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 2007-2013 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*® 2014 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2013 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).

For those interested in viewing previous Probate Law Case Summaries, go online to: http://www.kempklein.com/probate-summaries.php

DT: March 3, 2014

RE: Clarence Wessel *v*. Theodore F. Wessel, Jr., Et Al and David Stentz, Et Al
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL:

"How Good Is Mike Trout?"

With spring approaching and spring training starting it's time for some springtime prognostications.

My answer to the question as to how good Mike Trout is – is that he is very good; a potential superstar.

My reason for this opinion is that the pitchers in the American League have had ample time to try to figure Mike Trout out but, in two successive seasons, he has hit .326 and .323, respectively, each with over 500 at-bats.

Rookies are often judged by the 'sophomore jinx'. No matter how you look at it, Mike Trout had no sophomore jinx. If we look at his opening season as 2011, where he was only at the plate 123 times, he had a lowly batting average of .220. In 2012 he batted .326. If we look at 2012 as his first year, his 2013 year was certainly not jinxed, as he played in 157 games; batted 589 times, scored 109 runs; leading the league with 190 hits and a .323 average. His homerun production was only off by 3; dropping from 30 to 27. This young man is only 22 years of age, and will be 23 this summer.

His minor league performance has always been excellent. When he played a majority of the season he batted between .326 and .360.

Also, keep in mind that in 2012 he stole 49 bases.

The only thing lacking in this young man's short career is his RBI production.

I look forward to Mike hitting over 300 once again in 2014.

How do you feel?

By the way, Mike Trout's leit motif is "the motto" by Drake.

REVIEW OF CASE:

Reference Files: Settlement
Forcing a Settlement

This Appeal, emanating out of the St. Clair County Probate Court, is of importance because it shows that a settlement can be enforced even though it's not totally reduced to writing.

The Probate Court authorized a settlement based on emails between counsels.

The Court of Appeals ruled that a Trial Court's decision to enforce a Settlement Agreement is reviewed for abuse of discretion and cites *Groulx v Carlson*, 176 Mich App 484 (1989). The Court of Appeals also cites the *Maldonado v Ford Motor Co.*, 476 Mich 372 (2006) to say that there is no abuse of discretion unless the decision falls outside the range of principled outcomes.

The Court of Appeals, most importantly, held that even though all the terms were not in the settlement, found in the emails, as long as the material terms were in the emails that the court, on its own, could supply the missing non-material details and cites *Nichols v Seaks*, 296 Mich 154 (1941).

The court infers that the settlement might not have been final, had the parties requested the execution of a Release as a condition precedent.

The court does cite that the requirements for a settlement are found in MCR 2.507(G), which allows for settlement only in open court "or unless evidence of the agreement is in writing subscribed by the party against whom the agreement is offered or by that parties attorney". The Court of Appeals said that 'subscribed' is not defined and, for the first time, ruled that emails are a subscription.

The lesson learned from this is if a settlement is not final say so in your emails.

AAM:jv:763356
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

CLARENCE WESSEL, Individually and on behalf of the WESSEL LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v

THEODORE F. WESSEL, JR., Individually and as Trustee of the THEODORE WESSEL TRUST and the ELIZABETH WESSEL TRUST, THEODORE J. WESSEL and VERONICA WESSEL, as Trustees of the WESSEL FAMILY TRUST U/A JUNE 24, 1976, EDWARD J. WESSEL, Individually and as Trustee of the ELIZABETH WESSEL TRUST, MARY E. WESSEL, as Trustee of the WESSEL FAMILY TRUST U/A JUNE 17, 1976, JOHN H. WESSEL, Individually and as Trustee of the WESSEL FAMILY TRUST U/A JUNE 27, 1976, and DOUGLAS N. NELSON,

Defendants-Appellees,

and

DAVID STENTZ, BERNADINE STENTZ, ROBERT KNAPP, NORMA KNAPP, KENNETH KRUSE, JOANNE KRUSE, ROBERT WESSEL and RUTH WESSEL as Trustees of the WESSEL FAMILY TRUST U/A MARCH 3, 2005, and INTERNATIONAL TRANSMISSION COMPANY,

Defendants.

UNPUBLISHED
January 28, 2014

No. 312653
St. Clair Probate Court
LC No. 10-000269-CZ

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Plaintiff, individually and on behalf of the Wessel Limited Partnership, appeals as of right a probate court order dismissing his action and enforcing a settlement. We affirm.

This appeal arises from the settlement of a probate action originally filed by four of Elizabeth Wessel's eleven children, claiming breach of fiduciary duty and silent fraud against their defendant siblings and fraud and civil conspiracy against the estate's attorney. Ultimately, all of the plaintiffs except Clarence Wessel executed a release that dismissed the action in return for an agreement not to seek mediation sanctions. After a hearing, the probate court found an agreement by all of the parties, including plaintiff, to end the litigation, granted defendants' motion to enforce the settlement, and dismissed the action with prejudice and without costs.

Plaintiff argues that the probate court erred in dismissing his claims on the ground that a settlement that disposed of the probate action had been reached by all of the parties. We disagree. A trial court's decision to enforce a settlement agreement is reviewed for an abuse of discretion. *Groulx v Carlson*, 176 Mich App 484, 493; 440 NW2d 644 (1989). A court does not abuse its discretion unless its decision falls outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Settlement agreements are not normally set aside, and a party may not disavow a settlement agreement just because the party has had a "change of heart." *Metropolitan Life Ins Co v Goolsby*, 165 Mich App 126, 128-129; 418 NW2d 700 (1987).

Plaintiff contends that there was no meeting of the minds regarding the essential terms as required for a valid settlement. *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004). As noted by the probate court, the essential terms of the agreement were set forth in the e-mails between counsel. On May 4, 2012, plaintiffs' counsel sent defendants' attorney an e-mail that stated in part: "I have advised my clients to dismiss this action in return for an agreement not to seek mediation sanctions." Subsequent e-mails discussed dismissing the litigation along with a release. The e-mails contained all of the material terms, but even if any details were missing, the probate court had the authority to supply any missing non-material details. *Nichols v Seaks*, 296 Mich 154, 159; 295 NW 596 (1941). Further, plaintiff does not assert that his counsel was acting beyond the scope of his authority. A settlement entered into by an attorney on his client's behalf is binding on the client as long as the attorney acted with actual or apparent authority. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453-455; 733 NW2d 766 (2006). The probate court properly found that the parties agreed to the material terms of the settlement in the e-mails between counsel and thus properly enforced the settlement.

Plaintiff also argues that a formal written settlement was required before an order of dismissal could be entered. However, plaintiff never made the execution of a release or settlement agreement a condition precedent to any settlement. Without any such condition precedent, the terms were accepted unconditionally and were complete upon the transmission of the aforementioned e-mails.

Plaintiff further argues, for the first time on appeal, that the purported settlement was not properly subscribed. We disagree. "Generally, an issue is not properly preserved if it is not raised before, and addressed and decided by, the trial court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Here, plaintiff did not argue in the probate court that the alleged settlement was not properly subscribed pursuant to MCR 2.507(G) and thus

did not preserve this argument for appellate review. But even if this Court considers plaintiff's subscription argument, it must fail.

"Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). Plaintiff has not established that a plain error occurred when the settlement was enforced. MCR 2.507(G) provides that an agreement between the parties or their attorneys regarding the proceedings is binding only if it was made in open court "or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney." "Subscribed" is not defined in MCR 2.507(G). This Court has previously quoted *Random House Webster's College Dictionary* (2001) to define "subscribe" as "'to append, as one's signature, *at the bottom of a document* or the like; sign.'" *Kloian*, 273 Mich App at 459 (emphasis added). An electronic signature at the end of an e-mail, but not at the top, containing the terms of the settlement and an offer or acceptance is sufficient to meet the requirement of being subscribed. *Id.* at 459-460.

Here, sufficiently subscribed e-mails between counsel exist to establish that a settlement was made. The May 4, 2012 e-mail by plaintiffs' counsel contained a subscription and a statement that he recommended to his clients that they accept the settlement in return for an agreement not to seek mediation sanctions. The May 9, 2012 e-mail sent by plaintiffs' counsel from his phone, which stated, "They have all agreed to dismiss," was not subscribed, but a subsequent May 18, 2012 subscribed e-mail confirmed, "[e]veryone is on board with ending the litigation." Further, plaintiffs' counsel approved the form of the release in a subscribed e-mail dated May 10, 2012. The references to "everyone" or "all" in the emails include plaintiff. Each e-mail, except the one sent from plaintiffs' counsel's phone, is subscribed with a transmission identifying plaintiffs' counsel as the sender and author of the message.

The probate court made specific findings regarding the e-mails between counsel and found that the record was undisputed and that all of the material terms of the agreement were included in the e-mails. The probate court did not abuse its discretion by enforcing the parties' settlement and dismissing plaintiffs' action.

Affirmed. Defendant may tax costs. MCR 7.219.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder