STATE OF MICHIGAN

COURT OF APPEALS

ROBERT BORDENER and SARA MICHELLE BORDENER,

Plaintiffs/Counter-Defendants-Appellants,

v

JOHN P. HERRINTON and BERRY MOORMAN, P.C.,

Defendants-Appellees,

and

MIDWEST LENDING CORPORATION,

Defendant/Counter-Plaintiff,

and

TALON GROUP, INC., KS LIQUIDATING, L.L.C., KORSTONE, f/k/a KORSTONE SURFACES, L.L.C., TALON SURFACES, L.L.C., f/k/a TALON BUILDING PRODUCTS, TALON FINANCE COMPANY, L.L.C., TALON EQUITY PARTNERS, L.L.C., ETURA CORPORATION, EH CORPORATION and EH ENTERPRISES, LTD.,

Defendants.

UNPUBLISHED
December 22, 2005

No. 254877
Wayne Circuit Court
LC No. 01-121565-CK

ROBERT BORDENER and SARA MICHELLE BORDENER,

Plaintiffs/Counter-Defendants-Appellees,

v

JOHN P. HERRINTON and BERRY MOORMAN, P.C.,

Defendants-Appellants,

and

MIDWEST LENDING CORPORATION,

Defendant/Counter-Plaintiff,

and

TALON GROUP, INC., KS LIQUIDATING, L.L.C., KORSTONE, f/k/a KORSTONE SURFACES, L.L.C., TALON SURFACES, L.L.C., f/k/a TALON BUILDING PRODUCTS, TALON FINANCE COMPANY, L.L.C., TALON EQUITY PARTNERS, L.L.C., ETURA CORPORATION, EH CORPORATION and EH ENTERPRISES, LTD.,

Defendants.

No. 256359
Wayne Circuit Court
LC No. 01-121565-CK

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

In Docket No. 254877, plaintiffs appeal from an order granting summary disposition to defendants on plaintiffs' legal malpractice claim. In Docket No. 256359, defendants challenge the trial court's partial denial of case evaluation sanctions. We affirm in part and remand in part.

Plaintiffs' claims arise from the representation provided by attorney John Herrinton in plaintiffs' negotiations with defendant Talon Group concerning an agreement reached in 2000.

That agreement was part of a renegotiation of earlier agreements regarding the acquiring of patent rights to an invention by Robert Bordener by Talon. Specifically, Bordener held certain patents relating to the manufacturing of a countertop material known as "Korstone." The original agreement was reached in 1996. A second agreement was reached in 1998. Attorney Herrinton was not involved in these transactions. Rather, Bordener retained Herrinton to represent him in the 2000 negotiations. The 2000 agreement was the result of Talon's request in 1999 to renegotiate the 1998 agreement, citing a need to adjust the compensation schedule. Herrinton also sought changes in the agreement, seeking to change from a commission structure to a royalty structure, believing that that was to Bordener's advantage. The negotiations took fourteen months to complete.

The structure of the transactions was such that the rights to Korstone were owned by defendant Talon Surfaces. Talon Surfaces in turn was financed by a loan from defendant Talon Finance, which took a security interest in the intellectual property. According to defendants, by late 2000 Talon Surfaces was losing large amounts of money and was no longer viable. Talon was unable to find a purchaser for Talon Surfaces as a going concern. In 2001, approximately six months after the 2000 agreement was signed, Talon Finance foreclosed on the intellectual property held by Talon Surfaces, assigned those assets to another Talon subsidiary, Midwest Finance, which in turned assigned the assets to defendant Etura Corporation. The instant litigation commenced when Etura took the position that it was not obligated to honor the compensation agreement between Bordener and Talon.

The trial court granted defendants' motion for summary disposition, concluding that, because she was not a party to the contract, plaintiff Sara Bordener had failed to state a claim upon which relief could be granted, MCR 2.116(C)(8), and that there was no genuine issue of material fact, MCR 2.116(C)(10), regarding Robert Bordener's legal malpractice claims. On appeal, plaintiffs only challenge the grant of summary disposition with respect to the legal malpractice claims.

We review the grant of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In evaluating a motion under MCR 2.116(C)(10), the court must consider all the evidence submitted by the parties, including affidavits, pleadings, depositions and admissions, in the light most favorable to the nonmoving party and if that evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

In this case, plaintiffs primarily argue three grounds for finding malpractice. First, that attorney Herrinton failed to properly draft the 2000 agreement to protect Bordener's interest, such as including a clause establishing a reversionary interest to Bordener in the intellectual property in the event of a breach of contract. Second, that attorney Herrinton failed to file a security interest or notice with the United States Patent Office or under the Uniform Commercial Code. And, third, that attorney Herrinton abandoned his client.

With respect to the claim that attorney Herrinton was negligent in failing to adequately protect Bordener's interests in the 2000 agreement, the trial court concluded that there was no genuine issue of material fact on the issue of causation. Specifically, the trial court concluded

that it was speculative at best that plaintiffs could show that Talon would have signed an agreement in 2000 that would include the terms plaintiffs assert should have been included:

> In this case, based upon the documents that I have read and the different depositions, there is no evidence presented that conclusively demonstrates that had Mr. Herrington [sic] sought a reversion in the patents and intellectual property to Bordener, that Talon would have agreed to that. Talon had purchased the patents and property rights under the 1996 and 1998 agreements and there was no such clause then.
>
> There's no reason, except through speculation or guess to expect that Talon would have agreed to such a clause in 2000 had it been proposed. There's no evidence of a material fact that supports the Plaintiff's malpractice claim in this regard.

To establish legal malpractice, the plaintiff must show that the attorney's negligence was a proximate cause of the client's injury. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). To prove proximate cause, a plaintiff must establish (1) cause in fact and (2) legal cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). As the Court explained in *Skinner, supra* at 164-166, it is not sufficient to merely establish the speculative possibility that the defendant's conduct caused the plaintiff's injury:

> [A] causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.
>
> We have consistently applied this threshold evidentiary standard to a plaintiff's proof of factual causation in negligence cases:
>
> " 'The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.' " [*Mullholland v DEC Int'l Corp*, 32 Mich 395, 416 n 18; 443 NW2d 340 (1989), quoting Prosser & Keeton, Torts (5th ed), § 41, p 269.]
>
> "The mere possibility that a defendant's negligence may have been the cause, either theoretical or conjectural, of an accident is not sufficient to establish a causal link between the two." [*Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976).]

> "There must be substantial evidence which forms a reasonable basis for the inference of negligence. There must be more than a mere possibility that unreasonable conduct of the defendant caused the injury. We cannot permit the jury to guess . . . ." [*Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957). Citations omitted.]

The *Skinner* Court, *supra* at 166-167, then goes on to quote the following passage from 57A Am Jur 2d, Negligence, § 461, p 442:

> All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. However, if such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established.

We agree with the trial court that it is speculative at best that plaintiffs' attorney could have negotiated an agreement which included the clauses plaintiffs now believe should have been in that agreement. Plaintiffs point to no evidence to establish that Talon would have agreed to such terms. Indeed, defendants point to evidence that Talon would have been reluctant at best to agree to any terms that ceded any of their existing rights under previous agreements. That also leads to a secondary problem for plaintiffs' case, namely that they do not identify any evidence that Bordener would have been better off walking away from the negotiations rather than signing the 2000 agreement. That is, there is no showing here that attorney Herrinton gave away an element of the existing agreement, thus putting Bordener in a worse position than existed under the 1998 agreement. Simply put, the attorney was not in a position to dictate terms to Talon and plaintiffs can make no showing that any such desired term would have been agreed to by Talon. Accordingly, it is speculative at best that attorney Herrinton could have negotiated such terms and, therefore, there is no genuine issue of material fact that plaintiffs will be unable to establish causation on this claim.

Plaintiffs significantly rely on the trial court's statement that there is no evidence that "conclusively demonstrates" that attorney Herrinton could have obtained a reversionary interest clause in the agreement. Plaintiffs argue that this demonstrates that the trial court applied an erroneous burden of proof: that plaintiffs must "conclusively demonstrate" causation in order to survive summary disposition. Therefore, plaintiffs argue, reversal is required. We disagree. First, we believe that plaintiffs are reading the trial court's comments out of context. We read the trial court's use of "conclusively" as meaning "non-speculatively." In any event, on our de novo review, we are satisfied that plaintiffs are unable to establish a genuine issue of material fact. Even if the trial court held plaintiffs to the wrong burden, such error is harmless as defendants were entitled to summary disposition on this aspect of the claim even under the proper standard.

This then leads us to the second aspect of plaintiffs' claim, the failure to file a security interest or notice to the United States Patent Office. The trial court concluded that causation could not be established on this aspect of the claim either because plaintiffs would be unable to show that such a filing would accomplish anything other than putting Etura on notice of Bordener's interest. But Etura already had actual knowledge and, therefore, a filing would make no difference. We agree with the trial court that plaintiffs cannot show that such a filing would have been of benefit, especially in light of Etura's knowledge of the underlying transaction. Indeed, during the oral argument on the summary disposition motion in the trial court, plaintiffs' counsel stated that the expert would opine that a filing would have placed Bordener behind Talon Financial in the order of priority. But once Talon Financial foreclosed on the intellectual property and became owner, we fail to see how Bordener could then have greater priority than a buyer to whom Talon Financial sold the property.

In short, the only potential malpractice on this issue would have been if a reversionary interest or similar security had been included in the agreement, the attorney then failed to file notice of such interest, and Etura would have purchased intellectual property without such notice and, as a result, could have defeated Bordener's interest because of a lack of notice. But that was not the sequence of events. Summary disposition on this aspect of the claim was therefore properly granted.

Next, plaintiffs argue that attorney Herrinton committed malpractice by abandoning them as clients. We disagree. Plaintiffs claim that they were abandoned by attorney Herrinton by his failure to pursue litigation against Talon once Talon breached the agreement. But plaintiffs point to no evidence that Herrinton was retained to pursue such litigation. At most, plaintiffs make the unsubstantiated claim in their brief that "Mr. Herrington [sic] promised action through litigation." Plaintiffs suggest that the failure to timely pursue such litigation allowed the sale to be completed, at which point it became too late for Bordener to enforce his own contractual rights. But plaintiffs direct us to no evidence that Herrinton actually agreed to pursue such litigation, much less to any evidence to suggest that had such a strategy been pursued, Bordener would have been able to adequately protect his interests. At most, Bordener testified in his deposition that Herrinton promised to consult with the litigators in his firm to put together a litigation strategy. But that does not constitute an agreement to be engaged to pursue litigation, much less an abandonment of that pursuit. Moreover, if anything, Bordener's own deposition testimony suggests that any such litigation would be fruitless: the Talon Surfaces CEO had told him (Bordener) that Talon Surfaces was insolvent and had no money to pay any more to Bordener. If true, and plaintiffs point us to no evidence that it is not, then even a successful suit against Talon would have been fruitless as it would only produce an uncollectable judgment. Plaintiffs do suggest that a prompt suit could have prevented the sale to Etura. But plaintiffs do not explain how such a maneuver could be accomplished. In short, plaintiffs do not make even a minimal showing that defendants agreed to represent plaintiffs in such a suit or how such a suit could conceivably have produced a better outcome for plaintiffs.

Finally, plaintiffs argue that the trial court overlooked other instances of malpractice claimed by plaintiffs, including attorney Herrinton's failure to advise Bordener to accept an offer by Talon for a co-licensing arrangement which would have permitted Bordener to also

independently manufacture products under the patents. Perhaps the trial court failed to consider such claims because they were not clearly plead in the complaint nor argued as part of the summary disposition motion. Plaintiffs did raise the issue in the motion for reconsideration, pointing to sections of their complaint which can be read as raising this claim in only the most general of terms, as well as a brief argument on appeal. In any event, we are at a loss to understand how any such arrangement would have proven to be to plaintiffs' advantage. Any co-licensing arrangement with Talon would have come into existence after the signing of the 2000 agreement. But plaintiffs fail to show how any such arrangement would have survived the foreclosure on the intellectual property by Talon Financial. Simply put, just as the 2000 agreement itself and the compensation arrangement did not survive the foreclosure, we fail to see how a second agreement in 2000 to provide for co-licensing could have survived the foreclosure as well. In other words, plaintiffs would be unable to establish proximate cause as to this claim as well. Similarly, plaintiffs cannot demonstrate that any failure by Herrinton to explore Talon's financial condition would have produced a different outcome.

For the above reasons, we conclude that the trial court properly granted summary disposition to defendants on plaintiffs' legal malpractice claims.

Turning to defendants' appeal, they argued that the trial court erred when it failed to award defendants their expert witness fees as part of the case evaluation sanctions. After the trial court granted summary disposition to defendants, defendants moved for case evaluation sanctions. The trial court granted defendants their claim for attorney fees, but denied their claim to recover their expert witness fees. Unfortunately, the trial court did not explain its ruling, merely giving a terse "I'll allow the attorney fees but not the expert witness fees." Without knowing the basis for the trial court's ruling, we cannot say whether the trial court erred in denying the expert witness fees.

Although plaintiffs did present arguments to support the denial of expert witness fees entirely, their primary argument below seems to be not that the expert witness fees should not be awarded at all, but that they should be granted an evidentiary hearing to explore whether the amount of the fees were reasonable, especially the nearly $60,000 fee of the expert accountant. The trial court, without explanation, merely denied any expert witness fees at all.

MCR 2.403(O)(1) provides that a party that rejects case evaluation must pay the actual costs of the opposing party unless the verdict is more favorable to the rejecting party than was the case evaluation. MCR 2.403(O)(6) defines "actual costs" as including any cost taxable in a civil action plus a reasonable attorney fee. MCR 2.403(O)(11) provides that the trial court may refuse to award actual costs in the interests of justice where the "verdict" is the result of a ruling on a motion.

Plaintiffs in their brief below did raise the issue of denying actual costs in the interest of justice, though that really was not the focus of their argument at the hearing nor did the trial

court specify that as the basis for its ruling.[1] On the other hand, if the trial court merely agreed with the primary thrust of plaintiffs' argument, that the amount billed by the experts was unreasonable, that would seemingly not justify a complete denial of those fees. Presumably at least some of the expert's fees were reasonable, as plaintiffs do not argue that it was completely unreasonable to employ the experts at all.

Also present in this case is the question whether the expert witness fees were assessable at all. MCL 600.2164(1) provides that an expert may not be paid a fee in excess of the standard witness fee unless the trial court awards a higher sum. Conceivably, the trial court may be ruling that defendants may not pay the experts any expert witness fee, but if that is the basis of the trial court's ruling, it did not so state.

In sum, while there may well be a basis for the trial court to reduce or eliminate the amount requested by defendants for case evaluation sanctions, the trial court has failed to provide us with the rationale for its ruling and, therefore, the issue is unreviewable on the current record. Accordingly, we remand the matter to the trial court. On remand, the trial court may hold any hearing necessary to resolve this matter and may reiterate its original ruling on case evaluation sanctions or modify it if the court comes to the conclusion that its original ruling was in error. In any event, the trial court shall explain in detail on the record, or in a written opinion, the basis for its ruling. The trial court shall file with this Court any opinion and the transcript of any hearing held on remand within forty-two days of the matter being remanded to the trial court.

Affirmed in part and remanded in part for further proceedings consistent with this opinion. We retain jurisdiction. Defendants may tax costs in Docket No. 254877 only. No costs in Docket No. 256359, no party having prevailed in full.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter

[1] We also note that MCR 2.403(O)(11) authorizes the court to "refuse to award actual costs." It is unclear to us whether the court can, as was done here, award partial actual costs. The language of the court rule would suggest that it may have to be all or nothing, and thus the trial court's ruling could not be upheld on this basis.

Court of Appeals, State of Michigan

ORDER

Robert Bordener v John P. Herrinton

Docket Nos. 254877; 256359

LC No. 01-121565-CK

William B. Murphy
Presiding Judge

David H. Sawyer

Patrick M. Meter
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

On remand, the trial court may hold any hearing necessary to resolve this matter and may reiterate its original ruling on case evaluation sanctions or modify it if the court comes to the conclusion that its original ruling was in error. In any event, the trial court shall explain in detail on the record, or in a written opinion, the basis for its ruling.

The trial court shall file with this Court any opinion and the transcript of any hearing held on remand within forty-two days of the matter being remanded to the trial court.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 22 2005
Date

Sandra Schultz Mengel
Chief Clerk