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 2007-2014 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 and 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.

REVIEW OF CASE:

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 law 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 evidence creating an inference that the parties did not 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.

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Attachment
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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