S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

HUNTINGTON LEASING COMPANY,

Plaintiff/Counter-Defendant,

v

MANISTEE INTERMEDIATE SCHOOL DISTRICT,

Defendant/Counter-Plaintiff/Cross-Plaintiff-Appellee/Cross-Appellant,

and

ROBERT C. TILMANN,

Defendant/Cross-Defendant/Cross-Plaintiff-Appellee,

and

LOCAL INTERNET SERVICES,

Defendant/Cross-Defendant,

and

LARRY E. KIVELA and MARK A. PEHRSON, P.C.,

Defendants/Cross-Plaintiffs/Cross-Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
April 28, 2005

No. 250942
Mason Circuit Court
LC No. 01-000068-CK

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendants Larry Kivela and Mark A. Pehrson, P.C.,[1] appeal as of right from a trial court order dismissing their cross-claims for indemnification against defendants Manistee Intermediate School District (MISD) and Robert Tilmann. MISD filed a cross-appeal as of right from the trial court's dismissal of its legal malpractice claim against Mr. Kivela pursuant to MCR 2.116(C)(7). We affirm the trial court's dismissal of Mr. Kivela's indemnification claims. Although the trial court improperly dismissed MISD's legal malpractice claim based on the statute of limitations, MISD cannot establish that it suffered any damages. As the trial court reached the right result for the wrong reason, we also affirm the dismissal of MISD's legal malpractice claim.[2]

I. Facts and Procedural History

In 1998, MISD entered into a relationship with a service provider, Local Internet Services (LIS). LIS was to provide equipment and services to MISD, which MISD used to create and sell internet services at a profit.[3] The school board was fully aware of the relationship with LIS. However, LIS was subsequently unable to secure financial backing to purchase the equipment it intended to lease to MISD. As the equipment was in the process of being installed in MISD facilities, LIS asked Dr. Tilmann, the then-superintendent of MISD, to secure the financing using MISD's good credit. Dr. Tilmann secured the financing from Huntington Leasing Co. (Huntington) without notification to the school board.

In connection with this transaction, Huntington requested an opinion letter from an attorney confirming the legality of its transaction with MISD. As using MISD's regular counsel would have caused significant delay, LIS retained Mr. Kivela, on behalf of MISD,[4] to write the letter asserting that the lease agreement was proper and that MISD had the legal authority to enter into the contract.[5] LIS paid Mr. Kivela $100 for this task. Mr. Kivela did not have time to do independent research and, therefore, had to rely on the statements of Dr. Tilmann. Accordingly, Dr. Tilmann signed an indemnification agreement on behalf of MISD upon Mr. Kivela's request.

---

[1] Mark A. Pehrson, P.C., was the law firm where Mr. Kivela was employed when he drafted the opinion letter at issue in this appeal. For ease of reference, we will refer to both Mr. Kivela and Mark A. Pehrson, P.C. as Mr. Kivela.

[2] This Court may uphold a trial court ruling that reaches the right result albeit for the wrong reason. *Mulholland v DEC Internat'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

[3] The evidence reveals that MISD made more than double the cost of the equipment, or approximately $400,000, and continues to profit.

[4] Mr. Kivela conceded in his deposition that, although he was retained and paid by LIS, he considered MISD to be his client in this transaction.

[5] In fact, the MISD-Huntington lease agreement was illegal. The Michigan Constitution prohibits a governmental unit from lending its credit to private individuals. Const 1963, art 9, § 18; *Connor v Herrick*, 349 Mich 201, 216; 84 NW2d 427 (1957). As a result, Huntington also filed suit against Mr. Kivela, but settled its claims before trial.

For the next two-and-a-half years, MISD made monthly payments to LIS. LIS retained a portion of each payment for its service contract and forwarded the remainder to Huntington as payment on the lease. In 2000, however, the school board terminated Dr. Tilmann's employment. Dissatisfied with the service received from LIS, MISD subsequently negotiated a cessation of that business relationship.[6] Once the MISD-LIS relationship was successfully terminated and MISD stopped making payments to LIS, LIS stopped making payments to Huntington. Huntington, in turn, filed suit against MISD for the remainder of the equipment payments. MISD, who still retained the equipment and continued to make a large profit from selling its internet services, reached an agreement with Huntington to pay a reduced amount for the equipment.

As part of this litigation, MISD filed a cross-claim against Mr. Kivela alleging legal malpractice. MISD contended that Mr. Kivela, who was not a school finance attorney, breached his duty of care by failing to review the school board minutes and applicable law to ensure that the MISD-Huntington financing arrangement was legal. Mr. Kivela, in turn, sought to be indemnified by MISD or Dr. Tilmann personally for his costs involved in being brought into this suit.

II. Indemnification

Mr. Kivela argues that the trial court erred when it granted summary disposition to MISD and Dr. Tilmann on his claims for indemnification.[7] We disagree. This Court reviews a trial court's determination regarding a motion for summary disposition de novo.[8] A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone and should be granted only if the factual development of the claim could not justify recovery.[9]

The trial court properly determined that MISD lacked the authority to indemnify Mr. Kivela. "[A] county's authority, like the authority of townships, cities, and villages, is derived from and limited by the constitution and valid state statutes."[10] Local governmental units do not have inherent powers, "'only those limited powers which are expressly conferred by the state

---

[6] During these negotiations, LIS never mentioned the financing arrangement with Huntington. However, the settlement paid by MISD to LIS was significantly less than the amount still owed to Huntington for the actual equipment.

[7] MISD sought summary disposition based on MCR 2.116(C)(8) and MCR 2.116(C)(10). As it appears from the record that the trial court dismissed Mr. Kivela's indemnification claims for failure to state a claim upon which relief could be granted, we will review the dismissal under MCR 2.116(C)(8).

[8] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[9] *Id.* at 129-130.

[10] *Michigan Municipal Liability & Prop Pool v Muskegon Co Bd of Co Rd Comm'rs,* 235 Mich App 183, 190; 597 NW2d 187 (1999).

constitution or state statutes or which are necessarily implied therefrom.'"[11] A power is necessarily implied "if it is essential to the exercise of authority that is expressly granted."[12] An ultra vires act is an act that is outside the governmental unit's authority and not expressly authorized or implicitly mandated by statute.[13]

This Court addressed the power of a governmental unit to indemnify third parties in *Michigan Municipal Liability & Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*. The statute in question in that case expressly gave the county road commission the power to hire an engineer or consultant.[14] However, this Court held that the power to hire a third party does not necessarily imply that the county road commission has the power to enter into an indemnification agreement with that party.[15] The power to indemnify is not essential to the express power of hiring and, therefore, was an ultra vires act.[16]

The relevant statute in this case, MCL 380.601a, provides in relevant part:

> (1) An intermediate school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to any power expressly stated in this act; and, except as provided by law, may exercise a power incidental or appropriate to the performance of any function related to the operation of the intermediate school district in the interests of public elementary and secondary education in the intermediate school district, including, but not limited to, all of the following:
>
> * * *
>
> (d) Hiring, contracting for, scheduling, supervising, or terminating employees, independent contractors, and others to carry out intermediate school district powers. An intermediate school district may indemnify its employees.[17]

This statute grants MISD the power to hire employees, independent contractors, and other third parties; however, the power to indemnify is not necessarily implied from the power to hire. Furthermore, while the Legislature clearly expressed its intention to allow school districts to

---

[11] *Id*., quoting *Hanselman v Wayne Co Concealed Weapon Licensing Bd*, 419 Mich 168, 187; 351 NW2d 544 (1984).

[12] *Id.* at 191.

[13] *Ross v Consumers Power Co (On Remand),* 420 Mich 567, 620; 363 NW2d 641 (1984).

[14] *Michigan Municipal Liability*, *supra* at 192.

[15] *Id.* at 193.

[16] *Id*.

[17] MCL 380.601a(1)(d).

indemnify employees, it omitted independent contractors and other third parties from this provision. We must assume that this omission was intentional.[18]

Mr. Kivela argues that he was an employee of MISD based on *Coblentz v Novi*[19] and, therefore, can be indemnified pursuant to the statute. In *Coblentz*, this Court found that the City could charge a party requesting information under the Freedom of Information Act[20] for the time spent by the city attorney examining the requested documents to determine if they were exempt from disclosure.[21] Although the plaintiff contended that the City was not entitled to recover these fees as the city attorney was an independent contractor, this Court found that the attorney was an "employee" as required for recovery under MCL 15.234(1). The city attorney was an employee because he was "'hired to work for another.'"[22]

We do not agree that Mr. Kivela was an "employee" of MISD. This case is factually inapposite of Coblentz. MISD had retained counsel that served as the school board attorney. That attorney would be considered an employee pursuant to Coblentz. However, Mr. Kivela was retained by an outside party—LIS—to complete one specific task that was actually for the benefit of another outside party—Huntington. This connection is too attenuated to result in an employee-employer relationship. Furthermore, LIS was an independent contractor merely conducting internet services for MISD. Without considering LIS's questionable authority to retain counsel on behalf of MISD, LIS clearly was not authorized to hire employees on MISD's behalf. As Mr. Kivela cannot be considered an "employee" of MISD under MCL 380.601a(1)(d), the trial court properly dismissed his indemnification claim against the school board.

Mr. Kivela also argues that the trial court improperly dismissed his indemnification claim against Dr. Tilmann personally. We again disagree. At a motion hearing on November 26, 2001, Mr. Kivela's attorney agreed to voluntarily dismiss the indemnification claim against Dr. Tilmann. Pursuant to MCR 2.507(H),

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding *unless it was made in open court*, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.[23]

---

[18] *Reed v Breton*, 264 Mich App 363, 374-375; 691 NW2d 779 (2004).

[19] *Coblentz v Novi*, 264 Mich App 450; 691 NW2d 22 (2004).

[20] MCL 15.231 *et seq.*

[21] *Coblentz*, *supra* at 459-460.

[22] *Id.* at 460, quoting Random House Webster's College Dictionary (1992).

[23] MCR 2.507(H) (emphasis added).

Although Mr. Kivela challenges his counsel's authority to unilaterally dismiss his claim, attorneys have the apparent authority to settle a lawsuit on behalf of their clients.[24] As Mr. Kivela's attorney agreed to voluntarily dismiss this claim in open court, Mr. Kivela is bound by that agreement pursuant to MCR 2.507(H).[25] Accordingly, the trial court properly dismissed Mr. Kivela's indemnification claim against Dr. Tilmann.[26]

III. Legal Malpractice

On cross-appeal, MISD argues that the trial court improperly granted Mr. Kivela's motion for summary disposition of MISD's legal malpractice cross-claim based on the statute of limitations. In reviewing a motion under MCR 2.116(C)(7), this Court must consider "all documentary evidence filed or submitted by the parties,"[27] accepting the nonmoving party's well-pleaded allegations as true and construing the evidence in that party's favor.[28]

The statute of limitations for a legal malpractice action is two years from the date the attorney discontinued serving the plaintiff or within six months after the plaintiff discovered or should have discovered the existence of a claim.[29] MISD clearly did not raise its claim within the two-year period. "A lawyer discontinues serving a client when relieved of the obligation by the client or the court, or upon completion of a specific legal service that the lawyer was retained to perform."[30] Mr. Kivela was retained for a specific legal service—to draft an opinion letter—which was completed on March 25, 1998. MISD did not raise its malpractice claim until March 1, 2001, nearly three years later.

The discovery rule, however, allows a plaintiff to file a malpractice claim six months from the date the plaintiff discovered, or should have discovered through reasonable diligence, the existence of a possible cause of action.[31] MISD contends that it brought its claim within six

---

[24] *Nelson v Consumers Power Co,* 198 Mich App 82, 89-90; 497 NW2d 205 (1993), quoting *Capital Dredge & Dock Corp v Detroit*, 800 F2d 525, 530-531 (CA 6, 1986).

[25] *Id.* at 90.

[26] MISD also claims that Mr. Kivela violated MRPC 1.8(h)(1) by entering into an indemnification agreement that limited his malpractice liability and that the agreement was void as the school board did not approve the agreement in an open meeting in violation of MCL 380.623(2). However, as we have determined that the trial court properly granted both motions for summary disposition on other grounds, we need not reach these issues.

[27] *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

[28] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[29] MCL 600.5805(6); MCL 600.5838; *K73 Corp v Stancati,* 174 Mich App 225, 228; 435 NW2d 433 (1988).

[30] *Maddox v Burlingame,* 205 Mich App 446, 450; 517 NW2d 816 (1994) (citations omitted).

[31] *Moll v Abbott Laboratories,* 444 Mich 1, 5; 506 NW2d 816 (1993); *Gebhardt v O'Rourke,* 444 Mich 535, 544; 510 NW2d 900 (1993).

months of discovering its existence. MISD asserts that the school board had no prior knowledge of the direct relationship between MISD and Huntington as Dr. Tilmann entered into the financing portion of the internet equipment leasing agreement without the board's approval. MISD also denied having any knowledge that it had ever been represented by Mr. Kivela. MISD claimed that it first learned of this arrangement in September of 2000, when it received notice from Huntington following the cessation of the contract with LIS.

We agree that the trial court improperly granted Mr. Kivela's motion based on the statute of limitations. There is no evidence that Dr. Tilmann informed the school board of the MISD-Huntington financing arrangement. The record evidence would have merely placed the school board on notice that LIS had secured financing through Huntington. Furthermore, Dr. Tilmann's knowledge of this arrangement, and the opinion letter written by Mr. Kivela, cannot be imputed to MISD. As an agent of the school board, Dr. Tilmann's knowledge can only be imputed to the board if he was acting within the scope of his authority.[32] If an agent acts outside the scope of the law, it is presumed that the agent is acting outside the scope of his authority.[33] As noted previously, the financing arrangement between MISD and Huntington was an unconstitutional and illegal lending of public credit. Therefore, Dr. Tilmann's actions were outside the scope of his authority and his knowledge cannot be imputed to the school board. As MISD raised its legal malpractice claim within six months of its discovery, the trial court improperly dismissed MISD's claim on this ground.

However, Mr. Kivela originally sought the dismissal of MISD's legal malpractice claim based on MCR 2.116(C)(8) and MCR 2.116(C)(10). MISD's claim would properly have been dismissed pursuant to MCR 2.116(C)(10), and accordingly, we affirm the trial court's final disposition.[34] A motion under this subsection tests the factual support of a plaintiff's claim.[35] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of

---

[32] *Gordon Sel-Way, Inc v Spence Brothers, Inc,* 177 Mich App 116, 124; 440 NW2d 907 (1989), rev'd in part on other grounds 438 Mich 488;475 NW2d 704 (1991).

[33] *Rohe Scientific Corp v Nat'l Bank of Detroit,* 133 Mich App 462, 469-470; 350 NW2d 280, rev'd on other grounds on reh 135 Mich App 777; 355 NW2d 883 (1984).

[34] Although the trial court did not enter a ruling on Mr. Kivela's motion under this subsection, we may consider the issue on appeal as it is a matter of law that was raised below and the necessary facts appear in the record. *Hickory Pointe Owners v Smyk*, 262 Mich App 512, 516; 686 NW2d 506 (2004).

[35] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

material fact exists."[36] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[37]

To prove any tort action, a plaintiff must establish: "(1) a legal duty, (2) a breach of the duty, (3) a causal relationship, and (4) damages."[38] A tort claim does not arise or accrue unless and until all the elements have occurred, including damages.[39] To prove legal malpractice, a plaintiff must establish: (1) a duty arising from an attorney-client relationship; (2) that the attorney conducted himself negligently; (2) that the negligence was the proximate cause of the plaintiff's injury; and (4) damages in the form of an actual injury.[40] To meet the actual injury requirement, the plaintiff must show that "'but for the attorney's alleged malpractice, he would have been successful in the underlying suit.'"[41]

In this case, MISD cannot establish that it actually suffered any injury or damages. MISD was able to negotiate the cessation of both the LIS and Huntington arrangements at a discounted price. MISD did not even pay Mr. Kivela's $100 fee for the preparation of the opinion letter. In fact, Huntington is the only party injured by Mr. Kivela's legally inaccurate opinion letter. Huntington was the beneficiary of the opinion letter and likely settled with MISD for a reduced amount because Mr. Kivela failed to accurately determine that the financing arrangement was illegal. As MISD cannot establish that it was harmed in any way by Mr. Kivela's alleged negligence, its legal malpractice claim was properly dismissed.[42]

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Jessica R. Cooper

---

[36] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[37] *MacDonald v PKT, Inc,* 464 Mich 322, 332; 628 NW2d 33 (2001).

[38] *Lumley v Bd of Regents for the Univ of Michigan*, 215 Mich App 125, 130; 544 NW2d 692 (1996), citing *Connelly v Paul Ruddy's Equipment Repair & Serv Co*, 388 Mich 146, 149-150; 200 NW2d 70 (1972).

[39] *Id.*, citing *Connelly*, *supra* at 150.

[40] *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

[41] *Colbert v Conybeare Law Ofc*, 239 Mich App 608, 619; 609 NW2d 208 (2000), quoting *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

[42] As noted previously, it is questionable that LIS had the authority to retain counsel on behalf of MISD. Were it not for Mr. Kivela's concession that he considered MISD his client, we would also question whether MISD could establish the requisite attorney-client relationship.