NO. 5-10-0165

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DEVIN KAEMMERER and HOPE KAEMMERER,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	St. Clair County.
	)	
v.	)	No. 05-L-659
	)	
MICHAEL V. WAGNER,	)	Honorable
	)	Michael J. O'Malley,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Spomer concurred in the judgment.

R U L E 2 3 O R D E R

Held: In this legal malpractice action, the circuit court properly submitted to the jury the question of whether an attorney/client relationship existed between the defendant and the plaintiff, the circuit court properly submitted the question of the plaintiff's contributory negligence to the jury, and the circuit court properly denied the plaintiff's motion for a judgment notwithstanding the verdict.

Devin Kaemmerer and Hope Kaemmerer, the plaintiffs, appeal from a judgment entered in a jury trial by the circuit court of St. Clair County in favor of the defendant, Michael Wagner, in the plaintiffs' action for legal malpractice. The plaintiffs had sued the defendant attorney and alleged negligence in failing to properly advise them regarding the wisdom of purchasing a lawn fertilization business. At the trial, the defendant countered that no attorney/client relationship existed between the parties and that the plaintiffs had been contributorily negligent. A jury returned a verdict in favor of the defendant, and the plaintiffs appeal.

On appeal, the plaintiffs raise four issues: (1) whether the circuit court erred in

submitting to the jury the question of whether an attorney/client relationship existed between the parties, (2) whether the circuit court erred in submitting to the jury the affirmative defense of contributory negligence, (3) whether the court erred in denying the plaintiffs' motion to set aside the jury verdict and to enter a judgment for the plaintiffs, and (4) whether the plaintiffs' attorney fees incurred in prosecuting the legal malpractice case are a proper element of damages in this case. The defendant counters that the circuit court acted properly in each instance, but he urges as an additional reason to affirm that the circuit court erred in not directing a verdict in favor of the defendant because the evidence at the trial proved the defendant's affirmative defense that the plaintiffs had not brought their action within the two-year statute of limitations. For reasons that follow, we affirm the judgment of the circuit court. We set forth herein only those facts necessary to our decision.

Devin Kaemmerer testified at the trial that he has a high school degree and has taken some college classes. At all pertinent times hereto, he ran a lawn care business, which he had started in 1996. He had also purchased properties and "flipped" them, that is, fixed them up and resold them. He had never before purchased a business.

In 2002, Devin learned that Dave Ballone was interested in selling his Natural Lawn franchise business, a lawn fertilization business. Prior to purchasing the business, Devin received from Ballone the October, November, and December receipts that reflected the net billings for the business. The October statement showed an operating loss of approximately $25,000 for the year. Devin also received an active customer list. Devin never asked Ballone for, or received, any additional financial information on the business.

When Devin told his tax accountant about his plan to buy the business, the accountant advised him to get additional specific information. Devin asked Ballone about the accountant's questions, and Ballone answered the questions in a way that "sounded perfectly sensible" to Devin. Ballone stated that he was just tired of the business and wanted to get rid

of it. Devin felt satisfied with everything Ballone told him. They came to an agreement on the sale of the business: Devin would take on the business's existing debt in the approximate amount of $260,000; Ballone was to remain as a part owner for one year.

Devin testified that he met with the defendant on two occasions, once in November or December and once in January, when he and Ballone actually executed the agreement. At one point, the defendant asked Devin if he could handle the debt and if the bank was comfortable with it, and Devin responded affirmatively. The defendant gave Devin his card and told him to call with any questions. The defendant never asked Devin what he had done to learn about the business or advised him to get a complete financial analysis of the business.

At the second meeting in January 2003, Devin and Ballone actually signed a written purchase agreement. The defendant had drafted the agreement. Again, the defendant did not give Devin any advice on the wisdom of purchasing the business or what he should consider before purchasing it.

At no time did the defendant tell Devin that he had done collection work for Ballone. Devin believed that the defendant was his attorney, and the defendant never told him otherwise or indicated that there was any conflict of interest. The bill for the defendant's services was sent to Ballone for payment, although it was addressed to Kaemmerer Lawn, Inc., the business Devin had formed for the purposes of acquiring the Natural Lawn franchise business. The defendant had incorporated this business for Devin. Kaemmerer Lawn, doing business as Natural Lawn, paid the invoice.

After having purchased the business, Devin began calling customers from the list Ballone had provided, and he learned that many of the customers had cancelled their service. Only after buying the business did Devin begin discovering that it had financial difficulties.

In the late spring of 2005, Devin began to believe that buying the business had been

a mistake. In July 2005, Devin consulted with Laura Grandy, a bankruptcy attorney. He closed the business at the end of 2005. At his first meeting with Grandy, she told him that the defendant should not have represented both Ballone and Devin, and she advised him to consult another attorney about action against the defendant.

Devin identified a letter that had been written in 1998 from the defendant's law firm to Ballone advising Ballone about the wisdom of purchasing the Natural Lawn franchise. That letter stated that it would require at least 1,200 customers in order for the business to be profitable, because of the high franchise fee. The letter further advised that the probabilities of making a profit from the business were "not good" unless the business had gross sales in excess of one million dollars. Devin had never received any such information from the defendant. If Devin had had that information, he would not have purchased the business.

On cross-examination, Devin testified that the defendant drafted the purchase agreement based on information provided to him by Ballone. Devin believed that the defendant was the attorney for the business he was purchasing, Natural Lawn. Devin was impeached by his deposition testimony in which he stated that he knew that the defendant was Ballone's attorney, but he clarified that he believed that the defendant was Natural Lawn's attorney.

Prior to meeting with the defendant, Devin had not asked for any financial statements from the business. He was given the October, November, and December statements and the 2002 customer list, but he did not ask for any others. After the initial meeting with his accountant at which the accountant asked for additional information, Devin never returned to his accountant and never showed him the financial documents he had. Devin acknowledged that the financial documents he possessed showed that the business was losing money. No one ever told Devin that the business was losing customers, and had he known

that, it would have been a red flag.

Devin never specifically asked the defendant to perform any legal work for him, and the defendant never explicitly told Devin that he would represent him. The bill for the defendant's services was sent to Ballone and noted thereon that Ballone was the client. Devin and the defendant never discussed fees. Devin never gave the defendant any financial records to look over. Devin believed that if there was a problem, the defendant would have told him.

Devin knew that there were numerous serious problems with the business within months of purchasing it. The major problem was a shortage of customers, which Devin knew of soon after purchasing the business. He thought that with aggressive marketing he could get more customers.

The plaintiffs called attorney Mary Robinson to testify as an expert witness. She opined that the defendant was Devin's attorney, in that Devin "made a gesture of asking for *** legal services" and the defendant, "whether he understood that to be the question or not, *** provided legal services." The defendant did describe to Devin the terms of the purchase agreement, and that was the provision of legal services. The defendant also organized Kaemmerer Lawn, Inc., for Devin. Further, the defendant did not tell Devin that he was not Devin's attorney. According to Robinson, when a person reasonably thinks that an attorney might perform services for him, it is up to the lawyer to state that he is not that person's attorney or an attorney/client relationship is formed. Robinson concluded that there was an attorney/client relationship between the defendant and Devin for the following reasons:

> "[H]e provided legal services. Mr. Kaennerer [*sic*] came in, said, 'I have a legal problem.' Mr. Wagner provided legal services, gave him advice, helped structure the agreement, explained it after it was drafted, explained the corporation, applied for the federal number, and he never told–and all of those circumstances would have made

it reasonable for Mr. Kaemmerer to believe that Mr. Wagner was his lawyer and Mr. Wagner never told him he wasn't his lawyer."

Laura Grandy testified that she is an attorney. In mid-2005, Devin consulted Grandy about financial problems with the business he had purchased from Ballone. After hearing that the defendant had drafted the purchase agreement while representing Ballone, Grandy suggested to Devin that he seek advice from a legal malpractice attorney.

John Durako, Devin's tax accountant, testified that he has never been in the business of evaluating businesses for their current value. He had prepared the plaintiffs' tax returns for more than 25 years. In the fall of 2002, Devin came to Durako's office with a financial statement of the business he was thinking of buying. They went over the statement for 20 to 30 minutes, and Durako gave Devin a list of questions about things that Durako thought he ought to check into. Durako told Devin that if he got some more information, Durako would be able to give him better input. Devin never returned to Durako with the requested information. Devin's attitude was that, regardless of the facts, he knew that he could make the business profitable.

Devin's wife, Hope Kaemmerer, testified that the business lost $67,933 in 2003, lost $83,410 in 2004, and gained $1,371 in 2005. The gain in 2005 was a result of the business not paying its employees, the plaintiffs' children. Had the business paid its employees in 2005, it would have had a loss of approximately $49,000.

Prior to purchasing the business, the plaintiffs were not worried about the $25,000 loss shown on the October 2002 statement because there were two months left in the year and they thought more revenue would come in. They did not talk about getting any advice about the purchase.

The defendant testified that Ballone was a client of his firm when he started there in 1999. He had occasionally done work for Ballone. The defendant prepared the contract for

the sale of the Ballone's lawn business to the plaintiffs. Ballone telephoned the defendant and gave him the provisions of the contract he wanted drafted, and the defendant drafted the contract and faxed it to Ballone. Ballone made some corrections and faxed it back to the defendant. At that point, the defendant did not even know the name of the buyer. The defendant never spoke with the plaintiffs prior to drafting the contract.

The first time the defendant met or talked with Devin was the meeting when the contract was executed. At that meeting, Devin told the defendant that he knew that the defendant represented Ballone and that Ballone had said he was a "good guy." Devin did not ask the defendant to do anything for him as a lawyer, nor did Devin act in a way that the defendant could have reasonably believed that Devin wanted him to do something for him as a lawyer.

The defendant sent the bill for his services to Ballone. The bill indicated that the defendant's client was Ballone. The new corporation that the defendant formed, Kaemmerer Lawn, Inc., was partially owned by Ballone; Ballone owned 49% and Devin owned 51%. Ballone and Devin were to operate the business as partners through 2003, and then Devin was to take complete control of the business.

On cross-examination, the defendant testified that on the date of his meeting with Devin, when the contract was signed, Devin did ask the defendant to change the form of the corporation to an S-chapter corporation, and the defendant made the change. The defendant never told Devin that he was not his lawyer.

Dave Ballone testified that the defendant was employed at the law firm Ballone used and that the defendant had done some work for Ballone. Ballone told Devin this, and Devin still agreed to have the defendant draw up the purchase agreement. The defendant drafted the agreement and sent it to Ballone. Ballone made some changes in it and sent it back to the defendant. Both Ballone and Devin went to the defendant's office to sign the contract. That

was the only meeting they had with the defendant. At that meeting, Devin did not ask the defendant to do anything for him, and the defendant did not indicate that he would represent Devin.

Prior to signing the contract, Ballone gave Devin some income-and-expense statements for the preceding year and a customer list. Devin did not ask for anything else. Ballone believed that he had told Devin that the business had never made any money but that it was just at the point where it would start turning a profit.

The plaintiffs first argue that the circuit court erred in denying their motion for a directed verdict on the question of whether an attorney/client relationship existed between the plaintiffs and the defendant and in submitting the issue to the jury. During the trial, the plaintiffs filed a written motion for a directed verdict holding that, as a matter of law, an attorney/client relationship existed between the parties. The plaintiffs argued that the existence of an attorney/client relationship is the basis for the attorney's duty and that, thus, it is an issue for the court to decide. The plaintiffs argued that because the existence of the attorney/client relationship creates the duty, it must be a question of law, as is the question of a duty. The court denied the plaintiffs' motion for a directed verdict.

At the jury instruction conference, the plaintiffs renewed their argument that the existence of an attorney/client relationship was a question of law for the court, and they tendered an instruction that read as follows: "The Court now instructs you that an attorney-client relationship existed between [the parties] as a matter of law in this case. You have no need to consider that issue in the course of your deliberations." The court refused this instruction. Instead, the jury was instructed as follows:

> "The first issue for your determination on the claim of the plaintiffs against the defendant is whether an attorney-client relationship existed between the plaintiffs and the defendant at the time that defendant did the alleged negligent acts claimed by the

plaintiff[s]. An attorney-client relationship exists if there is a contract for employment. The contract may be express or implied, oral or written, and with or without provision for compensation. If the conduct of tyhe [*sic*] parties indicates that they have accepted an arrangement by which the attorney is to act for the client, that conduct may be sufficient to establish the attorney-client relationship. If you find that no attorney-client relationship existed, then your verdict must be for the defendant."

The plaintiffs raised the denial of their motion for a directed verdict as error in their posttrial motion.

On appeal, the plaintiffs argue that the formation of an attorney/client relationship is the basis of the duty in a legal malpractice case and is therefore a question of law for the court. While we agree with the plaintiffs that the question of a *duty* is one of law for the court, we do not agree that the question of whether an attorney/client relationship exists is one of law. To the contrary, we believe that the latter question is, at least in this case where the facts are disputed, one of fact for the jury.

The question of whether any party owes a duty to another is always a question of law, and courts have held that attorneys and their clients stand in such a relationship to each other that the law imposes upon the attorney an obligation of reasonable conduct for the benefit of his client and, in some cases not pertinent here, to third-party beneficiaries. *Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville*, 261 Ill. App. 3d 750, 759 (1994). However, whether the parties stand in the relationship of attorney/client to each other, giving rise to the duty, remains one of fact for the jury, unless, of course, the facts are undisputed and only one conclusion can be drawn from those facts. See *Hotze v. Daleiden*, 229 Ill. App. 3d 301, 309 (1992) (the issue of a material fact regarding the existence of an attorney/client relationship precluded a summary judgment for the attorney in the legal malpractice action). In the case at bar, the facts relating to the relationship

between the plaintiffs and the defendant were in dispute, and the question of the nature of that relationship was properly given to the jury.

The plaintiffs also argue that, even if the existence of an attorney/client relationship was a question of fact, the circuit court erred in denying their motion for a directed verdict on the issue because "all the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand" (*Owens v. Stokoe*, 115 Ill. 2d 177, 184 (1986)).

In ruling on a motion for a directed verdict, a court does not weigh the evidence, nor is it concerned with the credibility of witnesses; rather, it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion. *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1068 (2007). We apply the *de novo* standard of review to the circuit court's denial of a motion for a directed verdict. *Jackson*, 372 Ill. App. 3d at 1068.

The attorney/client relationship is consensual and arises only when both the attorney and the client have consented to its formation. *Simon v. Wilson*, 291 Ill. App. 3d 495, 509 (1997). The client must manifest his authorization that the attorney act on his behalf, and the attorney must indicate his acceptance of the power to act on the client's behalf. *Simon*, 291 Ill. App. 3d at 509. An attorney's duty to a client is measured by the representation sought by the client and the scope of the authority conferred. *Simon*, 291 Ill. App. 3d at 509.

We do not agree with the plaintiffs that, when viewed in the aspect most favorable to the defendant, the evidence in favor of the existence of an attorney/client relationship was so strong that no contrary verdict could stand. To the contrary, we find the evidence of the existence of an attorney/client relationship conflicting, and the question of whom to believe and what weight to be given to all the evidence was properly a decision for the trier of fact. Although the plaintiffs' expert witness testified to her opinion that an attorney/client

relationship had been established, her opinion is not conclusive, because a jury is not required to accept it. See *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542, 545 (1995). The circuit court did not err in denying the plaintiffs' motion for a directed verdict on the question of the existence of an attorney/client relationship between the parties.

The plaintiffs next argue that the circuit court erred in submitting to the jury the affirmative defense of contributory negligence.

In his answer to the plaintiffs' third amended complaint, the defendant raised the affirmative defense of the plaintiffs' contributory negligence. In an amended pleading, the defendant alleged the specific ways in which the plaintiffs had been contributorily negligent:

> "A. Failed to get and review financial statements of the business that was being purchased.
>
> B. Failed to review bank statements of the business that was being purchased.
>
> C. Failed to follow through with the accountant in examining financial statements of the business that was being purchased.
>
> D. [Stricken by the circuit court.]
>
> E. Failed to furnish [the defendant] with any information or financial statements concerning the business.
>
> F. Failed to call customers on the 2002 customer list to see if they were still active customers prior to purchasing the business."

The plaintiffs filed a motion to strike this defense because, they argued, they could not be contributorily negligent where it was the defendant's job to protect them from themselves by ensuring that they had all the information needed prior to purchasing the business. The plaintiffs argued that where the defendant failed to do this, any negligence on the part of the plaintiffs in not seeking enough information about the business prior to purchasing it should not be regarded as contributory to their damages. The circuit court denied the motion to

strike. The plaintiffs raised this issue in their posttrial motion.

The plaintiffs argue that the circuit court erred in submitting the affirmative defense of contributory negligence to the jury because there was an insufficient showing of proximate cause. Acknowledging that proximate cause is ordinarily an issue of fact for the jury (see *Robinson v. Boffa*, 402 Ill. App. 3d 401, 403 (2010)), the plaintiffs argue that the decision to submit the issue to the jury in the first instance must be based on the existence of some evidence of proximate cause. The plaintiffs argue that there was insufficient evidence of proximate cause to even submit the issue of contributory negligence to the jury because the defendant failed to present evidence that but for the plaintiffs' failures as alleged in the defendant's affirmative defense, the plaintiffs would not have purchased the business and suffered the injury.

The plaintiffs argue that even if they had done everything the defendant alleges they should have done, they still would have purchased the business, and the only thing that would have changed their mind would have been if the defendant had advised them that they would need 1,200 customers and one million dollars in gross sales to make a profit. The plaintiffs argue that there is no evidence that had they done all the things that the defendant alleges they were negligent in not doing, it would have resulted in a decision not to buy the business.

Proximate cause is ordinarily an issue of fact for the jury. *Robinson v. Boffa*, 402 Ill. App. 3d 401, 403 (2010). A court can only rule as a matter of law that proof of proximate cause is inadequate when the facts are undisputed and reasonable minds could not differ on the inferences to be drawn from those facts. *Rivera v. Garcia*, 401 Ill. App. 3d 602, 610 (2010). The lack of proximate cause may only be determined by the court as a matter of law where there is no genuine issue of material fact or only one conclusion is clearly evident. *Rivera*, 401 Ill. App. 3d at 610. Clearly, in the case at bar, the facts are not undisputed and no conclusion is clearly evident.

Nevertheless, the plaintiffs argue that there is no evidence that had they done all the things that the defendant alleges they were negligent in not doing, it would have resulted in a decision not to buy the business. Of course, the standard for negligence is that of a reasonable person. The jury was properly instructed that the term "ordinary care" means the care a reasonably careful person would use under similar circumstances. The plaintiffs essentially argue that even if they had all the information, they still would have purchased the business and therefore the defendant has not established proximate cause. The jury was asked to determine whether *a reasonably careful person* who had all the information would have purchased the business. It was up to the jury to determine whether the plaintiffs had failed in the way the defendant alleged and whether, but for those failures, a reasonably careful person in the plaintiffs' position would have acted differently.

The plaintiffs also argue that where it was the defendant's job to protect them from themselves by ensuring that they had all the information needed prior to purchasing the business and the defendant failed to do this, any negligence on the part of the plaintiffs in not seeking enough information about the business prior to purchasing it should not be regarded as contributory to their damages.

Ordinarily, the question of contributory negligence is a question of fact for the jury. *Basham v. Hunt*, 332 Ill. App. 3d 980, 995 (2002). It becomes a question of law only when all reasonable minds would agree that the evidence and the reasonable inferences therefrom, viewed in the light most favorable to the nonmoving party, so overwhelmingly favor the movant that no contrary verdict based on that evidence could ever stand. *Basham*, 332 Ill. App. 3d at 995. That is not the case here. The circuit court did not err in submitting the issue of contributory negligence to the jury.

The plaintiffs next argue that the circuit court erred in denying their motion for a judgment notwithstanding the verdict. A motion for a judgment notwithstanding the verdict

should be granted only when all the evidence, viewed in the light most favorable to the opposing party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Evans v. Shannon*, 201 Ill. 2d 424, 428 (2002). Our review is *de novo*. *Evans*, 201 Ill. 2d at 427.

We will not here repeat the evidence described above. Suffice it to say that the evidence presented does not so overwhelmingly favor the plaintiffs that no contrary verdict could ever stand. The circuit court did not err in denying the plaintiffs' motion for a judgment notwithstanding the verdict.

Finally, the plaintiffs argue that their attorney fees incurred in the malpractice action should properly be included as an element of damages in that suit. In light of our affirmance of the circuit court's judgment in favor of the defendant, we find it unnecessary to address this issue.

The defendant, arguing that we can affirm the circuit court's judgment on any basis appearing in the record, even if it was not the basis relied upon by the circuit court (see *Wade v. City of Chicago*, 364 Ill. App. 3d 773, 780 (2006)), asks us to affirm on the basis that the plaintiffs' action was barred by the statute of limitations. In light of our affirmance of the circuit court's judgment on other grounds, we find it unnecessary to address this issue.

For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

Affirmed.