STATE OF MICHIGAN

COURT OF APPEALS

BRENDA WRIGHT and DANIEL L. WRIGHT,

Plaintiffs-Appellants/Cross-Appellees,

v

JOSEPH BATTANI, DAVID J. LENAVITT, and JAY E. FELDSTEIN,

Defendants,

and

JACK M. LENAVITT,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 18, 2013

No. 303491
Lenawee Circuit Court
LC No. 09-003504-NM

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs, Brenda Wright and Daniel L. Wright, appeal as of right from the default judgment entered against defendant, Joseph Battani, as the final order in this action for legal malpractice. Plaintiffs challenge the trial court's earlier order granting summary disposition in favor of defendant, Jack M. Lenavitt, and dismissing him from the case. On cross-appeal, Lenavitt challenges an earlier ruling of the trial court denying his motion for summary disposition on the basis of lack of personal jurisdiction. We affirm in part, reverse in part, and remand for further proceedings.

I. STATUTE OF LIMITATIONS

Plaintiffs argue that the trial court erred by concluding that the statute of limitations, MCL 600.5805(6), barred their claim for legal malpractice against Lenavitt. We agree.

Lenavitt moved the trial court for summary disposition under both MCR 2.116(C)(7) (statute of limitations) and (C)(10) (no genuine issue of material fact), arguing that the statute of limitations barred plaintiffs' legal-malpractice claim. We review de novo a trial court's order

granting or denying motions for summary disposition under either MCR 2.116(C)(7) or (C)(10). *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 146; 624 NW2d 197 (2000).

"In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." *Farm Bureau Mut v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003). "Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo." *Id.*

Similarly, when reviewing a motion brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Cadle Co v City of Kentwood*, 285 Mich App 240, 247; 776 NW2d 145 (2009). A motion for summary disposition under MCR 2.116(C)(10) may be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 235; 780 NW2d 586 (2009). "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 v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The parties agree that the statutory limitations period for a claim of legal malpractice is two years, MCL 600.5805(6). MCL 600.5838 provides as follows:

> (1) Except as otherwise provided in section 5838a, a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
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> (2) Except as otherwise provided in section 5838a, an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, *or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later*. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred. [Emphasis added.]

Thus, "[p]ursuant to MCL 600.5805(6) and MCL 600.5838(2), a plaintiff must file a legal-malpractice action within two years of the attorney's last day of service to the plaintiff or within six months of when the plaintiff discovered or should have discovered the claim, whichever is later." *Wright v Rinaldo*, 279 Mich App 526, 534; 761 NW2d 114 (2008).

"[T]he standard under the discovery rule is not that the plaintiff knows of a 'likely' cause of action. Instead, a plaintiff need only discover that he has a 'possible' cause of action." *Gebhardt v O'Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994). A possible action for legal malpractice exists when a plaintiff is able to allege the following: "(1) the existence of an attorney-client relationship, (2) the acts constituting the negligence, (3) that the negligence was the proximate cause of the injury, and (4) the fact and extent of the injury alleged." *Id*. "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 223; 561 NW2d 843 (1997). An objective standard is used in determining when a plaintiff should have discovered a claim. *Id*.

Significantly, MCL 600.5856(a) provides that "[t]he statutes of limitations . . . are tolled . . . [a]t the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules." This Court has previously held that under MCL 600.5856(a), the filing of a federal action tolls the statute of limitations in this jurisdiction until the federal action is no longer pending. See, e.g., *Badon v Gen Motors Corp*, 188 Mich App 430, 436; 470 NW2d 436 (1991); *Lee v Grand Rapids Bd of Ed*, 148 Mich App 364, 370; 384 NW2d 165 (1986); *Ralph Shrader, Inc v Ecclestone Chem Co*, 22 Mich App 213, 214-215; 177 NW2d 241 (1970). We discussed this tolling concept in *Hoekstra v Bose*, 253 Mich App 460, 464-467; 655 NW2d 298 (2002), in the context of an action filed in another state as opposed to federal court:

> [T]he reference to jurisdiction in MCL § 600.5856(b) does require personal jurisdiction; however, that does not mean that the Legislature intended tolling to begin only when the court has personal jurisdiction over the defendant. The plain language of the statute indicates otherwise.
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> This construction of the statute comports with the policies outlined in *Ralph Shrader, Inc v Ecclestone Chemical Co, Inc*, 22 Mich App 213, 214-215; 177 NW2d 241 (1970). In that case, the plaintiff first filed suit in federal court, but the case was dismissed because diversity was lacking. When a new action was filed in the state court, the trial court dismissed it because the period of limitation had expired. *Id.* at 215. This Court reversed, holding that the matter was tolled while the case was pending in the federal court. *Id*. at 215-216. This Court expressly rejected the defendant's argument that the first suit must have been one in which the court had jurisdiction of the parties and of the subject matter. Instead, the Court espoused the reasoning of Judge Cardozo in *Gaines v City of New York*, 215 NY 533, 539-540; 109 NE 594 (1915):
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> > "The important consideration is that by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts. When that has been done, a mistaken belief that the court has jurisdiction, stands on the same plane as any other mistake of law. Questions of jurisdiction are often obscure and intricate. . . . There is nothing in the reason of the rule that calls for a distinction between the consequences of error in respect of the jurisdiction of the court and the

> consequences of any other error in respect of a suitor's rights." [*Ralph Shrader, Inc, supra* at 216-217.]

This view was reiterated in *Cronin v Minster Press*, 56 Mich App 471, 480-481; 224 NW2d 336 (1974), where this Court clarified that the rationale for the statute of limitations is to protect defendants from having to search for evidence long after a cause of action accrued. Because notification is the ultimate objective of the statute of limitations, the Court felt that the good-faith initiation of an action by the plaintiff should toll the period of limitation.

Further support is provided by *Federal Kemper Ins Co v Isaacson*, 145 Mich App 179, 183; 377 NW2d 379 (1985), where this Court held: "The tolling statute applies to prior lawsuits between the parties which have not been adjudicated on the merits. A dismissal without prejudice is not considered to be an adjudication on the merits, and therefore the tolling statute applies." (Citations omitted.) In *Federal Kemper*, this Court did not extend the tolling provision to a defendant unnamed in the first suit; the plaintiff was permitted only to take advantage of tolling regarding the defendant who had been a party in the prior, dismissed suit. *Id*. at 182-183.

* * *

On this matter, we are in accord with the further reasoning of Judge Cardozo in *Gaines, supra* at 540-541. In that case, as in the present case,

> [t]he defendant argues that an action dismissed for want of jurisdiction is a nullity in the same sense as if it had never been begun at all. But that is an extreme view. . . . A suitor who invokes in good faith the aid of a court of justice and who initiates a proceeding by the service of process, must be held to have commenced an action within the meaning of this statute, though he has mistaken his forum. . . . It may be that a different rule should be applied where the earlier action has been brought with knowledge of the lack of jurisdiction, and in fraud of the statute. Whether that is so we need not inquire at this time. Grotesque or fanciful situations, such as those supposed, will have to be dealt with when they arise. That they are conceivable, though improbable, ought not to govern our construction. [Citation omitted.]

Viewing all of the documentary evidence of record objectively in a light most favorable to plaintiffs, we conclude that plaintiffs' legal-malpractice claim was timely filed under the six-month discovery rule, MCL 600.5838(2). Lenavitt does not contest that negligence occurred in the handling of plaintiffs' medical-malpractice case or that the damages incurred were attributable to that negligence. Instead, Lenavitt disputes the existence of an attorney-client relationship. However, plaintiffs would be able to allege the existence of an attorney-client relationship on the basis of the record evidence. See *Gebhardt*, 444 Mich at 544. Although a

written retainer agreement was never proffered between Lenavitt and plaintiffs, plaintiffs testified that Lenavitt was the person whom they first met with and "signed the contract with." According to Brenda, from the time plaintiffs "signed on and right through to the end he represented himself as [their] attorney." Internal documents from Lenavitt's office state that Lenavitt was both the "case manager" and the "attorney in charge" for Brenda's case. Furthermore, written correspondence from Lenavitt to plaintiffs, to an attorney in Michigan (Margaret Noe) for "assistance with local representation," and to Dr. Bernardo Martinez regarding plaintiffs' medical-malpractice claim as well as the inclusion of Lenavitt's name on some of the initial pleadings demonstrate that he engaged in actions indicating his provision of legal services in the medical-malpractice action.

Plaintiffs acknowledge that on February 25, 2009, Lenavitt told them that Battani was "at fault" for the dismissal of their medical-malpractice case. Thus, plaintiffs had sufficient information on February 25, 2009, to discover the existence of a '"possible' cause of action" for legal malpractice. *Gebhardt*, 444 Mich at 544. This awareness was buttressed by plaintiffs' admission that they contacted other counsel to seek assistance after receiving this information. Using February 25, 2009, as the discovery accrual date, plaintiffs timely filed their legal-malpractice claim in the Lenawee Circuit Court on September 4, 2009. Plaintiffs first filed an action for legal malpractice on July 21, 2009, in the federal district court[1] against the same named defendants alleging subject-matter jurisdiction premised on diversity of citizenship. While this matter was pending in the federal district court, plaintiffs filed their complaint for legal malpractice in the Lenawee Circuit Court on September 4, 2009. Notwithstanding the federal district court's dismissal without prejudice of the federal action on September 21, 2009, for lack of subject-matter jurisdiction, plaintiffs' filing of the action in the federal court tolled the accrual of the limitations period, making the circuit-court filing timely. See *Badon*, 188 Mich App at 436; *Hoekstra*, 253 Mich App at 464-467.

Lenavitt contends that plaintiffs failed to act diligently to discover their potential claim and should have discovered the existence of a possible claim much sooner when they had difficulty communicating with Battani and had received no information on the status of the medical-malpractice case. We do not agree. It is true that "[a] plaintiff must act diligently to discover a possible cause of action and cannot simply sit back and wait for others to inform her of its existence." *Turner v Mercy Hosps & Health Servs of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995) (citations omitted). In *Snyder v Advantage Health Physicians*, 281 Mich App 493, 502; 760 NW2d 834 (2008), this Court cited with approval the definition of "reasonable diligence," as contained within Black's Law Dictionary (8th ed), as being "[a] fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue." We conclude that plaintiffs' discovery was reasonably diligent despite the extended lapse of time. Plaintiffs had retained counsel and depended on counsel to guide them in pursuing the medical-malpractice claim. There is no indication that plaintiffs are attorneys or particularly knowledgeable regarding legal proceedings or the time frame for their conclusion. Although

[1] Civil Action No. 09-CV-12866, United States District Court, Eastern District of Michigan, Southern Division, Hon. Bernard A. Friedman, presiding.

plaintiffs had difficulty contacting Battani, he reassured them that matters were under control and that a concurrent bankruptcy action had delayed the medical-malpractice proceedings and would require a number of years to resolve. Although suspicious of the extensive delay in the underlying matter, plaintiffs at this point had no reason to suspect the existence of a possible cause of action for legal malpractice. Significantly, Brenda's documentation of her contacts or attempts to contact Lenavitt's law office illustrate that she diligently sought to inquire about the status of her case. Given the factual circumstances of this case, plaintiffs' lack of action for a prolonged time period cannot be equated with a lack of reasonable diligence.

Lenavitt also contends that plaintiffs' federal court filing was done in bad faith because plaintiffs did not acknowledge the pending federal case in their circuit-court pleading. We disagree. MCR 2.113(C)(2) requires a statement in a complaint to acknowledge the existence of a "pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint." Lenavitt argues that it can be "reasonably postulated" that plaintiffs failed to comply with MCR 2.113(C)(2) "because the Circuit Court would have refused their filing and frustrated their attempt to overcome the statute of limitations." However, this does not illustrate that the *prior federal filing* was done in bad faith. Moreover, the United States District Court's dismissal of the federal action for failure to invoke the court's diversity jurisdiction does not by itself illustrate bad faith. Lenavitt has not demonstrated that plaintiffs filed the action in federal court "with knowledge of the lack of jurisdiction." *Hoekstra*, 253 Mich App at 466, quoting *Gaines*, 215 NY at 540-541.

Accordingly, the trial court erred by granting Lenavitt's motion for summary disposition on the basis that the statute of limitations barred plaintiffs' legal-malpractice claim.

II. PERSONAL JURISDICTION

On cross-appeal, Lenavitt argues that the trial court erred by denying his motion for summary disposition premised on lack of personal jurisdiction. We disagree.

"This Court reviews de novo a trial judge's decision on a motion for summary disposition. The legal question of whether a court possesses personal jurisdiction over a party is also reviewed de novo." *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012) (internal citation omitted). "The plaintiff bears the burden of establishing jurisdiction over the defendant, but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition." *Jeffrey v Rapid American Corp*, 448 Mich 178, 184; 529 NW2d 644 (1995) (internal citation omitted). "The affidavits, together with any other documentary evidence submitted by the parties, must be considered by the court. MCR 2.116(G)(5). All factual disputes for the purpose of deciding the motion are resolved in the plaintiff's (nonmovant's) favor." *Id.*

A two-step process is typically utilized when attempting to determine whether the exercise of limited personal jurisdiction over a defendant is proper. *Id.* In step one, it must be determined that the exercise of limited personal jurisdiction comports with the requirements of due process. *Id.* at 185. The second step in the analysis requires that a defendant meet the terms of MCL 600.705. *Id.* MCL 600.705 provides, in relevant part:

> The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:
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> (1) The transaction of any business within the state.
>
> (2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort.
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> * * *
>
> (5) Entering into a contract for services to be rendered or for materials to be furnished in the state by the defendant.

The Due Process Clause of the Fourteenth Amendment serves to restrict the jurisdiction of state courts from entering judgments affecting the rights or interests of nonresident defendants. *Kulko v California Superior Court*, 436 US 84, 91; 98 S Ct 1690; 56 L Ed 2d 132 (1978). Consequently, valid judgments affecting a nonresident's rights or interests may only be entered by a court that has properly acquired personal jurisdiction over the defendant. *Int'l Shoe v Washington*, 326 US 310, 319; 66 S Ct 154; 90 L Ed 95 (1945). A court may acquire personal jurisdiction over a nonresident defendant when the nonresident defendant has sufficient "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316. A three-part test is used to determine whether sufficient minimum contacts exist between a defendant and this state to permit the exercise of limited personal jurisdiction:

> First, the defendant must have purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. [*Mozdy v Lopez*, 197 Mich App 356, 359; 494 NW2d 866 (1992).]

The predominant focus of personal jurisdiction is on "reasonableness" and "fairness"; each case must turn on its own merits. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 433-434; 633 NW2d 408 (2001).

"Once the threshold requirement of minimum contacts is satisfied, a court must still consider whether the exercise of personal jurisdiction comports with fair play and substantial justice." *Jeffrey*, 448 Mich at 188-189.

> Factors that may be weighed in appropriate cases include the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and

> the shared interest of the several states in furthering fundamental substantive social policies. These factors may sometime serve to establish the reasonableness of jurisdiction on a lesser showing of minimum contacts. To defeat jurisdiction, a defendant who has purposefully directed its activities at forum residents must present a compelling case that the presence of some other considerations render jurisdiction unreasonable. [*Id*. at 189 (internal citations omitted).]

We conclude that the trial court did not err by denying Lenavitt's motion for summary disposition premised on lack of personal jurisdiction. Plaintiffs made a prima facie showing of jurisdiction to defeat Lenavitt's motion. See *id.* at 184. On its face, the record evidence shows that Lenavitt engaged in the provision of legal services to plaintiffs in furtherance of their medical-malpractice lawsuit in Michigan to fall within the scope of MCL 600.705. As previously discussed, Lenavitt met with plaintiffs and was the person plaintiffs "signed the contract with." Brenda testified that Lenavitt represented himself as plaintiffs' attorney from the time they "signed on and right through to the end." Internal documents from Lenavitt's office state that Lenavitt was the "case manager" and the "attorney in charge" of Brenda's case. Lenavitt communicated to plaintiffs through written correspondence. He moved the circuit court for admission pro hac vice and contacted outside counsel in Michigan to arrange "assistance with local representation" in plaintiffs' case. Lenavitt also interacted with Dr. Martinez in furtherance of plaintiffs' medical-malpractice claim. In one letter to Dr. Martinez, Lenavitt stated, "I am in the process of sending out a Notice of Intent to File a Claim on behalf of Brenda in accordance with Michigan law." Finally, after Lenavitt notified plaintiffs of the dismissal of their case, he advised them that they could either attempt to "revive" the case because of the bankruptcy or "sue him" for legal malpractice.

The trial court correctly determined that Lenavitt had sufficient "minimum contacts" with Michigan for the exercise of limited personal jurisdiction. See *Int'l Shoe*, 326 US at 316. By providing plaintiffs with the legal services and counseling discussed above, Lenavitt "purposefully availed [himself] of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of the state's laws." See *Mozdy*, 197 Mich App at 359. More specifically, Lenavitt's actions illustrate that he deliberately undertook to further plaintiffs' medical-malpractice claim in Michigan. See *Oberlies*, 246 Mich App at 434 (explaining that "purposeful availment" is akin to a deliberate undertaking to do or cause an act or thing to be done in Michigan). Lenavitt's lack of a physical presence in Michigan is not determinative where his efforts were purposely directed toward plaintiffs, residents of Michigan. See *Vargas v Hong Jin Crown Corp*, 247 Mich App 278, 286; 636 NW2d 291 (2001). Lenavitt's actions were "substantially connected with Michigan to make the exercise of jurisdiction" over him reasonable. *Mozdy*, 197 Mich App at 359. Indeed, Lenavitt's advice to plaintiffs regarding the prospect of their initiation of a legal malpractice suit against him illustrates that Lenavitt reasonably anticipated being "haled before a Michigan court." *WH Froh, Inc v Domanski*, 252 Mich App 220, 231; 651 NW2d 470 (2002). Finally, the exercise of personal jurisdiction over Lenavitt does not violate notions of "fair play and substantial justice." *Jeffrey*, 448 Mich at 188-189. The circuit court had an interest in adjudicating the dispute as the legal-malpractice action stemmed from the underlying medical-malpractice claim in Michigan. The burden on Lenavitt to appear in the subject forum was not significant given the respective localities.

Accordingly, the trial court did not err by denying Lenavitt's motion for summary disposition premised on lack of personal jurisdiction.

III. DAMAGES AGAINST LENAVITT IN LIGHT OF THE DEFAULT JUDGMENT AGAINST BATTANI

Lenavitt's final argument on cross-appeal is that plaintiffs are precluded from pursuing additional damages against him because of the default judgment entered against Battani. Lenavitt argues that plaintiffs have waived any claim for damages against Lenavitt because they failed to request an apportionment of liability against all alleged tortfeasors, including Lenavitt, in their motion for a default judgment. Lenavitt contends that the trial court both awarded plaintiffs 100 percent of their alleged damages in the default judgment and determined that Battani was 100 percent at fault for plaintiffs' damages.

Lenavitt raises this issue for the first time on appeal. "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Furthermore, Lenavitt has not provided this Court with a copy of the transcript of the motion hearing concerning plaintiffs' motion for a default judgment; thus, this issue is abandoned. See *Taylor v Blue Cross/Blue Shield of Mich*, 205 Mich App 644, 654; 517 NW2d 864 (1994) (concluding that an appellant abandons an issue on appeal by failing to provide this Court with a transcript of a hearing germane to the issue); see also *Waterford Sand & Gravel Co v Oakland Disposal, Inc*, 194 Mich App 571, 572; 487 NW2d 511 (1992) ("In view of the parties' . . . failure or refusal to provide this Court with a full transcript of the proceedings below, we consider the issues raised by both parties abandoned on appeal."); *Watkins v Manchester*, 220 Mich App 337, 341; 559 NW2d 81 (1996) ("[W]e note that plaintiff has not included a transcript of the hearing on defendant's motion to tax costs; therefore, this issue would ordinarily be considered abandoned on appeal."). Notwithstanding Lenavitt's abandonment of this issue, his argument lacks merit.

First, Lenavitt's contention that the trial court determined that Battani was 100 percent at fault for plaintiffs' damages is not supported by the record before this Court. At no point did the trial court make this determination. To the extent that Lenavitt argues that plaintiffs have created an "irrebutable inference" of such a finding "flowing from the hearing on damages," Lenavitt provides this Court with no legal authority demonstrating that such an "irrebutable inference" is appropriate in this case; an appellant may not leave it to this Court to discover the legal basis for his or her claims. *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 530; 730 NW2d 481 (2007). Moreover, Lenavitt's failure to provide this Court with a transcript of "the hearing on damages" prevents any consideration of what inferences flow from the hearing.

Second, Lenavitt's contention that the trial court awarded plaintiffs 100 percent of their alleged damages in the default judgment against Battani also is not supported by the record. The default judgment simply states that judgment is entered "in favor of Plaintiff [sic] against Defendant Battani in the sum of $35,000, including interest costs [sic] and sanctions under MCR 2.403." In plaintiffs' motion for a default judgment, the $35,000 requested by plaintiffs represented a $22,500 case-evaluation award and $12,500 in expenses, and plaintiffs emphasized that "[t]he case evaluation amount that was awarded does not reflect the true value of the underlying medical malpractice case."

Third, our decision in *Rodriguez v ASE Indus, Inc*, 275 Mich App 8; 738 NW2d 238 (2007), the only legal authority that Lenavitt provides this Court for the proposition that plaintiffs waived any claim for damages against him by failing to request an apportionment of liability, is materially distinguishable from the present case. In *Rodriguez*, a products-liability action, the trial court granted summary disposition in favor of the defendant, Design Systems, Inc. (DSI), and a jury later determined that the defendants, American Axle & Manufacturing, Inc. and ASE Industries, Inc., were at fault for the plaintiff's injuries. *Id.* at 10. On appeal, this Court concluded that the plaintiff waived the issue of whether the trial court erroneously granted summary disposition in favor of DSI because the plaintiff successfully opposed the inclusion of DSI as a nonparty at fault in the allocation of fault calculations by the jury. *Id.* at 20. We emphasized that the plaintiff could not "create an appellate parachute for herself by omitting DSI from the allocation of fault because it had been dismissed, thus potentially increasing the amount of fault allocated to the remaining defendant, and thereafter argue on appeal that summary disposition in favor of DSI was improper." *Id.* at 21-22. Unlike *Rodriguez*, neither the trial court nor a jury in the present case allocated fault as required by MCL 600.2957 and MCL 600.6304. And plaintiffs neither opposed an inclusion of Lenavitt in an allocation of fault nor failed to object to an exclusion of Lenavitt from an allocation of fault. See *id.* Therefore, *Rodriguez* does not stand for the proposition that plaintiffs waived a claim for damages against Lenavitt.

Ultimately, it was the trial court's duty to allocate fault. See MCL 600.2957(1) ("In an action based on tort or another legal theory seeking damages for personal injury, . . . the liability of each person shall be allocated under this section by the trier of fact . . . ."); MCL 600.6304(1) (stating that the court "shall make findings" regarding the percentage of the total fault of all persons that contributed to the injury); see also *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 323-324; 661 NW2d 248 (2003) (explaining that the trier of fact in a tort-based action "must allocate liability among those at fault"). Because the trial court did not consider MCL 600.6304 when it entered the default judgment against Battani, that judgment did not preclude plaintiffs from proceeding on their claims against Lenavitt. This conclusion is reinforced by *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44; 693 NW2d 149 (2005). In *Gerling*, the Michigan Supreme Court opined,

> The 1995 tort reform legislation does not negate the existence of common liability among . . . multiple tortfeasors. On the contrary, [MCL 600.]6304(1) provides that the allocation provisions of that section apply to tort actions "for personal injury, property damage, or wrongful death involving fault of more than 1 person," just as the contribution provisions of [MCL 600.]2925a(1) apply "when 2 or more persons become . . . severally liable in tort for the same injury to a person or property or for the same wrongful death . . . ." [MCL 600.]6304 applies specifically in those cases in which there is common liability among multiple tortfeasors, and it is inaccurate to interpret it as meaning that there is no longer any common liability among responsible tortfeasors. Rather, the common liability remains; what differ merely are the terms and conditions by which that liability must be satisfied. That is, by virtue of [MCL 600.]6304, in cases in which there has been a judgment, a tortfeasor need only pay a percentage of the common liability that is proportionate to his fault. Previously, where there had been a judgment, a tortfeasor could have been required to pay the entire amount

> of common liability and then seek contribution from other tortfeasors according to their degrees of fault. [*Id*. at 56-57.]

Plaintiffs' acquirement of a default judgment against Battani does not affect the application of MCL 600.6304. That statute requires that when there is common liability among multiple tortfeasors, each party is responsible only for his pro rata share of liability. It would be error to rely on MCL 600.2956 and MCL 600.2957 to conclude that plaintiffs, having obtained a default judgment against Battani, could not proceed with their action against Lenavitt where the court never determined, in accordance with MCL 600.6304, the percentage of fault of each party responsible for plaintiffs' damages.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Kelly