STATE OF MICHIGAN

COURT OF APPEALS

TRACI WEBBER, Personal Representative of the Estate of JANIE WEBBER, Deceased,

Plaintiff-Appellant,

v

GEORGE HILBORN and HILBORN & HILBORN, P.C.,

Defendants-Appellees.

UNPUBLISHED
December 29, 2009

No. 286861
Oakland Circuit Court
LC No. 2003-055071-NM

Before: Meter, P.J., and Borrello and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and disallowing plaintiff's second amended complaint in this legal malpractice action. For the reasons set forth in this opinion, we reverse and remand.

This action has its origins in a June 2000 automobile accident in which plaintiff's decedent, 17-year-old Janie Webber, was killed. Plaintiff alleges that the accident occurred when the pickup truck in which Janie was riding as a passenger, began swerving erratically from lane to lane and, when Janie's boyfriend attempted to apply the brakes, the accelerator pedal broke off and fell under the brake pedal. The truck then dangerously sped up out of control and crashed into an oncoming vehicle. Plaintiff hired defendants to represent her in a wrongful death product liability lawsuit against the manufacturer of the vehicle involved in the accident. In this malpractice case, plaintiff alleges that she lost her ability to pursue the product liability action because defendants failed to preserve the vehicle involved in the accident, and allowed the vehicle to be crushed by the storage yard where it was taken after the accident.

The trial court granted summary disposition for defendants in December 2005, on the grounds that the malpractice action was not filed within the applicable limitations period and that plaintiff's complaint failed to allege sufficient facts regarding the element of proximate cause. In a prior appeal, this Court reversed that decision, concluding that plaintiff's action was timely filed and that plaintiff's complaint "adequately alleged proximate causation and the fact and extent of injury." *Webber v Hilborn*, unpublished opinion per curiam of the Court of Appeals (Docket No. 267582, issued August 17, 2006). However, our Supreme Court reversed the portion of this Court's decision holding that plaintiff adequately stated a claim for legal

malpractice, reinstated the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(8), and remanded the case to the trial court "for a determination of whether further amendment of the complaint to allege proximate cause would be futile." *Webber v Hilborn*, 477 Mich 1109; 729 NW2d 839 (2007). On remand, after plaintiff filed a second amended complaint, defendants moved to dismiss the complaint and requested summary disposition pursuant to MCR 2.116(C)(8) on the ground that the amended complaint still failed to state a prima facie case of legal malpractice. The trial court agreed and granted defendants' motion. This appeal followed.

As an initial matter, defendants argue that this appeal should be dismissed under the law of the case doctrine. This Court originally dismissed this appeal for lack of jurisdiction because it concluded that the order appealed from was not a final order appealable by right. *Webber v Hilborn*, unpublished order of the Court of Appeals, entered August 13, 2008 (Docket No. 286861). Plaintiff then filed a motion for reconsideration of this Court's order and also filed a separate delayed application for leave to appeal in Docket No. 287424, raising the same claims at issue here. On October 9, 2008, this Court granted plaintiff's motion for reconsideration and reinstated this appeal. *Webber v Hilborn*, unpublished order of the Court of Appeals, entered October 9, 2008 (Docket No. 286861). However, plaintiff failed to withdraw her delayed application in Docket No. 287424, and this Court subsequently denied the application "for lack of merit in the grounds presented." *Webber v Hilborn*, unpublished order of the Court of Appeals, entered January 20, 2009 (Docket No. 287424). Defendants argue that the order denying plaintiff's application for "lack of merit" constitutes the law of the case, thereby barring plaintiff from relitigating her claims in this appeal.

Although this Court has recognized that orders denying leave "for lack of merit in the grounds presented" are decisions on the merits that constitute the law of the case, cf. *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983), the law of the case doctrine is discretionary and merely expresses the practice of courts generally; it is not a limit on their power. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109, n 13; 476 NW2d 112 (1991); *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 37-38; 536 NW2d 815 (1995). Additionally, it appears that two separate panels of this Court reached contrary conclusions as to whether to grant plaintiff's delayed application for leave to appeal. It also appears that the two panels reached contrary conclusions without any knowledge that plaintiff had filed two separate actions for leave to appeal. Due to this Court's oversight in allowing two separate applications for leave to appeal on the same case and issues and because this Court's order in Docket No. 287424 expresses no reasoning on the merits, we exercise our discretion to address the merits of plaintiff's appeal.

Plaintiff's second amended complaint alleged two separate counts, one labeled "legal malpractice" – "spoliation of evidence," and the other labeled "legal malpractice" – "failure to pursue the valuable products liability case which remained in spite of defendants' failure to preserve the Dodge pickup truck in its post-crash state."

First, we disagree with plaintiff's contention that she should be permitted to pursue an independent claim for spoliation of evidence. In *Teel v Meredith*, 284 Mich App 660, 661, 663; ___ NW2d ___ (2009), lv pending, this Court recently observed that "Michigan does not yet recognize as a valid cause of action spoliation of evidence that interferes with a prospective civil action against a third party," and the Court declined to recognize such an action. The Court

explained that the decision to impose new duties and recognize an independent tort claim for spoliation of evidence should be left to the Legislature. *Id.* at 663-664.

Furthermore, our Supreme Court remanded this case to the trial court for the limited purpose of determining whether further amendment of plaintiff's complaint to allege proximate cause for a legal malpractice action would be futile. The Supreme Court's order states, in pertinent part:

> In lieu of granting leave to appeal, we reverse the portion of the judgment of the Court of Appeals holding that the plaintiff adequately stated a prima facie case of legal malpractice, reinstate the order of the Oakland Circuit Court granting summary disposition to the defendants pursuant to MCR 2.116(C)(8), and remand this case to the trial court for a determination of whether further amendment of the complaint to allege proximate cause would be futile. MCR 2.116(I)(5). It is well established that in order to survive summary disposition of a legal malpractice claim, "a plaintiff 'must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit.'" *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586 (1994), quoting *Coleman v Gurwin*, 443 Mich 59, 63 (1993). In this case, the plaintiff failed to allege any facts in either her original or amended complaint showing that but for the defendants' negligence, she would have prevailed in the underlying suit. [*Webber*, *supra*, 477 Mich 1109.]

As explained in *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544-545; 705 NW2d 365 (2005):

> When an appellate court remands a case without instructions, a lower court has the "same power as if it made the ruling itself." However, when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order. "It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." [Citations omitted.]

Here, the Supreme Court remanded this case for the limited purpose of determining whether plaintiff could sufficiently plead a claim for legal malpractice that was not futile. The Supreme Court's order did not encompass consideration of an independent claim for spoliation of evidence.

For these reasons, plaintiff may not properly pursue an independent claim for spoliation of evidence. We agree, however, that plaintiff may pursue a spoliation of evidence theory in the context of a legally recognized legal malpractice action. Indeed, plaintiff 's spoliation claim is identified as a legal malpractice claim in her second amended complaint. Viewed in this manner, plaintiff is not attempting to pursue a new or novel cause of action, but rather one based on legal malpractice. We note that plaintiff 's previous complaint alleged a single count of malpractice for both failing to preserve evidence and for failing to properly pursue the underlying product liability litigation, despite the pickup truck's destruction. Plaintiff's second amended complaint sets forth these theories as two separate alternative claims of legal malpractice, presumably to better clarify her claims. 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 the negligence was the proximate cause of an injury; 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). Thus, although plaintiff may not pursue an independent claim for spoliation of evidence, she may pursue a spoliation theory to the extent that she can show that defendants' failure to preserve the pickup truck amounted to negligence in their legal representation of plaintiff, and that such negligence was the proximate cause of an injury, as well as both the fact and extent of the injury alleged.

We next consider whether the trial court erred in disallowing plaintiff's second-amended complaint and in granting defendants summary disposition under MCR 2.116(C)(8), on the basis of the trial court's conclusion that the second amended complaint failed to sufficiently state a claim for legal malpractice.

A trial court's decision to deny leave to amend the pleadings is reviewed for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). "An abuse of discretion occurs when the [trial court's] decision results in an outcome falling outside the principled range of outcomes." *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 625; 750 NW2d 228 (2008).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Patterson*, *supra*.

Under MCR 2.118(A)(2), a trial court should freely grant leave to amend "when justice so requires." Thus,

> [a] motion to amend ordinarily should be granted in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision. *Id*. at 656-657. [*Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9-10; 614 NW2d 169 (2000).]

When a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), it must give the nonprevailing party an opportunity to amend her pleadings pursuant to MCR 2.118, unless amendment is not justified or it would be futile to do so. MCR 2.116(I)(5); *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001). An amendment is considered futile if it merely restates allegations already made or adds new allegations that fail to state a claim. *Id.*

MCR 2.111(B)(1) requires that a complaint contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend."

> Under Michigan's rule of general fact-based pleading, see MCR 2.111(B)(1), the only facts and circumstances that must be pleaded "with particularity" are claims of "fraud or mistake." MCR 2.112(B)(1). In other situations, MCR 2.111(B)(1) provides that the allegations in a complaint must state "the facts, without repetition, on which the pleader relies," and "the specific allegations necessary reasonably to inform the adverse party" of the pleader's claims. See *Dacon v Transue*, 441 Mich 315, 330; 490 NW2d 369 (1992). A complaint is sufficient under MCR 2.111(B)(1) as long as it "contain[s] allegations that are specific enough reasonably to inform the defendant of the nature of the claim against which he must defend." *Porter v Henry Ford Hosp*, 181 Mich App 706, 708; 450 NW2d 37 (1989); see also *Goins v Ford Motor Co*, 131 Mich App 185, 195; 347 NW2d 184 (1983). [*Iron Co v Sundberg, Carolson & Assoc, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997).]

The degree of specificity required in pleadings depends on the complexity of the circumstances and the nature of the case. "Where the factual basis of the alleged malpractice is within the knowledge of the ordinary layperson, the cause may be pled with less specificity than a more complicated, technical malpractice claim." *Porter v Henry Ford Hosp*, 181 Mich App 706, 709; 450 NW2d 37 (1989). "The crucial question is whether the complaint is specific enough to provide the defendant with notice of the allegations against which he must defend." *Id.* at 709-710. The complaint should allow the court to draw inferences in support of the claim from the facts and not have to rely on the plaintiff 's inferences. *Id*. at 709.

Plaintiff's second amended complaint contains a statement of the facts and sets forth two separate claims of legal malpractice and the legal bases for those claims. Plaintiff's first count alleges that defendants committed legal malpractice by failing to preserve the truck. The second count alleges that defendants committed legal malpractice by advising plaintiff to dismiss the product liability lawsuit against DaimlerChrysler because of the damage to the truck when it was crushed after the accident. Plaintiff asserts that to the extent that the defective condition of the truck could still be determined despite its crushed state, it was malpractice for defendants to advise her to dismiss her product liability lawsuit when she could have still proven a defect and prevailed at trial.

MCR 2.111(A)(2)(a) permits a party to plead inconsistent claims, including "two or more statements of fact in the alternative when in doubt about which of the statements is true[.]" See *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 328; 657 NW2d 759 (2002). Here, plaintiff has pleaded alternative claims, alleging that she could prove either that defendants were negligent for advising her to dismiss her product liability claim when she could have still proven that the pickup truck was defective despite its condition after it was crushed, or that defendants were negligent for not preserving the truck, thereby preventing her from proving that the truck was defective. For either claim, however, plaintiff must still show that she would have prevailed in the underlying lawsuit as part of the "suit within a suit" requirement.

As previously indicated, an essential element of a legal malpractice claim is that the plaintiff prove that the defendant's negligent representation was the proximate cause of an injury. *Manzo*, *supra* at 712.

> In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff must show that, but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the "suit within a suit" requirement in legal malpractice cases. [*Id.*]

Although proximate cause involves both a legal and factual component, *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586 n 13; 513 NW2d 773 (1994), this case focuses on whether plaintiff can prove causation without relying on speculation or conjecture, *Id.* at 586-587. Factual causation may not be based on a mere possibility. In *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 684 NW2d 296 (2004), our Supreme Court explained:

> Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause.
>
> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." A valid theory of causation, therefore, must be based on facts in evidence. And while "'[t]he evidence need not negate all other possible causes,'" this Court has consistently required that the evidence "'exclude other reasonable hypotheses with a fair amount of certainty.'" [Footnotes omitted.]

The allegations in plaintiff's second amended complaint indicate that she is relying on a theory of defective design or manufacture for her underlying product liability claim. A prima facie claim for product liability requires that the plaintiff show that the defendant supplied a product that was defective and that the defect caused an injury. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 510; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1996). The claim may be based on either direct or circumstantial evidence, and the plaintiff meets its burden when it demonstrates, by a reasonable probability, that the defect is attributable to the manufacturer and that such hypothesis is more probable than any other hypothesis suggested by the evidence. *Id.* The plaintiff is not required to eliminate all other possible causes of the accident. *Id.*

Plaintiff alleged that the underlying accident was caused by a defective accelerator pedal and mount, which broke and interfered with the driver's use of the brakes. Paragraphs 25-26 of plaintiff's second amended complaint set forth the alleged defects that form the basis for her underlying product liability case:

25. At the time the Dodge pickup truck left DaimlerChrysler's control, it was defective and unreasonably dangerous to a person who might reasonably be expected to ride as a passenger therein.

26. These defects in the accelerator assembly include, but are not limited to, the conditions described in the following paragraphs:

a. That DaimlerChrysler negligently designed and selected materials for the accelerator mount and accelerator pedal which would break during normal use and operation of the vehicle so as to render the vehicle uncontrollable and injure people such as Janie Lynn Webber, and such a condition was reasonably foreseeable;

b. Despite DaimlerChrysler's knowledge or concerns as to the danger of using substandard materials, DaimlerChrysler released such component(s) or subcomponent(s) in the subject vehicle;

c. That DaimlerChrysler negligently designed and selected the accelerator mount assembly and accelerator pedal which would fracture and break during reasonable use or operation;

d. The failure of DaimlerChrysler to properly select components and subcomponents which make up the accelerator assembly was a result of a conscious choice by DaimlerChrysler, which was aware of superior designs, materials and technology used by other manufacturers;

e. That DaimlerChrysler negligently failed to adequately test the accelerator assembly during its developing [sic] using dummies or cadavers or computer programs which would reflect "the real world" of automobile usage and durability;

f. DaimlerChrysler negligently manufactured said vehicle and its component parts, including the accelerator assembly, brake pedal, brake pedal mount, and components;

g. DaimlerChrysler failed to use adequate quality control procedures and processes to alert it to manufacturing defects;

h. DaimlerChrysler committed other acts of negligence that may become known through discovery.

We believe that these allegations are sufficient to place defendants on notice of the nature of the underlying claim. Plaintiff's second amended complaint also includes the following allegations, which further explain her alternative legal malpractice theories:

60. However, Mr. Hilborn still could have and should have pursued the products liability case because, upon information and belief, the bake [sic] pedal,

> the accelerator pedal and plastic mount were (and still are) still preserved in their immediate post-crash conditions within the car.
>
> 61. Thus, they could have been used persuasively and successfully in the products liability case against DaimlerChrysler.
>
> 62. Therefore it was, upon information and belief, still possible for Mr. Hilborn to have pulled apart the wreckage to examine those components and then to have successfully proceeded with the products liability case and proven that the Dodge pickup truck was defective, including but not limited to the reasons set forth in Paragraph 26.
>
> 63. Unfortunately, however, Mr. Hilborn recognized his mistake in not preserving the Dodge pickup truck in its immediate post-crash state and immediately decided to jettison the case, not considering the fact that the case still could be pursued successfully.
>
> 64. In the alternative, if the brake pedal, accelerator pedal, the plastic mount and any other necessary components were destroyed by the crushing of the Dodge pickup truck, the very evidence which would have won the products liability case in favor of Plaintiff was destroyed, all as a direct and proximate result of Defendants' malpractice.

In addition, ¶¶ 75, 82 and 83 allege that as a proximate cause of defendants' negligence, plaintiff lost a valuable cause of action in the underlying product liability litigation.

We believe that the foregoing allegations are sufficient to put defendants on notice of plaintiff 's theories. Plaintiff alleged that had defendants either properly preserved the truck or not withdrawn from the case, she would have prevailed by proving that the truck was defective when it left the manufacturer's possession.

It is unnecessary at this point to consider whether plaintiff will be able to factually support and prove her claims for legal malpractice. When considering whether an amendment would be futile, a court should ignore the substantive merits of a claim and determine only whether it is legally sufficient on its face. *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Further, a motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint by the pleadings alone. *Patterson*, *supra* at 432. Here, plaintiff has alleged sufficient facts to show that she might have prevailed in her underlying product liability lawsuit but for defendants' alleged malpractice. Plaintiff's claims in her second amended complaint are not so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.* Therefore, the trial court, in ruling that the claims set forth in plaintiff's second amended complaint were futile and in determining that defendants were entitled to summary disposition under MCR 2.116(C)(8), made a mistake of law which constituted an abuse of discretion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro