

STATE OF MICHIGAN
COURT OF APPEALS

JAMES P. HARKINS, JR.,

Plaintiff,

and

DIANE DICKOW D'AGOSTINI and
KIMBERLY SMALL,

Plaintiffs-Appellants,

v

THOMAS R. PAXTON and GARAN, LUCOW,
MILLER, PC,

Defendant-Appellees.

UNPUBLISHED

March 22, 2012

No. 301576

Wayne Circuit Court

LC No. 08-018282-NM

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Diane Dickow D'Agostini and Kimberly Small ("the Judges") appeal as of right the trial court's June 24, 2009, order granting attorney Thomas R. Paxton and Garan, Lucow, Miller, P.C.'s ("the Attorneys") motion for summary disposition¹ and dismissing the Judges' claims for legal malpractice and fraud. We affirm in part and reverse in part the trial court's June 24, 2009, order and remand for further proceedings consistent with this opinion.

The underlying case ("the Horton matter") involves a clerk of the court, Michelle Horton, whose employment was terminated by the 48th District Court ("the Court"). The reason cited by the Court for Horton's termination was violation of the Court's Law Enforcement Information Network/Secretary of State (LEIN/SOS) policy. Horton filed suit in the United States District Court for the Eastern District of Michigan against the Court and James P. Harkins, Jr.² alleging

¹ MCR 2.116(C)(8).

² Harkins was the Court's administrator and was sued both individually and in his official capacity.

violation of 42 USC § 1983 – due process, wrongful discharge – breach of implied contract and legitimate expectations, and defamation. The Court and Harkins were insured, and attorney Thomas R. Paxton and the law firm of Garan, Lucow, Miller, P.C. (“Garan Lucow”) handled the defense. The case resulted in a verdict in favor of Horton.

The Judges filed a complaint against the Attorneys for legal malpractice and fraud on December 11, 2008. The Attorneys filed a motion for summary disposition³ regarding the Judges’ claims on March 6, 2009, arguing in part that the Judges lacked standing to bring a claim for legal malpractice against them because there was no attorney-client relationship. The trial court granted the Attorneys’ motion for summary disposition,⁴ finding that there was no attorney-client relationship and dismissed the Judges’ claims for legal malpractice and fraud for lack of standing.

The Attorneys’ motion for summary disposition was brought and granted pursuant to MCR 2.116(C)(8). While the parties attached documents to their motion and opposition, there is no indication that the trial court relied on any documents outside of the complaint in making its ruling. “A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone.”⁵ The trial court’s decision is reviewed de novo “to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery.”⁶ This Court accepts as true “[a]ll factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts.”⁷

Although the trial court characterized the dismissal of the Judges’ claim for legal malpractice because of lack of standing, it is clear that the Attorneys’ motion for summary disposition was brought to examine whether an attorney-client relationship existed. The Judges argue that the trial court erred when it granted summary disposition in favor of the Attorneys and dismissed the Judges’ claim for legal malpractice. We agree, as all of the elements of legal malpractice were alleged in the Judges’ complaint.

“The elements of legal malpractice 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.”⁸ “The relation of attorney and client is one of confidence based upon the ability, honesty, and integrity

³ MCR 2.116(C)(8).

⁴ *Id.*

⁵ *Averill v Dauterman*, 284 Mich App 18, 21; 772 NW2d 797 (2009).

⁶ *Id.*

⁷ *Id.*

⁸ *Manzo v Petrella (On Remand)*, 261 Mich App 705, 712; 683 NW2d 699 (2004).

of the attorney.”⁹ The establishment of an attorney-client relationship is not based on an individual’s obligation to pay.¹⁰ Rather, “the benchmark of an attorney-client relationship” is “[t]he rendering of legal advice and legal services by the attorney and the client’s reliance on that advice or those services[.]”¹¹

The Judges adequately alleged an attorney-client relationship in their complaint. The complaint indicates that the Judges had an attorney-client relationship with the Attorneys which was “established and reconfirmed through representations and actions of the Defendants.” Specifically, the Judges assert that the attorney-client relationship between the Attorneys and Small was “established and reconfirmed” at a meeting in September 2005, and at her deposition. Additionally, the Judges claim that they met with the Attorneys in preparation for their depositions at which time the Attorneys indicated that they were counsel for the Judges for all purposes related to the Horton matter, that their communications were protected by attorney-client privilege, and discouraged the Judges from retaining separate counsel. The Attorneys also allegedly provided the Judges with their business cards, as well as their home and cellular telephone numbers. The Judges further contend that they did not retain separate counsel in reliance on the Attorneys’ representations.

The Judges’ complaint also alleges negligence in the legal representation. Negligence in the legal representation is proven by demonstrating that “counsel failed to exercise reasonable skill, care, discretion, and judgment in the conduct and management of the underlying case.”¹² The Judges assert that the Attorneys violated their duties of loyalty and to avoid conflicts of interest. The Judges contend that the Attorneys withheld information from them, falsified information and failed to communicate with them regarding the status of the case. The Attorneys also did not plead key affirmative defenses in a timely manner, including challenging jurisdiction and raising the defenses of sovereign and governmental immunity. Additionally, the Attorneys allegedly failed to adequately identify and interview witnesses that should have been called at trial, and prepare witnesses for deposition. The Judges further allege that the Attorneys failed to introduce expert witness testimony at trial regarding the LEIN/SOS system, as well as Horton’s claims of wage and benefit loss. Moreover, the Attorneys improperly denied Horton’s request for arbitration and allowed budgetary constraints to affect the defense of the case.

The Judges assert that the Attorneys failed to file motions in limine or other motions to challenge Horton’s requested damages or to seek “judicial interpretation of applicable statutes, case law, court rules, and rules of evidence.” According to the complaint, the Attorneys impermissibly released privileged information to opposing counsel, misrepresented that the police released the information, and that the Court had waived its claim of privilege to such

⁹ *Macomb Co Taxpayers Ass’n v L’Anse Creuse Pub Sch*, 455 Mich 1, 10-11; 564 NW2d 457 (1997), citing *Haskins v Bell*, 373 Mich 389, 391; 129 NW2d 390 (1964).

¹⁰ *Macomb Co Taxpayers Ass’n*, 455 Mich at 11.

¹¹ *Id.*

¹² *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996).

documents. Moreover, the Judges claim that at trial, the Attorneys did not object to the proposed jury instructions and jury verdict form, and failed to properly object to testimony, the admission of evidence, and the absence of testimony.

Finally, the Judges' complaint contends that the alleged negligence of the Attorneys proximately caused their alleged damages, which include "[h]arm to reputation in the community; [h]umiliation, mortification and embarrassment; [e]motional distress; [e]conomic losses; [e]xemplary damages; [m]ental anguish; [and] [o]ther damages to be more fully described as discovery is concluded."

Because the Judges' complaint pleads all of the elements of legal malpractice, the trial court erred when it granted the Attorneys' motion for summary disposition and dismissed the Judges' legal malpractice claim.¹³

The Judges also argue that the trial court erred in dismissing their claim for fraud against the Attorneys. We disagree. The elements of fraud are that:

- (1) the defendant made a material representation;
- (2) the representation was false;
- (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion;
- (4) the defendant made the representation with the intention that the plaintiff would act upon it;
- (5) the plaintiff acted in reliance upon it; and
- (6) the plaintiff suffered damage.¹⁴

"[T]his Court is not bound by [a] plaintiff's choice of labels for her action[.]"¹⁵ "[T]he gravamen of plaintiff's action is determined by considering the entire claim."¹⁶ "If a client attempts to characterize a malpractice claim as a fraud or other type of claim, [this Court] will look through the labels placed on the claim and will make its determination on the basis of the substance and not the form."¹⁷

The Judges' complaint generally alleges the elements of fraud. The Judges then specifically assert, in addition to repeating a majority of the allegations made in support of their legal malpractice claim, that the Attorneys withheld "information regarding the failure to plead affirmative defenses in a timely manner" and the substance of the trial court's opinion and order regarding governmental immunity. Additionally, the Judges contend that the Attorneys misrepresented "that the Court had waived its claim of privilege to [Harkins'] investigation

¹³ *Averill*, 284 Mich App at 21.

¹⁴ *Cummins v Robinson Twp*, 283 Mich App 677, 695-696; 770 NW2d 421 (2009), citing *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).

¹⁵ *Johnston v Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989).

¹⁶ *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999).

¹⁷ *Brownell v Garber*, 199 Mich App 519, 532-533; 503 NW2d 81 (1993).

notes” and that the police provided privileged information to opposing counsel. Review of the complaint reveals that the alleged misrepresentations made by the Attorneys were made in correspondence to the insurer, which the Judges admitted in their complaint to never receiving. As such, those misrepresentations are inapplicable to their cause of action for fraud. In regard to the Attorneys allegedly withholding information, those assertions are duplicative of the Judges’ allegations of withholding information in support of their legal malpractice claim. Thus, the trial court appropriately dismissed the Judges’ claim for fraud.¹⁸ We find, however, that the dismissal was proper not because of “lack of standing,” but because the Judges’ fraud claim is duplicative of their cause of action for legal malpractice.

Affirm in part and reverse in part the trial court’s June 24, 2009, order and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael J. Talbot

¹⁸ *Id.*