STATE OF MICHIGAN

COURT OF APPEALS

BRANDY TAYLOR and BRIAN TAYLOR,

Plaintiffs-Appellees,

v

THURSWELL, CHAYET & WEINER, P.C.,

Defendant-Appellant,

and

BEVERLY J. HIRES, P.C.,

Defendant.

UNPUBLISHED
December 26, 2000

No. 224397
Oakland Circuit Court
LC No. 99-012679-NM

Before: Bandstra, C.J., and Smolenski and D. B. Leiber*, JJ.

PER CURIAM.

Defendant Thurswell, Chayet & Weiner appeals by leave granted from a circuit court order denying its motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs retained defendant to file a medical malpractice claim predicated on the wrongful birth of their daughter. The trial court dismissed the action, ruling that the statute of limitations had expired. Plaintiffs then sued defendant for legal malpractice. This Court affirmed the trial court's ruling in the medical malpractice case. In so doing, it abolished the tort of wrongful birth. *Taylor v Kurapati,* 236 Mich App 315; 600 NW2d 670 (1999). Defendant then moved to dismiss the legal malpractice claim. The trial court denied the motion on the ground that the decision in *Taylor* regarding the validity of the wrongful birth tort was mere dicta and need not be followed. We review the trial court's ruling de novo. *Gibson v Neelis,* 227 Mich App 187, 189; 575 NW2d 313 (1997).

The elements of a legal malpractice claim are (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that such negligence

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

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). The plaintiff "must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit." Thus, when the attorney's malpractice prevents the client from pursuing a cause of action, as where the attorney allows the statute of limitations to expire, the plaintiff must prove a "suit within a suit," i.e., that he would have prevailed in the underlying action. *Id.* at 63-64.

"Statements and comments in an opinion concerning some rule of law or legal proposition that are not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication." *Hett v Duffy*, 346 Mich 456, 461; 78 NW2d 284 (1956), quoting *People v Case*, 220 Mich 379, 382-383; 190 NW 289 (1922). While this Court did not need to reach the question whether a wrongful birth cause of action should be recognized in order to decide whether the trial court correctly ruled that the statute of limitations had expired, plaintiffs' counsel "conceded that, but for the claimed existence of the wrongful birth tort, there would be no issue relating to the statute of limitations. Thus, this case revolve[d] around the wrongful birth tort." *Taylor*, *supra* at 319. In that sense, then, the issue was necessarily decided and thus was not mere dicta. Because this Court determined that the underlying medical malpractice claim failed to state a claim upon which relief could be granted, plaintiffs cannot prove that they would have prevailed in the underlying claim and thus cannot show that defendant's negligence was a proximate cause of their injury.

We reverse.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Dennis B. Leiber