STATE OF MICHIGAN

COURT OF APPEALS

CHARLES BENSON and NICOLE NAULT, Plaintiffs-Appellants,	UNPUBLISHED February 7, 2013
v	No. 307543 Wayne Circuit Court
EUGENE H. BOYLE, JR., BOYLE BURDETT, and H. WILLIAM BURDETT, JR., Defendants-Appellees.	LC No. 2011-010185-NM

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition to defendants and dismissing plaintiffs' legal malpractice claim.[1] We reverse and remand for further proceedings.

This action arises out of a prior action[2] in which plaintiffs sued their former employer, Cooperative Optical Services, Inc. ("Co-Op Optical"), under the Whistleblower's Protection Act (WPA).[3] Plaintiff Charles Benson is the former chief operating officer of Co-Op Optical and plaintiff Nicole Nault is its former director of managed care. Plaintiffs and Dr. Joshua Lange, an optometrist and formerly Co-Op's vice president of medical services, were fired in January 2010 after reporting alleged violations of state rules and regulations by Co-Op's chief executive officer, Jacqueline Smith. Plaintiffs assert that they retained defendants to represent them, instead of any of several other attorneys who expressed an interest, after defendants held themselves out as experienced in WPA litigation and promised to do a better job.

[1] The court also dismissed claims for breach of contract, promissory estoppel, fraud, and intentional infliction of emotional distress, but plaintiffs have not appealed these rulings.

[2] *Benson, et al v Cooperative Optical Services, Inc*, Wayne Circuit Court No. 10-002171-CZ.

[3] MCL 15.361 *et seq.*

Plaintiffs alleged that defendants had failed to diligently pursue discovery in the underlying suit, failed to pursue claims for non-economic damages, wrongly advised plaintiffs that emotional damages could not be claimed in a WPA suit, inflicted personal abuse on plaintiffs by yelling and swearing at them, coerced them into accepting a poor settlement offer by threatening to terminate their representation and leave plaintiffs without counsel, and failed to separate plaintiffs' claims from Lange's claims when their interests became antagonistic. Instead of filing an answer and instead of responding to plaintiffs' discovery requests in the instant case, defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendants asserted that Co-Op was in a dire financial situation and had only a $1 million declining limits[4] liability insurance policy, and Smith had commenced her own lawsuit against Co-Op. Defendants felt that discovery would reduce available insurance proceeds and that plaintiffs had a good case against Co-Op but had limited damages and limited evidence of emotional distress.

Following a hearing, the circuit court found that plaintiffs' breach of contract and promissory estoppel counts duplicated the malpractice claims, and that intentional infliction of emotional distress could not be proven. The court scheduled a hearing on plaintiffs' motion for discovery, but noted that a hearing might not be necessary. The court then granted summary disposition on the malpractice count and dismissed the case. Before the dismissal, plaintiffs had filed a motion to amend their complaint and noticed it for a few days after the dismissal was entered. Plaintiffs sought to amend the complaint "to more specifically allege the acts constituting malpractice." Plaintiffs had also argued in their response to defendants' motion for summary disposition that they should be permitted to amend their complaint. The court did not decide the motion to amend, apparently because it granted summary disposition.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Id*., 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*., 119-120.

On appeal, plaintiffs argue initially that the trial court erred in dismissing their malpractice claims based on MCR 2.116(C)(8). We agree. The trial court clearly considered documentary evidence attached to the pleadings and made factual determinations based on factors not strictly confined to the contents of the pleadings themselves. However, a

[4] Meaning that any fees and costs of litigation would be deducted from the total coverage limits.

determination under an inappropriate subpart of the Court Rule does not mandate reversal so long as the record permits review under the proper subpart. *Detroit News, Inc v Policemen and Firemen Retirement System of City of Detroit*, 252 Mich App 59, 66; 651 NW2d 127 (2002). We will therefore review the matter as if summary disposition had been granted pursuant to MCR 2.116(C)(10).[5] See *id*.

Summary disposition is generally premature before discovery on disputed issues is complete, *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009), unless further discovery would not have a further likelihood of uncovering facts to support the nonmoving party's position. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). The submitted evidence should be viewed in the light most favorable to the nonmoving party. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The court may not find facts or assess credibility when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

A plaintiff asserting a claim for legal malpractice must prove both that the defendant attorney or attorneys were professionally negligent and that the plaintiff or plaintiffs would have received a more favorable outcome but for that negligence. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996). Alternatively stated, "a plaintiff must allege (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was the proximate cause of an injury, and (4) the fact and the extent of the injury alleged." *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993) (footnotes omitted). "Hence, a plaintiff in a legal malpractice action must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit." *Id*.

However, this Court has permitted recovery of noneconomic damages, such as for mental anguish, in legal malpractice cases where the injury was caused by the malpractice. *Gore v Rains & Block*, 189 Mich App 729, 739-741; 473 NW2d 813 (1991). The "suit within a suit" requirement applies where the alleged damages are the loss of such a suit, but "the attorney's liability, as in other negligence cases, is for all damages directly and proximately caused by the attorney's negligence." *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 693; 310 NW2d 26 (1981). Further, settlement is not a bar to claims of legal malpractice, although it may reduce the amount of damages. *Lowman v Karp*, 190 Mich App 448, 452-453; 476 NW2d 428 (1991). "When a settlement is compelled by the mistakes of the plaintiff's attorney, the attorney may be held liable for causing the client to settle for less than a properly represented client would have accepted." *Espinoza v Thomas*, 189 Mich App 110, 123; 472 NW2d 16 (1991).

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[5] We conclude that plaintiff's complaint adequately states a claim for legal malpractice, in any event, and as we discuss *infra*, the trial court additionally erred by failing to permit plaintiffs to amend their complaint.

The attorney judgment rule recognizes that attorneys are not guarantors of particular outcomes and thus insulates attorneys from liability for "mere errors in judgment" if they acted in good faith and with the honest belief that their actions were legally sound and in their client's best interests. *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002) (internal quotation omitted). However, lawyers conversely cannot "act with impunity and avoid malpractice liability merely because professional judgment of the attorney is at issue;" a lawyer may be liable for errors in judgment that are "very gross," *Basic Food*, 107 Mich App at 694-695, or "gross." *Mitchell*, 249 Mich App at 679. *Basic Food* further holds that the plaintiff need not always show that he or she would have prevailed completely in the underlying suit, but must prove that the recovery would have been greater absent the malpractice. *Basic Food*, 107 Mich App at 694.

Defendants sought summary disposition without any discovery having been conducted. When the evidence that exists in this record is viewed in the light most favorable to plaintiffs, as it must be, we conclude that there are sufficient questions of material fact to make summary disposition premature. We perceive at least some possibility that defendants may have committed the acts of personal abuse plaintiffs alleged they committed at facilitation, and by the possibility that defendants advised plaintiffs and proceeded under the understanding that emotional damages were not recoverable under the WPA in the underlying action. In fact, in a WPA action, plaintiffs would have been entitled to lost wages and other economic damages, in addition to noneconomic damages.[6] *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 499; 705 NW2d 689 (2005), overruled on other grounds, *Brown v Mayor of Detroit*, 478 Mich 589; 734 NW2d 514 (2007); *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997).

When the evidence in the scanty record is properly viewed in the light most favorable to the nonmoving party, there is a genuine question of fact whether defendants failed to obtain information regarding Co-Op's finances and insurance coverage to enable plaintiffs to properly evaluate the strength of the lawsuit, and whether defendants failed advise plaintiffs appropriately regarding the damages recoverable in a WPA claim. Consequently, there is a genuine question of fact whether defendants breached the standard of care and committed malpractice, proximately causing harm to plaintiffs. Therefore, the trial court erred in applying the attorney judgment rule in granting summary disposition.

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[6] We recognize, of course, that defendants may have known this and may have had sound reasons for proceeding as they did. On the other hand, being unaware of a key legal principle is neither a professional judgment nor a strategy. The important concern before us is that the standard for summary disposition requires us to construe the evidence—especially at this extremely early stage of the proceedings—in the light most favorable to the nonmoving party, and we are confident that the meritoriousness of either party's assertions will be supported by conducting discovery. Our opinion today is based strictly on the record as it is at this time.

Plaintiffs further argue that the trial court erred in granting summary disposition instead of deciding their motion to compel discovery. We agree. As noted, there was *no* discovery. Rather than a "fishing expedition," plaintiffs sought further documentary evidence to prove their position, which evidence attached to their pleadings showed was at least not speculative. Because there was some likelihood that discovery could have produced evidence in support of plaintiff's position, summary disposition prior to discovery was premature. *Liparoto Constr*, 284 Mich App at 33-34; *Dep't of Social Servs v Aetna Cas and Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989). Indeed, plaintiffs specifically identified what documents they had wanted in this suit and the underlying suit.

Plaintiffs also contend that the lower court erred in finding that plaintiffs failed to present evidence of causation of emotional damages. We agree. Plaintiffs did not have to prove physical injury as a condition precedent to recover damages for mental anguish. See *Gore*, 189 Mich App at 739-740. Noneconomic damages are recoverable for legal malpractice. *Id*.; *Coble v Green*, 271 Mich App 382, 393 n 3; 722 NW2d 898 (2006). Plaintiffs detailed physical and emotional symptoms in their affidavits and the psychiatrist's affidavit, and as discussed, there is a genuine question of fact whether defendants committed malpractice and thereby caused plaintiffs' injuries and cost plaintiffs a larger recovery. Plaintiffs did plead and show sufficient facts to demonstrate causation and emotional damages. In summary, it was simply too early to say that plaintiffs could not support these claims. Summary disposition was improper with regard to the elements of causation and damages.

Defendants argue that a party cannot withstand a motion for summary disposition on the basis of incomplete discovery without complying with MCR 2.116(H)(1) by filing affidavits. See *Coblentz v City of Novi*, 475 Mich 558, 570-571; 719 NW2d 73 (2006). This assertion reflects an incomplete understanding of the applicable law and the instant facts. Affidavits are required under MCR 2.116(H)(1) only where certain evidence is in the control of another person, plaintiffs are unable to acquire the evidence by ordinary means, *and* the nonmoving party cannot present sufficient evidence to overcome a motion for summary disposition without those necessary facts. Here, plaintiffs filed their own affidavits and those of Dr. Shiener and Mr. Goodman, setting forth sufficient facts to support their legal malpractice action. Other materials, e.g., the affidavit of Dr. Lange and e-mails between the parties, further supported plaintiffs' theories of malpractice, causation, and damages. The incompleteness of discovery affects the propriety of summary disposition in part because it affects how we assess the evidence in the record. However, because plaintiffs presented evidence sufficient to withstand summary disposition under the circumstances, affidavits were not required under MCR 2.116(H).

Finally, plaintiffs argue that the trial court erred in failing to address and grant their motion to amend their complaint. We agree. Pursuant to MCR 2.116(I)(5), before dismissing a case, the court "shall give the parties an opportunity to amend their pleadings . . . unless the evidence then before the court shows that amendment would not be justified." Leave to amend should be freely given in absence of undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice, or futility of amendment. *Weymans v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 663-664; 213 NW2d 134 (1973).

In the case at bar, plaintiffs' motion to amend was not dilatory or futile. An amendment "is futile if, ignoring the substantive merits, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998), quoting *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). Here, plaintiffs' proposed amended complaint added specific allegations regarding defendants' rebuffing plaintiffs' requests for information before the facilitation, failing to diligently pursue the suit against Co-Op, failing to add defendants, failing to forward plaintiffs' proposed settlement offer to opposing counsel or to inform plaintiffs of an offer from defendants, and failing to inform plaintiffs that the trial date had been moved back. The failure to be more specific regarding causation and damages stemmed largely from defendants' refusal to allow discovery in this case or to pursue discovery in the underlying suit. Plaintiffs' proposed complaint was legally sufficient, and the court abused its discretion in failing to allow the amendment. See *PT Today, Inc v Comm'r of Fin and Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006).

The order granting summary disposition is reversed and the case remanded for further proceedings consistent with this opinion. In addition to any other matters to be addressed on remand, plaintiffs shall be permitted to amend their complaint. We express no opinion whatsoever as to the substantive merits of this action, nor do we express any opinion as to the propriety of either granting or denying another summary disposition motion after discovery has been conducted. We hold only that summary disposition should not have been granted at this stage of proceedings and that plaintiffs should have been permitted to amend their complaint. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh

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Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

BOONSTRA, J., (*concurring*).

I concur in the result. I write separately to explain my somewhat differing rationale from that of the majority.

I agree entirely that summary disposition pursuant to MCR 2.116(C)(8) was improper. Because the trial court took into consideration record evidence upon which defendants relied in support of their motion, the motion should not have been granted under subrule (C)(8). I further agree that summary disposition pursuant to MCR 2.116(C)(10) was premature, and that plaintiffs' amended complaint should have been allowed.

I premise the latter conclusion in part on the fact that MCR 2.118(A)(1) authorizes a party to amend a pleading "once as a matter of course within 14 days after being served with a responsive pleading." Here, defendants never served a responsive "pleading." Defendants instead filed a motion for summary disposition, in lieu of filing an answer to plaintiffs' complaint. A pleading is narrowly defined to include an answer, but not a motion. MCR 2.110(A). In my view, Plaintiffs therefore had an absolute right to amend their complaint, without having to seek or obtain leave of the trial court to do so. When presented with plaintiffs' motion for leave to amend their complaint[1], therefore, the trial court in my judgment was obliged to grant that motion or, at a minimum, to note plaintiffs' right to amend without leave and to

[1] Plaintiffs represent that, in their response to defendants' motion for summary disposition, they specifically asked the trial court for leave to amend their complaint. Thereafter, on December 1, 2011, after the trial court held a hearing on defendants' motion but before it issued its opinion and order granting summary disposition to defendants, plaintiffs formally filed a motion to amend their complaint.

afford plaintiffs the opportunity to do so. MCR 2.118(A)(1); see also 1 Longhofer, Michigan Court Rules Practice (6th ed), § 2118.2, p 788 ("A party may therefore appropriately reply to a motion under [MCR 2.116] with an amended pleading designed to cure the defect revealed by the motion (assuming a responsive pleading has not also been filed and served more than 14 days before the proposed amendment).")

Moreover, in any event, the trial court was obliged to consider the request for leave to amend, and the proposed amended complaint, prior to or in conjunction with deciding defendants' motion for summary disposition. MCR 2.116(I)(5) ("If the grounds asserted are based on subrule (C)(8), (9), or (10), the court *shall* give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified") (emphasis added). The use of the term "shall" denotes a mandatory requirement. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Instead, the trial court failed to address in any fashion plaintiffs' request for leave to amend, or the proposed amendment, granted summary disposition to defendants, and canceled the scheduled hearing on plaintiffs' motion to amend. In my judgment, the amendment should have been permitted both because, as noted, plaintiffs had a right to amend without leave, and because the trial court was obliged under MCR 2.116(I)(5) to grant the opportunity to amend absent a finding that the amendment "would not be justified." The trial court never made any such finding.[2]

MCR 2.108(C)(2) does not compel otherwise. The use therein of the phrase "if one is allowed" (in requiring that the trial court set a time for filing an amended pleading), does not impose a "leave" requirement where, as here, one does not otherwise exist; rather, it merely recognizes that, depending on the circumstances, an amendment may be either permitted as of right (as here) or granted by leave of the trial court. In either event, the amendment would be one that is "allowed," in the context of MCR 2.108(C)(2).

Moreover, it is of no moment, in my view, that plaintiffs' motion to amend was filed after the hearing on defendants' motion for summary disposition. First, plaintiffs requested leave to amend in their response to the summary disposition motion—prior to the summary disposition hearing. Second, while the trial court gave an oral ruling from the bench at the summary disposition hearing regarding the dismissal of certain of plaintiffs' claims, it did not issue any ruling at that time with respect to plaintiffs' legal malpractice claim, which is the only claim that is the subject of this appeal. Third, and notwithstanding its oral ruling (on other counts), the trial court did not issue any order whatsoever relative to defendants' motion for summary disposition until after plaintiffs had formally filed their motion to amend the complaint. A court speaks only through its written orders. *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). This is not a situation, therefore, where a party requested leave to amend *after* the trial court granted summary disposition.

I also agree with the majority that the trial court's grant of summary disposition was premature. Defendants supported their motion with documentary evidence of their choosing,

[2] While defendants' maintain that amendment would have been futile and "would not be justified," MCR 2.116(I)(5), the trial court made no such assessment, and we should not do so in the first instance.

while otherwise failing to respond to plaintiffs' discovery requests. While plaintiffs moved to compel discovery, the trial court deferred a hearing on plaintiffs' motion to compel, and then granted summary disposition before that motion could be heard. Discovery should have been allowed to proceed; particularly given that defendants relied on certain documentary evidence in support of their motion for summary disposition, plaintiffs should have been afforded the opportunity in discovery to properly rebut the motion. While I would otherwise offer no characterizations as to the merits of plaintiffs' claims or the propriety of any particular discovery request, I agree with the majority that it was simply too early to say that plaintiffs could not support their claims, and that plaintiffs should have been afforded the opportunity in discovery to do so. The trial court's grant of summary disposition was therefore premature.

I therefore concur with the majority in reversing the trial court's grant of summary disposition to defendants, and in remanding for further proceedings.

/s/ Mark T. Boonstra