

STATE OF MICHIGAN
COURT OF APPEALS

FREDERICK F. FRITZ and JAMES T.
OTENBAKER,

Plaintiffs-Appellants,

v

RALPH TERRANCE RADER, KRISTEN L.
MURPHY, MICHAEL F. KELLY, RADER,
FISHMAN, GRAUER & McGARRY, PLLC, and
RADER, FISHMAN & GRAUER, PLLC,

Defendants-Appellees,

and

ERIC M. DOBRUSIN,

Not Participating.

UNPUBLISHED
November 30, 2004

No. 250201
Isabella Circuit Court
LC No. 02-001856-NM

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants in this legal malpractice action. We reverse.

Facts and Procedural History

Defendants represented plaintiffs in two breach of contract actions in which plaintiffs sought to recover certain royalty payments from Delfield Company for the sale of Delfield's products containing plaintiffs' inventions. In the first action, plaintiffs alleged that Delfield owed continued payments for the inventions. The parties submitted the case to mediation and both parties accepted the mediation evaluation of \$250,000 for plaintiffs. Delfield paid out the award, but before the trial court entered the order of dismissal, a disagreement arose regarding the scope of the award. Specifically, plaintiffs argued that they accepted the award with the understanding that it covered past damages only, from February 1997 through April 1999, and that the acceptance should not preclude plaintiffs from collecting payments for May 1999 to October 2003, when the final patent expired. In response, Delfield maintained that the mediation

award applied to all monies owed under the contract, past and future. On November 10, 1999, the trial court entered an opinion and order dismissing the case with prejudice under MCR 2.403(M)(1) because both parties agreed to the mediation evaluation.

Plaintiffs then filed a second action involving the same parties and the same contract and asserted that the earlier mediation award did not include their right to future payments under the contract. The trial court denied Delfield's motion for summary disposition under MCR 2.116(C)(7)¹ and granted plaintiff's request for a declaratory judgment, finding that Delfield must continue to make payments for all of the disputed patents until October 2003. Delfield appealed to this Court, and while that appeal was pending plaintiffs filed the present action against defendants for legal malpractice, asserting that defendants negligently destroyed plaintiffs' ability to recover money from Delfield that it owed plaintiffs for the period from May 1999 through October 2003. Plaintiffs alleged that defendants failed to seek declaratory relief for future damages in the prior case and erroneously informed plaintiffs that they could not seek future damages. Defendants moved for summary disposition, arguing that plaintiffs' malpractice suit amounted to nothing more than impermissible "second-guessing" of defendants' professional judgment. On June 2, 2003, the trial court verbally granted summary disposition in favor of defendants on the ground that the attorney judgment rule precluded the malpractice suit. On June 3, 2003, this Court issued its opinion in plaintiffs' second suit against Delfield. This Court reversed and remanded for entry of summary disposition in favor of Delfield, holding that:

Because plaintiffs' breach of contract claims were resolved in the first action, plaintiffs' second action was barred by res judicata and defendant was entitled to judgment as a matter of law. Further, were we to find that plaintiffs failed to assert their right to future payments in the first lawsuit, they clearly could have and should have sought a declaratory judgment in the first case to establish their rights under the contract.

This Court also noted that the dispute about whether the award covered only past damages arose before the judgment was entered, giving plaintiffs the opportunity to avoid having an unsatisfactory judgment entered.

On July 11, 2003, the trial court in the present malpractice action entered an order granting defendants' motion for summary disposition. An order denying reconsideration and relief from judgment was entered on July 21, 2003.

I.

Plaintiffs argue that the trial court erred by dismissing their malpractice action under the attorney judgment rule because defendants' failure to include a declaratory relief claim for future damages in the first lawsuit was such an obvious and serious blunder that it was not protected by the attorney judgment rule. Defendants contend that they made a good-faith judgment, in light

¹ Delfield argued that plaintiffs' claims were barred by res judicata.

of existing precedent at the time they filed the first lawsuit, to not seek future damages because such damages were speculative.

A. Effect of Acceptance of Mediation Evaluation, MCR 2.403(M)(1)

This Court dismissed plaintiffs' second lawsuit against Delfield pursuant to MCR 2.403(M)(1), which provides:

If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered.

In dismissing the second suit, this Court stated that it was compelled to dismiss by *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549; 640 NW2d 256 (2002), in which the Court rejected the plaintiff's attempt to appeal a summary disposition ruling made before the parties accepted a mediation award. Defendants contend in the present case that *CAM* overturned prior authority of this Court under which it was reasonable for defendants to think that they could split plaintiffs' claims against Delfield and accept a mediation award without foreclosing a second action for future damages. However, this Court made clear in *CAM* that "there is no warrant for proceeding in that manner [as defendants did in splitting claims] under the language of the current version of MCR 2.403(M)(1)." *Id.* at 556. That "current version" of the court rule, which the Court held "could not be more clear," *id.* at 57, became effective on March 31, 1990, nearly a decade before defendants in the present case prepared the complaint against Delfield.

CAM addressed the argument, also made by defendants here, that precedent allowed some claims to survive mediation when the plaintiff could show that the claims were excepted from the mediation award. The Court pointed out that the principal case cited for this proposition, *Reddam v Consumer Mortgage Corp*, 182 Mich App 754; 452 NW2d 908 (1990), involved an interpretation of the pre-1990 version of the court rule:

Plaintiff cites numerous decisions of the Court of Appeals as supporting its position that it may except a claim from an action submitted to case evaluation under MCR 2.403. In *Reddam*, the Court of Appeals examined the former, less explicit version, of MCR 2.403, and explained that acceptance of a case evaluation is essentially a consent judgment, but that the parties may show they submitted less than all claims of an action to case evaluation.

* * *

These principles were followed in subsequent Court of Appeals cases that construed the current version of MCR 2.403(M)(1). See *Joan Automotive Industries, Inc v Check*, 214 Mich App 383, 386-390; 543 NW2d 15 (1995), *Bush v Mobil Oil Corp*, 223 Mich App 222, 227; 565 NW2d 921 (1997), and *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 166; 561 NW2d 445 (1997).

These decisions improperly allow a party to make a showing that “less than all issues were submitted” to case evaluation. Allowing the parties involved in the case evaluation process to make such a showing has no basis in the court rule. Even if *Reddam* permitted such an approach under the less detailed language of former MCR 2.403(M), there plainly is no warrant for proceeding in that manner under the language of the current version of MCR 2.403(M)(1).

* * *

As we have explained, this unambiguous language evidences our desire to avoid bifurcation of civil actions submitted to case evaluation. To the extent that *Reddam* and its progeny have been read to suggest that parties may except claims from case evaluation under the current rule, these cases are overruled. If all parties accept the panel's evaluation, the case is over. [*CAM, supra* at 465 Mich 555-557.]

Significantly, the Court cited three cases as applying *Reddam*. But these cases – which all postdated the change in the court rule and predated plaintiffs’ suit against Delfield – suggest that, even before *CAM*, a prudent attorney would not readily rely on the proposition that claims could survive past acceptance of a mediation award. Although *Joan Automotive Industries, Inc v Check*, 214 Mich App 383; 543 NW2d 15 (1995), does mention the possibility, the result in that case was this Court’s *rejection* of a party’s attempt to maintain a claim that had already been through mediation – even though the trial court had explicitly documented that some of the claims in the case were not covered by the mediation in the final judgment. *Id.* at 389. Also, *Joan Automotive* affirms the policy against allowing claims to survive mediation:

Second, defendant’s interpretation would ill comport with the purpose to be accomplished by the mediation court rule, which “is to *expedite* and *simplify* the *final* settlement of *cases*.” To allow the splitting of claims would, necessarily, delay and complicate the resolution of civil actions. Further, the acceptance of a mediation award would not result in the final settlement of a case, because claims that previously had been summarily disposed of would survive mediation. While mediation has always suffered shortcomings and detractors, something this opinion does not purport to allay, its purpose – to promote the final settlement of cases – has always been clear. To accept defendant’s position would result only in the partial settlement of actions, leaving the outstanding claims to wend their way through the courts, a result at odds with the purpose of mediation. [*Id.* at 388-389 (citations omitted).]

Thus, this Court in *Joan Automotive* found that, because the defendant who was seeking to preserve a claim had not obtained a certification *from the court* that all the claims were not submitted to mediation, all the claims present in the case were covered by the mediation and merged into the settlement agreement at the moment when the mediation award was accepted. *Id.* at 388. Without these “necessary steps,” even the trial court’s statements about the claim having survived mediation were actually “not sufficient to resurrect defendant's claim from beyond the pale of mediation.” *Id.* at 389. Therefore, *Joan Automotive* should have suggested to

defendants that, even if it were possible to withhold some claims from mediation after 1990, doing so required the involvement and assent of the court.

The second case cited in *CAM* as applying *Reddam* is *Bush v Mobil Oil Corp*, 223 Mich App 222, 227; 565 NW2d 921 (1997). However, rather than suggesting that parties should expect to have some of their claims survive mediation, *Bush* reaffirms that mediation settlements are presumed to dispose of all the claims in a case, and further, if there is a material issue outstanding – such as whether future damages are included – it is an abuse of discretion to enter judgment on the mediation award:

A mediation award cannot form the basis of a settlement agreement where the evaluation leaves a material issue unresolved. *R N West Construction Co v Barra Corp of America, Inc*, 148 Mich App 115, 118; 384 NW2d 96 (1986).

Plaintiff argues that the mediation evaluation left no issue unresolved. Rather, the question of who would bear the expense of the environmental cleanup had already been settled by the trial court's order for declaratory relief. We disagree. Absent a showing that fewer than all the issues were submitted to mediation, a mediation award covers the entire matter. *Acceptance of the award is a final settlement of the case and disposes of all issues including those on which an appeal is pending at the time of the acceptance. Reddam v Consumer Mortgage Corp*, 182 Mich App 754; 452 NW2d 908 (1990).

Therefore, defendant correctly assumed that the mediation award included all issues, including those pending in this Court. Once the award was clarified, defendant should have been given an opportunity to reject the award. The trial court abused its discretion by entering judgment on the award without giving defendant an opportunity to reject it, once clarified. *To allow a judgment to be entered on a mediation evaluation that does not include all the claims would run counter to the purpose to be accomplished by the rule: to simplify the final settlement of cases. Joan Automotive, supra* at 388.

In conclusion, we reverse the entry of judgment on two grounds: (1) defendant's conditional acceptance of the mediation evaluation should have been treated by the trial court as a rejection; and (2) the mediation evaluation left unresolved a material factual issue between the parties. [*Bush, supra* at 228-229 (emphasis added).]

In tandem, *Joan Automotive* and *Bush* suggest that any party involved in mediation after 1997, at the latest, should have not have expected to be able to accept a mediation award and then argue that it did not cover a highly significant material issue. This Court's finding that the trial court erred in *Bush* served as notice to all concerned that there was no such thing as a "conditional acceptance" of a mediation settlement, because "a party has two choices with respect to a mediation evaluation: (1) acceptance or (2) rejection. The court rules do not provide for conditional acceptances." *Id.* at 226. Defendants filed such "conditional acceptances" on behalf of plaintiffs on August 23, 1999.

Nor did defendants here submit any evidence that they brought *Bush* to the attention of the trial court to explain why it would be an abuse of discretion for the court to enter the mediation settlement as a final judgment when the issue of future damages was unresolved. The case file includes an excerpt from the hearing where defendants argued against entering the mediation agreement as a final order in plaintiffs' first suit against Delfield. Defendant Kelly briefly mentioned *Reddam* and *Joan Automotive* while arguing to the court that the final judgment should not be entered and that the actions of the mediation panel were sufficient to remove the future damages issue from the mediated settlement. But defendants failed to bring *Bush*, dispositive authority on the question, to the court's attention.

The third case cited in *CAM* was *Auto Club Ins Ass'n v State Farm Ins Co*, 221 Mich App 154; 561 NW2d 445 (1997). This was an indemnity case that implicitly warned against expecting to be able to challenge a mediation settlement after it is accepted, because any party accepting an award does not qualify as an aggrieved party:

Pursuant to MCR 2.403(M)(2), State Farm and plaintiff could enter into a judgment between themselves because they accepted the portions of the mediation evaluation that applied to them. MCR 2.403(M)(1) also states that judgment entered pursuant to mediation "shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date of judgment." The acceptance of a mediation evaluation is legally equivalent to a consent judgment reached after negotiation and settlement. *Klawiter v Reurink*, 196 Mich App 263, 266; 492 NW2d 801 (1992). For all practical purposes, the parties entered into a settlement agreement under the mediation rules. 2 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed, 1996 Cum Supp), pp 136-137. Further, because a party who accepts a mediation decision is not an "aggrieved party," that party has no right to appeal that mediation decision, *Joan Automotive Industries, Inc v Check*, 214 Mich App 383, 389-390; 543 NW2d 15 (1995). [*Auto Club, supra* at 166.]

Finally, the 1990 amendment to the court rules was made to "clarify that the entry of a judgment following acceptance of an award *disposes of the entire case, even if the case includes equitable claims* on which the mediation panel is not permitted to make an award" (MCR 2.403 "Staff Comment to 1989 Amendment," emphasis added). Thus, as of April 1990, there should have been no doubt that acceptance of a mediation award brings the entire case to a close.

Defendants argue that, until *CAM*, it was reasonable for defendants to file a "conditional acceptance" so plaintiffs could preserve their claim for future damages. However, even aside from the case law reviewed above – which lends more authority to the proposition that mediation resolves all claims than not – the clear language of the court rule alone should have alerted defendants that, once accepted, mediation awards disposed of all claims in a case. And, in the case where the mediation award was set aside and the litigation allowed to resume, this Court did so because the trial court abused its discretion by failing to treat a "conditional acceptance" as a rejection. "Therefore, because defendant's response to the mediation evaluation did not conform to the court rules, the trial court should have deemed it a rejection." *Bush, supra* at 227.

B. Legal Malpractice and the Attorney Judgment Rule

In order to state a claim for legal malpractice, the plaintiff has the burden of adequately alleging (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was a proximate cause of an injury, and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The issue is not whether a duty existed, but rather the extent of that duty once invoked. An attorney is obligated to use reasonable skill, care, discretion, and judgment in representing a client. *Id.* at 656. “Further, according to SJI2d 30.01, all attorneys have a duty to behave as would an attorney ‘of ordinary learning, judgment or skill . . . under the same or similar circumstances.’” *Id.* An attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law. *Id.* Thus, Michigan attorneys must know what the “prevailing Michigan law” is, and where that law is uncertain or changing, must act to protect their clients’ interests in the same way as an ordinarily qualified attorney would. However, there is no malpractice liability created by losing a case if the attorney has acted with the requisite diligence and his actions were “in the best interests of his client.” *Id.* at 658. In *Simko*, the Court cited with approval a case distinguishing conscious *choices* made before and during trial with other “actions in relation to a trial”:

[T]here can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight. . . . *To hold that an attorney may not be held liable for the choice of trial tactics and the conduct of a case based on professional judgment is not to say, however, that an attorney may not be held liable for any of his actions in relation to a trial. He is still bound to exercise a reasonable degree of skill and care in all his professional undertakings.* [*Id.* at 658-659, quoting *Woodruff v Tomlin*, 616 F2d 924, 930 (CA 6, 1980) (citations omitted, emphasis added).]

In affirming dismissal of *Simko*’s malpractice case, our Supreme Court only considered two of his allegations, the failure to call additional defense witnesses and the failure to protect *Simko* from impeachment by finding out the name of the hotel where *Simko* had spent the day before his arrest. The Court held that “Plaintiffs’ claim that certain witnesses should have been called is nothing but an assertion that another lawyer might have conducted the trial differently, a matter of professional opinion that does not allege violation of the duty to perform as a reasonably competent criminal defense lawyer,” *id.* at 660-661, and also that “[t]here is no duty to infallibly protect a client from impeachment” because such a duty “would be an impossible standard for defense counsel to meet and would violate and extend beyond the well-established reasonable care standard.” *Id.* at 661. The *Simko* Court thus addressed, in the context of a criminal trial, the degree to which the minute-by-minute tactical choices of the defense attorney can give rise to liability.

The case at bar is factually distinct from *Simko*. Defendants were not required to make an irrevocable, split-second choice at trial. Rather, defendants had months in which to research

the relevant authority before and after filing the case, the timing of which they controlled. Plaintiffs alleged that defendants were negligent with regard to a procedural matter and that the negligence resulted in plaintiffs losing a piece of their claim. Because the rule regarding the effect of accepting a mediation award was amended in 1990 to specifically clarify that a mediation “judgment or dismissal shall be deemed to dispose of all claims in the action,” MCR 2.403(M)(1), and because of case law interpreting MCR 2.403(M)(1), defendants advice and decision with regard to whether to seek in the first action a declaration regarding plaintiffs’ right to future damages can support a malpractice claim. We conclude that the trial court erred in dismissing plaintiffs’ malpractice action because it was for the jury to decide whether, in light of the clear language of the controlling court rule and case law rejecting “conditional” acceptances of mediation awards, defendants acted reasonably in relying on questionable authority suggesting that acceptance of a mediation award did not necessarily foreclose future actions against the same defendant over the same contract.

II.

In light of our conclusion in Issue I, we need not address the remainder of the issues raised by plaintiffs.²

Reversed and remanded to the trial court for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

² We note, however, that plaintiffs ask in the section of their brief entitled “Relief Requested” that proceedings on remand be conducted by a different judge “in light of the trial judge’s stated predisposition” to the detriment of plaintiffs. This issue has not been properly presented, properly argued, or properly supported by appropriate citation to the record. *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992), overruled in part on other grds in *Bechtold v Morris*, 443 Mich 105; 503 NW2d 654 (1993). The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).