

STATE OF MICHIGAN
COURT OF APPEALS

ROSE HERRON,

Plaintiff-Appellant,

v

BLAISE REPASKY,

Defendant-Appellee.

UNPUBLISHED

March 3, 1998

No. 194364

Wayne Circuit Court

LC No. 95-526048 NM

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition in defendant's favor in this legal malpractice action. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I

Plaintiff's daughter, Cheryl Millan, an adult, was rendered a paraplegic in 1988 following a hospitalization. Plaintiff was appointed Millan's guardian in March 1989 and conservator of Millan's estate in May 1989. She filed a \$1,000 bond. In July 1989, plaintiff, as guardian of Millan and limited guardian of Millan's children, filed a medical malpractice action on behalf of Millan, which resulted in a 2.5 million dollar settlement in July 1991. Attorney Charles Barr represented plaintiff in the medical malpractice action. The settlement was not approved by the probate court and plaintiff did not file an additional bond. Plaintiff deposited the settlement proceeds disbursed to her in a bank trust account. In July 1992, a successor conservator was appointed for Millan's estate who, after investigation, filed charges against plaintiff. Plaintiff retained defendant Blaise Repasky, an attorney, in September 1992 to defend her in the probate court. In October 1993, the probate court entered an order of surcharge against plaintiff based on its findings that plaintiff had embezzled, comingled and negligently mishandled assets of Millan's estate.

In December 1993, plaintiff filed a legal malpractice action against Barr. Plaintiff alleged that Barr failed to notify the probate court of the settlement and failed to notify plaintiff of her duties as conservator. The circuit court dismissed the action on statute of limitations grounds, noting that Barr did

not represent plaintiff as conservator of Millan's estate and that his representation in the medical malpractice action had ceased on July 11, 1991. Plaintiff did not appeal that dismissal.

In September 1995, plaintiff filed the instant action against defendant, alleging that defendant failed to tell her that a legal malpractice claim against Barr would be barred two years from the date Barr last provided services to plaintiff, and failed to tell her that her claim would be barred notwithstanding the fact that her liability to Millan's estate had not yet been adjudicated. The circuit court granted defendant's motion for summary disposition, concluding that plaintiff had failed to show that defendant owed her a duty and failed to show that any breach of the duty was a proximate cause of her damages. This appeal ensued.

II

Plaintiff contends that the trial court erred in granting defendant's motion for summary disposition because plaintiff stated a claim on which relief could be granted and made adequate factual assertions about defendant's representation of plaintiff to support plaintiff's claim of breach of duty.

Defendant argues that the claim was properly dismissed because he did not owe a duty to plaintiff to advise her of the statute of limitations on her potential claim against Barr because there was no attorney-client relationship regarding this claim, since plaintiff hired defendant to represent her on the charges brought by McCarthy, not to sue Barr; there is no cognizable claim against defendant for advising plaintiff that she probably would prevail on the charges brought by McCarthy; and plaintiff already knew that the statute of limitations was running on her potential malpractice claim.

We review the circuit court's determination on a summary disposition motion *de novo*. *Pinckney Comm Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). We must determine independently whether a record might be developed that would leave open an issue upon which reasonable minds could differ. *Seabrook v Michigan Nat'l Corp*, 206 Mich App 314, 315-316; 520 NW2d 650 (1994).

Defendant brought his motion for summary disposition under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) relies on the pleadings alone, and all well-pleaded factual allegations in a complaint are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dept of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). Such a motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Id.* at 486-487.

However, in arguing to the circuit court that plaintiff knew or should have known that the statute of limitations was about to expire on her potential claim against Barr, defendant went outside the pleadings by referring to affidavits submitted by plaintiff and McCarthy. Since the circuit court considered McCarthy's affidavit in ruling on this aspect of defendant's motion, we

will construe the motion as one brought under both MCR 2.116(C)(8) and (C)(10). MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions and any other evidence and grant the benefit of any reasonable doubt to the party opposing the motion. *Id.*

We conclude that the trial court erred in granting defendant's motion for summary disposition on the ground that plaintiff did not adequately plead and establish that defendant had a duty to advise plaintiff on the statute of limitations applicable to her potential claim against Barr.

Plaintiff's complaint stated a claim on which relief could be granted. In order to state an action for legal malpractice, the plaintiff must adequately allege the following elements: 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 the injury; and 4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). Plaintiff must first establish the element of duty. Duty is any obligation the defendant has to the plaintiff to avoid negligent conduct. *Id.* In legal malpractice actions, a duty exists as a matter of law if there is an attorney-client relationship. Whenever an attorney is retained in a cause, it becomes his or her implied duty to use and exercise reasonable skill, care, discretion and judgment in the conduct and management thereof. *Id.* at 655-656. Plaintiff alleged the existence of a duty.

Defendant contends that no pertinent attorney-client relationship existed between defendant and plaintiff because plaintiff hired defendant only to defend her against the malfeasance charges McCarthy brought, not to bring suit against Barr. However, the charges against plaintiff in the probate court arose out of Barr's alleged failure to properly advise her on the disposition of the settlement. This was plaintiff's defense as presented by defendant in the probate proceeding, and according to plaintiff, Barr's conduct was the basis of defendant's advice to plaintiff that she would prevail in the probate court. Further, plaintiff's complaint alleges that she discussed the potential malpractice suit against Barr with defendant, and that he discouraged her from filing suit. One could reasonably conclude that while defendant did not undertake to represent plaintiff in a suit against Barr, he provided legal advice concerning the matter while acting as her attorney.

We conclude that under the circumstances that plaintiff alleged that defendant specifically discussed the potential malpractice claim with her and advised her regarding whether to pursue that claim, the circuit court erred in concluding that defendant owed no duty regarding this claim. While we agree with defendant that plaintiff failed to state a cause of action for liability arising from defendant's assurances that plaintiff would prevail in the probate court, we reverse the court's ruling as it pertains to the failure to advise regarding the statute of limitations.

Defendant also asserts that plaintiff already knew about the statute of limitations and therefore any breach would not be a proximate cause of any damages. While the successor trustee and plaintiff's prior attorney, Wanda Giancamilli, had informed plaintiff of a two-year statute of limitations, viewing the summary disposition record in a light most favorable to plaintiff, plaintiff was not informed when the statute would begin to run or would expire, believed that there could be no action until she suffered

damages, i.e., if and when she was surcharged, and was not informed otherwise by defendant. Questions of fact precluding summary disposition remained on this issue.

Finally, defendant argues that plaintiff cannot establish proximate cause because her loss was due to her own wrongdoing, not defendant's or Barr's. Defendant asserts that plaintiff would have committed the conduct leading to her being surcharged by the probate court regardless of Barr's advice or instructions to her, and that her intervening acts were not reasonably foreseeable or concurrent with Barr's alleged negligence. As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant's action was a cause in fact of the claimed injury. *Charles Reinhart Co v Winimko*, 444 Mich 579, 586; 513 NW2d 773 (1994). Thus, plaintiff must show that but for defendant's alleged malpractice, she would have been successful in the underlying suit against Barr. *Id.*

We conclude that as to some of the damages alleged, defendant is correct in asserting the defense of lack of proximate cause. As to others, however, there are genuine issues of material fact. Claims for damages based on surcharges imposed due to plaintiff's willful malfeasance, rather than negligence or poor record keeping, were properly dismissed. Such damages were not proximately caused by defendant as a matter of law, because they were not proximately caused by Barr as a matter of law.¹ However, to the extent plaintiff was assessed damages for simple negligence and poor record keeping attributable to Barr's alleged failures, her claim was not properly dismissed. We also agree that plaintiff personally suffered no damages from the failure to post a bond.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

¹ While not specifically addressed on appeal, it appears that surcharges relating to the purchase of the house on Ruskin Street in Trenton, and any other expenditures made after plaintiff was represented by attorney Giancamilli (beginning in May 1992) may also fall into this category.