STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL CAMMARATA and ROBIN CAMMARATA,

Plaintiffs-Appellants,

v

RICHARD D. NASH, individually, and d/b/a RICHARD NASH & ASSOCIATES,

Defendant-Appellee.

UNPUBLISHED
June 30, 2000

No. 210507
Lapeer Circuit Court
LC No. 96-022996-NM

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs appeal by right from an order granting defendant's motion for summary disposition. We affirm.

In August 1993, plaintiff Michael Cammarata was involved in a motor vehicle accident in which another vehicle rear-ended his Ford Ranger truck. Plaintiffs claimed that the truck's driver's seat, in which Michael had been sitting at the time of the accident, collapsed on impact. A week later, Michael and his wife, plaintiff Robin Cammarata, met with defendant Richard Nash, an attorney, to discuss a possible claim arising out of the accident. Defendant pursued a claim against the driver and the owner of the other vehicle. Eventually, the insurer of the vehicle offered to settle for $175,000. Plaintiffs accepted this settlement.

Subsequently, plaintiffs filed a legal malpractice action against defendant, claiming that he (1) failed to investigate and pursue a products liability action against Ford; (2) failed to preserve or to advise plaintiffs to preserve the Ford Ranger and the driver's seat, thus precluding plaintiffs from pursuing a products liability action against Ford; and (3) failed to appreciate the extensive nature of Michael's injuries, thereby inducing plaintiffs to accept an insufficient settlement amount in the suit against the other driver involved in the accident.

Defendant then moved for summary disposition under MCR 2.116(C)(7), (8), and (10), claiming that (1) no actionable attorney-client relationship existed between plaintiffs and defendant

regarding a products liability claim; (2) plaintiffs were not precluded, even in the absence of the truck and the seat, from pursuing a products liability claim after terminating their relationship with defendant, because the statute of limitations had not yet expired and they could have alleged a design defect – as opposed to a manufacturing defect – even in the absence of the particular vehicle involved in the accident; (3) plaintiffs could not prove that defendant caused plaintiffs any damages relating to a products liability claim, because defendant ceased representing plaintiffs before the expiration of the statute of limitations for such a claim; and (4) plaintiffs could not claim that the settlement amount was inadequate, because they signed a release indicating that they understood and accepted the settlement. The trial court granted defendant's motion, indicating that it was doing so under MCR 2.116(C)(8).

We note that even though the trial court claimed to rely on MCR 2.116(C)(8) in granting defendant's motion, the court looked beyond the pleadings in reaching its decision. Accordingly, we will treat the motion as having been decided under MCR 2.116(C)(10).[1] See *Sharp v City of Lansing*, 238 Mich App 515, 518; 606 NW2d 424 (1999). We review a trial court's grant of summary disposition under MCR 2.116(C)(10) de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in the light most favorable to the nonmoving party and decide if there exists a genuine issue of material fact. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

The essential elements of a prima facie legal malpractice action are: (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. *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).

We conclude that even assuming, arguendo, that an attorney-client relationship existed between plaintiffs and defendant regarding a potential products liability suit, plaintiffs have failed to bring forth any evidence that defendant breached his duty of care by allegedly informing plaintiffs that Michael's injuries were not severe enough to warrant a suit against Ford. While plaintiffs suggest that defendant, if he had diligently read Michael's medical reports, would have discovered a severe closed-head injury that warranted a large amount of compensation, plaintiffs presented no affidavits, depositions, or other documentary evidence indicating that the magnitude of Michael's injuries, combined with the circumstances of this particular accident, would have caused a reasonable attorney to pursue a products liability action against Ford. This was not a situation in which the attorney's alleged violation of professional conduct was so obvious that expert testimony was unnecessary. See *Beattie v Firnschild*, 152 Mich App 785, 792-793; 394 NW2d 107 (1986) (expert testimony required in legal malpractice action "unless the violation was so obvious that such testimony was not required"), and *Dean v Tucker*,

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[1] Plaintiffs claim that because the trial court purported to decide the motion under MCR 2.116(C)(8) and then looked beyond the pleadings, reversal is required. We disagree. The trial court's reliance on an incorrect subrule in granting summary disposition does not require reversal, as long as summary disposition under the correct subrule was appropriate. See, e.g., *Energy Reserves, Inc v Consumers Power Co*, 221 Mich App 210, 216; 561 NW2d 854 (1997).

205 Mich App 547, 550; 517 NW2d 835 (1994) ("In professional malpractice actions, an expert is usually required to establish the standard of conduct, breach of the standard, and causation."). Accordingly, plaintiff failed to create a prima facie case of legal malpractice regarding defendant's decision to forgo a products liability action.

Nor did plaintiff create a prima facie case of legal malpractice with regard to defendant's failure to preserve the truck and seat. Indeed, once defendant determined that a products liability action was not viable, he was under no duty to preserve evidence related to such an action. To hold otherwise would create unnecessary ambiguity regarding the point when an attorney's representation – and as a consequence malpractice liability – ceases after the attorney determines that a claim is non-meritorious and declines to represent the client in the particular matter.[2] We note, also, that the truck and seat were still in existence after defendant declined to pursue a products liability claim and that plaintiffs could have taken steps to preserve it on their own.

Plaintiffs additionally contend that defendant, after failing to properly review Michael Cammarata's medical reports and failing to appreciate the true extent of Michael's injuries, induced plaintiffs into settling for an insufficient amount. Defendant contends that because plaintiffs signed the settlement agreement, they cannot now argue that the settlement amount was insufficient. However, a plaintiff's settlement of an underlying action does not act as an absolute bar to a subsequent legal malpractice action. *Lowman v Karp*, 190 Mich App 448, 452-453; 476 NW2d 428 (1991). "When a settlement is compelled by the mistakes of the plaintiff's attorney, the attorney may be held liable for causing the client to settle for less than a properly represented client would have accepted." *Espinoza v Thomas*, 189 Mich App 110, 123; 472 NW2d 16 (1991). Therefore, contrary to defendant's argument, the settlement agreement did not bar plaintiffs' claims regarding the settlement.

Summary disposition was nevertheless appropriate, however, because plaintiffs failed to set forth any evidence that but for defendant's alleged negligence, they were entitled to or would have obtained more than $175,000 in the underlying action against the driver and owner of the vehicle that struck Michael's truck. Indeed, plaintiffs did not submit any affidavit or other documentary evidence to show that the severity of Michael's injuries warranted a verdict or

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[2] We note that even assuming, arguendo, that defendant breached his duty of care by failing to pursue a products liability claim and failing to preserve the truck and seat, summary disposition would nonetheless have been appropriate because plaintiffs did not set forth any evidence that a products liability suit against Ford would have been successful. See *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 692-693; 310 NW2d 26 (1981) (if a plaintiff in a malpractice suit alleges that an attorney's negligence prevented him from bringing a cause of action, he must show that the cause of action, if pursued, would have been successful). See also *Thomas v Lusk*, 34 Cal Rptr 2d 265 (Cal App, 1994) (even if the plaintiff's attorney failed to preserve significant evidence and the loss of the evidence somewhat impedes a showing of causation and damages in a subsequent legal malpractice case, the plaintiff, in certain circumstances, nonetheless continues to bear the burden of proving causation and damages).

settlement in excess of $175,000. Accordingly, plaintiffs failed to make a prima facie case of legal malpractice with respect to their claims about the settlement. *Coleman, supra* at 63.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens