STATE OF MICHIGAN

COURT OF APPEALS

NASIR ALI, MIR ASGHAR, and MID MICHIGAN AMBULATORY PHYSICIANS, PLC, doing business as ADVANCE URGENT CARE AND WALK-IN-CLINIC, Plaintiff-Appellants,	UNPUBLISHED March 21, 2019
v DAVID TRIVAX and SERLIN, TRIVAX & STERN, PLLC, Defendant-Appellees.	No. 343140 Ingham Circuit Court LC No. 16-000534-NM

Before: SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendants, David Trivax and Serlin, Trivax, and Stearn, PLLC. We reverse and remand.

I. BASIC FACTS

This legal malpractice case arises out of Trivax's representation of plaintiffs in an underlying employment contract and discrimination lawsuit filed by plaintiffs' former employee (hereinafter "the first lawsuit"). The contract in dispute in the first lawsuit guaranteed the employee 10% of the net profits earned yearly by plaintiffs' business, regardless of her continued employment. That case was resolved through case evaluation and the employee received a $60,000 award. Subsequently, Trivax advised plaintiffs to file a declaratory action, seeking a declaration that the case evaluation judgment extinguished the employee's entitlement to pursue any future net profits under the employment contract. Plaintiffs authorized Trivax to file this second lawsuit, and the trial judge ruled in plaintiffs' favor. The employee appealed and this

Court reversed, focusing solely on contract interpretation.[1] On remand, plaintiffs terminated Trivax as their legal representation. Successor counsel ultimately settled the case with the former employee, and she was paid $47,500.

Plaintiffs contend in this present action that Trivax breached the applicable standard of care in advising plaintiffs to file the declaratory action and in pursuing this course of action. They contend that the advice was unreasonable and conflicted with prevailing Michigan law. Further, they contend that because of the second lawsuit they suffered damages in the form of additional legal fees as well as the settlement payment. The trial court, however, granted defendants' motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), finding that Trivax's interpretation of the law, advice, and course of action were "conceivable" under Michigan law. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 120.]

"To determine if a genuine issue of material fact exists, the test is whether the kind of record which might be developed, giving the benefit of reasonable doubt to the opposing party, would leave open an issue upon which reasonable minds might differ." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994) (quotation marks and citation omitted).

III. LEGAL STANDARDS

"It is well established that an attorney is obligated to use reasonable skill, care, discretion and judgment in representing a client." *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995) (quotation marks, alteration, and citations omitted). 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 a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994) (opinion by RILEY, J.) (quotation marks and citation omitted). The plaintiff has the burden of establishing all four elements. *Id*. at 586. In this case, the parties do not dispute that there was an attorney-client relationship, and the trial court did not reach the

[1] *Ali v Loloee*, unpublished per curiam opinion of the Court of Appeals, issued March 18, 2014 (Docket No. 313939).

issue of causation or damages. Instead, the focus of the summary disposition opinion and order was the second prong of a legal malpractice claim—whether Trivax was negligent in his legal representation of plaintiffs.

IV. ANALYSIS

A. ISSUES OF LAW

Plaintiffs first argue that the trial court erred by failing to conduct an analysis of the law underlying Trivax's advice to file the second lawsuit. They continue to argue on appeal that the dispositive issue is whether the case evaluation award extinguished future claims and if it did, as they argue, Trivax's interpretation cannot be insulated as a mere error of judgment. While we disagree that this is the "dispositive issue," we agree that to determine whether Trivax exercised reasonable skill and professional judgment in accordance with Michigan law, the trial court should have analyzed the underlying legal issue.

In *Charles Reinhart Co*, an attorney was sued for malpractice after he failed to timely file an appellate brief or answer a motion for dismissal, resulting in the plaintiffs' loss of the appeal. *Charles Reinhart Co*, 444 Mich at 583-584. The plaintiffs argued that but for the attorney's negligence, they would have succeeded in their appeal. *Id*. at 584. The attorney filed a motion for summary disposition, arguing that the plaintiffs were unable to prove proximate cause because the underlying appeal, as a matter of law, would have been unsuccessful. *Id*. The trial court denied the motion, holding that the question of proximate cause was a question of fact for the jury. *Id*. at 585. Our Supreme Court disagreed. *Id*. at 590-591. In reaching that conclusion, the Court quoted other state appellate courts, reasoning:

> "The question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules. The plaintiff's petition that the jury should make this determination as a question of fact would require the jury to sit as appellate judges, review the trial court record and briefs, and decide whether the trial court committed reversible error. A judge is clearly in a better position to make this determination. Resolving legal issues on appeal is an area exclusively within the province of judges." [*Id*. at 590, quoting *Millhouse v Wiesenthal*, 775 SW2d 626, 628 (Tex, 1989) (alterations and ellipsis omitted).]

The Court concluded that "because the issue whether the underlying appeal would have succeeded is resolved by legal principle, the issue is one for the court, not the jury. Simply because issues of law are presented in a unique procedural posture does not eviscerate this basic governing principle of Michigan jurisprudence." *Charles Reinhart Co*, 444 Mich at 592.

Charles Reinhart Co is factually distinguishable from the instant case because this case does not involve an appellate malpractice lawsuit; nor does the particular issue in this case involve proximate cause. However, we conclude that the analysis from *Charles Reinhart Co* is nevertheless persuasive in the resolution of the instant case. Whether Trivax was negligent is directly related to the legal principles underlying his decision to advocate for and pursue the declaratory action in the second lawsuit. " 'It is emphatically the province and duty of the judicial department to say what the law is.' " *Id*. at 592, quoting *Marbury v Madison*, 5 US (1

Cranch) 137, 177; 2 L Ed 60 (1803). And "[s]imply because issues of law are presented in a unique procedural posture does not eviscerate this basic governing principle . . . ." *Charles Reinhart Co*, 444 Mich at 592. Whether Trivax advised plaintiffs to pursue the second lawsuit based on reasonable skill, care, discretion, and judgment in accordance with prevailing law is inherently dependent upon an analysis of the underlying law governing case evaluations. See *Simko*, 448 Mich at 656-658. The trial court erred by failing to examine the applicable law and simply deeming Trivax's interpretation "conceivable."

Furthermore, the trial court's apparent failure to analyze the underlying legal principles arose from its finding that Trivax's interpretation was "conceivable" under Michigan law. Whether an attorney's argument or interpretation of the law is "conceivable" is not the standard for determining whether an attorney's representation was negligent. The proper standard in a legal malpractice case is whether an attorney used reasonable skill, care, discretion, and judgment in representing a client, not whether a "conceivable" justification existed for the attorney's advice. See *id*.

B. EFFECT OF ACCEPTANCE OF CASE EVALUATION, MCR 2.403(M)(1)

Plaintiffs next argue that there is no legal support for Trivax's interpretation, advice, and course of action undertaken to pursue the second lawsuit.

Case evaluations are governed by MCR 2.403. "In general, the purpose of MCR 2.403 is to expedite and simplify the final settlement of cases to avoid a trial." *Larson v Auto-Owners Ins Co*, 194 Mich App 329, 332; 486 NW2d 128 (1992). MCR 2.403(M)(1) provides that a case evaluation judgment "shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered . . . ." Our Supreme Court has stated that "[t]he language of MCR 2.403(M)(1) could not be more clear that accepting a case evaluation means that *all claims* in the *action* . . . are dismissed." *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 555; 640 NW2d 256 (2002).

In *CAM Constr*, the plaintiff filed a four-count complaint against the defendant for failure to pay for services rendered and breach of contract. *Id*. at 550-551. Counts I, II, and III all dealt with the same contract, but count IV pertained to a separate contract. *Id*. at 551. The defendant was granted summary disposition on count IV, which was not appealed. *Id*. The case proceeded to case evaluation, which the parties accepted. *Id*. at 551-552. The defendant moved to dismiss the entire case, but the plaintiff argued that it reserved the right to appeal the summary disposition of count IV. *Id*. at 552. The circuit court agreed, but on appeal this Court dismissed the case, concluding that "a party cannot appeal an earlier order entered after a subsequent acceptance of the mediation[2] award." *Id*. at 552-553.

[2] Prior to August 1, 2000, MCR 2.403 used the term "mediation" instead of "case evaluation." See *Wilcoxon v Wayne Co Neighborhood Legal Servs*, 252 Mich App 549, 550-551 n 1; 652 NW2d 851 (2002).

Our Supreme Court affirmed, first explaining that under the terms of a court rule, "a claim consists of facts giving rise to a right asserted in a judicial proceeding," and that the judicial proceeding is "an action." *Id*. at 555. Therefore, it continued, the plain language of MCR 2.403(M)(1) did not allow a "bifurcation of the claims," and "the court rule's unambiguous language" dictated "that upon the parties' acceptance of a case evaluation all claims in the action be disposed." *CAM Constr*, 465 Mich at 555. The Court overruled previous decisions of this Court that had "improperly allowed[ed] a party to make a showing that less than all issues were submitted to case evaluation." *Id*. at 556 (quotation marks omitted). The Court concluded: "If all parties accept the panel's evaluation, the case is over." *Id*. at 557.[3]

The first lawsuit brought by plaintiffs' former employee alleged a claim for breach of an employment agreement. That agreement contained the "bonus" provision for future profits. In the complaint, the former employee argued that she was "indefinitely entitled to 10% of the net profits" and that she had suffered damages for "lost past and future income and employee benefits, [and the] loss of 10% of net profits earned for the year." She also sought a declaration that she was entitled to 10% of the past net profits, as well as 10% of net profits earned yearly. In her case evaluation summary submitted to the case evaluation panel, she asserted that she was entitled to future profits, estimating that she was owed more than $700,000 in future damages. "[A] claim consists of facts giving rise to a right asserted in a judicial proceeding . . . ." *Id*. at 555. The right to future profits was clearly a claim in the first lawsuit. Accordingly, when the parties accepted the case evaluation, all of the claims asserted in the complaint were disposed of under MCR 2.403(M)(1). See *id*.[4] This includes any claims for future profits under the same contract.

Defendants rely on *Dane Constr, Inc v Royal's Wine & Deli, Inc*, 192 Mich App 287, 293-294; 480 NW2d 343 (1991), and *English Trust v Equity Logistics*, unpublished per curiam opinion of the Court of Appeals, issued March 27, 2014 (Docket No. 314057), in support of their contention that caselaw provides that "certain claims are not extinguished by a case evaluation award." However, *Dane*, decided prior to *CAM Constr*, held that *equitable* claims were not extinguished by a case evaluation. Equitable remedies are not at issue in this case and, furthermore, since *Dane* was decided, MCR 2.403(A)(3) and MCR 2.403(M)(2) have been amended to provide a mechanism to exempt equitable claims from case evaluation. See *CAM*

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[3] See *Magdich & Assoc, PC v Novi Dev Assoc, LLC*, 305 Mich App 272, 280-281; 851 NW2d 585 (2014) (applying this principle and holding that "to the extent that [the] defendant claims that it definitively established that fewer than all claims were submitted to case evaluation, . . . such a showing is impermissible[;] . . . [i]n short, both parties accepted the case evaluation award without qualification, and therefore, the case is over").

[4] Furthermore, any future claim for profits was barred by res judicata because the first lawsuit (1) was decided on the merits, (2) was final, and (3) involved the same parties, and because (4) any claim for future profits could have (and arguably was) resolved in the first lawsuit. See *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). However, by filing the declaratory action, Trivax arguably waived the doctrine of res judicata as a defense. Issues involving res judicata are not raised in this appeal and we decline to address them.

Constr, 465 Mich at 556 (explaining that MCR 2.403 was previously "less detailed"). *English Trust* is unpublished and not binding on this Court. MCR 7.215(C)(1). Moreover, unlike in *English Trust*, in which the plaintiff shareholders retained an interest in the defendant company and could sue for *future* shareholder oppression violations notwithstanding their acceptance of a case evaluation, in this case the employee did not possess an ownership interest and her damages had all accrued under the same contract that was the subject of the case evaluation.

C. LEGAL MALPRACTICE AND THE ATTORNEY JUDGMENT RULE

Attorneys "have a duty to behave as would an attorney of ordinary learning, judgment, or skill . . . under the same or similar circumstances." *Simko*, 448 Mich at 656 (quotation marks and citation omitted). However, "[w]here an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment." *Id*. at 658. This is sometimes referred to as the "attorney judgment rule." See, e.g., *People v Trakhtenberg*, 493 Mich 38, 44-45; 826 NW2d 136 (2012).

We conclude that Trivax's representation is not shielded by the attorney judgment rule. Trivax had ample time to research the relevant authority and there was plentiful caselaw available that would suggest that filing the second lawsuit was unnecessary. At the time Trivax rendered the erroneous advice to plaintiffs, MCR 2.403(M)(1) had been amended to reflect the finality of a case evaluation judgment for more than 21 years and all caselaw interpreting MCR 2.403(M)(1) indicated that a case evaluation award extinguishes all claims. Accordingly, Trivax's advice to plaintiffs to file the second lawsuit can support a malpractice claim. The trial court erred by granting summary disposition because there remained a question of fact regarding whether Trivax acted as a reasonable attorney would, since prevailing Michigan law does not support his interpretation. Whether Trivax acted reasonably is a question of fact for the jury, not the trial court. See *Charles Reinhart Co*, 444 Mich at 590 n 22; see also *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 392; 808 NW2d 240 (2010).

Defendants rely heavily on the findings of the trial court judge in the second lawsuit, who agreed with Trivax's interpretation concerning the finality of a case submitted to case evaluation. However, their contention, and the view adopted by that judge, is plainly contrary to well-settled law. Defendants do not provide any authority to support their contention that an attorney acts reasonably simply because a judge agrees with an erroneous interpretation of the law. While this may be relevant to the jury's consideration of Trivax's performance, we cannot conclude that it is a basis for granting defendants' summary disposition motion.

V. CONCLUSION

Viewed in a light most favorable to plaintiffs, there remains a genuine issue of material fact regarding whether Trivax was negligent in his legal representation of plaintiffs. In light of this conclusion, we need not address plaintiffs' remaining issues concerning expert testimony and proximate cause and, because the trial court did not address these issues, we conclude that discussion is premature.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly