STATE OF MICHIGAN

COURT OF APPEALS

TRIAD MECHANICAL, INC., Plaintiff-Appellant, v DANIEL M. RHODES, Defendant-Appellee.	UNPUBLISHED April 8, 2008 No. 276616 Oakland Circuit Court LC No. 2003-052408-NM

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff Triad Mechanical, Inc., appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

I. Background

Defendant Daniel M. Rhodes was retained by plaintiff's worker's compensation carrier, Hastings Mutual Insurance Company (Hastings), to represent Hastings and plaintiff's interests with respect to a worker's compensation claim made by John Bailey. In September 2003, plaintiff filed a complaint against defendant, seeking damages for defendant's alleged legal malpractice and breach of fiduciary duties in connection with Bailey's claim. The complaint alleged that defendant's dual representation of Hastings and plaintiff constituted a conflict of interest because, unlike plaintiff, Hastings wanted to settle the case. Plaintiff alleged that defendant "pushed" it to accept the settlement, and "settled the claim despite full knowledge of Plaintiff's discontent with that outcome." Plaintiff sought damages for expenses allegedly incurred because of the settlement, including increased insurance premiums and emotional distress.

In a prior appeal, this Court reversed the trial court's decision granting defendant's motion for summary disposition under MCR 2.116(C)(8), concluding that the trial court erred in ruling that plaintiff had failed to plead the element of causation in fact. *Triad Mechanical, Inc v Rhodes*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2005 (Docket No. 255785).

On remand, the trial court ordered that discovery be completed by May 15, 2006, but later extended discovery to August 15, 2006. In November 2006, defendant moved for summary disposition under MCR 2.116(C)(10), with respect to the legal malpractice claim, alleging that

there was no factual support for plaintiff's claim that he breached a duty by not obtaining plaintiff's consent to the settlement. Defendant also sought summary disposition under MCR 2.116(C)(8) or (10) with respect to the "conflict of interest" allegations, alleging that plaintiff's complaint failed to plead a legally cognizable "conflict of interest" claim independent of the alleged legal malpractice claim. The trial court granted defendant's motion in January 2007, treating the disputed consent issue as affecting the issue of proximate cause. The court later denied plaintiff's motion for reconsideration.

II. Standard of Review

We review a trial court's grant of summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.118(C)(8) tests the legal sufficiency of the complaint based on the pleadings alone. *Id.* at 119-120. The motion may be granted only if the claim is so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.* at 119. Conversely, a motion under MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Id.* at 120.

> When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).
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> When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). But such materials "shall only be considered to the extent that [they] would be admissible as evidence . . . ." MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); *Campbell v Kovich*, 273 Mich App 227, 230; 731 NW2d 112 (2006). [*Healing Place at North Oakland Medical Ctr, supra* at 56.]

A motion for reconsideration under MCR 2.119(F) is reviewed for an abuse of discretion. *In re Estate of Moukalled*, 269 Mich App 708, 713; 714 NW2d 400 (2006); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

III. Record on Appeal

Initially, we consider plaintiff's request for enlargement of the record on appeal to include documentary evidence and defendant's May 11, 2007, deposition in a separate circuit court case, which was taken while this appeal was pending. We agree with plaintiff that MCR 7.216(A)(4) gives this Court authority to permit additions to the record. See *People v Nash*, 244 Mich App 93, 99-100; 625 NW2d 87 (2000). However, this Court has refused a party's request to expand the record where the trial court had not considered the evidence in rendering a decision. See *Coburn v Coburn*, 230 Mich App 118, 122; 583 NW2d 490 (1998), rev'd on other grounds 459 Mich 875 (1998); *Golden v Baghdoian*, 222 Mich App 220, 222 n 2 , 564 NW2d 505 (1997).

The only motion filed in this Court was defendant's motion to strike plaintiff's brief, based on plaintiff's improper supplementation of the record. That motion was denied without prejudice to the parties addressing the issues raised in the motion in their briefs. After considering the parties' briefs, we conclude that this is not an appropriate case for enlargement of the record on appeal.

The general rule that limits our review to the record presented to the trial court applies to a motion for summary disposition. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990), lv den 438 Mich 855 (1991). The case is unlike the situation in *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 412; 550 NW2d 243 (1996), in which the defendant brought a motion under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) or, alternatively, moved to compel arbitration under MCR 3.602, based on an employee handbook that allegedly contained an arbitration agreement. Although only part of the employee handbook was presented to the trial court and this Court, our Supreme Court granted the plaintiff's motion to expand the record to include the entire handbook for purposes of evaluating whether it created an enforceable arbitration agreement. *Id.* at 412-414.

The disputed issue in this case does not involve the construction of a written contract, but rather whether there is factual support for plaintiff's legal malpractice claim. In *Maiden, supra* at 121, our Supreme Court held that MCR 2.116(C)(10) "plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." Even where discovery is incomplete at the time of the motion, summary disposition may be proper if further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). A party claiming that discovery is incomplete must at least oppose the motion on this ground, assert that a dispute exists, and support the allegation with independent evidence. *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

Here, defendant moved for summary disposition under MCR 2.116(C)(10) in November 2006, approximately 11 months after this Court reversed the trial court's grant of summary disposition under MCR 2.116(C)(8). Shortly before defendant filed his motion, plaintiff's counsel, Jamal Hamood, withdrew because of the likelihood that he would be a witness in this case. Although both of the attorneys who entered appearances for plaintiff after Hamood's withdrawal filed responses to defendant's motion, neither response asserted that discovery was still open, let alone that there was a disputed issue that required further discovery. It was not until plaintiff moved for reconsideration of the trial court's January 10, 2007, summary disposition order that plaintiff argued that summary disposition was premature because it did not have the benefit of defendant's allegedly crucial deposition.

We note that plaintiff's motion for reconsideration, like plaintiff's argument on appeal, does not identify the date by which discovery was to be completed. Our review of the lower court record fails to disclose that the trial court ordered an extension for the completion of discovery beyond August 15, 2006, the date indicated in its May 16, 2006, calendar conference order. We deem abandoned any claim that discovery was still open at the time the trial court granted defendant's motion. A party may not merely announce a position and leave it to an appellate court to discover and rationalize the basis of the claim. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Even if the trial court could have ordered additional discovery, the appropriate means for plaintiff to demonstrate that summary disposition was premature would have been to "show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure." MCR 2.116(H)(1); see also *Coblentz v City of Novi*, 475 Mich 558, 570; 719 NW2d 73 (2006). Because plaintiff did not offer the required affidavit to the trial court, it cannot complain that discovery was prematurely ended. *Id.* at 571. Therefore, we deny plaintiff's request to permit expansion of the record on appeal. Accordingly, our review is limited to the record presented to the trial court.

IV. Defendant's Motion for Summary Disposition

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10) with respect to plaintiff's claim that defendant committed legal malpractice by settling Bailey's claim without its consent.

In general, the elements of a legal malpractice action are "(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." *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). As with other negligence actions, plaintiff must prove that defendant's alleged negligence was both a cause in fact of the injury, and legal or proximate causation. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994) *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 613; 563 NW2d 693 (1997). The cause in fact element generally requires proof that "but for" the defendant's actions, the plaintiff's injury would not have occurred, while legal or proximate causation involves an examination of the foreseeability of the consequences. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994).

The question of proximate cause is interrelated to the question of whether the relationship gives rise to a duty, because both questions depend in part on foreseeability. *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977). All attorneys have a duty to act as an attorney of ordinary learning, judgment, or skill would act under the same or similar circumstances. *Simko, supra* at 656; *Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002). Expert testimony is usually required in a malpractice action to establish the standard of conduct, breach of the standard of conduct, and causation, unless the "absence of professional care is so manifest that within the common knowledge and experience of an ordinary layman it can be said that the defendant was careless." *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989), lv den 434 Mich 862 (1990); see also *Beattie v Firnschild*, 152 Mich App 785, 791-793; 394 NW2d 107 (1986) (expert testimony required in a legal malpractice action,

even where the plaintiff claims that disciplinary rules were violated, unless the violation is obvious); but see *Charles Reinhart Co, supra* at 603-609 (proximate cause issue in a legal malpractice action based on negligence in an appeal, which intrinsically involves a legal issue, is to be resolved by the court).

Here, there is no dispute that an actionable attorney-client relationship existed between plaintiff and defendant that arose from Hastings's retention of defendant in connection with Bailey's worker's compensation claim. We note, however, that a legal malpractice action is founded on an injury to a fiduciary relationship. *Henry v Dow Chem Co,* 473 Mich 63, 78-79; 701 NW2d 684 (2005). Principles of equitable subrogation have been applied in the insurance defense context to recognize an attorney-client relationship running to both the insurer and the insured for purposes of a legal malpractice action. See *Atlantic Int'l Ins Co v Bell,* 438 Mich 512; 475 NW2d 294 (1991), and *Beaty v Hertzberg & Golden, PC,* 456 Mich 247, 254 n 5; 571 NW2d 716 (1997).

Although defendant's motion for summary disposition was based on his claim that plaintiff could not prove a breach of duty, we find no error in the trial court's treatment of the issue as substantively relating to the issue of causation. Indeed, the "consent" issue in defendant's motion was treated as presenting an issue of causation in one of plaintiff's responses to defendant's motion. Further, neither party offered expert evidence regarding the specific standard of care applicable to an attorney under the circumstances here, where the attorney represents the interests of both the insurer and the insured in a worker's compensation proceeding.

Although both parties relied on the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*., neither party established a statutory provision intended to set forth an attorney's duties. The statute cited by defendant requires a "carrier" give ten-days notice of a hearing on a proposed redemption agreement to the employer, unless waived by the worker's compensation magistrate. MCL 418.835(2) and (3). "Carrier" is defined as "a self-insurer or an insurer." MCL 418.601(c). Under the WDCA, the carrier generally has a duty to directly pay benefits to an eligible claimant. MCL 418.801; *Bailey v Oakland Hosp & Medical Ctr,* 472 Mich 685, 696; 698 NW2d 374 (2005). A claim for benefits may be settled by a redemption agreement, subject to the approval of the worker's compensation magistrate. MCL 418.835(1). The redemption represents a voluntary compromise of the employer's statutory liability. *Stimson v Michigan Bell Tel Co,* 77 Mich App 361, 364; 258 NW2d 227 (1977). The notice required of the "carrier" must include:

> (a) The amount and conditions of the proposed redemption agreement.
>
> (b) The procedure available for requesting a private informal managerial level conference.
>
> (c) The name and business phone number of a representative of the carrier familiar with the case.
>
> (d) The time and place of the hearing on the proposed redemption agreement and the right of the employer to object to it. [MCL 418.835(2).]

The statute cited by plaintiff, MCL 418.836(1)(b), establishes a magistrate's duties before accepting the proposed redemption agreement. It requires the magistrate find that the agreement was voluntarily agreed to by all parties. MCL 418.836(1)(b). The employer is considered a party for purposes of this provision, but "[i]f the employer does not object in writing or in person to the proposed redemption agreement, the employer shall be considered to have agreed to the proposed agreement." MCL 418.836(1)(b) and (4). A party may appeal the magistrate's decision as set forth in MCL 418.837. *Chrysler Corp v Workers' Compensation Appeal Bd,* 174 Mich App 277, 281; 435 NW2d 450 (1988).

Although there was undisputed evidence that defendant was involved in this statutory process, because defendant's motion for summary disposition was directed at the consequences of his actions in light of the statutory procedure, we shall examine the parties' arguments under the standards for causation. The initial inquiry is whether, "but for" defendant's actions, plaintiff's injury would not have occurred. *Skinner, supra* at 163.

In a typical legal malpractice action, the "but for" inquiry involves an evaluation of whether the plaintiff would have succeeded in the underlying action itself, which in this case would be Bailey's underlying claim for worker's compensation benefits. See generally *Charles Reinhart Co, supra* at 586-587. But where a settlement is reached in the underlying action, an attorney may be held liable if his or her malfeasance or nonfeasance caused the client to settle. See *Espinoza v Thomas,* 189 Mich App 110, 123-124; 472 NW2d 16 (1991); see also *Lowman v Karp,* 190 Mich App 448; 452-453; 476 NW2d 428 (1991) (settlement is not an absolute bar to a legal malpractice action).

Here, it is apparent from MCL 418.835(2) and (3), and 418.836(1)(b), that plaintiff's written consent to the proposed redemption agreement was not required. Further, plaintiff failed to present evidence that defendant committed any act of malfeasance or nonfeasance that prevented it from making written objections to the redemption agreement, or appearing at the July 24, 2002, redemption hearing. From the face of the letter evidence submitted by defendant in support of his motion, it can be inferred that defendant was undertaking to satisfy Hastings's duty under MCL 418.835(2) to give plaintiff written notice of the proposed redemption agreement in the amount of $40,000. The first letter, dated June 24, 2002, informed plaintiff of three ways to present objections to the proposed notice: (1) stating the objections in writing and sending them to defendant or the magistrate, (2) appearing at a June 27, 2002, hearing before the magistrate, or (3) contacting defendant or an insurance representative to discuss any objections. The second letter, dated July 2, 2002, contained this same information, except that the date of the scheduled hearing was changed to the obviously incorrect date of June 24, 2002. Each letter also gave plaintiff's president an opportunity to provide written consent to the settlement.

There is no evidence that plaintiff took any formal action in response to either letter. However, plaintiff had attorney Hamood, write a letter dated June 25, 2002, addressed to defendant in which it was indicated that plaintiff's president would acquiesce in the settlement, but not consent to it, because he was under the impression that Hastings would settle without his consent. Attorney Hamood also invited defendant to contact him to explain the rationale for the proposed settlement. It is undisputed that defendant did not appear at the July 24, 2002, redemption hearing. Another attorney, Jane Colombo, appeared on behalf of plaintiff and Hastings and represented to the magistrate that plaintiff acquiesced in the settlement. No other information about plaintiff's acquiescence was presented to the magistrate.

We conclude that plaintiff has not established any basis for holding defendant responsible for the limited disclosure made by attorney Colombo at the July 24, 2002, hearing regarding plaintiff's acquiescence. Nor is there any admissible evidence to support an inference that a more detailed disclosure would have affected the magistrate's decision to approve the redemption agreement. Also, we reject as without merit plaintiff's claim that it (or a representative of plaintiff) would have personally appeared at the hearing to object to the redemption agreement had the July 2, 2002, letter included the correct hearing date. The July 2, 2002 letter does indicate that the hearing was scheduled for June 24, 2002, but that date had already passed when the letter was sent. Plaintiff thus could not have relied to its detriment on the erroneous hearing date, particularly when plaintiff had in its possession a previous letter from defendant indicating the actual hearing date. Last, the existing record contains only an unsworn statement in one of plaintiff's responses to defendant's motion for summary disposition that this error prevented plaintiff from appearing at the hearing. "Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Finally, as indicated in defendant's reply to plaintiff's responses to the motion for summary disposition, there was no evidence that plaintiff took any action to seek review of the redemption order after it was entered by the magistrate, despite the procedures available for review in the WDCA, MCL 418.837, and the evidence that plaintiff consulted with another attorney with respect to Bailey's claim.

In sum, viewed in a light most favorable to plaintiff, the evidence was insufficient to support an inference that plaintiff became bound by the redemption agreement because of any malfeasance or nonfeasance by defendant. Because no genuine issue of material fact was shown with respect to whether defendant's actions were a cause in fact of plaintiff's injury, we affirm the trial court's grant of summary disposition in favor of defendant under MCR 2.116(C)(10) with respect to plaintiff's legal malpractice action.

Turning to plaintiff's challenge to the trial court's grant of defendant's motion with respect to its theory that defendant violated the conflict of interest rule in MRPC 1.7, the record reflects that defendant sought summary disposition under MCR 2.116(C)(8) on the ground that a rule violation does not give rise to an independent cause of action. Because plaintiff agrees on appeal that a rule violation does not give rise to an independent cause of action, we affirm the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(8) on this ground. There being no independent "conflict of interest" claim, the trial court's determination that plaintiff failed to present evidence of causation also supports its decision to grant summary disposition with respect to this theory under MCR 2.116(C)(10).

Plaintiff misconstrues the trial court's decision as disallowing evidence of a rule violation to prove negligence for purposes of defendant's motion under MCR 2.116(C)(10). It was unnecessary to reach this issue because the mere fact that a rule may have been violated does not give rise to a claim for damages. See MRPC 1.0(b); *Watts v Polaczyk*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000). We conclude that the rebuttable presumption of negligence found in *Beattie, supra* at 791-792, is not applicable here because that case was decided under the former Code of Professional Responsibility. Under the Michigan Rules of Professional Conduct (MRPC), the rules can be relevant, but "the admissibility of the Rules of Professional Conduct is governed by the Michigan Rules of Evidence and other provisions of law." MRPC 1.0(b).

V. Plaintiff's Motion for Reconsideration

Finally, plaintiff argues that the trial court erred in denying its motion for reconsideration, which was based on plaintiff's claim that summary disposition was premature because it had not taken defendant's deposition. Limiting our review to the existing record, we find no abuse of discretion in the trial court's decision denying the motion. MCR 2.119(F)(3); *In re Estate of Moukalled, supra* at 713.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering