STATE OF MICHIGAN

COURT OF APPEALS

JAN ROSE,

Plaintiff-Appellant,

v

MARY BETH BLACK,

Defendant/Cross-Plaintiff-Appellee,

and

D. J. SHAPIRO and ARTHUR J. COLE,

Defendants/Cross-Defendants.

UNPUBLISHED
April 21, 2000

No. 212354
St. Clair Circuit Court
LC No. 96-002574-NM

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiff Jan Rose appeals as of right from an order granting summary disposition to defendant Mary Beth Black pursuant to MCR 2.116(C)(10) in this legal malpractice case. We affirm.

I. Facts

Steven Rose, Jan Rose's husband, filed for divorce in late January 1993. Attorney Black represented Jan Rose in that action. According to Jan Rose, Black signed a consent judgment dividing the marital estate and debts without Rose's consent. Rose subsequently refused to sign the consent judgment and retained a new attorney to seek post-judgment relief.

After Rose contacted Black in mid-March 1994 to inform Black that she had retained new counsel, Black wrote Rose a letter acknowledging the call. The letter also stated, "Please be advised that there is a 42 day appeal period from the date of entry of Judgment, which was March 4, 1994, in which to file any appeal."[1] Rose's new attorney, D.J. Shapiro, filed a motion to set aside or amend the judgment of divorce in late March 1994, which the trial court in the divorce action denied in late April 1994. Shapiro did not file a timely appeal. The third attorney Rose retained, Arthur J. Cole, filed

applications for leave to appeal in this Court and the Supreme Court. However, both appellate courts denied leave to appeal.

After being barred from appellate review, Rose filed a complaint for legal malpractice against Black for her representation in the divorce action.[2] Rose alleged that Black failed to advise her of her rights, including her right to appeal, failed to demand a trial, failed to investigate and value the marital assets, and failed to conduct proper discovery, all against the standard of care. In support of her motion for summary disposition pursuant to MCR 2.116(C)(10), Black pointed out that the legal expert Rose had retained, Gary A. Colbert, indicated that he would not be able to testify that Black caused Rose any injury because

> Black's conduct cannot be the basis of Plaintiff's damages as Plaintiff [Rose] had recourse to attorney Shapiro for her remedy who was dismissed from the case. Attorney Colbert is of the opinion that attorney Shapiro's actions in failing to file a timely appeal, which if it had been done, would have cause or corrected Black's negligence. It is attorney Colbert's further opinion that by releasing attorney Shapiro, Plaintiff released the party through which she would gain her full remedy. In this scenario the release of Shapiro acts to exculpate Black, thus causation and damages as to Black's conduct would be purely speculative without recourse of attorney Shapiro's conduct.

The trial court ultimately granted summary disposition because it believed that Rose failed to document that she had retained an expert to testify regarding the standard of care and how Black allegedly breached that standard of care in the divorce action. The trial court also noted that the malpractice action was an attempt to revisit the issues in the divorce action, to which Rose did not object when she had an opportunity to do so. Furthermore, the trial court rejected Rose's claim that Black's incorrect advice regarding the period of time in which to file an appeal injured her because, at the time of the appeal, Rose was relying on Shapiro's advice. In effect, therefore, the trial court concluded that Shapiro's negligence regarding the appeal was the superseding cause of Rose's injuries. Finally, the trial court concluded that Rose had not created a question of material fact regarding whether she would have prevailed in the underlying divorce action by obtaining a larger share of the marital assets without Black's alleged negligence and in light of Rose's decision to sign the trial brief in that case.

II. Standard Of Review

We review a trial court's decision to grant a motion for summary disposition under MCR 2.116(C)(10) de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

III. Legal Standard For Summary Disposition

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 320-321; 575 NW2d 324 (1998). This Court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit

of every reasonable doubt. *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998). However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact suitable for trial. MCR 2.116(G)(4); *Etter v Michigan Bell*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

IV. Malpractice

To establish a prima facie case of legal malpractice, the plaintiff must prove: "(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." *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). An attorney retained in a cause is held to a standard of care that requires him "to use and exercise reasonable skill, care, discretion and judgment in the conduct and management thereof." *Simko, supra* at 655-656, quoting *Eggleston v Boardman*, 37 Mich 14, 16 (1877).

V. Expert Testimony And Negligence

Rose argues that summary disposition was inappropriate because Colbert provided sufficient testimony regarding Black's breach of the standard of care and, in any event, she did not have to retain an expert because Black's negligence in signing the consent judgment without Rose's consent would be obvious to a layperson. We agree with the first part of this argument.

Our opinion in *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994) clearly stated that an expert's testimony is usually necessary to establish the standard of care, the defendant's breach of that standard, as well as causation in professional negligence actions. These three elements are crucial because they are part of the plaintiff's prima facie case of malpractice. See *Coleman, supra* at 63; see also *Locke v Pachtman*, 446 Mich 216, 224; 521 NW2d 786 (1994) ("[T]he benefit of expert testimony, particularly in demonstrating the applicable standard of care, cannot be overstated."); *Richardson v Michigan Humane Society*, 221 Mich App 526, 527-528; 561 NW2d 873 (1997) (a plaintiff must show a disputed issue of fact regarding every element of his or her prima facie case to survive a motion for summary disposition). Here, we address the evidence of the standard of care and Black's breach. We address the causation issue in the next section.

Rose correctly points out that the law clearly precludes an attorney from settling a client's claim without the client's consent. *Howard v Howard*, 134 Mich App 391, 397; 352 NW2d 280 (1984). However, we cannot expect every layperson to know that consent to settlement must be express or implied and is not assumed to be a part of every attorney-client relationship. See generally *McNeil v Caro Community Hospital*, 167 Mich App 492, 497-498; 423 NW2d 241 (1988), citing *Coates v Drake*, 131 Mich App 687; 346 NW2d 858 (1984). Rose needed a legal expert to explain what an attorney of ordinary skill and diligence would do to secure a proper settlement agreement and what the attorney would do when attempting to secure a client's consent to the agreement, and how Black breached those standards. See *Simko, supra* at 656-657. Additionally, Rose needed an expert willing to testify that the specific steps Black took concerning discovery, assessing the value of the marital assets, failing to demand a trial, and advising Rose of the appeal process, were below the legal

profession's standards. See *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 690; 310 NW2d 26 (1991), quoting *Eggleston*, *supra* at 16. These each are technical aspects of litigation and, because individuals ordinarily turn to lawyers to handle these issues, we see no probability that a layperson would be able to understand how Black's actions were unreasonable and, therefore, negligent without an expert's testimony. See MRE 702.

Rose did retain Colbert, a legal expert, to testify on her behalf at trial. We are not certain why the trial court concluded that Colbert was unwilling to testify to the standard of care and Black's breach when the answer to the defense interrogatories clearly showed Colbert's willingness to do so. Although the statements in the answer to the interrogatories were relatively brief, at least five separate paragraphs indicated that Colbert found that Black had specific duties when representing Rose and, in every instance, Black violated those duties. Even though Colbert did not believe that Black's acts or omissions ultimately *caused* Rose's damages because she retained Shapiro and Cole to handle her appeals, his conclusions with regard to causation did not, in any way, diminish his opinion on Black's breach of the standard of care.

We cannot say with certainty that a jury would be willing to believe Colbert's opinions and the other evidence regarding Black's negligence. However, because Colbert was willing to testify that Black acted negligently, his proposed testimony created a question of fact for the jury to resolve. Therefore, the trial court erred when it granted summary disposition on the basis of the absence of evidence of negligence. If this were the sole element of the appeal, we would reverse. However, it is *not* the sole element and we must therefore deal with the question of expert testimony and causation.

VI. Expert Testimony And Causation

Rose also argues that the trial court erred when it concluded that she failed to provide any evidence that Black's negligence proximately caused her harm because Shapiro's failure to file a timely appeal caused her injuries. However, we have no choice but to conclude that the trial court properly granted summary disposition because Colbert was not willing to testify to the causal connection between Black's alleged negligence and her damages.

A plaintiff in a malpractice action must prove that the defendant's negligent conduct actually and proximately caused harm to the plaintiff. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). In her motion for summary disposition, Black did not contest that Rose had sufficient evidence that Black actually caused her harm. Rather, Black argued that Colbert, Rose's expert, was unwilling to testify that Black's conduct proximately caused her harm after Shapiro allegedly committed malpractice with regard to the appeal. See *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997) (to prove proximate cause, a plaintiff must demonstrate that it was foreseeable that the defendant's act and any intervening causes would lead to harm); see also *McLean v Rogers*, 100 Mich App 734, 736; 300 NW2d 389 (1980) ("[I]n order to show proximate cause, the plaintiff must prove that the injury was a probable, reasonably anticipated, and natural consequence of the defendant's negligence.").

We are puzzled at the trial court's reasoning that Shapiro's failure to file a timely appeal somehow superseded Black's alleged malpractice. See *Hagerman v Gencorp Automotive*, 457 Mich 720, 749; 579 NW2d 347 (1998) (a later act of negligence absolves a defendant of liability if it becomes a superseding cause of harm and "breaks the chain of causation"). This reasoning presumes an appellate court would have corrected Black's negligent errors on appeal, thereby eliminating all harm to Rose from those errors. However, Rose suffered harm at the time Black was allegedly negligent. *Gebhardt v O'Rourke*, 444 Mich 535, 552; 510 NW2d 900 (1994), citing *Luick v Rademacher*, 129 Mich App 803; 342 NW2d 617 (1983). Although a successful appeal may have mitigated Rose's damages, it would not have eliminated those damages altogether, especially for the period of time when the appeal was pending. See *Luick*, *supra* at 806-809. Rather, Shapiro's conduct apparently aggravated the injury Black allegedly caused. More importantly, even if Shapiro acted negligently, Michigan law acknowledges that there may be more than one proximate cause of an injury. *Rogers v City of Detroit*, 457 Mich 125, 143; 579 840 (1998). Therefore, as long as there was evidence that Black's conduct was still a "substantial" cause of Rose's injury, even though Shapiro was negligent, Black could still be held liable. *Hagerman*, *supra* at 734-736; see also *Hickey v Zezulka*, 439 Mich 408, 437-438; 487 NW2d 106 (1992) (the second negligent act must also be foreseeable in order not to break the chain of causation).

Nevertheless, we still come to a problem in the proofs, namely that questions of causation are ordinarily for the jury, not the court. *Francisco v Manson, Jackson & Kane, Inc*, 145 Mich App 255, 263; 377 NW2d 313 (1985). Only in cases involving *appellate* malpractice does proximate cause become a question of law for the court. See *Charles Reinhart Co*, *supra* at 589-594. While those of us with a background in the law may be able to act as our own experts by examining the record and determining from the raw facts whether Rose sustained her burden of production on the issue of causation, MCR 2.116(G)(4), a layperson would need an expert to explain why Black's acts or omissions proximately caused Rose's damages. However, Rose *concedes* that Colbert was not willing to testify that Black's acts caused Rose's harm. The absence of testimony from Colbert or any other expert supporting proximate cause left a critical, factual void in the record. In fact, because Colbert and Black's expert agreed that Shapiro, not Black, proximately caused Rose's damages, there was no question of fact for the jury to resolve concerning this element of the cause of action. *Richardson*, *supra* at 537-528.

Again, Rose argues that no expert testimony was necessary to prove this element of her case. The law may be no more complex than medicine, engineering, or other professions, in which juries play an active role in determining questions of fact related to causation. See *Charles Reinhart Co*, *supra* at 592-593. However, the law is a technical area in which expert opinion is largely necessary to show causation, the relationship that connects a defendant's allegedly negligent acts to a plaintiff's damages. See *Dean*, *supra* at 550. Therefore, even though the trial court articulated the wrong reasons for its decision, it did not err in granting summary disposition and we will not reverse. See *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Brian K. Zahra

[1] This advice was incorrect because a party has twenty-one days to file a motion to alter or amend a judgment, MCR 2.611(B), and then twenty-one days to file an appeal of right to this Court, MCR 7.101(B). This is not, specifically, a forty-two-day appeal period.

[2] The complaint also alleged that Shapiro and Cole committed legal malpractice. Black cross-complained against Shapiro and Cole. However, the parties stipulated to dismiss the cross-complaint and the claims against Shapiro and Cole.