

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of LOUIS F. LANIER,
Deceased.

FRANK S. SZYMANSKI, JR., Personal
Representative of the Estate of LOUIS F. LANIER,
Deceased,

UNPUBLISHED
April 4, 2000

Petitioner-Appellee,

v

WALTER SAKOWSKI,

No. 209917
Wayne Probate Court
LC No. 92-507458-SE

Respondent-Appellant.

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Respondent appeals as of right from the probate court order imposing a surcharge against him in the amount of offer of judgment sanctions against the estate of Louis F. Lanier. We reverse.

During the time that respondent served as temporary personal representative of Lanier's estate, he oversaw the progress of the estate's medical malpractice claim against William Beaumont Hospital (Beaumont). The case mediated for \$25,000; respondent accepted the award, but Beaumont rejected it. Beaumont then made an offer of judgment in the amount of \$3,000. Respondent testified, and petitioner has presented no contradictory evidence, that the attorney handling the malpractice action never told him of the offer of judgment. The estate did not respond to the offer of judgment, which constituted a rejection pursuant to MCR 2.405(C)(2). At trial, the jury returned a verdict of no cause of action in favor of Beaumont. The hospital's motion for costs and attorney fees pursuant to MCR 2.405(D)(1) was eventually settled for \$10,636.70. Petitioner, as successor personal representative of Lanier's estate, asked the probate

court to surcharge respondent for his failure to notify the heirs of the \$3,000 offer. The probate court ordered respondent to reimburse the estate in the amount of \$10,636.70.

In his sole issue on appeal, respondent contends that the probate court erred in assessing a surcharge against him in the amount of offer of judgment sanctions assessed against the estate. We review the probate court's decision to assess a surcharge against a personal representative for an abuse of discretion. See *In re Thacker Estate*, 137 Mich App 253, 264; 358 NW2d 342 (1984).

We conclude that the probate court abused its discretion in imposing a surcharge against respondent for the offer of judgment sanctions. The Revised Probate Code provides that "[a]n independent personal representative shall not be surcharged for any good faith act of administration or distribution if the act in question was authorized at the time." MCL 700.343(1); MSA 27.5343(1). MCL 700.175; MSA 27.5175 expressly gives a temporary personal representative the authority to commence or maintain a lawsuit as personal representative of the estate.

In assessing the surcharge against him, the probate court concluded that respondent failed to fulfill his "duty to be aware of what action was being taken on the estate's behalf." We disagree. There is no evidence in the record that respondent was derelict in attending to his responsibilities concerning the malpractice action.¹ However, respondent's undisputed testimony indicates that he was never told of Beaumont's offer of judgment. Respondent was not required to periodically contact the attorney handling the malpractice action to find out if Beaumont had made any settlement offers; as the probate court recognized, pursuant to MRPC 1.4(a), a lawyer is required to notify the client promptly of all settlement offers.² The record is silent regarding the attorney's failure to notify respondent of the offer of judgment. Under these facts, we cannot find that respondent violated any duty to the estate.

The probate court also faulted respondent for failing to relay the settlement offer to Lanier's heirs. However, it was undisputed that respondent was not told of the offer of judgment. Respondent can hardly be blamed for failing to inform others of facts of which he was not aware. In any case, the probate court erred in concluding that respondent had a duty to consult Lanier's heirs with regard to the offer of judgment. As an independent personal representative, respondent had the authority to make decisions regarding settlement of decedent's claims and was not obligated to obtain the consent of the heirs or any other interested persons. See *In re Merry Estate*, 174 Mich App 627, 633; 436 NW2d 421 (1989).

Finally, to the extent that the probate court assessed the surcharge against respondent because of respondent's admission that he would have rejected the offer of judgment without consulting the heirs, we conclude that the court abused its discretion. First, a personal representative can only be surcharged for what he actually did; it is not appropriate to penalize him for what he stated that he would have done under different circumstances. In addition, there is no indication that respondent's hypothetical rejection of the offer of judgment would have been

in bad faith. See MCL 700.343(1); MSA 27.5343(1). In light of the \$25,000 mediation evaluation, it would not be inherently unreasonable to reject a \$3,000 offer of judgment.³

Reversed.

/s/ Mark J. Cavanagh

/s/ Helene N. White

/s/ Michael J. Talbot

¹ For example, respondent testified that he engaged in extensive discussions with counsel with regard to the mediation evaluation.

² However, the probate court was mistaken in citing MRPC 1.4(a) in support of the statement that respondent would have violated his duty as an attorney by rejecting the offer of judgment without consulting the interested parties. Respondent's "client" was the estate.

³ We find the probate court's reliance on *In re Cain Estate*, 147 Mich App 615; 382 NW2d 829 (1985), to be misplaced. In that case, this Court essentially stated that where a personal representative, acting in good faith, has mistakenly taken assets from the estate, and the error cannot be corrected, the appropriate remedy is surcharge of the personal representative. See *id.* at 621-622. *In re Cain Estate* does not apply to a situation where a personal representative makes a good-faith judgment call which is found, with the benefit of hindsight, to be the wrong decision.