

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TRACI A. MESSENGER, GREGORY G.  
MESSENGER, M.D., and TRACI A.  
MESSENGER as Personal Representative of the  
Estate of MICHAEL RYAN MESSENGER,  
Deceased,

UNPUBLISHED  
December 9, 2008

Plaintiffs/Counter-  
Defendants/Appellants,

v

JAMES T. HEOS (P26210) and CHURCH,  
KRITSELIS & WYBLE, P.C.,

No. 279968  
Ingham Circuit Court  
LC No. 03-1853-NM

Defendants/Counter-  
Plaintiffs/Appellees.

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Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs, Gregory G. Messenger, M.D. and his wife, Traci A. Messenger, in her individual capacity and as personal representative of the estate of their deceased infant child, Michael Ryan Messenger, appeal as of right from the trial court's order granting summary disposition in favor of defendants, attorney James T. Heos, and Church, Kritselis & Wyble, P.C.<sup>1</sup> Because defendants' alleged misconduct falls within the attorney judgment rule and plaintiffs have made no showing sufficient to meet their burden to establish causation, we affirm.

Traci Messenger gave birth to a premature son at Sparrow Hospital in Lansing, Michigan on February 8, 1994. At birth, the infant was at just 25 weeks gestation. Prior to the birth, plaintiffs consulted with a neonatologist and decided that if their son was born that night that they did not want resuscitation of their premature infant child. Plaintiffs consented to a "do not resuscitate order" for the baby. But, contrary to the plaintiffs' directions, hospital staff instituted resuscitation procedures for the infant after its birth and then intubated the baby after he arrived

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<sup>1</sup> Defendants' cross appeal has been dismissed by stipulation and is not before us on appeal.

in the neonatal intensive care unit. Shortly thereafter, plaintiff Gregory Messenger, a licensed physician, disconnected the respirator sustaining his infant son and the child was pronounced dead.<sup>2</sup>

Plaintiffs brought a medical malpractice action against Sparrow Hospital, certain physicians, hospital staff members, and hospital officials which is the claim underlying the legal malpractice action in the instant case. Plaintiffs retained legal counsel who filed the initial complaint in the matter, but later changed counsel and retained defendant James Heos of defendant law firm Church, Kritselis & Wyble PC. The initial complaint filed by plaintiff's first attorney in early 1996 sounded entirely in medical malpractice and included a claim for wrongful resuscitation. After plaintiffs retained defendant attorneys, defendants filed an amended complaint in December 1998 adding counts to the original complaint including: intentional infliction of emotional distress, malicious prosecution, and tortious interference with plaintiff Gregory Messenger's ability to open a planned surgical center. The underlying case ultimately went to jury trial. Near the end of the jury trial, defendant attorneys abandoned the wrongful resuscitation claim and the question did not go to the jury. Ultimately, the jury trial resulted in a verdict of no cause of action in favor of the defendants.

Plaintiffs then commenced this suit against the instant defendants alleging legal malpractice, fraud, breach of express contract, and breach of fiduciary duty. Under the heading "Legal Malpractice," plaintiffs asserted that defendants: failed to adequately investigate the facts surrounding fraudulent concealment, wrongful prosecution, and tortious interference with a business expectancy; failed to timely secure and confirm expert witnesses and expert witness testimony; failed to keep plaintiffs reasonably informed about the status of the lawsuit; failed to consult with plaintiffs before limiting the scope of representation; failed to investigate a conspiracy theory; failed to properly defend against a statute of limitations motion; failed to properly defend against other motions; failed to call fact witnesses who were willing to travel to trial and using videotape depositions in their place; failed to support requested jury instructions with appropriate briefs and supporting case law; failed to adequately prepare for and secure additional testimony concerning standard of care issues; failed to properly pursue recusal of the circuit court judge; failed to, and improperly assessed expenses for participation of a dentist in defendants' pre-trial activity; and committed other acts of malpractice. Defendants moved for summary disposition on all counts in the complaint under both MCR 2.116(C)(8) and (10) arguing the application of the attorney judgment ruled barred plaintiff's claims as well as asserting plaintiffs' inability to prove the requisite causal connection between the asserted negligence and plaintiff's claimed injuries.

After entertaining oral arguments on defendants' motion for summary disposition, the trial court granted summary disposition on plaintiffs' complaint. The trial court reviewed the applicable legal malpractice standards and then dismissed plaintiff's legal malpractice claim with prejudice for failure to state a claim upon which relief can be granted under MCR 2.116(C)(8)

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<sup>2</sup> Plaintiff Gregory Messenger was subsequently tried and acquitted of manslaughter for the death of his son.

and because there was no genuine issue of material fact under MCR 2.116(C)(10) based on the application of the attorney judgment rule and its finding that plaintiffs had not satisfied the proximate cause element of legal malpractice. The trial court also dismissed the remaining counts in plaintiffs' complaint, but plaintiffs have not challenged those rulings on appeal.

This Court reviews a circuit court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Defendant filed its motion for summary disposition pursuant to both MCR 2.116(C)(8) and (10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone and may not be supported with documentary evidence. *Feyz v Mercy Memorial Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All factual allegations in support of the claim are accepted as true, and are construed in the light most favorable to the nonmoving party. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair, supra*. "A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party is entitled to judgment as a matter of law if the claim suffers a deficiency that cannot be overcome." *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997) (internal citations omitted).

On appeal, plaintiffs argue that the trial court committed reversible error by dismissing plaintiffs' legal malpractice claim pursuant to MCR 2.116(C)(8) based on the attorney judgment rule. Plaintiffs center their claim on the specific allegation that defendants advanced a theory of wrongful resuscitation consistently throughout the litigation and trial of the matter but defendants unexpectedly withdrew the theory of liability from the jury's consideration just before the end of trial. Further, plaintiffs allege that defendants failed to consult with plaintiffs—his clients—before taking such a drastic step. Plaintiffs assert that in doing so, defendants wrongfully compromised their cause of action without any specific authority. And, plaintiffs contend that this action was "not taken in good faith and honest belief that such actions were well founded in law[,]” and as such is not subject to the attorney judgment rule.

Defendants respond that summary disposition on plaintiffs' legal malpractice claim was appropriate because in choosing to forego pursuit of a wrongful resuscitation claim at trial on plaintiffs' behalf, defendants engaged in tactical conduct falling squarely within the attorney judgment rule. In their brief on appeal, defendants state that it was plaintiffs' initial retained attorney that had framed the matter as a cause of action for wrongful resuscitation. Defendants state in their brief on appeal that they did not believe that the wrongful resuscitation claim was viable at trial due to the fact that plaintiffs wanted the baby assessed for gestational age by the neonatologist, and plaintiff Gregory Messenger testified in particular that he wanted the infant assessed so that an informed choice could be made in conjunction with physicians regarding the best course of action for the baby. It is defendants' position that to conduct testing on the infant, the baby had to be living at the time the assessment was conducted. But then the testimony showed that plaintiff Gregory Messenger went to the neonatal intensive care unit and disconnected the baby from life support and as a result the baby died. Defendants argue specifically that, "[i]n light of Gregory Messenger, M.D.'s testimony that plaintiffs wanted the

baby assessed, no credible argument could be made that the Messengers did not want the baby to be kept alive for purposes of conducting the assessment. Thus, by virtue of Dr. Messenger's testimony, an already weak claim was rendered virtually impossible to credibly sustain in front of a jury." In support of this assertion, defendants point to this Court's ruling in *Taylor v Kurapati*, 236 Mich App 315; 600 NW2d 670 (1999), which abolished a cause of action for wrongful birth.<sup>3</sup> This case was decided in between the filing of either of the two complaints and the commencement of jury trial in fall 2002. Defendants believed that there was a significant overlap between the theories of wrongful birth and wrongful resuscitation and that *Taylor* dealt their case a "serious blow." In sum, defendants contend that they exercised their professional judgment to forego the claim for wrongful resuscitation because they believed it to be neither legally nor factually viable and a possible impediment for the remaining causes of action before the jury.

To establish a claim of legal malpractice, a plaintiff must show: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff-client; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). To establish causation, a legal malpractice plaintiff must show that, but for the attorney's alleged malpractice, she would have been successful in the underlying suit. *Id.* at 586. "In other words, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding." *Id.* (internal quotations and citations omitted). The plaintiff must prove cause in fact by reasonable inference and not just by mere speculation and impermissible conjecture. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 615, 563 NW2d 693 (1997).

In this issue, we must determine whether defendants breached their duty to plaintiffs when they abandoned the wrongful resuscitation claim near the close of the jury trial. In *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002), this Court explained the attorney judgment rule:

An attorney has an implied duty to exercise reasonable skill, care, discretion, and judgment in representing a client. *Simko v Blake*, 448 Mich 648, 655-656; 532 NW2d 842 (1995). Further, an attorney is obligated to act as an attorney of ordinary learning, judgment, or skill would under the same circumstances. *Id.* at 656. However, an attorney is not a guarantor of the most favorable possible outcome, nor must an attorney exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. *Id.* Further, "where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of [the] client, [the attorney] is not answerable for mere errors in judgment." *Id.*

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<sup>3</sup> The Legislature has since abolished claims for wrongful birth, wrongful life, and wrongful conception, except in cases involving an intentional or grossly negligent act or omission. MCL 600.2971. Though not mentioned by counsel, the general effective date for the legislation was March 28, 2001.

The “attorney judgment rule” recognizes that decisions made involving trial tactics or litigation strategy may avoid the issue of legal liability. An attorney is responsible for fashioning a strategy or representation that is consistent with the law, but, again, does not have to insure the most favorable possible outcome for his clients. *Simko, supra* at 655-658. Accordingly, while a gross error in judgment may be actionable, a mere error in judgment made in good faith is not. *Mitchell, supra* at 679. Therefore, where a plaintiff’s allegations cannot support a breach of duty because they are based on mere errors of professional judgment and not breaches of reasonable care, summary disposition is appropriate. *Simko, supra* at 659.

The record shows that defendant attorneys chose to pursue the wrongful resuscitation claim in trial before the jury and indeed presented testimony on the issue. However, after all the testimony, near the close of trial defendant attorneys chose to withdraw the wrongful resuscitation claim from the jury’s consideration. Significant to the case was the alleged violation by hospital staff of the do not resuscitate order that plaintiffs had executed in regard to the infant child. But at trial, plaintiff Gregory Messenger testified that he had made an agreement with the neonatologist, that “we wouldn’t want any resuscitation done if the baby was 25 weeks. But we wanted everything done if the baby wasn’t 25 weeks.” Plaintiff Gregory Messenger further testified that he understood, after the consult with the neonatologist, that hospital staff “would assess the baby for dates. And if the baby was 25 weeks, there would be no resuscitation.” It does not appear from the record that plaintiffs placed a specified time constraint on the performance of the infant’s assessment. In light of this testimony that plaintiffs wanted the baby assessed for gestational age in order to make a determination on resuscitation, defendant attorneys believed that they could not credibly argue that plaintiffs did not want the infant to be kept alive for purposes of conducting the assessment.

Defendants believed there were major obstacles in continuing to pursue the wrongful resuscitation theory including plaintiff Gregory Messenger’s testimony regarding the assessment of the infant and the holding of *Taylor, supra*. With these serious considerations in mind, especially considering the fact that there were multiple causes of action remaining to bring to the jury, we consider defendants choice to abandon the wrongful resuscitation claim a strategic decision to refocus the case on those claims on which defendant attorneys believed they could prevail. In other words, it appears that defendants were exercising discretion and professional judgment in good faith to excise an issue from the jury’s consideration that it felt was both legally and factually implausible and in fact a detriment to the case as a whole. For these reasons, after reviewing the record, we agree with the trial court that the alleged acts of malpractice fall within the “attorney judgment rule” set forth in *Simko, supra*, and *Mitchell, supra*, and do not constitute a breach of reasonable care.

In light of our conclusion regarding the duty element of plaintiff’s legal malpractice claim, we need not determine whether the trial court committed reversible error by dismissing plaintiff’s legal malpractice claim based on a finding that plaintiffs had not met their burden of satisfying the proximate cause element of a legal malpractice claim. But we will address it briefly. In regard to causation, the trial court found that, “the affidavits and complaint [were] not sufficient to satisfy the proximate cause element and requirement of legal malpractice, which in this case is the suit within a suit requirement.” Again, to establish causation, a legal malpractice plaintiff must show that, but for the attorney’s alleged malpractice, she would have been successful in the underlying suit. *Charles Reinhart Co, supra* at 586. “In other words, the client

seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding.” *Id.* (internal quotations and citations omitted). After reviewing the record, we agree with the trial court because plaintiffs have made no showing sufficient to meet their burden to establish causation, i.e. prove that they would have prevailed in the underlying suit but for defendants’ alleged malpractice.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio