STATE OF MICHIGAN

COURT OF APPEALS

JANET L. S. POGOR,

Plaintiff-Appellant,

v

WILLIAM H. POGOR,

Defendant,

and

STEVEN CABADAS,

Appellee.

UNPUBLISHED
December 26, 2000

No. 215480
Oakland Circuit Court
LC No. 96-528348-DM

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber*, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from two orders entered by the circuit court relative to the payment of attorney fees. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff first contends that the court erred in denying her motion to amend the judgment of divorce pursuant to MCR 2.612(C)(1)(b). Under that rule, the court may relieve a party from a final judgment on the ground of "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)." To obtain relief from judgment on this ground, the movant must meet the same standard applicable to a motion for a new trial under MCR 2.611(A)(1)(f): "(1) the evidence is newly discovered, not merely its materiality; (2) the evidence is not merely cumulative; (3) it is likely to change the result; and (4) the moving party could not have produced it at trial with reasonable diligence." *Hauser v Roma's of Michigan, Inc*, 156 Mich App 102, 106; 401 NW2d 630 (1986). The trial court's ruling on such a motion "is discretionary and will not be disturbed absent an abuse of discretion." *Driver v Hanley (After Remand)*, 226 Mich App 558, 564-565; 575 NW2d 31 (1997).

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff retained appellee to represent her in her divorce, agreeing to pay him not less than $200 per hour for his services, which would be invoiced periodically. Plaintiff was never billed because she did not have the funds with which to pay counsel. In a settlement placed on the record, she consented to pay appellee $25,000 for his services and that agreement became part of the judgment. Later, plaintiff obtained a copy of counsel's billing records, which showed that his fees for services rendered came to $12,150. The invoices were newly discovered, plaintiff not previously having possession of them. However, she knew that counsel had to prepare them as stated in the retainer agreement and had she asked for them at any time, she surely could have discovered exactly what he was billing her for. Because plaintiff could have easily obtained the invoices had she acted with reasonable diligence, they are "not 'newly discovered evidence' within the meaning of the court rules." *In re Pope Estate*, 205 Mich App 174, 178-179; 517 NW2d 281 (1994). Therefore, the trial court did not abuse its discretion in denying plaintiff's motion to set aside the attorney fee provision of the judgment of divorce.

Plaintiff next contends that the trial court erred in ordering her to pay appellee an additional fee for services rendered in connection with a tort action. The trial court held an evidentiary hearing regarding the amount of the fee. The trial court's factual findings are reviewed for clear error, MCR 2.613(C), but issues of law and the court's ultimate disposition are reviewed de novo. *Frericks v Highland Twp*, 228 Mich App 575, 583; 579 NW2d 441 (1998); *Edwards v Edwards*, 192 Mich App 559, 562; 481 NW2d 769 (1992).

Attorneys may not charge "an illegal or clearly excessive fee" for their services. MRPC 1.5(a). They may agree to accept a contingency fee for their services, provided the agreement is in writing and, in a personal injury action, the fee received does not exceed one-third of the amount recovered. MRPC 1.5(c); MCR 8.121(A), (B), (F). Plaintiff signed a separate retainer agreement whereby she agreed to pay appellee "one-third (1/3) of any settlement, verdict, or recovery of past, present or future monies awarded" in a personal injury action against her husband. Had she discharged appellee before he completed the services contracted for, he would have been entitled to compensation for the reasonable value of his services, taking into consideration the standard factors set forth in MRPC 1.5(a) and *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). *Morris v Detroit*, 189 Mich App 271, 278-279; 472 NW2d 43 (1991). In this case, however, he completed the contract, filing and settling the tort case for $150,000. Therefore, the receipt, retention, or sharing of the settlement proceeds in an amount "equal to or less than one-third the net amount recovered is deemed fair and reasonable." *Id*. Accordingly, we cannot find that the trial court erred in ordering plaintiff to pay appellee an additional $10,000 for services rendered in connection with the tort action.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Dennis B. Leiber