

STATE OF MICHIGAN
COURT OF APPEALS

PHIL SIMON and PHIL SIMON ENTERPRISES,
INC,

UNPUBLISHED
April 1, 2004

Plaintiff-Appellant,

v

HENRY JAMES TELMAN,

Nos. 241834, 243525
Kent Circuit Court
LC No. 01-007371-NM

Defendant-Appellee.

Before: Meter, P.J., Wilder and Borrello, JJ.

PER CURIAM.

In this consolidated appeal, plaintiffs appeal as of right from two adverse rulings of the trial court. In Docket No. 241834, plaintiffs appeal the trial court's order granting summary disposition for defendant under MCR 2.116(C)(8) and MCR 2.116(C)(10). In Docket No. 243525, plaintiffs appeal the trial court's order granting defendant's motion for costs and attorney's fees. This legal malpractice case arose under plaintiffs' allegations that defendant failed to file a timely appeal in an underlying zoning case and failed to communicate with him about this Court's denial of a motion for rehearing. We find that the trial court properly granted summary disposition to defendant but improperly considered and granted defendant's motion for costs and fees. Accordingly, we affirm the trial court's order on summary disposition, but we vacate the trial court's order granting attorney's fees and costs.

I. Docket No. 241834

Plaintiffs argue that the trial court improperly dismissed their claim on summary disposition for several reasons. Plaintiffs first claim that the matter whether plaintiffs could have succeeded on the underlying claim was a question of fact for a jury, and the trial court erroneously treated it as a question of law. Plaintiffs also claim that the burden was on defendant to produce the entire record and that the trial court erroneously shifted that burden to plaintiff.

Last, plaintiffs claim that the trial court could not properly decide the motion because the trial court did not have the entire record of the underlying claim before it.¹

A litigant pursuing a legal malpractice action must show “(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.” *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993) (footnotes omitted), citing *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 690; 310 NW2d 26 (1981). The burden of proving these elements is on the plaintiff. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994), citing *Coleman, supra* at 63.

Regarding proximate cause, the plaintiff must prove that “‘but for the attorney’s alleged malpractice, he would have been successful in the underlying suit.’” *Id.*,² quoting *Coleman, supra* at 63. This concept applies “where the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal.” *Id.* at 587, citing *Basic Food Industries, supra* at 691. This showing encompasses proving that the appellate court “‘would have had jurisdiction to hear the appeal, that the appellate court would have granted review when review is discretionary, and that the trial court’s judgment would have been modified on review.’” *Id.* at 587 n 15, quoting Comment, *Attorney Malpractice: Problems Associated with Failure-to-appeal Cases*, 31 BUFFALO L R 583, 589 (1982).

Thus, plaintiff’s burden of showing proximate cause involves two questions: “whether the attorney’s negligence caused the loss or unfavorable result of the appeal, and whether the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation.” *Id.* at 588, citing 2 Mallen & Smith, *Legal Malpractice* (3d ed), § 24.39, p 538. Because the second question “‘depends on an analysis of the law and the procedural rules,’” it is an issue of law for the court. *Id.* at 589, 590, quoting *Millhouse v Wiesenthal*, 775 SW2d 626, 628 (Tex, 1989). Otherwise, a jury would be required to sit as an appellate court, “‘review the trial record and briefs, and decide whether the trial court committed reversible error.’” *Id.*, quoting *Millhouse, supra* at 628.

Here, plaintiffs’ legal malpractice allegation was directed toward defendant’s failure to perfect plaintiffs’ appeal. Because to succeed on their claim plaintiffs would have had to show that they would have ultimately prevailed on appeal, the question was one of law for the trial court. Thus, plaintiffs’ assertion that the question was one of fact for a jury is incorrect.

¹ Given the many instances that the trial court acknowledged that it did not have the entire record before it, plaintiffs’ additional claim that the trial court claimed it reviewed the entire record is without merit.

² Justice Boyle authored the plurality opinion and was joined by two justices. Then-Chief Justice Cavanagh and Justice Boyle wrote separate concurring opinions agreeing with the ultimate rule of law that the issue whether the underlying suit in a malpractice claim would have succeeded was a question of law for the court.

Furthermore, plaintiffs had the burden of producing the entire record to the trial court in opposing defendant's motion for summary disposition. While the moving party has the initial burden of production, *Karbel v Comerica Bank*, 247 Mich App 90, 96; 635 NW2d 69 (2001), once that party presents evidence that there is no genuine issue of material fact and that the nonmoving party's complaint should be dismissed as a matter of law, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4); see also *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). And "[i]f the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." MCR 2.116(G)(4).

In his motion for summary disposition, defendant claimed that plaintiffs had not properly pleaded the case, and he challenged plaintiffs' ability to prove that the first court incorrectly decided the underlying dispute. Defendant presented the trial court with the court's ruling in the underlying claim. The burden then shifted to plaintiffs to contest defendant's assertions by presenting documentary evidence regarding legal error and thus proximate cause.

Plaintiffs failed to meet that burden. In their brief opposing summary disposition, plaintiffs focused solely on defendant's alleged negligent conduct in failing to perfect the appeal. Plaintiffs ignored the issue whether defendant's alleged negligence was the proximate cause of plaintiff's injury. Instead of arguing that there was legal error in the original decision and presenting argument or proof thereof, plaintiffs stated merely that their complaint was adequate because plaintiffs "pled the existence of an attorney-client relationship between themselves and Defendant; negligence by Defendant in the legal representation of Plaintiffs; that the negligence of Defendant was a proximate cause of their injuries; and, the fact and extent of the injuries alleged." Thus, the trial court properly placed the burden on plaintiffs, and it properly granted defendant's motion for summary disposition when plaintiffs failed to meet that burden. For these reasons, we affirm the trial court's order regarding summary disposition.

II. Docket No. 243525

After the trial court's order of dismissal was entered, defendant moved for attorney's fees and costs under MCR 2.114(D)(2), claiming that plaintiffs' complaint and brief in opposition to summary disposition were not well-grounded in fact or law because plaintiffs failed to allege that the underlying suit would have been successful and failed to "provide any legal citation, argument, or other materials to establish the same." Plaintiffs responded that defendant's motion was untimely filed. We disagree.

When a motion for fees and costs under MCR 2.114 is brought after final judgment has been entered in a case, the trial court has discretion whether to entertain the motion. *Maryland Casualty Co v Allen*, 221 Mich App 26, 30; 561 NW2d 103 (1997). Here, where the trial court considered defendant's motion for attorney's fees, brought three weeks after final judgment, we find no abuse of discretion.

Plaintiffs also argue that the trial court erred by refusing to grant an evidentiary hearing on the reasonableness of the fees requested, and we agree. Where a party objects to the reasonableness or necessity of the attorney's fees requested, an evidentiary hearing is strongly favored, if not required. *B & B Investment Group v Gitler*, 229 Mich App 1, 15-16; 581 NW2d 17 (1998); *Petterman v Haverhill Farms, Inc*, 125 Mich App 30, 33; 335 NW2d 710 (1983).

This Court has observed: “Where the opposing party challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered prior to approving the bills of costs. Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is.” *Id.* at 16, quoting *Wilson v General Motors Corp*, 183 Mich App 21, 42-43; 454 NW2d 405 (1990). Faced with a proper objection, it was insufficient for the trial court to have granted defendant’s request in full on the basis that the court was “familiar” with counsel for defendant and believed his fee to be reasonable. See *Howard v Canteen Corp*, 192 Mich App 427, 437; 481 NW2d 718 (1992), overruled on different grounds, *Rafferty v Markovitz*, 461 Mich 265; 602 Mich 367 (1999).

Thus, we remand for an evidentiary hearing on the reasonableness of the fees requested.

III. Conclusion

In Docket No. 241834, we affirm the trial court’s grant of summary disposition for defendant. In Docket No. 243525, we remand for further proceedings in accordance with this opinion. We retain jurisdiction.

/s/ Patrick M. Meter

/s/ Stephen L. Borrello