STATE OF MICHIGAN

COURT OF APPEALS

COMPUTER BUSINESS WORLD, L.L.C., and PARVIZ DANESHGARI,

Plaintiffs/Counter-Defendants-Appellants,

v

SANDER H. SIMEN and SIMEN, FIGURA & PARKER, P.L.C.,

Defendants/Counter-Plaintiffs-Appellees.

UNPUBLISHED
March 13, 2012

No. 301082
Genesee Circuit Court
LC No. 08-089895-NM

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs' claims on appeal relate to the trial court's order that denied their motion for summary disposition and granted defendants' motion for summary disposition on plaintiffs' legal malpractice claims. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS

Prior to the transactions at issue here, Sander Simen provided legal services to Parviz Daneshgari for his purchase of a restaurant, storage facility, and exercise facility. In 2004, Daneshgari decided to acquire an information technology company. Daneshgari hired a broker who prepared a package of information on Computer Builders Warehouse (sellers),[1] a computer manufacturing business. In late 2005, Daneshgari approached Simen regarding this proposed acquisition. Simen suggested that the purchase be an asset purchase, and Simen prepared a letter of intent. Simen also helped Daneshgari form a separate entity, Computer Business World, L.L.C. (CBW), with the intent that CBW would acquire Computer Builders Warehouse.

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[1] The sellers actually consist of a number of entities, including American Eagle Warranty Corporation, Times Square, Inc., CBW Enterprises, Inc., CBW Technologies, Inc., and SCD Enterprises, L.L.C.

Though the parties did not sign a formal agreement that defined the scope of Simen's legal representation, plaintiffs[2] expected that Simen would be responsible for the legal due diligence of the acquisition, which obviously included intellectual property matters. Simen also agreed that, to an extent, he was responsible for the legal due diligence, and Simen investigated potential liens on the real property involved in the transaction. Simen was also aware that no other lawyer was working on the due diligence aspect of the acquisition, and it took six months for the due diligence work to be completed. Simen did not remember discussing anything about intellectual property with plaintiffs before closing. Simen testified that he was not an intellectual property expert and that if an intellectual property issue arose, it would be his duty to consult an intellectual property attorney. Simen was also responsible for ensuring that schedules of events, including conveyance of intellectual property, were accurate and attached to the purchase agreement, although it was not Simen's responsibility to actually prepare the schedules.

On June 26, 2006, plaintiffs and the sellers entered into an asset purchase agreement in which plaintiffs agreed to purchase substantially all of the sellers' assets. Simen attended the closing on July 5, 2006, at which the sellers warranted that they owned the intellectual property that they were selling to plaintiffs. Simen failed to inform plaintiffs—his clients—that he did not receive from the sellers a certification of their ownership of the names, the service marks, and the trademarks.

Thereafter, a problem arose involving a retail store in Madison Heights. Plaintiffs leased the store from the sellers, and the lease was set to terminate on November 30, 2006. In an effort to renew the lease, the sellers sent a letter to plaintiffs in which they asked for $15,000 per month, a significant increase in rent. Simen responded by letter that while plaintiffs were interested in renewing the lease, the rent was unacceptable. Thereafter, the sellers sent a letter to plaintiffs and stated that, because plaintiffs had rejected the offer to renew the lease, plaintiffs had to vacate the property on November 30, 2006. Plaintiffs refused to vacate the property and the sellers began eviction proceedings. Simen represented plaintiffs in this action, but plaintiffs were unsuccessful in fighting the eviction and subsequently had to vacate the premises in January of 2007. Plaintiffs believed that they lost the eviction case because a proper counteroffer was not given to the sellers.

Another problem arose relating to the working capital of the sellers' company. Calculations after closing revealed that the working capital was significantly less than it was calculated to be prior to closing. It was eventually discovered that the sellers' had inflated their inventory, and had altered the age of some of their inventory in order to inflate the working capital calculations. Plaintiffs also discovered in late 2006 or early 2007 that the financial information the sellers had been providing was false.

According to the asset purchase agreement, Plante Moran was empowered to make final, binding, decisions regarding the calculations of the working capital. A six-month analysis was completed on March 14, 2007, when Plante Moran released its calculations on the working

[2] From this point on, it appears that Simen represented both CBW and Daneshgari. Thus, we refer to both CBW and Daneshgari as "plaintiffs."

capital of the sellers' company. The sellers did not accept these calculations, which led plaintiffs to conclude that the sellers were breaching the contract. Plaintiffs discussed with Simen the possibility of suing for breach of contract.

Another problem arose in April of 2007, when one of the sellers' franchises was not adhering to its contract with plaintiffs. Plaintiffs engaged the services of the Howard & Howard law firm and attorney Patrick McCarthy in an attempt to force the franchise to adhere to the contract. McCarthy began an investigation of the sellers' company and, within 24 hours, discovered that, contrary to the sellers' representations, the sellers did not own the "rights to the franchises, rights to the names, rights to the logos, rights to the products," rights to the trademarks, and rights to the computer brands. At the deposition, plaintiffs[3] testified that if they had known that the sellers did not own the intellectual property, plaintiffs would not have proceeded with the transaction. The sellers refused to take any action to secure the ownership rights of the intellectual property.

On April 3, 2007, McCarthy sent a letter to the sellers regarding the Asset Purchase Agreement, alleging claims of material changes in the accounting principles, misrepresentation of sales, misrepresentation of intellectual property, misrepresentation of inventory, breach of employment, consulting, and non-competition agreement, breach of Asset Purchase Agreement, conspiracy, trespass, theft, and unlawful interference with business relationship. Plaintiffs and the sellers failed to come to any agreement, however, which led plaintiffs to invoke the arbitration clause in the asset purchase agreement. While awaiting a decision by the arbitrator, the sellers' company failed in July of 2007, and plaintiffs were forced to close down operations because the bank stopped its line of credit.

The arbitrator issued an opinion and award on August 4, 2008. The arbitrator found that prior to the purchase, the sellers had engaged in a scheme to fabricate advertisements and invoices in order to obtain advertisement reimbursement, which they then reported as rebates in the costs of goods sold. The arbitrator further concluded that plaintiffs became aware of the fabrication of invoices and advertisements nine months after the purchase, and that plaintiffs "could not have detected this practice through normal due diligence." The arbitrator also found that the sellers had a legal duty to "disclose the practice of fabricating advertisements and invoices" and the sellers' purchase of "a high volume of parts from Intel and AMD at discounted prices and selling them through improper market channels." Moreover, the arbitrator found that two representatives of the sellers breached the contract when they walked out of a meeting concerning the company's working capital, threatened to bankrupt the company, and refused to work for the company for the agreed upon year after the sale.

Nevertheless, the arbitrator concluded that plaintiffs were "not entitled to rescission of the [asset purchase agreement] because they did not make a seasonable assertion of their rescission right." However, because of the fraudulent concealment and breach of contract by the sellers, the arbitrator awarded plaintiffs damages of $2,800,000, plus interest. The circuit court

[3] While it was Daneshgari who was testifying, it appears he was speaking on behalf of himself individually, as well as CBW.

confirmed the arbitration decision. It was plaintiffs' belief that they "would have had a higher arbitration award [but Simen] missed the deadline for breach of contract suit." As of August 6, 2009, the sellers had yet to pay plaintiff this arbitration award.[4]

On October 24, 2008, plaintiffs filed a complaint alleging legal malpractice against Simen and his law firm, Simen, Figura & Parker, P.L.C.[5] Plaintiffs alleged that defendants owed plaintiffs a duty of ordinary skill. Plaintiffs asserted that defendants breached this duty by failing to properly perform due diligence, failing to detect, warn, or explain the implications of the sellers not properly trademarking sellers' name and logo, failing to advise plaintiffs that due diligence should be conducted regarding the trademark issues, failing to negotiate plaintiffs' debt, failing to seek an extension of the Madison Heights lease, failing to seek rescission, and engaging in other acts of malpractice. Plaintiffs stated that if defendants had done due diligence relating to the trademarking issues, plaintiffs never would have entered into the transaction. Also, if defendants had sought an extension of the Madison Heights lease, plaintiffs argued that eviction would not have occurred. Lastly, plaintiffs alleged that the arbitrator refused to rescind the contract because defendants did not timely seek rescission. Plaintiffs asserted that the damages they sustained included loss of the purchase price, attorney fees and costs related to litigation, losses associated with the failure to obtain rescission, increased borrowing costs, and losses associated with the closure of the Madison Heights store. On February 17, 2009, defendants filed a counterclaim for alleged unpaid legal fees.

Plaintiffs and defendants filed motions for summary disposition. The trial court ultimately denied plaintiffs' motion for summary disposition and granted defendants' motion for summary disposition on plaintiffs' legal malpractice claims, and this appeal followed.

II. COLLATERAL ESTOPPEL

We agree with plaintiffs that collateral estoppel does not bar their legal malpractice claims regarding failure to perform intellectual property due diligence, failure to renew the Madison Heights lease, and failure to seek rescission.

We review de novo a grant or denial of a motion for summary disposition. *McLean v McElhaney*, 289 Mich App 592, 596; 798 NW2d 29 (2010), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).[6] MCR 2.116(C)(7) is the appropriate court rule to consider a

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[4] Plaintiffs argue in their appellate brief that it remains unclear how much of the $2,800,000 they will receive because the sellers have declared bankruptcy.

[5] We refer to Simen and his law firm as "defendants."

[6] A motion for summary disposition under MCR 2.116(C)(10) is reviewed considering the "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v AP Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). This Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Road Com'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). A motion for summary disposition

motion for summary disposition on collateral estoppel grounds. *Alcona County v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). The determination of whether collateral estoppel applies is a question of law that is reviewed de novo. *Minicuci v Scientific Data Management, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). Similar to a motion under MCR 2.116(C)(10), "when reviewing a motion for summary disposition under MCR 2.116(C)(7), all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by affidavits, depositions, admissions, or other documentary evidence submitted by the parties." *Pierce v City of Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005), citing *Maiden*, 461 Mich at 119.

Collateral estoppel is a doctrine that imposes "'a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims.'" *Monat v State Farm Ins Co*, 469 Mich 679, 687; 677 NW2d 843 (2004), quoting *Nummer v Dep't of Treasury*, 448 Mich 534, 541; 533 NW2d 250 (1995). The doctrine of collateral estoppel is meant to prevent "vexation, confusion, chaos and the ineffective use of judicial resources." *Board of County Road Com'rs for County of Eaton v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994). For collateral estoppel to apply, three requirements must be met: (1) "'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment,'" (2) "'the same parties must have had a full [and fair] opportunity to litigate the issue,'" and (3) "'there must be mutuality of estoppel.'" *Monat*, 469 Mich at 683-684, quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).

The last element, mutuality of estoppel, requires that in order for a party to be estopped from relitigating the issue, the party had to be a party in the prior action or be in privy with a party in the prior action. *Monat*, 469 Mich at 684. There is, however, an exception to this mutuality requirement. *Id.* at 685-686, 694-695. A party may assert collateral estoppel defensively against a party who had the opportunity to litigate the issue fully and fairly. *Id.* However, the ultimate issue in the subsequent action must be the same issue that was raised in the first proceeding. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). In other words, "[t]he issues must be identical, and not merely similar, and the ultimate issues must have been both actually and necessarily litigated." *Eaton*, 205 Mich at 376. "A question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for determination, and thereafter determined." *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). In order "to be necessarily determined in the first action, the issue must have been essential to the resulting judgment; a finding upon which the judgment did not depend cannot support collateral estoppel." *Id.* at 377. This Court has held that collateral estoppel may apply to factual findings made during prior arbitration proceedings. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995).

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under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). The motion should be granted if "there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law." *Pena*, 255 Mich App at 309-310. Moreover, "a genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The trial court incorrectly granted summary disposition to defendants based on collateral estoppel. As discussed in the facts section of this opinion, the issues addressed in the arbitration are plaintiffs' claims relating to the misrepresentations and fraudulent conduct of the sellers, not the conduct of Simen and his firm or their legal representation of plaintiffs in those transactions. Nowhere in the arbitrator's opinion is there any reference to intellectual property, intellectual property due diligence, or whether defendants bore any legal responsibility for the failure to perform intellectual property due diligence. The only mention of the term "due diligence" is a statement that plaintiffs could not have discovered the fabrication of invoices and advertisements through due diligence, and plaintiffs are not asserting any claim relating to the fabrication of invoices and advertisements in this lawsuit. Thus, the issue of defendants' responsibility for intellectual property due diligence was not actually litigated and was not subject to any final judgment. Furthermore, the cases defendants cite to support their conclusion are largely irrelevant. This Court's opinions in *Barrow v Pritchard*, 235 Mich App 478, 484-485; 597 NW2d 853 (1999), *Schlumm v Terrence J O'Hagan, PC (On Remand)*, 173 Mich App 345, 356; 433 NW2d 839 (1988), and *Knoblauch v Kenyon*, 163 Mich App 712, 716; 415 NW2d 286 (1987) address whether the plaintiffs were estopped from asserting a legal malpractice claim after a finding that the attorney had not provided ineffective assistance of counsel. Here, not only was ineffective assistance of counsel immaterial, it also sheds no light on whether the due diligence of the sellers' ownership of intellectual property was actually litigated in the arbitration.

With regard to plaintiffs' claim of legal malpractice relating to the Madison Heights lease, there is likewise no mention in the arbitration opinion of the lease or of the events surrounding plaintiffs' eviction. Thus, collateral estoppel does not bar this claim, because the issue has not been actually litigated and has not been subject to a final judgment. As for rescission, the arbitrator did state that rescission of the contract was not seasonably sought. However, the arbitrator made no findings of fact relating to why rescission was not sought, at what point rescission should have been sought, or the role defendants played in failing to seek rescission. Moreover, as plaintiffs acknowledge, even if collateral estoppel did apply, this would not justify granting defendants' motion for summary disposition because a finding that rescission was not seasonably sought actually bolsters plaintiffs' claim that defendants committed legal malpractice.

III. GENUINE ISSUES OF MATERIAL FACT

Plaintiff argues that there is a genuine issue of material fact regarding the causation element of plaintiffs' legal malpractice claims.

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 & Petrella & Assoc, PC (On Remand)*, 261 Mich App 705, 712; 683 NW2d 699 (2004). As in any negligence action, a plaintiff asserting a claim of legal malpractice "must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Proximate causation is generally understood in terms of foreseeability. *Pontiac School Dist v Miller, Canfield, Paddock*

& Stone, 221 Mich App 602, 613-614; 563 NW2d 693 (1997). To prove cause in fact, a plaintiff must:

> [i]ntroduce 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. [*Pontiac School Dist*, 221 Mich App at 614-615, quoting *Skinner*, 445 Mich at 165.]

Regarding whether failure to perform intellectual property due diligence caused plaintiffs' damages, it is true that defendants' role in the transaction was somewhat limited, and no written agreement existed defining any of defendants' responsibilities. However, plaintiffs and defendants agreed that defendants were responsible for "legal due diligence." What was meant by that term, and whether it included an investigation of the sellers' intellectual property ownership, has not been clearly established by either party. Thus, "giving the benefit of reasonable doubt to the opposing party," this is an "issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Moreover, that plaintiffs would not have proceeded with the transaction knowing about the intellectual property fraud is not merely speculative. Neither party disputes that the sellers fraudulently represented that they owned rights to the franchises, names, logos, products, trademarks, and computer brands. Defendants admitted that they did not perform any due diligence relating to the ownership of this intellectual property. In light of the subsequent quickness and ease with which a successor attorney discovered the intellectual property fraud, it is not mere speculation to conclude that if defendants had performed due diligence, the fraud would have been discovered. Considering the extent of the fraud and the significant sum of money plaintiffs paid for the intellectual property, it is also not mere speculation to conclude that plaintiffs would not have gone through with the transaction had they known about the fraud.

Defendants correctly assert that, with regard to whether defendants' alleged failure to timely negotiate the renewal of the Madison Heights lease caused the loss of the lease, it was plaintiffs who ultimately rejected the rent price suggested by the sellers. Yet, the negligence plaintiffs claim is that defendants should have sought to negotiate the renewal of the lease before October of 2006, and before the sellers were requesting such a high rent. Defendants presented no evidence suggesting that they actively sought renewal of the lease before the sellers' letter or that defendants exerted any other effort to renew the lease other than a single letter stating that $15,000 was too expensive. Moreover, it is well-settled that "[c]ourts are liberal in finding that a genuine issue exists, giving all benefits of doubt and resolving all reasonable inference in favor of the nonmoving party." *Pete v Iron County*, 192 Mich App 687, 689; 481 NW2d 731 (1991). Thus, there was a genuine issue of material fact regarding whether defendants' alleged negligence caused the loss of the Madison Heights lease.

Plaintiffs further claim that defendants' failure to timely seek rescission of the contract caused plaintiffs' extensive damages. In order to survive summary disposition "where the alleged malpractice results from a failure to diligently pursue or timely file a client's claim, a

plaintiff seeking to establish . . . proximate cause . . . must show that but for the attorney's alleged malpractice[,] [the plaintiff] would have been successful in the underlying suit." *Mitchell*, 249 Mich App at 677; See also *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).

Defendants contend that a failure to seek rescission did not cause plaintiffs any injury because plaintiffs had assumed the bank loan and rescission would have been impossible. Defendants cite no legal authority that supports the conclusion that assumption of the bank loan would have made rescission impossible.[7] While it is true that rescission seeks to place a party in the same position as before the transaction, there is nothing to suggest that plaintiffs could not have obtained some form of relief that accomplishes this goal. Moreover, the fact that the arbitrator found that the sellers behaved fraudulently but denied plaintiff's claim for rescission on the basis that it was not seasonably sought, suggests that plaintiffs would have been successful in a rescission suit. Thus, there is a genuine issue of material fact regarding whether defendants' failure to timely seek rescission caused plaintiffs damages.

IV. ATTORNEY'S KEY ADMISSION

Plaintiffs contend that the trial court should have granted their motion for summary disposition in light of defendant attorney's admission that he should have performed intellectual property due diligence.

Admissions are "'statements made by or on behalf of a party to the suit in which they are offered which contradict some position assumed by that party in that suit.'" *Fassihi v St Mary Hosp of Livonia*, 121 Mich App 11, 14; 328 NW2d 132 (1982), quoting *Elliotte v Lavier*, 299 Mich 353, 357; 300 NW 116 (1941). Here, defendant attorney testified that if he had to do the work again, he probably would have sought the advice of an intellectual property expert. However, he did not state that he had a legal duty to seek the advice of an intellectual property expert, or that his failure to do so constituted legal malpractice. Thus, plaintiffs' claim that defendants made an admission that required the grant of summary disposition is untrue. Rather, defendant's statement seems to be more of a reflection that, with the benefit of hindsight, it certainly would have been preferable to discover the intellectual property fraud before plaintiffs' entered into the transaction. Moreover, as discussed, whether the failure to perform intellectual property due diligence constituted legal malpractice raises a genuine issue of material fact, and therefore, it is a question best left for the jury.

V. ATTORNEY JUDGMENT RULE

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[7] It is not the responsibility of this Court "'to discover and rationalize the basis for [defendants'] claims, or unravel and elaborate for [them their] arguments, and then search for authority either to sustain or reject [their] position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Defendants argue that, if this Court finds the collateral estoppel and causation arguments unpersuasive, the grant of defendants' motion for summary disposition should be upheld based on the attorney judgment rule. Though the trial court did not base its ruling on the attorney judgment rule, defendants argued this position in their motion for summary disposition and at the hearing for the motion for summary disposition. Moreover, this Court has held that it "will not reverse when the circuit court has reached the correct result, even if it has done so for the wrong reason." *Hare v Starr Commonwealth Corp*, 291 Mich App 206, 226; __NW2d__ (2011). However, whether defendants' behavior violated the attorney judgment rule presents a genuine issue of material fact, and thus, this is not a case in which the trial court reached the right result for the wrong reasons.

According to the rule, an attorney acts negligently when he or she breaches an "implied duty to exercise reasonable skill, care, discretion, and judgment in representing a client." *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002), citing *Simko v Blake*, 448 Mich 648, 655-656; 532 NW2d 842 (1995). An attorney is not required to "exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession." *Mitchell*, 249 Mich App at 677. "[M]ere errors in judgment by a lawyer are generally not grounds for malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence." *Simko*, 448 Mich at 658.

Regarding the intellectual property due diligence, defendants acknowledged that they failed to perform any due diligence. While there is nothing to suggest that bad faith led to their inaction, it is also true that defendants were billing plaintiffs for conduct relating to this transaction, including legal due diligence, even though the effort and attention defendants were providing is questionable. Likewise, regarding the renewal of the Madison Heights lease, there is no evidence that defendants put forth any effort to negotiate a renewal of the lease prior to the sellers' initiation of negotiations a month before the lease expired. Other than sending one letter to the sellers stating that the rent price was unacceptable, there is no indication that defendants made any effort to negotiate a better price or a renewal of the lease. Yet, it is also true that the scope of defendants' representation is unclear, and it may not have included activities like investigation of the intellectual property or negotiation of the renewal of the lease. Thus, at this point in the litigation, reasonable minds may differ about whether the failure to investigate or suggest an investigation of the legal status of the intellectual property and failure to engage in active negotiation of the Madison Heights lease fell below a standard of "reasonable care, skill, and diligence." *Simko*, 448 Mich at 658; *West*, 469 Mich at 183.

Lastly, there is a genuine issue of material fact regarding whether defendants' failure to seek rescission was a violation of the attorney judgment rule. A failure to file a claim could be "an affirmative decision on part of defendant attorneys not to pursue the action," as opposed to a "mere oversight or the result of poor case management." *Mitchell*, 249 Mich App at 677. Here, however, defendant attorney did not articulate his reasons for failing to seek rescission. While defendants argue that plaintiffs' assumption of the bank loan rendered rescission impossible, defendants fail to specify whether this was actually the reason for failing to file the claim, or whether this is merely an after-the-fact reflection on why defendants' behavior was justified. Moreover, as discussed previously, it is not altogether obvious that the assumption of the bank loan would have barred a rescission claim. Thus, at this point in the litigation, it is premature to

decide whether defendants' failure to seek rescission was the product of reasoned discussions or of poor case management.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly