

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ANTHONY F. DELUCA,

Plaintiff-Appellee,

v

JOHN W. JEHLE and JOHN W. JEHLE, P.C.,

Defendants-Appellants.

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UNPUBLISHED

March 27, 2007

No. 266073

Oakland Circuit Court

LC No. 2003-050940-NM

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

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<sup>1</sup>—the attorney who represented the corporation and who also had done private work for plaintiff and his wife—violated his fiduciary duty to plaintiff.

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.

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<sup>1</sup> Given the relationship between defendants, we will employ the singular “defendant” throughout this opinion.

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.<sup>2</sup> 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).

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

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.

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<sup>2</sup> 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.

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.

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 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.

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.

/s/ Kathleen Jansen  
/s/ Janet T. Neff  
/s/ Joel P. Hoekstra