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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 2011 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 and 2012 compilations 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: November 18, 2011

RE: Estate of Paul A. Smith
STATE OF MICHIGAN COURT OF APPEALS

MAJOR LEAGUE STATS:

ALL STAR TEAMS COMPOSED OF ROOKIES OF THE YEAR

In 1947 and 1948 the Major Leagues chose one Rookie of The Year, not one for each league. From 1949 to the present, each league has a Rookie of The Year.

Here are my two "all star" teams composed of Rookies of The Year. I have been liberal with the positions I have assigned them; looking first to the position they occupied as Rookie of The Year, as well as the number of games played and the position. Sometimes, I admit, I had to squeeze some of the people in because of the absence of other stars at that position.

American League:

Catcher:	Carlton Fisk – Hall of Fame
1st Base:	Eddie Murray – Hall of Fame
2nd Base:	Rod Carew – Hall of Fame
3rd Base:	Gil McDougald
Shortstop:	Ossie Guillen
Outfield:	Tony Oliva
	Carlos Beltran
	Ichiro Suzuki
Pitcher:	Justin Verlander (Cy Young winner)
	Neftali Feliz

National League:

Catcher:	Johnnie Bench – Hall of Fame
1st Base:	Albert Pujols
2nd Base:	Jackie Robinson – Hall of Fame
3rd Base:	Pete Rose
Shortstop:	Alvin Dark
Outfield:	Willie Mays – Hall of Fame
	Billy Williams – Hall of Fame
	Frank Robinson – Hall of Fame
Pitcher:	Joe Black
	Don Newcombe (Cy Young winner)

It seems those in the National League went on to greater success than those in the American League. I really don't know of any reason for this. It also seems that the American League had better infielders, and the National League better outfielders.

You might consider making your own team.

REVIEW OF CASE:

Reference Files: Wrongful Death
Personal Representative – Right to Settle [w/ref. to *In re Merry*]
Consideration

Decedent passed away owing money to Comerica Bank. Decedent left a wife, who was named the personal representative, and a child. Decedent committed suicide. The estate researched a wrongful death action against Comerica. The prosecution of such an action was discussed with Comerica as part of settlement negotiations. Upon presentation of the settlement of mutual claims to the Probate Court, the son filed an emergency petition to escrow the Settlement proceeds so that he could plead that some part of the Settlement proceeds was actually wrongful death proceeds. Estate moved for summary disposition which was granted. The Court of Appeals affirmed.

The Court of Appeals reasoned that the idea of a wrongful death action was discussed, but since it was baseless the court could not find that to be consideration for an agreement. Therefore, the proceeds of settlement were not wrongful death proceeds. The Court of Appeals cited 5M.CIV.JUR., Comprises and Settlements, Section 13, p. 283.

The Court of Appeals continued by saying that the original obligations to repay the loan could not provide consideration for a new agreement. The Court of Appeals summarized the common law that consideration once promised cannot be deemed valid consideration for a separate modification agreement. The Court of Appeals went on to say that certain waivers of rights would constitute valid consideration.

As the consideration was not composed of wrongful death proceeds, summary disposition was appropriately entered and since there was no wrongful death action filed there was no breach by the fiduciary in making a distribution in violation of the wrongful death statute.

I believe the Court of Appeals came to the right result, and I agree with their reasoning, but there are certain relevant laws that are left out. This is not a criticism of the Court of Appeals, as the following may not have been pleaded by the attorneys of record and there is no need for a Court of Appeals to do an attorney's work for them.

As to the issue of valid consideration, a Court of Appeals looks at certain circumstances and, therefore, finds that the waiver was valid consideration. The Court of Appeals need not have done this. MCL 566.1 reverses the common law; allowing modifications, with original consideration as valid consideration, if the agreement is in writing.

As to the balance, I would have simply cited *In re Merry*, 174 Mich App, 627 (1989), allowing a personal representative to settle with a claimant over the objections of heirs.

AAM:jv:Doc 701347v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of PAUL A. SMITH.

MARTINIQUE M. SMITH, Personal Representative of the Estate of PAUL A. SMITH,

Appellee,

v

JUSTIN P. SPARKMAN,

Appellant,

and

HUNTINGTON NATIONAL BANK and COMERICA BANK,

Interested Parties.

UNPUBLISHED
October 20, 2011

No. 296418
Oakland Probate Court
LC No. 2008-316280-DE

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

In July 2009, appellant Justin P. Sparkman filed an emergency petition urging the probate court to approve a settlement between the Estate of Paul A. Smith and claimant Comerica Bank, on the condition that the court hold in escrow a portion of the settlement to which Sparkman claimed entitlement. Appellee Martinique M. Smith, the personal representative of the decedent's estate, moved for summary disposition of Sparkman's petition pursuant to MCR 2.116(C)(10). The probate court granted Smith's motion. Sparkman appeals as of right. Because, the trial court correctly granted Smith's motion for summary disposition of Sparkman's emergency petition pursuant to MCR 2.116(C)(10), given that Sparkman failed to show that the estate possessed a legitimate or viable wrongful death claim against Comerica Bank, and, Smith did not violate her fiduciary responsibilities to the estate, we affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Paul A. Smith died by suicide in March 2008. In April 2008, the probate court issued letters of authority appointing Martinique Smith, the decedent's spouse, as the personal representative of his estate. Sparkman is the decedent's son.

In August 2008, Comerica Bank filed a claim against the estate. Comerica Bank estimated the "current and contingent" debts of the decedent's estate at in excess of $16,000,000 or $17,000,000. Between August 2008 and June 2009, negotiations took place concerning a potential settlement of Comerica Bank's claim against the estate. During the negotiations, attorneys for the estate advised Comerica Bank of potential wrongful death or lender liability claims against Comerica Bank. The negotiations culminated in a June 30, 2009, settlement agreement.

On July 1, 2009, Sparkman filed an emergency petition in the probate court "to escrow funds equal to the net settlement value to the estate resulting from a settlement agreement with Comerica Bank and to determine whether such settlement agreement is subject to the provisions of MCL[] 700.3924." In the petition, Sparkman related his "belief" "that the facts, circumstances, and events leading up to and causing the Decedent's death by suicide were directly related to . . . [his] banking relationship with Comerica and the actions of its employees and/or agents, including, but not limited to, the making and administration of loans and extension of credit." Sparkman claimed that the June 30, 2009, settlement agreement between the decedent's estate and Comerica Bank entitled him to relief from the probate court, alleging in pertinent part as follows:

> 13. The Estate required Comerica to execute a Covenant Not to Sue on any of the remaining obligations owed by the Estate to Comerica for an approximate savings to the Estate of at least $1,500,000.00 - $2,000,000.00
>
> 14. In addition, Comerica required the Estate to waive and release all claims arising out of or in conjunction with the Decedent's death and the extension of credit to the Decedent and his companies.
>
> 15. Despite the use of a wrongful death allegation and the settlement language offered by Comerica, the Personal Representative's counsel now claims that no viable claim for wrongful death existed, and therefore, MCL[] 700.3924 is inapplicable to the settlement agreement.
>
> 16. The effect of the Personal Representative's position with regard to the settlement agreement and wrongful death claim is to: (a) deprive [Sparkman] of any claim to the savings realized by the Estate (and, ultimately the [decedent's] trust) as a result of the settlement with Comerica; and (b) enhance the benefit to the Personal Representative, as surviving spouse and primary beneficiary of the Decedent's trust.

Sparkman alleged that Smith breached her fiduciary duties to him. Sparkman urged the probate court to approve the settlement agreement with Comerica Bank, "provided [Sparkman] is entitled to his share, individually, of the value of such settlement."

In December 2009, Smith filed a motion for summary disposition of the emergency petition pursuant to MCR 2.116(C)(10), asserting that "there is no genuine issue of fact as to whether or not [Sparkman] is entitled to any distribution from the Estate for the 'value of such settlement to the Estate' resulting from a settlement agreement reached between Comerica Bank and [the estate] . . . ." Smith specifically contended that (1) undisputed facts of record showed that "[e]xperienced commercial litigators utilized by the Estate determined that a viable wrongful death claim against Comerica Bank did not exist"; (2) "no case law or statute . . .support[ed] a wrongful death claim against Comerica Bank"; (3) Sparkman "has failed to offer any proof that Comerica Bank, in settling its claims with the Estate, placed any value on a potential wrongful death claim against it"; (4) "Sparkman never demanded, much less asked, [the estate] to pursue a wrongful death claim against Comerica Bank"; and (5) "Sparkman has failed to present any support to the contention that a viable wrongful death claim against Comerica Bank existed." Smith concluded that because no wrongful death claim existed, MCL 700.3924 "does not apply in this case."

Following a hearing in January 2010, the probate court granted Smith's motion, explaining:

> I have reviewed the pleadings presented by both parties, and there are significant amounts of information presented by [Sparkman] to show that, along the way, . . . there were discussions related to the cause of death of Paul Smith and whether a claim could be made that any actions of Comerica were the cause of Paul Smith taking his own life.
>
> * * *
>
> In reviewing this, there is an . . . admission perhaps made on behalf of [Sparkman] that there will not be direct evidence from representatives of the bank, whether they're employees, officers or attorneys, that state that [a potential wrongful death claim] was in fact or did in fact have value in reaching the settlement.
>
> * * *
>
> And so the Court in a way is left with a certain requirement that it speculate into what are the possible reasons. And . . . I'm not using speculate in a legal sense, but simply, because we don't have direct evidence, we'd have to go based on inferences from other facts or make assumptions about certain things.
>
> . . . I do think I need to, as I asked [Sparkman's counsel] in argument, in order to say that the wrongful death allegations did have value in the settlement, I do, without determining the amount it might be worth, I do feel that I do have to find that it does in fact have value.
>
> . . . [Sparkman] argu[es] that it simply does not matter, and the only . . . thing I have to determine is whether or not it was some part of the calculus that the parties engaged in together or on their own when they reached the settlement.

* * *

> I don't find that a wrongful death cause of action has any viability under the circumstances here presented. . . .
>
> There are reasons I know why counsel took the strategy they did on each side, a matter of trial strategy, whether to go to the bank and actually have them say, . . . [wrongful death or other estate claims] had nothing to do with it. It seems like a futile gesture on their part to do so, and I think they were right.
>
> I understand the argument that [Sparkman] want[s] to bifurcate the issue of first whether there is a possibility . . . that wrongful death was a part of the settlement and the second part being, okay, how much a part. But as I said, I find that I cannot allow this case to go further without first finding that the wrongful death cause of action does have viability, and I find that it does not, certainly not on this record.
>
> As I said, without that, I'm left with pure speculation on how much value it had if I cannot look at whether it does have value. So I granted the motion for summary disposition pursuant to MCR 2.116(C)(10).

Sparkman now appeals as of right.

II. WRONGFUL DEATH CLAIM

This Court reviews de novo a lower court's summary disposition ruling. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers 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*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

Appellant Sparkman did not establish a genuine issue of material fact that the estate possessed a good-faith, viable wrongful death claim against Comerica Bank. The evidence of record, including a February 2009 memorandum authored by estate counsel Gregory Gamalski and the depositions of estate cocounsel Gamalski, George Mercer, and David Zacks, establishes that no legitimate wrongful death claim could have been pursued in good faith against Comerica Bank. Sparkman has not identified a viable legal theory under which the estate could have proven some "wrongful act, neglect, or fault of" Comerica Bank that resulted in the decedent's suicide. MCL 600.2922(1). The facts do not give rise to a reasonable inference that Comerica Bank engaged in any purposeful conduct that might form the basis for an intentional tort. And in

the context of a negligence action, our Supreme Court has explained that no duty to prevent a suicide exists unless the death was foreseeable:

> Where the events leading to injury are not foreseeable, there is no duty, and summary disposition is appropriate. In this case, the defendants had no notice that the decedent might attempt suicide, and therefore they cannot be held responsible for failing to prevent the decedent's death. This death was not reasonably foreseeable. Tragic as it was, defendants cannot be held responsible for the unforeseen suicide of the plaintiff's decedent. [*Johnson v Detroit*, 457 Mich 695, 711-712 (lead opinion by MALLETT, J.), 713 (TAYLOR, J., concurring in part and dissenting in part); 579 NW2d 895 (1998) (internal citations omitted).]

Nothing in the present record suggests that Comerica Bank could or should have reasonably foreseen the decedent's death. In summary, no evidence reasonably substantiates that the estate in good faith could have asserted a wrongful death claim against Comerica Bank.

Sparkman argues that a potential wrongful death claim against Comerica Bank nonetheless factored into the settlement agreement because the release of even a doubtful claim may qualify as consideration for a settlement agreement. However, the authorities invoked by Sparkman clarify that withdrawal of *good-faith* claims may constitute consideration for entering into a settlement agreement. For example, in *Hewett Grocery Co v Biddle Purchasing Co*, 289 Mich 225, 234; 286 NW 221 (1939), the Supreme Court observed:

> "'A *bona fide* claim, with a color of right, although there be in fact no right, *so long as the party asserting it does not know he has no right, and acts in good faith*, is sufficient to sustain a compromise; for a party may buy his peace in a case in which he knows there is no right against him.'" [Quoting *Gates v Shutts*, 7 Mich 127, 133 (1859) (emphasis added).]

Further, 5 MI Civ Jur, Compromise and Settlement, § 12, p 282, provides:

> [F]orbearance or a promise to forbear from doing what one cannot legally do is not consideration for a compromise .... While the settlement of a bona fide dispute or an unliquidated claim, *if made fairly and in good faith*, is a sufficient consideration for a compromise, in order for this rule to apply there must be an actual or genuine dispute or controversy between the parties concerning the subject of the claim. [Emphasis added, internal footnotes omitted.]

Similarly, 5 MI Civ Jur, Compromise and Settlement, § 13, p 283, provides:

> The compromise and settlement of an asserted claim involved in a legal controversy, no matter how doubtful, constitutes sufficient consideration for settlement and for an obligation given by one party to another in consideration of the settlement. The surrender of even doubtful claims *on the honest and reasonable belief in the validity of those claims* is a legal detriment amounting to consideration. *While a claim which is entirely baseless, and without foundation in law or equity, does not afford a sufficient consideration for a compromise*, and the threat or fear of a lawsuit or criminal prosecution on a baseless claim does not

furnish a consideration for a compromise, the *settlement of an unfounded claim asserted in good faith* is consideration for a contract of settlement." [Emphasis added, internal footnotes omitted.]

The submitted evidence demonstrates that although the estate investigated whether a possible a wrongful death claim could be brought, it determined that there were no facts or viable legal theory that would support a good-faith wrongful death claim against Comerica Bank, and Sparkman has not shown that a colorable wrongful death claim was taken into account by the estate and Comerica Bank when they entered into the settlement agreement.

Sparkman's suggestion that Comerica Bank received no consideration in the settlement agreement if the estate did not have a valid wrongful death claim to release ignores the terms of the settlement agreement. The decedent and his business entities gave Comerica Bank mortgage notes and made other promises to pay back loans. Therefore, the estate's settlement agreement promise to pay Comerica Bank $4,120,775 may be treated as a preexisting obligation. *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000) ("it is well settled that doing what one is legally bound to do is not consideration for a new promise"). But although the estate had an obligation to pay the mortgages obtained by the decedent or face foreclosure regarding the mortgaged properties,[1] the estate agreed "to sell, transfer, convey and assign" the mortgaged properties to Comerica Bank and "waive any and all rights of redemption . . . [the estate] may have in and to any of the Properties absolutely." The parties' waiver of certain terms of their original agreement amounted to consideration adequate to support their modification. *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 11; 708 NW2d 778 (2005). Furthermore, the estate gave Comerica Bank a broad release of any potential claims against the bank:

> Debtors and [Smith] . . . each hereby waive, discharge and forever release lender, lender's employees, officers, directors, [and] attorneys . . . from and of any and all claims, causes of action, defenses, counterclaims or offsets and/or allegations debtors and [Smith] . . . may have or may have made or which are based on facts or circumstances arising at any time up through and including the date hereof, whether known or unknown, . . . including without limitation, the "claims" as defined in the purchase agreement.

The estate's release constituted adequate consideration for the settlement agreement. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 454; 733 NW2d 766 (2006).

Concerning Sparkman's emphasis on the final settlement agreement's deletion of three words, "the death of," from Recital M, the appearance of this phrase in prior drafts of the agreement between the estate and Comerica Bank does not reasonably signal, as Sparkman

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[1] In ¶ 2 of the settlement agreement, the estate acknowledged "the Liabilities as set out in Loan Documents, the amount of the Liabilities as stated, . . . the existence of the defaults," and "that [Comerica Bank's] accelerations and demands for repayment of the Liabilities were timely and proper."

maintains, that "the potential wrongful death claim was a component of the settlement negotiations." Smith and Sparkman do not dispute that shortly before the closing, the words "the death of" were removed from Recital M, which ultimately stated, "Debtors and [Smith] have asserted certain claims against Lender with respect to Paul A. Smith, the making of loans and other extensions of credit to Debtors, or any of them, and other claims related to the Liabilities." The words "the death of" previously appeared before the decedent's name. The removal of the phrase "the death of" from Recital M seemingly broadened the scope of the term "claims" defined in this recital to include any claim relating to the decedent, not just his death. However, in light of the ample evidence establishing the groundlessness of a wrongful death claim and the estate's abandonment of such a claim, we reject that the mere deletion of the phrase "the death of" from the final settlement agreement signals that the estate and Comerica Bank engaged in negotiation in any meaningful respect regarding a wrongful death claim.

We conclude that the probate court correctly granted Smith's motion for summary disposition of the emergency petition pursuant to MCR 2.116(C)(10), because the evidence of record agreed that the estate had no legitimate wrongful death claim against Comerica Bank and, consequently, a wrongful death claim did not comprise a part of the settlement agreement between the estate and Comerica Bank.

III. BREACH OF FIDUCIARY DUTIES

Finally, Sparkman contends that Smith ignored her responsibility to distribute wrongful death proceeds derived from the estate's settlement agreement with Comerica Bank, as required by the following provisions of MCL 700.3924:

> (1) For the purpose of settling a claim as to which an action is not pending in another court for damages for wrongful death or for a claim existing under this state's laws relating to the survival of actions, if a personal representative petitions the court in writing asking leave to settle the claim and after notice to all persons who may be entitled to damages as provided in section 2922 of the revised judicature act of 1961, being section 600.2922 of the Michigan Compiled Laws, the court may conduct a hearing and approve or reject the settlement.
>
> (2) The proceeds of a court settlement of a cause of action for wrongful death shall be distributed in accordance with all of the following . . . .

But because no wrongful death claim, and no proceeds arising from such a claim, existed in this case, Smith did not violate her fiduciary responsibilities to the estate, see MCL 700.1212 and

MCL 700.3703, by neglecting to distribute wrongful death proceeds in conformity with MCL 700.3924.

Affirmed. As the prevailing party, appellee may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio