STATE OF MICHIGAN

COURT OF APPEALS

OLIVER HAYES, JR., and ELEANOR HAYES,

Plaintiffs-Appellants,

v

VANDER PLOEG, RUCK, LUYENDYK & WELLS, and CHARLES W. LUYENDYK,

Defendant-Appellees.

UNPUBLISHED
August 22, 1997

No. 188574
Muskegon Circuit Court
LC No. 94-031212-NM

Before: Cavanagh, P.J., and Holbrook, Jr. and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting summary disposition to defendants and dismissing plaintiffs' claim for legal malpractice in its entirety. We affirm.

Plaintiffs claim that the trial court erred in its initial grant of summary disposition to defendants, in which the trial court dismissed Stephen Corwin, Joseph Fisher, Allan Vander Ploeg, and David Wells as defendants, and Eleanor Hayes as a party plaintiff in this action. We conclude that the trial court did not err in dismissing these parties. Our review of the trial court's grant of summary disposition is de novo to determine whether the prevailing party, in this case defendants, was entitled to judgment as a matter of law. *Tranker v Figgie Int'l, Inc,* 221 Mich App 7, 11; 561 NW2d 397 (1997). It is undisputed that none of the newly named defendants were served with process pursuant to MCR 2.105(A). Although plaintiffs assert that service of process of the newly added defendants was properly effectuated through service on Farr & Oosterhouse, defendants' attorneys, the requirements of MCR 2.105(A) must be met even when service is made on a party for whom an attorney has appeared in the action. See MCR 2.107(B)(1)(a). We conclude that *Penny v ABA Pharmaceutical Co (On Remand),* 203 Mich App 178; 511 NW2d 896 (1993), relied on by plaintiffs, is not determinative in this case. In contrast to the defendant in *Penny,* the instant defendants timely and consistently objected to the improper service of process, to the improper addition of the newly added defendants, and to the improper addition of Eleanor Hayes as a plaintiff. See MCR 2.116(D)(1). This was not a case, as in *Penny*, where the defendants sandbagged the plaintiffs into believing that service had been properly made until it was too late. Further, Farr & Oosterhouse represented all of the defendants in the action, not just the newly

added defendants, so they would have participated in the proceedings regardless of the presence of the newly added defendants. Finally, unlike the plaintiff in *Penny*, the instant plaintiffs knew that they had not served the amended complaint(s) on the newly added defendants. While MCR 2.105(J)(3) may be utilized to cure *defects* in service of process and to cure defects within the summons itself, the rule does not forgive a complete failure to serve process which includes the summons and the complaint. 1 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), 1996 Supplement, p 33. Because there was a complete failure of service on the newly added defendants, dismissal of the action against them was mandated. *Id.; Holliday v Townley*, 189 Mich App 424, 426; 473 NW2d 733 (1991). The trial court also correctly dismissed Eleanor Hayes as a party plaintiff because plaintiffs never obtained or mailed a summons notifying any of the defendants that Eleanor was a new plaintiff in this action. See 72 CJS, Process, §4 and §5, pp 593-594; *Durfy v Kellogg*, 193 Mich App 141, 144 n 3; 483 NW2d 664 (1992); *Holliday, supra.*

Plaintiffs next claim that the trial court erred in granting summary disposition on their legal malpractice claim in favor of defendants Vander Ploeg and Wells based on the court's determination that there was no attorney-client relationship between them and plaintiffs. In order to state an action for legal malpractice, the plaintiff must first prove the existence of an attorney-client relationship. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Plaintiffs do not dispute that neither Vander Ploeg nor Wells, who were partners in the defendant law firm, has personally represented plaintiffs in the underlying matters forming the basis of the legal malpractice action. Plaintiffs argue, however, that Vander Ploeg and Wells may be sued individually, apart from a suit against the firm, on the basis of an agency theory or vicarious liability arising as a result of their partnership in the firm. While as a technical matter it may have been plaintiffs' option to bring all of the partners of the defendant law firm into the suit in their capacity as individuals because of their joint and several liability as members of the partnership, as a practical matter Vander Ploeg and Wells would be liable to plaintiffs only to the extent that the law firm was found liable. See MCL 449.13; MSA 20.13, MCL 449.15; MSA 20.15; 7 Am Jur 2d, Attorneys at Law, § 216, pp 258-259; 59A Am Jur 2d, Partnership, §§ 711 and 712, pp 591-592; 70 ALR3d 1298, § 1[a], p 1300. Any error by the trial court in dismissing Vander Ploeg and Wells on the basis of a lack of attorney-client relationship was harmless in light of our previous determination that their dismissal from the action was proper due to lack of service of process on them. Any error in this regard was further harmless in light of our next conclusion that summary disposition was appropriately granted.

Although plaintiffs argue that the trial court erred in granting summary disposition to defendants whereby plaintiffs' claims of legal malpractice were entirely dismissed, we conclude that summary disposition was properly granted because plaintiffs did not have an expert to establish breach of the standard of care by defendants and proximate cause as to plaintiffs' damages. *Phillips v Mazda Motor Mfg Corp*, 204 Mich App 401, 409-410; 516 NW2d 502 (1994). These were necessary elements of plaintiffs' legal malpractice claim. *Simko, supra; Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). We agree with the trial court that this is not a case where the areas of claimed legal malpractice are within the common knowledge and experience of an ordinary lay person such that expert testimony would be unnecessary. Although plaintiffs contend they should have been allowed to present their expert's opinion at trial, to be based on testimony developed

during trial, the time for discovery in this case had ended on May 30, 1995, and plaintiffs were obligated at that point to present sufficient evidence in the form of expert testimony to withstand summary disposition. We reject plaintiffs' assertion that they could have relied on defendants' experts—specifically defendants Corwin and Luyendyk. It is true that a plaintiff in a malpractice case may establish the standard of professional care through defense witnesses. MCL 600.2161; 27A.21161; *Porter v Henry Ford Hospital,* 181 Mich App 706, 710; 450 NW2d 37 (1989). However, reliance by plaintiffs on Corwin and Luyendyk would have been to no avail because each of them submitted affidavits averring that the applicable standard of care had been comported with. Thus, in opposing defendants' motion for summary disposition, plaintiffs did not carry their burden of showing that a material issue of fact existed in regard to a breach of the standard of care and proximate cause by defendants. See *Quinto v Cross & Peters Co,* 451 Mich 358, 362-363; 547 NW2d 314 (1996). Because plaintiffs had no expert on which they could rely to establish that defendants had breached the applicable standard of care or had proximately caused plaintiffs' damages, defendants were entitled as a matter of law to summary disposition of the legal malpractice claims against them.

Plaintiffs also contend that the trial court denied plaintiff Oliver Hayes his constitutional due process right of reasonable access to the courts. Contrary to plaintiffs' assertion, the trial court recognized and appropriately applied the factors in *Hall v Hall,* 128 Mich App 757, 761-762; 341 NW2d 206 (1983), and did not abuse its discretion in denying Oliver Hayes' requests to personally attend hearings. Plaintiffs further argue that the trial court erred in granting defendants' second motion for summary disposition without first reading Oliver Hayes' response. However, even assuming that the trial court did err in granting summary disposition to defendants without first reviewing Oliver Hayes' brief in response, any error was harmless because plaintiffs' responsive brief and attached exhibits did not create an issue of material fact regarding proximate cause and the result would have been the same in any event.

Plaintiffs next claim that the trial court abused its discretion in denying their motion to change venue. We disagree. A trial court may order a change of venue when an impartial trial cannot be had where the action is pending. MCR 2.222(A). The burden of demonstrating prejudice as a ground for change of venue rests upon the moving party, who must make a *persuasive* showing in support of such a change. *Chilingirian v City of Fraser,* 182 Mich App 163, 165; 451 NW2d 541 (1989). Plaintiffs did not carry their burden of making a persuasive showing of prejudice due to impartiality if the trial was held in Muskegon County. Although defendants also claim that they could not receive an impartial trial because the assigned trial court was manifestly biased against them and favored defendants in its rulings, plaintiffs have not met the heavy burden of overcoming a presumption of impartiality. *Cain v Dep't of Corrections,* 451 Mich 470, 497; 548 NW2d 210 (1996). Disqualification based on bias or prejudice cannot be established merely by repeated rulings against a party, even if the rulings are erroneous. *Wayne Co Prosecutor v Parole Bd,* 210 Mich App 148, 155; 532 NW2d 899 (1995). Contrary to plaintiffs' assertion, the trial judge was not "hand-picked" by any of the Muskegon Circuit judges; The judge was assigned as a visiting judge in this case by the State Court Administrative Office of the Supreme Court.

Finally, plaintiffs' claim is without merit that the trial court abused its discretion in awarding expenses of $300 to defendants for Oliver Hayes' refusal to comply with the defendants' discovery requests. Defendants were entitled to discovery of the documents pursuant to MCR 2.302(B) and MCR 2.310(A)(1). Defendants were entitled to discovery of the identification of witnesses, including experts, that plaintiffs intended to call at trial. MCR 2.401(I)(3); MCR 2.302(B)(4). Furthermore, because Oliver Hayes alleged that defendants, as his attorneys, had breached their duty to him as a client, he had waived his attorney-client privilege and was not entitled to refuse to answer questions on that basis concerning communication between him and defendants. *People v Houston*, 448 Mich 312, 332; 532 NW2d 508 (1995). Defendants' discovery requests were proper and plaintiffs' failure to comply was unjustified. Accordingly, the trial court did not abuse its discretion in awarding $300 to defendants for their costs and attorney fees in bringing the motion to compel Oliver Hayes to comply with defendants' discovery requests. MCR 2.313(A)(5).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen