STATE OF MICHIGAN

COURT OF APPEALS

EARL WOODS and MARIE R. WOODS,

Plaintiffs-Appellants,

v

LAWRENCE E. GURSTEN, KEVIN A. MCNEELY, and GURSTEN, WIGOD, KOLTONOW & FALZON, P.C.,

Defendants-Appellees.

UNPUBLISHED
December 15, 1998

No. 194523
Wayne Circuit Court
LC No. 94-417073 NM

Before: Doctoroff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal by delayed leave granted the trial court's dismissal of their claims against defendants in this legal malpractice action. We affirm.

Defendants were retained to represent Earl Woods in a personal injury action. After the action was settled, Earl's wife, Marie Woods, through separate counsel, sought to pursue a claim for loss of consortium, but her claim was dismissed for failure to have joined it with her husband's claims. Plaintiffs then filed suit against defendants, claiming that defendants failed to provide reasonably prudent and proper legal services and settled Mr. Woods' personal injury lawsuit for an insufficient and inadequate amount, and that defendants were responsible for the loss of Mrs. Woods' separate loss of consortium claim for failing to join it with Mr. Woods' claims. Defendants moved for summary disposition, arguing that plaintiffs should not be allowed to attack the adequacy of the settlement in a legal malpractice action because defendants' recommendation of settlement was made in good faith and was based upon their informed judgment, and that no attorney-client relationship existed between defendants and Mrs. Woods.

Defendants moved for summary disposition pursuant to both MCR 2.116(C)(8) and (10). The trial court did not specify the subrule under which it granted defendants' motion. However, because matters outside the pleadings were considered by the trial court, we will treat the motion as having been granted under MCR 2.116(C)(10). See MCR 2.116(G)(5). This Court reviews de novo a grant of

summary disposition pursuant to MCR 2.116(C)(10), examining the entire record, including pleadings, affidavits, depositions, admissions, and other documentary evidence, and construing all reasonable inferences arising from the evidence in a light most favorable to the nonmoving party. *Henderson v State Farm Fire & Casualty Co*, 225 Mich App 703, 708; 572 NW2d 216 (1997). A motion for summary disposition pursuant to MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. The trial court must ask whether a record might be developed that leaves open an issue upon which reasonable minds could differ. *Id.* The trial court may not make factual findings or weigh credibility in deciding a motion for summary disposition, and this Court will uphold the grant of summary disposition if it is satisfied that the claim cannot be proved at trial. *Id.* at 709.

In order to sustain an action for legal malpractice, the plaintiff has the burden of proving four elements: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The first element the plaintiff must prove is "duty." *Id.* "Duty" is any obligation the defendant has to the plaintiff to avoid negligent conduct. *Id.* In negligence actions, the existence of duty is a question of law for the court. *Id.* In legal malpractice actions, a duty exists, as a matter of law, if there is an attorney-client relationship. *Id.* An attorney is obligated to use reasonable skill, care, discretion, and judgment in representing a client. *Id.* at 656.

In granting defendants' motion for summary disposition with regard to the claims of Mrs. Woods, the trial court found that defendants owed no duty to Mrs. Woods because there was no attorney-client relationship. In her deposition, Mrs. Woods acknowledged that she knew defendants did not represent her, that she did not ask defendants to represent her, that she did not want defendants to represent her, and that shortly after her husband's suit was settled she consulted with another attorney regarding filing a separate lawsuit seeking loss of consortium damages.

Generally, a legal malpractice action may be brought only by a client who has been damaged by their counsel's negligence. As in this case, however, a third party may claim that their relationship with counsel is of a nature sufficient to justify the imposition of liability even in the absence of an attorney-client relationship. See e.g. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253-254; 571 NW2d 716 (1997). Although "[t]here has been a reluctance to permit an attorney's actions affecting a non-client to be a predicate to liability because of the potential for conflicts of interest that could seriously undermine counsel's duty of loyalty to the client," the Supreme Court "has recognized that an attorney's negligence may expose him to liability to third parties under certain circumstances." *Id.* at 254. See also *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996); *Atlanta Int'l Ins Co v Bell*, 438 Mich 512; 475 NW2d 294 (1991).

Mrs. Woods argues that defendants owed her a duty of care because she was foreseeably affected by their conduct of advising her husband to have her wait to pursue a loss of consortium claim until after his lawsuit was resolved. See *Mieras*, *supra* at 297-299. However, defendants' advice may have been legally correct. Compare *Oliver v State Police Dep't*, 160 Mich App 107, 112; 408

NW2d 436 (1987) ("Michigan law does not require a consortium claim to be joined to the claims raised by the principal plaintiff.") with *Oldani v Lieberman*, 144 Mich App 642, 646; 375 NW2d 778 (1985) ("In general, a spouse seeking damages for loss of consortium should be joined in the principal case brought by the other spouse."). Because the issue has not been decided by the Supreme Court, see Michigan Court Rules Practice (3rd ed), supp 1998, Rule 2.205, pp 17-18, defendants' advice as to whether Mrs. Woods' loss of consortium claim should have been brought separately cannot support a malpractice claim. "[M]ere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill and diligence." *Simko, supra* at 658. See also *Boyle v Odette*, 168 Mich App 737, 745-746 n 1; 425 NW2d 472 (1988). Therefore, the trial court properly granted summary disposition in favor of defendants on the claims of Mrs. Woods.

In granting defendants' motion for summary disposition with regard to the claims of Mr. Woods, the trial court relied on *Simko, supra*, and found there was no evidence that defendants felt that they were weakened in their settlement negotiations because of a lack of preparation in the underlying lawsuit. Although an attorney is obligated to use reasonable skill, care, discretion and judgment in representing a client, an attorney does not have a duty to insure or guarantee the most favorable outcome possible. *Simko, supra* at 656.

Plaintiffs argue that defendants failed to properly prepare for Mr. Woods' personal injury lawsuit. However, even if another attorney may have referred Mr. Woods to a different physician, deposed another doctor, or evaluated the potential of proving a closed-head injury claim differently and recommended that the settlement offer be rejected, these are legitimate areas of attorney judgment which may not be second-guessed. Therefore, the trial court properly dismissed Mr. Woods' claims against defendants.

Although plaintiffs rely on *Lowman v Karp*, 190 Mich App 448; 476 NW2d 428 (1991), and *Espinoza v Thomas*, 189 Mich App 110; 472 NW2d 16 (1991), in arguing that their claim of malpractice against defendants is not barred by their settlement of the underlying litigation, this was not the basis for the trial court's decision. *Lowman* and *Espinoza* are distinguishable from the present case in that Mr. Woods was not forced to compromise his claim because his attorneys refused to try the case nor did he lose a piece of his claim. Rather, Mr. Woods was required to choose between proceeding to trial knowing that he might receive less than the settlement offer or accepting the offer, and he simply decided to accept his attorneys' assessment of the value of his case. There are no allegations that defendants were negligent with regard to a procedural matter or that their conduct left plaintiffs with no viable option but to settle their case.

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald