

STATE OF MICHIGAN  
COURT OF APPEALS

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PHYLLIS D. RAPAPORT,

Plaintiff-Appellant/Cross-Appellee,

v

JACK C. CHILINGIRIAN,

Defendant-Appellee/Cross-Appellant.

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UNPUBLISHED

July 27, 1999

No. 209097

Oakland Circuit Court

LC No. 89-375679 NM

Before: Collins, P.J., Markman, and J.B.Sullivan\*, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from an opinion and order granting summary disposition in favor of defendant. Defendant has filed a cross-appeal, seeking affirmation on the alternative ground that dismissal should have been ordered as a discovery sanction. We affirm.

This appeal involves attorney Chilingirian's representation of plaintiff between 1983 and 1988 for three separate matters: (1) a legal malpractice against an attorney, John Manikoff, who represented plaintiff in former proceedings relative to her divorce from Raymond Rapaport and for which plaintiff received a monetary judgment as a result of a jury trial (the Manikoff matter); (2) an accounting action against a partnership in which plaintiff, her former husband, and Paddi Coughlin were all partners, and which was eventually settled by plaintiff (the Coughlin matter); and (3) post-judgment proceedings in the divorce case wherein plaintiff sought increased alimony from her former husband (the Rapaport matter).

Our review of the trial court's grant of summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). However, an appellant may not leave it to a reviewing court to discover and rationalize the basis of his or her claims. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). An issue given only cursory treatment need not be addressed. *Community Nat'l Bank v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520-521; 407 NW2d 31 (1987). Consistent with *Goolsby* and *Community Nat'l Bank*, we hold that plaintiff's broad assertion that her March 11, 1997, affidavit provides the requisite factual support for

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the legal malpractice allegations is insufficient to present for our review the question whether the trial court correctly granted summary disposition in favor of defendant.

Plaintiff's assertion that she was entitled to a jury trial pursuant to our Supreme Court's order in the prior appeal reinstating the legal malpractice action, see 445 Mich 910, is also insufficient to present that question for appellate review. *Goolsby, supra*. We could also decline to address that issue because it is not set forth in the statement of questions presented. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 157; 536 NW2d 851 (1985). In any event, the legal malpractice action was reinstated by the Supreme Court because it agreed with the dissenting opinion of this Court, *Rapaport v Chilingirian*, unpublished opinion per curiam, issued October 20, 1993 (Docket Nos. 132845, 132970 & 133232) (Judge Shepherd dissenting), that dismissal as a sanction for plaintiff's inadequate amended complaint was inappropriate. Reinstatement did not, however, preclude the trial court from ruling on defendant's motions for summary disposition, and the decision to grant summary disposition was not inconsistent with the Supreme Court's prior order. *Hadfield v Oakland Co Drain Comm'r*, 218 Mich App 351, 355; 554 NW2d 43 (1996).

Regarding the specific questions whether summary disposition was properly granted for the legal malpractice claims involving the Coughlin and Manikoff matters, the record indicates that the trial court granted summary disposition under MCR 2.116(C)(10), based on plaintiff's failure to demonstrate a genuine issue of a material fact with respect to the element of causation. The record further indicates that the trial court considered the causation element in the context of the specific allegations made by plaintiff in Count I of her original complaint, which were premised on pre-withdrawal conduct, as well as the general allegations set forth in ¶¶ 12-13 of the complaint concerning the act of withdrawal itself and which was referred to below as plaintiff's "abandonment" claim.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek, supra* at 337. In reviewing a trial court's decision on the motion, this Court must consider the affidavits, pleadings, depositions, admissions and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party, *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), and grant the benefit of all reasonable doubt to the opposing party, *Bourne v Farmers Ins Exchange*, 449 Mich 193, 197; 534 NW2d 491 (1995). The initial burden of factually supporting the motion rests with the moving party. The burden then shifts to the opposing party to establish a genuine issue of material fact. *Quinto, supra* at 362. A genuine issue of material fact must be established by admissible evidence. *SSC Associates Ltd Partnership v General Retirement System*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

In a legal malpractice action, a plaintiff's damages may not be based on speculation. *Coleman v Gurwin*, 443 Mich 59, 64; 503 NW2d 435 (1993). A plaintiff must prove that the attorney's negligence was both a cause in fact and legal (proximate) cause of an injury. *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586 n 13; 513 NW2d 773 (1994). Generally, to establish cause in fact, a plaintiff must show that, but for a defendant's actions, the injury would not have occurred. *Skinner, supra* at 163. Circumstantial evidence may be used, but a mere possibility of causation is not enough. *Skinner, supra* at 164-165. Expert testimony is usually required to establish the applicable standard of conduct, breach of that

conduct and causation in a malpractice action. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989).

Having considered the proofs submitted to the trial court and plaintiff's arguments on appeal, we agree that plaintiff failed to demonstrate a genuine issue of material fact with regard to whether the alleged negligence by defendant was a cause in fact of any injury relative to the underlying Manikoff and Coughlin matters. Plaintiff's mere non-expert opinion that she suffered damages is insufficient to establish a genuine issue of material fact. See *SSC Associates Ltd Partnership, supra*. Further, while plaintiff correctly argues that her settlement of the Coughlin litigation did not bar a legal malpractice action as a matter of law, *Lowman v Karp*, 190 Mich App 448; 476 NW2d 428 (1991), defendant here was entitled to judgment because no genuine issue of material fact was established with regard to the causation element. MCR 2.116(I)(1). In the Manikoff and Coughlin matters, the plaintiff presented no documentary evidence that she would have received a higher settlement or, alternatively, would have gone to trial and obtained a recovery greater than her settlement but for the alleged malpractice.

Next, with regard to the specific question whether a genuine issue of material fact existed in connection with the legal malpractice claim based on the so-called Rapaport matter, we hold that this issue is not properly before this Court because plaintiff has failed to brief the merits of the question. *Goolsby, supra* at 655 n 1.

Finally, regarding the "abandonment" claim based on defendant's withdrawal in each of the three cases, we hold that plaintiff has failed to demonstrate any basis for disturbing the trial court's grant of summary disposition in favor of defendant. Plaintiff's reliance on *Fisher v State*, 248 So2d 479, 486 (Fla, 1971), and *Lipton v Boesky*, 110 Mich App 589; 313 NW2d 163 (1981), to demonstrate error is misplaced. Taken together, those cases merely reflect the distinction between an attorney's negligence in the conduct of the litigation and an attorney's negligence in the act of withdrawal itself. Neither case relieves a plaintiff of the responsibility for proving an injury caused by the attorney's alleged negligence in a legal malpractice action. Because the trial court's decision relative to both pre-withdrawal and withdrawal conduct was based on plaintiff's failure to establish factual support for her claim that any alleged negligent conduct was a cause in fact of any injury, and because we agree that plaintiff has not established a genuine issue of material fact on this issue, we uphold the trial court's decision.

Because we are affirming the trial court's grant of summary disposition in defendant's favor, we find that the question raised in defendant's cross-appeal, whether a discovery sanction of dismissal was also appropriate, is moot. Although there are exceptions, this Court generally will not decide a moot issue. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Moreover, even if the issue were not moot, we would decline to address it

because it has not yet been decided by the trial court. As a general rule, appellate review is limited to issues actually decided by the trial court. *Allen v Keatings* 205 Mich App 560, 564-565; 517 NW2d 830 (1994).

Affirmed. No costs awarded.

/s/ Jeffrey G. Collins

/s/ Stephen J. Markman

/s/ Joseph B. Sullivan