STATE OF MICHIGAN

COURT OF APPEALS

GEORGE H. ESHO,

Plaintiff-Appellant,

v

CHRISTOPHER PENCAK,

Defendant-Appellee.

UNPUBLISHED
July 28, 2000

No. 212436
Wayne Circuit Court
LC No. 95-520141-NM

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from the trial court's order awarding defendant costs and attorney fees. We affirm in part, reverse in part, and remand for entry of a corrected judgment.

Defendant is a licensed pharmacist and attorney who was retained to represent plaintiff, a pharmacist, in a case involving his distribution of cough syrup containing codeine. After an administrative hearing, plaintiff was suspended for a period of six months. Defendant handled the appeal of the administrative decision to the circuit court that was unsuccessful. Defendant also attempted to file a claim of appeal from that decision, but the appeal was dismissed as untimely. Defendant explained that he believed that the Court would be closed due to a holiday when in fact it was operating on Good Friday. Defendant attributed his delay in filing to actions of plaintiff, such as plaintiff's delay in deciding to appeal and delay in providing the filing fee. Defendant asserted that despite the failure to timely file the claim of appeal, plaintiff retained him to represent the pharmacy in a

[1] We note that the caption as presented by the parties does not accurately reflect the proceedings below. While plaintiff commenced the litigation by filing a legal malpractice claim against defendant, defendant filed a countercomplaint for account stated, requesting costs and attorney fees for his prior representation of plaintiff. This countercomplaint added Christopher Pencak, P.C. as a counterplaintiff and also named Liberty Discount Drug, Inc. as a counterdefendant. The trial court granted defendant's motion for summary disposition of the original complaint for legal malpractice, and the trial addressed defendant's countercomplaint only. However, for purposes of consistency, we will address the parties as designated in the pleadings presented on appeal.

slip and fall action. However, defendant withdrew from representing plaintiff in the tort action because of plaintiff's failure to pay for services rendered.

For a period of time between 1993 and 1995, defendant did not submit requests for payment to plaintiff. However, on July 13, 1995, plaintiff filed a complaint alleging legal malpractice by defendant. Defendant filed a countercomplaint alleging account stated, seeking payment for legal services. Plaintiff asserted that defendant had waived entitlement to legal fees based on his failure to timely file the claim of appeal. The trial court dismissed the legal malpractice claim, and a trial on the account stated claim occurred over a period of time.[2] The trial court awarded defendant $11,077 plus costs and interest, the full amount of costs and attorney fees requested.

Plaintiff first argues that the trial court erred in admitting evidence of plaintiff's representation by numerous attorneys and his failure to pay prior counsel. A trial court's decision to admit evidence is within its sound discretion and will not be disturbed on appeal absent an abuse of discretion. *Roulston v Tendercare, Inc*, 239 Mich App 270, 292; 608 NW2d 525 (2000). However, we note that the "conduct of a trial is within the control of the presiding judge and does not result in error warranting reversal unless there is some proof of prejudice." *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992). Even if we were to conclude that the admission of evidence was an abuse of discretion, plaintiff cannot demonstrate prejudice as a result of admission because plaintiff has failed to take issue with the trial court's finding regarding waiver. Specifically, at trial, plaintiff admitted that he entered into two retainer agreements with defendant to handle two legal matters. Plaintiff's defense to the payment of fees was that defendant offered to waive his fees due to his failure to timely file the appeal. The trial court held that there was no such waiver. Plaintiff has not appealed this ruling. Accordingly, the evidentiary issue has no bearing on the holding that plaintiff was responsible for costs and attorney fees.

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[2] On appeal, we have been provided with four volumes of trial transcript. The trial transcripts provided are May 30, 1997, June 26, 1997, July 14, 1997, and August 20, 1997. At the conclusion of the August 20, 1997 trial testimony, the parties noted that trial was not complete and an additional trial date would be necessary. The trial court stated that September 9, 1997 or September 10, 1997, would be available for completion of trial. A letter contained in the lower court file drafted by plaintiff's trial counsel indicates that trial would continue on September 23, 1997 at 2:00 p.m. On September 23, 1997, the lower court docket entries provide "Trial - Reslt [sic]: Case Scheduled." A second letter appears in the file that provides that trial would continue on November 6, 1997 at 2:00 p.m. On November 6, 1997, the lower court docket entries provide "Trial - Reslt[sic]: Case Scheduled." Finally, on December 12, 1997, the lower court docket entries reflect that a review hearing was held and that the parties were to submit affidavits and other information. If trial did in fact occur on those additional dates, we have not been provided with the trial testimony on appeal. It was plaintiff's obligation, as appellant, to file the record on appeal, and we will not consider any alleged evidence or testimony proffered by the parties for which there is no record support. *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). Accordingly, our review was limited to the four volumes of transcript provided on appeal irrespective of whether additional pertinent testimony occurred on other dates.

Plaintiff next argues that the trial court erred in awarding two lump sum fees that were charged by defendant. We agree. We review a trial court's findings of fact in a bench trial under the clearly erroneous standard. MCR 2.613(C); *Hofmann v Auto Club Insurance Association*, 211 Mich App 55, 98; 535 NW2d 529 (1995). The clearly erroneous standard also applies to a finding regarding the amount of damages. *Id*. at 98-99. A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made. *Id*. at 99. In the present case, the trial court did not make any findings regarding the propriety of awarding lump sums of $1500 and $1000. At trial, defendant acknowledged that he entered into two retainer agreements that provided that he was to be paid $100 per hour in the pharmacy suspension action and $125 per hour in the tort action. Specifically, at the August 20, 1997, trial hearing, defendant could not recall the basis of the extra $1500 charge. He merely explained both fees as being "flat fees." Despite the numerous dates that trial occurred and the numerous adjournments of trial, defendant could have examined his files and determined the basis for the "flat fees" when he had signed retainer agreements, but he did not do so. Additionally, when asked whether the "flat fees" appeared on bills submitted to plaintiff or if they were merely submitted on the account stated at trial, defendant could not explain at what time the "flat fees" were incurred and billed to plaintiff. Accordingly, because there is no support for the "flat fees" in the record and defendant could not explain their basis, we reverse the trial court's decision with respect to the "flat fees" of
$2500 only.[3]

Affirmed in part, reversed in part, and remanded for entry of a corrected judgment. We do not retain jurisdiction.

/s/ Harold Hood
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

[3] We note also that defendant's brief on appeal continually asserts that the trial court's findings of fact are reviewed under the clearly erroneous standard and does not specifically address the propriety of the flat fees.