STATE OF MICHIGAN

COURT OF APPEALS

FALAMARZ ZAHRAIE, and PARS PETROLEUM, LTD.,

Plaintiffs/Counterdefendants-Appellants/Cross-Appellees,

v

DARYOUSH ZAHRAIE, and D&F PETRO, INC.,[1]

Defendants/Counterplaintiffs-Appellees/Cross-Appellants,

and

TURKIA A. MULLIN, and SALEH & D'ANDREA P.L.C., d/b/a SALEH D'ANDREA & MULLIN, P.L.C.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
December 15, 2005

No. 256862
Wayne Circuit Court
LC No. 02-205707-CK

Before: Gage, P.J., and Hoekstra, and Murray, JJ.

PER CURIAM.

Plaintiffs/counterdefendants, Falamarz Zahraie (Falamarz) and Pars Petroleum, Ltd. (Pars),[2] appeal as of right the jury verdict of no cause of action for their legal malpractice claim against defendants Turkia A. Mullin (Mullin) and Saleh & D'Andrea, P.L.C., d/b/a Saleh D'Andrea & Mullin, P.L.C.[3] They also appeal the trial court's order denying their motion in

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[1] We will collectively refer to Daryoush and D&F as "the Daryoush defendants."

[2] We will collectively refer to Falamarz and Pars as "plaintiffs."

[3] We will collectively refer to Mullin and Saleh & D'Andrea, P.L.C., d/b/a Saleh D'Andrea & Mullin, P.L.C., as "the Mullin defendants."

limine regarding Robert Harrington and the trial court's order denying their motion for JNOV.[4] The Mullin defendants cross-appeal as of right, offering alternate grounds for affirming the judgment of no cause of action against them and the trial court order denying plaintiffs' motion in limine. The Mullin defendants also argue, as alternate grounds for affirmance, that the trial court erred in denying their motions for directed verdict and summary disposition. We affirm.

Falamarz owned a gas station and convenience store in Detroit, and he agreed to sell it to his brother, Daryoush. Falamarz retained Mullin, an attorney who drafted an asset purchase agreement for the sale of the gas station. The closing occurred, and Mullin was not present. Falamarz claimed that Mullin scheduled the closing for a time when she would be out of town, but Mullin maintained that she was unaware of the closing and did not learn of it until after the fact. It is undisputed that plaintiffs did not receive the $240,000 down payment they were expecting. However, Daryoush claimed that they modified the asset purchase agreement such that Daryoush forgave some of Falamarz' loans and assumed some of his debts in lieu of providing the down payment check.

Plaintiffs argue that the trial court erred in denying their motion for JNOV because the Mullin defendants failed to present expert testimony to counter the testimony of their expert witness. We review de novo a trial court's decision on a motion for judgment notwithstanding the verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). When considering a motion for judgment notwithstanding the verdict, we review the evidence and all legitimate inferences drawn from the evidence in the light most favorable to the nonmoving party. *Id.* A motion for JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. *Id.*

The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella (On Remand)*, 261 Mich App 705, 712; 683 NW2d 699 (2004). The plaintiff bears the burden of proving the elements of a legal malpractice claim. *Id.* at 715, 718; *Barrow v Pritchard*, 235 Mich App 478, 483-484; 597 NW2d 853 (1999). A plaintiff in a legal malpractice action is obligated to offer expert witness testimony about the applicable standard of

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[4] Plaintiffs also raise several issues regarding the jury verdict of no cause of action for their claim against the Daryoush defendants, the trial court's order denying their motion for JNOV or new trial on their claim against the Daryoush defendants, and the trial court's order granting the Daryoush defendants' motion for rehearing and reconsideration of its partial summary disposition order. The Daryoush defendants cross-appealed as of right the trial court order denying their motion for summary disposition on plaintiffs' breach of contract claim. However, this Court recently received notice of a pending bankruptcy proceeding, which deprives us of the authority to continue our review of this case with respect to the Daryoush defendants. See 11 USC 362. Accordingly, we partially closed plaintiffs' appeal with respect to the Daryoush defendants. *Falamarz Zahraie v Daryoush Zahraie*, unpublished order of the Court of Appeals, entered November 21, 2005 (Docket No. 256862). Therefore, we will only address the issues pertaining to the Mullin defendants in this opinion.

care and the alleged violation of the standard of care unless it is within the common knowledge and experience of an ordinary layman. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989); *Joos v Auto-Owners Ins Co*, 94 Mich App 419, 422; 288 NW2d 443 (1979).

Plaintiffs' expert witness testified that Mullin's actions constituted a breach of the standard of care as follows: 1) failure to sufficiently advise Falamarz and Daryoush about the conflict of interest and use of an improper waiver of the conflict of interest; 2) failure to diligently perform on her clients' behalf by not preparing herself or advising her clients about the closing; and 3) failure to attend the closing. Plaintiffs' expert opined that Mullin's actions constituted malpractice because they were a direct cause in fact of Falamarz' failure to receive compensation for his ownership interest and inventory. However, Mullin testified at trial that her actions did not constitute negligence, and expert testimony may be elicited from the defendant in a legal malpractice action. *Beattie v Firnschild*, 152 Mich App 785, 794; 394 NW2d 107 (1986).

Credibility is for the jury to determine, *Franzel v Kerr Mfg Co*, 234 Mich App 600, 622; 600 NW2d 66 (1999), and the jurors were not obligated to accept the expert's testimony, *Detroit v Larned Assoc*, 199 Mich App 36, 41; 501 NW2d 189 (1993). Plaintiffs bore the burden of proving the elements of their malpractice claim, and the Mullin defendants never had a burden to prove the absence of malpractice. See *Manzo, supra* at 712. Accordingly, the trial court did not err in denying plaintiffs' motion for JNOV.

Next, plaintiffs argue that the trial court abused its discretion in denying their motion in limine to exclude evidence that Robert Harrington attended the closing, thereby obligating him to represent plaintiffs and excusing Mullin's failure to attend. We review for an abuse of discretion a trial court's decision whether to admit or exclude evidence, *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005), and a trial court's decision on a motion in limine, *Bartlett v Sinai Hosp*, 149 Mich App 412, 418; 385 NW2d 801 (1986).

MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Because Robert Harrington's presence at the closing directly affects the proximate cause analysis of a legal malpractice claim, it is relevant. MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." While evidence that Robert Harrington represented plaintiffs at the closing likely prejudiced plaintiffs to some extent, its probative value outweighed any danger of unfair prejudice. Robert Harrington represented plaintiffs in other matters for which the proceeds of the closing were required, and evidence of his presence at the closing was crucial to the Mullin defendants' defense to plaintiffs' malpractice claim.

A formal contract is not required to create an attorney-client relationship, and a contract may be implied from the parties' conduct. The relationship is sufficiently established when one seeks, receives, and acts on the legal advice and services of an attorney. *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Schools*, 455 Mich 1, 11; 564 NW2d 457 (1997). Falamarz specifically asked Robert Harrington, who represented him in other matters involving the gas station, to attend the closing. Robert Harrington therefore attended the closing, with the goal of

obtaining the proceeds for settlements in other cases involving the gas station. Robert Harrington then billed plaintiffs for his time in attending the closing and time spent on the telephone discussing the closing. There is therefore a viable argument that the existing attorney-client relationship between Falamarz and Robert Harrington extended to the closing.

When an attorney represents a client, the representation generally continues until the attorney is relieved of the obligation by either the client or the court. *Mitchell v Dougherty*, 249 Mich App 668, 683-684; 644 NW2d 391 (2002). However, an exception exists when the attorney is retained to perform a specific task, such as the sale of a business. In that instance, the representation ends when the specific legal service is completed. *Id.* at 683 n 6. While there is some dispute about the scope of the services Falamarz retained Mullin to perform, the sale of the gas station was the central focus of representation. Thus, there may be some merit to the argument that Mullin's representation of plaintiffs terminated when Robert Harrington attended the closing. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion in limine to preclude evidence that Robert Harrington represented plaintiffs at the closing.

Affirmed.

/s/ Hilda R. Gage
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray