STATE OF MICHIGAN

COURT OF APPEALS

CAROLYN M. SCHMIDT,

Plaintiff-Appellant,

v

DENISE M. LAFAVE SMITH, DENISE LAFAVE SMITH, PLLC a/k/a LAFAVE SMITH CENTER FOR FAMILY & ELDER LAW,

Defendants-Appellees.

UNPUBLISHED
March 29, 2012

No. 300718
Ingham Circuit Court
LC No. 08-001319-NM

Before: WILDER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition under MCR 2.116(C)(10) and dismissing her legal malpractice claim. We reverse and remand.

I. BASIC FACTS

Plaintiff hired defendant[1] to provide services relative to Medicaid issues and estate planning involving plaintiff's father, Hubert Wade.[2] Specifically, plaintiff wished to make Wade eligible for Medicaid.

The Medicaid program was created by Congress with the intent "to provide benefits to the truly needy." *Mackey v Dep't of Human Servs*, 289 Mich App 688, 697; 808 NW2d 484 (2010). "To be eligible for Medicaid long-term-care benefits in Michigan, an individual must meet a number of criteria, including having $2,000 or less in countable assets." *Id.* at 698. In some cases, persons with wealth have transferred their assets for less than fair market value in order to become eligible for Medicaid. See *id.* at 698-699. The typical purpose of such transfers is to "pass on . . . accumulated wealth" within the family unit. See *id.* at 697. To avoid this misuse of the Medicaid system, however, a state examines all transfers of assets within a

[1] In this opinion, both defendants will be referred to as the singular "defendant."

[2] Both plaintiff and her husband signed the agreement with defendant and were collectively referenced as "Client" in the document.

specified time frame to determine whether the transfers were made "solely to become eligible for Medicaid, which can be established if the transfer was made for less than fair market value." *Id.* at 696. This time frame is the "look-back period." *Id*. "A transfer for less than fair market value during the 'look-back' period is referred to as a 'divestment.'" *Id*. A divestment "subjects the applicant to a penalty period during which payment of long-term-care benefits is suspended." *Id*.

Plaintiff had durable power of attorney for Wade,[3] who was suffering from Alzheimer's disease. Pursuant to defendant's advice, plaintiff, as power of attorney, "spent down" Wade's assets in an effort to make him eligible for Medicaid. Wade retained $2,000, his personal residence, and a vehicle, and his remaining assets were transferred to a bank account that was jointly owned by plaintiff and her husband. This account only held money related to Wade; plaintiff and her husband did not commingle any of their other funds with this account.

After spending down Wade's assets, plaintiff filled out Wade's application for Medicaid. Plaintiff claims that she then took the application packet to defendant on August 27, 2007, for defendant's review and approval, but defendant denies ever reviewing the application. Regardless, there is no dispute that plaintiff submitted the application to the Department of Human Services (DHS) on August 31, 2007. That application was denied a week later. Defendant filed a notice of appeal with DHS to preserve plaintiff's right to appeal but, thereafter, failed to otherwise respond to any of plaintiff's "numerous" calls. After determining that nothing was happening in her appeal, plaintiff retained another attorney in February 2008, in a continued effort to obtain Medicaid coverage for Wade. Plaintiff's new attorney withdrew the appeal filed by defendant and filed a new application, which was eventually approved.

While Wade's approval for Medicaid was being sought, and during the "penalty period" following his approval for Medicaid, plaintiff continued to pay for Wade's nursing-home care from the money she transferred to her bank account.

On October 1, 2008, plaintiff filed a law suit in her individual capacity against defendant, alleging malpractice. Plaintiff alleged that defendant negligently failed to provide adequate advice regarding the "spend down" of Wade's assets and that defendant's inattention following the rejection of the initial application caused an undue delay. Among the damages plaintiff sought were the costs associated with Wade's nursing-home care during the several-month delay in getting the Medicaid approval and the attorney fees she paid to another attorney to get the approval process completed.

Defendant moved for summary disposition arguing that (1) defendant did not owe a duty to plaintiff because Wade, not plaintiff, was defendant's client and (2) plaintiff incurred no damages because any funds allegedly lost were Wade's own funds, not plaintiff's, and that any loss to plaintiff is best characterized as a loss of a potential inheritance, which would not be

[3] "[A] power of attorney is a written instrument by which a principal authorizes and appoints an agent, known as an attorney in fact, and delegates to the agent the power to perform acts on behalf of, in the place of, and instead of the principal." *Persinger v Holst*, 248 Mich App 499, 503; 639 NW2d 594 (2001).

recoverable as a matter of law. The trial court granted defendant's motion for summary disposition, concluding that plaintiff failed to establish a genuine issue of material fact with respect to damages, a necessary element of a legal malpractice claim. In particular, the trial court agreed with defendant that plaintiff's damages merely constituted a potential loss of inheritance. The trial court further agreed that all relevant expenditures were paid with Wade's money and not plaintiff's money, making any loss to plaintiff merely speculative. The trial court declined to address whether plaintiff and defendant had an attorney-client relationship, the first element of a legal malpractice claim.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). 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); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

III. ANALYSIS

In order to establish a legal malpractice claim, a plaintiff must prove "(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." *Coble v Green*, 271 Mich App 382, 386; 722 NW2d 898 (2006). Defendant, in her motion for summary disposition, argued that plaintiff's claim was legally deficient because she could not establish elements one and four; hence, we will confine our analysis to those elements as well.

Whether there is an attorney-client relationship is a question of law for the court to decide. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). On the basis of the record before us, we conclude that plaintiff and defendant had an attorney-client relationship. The retainer agreement in its plain and unambiguous language identifies plaintiff and her husband as "Client." Defendant's contention, that Wade was her "true" client, defies our long-standing principle that a contract must be interpreted according to its plain language. *Rory v Continental Ins Co*, 473 Mich 457, 465; 703 NW2d 23 (2005). Moreover, to the extent that defendant's services were provided to benefit Wade, we note that it is not unusual for a client to enter into a third-party beneficiary contract with an attorney. See, e.g., *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253-254; 571 NW2d 716 (1997). In addition, defendant fails to explain why, if Wade was her "true" client and not plaintiff, plaintiff's husband signed the retainer agreement, since only plaintiff had Wade's power of attorney.

We next conclude that the trial court erred in finding that plaintiff failed to establish a genuine issue of material fact as to whether she had incurred damages as the result of defendant's malpractice. We agree that, if Wade owned the assets at issue, plaintiff's claim of malpractice

would necessarily fail because it is a fundamental principle of law that "potential heirs and legatees do not have a right in an estate until the testator dies." *In re Estate of Finlay*, 430 Mich 590, 601; 424 NW2d 272 (1988). In other words, "no one can be an heir during the life of an ancestor," *id.* at 601 n 12, and if the assets at issue were owned by Wade, plaintiff would have no property interest in these assets until Wade's death, see *In re Estate of Smith*, 252 Mich App 120, 128-129; 651 NW2d 153 (2002).

However, given the facts presented, there is no genuine issue of fact regarding plaintiff's ownership of the funds in dispute. While these assets were originally owned by Wade, it is undisputed that Wade, through plaintiff, who was acting as his agent pursuant to the power of attorney, transferred title to these assets to plaintiff. Thus, while the assets were ultimately spent on Wade's private medical care, the assets nevertheless belonged to plaintiff.

Defendant's reliance on statements plaintiff made, that in essence the money was part of Wade's "estate," is misplaced. The term "estate" is a legal term of art, see *Treiber v Citizens State Bank*, 598 NW2d 96, 101 (ND, 1999), citing Black's Law Dictionary (6th ed), and plaintiff's subjective lay opinion of what was or was not part of Wade's estate is not relevant to a determination of whether she or Wade possessed legal title to the funds in dispute. Furthermore, defendant's assertion that the money in question belonged to Wade contradicts the very notion of divestment. As this Court stated in *Mackey*, divestment is an asset *transfer*. *Mackey*, 289 Mich App at 697. By definition, Wade could not become eligible for Medicaid unless he transferred his assets to another person. As discussed earlier, Wade transferred his assets to plaintiff, and as such, any loss of these assets would be plaintiff's loss. The trial court erred when it held that plaintiff failed to suffer any injury.[4]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

[4] We once again note that, because the elements of breach and proximate cause were not argued below, we decline to offer any opinion on whether plaintiff presented enough evidence to create an issue of fact on these elements.