STATE OF MICHIGAN

COURT OF APPEALS

MARVA D. LEWIS,

Plaintiff-Appellant,

V

YOUNG, BASILE, HANLON, MACFARLANE, WOOD & HELMHOLDT, P.C., TODD L. MOORE, THOMAS N. YOUNG, ANDREW R. BASILE, WILLIAM M. HANLON, JR., MARSHALL G. MACFARLANE, DONALD L. WOOD, and THOMAS D. HELMHOLDT,

Defendants-Appellees.

UNPUBLISHED
November 13, 2001

No. 221093
Oakland Circuit Court
LC No. 98-011194-NM

Before: Holbrook, Jr., P.J., and Cavanagh and Gribbs,* JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the orders granting defendants summary disposition and denying her motion for reconsideration in this legal malpractice case. We affirm.

I

On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendant Moore, as well as defendant law firm. We disagree.

Initially, we note that this Court reviews a trial court's decision regarding summary diposition de novo. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 324; 583 NW2d 725 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis of a claim.[1] *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). We consider the

[1] The trial court's order did not indicate what subsection of MCR 2.116 supported its grant of summary disposition. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). Both plaintiff and defendants attached documentary evidence and affidavits to their motion and response. Because the trial court considered material beyond the pleadings in evaluating the motions, this Court reviews its decision as having been decided under MCR 2.116(C)(10). *DeHart v Joe Lunghamer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417 (1999).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

affidavits, pleadings, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party. *Hawkins, supra*. The motion is proper if no genuine issue of material fact exists, thereby entitling the moving party to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

A claim of legal malpractice is grounded in professional negligence. In order to establish a cause of action for legal malpractice, the plaintiff has the burden of establishing 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 an injury; and, (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The third element, factual causation, is established by showing that, but for the attorney's negligence, the client would have prevailed in the underlying suit. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

Here, we find that plaintiff did not establish that, but for defendant Moore's alleged negligence, her patent application would have been allowed. On August 20, 1996, plaintiff discharged defendant Moore and revoked his power of attorney. Three months later, on November 25, 1996, the USPTO sent a notice to plaintiff, rejecting the amendment that Moore had filed, indicating that plaintiff had one month from the date of the rejection to correct the deficiencies in the patent application, and identifying those deficiencies. Plaintiff subsequently submitted an amendment in December 1996, which resulted in a "Final Rejection." Viewed in a light most favorable to plaintiff, the evidence shows that, at the time plaintiff discharged Moore, she had an opportunity to pursue her patent application and did so. See *Boyle v Odette*, 168 Mich App 737, 425 NW2d 472 (1988). Accordingly, we hold that the trial court did not err in summarily dismissing plaintiff's legal malpractice claim against defendant Moore.

We further find that, although defendant law firm is entitled to summary disposition, the trial court erred in concluding that it was not a proper party because there was no attorney-client relationship between it and plaintiff. "In order to prove that a defendant employer is vicariously liable for its employee's negligent acts, the plaintiff need only show that there was an employment relationship between the employer and the employee and the negligence occurred within the scope of the employment." *Rogers v JB Hunt Transport, Inc*, 244 Mich App 600, 605; 624 NW2d 532 (2001). Here, the evidence shows that defendant Moore was employed by defendant law firm during the time he represented plaintiff. However, this Court will not reverse a trial court's decision if it reached the right result for the wrong reason; the derivative claim against defendant law firm is properly dismissed because summary disposition was correctly granted to defendant Moore. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

II

We reject plaintiff's claim that the trial court erred in accepting defendants' motion for summary disposition as their first responsive pleading. We review this issue de novo as a question of law. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Generally, a defendant "must serve and file an answer *or take other action permitted by law or these rules* within 21 days after being served . . .." MCR 2.108(A)(1) (emphasis added).

MCR 2.116 governs summary disposition motions, and provides that "[a] motion under this rule *may be filed at any time consistent with subrule (D) and subrule (G)(1)* . . .." MCR 2.116(B)(2) (emphasis added). Of relevance to this case, MCR 2.116(D) sets forth the timetable to raise particular issues by motion. Issues related to subject-matter jurisdiction, failure to state a claim or valid defense, and the existence of a genuine issue of material fact may be raised "*at any time*." MCR 2.116(D)(3) (emphasis added). Because defendants raised claims that fell into this category, they properly could file their motion for summary disposition under MCR 2.116(C)(8) and (10) as the first responsive pleading.

III

We also reject plaintiff's claim that the trial court erred in denying her motion for reconsideration because she presented new evidence. This Court reviews a trial court's decision denying a motion for reconsideration for an abuse of discretion. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609-610; 450 NW2d 6 (1989). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

We conclude that plaintiff has not shown that the trial court made a palpable error or that a different disposition of defendants' motion for summary disposition would result from correction of the error. See MCR 2.119(F)(3). In the motion for reconsideration, plaintiff again argued that the trial court's reliance on *Boyle*, *supra*, was misplaced because she did not actually have four months to correct the errors in the amendment. To the motion, plaintiff attached her affidavit and excerpts from the USPTO's Manual of Patent Examining Procedure (6th ed, 1997). However, we find that the trial court did not abuse its discretion in denying plaintiff's motion, which was based on facts that could have been pleaded or argued before the trial court's original order. See *Charbeneau v Wayne Co General Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

IV

Plaintiff's final claim is that the cumulative effect of the number of errors shows that she was denied her due process right to a fair trial. However, no cognizable errors have been identified that deprived plaintiff of her due process rights, and reversal is therefore not warranted under this theory. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 471; 624 NW2d 427 (2000).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Roman S. Gribbs