STATE OF MICHIGAN

COURT OF APPEALS

CHANDU MANSHARAMANI and SAVITRI BHAMA M.D., Plaintiffs-Appellants,	UNPUBLISHED November 22, 2011
v GREGORY D. DEMOPOULOS, Defendant-Appellee.	No. 299870 Macomb Circuit Court LC No. 2008-005714-NO

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal by right from a grant of summary disposition in favor of defendant Gregory D. Demopolous. This is a legal malpractice action arising out of Demopolous's representation of plaintiffs, who are siblings, in an underlying divorce action involving plaintiff Chandu's now former wife Sonia.[1] Plaintiffs generally alleged that Demopolous committed malpractice because he failed to obtain an annulment, despite there being no legal basis for one under Michigan law, and for failing to enter a qualified domestic relations order (QDRO) contemporaneously with the judgment of divorce, despite plaintiffs' own conduct making it very dubious whether there still existed an attorney-client relationship with Demopolous or whether Demopolous was permitted to take any actions on plaintiffs' behalf at the time. The trial court, after numerous acts of generosity in response to discovery abuses and dilatory behavior by plaintiffs, granted summary disposition in favor of Demopolous. We affirm.

The facts of the underlying divorce action were previously summarized by this Court when cross-appeals were taken by all parties in that underlying action:

> The parties were married in August 1989, but have lived apart since August 1991. Plaintiff filed this action in 2005. At the time of trial, defendant was 77 years old. He was retired and received a monthly pension of $1,464 and social security benefits of $1,500 a month. Plaintiff was 63 years old and

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[1] To minimize confusion, we will refer to the parties by their given names where necessary to identify them individually.

> employed as a cashier at a 7-Eleven store. Her take-home pay averaged $250 a week, and she received approximately $533 a month in social security benefits. She had an IRA account worth approximately $8,000, but no pension.
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> Soon after the parties married, they purchased and lived in a condominium. Defendant initially provided $17,000 toward the purchase of the condominium, including a $5,000 down payment paid before the marriage, and the property was titled in his name alone. Bhama provided some of the furniture for the condominium. When the parties separated in 1991, defendant moved out of the condominium and plaintiff continued to live there. Defendant continued to pay the mortgage payments and condominium association fees, but plaintiff paid the maintenance and utility expenses. In December 2002, defendant quitclaimed the condominium property to himself and Bhama even though plaintiff continued to reside there.
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> The trial court determined that the condominium was marital property, voided defendant's purported transfer of the property to himself and Bhama, and awarded each party half the value of the condominium. The trial court rejected Bhama's claim that the furniture she furnished early in the marriage was intended as a loan and, instead, determined that it was a gift and awarded it to plaintiff. Defendant was awarded his entire pension, and plaintiff was awarded her $8,000 IRA. [(*Mansharamani v Mansharamani*, unpublished opinion per curiam of the Court of Appeals, Docket No. 277038, decided July 1, 2008).]

The judgment of divorce in that action was entered on January 30, 2007.

Initially, we note that plaintiffs have properly declined to pursue on appeal their theory that Demopolous should have obtained an annulment. Giving plaintiffs the maximum benefit of the doubt and considering the broadest possible implications of statements they made at their depositions and in other communications found in the lower court record, plaintiffs have for the most part only stated circumstances that might constitute bases for a divorce. To the extent any of them *might* constitute a basis for an annulment instead of evidence that the marriage broke down, pursuant to MCL 552.37, "[n]o marriage shall be annulled on the ground of force or fraud, if it shall appear that, at any time before the commencement of the suit, there was a voluntary cohabitation of the parties as husband and wife." Chandu and his wife did voluntarily cohabit as husband and wife for a time. A suit for annulment on the basis of physical incapacity must be brought "within 2 years from the solemnization of the marriage," MCL 552.39, which Chandu's claim was not. Chandu candidly admitted that he had no answer to why he had not attempted to divorce Sonia in 1991. Consequently, Chandu's annulment argument appears devoid of even arguable merit. In any event, the issue is waived. See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Motions for summary disposition under MCR 2.116(C)(10) are reviewed de novo; they test the factual support for a claim and require the evidence and all legitimate inferences to be viewed in the light most favorable to the nonmoving party to determine whether there is a genuine issue of material fact. *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73

(2006). "In order to establish a claim of legal malpractice, a plaintiff must prove (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." *Estate of Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002). A plaintiff in a legal malpractice action must prove not only cause in fact, but must also satisfy the proximate causation element by showing that the underlying action would have been successful but for the attorney's claimed negligence. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586-589; 513 NW2d 773 (1994).

The only malpractice issue on appeal is whether Demopoulos committed legal malpractice by failing to enter a QDRO at the time the judgment of divorce was entered. As to that issue, plaintiffs cannot prove the second or third of these elements, and it is dubious whether they can prove the first or fourth.

The evidence shows that plaintiffs were responsible for delaying the entry of the judgment by refusing to sign it because they did not like the result, irrespective of the fact that they achieved part of their desired outcome and the remainder of their wishes were utterly devoid of legal merit. Furthermore, plaintiffs are clearly inclined to pursue their own ideas about the proper course of action irrespective of either the advice of counsel or the law. Plaintiffs retained new counsel, John R. Hocking III, and explicitly directed Demopolous *not* to agree to any judgment of divorce. Although plaintiffs indicated that Demopoulos and Hocking were to be "co-counsel," Hocking directed Demopoulos to do nothing until he had reviewed the record, personally appeared on behalf of plaintiffs and opposed the judgment, and, in response to Demopoulos attempting to suggest a QDRO to Chandu, explicitly told Demopoulos to have no further contact with "his clients." While there does not appear to have been a *formal* termination of Demopolous's attorney-client relationship with plaintiffs prior to the entry of the judgment, termination can be implied by the clients' actions. See *Mitchell*, 249 Mich App at 683-685. It is dubious whether Demopoulos even still had an attorney-client relationship with plaintiffs after plaintiffs retained Hocking.

Presuming the tenuous relationship still existed, the evidence shows that QDROs are typically not entered simultaneously with judgments of divorce. Plaintiffs object to the trial court's consideration of testimony to that effect given by their proffered expert, Neil Colman. Notably, the trial court properly declined to consider Colman an expert on legal malpractice, largely because Colman himself disavowed any special expertise on the topic and also stated that he was in no position to evaluate any of Demopolous's acts or omissions. If nothing else, any opinion rendered by Colman could not possibly have been based on sufficient facts or data. MRE 702. However, the trial court did not abuse its discretion by considering Colman's *factual* testimony that he had considerable experience—in excess of twenty years—with divorce work and was familiar with the opinion of another practitioner known as the "king of QDROs." Colman explained that in both of their experiences, QDROs are not generally entered at the same time as judgments. Admission of lay witness testimony is reviewed for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454-455; 540 NW2d 696 (1995).

Plaintiffs have not provided any reason why Colman's *factual* testimony as a lay witness was inadmissible or otherwise improper for the trial court's consideration.[2]

Plaintiffs argue that the instant action is atypical because Chandu was already retired at the time the judgment of divorce was entered, and so Demopoulos should have entered the QDRO simultaneously with the judgment even if doing so would be unusual. We take no position as to that argument, because it ignores the fact that Demopoulos acted—or refrained from acting—at the direction of his clients, who clearly insisted on pursuing legally meritless courses of conduct despite Demopolous's urgings and advice. Presuming, without deciding, that the specific facts of this case called for entry of a QDRO along with the judgment of divorce, Demopoulos had been expressly forbidden from agreeing to or entering any such judgment and arguably directed to desist from any engagement with the case. The specific facts of this particular case do not in any way indicate that the standard of care called for Demopoulos to prepare a QDRO at all. If anything, Demopoulos went above and beyond the call of duty to nevertheless prepare and enter one.

The evidence further shows no likelihood that any harm plaintiffs suffered was because the QDRO was not entered along with the judgment. Sonia was unhappy with the award of the entirety of Chandu's pension to Chandu. Sonia's attorney unambiguously stated that he would have objected to the QDRO even if it had been proffered earlier. Even if no appeal or cross-appeal had yet to be filed, it is apparent that Sonia intended to appeal that portion of the judgment. Consequently, the evidence indicates that there is a high likelihood that even if Demopoulos had prepared a QDRO and attempted to file it along with the judgment, it would have been rejected at that time. Plaintiffs have provided no evidence tending to show otherwise, and discovery was closed at the time of the summary disposition motion, so they have not satisfied their burden of proving, or even establishing a genuine question of fact, regarding proximate causation.

Finally, it is not known what harm ultimately befell plaintiffs as a result of the delayed entry of the QDRO. Plaintiffs have established that the Michigan Office of Retirement Services (ORS) withheld half of Chandu's pension from the date of the judgment until the date the QDRO was finally entered and refused to honor the retroactivity provision in the QDRO. However, Chandu was apparently engaged in an administrative proceeding to recover the withheld funds. The outcome of that proceeding has not been revealed on this record. Chandu and Savitri discussed a variety of health issues that they allegedly suffered, but there is nothing in the record indicating the extent to which those can be attributed to the delayed entry of the QDRO. In sum, it appears that Chandu did suffer the loss of half of his pension for a time, but it is unclear whether that loss was permanent, and plaintiffs have not provided any evidence showing that the

[2] Plaintiffs argue only that the trial court's decision not to consider Colman an expert should, for no discernable reason, necessarily constitute a rejection of Colman's testimony altogether. Plaintiffs provide no authority for this extraordinary conclusion, and we cannot find any. It is clear that there would have been no possible basis for considering Colman to be an expert on the topic of legal malpractice, but there is no basis for excluding his factual testimony.

delayed QDRO caused them any harm beyond the pension loss. Consequently, plaintiffs cannot prevail on a legal malpractice claim, and summary disposition was properly entered in Demopolous's favor.

Summary disposition was independently proper for the simple reason that plaintiffs had failed to secure an expert witness. Plaintiffs correctly argue that although expert testimony is usually required to prove legal malpractice, it is unnecessary where ordinary laypersons can recognize a breach of the standard of care. *Beattie v Firnschild*, 152 Mich App 785, 791-793; 394 NW2d 107 (1986); *Law Offices of Lawrence J Stockler*, *PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). However, there is no basis here for the contention that a layperson would know what the applicable standard of care was or whether Demopoulos breached it. As noted, it was dubious whether an attorney-client relationship existed at the time or what Demopolous's obligations were, given plaintiffs' own actions. Plaintiffs have not suggested any reason why laypersons would know what a QDRO is or what it is supposed to accomplish, or why such a thing would be necessary in addition to the judgment of divorce, let alone why its timing would be significant. It is inconceivable that a layperson would have been able to predict that the ORS would eventually decline to honor a retroactive QDRO. This is not a case in which any breach of the standard of care would be obvious to laypersons.

Plaintiffs argue that the trial court should have granted them more time in which to secure an alternative expert witness, particularly in light of Hocking's withdrawal as their attorney. We review a trial court's decision whether to allow counsel to withdraw for an abuse of discretion. *In re Withdrawal of Attorney*, 234 Mich App 421, 431; 594 NW2d 514 (1999). We also review for an abuse of discretion a trial court's decision whether to allow a party to add an expert witness and a decision whether to grant or deny a motion for adjournment. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). In evaluating the trial court's exercise of that discretion, "cases where a denial was proper have always involved some combination of numerous past continuances, failure of the movant to exercise due diligence, and lack of any injustice to the movant." *Id*. We find no error.

An attorney "may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if," among other possible reasons, "the client insists upon pursuing an objective that the lawyer considered repugnant or imprudent" or "the representation . . . has been rendered unreasonably difficult by the client." Michigan Rule of Professional Conduct 1.16(b)(A)(3), (5). Contrary to plaintiffs' contention, the latter possible bases are *in the alternative to* withdrawal being possible "without material adverse effect." See *In re Withdrawal of Attorney*, 234 Mich App at 432. It is manifestly obvious from reading the communications in the record between plaintiffs and their attorneys that plaintiffs are difficult and contentious clients with a strong determination to pursue courses of action contrary to both legal advice and the law. Attorney Hocking explained at the hearing on his motion to withdraw that plaintiffs were causing him "an unusual amount of stress," and he provided an example of plaintiffs refusing to cooperate. The trial court did not abuse its discretion in permitting Hocking to withdraw.

Plaintiffs contend that Hocking withdrew because he was unprepared; they contend that Hocking's real reason for withdrawing is that he had not undertaken the steps necessary to secure Colman as an expert. Colman did concede that he had no idea that he had been listed or

expected to be an expert witness, and he had never even discussed fees for serving as an expert witness. Plaintiffs conclude that this proves Hocking was lying when he stated at his motion to withdraw that plaintiffs had been advised of the need for a retainer for an expert witness for a year and had refused to pay it. As defendant points out, plaintiffs' argument is tenuous at best and proves nothing: there is nothing nonsensical about Hocking refraining from making a formal request to Colman to serve as an expert witness until plaintiffs had agreed to commit to expert witness fees. Plaintiffs argue that Colman could have been certified as an expert witness notwithstanding his own disavowal of expertise, but notwithstanding the authority plaintiffs cite showing the theoretical possibility of doing so, Colman explicitly disavowed being in a position to render an opinion in this matter, irrespective of whether he had expertise in the abstract.

Plaintiffs contend that the trial court should have afforded them more time in which to secure an alternative expert witness. However, the record makes it very clear that plaintiffs were responsible for numerous discovery violations and delays, and they appeared to have been themselves responsible for Colman not having been retained as an expert. The trial court stated that plaintiffs "ha[d] been previously warned about their discovery abuses and will not now be permitted to further unnecessarily delay resolution of this matter." In its order denying reconsideration, the trial court also accurately explained that plaintiffs' "continued misconceptions about the law do not establish defendant committed malpractice." Under the circumstances, we conclude that the trial court did not abuse its discretion.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause