STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER P. AIELLO, P.C.,

Plaintiff/Counterdefendant-Appellant,

v

CHRISTINE LYNN MORRISON,

Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee,

and

CHRISTOPHER P. AIELLO, Individually,

Third-Party Defendant/Appellant.

UNPUBLISHED
September 16, 2003

No. 238014
Oakland Circuit Court
LC No. 00-020759-CK

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

PER CURIAM.

Plaintiff Christopher P. Aiello, P.C. [hereinafter "Aiello PC"] and third-party defendant Christopher Aiello [hereinafter "Aiello"], individually, appeal as of right the circuit court order granting judgment notwithstanding the verdict [hereinafter "JNOV"] to defendant/counterplaintiff/third-party plaintiff Christine Morrison [hereinafter "defendant"]. We affirm in part, reverse in part, and remand for reinstatement of the jury verdict.

This case arose when plaintiff Aiello PC sued defendant for attorney fees incurred for plaintiff's services during defendant's divorce action following her two-month marriage to Edward Hannaford. The Macomb County divorce action, which involved "a high degree of acrimony, dislike and disrespect between the two parties," resulted in entry of an annulment in August 1997, although related proceedings continue to this day. Defendant responded to Aiello PC's contract action by filing a counter suit for legal malpractice against Aiello. Aiello represented defendant between February 1997 and April 1998, and he was one of at least eight attorneys to represent her during the divorce proceedings.

Following a jury trial, judgment was entered in favor of Aiello and Aiello PC. The jury found that defendant had a balance due to Aiello PC of $2,035.02, that Aiello was held to the standard of ability ordinarily possessed by members of the bar, that Aiello had not acted in a

manner contrary to the requisite standard, that Aiello had good cause to withdraw his representation before the end of the divorce action, and that Aiello's fee was reasonable. The jury verdict was reversed by the subsequent JNOV entered by the circuit court.

First, Aiello and Aiello PC argue that the trial court erred in granting defendant's motion for JNOV. We agree. The appellate court reviews de novo "the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion [for directed verdict or judgment notwithstanding the verdict] be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). See also *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence fails to establish a claim as a matter of law is JNOV appropriate. *Forge, supra*; *Chiles v Machine Shop, Inc*, 238 Mich App 462, 469; 606 NW2d 398 (1999). To establish a claim of legal malpractice, the plaintiff "must prove professional negligence, i.e., that counsel failed to exercise reasonable skill, care, discretion, and judgment in the conduct and management of the underlying case. The plaintiff also must establish that, but for the negligence, the outcome of the case would have been favorable to the plaintiff." *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996).

The standard for deciding a directed verdict or a JNOV are the same. *Wilkinson, supra* at 391; *Forge, supra* at 204. "Judgment notwithstanding the verdict is proper only when the movant would have been entitled to a directed verdict." *Farm Bureau Ins v Sears, Roebuck & Co*, 99 Mich App 763, 767; 298 NW2d 634 (1980). "If the trial court could not have directed a verdict for the defendant before submission of the case to the jury, he cannot direct that judgment notwithstanding the jury's verdict." *Hes v Haviland Products Co*, 6 Mich App 163, 173-174; 148 NW2d 509 (1967).

Here, the trial court denied a motion for directed verdict and then granted JNOV on defendant's claims of malpractice. A core issue at trial involved whether defendant and Hannaford entered into a new agreement and consented to modification of the settlement they previously placed on the record. Viewing the evidence in a light most favorable to Aiello, the jury was entitled to find that defendant changed her mind after the settlement was placed on the record and that she and Hannaford reached a new agreement regarding parenting time. *Wilkinson, supra* at 391. The evidence showed there had been other occasions when defendant stated an agreement on the record and then changed her mind and refused to sign the judgment. Although defendant argues on appeal that she would never have given up "precious" parenting time with her child, there was evidence that she did not always place a high value on parenting time. For example, defendant did not take the child for visitation in the summer of 1998 and again in 1999. Defendant failed to take part in court-ordered counseling, and did not attend a hearing to reinstate her parenting time. While defendant raises arguments on appeal concerning the differences in parenting time between the settlement record and the final judgment, she did not challenge the September 8, 1997, judgment until October 2000, after Aiello PC filed this 1999 action for payment of her overdue bill, at which time defendant counter-sued for malpractice. Although defendant asserts it is ludicrous to think she could have reached an amicable agreement with Hannaford, this was essentially a credibility contest, which the jury decided in favor of Aiello/Aiello PC. The evidence supports the jury verdict that Aiello used the

requisite skill and that defendant was not prejudiced when he acted in conformity with her wishes. *Radtke, supra* at 424.

As to the cancelled March 9, 1998, evidentiary hearing, regarding the referee recommendation on child support, the record shows that child support was established after Aiello's representation ceased, in July 1998, and was modified again by motion of Aiello's successor attorney in May 1999. There was a hearing, a year later, as to why defendant was not paying the requisite child support, and her next attorney did not request a hearing, but stipulated to entry of an order. There is no evidence that defendant did not owe the child support recommended by the Friend of the Court, and the question of support remains modifiable if defendant is ever able to establish that application of the child support formula was unjust or inappropriate. MCL 522.17; MCL 552.605(2); *Ghidotti v Barber*, 459 Mich 189, 198; 586 N.W2d 883 (1998). In short, there is no evidence that the outcome of defendant Morrison's support obligation would have been different but for Aiello's actions. *Radtke, supra.* Rather, the evidence supported the jury verdict that there was no legal malpractice. As such, JNOV was improperly granted. *Wilkinson, supra* at 391.

The trial court also denied defendant's directed verdict motion, but then granted JNOV for defendant on Aiello PC's claim for the past due attorney bill on the grounds that it was not a "correct account stated" and that the fee was not reasonable. As noted previously, JNOV is allowed only if there is insufficient evidence, as a matter of law, to make an issue for the jury. *Hes, supra* at 173-174. Here, defendant signed retainer agreements regarding Aiello's fee structure. There was evidence that defendant was billed for $2,035.02, less a $50 error discovered at trial, but that she actually owed more than $4,000. The jury reviewed the billing records and heard extensive testimony concerning Aiello's representation, including motions he filed and discovery he conducted. There is evidence to support the jury verdict that defendant owed Aiello $2,035.02, and JNOV was improperly granted. *Wilkinson, supra* at 391.

Aiello/Aiello PC also argue that the trial court erred in denying Aiello an award of attorney fees under the case evaluation rule.[1] This issue involves a question of law to be reviewed de novo. *Earth Movers, Inc v Walter Toebe Construction Co*, 251 Mich App 87, 91; 649 NW2d 397 (2002). Following a case evaluation hearing, which recommended an award of $6,000 to defendant, Aiello/Aiello PC submitted a written acceptance and defendant failed to respond. Under MCR 2.403(L)(1), defendant's failure to respond within twenty-eight days was considered a rejection. As a general rule, MCR 2.403(O) "requires the rejecting party to compensate the prevailing party for the 'actual costs' of the portion of the litigation made necessary by the rejection of the [case] evaluation." *McAuley v General Motors Corp*, 457 Mich 513, 520; 578 NW2d 282 (1998), overruled in part on other grounds *Rafferty v Markovitz*, 461

[1] We note that although the parties refer to "mediation sanctions" under MCR 2.403, the current terminology will be used for clarity, as the amendment does not impact the analysis, and because the court rule in effect at the time of rejection was the court rule using the terminology "case evaluation." See *Haliw v Sterling Heights*, ___ Mich App ___; ___ NW2d ___ (Docket No. 237269, issued 8/5/03) slip op p 3 ("In general, this Court applies the version of the rule existing at the time mediation, now case evaluation, was rejected").

Mich 265, 272 n 6; 602 NW2d 367 (1999). It is undisputed that defendant sued both Aiello, individually, and Aiello PC, the law firm. Members of the Aiello PC firm represented Aiello and Aiello PC at trial, and Aiello did some representation himself, although he did not bill for his own time. Aiello asserted that he was charged $90,000, individually, in this case, and he sought attorney fees in the amount of $60,751.51. The trial court noted that it could not "see how Mr. Aiello can disassociate himself from the corporation, from Aiello PC," and denied his request for attorney fees.

"[A] litigant representing himself may not recover attorney fees as an element of costs or damages under either a statute or a court rule because no attorney fees were incurred." *McAuley, supra* at 520. Litigant-attorneys are not permitted to recover compensation for time spent in their own behalf. *Watkins v Manchester*, 220 Mich App 337, 344-345; 559 NW2d 81 (1996). Moreover, MCR 2.117(B)(3)(b), provides that the appearance by an attorney is deemed to be the appearance of every member of the law firm. Therefore, the appearance in this case of Aiello PC for Aiello would include the appearance of Aiello, a member of that firm. Consequently, the trial court did not err in treating the two parties, Aiello and Aiello PC, as pro se litigants and in denying their request for attorney fees.

Affirmed in part, reversed in part, and remanded. The trial court's rejection of Aiello/Aiello PC's request for case evaluation sanctions is affirmed. The trial court's grant of judgment notwithstanding the verdict is reversed and this matter is remanded for reinstatement of the jury verdict. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten F. Kelly