STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA J. WINKLER,

Plaintiff-Appellant,

v

WILLIAM L. CAREY,

Defendant-Appellee.

UNPUBLISHED
December 1, 2005

No. 255193
Roscommon Circuit Court
LC No. 03-723731-NM

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of defendant's motion for summary disposition and denial of her motion for summary disposition. We affirm.

Defendant prepared a prenuptial agreement at plaintiff's request. The prenuptial agreement itself did not list any of plaintiff's or her soon to be husband's assets. Plaintiff stated that defendant informed her that she and her fiancé should attach a list of their assets to the agreement. Plaintiff stated that defendant did not inform her that she should also include approximate values of the assets on the list. Plaintiff and her husband ended up separating and filing for divorce. In the divorce action, the trial court set aside the prenuptial agreement because of nondisclosure by plaintiff. That decision was not appealed, and plaintiff and her husband entered into a consent judgment in the divorce action. Subsequently, plaintiff filed the instant action against defendant alleging that defendant's failure to inform her to place values on the asset lists caused the prenuptial agreement to be set aside. The trial court in this case granted defendant's motion for summary disposition finding that plaintiff could not prove that the lack of values on the asset lists was the proximate cause of the prenuptial agreement being set aside. We agree with the trial court.

To pursue a claim of legal malpractice, a plaintiff must show: (1) the existence of an attorney-client relationship; (2) negligence on the part of the attorney in the representation of the plaintiff; (3) the attorney's negligence was the proximate cause of the plaintiff's damages; and (4) the fact and extent of the injury alleged. *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). "Often the most troublesome element of a legal malpractice action is proximate cause." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). To prove proximate cause, the plaintiff must show that the defendant's actions were a cause in fact of the plaintiff's claimed injury. *Id.* "Causation in fact is one aspect of, and distinguishable from, legal or proximate cause." *Richards v Pierce,* 162 Mich App 308,

316; 412 NW2d 725 (1987). To show that the attorney's negligence was the proximate cause of the plaintiff's damages, a plaintiff has to show that, but for the attorney's negligence, the plaintiff would have been successful in the underlying suit. *Manzo, supra* at 712. Although proximate cause is often a question of fact for the jury, see *Teodorescu v Bushnell, Gage, Reizen & Byington* (*On Remand*), 201 Mich App 260, 266; 506 NW2d 275 (1993), "[w]hen the facts bearing upon proximate cause are not in dispute and reasonable persons could not differ about the application of the legal concept of proximate cause to those facts, the court determines the issue." *Paddock v Tuscola & Saginaw Bay Railway Co, Inc*, 225 Mich App 526, 537; 571 NW2d 564 (1997). The facts in this case were not in dispute because defendant accepted plaintiff's version of the facts for purposes of the motion for summary disposition.

In the divorce action, the trial court found that there was a presumption of nondisclosure because the prenuptial agreement provided for a complete waiver of plaintiff's husband's rights in her estate; plaintiff's estate was very ample compared to her husband's estate; plaintiff was rather secretive about her financial affairs; although the agreement made reference to the parties being fully informed of the other's property interest, this was contradicted by a lack of values on the lists of assets; and that plaintiff's husband was not represented by independent counsel. See *In re Benker Estate*, 416 Mich 681, 693; 331 NW2d 193 (1982). The trial court found plaintiff's negotiation of real estate transactions without her husband's knowledge to be an example of her secretive financial affairs. The trial court stated that the lack of values on the asset lists also supported the finding that plaintiff was secretive about her financial affairs.

Based on the trial court's opinion in the divorce action, we conclude that plaintiff cannot show that the lack of values on the asset lists was the proximate cause of the prenuptial agreement being set aside. Although the lack of values was used with regard to its analysis of two factors, the trial court listed three other factors that led to the presumption of nondisclosure that were not at all related to the lack of values on the asset lists. Plaintiff argues that if values were included on the asset lists, any presumption of nondisclosure would have been rebutted. See *In re Benker Estate, supra* at 699. However, the trial court in the divorce action found both the lack of values on the asset lists and real estate purchases that occurred without plaintiff's husband's knowledge to be areas of nondisclosure. Therefore, plaintiff cannot show that, but for the lack of values on the asset lists, the prenuptial agreement would have been upheld. *Manzo, supra* at 712.

Thus, the trial court did not err in granting defendant's motion for summary disposition. Accordingly, we likewise reject plaintiff's argument that the trial court erred in denying her motion for summary disposition.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer
/s/ William B. Murphy