Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May

Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

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DT: April 13, 2011

RE: John W. Conforti Trust
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

Today is April 13th. It is the day when Pete Rose got his 4000th major league hit in 1984. Today, April 13, 2011 another player was assured the same legacy as Pete Rose. Today Barry Bonds was convicted of obstruction of justice and he has equaled Pete Rose's infamy; barring himself from the Hall of Fame.

Gone are the manifest achievements each produced which added facets to baseball's great diamond. Those facets are now clouded by off diamond actions of overstepping the bounds of society.

Why did it happen? Not the use of steroids but the lies about it. Not the gambling but the lies about it. In my opinion it is because of the arrogance brought on by success, which comes from being on the pinnacle of fame:

> "I am the king of my world. I receive so much adulation and homage that when I step into your world, the real world, your rules do not apply. My hubris and my talent allow this. I can't let my following of your rules allow me to tell the truth when it mars my achievements in my world."

It is not the wealth of Rose and Bonds that led them to arrogate themselves above the norms of society, though I am sure that was a factor. It is being made a titled noble in a land that had reason to abolish titles of nobility in 1787. Iconic stature does not carry with it exemptions from the laws of society. So, therefore, we are to blame also for allowing ourselves to bestow the stature upon men who play a boy's game while the everyday working person must think of the consequences of their acts in the world in which they live.

A sad day.

REVIEW OF CASE:

Reference Files: Sanctions
Attorney Liability

This is one of the strongest Lower court and Court of Appeals' Affirmation I have read, imposing liability on fiduciaries and their attorneys for fiduciary wrongdoing.

Appellant, client/fiduciary, through an attorney, accepted a mediation award. When it came time for payment the trust had no funds. The Macomb County Probate Court sanctioned attorney and fiduciary for the total amount of Appellee's attorney fees; not for failure to pay the sanctions but for the conduct of the fiduciary.

The Lower court made the following findings of fact to support its award of sanctions:

1. There was $275,000 in unauthorized withdrawals by Appellant/Client.

2. That the client filed and signed an accounting, also signed by the lawyer as a lawyer; showing that the only disbursement, apparently to the Appellant was $5,194. In reality, the entire bank account at that time, listed as $125,000, had been depleted.

3. That the attorney filed a Case Evaluation Summary that said that there were sufficient assets to make distributions and attached the aforementioned accounting, which did not disclose the true withdrawals.

The attorney pleaded good faith belief based upon reasonable inquiry.

4. That the attorney knew or should have known there was no money to pay the mediation award and further that "they engaged in a concerted effort… to avoid (Respondent's) (note apostrophe; references to client) financial responsibility."

5. Respondent embarked upon persistent untenable positions as evidenced by pleadings and testimony, much of which was fraught with fabrication of facts, figures and distorted values.

The Court of Appeals found that that the sanction award of the Lower court, which they sustained, was not for the failure to pay the mediation award but for the reasons set forth in number five above.

Though an unpublished Opinion I believe this case has import. When you are an attorney for a fiduciary be careful. Though the court didn't say what was reasonable inquiry they clearly said attorney's actions in this case were not. The Court of Appeals, in affirming the Lower court, is adopting the Lower court's language of "knew or should have known." "Should have known" clearly would have included some verification of funds.

Note the duality of both the attorney signing the account and the mediation summary. (The account I am sure was signed as attorney and not as fiduciary.) Please also note that the Appellee in the lower court relied upon MCR 2.114 and not MCR 5.114, which includes MCR 2.114 and allows for contempt for "knowingly" making a false declaration. This would have applied to the fiduciary, but even here would have been problematic, as against the attorney. Note that even though an account may not be a pleading that MCR 2.114 applies to documents. The lower court, and thus the Court of Appeals, relied upon MCR 2.301G which, although similar to MCR 2.114 and 5.114 deals with similar actions in discovery. Since an account and mediation summary are not discovery, both courts' reliance is, in the author's opinion, an error. It is a harmless error because of MCR 2.114.

AAM:jv:doc 686795
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re JOHN W. CONFORTI TRUST.

LOUISE TROMBLY, Successor Trustee,

Petitioner-Appellee,

v

ANNMARIE SIWIK,

Respondent-Appellant,

and

LEIGH SAVAGE,

Appellant.

UNPUBLISHED
January 13, 2011

No. 295316
Macomb Probate Court
LC No. 2007-190319-TV

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Respondent and her attorney, Leigh Savage, appeal as of right from a judgment for petitioner, which included a provision assessing a sanction against respondents and Savage, jointly and severally, of $30,125.12, representing the amount of petitioner's attorney fees and costs. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from a dispute between petitioner and respondent as to trust assets that were to be distributed to the parties following the death of their father, John Conforti. Following claims by both parties that each had unlawfully taken trust assets, the underlying claims in this suit went to case evaluation. The award provided that petitioner would retain $108,000 in cash and a vehicle worth $20,000, and receive an additional amount of $55,000 from respondent "to be deducted from her trust share and if short fall to be paid by [respondent] personally." The parties accepted the award. After additional disagreement about the contents of the order that should be entered to confirm acceptance of the case evaluation, the trial court ultimately entered petitioner's order confirming acceptance of the case evaluation. The court closed the estate and discharged respondent as trustee in an order dated February 1, 2008.

In a March 3, 2008, letter to petitioner, appellant Savage advised that the trust did not have any cash to pay the case evaluation award. Alleging that respondent had failed to comply with the trial court's order, petitioner filed a motion for an order directing respondent to show cause why she should not be held in contempt and a motion to reopen the estate and to be appointed successor trustee. In an order dated June 2, 2008, the court appointed petitioner as successor trustee. The court ordered respondent to file a first and final accounting and to turn over all trust assets within 60 days.

From June 2008 until the judgment was entered in November 2009, the court repeatedly ordered respondent to provide an account, but the accounts that respondent provided were disallowed. Ultimately, the court was informed that at the time of the case evaluation, there was no cash left in the trust accounts.

On October 22, 2008, respondent filed a first and final account for the period June 16, 2006 through July 31, 2008. It indicated that the value of the remaining trust assets was $50,660, with no cash in any of the bank accounts. Petitioner filed objections. She claimed that the account was a "complete fabrication," included values that were inconsistent with respondent's earlier assertions, and failed to show the full extent of the substantial disbursements that respondent made to herself. In response, respondent argued that the issues had already been litigated and resolved through the case evaluation and final order. The response (signed by appellant Savage) attached "Mrs. Siwik's reply to the objections," which set forth detailed responses to petitioner's contentions. Petitioner then filed a detailed reply to respondent's response.

Following a show cause hearing in December 2008, the trial court dismissed the September 9, 2008, order to show cause because respondent had filed an account "which on its face, shows a legitimate zero cash balance," and noted that petitioner would be able to argue her objections at an evidentiary hearing on the account.

At an evidentiary hearing on February 24, 2009, counsel for respondent, appellant Savage's partner John Burket, explained that the reason respondent did not pay the $55,000 award in January 2008 was that "at that time there was not liquid cash to pay." Following the hearing, the court determined that respondent made withdrawals of approximately $275,000 without authorization. The court awarded Florida property, valued at approximately $20,000, to petitioner and disallowed attorney fees incurred by respondent while she was trustee. The court ordered respondent to file an amended first and final account by May 29, 2009. On June 4, 2009, the court ordered respondent to show cause for failure to comply with the court's order.

On June 23, 2009, petitioner filed her "motion for counsel fees and sanctions." She requested that the court enter an order directing payment of attorney fees expended for the benefit of the trust to be paid out of trust funds. She also requested that appellants be sanctioned for "improper, vexatious actions and breaches of the provision of MCR[] 2.114." She cited as examples the first amended response to the petition in which appellants "denied that anything more than a net of $5,194 had been removed by the Respondent from the Trust's bank account at National City Bank, whereas by [sic] evidence indicated that by October, 2006, the entire bank balance of almost $125,000 had been removed by Respondent." Petitioner also referred to respondent's case evaluation summary where "they reiterate the same 'facts' . . . and go on to

represent that 'sufficient assets remain to be administered and Trustee (Respondent) intends to complete administration and distribute the residual shares to herself and Petitioner.'" Petitioner also referred to an interim accounting that was attached to respondent's case evaluation summary that did not show respondent's withdrawals and the absence of cash available.

Respondent again filed amended accounting and ultimately, the trial court disallowed her amended accountings. In a separate response filed on behalf of appellant Savage, Burket, and their firm, they noted that they had not signed "any pleadings which assert or verify any financial matter concerning the Trust since the Case Evaluation Summary was filed in October, 2007." They denied awareness that respondent's "share had been withdrawn and disposed of as Petitioner alleges," and claimed that at the time of the acceptance of the case evaluation award, they did not know "that the case was not there." They argued that they should not be sanctioned under MCR 2.114 because "anything they signed and submitted was based upon a good faith belief after a reasonable inquiry, particularly when viewed in the context for which it was presented."

At the hearing on July 22, 2009, Savage acknowledged that before the case evaluation, he prepared and signed the interim accounting based on information that respondent provided. He asserted that he did not know when he completed the accounting at the time of the acceptance of the case evaluation "that the assets have [sic] been depleted to where she couldn't meet that obligation." The trial court indicated that it believed that appellant Savage knew or should have known at the time of the case evaluation that there was no money to satisfy any award. Burkett asked the court, "[W]hat specific documents did [appellant Savage] sign that are sanctionable?" The trial court stated that whether Savage knew or should have known that there was no money when respondent accepted the case evaluation, "either way it's improper, absolutely unacceptable."

In an opinion dated August 6, 2009, the trial court ordered appellants, jointly and severally, to pay attorney fees and costs totaling $30,125.12. The court found that they engaged in a "concerted effort . . . to avoid [respondent's] financial responsibility." (Opinion, p 1.) The court explained:

> The Respondent embarked upon a persistent untenable position as evidence by inconsistent and inaccurate accounts, pleadings, and testimony, much of which was fraught with fabrication of facts, figures and distorted values.
>
> The actions on the part of [respondent] were a misuse of the legal system as further evidenced by the commitment to settle, yet later acknowledging that the money was never there to begin with at the time of the settlement agreement.

The trial court then quoted MCR 2.302(G)(3)(a), (b), and (c), and the penalty in MCR 2.302(G)(4). The trial court did not identify any specific documents that were the basis for the decision. The trial court entered a judgment on November 18, 2009, that included a provision requiring appellants to pay petitioner $30,125.12, as her attorney fees and costs. This appeal ensued.

On appeal, appellants argue that petitioner's motion for sanctions relied on statements made by appellants in the case evaluation summary and attachments. MCR 2.403(J)(4) provides that "[s]tatements by the attorneys and the briefs or summaries are not admissible in any court or evidentiary hearing." According to appellants, the trial court's opinion shows that it awarded sanctions because Siwik did not pay the case evaluation that she accepted. However, MCR 2.403(M) indicates that the effect of an acceptance of a case evaluation is a judgment unless the award is paid within 28 days. The rule does not state that failure to pay will result in sanctions. Therefore, appellants argue that the trial court erred in sanctioning appellants as if acceptance of the case evaluation was a promise to settle.

We begin our analysis of appellants' claims based on MCR 2.403(J)(4) by noting that this issue was not preserved for appellate review. An issue not raised before and considered by the trial court is generally not preserved for appellate review. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). However, "[t]his Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010). In some civil cases, this Court has reviewed unpreserved issues for plain error. For example, in *Rivette v Rose-Molina*, 278 Mich App 327, 328-329; 750 NW2d 603 (2008), this Court stated:

> Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). "'To avoid forfeiture under the plain-error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In the proceedings below, appellants did not cite MCR 2.403(J)(4) or raise any argument that the trial court's consideration of statements made in, or documents submitted with, a case evaluation summary was improper. On the contrary, in a brief dated January 10, 2008, which was signed by appellant Savage, respondent urged the trial court to consider the petitioner's and respondent's case evaluation summaries and attached them as exhibits. Although MCR 2.403(J)(4) provides that statements by attorneys and case evaluation briefs and summaries are not admissible, the rule does not preclude parties from waiving any objection. Inasmuch as the parties had submitted the materials to the court for consideration, the court's consideration of the materials was not "clear or obvious" error. To the contrary, by submitting the case evaluation materials to the court, appellants affirmatively waived any objection to their consideration. "Reversible error cannot be error to which the aggrieved party contributed by plan or negligence." *Harville v State Plumbing & Heating Inc*, 218 Mich App 302; 553 NW2d 377 (1996) (citation and internal quotation marks omitted).

The second part of appellants' argument, that the trial court erred in awarding sanctions on the basis of respondent's failure to pay the case evaluation award because MCR 2.403(M) does not indicate that non-payment will result in sanctions, also was not raised or addressed by the trial court. However, this part of the argument does not implicate waiver. As previously

stated, this Court may consider this argument to address an issue of law for which the necessary facts have been presented. *Nuculovic*, 287 Mich App at 63.

As argued by appellants, whether the trial court's award of sanctions comports with the court rules presents a question of law involving the interpretation and application of court rules, which this Court reviews de novo. *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

The second part of appellants' argument is based on the assertion that the trial court awarded the sanctions because respondent was unable to pay the case evaluation award. The assertion is inaccurate. The trial court's decision was not focused on the unavailability of cash in the trust's assets to pay petitioner, but rather, as stated previously, on appellants' "concerted effort . . . to avoid [respondent's] financial responsibility," and the filing of "inconsistent and inaccurate accounts, pleadings, and testimony, much of which was fraught with fabrication of facts, figures and distorted values." Appellants cite MCR 2.403(M) regarding the effect of the acceptance of the case evaluation, but that rule had no bearing on the trial court's decision in this case.

Affirmed. Petitioner, being the prevailing party, is entitled to costs. MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello