching fiduciary duties, mismanaging the properties, improperly administering the trusts, favoring Anne over the other siblings, charging fees that were excessive as to hourly rate and time consumed, and charging fees that were generated by work on the IRAs and real estate that, had Mills acted consistent with his fiduciary duties, would not have been incurred.

The O'Neill siblings complained that a planned distribution of the Glen Lake property to an LLC comprised of the siblings, minus Anne, which involved the procurement of a loan secured by the property to be used by the LLC to purchase Anne's interest in the property, did not come to fruition because of Mills's inattentiveness to the matter. They also asserted that Mills improperly allowed Anne to live rent-free in the condo, let the condo fall into disrepair, and failed to put the condo up for sale or otherwise distribute it as mandated by the trust and his fiduciary duties. The O'Neill siblings further contended that Mills should have accepted a sales offer of \$700,000 for the Randall property in June of 2007, shortly after it was listed for sale, where Mills was aware of a poor local real estate market. He eventually closed on the Randall property two years later, selling it for \$502,500. The O'Neill siblings also complained about Mills's employment of his sister as the realtor who listed the Randall property for sale. Finally, the O'Neill siblings maintained that Mills should not have liquidated the IRAs soon after their father's death, given that, according to the siblings, the estate had enough cash on hand to cover expenses and the liquidation resulted in an avoidable and substantial tax burden. Although initially requesting damages for alleged losses in the context of the objections (surcharges), the O'Neill siblings later restricted their objections to a challenge of the fees sought to be approved by Mills in the account petitions.

Mills countered all of the objections. He argued that the O'Neill siblings themselves ultimately decided against the proposed distribution of the Glen Lake property and the loan-backed purchase of Anne's interest. Mills further contended that the early \$700,000 offer on the Randall property was nearly \$100,000 below the list price, which the siblings had insisted was set too low, and \$25,000 below the appraised value, making his decision not to sell reasonable *at the time*. He also argued that it was necessary to liquidate the IRAs, considering that certain

² The Randall property was subject to two mortgages held by mortgagees LaSalle Bank and Wells Fargo. There were no existing liens or mortgages relative to the Cheboygan cottage, the condo, and the Glen Lake property.

expenses, e.g., carrying costs associated with the real estate, had to be paid, estate debts loomed over Mills, and because John's trust was cash poor. As to the condo, Mills maintained that Anne was unhappy in the unit, that the condo should be sold, and that Anne needed cash and not real property given her limited financial resources. However, Mills contended that preparing the condo for sale had been problematic as it was in need of costly repairs and Anne had not been entirely cooperative in giving Mills access to the condo to have repairs made. Mills had hoped to use funds from a sale of the Randall property and/or from Anne's Glen Lake buyout monies to make the necessary condo repairs such that it would be in suitable condition for sale. But unfortunately, absent any wrongdoing by Mills, the Randall property did not sell for two years and the plan to distribute the Glen Lake property fell apart. Mills eventually came to the conclusion that the condo should be transferred to Anne's trust, especially considering that appraisals on the condo reflected a \$100,000 diminution in its value from 2007 to 2009. In general, Mills argued that the O'Neill siblings' criticisms were made with the benefit of hindsight. Mills filed multiple motions for summary disposition under MCR 2.116(C)(10) in regard to the objections.

Relevant here, the probate court granted summary disposition in favor of Mills on objections that concerned services performed by Mills relative to the sale of the Randall property. The court concluded, as a matter of law, that Mills did not breach any fiduciary duties under the circumstances, that the objections by the O'Neill siblings were impermissibly made with the benefit of hindsight, and that there was no conflict of interest nor any wrongdoing in employing Mills's sister as realtor to sell the property. In light of the probate court's ruling regarding Mills's sister, the court additionally granted summary disposition in favor of Mills concerning his billing for attorney services provided by outside counsel relative to conflict-of-interest issues and the employment of the sister as realtor. The probate court also granted summary disposition in favor of Mills on objections that concerned his liquidation of the IRAs, with the court concluding, as a matter of law, that Mills was not grossly negligent in liquidating the IRAs and that the issue could not be examined with the benefit of hindsight.³ The court limited its IRA ruling strictly to the objections regarding fees billed by Mills that were associated with work done in reviewing and liquidating the IRAs.

Following an evidentiary hearing with respect to the account petitions and objections thereto that were not resolved in the summary disposition motions, the probate court ruled that Mills had not conducted himself improperly in administering and managing the Glen Lake property and the condo. The court found that, with regard to the Glen Lake property, Mills's testimony was credible and the siblings' testimony was not credible. The probate court further found that the O'Neill siblings, sans Anne, engaged in obstructive behavior and conduct that prevented Mills from expeditiously administering the properties. The court opined that Anne's siblings attempted to isolate her from the ongoing administration of the trusts through a series of

³ In reaching its conclusion, the court did not consider the response brief and attachments submitted by the O'Neill siblings because they were not filed and served at least seven days before the hearing. MCR 2.116(G)(1)(a)(ii). The response was filed two days late and served one day late. We do note that Mills's motion on the matter had been filed and served more than two months before the siblings filed their response.

“non-Anne” emails. The probate court, however, did decrease the amount of fees for which Mills sought approval in his petitions, finding certain hourly rates excessive.⁴

On the first day of the evidentiary hearing, the O’Neill siblings filed a separate action for damages in the probate court against Mills and WWRP. Anne did not join these proceedings, which comprised lower court docket number 2010-329160-CZ. The complaint contained four counts; one pertained to the condo, one regarded the IRAs, one dealt with the Randall property, and the last count concerned WWRP and vicarious liability. The nature of the allegations mimicked those raised by the O’Neill siblings in their objections to the account petitions. The O’Neill siblings, however, did couch all of their claims in the complaint in terms of gross negligence given the following language in both trusts:

The Trustees agree to carry out the provisions hereof according to their best abilities, but no Trustee shall be responsible for any mistake in judgment or for any decrease in value of or loss to, the Trust estate, or for any cause whatever except a Trustee’s own bad faith or gross negligence.

Mills and WWRP filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that the O’Neill siblings’ claims were barred by the doctrines of res judicata and collateral estoppel, that the siblings did not allege acts constituting gross negligence as a matter of law, and that there was no genuine issue of material fact that Mills’s conduct did not amount to gross negligence. The probate court held a hearing on the motion for summary disposition, and the court took the matter under advisement. On April 6, 2011, the same day that the probate court issued its ruling on the objections to the account petitions arising out of the evidentiary hearing, the court issued a written opinion and order granting the motion for summary disposition in favor of Mills and WWRP. The probate court ruled that the O’Neill siblings’ claim regarding the Randall property was barred by the doctrines of res judicata and collateral estoppel, where the court definitively determined that Mills had not breached any duties in handling the sale of the property in its earlier summary disposition ruling on objections pertaining to trustee fees and the Randall property. But, as to the claims regarding the IRAs and the condo, the court found that res judicata and collateral estoppel did not apply, considering the procedural posture of the account proceedings and the court’s limited rulings in those proceedings. The probate court nevertheless granted summary disposition in favor of Mills and WWRP on the basis that the allegations in the complaint did not rise to the level of gross negligence, MCR 2.116(C)(8), nor was the documentary evidence sufficient to create a factual dispute relative to gross negligence, MCR 2.116(C)(10).

⁴ Mills billed “trustee” fees at \$300 per hour for his work, and the probate court reduced Mills’s rate to \$150 per hour with respect to those hours devoted to actual “trustee” work, while allowing the \$300 per hour rate to stand relative to “legal” services performed by Mills in regard to both trusts and files. Mills had also billed “trustee” fees at \$150 per hour for the work of his paralegal, and the probate court reduced her hourly rate to \$80 for certain travel time and janitorial services associated with the real properties and to \$125 for the remainder of her services. In sum, there was a total reduction of \$24,330 in trustee fees. We also note that Mills had successfully distributed the Cheboygan cottage to the siblings, minus Anne, by way of an LLC, and said cottage is not at issue in this appeal.

In Docket No. 303629, Anne O’Neill appeals the probate court’s rulings concerning John’s trust and file, which encompassed the court’s decisions relative to the IRAs, the Randall property, the condo, and, in general, the trustee and attorney fees associated with administering John’s trust.⁵ In Docket No. 303631, Anne also appeals the probate court’s rulings concerning Mary Ann’s trust and file, which encompassed the court’s decisions regarding the Glen Lake property and, in general, the trustee and attorney fees associated with administering Mary Ann’s trust. In Docket No. 303632, Michael O’Neill appeals the probate court’s rulings with respect to John’s trust and file. In Docket No. 303655, Michael further appeals the probate court’s order granting summary disposition in favor of Mills and WWRP in the separate civil lawsuit. This Court consolidated the appeals. *In re O’Neill Trusts*, unpublished order of the Court of Appeals, entered April 27, 2011 (Docket Nos. 303629, 303631, 303632, and 303655).

With respect to the other three O’Neill siblings, John II, Ellen, and Mary, they filed a motion to participate in the appellate proceedings. This Court granted the motion to participate, and directed the Clerk’s Office to align them as “appellees” in all four appeals. *In re O’Neill Trusts*, unpublished order of the Court of Appeals, entered November 8, 2011 (Docket Nos. 303629, 303631, 303632, and 303655). The order also allowed the three siblings to “file an appellee’s brief.” *Id.*

II. ANALYSIS

A. JURISDICTIONAL ISSUE

We initially reject a preliminary argument posed by Mills and WWRP that the summary disposition rulings on the Randall property and IRAs were not timely appealed by claim of right, nor appealed by application for leave, and therefore any arguments pertaining to those rulings should not be considered, as they are outside of our jurisdiction. We hold that those interlocutory orders are properly before us, considering that a timely appeal as of right was filed with respect to the final order on the evidentiary hearing that fully resolved all of the objections to the account petitions. See MCR 5.801(B)(2)(x) (final probate orders appealable by right include orders pertaining to inter vivos trusts that “resolv[e] . . . [the] allowing or disallowing [of] an account, fees, or administration expenses”); *Southfield Jeep, Inc v Preferred Auto Sales, Inc*, 477 Mich 1061; 728 NW2d 459 (2007) (“Because the . . . court’s denial of the defendant’s motion was interlocutory, the defendant may appeal that decision as of right, on entry of a final order by the . . . court disposing of the case;” a “party in a civil action may raise previous interlocutory decisions when it brings an appeal of right from a final order”) (internal quotation marks omitted). Accordingly, we have jurisdiction over all of the appellate matters presented to us.

B. GOVERNING LEGAL PRINCIPLES

With respect to the probate court’s order arising out of the evidentiary hearing or bench trial, the court’s factual findings are reviewed for clear error, but we review de novo the court’s

⁵ We note that Anne had not yet joined in the lower court proceedings when the probate court granted Mills’s motion for summary disposition on the objections related to the Randall property; therefore, any arguments by her regarding the ruling were not preserved.

conclusions of law, construction of the trusts, and its interpretation of the Estates and Protective Individuals Code (EPIC), MCL 700.1101 *et seq.* *In re Estate of Raymond*, 483 Mich 48, 53; 764 NW2d 1 (2009); *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011); *In re Leete Estate*, 290 Mich App 647, 661; 803 NW2d 889 (2010); *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005); *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).⁶ 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.” *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). In general, questions of law addressed by a probate court are reviewed de novo on appeal. *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001). A court’s ruling on a motion for summary disposition, as well as questions regarding the applicability of res judicata and collateral estoppel, are reviewed de novo on appeal. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *In re Egbert R Smith Trust*, 480 Mich 19, 23; 745 NW2d 754 (2008).⁷

A probate court has exclusive legal and equitable jurisdiction over proceedings concerning the administration and distribution of trust assets and the declaration of rights involving a trust, trustee, or trust beneficiary, including proceedings entailing review of a trustee’s fees, settlement of interim or final accounts, ascertainment of beneficiaries, the determination of questions arising in the administration of a trust, and the construction of a trust. MCL 700.1302(b). Pursuant to 2009 PA 46, effective April 1, 2010, the Legislature enacted the Michigan trust code (MTC), MCL 700.7101 *et seq.*, which forms Article VII of EPIC. Article VII of EPIC previously addressed trust administration, but was not as extensive as the MTC, even though there are many similar features and principles. Because the events at issue here occurred before the MTC became effective in April 2010, we must rely on the previous version of Article VII, not the MTC. See MCL 700.8206(2) (“The amendments and additions to article VII enacted by the amendatory act that added this section do not impair an accrued right or affect an act done before that effective date.”).

“A trustee has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, use, and distribution of the trust property to accomplish the desired result of administering the trust legally and in the trust beneficiaries’ best interest.” MCL 700.7401(1),

⁶ The objective of a probate court when construing a trust is to ascertain and give effect to the intent of the settlor. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008). “The intent of the settlor is to be carried out as nearly as possible.” *Id.* The intent of the settlor is to be gleaned from the trust itself, requiring examination of the four corners of the trust, and only if an ambiguity exists is it proper to look outside the trust’s four corners and consider the circumstances surrounding creation of the trust. *Id.*; see also *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985).

⁷ A probate court is permitted to entertain and decide motions for summary disposition in the context of probate petitions, accounts, and objections. *In re Humphrey Estate*, 141 Mich App 412, 427; 367 NW2d 873 (1985).

amended by 2009 PA 46 (see MTC, MCL 700.7817). A trustee is permitted to employ and pay reasonable compensation to an attorney and other professionals for the purpose of advising and assisting the trustee in the performance of the trustee's administrative duties. MCL 700.7401(2)(v) and (w), amended by 2009 PA 46 (see MTC, MCL 700.7817[v] and [w]). "Except as otherwise provided by the terms of the trust, the trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule." MCL 700.7302, amended by 2009 PA 46 (see MTC, MCL 700.7803). The Michigan prudent investor rule is embodied in MCL 700.1501 *et seq.*⁸ "Compliance with the prudent investor rule is determined in light of the facts and circumstances that exist at the time of a fiduciary's decision or action, . . . *not by hindsight*[,] [and] [t]he prudent investor rule requires a standard of conduct, not outcome or performance." MCL 700.1509 (emphasis added). "If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills." MCL 700.7302, amended by 2009 PA 46 (see MTC, MCL 700.7803). A trustee has a general duty to administer a trust expeditiously for the benefit of the beneficiaries. MCL 700.7301, amended by 2009 PA 46 (see MTC, MCL 700.7801). "On petition of an interested person, after notice to all interested persons, the court may review the propriety of employment of a person by a trustee including an attorney, auditor, investment advisor, or other specialized agent or assistant, and the reasonableness of the compensation of a person so employed and the *reasonableness of the compensation determined by the trustee for the trustee's own services.*" MCL 700.7205, amended by 2009 PA 46 (emphasis added; see MTC, MCL 700.7207). The probate court can "order a person who receives excessive compensation from a trust to make an appropriate refund." *Id.*

As can be gleaned from the statutory provisions cited above, the payment of expenses by a trustee and the compensation owed to a trustee for services rendered are measured by a general reasonableness standard. And both John and Mary Ann's trusts expressly employed a

⁸ MCL 700.1502 provides:

(1) A fiduciary shall invest and manage assets held in a fiduciary capacity as a prudent investor would, taking into account the purposes, terms, distribution requirements expressed in the governing instrument, and other circumstances of the fiduciary estate. To satisfy this standard, the fiduciary must exercise reasonable care, skill, and caution.

(2) The Michigan prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of the governing instrument. A fiduciary is not liable to a beneficiary to the extent that the fiduciary acted in reasonable reliance on the provisions of the governing instrument.

reasonableness standard relative to the payment of expenses by the trustee and the trustee's compensation.⁹

“A trustee is personally liable for an obligation arising from ownership or control of the trust estate property or for a tort committed in the course of administration of the trust estate only if the trustee is personally at fault.” MCL 700.7306(2), repealed by 2009 PA 46 (see MTC, MCL 700.7901 *et seq.*). “The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, or indemnification or in another appropriate proceeding.” MCL 700.7306(4), repealed by 2009 PA 46 (see MTC, MCL 700.7901 *et seq.*). “A beneficiary may also be barred from commencing a proceeding against a trustee for breach of trust by *adjudication*, consent, ratification, *estoppel*, or other limitation.” MCL 700.7307(1), repealed by 2009 PA 46 (emphasis added; see MTC, MCL 700.7901 *et seq.*). Under common law principles, “trustees may not be liable for mere mistakes or errors of judgment where they have acted in good faith and within the limits of the law and of the trust.” *In re Harold S Ansell Family Trust*, 224 Mich App 745, 748-749; 569 NW2d 914 (1997) (citation omitted). As noted earlier, both John and Mary Ann's trusts provided for the liability of the trustee for losses only on a showing of bad faith or gross negligence.

C. DISCUSSION

1. RANDALL PROPERTY

We hold that the probate court did not err in granting summary disposition in favor of Mills on the objections to the account petition relative to John's file and the Randall property. The documentary evidence submitted for purposes of summary disposition revealed that the Randall property was appraised at \$725,000 at the time of John's death, it was listed by Mills's realtor sister, Jacqueline Aubuchon, for \$799,900 on June 18, 2007, the O'Neill siblings believed, as reflected in an email from Michael, that \$799,900 was too low of a sales price and suggested a listing price of somewhere between \$800,000 and \$850,000, an offer of \$650,000

⁹ With respect to factors subject to consideration in a “reasonableness” analysis, this Court in *Comerica Bank v City of Adrian*, 179 Mich App 712, 724; 446 NW2d 553 (1989), observed:

[C]ourts have used the following factors to determine the reasonableness of a testamentary trustee's proposed fee: (1) the size of the trust, (2) the responsibility involved, (3) the character of the work involved, (4) the results achieved, (5) the knowledge, skill, and judgment required and used, (6) the time and the services required, (7) the manner and promptness in performing its duties and responsibilities, (8) any unusual skill or experience of the trustee, (9) the fidelity or disloyalty of the trustee, (10) the amount of risk, (11) the custom in the community for allowances, and (12) any estimate of the trustee of the value of his services. The weight to be given any factor and the determination of reasonable compensation is within the probate court's discretion. In this regard, we note that while time spent is one indicator of value, it may be a poor indicator in some circumstances. Naturally, the probate court must consider the circumstances of the case in determining which factors are to be given weight. As always, the burden of proof is on the claimant to satisfy the court that services rendered were necessary and that charges therefor are reasonable. [A] claimant's failure to present records concerning his services is usually weighed against him. [Citations omitted.]

was received on June 25, 2007, Mills rejected the offer and made a counteroffer of \$750,000, and a few days later the prospective purchaser communicated a new verbal offer of \$700,000, which was not accepted by Mills, who thought that the offeror was looking to “steal the house at a very low price.”¹⁰ Mills testified in his deposition that the prospective purchaser refused to go over \$700,000. Mills indicated that had an offer of \$725,000 been made, “we probably would have had a deal.” The price of the property was thereafter periodically reduced until it was down to \$659,000 in March 2008, and an offer of \$550,000 was made on May 30, 2008, with Mills submitting a counteroffer of \$635,000. The prospective purchaser refused to budge from his \$550,000 offer and no deal was negotiated. The price of the Randall property was later reduced to \$579,000 in November 2008; it was appraised at \$565,000 at the time. The property was subsequently appraised at \$500,000 in February 2009. The Randall property eventually sold for \$502,500 after some negotiations that included addressing the repair of defects in basement walls. The closing took place on June 11, 2009. There were 158 showings of the property during the listing period, there were regular open houses, and the property was widely advertised in newspapers and trade publications.

Under these circumstances, we conclude, as a matter of law, that Mills’s actions were reasonable and proper. Assuming contemplation of the *verbal* \$700,000 offer was even required, the price was nearly \$100,000 less than the listing price, \$25,000 less than the property’s appraised value, \$100,000 to \$150,000 less than the O’Neill siblings thought was a proper listing price, and the home had just been placed on the market when the offer was made. In affidavits, the O’Neill siblings averred that they first learned of the rejected \$700,000 offer in August 2007, yet they did not assert that, at the time, they complained to Mills about not accepting the offer. We acknowledge that there was evidence that the local real estate market had taken a turn for the worse in the summer of 2007 and that Mills himself indicated in his deposition and in an email that numerous houses in the area had not been “moving” and the market was “awful.” But he also testified that he “had no clue . . . what would happen in the next two years.” We find that with respect to the sale of the Randall property and the failure to sell it in 2007 at a much higher price than that obtained in 2009, the O’Neill siblings’ arguments are essentially demanding, improperly so, examination of the issue with the benefit of hindsight and based on the outcome. MCL 700.1509. Reversal is unwarranted.¹¹

Furthermore, in regard to the separate civil action and the Randall property claim, collateral estoppel barred relitigation of the matter, as essentially conceded by Michael O’Neill at oral argument, assuming we affirmed the summary disposition ruling in the context of the

¹⁰ Mills did testify in his deposition that it is possible that he may have made a counteroffer of \$775,000 to the original \$650,000 offer and then came back with a counteroffer of \$750,000 in response to the \$700,000 verbal offer. He also testified that the O’Neill siblings had been of the view that Mills was “giving it away” by initially listing the house under \$800,000.

¹¹ We also reject the arguments regarding the employment of Mills’s sister as the realtor who listed the property for sale. There is no indication whatsoever of any conduct on her part that was unreasonable, improper, or prejudicial to the O’Neill siblings. Indeed, the record reflects that she aggressively marketed the Randall property. We fail to see how any true conflict of interest arose, and a trustee may employ a “realtor . . . even if the person is associated with the trustee.” MCL 700.7401(2)(v), amended by 2009 PA 46 (see MTC, MCL 700.7817[v]).

objections to the account petition in John's file.¹² The probate court had earlier ruled, properly so, that Mills did not breach any fiduciary duties and acted reasonably in handling the sale of the Randall property; therefore, the issue of whether Mills's conduct was improper had been litigated and resolved. This is especially true where the gross negligence standard applicable to the damages action was a higher threshold for the siblings to overcome than the mere reasonableness standard applicable to the trustee fee proceedings. Summary disposition was properly granted under MCR 2.116(C)(7). Moreover, gross negligence requires a showing of conduct so reckless as to demonstrate a substantial lack of concern for whether an injury or loss results. *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003). With respect to the Randall property, the complaint in the civil action did not allege facts rising to the level of gross negligence, nor did the documentary evidence submitted in connection with the summary disposition briefs establish a genuine issue of material fact regarding gross negligence.¹³ Accordingly, summary disposition was also proper under MCR 2.116(C)(8) and (10).

¹² "Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). "A judgment is considered a determination of the merits, and thereby triggers the doctrine of collateral estoppel on relitigation, even if the action has been resolved by . . . summary disposition." *Detroit v Qualls*, 434 Mich 340, 356 n 27; 454 NW2d 374 (1990).

¹³ The attachments mainly consisted of documents filed in the proceedings regarding the objections to the account petitions, including documentary evidence submitted in the earlier motions for summary disposition. That documentary evidence constituted "substantively admissible evidence" for purposes of summary disposition in the civil action, given that we look to the content or substance rather than the form of the submissions. *Maiden v Rozwood*, 461 Mich 109, 121, 124 n 6; 597 NW2d 817 (1999).

2. THE IRAs

We hold that the probate court did not err in granting summary disposition in favor of Mills on the objections to the account petition relative to his liquidation of the IRAs held by John's trust. We again note that the probate court refused to consider the O'Neill siblings' response brief and attached documentary evidence, given that they were not timely filed and served under MCR 2.116(G)(1)(a)(ii). On appeal, none of the O'Neill siblings cite any authority for their proposition that the delay in filing and service should be ignored as it was de minimis, excusable, and did not result in prejudice. It is not this Court's obligation to search for authority to sustain an appellant's position. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Additionally, Mills's summary disposition motion on the matter had been filed more than two months before the hearing; the failure to timely respond was not excusable. The O'Neill siblings were required to respond to the properly-supported (C)(10) motion with documentary evidence, MCR 2.116(G)(4), and to do so in timely fashion, which was not accomplished.

Furthermore, there was evidence that the trust estates had little cash on reserve and that Mills was immediately faced with extensive carrying costs, including mortgages, insurance, and property taxes. There was evidence that WWRP advanced money to the trust estates in order to cover costs and expenses. Additionally, there was a need to supplement Anne's social security disability income to pay for her living expenses, along with a demand by LaSalle Bank to make payment in full, amounting to over \$123,000, relative to an equity line of credit secured by a mortgage on the Randall property. LaSalle Bank had indicated that John's death triggered a default under the mortgage. Indeed, Michael O'Neill testified that he had suggested to Mills that he should pay off the LaSalle Bank mortgage. Despite the apparent right to do so, LaSalle Bank ultimately did not take any legal steps to recover the balance of the mortgage and instead continued to accept monthly mortgage payments. But Mills had no way to predict the future course taken by LaSalle Bank. Mills was also concerned about possible income tax liability in relationship to any work performed by John in 2006 and 2007, and the potential of estate tax liability.¹⁴

¹⁴ We do reject Mills's general appellate argument that the total debt balance carried by the trust estates had to be considered when determining the immediate cash needs of the estates where the balance was not currently due in full but payable over time. Additionally, there was documentary evidence, including Mills's own asset-liability timeline prepared by paralegal McGowan, suggesting that there may have been enough cash in the trust accounts to cover expenses and costs even absent liquidation of the two IRAs at issue. This would not be true had it become necessary to pay off the LaSalle Bank mortgage. Further, assuming it proper to consider despite the untimely filing and service of the siblings' response and documentary evidence, Mills did testify in his deposition that he was only in the process of amassing all of the financial information regarding assets and liabilities when he decided to liquidate the IRAs. And he admitted that he did not know the cash needs of the estate when he began the process of liquidating the IRAs, nor was he entirely sure of the exact tax consequences in liquidating the IRAs. That said, there can be no doubt that substantial cash was required to maintain and preserve the real properties held by the trusts and that the trusts had a fairly small reservoir of cash.

Assuming that the documentary evidence submitted by the O’Neill siblings should have been considered by the probate court and that the evidence referenced in footnote 14 above created a genuine issue of material fact regarding the reasonableness of liquidating the IRAs, we hold that the O’Neill siblings nevertheless effectively waived this issue. Mills had submitted accountings to the O’Neill siblings for the years 2007 and 2008.¹⁵ Mills testified to delivering the accountings to the O’Neill siblings, and there was testimony by the siblings acknowledging receipt of the accountings. Even on cursory examination of these accountings, it was made evident that the IRAs at issue had been liquidated by Mills. If there was any question on the matter upon review of the 2007 accounting, the 2008 accounting definitively reflected that the two IRAs had been liquidated. In the paragraph in John’s trust regarding the mandatory accountings, it was provided, “Such accounts shall become binding on all income beneficiaries and remaindermen sixty (60) days after mailing.” Despite this language, there is no evidence that the O’Neill siblings objected to the IRA liquidations, or did anything in response, within 60 days of either the 2007 or 2008 accountings, and they certainly did not pursue any court actions within those timeframes. Under the plain language of John’s trust, the O’Neill siblings were bound by the 2007 and 2008 accountings, which included liquidation of the IRAs owned by the trust. Effectively, the O’Neill siblings waived any future claim that Mills improperly liquidated the IRAs.

Furthermore, the probate court properly dismissed the IRA claim in the context of the separate civil action. Having failed to object to the 2007 and 2008 accountings, thereby waiving any complaints about liquidation of the IRAs, the O’Neill siblings could not maintain a suit for damages predicated on IRA liquidation. Moreover, the complaint in the civil action did not allege facts rising to the level of gross negligence relative to Mills’s handling of the IRAs, nor did the documentary evidence submitted in connection with the summary disposition briefs establish a genuine issue of material fact regarding gross negligence. Accordingly, summary disposition was proper under MCR 2.116(C)(8) and (10).

¹⁵ With respect to a revocable trust following the death of the settlor, and unless directed otherwise in the trust, “[a]t least annually and on termination of the trust or a change of the trustee, the trustee shall provide a statement of account to each current trust beneficiary and shall keep each current trust beneficiary informed of the trust and its administration.” MCL 700.7303(3)(b)(i), amended by 2009 PA 46 (see MTC, MCL 700.7814). “In the trustee’s discretion, the trustee may provide a statement of account and other information to any beneficiary.” MCL 700.7303(3)(b)(iv), amended by 2009 PA 46 (see MTC, MCL 700.7814). “A statement of account . . . is a report by the trustee that shall, at a minimum, list the trust assets, if feasible giving their market values, the trust liabilities, receipts, and disbursements, and state the source and amount of the trustee’s compensation.” MCL 700.7303(3)(d), amended by 2009 PA 46 (see MTC, MCL 700.7814). No particular format or formality is required for the statement of account unless a court specifies its content and manner of presentation. *Id.* Here, both trusts required annual accountings.

3. THE GLEN LAKE PROPERTY

The testimony presented at the evidentiary hearing indicated that, in May of 2008, John II had arranged for a loan to the sibling-based LLC from State Savings Bank through agent Blake Brooks that was going to be used to purchase Anne's interest in the Glen Lake property. A letter of interest, a promissory note, and a mortgage had been prepared at the time and were introduced into evidence. Entries in the invoices submitted by Mills reflected that services had been performed in May and June 2008 in regard to the preparation and review of various documents connected to the Glen Lake distribution plan, including deeds, a purchase agreement, a seller's disclosure statement, the title policy, and a certificate of trust. A closing was scheduled for early July 2008, but it never transpired.¹⁶ A July 23, 2008, letter from Michael O'Neill to Mills complained about Mills failing to forward closing documents to Brooks at State Savings Bank. However, there was undisputed evidence that Anne O'Neill had voiced opposition to the transaction in July 2008, maintaining that the appraised value of the Glen Lake property was inaccurate and too low because it failed to take into consideration an easement. Because Mills was also the trustee of Anne's trust, and in light of his fiduciary duties, he filed a petition in the probate court outlining the planned distribution of the Glen Lake property and requested court authorization of the distribution. The probate court entered an order on August 20, 2008, granting Mills's petition. Mills testified that he thereafter waited for the 21-day appeal period to expire before acting pursuant to the court's order.

Invoice entries reflected that in September 2008, Mills once again began taking steps to distribute the property and close on the loan, but he did not yet forward documents to the lender or title company. The O'Neill siblings complained that Mills was not moving quickly enough to close on the loan and distribute the property. In October 2008, Mills indicated that he was ready to proceed. However, as reflected in an October 2008 email from Brooks to John II, as well as John II's testimony, the bank indicated that it was a different world than that which existed the prior spring given the real estate meltdown and that a new loan request would have to be processed, along with a new appraisal being undertaken. The email from Brooks indicated that the original loan commitment was for \$250,000 and suggested that the siblings were now possibly requesting a greater amount. John II responded to Brooks's email, stating that the family had held a conference and decided on postponing acquisition of the Glen Lake property.

We also note a couple of emails sent in the fall of 2008 by Michael O'Neill, who had been designated by his siblings as essentially their spokesperson in dealing with Mills. In one email to his siblings, Michael indicated that he had second thoughts about the planned Glen Lake transaction given the financial meltdown and plummeting real estate prices. He questioned why they should pay a March 2007 price in November 2008, whether they were "buying into a loss," and why they should "take on this enormous debt for an asset that is not liquid and may not appreciate for 5 years or more." After the siblings had decided against moving forward with the Glen Lake distribution and loan, Michael emailed Mills and informed him of the decision to defer the transaction for the time being due to the upheaval in the financial markets and the bank's need to reprocess the loan. The O'Neill siblings had obtained counsel around this time and there was talk of Mills possibly stepping down as trustee. John II testified that the planned

¹⁶ It appears that the death of a person at the title company may have caused some delay.

distribution and closing were called off by the siblings because the bank was reconsidering the loan and because, with the possibility that Mills would no longer be the trustee, the siblings were contemplating a distribution of the Glen Lake property to all five siblings.

On this record, we cannot conclude that the probate court committed clear error in its factual finding that Mills was not at fault for the failure of the planned distribution of the Glen Lake property and the associated loan to the LLC. Even assuming Anne had not yet voiced objection to the plan at the time of the first scheduled closing in July 2008, it is quite evident that she had concerns at the time. Given the use of “non-Annie” emails, which the court found problematic, it is not even clear that Anne knew about the Glen Lake transaction when the paperwork was first being prepared. And in July 2008 she objected by email to the appraisal value, which was being used to determine the value of her interest and the amount that her siblings would have to pay her to buy out her interest. As the trustee of Anne’s trust and the parents’ two trusts, Mills acted reasonably and appropriately in seeking direction and authorization from the probate court before going forward with the Glen Lake plan. It was also reasonable and appropriate for Mills to await the expiration of the 21-day appeal or reconsideration period following entry of the court’s order. Assuming that more timely action by Mills in September 2008 may have moved up a closing date, it is quite clear that the bank’s actions would have nevertheless unfolded just as they did and that the siblings’ decision to back out of the arrangement would have been the same. By September 2008, the economic crisis had been well underway. Trustee fees as to time spent attending to the Glen Lake property were proper. Any lack of success in finalizing the closing cannot be attributed to Mills; he acted reasonably under the circumstances.

4. THE CONDO

At the evidentiary hearing, Mills testified that his plan was to sell the condo when he first began to administer John’s trust. However, he found that the condo was in disrepair and would require a great deal of work before it could be listed for sale. Indeed, the testimony from all of the siblings indicated that the condo was in poor condition and had experienced many maintenance problems in the past, including failures of the furnace and air conditioning system and a flood caused by a leaking water pipe, which created mold and other issues. John II testified about the “serious degradation” of the condo. Michael O’Neill described the condo as a “wreck” and “college housing without the charm.” According to Mills, there was also the issue of Anne’s financial needs; her only income was social security disability. In a conversation shortly before John’s death, Mills had promised John that he would take care of Anne. Mills’s position was that Anne needed funds and a cash flow for living expenses, not real property interests.

Mills initially rejected any transfer of the condo into Anne’s trust. Mills testified that the situation with Anne and the condo created the chicken and the egg dilemma. While he wanted to sell the condo, Mills felt that he lacked the trust funds to repair the condo in order to make it saleable and lacked the funds to move Anne into different housing as the repairs were completed. Mills had hoped to make a distribution of the Glen Lake property to the O’Neill siblings, with Anne’s interest being bought out, and then take Anne’s money from that transaction to repair the condo. But, as indicated above, the planned distribution of the Glen Lake property did not come to fruition. Mills had also hoped that the Randall property would sell in timely fashion at a fair price so that he could take a share of those proceeds to ready the condo for sale. Mills additionally indicated that Anne was not cooperative in allowing him access to the condo for

purposes of making repairs. Anne testified that she was not happy living in the condo, and Mills testified that Anne did not want to reside in the condo. Mills eventually decided that the condo should not be sold because its appraised value had now dropped \$100,000 from 2007 to 2009.

When asked what his thoughts were regarding whether the condo should be sold or kept, John II testified, “I didn’t have a strong opinion on it one way or the other.” But he then testified “that Annie needed a place to live and . . . she ought to own the condo.” Mary O’Neill testified that she never expressed an opinion regarding whether the condo should be sold or not. Ellen O’Neill testified that she wanted to see the condo sold after her father’s death, but she objected to putting money into the condo to make repairs, believing it could be sold without fixing it up. We note that one of the objections raised by the O’Neill siblings was that Mills breached his fiduciary duties “when he failed to list the condominium for sale,” thereby suggesting that the siblings wanted the condo put up for sale.

On this record, we cannot conclude that Mills’s initial decision to sell the condo, as opposed to transferring it to Anne’s trust, was unreasonable. There is no indication that anyone desired to have the condo distributed to the five siblings jointly. Furthermore, impediments developed beyond Mills’s reasonable control, financial and otherwise, in regard to making timely repairs that would have allowed for the condo to be placed on the market. Placing any blame on Mills based on the fact that the value of the condo decreased dramatically from 2007 to 2009, at which point he realized that a sale should not be pursued, would be tantamount to evaluating his performance with the benefit of hindsight. The same can be said regarding Mills’s unfulfilled hopes to use proceeds from a Randall property sale and Glen Lake distribution to make condo repairs in preparation of a sale. We recognize that Michael O’Neill presented Mills with a proposed plan in September/October 2007 in which Anne would receive the condo into her trust, the four other O’Neill siblings would receive title to the Randall property, Glen Lake property, and the Cheboygan cottage, and the siblings would give Anne \$230,000, in order to equalize the distribution, that could be placed in her trust. However, Mills testified that, at that early stage of his administration of the trusts, i.e., the fall of 2007, there was still the prospect of Anne receiving her cash interests in the Glen Lake property, the Cheboygan cottage, and the Randall property, while still being able to sell the condo, which condo Anne did not want, and which Mills thought should not be placed in Anne’s trust. Again, like much of this case, the O’Neill siblings are lodging complaints about Mills’s performance with the benefit of hindsight.

In sum, we hold that the probate court did not err in rejecting the siblings’ objections to trustee fees associated with Mills’s work in handling the condo. As viewed at the time of his performance of services, Mills’s decisions, actions, and conduct were reasonable under the circumstances.¹⁷ Moreover, the complaint in the civil action did not allege facts rising to the level of gross negligence relative to Mills’s handling of the condo, nor did the documentary evidence submitted in connection with the summary disposition briefs establish a genuine issue

¹⁷ The O’Neill siblings, except for Anne, complain that Mills provided favorable treatment to Anne, ignoring the fact that he owed fiduciary duties to them as well as Anne. The record does not support this contention. Although Mills made cash advances to Anne and allowed her to live in the condo rent-free, as John had also done, Mills always planned and made attempts to offset the benefits given to Anne so as to eventually equalize the distribution of the trust estates.

of material fact regarding gross negligence. Accordingly, summary disposition was proper under MCR 2.116(C)(8) and (10).

As a final note on all of the real estate, we recognize that under the residuary provisions in the trusts, the five O'Neill siblings held equal shares and there was a direction to the trustee that the shares "shall forthwith be distributed to such children, free and discharged from the Trust hereof." The siblings argue that Mills did not do as directed, i.e., forthwith distribute the trusts' assets. This argument simply fails to appreciate the circumstances and obstacles facing Mills and the realities of making the distributions in a manner that was in the best interests of all concerned. It is true that one of the factors to consider in the reasonableness analysis is "the results achieved," as emphasized by Michael, but we must also contemplate, among other factors, "the character of the work involved." *Comerica Bank*, 179 Mich App at 724. The character of the work involved here can reasonably be described as "difficult" under the circumstances. Had the real estate market continued its historical upward trend or only incurred a short-lived downturn, this case, in all likelihood, would not have arisen. However, Mills did not have the benefit of hindsight in making his decisions.

5. TRUSTEE FEES GENERALLY

Here, we shall address a couple of issues that dovetail. The probate court found that some of Mills's services constituted legal work for which he properly billed at \$300 per hour and that some of his services constituted trustee work for which the rate should have been \$150 per hour. However, the court failed to identify those entries in the invoices that the court believed reflected legal work, and Mills himself testified that *all* of the services provided were trustee services, not legal services.

Regardless of whether \$300 per hour was reasonable, the O'Neill siblings effectively waived any claim that the \$300 rate was unreasonable. Mills testified that he disclosed his \$300 per hour rate to the siblings at a family meeting shortly after John's death. Michael O'Neill testified that Mills informed the siblings of a billing rate at the family meeting, although Michael indicated that he could not presently recall the amount that Mills had stated. There is an email in the record sent by Anne to Michael dated October 8, 2007, in which Anne stated, "What I fear is a meeting with [Mills] where I'm asking a million 'stupid' questions at \$300/hr." It is abundantly clear that the O'Neill siblings knew about Mills's billing rate up front and made no objection to it; rather, they allowed him to proceed as trustee and only after the fact asked a court to visit the question of reasonableness as to compensation.

Furthermore, although invoices were not attached showing the \$300 per hour rate, the 2007 accounting that was served on the siblings by Mills reflected a charge of \$63,447 for trustee and legal services rendered. The 2008 accounting showed an additional \$18,879 in charges. Michael O'Neill testified that the amounts charged were of concern to him at the time, but no court intervention was sought, no challenge to the fees was raised, and Mills continued to provide services. As noted earlier, in the paragraph in John's trust regarding the mandatory accountings, it was provided, "Such accounts shall become binding on all income beneficiaries and remaindermen sixty (60) days after mailing." The same provision is contained in Mary Ann's trust. If the O'Neill siblings were troubled by or objected to the fees being charged by Mills, it was imperative for them to squarely and timely confront Mills about a reduction in the fees and, if no satisfactory resolution came about, to seek court intervention on the issue of fees. They were not entitled to sit back and allow Mills to continue providing services, only to attack

his rates and fees in the future.¹⁸ Accordingly, the issues regarding the court's failure to identify particular invoice entries and Mills's testimony about solely providing trustee services are rendered immaterial.¹⁹ We do note that there was testimony by Mills's expert witness that the \$300 per hour rate was reasonable for the services provided by Mills even if Mills viewed those services as "trustee" work.

We have carefully examined all of the various appellate arguments posed by the O'Neill siblings regarding the fees billed by Mills and the separate civil action, and we hold that none of the arguments warrant reversal.

Affirmed. Having fully prevailed on appeal, we award taxable costs to Mills and WWRP pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Christopher M. Murray

¹⁸ Indeed, this reasoning provides additional support for our rulings regarding the objections to trustee fees billed for work concerning the Randall property, the Glen Lake property, and the condo.

¹⁹ While we conclude that the probate court should have allowed the \$300 per hour rate to stand for all of Mills's services, we shall not reinstate the initial charges and will allow the reduction made by the court to remain intact, given that Mills did not file a cross-appeal.