STATE OF MICHIGAN

COURT OF APPEALS

BRIAN M. KELLY TRUST, DENNIS KELLY, Trustee, and SEAN KELLY, Trustee, Petitioners/Counter-Respondents-Cross-Appellees-Appellants,	UNPUBLISHED March 8, 2007
v	No. 268550 Oakland Probate Court LC No. 2003-288141-CZ
ADKISON, NEED, GREEN & ALLEN, PLLC, PAUL GREEN, and JOHN YUN, Respondents/Counter-Petitioners-Cross-Appellants-Appellees.	

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In this legal malpractice case, petitioners appeal by leave granted[1] a probate court order granting summary disposition in favor of respondents pursuant to MCR 2.116(C)(7) on the basis of judicial estoppel. Respondents cross-appeal the same order, which denied respondents' motion for summary disposition pursuant to MCR 2.116(C)(10) based on causation. We affirm.

I. Facts

Brian M. Kelly (decedent) died unexpectedly on August 20, 2000, as a result of injuries he sustained in an automobile accident. The decedent had a complex estate plan, which included several trusts. Petitioners Dennis and Sean Kelly are two of the decedent's ten children and co-trustees of the Brian M. Kelly Family Trust (the trust). The trust was the contingent beneficiary of an IRA that the decedent opened with Charles Schwab on March 16, 1993. The IRA was funded by six mutual funds and one money market fund. These funds were very volatile, and the value of the IRA diminished dramatically before the proceeds could be distributed to the beneficiaries.

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[1] *In re Kelly Estate*, unpublished order of the Court of Appeals, entered July 14, 2006 (Docket No. 268550).

In December 2002, petitioners filed a legal malpractice complaint against respondent law firm Adkison, Need, Green & Allen, PLLC, and respondents Paul Green and John Yun, individual attorneys with the firm. The basis of petitioners' malpractice complaint was respondents' alleged delay in advising or assisting them in effectuating the transfer of the aforementioned IRA that the decedent possessed at the time of his death to petitioners' control. Petitioners alleged that respondents' delay caused a significant diminution in the value of the IRA. According to the complaint, the decedent's IRA was "volatile" and the decedent had devoted a significant amount of time to managing these accounts during his lifetime. The complaint alleged that at the time of the decedent's death on August 20, 2000, the value of the IRA was $675,000. Petitioners asserted that they contacted Charles Schwab, seeking information regarding how to obtain control over the decedent's IRA so that they "could reassign the holdings to a more conservative securities and/or bond/mix." Petitioners' complaint asserted that respondents committed professional negligence in that respondents' delay in ensuring that petitioners had control of the decedent's IRA account precluded petitioners from preventing the value of the IRA to diminish. According to the complaint, petitioners "had sufficient knowledge and understanding as reasonable and prudent attorneys working in the field of probate and trusts to know that the stock had to be sold to generate a change in the investment mix. They failed to properly advise the Trust to obtain a court order if necessary." Petitioners asserted that because of respondents' delay, petitioners were unable to gain access to the decedent's IRA until April 2001, and that by that time, the value of the IRA had decreased by approximately $470,000.

Respondents moved for summary disposition of petitioners' complaint under MCR 2.116(C)(7) and (10). Respondents argued that they were entitled to summary disposition because petitioners' damages were speculative, the statute of limitations had expired, petitioners were judicially estopped from establishing a different (higher) value for the IRA on the date of the decedent's death than that submitted by petitioners in their First Annual Account of Fiduciary, which was accepted by the Emmet County Circuit Court, Family Division, in an order entered on January 2, 2003, and because there was no genuine issue of material fact regarding whether respondents caused petitioners' damages. Regarding judicial estoppel, respondents argued that petitioners had been sued by their siblings in probate court because of the decrease in value of the decedent's IRA and that during the course of that litigation, petitioners prepared an accounting for the trust. In the accounting, petitioners asserted that the value of the IRA on the date of the decedent's death was $393,116.22. According to respondents, because the circuit court approved the accounting, petitioners were estopped from disputing the value of the IRA as established in the accounting.

In an opinion and order dated February 17, 2005, the trial court granted respondents' motion for summary disposition under MCR 2.116(C)(7) based on estoppel, stating:

> Pursuant to *McDannel v. Black*, 270 Mich 305 (1935), "a settled account is conclusive between the parties unless some fraud, mistake, or omission, or inaccuracy is shown." The Petitioner did not claim fraud, mistake, omission, or inaccuracy; therefore pursuant to **MCR 2.116(C)(7),** therefore, summary disposition is appropriate because the Petitioner is estopped from relitigating the issue.

In essence, the trial court ruled that petitioners were judicially estopped from claiming that the value of the decedent's IRA account was more than $393,116.22 on August 20, 2000, the date of the decedent's death.[2]

Although the trial granted respondents' motion under MCR 2.116(C)(7),[3] it denied respondents' motion under MCR 2.116(C)(10), stating: "this Court does not believe that the record would develop where reasonable minds could differ that the Respondent was negligent for damages from the decrease in value of the mutual fund held in the Decedent's IRA account."

II. Standard of Review

Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by judicial estoppel. This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *DiPonio Constr Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001). In deciding a motion brought pursuant to MCR 2.116(C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). Judicial estoppel is an equitable doctrine. *Opland v Kiesgan*, 234 Mich App 352, 365; 594 NW2d 505 (1999). This Court reviews de novo a trial court's decision in equitable matters and reviews for clear error the findings of fact supporting the equitable decision rendered. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

> This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey*, *supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great*

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[2] The trial court's ruling effectively eliminated a substantial portion of petitioners' alleged damages.

[3] On February 2, 2003, respondents filed a counterclaim and third party complaint seeking recovery of $30,758 in unpaid legal fees and then moved for summary disposition under MCR 2.116(C)(10). In its February 17, 2005, opinion and order, the trial court also granted respondents' motion for summary disposition for the payment of legal fees in the amount of $30,758. Petitioners do not contest the propriety of the trial court's ruling in this regard on appeal.

> *Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Memorial Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), lv pending 477 Mich 859 (2006).]

III. Analysis

A. Judicial Estoppel

Petitioners argue that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(7) under the doctrine of judicial estoppel. According to petitioners, the trial court erred in ruling that petitioners were estopped from asserting in their legal malpractice case against respondents a higher value for the decedent's IRA at the time of the decedent's death than the value of the IRA that was asserted by petitioners in their accounting of the trust ($393,116.22), which the Emmet County Circuit Court, Family Division, approved and accepted.

The purpose of judicial estoppel is to protect the integrity of the judicial process. *Opland*, *supra* at 365. The doctrine of judicial estoppel is "[s]ometimes described as the doctrine against the assertion of inconsistent positions[.]" *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994). "[J]udicial estoppel is widely viewed as a tool to be used by the courts in impeding those litigants who would otherwise play 'fast and loose' with the legal system." *Id.* It "'is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.'" *Opland*, *supra* at 364, quoting *Levinson v United States*, 969 F2d 260, 264 (CA 7, 1992). Judicial estoppel must be cautiously applied. *Opland*, *supra* at 363-364. It is an extraordinary remedy that should only be invoked when a party's inconsistent behavior would otherwise result in a miscarriage of justice. *Id.* at 364. Michigan has adopted the prior success model of judicial estoppel, which prevents a party who has successfully and unequivocally asserted a position in a prior proceeding from asserting an inconsistent position in a subsequent proceeding. *Paschke*, *supra* at 509. "[T]he mere assertion of inconsistent positions is not sufficient to invoke [judicial] estoppel[.]" *Id.* at 510. In order for the doctrine to apply, there must be some indication that the court in the earlier proceeding accepted the party's position as true, and the claims in the earlier proceeding and the subsequent proceeding must be "wholly inconsistent." *Id.*

The previous proceeding in this case involved a petition filed by Lisa Kelly (Lisa), the sister of petitioners and a beneficiary of the Brian M. Kelly Family Trust. In March 2002, Lisa petitioned for an accounting of the Brian M. Kelly Family Trust (as well as the Brian M. Kelly Class A Voting Convertible Common Capital Stock Retaining Trust, another trust established by the decedent before his death) and removal of petitioners in the instant case as trustees of the Brian M. Kelly Family Trust.[4] In the petition, Lisa asserted that the value of the trust was

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[4] The petition also sought a restraining order on the sale of the Kelly family business, Titan
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$729,000 at the time of the decedent's death, and had depleted to $40,000 at the time of the filing of her petition. According to Lisa's petition, no distributions had been made from the trust to the beneficiaries, and petitioners mismanaged and wasted the trust's assets, neglected their duties, violated the terms of the trust, failed to observe the standard of care imposed on them by statute, and otherwise engaged in conduct that constituted a breach of trust. The petition specifically alleged that petitioner Sean Kelly "misappropriated $126,049.13 from Titan Finishes Corporation and/or the Brian M. Kelly Family Trust." The petition further asserted that despite repeated demands by the beneficiaries of the trust, petitioners (Dennis and Sean Kelly) repeatedly refused to give an accounting of inventory, receipts, or disbursements related to the trust.

On July 11, 2002, petitioners[5] filed their First Annual Account of Fiduciary. Included as part of the accounting was an inventory listing of the trust's assets on August 20, 2000, the date of the decedent's death. This inventory states that the value of the IRA on August 20, 2000, was $393,116.22. Lisa Kelly filed objections to the accounting, alleging that it contained irregularities, and on December 5, 2002, the court conducted a hearing regarding Lisa Kelly's objections to the accounting. On January 2, 2003, the Emmet County Circuit Court, Family Division, entered an "Order Accepting First Annual Account." In this order, the court explicitly "accepted and approved" the accounting, subject to provisions that neither party contends are applicable on appeal.

As stated previously, in order for judicial estoppel to apply, the party must have successfully asserted the position in the earlier proceeding in that there must be some indication that the court in the earlier proceeding accepted the party's position as true, and the claims in the earlier proceeding and the subsequent proceeding must be "wholly inconsistent." *Paschke*, *supra* at 509-510. In this case, the requirement that the court in the earlier proceeding involving Lisa Kelly's petition must have accepted petitioners' position regarding the value of the IRA as true is satisfied. The court's January 2, 2003, order specifically "accepted and approved" the accounting of the trust, which established the value of the IRA at the time of the decedent's death as $393,116.22. Given the court's explicit acceptance and approval of the accounting, this order is sufficient to establish that the court accepted as true petitioners' assertion in the accounting that the value of the IRA at the time of the decedent's death was $393,116.22.

Furthermore, petitioners' assertion in the earlier proceeding that the value of the IRA at the time of the decedent's death was $393,116.22 is wholly inconsistent with petitioners' claim in their legal malpractice action against respondents that the value of the IRA at the time of the decedent's death was $675,000. Petitioners argue on appeal that that the lower value of the IRA in the first annual accounting was asserted for tax purposes. According to petitioners, the $393,116.22 value "constitutes a tax accounting position being asserted for the filing year after decedent's death, rather than a binding valuation on the true value of the stock as of the date of

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(…continued)

Finishes Corporation, as well as restoration of assets to the trusts.

[5] In fact, only petitioner Sean Kelly's name and signature appeared on the accounting. Although the accounting asserted that Sean Kelly was "Co-Trustee," petitioner Dennis Kelly's name or signature did not appear on the accounting.

death." Petitioners asserted a different value for the IRA on the date of the decedent's death in rendering the accounting for the trust than the value that they assigned to the trust in their legal malpractice complaint against respondents. By claiming different values of the IRA in the earlier proceeding involving their sister's attempt to have them removed as trustees and the subsequent legal malpractice action against respondents, petitioners are attempting to assert two wholly inconsistent positions in order to receive a benefit from both positions. Specifically, petitioners asserted a lower value of the IRA at the time of the decedent's death in the accounting in order to limit or minimize their tax liability; in contrast, petitioners asserted a higher value of the IRA at the time of the decedent's death in their legal malpractice action against respondents in an attempt to maximize their recovery of damages in their legal malpractice action against respondents. This is precisely the type of fast and loose play with the legal system that the judicial estoppel doctrine aims to prevent. *Id.* at 509. Petitioners are deliberately manipulating the value of the decedent's IRA in order to receive a benefit from both positions. Therefore, we conclude that petitioners are bound by the $393,116.22 value of the IRA, as stated in petitioners' accounting and specifically accepted by the Emmet County Circuit Court, Family Division, under the doctrine of judicial estoppel.

We reject petitioners' suggestion that the court granted summary disposition under MCR 2.116(C)(7) based on res judicata. Respondents' motion for summary disposition argued that summary disposition was appropriate under judicial estoppel and made only a cursory reference to res judicata. Furthermore, there was no discussion in the trial court's opinion regarding the applicability of res judicata. We therefore find that the court's reference to res judicata in the order did not constitute a conclusion that petitioners' issues were precluded under res judicata and that the trial court granted respondents' motion under MCR 2.116(C)(7) based on judicial estoppel.

B. Causation

On cross-appeal, respondents argue that the trial court erred in denying their motion for summary disposition under MCR 2.116(C)(10) based on lack of causation. In denying respondents' motion for summary disposition under MCR 2.116(C)(10), the trial court stated:

> Pursuant to *Simko v Blake*, 448 Mich 648 (1995), for a claim of legal malpractice, four elements must be present (1) the existence of an attorney-client relationship; (2) negligence in representation of the plaintiff; (3) causation; (4) damage. This Court has given all the parties the benefit of reasonable doubt and has taken the evidence in light most favorable to the non-moving party; however, this Court does believe that the record would develop where reasonable minds could differ that the Respondent was negligent for damages from the decrease in value of the mutual fund held in the Decedent's IRA account. Pursuant to **MCR 2.116(C)(10)**, the Respondent is not entitled to a judgment as a matter of law at the current time.
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> **IT IS FURTHER ORDERED** that the Respondent Paul Green's Motion for Summary Disposition pursuant to **MCR 2.116(C)(10)** as against the legal

malpractice action filed for damages from the decrease in value of the mutual fund held in the Decedent's IRA account is **DENIED**.

The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella & Petrella & Assoc (On Remand)*, 261 Mich App 705, 712; 683 NW2d 699 (2004). The plaintiff bears the burden of proving the elements of a legal malpractice claim. *Id.* at 718. Generally, proximate cause is a factual inquiry for the jury. *Fiser v Ann Arbor*, 417 Mich 461, 475; 339 NW2d 413 (1983), overruled in part on other grounds 462 Mich 439 (2000). "Any doubts about the relations between the causes and the effects should be resolved by the jury." *Id.* In order to establish proximate cause, a plaintiff must establish that the defendant's action was a cause in fact of the claimed injury. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 613; 563 NW2d 693 (1997). Causation in fact is one aspect of, and distinguishable from, legal or proximate cause. *Richards v Pierce*, 162 Mich App 308, 316; 412 NW2d 725 (1987).

Respondents argue on appeal that the doctrine of loss causation, which has been applied to federal securities fraud cases, applies to the instant case and prevents petitioners from establishing causation. According to respondents, even in cases in which plaintiffs have been victims of securities fraud, the doctrine of loss causation prevents the recovery of losses caused by a general downturn in the stock market. Therefore, respondents contend, petitioners are unable to establish causation in the instant case. In *Bastian v Petren Resources Corp*, 892 F2d 680 (CA 7, 1990), the Seventh Circuit Court of Appeals explained the doctrine of loss of causation as follows:

> Indeed what securities lawyers call "loss causation" *is* the standard common law fraud rule . . . merely borrowed for use in federal securities fraud cases. It is more fundamental still; it is an instance of the common law's universal requirement that the tort plaintiff prove causation. No hurt, no tort. . . .
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> "Loss causation" is an exotic name—perhaps an unhappy one . . . for the standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains. . . . No social purpose would be served by encouraging everyone who suffers an investment loss because of an unanticipated change in market conditions to pick through offering memoranda with a fine-tooth comb in the hope of uncovering a misrepresentation. Defrauders are a bad lot and should be punished, but [they are not] . . . insurers against national economic calamities. If the defendants' oil and gas ventures failed not because of the personal shortcomings that the defendants concealed but because of industry-wide phenomena that destroyed all or most such ventures, then the plaintiffs, given their demonstrated desire to invest in such ventures, lost nothing by reason of the defendants' fraud and have no claim to damages. [*Id.* at 683-685 (citations omitted).]

In granting summary disposition, the trial court did not specifically address the doctrine of loss causation or its applicability to the facts of this case. Respondents argued in their brief in support of their motion for summary disposition that summary disposition was appropriate based on a lack of causation. In their brief, they contended that the falling stock market, not their conduct, caused the decrease in value of the IRA, but their causation argument was not explicitly based on the doctrine of loss causation. Respondents did, however, argue the doctrine of loss causation at the hearing on the motion for summary disposition. Nevertheless, as stated above, the trial court did not specifically address respondents' loss causation argument in denying respondents' motion based on lack of causation. Generally, an issue that has not been raised before and decided by the trial court has not been preserved for review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). However, this Court can address an unpreserved issue if it involves an issue of law and the facts necessary for resolution of the issue are presented. *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002).

We deem it unnecessary to address the applicability of the loss causation doctrine to the facts of this case. As the Seventh Circuit observed in *Bastian*, "'loss causation' is just an exotic name for a standard requirement of tort law" that the plaintiff must prove causation. *Bastian*, *supra* at 686. Therefore, we decline to decide whether the loss causation doctrine from federal securities fraud cases applies to this case, and our analysis of this issue will address whether the trial court erred in denying respondents' motion for summary disposition based on causation.

According to petitioners, respondents' conduct caused the diminution in value of the funds in the decedent's IRA. Petitioners' complaint alleged that at the time of the decedent's death, the IRA had a value of $675,000, and at the time the assets of the IRA were distributed to the trust in April 2001, the value of the IRA had decreased by $470,000. Specifically, petitioners contend that respondents caused the decrease in value of the IRA in two ways. First, petitioners contend that respondents' delay in helping them to gain access and control over the decedent's IRA caused the decrease in the value of the IRA. Second, petitioners contend that respondents orchestrated the transfer of the IRA funds to the trust in December 2000 in a manner which would have caused a substantial tax liability to the estate. Although petitioners were able to get this transfer reversed and avoid the tax liability, the improper transfer further delayed the distribution of the IRA and therefore caused a further decrease in the value of the mutual funds in the IRA.

It is clear that petitioners were relying on the knowledge and skill of respondents regarding the handling of the decedent's estate and specifically the decedent's IRA. Petitioner Sean Kelly asserted that when his father died, he was aware that his father possessed some mutual funds and that the funds were volatile, but he was not sure what the mutual funds were, and that is why he was relying on respondent Green's expertise. It is clear from a memorandum drafted by respondents to petitioners and their eight siblings that as early as August 30, 2000, respondents were cognizant of the fact that the Charles Schwab accounts were "assets . . . of particular importance[.]" Petitioners claim that they informed petitioner Green that the funds in the IRA were very volatile in a telephone conversation on August 21, 2000, and a copy of respondents' billing reveals that respondent Green had a telephone conversation with petitioner Sean Kelly on August 21, 2000, regarding the decedent's death "and implementation of his trusts and will[.]" Respondent Green testified in a deposition that he did not become aware that the funds in the IRA were volatile until November 2000; however, he admitted that he was having

conversations with Charles Schwab and billing the estate for such conversation as early as September 8, 2000.[6] Petitioners' expert, attorney Alan May, testified that within 48 hours of learning that an asset in an estate was volatile, a reasonable and prudent probate lawyer would have undertaken to transfer the funds into more conservative holdings.

Petitioners, not respondents, generally communicated with Charles Schwab regarding the decedent's IRA. On October 26, 2000, Charles Schwab received a request for distribution of the assets of the decedent's IRA to the trust. According to Kelly Qua, a Charles Schwab representative, only the account holder can request such a distribution. However, there was some confusion on Schwab's part regarding whether the trust was a contingent beneficiary of the decedent's IRA, and this caused further delay in the distribution of the trust. The decedent's wife was the primary beneficiary of the IRA, but she died in 1995. On November 3, 2000, Charles Schwab wrote to petitioners alerting them that the decedent had not made a contingent beneficiary designation. In fact, on September 14, 1995, the decedent, in a handwritten note, had named the trust as contingent beneficiary of the IRA. On November 16, 2000, the decedent's former attorney, who had drafted the trust, faxed respondent Green a copy of the decedent's handwritten note, which respondent Green promptly faxed to Charles Schwab. Thereafter, on November 27, 2000, respondent Green wrote a letter to Charles Schwab asking Schwab to transfer the decedent's account to the trust. Charles Schwab transferred the funds in the trust on December 4, 2000, more than three months after the decedent's death. However, when the funds in the IRA were transferred to the trust on December 4, 2000, petitioners learned that it was a taxable event, which petitioners contend would have caused the estate to incur a $200,000 tax liability.[7] Although petitioners could have placed the IRA funds in a safer investment at that time, they contend that the tax liability would have further wasted the estate. Therefore, petitioners sought and were successful in getting Charles Schwab to reverse the transaction. This further delayed the assets of the IRA being transferred to petitioners, however. According to petitioner Sean Kelly, at this point, petitioners lost faith in respondents and did not seek further counsel from them. Thereafter, petitioners retained substitute counsel.

As counsel for the decedent's trusts and estate, respondents had a duty to safeguard the assets of the estate. In legal malpractice actions, a duty exists as a matter of law if there is an attorney client relationship.[8] *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). An attorney has a duty to exercise reasonable skill, care, discretion and judgment in the conduct of the cause and representation of the client. *Id.* at 656. All attorneys have a duty to behave as would an attorney of ordinary learning, judgment or skill under the same or similar circumstances. *Id.* In legal malpractice actions, expert testimony is necessary to establish the standard of care to which an attorney will be held and a violation of that standard. *Beattie v Firnschild*, 152 Mich App 785, 791; 394 NW2d 107 (1986). Petitioners contend that the

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[6] In reviewing the grant or denial of a motion for summary disposition under MCR 2.116(C)(10), this Court must assess the evidence in the light most favorable to the party opposing the motion. *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 686; 650 NW2d 343 (2001).

[7] Respondents do not contest this fact.

[8] The parties do not dispute that an attorney client relationship existed in this case.

testimony of their expert, attorney Alan May, established that respondents failed to act immediately to safeguard the volatile asset and that respondents' conduct of effectuating a transfer of the IRA to petitioners' control in December 2000 would have caused a $200,000 tax liability if it had not been reversed and that this mistake further delayed the safeguarding of the IRA's volatile funds. May testified in a deposition that respondent Paul Green violated the standard of care by accepting a case for which the firm did not have the requisite knowledge. Respondent Green even admitted in a deposition that he had no experience with dealing with brokerage accounts, such as the decedent's IRA, in terms of how to change or close such accounts on behalf of clients. Despite his admitted complete lack of experience in dealing with such matters, when petitioner Sean Kelly asked respondent Green, who was counsel for Titan Finishes Corporation, if Green could refer him to an attorney who could handle estate matters, respondent Green represented to petitioner that respondents handled estate matters. May further asserted that respondent Green violated the standard of care by characterizing respondent John Yun as a probate specialist and in failing to supervise Yun when Yun was working in an area that was beyond his level of expertise. May also testified that respondent Yun violated the standard of care by failing to seek the counsel of someone who "had the knowledge." According to May, once respondents knew that the assets in the trust were volatile, they should have "moved immediately to cure the problem, or found someone to cure the problem. . . . [H]e could have and should have . . . either directly or indirectly through other counsel in his firm proceeded to sell the stock through a safe harbor account." According to May, respondents should have moved within 48 hours of learning of the volatility of the funds to safeguard the IRA.

As noted above, proximate cause in legal malpractice cases is generally a factual inquiry for the jury. *Fiser*, *supra* at 475. We find that the trial court correctly held that petitioners established a genuine issue of fact regarding whether respondents were a cause in fact of the decrease in the value of the decedent's IRA, at least from August 20, 2000, until petitioners retained alternative counsel in December 2000 or January 2001. Because an attorney client relationship existed in this case, respondents had a duty to safeguard the assets of the decedent's estate. Viewing the evidence in the light most favorable to petitioners, as the non-moving party, respondents knew about the volatility of the decedent's IRA. Petitioners' expert testified that a reasonable attorney would have acted within 48 hours of learning of the volatility of the funds, yet respondents utterly failed to safeguard the funds in the IRA despite their knowledge regarding the volatility of the assets. We therefore conclude that petitioners established an issue of fact regarding causation and that the trial court properly denied respondents' motion for summary disposition under MCR 2.116(C)(10) based on causation.

We emphasize that our holding today should not be interpreted as imposing a duty as a matter of law upon attorneys engaged in representation of an estate or other legal matters with financial implications to provide complicated financial advice and counsel. "An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession." *Simko*, *supra* at 656. Neither the question of the existence of a lawyer's duty to render financial advice nor the extent of that duty was raised before or decided by the trial court, and the issue of duty is not before this Court on appeal.

Affirmed.

/s/ Stephen L. Borrello
/s/ Jessica R. Cooper

S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

BRIAN M. KELLY TRUST, DENNIS KELLY, Trustee, and SEAN KELLY, Trustee,

Petitioners/Counter-Respondents-Appellants/Cross-Appellees,

v

ADKISON, NEED, GREEN & ALLEN, PLLC, PAUL GREEN, and JOHN YUN,

Respondents/Counter-Petitioners-Appellees/Cross-Appellants.

UNPUBLISHED
March 8, 2007

No. 268550
Oakland Probate Court
LC No. 2003-288141-CZ

Before: Borrello, P.J., and Jansen and Cooper, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I concur in parts I, II, and III.A of the majority opinion. I write separately, however, because I disagree with the majority's analysis in part III.B. The majority assumes that respondents, as probate attorneys, owed the legal duty to maximize the rate of return on the Charles Schwab IRA, or at least to promptly move the volatile IRA assets into more stable and conservative holdings. I cannot agree.

Whether a duty exists in a legal malpractice action is a question of law. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). In general, it is the duty of the trustee "to administer a trust expeditiously for the benefit of the beneficiaries[.]" MCL 700.7301. The trustee occupies a fiduciary relationship with respect to the trust beneficiaries, and "[e]xcept 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.

Under the prudent investor rule, the trustee must "invest and manage fiduciary assets solely in the interest of the beneficiaries." MCL 700.1506. The trustee "may delegate investment and management functions," provided that he or she "exercises reasonable care, skill, and caution" in (1) "[s]electing an agent," (2) "[e]stablishing the scope and terms of the delegation," and (3) "[p]eriodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation." MCL 700.1510(1)(a)-(c). If the trustee complies with these requirements, the agent replaces the trustee as the new fiduciary,

MCL 700.1510(3), and the trustee cannot be held personally liable to the beneficiaries for the agent's investment or management decisions, MCL 700.1510(2).

In this case, there was no credible evidence that the trustees specifically delegated their investment and management duties to respondents. Moreover, even if there were evidence of such a delegation to respondents, the record does not support a conclusion that the trustees "exercise[d] reasonable care, skill, and caution" in "[e]stablishing the scope and terms of the delegation." MCL 700.1510(1)(b). This is borne out by the fact that respondents were expressly retained only as probate attorneys, and not as investment advisors or financial planners. Moreover, although petitioner's proposed expert opined that respondents, as probate attorneys, had the duty to move the volatile IRA assets into a more stable and conservative investment within 48 hours, I have located no support for this proposition in our statutes or case law. In the absence of specific evidence that the trustees delegated their investment and management duties pursuant to MCL 700.1510(1), I conclude that respondents owed no duty to prudently invest or manage the assets of the IRA. Respondents' sole duty was to exercise due care in the *rendering of legal services*, by acting "as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances." *Simko v Blake*, 448 Mich 648, 658; 532 NW2d 842 (1995). The duty to prudently invest and manage the trust assets was separate from the duty to provide legal services, and it belonged to the trustees alone rather than to respondents.

/s/ Kathleen Jansen