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 2007-2012 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and 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. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2013 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2012 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011.

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

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DT: March 5, 2013

RE: In re Doris M. Heinzerling Living Trust, Ned Heinzerling Living Trust, and Ned and Doris Heinzerling Children's Trust f/b/o Eric E. Heinzerling
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL LORE:

Team of Ballplayers Having The Name "May" as Part of Their Last Name

First base	–	Lee May
Second base	–	Eddie Mayo
Shortstop	–	Chick Maynard
Third base	–	Pinky May
Leftfield	–	Carlos May
Centerfield	–	Willie Mays
Right field	–	Dave May

Right handed pitcher	–	Al Mays (of course)
Left handed pitcher	–	Rudy May
Left handed designated pitcher	–	Carlos May
Right handed designated hitter	–	John Mayberry

I am going south soon and will be watching some spring training games. Unfortunately, the travelling squads do not include many of the established players who are left in Lakeland. Nevertheless, it is always a pleasure to see the rookies trying their best so that they can come north with a team.

Last year I saw Drew Smiley and was very impressed with him, and was happy when he came north.

For those of you have never seen a spring training game the atmosphere is quite different. There are only about 6,000 people watching, and they are all very close to the field.

The non-fraternization rule is not enforced and you will often see the players from the opposing teams joking with each other. Pitchers never throw high inside pitches to the batters that follow a homerun, and they serve crab cakes rather than hotdogs.

Parking is free and all and all it's a very pleasant day.

REVIEW OF CASE:

Reference Files: Res Judicata
Settlement Agreement – Effect

Sister wrongfully took money from a Trust. Successor Trustee arranged a settlement with the parties after sister's removal. Successor Trustee sold personal property. Brother alleged too much authority was given to an agent to sell property and there was failure to account. As part of the settlement made with sister, a lien was given by her on out of state property which was not timely recorded. Before perfection of the lien, the land was encumbered by a lender giving cash to sister, in violation of the agreement; no payment was made by sister on her obligations.

Successor Trustee sued lawyers handling the matter and made a recovery.

Brother asked for a share beyond that he was awarded in the Settlement Agreement.

The Lower Court and the Court of Appeals quieted Title in favor of the wrongdoing sister, pursuant to a Settlement Agreement and awarded the brother only what he had agreed to in the Settlement Agreement.

Actions against the Successor Trustee for removal, and on accountings, resulted in favorable rulings for the Successor Trustee. Later, there was an effort made to surcharge the Successor Trustee.

The Lower Court and the Court of Appeals gave cognizance to the Trust instrument; which prevented an individual beneficiary alone from removing a trustee. The gravamen of the court's refusal to remove, however, was res judicata as to the allegations plead, and not because there was only one person making the motion for removal as required by the Trust.

The Lower Court ruled that any claims of wrongdoing were vitiated by the failure to object to accountings.

The Court of Appeals reviewed cases pro and con as to the efficacy of accountings vis-à-vis res judicata. The Court of Appeals did not criticize rulings that define res judicata as 'that which was litigated or could be litigated' but took a very conservative view of what could be litigated, and ruled that the Probate Court erred in saying that the issues of wrongdoing could have been raised in the accounting hearings.

Nevertheless, the Court of Appeals sustained the Lower Court's finding that wrongdoing could not be pursued on another ground which is implicit and not explicit; to wit that those claims could have been raised on the Petition for Removal.

There is a thorough discussion of the cases pro and con on the issue of res judicata to which the litigator is alerted.

AAM:jv:doc 733726
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re DORIS M. HEINZERLING LIVING TRUST, NED HEINZERLING LIVING TRUST, and NED AND DORIS HEINZERLING CHILDREN'S TRUST, f/b/o ERIC E. HEINZERLING.

ERIC E. HEINZERLING,

Petitioner-Appellant,

v

LYNN H. STINSON,

Respondent-Appellee.

UNPUBLISHED
January 22, 2013

No. 299555
Oakland Probate Court
LC No. 2005-297525-TV

ERIC E. HEINZERLING,

Plaintiff-Appellant,

v

JON B. MUNGER and JON B. MUNGER, P.L.L.C.,

Defendants-Appellees.

No. 299557
Oakland Probate Court
LC No. 2009-325549-CZ

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In Docket No. 299555, appellant Eric Heinzerling ("Heinzerling") appeals by right the probate court's order granting respondent Lynn H. Stinson's motion to quiet title to disputed property "free and clear of any and all liens previously asserted by Heinzerling." Heinzerling also challenges the probate court's separate order denying his petition to remove Jon B. Munger as trustee of three trusts established by Heinzerling's parents, Ned and Doris Heinzerling. In a separate but related case, Heinzerling appeals by right in Docket No. 299557 the probate court's

order granting summary disposition in favor of defendants Jon Munger and Jon B. Munger, P.L.L.C., and thereby dismissing all 13 of Heinzerling's claims. We affirm in both appeals.

These appeals arise from events between 2005 and 2010, related to the management of three trusts. Eric Heinzerling and his sister Lynn Stinson are the children of Ned and Doris Heinzerling, who died within a few months of each other in 2000. Ned and Doris each created their own trust, referred to respectively as the "Ned Trust" and the "Doris Trust." In addition, Ned and Doris jointly established a trust for the benefit of Heinzerling (referred to as the "Children's Trust"). Stinson acted as sole trustee for the trusts until Heinzerling petitioned for her removal in 2005. Jon Munger, a public administrator, was appointed co-trustee with Stinson, and later was appointed sole trustee. By the time Munger became trustee, Stinson had transferred more than 50 percent of the trust assets to herself.

In 2006, Munger sold the decedents' Bloomfield Hills residence on Lakewood (the "Lakewood property"). Before the buyers took possession, Munger arranged for Stinson and Heinzerling to go through the enormous quantity of personal belongings stored inside the residence. After items were tagged and transferred, Munger hired Christy's Estate Operations (Christy's) to empty the house of personal property. Heinzerling alleges that Christy's employees wrongfully disposed of items that had been tagged for him, and that Munger's relatives also helped to hastily empty the house in advance of transferring possession to the buyers. Heinzerling asserts that Munger gave Christy's employees too much discretion to dispose of property they believed did not have value, and that Christy's employees failed to account for items that had been designated for Heinzerling.

Munger determined that Stinson should compensate the Doris Trust in the amount of $250,000. In 2006, the parties entered into an agreement whereby Stinson agreed to pay the Doris Trust $250,000, due within 24 months, which would then be paid to Heinzerling. They also agreed that Stinson would secure the debt by executing a mortgage on property in Chautauqua, New York, a summer residence that Stinson had received from the decedents' trusts. The parties subsequently entered into an amendment to the 2006 settlement agreement, which provided that Heinzerling would receive his $250,000 payment subject to the terms of the Doris Trust. Before Munger recorded the mortgage, however, Stinson executed another mortgage to a commercial lender to secure a loan for herself in the amount of $400,000.

When the 24-month period expired, Stinson failed to pay the debt. She indicated that she was contemplating filing for bankruptcy. Munger decided to pursue a legal malpractice action against the attorneys who managed the trusts. The three consolidated malpractice actions (brought by Munger on behalf of the trust, Heinzerling, and Stinson) were eventually settled in 2008 through facilitative mediation, which awarded Heinzerling the bulk of the settlement amount. After the mediation was complete, Munger and Heinzerling clashed over the distribution of the proceeds. Heinzerling maintained that he should receive his entire distribution immediately, free from any trust, while Munger maintained that it should be distributed in accordance with the terms of the Doris Trust, pursuant to the amendment to the 2006 settlement agreement.

Heinzerling petitioned the probate court to remove Munger as trustee and to enforce the malpractice settlement by ordering Munger to release Heinzerling's entire distribution immediately. The court denied the petition.

Heinzerling then brought a 13-count complaint against Munger, asserting claims for breach of fiduciary duty, breach of the 2006 settlement agreement, and various claims for fraud and conversion. The claims were principally based on Munger's failure to protect Heinzerling's interest in Stinson's $250,000 payment by promptly recording the Chautauqua mortgage, and on Munger's alleged failure to properly account for and distribute personal property from the Lakewood property. The probate court granted Munger's motion for summary disposition, holding that Munger's prior annual fiduciary accounts had res judicata effect with respect to Heinzerling's claims concerning the Chautauqua mortgage, the underlying $250,000 debt, and the personal property.

Heinzerling thereafter brought a second petition to remove Munger as trustee of the trusts, which the probate court denied. In the meantime, Stinson moved to quiet title to the Chautauqua property on the ground that the 2008 malpractice settlement released all claims between herself and Heinzerling. The probate court granted that motion.

I. DOCKET NO. 299555

Heinzerling argues that the probate court erred in granting Stinson's motion to quiet title to the Chautauqua property and by denying his petition to remove Munger as trustee of the trusts.

A. MOTION TO QUIET TITLE

This Court reviews de novo a trial court's ultimate decision in an action to quiet title, but reviews the court's factual findings underlying its decision for clear error. *Jonkers v Summit Twp*, 278 Mich App 263, 265; 747 NW2d 901 (2008). The probate court quieted title to the Chautauqua property in favor of Stinson because it determined that Heinzerling was barred from asserting any claims relating to the property pursuant to the terms of a release.

"The scope of a release is controlled by the language of the release, and where . . . the language is unambiguous, [the courts] construe it as written." *Adair v State of Mich*, 470 Mich 105, 127; 680 NW2d 386 (2004). Here, the 2006 settlement agreement provided that all parties, including Heinzerling and Stinson, "fully and completely release and forever discharge all Parties . . . from any and all actions . . . from the beginning of time through date of this Agreement." The provision further states that the release "applies to any and all claims that any Party has, had, may have had or hereafter ever will have, whether known or unknown, whether presently asserted or not . . . including but not limited to all claims that were or could have been brought in the present actions, with the exception only of the obligations of each Party under this Agreement." Although the 2006 settlement agreement does not prospectively release the parties from liability for future breaches of the agreement itself, the 2008 malpractice settlement agreement, to which Heinzerling and Stinson were both parties, provided:

> As between Plaintiff Lynn Stinson and Eric Heinzerling the resolution of these issues is a *full, final and complete settlement of all claims* and both parties are released from any obligation to the other.

The plain language of the release clearly applies to any claims Heinzerling had, or may have had, against Stinson for her violations of the 2006 settlement agreement. *Adair*, 470 Mich at 127. Moreover, Heinzerling's distribution of the malpractice settlement proceeds was intended, at least in part, to compensate Heinzerling for the damages he suffered as a result of Stinson recording a priority mortgage on the Chautauqua property. The probate court did not err in quieting title in the Chautauqua property for Stinson because the 2008 malpractice settlement agreement released all claims between Stinson and Heinzerling, including those related to Stinson's $250,000 debt to the Doris Trust and to the Chautauqua property mortgage.

Heinzerling argues that the release does not apply to his claims concerning the Chautauqua property mortgage and debt because these were obligations that Stinson owed to the Doris Trust, which was not a party to the malpractice settlement. However, Munger entered into the malpractice settlement in his capacity as trustee on behalf of the Doris Trust. Additionally, Heinzerling did not oppose quieting title on the trust's behalf, but on his own, individual behalf. Heinzerling's arguments challenging the probate court's order quieting title are without merit.

B. HEINZERLING'S SECOND REQUEST TO REMOVE MUNGER AS TRUSTEE

Heinzerling argued below that Munger should be removed as trustee for improper conduct and various alleged breaches of his fiduciary duties toward Heinzerling. The probate court denied Heinzerling's petition to remove Munger as trustee, holding that Heinzerling's claims were barred by res judicata and collateral estoppel because they were based on allegations made by Heinzerling in his prior petition to remove Munger as trustee, which the court denied. Heinzerling does not challenge the probate court's res judicata or collateral estoppel determinations. Instead, he now argues that the probate court did not have discretion whether to remove Munger as trustee, but rather was obligated to remove Munger at Heinzerling's request because the terms of the trusts provided him, as an income beneficiary, with the absolute right to remove a trustee upon request, with or without cause. Heinzerling's failure to advance this argument below leaves this issue unpreserved.

Generally, a probate court's decision on a motion to remove a trustee is reviewed for an abuse of discretion. *In re Duane V Baldwin Trust*, 274 Mich App 387, 396-397; 733 NW2d 419 (2007), aff'd 480 Mich 915 (2007). When an issue has not been preserved, however, "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Egbert R Smith Trust,* 274 Mich App 283, 285; 731 NW2d 810 (2007), aff'd 480 Mich 19 (2008).

Heinzerling relies on the language in the Doris Trust and the Children's Trust, which he asserts gives him, as the remaining income beneficiary, the right to remove a trustee upon request, with or without cause. However, Heinzerling disregards that the pertinent provisions of both trusts further provide:

> Notwithstanding the foregoing, no person, acting alone, may remove or name a trustee of a trust hereunder that would be included in that person's estate solely by reason of this right of removal or appointment.

Thus, neither trust authorized Heinzerling, acting alone, to remove Munger as trustee at will. Accordingly, the probate court did not violate the terms of the trusts by failing to remove Munger as trustee at Heinzerling's sole request.

DOCKET NO. 299557

The probate court granted summary disposition of Heinzerling's 13 claims against the Munger defendants principally under MCR 2.116(C)(7) (res judicata), but also partly under MCR 2.116(C)(10) (no genuine issue of material fact). However, Munger also moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim for relief). On appeal, Heinzerling and defendants both address whether summary disposition was warranted under all three of these subrules.

A probate court's ruling on a motion for summary disposition is reviewed de novo. *Rheaume v Vandenberg*, 232 Mich App 417, 420-421; 591 NW2d 331 (1998). "When reviewing a motion granted pursuant to MCR 2.116(C)(7), we consider all affidavits, pleadings, and other documentary evidence submitted by the parties and, where appropriate, construe the pleadings in favor of the plaintiff." *Id.* at 421. The question whether res judicata applies in a given case is a question of law that this Court reviews de novo. *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 624; 808 NW2d 471 (2010).

Summary disposition may be granted under MCR 2.116(C)(8) if the nonmoving party fails to state claim on which relief can be granted. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). A reviewing court must consider the pleadings alone and accept all factual allegations as true. *Id.* A motion may be granted under MCR 2.116(C)(8) only if the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

Summary disposition may be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Cowles v Bank West*, 476 Mich 1, 32; 719 NW2d 94 (2006). This Court must consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

The probate court determined that Heinzerling's claims based on Munger's allegedly wrongful acts or omissions with respect to the Chautauqua property mortgage were barred by res judicata because Heinzerling failed to object to the exclusion of the mortgage and related promissory notes from his first annual account for the estate covering the period from September 2005 to September 2006. The court also concluded that Heinzerling's claims arising from the alleged mismanagement of the Lakewood personal property were barred by res judicata because Munger's third annual account for the period covering September 2007 to September 2008 listed final storage bills and stated that "[a]ll personal property distributed to Eric Heinzerling pursuant to the settlement agreement." Although the court did not distinguish among Heinzerling's 13 claims in its res judicata analysis, counts I - V, and counts XI - XIII, all arise at least in part from the facts surrounding the Lakewood personal property and the Chautauqua mortgage, and could be subject to dismissal or partial dismissal on grounds of res judicata. Counts VI - X (the various

fraud claims regarding Munger's inducements for Heinzerling to enter into the 2006 probate settlement and the 2008 malpractice settlement), are within the probate court's res judicata analysis in relation to Heinzerling's prior petition to remove Munger as trustee.

The doctrine of res judicata "bars a subsequent action between the same parties when the evidence or essential facts are identical." *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010) (citation and internal quotations omitted). The doctrine applies when "the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies." *Id.* (citation and internal quotations omitted).

In *In re Humphrey Estate*, 141 Mich App 412, 417; 367 NW2d 873 (1985), the decedent created an inter vivos trust known as the "Thirty Trust." Before the decedent's death, he appointed the Detroit Bank & Trust Company as the executor of his estate and as trustee for the Thirty Trust. *Id.* The petitioner-appellant objected to the bank's first annual account of the decedent's estate on the ground that the account erroneously excluded the Thirty Trust and three GMAC bearer notes totaling $112,000 from the estate assets. *Id.* at 417-418. The petitioner and her counsel withdrew their objections at a hearing on the first account, and the probate court entered an order allowing the first account as stated. *Id.* at 418. The petitioner subsequently petitioned the probate court to remove the bank as executor of the decedent's estate, to set aside the first annual account, and to hold that the Thirty Trust in question was invalid on the ground that it violated the rule against perpetuities. *Id.* The bank-executor argued in response that "the allowance of the first account was *res judicata* as to the later-raised issues of the validity of the Thirty Trust and the lack of inclusion of the GMAC notes in the estate and that summary judgment should be granted" against the petitioner's claim that the Thirty Trust was invalid. *Id.* at 419. The probate court ruled that the allowance of the first account was res judicata regarding the inclusion of the GMAC notes in the trust assets. *Id.* Meanwhile, the petitioner filed an action in circuit court, seeking to void the Thirty Trust. The defendant bank moved for accelerated judgment under GCR 1963, 116.1(5) on the ground that the probate court's allowance of the first account precluded the petitioner from contesting the validity of the Thirty Trust. *Id.* at 420. The lower court granted accelerated judgment for the defendant bank. *Id.* On appeal, the petitioner argued that res judicata did not apply because the first annual account did not disclose the disposition of the GMAC notes. This Court held:

> In this case, appellant's original objection to the first annual account, filed May 25, 1978, made no mention of the GMAC notes, but was based on the alleged invalidity of the Thirty Trust. That objection was withdrawn and she did not object to the GMAC notes not being included in the annual account until her amended petition of February 20, 1979, eight months after the order allowing the account was entered. It is undisputed that appellant was aware of the existence of the GMAC notes. She was present when they were discovered in her late husband's safety deposit box. She also testified that she knew the GMAC notes were not considered part of the decedent's estate and she expressed no dissatisfaction with the absence of the GMAC notes from either the probate inventory or the annual account. With any diligence whatsoever, the absence of the GMAC notes from the first annual account could have been contested in a timely fashion. It was not. We hold that the probate court (and the circuit court

in upholding the probate court's ruling) properly applied the doctrine of res judicata. [*Id.* at 430.]

Heinzerling argues that this case is distinguishable from *In re Humphrey Estate* and does not justify application of the res judicata doctrine to dismiss Heinzerling's claims. According to Heinzerling, *In re Humphrey Estate* establishes that res judicata precludes a party from challenging the inclusion or exclusion of specific assets after an annual account has been approved. Heinzerling argues that this case is distinguishable because his claims do not involve a simple matter of the exclusion of the debt and mortgage from the estate assets, but rather questions whether Munger breached his duty to safeguard the trust's right to Stinson's $250,000 payment for eventual distribution to Heinzerling. Heinzerling contends that the probate court applied res judicata too broadly, with the unjust result that if an asset is omitted from an estate accounting, and the accounting is not challenged, the trustee is effectively relieved from all obligations regarding the asset, and the asset is effectively removed from the trust. Heinzerling relies on pre-*Humphrey* case law in support of his argument.

In *McDannel v Black*, 270 Mich 305, 312-313; 259 NW 40 (1935), our Supreme Court held that an executor's claim for additional compensation for the rendering of extraordinary services was barred by his failure to timely assert the claim in proper statutory form, i.e., in the prior annual accounts. The Court also stated, "A settled account is conclusive between the parties unless some fraud, mistake, omission, or inaccuracy is shown[.]" *Id.* at 311. Heinzerling argues that this passage favors a narrow application of res judicata.

In *MacKenzie v Union Guardian Trust Co*, 262 Mich 563, 567; 247 NW 914 (1933), an issue arose concerning whether a provision of the decedent's will for annual payments to a legatee established a trust. The executor's four annual accounts did not reflect the creation of a trust. The petitioner, the beneficiary of the alleged trust, asked the probate court to construe the decedent's last will and testament with respect to the creation of a will. *Id.* Our Supreme Court held:

> The allowance of an annual account of an executor or administrator is final and conclusive as to the amount of money received by him and the disbursements made by him, in the absence of fraud or breach of trust; but this has nothing to do with the construction of the will under which an executor acts. Annual accounts are final and conclusive against the executor, in the absence of fraud and mistake, as to receipts and disbursements where properly allowed after due notice.
>
> Such annual accounts make it incumbent upon the executor to account for the inventoried value of the property received, and this may be shown by the receipt of an equivalent cash value, or by showing the property is worthless, has been destroyed by accident, without the fault of the executor, belonged to some other person, or upon a fair sale brought less than the appraised value thereof.
>
> The rule is general that orders of the probate court allowing annual accounts are final and conclusive as to all matters included therein, but they do not adjudicate what is not before the court and not included in the annual account.

> Their allowance is binding as to what is included therein, but is not binding as to what is not included. The allowance of a final account of an executor may be conclusive as to receipts and disbursements, but even the allowance of a final account may not amount to a construction of the will. [*Id.* at 579-580.]

The Court concluded that the prior accounts were not res judicata of the petitioner's right to the trust because

> [t]here is nothing in the annual accounts of defendant, heard and allowed before the bill in this case was filed, which showed defendant had converted the trust estate provided to be set up for petitioner Ruth Day MacKenzie, or that the probate court construed, or intended to construe, the will of deceased, so as to permit defendant so to do. The allowance of these annual accounts does not amount to a former adjudication or a construction of the will involved adverse to petitioners' claims. [*Id.* at 586.]

In *In re Wagar's Estate*, 295 Mich 463, 468; 295 NW 227 (1940), our Supreme Court cited *MacKenzie* for the proposition that prior approved annual accounts were not res judicata of a claim that the decedent's will made provisions for payments to legal heirs.

In *Green v Old Kent Bank & Trust Co*, 3 Mich App 654; 143 NW2d 581 (1966), the plaintiffs, beneficiaries to a trust, claimed that the defendants-trustees breached their fiduciary duties to the plaintiffs by selling the trust's stock in transactions that were not beneficial to the trust, triggering adverse tax consequences, and raising conflict of interest questions. *Id.* at 660-661. The probate court determined that the prior accountings were res judicata of the plaintiffs' claims, and dismissed the lawsuit. *Id.* at 662. This Court reversed, holding:

> The probate court order in the instant case did not adjudicate plaintiffs' allegations, as yet unanswered by defendants, that the co-executors sold Wolverine stock contrary to the testator's intentions, committed a culpable tax blunder, and made an improper sale of stock to Wolverine insiders at less than market price. Plaintiffs' claim concerning these transactions, including all those prior to July 31, 1962, are not barred by the probate court order allowing the accounts, nor will the order discharging co-executor Janssen bar plaintiffs' claims against him. [*Id.* at 664-665.]

Munger argues that *MacKenzie* and *Green* have been superseded by later decisions holding that res judicata is to be applied broadly, barring not only claims that were actually litigated, but claims that could have been litigated in a prior action, and were not. Munger cites *Gose v Monroe Auto Equip Co*, 409 Mich 147; 294 NW2d 165 (1980), in which our Supreme Court cited *MacKenzie* as an example of a narrow application of res judicata that "bars a second action only if the same question was actually litigated in the first proceeding." *Id.* at 160 n 2. A majority of the Court in *Gose* adopted a broader rule, holding that a worker's compensation award was "an adjudication as to the condition of the injured workman at the time it is entered, and *conclusive of all matters adjudicable at that time*[.]" *Id.* at 160 (emphasis in original).

Under *MacKenzie*, and *Green*, res judicata would not apply because the question whether Munger breached a fiduciary duty to Heinzerling by failing to promptly record the mortgage was not actually adjudicated. Heinzerling correctly asserts that applying res judicata to bar his claim in this context creates the hazard that once an account is filed and approved, the trustee is essentially immune from any subsequent claim that he breached his fiduciary duty with regard to any omitted assets.

According to the probate court, Heinzerling's claim that Munger breached a fiduciary duty or any other duty by failing to timely secure the priority of the Doris Trust's mortgage was based on the assumption that the mortgage and related promissory note were Doris Trust assets. However, these assets were omitted from the annual account, and Heinzerling failed to object to the omissions. Therefore, according to the probate court's reasoning, by failing to object to the omission of the mortgage from the account, Heinzerling lost his opportunity to pursue any claim premised on the assumption that the mortgage was a trust asset.

We conclude that the probate court erred in regarding the approval of the annual accounts as a blanket judgment for all matters related to trust assets. The issue Heinzerling raises is not whether Stinson's underlying debt and the Chautauqua mortgage that secured it are assets of the Doris Trust. Although the probate court stated in its order quieting title for Stinson that the debt and Chautauqua mortgage were Stinson's obligations to Heinzerling personally, and not to the Doris Trust, the 2006 settlement clearly states that Stinson's debt is owed to the Doris Trust. The parties have tacitly acknowledged that Stinson's debt and the Chautauqua mortgage were Doris Trust assets. Although they were not listed as such in the annual accounts, Munger tacitly acknowledged that they were trust assets by filing a malpractice action against the trust attorneys and Stinson's attorneys for their professional negligence in failing to secure these assets on behalf of the trust. Munger also signed off on settlements that imposed on Stinson the duty to pay the debt to the Doris Trust, to be secured by the Chautauqua mortgage. Munger represented in correspondence to Heinzerling that he would take appropriate action if Stinson failed to make the payment pursuant to the 2006 settlement. Munger testified in his deposition that when Stinson failed to make the payment, he weighed the options of pursuing legal action against Stinson versus a malpractice action against the trust attorneys, and opted for the latter. If Heinzerling, and not the Doris Trust, were the only real party in interest regarding these assets, Munger would have lacked standing to pursue these claims in his capacity as trustee for the Doris Trust. Because there is no genuine dispute concerning the status of the Chautauqua mortgage and promissory note as trust assets, we do not believe that the issues concerning Munger's alleged breach of fiduciary duty to Heinzerling in securing these assets is a matter that was actually litigated or could have been litigated in the annual accounts proceedings.

However, the probate court correctly concluded that Heinzerling's claims concerning the personal property from the Lakewood property are barred by res judicata based on Munger's annual accounts. *TBCI, PC*, 289 Mich App at 43. Heinzerling knew the relevant facts at the time Munger filed the September 2007 to September 2008 account. The account stated that the payments to Public Storage and Art Pack are "[f]inal storage bills," and further indicated, "All personal property distributed to Eric Heinzerling pursuant to the settlement agreement." Although Heinzerling alleges that he relied on Munger's representations that the personal property items were placed in storage for eventual delivery to Heinzerling, Heinzerling knew that he had not personally verified this. Heinzerling also alleges that he had no way of discovering

that Christy's employees disposed of items, but Munger listed final storage expenses for that year, which should have alerted Heinzerling that he had received all the items he was going to receive.

The probate court also concluded that approval of the prior accounts was res judicata of Heinzerling's claims as they pertained to Munger's fees. Heinzerling argues on appeal that he was not challenging the fact of Munger's bills, but the legal propriety of the rates that Munger charged. Heinzerling does not explain how the facts surrounding any alleged and unspecified impropriety could not have been known to him at the time he tacitly approved the annual accounts. We conclude that any claims regarding improper attorney fees are barred by res judicata. *TBCI, PC*, 289 Mich App at 43.

Finally, we conclude that any of Heinzerling's claims that were not barred by res judicata regarding the approved fiduciary accounts were barred by res judicata in light of Heinzerling's prior petition to remove Munger as trustee and to enforce the settlement, and the probate court's order denying that petition. The probate court discussed this order as a basis for dismissing Heinzerling's claims on the basis of res judicata, but Heinzerling does not address this portion of the probate court's order. The probate court's prior order denying Heinzerling's petition to remove Munger as trustee was a final judgment disposing of Heinzerling's claims that Munger improperly induced Heinzerling to sign the malpractice agreement through misrepresentations and non-disclosure of facts that Munger had a duty to disclose, and that Munger jeopardized Heinzerling's interests in regard to the Chautauqua mortgage. In sum, all of Heinzerling's claims were barred by res judicata, if not from the approval of the annual accounts, then from the order denying Heinzerling's petition to remove Munger as trustee. *TBCI, PC*, 289 Mich App at 43.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio