

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

DEANA IVANCIC,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-050
RAE ANN ENOS,	:	
Defendant,	:	
DAVID H. DAVIES, ESQ., et al.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Probate Division, Case No. 09 CV 0183.

Judgment: Affirmed.

Margaret Mary Meko, The Meko Law Office, LLC, 2778 SOM Center Road, Suite 202, Willoughby Hills, OH 44094; and *Anthony Smith*, Karl & Smith, 493 Front Street, Berea, OH 44017 (For Plaintiff-Appellee).

David H. Davies, Esq., pro se, Law Firm of David H. Davies, 38108 Third Street, P.O. Box 1264, Willoughby, OH 44096 (Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Appellant, David H. Davies, appeals from two judgment entries of the Lake County Court of Common Pleas, Probate Division. The first addressed the court's determination that it had jurisdiction to hear an amended complaint for breach of fiduciary duty brought by the half-sister of the administrator against the administrator

and the administrator's attorney, Mr. Davies, as well as a cross-claim for breach of fiduciary duty and fraud asserted by the administrator against her attorney. Both pleadings sought, inter alia, an accounting and money damages via disgorgement of the funds paid to Mr. Davies from the estate, as well as attorney fees. Just before trial, the siblings reached a settlement between them, and together proceeded to trial on the claims against Mr. Davies.

{¶2} The second appealed judgment was entered after trial against Mr. Davies in the amount of \$67,509.80, which sum included \$50,000 he received in satisfaction of his claim for attorney fees incurred by the decedent before his death. He received this money through the sale of an estate asset, without presentment of his claim to the administrator of the estate or the court. For the following reasons, we find Mr. Davies' assignments of error to be without merit and affirm the judgment of the probate court.

Substantive Facts and Procedural History

{¶3} On June 9, 2007, Raymond Griffith died intestate, leaving behind two daughters. His elder daughter, Deana Ivancic, was born to Dorothy Francis (nee Quick), who he never married. Mrs. Francis eventually married Ron Francis, who raised Ms. Ivancic as his own, but never adopted her. The younger daughter, Rae Ann Enos, was born to Mr. Griffith's wife. Ms. Enos was aware that she had a half-sister, but throughout her life was unsure whether or not Ms. Ivancic had been adopted.

Attorney Davies' Lien for Attorney Fees

{¶4} Just prior to and in anticipation of Mr. Griffith's death, Ms. Enos sought assistance from David H. Davies, Esq. in the administration of her father's estate. Mr. Davies had been Mr. Griffith's personal attorney prior to his death, having worked on a

number of matters for Mr. Griffith between 2005 and 2007. In lieu of ongoing and direct payment for the services Mr. Davies rendered to Mr. Griffith, Mr. Davies asserts that he entered into a contingent fee agreement with Mr. Griffith, whereby he took a one-third interest in the value of Mr. Griffith's home. Mr. Davies, however, was unable to produce a signed fee contract. He recorded a \$50,000 mortgage lien against the property on June 7, 2007, two days before Mr. Griffith's death, while he lay in the hospital succumbing to a stroke.

{¶5} Apparently unaware that Mr. Davies had become the single largest creditor of the estate of her late father, Ms. Enos hired Mr. Davies as attorney for the estate. No conflict of interest waiver was offered or executed between Ms. Enos and Mr. Davies.

{¶6} The primary asset of Mr. Griffith's estate was a home appraised at \$200,000. A sale of the home was arranged, and Mr. Davies received \$50,000 directly from the title company out of escrow, in satisfaction of the debt he had secured by the previously recorded mortgage lien. Mr. Davies never submitted his claim for attorney fees in writing to Ms. Enos, nor to the probate court for approval. The remainder of the proceeds from the sale of the home was deposited into the estate account; bills were paid and distributions made. A First Partial Account for the estate was submitted to the court. That accounting showed receipts of the real estate, an automobile, and three disbursements.

{¶7} The first disbursement was described as "Real Estate Settlement Statement Attached;" the second was described as "Rae Ann Enos Disbursement;" and the third indicated that the funeral bill was "Paid Outside of Estate." No real estate

settlement statement was attached, however, nor was one found in the certified copy of the probate court file submitted at trial.

{¶8} Inasmuch as Ms. Enos was listed as the sole beneficiary, no final accounting was filed; rather, a Certificate of Termination was prepared by Mr. Davies, listing payment to him of \$3,200, for “all attorney fees.” It was signed by Ms. Enos and filed with the court. Closing of the estate was delayed in order to deal with a \$7,000 claim presented to the estate for medevac services provided to Mr. Griffith in his final days. That late claim was rejected, and the probate court issued a Certificate of Termination.

The Undisclosed Heir

{¶9} According to Ms. Enos, upon hiring Mr. Davies on June 9, 2007, she disclosed to him that she had a half-sister, but she told him she was unsure whether the half-sister had been adopted by a new father. Although Mr. Davies was aware of the existence of this second child through his conversations with the decedent, he did not conduct an independent investigation into whether Ms. Ivancic had been adopted. Instead, he prepared for Ms. Enos’ signature and filed the Application for Authority to Administer Mr. Griffith’s estate, listing Ms. Enos as the sole beneficiary. Ms. Enos inquired of Mr. Davies at the time the documents were prepared why she was the only beneficiary listed, but she was told by Mr. Davies not to worry about it. Mr. Davies disputes this, claiming Ms. Enos told him that the half-sister had been adopted. The estate was administered by Ms. Enos without notice to Ms. Ivancic.

{¶10} About two years after the estate was first opened, Ms. Ivancic learned of her father’s death, and, through her attorney, Margaret Meko, made inquires about her

father's estate. Ms. Ivancic filed a motion to re-open the estate, which the probate court granted. Ultimately, Attorney Gerald Walker was appointed administrator of the re-opened estate.

The Adversary Action

{¶11} In a separate adversarial action in the probate court, Ms. Ivancic filed a complaint against Ms. Enos, alleging breach of fiduciary duty and conversion. She sought compensatory damages as well as attorney fees. The complaint was subsequently amended to include Mr. Davies, and set forth claims for relief against both Ms. Enos and Mr. Davies for breach of fiduciary duty in failing to disclose Ms. Ivancic as a next-of-kin, for distributing the net estate to Ms. Enos rather than dividing the net estate between the two siblings, and for satisfying Mr. Davies' mortgage lien from estate assets without disclosing the nature of this conflicting interest to his client or the court, and without obtaining court approval for such payment. The amended complaint sought money damages, an accounting, and disgorgement, together with attorney fees.

{¶12} Ms. Enos then filed a cross-claim against Mr. Davies for breach of fiduciary duty, fraud, and conversion, alleging that: 1) he failed to disclose that he was an estate creditor; 2) he failed to disclose that he had no professional liability insurance; 3) he failed to investigate whether Ms. Ivancic had been adopted, and thus induced her to sign incorrect disclosure forms filed in the probate court; and 4) he failed to properly instruct her as to the distribution of estate assets. In her prayer for relief, Ms. Enos sought an accounting and disgorgement of the funds to the estate, a determination of her liability to Ms. Ivancic, an order setting forth an equitable distribution of the entire estate, attorney fees, and punitive damages.

{¶13} In the re-opened probate administration, Ms. Ivancic also filed a motion requesting an accounting of the money received by Mr. Davies in payment of the alleged debt, and for an order determining her status as an heir. The trial court appointed Attorney Gerald Walker as Successor Administrator, and he was charged with investigating the \$50,000 mortgage pay-off to Mr. Davies.

Investigation of the \$50,000 Fee Requested by the Probate Court

{¶14} The propriety of the payment to Mr. Davies was first raised at a pretrial conference, and the probate judge ordered Attorney Walker to conduct an investigation of the circumstances surrounding the \$50,000 payment. Attorneys Walker and Meko met with Attorney Davies, who explained that he had handled several legal matters for the decedent justifying the \$50,000 fee. Attorney Walker reported to the court that both he and Attorney Meko had requested that Attorney Davies provide them with all documentation to support the claim for fees. He failed to do so, and Attorney Walker opined that, based upon the investigation of the pertinent court dockets, the “\$50,000 fee does not seem justified based upon the type and amount of work that Mr. Davies appears to have put into each of these matters.” He further advised the court that the payment was “improper and a breach of fiduciary duty by Mr. Davies, whether [or not] it can be justified by time sheets, fee bills, etc., because Mr. Davies had a conflict of interest in representing the Estate and being a large [creditor] of the Estate and because he did not have this Court specifically consider and approve this large fee against the Estate.”

The Motion to Dismiss

{¶15} While a motion to compel discovery was pending against him, Mr. Davies filed a motion to dismiss the complaint and the cross-claim, arguing that the probate court lacked jurisdiction under R.C. 2101.24 to entertain a breach of fiduciary duty claim seeking monetary damages. He further argued that both sisters failed to state claims upon which relief could be granted, because he owed no fiduciary duty to either sister. He alleged that he did not represent Ms. Ivancic and he was only acting as the fiduciary's, Ms. Enos, attorney and not as the fiduciary. The probate court overruled his motion to dismiss, and a trial date was set.

The Trial and Decision

{¶16} A pre-trial hearing was held, during which the magistrate took testimony from both Ms. Enos, who by then resided out of state, and Mrs. Francis. A recording was made of this hearing and a transcript was incorporated into the record; however, only Mrs. Francis' portion was properly recorded. The trial record has been supplemented pursuant to App.R. 9(E) to properly reflect Ms. Enos' testimony.

{¶17} Just prior to a trial to the magistrate, Ms. Ivancic and Ms. Enos stated on the record that they had successfully settled all claims between them. Together, they proceeded to trial on the amended complaint and cross-claim against Mr. Davies.

{¶18} At trial, Mr. Davies was the sole witness. Attorneys for both Ms. Ivancic and Ms. Enos were present, and conducted direct and cross examinations of Mr. Davies. Mr. Davies testified on his own behalf, detailing the nature and extent of his legal work for the decedent and, later, his estate. He submitted five fee bills, which only partially itemized the time spent on the various matters for the decedent, and which were not prepared contemporaneously with the services rendered.

{¶19} Post trial, only Ms. Ivancic filed proposed findings of fact and conclusions of law. The magistrate issued a lengthy and well-supported decision determining Ms. Ivancic to be an heir, and finding that Mr. Davies breached a fiduciary duty owed to both sisters.

{¶20} The magistrate further found that Mr. Davies did not make a proper claim, pursuant to R.C. 2117.06(A), for the \$50,000 he received outside the administration of the estate, in satisfaction of his lien against the decedent's real property. He failed to produce a contingency fee agreement to support his claim, and failed to disclose to the parties or the court his conflict of interest between his role as the estate attorney and the estate's largest creditor.

{¶21} The magistrate recommended that the probate court "order Attorney Davies to return the \$50,000 to the estate for distribution in accordance with the Statute of Descent and Distribution; return \$3,200.00 he received for legal services rendered in decedent's estate; order Attorney Davies to account for distribution of \$9,471.42 listed as remaining assets on the First Partial Account; and pay attorney fees and costs of attorneys Meko and Smith, the amount to be approved by the Court upon application."

{¶22} The trial court considered Mr. Davies' objections and applications for attorney fees submitted by Ms. Ivancic and Ms. Enos. After a hearing, the trial court overruled Mr. Davies' objections, expressly finding that Mr. Davies "owed a duty to Rae Ann Enos" and that he "breached his fiduciary duty in failing to investigate to determine whether Deana Ivancic had been adopted and to make a claim for \$50,000 for legal services rendered to decedent or disclose his conflict of interest as a claimant." The court described this as "an obvious conflict of interest," requiring either a waiver or new

counsel. The trial court's entry is silent regarding any fiduciary duty owed by Mr. Davies to Ms. Ivancic.

{¶23} The trial court reaffirmed its earlier decision regarding its own jurisdiction to consider the complaint and award money damages, and granted Ms. Ivancic's application for attorney fees in the amounts of \$9,650.80 and \$1,984.00. It also granted Ms. Enos' application for attorney fees, in part, in the amount of \$4,375.00.

{¶24} The trial court explained how it determined each attorney fees award. The court granted Ms. Ivancic's request in whole because "Attorney Meko was lead counsel as attorney for plaintiff and responsible for the bulk of legal services necessary." As for the fees it awarded Ms. Enos, the trial court considered Prof.Cond.R. 1.5 and found "the hours billed exceeded the time and labor required, there were no novel questions involved, and that the fee exceeds that customarily charged in the locality for similar legal services. Rae Ann Enos and Deana Ivancic settled the claims prior to trial. Attorney Smith then continued his representation on his client's cross-claim against attorney Davies. Fewer hours of legal services were required by attorney Smith based on the legal services rendered by attorney Meko."

{¶25} Mr. Davies was ordered to return the \$50,000 to the Griffith estate, together with \$1,500.00 of the \$3,200.00 he had received as attorney fees for his service to the estate. He timely filed an appeal, and now brings five assignments of error for our review:

{¶26} "[1.] The court erred in denying defendant-appellant's motion to dismiss for lack of jurisdiction and for failure to state a claim for which relief may be granted."

{¶27} “[2.] The court erred in finding that defendant Davies’ [sic] was required to present a claim against the estate for payment of a note secured by a duly filed and recorded lien against real estate owned by the decedent and that his failure to do so requires that he refund the money he received from the proceeds of the sale in satisfaction of that lien.”

{¶28} “[3.] The court erred in finding that the plaintiff and defendant Enos were entitled to an award of attorney fees against the defendant Davies.”

{¶29} “[4.] The court erred in ordering that defendant-appellant return a portion of the fee paid to him for his representation of the estate.”

{¶30} “[5.] The court erred in finding that the evidence proved that defendant breached his fiduciary duty and that the plaintiff was entitled to damages.”

{¶31} We will initially address the first and fifth assignment of errors together as they are interrelated.

Motion to Dismiss

{¶32} In his first assignment of error, Mr. Davies argues that the trial court erred in failing to dismiss the complaint and cross-claim against him. He contends that the probate court lacked jurisdiction to hear a breach of fiduciary duty action seeking money damages, and that both Ms. Ivancic and Ms. Enos failed to state claims upon which relief could be granted.

{¶33} “An appellate court’s standard of review for a trial court’s actions regarding a motion to dismiss is de novo.” *Bliss v. Chandler*, 11th Dist. No. 2006-G-2742, 2007-Ohio-6161, ¶91, citing *State ex rel. Malloy v. City of Girard*, 11th Dist. No. 2006-T-0019, 2007-Ohio-338, ¶8, citing *Clark v. Alberini*, 11th Dist. No. 2001-T-0015, 2001 Ohio App.

LEXIS 5665, *4 (Dec. 14, 2001). The “[d]ismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in [nonmoving party’s] favor, it appears beyond doubt that [nonmoving party] can prove no set of facts warranting relief.” *Id.* at ¶92, quoting *Malloy* at ¶9, citing *Clark v. Connor*, 82 Ohio St.3d 309, 311 (1998).

Civ. R. 12(B)(1) and the Jurisdiction of the Probate Court

{¶34} In denying Mr. Davies’ motion to dismiss, the trial court cited to *Gilpin v. Bank One Corp.*, 12th Dist. No. CA2003-04-073, 2004-Ohio-3012, and stated that “the Court does have jurisdiction to address the breach of fiduciary duty by an estate attorney.” We agree with this view.

{¶35} Among other subject matters, a probate court has the exclusive jurisdiction “[t]o direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates” and “[t]o direct and control the conduct of fiduciaries and settle their accounts.” R.C. 2101.24(A)(1)(c) and (m). Although probate courts are courts of limited jurisdiction, they have plenary power “at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code.” R.C. 2101.24(C).

{¶36} The Supreme Court, in *State ex rel. Lewis v. Moser*, 72 Ohio St.3d 25 (1995), addressed this issue by declining to issue a writ of mandamus compelling a court of common pleas judge to hear a case that had been transferred to the probate division. The court held that “relators [had] failed to establish the manifest lack of

jurisdiction” required to issue the writ, noting that it was “not convinced that the probate court so patently and unambiguously lacks jurisdiction over claims for breaches of fiduciary duties seeking monetary damages that we are willing to issue a writ of mandamus and circumvent the appellate process.” *Moser* at 28-29. The *Moser* court further suggested that a basis existed for recognizing that probate courts can award monetary damages, based on a thoughtful analysis of the issue provided in *Goff v. Ameritrust Co., N.A.*, 8th Dist. Nos. 65196 and 66016, 1994 Ohio App. LEXIS 1916 (May 5, 1994).

{¶37} Since *Moser*, Ohio courts have construed these provisions to mean that probate courts have jurisdiction over claims of breach of fiduciary duty arising from the administration of an estate and to award monetary damages. See, e.g., *Ohio Farmers Ins. Co. v. Bank One*, 2d Dist. No. 16981, 1998 Ohio App. LEXIS 3854 (Aug. 21, 1998); *Keith v. Bringardner*, 10th Dist. No. 07AP-666, 2008-Ohio-950; *Gilpin, supra*.

{¶38} Most significantly, this court has held that probate courts have jurisdiction to hear monetary claims arising out of subject matters within the probate court’s statutory jurisdiction. See *Holik v. Lafferty*, 11th Dist. No. 2005-A-0005, 2006-Ohio-2652. “The plenary power situated in the probate court is a complete and total power to determine issues concerning the administration of an estate. This power extends to the right to determine the heirs and to order distribution to them. In other words, it is strictly limited to matters involved the enhancement or depletion of the estate and distribution of that estate to the proper heirs.” 1 *Baldwin’s Oh. Prac. Merrick-Rippner Prob. L.* Section 3:4 (2011).

{¶39} Ms. Enos' and Ms. Ivancic's claims against Mr. Davies were for breach of fiduciary duty arising out of the administration of their father's estate. They both sought to enhance the estate in the wake of Mr. Davies' depletion of the estate by \$50,000, and to have the estate distributed according to law. Therefore, the matter was properly before the probate court. The probate court did not err in declining to dismiss the complaint for lack of jurisdiction pursuant to Civ.R. 12(B)(1).

Civ.R. 12(B)(6) and Claims for Breach of Fiduciary Duty

{¶40} Mr. Davies also argues that the probate court erred when it did not dismiss the amended complaint and cross-claim for failure to state a claim upon which relief can be granted, pursuant to Civ.R. 12(B)(6).

{¶41} A Civ.R. 12(B)(6) motion is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545 (1992). A party may only prevail on a motion to dismiss under Civ.R. 12(B)(6) if it “appear[s] beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.’ *O’Brien v. Univ. Comm. Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, * * * syllabus. A court ‘must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party.’ *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.” *Estate of Ridley v. Hamilton Cty. Bd. of MRDD*, 102 Ohio St.3d 230, 232 (2004). “Under these rules, a plaintiff is not required to prove his or her case at the pleading stage. * * * Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss.” *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144-145 (1991).

{¶42} Under Ohio’s liberal pleading rules, all that is required of a plaintiff bringing suit is “(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled.” Civ.R. 8(A).

{¶43} The premise of Mr. Davies’ motion was jurisdictional – his argument to the trial court was that both sisters’ claims for breach of fiduciary duty were not the “the matters and types of claims” the probate court has jurisdiction to hear under R.C. 2101.24. Only on appeal does he claim Ms. Ivancic’s pleadings were insufficient in that she “does not allege that he was acting in a fiduciary capacity *as the term fiduciary applies to probate matters.*” (Emphasis added.) He appears to limit his attack on the pleadings by citing the definition of “fiduciary” found in the probate code. Mr. Davies’ motion ignored the fact that a fiduciary duty may arise out of a relationship as well.

{¶44} Both sisters claimed relief based on a breach of fiduciary duty. Generally, a “fiduciary” is defined as “a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.” *Hurst v. Entertainment Title Agency*, 157 Ohio App.3d 133, 2004-Ohio-2307, ¶39 (11th Dist.), quoting *Strock v. Pressnell*, 38 Ohio St.3d 207, 216 (1988). In *Hurst*, this court further explained that “[a] breach of a fiduciary duty claim essentially is a negligence claim involving a higher standard of care. Thus, the party asserting such breach must establish the existence of a fiduciary duty, a breach of that duty, and an injury proximately therefrom.” (Citations omitted.) *Id.* at ¶39. To succeed on a claim of breach of a fiduciary duty, the plaintiff must prove the existence of a duty arising out of a fiduciary relationship, failure to observe that duty, and injury resulting proximately

therefrom. *Culbertson v. Wigley Title Agency*, 9th Dist. No. 20659, 2002-Ohio-714, ¶24, citing *Strock* at 216.

{¶45} Ms. Ivancic’s amended pleading alleged that Mr. Davies, acting in his capacity as the estate’s attorney, owed her a fiduciary duty as a beneficiary of that estate. She further alleged that Mr. Davies breached that duty by: 1) “failing to disclose [Ms. Ivancic] as a next of kin/beneficiary;” 2) distributing all the net proceeds of Mr. Griffith’s estate to Ms. Enos; and 3) “receiving a \$50,000 pay-off of a mortgage lien on Estate real property and at the same time representing the Estate, and, upon information and belief, not [fully] disclosing and obtaining Court approval of this pay-off for attorney fees.” Ms. Enos raised the same claims in her cross-claim. She stated that Mr. Davies owed her a fiduciary-duty arising from the attorney-client relationship. She alleged, in the same way Ms. Ivancic did, that Mr. Davies had breached that duty, and, in essence, she sought the same result as Ms. Ivancic.

{¶46} A review of the amended complaint and cross-claim reveals that the sisters’ pleadings more than met the liberal pleading standard in Ohio if indeed a fiduciary relationship existed with Mr. Davies.

Fiduciary Duty

{¶47} In his fifth assignment of error, Mr. Davies challenges the probate court’s determination that he breached a fiduciary duty to Ms. Ivancic and Ms. Enos, and that as a result of the breach, they were entitled to monetary damages. Mr. Davies argues that he could not have breached a duty he did not owe, and that, even if he had been acting in a fiduciary capacity, no proof was offered to support a finding of breach.

Standard of Review

{¶48} The existence of a duty is a question of law. *Studniarz v. Sears Roebuck & Co.*, 11th Dist. No. 2009-L-159, 2010-Ohio-3049, ¶19, citing *Frano v. Red Robin Internatl., Inc.*, 181 Ohio App.3d 13, 2009-Ohio-685, ¶65 (11th Dist.). Courts review questions of law *de novo*.” *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶34.

{¶49} Upon a *de novo* review of pure questions of law, a court of appeals reviewing a trial court’s judgment will give considerable deference to a trial court’s findings of fact and conclusions of law. “Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. Deference is extended to the trial court’s determination because “the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 80 (1984). Thus, “an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge.” *Id.*

Whether a Fiduciary Duty was Owed and to Whom Was that Duty Owed

{¶50} Mr. Davies first argues the trial court erred in finding that he owed a fiduciary duty to either sister. At the outset, we note the trial court’s entry overruling Mr. Davies’ objections and modifying the Magistrate Decision is silent regarding Mr. Davies’ duty toward Ms. Ivancic. Rather, the trial court determined liability based on the clear

and unambiguous fiduciary duty Mr. Davies owed to Ms. Enos arising from the attorney-client relationship.

{¶51} The magistrate correctly found that the attorney-client relationship imposes a fiduciary duty upon the attorney for the estate to conduct business in good faith. That law is well-settled. “There is no doubt that an attorney-client relationship imposes a fiduciary duty upon the attorney and that the attorney must conduct business in good faith.” *Petersen Painting & Home Improvement, Inc. v. Znidarsic*, 75 Ohio App.3d 265, 269 (11th Dist.1991). See also Ohio Rules of Professional Conduct. Ms. Enos, as administrator of her father’s estate, hired Mr. Davies to represent her in the administration of the estate. Thus an attorney-client relationship was established, and Mr. Davies owed a fiduciary duty to Ms. Enos as his client.

{¶52} Mr. Davies argues he owed no such duty toward the beneficiary, Ms. Ivancic, as he was not her attorney. The law relating to the duty owed to certain nonclients, such as the beneficiaries of an estate, is still evolving given the line of cases decided after *Scholler v. Scholler*, 10 Ohio St.3d 98 (1984), and *Elam v. Hyatt Legal Serv.*, 44 Ohio St.3d 175 (1989) (relied upon by the magistrate to find there was a fiduciary duty owed to Ms. Ivancic), which were followed by *Arpadi v. First MSP Corp.*, 68 Ohio St.3d 453 (1994), and the passage of statutes designed to shield an attorney from liability to a third party, including R.C. 5815.16. Given the existence of this statute, the trial court should have dismissed Ms. Ivancic’s claim against Mr. Davies for breach of fiduciary duty. We need not address this issue further, however, as it is not outcome-determinative. Even if Ms. Ivancic’s claim against Mr. Davies for breach of fiduciary duty had been dismissed, the result would have been the same.

Whether Mr. Davies Breached his Fiduciary Duty

{¶53} Substantial competent and credible evidence was presented to support a finding that Mr. Davies breached a clearly established duty to Ms. Enos. In fact, a review of the trial record reveals three distinct breaches of that duty by Mr. Davies: 1) the failure to properly investigate Ms. Ivancic's status and list her as a beneficiary; 2) undertaking representation of the estate despite his substantial and direct conflict of interest with the interests of the estate and its beneficiaries, and failure to disclose such interest; and 3) his failure to properly present his \$50,000 claim against the estate.

Breach of Duty to Investigate

{¶54} The trial court properly found that the first breach of duty occurred when Mr. Davies failed to investigate Ms. Ivancic's status and list her as a beneficiary on the probate forms. The trial court properly described this as a breach of a duty owed to Ms. Enos. As administrator of the estate, Ms. Enos was charged with the duty to investigate and identify all potential beneficiaries of her father's estate. See *In re Estate of Daily*, 12th Dist. No. CA99-03-011, 1999 Ohio App. LEXIS 5118, *5 (Nov. 1, 1999), citing *In re Estate of Haggerty*, 70 Ohio Law Abs. 463 (P.C. 1954). Mr. Davies, as her attorney, had a duty to assist her in the accomplishment of this task. Failure to properly identify all potential beneficiaries exposes an attorney for an estate to potential liability. See, e.g., *Brinkman v. Doughty*, 140 Ohio App.3d 494 (2d Dist.2000) (reversing a trial court's grant of summary judgment to estate attorneys who failed to list decedent's known siblings as next of kin in a wrongful death case).

{¶55} There was no dispute before the court below that Mr. Davies was aware of Ms. Ivancic's existence, and there was no dispute that he failed to independently investigate whether she had indeed been adopted.

{¶56} Furthermore, credible evidence exists in the record that Ms. Ivancic's status had never been definitively determined. Mr. Davies was duty-bound to undertake an investigation before preparing and submitting the Standard Probate Form 1.0 listing all beneficiaries.

Breach of Duty to Disclose and Avoid a Conflict of Interest

{¶57} No legitimate argument may be made that Mr. Davies' \$50,000 claim against the estate, satisfaction of which would consume 25 percent of the estate's value, did not create a conflict of interest. Such a conflict had to be affirmatively and fully disclosed to his client and estate beneficiaries *before* undertaking representation. *See, e.g., Disciplinary Counsel v. Dettinger*, 121 Ohio St.3d 400, 2009-Ohio-1429 (upholding a finding of misconduct when "respondent had violated DR 5-101(A)(1) and 5-104(A) in continuing to represent [the] estate without first obtaining his client's and the executor's consent after explaining the attendant risks of their conflicting interests"); *Kinnunen v. Schulz*, 11th District No. 1144, 1984 Ohio App. LEXIS 10059 (May 18, 1984) (allowing a late claim against an estate due to the estate attorney's failure to disclose his conflicted representation of both the estate and the claimant). The fact that Ms. Enos signed off on the settlement statement listing the payment to Mr. Davies is insufficient notice and waiver of any conflict.

Failure to Present His Claim to the Estate and the Probate Court

{¶58} Lastly, competent, credible evidence was presented to support the trial court's determination that Mr. Davies compounded his failure to disclose and avoid a clear conflict of interest by failing to present his claim for fees in the same fashion as any other estate creditor. He satisfied his alleged debt outside the administration of the estate, in direct violation of R.C. 2117.06, thereby avoiding statutory safeguards and probate court oversight. Because of Mr. Davies' status as both attorney to the estate and creditor, his duty to disclose and properly present his claim is heightened, and such self-dealing is a clear breach of fiduciary duty. See, e.g., *Ollick v. Rice*, 16 Ohio App.3d 448 (8th Dist.1984) (finding that the prohibition on self-dealing by an estate fiduciary is equally applicable to the attorney employed by the fiduciary).

{¶59} The trial court made very specific findings of fact and conclusions of law, which were well supported by the trial record. Because substantial competent and credible evidence exists to support the trial court's determination, we find Mr. Davies first and fifth assignments of error without merit.

Whether R.C. 2117 Applies to an Attorney's Mortgage Lien for Decedent's Unpaid Legal Fees

{¶60} In his second assignment of error, Mr. Davies argues that the trial court erred in finding that he had failed to properly present his claim against the estate. He suggests that he was not required to present this claim against the estate because he meets the requirements of R.C. 2117.10, which states that "[t]he failure of the holder of a valid lien upon any of the assets of an estate to present his claim upon the indebtedness secured by such lien, as provided in Chapter 2117 of the Revised Code, shall not affect such lien if the same is evidenced by a document admitted to public record, or is evidenced by actual possession of the real or personal property which is

subject to such lien.” We review this question of law *de novo*. *Long Beach Assn., Inc. v. Jones*, 82 Ohio St.3d 574 (1998).

{¶61} R.C. 2117.06(A) requires “[a]ll creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated,” to present their claims either to the administrator, or the administrator and the court, in writing.

{¶62} Furthermore, a claim must be made within six months of the decedent’s death. R.C. 2117.06(B).

{¶63} R.C. 2117.06(B) is a statute of limitations on the presentment of claims against an estate. R.C. 2117.10 provides an exception to that statute of limitations, and acts to preserve a valid lien regardless of presentation. “The present statute will protect those liens of which the executor or administrator may reasonably be expected to have knowledge. As to other liens, the lienholder is required to bring his lien to the attention of the executor or administrator by presenting a claim thereon.” (Citation omitted.) *Kuhnle v. Rusmiser*, 113 Ohio App. 389, 391 (2d Dist.1960).

{¶64} Mr. Davies mistakenly construes this provision to mean that he was permitted to satisfy his debt outside the administration of Mr. Griffith’s estate, without first complying with the presentation statute. Initially, Mr. Davies’ claim is not one that falls under the limited exceptions to the presentation statute (i.e., judgment liens, administration expenses, allowance for support, personal property taxes and obligations owed the state or its subdivisions, equitable ownership, ownership of chattels).

{¶65} Furthermore, R.C. 2117.10 would merely have preserved Mr. Davies’ recorded lien on Mr. Griffith’s property, had he failed to present the claim to the

administrator and court during the six month presentment period. Ms. Ivancic is quick to point out that R.C. 2117.10 applies only to *valid* liens, and contends that Mr. Davies' lien was not in fact valid, as the supporting document (the contingent fee agreement) is not properly executed. She therefore suggests that Mr. Davies would not be protected under R.C. 2117.10, and this court agrees.

{¶66} The court below had before it the mortgage deed recorded by Mr. Davies prior to Mr. Griffith's death. This deed recites that it is given to secure a "promissory note payable to the order of grantee of even date herewith in the principal amount of \$50,000.00 due and payable in accordance with the terms and conditions of said note and bearing interest at the rate of six percent (6%) per annum from 10/19/06." No such "promissory note" exists, and Mr. Davies failed to produce a signed original or copy of the purported contingent fee agreement.

{¶67} Furthermore, Mr. Davies did not list the satisfaction of his debt as a disbursement on the partial account filed with the court. Despite his protestations to the contrary, the estate administration file contains no copy of the real estate settlement statement evincing the payment to Mr. Davies. We agree with Ms. Ivancic's observation as to the holding in *In re Estate of Cogan*, 123 Ohio App.3d 186 (8th Dist.1997), a case offered as support for Mr. Davies position. The absence of these disclosures actually supports a finding that the claimant is hiding the claim, or is engaged in self-dealing, so much so that his status as a secured creditor cannot protect his claim. Mr. Davies' interests were in direct conflict with those of the estate and its beneficiaries, further compromising the validity of his actions and indicating that presentment of the claim prior to satisfaction would have been appropriate under the circumstances.

{¶68} Given the complexity of the circumstances surrounding Mr. Davies' relationship to the Griffith estate, and the fact that R.C. 2117.10 only prevents the extinguishment of *the lien*, and does not waive the requirement of presentation of the *claim for money*, the trial court did not err in rejecting Mr. Davies' argument under R.C. 2117.10. Mr. Davies' second assignment of error is without merit.

Award of Attorney Fees to Ms. Ivancic and Ms. Enos

{¶69} In his third assignment of error, Mr. Davies argues that the probate court erred in finding that Ms. Ivancic and Ms. Enos were entitled to recover their attorney fees. Mr. Davies argues that attorney fees were not appropriate because of a lack of a statutorily created duty or presence of bad faith. He further argues that even if the facts justified an award of attorney fees, Ms. Ivancic and Ms. Enos failed to provide adequate evidence of the reasonableness of their attorney fees.

Standard of Review

{¶70} Generally, “the decision whether to award attorney fees is [a] matter within the sound discretion of the trial court.” *Frederick v. Frederick*, 11th Dist. No. 98-P-0071, 2000 Ohio App. LEXIS 1458, *25 (Mar. 31, 2000). Absent a clear abuse of discretion, a reviewing court will not reverse the judgment of the trial court. *Birath v. Birath*, 53 Ohio App.3d 31, 39 (10th Dist.1988). “This court has recently stated that the term ‘abuse of discretion’ is one of art, connoting judgment exercised by a court, which does not comport with reason or the record.” *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court's “failure to exercise sound,

reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11. When an appellate court is reviewing a pure issue of law, “the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.” *Id.* at ¶67.

An Exception to the American Rule – Conduct Amounting to Bad Faith

{¶71} A trial court will rarely award attorney fees to a prevailing party, due in great part to the limited circumstances permitted under Ohio law for such awards. As a general rule, attorney fees are not recoverable and each party is to bear its own litigation costs and attorney fees. *Krasny-Kaplan Corp. v. Flo-Tark, Inc.*, 66 Ohio St.3d. 75 (1993); *Vance v. Roedersheimer*, 64 Ohio St.3d 552 (1992). An award of attorney fees is improper “in the absence of statutory authorization or a finding of conduct that amounts to bad faith.” *Pegan v. Crawmer*, 79 Ohio St.3d 155, 156 (1997). However, if a party’s conduct amounts to bad faith, an award of attorney fees is at the discretion of the trial court. *Sorin v. Warrensville Hts. School Bd. of Edn.*, 46 Ohio St.2d 177 (1976).

{¶72} The Supreme Court of Ohio has stated that “bad faith” is “a general and somewhat indefinite term. It has no constricted meaning. It cannot be defined with exactness. It is not simply bad judgment. It is not merely negligence. It imports a dishonest purpose or some moral obliquity. It implies conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will. It partakes

of the nature of fraud. * * * It means ‘with actual intent to mislead or deceive another.’” (Citations omitted.) *State ex rel. Bardwell v. Cuyahoga County Bd. of Commrs.*, 127 Ohio St.3d 202, 2010-Ohio-5073, ¶8.

{¶73} Ohio courts have awarded attorney fees in cases of a breach of fiduciary duty, construing such a breach to rise to the level of bad faith. See, e.g., *Mauger v. Inner Circle Condo. Owners Assn.*, 9th Dist. No. 10CA0046-M, 2011-Ohio-1533 (upholding the trial court’s award of attorney fees based on the existence of competent, credible evidence that the defendant had engaged in self-dealing that violated the company’s by-laws and “his duty not to act in bad faith”).

{¶74} Furthermore, this court has found that “‘the probate court’s finding that [a defendant] was “guilty of concealment of estate assets” is tantamount to a finding that [the defendant] acted in bad faith and/or for oppressive reasons in concealing the assets,’ so that such a finding gives ‘the probate court the authority to order him to pay the attorney fees associated with prosecution of the case.’” (Citations omitted.) *Apergis v. Boccia*, 11th Dist. No 2009-T-0079, 2010-Ohio-2954, ¶30, quoting *In re Estate of Toth*, 5th Dist. No. CA-9312, 1993 Ohio App. LEXIS 5790, *3 (Nov. 29, 1993).

{¶75} The trial court found that Mr. Davies had engaged in a course of conduct amounting to breach of his fiduciary duty as a result of his conflict of interest in representing the estate, his failure to investigate Ms. Ivancic’s status as an heir, and his failure to properly present his claim against estate. Although the trial court did not use the term “bad faith,” it is clear from the record that the trial court considered it as such. We find the trial court did not abuse its discretion in ordering Mr. Davies to pay the attorneys fees Ms. Ivancic and Ms. Enos incurred in the prosecution of the breach of

fiduciary duty claim. But for Mr. Davies' egregious failures during the initial administration of the estate, neither of the sisters would have incurred these fees.

{¶76} The trial court carefully evaluated the reasonableness of the attorney fees submitted by both Ms. Meko and Mr. Smith. In fact, the trial court found the hours billed by Mr. Smith to have "exceeded the time and labor required, there were no novel questions involved, and that the fee exceeds that customarily charged in the locality for similar legal services." Thus the trial court reduced the award to Mr. Smith accordingly. The court quite obviously engaged in the required consideration of Ohio Code of Professional Responsibility DR 2-106(B) factors in the exercise of its discretion. See *Swanson v. Swanson*, 48 Ohio App.2d 85, 90 (8th Dist.1976); *In re Estate of Keytack*, 11th Dist. 2008-T-039, 2008-Ohio-6563, ¶30-38. Therefore, the trial court did not err in awarding attorney fees to Ms. Ivancic and Ms. Enos, nor did it err in its evaluation of the appropriate amount of those awards. Mr. Davies' third assignment of error is without merit.

Return of Attorney Fees Taken as Attorney for the Estate

{¶77} In his fourth assignment of error, Mr. Davies argues that the trial court erred in ordering him to return a portion of the fees he received as attorney for the estate. He argues that this was improper, but he fails to support his contention with any salient case law.

{¶78} Generally, and particularly in probate court, "where one has created, augmented, or preserved a fund he may be compensated therefrom." *In re Estate of Colosimo*, 104 Ohio App. 342, 343 (2d Dist.1957). See also *Goff v. Key Trust Co.*, 8th Dist. No. 71636, 1997 Ohio App. LEXIS 5670 (Dec. 18,1997). Where it is revealed an

attorney has not in fact augmented or preserved a fund, but, rather, has diminished, squandered, or mismanaged the fund with which he was entrusted, Ohio courts have held that the reduction, or even outright denial, of attorney fees is appropriate. See, e.g., *In re Estate of Nicholson*, 7th Dist. No.04-MA-207, 2005-Ohio-4890 (finding a reduction of attorney fees acceptable and warranted where there had been self-dealing, malfeasance, or substantial mismanagement).

{¶79} Pursuant to R.C. 2113.36, “[i]f an attorney has been employed in the administration of the estate, reasonable attorney fees paid by the executor or administrator shall be allowed as a part of the expenses of administration. The court may at any time during administration fix the amount of such fees * * *.” A probate court has exclusive jurisdiction to determine the reasonableness of attorney fees to be paid. *In re Estate of Cercone*, 18 Ohio App.2d 26 (7th Dist.1969). “[R]easonable attorney fees shall be based upon the actual services performed by the attorneys and upon the reasonable value of those services.” *In re Estate of Verbeck*, 173 Ohio St. 557, 558 (1962). A probate court’s determination of reasonable fees is a question of fact and will not be reversed by a reviewing court unless manifestly against the weight of the evidence. *Kern v. Heilker & Heilker*, 56 Ohio App. 371 (1st Dist.1937).

{¶80} “The extent of a probate court’s discretion includes the ability to, *sua sponte*, vacate an erroneous order fixing attorney’s fees for services rendered for an estate and file a new judgment entry for a lesser amount which the court finds to be the reasonable value of the services rendered for the benefit of the estate.” *In re Estate of Clark*, 11th Dist. No. 97-G-2060, 1997 Ohio App. LEXIS 5702, *7 (Dec. 19, 1997).

{¶81} The trial court found that Mr. Davies' conduct did not preserve or augment Mr. Griffith's estate. Rather, as discussed previously, Mr. Davies' failures diminished the estate substantially, justifying the trial court's order to return a portion of the fees taken. Mr. Davies fourth assignment of error is without merit.

{¶82} Because the trial court did not err in any of its findings of fact or conclusions of law, the judgment of the Lake County Court of Common Pleas, Probate Division, is affirmed.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDALL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDALL, J., concurs in judgment only with a Concurring Opinion.

{¶83} I concur in the judgment to affirm the decision of the Lake County Probate Court. I write separately to further address why the probate court's exercise of jurisdiction was proper.

{¶84} In *Elam v. Hyatt Legal Servs.*, 44 Ohio St.3d 175, 541 N.E.2d 616 (1989), the Ohio Supreme Court held that the attorney for a fiduciary, such as an estate administrator, may be liable to a third party when the third party is in privity with the fiduciary. *Id.* at 176. The court was clear that the basis for liability in such a situation is the fiduciary nature of the relationship between the attorney's client and the third party. "In probate, the attorney-client relationship exists between the attorney and the personal representative of the estate. * * * *The personal representative stands in a fiduciary relationship to those beneficially interested in the estate.* He is obligated to exercise the

utmost good faith and diligence in administering the estate in the best interests of the heirs.” (Emphasis sic.) (Citation omitted.) *Id.* at 176-177.

{¶85} This reading of *Elam* was confirmed by the Ohio Supreme Court’s subsequent decision in *Arpadi v. First MSP Corp.*, 68 Ohio St.3d 453, 458, 628 N.E.2d 1335 (1994): “*Elam* therefore recognizes that an attorney retained by a fiduciary owes a similar duty to those with whom the client has a fiduciary relationship. * * * *A fortiori* those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates.”

{¶86} In 1998, subsequent to the decisions in *Elam* and *Arpadi*, the General Assembly enacted Revised Code 5815.16, which provides: “Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations.” R.C. 5815.16(A).

{¶87} The purpose of Revised Code 5815.16 was to nullify the effect of *Elam*’s holding. “The Ohio State Bar Association prompted the General Assembly to add Section 5815.16 to the Ohio Revised Code, which protects lawyers representing trustees and fiduciaries of decedents’ estates from the exposure that *Arpadi* recognized.” Giorgianni, *Simon, Arpadi, LeRoy, and the Scope of Lawyers’ Immunity from Malpractice Liability*, Hamilton County Law Library Newsletter (July 2010) 3.

{¶88} Although Revised Code 5815.16 precludes Ivancic's breach of fiduciary duty claim with respect to Davies, it does not compel the reversal of the probate court's decision.

{¶89} Initially, Ivancic brought her claims for breach of fiduciary duty against Enos and Davies. While Ivancic settled her claims against Enos, Enos cross-claimed against Davies, raising substantially the same breach of fiduciary duty claims.

{¶90} The probate court, in its March 28, 2011 Judgment Entry, expressly found that "Attorney Davies owed a duty to Rae Ann Enos," and that he "breached his fiduciary duty in failing to investigate whether Deana Ivancic had been adopted and to make a claim for \$50,000 for legal services rendered to decedent or disclose his conflict of interest as a claimant." The March 28, 2011 Judgment Entry is silent regarding Davies' duty toward Ivancic.

{¶91} Ivancic's claims against Davies were wholly derivative of Enos' claims, i.e., they only existed by virtue of the privity she allegedly shared with Enos. Accordingly, even if Ivancic's claims had been dismissed, the result is the same. Enos raised the same claims in her capacity as Davies' client, and there can be no dispute that Davies owed Enos a fiduciary duty. For the foregoing reasons, I concur with the decision to affirm the probate court.