

STATE OF MICHIGAN  
COURT OF APPEALS

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PAMELA R. KINNEY, Personal Representative of  
the Estate of JOSEPH TRATNIK, Deceased,

UNPUBLISHED  
February 26, 2004

Plaintiff-Appellant,

v

THOMAS GEIL and GEIL, SMIT & KRAGT,

No. 245025  
Calhoun Circuit Court  
LC No. 02-001036-NM

Defendants-Appellees.

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Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendants on plaintiff's legal malpractice claim. We affirm in part, reverse in part and remand.

Plaintiff retained defendants to pursue a products liability claim arising out of the death of her three-year-old son, Joseph. Joseph was killed while riding in a conversion van driven by plaintiff when Joseph apparently engaged a toggle switch that activated a moveable seat that folded down into a bed and was crushed against the seat in front.

Defendant Geil determined that there was a potential claim against the manufacturer of the conversion van, Cobra Industries of Indiana. An action was filed against Cobra, as well as the seller of the vehicle, Krenek Van & R.V. Center, a Michigan company.<sup>1</sup> No claim was filed against the component manufacturer of the moveable seat/bed, Veada, Inc., also an Indiana Corporation.

After suit was filed, it was ascertained that Cobra was in bankruptcy and there was no available insurance to pay plaintiff's claim if successful. Geil informed plaintiff that, because it seemed unlikely that a collectible judgment could be obtained, he and his firm were not in a

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<sup>1</sup> In his deposition, defendant Geil indicated that even at the time of the filing of the claim against Krenek, he thought that that claim was "extremely thin" in view of the effects of the adoption of tort reform in 1996 with respect to the seller's liability. He indicated that he brought the claim because it would prevent the matter from being removed to federal court.

position to proceed with the matter. Accordingly, a voluntary dismissal without prejudice was filed. Attorney Geil, however, did locate an Indiana attorney, David Woodward, who was willing to take over the case and pursue it. Apparently, attorney Woodward had had some success in dealing with claims against Cobra. Shortly before the expiration of the statute of limitations, Woodward did file a claim on plaintiff's behalf in federal court against Cobra. Apparently that suit was eventually discontinued because of the absence of any assets or insurance to attach even if the suit was successful.

Thereafter, plaintiff commenced the instant legal malpractice action.<sup>2</sup> The focus of her claim is that she lost any potential claim against the potentially collectible defendants of Krenek and Veada because of the expiration of the period of limitations. Specifically, her complaint alleges the attorneys had a duty to:

(a) Make certain that the Estate's Personal Representative knew when the Statute of Limitations ran with respect to the refile of the action against Krenek Motors Inc. and put that date in writing to the Personal Representative with appropriate legal advice as to the ramifications legally of not examining the vehicle in time to refile before the Statute ran and the legal ramifications of not refile before the Statute ran;

(b) Make certain that the Estate's Personal Representative knew when the Statute of Limitations ran with respect to filing an action against Veada, the fold down seat manufacturer, and put that date in writing to the Personal Representative with appropriate legal advice as to the ramifications legally of not examining the vehicle in time to file before the Statute of Limitations ran and the legal ramifications of not filing before the statute ran;

(c) Arrange for the expert (Larry Schneider, Ph.D.) to examine the vehicle before the Statutes of Limitations ran vs. Krenek and Veada and not after the Statute of Limitations ran, which they had by the time of his inspection of 2/12/2000.

Thereafter, defendants moved for summary disposition, arguing (1) that they had no liability because they had ceased representing plaintiff, and substitute counsel had been employed, before the period of limitations had expired, and (2) that under the attorney judgment rule, they were not liable for their determination that the claims against Krenek and Veada were not viable, even if that judgment proved to be erroneous. The trial court disagreed on the first point, concluding that attorney Geil had continued his representation of plaintiff even after Woodward took over primary responsibility for the matter. But the trial court agreed with defendants on the second point, opining as follows:

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<sup>2</sup> Attorney Woodward and his firm were originally parties to this action, but are no longer involved in this litigation.

But the problem, it seems to me, is that Mr. Geil – I mean, excuse me – yeah, Mr. Geil had concluded the case was a loser. I really don't think that there's a disputed issue of fact about the fact that that was communicated to the Defendant (sic). She didn't want to invest any more money in the case. And so I really think this case comes under – in the area of attorney judgment. I don't think that the Defendant breached his professional duty in that regard. And quite honestly, I think the decision not to sue is entirely reasonable under the circumstances presented in this case.

Under the attorney judgment rule, an attorney is not liable for what, in hindsight, were errors in judgment where the attorney made those judgments in good faith and in the honest belief that the decisions were well founded in the law and made in the best interest of the client. *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002). In other words, while a gross error in judgment may be actionable, a mere error in judgment made in good faith is not. *Id.* at 679. Thus, an attorney is not obligated to pursue every claim for which there is some scintilla of evidence even though, in the attorney's good faith judgment, the claim is not worth pursuing. *Id.*

The facts in *Mitchell* are illustrative of this point. The plaintiffs retained the defendants to represent them in a medical malpractice action arising out of chemotherapy treatment involving an allegation of administering the incorrect drug during a hospital admission. The attorney determined that there was a viable claim against the physicians, but not against the hospital and allowed the limitations period to expire without pursuing a claim against the hospital. The plaintiffs then instituted a legal malpractice claim against the defendants for not bringing suit against the hospital. This Court upheld the trial court's grant of summary disposition, concluding that the plaintiffs had not created a genuine issue of material fact that the defendant's failure to pursue a claim against the hospital was anything other than a good faith exercise of their judgment regarding which claims were worth pursuing. *Id.*

We would have little difficulty in applying *Mitchell* to the case at bar and upholding the grant of summary disposition if plaintiff's claim in this case was based upon defendant's failure to pursue a claim against either Krenek or Veada.<sup>3</sup> But, with the exception of the claim that defendants failed to arrange for the expert witness to inspect the vehicle before the period of limitations had expired, plaintiff's claimed breach of duty is not the failure to pursue those claims. Rather, plaintiff's claim is based upon a failure to apprise her of when the period of limitations would expire and the need to take action through other counsel, if she wished to continue to pursue such a claim. In short, defendant's argument, and the trial court's decision, simply misses the point with respect to the main part of plaintiff's claim.

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<sup>3</sup> We note that *Mitchell* also involved an issue regarding the failure to advise the client regarding when the period of limitations expired. But this issue was ultimately resolved on the basis that the plaintiffs were advised, by their own admission, on the correct date when the period of limitations expired. *Mitchell, supra* at 679-680.

We do agree that summary disposition with respect to the claim of failure to have the expert examine the vehicle before the period of limitations expired was appropriate. That matter comes within the attorney judgment rule. There would be no obligation to have an expert examine the vehicle where the attorney concluded that a claim against Krenak and Veadar was not viable under Michigan law. Therefore, to have a valid legal malpractice claim on this point, plaintiff would have to create a genuine issue of material fact that defendants committed a gross error in judgment in making such a determination. *Mitchell, supra* at 679. We are not persuaded that plaintiff has done so.

But with respect to plaintiff's claim that defendants breached a duty to advise her of when the period of limitations would expire, and the ramifications of a failure to file suit before that time, that issue is simply unaddressed by defendants or the trial court. It is not resolvable by application of the attorney judgment rule. Therefore, summary disposition of those portions of plaintiff's claims was inappropriate.<sup>4</sup>

We do note that we are not expressing any opinion on the ultimate viability of plaintiff's claims or whether a failure to advise plaintiff regarding the period of limitations constituted malpractice by defendants. We are merely holding that those claims are not resolvable under the attorney judgment rule.

Affirmed in part, reversed in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, no party having prevailed in full.

/s/ David H. Sawyer  
/s/ Henry William Saad  
/s/ Richard A. Bandstra

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<sup>4</sup> With respect to defendant's argument that the trial court erred in concluding that their representation of plaintiff ended, and plaintiff had retained new counsel, before the period of limitations had expired, we are not persuaded that the trial court erred in concluding that there was sufficient evidence to support the proposition that defendants had continued to represent plaintiff.