STATE OF MICHIGAN

COURT OF APPEALS

BRAD R. SAFFRON, Plaintiff/Counter Defendant-Appellant,	UNPUBLISHED July 17, 2012
v	No. 301925 Grand Traverse Circuit Court
CRAIG W. ELHART, and CRAIG W. ELHART, PC, Defendants/Counter Plaintiffs-Appellees.	LC No. 2010-027791-NM

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

This legal malpractice case arises from a bitterly-contested divorce action tried before Judge David L. Stowe. Plaintiff Brad R. Saffron alleges that his divorce counsel, defendant Craig W. Elhart, failed to thoroughly evaluate certain assets and neglected to effectively challenge the validity of an antenuptial agreement. Competent representation, Saffron claims, would have yielded a more favorable property award. Elhart answered Saffron's legal malpractice complaint with a counterclaim seeking $28,465.54 in outstanding attorney fees. The circuit court granted summary disposition to Elhart, finding Saffron's claim "potentially incredibly speculative" absent evidence concerning whether additional evidence would have altered Judge Stowe's property distribution ruling. And because Saffron failed to timely respond to Elhart's counterclaim, the circuit court entered a default judgment in Elhart's favor. We affirm, albeit for different reasons than those articulated by the trial court.

I. FACTS AND PROCEEDINGS

On April 14, 1986, Saffron and his betrothed, Elaine Van Dyke, signed an antenuptial agreement providing that certain identified assets and liabilities would remain separate property.[1] Elaine's separate property included a home in Honor, Michigan, an investment retirement

[1] Elaine Van Dyke became Elaine Saffron upon the marriage. To avoid confusion we refer to her in this opinion as "Elaine, and to Brad Saffron as "Saffron."

account, a State of Michigan pension, and a variety of small savings accounts. Saffron claimed separate ownership of tools worth $25,000 and several other items. The couple married on April 19, 1986.

The Saffron's 22-year marriage was stormy throughout. In 1987 and 2003 Saffron filed and dismissed divorce complaints. In 2006, Elaine filed for divorce after Saffron committed an act of domestic violence. The 2006 divorce action culminated in a 2008 trial before Grand Traverse Judge David Stowe. Elhart was Saffron's third lawyer in the final divorce proceeding, and represented Saffron for about 13 months before the trial. The parties resolved their disputes concerning child custody and parenting time; the trial focused exclusively on the division of marital and separate property.

The parties' primary assets consisted of five parcels of real property, a Corvette, and Elaine's pension and deferred compensation plans. Only small amounts of cash remained in the parties' bank accounts. Elaine claimed all the property as separate, contending that she inherited some of it, used separate funds to obtain the Corvette, and that the antenuptial agreement shielded the remaining assets. Saffron raised no challenge to Elaine's entitlement to the home in Honor. Instead, he centered his case on an allegation that Elaine had gambled away close to $300,000, and that her share of the marital estate should be discounted by that amount.

During the divorce trial, Elhart established to Judge Stowe's satisfaction that Elaine gambled regularly and extravagantly. The precise amount of her winnings and losses, however, remained unclear. Elhart attempted to demonstrate that during the last five years of the marriage, Elaine gambled away approximately $290,000. Elaine asserted that the $290,000 belonged to her because she had "saved" it during the marriage, and insisted that she used most of it to defray expenses unrelated to gambling. Elhart subpoenaed bank and casino records, referred to them during his cross examination of Elaine, but did not offer to place all of them in evidence.[2] Nor did Elaine place into evidence bank or other records supporting her version of how the money had been spent. Notably, neither party established exactly how much money Elaine had spent or what she spent it on.

[2] Saffron provided the circuit court with a "notebook" containing, in Saffron's counsel's words, "voluminous" financial documents. Counsel has provided no explanation or summary of what these documents are supposed to represent, or how the circuit court or this Court should use them. In his brief on appeal, Saffron states: "It is Plaintiff/Appellant's position that [if] the trial court read in full the voluminous submissions before it, as it was required to do under MCR 2.116(C)(10), it would have located evidence supporting Plaintiff/Appellant's position, that 'but for' Mr. Elhart's mistakes, he would have been awarded more in marital assets." We decline Saffron's invitation to search through the documents to locate evidence supporting his claim. "MCR 2.116(G)(4) squarely places the burden of identifying the issues and evidentiary support on the parties, not the trial court." *Barnard Mfg Co, Inc, v Gates Performance Engineering, Inc,* 285 Mich App 362, 376; 775 NW2d 618 (2009). Saffron has failed to refer to any specific documents that would aid our evaluation of the evidence, and we will not "scour the record" to locate evidentiary tidbits that may create fact questions.

Saffron's testimony at the divorce trial concentrated on his contributions to the marriage. He testified that he had been intermittently employed, earning at most approximately $25,000 per year, and for a long period stayed home to raise the children. Elaine worked in a job that paid her approximately $40,000 yearly. Saffron readily admitted that Elaine managed all household finances. When Saffron worked outside the home, he routinely turned over to Elaine his entire paycheck. Elaine was fired from her job the day before the divorce trial commenced.[3]

In a bench opinion, Judge Stowe expressed incredulity that Elaine had earned and saved $290,000 without any contribution from Saffron. He concluded that the sum represented marital property, and that Elaine had "gambled away a significant portion[] of the parties' savings[.]" Judge Stowe ruled the antenuptial agreement enforceable. Pursuant to the agreement, Elaine received the home in Honor, Michigan. Judge Stowe applied a "coverture factor" to divide Elaine's pension, allocating 40% to Saffron. Elaine received all of the real property, other than one 10-acre parcel purchased during the marriage. Judge Stowe allocated approximately 55% of the remaining marital property to Elaine, as well as credit card debt totaling approximately $20,000.[4] Included in the property awarded to Elaine was a 2006 Corvette convertible that Elaine had won in a casino raffle, which Judge Stowe determined to be separate rather than marital. Pursuant to the divorce judgment, Elaine made an "equalization payment" to Saffron amounting to $103,685.

Shortly before Judge Stowe entered the judgment of divorce, Saffron fired Elhart and retained attorney Lea Ann Sterling. After the judgment entered, Sterling filed a motion asserting that the judgment reflected a mathematical error. Sterling construed the bench ruling as reflecting that the parties would share equally in the marital assets. Judge Stowe denied the motion.

In February 2010, Saffron sued Elhart and defendant Craig W. Elhart, P.C.[5] Saffron's complaint averred that Elhart failed to conduct adequate discovery concerning the marital assets, "abandoned any request for spousal support or attorneys' fees," "did not prepare his witnesses or exhibits in order to document for the record the values (and dissipation of by the ex-wife) of the marital assets," and neglected to obtain or enforce temporary orders preventing waste. Elhart filed an answer on April 15, 2010, along with a counterclaim seeking $28,465.54 in attorney fees. The counterclaim included a claim under MCL 600.2145 for an account stated.

On May 12, 2010, the circuit court entered a default on Elhart's counterclaim. Saffron filed an answer to the counterclaim the same day. On May 27, 2010, Saffron filed a motion to set aside the default, asserting that "a new staff member" in his attorney's law office had

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[3] Elaine worked for Benzie County. Saffron reported to county authorities that Elaine had committed misconduct, resulting in the termination of her employment.

[4] The evidence conflicts concerning the exact percentages of the parties' property awards. Judge Stowe expressed no finding in this regard. Viewing the evidence in the light most favorable to Saffron, we assume that he received approximately 40% of the marital estate.

[5] We refer to both defendants simply as Elhart.

mistakenly docketed the deadline for answering the counterclaim as expiring in 28 days rather than 21, as provided under MCR 2.108(A)(4). Saffron's counsel also filed an affidavit of meritorious defense asserting Elhart's professional negligence and "errors and inaccuracies in the invoices and billings submitted." After entertaining oral argument the circuit court entered an order keeping the default in place but setting aside the amount, "pending determination of factual and evidentiary matters as set forth in the Plaintiff's original Complaint of legal malpractice[.]"

The parties conducted extensive discovery. Saffron named three expert witnesses, all of whom testified that various aspects of Elhart's representation fell below the standard of care. Saffron withdrew one expert's testimony from consideration. Because the testimony of attorney Michael Winnick most comprehensively sets forth Saffron's claims, we turn to a summary of his opinions.

Winnick testified that Elhart should have moved to set aside the antenuptial agreement on the grounds of fraud and rescission. Winnick based this opinion on Saffron's deposition testimony in the legal malpractice case that shortly after signing the agreement, Elaine revealed that she had engaged in an affair and tore up the document. According to Winnick, Elhart failed to bring these facts to Judge Stowe's attention. Winnick agreed that he lacked a "crystal ball," and could not state with certainty whether Judge Stowe would have stricken the agreement. He continued:

> This is not one of those run-of-the-mill, hit the print button on the word processor cases. You've got facts here. And you've got good facts, and you've got good law. The law's relatively clear on this. And I would submit to you that a jurist who is presented with facts as clear as this, coupled with law that's as clear as what it is, because this is not a convoluted area of the law - - I guess how I'd have to answer your question is I'm positive one of two things would have happened here. I'm - - and this is not meant to be in a smart-aleck tone - - but I'm positive one of two things would have happened. I'm positive either, A, the Judge would have set this aside or I'm positive that the lawyer would have lost the motion, but at least a good record could have been made, so in the Court of Appeals the guy could have maybe gotten it right.

Winnick next criticized Elhart's failure to trace the approximately $290,000 in cash that Elaine spent. Winnick recounted that during the divorce trial, Elaine argued that she controlled the $290,000 because it was "protected by the prenuptial agreement." Winnick opined that in the absence of an accounting, Elhart lacked an ability to effectively challenge this claim. Winnick charged that by failing to "follow through" with motions to compel production of missing bank and casino records and to place a complete set of financial records in evidence, Elhart lacked the ammunition necessary to rebut Elaine's testimony. Winnick emphasized that had Judge Stowe considered the additional evidence, he would have concluded that Elaine had actually gambled-away marital property. That fact, Winnick opined, would have played an important role in Judge Stowe's division of the parties' property. He summarized:

> The problem you have here is you're stuck with her explanation because the discovery was deficient and the preparation was deficient. You weren't able to impeach her. Do you really think Elaine Saffron was going to give you an

> explanation of the dissipation of those assets that were [sic] advantageous to Mr. Saffron?

Winnick further testified that Elhart breached the standard of care by failing to seek spousal support and attorney fees.

Elhart sought summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that no evidence connected Saffron's damage claim to the allegations of legal malpractice, and that the attorney judgment rule shielded Elhart from liability. Saffron countered with a motion for summary disposition pursuant to MCR 2.116(I)(2). The circuit court granted Elhart's motion and denied Saffron's. In a lengthy bench opinion, the court observed that because Judge Stowe's property division was an "equitable determination" rendered within a "legal framework,"

> what should occur in a case of this nature is plaintiff has an obligation to make a prima fascia [sic] showing there were violations of the standard of care, there were reasonable inferences from those violations that are material with regard to causation and damages and that ultimately then if that can be sustained, upon appeal, that what you would get is a re-trial of the divorce action before the same judge or that judge's successor.

The court characterized as "speculative" whether Saffron would have obtained a better result, ruling:

> I am going to grant the motion for summary disposition, and specifically request that if indeed this case is remanded here, that there be some specific guidance being given on how this judge is supposed to conduct the trial. Does Hanaway apply? Am I instructing the jury with regard to the statutory factors? Am I going to determine the alimony award or do I simply instruct the jury on what the factors are for alimony? Do I instruct the jury with regard to rehabilitative alimony? Do I ask the jury to keep in mind that when you make a spousal support award you need to look at the size of the marital estate? Do I instruct them about not invading corpus, that they can only look at the interest income associated with it.

Elhart then renewed his request for entry of default judgment, and Saffron objected. After a hearing, the circuit court ruled that the default had been properly entered, explaining: "the Court was not persuaded that there was both good cause [and a] meritorious defense or excusable neglect to justify setting it aside."

II. ANALYSIS

A. Summary Disposition of the Legal Malpractice Claim

We first address Saffron's contention that the circuit court improperly granted summary disposition to Elhart. We review de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Because the circuit considered evidence outside the pleadings, MCR 2.116(C)(10) supplies the appropriate basis for our review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). "Summary

disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "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*, 469 Mich at 183.

The dispute in this case boils down to whether Saffron established a prima facie showing that he would have fared better in the divorce but for Elhart's negligence. The circuit court expressed that a jury could only speculate whether a different legal approach would have sufficiently persuaded Judge Stowe to render a different award. Elhart similarly contends that "no witness can say how Judge Stowe would have ruled if Mr. Elhart conducted trial in conformity with [Saffron's] suggestions, or how he would have ruled on the separate versus marital property issues, or even what percentage distribution he would have applied to his division of the estate." Saffron responds that were this Court to accept Elhart's argument, divorce practitioners would enjoy immunity for their professional negligence.

Resolution of this dispute rests on the distinction between questions of law and questions of fact. Whether Judge Stowe would have resolved a *legal* question in favor of one spouse or the other is a question reserved for the court. *Factual* determinations in a legal malpractice case, including the amount of damages to be awarded, remain the province of a jury. In this case, Saffron's arguments concerning legal issues, such as the validity of the antenuptial agreement and whether the introduction of additional evidence would have resulted in a more favorable award, were for the court alone to decide. On de novo review of the evidence, we decide those issues in Elhart's favor.

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*, 261 Mich App 705, 712; 683 NW2d 699 (2004). In *Basic Food Indus, Inc v Grant*, 107 Mich App 685, 691; 310 NW2d 26 (1981), this Court observed: "The last two elements which must be established to make out a prima facie case of malpractice, proximate causation and damages, have proven to be problematic." In some legal malpractice cases, such as those arising from a missed statute of limitations, proximate cause is satisfied when a plaintiff proves the "suit within a suit." *Id.* at 692-693. But in other cases, the "suit within a suit" concept is "wholly without value." *Id.* at 693.

Establishing causation in a legal malpractice case arising from a divorce action presents unique conceptual difficulties. Contested divorce cases are decided by a judge sitting in equity, guided by statutes and, to a lesser extent, the common law. Saffron contends that because an assessment of causation in a legal malpractice case stemming from a contested divorce involves issues of law within the exclusive province of the courts, a judge rather than a jury must decide whether the plaintiff has proved causation. According to Saffron's brief on appeal, "[I]n this area of divorce law, the issue of how the marital estate (property and debt) is to be valued, and

how it is to be distributed equitably was obviously an issue for the then trial court (Judge Stowe) to decide. And, the obverse is true here – the decision about proximate cause belongs to the trial Court in this type of malpractice case." Saffron premises his argument on *Radtke v Miller, Canfield, Paddock & Stone*, 209 Mich App 606; 532 NW2d 547 (1995), rev'd in part on other grounds 453 Mich 413; 551 NW2d 698 (1996), and *Charles Reinhart Co v Winiemko*, 444 Mich 579; 513 NW2d 773 (1994).

Elhart insists that the Supreme Court's reversal of this Court's opinion in *Radtke* renders that case meaningless, and that *Winiemko* applies only to legal malpractice actions presenting whether an aborted appeal would have been successful. Juries, Elhart insists, must decide proximate cause. And since no jury could possibly read Judge Stowe's mind or reconstruct how he would exercise his considerable discretion in shaping a property award, Elhart concludes that causation in such a case never moves beyond the realm of rank speculation.

We conclude that Saffron has the better of this legal argument. Our review of *Winiemko* and *Radtke* compels the conclusion that in a legal malpractice case arising from a missed appeal or a negligently presented divorce case, the court must distinguish between legal and factual elements, decide the legal elements, and instruct the jury accordingly.

In *Winiemko*, 444 Mich at 583-584, the plaintiffs alleged that the defendant failed to perfect an appeal as of right, resulting in its dismissal. The defendant countered that the plaintiff failed to present a prima facie case because "the underlying appeal, as a matter of law, could not have succeeded." *Id.* at 584. The trial court permitted the jury to determine this question. The jury found for the plaintiff and awarded damages. *Id.* at 585. The Supreme Court reversed and remanded, holding "that the question whether a court or a jury should determine whether the underlying appeal would have been successful is reserved to the court because whether an appeal would have been successful intrinsically involves issues of law within the exclusive province of the judiciary." *Id.* at 608.

In *Winiemko*, the Supreme Court acknowledged that in most legal malpractice cases, proximate cause is determined by the jury: "If the malpractice action is not one focused exclusively on the appellate process or issues of law, but is focused on malpractice occurring during litigation or settlement negotiations, then proximate cause often is an issue of fact." *Id.* at 590 n 22. However, "'courts will not permit even expert witness testimony on a question of . . . law because it is the exclusive responsibility of the trial judge to find and interpret the applicable law.'" *Id.* at 592, quoting *People v Lyons*, 93 Mich App 35, 46; 285 NW2d 788 (1979) (alteration in original). Because appeals are generally "based on and resolved as matter of law, not fact," the Supreme Court determined that in legal malpractice cases arising from a missed opportunity to appeal, proximate causation must be decided by a judge rather than a jury.

Throughout *Winiemko*, the Supreme Court favorably cited the Oregon Supreme Court's decision in *Chocktoot v Smith*, 280 Or 567; 571 P2d 1255 (1977). The legal malpractice alleged in *Chocktoot* arose from a probate proceeding in which a judge determined that a claimant to estate proceeds was not the son of the deceased. *Id.* at 569. The disgruntled claimant sued his attorneys, alleging that they negligently failed to present evidence that would have resulted in a different outcome. *Id.* The judge presiding over the legal malpractice case directed a verdict in the plaintiff's favor on the question of the defendants' negligence, and "also ruled that it had the

responsibility to decide whether defendants' negligence changed the outcome" of the heirship claim. *Id.* The judge concluded that the attorneys' negligence proximately caused the claimant's loss in the probate court. *Id.* at 569-570. The attorneys appealed, arguing that the jury should have decided this question. *Id.* at 570.

In *Chocktoot*, the Oregon Supreme Court delineated the roles of judge and jury with respect to the underlying issue presented in that case. It declared: "[N]o jury can reach its own judgment on the proper outcome of an earlier case that hinged on an issue of law . . . . [T]he jury cannot decide a disputed issue of law on the testimony of lawyers." *Id* at 572-573. The Court instead posited: "If the trial judge is persuaded that the earlier court would properly have ruled favorably upon the legal step omitted by the malpractice defendant, it is his task in a jury trial to explain the effect that this favorable ruling would have had on plaintiff's case." *Id.* at 574. Thus, the Oregon Supreme Court concluded that "[t]he question what decision should have followed in the earlier case if the defendant attorneys had taken proper legal action is a question of law for the court. Consequently such legal rulings are also open for briefing and review on appeal." *Id.* at 575. In *Winiemko*, 440 Mich at 589, our Supreme Court cited *Chocktoot* as authority for the proposition that "whether an appeal lost because of an attorney's negligence would have succeeded if properly pursued is an issue for the court because the resolution of the underlying appeal originally would have rested on a decision of law."[6]

Radtke, 209 Mich App 606, involved a legal malpractice action arising from a forfeited deposit of earnest money when a property buyer failed to close the sale. The buyer sued the seller, alleging breach of contract, fraud, and interference with economic relations. *Id.* at 610. This Court determined that the plaintiff's admissions made in another case required that summary disposition be granted to the seller. *Id.* at 611. The plaintiff then sued his attorneys, contending that their failure to preserve an argument in the trial court that would have resulted in a successful appeal. *Id.* This Court held that the plaintiff "presented sufficient evidence of legal malpractice to avoid summary disposition." *Id.* at 613. In reaching this conclusion, this Court cited *Winiemko* for the proposition that although proximate cause is usually decided by a jury, "to the extent it involves questions of law – for example, whether an aborted appeal would have been successful – it is an issue reserved for the Court." *Id.*

The Supreme Court disagreed with this Court's analysis of the law underlying its causation analysis, holding that the preservation error alleged by the plaintiff would not have occasioned a different appellate result. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413; 551 NW2d 698 (1996). In other words, the Supreme Court found that even had the lawyers raised the legal argument they had omitted to pursue, they nevertheless would have lost the appeal. The Supreme Court reversed the Court of Appeals "on this point[.]" *Id.* at 427. No aspect of the Supreme Court's opinion in *Radtke* called into question the fundamental issue

[6] In a footnote, the *Winiemko* Court further cited *Chocktoot*'s instruction that "[i]f the alleged negligence of an attorney in an earlier case involved both legal and factual elements, it would be necessary for the trial court to separate these elements and to instruct the jury accordingly." *Winiemko* at 589 n 21.

presented here: whether a court must decide any issues of law that may arise in a legal malpractice case.

Like legal malpractice cases involving a lost claim of appeal, the instant case inherently involves legal issues. For example, Saffron contends that a properly-mounted challenge to the antenuptial agreement would have resulted in a finding of its invalidity. Similarly, Saffron alleges that a claim for spousal support would likely have succeeded. Pursuant to the reasoning carefully set forth in *Winiemko*, we conclude that these legal questions must be resolved by a judge. Accordingly, we turn to a review of Saffron's legal malpractice claims to determine whether they present questions of law. As to fact questions, we consider whether Saffron's submissions establish genuine issues for a jury to decide.

We first evaluate Saffron's claim that had Elhart moved to set aside the antenuptial agreement on the ground that it had been rescinded or was the product of fraud, he would have succeeded. This allegation presents an issue of law that would have been decided by Judge Stowe had Elhart raised it during the divorce proceedings. We dispense easily with the claim that Elaine's fraud should have vitiated the agreement. Saffron testified at his deposition that even had he known of his fiancée's infidelities, "I probably would have signed it anyway[.]" With this admission, Saffron conceded that he did not rely to his detriment on Elaine's fraudulent representations; he wished to marry her regardless of her previous transgressions. While Saffron's testimony that Elaine voluntarily tore up the agreement tends to support a claim for rescission, Saffron has failed to advance any argument that the property covered by the agreement qualified as marital rather than separate. Thus, whether the contract was rescinded is immaterial. The items listed in the agreement either no longer exist, or clearly constituted separate property even absent their inclusion in the antenuptial agreement.

Next, we consider Saffron's argument that had Elhart conducted more thorough discovery of the marital assets and introduced the fruits of this discovery at the trial, Saffron would have received a more generous award of marital property. This "but for" question raises a mixed question of law and fact. For example, whether the discovered asset qualified as marital or separate property obviously presents a question of law. In *Chockfoot*, the Oregon Supreme Court decided that what a reasonable judge would have done with additional relevant information is a question of law. *Chockfoot*, 571 P2d at 574.[7]

Here, whether we deem proximate cause a legal question in whole or in part, we conclude that Saffron failed to establish it. Saffron's claim that Elhart's failure to locate or trace $290,000 resulted in a reduced property award lacks a factual basis. Judge Stowe seemed to acknowledge that Elaine had spent a large sum of money, despite that neither party introduced specific proofs on this score. Saffron claims that Elhart should have marshaled evidence proving that Elaine gambled away $290,000 of marital funds. But Saffron has failed to demonstrate that such

[7] At least one other court has ruled that this question should be decided by the jury. In *Pickett, Houlon & Berman v Haislip*, 73 Md App 89, 111; 533 A2d 287 (1987), the Maryland Court of Special Appeals held that a jury should determine "what a *reasonable* judge would have awarded in the initial divorce action." (Emphasis in original).

evidence exists or ever existed. Despite that Saffron has had ample opportunity to obtain proof of the amount Elaine gambled and lost, no such evidence was presented to the circuit court. A genuine issue regarding proximate cause cannot be based upon mere speculation or conjecture that some causal connection is *possible*. See *Skinner v Square D Co*, 445 Mich 153, 164-165, 174; 516 NW2d 475 (1994). "[A] causation theory must have some basis in established fact." *Id.* at 164. Although Judge Stowe may well have divided the Saffrons' assets differently had evidence supported that Elaine wasted marital property, no facts other than those already available to Judge Stowe support that she did.

Nor do we find any factual support for Saffron's contention that Judge Stowe would have awarded spousal support had Elhart argued for it. The primary purpose of spousal support "is to balance the incomes and needs of the parties in a way that will not impoverish either party." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). In figuring a suitable amount of spousal support, "[r]elevant factors include the length of the marriage, the parties' ability to pay, their past relations and conduct, their ages, needs, ability to work, health and fault, if any, and all other circumstances of the case." *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). By the time Judge Stowe entered the judgment of divorce, Elaine was unemployed. Evidence presented in the legal malpractice case establishes that shortly after the divorce she sought bankruptcy protection, and claimed an inability to pay Saffron the cash due him pursuant to the divorce judgment. Alternatively, even had Judge Stowe been persuaded to award Saffron some measure spousal support, no evidence exists that Elaine could have paid it.

Lastly, Saffron asserts that Elhart should have urged Judge Stowe to award attorney fees. "Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit[.]" *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). Attorney fees also may be appropriately awarded to a party incurring expenses caused by the opposing party's unreasonable conduct in the course of litigation. *Id.* Saffron's attorney fee claim would have lacked a legal basis. As in *Hanaway*, the evidence simply does not support that the actions of Elaine or her counsel hindered Saffron's ability to discover the value of the parties' assets, or forced Saffron to incur greater expenses than he otherwise would have incurred. Neither Saffron's expert witnesses or his counsel demonstrated through an analysis of Elhart's billing records or any alternative method of proof that Saffron lacked funds to pay his attorney, or that Elaine's counsel abused discovery. Saffron's failure to adequately support a factual basis for an attorney fee award in the divorce case dooms this claim.

In summary, our de novo review of the law and the evidence supports that Saffron failed to carry his burden of substantiating that but for Elhart's negligence, Saffron would have obtained a more favorable divorce judgment.

B. The Default Judgment

We now consider Saffron's claim that the circuit court erred by refusing to set aside the default judgment. "We review for an abuse of discretion a circuit court's ultimate decision to grant or deny relief from a judgment." *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010). The abuse of discretion standard also governs our review of rulings on motions to set aside default judgments. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

"A motion to set aside a default or a default judgment . . . shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." MCR 2.603(D)(1). Here, regardless whether Saffron demonstrated good cause for setting aside the default, he has failed to raise any meritorious defense to Elhart's account stated claim.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering