STATE OF MICHIGAN

COURT OF APPEALS

GREGORY D. SHANNON, M.D., NANCY SHANNON, M.D., and 1650 HASLETT ROAD, L.P.,

Plaintiffs-Appellants,

v

FOSTER SWIFT COLLINS & SMITH, P.C., and STEVEN L. OWEN,

Defendants-Appellees.

UNPUBLISHED
January 20, 2009

No. 275991
Ingham Circuit Court
LC No. 05-000349-NM

Before: Gleicher, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs appeal as of right from a circuit court order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

I. Underlying Facts & Procedure

Plaintiffs Gregory and Nancy Shannon retained defendant Steven Owen to represent them regarding their purchase of commercial real estate. In November or December 2002, Gregory Shannon gave Owen copies of a signed "Buy and Sell Agreement," a proposed lease, and "other materials" describing his intended purchase of a building in Haslett. According to the agreement, Vlahakis Commercial Investment & Brokerage intended to sell Gregory Shannon a partially completed building. An addendum to the agreement listed 19 total interior and exterior items of work that the seller would complete before the closing date. Plaintiffs envisioned that the building would house Nancy Shannon's internal medicine practice and other tenants, and planned to complete the interior buildout after they closed on the sale. Vlahakis and the Therapy Institute, a potential building tenant, had negotiated, but not signed, the "proposed lease" supplied to Owen with copies of the agreement.

On December 13, 2002, Owen sent plaintiffs a letter informing them, "I would be very happy to assist you in any way I can with this purchase." Owen's letter disclosed two conflicts of interest, the first involving Irwin Union Bank and Trust Company, the potential mortgage lender, and a second involving Vlahakis Reality, "the broker for the seller." The letter advised the Shannons that Owen's law firm represented both entities. According to Owen's letter, the

bank conflict "would have to be waived by both sides if we were to represent you in negotiations with the lender or review of the proposed bank documents." Concerning Vlahakis Realty, Owen stated, "That conflict would also have to be addressed."

Gregory Shannon later obtained a mortgage from National City Bank, which Owen's law firm also represented. Plaintiffs waived in writing the potential conflict with National City Bank. But plaintiffs maintained that Owen never addressed the potential conflict involving the Vlahakis entities. Defendants presented no contrary evidence; Owen acknowledged that "[t]here's nothing in the file that shows [Vlahakis Realty] was the subject of a waiver."[1]

Owen's billing records reveal that he expended considerable time providing Gregory Shannon with "professional services" before the March 17, 2003 scheduled closing date. Billing entries on March 3, 4, 6, 7, 10, 11, 12, 13 and 14, 2003 reflect multiple "phone conference[s]" and other "communication[s]," as well as time spent in "general preparation," and reviewing messages, the purchase agreement, and the closing documents.

Plaintiffs, Owen, and representatives of the seller and the bank met for the March 17, 2003 closing. At Gregory Shannon's deposition, he described that when he reviewed the bids for the interior buildout, he realized that "we were hundreds of thousands of dollars short," and would need an additional $300,000 to complete the building. Gregory recalled advising Owen of the problem and asking him, "What can we do?" Gregory recalled that Owen replied,

> Well, you are kind of between a rook [sic] and a hard place. He said, They can make you close. On top of that, if you don't, you can be responsible for this lease that I was telling about [sic], and you can be responsible if they sell it to somebody else but they sell it for less, you can be responsible for that too.

Gregory estimated that he and Nancy spent 15 or 20 minutes discussing their situation with Owen, who "didn't come up with anything that we could do." Gregory recounted that he urged Owen to "ask them if I can pay them 30,000 bucks, not fight about this thing in court, walk away and be $10,000 a month for their property being off the market and see if we can get out of this thing[.]" Plaintiffs then left the closing.

Gregory Shannon testified that within a few days, he again spoke to Owen, who told him that "they are going to make you take the building. And, in other words, they turned down the $30,000 thing." Gregory recounted that Owen further advised, "[I]f you don't take the building, they are going to hold you responsible for this lease, and they want to fight about it. They are not letting you out." Gregory subsequently negotiated a reduction of the purchase price, and closed the transaction without Owen's assistance on March 24, 2003.

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[1] Although plaintiffs alleged at oral argument that Foster Swift also represented Vlahakis Commercial Investment & Brokerage, the seller of the property, our search of the record revealed no evidence in this regard.

Plaintiffs thereafter filed a complaint alleging that before and during the closing, defendants "were engaged in a conflict of interest that was not waivable, did not fully inform Plaintiffs regarding the extent to which the conflict of interest impaired the ability the [sic] furnish advice and counsel, did not properly advise Plaintiffs to seek independent counsel, misinterpreted or intentionally misrepresented the penalties and liability" associated with the Therapy Institute lease, and "otherwise failed to furnish Plaintiffs with independent advice and counsel in keeping with the standard of practice for attorneys similarly situated." Plaintiffs additionally asserted that defendants' negligence proximately caused "[l]oss of profits in the business opportunity," "[l]oss of investment opportunity," and the incurrence of "[e]xpenses associated with the physical completion of the building," and "[e]xpenses associated with remedy of blatant [sic] defects in the building."

Defendants sought summary disposition under MCR 2.116(C)(8) and (10), insisting that plaintiffs had failed to "establish the proximate cause component of their legal malpractice claim." Defendants also argued that the attorney-judgment rule barred plaintiffs' "claim regarding Owen's conduct at the closing." Plaintiffs responded by filing an affidavit of Steven A. Matta, a Michigan attorney, who attested to Owen's breaches of the standard of care. The circuit court granted defendants summary disposition, finding that Owen's advice fell "within the realm of potentially an error in judgment that may, in fact, not even be an error in judgment, but, as a judgmental decision . . . not actionable as a matter of law." The circuit court further determined that "there is no minimal showing here of any genuine issue of fact of any link between the conflict and the ultimate outcome."

I. Attorney-Judgment Rule

We first address plaintiffs' contention that the circuit court improperly granted defendants summary disposition on the basis that the attorney-judgment rule barred their malpractice claims. Given that the circuit court plainly considered the documentary evidence submitted by the parties, the court apparently granted summary disposition pursuant to MCR 2.116(C)(10), "which tests the factual support for a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In invoking the attorney-judgment rule, the circuit court cited our Supreme Court's decision in *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995). The plaintiff in *Simko* was convicted of possessing over 650 grams of cocaine. *Id*. at 650-651. After this Court overturned Simko's conviction, he sued his criminal defense counsel on the basis that counsel had failed to produce certain trial witnesses, including Simko's personal physician, and that counsel's errors led to Simko's conviction. *Id*. at 651-653. The circuit court granted summary disposition in favor of the defendant, opining that an attorney "cannot possibly be held responsible for the acts of an unreasonable jury." *Id*. at 653.

The Supreme Court ultimately affirmed the circuit court's ruling, holding that Simko's "complaint and pleadings failed to state a breach of duty." *Id*. at 654. The Supreme Court recognized that "all attorneys have a duty to behave as would an attorney of ordinary learning, judgment or skill . . . under the same or similar circumstances . . . ." *Id*. at 656 (internal quotation omitted). That duty of care includes "the duty to fashion such a strategy so that it is consistent with prevailing Michigan law." *Id*. However, "an attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession." *Id*. Furthermore, "an attorney does not have a duty to insure or guarantee the most favorable outcome possible." *Id*. Nor must an attorney "be required to predict infallibly how a court will rule." *Id*. at 658. The Supreme Court finished its observations concerning an attorney's responsibility by observing that "mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence." *Id*.

Applying those principles to the facts presented in *Simko*, the Supreme Court explained that "it is a tactical decision whether to call particular witnesses, as long as the attorney acts with full knowledge of the law and in good faith." *Id*. at 660. "[T]actical decisions do not constitute grounds for a legal malpractice action." *Id*. The Supreme Court concluded, "When an attorney fashions a trial strategy consistent with the governing principles of law and reasonable professional judgment, the attorney's conduct is legally adequate." *Id*. at 661.

Relying on *Simko*, the circuit court found that the attorney-judgment rule should shield Owen from malpractice liability because "in good faith" he gave legal advice "well-founded in the law," notwithstanding that the advice ultimately may not have been "correct." In our view, the circuit court constructed a rule of attorney immunity bearing little resemblance to the actual contours of *Simko*'s attorney-judgment rule.

Regardless whether Owen predicated his advice on well-recognized precepts of Michigan law, the standard of care required him to function as an advocate for plaintiffs. "The attorney not only has duties of care and professional skill, but he must also conduct himself in a spirit of loyalty to his client, assuming a position of the highest trust and confidence." *Kukla v Perry*, 361 Mich 311, 316; 105 NW2d 176 (1960). When an attorney agrees to represent a client, "he is obliged to exert his best efforts wholeheartedly to advance the client's legitimate interests with fidelity and diligence until he is relieved of that obligation either by his client or the court." *State Bar of Michigan v Daggs*, 384 Mich 729, 732; 187 NW2d 227 (1971). "An attorney is obligated to use reasonable skill, care, discretion and judgment in representing a client, assuming the position of highest trust and confidence." *Beattie v Firnschild*, 152 Mich App 785, 790; 394 NW2d 107 (1986). "An attorney owes an undivided allegiance to his client and he cannot act both for his client and one whose interest is adverse or conflicting with that of his client in the same general matter unless the client consents after he has been given full knowledge of all the facts and circumstances." *Olitkowski v St Casimir's S & L Ass'n*, 302 Mich 303, 310; 4 NW2d 664 (1942).

Plaintiffs here alleged that before the closing, Owen should have attempted to determine whether their seller had complied with the requirements of the agreement. Plaintiffs further averred that at the closing, Owen owed a separate duty to *fully* advise and counsel them concerning their options, not to partially advise them or to omit information that sacrificed plaintiffs' interests to those of Vlahakis. Essentially then, plaintiffs maintain that Owen owed

them, as his clients, a duty to exercise the care that a reasonable attorney would have provided under the same or similar circumstances. Because the record in this case is replete with questions of fact, the determination whether Owen met that standard belongs to the jury.

When Gregory Shannon told Owen that he lacked the $300,000 necessary to complete the transaction with Vlahakis, the standard of care required Owen "to exert his best efforts wholeheartedly to advance the client's legitimate interests with fidelity and diligence." *State Bar of Michigan*, *supra* at 732. According to Matta's affidavit, Owen breached the standard of care by "fail[ing] to properly furnish independent advice and counsel to Plaintiffs regarding opportunities for inspection, the right to forego closing the business transaction for a variety of legitimate business reasons, not the least of which was the incomplete status of the building at the time of the closing." We additionally observe that no indication exists that Owen ever explained to plaintiffs the potential for alternative dispute resolution plainly set forth in the buy-sell agreement: "PURCHASER and SELLER agree that any dispute related to this Agreement shall be submitted to mediation."

Viewed in the light most favorable to plaintiffs, the evidence established that Vlahakis had breached the agreement by failing to complete the promised buildouts. Furthermore, contrary to the advice that plaintiffs claim Owen offered them regarding the lease, they could not have been held responsible for rent payments because the lease was never signed. Plaintiffs' claims and evidence, if believed by a jury, raise a valid defense to a lawsuit seeking specific performance. Although Owen gave plaintiffs advice technically consistent with the law, the issue remains whether he behaved in a manner consistent with the fiduciary standard of care. A lawyer may not "act with impunity and avoid malpractice liability merely because professional judgment of the attorney is at issue. Since everything an attorney does is based on his professional judgment, a contrary holding would seriously undercut the tort of legal malpractice." *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 694-695; 310 NW2d 26 (1981). The attorney-judgment rule does not automatically shield a lawyer who provides his client with a partial legal analysis or position.[2]

Plaintiffs assert that because Owen operated under a conflict of interest, he did not fully advise them with respect to their right to challenge Vlahakis by filing their own suit for specific performance, or by insisting on submission of the matter to mediation, as the agreement here requires. But regardless whether Owen operated under a conflict of interest, the standard of care arguably obligated him to provide plaintiffs both with Vlahakis's legal arguments and counterarguments that could support and benefit plaintiffs' position, and to counsel plaintiffs regarding all realistic legal options. Contrary to the circuit court's analysis, *Simko* does not give a free pass to an attorney who merely recites some advice consistent with Michigan law. Rather,

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[2] We can discern no principled basis for treating attorneys differently than other professionals who make "judgments." For example, a physician treating a patient's breast cancer may make a professional "judgment" that a patient should undergo a radical mastectomy. However, if the standard of care required the physician to offer the patient a more limited surgery, or nonsurgical treatment with chemotherapy, the physician could not obtain summary disposition merely by arguing that his "judgment" superceded his obligations under the standard of care.

as the Supreme Court explained in *Simko*, "mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith *and exercises reasonable care, skill, and diligence*." *Simko, supra* at 658 (emphasis supplied). In summary, we conclude that whether Owen exercised reasonable care, skill and diligence presents a factual question that must be resolved by a jury, as are all disputed questions of "reasonableness" in negligence cases. *Durant v Stahlin*, 375 Mich 628, 653-654; 135 NW2d 392 (1965). See also Restatement Law Governing Lawyers, 3d, § 52, cmt b (2000):

> A trier of fact applying the standard may consider such circumstances as time pressures, uncertainty about facts or law, the varying means by which different competent lawyers seek to accomplish the same client goal, and the impossibility that all clients will reach their goals. Such factors are especially prevalent in litigation. They warrant caution in evaluating lawyers' decisions, although they do not warrant the view, still occasionally asserted, that all decisions taken in good faith are exempt from malpractice liability.

Plaintiffs presented evidence in the form of Matta's affidavit, from which a reasonable jury could conclude that Owen failed to exercise reasonable care, skill, and diligence in representing their interests. Properly interpreted, *Simko* holds that an attorney whose "judgment" fails to conform with that of a reasonable lawyer under the same or similar circumstances faces liability for legal malpractice. Here, the determination whether Owen exercised "reasonable care, skill, and diligence" in representing plaintiffs, including by neglecting to provide plaintiffs with a strategy to avoid closing on the real estate transaction, must be made by a jury, and not by the circuit court.

II. Proximate Cause

The circuit court also opined that plaintiffs failed to make "any factual showing whatsoever" that Owen's actions proximately contributed to any injury that plaintiffs allegedly suffered. The complaint alleges that as a result of defendants' negligence, plaintiffs incurred, among other damages, "[e]xpenses associated with the physical completion of the building," and "[e]xpenses associated with remedy of blatant [sic] defects in the building." According to plaintiffs, multiple problems with the building increased their buildout costs, and Owen should have deferred the closing until Vlahakis remedied the building's defects. Plaintiffs further assert that their concern that they would be held to the Therapy Institute lease ultimately compelled them to close the deal on unfavorable terms. Under plaintiffs' theory of liability, if Owen had adhered to the standard of care he would have zealously advocated a more favorable purchase agreement for them, and would have instructed them that the unsigned lease merited no concern. Indisputably, the standard of care required vigorous advocacy as well as accurate advice.

In *Basic Food Industries, supra* at 692, this Court adopted the following language employed by the Wisconsin Supreme Court to describe proximate cause in a legal malpractice action:

> An attorney must be held to undertake to use a reasonable degree of care and skill, and to possess to a reasonable extent the knowledge requisite to a proper performance of the duties of his profession, and, if injury results to the client as a proximate consequence of the lack of such knowledge or skill, or from the failure

to exercise it, the client may recover damages *to the extent of the injury sustained.* [Emphasis in original, internal quotation omitted.]

Proximate cause generally presents a factual question for decision by the trier of fact. *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

Plaintiffs contend that an attorney comporting with the applicable standard of care by zealously representing his clients would have delayed the closing. Had this occurred, plaintiffs would have had an opportunity to pursue negotiation regarding the building defects with the seller, or to submit the dispute to mediation, and would have ascertained that the threatened lease played no part in the deal. Plaintiffs presented evidence in support of their assertion that Owen proximately caused their asserted damages, including (1) Matta's affidavit, which after setting forth a lengthy list of Owen's acts of negligence opined, "From the material I have reviewed, it is my opinion that the Shannons have sustained financial losses as a consequence of the closing being concluded when the building was incomplete, and at a time when the buy-sell agreement had not been properly satisfied by the seller of the properties," and (2) Gregory Shannon's deposition testimony estimating that the closing on the defective property increased plaintiffs' building costs from $42 a square foot to about $220 a square foot. We conclude that the determination whether Owen's negligence proximately caused plaintiffs to expend more money than they would have if represented by counsel zealously pursuing their interests constitutes a question of fact.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra