# STATE OF MICHIGAN

# COURT OF APPEALS

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| JASON HULL and LAURA HULL,<br><br>Plaintiffs-Appellants,<br><br>v<br><br>RONALD A. STEINBERG and LAW OFFICES OF RONALD STEINBERG,<br><br>Defendants-Appellees. | UNPUBLISHED<br>August 9, 2012<br><br>No. 304275<br>Jackson Circuit Court<br>LC No. 10-002431-NM |

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Plaintiffs, Jason and Laura Hull, appeal the trial court's grant of summary disposition to defendants, Ronald A. Steinberg and Law Offices of Ronald Steinberg. For the reasons set forth below, we affirm.

## I. FACTS AND PROCEEDINGS

On August 21, 2005, a semi-truck driven by Sukhdeep Singh Kahlon struck plaintiffs' vehicle on I-94 in Jackson County. Plaintiffs did not lose consciousness during the collision, but they were taken to the hospital immediately after the accident. Mr. Hull testified that he was able to move his arms and legs without difficulty at the hospital. According to both plaintiffs, they experienced pain after the accident, they treated with various doctors for neck, arm, and back pain, and they missed some work. Mr. Hull returned to his job on October 7, 2005 after his chiropractor, Dr. Murkowski, stated he could return to work. Mr. Hull testified that, other than a brief lay-off from one position, he worked continuously thereafter in 2005, 2006 and 2007. At his deposition in November 2006, Mr. Hull testified that he was able to help around the house, mow lawns, and he could also take out the garbage. Mr. Hull testified that he was able to work because he was on various pain medications. He also underwent rhizotomy procedures during which, according to plaintiffs, a doctor severed nerves that carry pain sensation to the brain.

Mrs. Hull went on maternity leave from her teaching job shortly after the accident, but she testified that her leave was extended because of the accident. She testified that the accident did not harm her baby, who was born about a month after the collision. Dr. Murkowski told Mrs. Hull that she had no residual damage from the accident as of December 2005. However, Mrs. Hull recalled that, at the time of her deposition in 2006, she was taking pain medications and had some neck and occasional arm pain. She complained that it was painful to lift her daughter, rock

her, and push her in a stroller. She also stated that she had difficulty reaching for things in high cupboards, doing household cleaning, performing some routine cooking tasks, and taking long car rides. Like Mr. Hull, Mrs. Hull underwent rhizotomy procedures to reduce her pain and continued to take pain medications despite her return to work.

Mr. Steinberg represented plaintiffs in a third-party no-fault case against Mr. Kahlon and the owner of the truck, Jagjot Express, Inc. Mr. Steinberg filed the lawsuit on May 31, 2006. Mr. Kahlon and Jagjot Express filed a motion for summary disposition on December 15, 2006. The trial court ruled that plaintiffs did not suffer a serious impairment of an important body function and their injuries did not affect their general ability to lead their normal lives under the applicable standard articulated in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), overruled by *McCormick v Carrier*, 487 Mich 180 (2010). Accordingly, on February 7, 2007, the trial court granted summary disposition to Mr. Kahlon and Jagjot Express, and dismissed the case with prejudice.

In February 2007, Mr. Hull moved to Mississippi to work in a clerical capacity at Gauci's Custom Building. A few months later, Mrs. Hull joined Mr. Hull in Mississippi and secured a teaching job there in 2007. From Mississippi, plaintiffs informed Mr. Steinberg that their physical conditions deteriorated after the case was dismissed. Both plaintiffs began to treat with Dr. Matthew Wallack, who reported that both plaintiffs needed continuing, aggressive procedures to reduce their pain. Mr. And Mrs. Hull underwent various epidural steroid injections, with limited success. Because both plaintiffs continued to complain of serious, debilitating pain, Dr. Wallack predicted that their "injuries are most likely going to be lifelong requiring long-term medical treatment." Mr. Hull testified that he could no longer work because he could not lift his arms above his head, his arms became very weak, he had constant neck pain, and he could not sit for long periods of time because of pain. Mr. Hull was also hospitalized three times for depression and anxiety. Mrs. Hull reported that she had difficulty holding a book in class, she could not write on the chalkboard above shoulder level, type for more than 30 minutes, lift more than 10 pounds, participate in any sports, and she had difficulty holding her daughter.

In 2008, plaintiffs informed Mr. Steinberg from Mississippi that their medical conditions had worsened. On that basis, Mr. Steinberg filed a motion for relief from judgment and a motion to reinstate the third-party claim against Mr. Kahlon and Jagjot Express. Mr. Steinberg argued to the trial court that, on the basis of their deteriorating conditions, plaintiffs met the *Kreiner* threshold requirements. After a lengthy hearing, the trial court denied the motion. The court reasoned that the only legal basis on which it could consider the motion was for newly discovered evidence, which had to be filed within one year of the trial court's original dismissal in February 2007. Because the motion was not filed within one year of that date, the trial court denied plaintiffs' request for relief.

Plaintiffs filed this legal malpractice action against Mr. Steinberg and his law firm on August 11, 2010. Plaintiffs alleged that Mr. Steinberg filed their third-party action too early and that he should have asked the trial court to grant Kahlon and Jagjot Express's motion for summary disposition without prejudice. According to plaintiffs, though the statute of limitations gave plaintiffs three years to file their third-party claim, Mr. Steinberg filed the case just over nine months after the accident. Plaintiffs maintained that their injuries had not fully developed

or were not fully known by the time Mr. Steinberg filed the case and that his decision to file the case in 2006 amounted to legal malpractice.

On December 20, 2010, Mr. Steinberg and his firm filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Mr. Steinberg argued that plaintiff cannot establish that his decision to file the case within the statute of limitations amounted to malpractice. He further argued that his failure to ask for the trial court to grant summary disposition to Kahlon and Jagjot Express without prejudice cannot constitute malpractice because a motion pursuant to MCR 2.116(C)(8) and (10) is an adjudication on the merits and is always either denied or granted with prejudice.

Plaintiffs expanded their claims in response to defendants' motion for summary disposition and also filed an amended complaint. In addition to their other claims, plaintiffs argued that Mr. Steinberg failed to adequately communicate with them about when the case should be filed, he filed the case "with insufficient workup," he failed to recognize that plaintiffs' medical conditions could worsen, he failed to ask for a stay or a delay of summary disposition until the Michigan Supreme Court decided *McCormick*, 487 Mich 180, he did not timely file the motion to reinstate the case, and failed to appeal the initial dismissal of the case or the trial court's denial of the motion to reinstate the case.

Following oral argument, the trial court issued an opinion and order that granted summary disposition to Mr. Steinberg and his firm. The trial court ruled that a decision regarding the timing of when to file a case constitutes trial strategy that, if "done in good faith and with reasonable care, skill and diligence falls within the attorney judgment rule." The court ruled that Mr. Steinberg had no duty to delay the filing of plaintiffs' case until the end of the statutory period in the event that plaintiffs might better meet the *Kreiner* threshold. It also rejected plaintiffs' contention that they may have met the *McCormick* threshold because it would be "unreasonable to hold attorneys to the standard of having the foresight to predict changes in the law that may or may not affect a case." The court further ruled that the decisions made by Mr. Steinberg and his firm in handling the case were reasonable and strategic in nature. Accordingly, the court granted summary disposition to defendants.

## II. ANALYSIS

### A. STANDARD OF REVIEW AND APPLICABLE LAW

As this Court explained in *Lee v Detroit Medical Center*, 285 Mich App 51, 58-59; 775 NW2d 326 (2009):

> This Court reviews a trial court's decision on a motion for summary disposition de novo. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "A motion for summary disposition brought [under] MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone." *Id.* A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the pleadings, affidavits,

depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley, supra* at 278.

As our Supreme Court explained in *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993), a plaintiff must establish the following elements in a legal malpractice case:

(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.

It is undisputed that Mr. Steinberg and his firm represented plaintiffs in their third-party no-fault case and, therefore, there was an attorney-client relationship. "In legal malpractice actions, a duty exists, as a matter of law, if there is an attorney-client relationship." *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). With regard to the nature and extent of the duty Mr. Steinberg and his firm owed to plaintiffs, our Supreme Court opined as follows in *Simko* at 656-659:

> It is well established that "[a]n attorney is obligated to use reasonable skill, care, discretion and judgment in representing a client." *Lipton v Boesky*, 110 Mich App 589, 594; 313 NW2d 163 (1981), citing *Eggleston* [*v Boardman*, 37 Mich 14, 16 (1877)]; *Joos v Auto-Owners Ins Co*, 94 Mich App 419, 422; 288 NW2d 443 (1979). Further, according to SJI2d 30.01, all attorneys have a duty to behave as would an attorney "of ordinary learning, judgment or skill . . . under the same or similar circumstances . . . ."
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> An attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law. However, an attorney does not have a duty to insure or guarantee the most favorable outcome possible. An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession.
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> [Moreover,] mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence. *Baker v Beal*, 225 NW2d 106, 112 (Iowa, 1975). Where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment. *Rorrer v Cooke*, 313 NC 338, 340-342; 329 SE2d 355 (1985). See also 7 Am Jur 2d, Attorneys at Law, §§ 201-202, pp 250-252; 7A CJS, Attorney & Client, §§ 257-258, pp 464-472; 1 Mallen & Smith, Legal Malpractice (3d ed), §§ 14.12 to 14.17, pp 836-853:

> [T]here can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight . . . .

As noted, a plaintiff in a legal malpractice case must also establish that counsel's negligence was a proximate cause of an injury. *Coleman*, 443 Mich at 63. As this Court explained in *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004):

> 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. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586-587; 513 NW2d 773 (1994).

## B. DISCUSSION

This is not a case in which, because of some oversight or miscalculation, an attorney failed to file a case within the applicable statute of limitations and lost a client's opportunity to litigate. Rather, the crux of plaintiffs' claim is that Mr. Steinberg breached a duty to them by filing the complaint *within* the statute of limitations, but too early to fully know the extent of their accident injuries. In other words, plaintiffs maintain that Mr. Steinberg should have anticipated that their injuries would worsen over time and he should have filed the claim later so that they could better meet the *Kreiner* threshold. Plaintiffs' claim is without merit. Regardless whether matters of "attorney judgment" automatically immunize an attorney from malpractice,[1] we hold that there is no genuine issue of material fact with regard to whether Mr. Steinberg met the standard set forth in *Simko*—the record reflects that Mr. Steinberg acted in good faith and as an attorney with ordinary learning, judgment or skill would have under the same or similar circumstances. Accordingly, the trial court correctly granted summary disposition to defendants.

Plaintiffs concede that Mr. Steinberg and his firm acted in good faith. We further hold that Mr. Steinberg exercised reasonable learning and skill when he decided when to file the case. Mr. Steinberg testified that he was concerned that, as with most accident victims, plaintiffs' injuries would continue to improve with further time and treatment and he wanted opposing counsel to depose plaintiffs while plaintiffs continued to show symptoms that may meet the *Kreiner* threshold. Though Mr. Steinberg recognized and considered that plaintiffs' injuries

[1] See *Grace v Leitman*, 477 Mich 1064; 728 NW2d 861, vacated 480 Mich 913 (2007); *Shannon v Foster Swift Collins & Smith, PC*, unpublished opinion per curiam of the Court of Appeals, issued January 20, 2009 (Docket No. 275991); *Messenger v Heos*, unpublished opinion per curiam of the Court of Appeals, issued December 9, 2008 (Docket No. 279968).

might worsen, in his experience, accident injuries generally improve. Mr. Steinberg considered that, even if their pain levels remained the same, waiting to file the action may have made it more difficult for plaintiffs to meet the *Kreiner* threshold, because both plaintiffs had returned to work and continued to lead their lives, albeit with some pain. Mr. Steinberg further testified that, in his opinion, because both plaintiffs had to undergo rhizotomy procedures, this was objective evidence of underlying injuries from the accident rather than mere generalized complaints of pain, and he relied on that evidence in his attempt to show that plaintiffs had a viable no-fault claim. Mr. Steinberg also considered that he would save plaintiffs money by combining some of the discovery necessary for both the third-party case and their first-party claims against their auto insurer.

Plaintiffs presented evidence in this malpractice case that, after the trial court granted summary disposition in 2007, which was 18 months after the accident, their pain increased, their doctor in Mississippi found their physical conditions will require life-long pain management, and Mr. Hull began to suffer depression and anxiety because of his physical limitations and his eventual inability to work. However, no evidence in the record suggests that Mr. Steinberg should have anticipated that plaintiffs' symptoms would worsen to such an extent so long after the accident. In light of the medical evidence existing from the time of the collision and for several months thereafter, Mr. Steinberg based his decision to file the case on an honest belief well founded in the law and in the best interest of his clients. *Simko*, 448 Mich at 694.

Further, plaintiffs have not shown that Mr. Steinberg breached a duty to them with regard to communication about the case. Mr. Steinberg testified that he did not generally discuss with plaintiffs the options of when to file a complaint. However, Mrs. Hull testified that Mr. Steinberg was available for and answered all of their questions and Mr. Steinberg testified that he communicated with plaintiffs by telephone many times and he sent them numerous letters. Mr. Steinberg also testified that, at their initial consultation and thereafter, he talked to plaintiffs about the serious impairment threshold. Further, plaintiffs had knowledge of the same medical evidence as Mr. Steinberg before he filed the case and through the motion for summary disposition. There is no indication in the record that plaintiffs were aware and would have advised Mr. Steinberg of any underlying accident injuries that would be progressive, or that they knew and would have expressed to Mr. Steinberg that they would deteriorate rather than recuperate from the accident many months after the collision. In other words, in light of the evidence existing at the time, Mr. Steinberg's decision to file the complaint was consistent with an attorney of ordinary learning, judgment or skill and plaintiffs offer no evidence to suggest their additional input would have or should have altered his decision.

We find no merit to plaintiffs' contention that Mr. Steinberg should have requested that the trial court enter summary disposition for Kahlon and Jagjot Express without prejudice. A motion pursuant to MCR 2.116(C)(10) is an adjudication on the merits and is granted when "the moving party is entitled to judgment . . . as a matter of law." Thus, such a request would have been futile. As the trial judge opined when Mr. Steinberg asked him to reconsider the case against Kahlon and Jagjot Express, to permit a motion for summary disposition without prejudice in a third-party no-fault case would encourage plaintiffs to find other doctors or chiropractors to give stronger testimony or a worse prognosis each time they fail to meet the threshold requirements to proceed to trial. Plaintiffs simply failed show that Mr. Steinberg was negligent for failing to make the request or that such a motion would have been successful.

Moreover, though the record reflects that, as a plaintiff attorney, Mr. Steinberg hoped that the *Kreiner* standard would be modified, we will not hold an attorney to a standard of requiring that he foretell a change in the law in a determination of when to file a claim. An attorney's duty of care includes "the duty to fashion such a strategy so that it is consistent with prevailing Michigan law." *Simko*, 448 Mich at 656. Our Supreme Court decided *McCormick* on July 31, 2010, nearly five years after plaintiffs' accident and, thus, was not the prevailing law within Michigan at the time of the accident or within the time plaintiffs could file their case. As the trial court observed, it would simply be "unreasonable to hold attorneys to the standard of having the foresight to predict changes in the law that may or may not affect a case."

Plaintiffs also contend that Mr. Steinberg should have done more to prepare the case before he filed it and that he should have better prepared them for their depositions by, for example, having them fill out a client impairment list. The record reflects that Mr. Steinberg obtained and reviewed all of plaintiffs' medical records and spoke to plaintiffs extensively about the case. Indeed, Mr. Steinberg testified that he collected four large folders and a banker's box full of documents for the case. He also reviewed the records and developed a strategy to present the evidence in a way that he believed would survive defendants' *Kreiner* motion. Plaintiffs have not presented any evidence to show that, had Mr. Steinberg done more, they would have prevailed against Kahlon and Jagjot Express. They also have not shown any deficiencies in their deposition testimony or a failure or inability to articulate the nature or extent of their injuries. "When an attorney fashions a trial strategy consistent with the governing principles of law and reasonable professional judgment, the attorney's conduct is legally adequate." *Simko*, 448 Mich at 661. Plaintiffs have presented nothing to show that Mr. Steinberg's conduct in any way led to their unfavorable result and, for proximate cause purposes, they have not shown that, had Mr. Steinberg done more, they would have prevailed. *Manzo*, 261 Mich App at 712.

Moreover, plaintiffs have not shown on what basis they may have prevailed had Mr. Steinberg appealed the trial court's decision on the motion for summary disposition brought by Kahlon and Jagjot Express. Indeed, they do not present evidence to show that the trial court erred in granting summary disposition to Kahlon and Jagjot Express or what arguments may have been meritorious in this Court had Mr. Steinberg brought a claim of appeal. Further, when Mr. Steinberg learned that plaintiffs' doctor in Mississippi expressed the opinion that plaintiffs' injuries will require life-long treatment, he re-filed the case and moved the original judge to reconsider its prior decision. The trial judge opined that the only way it might consider plaintiffs' motion for relief from judgment were if Mr. Steinberg had filed the case within a year of his prior judgment, February 7, 2007, and based it on newly discovered evidence. However, plaintiffs have not shown that Mr. Steinberg had in his possession sufficient "newly discovered" evidence as of the one-year mark, February 7, 2008, such that they would have prevailed. Dr. Wallack wrote Mr. Steinberg a letter on July 23, 2008, which Mr. Steinberg maintains triggered his decision to seek reconsideration. And, while Mr. Steinberg testified that he heard earlier from Mrs. Hull that their medical problems continued, he informed her that he would need some evidence in writing in order to pursue any kind of relief from the trial court's decision. No evidence suggests that plaintiffs provided that evidence until after the one-year deadline passed. Thus, Mr. Steinberg was not professionally negligent in failing to pursue the motion sooner. Further, plaintiffs fail to present evidence or argument to establish that Mr. Steinberg may have prevailed in an appeal of that ruling because there appears to have been no valid legal basis to reopen the case.

In sum, despite his failure to obtain a favorable result for plaintiffs in the underlying action, the record reflects that Mr. Steinberg breached no duty owed to plaintiffs as their attorney or that any conduct by Mr. Steinberg caused them any injury. Accordingly, the trial court correctly granted summary disposition to Mr. Steinberg and his firm.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering