YOUR LEGAL ADVISORS

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 2007-2017, 2020 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*® 2020 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine's list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

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://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller" and
"Sons of Adam," an International Terror Mystery.

DT: December 14, 2020
RE: ***In re Estate of Kapp***
STATE OF MICHIGAN COURT OF APPEALS

"Alan, you cannot write about baseball all your life"
- Mrs. Pollinger
- 12th Grade English Comp
- Mumford High - 1959

BASEBALL – RULE 5

You may have read, if you are still following baseball, (and it is admittedly difficult, as our Tigers hustle to field somewhere between a Triple A and Double A team), that Major League has just completed the "Rule 5 Draft."

What is it? In short, the Rule 5 draft is a way that a team can sprinkle fertilizer on the other teams without involving a ground crew.

The best analysis is from MLB itself:

Rule 5 Draft

Definition: The Rule 5 Draft allows clubs without a full 40-man roster to select certain non-40-man roster players from other clubs. Clubs draft in reverse order of the standings from the previous season. Players signed at age 18 or younger need to be added to their club's 40-Man roster within five seasons or they become eligible for the Rule 5 Draft. Players who signed at age 19 or older need to be protected within four seasons.

Not every club will make a selection, but those that do pick a player must pay $100,000 to the club from which said player was selected. Rule 5 Draft picks are assigned directly to the drafting club's 27-man roster and must be placed on outright waivers in order to be removed from the 26-man roster in the subsequent season. Should the player clear waivers, he must be offered back to his previous team for $50,000 and can be outrighted to the Minors only if his original club does not wish to reacquire him. A Rule 5 Draft pick can be placed on the Major League injured list, but he must be active for a minimum of 90 days to avoid being subject to the aforementioned roster restrictions in the next campaign.

Clubs may trade a player selected in the Rule 5 Draft, but the same restrictions apply to the player's new organization. However, a club may also work out a trade with the Rule 5 pick's original club to acquire his full rights, thereby allowing him to be optioned to the Minors under traditional circumstances.

Despite Dale Rands to the contrary, (he read a novel of mine where I have a German spy in America talking about a Rule 5 draft), Rule 5 is old.

Rule 5 began in 1892. I will admit to brother Rands that the term "Rule 5" did not appear until the 1941 Rules. The theory was the same, however, the process in which

players who were eligible went through numerous changes. It was first applicable to minor leaguers.

There has been aberration to my fertilizer conclusion. Hack Wilson had a poor year with the Giants and was sent down to Toledo. He did well and was Rule 5'd to the Cubbies. He went on to the Hall of Fame.

The Pirates grabbed Roberto Clemente from Montreal (favored team at the time), another Hall of Famer.

Some draftees were traded back; Cecil Cooper, Bobby Bonilla, Jose Bautista.

Shane Victorino was "Rule 5'd" twice.

Those of you who followed baseball in the 40's and 50's will want to wish the great first baseman, Eddie Robinson a Happy 100th birthday, December 15, 2020!

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

RE: *In re Estate of Kapp*

- Res Judicata
- Privity

Appellant sued Appellee for conversion in Circuit Court. There were remands to clarify what actually transpired in the Probate Court. What occurred is that the heirs of the estate entered into a global settlement which satisfied the claims of conversion. The estate was neither a party to the settlement, nor was it even in existence. Appellee moved for Summary Disposition on the basis of res judicata. Appellant responds that the estate is a different party, therefore, res judicata does not apply. The lower Court granted Summary Disposition. The Court of Appeals affirmed, saying inter alia:

1. Although the heirs could not bind the estate, the heirs adequately represented the interests in the estate because:
2. The estate and the heirs are in privity.
3. The estate must represent the interest of the heirs but their interest were adequately represented regarding the global settlement.
4. The Court cited *In re Estate of Koernke*, 169 Mich App 397 – There was privity between an estate and decedent's Guardian.

STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF JANET KAPP, by MILA KAPUSTA, Personal Representative,

Plaintiff-Appellant,

v

LORRIE KAPP, also known as LORRIE J. KAPP, also known as JANET LORRAINE KAPP, also known as JANET L. KAPP,

Defendant-Appellee.

UNPUBLISHED
November 24, 2020

No. 350675
Oakland Circuit Court
LC No. 2019-171448-CZ

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM.

In this action for fraud and conversion, plaintiff, the estate of Janet Kapp, appeals as of right the circuit court's order granting summary disposition under MCR 2.116(C)(7) (claim barred by prior judgment) in favor of defendant Lorrie Kapp. We affirm.

I. BACKGROUND

Mila Kapusta and Lorrie Kapp are both daughters of Janet and Milan Kapp. Janet passed away in November 2017. In September 2017, a few weeks before their mother's death, Mila brought suit against Lorrie alleging statutory and common law conversion. According to that complaint, from February to November 2016 Lorrie impermissibly withdrew funds from a joint savings account held by Mila and her parents. On Lorrie's motion, the circuit court removed the complaint to the probate court where there were other related matters pending. In March 2018, the probate court dismissed Mila's conversion claims without prejudice because they had not been properly pleaded.

In April 2018, Mila filed a second complaint in circuit court containing the same claims and allegations, and the circuit court again removed the complaint to the probate court. In July 2018, a global settlement was reached as to the various matters pending in the probate court. Relevant to this appeal, Mila's conversion claims against Lorrie were dismissed with prejudice. All of the heirs to the estate or their attorneys consented to the settlement agreement and were

present for the hearing where it was read into the record. An order regarding the settlement was entered in August 2018.

In October 2018, this Court reversed the probate decision to not appoint Mila as Janet's personal representative, which was contrary to Janet's will. *In re Kapp Estate*, unpublished per curiam opinion of the Court of Appeals, issued October 18, 2018 (Docket No. 341871).

In January 2019, Mila filed the instant action as personal representative of Janet's estate. The complaint alleged statutory and common law conversion on the basis of Lorrie's withdrawals from the joint savings account, and also claimed fraud for Lorrie's alleged actions that removed a block on the account. An amended complaint was filed adding allegations that Lorrie took a piano from Janet's home after her death.

In lieu of filing an answer, Lorrie moved for summary disposition under MCR 2.116(C)(7), arguing that the estate was barred from relitigating issues and claims resolved by the 2018 settlement agreement. The circuit court adjourned the first motion hearing and instructed the parties to figure out "what was actually said" at the probate court hearing on the settlement agreement. The circuit court later issued an opinion and order granting Lorrie summary disposition. Having reviewed the probate court hearing and order containing the terms of the 2018 settlement agreement, the circuit court concluded that the estate's claims were barred by res judicata.

II. ANALYSIS

On appeal, the estate argues that res judicata does not preclude the present action because the estate's interests are distinct from the parties who entered into the 2018 settlement agreement.[1]

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004).]

There is no dispute that the 2018 settlement dismissing Mila's conversion claims against Lorrie was a decision on the merits. *Limbach v Oakland Co Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997) ("This Court has held that a voluntary dismissal with prejudice acts as an adjudication on the merits for res judicata purposes."). Nor does the estate dispute that its

[1] We review de novo a circuit court's decision to grant summary disposition under MCR2.116(C)(7). *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015). We also review de novo the application of legal doctrines such as res judicata. See *Estes v Titus*, 481 Mich 573, 579 NW2d 493 (2008).

instant claims were or could have been resolved in the 2018 case. Thus, the question in this case is whether the second element of res judicata is satisfied.

The estate was not a party to the prior action and so we must determine whether privity exists in this case. "For purposes of res judicata, parties are in privity with each other when they are so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013) (quotation marks and citations omitted). Privity exists when there is "a 'substantial identity of interests' that are adequately presented and protected by the first litigant." *Adair*, 470 Mich at 122.

As personal representative, Mila must "act[] reasonably for the benefit of interested persons," MCL 700.3715(1), which includes the heirs to the estate, MCL 700.1105(c). However, all of the heirs were represented by counsel in the settlement negotiations in the probate court that resulted in the dismissal with prejudice of Mila's conversion claims against Lorrie. Further, Janet's guardian and conservator and his attorney approved of the settlement agreement. The estate has not identified an interested party who was not involved in the settlement negotiations. Thus, all those with an interest in the estate were aware of Mila's claims against Lorrie and agreed to resolve that dispute as part of the global settlement. In sum, as it pertains to the claims against Lorrie, the estate itself has no interest distinct from the combined interests of those who consented to the 2018 settlement agreement. For these reasons, we conclude that the estate was adequately represented in the prior action.

The estate also argues that res judicata does not apply because the estate did not exist at the time the heirs reached their settlement agreement. However, the estate provides no legal authority supporting for this position, and, to the contrary, we have held that there was a privity of interest between the decedent's guardian and personal representative, who acquired his interest after the decedent's death. *Matter of Estate of Koernke*, 169 Mich App 397, 399-400; 425 NW2d 795 (1988). The estate's argument that heirs of an estate cannot legally bind an estate also misses the mark. We do not hold that heirs can bind an estate, but rather that, under the circumstances of this case, the heirs adequately represented the estate's interests for purposes of res judicata.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro