

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA ROSE,

Plaintiff-Appellant,

v

LAW OFFICES OF LEE B. STEINBERG, P.C.,

Defendant-Appellee.

UNPUBLISHED

July 17, 1998

No. 198067

Wayne Circuit Court

LC No. 96-602407-NM

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). We reverse.

This legal malpractice suit involves defendant's representation of plaintiff in a suit arising out of injuries she sustained while a passenger during a one car accident that occurred May 1, 1994. Defendant filed a negligence claim against Jennifer Rogers, the alleged driver and owner of the car involved in the accident, and a claim for no-fault benefits against the Automobile Club Insurance Association. The complaint alleged Rogers was driving at a high rate of speed when she reached a dead end in the road. The complaint alleged when Rogers quickly applied the brakes, the car slid into a dead end road sign, causing plaintiff to strike the windshield of the car. On February 22, 1995, defendant filed a motion to withdraw as counsel for plaintiff. On March 8, 1995, plaintiff retained Barry Adler to represent her. On May 3, 1995, plaintiff notified Garland's Pub that she contemplated pursuing an action against it under the dram shop act. Adler later filed an amended complaint on behalf of plaintiff alleging, among other things, that John Walker was the driver of the vehicle at the time of the accident and that Garland's Pub had served alcohol to Walker while he was visibly intoxicated.

After plaintiff's complaint was amended to include a claim under the dram shop act against Garland's Pub, Garland's Pub filed a motion for summary disposition claiming plaintiff failed to give it notice within 120 days, as required by the dram shop act, from the date she hired defendant. In response to Garland Pub's motion, plaintiff argued she did not enter into an attorney-client relationship for the purpose of pursuing the dram shop action until she hired Adler. Plaintiff argued she retained defendant for the purpose of pursuing an automobile accident claim and not to pursue the dram shop

action. Therefore, because she gave notice to Garland's Pub within 120 days of retaining Adler, plaintiff argued she fulfilled the notice requirement. Plaintiff further argued defendant was not aware that alcohol was consumed by the negligent driver at a bar. The trial court granted Garland's Pub's motion for summary disposition.

After the trial court granted summary disposition to Garland's Pub, plaintiff filed this legal malpractice claim against defendant. Plaintiff's complaint alleged defendant failed to notify Garland's Pub of a potential claim and failed to notify plaintiff of her right to pursue a claim against Garland's Pub. Defendant filed a motion for summary disposition. At the hearing on defendant's motion, the trial court stated judicial estoppel applied and plaintiff was barred from asserting an inconsistent legal position from the one she asserted in prior litigation. The trial court entered an order granting defendant's motion for summary dispositions pursuant to MCR 2.116(C)(7) and (C)(10).

Plaintiff argues the trial court erred by applying judicial estoppel to this case. We agree. Under the doctrine of judicial estoppel, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994); *Driver v Hanley (After Remand)*, 226 Mich App 558, 562-563; 575 NW2d 31 (1997), lv pending. However, a party will not be estopped by merely asserting inconsistent positions. In order for the doctrine to be invoked, there must be some indication that the court in the earlier proceeding accepted the party's position as true. *Paschke, supra* at 510.

Plaintiff's position in the underlying suit was that she retained defendant only to pursue an automobile accident claim and not to represent her in a dram shop action; therefore, plaintiff contended she was not required to give Garland's Pub notice within 120 days after entering into an attorney-client relationship with defendant. The trial court clearly did not accept this position because it dismissed plaintiff's suit against Garland's Pub for failure to comply with the 120-day notice requirement. Accordingly, plaintiff is not estopped under the doctrine of judicial estoppel from asserting a position in this legal malpractice suit inconsistent with her position in the prior suit, and it was improper for the trial court to grant summary disposition for defendant on this basis.

In light of our conclusion, it is unnecessary to consider plaintiff's remaining arguments.

Reversed.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski