STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

PETTER INVESTMENT CO. d/b/a RIVEER ENVIRONMENTAL; MATTHEW PETTER; and DOUGLAS PETTER,

Plaintiffs,

vs.

PRICE HENEVELD COOPER DEWITT & LITTON, LLP; and EUGENE J. RATH,

Defendants/Counter-Plaintiffs,

vs.

PETTER INVESTMENT CO.,

Counter-Defendant.
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Case No. 11-03293-NM

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING DEFENDANTS' MOTION *IN LIMINE* TO BAR PLAINTIFFS' DEMAND FOR ATTORNEY FEES

In an effort to foreclose what the plaintiffs view as a simple extension of the proximate-cause concept, but what the Court regards as a moral hazard,[1] Defendants Price Heneveld Cooper DeWitt & Litton, LLP ("Price Heneveld") and Eugene Rath have moved *in limine* to restrict damages in the form of attorney fees resulting from the defendants' alleged legal malpractice. The Court concludes that Plaintiffs Petter Investment Co., Matthew Petter, and Douglas Petter (collectively, "Petter") may not seek as damages in this legal-malpractice case any attorney fees beyond those incurred by Petter in the underlying litigation that was resolved in November of 2009.

[1] As Judge Frank Easterbrook put it, the term "moral hazard" refers to "the tendency to take additional risks (or run up extra costs) if someone else pays the tab." Medcom Holding Co v Baxter Travenol Laboratories, Inc, 200 F3d 518, 521 (7th Cir 1999).

The Court offered a comprehensive explanation of this case in an Opinion and Order Denying Defendants' Motion for Summary Disposition Under MCR 2.116(C)(10) issued September 4, 2015, so the Court shall simply present a thumbnail sketch of the parties' dispute now. In September 2007, Plaintiff Petter's soon-to-be archnemesis, Hydro Engineering, sent Petter a certified letter accusing Petter of infringing upon Hydro Engineering's patents. Petter retained Defendant Price Heneveld, which initiated a preemptive suit seeking declaratory relief against Hydro Engineering in the United States District Court for the Western District of Michigan. Four weeks after filing that lawsuit, Price Heneveld furnished a 21-page opinion letter to Petter outlining the competing patent claims of Petter and Hydro Engineering. In a nutshell, Price Heneveld's letter advised Petter that it could continue production without fear of patent infringement. That conclusion proved ill-advised when the United States District Court for the Western District of Michigan issued a string of rulings that cut the legs out from under Petter's position in the litigation.

On April 17, 2009, in the wake of several adverse rulings in the federal patent case, Plaintiff Petter retained Honigman Miller Schwartz and Cohn LLP ("Honigman") to replace Defendant Price Heneveld as counsel in the United States District Court of the Western District of Michigan. After suffering more fatal blows in the federal case, Petter – acting upon the legal advice of Honigman – settled the dispute with Hydro Engineering on unfavorable terms in November 2009. But resolution of that lawsuit did not bring peace and stability. Instead, it simply created a quiescent period, which was followed by a series of lawsuits between Petter and Hydro Engineering. Indeed, Petter is still slugging it out with Hydro Engineering in federal court in Utah, and if history is a reliable guide, the two companies may very well be locked in a death match in one court or another from now until the end of time.

The Court's denial of summary disposition in the instant case dictates that this lawsuit must be resolved at trial. In the course of preparing for that eventuality, Plaintiff Petter let the defendants know that Petter would seek as damages all of the attorney fees incurred throughout the entire course of Petter's litigation against Hydro Engineering. That disclosure prompted the defendants to move *in limine* to restrict Petter's request for damages to the attorney fees associated with the action in the United States District Court for the Western District of Michigan in which the defendants served as counsel for Petter. The parties have supplied the Court with two rounds of briefs presenting the issue of available damages in remarkable detail. In addition, the Court has heard two rounds of arguments on the issue. Now, the Court must determine the extent to which Petter can pursue damages in the form of attorney fees that it has paid in its legal battles with Hydro Engineering.

In a legal-malpractice action, "the attorney's liability, as in other negligence cases, is for all damages directly and proximately caused by the attorney's negligence." Basic Food Industries, Inc v Grant, 107 Mich App 685, 693 (1981). Therefore, if Plaintiff Petter can establish the elements of legal malpractice against Defendants Price Heneveld and Rath, Petter can recover the attorney fees it incurred as "a legal and natural consequence of defendants' negligence." Gore v Rains & Block, 189 Mich App 729, 741 (1991). But Petter's "legal malpractice claim must fail" to the extent that "they cannot prove their alleged damages were caused by defendant[s]" Price Heneveld and Rath. McCluskey v Womack, 188 Mich App 465, 474 (1991). With these principles in mind, the Court must turn to the dispute about the damages available to Petter.

The record contains sufficient evidence to enable Plaintiff Petter to pursue all of the attorney fees they paid to Honigman to litigate and settle the patent dispute in the United States District Court for the Western District of Michigan, which the parties have dubbed "Petter I." Indeed, neither of

the defendants contests that proposition in their motion *in limine*. But both defendants strenuously object to Petter's attempt to recover attorney fees expended in a subsequent lawsuit filed by Petter in 2010 in the United States District Court for the Western District of Michigan, which the parties have called "Petter II." And the defendants are apoplectic about Petter's demand for attorney fees they have incurred – and continue to incur – in a consolidated collection of lawsuits still taking place in the United States District Court for the District of Utah, which the parties describe as "Petter III." The stakes are high in this *in limine* contest over damages. The costs incurred in Petter I amount to more than $700,000, whereas the attorney fees from Petter I, II, and III in the aggregate already have surpassed $5 million, and those fees are still growing by the day.[2]

After Honigman replaced Defendants Price Heneveld and Rath in Petter I, that case dragged on for several months and then ended with a settlement memorialized in an agreement "entered into this 2nd day of November, 2009 by and between Petter" and Hydro Engineering. See Exhibit B to Defendants' Brief in Support of Motion *in Limine* ("Settlement Agreement"). By its express terms, that settlement agreement resolved all claims between Petter and Hydro Engineering, put in place a permanent injunction, and terminated the action in the United States District Court for the Western District of Michigan. See id. Additionally, the settlement agreement barred Petter from contesting "the validity or enforceability of any of the Hydro patents in suit[.]" Id. ("Settlement Agreement," § 9). By all accounts, Honigman negotiated that agreement on behalf of its client, Petter. Therefore, Petter I seemingly ended, for once and for all, the dispute between Petter and Hydro Engineering in which Price Heneveld and Rath initially played the role of counsel.

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[2] The mounting litigation costs incurred by Petter call to mind Will Rogers's suggestion that, "[w]hen you find yourself in a hole, stop digging." To be sure, Hydro Engineering has initiated some of the litigation, but Petter has started its fair share of the legal battles.

Defendants Price Heneveld and Rath argue persuasively that the settlement agreement, which went into effect on November 2, 2009, broke the causal chain between their alleged malpractice and Plaintiff Petter's subsequent damages in the form of attorney fees. The Court wholeheartedly agrees. As our Court of Appeals has explained: "Proximate cause is usually a factual issue to be decided by the trier of fact, but if the facts bearing on proximate cause are not disputed, and if reasonable minds could not differ, the issue is one of law for the court." Dawe v Dr Reuven Bar-Levav & Associates, PC, 289 Mich App 380, 393 (2010). This is such a case, at least with respect to the attorney fees and costs incurred by Petter after November 2, 2009. Because Petter and Honigman – as opposed to the defendants – negotiated the terms of the settlement agreement with Hydro Engineering, any further litigation between Petter and Hydro Engineering resulted either from deficiencies in the settlement agreement for which Honigman and Petter would be responsible or from fresh grievances of Petter that could not possibly be attributable to Defendants Price Heneveld and Rath. Therefore, the Court concludes that the defendants could not possibly be the cause in fact of any damages in the form of attorney fees and other litigation costs incurred by Petter after November 2, 2009.[3] See McCluskey, 188 Mich App at 474.

Plaintiff Petter contends that, had it not been for Defendants Price Heneveld and Rath, Petter would have gone about their business making and selling car-wash racks without interference from Hydro Engineering and without the crippling legal expenses they have incurred. That is, Petter takes

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[3] As our Supreme Court has observed, "proving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as 'proximate cause.'" Skinner v Square D Co, 445 Mich 153, 162 (1994). "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." See id. at 163. "A plaintiff must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue." Id. Thus, the Court need not consider legal cause to resolve the motion *in limine*.

the position that sound legal advice from the defendants in the embryonic stage of Petter's dispute with Hydro Engineering would have brought Petter's products into conformity with the limitations imposed by Hydro Engineering's patents, thereby dispensing with the need for any litigation against Hydro Engineering. The Court explained in its opinion issued on September 4, 2015, why Petter's reasoning gets its legal-malpractice claim to the jury insofar as damages resulting from Hydro I are concerned. But the Court's opinion did not afford Petter *carte blanche* authority to litigate against Hydro Engineering forevermore and pass on its attorney-fee bills from such misadventures to Price Heneveld and Rath. The decisions from the United States District Court for the Western District of Michigan in Petter I left no doubt that the defendants had erred in their analysis of the breadth of the Hydro Engineering patents. But Petter extricated itself from that legal mess by settling Petter I and, with the assistance of subsequent counsel, redesigning its wash racks in light of the federal court's rulings. To lay the legal fallout from Petter's redesign efforts at the feet of the defendants stretches the concept of proximate cause beyond the breaking point.[4]

If Plaintiff Petter suffered damages in the form of attorney fees incurred in litigation after the settlement agreement with Hydro Engineering went into effect on November 2, 2009, those damages must be attributed to the attorneys who negotiated the settlement agreement or advised Petter about redesigning its products. To contest the efficacy of the settlement agreement does nothing to support

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[4] In some strained sense, every single adverse consequence visited upon Plaintiff Petter might be traced to the defendants' flawed legal advice to Petter if Hydro Engineering became emboldened by its success in the United States District Court for the Western District of Michigan, and thereafter chose to pursue Petter to the ends of the earth. But the comprehensive settlement agreement, which Petter and Hydro Engineering employed to resolve Petter I, belies that contention. At the end of the day, Petter's argument strikes the Court as similar to Benjamin Franklin's observation: "For the want of a nail the shoe was lost, for the want of a shoe the horse was lost, for the want of a horse the rider was lost, for the want of a rider the battle was lost, for the want of a battle the kingdom was lost, and all for the want of a horseshoe-nail." Proximate-cause analysis, however, does not work that way.

Petter's claim for damages arising after the agreement went into effect. As a matter of law and logic, all attorney fees incurred by Petter after November 2, 2009, cannot possibly be the responsibility of Defendants Price Heneveld and Rath. Thus, the Court must grant the defendants' motion *in limine*, and thereby restrict Petter's damages in the form of attorney fees to those fees incurred either before or in connection with the settlement that went into effect on November 2, 2009.

IT IS SO ORDERED.

Dated: July 20, 2016

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge