STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH A SILVERMAN, PC,

Plaintiff/Counterdefendant-Appellee,

and

ELIZABETH A SILVERMAN,

Third Party Defendant,

v

LAWRENCE DAVID KORN,

Defendant/Counterplaintiff/Third Party Plaintiff-Appellant.

UNPUBLISHED
August 13, 2020

Nos. 349331
Oakland Circuit Court
LC No. 2018-163097-CZ

ELIZABETH A SILVERMAN, PC,

Plaintiff/Counterdefendant-Appellee,

and

ELIZABETH A SILVERMAN,

Third Party Defendant,

v

LAWRENCE DAVID KORN,

Defendant/Counterplaintiff/Third Party Plaintiff-Appellant.

No. 350830
Oakland Circuit Court
LC No. 2018-163097-CZ

Before: TUKEL, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

This case, which arises out of the divorce of defendant/counterplaintiff/third-party plaintiff Lawrence David Korn (Korn) and his ex-wife, Margarette Clarke, may well demonstrate the wisdom of the expression "Marry in haste, repent at leisure." Korn was dissatisfied with the result of the divorce proceedings so he refused to pay the balance he owed in attorney fees to plaintiff/counterdefendant Elizabeth A. Silverman, PC (the firm) and third-party defendant Elizabeth A. Silverman (Silverman). The firm eventually sued Korn for the unpaid attorney fees; Korn responded by bringing claims of legal malpractice against the firm and Silverman. Relevant to this appeal, the trial court granted summary disposition to the firm and Silverman on Korn's legal malpractice claim in Docket No. 349331. In Docket No. 350830, the trial court later awarded $78,653.95 in attorney fees to the firm and Silverman for the unpaid attorney fees and Silverman's attorney fees to represent herself and the firm in their efforts to recover Korn's unpaid legal fees. Defendant now appeals as of right in both cases. For the reasons stated below, we reverse the trial court's decision to grant summary disposition to the firm and Silverman on the legal-malpractice issue, vacate the $78,653.95 judgment, and remand this matter for further proceedings.

I. UNDERLYING FACTS

This lawsuit arises out of divorce proceedings between Korn and Clarke. The two married as part of what Korn describes as a "business relationship" marriage; it was beneficial to Korn because he could temporarily become a beneficiary of Clarke's employment-based health insurance, and was beneficial to Clarke because they agreed to file joint tax returns in which she could save approximately $25,000 in tax credits. The couple agreed that they would divorce after Korn successfully obtained disability benefits. By the time they did divorce, the "business relationship" was no longer as cooperative. Clarke filed for a divorce in Oakland County, and Korn retained Silverman and the firm to represent him in that divorce case.

In the divorce case, Korn alleged, among other claims, that Clarke began taking advantage of him financially during their marriage and was able to successfully do so because he suffers from a mental disability. After a four-day trial, the trial judge issued an opinion and order divorcing Korn and Clarke, distributing their property and debt, and declining to award attorney fees and costs to either party. The trial judge "was not impressed with either party as a witness and did not find either party to be credible." Nevertheless, the trial court awarded Clarke the couple's boat, their West Bloomfield, Michigan home and the personal property inside of it (with some exceptions), her premarital pensions, a share of two other accounts, and a significant share of the equity in the couple's West Palm Beach, Florida home. The trial court awarded Korn the West Palm Beach home (but required him to pay Clarke her share of the home's equity) and the personal property in the home, a book the couple had worked on together, two horses, and a share of the two accounts. The court expressly declined to find that Clarke had committed fraud or conversion and declined to order treble damages as requested by Korn.

After the divorce proceedings came to an end, the firm filed this lawsuit against Korn, containing two counts—one for breach of contract, and a second for account stated—based on Korn's failure to pay invoices for the work performed by Silverman and the firm in the divorce case. In response, Korn filed a legal-malpractice counterclaim against the firm and a legal-malpractice third-party claim against Silverman. Korn alleged numerous purported shortcomings, including Silverman's inadequate questioning of witnesses, her failure to understand and

demonstrate Korn's mental disability, missteps in recording a deed, and flawed advice regarding what property to remove from the couple's homes.

The firm and Silverman eventually moved for summary disposition. In response, Korn generally took the position that his criticisms of Silverman's conduct in the divorce case both excused him from paying the firm's invoices and entitled him to a money judgment in his favor. In support of his position, Korn relied significantly on deposition testimony from Charles Kronzek, an experienced lawyer whom he offered as a standard-of-care expert. Consistent with Korn's assertions, Kronzek generally testified that Silverman's conduct fell below the relevant standard of care in numerous ways and that, had it not been for Silverman's allegedly inadequate performance, Korn would have fared better in the divorce case.

The trial court ultimately granted summary disposition to the firm and Silverman on all three claims. Regarding the breach-of-contract and account-stated claims, the trial court emphasized Korn's failure to object to the firm's invoices within a reasonable time. Regarding the legal-malpractice counterclaim and third-party claim, the trial court explained that a plaintiff must meet the "suit within a suit" (or "case within a case") requirement, i.e., "show that but for the attorney's alleged malpractice the plaintiff/client would have been successful in the underlying lawsuit." The court explained that because Korn failed to present evidence that the outcome of the divorce case would have been different had Silverman not breached the standard of care, Korn was unable to prove the causation and damages elements of his legal-malpractice claims.

The firm subsequently filed a motion for entry of judgment, seeking a judgment in the firm's favor in the amount of $78,653.95. According to the firm's motion, this amount reflected the amount that was due and owing for Silverman's work in the underlying divorce case—$47,976.17—as well as the costs and fees that had been incurred in this action based on a provision in the retainer agreement that provided for "all fees, costs, and attorney fees for [Silverman's] actual time expended" in the event that she had "to commence litigation against [Korn] to collect outstanding fees." Over Korn's objections, the trial court entered an order awarding the firm its requested amount of $78,653.95. This appeal followed.

II. DOCKET NO. 349331

In Docket No. 349331, Korn argues that the trial court erred by granting summary disposition to the firm and Silverman on his legal malpractice claim. We agree.

A. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and is reviewed de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481

Mich 419, 425; 751 NW2d 8 (2008). "Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v Midmichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016).

B. ANALYSIS

As an initial matter, Silverman and the firm argue that summary disposition was appropriate based on the doctrine of judicial estoppel. In the divorce proceedings, Korn repeatedly and successfully defeated motions attempting to declare him mentally incompetent. Silverman and the firm argue that Korn is precluded by the doctrine of judicial estoppel from arguing on appeal that he had a mental disability, given his arguments below that he was not mentally incompetent. "Judicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012). However, Silverman and the law firm have presented no evidence or legal authority to establish that Korn's alleged mental disability, which he argues that Silverman should have addressed in greater detail in his divorce case, is necessarily inconsistent with his being mentally competent. Because the two arguments are not inherently contradictory, judicial estoppel does not apply in this case.

Turning to Korn's allegation of attorney malpractice, a legal malpractice claim has four elements: "(1) the existence of an attorney-client relationship (the duty); (2) negligence in the legal representation of the plaintiff (the breach); (3) that the negligence was a proximate cause of an injury (causation); and (4) the fact and extent of the injury alleged (damage)." *Barrow v Pritchard*, 235 Mich App 478, 483-484; 597 NW2d 853 (1999). "Often the most troublesome element of a legal malpractice action is proximate cause." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). It requires that a plaintiff "establish that the defendant's action was a cause in fact of the claimed injury." *Id*. at 586.

In some cases, the causation element requires that "a plaintiff . . . show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit. In other words, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding." *Charles Reinhart Co*, 444 Mich at 586 (citations and quotation marks omitted). This is because permitting a plaintiff to recover without demonstrating he or she would have succeeded in the underlying matter "would permit a jury to find a defendant liable on the basis of speculation and conjecture." *Id*. at 586-587. But "the 'suit within a suit' concept is not universally applicable." *Id*. at 587. Rather, the

> "suit within a suit" concept has vitality only in a limited number of situations, such as where an attorney's negligence prevents the client from bringing a cause of action (such as where he allows the statute of limitations to run), where the attorney's failure to appear causes judgment to be entered against his client or where the attorney's negligence prevents an appeal from being perfected. [*Coleman v Gurwin*, 443 Mich 59, 64; 503 NW2d 435 (1993).]

In our view, this is one of those cases where the "suit within a suit" concept does not strictly apply because the alleged actions that constituted malpractice were not procedural or administrative in nature. Thus, to the extent the trial court believed that the "suit within a suit" concept did strictly apply, it erred. When the suit with a suit standard does not apply, "the attorney's liability, as in other negligence cases, is for all damages directly and proximately caused by the attorney's negligence." *Basic Food Indus, Inc v Grant*, 107 Mich App 685, 693; 310 NW2d 26 (1981).[1] Thus, Korn was only required to show by a preponderance of the evidence that he would have received a more favorable outcome in his underlying divorce case but for the alleged legal malpractice of Silverman and the firm. See *id*.

The mere fact that the "suit within a suit" concept does not apply here, however, does not relieve plaintiff of the requirement that he prove that Silverman's alleged shortcomings were the proximate cause of any alleged damages.[2] It is these two elements—causation and damages—that are problematic for most plaintiffs. See, e.g., *Charles Reinhart Co*, 444 Mich at 586. With respect to these elements, Korn relies primarily on Kronzek's testimony that he believed Korn may have done better in the divorce case but for Silverman's conduct.

During his deposition, Kronzek was asked whether he believed that if Silverman "acted as [Kronzek] outlined above that [Kronzek] believe[d] the standard of practice required, the outcome would have been any different." Kronzek answered that he could not "predict what [the judge] would do" but stated that he "believe[d] [Korn] would have done far better." Kronzek additionally explained that he believed Korn's case in the underlying divorce "would have materially improved" had Silverman's conduct not fallen below the standard of care. When asked "[w]hat evidence [he had] that [Korn] would have obtained a better result," Kronzek answered as follows: "I haven't examined any evidence at all. The only thing that I can tell you is that I believe that any fair and reasonable judge would have ruled much more in favor of Mr. Korn if the Court had before it the information that I indicated." The question before this Court is whether Kronzek's testimony was sufficient to create a genuine issue of material fact with respect to causation and damages. We conclude that it is.

In our view, the trial court's comments during the hearing on the motion for summary disposition do not reflect that it viewed the evidence before it, including Kronzek's expert testimony, in the light most favorable to Korn as it was required to for purposes of MCR 2.116(C)(10). See *Patrick*, 322 Mich App at 605. Rather, in granting the firm and Silverman's motion, the trial court emphasized Kronzek's testimony that he could not "predict with certainty what [the judge] would rule," as well as his statement that he had not "examined any evidence at all." While those are accurate references to Kronzek's testimony, their context undermines the trial court's reliance on them. Kronzek stated that he could not "predict what [the judge] would do," but he also stated that he "believe[d] [Korn] would have done far better" and that Korn's case

[1] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) (citation omitted).

[2] For ease of reference, we will refer to the representation that Silverman and the firm provided for Korn during his divorce case as if only Silverman represented Korn.

in the underlying divorce "would have materially improved" but for the alleged legal malpractice of Silverman and the firm. Similarly, while Kronzek answered that he had not "examined any evidence at all" when asked "[w]hat evidence [he had] that [Korn] would have obtained a better result," his earlier testimony during the deposition demonstrated that he had reviewed the trial transcripts from the divorce proceeding; hearing transcripts from one or both cases; the deposition testimony of Korn, Silverman, and Clarke; the pleadings from this case; written discovery; and other documents. Viewing this testimony in the light most favorable to Korn, it does not appear that Kronzek's testimony that he had not "examined any evidence at all" demonstrated that his opinion was completely baseless. Instead, it simply appears that Kronzek believed, based on his review of the documents listed above, "that any fair and reasonable judge would have ruled much more in favor of Mr. Korn if the Court had before it the information that I indicated."

Viewing the evidence in the light most favorable to Korn, Kronzek testified that if Silverman had met the standard of care in Korn's divorce case then Korn would have received a more favorable verdict in his divorce case. Additionally, despite Kronzek's statement to the contrary, he did in fact review evidence of Korn's divorce case and, therefore, his opinion was based on actual facts of that case. In the context of Korn's legal-malpractice claim as a whole, it is hard to imagine what further evidence of causation he could have provided. Because Korn presented sufficient evidence to create a genuine issue of material fact regarding whether Silverman's alleged breaches of the relevant standard of care caused damages, we reverse the trial court's dismissal of the counterclaim and third-party claim.

This does not mean, however, that there is sufficient evidence of causation and damages with respect to all of the alleged breaches identified by Korn in his briefing. When alleged malpractice is not focused on process-related issues, e.g., a failure to timely file an appeal, or questions of law, e.g., filing an inadequate notice of intent to sue, see *Fairley v Dep't of Corr*, 497 Mich 290; 871 NW2d 129 (2015), but rather "is focused on malpractice during litigation or settlement negotiations, then proximate cause often is an issue of fact." *Charles Reinhart Co*, 444 Mich at 590-591 n 22. Here, practically all of Silverman's alleged breaches focused on purported malpractice during litigation in the divorce case. The trial court failed to identify which claims focused on purported malpractice during litigation and we decline to do so in the first instance here. Rather, on remand, we direct the trial court to consider each of Korn's numerous individual claims of legal malpractice separately. Part of this analysis must depend on whether the specific allegation, for example whether Silverman's alleged "[f]ailure to call witnesses who were vital to Korn's case," was an alleged instance of malpractice during the litigation and, therefore, a question of fact.

On the other hand, some of Korn's allegations that Silverman's conduct fell below the relevant standard of care do not "focus[] on malpractice during litigation." *Charles Reinhart Co*, 444 Mich at 591 n 22. For example, Korn repeatedly criticizes Silverman's failure to pursue an annulment. A judgment of annulment, however, is a form of equitable relief, MCL 552.12, and the issue of whether a party is entitled to equitable relief is generally a question of law, *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008). Consequently, this alleged failure may be a process-related issue that is appropriate for summary disposition. *Charles Reinhart Co*, 444 Mich at 591 n 22. Additionally, some of Korn's criticisms focus on conduct that has *not* been tied by any evidence to any damages. For example, Korn criticizes Silverman for "[f]iling a witness list naming an expert witness who had died several years prior to the inception

of the divorce case." While perhaps objectively unreasonable, Korn has not identified any evidence, including Kronzek's testimony, that causally connected that mistake to any damages.

Accordingly, we reverse the trial court's decision granting summary disposition in favor of the firm and Silverman on Korn's legal-malpractice counterclaim and third-party claim and remand this matter for further proceedings with respect to those specific claims. On remand, the parties and the trial court should specifically address each of Korn's legal malpractice allegations individually rather than addressing them as one claim. In doing so, the parties and the trial court will be better-situated to address specific arguments that come with those allegations, such as when and whether the attorney-judgment rule applies.[3]

III. DOCKET NO. 350830

In Docket No. 350830, Korn argues that the trial court erred by awarding attorney fees to Silverman for representing the firm and herself in this case. We agree.

A. STANDARD OF REVIEW

As stated earlier, a motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and is reviewed de novo. *Joseph*, 491 Mich at 205-206. Additionally, "questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "This Court reviews the trial court's decision to award attorney fees for an abuse of discretion." *Featherston v Steinhoff*, 226 Mich App 584, 592; 575 NW2d 6 (1997). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016).

B. ANALYSIS

"In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory*, 473 Mich

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[3] This Court explained the attorney judgment rule in *Estate of Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002) (citations omitted):

> An attorney has an implied duty to exercise reasonable skill, care, discretion, and judgment in representing a client. Further, an attorney is obligated to act as an attorney of ordinary learning, judgment, or skill would under the same or similar circumstances. However, an attorney is not a guarantor of the most favorable possible outcome, nor must an attorney exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. Further, "where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of [the] client, [the attorney] is not answerable for mere errors in judgment."

at 464. "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be enforced as written." *Id*. at 468. Contracts are enforced "according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract." *Id*. Finally, "the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Kendzierski v Macomb Co*, 503 Mich 296, 312; 931 NW2d 604 (2019) (citation and quotation marks omitted).

"As a general rule, attorney fees are not recoverable from a losing party unless authorized by a statute, court rule, or other recognized exception." *Great Lakes Shores, Inc v Bartley*, 311 Mich App 252, 255; 874 NW2d 416 (2015). "Contractual provisions for payment of reasonable attorney fees are judicially enforceable. In other words, a contractual clause providing that in the event of a dispute the prevailing party is entitled to recover attorney fees is valid." *Fleet Business Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007) (citations and quotation marks omitted).

The trial court awarded attorney fees to Silverman and the firm pursuant to the following provision from the retainer agreement: "If Attorney has to commence litigation against client to collect outstanding fees, Client shall be responsible for all fees, costs, and attorney fees for Attorney's actual time expended." In doing so, the trial court held that the firm and Silverman were entitled to attorney fees for representing themselves. But this decision conflicts with two recent decisions by our Supreme Court holding that attorneys may not recover attorney fees when representing themselves.

In *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 424; 733 NW2d 380 (2007), our Supreme Court held that an attorney representing himself or herself was not permitted to collect "actual attorney fees" as normally permitted under MCL 15.271(1)(4) of the Open Meetings Act, MCL 15.261 *et seq*.. "Because an attorney is defined as an agent of another person, there must be separate identities between the attorney and the client before the litigant may recover actual attorney fees." Appreciating that "the word 'attorney' connotes an agency relationship between two people," the Court held that "no 'actual attorney fees' " could be awarded to an attorney who represented himself or herself because "there was no agency relationship between two different people," i.e., "no lawyer-client relationship as understood in the law." *Id*. at 428, 432 (citations omitted; emphasis added).

Our Supreme Court reached a similar result in a similar context in *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497 Mich 265, 267; 870 NW2d 494 (2015), when it addressed "whether [a] law firm can recover, as case-evaluation sanctions under MCR 2.403(O)(6)(*b*), a 'reasonable attorney fee' for the legal services performed by its own member lawyers in connection with its suit to recover unpaid fees from the . . . former clients of the firm." In that case, the clients argued that the "actual costs" provided for under the court rule did not "include a 'reasonable attorney fee' for the legal services performed by [the firm's] member lawyers" because the firm's "self-representation did not give rise to an 'attorney fee.' " *Id*. at 273. Relying largely on its previous decision in *Omdahl*, the Supreme Court agreed and held that firms "cannot recover a 'reasonable attorney fee' under MCR 2.403(O)(6)(*b*) for the legal services performed by its member lawyers in connection with the instant suit." *Id*. at 280. In doing so, the Supreme Court

squarely rejected the firm's argument that the fact that the lawyers were representing their firm, rather than themselves, made a difference. *Id*. at 276-280.

In our view, there is no reason in this case to depart from the reasoning set forth in *Omdahl* and *Fraser Trebilcock*. Here, the firm sought, and the trial court awarded, "attorney fees" under the retainer agreement based on Silverman's representation of herself and the firm. Under *Omdahl* and *Fraser Trebilcock*, however, the firm did not actually incur any attorney fees for Silverman's representation of it, because she was a member of the firm. The firm argues that neither of those decisions control the outcome in this case because it sought "attorney fees" under a contract, not a statute or a court rule. Yet the firm offers no persuasive rationale to support its request that this Court treat the term "attorney fee" differently for purposes of a contract than it must for purposes of a statute or a court rule. To the contrary, all three—contracts, statutes, and court rules— if unambiguous, are interpreted and applied according to their plain and ordinary meanings. See, e.g., *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016) (explaining that contractual language is interpreted and applied according to its "plain and ordinary meaning"); *Vanderlaan v Tri-Co Community Hosp*, 209 Mich App 328, 332; 530 NW2d 186 (1995) (explaining that statutory language is interpreted and applied according to its "plain and ordinary meaning"); *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002) (explaining that language in a court rule is interpreted and applied according to its plain and ordinary meaning"). Consequently, as a matter of law, the firm is not entitled to recover "attorney fees" for Silverman's representation of herself or the firm, and we therefore vacate the September 17, 2019 judgment in favor of the firm and remand this matter for further proceedings.

IV. CONCLUSION

In Docket No. 349331, we reverse the trial court's order granting summary disposition to Silverman and the firm and remand for further proceedings. In Docket No. 350830, we vacate the trial court's order awarding $78,653.95 and remand for further proceedings. We do not retain jurisdiction.

/s/ Jonathan Tukel
/s/ Deborah A. Servitto
/s/ Jane M. Beckering