

STATE OF MICHIGAN
COURT OF APPEALS

KOHL, HARRIS, NOLAN & MCCARTHY, P.C.,

Plaintiff-Appellee,

v

NEILL T. PETERS,

Defendant-Appellant,

and

LAW OFFICE OF NEILL T. PETERS, P.C.,

Defendant.

UNPUBLISHED

January 22, 2008

No. 275377

Lapeer Circuit Court

LC No. 05-036487-CZ

Before: Saad, P.J., and Jansen and Beckering, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I concur in the majority's conclusion that the trial court properly denied defendant Peters's motion for summary disposition. However, because a question of fact remained concerning the precise amount to which Kohl was entitled for his work on the Werthman case, I respectfully dissent from the majority's decision to affirm the grant of summary disposition in favor of plaintiff. It is axiomatic that summary disposition may not be granted when there remains a genuine issue of material fact for trial.¹ MCR 2.116(C)(10); see also *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

¹ Although plaintiff moved for summary disposition pursuant to MCR 2.116(C)(8) alone, it set forth factual arguments in the text of its summary disposition motion and relied on facts outside the pleadings during the proceedings below. Therefore, I construe plaintiff's motion for summary disposition as having been granted pursuant to MCR 2.116(C)(10). See *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

As evidenced by the competing allegations raised in this case, the oral fee-splitting agreement between Kohl and the law firm, taken together with the Memorandum of Buy-Sell Agreement and Shareholder Employment Agreement, was subject to two differing interpretations. On the one hand, the combined effect of the agreements could be interpreted as entitling Kohl to 50 percent of the total attorney fee earned with respect to the Werthman case. However, just as reasonably, the combined effect of the agreements could be interpreted as entitling Kohl to only 50 percent of that portion of the attorney fee ultimately paid to the law firm by Peters. When read in conjunction, the agreements between the various parties were unclear concerning the total amount to which Kohl was entitled for his work on the Werthman case. Accordingly, a jury-submissible question of fact remained with respect to the agreements' meaning, and plaintiff's motion for summary disposition should have been denied. I would reverse and remand for further proceedings.

/s/ Kathleen Jansen