# STATE OF MICHIGAN

# COURT OF APPEALS

KENNETH A. PICKL, MARGO L. PICKL, FREDERICK W. JACKSON, JR., in his individual capacity and as Personal Representative of the Estate of FREDERICK W. JACKSON, PATRICIA NUSBAUM JACKSON, in her individual capacity, as Personal Representative of the Estates of VIRGINIA JACKSON and FREDERICK W. JACKSON, and as Trustee of the Frederick W. Jackson Trust,

Plaintiff-Appellees/Cross-Appellants,

v

GEORGE E MICHAELS, JOSEPH N. IMPASTATO, CHRISTINE E. MICHAELS, MARIAN A. IMPASTATO, and GEORGE E. MICHAELS, P.C.,

Defendant-Appellants/Cross-Appellees.

UNPUBLISHED
August 27, 2002

No. 224206
Otsego Circuit Court
LC No. 96-006813-CK

Before: Hoekstra, P.J., and Whitbeck, C.J., and Talbot, J.

PER CURIAM.

Defendants George E. Michaels, Joseph N. Impastato, Christine E. Michaels, Marian A. Impastato, and George E. Michaels, P.C., appeal as of right from the trial court's judgment for plaintiffs. We reverse in part, affirm in part, and remand.

## I. Basic Facts And Procedural History

On August 6, 1979, Virginia and Fred Jackson retained defendant Joseph N. Impastato (Impastato) to represent them in a dispute Virginia Jackson had with her brother, James Doyle, concerning property that their mother, Merle Doyle, owned. The disputed property was a tract of approximately 1,000 acres of land in Dover Township, Otsego County. In October 1979, Merle

Doyle and Virginia Jackson sued James Doyle in Macomb Circuit Court,[1] alleging that he had unduly influenced Merle Doyle to obtain an interest in the Dover property. In 1982, the Macomb Circuit Court dismissed Merle Doyle as a party and added Jean Doyle, James Doyle's wife, as a defendant in the lawsuit.

Whether Impastato first represented the Jacksons or Merle Doyle in this 1979 suit is not clear. In any event, sometime after the Jacksons retained him, Impastato referred the Jacksons to defendant George E. Michaels (Michaels). Impastato and Michaels did not have a written referral agreement, but they orally agreed that Impastato would receive one-half of what Michaels recovered in the litigation. Michaels began representing Virginia Jackson no later than 1982. In July 1983, Merle Doyle died and her estate was subsequently opened in Wayne Probate Court. Her estate was added as a plaintiff to the existing action, begun in 1979, between Virginia Jackson and James and Jean Doyle.

In 1985, the Doyle estate filed an additional complaint against James and Jean Doyle, which was dismissed because the plaintiffs failed to serve the defendants before the summons expired. The estate filed a new complaint against James and Jean Doyle and sought to have this action consolidated with the 1979 action. The trial court, however, denied the motion for consolidation. When the trial court finally heard Virginia Jackson's 1979 suit, it concluded that James Doyle had breached his fiduciary duty, voided certain inter vivos transactions between him and his mother, and ordered him to return the property to his mother's estate. The estate then moved for summary disposition on the basis of collateral estoppel, which the court granted. Both the 1979 law suit concerning undue influence and the probate case were appealed to this Court, which this Court consolidated and affirmed in February 1989.[2]

As of this Court's decision in early 1989, not only had the 1979 suit been pending for about a decade and Michaels had been Virginia Jackson's attorney for approximately seven years, but Michaels had been representing Virginia Jackson for most of this time *without* a written retainer agreement; Virginia Jackson only signed a written retainer agreement with Michaels in June 1988. The agreement provided that Michaels would receive "one half (1/2) of any and all proceeds, be that real estate, personal property, or mixed, that comes to Virginia Jackson through the Probate Estate of Merle Doyle." Virginia Jackson also agreed to reimburse Michaels for his "costs and expenses." Because this Court had affirmed the trial court's decision to return additional property to the Doyle estate, Michaels, and through him Impastato, stood to gain a significant amount as a result of this agreement.

On September 26, 1991, Virginia Jackson and James and Jean Doyle entered into a settlement agreement in which James Doyle would receive a one-third interest in the Dover property, with Virginia Jackson receiving the remaining interest. The agreement stated that the siblings would own the mineral rights, "including gas and oil rights," for the Dover property "as equal co-tenants in common subject to the Consent Judgments entered in a certain lawsuit in the

---

[1] See *Estate of Doyle v Doyle*, 177 Mich App 546, 547-548; 442 NW2d 642 (1989).

[2] See *id*.

Circuit Court for the County of Otsego, being Case No. 77-622-CH."[3] The agreement also provided that Virginia Jackson and James Doyle would evenly split "[a]ny monies earned and undisbursed on account of royalties or lease payments on the mineral rights, whether currently held or which may accrue prior to final disbursement[.]" This agreement settled the Macomb Circuit Court cases from 1979 and 1985, the proceeding in Wayne County Probate Court, and a separate suit Virginia Jackson filed against James Doyle in Wayne Circuit Court. In addition to dividing Merle Doyle's real and personal property between the siblings, the agreement provided that Michaels would receive $100,000 in attorney fees and costs for services provided to the estate. From Michaels's and Impastato's perspective, they ceased representing the Jacksons when the settlement was executed.

The next day, on September 27, 1991, Virginia and Fred Jackson signed a quit claim deed granting themselves Virginia Jackson's interest in the Dover property as joint tenants. This deed also granted George E. Michaels, P.C., "a fifty (50%) percent undivided interest as tenants in common of their two-thirds (2/3) interest" and "a fifty (50%) percent undivided interest as tenants in common of their oil, gas and mineral rights" in the Dover property. On April 17, 1992, a quit claim deed was executed in which George E. Michaels, P.C., granted Michaels and Impastato a "fifty (50%) percent undivided interest of a two-thirds (2/3) interest" and a "fifty (50%) percent interest of a one-half interest in the oil, gas and mineral rights" of the Dover property as tenants in common.

On July 14, 1992, Virginia Jackson signed a warranty deed conveying a "fifty (50%) percent undivided interest in her two-thirds (2/3) interest" and a "fifty (50%) percent interest in her one-half interest in the oil, gas and mineral rights of" the Dover property to Michaels and Impastato. In fact, there appear to be at least three distinct copies of deeds dated July 14, 1992, all of which purport to convey the same interest in the Dover property to Michaels and Impastato. Virginia Jackson actually signed the first of these three deeds on July 14, 1992, and recorded it on August 3, 1992. She "acknowledged" the second deed on August 26, 1993, and recorded it on September 1, 1993. Both Jacksons acknowledged the third deed on April 15, 1994, and recorded it on May 5, 1994. Apparently, Michaels drafted the first deed and Impastato drafted the second deed. Michaels drafted the third deed, purportedly to correct a "scrivener's error" in the previous deed; however, unlike the first two deeds, this deed included Fred Jackson's acknowledgment and signature.

In May 1993, Virginia Jackson hired attorney Roy Benaway to file a complaint in Otsego Circuit Court against James Doyle, Michaels, and Impastato to partition the Dover property. Pursuant to the September 1993 amended complaint, Michaels and Impastato became plaintiffs. On March 23, 1994, Virginia Jackson executed a quit claim deed granting to herself and Fred "all my rights, title and interest" in the Dover property. Before Virginia Jackson died on April 26, 1994, she was removed as a party and her husband added in her place.

On July 24, 1994, while the partition action was pending, Impastato executed a quit claim deed of his interest in the Dover property to himself and his wife, defendant Marian Impastato.

---

[3] See *Wolverine Gas & Oil Co v Doyle*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 1985 (Docket No. 79358).

On that same date, Michaels executed a similar quit claim deed conveying his interest in the Dover property to himself and his wife, defendant Christine Michaels. Both couples recorded their respective deeds.

The partition action ended when the parties entered into a consent judgment on June 20, 1995. Pursuant to the consent judgment, Fred Jackson, Michaels, and Impastato received approximately 688 acres of the property, and James Doyle received approximately 312 acres of the property. Christine Michaels and Marian Impastato were not included as parties in the partition action, and the consent judgment did not account for their interest in the Dover property.

On the same day the trial court entered the consent judgment, Fred Jackson, Michaels, and Impastato agreed to sell their portion of the Dover property to plaintiffs Kenneth and Margo Pickl. The terms of the purchase agreement allowed Impastato the right to rescind the agreement by June 26, but Impastato did not exercise this right. Neither Christine Michaels nor Marian Impastato signed the purchase agreement. Plaintiffs claimed that, at the time the agreement was signed, Michaels and Impastato stated that they were signing the agreement on behalf of their wives; however, defendants denied making these representations. Subsequently, in August 1995, Christine Michaels signed a document titled "Power of Attorney" in which she authorized her husband to enter into a contract for sale of her interest in the Dover property. Marian Impastato testified that she did not authorize the sale of her interest in the Dover property, and there is no evidence in the record to contradict this assertion.

According to plaintiffs, they made numerous attempts to close the sale between June 1995 and November 1995, but defendants thwarted their efforts. Fred Jackson died on November 10, 1995. On December 4, 1995, attorney Michael K. Cooper, who apparently was representing Impastato and Michaels, sent a letter to attorney Benaway, real estate agent Dale Smith, and the Pickls stating that Michaels and Impastato were unable to proceed with the Dover property sale because "their spouses were unwilling to participate." Because Christine Michaels and Marian Impastato had not signed the purchase agreement, the closing was impossible.

On July 11, 1996, plaintiffs initiated the instant action. Count I alleged that defendants were in breach of the purchase agreement and sought specific performance. Count II alleged that Michaels and Impastato misrepresented that they were acting on their wives' behalf and sought damages for misrepresentation, fraud, and fraudulent breach of the purchase agreement. Count III alleged that Michaels and Impastato committed malpractice and breached their fiduciary duties to plaintiffs by making these misrepresentations; by charging an "overreaching and unreasonable" fee for their services; by entering into a real estate transaction with Virginia and Fred Jackson that constituted a conflict of interest; by quit claiming their interest in the Dover property to their wives; and by delaying and ultimately refusing to sell the Dover property. Plaintiffs sought reformation or invalidation of the deeds and damages.

George E. Michaels, P.C. filed a counter complaint alleging that the estates of Virginia and Fred Jackson owed it money and seeking damages for defamation against plaintiff Kenneth Pickl. Defendants moved for summary disposition on April 21, 1997, arguing that plaintiffs could not obtain specific performance of the purchase agreement because all persons having interest in the property, namely Christine Michaels and Marian Impastato, did not sign the agreement. Defendants also argued that plaintiffs could not prove their fraud claim against

defendant attorneys, and the statute of limitation barred plaintiffs' legal malpractice claim. On October 15, 1997, plaintiffs moved for summary disposition on their breach of contract claim against Michaels and Christine Michaels, arguing that the power of attorney Christine Michaels signed enabled her husband to continue with the sale of the property. Following a hearing on November 10, 1997, the trial court granted plaintiffs' motion and subsequently entered an order granting specific performance of the purchase agreement as it concerned George and Christine Michaels. The trial court also granted defendants' motion for summary disposition of Count III, the legal malpractice claim, on December 5, 1997.

The trial court conducted a bench trial on August 27 and 28, 1998, and September 3, 1998. On September 14, 1998, the trial court read its findings of fact, conclusions of law, and verdict on the record. The trial court found that the retainer agreements the Jacksons signed only entitled Michaels and Impastato to fifty percent of the "net proceeds" obtained in the litigation against James Doyle, and that, as a matter of law, proceeds meant "monies or profits," which did not include real property. However, the trial court concluded that the oil, gas, and mineral rights did qualify as proceeds. The trial court also stated it was shocked by the conduct of Michaels and Impastato. It concluded that their dealings with the Jacksons regarding the partition action and the Dover property sale was "reprehensible, improper, and fraudulent," and violated the Michigan Rules of Professional Conduct (MRPC). Further, the trial court found, Michaels and Impastato improperly acquired a proprietary interest in the Dover property. The trial court entered an order voiding the fee simple interest Michael and Impastato had in the property, excluding their interest in the oil, gas, and mineral rights. The trial court found that, at best, the attorneys were entitled to a lien in an amount equal to fifty percent of the appraised value of the Jacksons interest in the Dover property, and granted George E. Michaels, P.C. and Impastato each an attorney lien of $92,192.00. The court also awarded plaintiffs costs and attorney fees on December 2, 1998.

Defendants filed motions to amend the judgment, for a new trial, and for relief from the judgment, all of which the trial court denied. According to plaintiffs' brief on appeal, the Pickls purchased the Dover property from the Jacksons' estates on January 4, 1999.

## II. Fee Simple Interest

### A. Standard Of Review

Defendants first argue that the trial court erred when it denied Impastato and Michaels a fee simple interest in the Dover property. We apply review de novo when interpreting contracts.[4]

### B. Analysis

According to defendants, the trial court erroneously found that the retainer agreements between Impastato, Michaels, and Virginia and Fred Jackson only entitled the attorneys to a percentage of the "proceeds" of the probate dispute between Virginia Jackson and James Doyle,

[4] *South Macomb Disposal Authority v American Ins Co*, 225 Mich App 635, 653; 572 NW2d 686 (1998).

which did not allow a fee simple interest in the real property. Additionally, defendants claim, the parties did not raise this issue in the trial court, which means that the trial court erred when it raised this matter sua sponte.

A complaint must provide the opposing party with reasonable notice of the claims that party will be called to defend.[5] Although a trial court may amend the pleadings to conform to issues tried by the express or implied consent of the parties,[6] it does not have the discretion to amend the complaint to add an additional claim on its own initiative.[7] Further, "[a] trial court does not have the authority to grant relief based on a claim that was never pleaded in a complaint or requested at any time before or during trial."[8]

In this case, it appears that, in the pleadings and at trial, none of the parties addressed whether the terms of the retainer agreements entitled the attorneys to an interest in the Dover property. Though plaintiffs claim in their appellate brief that the issue was tried by the consent of the parties, they do not cite any document or transcript that supports this claim. Further, we have been unable to locate any clear statement of this issue in the pleadings or arguments of the parties. "A party may not leave it to this Court to search for a factual basis to sustain or reject its position."[9] Therefore, we conclude that the parties did not raise this issue or try the issue by implied consent, and the trial court erred by raising this issue and using it as the basis of its verdict in this case. This error was not harmless because it violated defendants' due process right to have notice of the claims against them. "Leaving a defendant to guess upon what grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice."[10]

Even if we were to ignore the trial court's error in raising an issue not pleaded or argued by the parties, we cannot ignore the trial court's conclusions regarding the language of the retainer agreements and the meaning of the term "proceeds." As the trial court stated:

> I would note, too, that the language in [exhibits] 28 and 60[11] are substantially the same in any event . . . it still contains the key language: 50 percent of the net proceeds.
>
> * * *

---

[5] See MCR 2.111(B)(1); *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992).

[6] See MCR 2.118(C)(1).

[7] See *City of Bronson v American State Ins Co*, 215 Mich App 612, 619; 546 NW2d 702 (1996).

[8] *Reid v Michigan*, 239 Mich App 621, 630; 609 NW2d 215 (2000).

[9] *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998).

[10] *Dacon*, *supra* at 329.

[11] Exhibit 28 was the retainer agreement between Impastato and Fred and Virginia Jackson. Exhibit 60 was the "Confirmation and Attorney-Client Agreement" between Virginia Jackson and Michaels.

> And the language of those agreements is controlling. All of those deeds relate back, as I mentioned, to those underlying agreements: the retainer agreements and the order settle agree [sic] — settlement agreement and order confirming those agreements.
>
> And I do find from a close examination of these agreements that there never was any agreement — any written agreement providing for conveyance of any interest in real estate, any estate — in real property to any attorney involved, Michaels or Impastato.
>
> * * *
>
> It is an elementary matter of contract law that it's the agreement of the parties that controls. And I find that neither the order confirming settlement agreement; the retainer agreement, number 28; the confirmation and attorney/client agreement, as the title of Exhibit 60; and Exhibit Four, the settlement and release agreement do not provide, and the court did not confirm, conveyance of a ownership interest of any nature to either of the attorneys.
>
> * * *
>
> I note that there is nothing in the retainer agreement signed by Virginia Jackson and Fred Jackson, but unsigned by Mr. Impastato, that provides that they become co-owners. . . . But rather the agreement specifically and clearly states that the attorneys are to receive, as I mentioned, 50 percent of the net proceeds. Proceeds means monies.
>
> * * *
>
> And, again — and Exhibit 60 confirms the same agreement. . . . It states, quote, "That the attorney, George E. Michaels, P.C., is to receive one-half of any and all proceeds . . ."; that being the key contractual term that Virginia Jackson agreed to. Proceeds. Proceeds, means monies or profits.

First, the trial court plainly misquoted the language of the agreement between Virginia Jackson and Michaels. The agreement stated that Michaels was to receive "one half (1/2) of any and all proceeds, *be that real estate, personal property, or mixed*, that comes to Virginia Jackson through the Probate Estate of Merle Doyle . . . ."[12] This language directly contradicted the trial court's conclusion that there was no evidence that the Jacksons agreed to convey real property to the attorneys.

Second, we do not agree with the trial court's conclusion that the term "proceeds" should be construed as meaning only money or profits.

---

[12] Emphasis added.

> When presented with a contractual dispute, a court must determine what the parties' agreement is and enforce it. Contractual language is to be given its plain and ordinary meaning, and technical and constrained constructions are to be avoided." In the absence of a clear definition, contractual language is given its ordinary and plain meaning, avoiding technical and constrained constructions.[13]

The term "proceeds" can mean "something that results or accrues,"[14] "the total amount or profit derived from a sale or other transaction," or the value of land, goods, or investments when converted into money.[15] Although "money" or "profits" would fit these definitions, they are not the exclusive meaning of the term. In fact, Black's Law Dictionary explicitly states that "[p]roceeds does not necessarily mean only cash or money."[16] Thus, though used widely in everyday speech, the term "proceeds" could have one of several meanings, depending on the context or the parties' intent. That the agreement between Virginia Jackson and Michaels explicitly includes real estate within the meaning of proceeds suggests that the parties did not intend to limit the meaning to money or profits. Thus, the trial court erred in applying a narrow and constrained construction of the term. Under the terms of the contract, the attorneys were entitled to a fee simple interest in the Dover property.[17]

## III. Post-Judgment Motion For Relief

Defendants argue that the trial court erred when it denied their motion for post-judgment relief because they presented the trial court with evidence that it clearly erred when it found that Virginia Jackson did not intend to transfer a fifty percent interest in the Dover property. For the same reasons we concluded that the trial court erred in interpreting the contract at trial, it also erred in denying the motion for post-judgment relief.

## IV. Directed Verdict

Defendants contend that the trial court erred in denying their motion for a directed verdict because the statute of frauds barred this lawsuit. They failed to raise the statute of frauds issue at

---

[13] *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 449; 571 NW2d 548 (1997).

[14] *Random House Webster's College Dictionary* (2d ed, 1997), p 1037.

[15] Black's Law Dictionary (6th ed, 1990), pp 1204-1205.

[16] *Id*. at 1204.

[17] Needless to say, plaintiffs object to the terms of the retainer agreement as unethical. Assuming that Michaels and Impastato breached the rules of professional conduct, a breach of ethics is not equivalent to malpractice and does not give rise to an independent cause of action. See *Watts v Polaczyk*, 242 Mich App 600, 607, n 1; 619 NW2d 714 (2000), citing MRPC 1.0(b). Thus, though we also have great concerns about whether Michael and Impastato acted ethically in securing their own interests in this way, this ethics problem does not figure directly in our decision.

trial,[18] have not presented it for our review in the statement of issues presented,[19] nor briefed this issue adequately.[20] Thus, we will not address it.

## V. Attorney Fees

### A. Standard Of Review

Defendants argue that the trial court erred in determining that their defense was frivolous and, therefore, that plaintiffs were entitled to attorney fees. "A trial court's finding that a claim is frivolous will not be reversed on appeal unless clearly erroneous."[21]

### B. Analysis

Plaintiffs requested attorney fees under MCL 600.2591 and MCR 2.625(A)(2),[22] arguing that they were the prevailing parties and that the defenses asserted in this matter were frivolous. MCL 600.2591(1) provides:

> Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

An action or defense is "frivolous" if:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.[23]

In support of their request for attorney fees, plaintiffs argued that defendants had no reason to believe the facts supporting their case were true, and their defense was devoid of legal merit. Plaintiffs claimed that defendants delayed this case to harass them. Further, plaintiffs asserted that defendants had a "free ride" in this case because their malpractice insurer paid for their

[18] See *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

[19] See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

[20] See *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

[21] See *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996).

[22] The court rule states that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591 . . . ."

[23] MCL 600.2591(3)(a).

defense even though the trial court found the attorneys' conduct unethical and reprehensible. Defendants countered that plaintiffs' arguments focused on irrelevant issues, such as whether they paid for their defense, which were unrelated to the facts and legal merit of the defenses. Defendants also claimed that any alleged misconduct would not render their legal defenses frivolous. Moreover, defendants pointed out that their statute of limitations defense of the legal malpractice claim was not frivolous because they prevailed on that claim.

After the hearing, the trial court made the following findings and conclusions:

> The essence of [defendants] entire claim was that they were entitled to fee simple title to this large tract of acreage. That claim, I believe was from the entire facts and record and based on the findings I made on September 14th of 1998 and listening to the defense was, in fact, frivolously asserted. I believe it was designed to, based on my knowledge of the case, designed to financially injure the heirs to force them into expensive, costly, protracted litigation just like the — just like it turned out and still continues today and probably will continue their claim to — that they were entitled to fee simple title to that acreage as co-owners with the elderly former clients was, as I found before, to be unconscionable and fraudulent.
>
> I believe that without question the plaintiffs under the statute do qualify clearly as prevailing parties because the essence of the claim was the lawyers' assertion that they were fee simple title owners and thus entitled to apply dower rights of their spouses to — in conjunction with their claim to that vast piece of acreage that had been in the Pickl family.
>
> I don't believe further based on my knowledge of and having sat and listened to the lawyers testify, their spouses testify, and the other witnesses and exhibits that they, they meaning the attorneys, had any reasonable basis to believe candidly and honestly and forthrightly that they were at all entitled to be fee simple owners with these heirs. As I found before, that conclusion and belief was bordering on the absurd, was preposterous for the reasons outline [sic] in the September 14, '98 transcript of the findings of fact. I incorporate those into this record.
>
> * * *
>
> I do agree with [defense counsel] that the position of Count III which was a dismissal of the malpractice claim based on the statute of limitations was reasonably asserted. It was not timely. . . . I believe I was accurate on that ruling just as I was accurate on the ultimate ruling.
>
> But be that as it may, certainly it was not a frivolous defense asserted as to Count III only. I find that only as to Count III because the statute of limitations argument I thought was meritorious and not frivolous.

Thus, the trial court concluded that plaintiffs were entitled to attorney fees incurred after the date that Count III was dismissed.

The trial court clearly erred in determining that the defenses asserted in this matter were frivolous. To begin with, the trial court based its finding on a nonexistent defense, that is, that defendants asserted a fee simple interest in the Dover property. Contrary to the trial court's characterization of this as a "defense," neither party raised nor argued this issue in the pleadings or at trial. In fact the statements in plaintiffs' complaint suggest that they did not dispute defendants' fee simple interest in the property. Even assuming defendants' claim to an interest in the property constituted a defense, they had a reasonable belief that the facts of this case and the law supported their position. As we noted in above, the language of at least one of the contingency fee agreements entitled defendants to "one half (1/2) of any and all proceeds, be that real estate, personal property, or mixed." In addition, the defendants' position that the term "proceeds" could include real property was not devoid of arguable legal merit because there was no existing case law interpreting the meaning of the term.

The trial court also incorrectly determined that defendants engaged in protracted litigation to injure plaintiffs. Much of the conduct the trial court cited in its finding occurred before this litigation, when the defendant attorneys represented plaintiffs and when they disputed the property sale. The trial court did not identify any conduct by defendants in this suit that would support a finding that defendants sought to harass, embarrass, or injure plaintiffs. In sum, because there is no evidence that defendants' conduct or defenses were intended to injure plaintiffs and the law supported their defenses, the trial court clearly erred when it found that defendants advanced a frivolous defense.

## VI. Oil, Gas, And Mineral Rights

### A. Standard Of Review

Plaintiffs, in their cross-appeal, contend that the trial court erred when it voided all the deeds providing defendants an interest in the property but did not void defendants' interests in the oil, gas, and minerals on the property. This issue requires review de novo.[24]

### B. Analysis

The crux of plaintiffs' argument is that the trial court's conclusion that a right to "proceeds" did not extend to a fee simple interest in the land should have also barred defendants' interest in the oil, gas, and minerals rights. In the trial court's view, "the oil and gas interests are in effect, proceeds interest, so that — this ruling does not disturb their oil, gas interests because those are truly net — net proceeds interest." Defendants argue that their interests are personal property because, in *Mark v Bradford*,[25] the Michigan Supreme Court held that mineral interests are personal property, not real property. However, this Court has held that an interest in an oil

---

[24] See *South Macomb Disposal Authority*, *supra* at 653.

[25] *Mark v Bradford*, 315 Mich 50, 58; 23 NW2d 201 (1946).

and gas lease is real property.[26] Regardless of how we characterize defendants' interests in these rights, the contingent fee agreement entitles defendants to an interest in "monies or profits," and, as such, fall under the trial court's definition of proceeds. Our conclusion that the trial court's definition of proceeds was too narrow makes it only that much clearer that defendants are entitled to their interests in these rights. Thus, the trial court did not err when it declined to void defendants' right to receive royalty payments from the oil, gas, and leases.

## VII. Malpractice Claim

### A. Standard Of Review

Plaintiffs also contend that the trial court erred when it granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) for the legal malpractice claim by the estate of Frederick Jackson. This issue also requires review de novo.[27]

### B. Analysis

Plaintiffs argue that statute of limitations on legal malpractice actions is two years, they filed the complaint in this matter in July 1996, and defendant attorneys prepared letters and had telephone consultations with the Fredericks as late as August 1995. They also contend that a genuine issue of material fact existed regarding the date on which Michaels and Impastato severed their attorney-client relationship with Fred Jackson. As a result, they assert that the trial court erred in concluding that the limitation period expired before plaintiffs filed their complaint.

Plaintiffs are correct in some respects. The statute of limitations is two years for a legal malpractice claim.[28] A claim for legal malpractice accrues on the last date the attorney provided services to the client.[29] However, defendants presented to the trial court Michaels' affidavit stating that his representation was limited to Virginia Jackson's dispute with her brother and a law suit against Wolverine Gas & Oil Company. According to Michaels, this representation ended after the parties reached a settlement on the record in Wayne Probate Court on June 15, 1992, more than four years before plaintiffs filed their complaint. Plaintiffs, however, point to letters Michaels and Impastato wrote in July 1993, February 1994, and August 1995, which plaintiffs allege demonstrate a continuing attorney-client relationship between defendant attorneys and the Jacksons. Yet, the August 1995 letter, the only letter that would bring the malpractice claim within the period of limitations, is nothing more than a memorandum of understanding regarding discussions between defendant attorneys and Frederick. There is nothing in the letter to bolster plaintiffs' claim that defendant attorneys were representing Frederick at that time, contrary to Michaels' affidavit. Because plaintiffs provided no evidence establishing that the alleged attorney-client relationship beyond June 1992, the trial court did not err when it granted summary disposition to defendants on this claim.

---

[26] See *Thomas v Steuernol*, 185 Mich App 148, 152; 460 NW2d 577 (1990).

[27] See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[28] See MCL 600.5805(4); *Fante v Stepek*, 219 Mich App 319, 322; 556 NW2d 168 (1996).

[29] See MCL 600.5838(1); *Fante*, *supra*.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot