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STATE OF MICHIGAN

IN THE SUPREME COURT

BRYAN PUNTURO AND FAWN PUNTURO,
husband and wife, and B&A HOLDINGS, LLC
d/b/a ParkShore Resort,
a Michigan limited liability company,

Plaintiffs/Appellees/Cross-Appellants,

MSC Docket No. 158749
MSC Docket No. 158755
MSC Docket No. 158556

COA File No. 338727
Consolidated into:
COA File No. 338728
COA File No. 338732

BRACE KERN,
an individual, and
SAUBURI BOYER AND DANIELLE KORT,
f/k/a Danielle Boyer, individuals,

Defendants/Appellants/Cross-Appellees.

Lower Court File No: 17-32008-CZ
Hon. Thomas G. Power

_____/

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_____/

APPELLEES' APPENDIX

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Dated: February 20, 2020

MOOTHART & SARAFA, PLC

By: /s/ Jonathan R. Moothart

Jonathan R. Moothart (P40678)
Attorney for Plaintiffs/Appellees
9815 Miami Beach Rd.
P.O. Box 243
Williamsburg, MI 49690
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A log of Boyer text messages produced by Attorney General in extortion case

EXHIBIT A

phone, email, text

05/04/14	2:28 PM	Texted Dave Odell "Hey Dave can you give me a quick call this afternoon. Nothing urgent at all, I just have a friendly request."
05/04/14	3:10 PM	Casey texts "Spoke with Wiley. Ill let you guys talk but He's calling dad and telling him he's out and going to work for you." I respond "Just spoke with Wiley and he called your dad to break the news."
05/04/14	4:18 PM	Called O'dell
05/04/14	4:21 PM	I text Dave, "I'll get to the point. I've caught wind that you're thinking about putting a boat up North in Traverse City. I don't know if you're seriously considering it or not, but I strongly r recommend you give that up quick. We just agreed a couple months ago to mutually leave each other alone. I don't mess with you in Florida and you don't mess with me in Michigan. There's no way I'm gonna let you get away with putting a boat next in my hometown without coming after you in every way I know how that is legal. I own 4 parasail boats still and 3 of them need a home! I can't even tell you how badly everyone down south wants me to come back down there. I want you to leave me alone and you gave me your word that with or without a piece of paper, you would honor that agreement. Please give me a call"
05/04/14	4:23 PM	Spoke to Bryan over phone about renting space from ParkShore
05/04/14	4:42 PM	Spoke with Odell about honoring our verbal agreement to Not compete in exchange for Siesta Key Parasailing name, etc.
05/04/14	5:19PM	Wiley texts "Not any big deal. Doesn't require a call back. Was just hoping you could keep my name out of any conversations between that guy in Florida and BP. You and I are good. Just trying to avoid any more scrutiny from outside sources.
05/04/14	5:54 PM	Called Wylie back at do discuss what happened with O'dell
05/04/14	6:49 PM	"Good talk with your dad. Spoke for about 20 minutes. Im shocked but he didn't have anything negative to say at all. He may just have been fuming so bad that he didn't show his emotion but I felt he listened very well and was open to the idea. I'm planning to speak to him in a couple days. Also the guy in Florida is not gonna come up here. He is signing an agreement tonight that he will not compete with me if I don't compete with him. basically, I told him that I'm gonna send a 12-pack or two down his way this summer and I'll bring all four boats down next winter if he competes with me in TC with your dad. I've been offered the location down there to do that and I don't want to but I think he was crapping his pants cause I owned him when I was there last. Anyway, I think he was the only likely guy to help your dad and he

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MUTUAL COVENANT NOT TO COMPETE AGREEMENT

made this 5th day of May, 2014, by and between Traverse Bay Parasail, LLC, having a present business address of 1773 US 31 IN Traverse City, MI, 49686 and its principal member Saburi Boyer (Hereinafter "TBP") and Adventure Guides Parasail, LLC, having a present business address of 1265 Old Stickney Point Rd, Siesta Key, Florida, 34242 and its principal member David O'Dell (hereinafter "AGP") collectively referred to herein as the "Parties."

WHEREAS, AGP and TBP are certain parasail and watersports businesses and the principals are former competitors in Siesta Key, Florida. AGP has acquired right title and interest in the name Siesta Key Parasailing, formerly owned by Saburi Boyer, and in additional consideration for the mutual release signed by the parties in April 2014, and the signing over of the domain name SiestaKeyParasailing.com, AGP and its principal David O'Dell, and in return TBP and its principal Saburi Boyer also agreed to sign this mutal Non Compete agreement.

NOW, THEREFORE, in consideration of the mutual promises contained herein and for consideration herein expressed, the parties agree as follows:

Restricted Activity. For a period of Seven (7) years from execution of this Agreement, AGP and TBP will not directly or indirectly own, lease, manage, operate, or invest in a Parasail or Watersports Company as provided by eachother or otherwise compete with eachother, within a radius of the 20 miles of their business addresses listed in this Agreement, which has been established as their markets.

AGP and TBP further covenant that during said period and within said area AGP or TBP will not directly or indirectly be employed by, advise, consult with any other person, firm or professional corporation engaged in the business of watersports within said restricted area.

Modification. In the event that any Court of competent jurisdiction finds any provision hereof to be unreasonable or unenforceable by virtue of its scope, geographic area, or duration, the parties agree that said Court shall modify and enforce said provisions to the fullest extent consistent with Michigan Law.

Enforcement. AGP and TBP acknowledge that the restrictions contained herein subject to the limitations contained herein are reasonable as to time and scope, necessary to protect the interest of the offended party, and not unduly burdensome to

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the offending party. The Parties may enforce their rights pursuant to this Agreement at law and/or in equity and shall be entitled to injunctive relief to prevent any breach or continuing breaches of this Agreement.

Merger and Benefit. This Agreement may only be amended in writing, signed by the parties hereto. This Agreement shall inure to the benefit of and be binding on the parties' respective successors, heirs and assigns and affilate entities.

Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Michigan.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date and year first above written.

Adventure Guides Parasailing, LLC

By: David O'Dell

Capacity Signing:Personally and as Managing Member

Signature:_____
Date:_____

Traverse Bay Parasail, LLC

By: Saburi Boyer

Capacity Signing: Personally and as Managing Member

Signature:_____
Date:_____

A log of Boyer text messages produced by Attorney General in extortion case

herein subject to the limitations contained herein are reasonable as to time and scope, necessary to protect the interest of the offended party, and not unduly burdensome to
the offending party. The Parties may enforce their rights pursuant to this Agreement at law and/or in equity and shall be entitled to injunctive relief to prevent any breach or continuing breaches of this Agreement.

Merger and Benefit. This Agreement may only be amended in writing, signed by the parties hereto. This Agreement shall inure to the benefit of and be binding on the parties' respective successors, heirs and assigns and affilate entities.

Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Michigan.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date and year first above written.

Adventure Guides Parasailing, LLC

By: David O'Dell

Capacity Signing:Personally and as Managing Member

Signature: David O'Dell
Date: 5-20-14

Traverse Bay Parasail, LLC

By: Saburi Boyer

Capacity Signing: Personally and as Managing Member

Signature:
Date:

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●●○○○ AT&T LTE 9:18 PM

EXHIBIT B

< Messages (1) (231) 883-9110 Details

iMessage
May 6, 2014, 2:32 PM

Eric,

It's Saturi. I would greatly appreciate if you could give me a few minutes of your time here in the next couple hours. I think it would beneficial for both of us to talk today. Thanks

May 28, 2014, 8:41 PM.

Thanks for letting us use your wheels. Hopefully Sully got them back to you without making you wait too long. Either way

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●●○○○ AT&T LTE 9:18 PM

< Messages (1) (231) 883-9110 Details

Yup

Jun 27, 2014, 8:18 AM

Hey Eric, I got your email last night requesting information on a used parasail boat. Please give me a call when you are available to talk.

???, I am sorry I did not know that you are this company.
I will call you in a bit, I have ears around right now.

Okaybaby

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●●○○○ AT&T LTE 9:18 PM

Messages (1) (231) 883-9110 Details

When do you think we can talk

Jun 27, 2014, 2:53 PM

?

I'll still call you, busy day today

Ok

Ill be in a meeting till 5ish and will be available after that

Jun 27, 2014, 4:09 PM

Got off early are you available?

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●●○○○ AT&T LTE 9:19 PM

Messages (1) (231) 883-9110 Details

Got off early are you available?

I'm close to your office and thought I might swing over if you are

Jun 29, 2014, 9:16 PM

I have some additional thoughts I would like to share with you. We both have a lot on our plates this week with the fourth on Friday, but I would still like to email you some of my thoughts. What is your current email address? I tried the old one and it bounced back.

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Sent from my iPhone

Begin forwarded message:

From: Saburi Boyer <captainsaburi@hotmail.com>
Date: April 26, 2016 at 10:46:23 AM EDT
To: "captainsaburi@gmail.com" <captainsaburi@gmail.com>
Subject: Fw: Parasailing

From: Saburi Boyer <captainsaburi@hotmail.com>
Sent: Monday, June 30, 2014 8:16:02 AM
To: e@breakNwaves.com
Subject: Parasailing

Eric, I'm sure it comes as no surprise to you that Casey did around 150-200k in parasailing sales from the park-shore the past few years. I don't think you would do quite as much outside of the park-shore as he did right out front and center, but I may be wrong.

With Casey running the boat mostly himself (very hard long hours), little Maintenance expense (crazy lucky on this one), and no insurance (also very lucky), he profited about 30,000-40,000 per year on average over the past few years. So that is about 15-20 percent, which is good for a parasail business these days.

The days of 30-plus percent profits went out the window years ago. The boats have quadrupled in price. Staff expect to make more as they are in high demand and low supply. Repairs and maintenance have tripled. Insurance has quintupled and more. Virtually every other expense has at least increased a little over the past ten years or so since you got out of it. We have to fly way more people than we used to just to break even for the season.

If you want a good million dollar liability policy that's about 25,000 alone. A good maintenance program and normal repairs on a newer boat should cost close to that every year as well. A drive should last two seasons and they are 12 grand alone and not worth rebuilding (almost as much as new to rebuild and they don't last as long.). I can't tell you how many of mine have lasted less than one season. In Siesta Key I bought close to 30 drives in 8 years.

If you pay for good insurance and have average luck with maintenance you would be close to making nothing or maybe losing money on Casey's average year. Great years you make some

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pretty good money and bad years you probably break even or lose some. By the way, this one has been a bad one so far, so its probably not worth it to open up for this summer. The math just doesn't work out all that well when you consider tying up 150-200k in equipment. You have to consider depreciation and refit/repower costs over time plus hassle and liability. I think I'm being very fair and realistic with you about this.

Casey is getting out in part because of his dad, but mostly because all of his luck has caught up with him and now he realizes that it just isn't worth it for him to try and do this business the right way. If he wasn't lucky in insurance and repairs he probably wouldn't have made it these 8 years.

Eric, I would like I offer you ten percent of parasail ride revenue generated from your location. You could continue to advertise parasailing the same way you have for 15 years and everyone you book could be picked up from your location so that you get the benefit of traffic. I have a software coming out this week that will enable others to book for me and you could use it also. Ten percent of revenue could easily be half or more than half of the profit based on a normal season. And even if it was a bad season and I lost money you would still make some. That's a lot of reward for very little risk. If you booked 2000 flights (Casey's worst recent year) then that's 18,000 dollars, or with 3000 flights (Casey's best year) 27,000 in commission. That wont make you rich but it would go a long way towards helping pay for that property. And no 200k dollar investment. You can free up that money to pay down or improve your real property instead.

The only way I could justify doing this is that is our profit margin goes up when we break the 300k sales range. This will never happen with two companies, but with one its pretty likely. This I why I bought Casey's business. There are economies of scale that make the numbers jive better with one company. We can be more efficient that way. We save a lot on insurance, fuel, payroll, and maintenance. We put less hours on the boats as a whole and have less deprecation as a result.

Unfortunately for me I would be turning around and giving that extra profit right back to you if you agreed to this deal structure. I would at least be able to provide my people with jobs (important to me), honor my deal with Casey (also important) and maintain my recently reacquired position as the only operator in the area (though not necessary it is a nice benefit to me), and hopefully I could still find a way to make a little something for myself in the long run after Casey is paid off.

If you want to open a parasail business with your own boat that you fly yourself, than you will probably make about the same or maybe a little more than I'm offering you, and less with a partner, but the future of our industry is unknown. We may have twenty years left or it could all crumble in a year if someone gets killed and we get too much bad industry publicity.

A year or two ago i sold every boat i listed in a week and couldn't find enough inventory. Now I'm struggling to get a buyer for my own immaculate 2010 boat that i haven't been able to sell for 18 months. Traverse City is doing well as a whole, but the parasailing industry is at a major crossroads right now. Don't take my word for it. Call ten other successful operators who saw steady growth for many years and then sharp decline the past two seasons (you will find almost unanimous consensus among most of the 250 operator in the US). Ask them about the effects of this bad publicity on their businesses and their legitimate fears of our indistry disappearing or collapsing.

If you do with this me you wont have the aggravation or investment, or too much risk with a

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volatile industry. As I mentioned before, I know I can't persuade you to do anything. You are a smart guy and logic and reason will lead you to a sound business decision. I am just trying to provide you with information that I think can help you make a more informed decision.

Please think it over these next few days and let me know your thoughts. Feel free to call some other operators and get some their opinions on the industry and insurance crisis we are in.

Thanks Again,
Saburi

Sent from my iPhone

Sent from my iPhone

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●●○○○ AT&T LTE 9:19 PM

< Messages (1) (231) 883-9110 Details

Eric Harding
Break'N Wave...
EH

Thx

Jul 9, 2014, 1:55 PM

Have you given any thought to my proposal?

Sent as Text Message

Jul 10, 2014, 8:16 AM

I haven't done enough business for one boat yet this season let alone two. I'd like to it down with you about this soon when you are available.

Edit

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Messages (1) (231) 883-9110 Details

Sit

Jul 13, 2014, 10:50 AM

Are you available to chat?

Jul 13, 2014, 12:44 PM

I haven't made a final decision yet. I am heading down to Sandusky Ohio on Wednesday and will know after that.

All I can say is that there is no way that either business makes money in a year like this year. Even with the traffic from

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< Messages (1) (231) 883-9110 Details

both businesses we still had the worst revenue June in years. We did less business in all of June than the holiday weekend. That is bad.

I know you are used to the weather with rentals, but it's way worse with parasailing. You don't get the advanced reservations that you do with rentals. Everything is last minute (within a day or so) and the fixed costs and hassles are considerably higher.

We both have a good year and yes, we both

3

000226

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Pltfs-Appellees' Appendix Page 14

●●○○○ AT&T LTE 9:19 PM

< Messages (1) (231) 883-9110 Details

ok alright. We get less than stellar weather and both businesses make very little or lose.

I know you want consistent income to pay for that property and the only way you get that is if I pay you a percentage. I really think you make more this way in the long run and for very little hassle.

I look forward to hearing back from you after your trip. Feel free to call if you have any questions or thoughts you would like to discuss. Thanks.

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Messages (1) (231) 883-9110 Details

Jul 22, 2014, 10:14 AM

Any thoughts?

Pete's selling is down over 40 percent from 2012 and significantly over last year. That is including the business I have gotten from Casey shutting down.

Apart from 4th of July, I haven't been more than half way booked with one boat on any single day. I'd love to generate some more sales thru you and help us both make some more money. I could do at least double what I've been

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Pltfs-Appellees' Appendix Page 16b

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< Messages (1) (231) 883-9110 Details

needing to run a second boat.

Please let me know what direction you are leaning towards

Jul 22, 2014, 4:42 PM

The more and more I think about it, I do not think going into a business with a boat rental competitor is a good idea. Just yesterday we put a bid in a 2012 Ocean Pro 31. That is the route we have decided to take. Good thing for you is we would not take possession until

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< Messages (1) (231) 883-9110 Details

mid-September 2014. Appreciate you trying to work something out though! E-

Ok I guess I made an effort but you've gotta do what you've gotta do. I think you'll be disappointed to see that you've had a sidelined seat to the glory days of parasailing and it will just never be what it was a couple years ago. Hopefully we can continue to be respectful towards each other and be friendly competitors as I have been with Casey these past couple

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●●ooo AT&T LTE 9:27 PM

< Messages (1) (231) 883-9110 Details

Ok I guess I made an effort but you've gotta do what you've gotta do. I think you'll be disappointed to see that you've had a sideline treat to the glory days of baratalling and it will just never be what it was a couple years ago. Hopefully we can continue to be respectful towards each other and be friendly competitors as I have been with Casey these past couple years. I understand your desire to move to your own tune. I have that same motivation.

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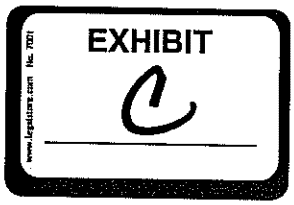

From: Brace Kern [mailto:kern@law-bek.com]
Sent: Sunday, May 08, 2016 11:35 PM
To: 'Jonathan Moothart'
Cc: 'Nancy Kim-Moothart'
Subject: RE: Boyer v Punturo

This exchange is protected by MRE 408 as communications in an offer to compromise.

Good evening Jon,

I'm not sure I can provide the level of details and terms you're looking for.
So, if we're getting into specifics, we should probably have a conference call tomorrow around 11 with both of them involved.

Essentially, we will dismiss the lawsuit and turn over Traverse Bail Parasail and all of its assets to your client in exchange for $750,000.
Saburi will execute a covenant not to compete for a reasonable duration, vicinity and extent as permitted by law.
Summarily, he will leave the Traverse area parasailing business for as long as Bryan continues to operate Traverse Bay Parasail.
Bryan will need to move the location of the business to the ParkShore (or some other location) as the lease probably won't transfer.

My clients will publicly acknowledge that they are impressed by Bryan taking a proactive approach to rectify any harm caused by any misunderstandings and that all has been forgiven and forgotten.
My clients will appear as subpoenaed to do so, or requested by your client to do so, to inform any relevant parties that they bear no hard feelings.
There will be a non-disparagement agreement through which neither will speak ill of each other moving forward.

This is a no strings attached kind of offer.
Part of the idea of my clients giving up their business is to create closure in a positive way and with some finality between our clients.
A no contact agreement (except through counsel) might be a good idea just to keep them apart so nothing new (negative) arises.
Since your client has more going on with both his situation and taking over the business, we are open to hearing his concerns/requests.

We think this will produce the most positive result for everyone.

Brace Kern
BEK LAW
3434 Veterans Drive
Traverse City, MI 49684
231.492.0277 (call or text)
KERN@LAW-BEK.COM
WWW.LAW-BEK.COM

May 8, 2016, Kern e-mail to Punturo's counsel

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From: Jonathan Moothart [mailto:jon@moothartlaw.com]
Sent: Sunday, May 8, 2016 9:09 PM
To: Brace Kern <kern@law-bek.com>
Cc: Nancy Kim-Moothart <nancy@moothartlaw.com>
Subject: Boyer v Punturo

Brace:

Thanks for your call on Friday, May 6 regarding a possible settlement of the above case. I have discussed the matter with my client. We would appreciate further details regarding your proposal with specific numbers and terms.

Thank you.

Jon

Jonathan R. Moothart, Esq.
Moothart & Sarafa, PLC
Attorneys and Counselors at Law
P.O. Box 243
9815 Miami Beach Rd.
Williamsburg, MI 49690-0243
(231) 947-8048
(231) 267-5900
(231) 267-5300 - facsimile
jon@moothartlaw.com

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2006 WL 2380960
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Linda RECKER and Linda Zahrn, Plaintiffs-Appellants,
v.
David MALSON, Michael Dunn, Dunn, Malson & Kozera, P.C., and Sean Fitzgerald, Defendants-Appellees.

Docket No. 268230.
|
Aug. 17, 2006.

Kent Circuit Court; LC No. 03-004250-NM.

Before: ZAHRA, P.J., and NEFF and OWENS, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 In this legal malpractice case, plaintiffs appeal as of right from the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs were part of a group of nurses who sued their employer Butterworth Hospital. The nurses were working under a plan known as "the Baylor plan," which was designed to secure a competent, experienced nursing staff to work weekend shifts. After the hospital unilaterally changed the plan, the nurses sued for breach of contract. Defendants represented the nurses in that litigation. The nurses prevailed at the liability phase of a trial. In lieu of proceeding to a trial on damages, the nurses unanimously agreed to accept a settlement offered by the hospital. Plaintiffs then filed this action against defendants for legal malpractice. They alleged they were just-cause employees while other nurses were at-will employees, and it was a conflict of interest for defendants to represent both groups of nurses. They claimed defendants committed malpractice by waiving an opportunity to amend the pleadings to allege plaintiffs' just-cause status, and negotiating a settlement more advantageous to the at-will nurses but inadequate regarding interests of just-cause employees. Plaintiffs also alleged defendants pressured them into accepting the settlement, and defendants were motivated because of financial difficulties rather than their clients' interests.

Defendants moved for summary disposition alleging plaintiffs could not prove that any breach of the standard of care proximately caused plaintiffs' alleged damages. They also argued their decisions in the underlying litigation fell within the attorney-judgment rule and, therefore, were not actionable. The trial court agreed that plaintiffs could not prove proximate cause and granted defendants' motion. [1]

1 We initially address defendants' claims that plaintiffs improperly expanded the record on appeal. Our review of the trial court record discloses that several documents included within plaintiffs' appendix were not submitted to the trial court. This Court's review is limited to the record established in the trial court, and a party may not expand the record on appeal. *Sherman v. Sea Ray Boats, Inc,* 251 Mich.App 41, 56; 649 NW2d 783 (2002); *Isagholian v. Transamerica Ins Corp,* 208 Mich.App 9, 18; 527 NW2d 13 (1994). Accordingly, we decline to consider those documents not submitted at the trial court level.

We review a trial court's decision on a summary disposition motion de novo. *Spiek v. Dep't of Transportation,* 456 Mich. 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim; a court must consider the submitted admissible evidence to determine whether a genuine issue of material fact exists that would preclude granting the moving party judgment as a matter of law. *Babula v. Robertson,* 212 Mich.App 45, 48; 536 NW2d 834 (1995). The elements of a legal malpractice claim are: (1) an attorney-client relationship; (2) negligent legal representation; (3) the proximate cause between the negligence and an injury; and (4) the fact and extent of the claimed injury. *Manzo v. Petrella,* 261 Mich.App 705, 712; 683 NW2d 699 (2004).

> [T]o establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff must show that, but for an attorney's

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EXHIBIT
6

> alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the "suit within a suit" requirement in legal malpractice cases. [*Id.*]

*2 Proximate cause is generally a question of fact for the jury. *Teodorescu v Bushnell, Gage, Reizen & Byington (On Remand)*, 201 Mich.App 260, 266; 506 NW2d 275 (1993). Although proximate cause involves both a legal and factual component, this case focuses on whether plaintiffs can factually prove causation without relying on speculation or conjecture. *Charles Reinhart Co v. Winiemko*, 444 Mich. 579, 586-587 n 13; 513 NW2d 773 (1994).

Plaintiffs' principal theory of liability was that defendants failed to adequately represent their interests by waiving plaintiffs' right to allege their status as just-cause employees; plaintiffs maintain this affected the amount of future damages they could have recovered had the case proceeded to trial. We disagree.

While defendants initially alleged that all the nurses were at-will employees and declined to amend the pleadings to allege plaintiffs' just-cause status when informed by the trial court they would have to adjourn the scheduled trial date if they did so, their conduct did not affect plaintiffs' ability to recover the damages sought in light of a ruling by the court in the underlying litigation. In the underlying litigation, the court addressed several motions brought by the hospital to limit damages. The judge agreed that the nurses who had left the Baylor plan could not receive future damages but held that nurses who were still employed under the Baylor plan, which included both plaintiffs here, would be entitled to recover future damages. Thus, even though the pleadings were not amended to allege plaintiffs' just-cause status, plaintiffs would have been allowed to seek as damages the premium pay they were promised under the Baylor Plan.

Although plaintiffs argue that they would have been automatically entitled to future damages until their retirement had defendants amended the complaint to add the just-cause theory, they cite no authority for this proposition. In fact, future damages are generally available at the court's discretion only if reinstatement is not feasible. See *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich.App 188, 200-201; 390 NW2d 227 (1986). While future damages may be awarded based on a party's just-cause status, whether they are recoverable in a specific case will depend on the facts. Cf. *Ritchie v Michigan Consolidated Gas Co*, 163 Mich.App 358, 374; 413 NW2d 796 (1987). Because plaintiffs continue to be employed by the hospital, we find no basis for plaintiffs' claim that they would have automatically been entitled to future damages until retirement age. Regardless, the court in the underlying litigation ruled that plaintiffs could recover future damages at trial even though they were not identified as just-cause employees in the pleadings. In light of this ruling, defendants' failure to amend the pleadings did not proximately cause plaintiffs' alleged damages.

Plaintiffs also argue that defendants did not adequately represent their interests because of several conflicts of interest. In considering this issue, we first address defendants' argument that the Michigan Rules of Professional Conduct cannot form the basis for plaintiffs' conflict-of-interest claims. MRPC 1.0(b) provides:

> *3 Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.

Although a violation of a rule cannot "give rise" to a cause of action for enforcement or for damages caused by a failure to comply, *Watts v. Polacyzk*, 242 Mich.App 600, 607 n 1; 619 NW2d 714 (2000), plaintiffs here do not rely solely on the rules to establish their claim, but instead refer to the rules only as evidence of the standard of care. This is consistent with MRPC 1.0(b), which contemplates that a rule is otherwise admissible as evidence in civil proceedings. Plaintiffs rely on MRPC 1.7(b) and 1.8(g) to support their argument that it was a conflict of interest for defendants to represent all the nurses as one group where the nurses' interests differed depending on whether they were at-will employees or just-cause employees. Plaintiffs

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maintain that the ultimate settlement with the hospital favored the at-will employee nurses who no longer worked under the Baylor plan because most of the settlement amount was allocated for back pay not future damages, and defendants failed to adequately represent plaintiffs' interests as just-cause employees.

Assuming for the sake of argument that a conflict of interest existed, plaintiffs cannot establish proximate cause in light of the evidence that they (1) were aware of the terms and effect of the settlement, (2) consulted independent experts before accepting the settlement, and (3) voluntarily accepted the settlement. Although plaintiffs claimed they felt pressured to accept the settlement, it was undisputed that they consulted with an accountant and another attorney before deciding whether to accept the offer. In addition, the judge in the underlying litigation met with plaintiffs to address their questions about the settlement terms. Plaintiffs were advised by an independent attorney not to accept the offer because it did not adequately compensate them for future damages, but they ultimately agreed to accept the settlement. Because they made an informed and voluntary decision to accept the agreement knowing their claim for future damages might have been compromised, plaintiffs cannot establish that defendants' alleged conflict of interest was the proximate cause of their alleged damages.

Next, plaintiffs rely on MRPC 1.7(b) to support their argument that a conflict of interest existed because defendant law firm was experiencing financial difficulties. Plaintiffs contend defendants placed their own financial interests above plaintiffs' interests in negotiating the settlement and recommending that plaintiffs accept the settlement offer. Even if there is merit to plaintiffs' claim that the law firm was experiencing financial difficulties, for the reasons previously discussed, plaintiffs have not shown that they were improperly influenced by defendants to accept the settlement agreement.

*4 In sum, defendants were entitled to summary disposition because plaintiffs failed to show that defendants' alleged malpractice proximately caused plaintiffs' alleged damages. [2]

2 In light of our decision, it is unnecessary to consider plaintiffs' arguments concerning the attorney-judgment rule, an issue that was neither addressed nor decided by the trial court.

Affirmed.

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2007 WL 914350
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Anthony F. DELUCA, Plaintiff-Appellee,
v.
John W. JEHLE and John W. Jehle, P.C., Defendants-Appellants.

Docket No. 266073.
|
March 27, 2007.

Oakland Circuit Court; LC No.2003-050940-NM.

Before: JANSEN, P.J., and NEFF and HOEKSTRA, JJ.

Opinion

PER CURIAM.

*1 In this attorney malpractice action, defendants appeal as of right from the judgment entered by the circuit court following a jury trial. The jury returned a verdict in favor of plaintiff, who was awarded $312,750. This case arose when plaintiff, a podiatrist, who was bought out of his professional practice by the other 50-percent shareholder, alleged that the individual defendant[1] -the attorney who represented the corporation and who also had done private work for plaintiff and his wife-violated his fiduciary duty to plaintiff.

1 Given the relationship between defendants, we will employ the singular "defendant" throughout this opinion.

Defendant first claims that the trial court failed to properly act as a gatekeeper when it allowed plaintiff's accounting expert to testify regarding plaintiff's damages without first determining that the expert's methodology and data were sufficiently reliable to be admissible. We disagree. MRE 702 states:

> If the court determines that scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under this rule, the trial court is required to act as a gatekeeper to prevent unreliable expert testimony from being admitted as evidence. *Gilbert v. DaimlerChrysler Corp,* 470 Mich. 749, 779; 685 NW2d 391 (2004).

Defendant's main point of contention appears to be that the businesses plaintiff's expert used for comparison were not similar enough to the business at issue in this case.[2] However, that plaintiff's expert did not compare other podiatrist practices, but instead what he considered to be similar practices, was put before the jury. Where an expert's knowledge is limited but the limits of his knowledge are revealed in testimony, then those limits go to the weight of his testimony, not the admissibility. *Triple E Produce Corp v. Mastronardi Produce, Ltd,* 209 Mich.App 165, 175; 530 NW2d 772 (1995).

2 It is noteworthy that defendant did not contest the general methodology used by plaintiff's expert and that he did not employ an expert of his own to contest the testimony of plaintiff's expert.

Defendant's assertion that plaintiff's expert incorrectly calculated plaintiff's loss of salary does not even fall within the purview of expert testimony because it does not require any special knowledge to understand.

Defendant also argues that plaintiff's expert testimony regarding the different tax treatment of capital gains versus ordinary income was unreliable because it did not take into account the alternative minimum tax (AMT) or consider plaintiff's former partner's willingness to pay the compensation as capital gains. Again, the lack of consideration of the AMT was put before the jury, and so this argument goes to weight, not admissibility. *Id.* And consideration of the partner's willingness to pay is a

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jury question, not a condition of admissibility for expert testimony.

*2 Defendant also complains that plaintiff's expert's opinion on the financial performance of the practice should not have been admitted because he only looked at data from 31 podiatry practices and he could not confirm that any of them were even within Michigan. This is also an argument that speaks to the limitations of the data, and so goes to the weight, not the admissibility of the evidence. *Id.*

Finally, defendant complains that the underlying data used by plaintiff's expert should not have been admitted because there was no information presented regarding the reliability of the underlying data. Plaintiff's expert testified that the Pratt database he used was a very large national database of business sales, and he also said that he used another database from the National Association of Healthcare Consultants. He testified that Shannon Pratt is a "father" of business valuation, thereby establishing its data as well accepted in the industry. Regarding the other database, plaintiff's expert said nothing about it beyond the name of the organization and what sort of data was collected. But again, the limitations of the data were explained to the jury, and there was nothing to suggest that there was any reason to doubt the accuracy of that financial data. Defendant was free to cross-examine plaintiff's expert on that particular point, but did not. Defendant was also free to bring its own expert witness in that area, but did not.

Therefore, the trial court did not abuse its discretion nor fail to exercise its gate keeping function when it allowed plaintiff's accounting expert to testify.

Defendant next claims that the trial court instructed the jury with an incorrect legal standard when it determined that a violation of the Michigan Rules of Professional Conduct (MRPC) creates a rebuttable presumption of malpractice. We disagree. With respect to challenges to jury instructions, "there is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury." *Murdock v. Higgins,* 454 Mich. 46, 60; 559 NW2d 639 (1997). Additionally, reversal is not required unless the failure to reverse would be inconsistent with substantial justice. MCR 2.613(A); *Ward v. Consolidated Rail Corp,* 472 Mich. 77, 84, 87; 693 NW2d 366 (2005).

The MRPC were adopted effective October 1, 1988. MRPC Title Page. MRPC 1.0(b) states as follows:

> Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.

The comment to MRPC 1.0 states as follows:

> [A] violation of a rule does not give rise to a cause of action, nor does it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons.

*3 While the trial court did say to counsel and the parties that it was going to use the "rebuttable presumption" standard, the jury instructions reflected a standard more in keeping with the above commentary and the MRPC:

> If you find the defendant violated the Michigan Rules of Professional Conduct you may infer that the defendant was negligent. However, you should weigh all the evidence that was presented in determining whether the defendant was or was not negligent.

This language suggests that the jury may use a violation of the MRPC as evidence of negligence, but says nothing

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about any presumption of negligence. MRPC 1.0(b) explicitly allows the admission of MRPC as evidence "governed by the Michigan Rules of Evidence and other provisions of law." Thus, the jury instructions on this point fairly and accurately presented the applicable law to the jury. Even if the testimony of plaintiff's expert on this point communicated the rebuttable presumption language to the jury, the jury instruction would have corrected that. Juries are presumed to follow their instructions. *People v. Hana,* 447 Mich. 325, 351; 524 NW2d 682 (1994). Therefore, defendant is not entitled to reversal on this basis.

We also find no merit in defendant's assignment of error in the trial court's failure to grant its motion for a judgment notwithstanding the verdict (JNOV) because there was insufficient evidence to support the jury's verdict.

> Judgment notwithstanding the verdict should be granted only when there was insufficient evidence presented to create an issue for the jury (citation omitted). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *[Merkur Steel Supply Inc v. Detroit,* 261 Mich.App 116, 123-124; 680 NW2d 485 (2004).]

"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." *Mitchell v. Dougherty,* 249 Mich.App 668, 676; 644 NW2d 391 (2002).

First, there was evidence of an attorney-client relationship between plaintiff and defendant, both as a corporate attorney and as an attorney representing plaintiff in matters dealing with his personal financial and estate planning. Second, there was evidence that there was a conflict of interest such that defendant could not properly represent plaintiff's interests in the sale of the practice because plaintiff's interests were contrary to the interests of the corporation itself. There was evidence that defendant should have been aware of this conflict and that it required him to insist on independent counsel for plaintiff. There was evidence that defendant told plaintiff in error that plaintiff's partner could have left him with nothing. Third, there was evidence that the deal that plaintiff received, and accepted based on defendant's erroneous advice, was worse than what he would have received had he kept the original binding arrangement of a five-year buyout at 25 percent. Finally, there was sufficient evidence presented to allow a trier of fact to approximate the damages caused by showing lost income, comparing the sale of similar practices, and showing the differences in tax treatment that were possible. In sum, there was sufficient evidence for a trier of fact to find for plaintiff on all four elements of a legal malpractice claim. Therefore, there was no error in the denial of defendant's motion for JNOV.

*4 Finally, defendant argues that plaintiff's counsel made repeated improper insinuations, unsupported by the evidence, that defendant deliberately gave plaintiff's personal financial information to plaintiff's partner in order to give the partner an unfair advantage. Defendant asserts that these arguments inflamed the passions of the jury against him and denied him a fair trial. Alleged improper comments by an attorney are reviewed first to determine if there was error, and then if there was error, if that error requires reversal. *Hunt v. Freeman,* 217 Mich.App 92, 95; 550 NW2d 817 (1996).

> An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is only required where the prejudicial statements of an attorney reflect a studied purpose to inflame or deflect the jury's attention from the issues involved. *[Id.* (citation omitted).]

Defendant claims it was misconduct for plaintiff's counsel to repeatedly assert that defendant improperly shared personal financial information with plaintiff's partner that defendant had in his possession from his estate planning done on behalf of plaintiff. Defendant argues that there was no evidence to support this assertion. However,

plaintiff's personal financial information was found in the partner's files at the practice. While this certainly does not definitively establish any nefarious dealings, plaintiff's assertion is consistent with that evidence. As such, plaintiff's argument is a reasonable inference from the evidence presented and so did not constitute error.

Affirmed.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Daniel J. TRIERWEILER, Pla intiff/Counter-defendant-Appellant/Cross-Appellee,
v.
VARNUM, RIDDERING, SCHMIDT & HOWLETT, L.L.P., Defendant/Counter-plaintiff-Appellee/Cross-Appellant.
Daniel J. TRIERWEILER, Plaintiff/Counter-defendant-Appellee,
v.
VARNUM, RIDDERING, SCHMIDT & HOWLETT, L.L.P., Defendant/Counter-plaintiff-Appellant.

No. 256511, 261865.
|
May 2, 2006.

Before: BANDSTRA, P.J., and WHITE and FORT HOOD, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 These consolidated appeals stem from the same lower court legal malpractice action. In docket number 256511, plaintiff appeals by leave granted from the circuit court's order ruling that, to the extent plaintiff can prove he is entitled to pre-complaint interest as an element of his damages at trial, that interest will be limited to five percent simple interest and may not be compounded. Defendant cross-appeals the circuit court's order denying its motion for partial summary disposition pursuant to MCR 2.116(C)(8) as to plaintiff's claim for damages for fees plaintiff paid to defendants and other attorneys in pursuing tort recoveries against other parties in connection with the underlying loan transaction in which the alleged malpractice occurred, and as to all aspects of plaintiff's complaint that purport to be based on or refer to an alleged violation of the Michigan Rules of Professional Conduct ("MRPC").

We reverse the circuit court's ruling limiting pre-complaint interest plaintiff may recover to five percent, and its ruling that any interest recovered must be computed simply, and not compounded. As to defendant's cross-appeal, we conclude the circuit court erred in denying defendant's motion to dismiss plaintiff's claim for recovery of investigation and litigation related attorney's fees, and reverse that ruling. We affirm the circuit court's denial of that portion of defendant's motion that sought to dismiss references to the MRPC.

In docket number 261865, defendant challenges the circuit court's order denying its motion in limine, which sought to exclude plaintiff's claim for attorney fees and costs incurred in litigating claims against other alleged tortfeasors involved in the underlying loan transaction. Defendant also challenges the circuit court's determination not to grant a set off for plaintiff's third-party contractual recoveries. We reverse the denial of defendant's motion in limine, and also reverse the circuit court's determination not to grant a setoff.

Underlying Facts

Plaintiff's first amended complaint alleged that plaintiff retained defendant law firm to provide legal advice and services related to a $900,000 loan transaction between plaintiff and Croxton and Trench Holding Corporation, which, together with an earlier $300,000 unsecured loan made to Croxton and Trench by plaintiff (without defendant's involvement), was to be fully secured by Government National Mortgage Association bonds. The complaint further alleged that defendant law firm's investigation of the proposed transaction revealed that the bonds to be pledged as collateral were not owned by Croxton and Trench and that, should Croxton and Trench default on the loans, it could not repay the loans from its assets. Plaintiff also alleged that one of the owners of the bonds, who pledged to unconditionally guarantee the loan to Croxton and Trench and to secure the guarantee with the bonds, was an individual with Texas convictions for securities fraud. Plaintiff alleged that defendant failed to discover this latter information. Plaintiff further alleged that defendant represented to plaintiff that it had completed the appropriate investigation and services necessary to verify the existence and ownership of

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adequate security and to perfect that security through the loan documents.

*2 Plaintiff closed on the loan on December 1, 1989, in reliance on defendant's advice and services. Plaintiff's complaint alleged that Croxton and Trench defaulted on the loan in January 1990, that the bonds never attached as collateral to secure the loan and, therefore, he was unable to recover the money loaned to Croxton and Trench. Finally, plaintiff alleged that defendant failed to adequately and properly protect his interest in a subsequent lawsuit to recover these funds, such that plaintiff lost any possibility of recovering from various Colorado attorneys, accountants and firms, and was forced to settle with remaining defendants for amounts less than sufficient to cover plaintiff's losses.

Plaintiff's legal malpractice action sought to recover against defendant for failing to ensure that the loan transaction was adequately secured and for its purported negligence in handling the subsequent litigation in Colorado. Plaintiff alleged that, as a result of defendants acts and omissions, among other things: he lost his $900,000 and the use of that money; he lost claims against certain Colorado attorneys, accountants and firms; he paid fees to accountants and other attorneys to attempt to remedy and mitigate the damages caused by defendant's conduct; and he paid fees to defendant and has been billed for additional fees by defendant that were unearned due to defendant's malpractice.

Defendant counter-claimed, seeking to recover more than $250,000 in unpaid attorney fees allegedly incurred in investigating and litigating against those parties who allegedly had defrauded plaintiff in connection with the underlying loan.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), seeking to prevent plaintiff from recovering attorney fees incurred in connection with the loan and subsequent litigation filed to recover (or attempt to recover) some of plaintiff's financial losses following the default on that loan; defendant also sought dismissal of all plaintiff's allegations purportedly based on or referring to the MRPC. The circuit court denied defendant's motion for partial summary disposition as it pertained to plaintiff's references to violations of the MRPC and to plaintiff's claims for attorney fees. [1]

1 Defendant sought leave to appeal this order to this Court (Docket No. 248867); this Court denied defendant's application for failure to persuade the Court of the need for immediate appellate review.

Defendant later filed a motion in limine asking for a ruling that to the extent plaintiff can prove entitlement to pre-complaint interest as an element of his damages, the interest rate should be limited to five percent under MCL 438.31, and any computation methodology for pre-complaint interest may include only simple, and not compound interest. The circuit court concluded that to the extent plaintiff could prove he is entitled to precomplaint interest as a common law element of damages, plaintiff may not claim in excess of five percent, per MCL 438.31, and that the common law permitted only simple interest.

Plaintiff sought leave to appeal this order. This Court granted leave by order entered October 26, 2004. Defendant filed a cross-appeal of the circuit court's order denying its motion for partial summary disposition.

*3 The case continued in the circuit court and defendant filed another motion in limine, this time seeking a ruling that "plaintiff's expenses incurred in his earlier efforts to recover tort damages from others do not constitute proper mitigation expenses" and therefore, cannot be included in plaintiff's claim for damages. The circuit court denied defendant's motion, noting that "we will leave to a later date a court's determination when a more clear factual development is had exactly what damages may be clearly sought by plaintiff from the defendant, if any, with the goal as conceded here that the amount of damage not exceed the actual loss plus interest." Defendant filed an application for leave to appeal this order in this Court (Docket No. 261865); this Court granted defendant's application by order dated July 18, 2005, and consolidated docket numbers 256511 and 261865 on its own motion.

I-Docket No. 256511

The issues whether MCL 438.31 [2] applies to limit plaintiff's claim for pre-complaint interest to a rate not to exceed five percent, and whether such interest may be compounded or must be computed simply are questions of law this Court reviews de novo. *Solakis v. Roberts*, 395 Mich. 13, 19; 233 NW2d 1 (1975). Defendant does not dispute that plaintiff may be entitled to recover

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pre-complaint interest, if properly proved at trial. The dispute here regards the appropriate rate and whether pre-complaint interest may be compounded annually.

2 MCL 438.31 provides in relevant part:

> The interest of money shall be at the rate of $5.00 upon $100.00 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest, not exceeding 7% per annum. This act shall not apply to the rate of interest on any note, bond or other evidence of indebtedness issued by any corporation, association or person, the issue and rate of interest of which have been expressly authorized by the public service commission or the securities bureau of the department of commerce, or is regulated by any other law of this state, or of the United States, nor shall it apply to any time price differential which may be charged upon sales of goods or services on credit.

... Michigan has long recognized the common-law doctrine of awarding interest as an element of damages. The doctrine recognizes that money has a "use value" and interest is a legitimate element of damages used to compensate the prevailing party for the lost use of its funds.... [T]he pivotal factor in awarding such interest is whether it is necessary to allow full compensation. [*Gordon Sel-Way, Inc v. Spence Bros, Inc,* 438 Mich. 488, 499; 475 NW2d 704 (1991) (citations omitted.)[3]]

3 See also *Snow v. Nowlin,* 43 Mich. 383, 387; 5 NW 443 (1880), and *Banish v. City of Hamtramck,* 9 Mich.App 381, 400; 157 NW2d 445 (1968).

Michigan case law addressing whether the usury statute, MCL 438.31, applies "is sparse and inconsistent." See *Manley, Bennett, McDonald & Co v St Paul Fire & Marine Ins Co,* 821 F Supp 1225, 1228 (ED Mich.1993), aff'd 33 F3d 55 (CA 6, 1994). "Usury is, generally speaking, 'the receiving, securing or taking of a greater sum or value for the loan or forbearance of money, goods, or things in action than is allowed by law." ' *Hillman's v. Em 'N Al's,* 345 Mich. 644, 651; 77 NW2d 96 (1956) (citations omitted). Usury statutes are enacted pursuant to the state's police power for the valid purpose of protecting "necessitous borrowers from extortion." *Wilcox v. Moore,* 354 Mich. 499, 504; 93 NW2d 288 (1958); *Visioneering Inc Profit Sharing Trust v Belle River Joint Venture,* 149 Mich.App 327, 340; 386 NW2d 185 (1986). Michigan's usury statute applies to interest on the loan of money, the forbearance of money, the extension of pre-existing debts and on "all contracts and assurances." *Hillman's, supra* at 651. Usury statutes are in derogation of the common law, and therefore, are to be strictly construed. *Marion v. Detroit,* 284 Mich. 476, 484; 280 NW26 (1938).

*4 It is well settled that where a transaction underlying a civil action is contractual in nature, an award of pre-complaint interest is subject to the limitations set forth in MCL 438.31. *Solakis, supra,* 395 Mich. 21-22.

Defendant asserts that the same is true for pre-complaint interest in a tort action, relying on *Ehman v. Libralter Plastics, Inc,* 207 Mich.App 43, 45; 523 NW2d 639 (1994). However, *Ehman* offers no analysis helpful here-it establishes only that precomplaint interest in a conversion case is subject to MCL 438.31.[4]

4 In *Ehman,* the defendant was unable to return plastic injection molds to the plaintiff, which were in the defendant's possession and were owned by the plaintiff. The defendant admitted liability for conversion, but contested the amount of damages owed the plaintiff. The trial court ruled that the plaintiff's damages were to be determined by the value of the molds as of the date of conversion and awarded the plaintiff that amount, together with interest from the date of the conversion at a rate based on rates the plaintiff had been paying for personal loans. This Court agreed that the value of the molds at the time of conversion was the proper measure of the plaintiff's damages and that damages in a conversion case "include interest from the date of the conversion"; however, this Court reversed the trial court's determination as to the applicable rate of interest to be applied, concluding that the trial court erred in "failing to award interest in conformity with MCL 600.6013 [the judgment interest statute] ... and MCL 438.31 [the usury statute]."

We agree with plaintiff that *Jaffe v. Harris,* 126 Mich.App 813; 338 NW2d 228 (1983), rev'd in part 419 Mich. 942; 355 NW2d 617 (1984), is controlling. In *Jaffe,* the parties were partners in a limited partnership; the plaintiffs alleged the defendant wrongfully withdrew partnership funds for time periods without paying interest on those funds, wrongfully increased his management fee and wrongfully used partnership money for his own expenses. The plaintiffs also sued the partnership's accounting firm,

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alleging it was guilty of fraud and malpractice in failing to conduct its audit with due care because it failed to discover or bring to the plaintiffs' attention the defendant's financial wrongdoing. The claims against the accounting firm were dismissed, but the plaintiffs prevailed against the defendant on their management fee claim and on a claim of fraudulent concealment of the defendant's improper withdrawals from partnership funds. The trial court ruled that it had the discretion to award interest as damages on the claim that defendant improperly withdrew partnership funds, utilizing varying rates of interest each year to be compounded annually from the date of the first improper withdrawal. *Id.* at 820. This Court upheld that award, concluding that "each rate of interest utilized was supported by competent evidence" and that the trial court did not exceed its authority by determining that the interest to be paid as damages should be compounded. The Court noted that there was "no indication that the computation of interest utilized here resulted in double recovery." *Id.* at 822.

In lieu of granting leave to appeal, the Supreme Court ordered that "[t]he judgment of the Court of Appeals dealing with damages for the unauthorized withdrawals is reversed. Plaintiffs may not recover compound interest damages beyond ... the date on which the first complaint was filed. Thereafter, plaintiffs are entitled to judgment interest pursuant to MCL 600.6013; ..." *Jaffe, supra,* 419 Mich. 942. Thus, the Supreme Court left intact this Court's conclusion that interest awarded to the plaintiffs at a variable rate was appropriate if supported by proofs. See also, *Manley, Bennett, McDonald & Co v St Paul Fire & Marine Ins Co,* 821 F Supp 1225, 1228 (ED Mich.1993), aff'd 33 F3d 55 (CA 6, 1994).

Following *Jaffe, supra,* we reverse the circuit court's determination that any award of pre-complaint interest in this case be limited to the rate provided by MCL 438.31. Rather, the appropriate rate should be determined as a matter of fact based on proofs presented at trial.

B

*5 The circuit court also determined that any award of pre-complaint interest was to be computed simply and not compounded, agreeing with defendant that the common law does not permit interest to be compounded unless permitted by statute, authorized by a contract between the litigating parties or where necessary to ensure that a willful wrongdoer does not profit from the wrongdoing. We disagree.

The common law favors simple interest and disfavors the compounding of interest, allowing it only where authorized by statute or explicit agreement of the parties, or where compelled by the presence of some special circumstances, such as "peculiar relations between the parties or the fraudulent conduct of the debtor" or in actions in equity where necessary to achieve a just and equitable result. *Nation v. WDE Elec Co,* 454 Mich. 489; 563 NW2d 233 (1997); *Norman v. Norman,* 201 Mich.App 182, 186-187; 506 NW2d 254 (1993). However, neither of these cases nor any other Michigan case has addressed whether pre-complaint interest is to be computed simply, or whether it may be compounded as appropriate to fully compensate an injured party.

In *Nation, supra,* 454 Mich. 494, the Court determined, as a matter of statutory interpretation, that the reduction of future damages to present cash value under MCL 600.6306 is to be calculated using simple interest methodology. In *Norman, supra,* the parties' consent judgment of divorce provided that the plaintiff was to have a lien on the marital home in the amount of $14,000, which was to accrue interest at 8¾ % per annum from the date the judgment entered, and which was to become due and payable upon the happening of certain events. Upon the occurrence of one of those events, a dispute arose as to whether the interest was to be calculated simply or compounded annually. The trial court determined that the interest was to be compounded annually; this Court reversed, concluding that because neither the consent judgment nor any statute specifically provided for compound interest and there were no special circumstances warranting deviation from the general rule, the consent judgment "must be construed as providing for the payment of simple interest rather than compound interest." *Norman, supra,* 201 Mich.App 183-184, 187, 189. Thus, while both *Nation* and *Norman* articulate the general rule in favor of simple interest, neither addresses whether pre-complaint interest may be compounded in this legal malpractice action.

The other cases defendant cites as requiring that only simple interest be available to plaintiff in this case, *Gage v. Ford Motor Co,* 423 Mich. 250; 377 NW2d 709 (1985), and *Schwartz v. Piper Aircraft, Corp,* 90 Mich.App 324;

282 NW2d 306 (1979), are also inapposite. In *Gage*, the Court addressed the effect of the 1980 amendments to the judgment interest statute on claims filed before the amendment but resolved after the date stated therein. The Court determined that the compounding of interest under MCL 600.6013 was not permitted before the date specifically provided in the amendments. *Id.* at 259-260. Nothing in *Gage* purports to address, or relates to, the computation of interest as a matter of pre-complaint, common-law damages. In *Schwartz*, this Court noted recognized that that case "only concerned" whether the judgment interest statute, MCL 600.6013, provided for simple or compound interest and expressly did not address interest awarded by the jury as a common law element of damages. [5]

5 Defendant asserts that *Schwartz*, "squarely addressed and rejected" the argument that compounding should be allowed in every case because simple interest may fail to fully compensate the prevailing party for his losses. Contrary to this assertion, this Court expressly stated that it was not dealing with the recovery of precomplaint interest as a part of damages in *Schwartz*, and the issue in *Schwartz* was whether the judgment interest statute in effect at that time provided for simple interest.

*6 The Supreme Court's order in *Jaffe, supra*, 419 Mich. 942, allowed compound interest before, but not after the complaint was filed. The *Jaffe* order states that the "[p]laintiff may not recover compound interest damages beyond ... the date on which the complaint was first filed" [6] and it left intact this Court's affirmance of the trial court's compounding of pre-complaint interest. See also *Manley, supra*, 821 F Supp 1228, in which the court, applying Michigan law, awarded the plaintiff pre-complaint interest to be compounded annually. *Id.*, at 1229. [7]

6 In a prior appeal in *Jaffe*, the resolution of which is reported at 109 Mich.App 786; 312 NW2d 381 (1981), the plaintiffs filed their complaint before June 1, 1980. Before June 1, 1980, MCL 600.6013 provided for only simple postcomplaint interest; thereafter postcomplaint interest was to be compounded annually. *Gage*, 423 Mich. 252.

7 In so doing, the *Manley* court explained:

> The general American rule appears to be that common law interest cannot be compounded unless authorized by statute. See 22 Am.Jur.2d, Damages § 650. Nevertheless, at least one recent Michigan case allowed compound interest to stand. *Jaffe, supra* [126 Mich.App 813; 338 NW2d 228 (1993), rev'd in part, lv den in part, 419 Mich. 942; 335 NW2d 617 (1984)].
>
> The general purpose behind awards of pre-complaint interest was discussed by the Michigan Supreme Court in *Gordon Sel-Way, Inc. v. Spence Brothers, Inc.*, 438 Mich. 488, 499, 475 N.W.2d 704 (1991). "[T]he pivotal factor in awarding such interest is whether it is necessary to allow full compensation." *Id.* My job as fact finder in this case is to award plaintiff a sum of money that reflects not only its exact dollar expenditures, but also any additional value plaintiff could have derived from the use of that money for its own purposes. Just as future damages are reduced to present value, so past ascertainable damages should be increased to present value. Whether or not compound interest is needed to accomplish this goal is a question of fact. Without adequate interest, plaintiff cannot be made whole, and defendant would be unjustly enriched.
>
> In the modern business world compound interest is commonplace. Several cases have recognized the importance of awarding compound interest in other situations. *Johns-Manville Corp. v. Guardian Industries Corp.*, 718 F.Supp. 1310 (E.D.Mich.1989), involved calculation of pre-complaint interest on royalties in a patent infringement case. The court concluded: "Because interest 'serves to make the patent owner whole,' [*General Motors Corp. v.] Devex [Corp.]*, 461 U.S. [648] at 656, 103 S.Ct. [2058] at 2062 [76 L.Ed.2d 211 (1983)] the Court finds that annual compounding, rather than simple interest, is proper." Accord, *American Anodco, Inc. v.. Reynolds Metals Co.*, 572 F.Supp. 895, 896 (W.D.Mich.1983).
>
> Michigan cases that deny awards of compound interest all involve statutory, rather than common law, interest. In *Schwartz v. Piper Aircraft Corp.*, 90 Mich.App. 324, 282 N.W.2d 306 (1979), the court of appeals reversed a lower court ruling that required the defendant to pay compound *judgment* interest. The ruling was made at a time when M.C.L. § 600.6013 did not specifically provide for compound interest, as it does now. Judgment interest, unlike pre-complaint interest, has always been purely statutory. *Matich v.. Modern Research Corp.*, 430

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> Mich. 1, 420 N.W.2d 67 (1988). Therefore, the judgment interest statute is in derogation of the common law and must be strictly construed. But pre-complaint interest as an element of damages is *not* in derogation of the common law. The only constraining factors are the common law itself and the need to fully compensate plaintiff. [*Id.*, at 1228.]

Applying *Jaffe, supra,* we conclude that the circuit court erred in ruling that Michigan's usury statute, MCL 438.31, applies to limit plaintiff's claim for pre-complaint interest on the lost use of his money in this legal malpractice action. The circuit court further erred in determining that pre-complaint interest may not be compounded in this case as a matter of law. If plaintiff's proofs at trial establish that defendant was deficient in its representation during the loan transaction, he is entitled to an award of damages sufficient to fully compensate him for his resulting losses. If the proofs establish that a rate in excess of five percent or the compounding of interest is necessary to do so, such an award is not barred as a matter of law.

II -Cross-Appeal in Docket No. 256511

On cross-appeal, defendant contends that the circuit court should have dismissed the portion of plaintiff's first amended complaint that purports to be based on alleged violations of the Michigan Rules of Professional Conduct (MRPC). We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v. Ameribank,* 468 Mich. 557, 561; 664 NW2d 151 (2003). Defendant relies on MRPC 1.0(b), which provides:

> Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules do not, however, give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with an obligation or prohibition imposed by a rule. In a civil or criminal action, the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law.

A violation of the rules cannot "give rise" to a cause of action for enforcement or for damages caused by a failure to comply, as this Court noted in *Watts v. Polaczyk,* 242 Mich.App 600, 607 n1; 619 NW2d 714 (2000). However, it does not follow that the rules are irrelevant for all purposes.

Defendant argues that, pursuant to MRPC 1.0(b), a violation of an ethical rule does not create any presumption of malpractice, and further is inadmissible as evidence or in argument in a legal malpractice case. Defendant cites cases from other jurisdictions and legal treatises in support of its argument. Defendant points out that the prior Code of Professional Responsibility contained no prohibition like that set forth in MRPC 1.0(b), and therefore, that this Court's decisions that a violation of the Code constituted a rebuttable presumption of negligence do not apply to violations of the MRPC. Plaintiff argues that his claim for malpractice is not based on any violation of the ethical rules and does not seek to enforce any rule, both of which are prohibited by MRPC 1.0(b); rather he relies on the third sentence of MRPC 1.0(b)-providing that admissibility of the rules in a civil case shall be determined by the rules of evidence.

*7 We conclude that the circuit court did not err in denying defendant's motion to strike references to the MRPC in plaintiff's complaint or at trial. Certainly, violations of the MRPC cannot form the basis for an action for malpractice; they do not establish any presumption of negligence. However, the MRPC are admissible as evidence in a malpractice action, where they are relevant to the alleged deficient conduct at issue and where their probative value is not outweighed by their prejudicial effect. Plaintiff asserts that the MRPC are relevant to the scope of defendant's duty to plaintiff and as to whether defendant met the applicable standard of care. Defendant does not argue that the prejudicial effect of the rules outweigh their probative value in the instant case. Therefore, we affirm the circuit court's denial of defendant's motion.

III

On cross-appeal, defendant also contends that the circuit court should have dismissed plaintiff's claim for recovery of investigation and litigation related attorney fees paid

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to defendant that were unearned because of defendant's malpractice, as well as fees paid to other attorneys in an attempt to mitigate the damages caused by defendant's malpractice. We agree.

Whether plaintiff is entitled to recover attorney fees and costs incurred in investigation and litigation following the loan transaction is a question of law. This Court reviews questions of law de novo. *Bennett v. Weitz,* 220 Mich.App 295, 299; 559 NW2d 354 (1996).

We agree with defendant that plaintiff is not entitled to recover any attorney fees expended-whether paid to defendant or to others-in investigation and litigation subsequent to the failed loan transaction. To recover such fees "[t]he wrongdoer must be guilty of malicious, fraudulent or similar wrongful conduct, rather than negligence", *Mieras v. DeBona,* 204 Mich.App 703, 709-710; 516 NW2d 154 (1994), rev'd on other grounds, 452 Mich. 278; 550 NW2d 202 (1996),[8] see also *Bonner v. Chicago Title Ins Co,* 194 Mich.App 462, 468-469; 487 NW2d 807 (1992). In the instant case, plaintiff alleges that defendant committed professional negligence in its representation of him during the loan transaction; he has not asserted that defendant's conduct was malicious, fraudulent or otherwise similarly wrongful. Therefore, plaintiff is not entitled to recover attorney fees from prior litigation undertaken to address the results of defendant's alleged malpractice and the circuit court erred in denying defendant's motion in limine in this respect.[9]

8 The defendant in *Mieras, supra,* was alleged to have negligently drafted the decedent's will. The plaintiffs, two of decedent's children, were forced to defend an action brought by another of decedent's children contesting the will; in the attorney negligence action, the plaintiffs alleged that the defendant failed to properly revise the will to effectuate the decedent's intent and that he negligently supervised the execution of the will, leading to the costly will contest. This Court agreed that the defendant owed the plaintiffs a duty as named beneficiaries of the will; however, the Court upheld the trial court's determination that the plaintiffs were not entitled to recover attorney fees incurred in the will contest litigation. This Court explained:

> Generally, awards of costs or attorney fees are not allowed unless expressly authorized by statute or court rule. *State Farm Mutual Automobile Ins Co v Allen,* 50 Mich.App 71, 74; 212 NW2d 821(1973). However, a party may recover as damages the costs, including attorney fees, expended in a prior lawsuit he was forced to defend or prosecute because of a third party's wrongdoing. *Bonner v. Chicago Title Ins Co,* 194 Mich.App 462; 487 NW2d 807 (1992). The wrongdoer must be guilty of malicious, fraudulent or similar wrongful conduct, rather than negligence. *G & D Co v. Durand Milling Co, Inc,* 67 Mich.App 253, 259-260; 240 NW2d 765 (1976).
>
> Plaintiffs have alleged only negligence, not fraud or malice in defendant's execution of his legal services for [the decedent]. As a consequence, their claim for the costs of defending against ... [the] will challenge fails. [*Id.,* at 709-710.]

The defendant in *Mieras* appealed to the Supreme Court, which agreed with this Court that the plaintiffs could bring a tort-based cause of action against the defendant for negligent breach of the standard of care owed them by nature of their third-party beneficiary status, but reversed this Court's reinstatement of the plaintiffs' complaint on the basis that the will fulfilled the intent of the testator as expressed therein.

9 For the sake of clarity, we note that while plaintiff argued below, and argues again on appeal, that pursuant to MCL 600.2912(2), defendant's alleged malpractice is a defense to defendant's counterclaim for unpaid fees and that he is entitled to recoup attorney fees he paid to defendant for services during which the alleged malpractice occurred, defendant has not asserted otherwise and this issue is not before this Court at this time.

IV -Docket No. 261865

In Docket No. 261865, defendant asserts that plaintiff cannot recover attorney fees expended in seeking or obtaining litigation recoveries against other alleged third-party tortfeasors who caused the loss underlying this case, because those fees were not incurred in the avoidance of any loss, but rather to repair past damages, the incurring of the fees was motivated by revenge and personal animosity toward those parties and not any intent to mitigate, and as a matter of law, any recoveries obtained from the third-parties cannot be used to reduce the damages plaintiff may seek to recover from defendant.

***8** Whether costs incurred in litigation against parties other than the defendant constitute "mitigation" expenses

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is a question of law. This Court reviews such questions de novo. *Bennett, supra,* 220 Mich.App 299.

Generally, whether in contract or tort, an injured party "must make every reasonable effort" to minimize the damages they suffer. *Williams v. American Title Ins Co,* 83 Mich.App 686, 697; 269 NW2d 481 (1978); *Bak v. Citizens Ins Co,* 199 Mich.App 730, 736; 503 NW2d 94 (1993). The doctrine of mitigation entitles a defendant to some measure of protection against unnecessary loss suffered by a plaintiff. *Morris v. Clawson Tank Co,* 459 Mich. 256, 265; 587 NW2d 253 (1998).

Plaintiff argues that expenses he incurred in investigating and bringing suit against other participants in the loan transaction were incurred in a reasonable attempt to mitigate his damages resulting from defendants' negligence. However, contrary to this characterization, plaintiff's actions in investigating and bringing suit against other parties involved in the loan transaction were taken to *recover* the portion of his losses attributable to the conduct of those parties and not to *avoid* any further unnecessary loss resulting from defendant's conduct. That is, plaintiff's litigation against other parties did nothing to "minimize the economic harm," to "conserve the economic welfare" of the community, or to protect against any unnecessary loss *arising from defendant's alleged wrongdoing.* Therefore, costs incurred in connection with this litigation do not constitute mitigation expenses and the circuit court erred in not so ruling.

We conclude that the circuit court erred in denying defendant's motion in limine to exclude plaintiff's claim for attorney fees and costs incurred in litigating claims against other alleged tortfeasors involved in the underlying loan transaction. Such expenses were not incurred in mitigating the damages allegedly caused by defendant's conduct, but rather were incurred in attempting to recover from those alleged tortfeasors the portion of plaintiff's damages that were attributable to their alleged wrongdoing.

V

Defendant also contends that the circuit court erred in not granting a set-off for plaintiff's third-party contractual recoveries-as distinguished from the tort recoveries-as such recoveries do not come within the parameters of tort liability statutes.

Whether defendant is entitled to a set-off for contract-based recoveries received by plaintiff is a question of law this Court reviews de novo. *Bennett, supra,* 220 Mich.App 299.

Defendant asks this Court to declare that it is entitled to a set-off of any recoveries obtained by plaintiff on the loan documents themselves; that is, for any "contract-based" or "transaction based" recoveries from other parties connected to the loan transaction. Defendant also asks this Court to determine that certain recoveries were in fact contract based. The former question, which presents an issue of law, is properly before this Court and is ripe for resolution. The circuit court, however, has not decided the latter question, and we conclude that the record is insufficient to allow this Court to address it.

*9 As this Court observed in *Grace v. Grace,* 253 Mich.App 357, 368-369; 655 NW2d 595 (2002):

> Generally, under Michigan law, only one recovery is allowed for an injury. To determine whether a double recovery has occurred, this Court must ascertain what injury is sought to be compensated. Thus, where a recovery is obtained for any injury identical with another in nature, time, and place, that recovery must be deducted from the plaintiff's other award. [Citations omitted.]

In *Grace,* the plaintiff sued her divorce attorney for malpractice. While that case was pending, the plaintiff filed suit against the defendant, her former husband, for fraud, on the basis that the defendant concealed and/or undervalued substantial marital assets before the parties entered into a separation agreement, which included a valuation of the plaintiff's share of the marital estate. The plaintiff settled the case against her attorney and obtained a substantial jury verdict in her favor against the defendant. The trial court granted the defendant a set off against the verdict for the plaintiff's malpractice settlement. This Court affirmed, explaining:

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In the present case, plaintiff sought damages against defendant for fraudulently concealing certain marital assets and for failing to disclose the true value of other disclosed assets. Here, plaintiff's claim arises out of the separation agreement that was later incorporated into the divorce judgment. Likewise, plaintiff's legal malpractice claim against her divorce attorney sought damages for his alleged failure to discover the assets that defendant had concealed and determine the true value of the disclosed assets....

We conclude that plaintiff has sought to recover damages for an injury identical in nature, time, and place against both defendant and her divorce attorney. This is especially so where the legal malpractice action arises out of plaintiff's claim that defendant fraudulently concealed certain marital assets and undervalued marital assets that were disclosed. Therefore, to make plaintiff whole in either case she must receive half the value of the marital estate at the time of the divorce. See, e.g., *Coleman v. Gurwin,* 443 Mich. 59, 63-64; 503 NW2d 435 (1993), quoting *Basic Food Industries, Inc v. Grant,* 107 Mich.App 685, 691; 310 NW2d 26 (1981) (the recovery sought in a legal malpractice case is usually the value of the claim of the suit in the proceeding in which the negligent act occurred if the client was a plaintiff in the action, or the amount of the judgment imposed if the client was a defendant).

Similarly, in *Great Northern Packaging Inc v. General Tire & Rubber Co,* 154 Mich.App 777, 779-780; 399 NW2d 408 (1986), the plaintiff and the defendant entered into a blanket purchase order; thereafter one of the plaintiff's salesman left plaintiff's employ and went to work for a competitor. The competitor then offered to sell the defendant a similar product at a lower price. The plaintiff filed suit against the defendant for breach of contract and unjust enrichment, and against the competitor, alleging unfair competition, tortuous interference with contractual relation and unjust enrichment. The plaintiff ultimately accepted a mediation award against the competitor and obtained a jury verdict in its favor against the defendant. This Court upheld the trial court's allowance for a setoff of the mediation award against the verdict, explaining that a set off was appropriate to the extent that the mediation award duplicated the verdict. *Id.,* at 783-784.

*10 We conclude that, here as in *Grace,* any transaction-based recoveries plaintiff has obtained from other parties-such as from a guarantor of Croxton and Trench's debt, for example-are properly set off against any verdict or judgment ultimately obtained against defendant in this action, because they compensate plaintiff for an injury identical in nature, time and place-the loss of plaintiff's funds as a result of Croxton and Trench's default on the underlying loan.

Plaintiff argues that the Legislature eliminated the right to set-off for *any* recovery when it amended MCL 600.2925d [10] to eliminate set-offs and to remove any reference to tortfeasors therein, replacing all such references with the generic term "person", thereby broadening the coverage of the provision to prohibit any and all set-offs for any and all injuries. We acknowledge that the 1995 amendments to MCL 600.2925d removed references to "tortfeasors," as well as a specific reference to persons "liable in tort." See Effect of Amendment notes, following MCL 600.2925d. [11] However, we note that MCL 600.2925a specifically speaks in terms of persons jointly liable *in tort,* that MCL 600.2925b addresses determining the pro rata share of liability among joint *tortfeasors,* that MCL 600.2925c addresses the enforcement of contribution among two or more *tortfeasors,* and that MCL 600.2925d addresses the effect of a release, covenant not to sue or covenant not to enforce a judgment, given in good faith, to "1 of 2 or more persons for the same injury or the same wrongful death." Thus, considered in context, MCL 600.2925d does not operate to prevent the set off of transaction-based recoveries of the underlying debt. Such recoveries are not setoffs in the sense that they compensate for the loss. Rather, they diminish the actual amount of damages. We conclude that any monies recovered by plaintiff based on documents prepared by defendant in the underlying loan transaction, must be credited against any damages that might be awarded against defendant in this malpractice action.

10 MCL 600.2925d provides:

> If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons for the same injury or the same wrongful death, both of the following apply:
>
> (a) The release or covenant does not discharge 1 or more of the other persons form liability for the injury or wrongful death unless its terms so provide.

(b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.

11 Before 1995, MCL 600.2925d provided:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 or 2 or more persons liable in tort for the same injury or the same wrongful death

(a) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide.

(b) It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.

(c) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

In Docket No. 256511, we reverse the portion of the circuit court's order limiting plaintiff's claim for pre-complaint interest to five percent simple interest; affirm the circuit court's denial of defendant's motion to dismiss the portion of plaintiff's complaint that refers to the MRPC, and reverse the circuit court's denial of defendant's motion to dismiss plaintiff's claim for recovery of attorney fees and costs incurred in post-transaction litigation.

In Docket No. 261865, we reverse the court's order denying defendant's motion in limine which sought to exclude plaintiff's claim for attorney fees and costs incurred in litigating claims against other alleged tortfeasors involved in the underlying loan transaction. We also reverse the circuit court's determination not to grant a set off, as discussed herein.

All Citations

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Exhibit 9

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1998 WL 1991802
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Larry **FARLEY** and Barbara **Farley**,
Plaintiffs-Appellees/Cross-Appellants,
v.
Louis **REICHLIN**, Defendant-Appellant/Cross-Appellee,
and
Eric JACOBSON, Defendant.

No. 195162.
|
April 3, 1998.

Before: MARKMAN, P.J., and MURPHY and NEFF, JJ.

UNPUBLISHED

PER CURIAM.

***1** Defendant Louis **Reichlin** appeals as of right and plaintiffs, Larry and Barbara **Farley**, cross-appeal from a net judgment of $24,048 on Larry **Farley's** slander claim. We affirm the judgment but remand for further findings regarding the proper set-off of damages.

Plaintiffs resided on a 165-acre parcel of land that was also used for two business operations. One operation was a calendar assembly and distribution business that was operated out of a building constructed on the parcel for this purpose. The other operation involved two pits from which a contractor excavated sand. One pit was also refilled by the contractor by dumping items such as stumps and concrete. Plaintiffs filed the instant action against two individuals, Louis **Reichlin** and Eric Jacobson, who allegedly interfered with these business operations, based on theories of slander and defamation, intentional infliction of emotional distress, intentional interference with business expectancy, and civil conspiracy. An additional count of civil trespass was alleged only against **Reichlin**. Before the jury trial commenced, plaintiffs settled with Jacobson. Further, all claims against **Reichlin** (hereinafter "defendant") were dismissed before or during trial, with the exception of Larry **Farley's** (hereinafter "plaintiff") slander and intentional infliction of emotional distress claims.

At trial, plaintiff presented evidence of several allegedly false statements made by defendant, a property owner residing near plaintiff, to other property owners and government officials. First, in December 1992, defendant told the county zoning administrator that plaintiff's pit activity had only been in operation for approximately seven years. This statement was significant because the county enacted a zoning ordinance in 1970 that would regulate this activity unless it was subject to a grandfather provision for prior, continuous activities preceding the enactment of the zoning ordinance. The administrator testified that he relied on defendant's statement to send a notice of a zoning ordinance violation to plaintiff, but rescinded the notice when he discovered that the pits were in operation before 1970. Defendant appealed the rescission decision to the county zoning board of appeals, but plaintiff ultimately prevailed.

Second, plaintiff presented evidence that some of defendant's allegedly false statements concerning the pit operations caused the DNR to investigate the items being dumped into the pit. During the DNR investigation, some of defendant's statements were proven true when items such as stumps, brush, concrete and asphalt were observed in the pit. The DNR determined that these inert items could be dumped in the pit, but that the contractor using the pit was required to obtain a "designation of inertness" for them under the DNR rules then in effect. Other statements made by defendant could not be verified by the DNR (*i.e.,* that pipes were dumped). Plaintiff's slander claim was based in part on these unverified statements.

***2** Third, plaintiff presented evidence of alleged slander stemming from another 1993 DNR investigation, initiated by Jacobson, regarding whether chemicals used in plaintiff's calendar business were causing pollution or contamination. The DNR took ground samples in April 1993 as part of this investigation, but the test results revealed only nonhazardous trace amounts of chemicals. These test results were first released by the DNR during June 1993, but the test results were available for some time before their release. [1] At trial in the case at bar, plaintiff relied on statements made by defendant during the time that the DNR test results were being released as support for his theory that defendant made false statements about the existence of a pollution or contamination

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hazard. Plaintiff also claimed that defendant attempted to use this information to reopen the previously decided issue of whether his calendar business could continue on the property as a home occupation.

1 As a result of the DNR investigation, plaintiff later pleaded no contest to a criminal charge of discharging without a permit, albeit involving no harm to the environment.

The jury, by special verdict, awarded damages of $18,000 to plaintiff for the slander claim. No damages were awarded for the count of intentional infliction of emotional distress because the jury did not find that defendant actually and proximately caused plaintiff severe or extreme emotional distress. The trial court added statutory interest, taxable costs pursuant to MCR 2.625, and attorney fees pursuant to MCR 2.405 in the amount of $24,048. Therefore, the original judgment was $42,048. However, the court subsequently ordered a set-off, or reduction of the jury award, because plaintiff had already received a settlement award from Jacobson covering many of the same claims. The trial court determined that the amount of the reduction was to be equal to the total damages awarded by the jury ($18,000), leaving a net judgment for plaintiff of $24,048.

On appeal, defendant first contends that the trial court improperly denied his motion for a directed verdict on the issue of qualified privilege. The motion was directed both at the allegations of slander involving defendant's statements to the DNR regarding the contents of the pit, and at defendant's statements to the county zoning administrator regarding the number of years that the pits had been operating. Defendant argued that, even assuming that inaccurate statements were made, there was no actionable slander since the statements were protected by a qualified privilege. In denying the motion, the trial court concluded that the qualified privilege applied, but that the issue should go to the jury because there was evidence falling both inside and outside the scope of the privilege.

When reviewing a motion for directed verdict, this Court looks at the evidence and legitimate inferences drawn from the evidence in the light most favorable to the nonmoving party. *Mason v. Royal Dequindre, Inc,* 455 Mich. 391, 397; 566 NW2d 199 (1997). Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ. *Brisboy v. Fibreboard Corp,* 429 Mich. 540, 549; 418 NW2d 650 (1988). The initial determination of whether a privilege exists is one of law for the court. *Swenson-Davis v. Martel,* 135 Mich.App 632, 636; 354 NW2d 288 (1984).

***3** The court must examine the external circumstances surrounding the publication to determine if they give rise to a privileged communication. *Lawrence v. Fox,* 357 Mich. 134, 139-140; 97 NW2d 719 (1959). However, if facts are in dispute, either the court will decide, based on facts found by the jury, whether the statement is privileged, or will instruct the jury as to what facts they must find in order to hold the statement privileged. *Id.* at 141. The elements of a qualified privilege are (1) good faith, (2) a legitimate interest to be upheld, (3) a statement limited in its scope to this legitimate interest, (4) a proper occasion for communicating the statement, and (5) communication of the statement in a proper manner and to proper parties only. *Prysak v. R L Polk Co,* 193 Mich.App 1, 15; 483 NW2d 629 (1992). Defendant bears the burden of proof to establish the existence of a privileged occasion for the statement, *Lawrence, supra* at 141, but a plaintiff may then overcome the qualified privilege by showing that the statement was made with actual malice, i.e., with knowledge of its falsity or reckless disregard of the truth. *Prysak, supra* at 15.

On appeal, defendant presents a somewhat confusing argument that fails to adequately address the specific grounds of the motion for direct verdict, inappropriately relies on evidence introduced by the defense after the motion for directed verdict was denied, and inadequately distinguishes the question of whether he established a privileged occasion for the statements from the plaintiff's burden to establish actual malice. We also note that defendant's argument incorrectly suggests that good faith and actual malice are separate and distinct issues. As was noted in *Lawrence, supra* at 141-42, a statement made with actual malice establishes a lack of good faith.

While we, thus, find serious deficiencies in defendant's argument, we will briefly address defendant's claim. First, we believe that it would have been better for the trial court to address each party's burden of proof separately in deciding if a directed verdict was proper based on the proofs introduced up to the time that the trial court decided the motion. Second, while we believe that it may have been appropriate for the trial court to decide, as a matter of law, whether the proofs were sufficient to find that the surrounding circumstances showed the existence of a privileged occasion, any possible error

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warrants no relief because defendant's liability was based on actual malice. Hence, the dispositive issue is whether plaintiff established a factual question of actual malice. Viewing plaintiff's proofs and the legitimate inferences that may be drawn therefrom in the light most favorable to plaintiff, we hold that reasonable minds could differ on whether defendant made the alleged defamatory statements with actual malice. [2] Accordingly, defendant was not entitled to a directed verdict based on a qualified privilege.

2 The elements of a claim for defamation are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, (3) either actionability of the statements irrespective of special harm, or the existence of special harm caused by the publication. *Gonyea v Motor Parts Federal Credit Union,* 192 Mich.App 74, 77; 480 NW2d 297 (1991). Because this appeal is limited to the availability of the qualified privilege, we have assumed for purposes of our review that plaintiff has met his burden of proving false and defamatory statements.

***4** Defendant also argues in his first issue on appeal that the trial court improperly denied his motion for judgment notwithstanding the verdict (JNOV) on the issue of qualified privilege and that the issue of qualified privilege should not have been submitted to the jury. Defendant failed to preserve these arguments because they were not set forth in the statement of the issue presented. *Meagher v. McNeely & Lincoln, Inc,* 212 Mich.App 154, 156; 536 NW2d 851 (1995). The standard of review for a JNOV requires a review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Phinney v. Perlmutter,* 222 Mich.App 513, 524; 564 NW2d 532 (1997).

Where special verdict forms were used, error may be localized so that the sound portions of the verdict are saved. *Sudul v. Hamtramck,* 221 Mich.App 455, 458-459; 562 NW2d 478 (1997). In the case at bar, both special verdict forms used for slander required a finding of actual malice, that is, that plaintiff proved that "defendant had knowledge that the statement(s) was false or that the defendant acted with reckless disregard as to whether the statement(s) was false." *Prysak, supra* at 15. Since the jury found actual malice on both forms and a plaintiff overcomes a qualified privilege by showing actual malice, *Id.* at 15, the separate question presented to the jury in one form regarding whether defendant had a qualified privilege was not a controlling issue in the case. Thus, even if defendant had properly preserved this question, manifest injustice would not result if we declined to consider it. *Bieszck v Avis Rent-A-Car System, Inc,* 224 Mich.App 295, 302; 568 NW2d 401 (1997), lv pending.

Defendant next contends that the trial court erred in ruling that plaintiff's claim was not barred by the prior release made during the Jacobson settlement. The scope of a release is governed by the intent of the parties as it is expressed in the release. *Wyrembelski v. St Clair Shores,* 218 Mich.App 125, 127; 553 NW2d 651 (1996). If the terms of the release are unambiguous, the legal effect of the language is a question of law. *Id.* at 127. Here, the release executed by both plaintiffs discharges "Tuscarora Township, its officers, boards and commissions, its agents, employees ...." By way of illustration, the release also states that it is "intended to release ... any and all liability ... which arises or may arise in connection with any legislative or administrative determination concerning the parcels ... owned by the **Farleys**." The release, in unambiguous language, plainly does not apply to defendant, a former township officer who has continued to sit on annual property tax review boards, because he was sued in his individual capacity, rather than in the capacity of any past or present position that he served in the township. Further evidence that the release did not apply to defendant is found in the provision of the release that "authorizes a dismissal with prejudice and without cost of the litigation currently pending in the Cheboygan Circuit Court, Case NO. 94-3834-NZ, only as to Eric A. Jacobson." Therefore, the trial court did not err in holding that the release did not apply to defendant.

***5** Although defendant argued at the trial court motion hearing that the release takes away the statutory right to contribution under M.C.L. § 600.2911(4): MSA 27A.2911(4), we decline to consider his claim on appeal that this statutory right was usurped by plaintiff in part because this issue is given, at best, cursory treatment in his brief. *Community Nat'l Bank v Michigan Basic Property Ins Ass'n,* 159 Mich.App 510, 520-521; 407 NW2d 31 (1987). We also note that this statutory provision expressly pertains to "libel." Under M.C.L. § 600.2911(8); MSA 27A.2911(8), libel is defined as including "defamation by a radio or television broadcast."

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However, defendant cites no authority for the proposition that the libel provision of M.C.L. § 600.2911(4); MSA 27A.2911(4) applies to plaintiff's slander claim or that this statutory provision has any relevancy to the issue of how the release should be construed. Hence, we decline to consider this issue.

Defendant next contends that the trial court erred in denying a directed verdict and JNOV on the issue of damages for the slander claim because the only evidence of damages was plaintiff's own testimony. When a plaintiff proves actual malice, the plaintiff is entitled to recover economic damages, as well as actual damages to, among other things, reputation or feelings. *Glazer v. Lamkin,* 201 Mich.App 432, 437; 506 NW2d 570 (1993); MCL 600.2911; MSA 27A.2911. However, as a theory of causation, damages must be based on reasonable inferences, and not conjecture. *Poledna v. Bendix Aviation Corp,* 360 Mich. 129, 138; 103 NW2d 789 (1960). While damages must be proven with reasonable certainty, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. *Hoffmann v. Auto Club Ins,* 211 Mich.App 55, 108; 535 NW2d 529 (1995); *Bonnelli v. Volkswagon,* 166 Mich.App 483, 511; 421 NW2d 213 (1988).

In the case at bar, defendant sought a partial directed verdict on damages with regard to the attorney fees for the slander claim, while his motion for JNOV claimed that plaintiff failed to prove any cognizable damages for slander. Viewed in the light most favorable to plaintiff, we hold that plaintiff's testimony established an evidentiary basis for the jury to determine damages, with reasonable certainty, arising from defendant's claimed slander. Although plaintiff did not introduce documentary evidence on the attorney fees, his testimony was sufficient for the jury to evaluate the reasons for and amount of attorney fees. ***Cf***. *Zeeland Farm Services, Inc v JBL Enterprises, Inc,* 219 Mich.App 190, 196-198; 555 NW2d 733 (1996). Hence, the trial court did not err in denying defendant's motion for a partial directed verdict on attorney fees and the subsequent motion for JNOV on all components of damages. *Phinney, supra* at 524-25.

Defendant next contends that the trial court should have granted his motions for a mistrial and new trial or, in the alternative, ordered remittitur. We review a trial court's grant or denial of a new trial for an abuse of discretion. *Phillips v Mazda Motor Mfg (USA) Corp,* 204 Mich.App 401, 411; 516 NW2d 502 (1994). The proper remedy to correct a defective verdict is to either reinstruct the jury or order a new trial. *Beasley v. Washington,* 169 Mich.App 650, 658; 427 NW2d 177 (1988). Since the trial court was able to determine the jury's intent on damages by submitting to it a supplemental special verdict form, we find that the trial court did not abuse its discretion in denying a new trial. Further, we find no basis for defendant's argument that remittitur would be appropriate.

***6** Finally, we consider plaintiff's claim that the trial court erred in ordering a set-off of $18,000 against the jury award to account for the settlement with Jacobson. This question of law regarding the application of M.C.L. § 600.2925d(b); MSA 27A.2925(4)(b) to the release executed between plaintiffs and Jacobson for their settlement is considered de novo on appeal. See *In re Lafayette Towers,* 200 Mich.App 269, 273; 503 NW2d 740 (1993).

At the time that the release was executed, M.C.L. § 600.2925d; MSA 27A .2925(4) stated:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons *liable in tort for the same injury* or the same wrongful death:
>
> (a) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide.
>
> *(b) It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.*
>
> (c) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor. [Emphasis added .][3]

[3] As amended by 1995 PA 161, effective March 28, 1996, M.C.L. § 600.2925d; MSA 27A.2925(4) removed the clause for reducing a claim against the other tortfeasor. This statute now provides:

> If a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 or

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> 2 or more persons for the same injury or the same wrongful death, both of the following apply:
> (a) The release or covenant does not discharge 1 or more of the other persons from liability for the injury or wrongful death unless its terms so provide.
> (b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.

The focus of this provision is on the nature of the injury and not the identity of the plaintiff. See *O'Dowd v General Motors Corporation Corp,* 419 Mich. 597, 606; 358 NW2d 553 (1984). In the case at bar, the nature of the injury included economic and non-economic damages claimed by both plaintiffs. Further, the plaintiffs' complaint contained allegations of a concerted action between defendant and Jacobson and, as the trial court observed, the evidence at trial on some statements made by defendant could be deemed "joint in the sense that it is the actions of two parties who have decided to pursue that particular ending with regard to plaintiff."

Under these circumstances, the trial court correctly found that defendant was entitled to a set-off because both the amount stipulated in Jacobson's release ($30,000) and the jury's finding that defendant was liable for $18,000 can be viewed as encompassing liability for the same injury. However, the trial court incorrectly ordered a set-off of $18,000 without conducting an evidentiary hearing to determine how much of the settlement money should be allocated to alleged injuries other than those covered by Larry **Farley's** slander claim against defendant, *e.g.,* non-economic damages claimed by plaintiff Barbara **Farley**, since the $30,000 amount specified in the settlement release was not allocated between injuries; and to determine the correct allocation of the jury award, if any, between "joint" statements and statements due solely to defendant. For this reason, we find it necessary to remand this case to the trial court for further proceedings to determine the amount of the settlement and jury verdict that constitute liability in tort for the same injury as required by M.C.L. § 600.2925d(b); MSA 27A.2925(4)(b).

***7** Affirmed as to the judgment but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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