STATE OF MICHIGAN

COURT OF APPEALS

HUGH M. DAVIS, CONSTITUTIONAL LITIGATION ASSOCIATES, P.C., and WILLIAM P. HACKETT,

Plaintiffs/Counter-Defendants-Appellants,

v

DUJUAN ROSE,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellee,

v

MARLINGA LAW GROUP, P.L.L.C. and CARL J. MARLINGA,

Third-Party Defendants.

UNPUBLISHED
October 20, 2011

No. 298904
Calhoun Circuit Court
LC No. 09-001476-CK

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiffs/counter-defendants Hugh M. Davis, Constitutional Litigation Associates, P.C., and William P. Hackett, appeal as of right the order of dismissal in this action in which plaintiffs sought to recover fees for legal services provided. We reverse and remand.

Plaintiffs represented defendant/counter-plaintiff/third-party plaintiff Dujuan Rose in a criminal matter and related federal civil rights suit. Rose later decided to discharge plaintiffs and to hire third-party defendants Carl J. Marlinga and his law practice, Marlinga Group, P.L.L.C.,[1] to represent him in the criminal and civil matters. At that point, Rose had not paid plaintiffs any attorney fees. When Marlinga filed a civil suit on behalf of Rose, plaintiffs filed a notice of liens in the civil suit in the amount of $15,115.91 for Davis and the Constitutional Litigation

[1] Marlinga and his law practice will be collectively referred to as "Marlinga."

Associates, P.C., and $45,046.5 for Hackett. The notice of liens provided that plaintiffs' representation of Rose and the attorney fees relating to such representation included both the civil case and the criminal charges against Rose. The civil case was ultimately settled for $350,000 and $60,000 of Rose's share was retained in Marlinga's trust account by agreement of the parties and the attorneys to satisfy the liens. Rose subsequently refused to sign a release so that the liens could be paid. Accordingly, plaintiffs filed a complaint in the present case requesting that the trial court enter a judgment in the amount of $60,208.64.

A default was entered against Rose for failure to appear. A default judgment was subsequently entered against Rose in the amount of $60,442.60. The default judgment provided that "[t]his judgment resolves the last pending claim and closes the case." The default judgment also provided that "[j]udgment has been entered and will be final unless within 21 days of judgment date a motion for new trial or an appeal is filed." Within the time allotted in the judgment, Rose moved to set aside the default and default judgment. Rose also moved to implead Marlinga.

On August 5, 2009, the trial court entered an order partially granting and partially denying Rose's motion to set aside the default and default judgment. The court refused to set aside the default, but provided plaintiffs five days to submit complete and accurate billings for services to the trial court for an in camera review. The order further provided that the trial court "shall perform [its] review in due course and will notify the parties whether the judgment stands as entered, the judgment should be modified in such amount as the court deems appropriate, or whether the court will schedule the matter for an evidentiary hearing as to the amount of damages due the Plaintiff[s]."

Following court-ordered mediation, a mediation status report was filed on March 23, 2010, indicating that the case was settled and that documents would be filed with the court "within the next couple of weeks." On April 7, 2010, an order for immediate release of funds was entered ordering Marlinga to send the $60,000 he held in trust to the mediator's law firm to be held in that firm's interest on lawyers trust accounts (IOLTA) account. Also on that date, a stipulation and order to implead Marlinga was entered indicating that Marlinga and his firm would be added as third-party defendants in this case. On April 28, 2010, plaintiffs filed a first amended complaint naming Rose and Marlinga as defendants. Rose thereafter filed a cross-claim against plaintiffs and a counterclaim against Marlinga.

A settlement conference was held on May 13, 2010.[2] On May 17, 2010, the trial court entered a finding and order indicating that it had been advised by counsel for the parties that mediation by settlement had been concluded on May 13, 2010, and "that the funds at issue have been distributed in accordance with that settlement."[3] The trial court also found that it had erroneously signed the April 7, 2010, order impleading Marlinga because the "case ha[d] been

[2] The settlement conference was not conducted on the record.

[3] Plaintiffs received $32,500 and the remainder of the $60,000 held in the IOLTA account was released to Rose.

closed since the entry of the Default Judgment." The court set aside the order to implead Marlinga *nunc pro tunc* and dismissed plaintiffs' first amended complaint.

The trial court denied plaintiffs' motion to reconsider. Plaintiffs then moved for relief supplementary to judgment requesting, in pertinent part, that the court order satisfaction of the default judgment. At the hearing on the motion, the trial court reiterated that it was previously informed that mediation had resulted in a settlement between the parties. Plaintiffs explained that the settlement was not a complete settlement between the parties but, rather, that the settlement resolved only the criminal component of the case. Plaintiffs explained that it was agreed that plaintiffs would attempt to get the share that they were owed for the civil component of the case from Marlinga, who had received a percentage of the money that Rose receiving in the civil rights case as an attorney fee, and that was why Marlinga was interpleaded. The trial court denied the motion for relief supplementary to judgment, stating that Marlinga "was not a party to this case."

Plaintiffs now argue that the trial court erroneously found that the "funds at issue" had been distributed because plaintiffs only received $32,500 of the default judgment of $60,423. They maintain that this amount represented only the settlement of their criminal representation of defendant, and that Marlinga and his law firm were impleaded so that plaintiffs could recover from Marlinga the fees owed for plaintiffs' civil representation of defendant. Plaintiffs argue that the trial court improperly reversed its order allowing them to implead Marlinga after the parties had reached a settlement, and erroneously found that the parties had indicated at the settlement conference that the entire case was settled.

We review a trial court's findings of fact for clear error. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). We review questions of law de novo. *Cardinal Mooney High School v Mich High School Athletic Ass'n*, 437 Mich 75, 76; 467 NW2d 21 (1991).

First, we agree with plaintiffs that the settlement reached between plaintiffs and Rose involved the $60,000 withheld from defendant from his share of the proceeds of the civil suit. The trial court erroneously found that this $60,000 represented the "funds at issue" in the present case. Rather, the funds at issue in the present case are the remainder of the amount due plaintiffs under the default judgment. Plaintiffs only received $32,500 from Rose in settlement of the criminal representation. Pursuant to the default judgment, $27,923 was still due plaintiffs for their civil representation. Accordingly, the trial court erroneously found that the funds at issue in this case had been distributed. *Id*.

In addition, the default judgment, which was entered against defendant for $60,423, provided that "[t]his judgment resolves the last pending claim and closes the case." The default judgment also provided that "[j]udgment has been entered and will be final unless within 21 days of judgment date a motion for new trial or an appeal is filed." Pursuant to MCR 2.603(D)(2)(b), within 21 days of the default judgment, Rose moved to set aside the default and default judgment arguing, *inter alia*, that plaintiffs were not entitled to $60,000 in attorney fees. Because the plain language of the default judgment provided that the judgment would be final "unless within 21 days of judgment date a motion for new trial or an appeal is filed," and defendant moved to set aside the default judgment within 21 days of the default judgment, the default judgment did not become final. See *Mich v Heinitz' Estate*, 352 Mich 313, 317; 89 NW2d 476 (1958), where the

Court indicated that an order should be interpreted according to its plain language. The trial court clearly denied Rose's motion to set aside the default. But the court never complied with its August 5, 2009, order in which it stated that, after an in camera review of plaintiff's billings, the court would "notify the parties whether the judgment stands as entered, the judgment should be modified in such amount as the court deems appropriate, or whether the court will schedule the matter for an evidentiary hearing as to the amount of damages due the Plaintiff," and therefore never ruled on defendant's motion to set aside the default judgment. Thus, the judgment never became final, nor was it ever set aside. It follows that the default judgment did not close the case, and the actions of the parties and the trial court clearly indicate that the case continued to proceed. Plaintiffs impleaded Marlinga and settled a portion of the case with Rose. Marlinga was impleaded, pursuant to MCR 2.205(A), so plaintiffs could pursue the recovery of their attorney fees for partially representing defendant in the civil case from Marlinga, who collected a contingency fee in that case. See *Reynolds v Polen*, 222 Mich App 20, 23-24; 564 NW2d 467 (1997) ("An attorney on a contingent fee arrangement who is wrongfully discharged . . . is entitled to compensation for the reasonable value of his services based upon *quantum merit*," and that attorney's recovery shall be from a successor attorney who recovered under a contingent fee arrangement.). Based on the foregoing, the trial court erroneously indicated in its May 2010 finding and order that the case had been closed since the date of the default judgment. *Sweebe*, 474 Mich at 154. Moreover, we conclude that the trial court erroneously indicated in its May 2010 order that the parties had informed it at the settlement conference that the case was settled. *Id*.[4]

Finally, we address plaintiffs' argument that the trial court erroneously used its *nunc pro tunc* power to set aside the order to implead Marlinga. We review "[t]he power to enter a judgment *nunc pro tunc*" for an abuse of discretion. *Vioglavich v Vioglavich*, 113 Mich App 376, 386; 317 NW2d 633 (1982). In this case, the trial court indicated in its May 2010 finding and order that the case had been closed closed since the date of the default judgment on June 2, 2009. Thus, the trial court indicated that it erroneously entered the April 7, 2010, order allowing plaintiffs to implead Marlinga. The trial court then set aside the April 7, 2010, order to implead Marlinga *nunc pro tunc*. We conclude that the trial court abused its discretion when it set aside the April 7, 2010, order to implead Marlinga *nunc pro tunc*. *Id*. "A nunc pro tunc entry" is "an entry made now of something which was actually previously done, to have effect as of the former date." *Pauley v Hall*, 124 Mich App 255, 264; 335 NW2d 197 (1983). In this case, the setting aside of the order to implead Marlinga was not "an entry made now of something which was actually previously done." *Id*. The trial court never actually previously set aside the order

[4] Plaintiffs also argue that the trial court's May 2010 finding and order was arbitrary and capricious, but plaintiffs do not cite any authority explaining why an arbitrary and capricious standard of review should be applied in this case and we have found none. An appellant may not merely announce his or her position and leave it to us to discover and rationalize the basis for the claims; nor may the appellant give issues cursory treatment with little or no citation to supporting authority. See MCR 7.212(C)(7); *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). "An appellant's failure to properly address the merits of his [or her] assertion of error constitutes abandonment of the issue." *Id*. Thus, this issue is deemed abandoned. *Id*.

to implead Marlinga. Thus, the trial court could not set aside the April 7, 2010, order to implead Marlinga *nunc pro tunc* and abused its discretion when it did so. *Vioglavich*, 113 Mich App at 386.

In sum, the trial court erred by deeming the present case settled, by setting aside its order allowing Marlinga and his law firm to be impleaded in the case, and by dismissing plaintiffs' suit seeking fees from Marlinga and his law firm for plaintiffs' civil representation of defendant.

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

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck