

STATE OF MICHIGAN
COURT OF APPEALS

J.M.S. & ASSOCIATES, INC., CHARLES
AGRUSA, SR., and ANGELINE AGRUSA,

UNPUBLISHED
October 3, 2000

Plaintiffs-Appellants,

v

ALLEN L. SCHWARTZ, a/k/a ALLEN F.
SCHWARTZ, and HOWARD L. WOLKIND,

No. 214765
Oakland Circuit Court
LC No. 97-549005-NM

Defendants-Appellees.

Before: Gribbs, P.J., and Neff and O'Connell, JJ.

PER CURIAM.

The trial court granted summary disposition in favor of defendants in this legal malpractice action. MCR 2.116(C)(8), (10). Plaintiffs appeal by right and we affirm.

Plaintiffs argue that their complaint, seeking attorney fees from a federal case and damages for mental anguish, humiliation, and embarrassment, stated a cognizable claim for relief. We disagree. This Court reviews a trial court's decision regarding a motion for summary disposition de novo. *Hawkins v Mercy Health Services, Inc.*, 230 Mich App 315, 324; 583 NW2d 725 (1998). A motion pursuant to MCR 2.116(C)(8) determines whether the plaintiff's pleadings allege a prima facie case. *Garvelink v The Detroit News*, 206 Mich App 604, 607; 522 NW2d 883 (1994); *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999). When testing the sufficiency of the claim, all factual allegations, and all reasonable inferences, are accepted as true. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(8) should only be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

When reviewing a trial court's grant or denial of a motion brought pursuant to MCR 2.116(C)(10), the appellate court, like the trial court, must view the depositions, affidavits, and documentary evidence in a light most favorable to the nonmoving party and must make all legitimate inferences in favor of the nonmoving party. *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547

NW2d 314 (1996). When the nonmoving party has the burden of proof at trial, that party may not rest on mere allegations or denials in the pleadings. *Id.* Rather, the party must come forward with documentary evidence setting forth specific facts showing that there is a genuine issue for trial. *Id.*

In order to state an action for legal malpractice, a plaintiff has the burden of proving (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); *Simko*, *supra* at 655. The fourth element of a legal malpractice claim necessarily includes damages. *Gambino v Cardamone*, 163 Mich App 574, 579; 414 NW2d 896 (1987).

Even assuming plaintiffs incurred additional damages in the form of legal fees, Michigan adheres to the general rule that attorney fees are not recoverable, either as an element of costs or as an item of damages, unless expressly authorized by statute, court rule, or a recognized exception. *State Farm Mut Automobile Ins Co v Allen*, 50 Mich App 71, 74; 212 NW2d 821 (1973); *Matras v Amoco Oil Co*, 424 Mich 675, 695; 385 NW2d 586 (1986); *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 468; 487 NW2d 807 (1992). An exception to the general rule exists when the party seeking attorney fees as damages has been forced to expend money to prosecute or defend a prior lawsuit because of the wrongful acts of the third party. *Warren v McLouth Steel Corp*, 111 Mich App 496, 508; 314 NW2d 666 (1981); *In re Thomas Estate*, 211 Mich App 594, 602; 536 NW2d 579 (1995). Under this exception, recovery has been allowed in limited situations where a party has incurred legal expenses as a result of another party's fraudulent or unlawful conduct. *State Farm*, *supra* at 78.

"Wrongful acts," however, do not include negligence. Exceptions to the prevailing doctrine that attorney fees are not recoverable must be narrowly construed. *Scott v Hurd-Corrigan Moving & Storage Co, Inc*, 103 Mich App 322, 347; 302 NW2d 867 (1981). To invoke the "wrongful acts" exception, the wrongdoer must be guilty of malicious, fraudulent, or similar wrongful conduct, rather than negligence. *G & D Co v Durand Milling Co, Inc*, 67 Mich App 253, 260; 240 NW2d 765 (1976); *Mieras v DeBona*, 204 Mich App 703, 710; 516 NW2d 154 (1994), *rev'd* on other grounds 452 Mich 278; 550 NW2d 202 (1996). Where there is no evidence to support a claim that a third party's wrongdoing caused the prior litigation, recovery of attorney fees under this exception is improper. *Id.*; *Bonner*, *supra* at 468-469. Plaintiffs' claim in this case has always been one of professional negligence. Thus, defendants are correct that the "wrongful acts" exception does not apply here.

Further, defendants correctly state that plaintiffs have not demonstrated that defendants' conduct was the cause of the mental anguish allegedly suffered by plaintiffs and that any mental anguish would have been the result of the conduct of Kodak Credit and Eastman Kodak. The cause of the alleged mental anguish arose from the scanner lease transaction, the misrepresentations concerning the scanner's functioning, and plaintiffs' subsequent refusal to pay for the equipment; it did not arise from defendants' legal representation. Thus, although plaintiffs may have shown damages in the form of liability for attorney fees incurred in their federal action, those fees were not recoverable as an item of damages. The trial court therefore reached the right result in granting summary disposition.

Plaintiffs also argue that defendants' failure to join Eastman Kodak as a third party in the Oakland County action was not a reasonable trial strategy. Again, we disagree. The record indicates that defendants' decision not to join Eastman Kodak was based on the strategy that, by asserting in the Oakland County action that Eastman Kodak was the same legal entity as Kodak Credit, and forcing Kodak Credit to "stand in the shoes" of Eastman Kodak, plaintiffs could later bring a separate action against Eastman Kodak that would not be barred by res judicata or collateral estoppel.

Where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interests of his client, he is not answerable for mere errors in judgment. *Simko, supra* at 658. An attorney does not have a duty to insure the most favorable possible outcome. *Id.* at 656. Here, defendants' strategy was reasonable, as was demonstrated by the proceedings in federal court which resulted in plaintiffs not being held liable on their agreements with Eastman Kodak, and their liability to Kodak Credit being effectively paid by Eastman Kodak. Therefore, the trial court correctly granted defendants' motion for summary disposition.

Finally, plaintiffs argue that the trial court erred by granting summary disposition because plaintiffs presented evidence to support their complaint. Specifically, plaintiffs contend that they alleged defendants' negligent representation in ¶ 13 of their complaint, and that these allegations were supported with documents that created a genuine issue of fact. Plaintiffs offer no argument or explanation regarding how or why their documentary evidence created a genuine issue of material fact. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Meagher v Wayne State University*, 222 Mich App 700, 716; 565 NW2d 401 (1997). This Court need not address an issue that is given only cursory consideration. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992); *In re Webb H Coe Marital and Residuary Trusts*, 233 Mich App 525, 537; 593 NW2d 190 (1999). Accordingly, we decline to address this claim. Moreover, plaintiffs' claim that the alleged breaches arose from violation of MRPC 1.1(a) or (b) does not give rise to a civil action. MRPC 1.0(b).

Affirmed.

/s/ Roman S. Gribbs

/s/ Janet T. Neff

/s/ Peter D. O'Connell