

STATE OF MICHIGAN
COURT OF APPEALS

JACK A. Y. FAKHOURY and MOTOR CITY
AUTO WASH, INC.,

UNPUBLISHED
January 17, 2006

Plaintiffs-Appellants/Cross-
Appellees,

v

LYNN L. LOWER, and CHEATHAM, ESTES &
HOLLMAN, P.C.,

No. 256540
Oakland Circuit Court
LC No. 2002-039939-NM

Defendants-Appellees/Cross-
Appellants.

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's dismissal of their legal malpractice claims. Defendants cross-appeal, raising a jurisdictional challenge. We affirm in the principal appeal. Defendants' jurisdictional challenge on cross-appeal fails.

Jack A. Y. Fakhoury is the president and sole shareholder of Motor City Auto Wash, Inc. (MCAW), a service station/car wash/retail station. Defendant Lynn Lower is an attorney at defendant law firm, Cheatham, Estes & Hollman, P.C., and represented Fakhoury and MCAW in the underlying litigation, *Allied Capital Corp v Motor City Auto Wash, Inc., et al.*, Wayne Circuit Court No. 98-832046.

The underlying litigation

In April 1997, MCAW borrowed \$890,000.00 from Allied Capital, to improve the physical facility at its service station/car wash/retail store in Inkster, Michigan. Fakhoury personally guaranteed the loan. Defendants Lower and Cheatham, Estes & Hollman, P.C., represented MCAW and Fakhoury in their dealings with Allied Capital, beginning in 1997.

MCAW failed to make payments under the \$890,000.00 loan agreement. Allied Capital declared a default and demanded payment of the entire debt in August 1998. After MCAW failed to cure the default and Fakhoury failed to pay on the guaranty, Allied Capital commenced a foreclosure action in October 1998 against MCAW, which included a count against Fakhoury based on his guaranty of the corporate debt.

Defendants represented Fakhoury and MCAW in the foreclosure action, and filed counterclaims for both Fakhoury and MCAW, alleging lender liability based on Allied Capital's failure to fund a \$340,000 loan commitment Allied allegedly made in November 1998.¹ MCAW and Fakhoury's counterclaims alleged that Allied had breached the covenant of good faith and fair dealing, and had damaged them in that they lost profits, lost goodwill in the business community, their credit standing was injured, and they incurred attorney fees and costs.

In April 2000, defendants filed a motion to withdraw as counsel for Fakhoury and MCAW. An order granting the motion was entered on May 12, 2000.

After defendants withdrew as counsel for Fakhoury and MCAW, Allied Capital's foreclosure action against MCAW proceeded. On Allied Capital's motion, the circuit court struck MCAW's affirmative defenses to Allied Capital's complaint, MCAW's supplemental answers to all interrogatories or request for production of documents, and all expert witnesses named by MCAW. In August 2000, Fakhoury's individual counterclaim against Allied was dismissed on the basis that he lacked standing to pursue the claim on MCAW's behalf and failed to state a cause of action.

A foreclosure judgment in the amount of \$887,711.40 was entered against MCAW. On the same date, the circuit court dismissed MCAW's counterclaim against Allied Capital.

MCAW commenced a bankruptcy proceeding.² After the bankruptcy stay was lifted, the circuit court in the *Allied Capital* case entered judgment against Fakhoury in the amount of \$1,242,518.86 plus accrued interest from June 8, 2001, plus costs and fees as provided under Fakhoury's guaranty of the \$890,000.00 loan.

The instant action

Fakhoury and MCAW filed the instant legal malpractice action against defendants in April 2002. The first amended complaint alleged that defendants committed legal malpractice and breached duties owed to Fakhoury and MCAW by:

- (a) failing to communicate in writing the contingent fee agreement between Attorneys and MCAW/Fakhoury;
- (b) conducting little or no discovery;
- (c) failing to timely forward Allied Capital's discovery requests to MCAW and Fakhoury;

¹ In November 1998, MCAW signed a commitment letter with Allied Capital for an additional loan in the amount of \$340,000.00, but that deal did not close.

² Plaintiff does not provide details regarding the bankruptcy proceeding. Defendants' motions below state that MCAW filed a voluntary petition for bankruptcy on July 20, 2000.

- (d) failing to timely respond to discovery requests from Allied Capital, resulting in the ordering of sanctions by the Court;
- (e) failing to timely consult with, retain or identify on a witness list any expert witnesses;
- (f) failing to timely communicate to MCAW and Fakhoury settlement offers from Allied Capital;
- (g) failing to timely respond to settlement offers received from Allied Capital;
- (h) failing to accurately advise MCAW and Fakhoury during the Underlying Litigation;
- (i) otherwise failing to prosecute the counterclaim;
- (j) attempting to renegotiate their fee agreement with MCAW and Fakhoury without fully advising MCAW and Fakhoury of their alternatives, rights and responsibilities with respect to the fee agreement;
- (l) [sic (k)] filing a motion to withdraw at a critical point in settlement negotiations that communicated inaccurate information to the Court and Allied Capital, prejudicing the position of MCAW and Fakhoury in settlement negotiations and with the Court; and
- (m) engaging in other acts of malpractice that may be ascertained during discovery in this matter.

The first amended complaint also alleged that at the time defendants ceased representing MCAW and Fakhoury in the underlying litigation, discovery had closed, and because defendants had done no work to defend against the Allied Capital complaint or to prosecute the counterclaim, MCAW and Fakhoury were unable to obtain additional counsel to represent them in the underlying litigation. Finally, the amended complaint alleged that as a direct and proximate result of defendants' malpractice, an adverse judgment was rendered against MCAW and Fakhoury, and the counterclaim was dismissed.

Defendants moved to dismiss MCAW due to its filing of bankruptcy, asserting that only the bankruptcy trustee, and not MCAW, had standing or legal capacity to sue. The circuit court granted the motion.

After MCAW was dismissed as a party, defendants filed additional summary disposition motions. The circuit court partially dismissed Fakhoury's case, concluding that Fakhoury lacked standing to assert legal malpractice against defendants because of their representation of MCAW relating to the "lender liability" counterclaim in the *Allied Capital foreclosure* action, but allowed Fakhoury's case to proceed to the extent he alleged malpractice as to defendants' representation of him *in defense of* the Allied Capital complaint. The circuit court also granted defendants partial summary disposition as to Fakhoury's allegations of legal malpractice regarding defendants' withdrawal from representing Fakhoury in the Allied litigation, on the

basis that Fakhoury had stipulated on the record in the underlying matter that he concurred with trial counsel's motion to withdraw. On defendants' motion, the circuit court also excluded certain of Fakhoury's damage claims: (1) for loss of wages as an employee of Motor City Auto Wash, Inc.; and (2) for loss of equity in Motor City Auto Wash, Inc. These three rulings are challenged on appeal.

The circuit court denied defendants' motion in limine to preclude Fakhoury from seeking mental anguish and emotional distress damages.³ However, the circuit court granted defendants summary disposition as to Fakhoury's claims of professional negligence 1) regarding sanctions imposed against MCAW, 2) regarding failing to timely forward Allied's discovery requests to MCAW, 3) regarding the fee agreement and any claimed renegotiation of the fee agreement, and 4) allegations that defendants failed to properly communicate settlement offers in the underlying foreclosure action. The circuit court also granted defendants' motion in limine to exclude all expert testimony from Fakhoury's proposed expert, Stuart Schram, specifically testimony on Fakhoury's lost wages/earnings with MCAW, and loss of equity with MCAW.

Defendants accepted the unanimous February 2004 case evaluation (\$7,500 in defendants' favor), and Fakhoury and MCAW rejected it. On March 10, 2004, defendants filed a Motion for Security for Costs under MCR 2.109. The circuit court granted the motion, requiring Fakhoury to post a \$20,000 bond in thirty days (the order required the bond be filed with the clerk by April 19, 2004 at 4:00 p.m.) The order further provided that failure to post the bond "will result in a dismissal of this action with prejudice."

Fakhoury did not file the bond. The court entered an order of dismissal on April 20, 2004 dismissing Fakhoury's case with prejudice for failure "to comply with the 3/17/04 order".

On May 11, 2004, Fakhoury filed a motion to set aside the April 20th order of dismissal, as well as the March 17 order requiring him to post a bond. The circuit court treated Fakhoury's motion as a motion for reconsideration of the April 20, 2004 dismissal, and entered an order on May 21, 2004, stating that plaintiff's motion to set aside the dismissal was "in fact, a disguised motion for reconsideration," and ordered Fakhoury to supplementally brief two issues: (1) under what circumstances the court could dispense with the 14-day time limit for filing of motions for reconsideration under MCR 2.119(F)(1), and (2) under what authority plaintiff based bringing his motion to set aside the April 20, 2004 order of dismissal, pursuant to MCR 2.612, when the relief requested effectively requests reconsideration of the initial order for security for costs dated March 17, 2004.

Both plaintiffs and defendants submitted supplemental pleadings. On June 10, 2004 the circuit court entered its "opinion and order denying plaintiff's [Fakhoury's] motion for reconsideration entitled 'motion to set aside April 20, 2004 Order of Dismissal,' stating that Fakhoury's supplemental brief failed to address the first issue the court had requested briefing on, and simply reiterated arguments set forth in response to the underlying motion for security

³ Defendants filed an application for leave to appeal that ruling, which this Court denied by order dated June 25, 2004.

for costs. Thus, the court declined to consider Fakhoury's motion for reconsideration "having failed to timely file said motion in compliance with MCR 2.119(F)(1).

Plaintiffs Fakhoury and MCAW appeal and defendants cross-appeal.

I

We first address defendants' claim on cross-appeal that this Court has jurisdiction to review only the June 10, 2004 order of the circuit court, because plaintiffs filed a claim of appeal on July 1, 2004, and that claim was untimely insofar as plaintiffs seek review of orders the circuit court entered before June 10, 2004.

"Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

MCR 7.204(A)(1) provides:

(1) An appeal of right in a civil action must be taken within

(1) 21 days after entry of the judgment or order appealed from;

(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or **reconsideration**, or a motion for other postjudgment relief, if the motion was filed within the initial 21-day appeal period or within further time the trial court may have allowed during the 21-day period; * * * [Emphasis added.]

The latter provision applies here.

As defendants acknowledge, the circuit court treated plaintiffs' May 11, 2004 motion as a motion for reconsideration, not as a motion for relief from judgment. The court denied plaintiffs' May 11, 2004 motion by opinion and order entered on June 10, 2004, entitled "Opinion and Order Denying Plaintiff's Motion for Reconsideration Entitled 'Motion to Set Aside April 20, 2004 Order of Dismissal.'" Emphasis added.

May 11, 2004 was "within 21 days after" the circuit court entered the order of dismissal on April 20, 2004. Defendants' jurisdictional challenge on cross-appeal thus fails.

II

In the principal appeal, plaintiffs first challenge the dismissal of MCAW. This Court reviews the circuit court's grant of summary disposition de novo. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

The parties agree that the commencement of a bankruptcy case creates an estate that includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 USC § 541(a)(1). The parties also agree that the Chapter 7 trustee for MCAW had standing to pursue MCAW's legal malpractice claim.

Fakhoury and MCAW do not address on appeal how the circuit court erred by dismissing MCAW's malpractice claim. Rather, plaintiffs state that as a dissolved corporation under MCL 450.1834(e), MCAW could prosecute its claims. Defendants respond that MCAW was not merely a "dissolved" corporation, it was a corporation in bankruptcy. Plaintiffs do not counter this statement.

Regarding the assets of a bankruptcy estate, and absent abandonment of the claim, the bankruptcy trustee is the sole proper party to bring suit. See *In re RCS Engineered Products Co*, 102 F3d 223 (CA 6, 1996). Under MCR 2.201(B), an action must be prosecuted in the name of the real party in interest. *Hoffman v Auto Club Ass'n*, 211 Mich App 55, 94-96; 535 NW2d 529 (1995). Fakhoury and MCAW's complaint was not filed on behalf of, or in the name of, the bankruptcy trustee. The trustee had not abandoned this claim, thus, we affirm the circuit court's dismissal of MCAW's claim.

II

Plaintiffs contend that the circuit court erred in not permitting Fakhoury to proceed on the lender liability counterclaim. Plaintiffs' appellate brief does not argue how the circuit court erred, simply announces that Fakhoury had standing to assert legal malpractice claims, and cites authority regarding *the elements* of a malpractice claim. The elements of a malpractice claim are not at issue here.

An appellant may not give issues cursory treatment with little or no citation of supporting authority. *Goolsby v Detroit*, 419 Mich 651, 655 n1; 358 NW2d 856 (1984). Failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). We conclude plaintiffs abandoned this issue, but note that in any event, we reject plaintiffs' claims on the merits. In *Michigan National Bank v Mudgett*, 178 Mich App 677, 679-680; 444 NW2d 534 (1989), this Court noted:

In general, a suit to enforce corporate rights or to redress or prevent injury to the corporation, must be brought in the name of the corporation and not that of a stockholder, officer or employee. [citations omitted.]

The general rule is inapplicable where the individual shows a violation of a duty owed directly to him. . . . This exception does not arise, however, merely because the acts complained of resulted in damage both to the corporation and to the individual, but is limited to cases where the wrong done amounts to a breach of duty owed to the individual personally. Thus, where the alleged injury to the individual results only from the injury to the corporation, the injury is merely derivative and the individual does not have a right of action against the third party. [citations omitted.]

See also, *In re Van Dresser Corp*, 128 F3d 945 (CA 6, 1997) (holding that **guarantor** has no standing to bring claims against alleged tortfeasor resulting from his payment of debtor corporation's loan because the tort claims were the property of the bankruptcy trustee for the debtor corporation), and *Barger v McCoy Hillard & Parks*, 396 NC 650; 488 SE2d 215 (NC, 1997) (holding that rules of law paralleling the rules for shareholder's individual actions should

be applied to creditors and guarantors). In the instant case, Fakhoury made no showing that his injuries are separate and distinct from MCAW's; rather, they are derivative of MCAW's injury.

III

Plaintiffs next challenge the circuit court's ruling excluding his damage claims for lost wages as an employee of MCAW and loss of equity in MCAW.

A legal malpractice plaintiff may recover all damages that are a legal and natural consequence of the defendants' negligence. *Gore v Rains & Block*, 189 Mich App 729; 473 NW2d 813 (1991); *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 692; 310 NW2d 26 (1981).

Plaintiffs' appellate brief does not address the issue raised, but rather, cites cases for general propositions regarding legal malpractice claims. We conclude that plaintiffs abandoned this issue. *Yee, supra*. Further, we see no apparent merit to plaintiffs' position where the losses are clearly derivative of the corporate loss, *Mudgett, supra* at 679-680, and attorney fees are not ordinarily recoverable. *Bonner, supra* at 468.

IV

Plaintiffs also assert that the trial court committed error when it dismissed plaintiffs' claims relative to defendants' withdrawal in the underlying case. We disagree.

MCR 2.117(C)(2) provides that "An attorney who has entered an appearance may withdraw from the action or be substituted for only on order of the court." Defendants' motion for leave to withdraw asserted that good cause existed for their withdrawal, based on reasons including Fakhoury's failure to cooperate and assist, that Fakhoury "has engaged in objectives that petitioners consider repugnant or imprudent," and that continued representation would result in "an unreasonable financial burden."⁴ Defendants filed their motion to withdraw in April 2000, at which point trial was scheduled for September 11, 2000.

At the April 14, 2000 hearing on defendants' motion for leave to withdraw, Fakhoury stipulated to defendants' withdrawal and did not contest the factual assertions in defendants' motion to withdraw.⁵ Under these circumstances, we find no error in the circuit court's dismissal of plaintiffs' claims relative to defendants' withdrawal from representation.

⁴ At the April 14, 2000 hearing, Charles Cheatham represented his firm and stated on the record that Fakhoury owed the firm \$77,000.

⁵ MRPC 1.16(b) provides in pertinent part:

V

Plaintiffs assert that the circuit court erred when it ordered them to post a \$20,000 bond. We disagree.

This Court reviews the circuit court's determination to require a security bond for an abuse of discretion. *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 270; 463 NW2d 254 (1990). The circuit court's determinations regarding the legitimacy of plaintiffs' claims and Fakhoury's ability to post a bond are reviewed for clear error. *In re Surety Bond for Costs*, 226 Mich App 321, 333; 573 NW2d 300 (1997).

MCR 2.109 provides in part:

(A) Motion. On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court . . . The court shall determine the amount in its discretion . . .

(B) Exceptions. Subrule (A) does not apply in the following circumstances:

(1) The court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond.

At the time defendants moved for security for costs, the circuit court had significantly limited the claims available to plaintiffs, and the unanimous February 2004 case evaluation (\$7,500 in defendants' favor) had been accepted by defendants and rejected by plaintiffs. There were pending motions seeking dismissal of plaintiffs' remaining claims of professional negligence, which regarded the adequacy of discovery in the underlying litigation, the retention

(...continued)

Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

* * *

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

* * *

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

of an expert witness, and the alleged failure of defendants to keep plaintiffs adequately advised during that litigation. In granting the motion, the circuit court noted Fakhoury's propensity to not meet his financial obligations. Plaintiffs do not take issue with that assessment. Fakhoury did not claim to be unable to post a bond. The circuit court's remark to the effect that plaintiffs were unlikely to prevail on their claims was not inappropriate. See *In re Surety*, *supra* at 333, where this Court noted, "In determining the legitimacy of a claim, a trial court is not strictly limited to considering the plaintiff's legal theory, but may also consider the likelihood of success on that theory."

Under these circumstances, we conclude that the circuit court did not abuse its discretion by requiring Fakhoury to post a bond.

VI

Plaintiffs contend that the circuit court erred by refusing to set aside the order of dismissal. We disagree.

This Court reviews a circuit court's determination on a motion for reconsideration, MCR 2.119(F)(1), for an abuse of discretion. *Mudgett*, 178 Mich App at 681. Plaintiffs' appellate brief merely sets forth MCR 2.612(C)(1)(a), the court rule regarding relief from judgment, several cases applying that court rule, and then in one sentence states "because the imposition of the bond requirement was improper, so was the dismissal and the order of dismissal should have been set aside."

We conclude that the circuit court did not abuse its discretion by denying plaintiffs' motion to set aside the order of dismissal. The court's orders setting bond and dismissing for failure to post bond were proper. Plaintiffs did not follow the March 17 order to post security, or seek reconsideration or relief from that order within the 30 days provided. Fakhoury did not explain why he failed to comply with the March 17 order and post security, and thus has provided no basis for relief from the order of dismissal.

We affirm the circuit court's order of dismissal. We reject defendants' jurisdictional challenge on cross-appeal. Given our disposition, we need not reach defendants' remaining issue on cross-appeal, regarding the availability of emotional damages to Fakhoury.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder