

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NORTHVILLE LUMBER COMPANY, a/k/a  
HARTLAND LUMBER,

UNPUBLISHED  
November 6, 2007

Plaintiff/Counter-Defendant-  
Appellant,

and

STEWART C. OLDFORD, JR., and HOWARD A.  
OLDFORD,

Plaintiffs/Counter-Defendants,

v

No. 272301  
Livingston Circuit Court  
LC No. 03-019800-CZ

BEVERLY MARIE CUTLER, ABN AMRO  
MORTGAGE GROUP, INC., ALBION  
COUNTRY LANES, INC., GERARD J.  
KUCZAJDA, JACK NORTON, and KAY  
NORTON,

Defendants,

and

NATIONAL CITY BANK OF  
MICHIGAN/ILLINOIS,

Defendant/Counter-Plaintiff/Third-  
Party Plaintiff,

and

RICHARD C. GILLIKIN, C.P.A., and RICHARD  
C. GILLIKIN & ASSOCIATES, P.C.,

Defendants/Counter-Plaintiffs-  
Appellees,

and

STEWART OLDFORD, SR.,

Third-Party Defendant.

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Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

In this accountant malpractice action, plaintiff Northville Lumber Company (plaintiff) appeals as of right from the trial court's order granting summary disposition in favor of defendants Richard C. Gillikin, C.P.A., and Richard C. Gillikin & Associates, P.C. (defendants). We reverse.

This case arises out of the long-term embezzlement of corporate funds by plaintiff's former bookkeeper, Beverly Cutler. Plaintiff, a small, family owned lumber business, did not have a chief financial officer, but retained the services of accountant George Smith who was later succeeded by defendants. Plaintiff began to experience cash flow problems in the business and consulted with defendants. Defendants offered various explanations for the problems, including the software computer program, the need to increase sales, and a loss of inventory to theft. Plaintiff alleged that it followed the recommendations offered by defendants, but were still unable to determine the cause of the problem. For example, plaintiff increased its sales by a million dollars as defendants recommended, but continued to experience cash flow problems. On the contrary, defendants asserted that the owners rebuffed the explanations offered. As a result of the cash flow problems, plaintiff began to have issues with its lender and its line of credit. Plaintiff's financial situation caused the company to end Cutler's employment in January 2003. After she left, her replacement discovered the embezzlement after finding discrepancies between a bank statement and cancelled checks. Cutler was convicted of criminal embezzlement in 2004 and was ordered to pay restitution of \$1.2 million. Before Cutler was convicted, plaintiff and two of its officers filed the instant action against Cutler, other alleged recipients of embezzled funds, plaintiff's banking institution, and defendants. Plaintiff alleged that defendants committed accountant malpractice by failing to discover the embezzlement and reaching erroneous conclusions when consulted about a cash flow problem that plaintiff was experiencing while Cutler was embezzling funds. Plaintiff alleged that defendants' failure to conduct an in-depth review of its records and failure to review or audit financial records enabled Cutler to continue with her embezzlement activities. The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10). Afterward, judgments were entered against Cutler and Albion Country Lanes, Inc., for approximately \$1.4 million. All other parties were dismissed by stipulation. Plaintiff appeals as of right.

We review a trial court's grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* The affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties, to the extent the substance or content would be admissible as evidence, is considered in a light most favorable to the party opposing the motion. *Id.* at 119-120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact,

the moving party is entitled to judgment as a matter of law.” *Id.* at 120. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). “Critically, the court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition.” *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998). When credibility of witnesses is an issue, summary disposition is rarely appropriate. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606 n 5; 572 NW2d 679 (1997).

In general, the elements of a negligence action are “(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Proximate cause is a legal term signifying both cause in fact and legal cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). In general, an act or omission is a cause in fact of a plaintiff’s injury only where the injury would not have occurred without that act or omission. *Id.* at 87. “Under Michigan negligence jurisprudence, it is not necessary to show that a party’s conduct was ‘the’ proximate cause of the injuries—showing that the party’s conduct was ‘a’ proximate cause of the injuries is sufficient.” *Orzel v Scott Drug Co*, 449 Mich 550, 566-567; 537 NW2d 208 (1995).

Defendants allege that they had no obligation to discover the fraud committed by a trusted employee. However, as previously stated, there may be more than one proximate cause for an injury, and defendants cannot escape liability for any breach or criminal act committed by Cutler when they may have also contributed to the harm. Further, plaintiff contends that it looked to defendants to identify the source of the losses. *Orzel, supra*. Therefore, defendants’ repeated reliance on the criminality of Cutler does not entitle them to summary disposition.

Defendants further allege that they did not have an obligation to: (1) conduct an audit and were not retained for that function; (2) discover the embezzlement when plaintiff experienced cash/flow problems; (3) review the computer system; and (4) address the inventory adjustment particularly where plaintiff’s inflation of the inventory precludes this claim. However, the underlying factual issues regarding defendants’ retention and the accompanying credibility issues preclude the grant of summary disposition in this case. *Morris, supra*.

In the present case, defendants assert that their retention was limited to providing compilations, which relied on the financial information presented from plaintiff’s representative, Cutler. However, that testimony is contradicted by plaintiff’s representatives who assert that they turned to defendants for an explanation of the cash shortage, particularly after they followed defendants’ advice and increased sales by one million dollars. Further, the invoices submitted by defendants buttress the testimony of plaintiffs’ representatives. These invoices did not establish a consistent billing for administrative services, but indicated that defendants were consulted on other issues, including “the problems with inventory costing procedures.” Moreover, a representative of plaintiff sent a letter to defendants questioning the amount of the invoices and whether the work performed involved plaintiff or another enterprise of plaintiff’s representatives. Further, there is also a credibility dispute with regard to the inventory issue. Defendants assert that plaintiff’s representatives have unclean hands as they provided an inflated inventory to obtain additional credit. However, plaintiff’s representatives and their expert allege that defendants never made a concerted effort to discover the true status of the inventory and the

process would have led to an audit to discover Cutler's criminality. Where the credibility is crucial to the outcome of an issue, summary disposition is inappropriate. *Harrison, supra*.

In order to grant summary disposition in favor of defendants, the trial court improperly made various factual findings. *Morris, supra*. The trial court found that there were deficiencies in the testimony of plaintiff's expert. However, at the commencement of the deposition, the expert noted that his opinion was not complete because he had not finished a review of the documentation and had not seen the opinion of defendant's expert. The trial court also faulted plaintiff's expert for not knowing whether defendant "dug further" into the inventory problem. However, plaintiff's expert testified that he was unaware of what action defendants specifically took, but had information from plaintiff's representatives that they requested an audit, but defendant spent a day at the facility only to advise that there was either a computer "glitch" or theft. Accordingly, the trial court erred in granting defendants' motion for summary disposition.<sup>1</sup>

Reversed.

/s/ Karen M. Fort Hood

/s/ Helene N. White

/s/ Stephen L. Borrello

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<sup>1</sup> Defendants raised various issues in the lower court that were not decided below. Defendants allege that the restitution order against Cutler precludes recovery from these defendants. However, restitution is not a substitute for civil damages. *In re McEvoy*, 267 Mich App 55, 67; 704 NW2d 78 (2005). Moreover, any amount paid to a victim is set off against any amount later recovered as compensatory damages. MCL 780.766(9). Finally, MCL 600.6304 applies to claims for "personal injury, property damage, or wrongful death" and does not provide a basis for summary disposition.