

STATE OF MICHIGAN
COURT OF APPEALS

VICTORIA EVA ABDELLA, Personal
Representative of the Estate of Carol Dean,
Deceased, and VICTORIA EVA ABDELLA

UNPUBLISHED
January 25, 2005

Plaintiffs-Appellees,

and

VICTORIA EVA ABDELLA

Plaintiff/Cross-Appellant

v

KENNETH TESSMAR and ROBERT TESSMAR,
as partners in TESSMAR AND TESSMAR, a
Michigan Co-Partnership,

No. 248851
Oakland Circuit Court
LC No. 99-016850-CK

Defendants-Appellants/Cross-Appellees.

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendants appeal as of right a judgment entered against them after a jury trial and an order denying their motion for judgment notwithstanding the verdict. Plaintiff Victoria Eva Abdella cross appeals an order granting defendants summary disposition on her individual claim for attorney fees. This case arose after defendants refused to pay for legal services rendered by Carol Dean that were billed to corporations, of which Kenneth and Robert were shareholders, after the corporations declared bankruptcy, and refused to pay for legal services rendered by Abdella for which defendants did not receive a bill. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

According to Kenneth, he and his brother Robert owned Tessmar & Tessmar, a partnership that owned and leased buildings. They also owned a corporation called Tri-State and a corporation called Home Design in connection with a furniture business; the furniture business involved about seventeen corporations, and the corporations that were not owned by the brothers leased the Tri-State, and later the Home Design, name. About 1982, Dean, an attorney and the brothers' cousin, began to represent the brothers' various personal and business interests.

Because there were so many entities and litigation matters on the brothers' behalf, Dean sent a consolidated bill each month to one location that itemized: the name of the attorney working on the matter, the matter worked on, the time involved, the specific activity performed, and associated court fees. There were two parts to each bill: the summary or invoice included the itemization of services performed for the previous month, while the statement – the portion containing the address – indicated the total amount billed and paid the previous month, the amount past due, and the total balance owed.

The corporations filed for bankruptcy in September 1992. Before the bankruptcy, the bills were addressed to Tri-State or Home Design. Bills were addressed to Tessmar & Tessmar from October 2, 1992 until April 4, 1994, and payments were made on these bills without written objection. Dean died May 20, 1994. Her personal representative went through the outstanding billings, correlated them to the applicable files, and determined that defendants owed Dean about \$42,000. After numerous calls to defendants, she determined that they did not intend to pay the amount owed, and she filed a collection action naming only Kenneth and Robert as defendants. The trial court granted defendants summary disposition because of the statute of frauds and because Tessmar & Tessmar was not named as a defendant.

With respect to Abdella's individual claim, the complaint alleged that Dean represented defendants in acquiring property from the Rothschild estate. Because the value of the property was insufficient to cover the costs of probating the estate and clearing title, the Rothschild heirs were not interested in opening probate. Dean could not represent both defendants and the Rothschild heirs because of a conflict of interest. After negotiations for purchasing the property were completed, Dean hired Abdella on behalf of the Rothschild heirs to clear title with the understanding that defendants would pay for the services. Abdella probated the estate, cleared title, and submitted her bill for services to Dean a few weeks before Dean died. Tessmar & Tessmar were not billed for Abdella's services. Kenneth and Robert denied they were liable for attorney fees. Abdella filed suit against the brothers. Defendants moved for summary disposition, which was granted on the grounds that there was no privity of contract, and a conflict of interest may have existed.

Plaintiffs appealed the grant of summary disposition and, in the meantime, filed a separate action against Tessmar & Tessmar. The trial court dismissed the separate action on the basis of res judicata. Plaintiffs appealed the second grant of summary disposition. In a consolidated appeal, this Court found that the trial court abused its discretion by denying plaintiffs' motion to amend their complaint to add the partnership. It found that defendants waived the statute of frauds defense because they failed to plead it as an affirmative defense in their answer. And it found that res judicata did not apply under the circumstances presented. This Court affirmed the trial court with respect to Abdella's claims against Kenneth and Robert, but specifically declined to address whether Dean had authority to bind the partnership, finding that the trial court did not reach this issue. On remand, defendants again sought summary disposition with respect to Abdella's claims, which was granted. The jury returned a verdict in favor of the estate against the partnership, and judgment was rendered accordingly. Defendants' motion for judgment notwithstanding the verdict was denied.

Defendants first argue that there was insufficient evidence to establish that Tessmar & Tessmar owed Dean for services rendered. We disagree.

The trial court's decision on a motion for a directed verdict and on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, this Court must view the evidence and all legitimate inferences from it in the light most favorable to the nonmoving party. *Id.* If a reasonable jury could have honestly reached a different conclusion, the jury verdict must be upheld. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). "A judgment notwithstanding the verdict is proper where insufficient evidence is presented to create an issue for the jury." *Michigan Microtech v Fed Pub Inc*, 187 Mich App 178, 186; 466 NW2d 717 (1991). To recover for legal services rendered, an attorney must establish that an attorney-client relationship existed. *Plunkett & Cooney, PC v Capitol Bancorp LTD*, 212 Mich App 325, 329; 536 NW2d 886 (1995). Therefore, the estate was required to establish that an attorney-client relationship existed between Dean and Tessmar & Tessmar before fees could be recovered.¹

The record demonstrates that an attorney-client relationship existed between Dean and Tessmar & Tessmar before September 1992. And "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." *Michigan Nat'l Bank v Laskowski*, 228 Mich App 710, 712; 580 NW2d 8 (1998), quoting 11 USC 524(e). Thus, the fact that the corporations' responsibility to pay the debt may have been discharged did not discharge Tessmar & Tessmar's obligation to pay for services rendered on its behalf. Nevertheless, the estate failed to present competent evidence that the services were rendered on Tessmar & Tessmar's behalf.

Counsel for the estate also argued Tessmar & Tessmar assumed liability for the corporate debt that was previously discharged in bankruptcy, and that this was how Dean and the brothers consistently did business. Defendants appear to challenge this theory on appeal by arguing that it was barred by the statute of frauds. However, in a previous appeal, this Court found that defendants failed to raise the statute of frauds as an affirmative defense as required by MCR 2.111(F) and, thus, waived the statute of frauds as a defense.

Partial payment of the previously discharged debt was some indication that defendants intended to assume the discharged debt. Although Kenneth denied any agreement to assume the discharged debt, he acknowledged that the bills were first sent to Tri-State, then Home Design, then Tessmar & Tessmar; he could not explain why the October 1992 bill carried a balance from September – the month the bankruptcy petition was filed – when the bill would have been zero had there not been an agreement; and he admitted that he never disputed the balance in writing. "Where the parties do not explicitly manifest their intent to contract by words, their intent may be gathered by implication from their conduct, language, and other circumstances attending the transaction." *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997), citing *Temborius v Slatkin*, 157 Mich App 587, 596; 403 NW2d 821 (1986).

¹ Although Dean also represented the brothers' personal interests, and the brothers were listed as individual defendants in the instant suit, the jury found that the brothers were not liable; therefore, the brothers' personal interests are not at issue in the instant appeal.

Past dealings between the parties indicated that the balance would be assumed by Tessmar & Tessmar. “[T]erms of an oral agreement may be demonstrated by the course of dealing and performance between contracting parties.” *Tucker v Allied Chucker Co*, 234 Mich App 550, 567; 595 NW2d 176 (1999), citing *State Bank of Standish v Curry*, 442 Mich 76, 86; 500 NW2d 104 (1993). With respect to consideration, it can be inferred, as the estate’s counsel argued and as demonstrated by 1½ more years of legal services, that Dean agreed to continue to represent defendants in exchange for defendants’ promise to assume liability for the discharged debt. “Whether an offer has been accepted and a contract formed involves a factual determination, *In re Costs and Attorney Fees (Powell Production, Inc v Jackhill Oil Co*, 250 Mich App 89, 97; 645 NW2d 697 (2002), and judgment notwithstanding the verdict is not proper if reasonable minds could differ on issues of fact, *Michigan Microtech*, *supra* at 186.

Defendants next argue the trial court’s instruction essentially directed a verdict for the estate if the jury found that Dean performed legal services. We disagree.

Claims of instructional error are reviewed de novo. *Lewis v Legrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). The court’s determination whether an instruction was supported by the evidence is entitled to deference. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 424; 653 NW2d 415 (2002). Reversal is not required 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). Defendants appear to argue that the instruction was erroneous because whether Dean had provided the services was not at issue; the issues were for whom she performed the services, and whether the debt was discharged by bankruptcy. However, “[a] trial court’s jury instructions must include all the elements of the plaintiffs’ claims and should not omit any material issues, defenses, or theories of the parties that the evidence supports.” *Lewis*, *supra* at 211, citing *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

The challenged instruction was relevant to the estate’s theory of the case because it defined a contract in the context of the attorney-client relationship, and the estate was required to prove the existence of a contract as one of the elements of its claim. “A trial court may give an instruction not covered by the standard instructions as long as the instruction accurately states the law and is understandable, concise, conversational, and nonargumentative.” *Bordeaux v Celotex Corp*, 203 Mich App 158, 169; 511 NW2d 899 (1993), citing *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 123; 492 NW2d 761 (1992). When the instruction was challenged, the court determined that it was a correct statement of law and refused to strike it. The entirety of the challenged instruction was taken from our Supreme Court’s discussion in *Macomb Co Taxpayers Ass’n v L’Anse Creuse Public Schools*, 455 Mich 1, 10-12; 564 NW2d 457 (1997), and is good law. When read in conjunction with the elements the estate was required to prove, the challenged instruction did not direct the jury to find for the estate unless the elements of its claim were proven.

Abdella argues on cross appeal that the court improperly granted defendants summary disposition with respect to her claim for attorney fees. We agree.

A trial court's grant of summary disposition pursuant to MCR 2.116(C)(10), is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Defendants moved for summary disposition arguing that Abdella could not prove that defendants owed her for legal services. Summary disposition is properly granted when there is no issue of material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). To recover for legal services rendered, an attorney must establish that an attorney-client relationship existed. *Plunkett & Cooney, PC, supra* at 329. With respect to the attorney-client relationship, our Supreme Court has stated:

The rendering of legal advice and legal services by the attorney and the client's reliance on that advice or those services is the benchmark of an attorney-client relationship. The attorney's right to be compensated for his advice and services arises from that relationship; it is not the definitional basis of that relationship. [*Macomb, supra* at 11.]

* * *

[N]or is a contract necessary to create this relationship. The contract may be implied from the conduct of the parties. The employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession. [*Macomb, supra* at 11, quoting 7 Am Jur 2d, Attorneys at Law, § 118, pp 187-188.]

Abdella presented an affidavit of the personal representative of the Rothschild estate, in response to defendants' summary disposition motion. The affidavit clearly established that an attorney-client relationship existed between Abdella and the Rothschild heirs. Therefore, the Rothschild heirs were obligated to pay Abdella's bill for services rendered. *Macomb, supra* at 12. "It is well established that one may assume original liability by a direct promise to pay for services to be rendered to another in the future." *Schier, Deneweth & Parfitt, PC v Bennett*, 206 Mich App 281, 282; 520 NW2d 705 (1994), citing *Highland Park v Grant-Mackenzie Co*, 366 Mich 430, 443-444; 115 NW2d 270 (1962).²

The personal representative averred that representatives of Tessmar & Tessmar approached him about purchasing the estate property. He maintained that he was aware the costs of clearing title might be higher than the value of the property, and he and the other heirs were not interested in selling the property if the attorney fees would potentially exceed the sale proceeds. This indicated that if Tessmar & Tessmar had wanted to purchase the property, it would have had to agree to pay the costs of clearing title. According to the personal representative, Tessmar & Tessmar's agents agreed that Tessmar & Tessmar would pay the costs. The existence and scope of an agency relationship is a question of fact. *Michigan Nat'l*

² Moreover, an original promise to pay the debt of another for services to be rendered in the future, rather than a collateral promise to pay another's existing debt, does not need to be in writing to satisfy the statute of frauds. *Schier, Deneweth & Parfitt, PC v Bennett*, 206 Mich App 281, 283; 520 NW2d 705 (1994).

Bank v Kellam, 107 Mich App 669, 678; 309 NW2d 700 (1981). However, the actions of the agent may not establish apparent authority. *Id.* at 681.

Instead, the apparent authority of an agent is determined by the statements or conduct of the principal, which would cause a party to justifiably believe that the agent is acting within the apparent scope of his powers. *Michigan Nat'l Bank, supra* at 679, citing *Central Wholesale Co v Sefa*, 351 Mich 17, 25; 87 NW2d 94 (1957). Payment of past bills indicated an affirmative act on Tessmar & Tessmar's part supporting Dean's apparent authority to hire Abdella. Moreover, because a principal's failure to check an agent's assumption of authority is sufficient to establish justifiable reliance on the agent's apparent authority, *Michigan Nat'l Bank, supra* at 679, and Tessmar & Tessmar had not informed Abdella in the past that Dean lacked the authority to hire her, an issue of material fact was created whether Abdella justifiably relied on Dean's apparent authority to hire her and to authorize payment by Tessmar & Tessmar in the instant matter.

Nevertheless, defendants argue that the trial court properly denied Abdella recovery because Abdella engaged in a conflict of interest by representing both the Rothschild heirs and Tessmar & Tessmar, and courts should not sanction "unprofessional conduct infringing on the integrity of judicial proceedings." *Hightower v Detroit Edison Co*, 262 Mich 1; 247 NW 97 (1933). However, *Hightower* involved improper solicitation of clients and is distinguishable on its facts. *Id.* at 10-11. Instead, defendants' argument is addressed by MRPC 1.8(f), which provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

Here, the personal representative's affidavit indicated that the clients consented after consultation. Although defendants argue that Abdella's independent professional judgment was demonstrably compromised by the fact that she did not negotiate a better price for the property, the personal representative stated that the purchase agreement negotiations, including the price, took place before Abdella was hired. And conflicts in evidence must be resolved in favor of the non-moving party. Moreover, there was no evidence in the record that the information relating to representation of the Rothschild heirs was unprotected. Thus, Abdella did not violate MRPC 1.8(f).

Moreover, under MRPC 1.7, simultaneous representation of current clients with adverse interests, and MRPC 1.9, representation of a current client whose interest is adverse to that of a former client, the interests of the clients must be adverse; here, there was no indication that the interests of the Rothschild heirs and Tessmar & Tessmar were adverse once the fee arrangement was determined. Moreover, the Rothschild affidavit established that the Rothschild heirs consented after consultation and, as previously discussed, Abdella raised a genuine issue of

material fact whether Tessmar & Tessmar consented.³ Because issues of material fact remained, summary disposition was improper. MCR 2.116(C)(10).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

³ Defendants also cite 7 Am Jur 2d, Attorneys at Law, §58, p 119 for the proposition that an attorney may not represent different interests in the same property or estate. However, 7 Am Jur 2d, Attorneys at Law, §57, p 118 indicates that a conflicting interest by itself does not necessarily preclude dual representation. And 7 Am Jur 2d, Attorneys at Law, §58, p 119 merely indicates what constitutes a conflicting interest. Although representing different interests in the same property is listed as a conflicting interest, the Michigan case cited with respect to this item, *State Bar Grievance Administrator v Estes*, 392 Mich 645, 650-651; 221 NW2d 322 (1974), demonstrated a situation where the interests were directly adverse; that is not the case here.