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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 2007-2014 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®* 2015 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2014 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: November 17, 2014

RE: John Alan Navarro, Plaintiff-Appellant, v. Whitny Morris Andrews, as Personal Representative of the Estate of Shirlene Danette Morris, Deceased, Defendant-Appellee
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL STATS:

ALGORITHMS TO ADJUST DISPARATE CRITERIA.

My SABR brothers do this all the time. I confess I am an amateur. My best analysis was creating a formula for determining how and to what extent the statistics of those such as Joe DiMaggio and Ted Williams would have ended up had the former not been called away to the second World War and the latter that wore plus Korea.

Temporal analysis defies my ken. How do the players of one era compare to another?

It's easy to make a quantative adjustment based on the number of games in a season. There are only so many other tangibles to weigh. Beyond that, I cannot conceive of a formula. Some tangibles which would have to be analyzed as values are:

1. Even looking at the simple criteria mentioned above, number of games, three non-mathematical factors surface. First, the extra games are played in colder weather, without doubleheaders and at night. See what I mean?
2. Today's people are larger, better trained, more aware of diet and the effect of drugs and alcohol.
3. Some era's used artificial turf more than others.
4. In the pivotal year of 1940, America had a population of 130,000. Despite the proliferation of teams which weakens overall talent and allows the best to succeed far more over the worse, U.S. population is now over 350,000 <u>and</u> add in a zillion strong men from the rest of the world who didn't play in 1940, together with a high number of African Americans.
5. Better equipment for present players. A .990 fielding percent in the 30's with paw covering mitts is better than a .990 today, when fielders use peach baskets.
6. Field areas are smaller today.
7. Medical care is superior. Tommy John surgery and other reconstruction. Hospitals screwed up Joe DiMaggio and Mickey Mantle's legs. They did not make them better. Antibiotics get folds back in the saddle sooner.
8. Travel is by plane, not train.
9. Statistical analysis itself is better helping Managers and General Managers make decisions.
10. Videotapes help coaches and players spot their flaws.
11. Unions and free agents prevent teams from burying players so they can't join opposing teams.
12. There are more college teams and less minor league teams.
13. Managing pitchers are different today, there are few complete games.
14. There was no designated hitters.

I am sure I have missed many; but to the average fan I hope I have given you something to make valid comparisons. To my SABR friends; please solve the problem.

<u>REVIEW OF CASE</u>:

Reference Files: Claim For Services
Presumption of Gratuity
Contract Implied in Law
Contract Implied in Fact

Let us merely state the law as set forth by the Court of Appeals and not apply it to the facts of the case. The Yale approach might better help us understand this case.

1. A contract is implied by <u>law</u> when one received a benefit, retains it and gives no reasonable compensation. *In Re Lewis Estate,* 168 Mich App 70, 74 (1988).
2. This is a legal fiction.
3. This legal fiction cannot be applied when there is a presumption of gratuity.
4. A presumption of gratuity applies when the party rendering the service is related by blood or thereabouts, *Featherston v Steinhoff,* 226 Mich App 584.
5. When there is a presumption of gratuity, a plaintiff may still recover under a theory of a contract implied in fact.
6. A contract implied in fact arises when:
   a. A performs a service for B.
   b. Expecting to be paid.
7. The courts will disregard the presumption of gratuity if the facts show a contract implied in fact. *Estate of Morris,* 193 Mich App 579 (1992). As a presumption cannot establish a question of fact.
8. If those pertinent facts are pleaded by a claimant, the estate cannot rely on only presumption, but has to adduce <u>evidence</u> creating an inference that the parties did <u>not</u> manifest a mutual conflict to contract. *Erickson v Goodell Oil Co,* 384 Mich 207 (1970).

In the instant case the Lower Court erred in not applying the presumption of gratuity, but properly denied a summary disposition for plaintiff despite the lack of rebuttal evidence by the estate when claimant's case was based upon his own affidavit and as such credibility was an issue.

The concurring opinion muddies the situation a bit. It holds that even if there is a presumption of gratuity, the estate must produce evidence that the parties did not manifest a mutual intent to contract on that the services were not valuable.

The concurring opinion also abjures the Lower Court's reliance on the possibility at trial of lack of credibility as a ground to deny a summary disposition.

The concurring opinion joined the majority because of other failures by plaintiff in his summary disposition motion.

AAM:kjd
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STATE OF MICHIGAN

COURT OF APPEALS

JOHN ALAN NAVARRO, Plaintiff-Appellant,	UNPUBLISHED September 25, 2014
v WHITNY MORRIS ANDREWS, as Personal Representative of the Estate of SHIRLENE DANETTE MORRIS, Deceased, Defendant-Appellee.	No. 311612 Wayne Probate Court LC No. 2010-758819-CZ

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right an order finding for plaintiff in the amount of $8,400 in his claim against the estate for attendant care services. We affirm.

On appeal, plaintiff argues that: (1) the court erred in denying plaintiff's motion for summary disposition because there was no genuine issue of material fact; (2) the judge erred in his application of MCR 5.101(C)(2); (3) the court's final opinion and determination was based upon an erroneous conclusion of law; and (4) the judge's findings of fact were clearly erroneous. We disagree.

I. SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred in denying plaintiff's motion for summary disposition because there was no genuine issue of material fact that plaintiff was owed for the services he rendered on behalf of decedent, and defendant failed to set forth any specific facts in support of her response to plaintiff's motion. We disagree.

A. STANDARD OF REVIEW

Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing the grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012). This Court is "limited to considering the evidence submitted to the trial court before its decision on the motions." *Calhoun Co v Blue Cross Blue Shield of Mich*, 297 Mich App 1, 12; 824 NW2d 202 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

"This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). A genuine issue of material fact exists when, after viewing the evidence in the light most favorable to the nonmoving party, the record leaves open an issue upon which reasonable minds may differ. *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013). Certain circumstances might present issues of fact or credibility that preclude summary disposition even in the absence of specifically refuting documentary evidence. *White v Taylor Distrib Co*, 275 Mich App 615, 626, 628; 739 NW2d 132 (2007).

B. DISCUSSION

There was a genuine issue of material fact regarding whether plaintiff was owed money for the services rendered to decedent, therefore, the trial court properly denied plaintiff's motion for summary disposition.

A contract may be implied in law where there is a receipt of a benefit by one person from another, and retention of the benefit is inequitable, absent reasonable compensation. *In re Estate of Lewis*, 168 Mich App 70, 74; 423 NW2d 600 (1988). This legal fiction is inapplicable when the parties have a relationship that gives rise to the presumption that services were rendered gratuitously. *Id.* A presumption of gratuity arises where the plaintiff is related by blood or marriage to the decedent, or where the parties lived together as husband and wife, despite never having married. *Id.*

The trial court erred in finding that no presumption of gratuity applied in this case. In *Featherston v Steinhoff*, 226 Mich App 584; 575 NW2d 6 (1997), this Court discussed when the presumption of gratuity applies. In *Featherston*, the plaintiff and defendant cohabited for eight years, beginning roughly six months after plaintiff gave birth to their son, but the two never married. *Id.* at 585. This Court held that "[t]hose engaged in meretricious relationships do not enjoy property rights afforded a legally married couple," but "services rendered during a meretricious relationship are presumably gratuitous." *Id.* at 589.

Featherston controls the case at hand. In both, the parties had a child together and cohabited for an extended period of time. These facts are sufficient to find that plaintiff and decedent were living together as husband and wife, despite never having married, and therefore, a presumption of gratuity applies. *In re Estate of Lewis*, 168 Mich App at 74. Further, in the case at hand, plaintiff testified that he and decedent were engaged to be married, and presented decedent to others as his "fiancé." This fact, when coupled with the others, only further supports a presumption of gratuity for the services plaintiff rendered on behalf of decedent.

Even when a presumption of gratuity arises, a plaintiff may still recover for the services provided under the theory of implied-in-fact contract. *In re Estate of Morris*, 193 Mich App 579, 582; 484 NW2d 755 (1992). A contract implied in fact occurs when (1) one person performs or provides services for another, (2) with the expectation of being paid, and (3) the individual receiving the benefit expects to pay for the services. *Id.* Plaintiff's primary evidence in support of his claim that decedent expected to pay for the attendant care services was his own affidavit. Therefore, the trial judge properly denied summary disposition, in order to assess plaintiff's credibility at trial. See *Wurtz v Beecher Metro Dist*, 298 Mich App 75, 90; 825 NW2d 651 (2012), lv gtd 494 Mich 862 (2013) (holding that summary disposition is improper when the case requires a credibility determination).

Absent the presumption of gratuity, there was still a genuine issue of material fact such that summary disposition was properly denied. As the trial judge mentioned, there was an issue regarding the beneficial extent of the services rendered by plaintiff. To sufficiently prove a contract implied in law, plaintiff must show that there was a receipt of a benefit by decedent and from plaintiff, and retention of the benefit is inequitable, absent reasonable compensation. *In re Estate of Lewis*, 168 Mich App at 74.

Plaintiff provided no evidence that decedent's retention of the benefit provided by plaintiff would be inequitable, absent compensation for plaintiff. Plaintiff and decedent lived together, and had a child together. The only evidence provided to show that plaintiff expected to be compensated for his efforts in assisting decedent was his own affidavit. In fact, it could be just as likely that plaintiff was acting out of the love and care for the mother of his child, and therefore, his care for decedent would not be considered inequitable. Thus, because the only evidence supporting plaintiff's position was his own affidavit, and no other evidence was provided to support plaintiff's ultimate contention, i.e., that he expected to be paid for his services and decedent expected to pay plaintiff for the services rendered, the trial judge properly denied the motion for summary disposition in order to assess plaintiff's credibility at trial. See *Wurtz*, 298 Mich App at 90.

The same credibility issues apply had the trial judge found that there was a presumption of gratuity and plaintiff had to prove a contract implied in fact. The main evidence supporting plaintiff's motion for summary disposition was his own affidavit, stating that he expected to be paid for the services he rendered to decedent, and that decedent had initiated the underlying lawsuit against decedent's insurance provider in order to recover the money owed to plaintiff. Again, summary disposition is improper in cases where credibility is integral to the determination. *Id.*

Secondly, plaintiff contends that summary disposition should have been granted because defendant failed to set forth facts as required by MCR 2.116(G)(4). This subrule states:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. *If the adverse party*

> *does not so respond, judgment, if appropriate, shall be entered against him or her.* [MCR 2.116(G)(4) (emphasis added).]

As stated above, because plaintiff's contention that he had an oral contract with decedent was only supported by his own affidavit, plaintiff's credibility was central to the case. "[S]ummary disposition is rarely appropriate in cases involving questions of credibility[.]" *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005). Even though defendant did not attach documentary evidence to her response to plaintiff's motion for summary disposition setting forth specific facts showing there was a genuine issue for trial, it would not have been appropriate to enter judgment in favor of plaintiff.

In the present case, there was a genuine issue of material fact regarding whether there was a contract implied in fact between plaintiff and decedent. Though the trial judge erred in holding that the presumption of gratuity did not apply, plaintiff's credibility was a central factor in determining the existence of an implied-in-fact contract, and therefore, summary disposition was properly denied.

II. APPLICATION OF MCR 5.101(C)(2) AND MCL 700.1303(h)

Plaintiff next contends that the trial judge improperly construed the claim in the context of the amount of estate assets that should be distributed to plaintiff, instead of for the validity of plaintiff's claim for compensation for attendant care services. We disagree.

A. STANDARD OF REVIEW

Court rules and statutes are subject to the same rules of construction. *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010). Questions of statutory interpretation are reviewed de novo by this Court. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009).

B. DISCUSSION

The trial court did not err its application of MCR 5.101(C)(2) and MCL 700.1303(h). "Any action filed by a claimant after notice that the claim has been disallowed" must be titled a "civil action," must be commenced by filing a complaint, and is governed by the rules applicable to all civil actions filed in the circuit courts. MCR 5.101(C)(2). The probate courts of this state have concurrent legal and equitable jurisdiction to "[h]ear and decide a claim by or against a fiduciary or trustee for the return of property." MCL 700.1303(h).

Plaintiff contends that the trial judge erroneously found for plaintiff in the limited amount of $8,400, because the trial judge reduced the amount of plaintiff's claim to a percentage of its actual value. Plaintiff is correct that the issue before the court was the validity of plaintiff's claim to the settlement with decedent's insurance provider for attendant care services. Additionally, plaintiff is correct that the trial court, as a probate court, had jurisdiction to hear a claim against a trustee of an estate for the return of property. See MCL 700.1303(h).

However, plaintiff mistakenly asserts that the trial court did not correctly apply its jurisdiction in this case. In his opinion and order, the trial judge stated that "[t]he issue to be resolved is solely what percentage or amount, if any, of this claim should the Plaintiff receive from the Estate when it is time for distribution of the Estate assets." The trial judge went on to find that plaintiff could not have been decedent's primary care provider for the entire time period for which decedent was suing her insurance provider for benefits. Assuming plaintiff did provide services to decedent, in the trial judge's ruling, the judge found that the most care plaintiff could have provided was approximately 20 percent of what he claimed. The trial court had not reduced the plaintiff's claim to 20 percent of the amount alleged because of limitations on the estate's assets, and in fact, the trial court had not yet determined whether plaintiff would be eligible to receive all $8,400 of the claim once distribution of the estate assets was completed, and all other creditors to the estate were taken into account. Thus, from a reading of the trial judge's opinion and order, it becomes clear that the trial judge was properly analyzing the lawsuit as one for the validity of plaintiff's claim for attendant care services due to him from the settlement with decedent's insurance provider.

III. CONCLUSIONS OF LAW

Plaintiff also contends that the trial court's opinion was based upon an erroneous conclusion of law, because the trial court held that plaintiff had to prove the existence of a contract implied in fact. We disagree.

A. STANDARD OF REVIEW

Questions of law are subject to de novo review. *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002).

B. DISCUSSION

As stated above, the trial court erred in finding that there was no presumption of gratuity between plaintiff and decedent. However, the trial court then correctly addressed the issue under a contract-implied-in-fact analysis.

A contract implied in law is not an actual contract, but a legal fiction imposed to do justice, even though it may be clear from the circumstances that no promise was ever made or even intended. *In re Estate of Lewis*, 168 Mich App at 74. A contract may be implied in law if there is receipt of a benefit by one person from another, and retention of the benefit is inequitable, absent reasonable compensation. *Id.* This legal fiction, however, is not applicable where the relationship between the individuals giving and receiving the benefit is such that there is a presumption that the services were rendered gratuitously. *Id.* Such a presumption arises when the plaintiff is related by blood or marriage to the decedent, and where the parties lived together as husband and wife despite never having married. *Id.*

Even when a presumption of gratuity arises, a plaintiff may still recover for services rendered under the theory of a contract implied in fact. *In re Estate of Morris*, 193 Mich App at 582. A contract implied in fact arises when services are performed by someone who intends to be compensated from another who expects at the time of performance to compensate for those services. *Id.*

The trial judge incorrectly found that no presumption of gratuity arose between plaintiff and decedent. Plaintiff and decedent had a child together and cohabited for an extended period of time. These facts are sufficient to find that plaintiff and decedent were living together as husband and wife, despite never having married, and therefore, a presumption of gratuity applies. *Featherston*, 226 Mich App at 591; *In re Estate of Lewis*, 168 Mich App at 74. Further, in the case at hand, plaintiff testified that he and decedent were engaged to be married, and presented decedent to others as his "fiancé." This fact, when coupled with the others, only further supports a presumption of gratuity for the services plaintiff rendered on behalf of decedent. Therefore, because a presumption of gratuity applied to the services plaintiff rendered to decedent, the trial judge properly found that plaintiff was required to prove a contract implied in fact in order to recover on his claim for attendant care services. See *In re Estate of Lewis*, 168 Mich App at 74.

IV. FINDINGS OF FACT

Finally, plaintiff contends that the trial judge's opinion was based upon erroneous findings of fact, because the trial judge found that plaintiff had not proven the beginning date for his attendant care services, inquired about decedent's first lawsuit against her insurer, found plaintiff not credible, and found that plaintiff could only have provided 20 percent of the care decedent received. Again, we disagree.

A. STANDARD OF REVIEW

A trial court's findings of fact are reviewed for clear error. *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Hannay v Dep't of Transp*, 299 Mich App 261, 271; 829 NW2d 883 (2013).

B. DISCUSSION

The trial court did not base its opinion upon clearly erroneous findings of fact. It is the duty of the finder of fact to determine the credibility of evidence presented. *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 103; 574 NW2d 36 (1997). This Court will respect the trial court's superior position to make credibility determinations of witnesses, and will not revisit those determinations on appeal. *Shann v Shann*, 293 Mich App 302, 307; 809 NW2d 435 (2011).

Plaintiff's claim was supported by the testimony of three individuals: plaintiff, plaintiff's son, and the attorney that represented decedent in the lawsuit against her insurance provider. Defendant supported her defense with testimony that directly contradicted much of the testimony by plaintiff and plaintiff's son, and even some of the assertions made by the attorney. The trial judge found that plaintiff had a number of credibility issues, and that defendant's testimony was much more credible.

Plaintiff first argues that the trial court erred in finding that he did not establish the beginning date for his services. The trial court found that, despite its requests, neither plaintiff nor the attorney from the State Farm lawsuit provided any calendars or attendant care service schedules to show the dates and amounts of care plaintiff provided decedent. The finder of fact may draw an adverse inference against a party that has failed to produce evidence only when the evidence was under the party's control and could have been produced, the party has no reasonable excuse for the failure to produce the evidence, and the evidence is material. *Ward v Consol Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005). Decedent's attorney from the lawsuit against her insurance provider testified that it was his standard custom and practice to have family providers fill out and maintain calendars documenting the hours of care they provide, and the attorney remembered providing such calendars to the insurer. The trial judge found, and we agree, that these schedules were in plaintiff's control and could have been produced, that plaintiff had no excuse for his failure to produce the schedules, and that these schedules were material to the case. The trial judge was allowed to make an inference against plaintiff because of his failure to produce these schedules, and it was such an inference that led to the judge's finding that the starting date for plaintiff's services rendered to decedent could not have begun when plaintiff claimed.

Plaintiff next argues that the trial court erred in requiring the live testimony of the attorney, and then inquiring about decedent's first lawsuit against the insurance provider, which was irrelevant to the instant case. Under MRE 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Further, a witness may be impeached by showing the improbabilities of his story through admission of previous conduct or statements that are inconsistent with the testimony. *Gilchrist v Gilchrist*, 333 Mich 275, 280; 52 NW2d 531 (1952).

Because decedent had previously settled with the insurance provider for a similar claim for attendant care services, and because the attorney testified that plaintiff had rendered attendant care services in the first suit, it was relevant to the determination of what decedent was planning to do with the settlement in the instant case to consider her previous conduct with settlement monies. See *id.* Therefore, the trial court did not err in questioning the attorney about decedent's use of the first settlement with her insurance provider.

Third, plaintiff argues that the trial judge erred in finding that the sole issue to be resolved was what percentage or amount, if any, of plaintiff's claim should be distributed from the estate's assets, and if this was a finding of fact, it was clearly erroneous. This was a conclusion regarding the trial court's jurisdiction, and therefore, is a question of law. See *Nash v Salter*, 280 Mich App 104, 108; 760 NW2d 612 (2008). Further, as stated above, the trial court did not err in determining the issue before it.

Fourth, plaintiff argues that the trial court erred in finding plaintiff not credible because of his previous experience with the legal system and his failure to intervene in decedent's lawsuit against her insurance provider. Again, an appellate court will not disturb a fact finder's credibility determinations on appeal. *Shann*, 293 Mich App at 307. Therefore, the trial judge did not clearly err in finding that plaintiff was less credible than defendant because of either plaintiff's legal experience or his failure to intervene in the lawsuit against decedent's insurance provider.

Finally, plaintiff claims that the trial court erred in finding that only 20 percent of the services that plaintiff claims to have rendered to decedent could actually have been provided. At trial, plaintiff and plaintiff's son both testified that they each did the majority of the housework. Further, defendant testified that decedent was capable of at least doing minor chores around the house, and of cooking dinner when defendant came over to visit. On the basis of this testimony, and in light of the trial court's credibility findings, it was not clear error for the trial court to find that plaintiff's claim regarding money owed for services rendered was inflated.

V. CONCLUSION

The trial court did not err in denying plaintiff's motion for summary disposition because there was a genuine issue of material fact as to the existence of a contract implied in fact, and defendant's failure to attach affidavits or other factual support to her response did not necessitate summary disposition in plaintiff's favor. Second, the trial court properly analyzed the lawsuit as a claim against an estate or trustee for the return of property, and therefore, did not err in the application of its jurisdiction to the instant case. Third, the trial court erred in finding that no presumption of gratuity applied, but then properly found that plaintiff had the burden of showing that there was a contract implied in fact, so the error of law does not merit reversal. Finally, the trial court did not make any clearly erroneous findings of fact by using evidence of decedent's conduct involving her first settlement with her insurance provider or by finding plaintiff less credible than defendant.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

STATE OF MICHIGAN

COURT OF APPEALS

JOHN ALAN NAVARRO,

Plaintiff-Appellant,

v

WHITNY MORRIS ANDREWS, as Personal Representative of the Estate of SHIRLENE DANETTE MORRIS, Deceased,

Defendant-Appellee.

UNPUBLISHED
September 25, 2014

No. 311612
Wayne Probate Court
LC No. 2010-758819-CZ

Before: STEPHENS, P.J., and M. J. KELLY and RIORDAN, JJ.

M. J. KELLY, J. (*concurring*).

Although I do not join the majority's analysis for the reasons more fully explained below, I agree that the trial court properly denied the motion for summary disposition by plaintiff, John Alan Navarro. Moreover, after reviewing the remaining issues, I conclude there were no errors that would warrant relief. Therefore, I concur with the majority's decision to affirm.

I. BASIC FACTS

Shirlene Danette Morris and John Alan Navarro had a dating relationship and lived together for some time. They had a daughter in 2008. Morris had been involved in an automobile accident in 2005 and, among other injuries, sustained a closed head injury that caused her to have seizures.

Morris filed a claim for first-party benefits with State Farm and State Farm agreed to pay certain benefits through February 2008, but refused to pay her claims after that date. Morris sued State Farm for costs incurred after February 2008. She claimed, in relevant part, that State Farm had to pay for 24-hour attendant care, which Navarro provided to her. In April 2009, while that suit was still pending, Morris died.

Morris' daughter from a previous relationship, Whitny Morris Andrews, was eventually appointed to be the personal representative for Morris' estate. In June 2010, Andrews settled with State Farm on behalf of the estate. State Farm agreed to pay the estate $92,500, which included payment for attendant care. After the settlement, Navarro submitted a claim to the estate requesting payment for the services that he provided to Morris, but Andrews denied the claim.

Navarro sued the estate in August 2010. In July 2011, Navarro moved for summary disposition. He argued that the undisputed evidence showed that he provided attendant care services to Morris during the period at issue and that he was entitled to compensation for his services. The trial court determined that there was a question of fact as to whether and to what extent the estate had to compensate Navarro for his services. The dispute proceeded to a bench trial and the court found that Navarro was entitled to $8,400 in compensation.

Navarro then appealed in this Court.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Navarro argued on appeal that the trial court should have granted his motion for summary disposition because the estate failed to present any evidence to rebut his evidence that he was entitled to compensation for his claim. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. ANALYSIS

In the present case, the trial court determined that the estate had established a question of fact as to whether Morris received beneficial services from Navarro and whether they had mutually agreed that Navarro should be paid for those services. In order to determine whether the trial court properly denied Navarro's motion, this Court must examine the evidence and arguments actually proffered is support or response to the motion at issue—we are not at liberty to expand the record to include evidence or arguments that the trial court did not have the opportunity to consider. See *id.* at 380-381.

Summary disposition under MCR 2.116(C)(10) is appropriate when the moving party establishes that he or she is entitled to judgment as a matter of law because, except "as to the amount of damages, there is no genuine issue as to ant material fact . . . ." In order to establish the right to judgment as a matter of law, the moving party must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). The level of specificity required is that which would place the nonmoving party on notice of the need to respond. *Barnard Mfg*, 285 Mich App at 369. The moving party must support its motion with affidavits, depositions, or other documentary evidence, which—if left unrebutted—would establish its right to relief. *Id.* at 369-370.

Navarro's motion for summary disposition and his brief in support were poorly organized and poorly presented. In his motion, Navarro stated that he was submitting his affidavit in support of the motion, but then failed to cite or even discuss the affidavit in his brief. He also stated numerous facts in his brief without citing any evidence to support those facts. Instead, he apparently left it to the trial court to sift through the documents he submitted with his brief to determine whether those documents might permit a reasonable jury to find the existence of the facts that he asserted. For example, Navarro attached to his brief a copy of the case evaluation summary that was apparently submitted in Morris' suit against State Farm, but Navarro did not discuss that document in his brief: he did not discuss who drafted it, did not discuss whether and to what extent it was admissible, and did not even discuss the inferences that could reasonably be drawn from it. To further complicate any court's review, Navarro did not specifically identify or discuss the elements applicable to his claim—let alone show how his evidence established each element. Rather, under the heading "Replacement Services and 24 Hour Attendant Care", he merely asserted that Andrews could not argue that he did not render the attendant care without "effectively admitting that she participated in the perpetration of a fraud against State Farm." He then stated—again without any citation to record evidence—that he did in fact "render replacement services" and was entitled to compensation.

The estate's brief in response to Navarro's motion was, to be sure, similarly deficient. The estate did not bother to present any evidence to show that Navarro did not provide the services or to show that the parties did not agree that Navarro should be compensated. Instead, the estate merely relied on the legal presumption that Navarro provided the services gratuitously on the basis of his relationship with Morris, without citing any evidence to establish the nature of that relationship, and argued that the trial court could disregard Navarro's "self-serving" affidavit.

While the presumption of gratuitous service likely applies to Navarro under the facts assumed to be present at the time of the motion, see *Featherston v Steinhoff*, 226 Mich App 584, 588-589; 575 NW2d 6 (1997), the presumption applies only to the extent that Navarro's claim was for compensation under the equitable doctrine of unjust enrichment. See *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 185-186; 504 NW2d 635 (1993) (explaining that courts enforce the equitable doctrine of unjust enrichment through the fiction of a contract implied in law, but will not resort to that fiction under situations were a contract must be implied in fact); *In re McKim Estate*, 238 Mich App 453, 457-458; 606 NW2d 30 (1999) (explaining that courts will not use the equitable remedy of implying a contract in law under circumstances where courts presume that the services were rendered gratuitously). Because courts will disregard this presumption under facts establishing a contract implied in fact, see *In re Estate of Morris*, 193 Mich App 579, 582; 484 NW2d 755 (1992), the estate could not rely on the presumption to establish a question of fact in response to evidence that, if left unrebutted, established that Morris and Navarro manifested an intent to contract "by implication" through the "conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction." *Erickson v Goodell Oil Co*, 384 Mich 207, 212; 180 NW2d 798 (1970). Rather, the estate had to show that the evidence permitted an inference that the parties did not manifest a mutual intent to contract or that the services rendered were not valuable.

I also question whether it is sufficient for a nonmoving party to respond to a motion for summary disposition by arguing that the court should disregard an affidavit as potentially incredible. This Court has asserted that courts are free to disregard unrebutted affidavits offered in support of a motion for summary disposition on the ground that a finder-of-fact might disbelieve the testimony at trial. See, e.g., *Wurtz v Beecher Metro Dist*, 298 Mich App 75, 90; 825 NW2d 651 (2012), rev'd 495 Mich 242 (2014); *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 365, 480 NW2d 275 (1991) ("It is well settled that where the truth of a material factual assertion of a moving party's affidavit depends on the affiant's credibility, there exists a genuine issue to be decided at trial by the trier of fact and a motion for summary disposition cannot be granted."). However, these statements of the law appear to have their origin in motion practice under the prior rules. See *SSC Assoc Ltd Partnership*, 192 Mich App at 365, citing *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201 (1973). And since the adoption of the current court rules, our Supreme Court has cautioned against applying the former standards to the current court rules. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Moreover, it is well settled that courts may not assess credibility on a motion for summary disposition and must evaluate the motion on the evidence actually proffered rather than on the mere possibility that a claim might be supported at trial. See *Maiden*, 461 Mich at 121 (stating that a reviewing court must analyze the evidence actually proffered and may not employ a standard citing the mere possibility that the claim might be supported at trial); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) (stating that courts may not assess the credibility of the evidence on a motion for summary disposition). Indeed, although our Supreme Court has not directly considered whether and when a court is justified in disregarding an affidavit or deposition testimony under the current rules, the Court has rejected the notion that a party may respond to a properly supported motion for summary disposition by arguing that it would show that a witness' reason for acting was not worthy of belief at trial—and it did so over a dissent claiming that summary disposition was inappropriate when the issue turned on testimony that could be disbelieved by a jury. See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115-116 (opinion by the Court), 122-124 (opinion by Levin, J.); 469 NW2d 284 (1991). Even to the extent that this Court has directly considered the continued viability of this rule, it has limited it to those circumstances where the opposing party's ability to "submit documentary evidence to effectively counter" an affiant's subjective claims is "near to impossible." *White v Taylor Distributing Co, Inc*, 275 Mich App 615, 627; 739 NW2d 132 (2007).

Notwithstanding these deficiencies in the estate's response to Navarro's motion for summary disposition, I nevertheless conclude that the trial court did not err when it denied his motion. As already explained, Navarro failed to specifically identify the elements of his claim about which he felt there was no genuine issue of material fact and failed to identify or discuss the evidence that established each element. Because he failed to minimally argue and support his motion for summary disposition, the burden to rebut his evidence never shifted to the estate and the trial court properly denied the motion. *Barnard Mfg*, 285 Mich App at 370.

III. CONCLUSION

The trial court did not err when it denied Navarro's motion for summary disposition. Further, I concur fully with the majority's treatment of the remaining issues on appeal. Because there were no errors warranting relief, I concur with the majority's decision to affirm.

/s/ Michael J. Kelly