

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA KAUER

Plaintiff-Appellant,

v

BEVERLY CLARK and BEVERLY CLARK, P.C.,

Defendants-Appellees.

UNPUBLISHED

July 9, 1996

No. 175138

LC No. 92-226322-NM

Before: Bandstra, P.J., and Markman and M. D. Schwartz,* JJ.

PER CURIAM.

Plaintiff appeals by right trial court orders granting defendants' motion for summary disposition and denying plaintiff's motion for reconsideration. We affirm.

Plaintiff retained defendants¹ to represent her in a divorce action. The marriage at issue was of long duration and involved substantial assets. After the divorce trial started, plaintiff entered into a settlement agreement with her estranged husband. This agreement was the basis of a divorce judgment. Plaintiff thereafter filed the present legal malpractice action in which she contends that defendants' malpractice resulted in plaintiff's acceptance of an inadequate and improper property settlement not representative of her interest in the marital estate.

Defendants filed a motion for summary disposition. They relied in large part on plaintiff's own testimony regarding her reasons for accepting the settlement agreement. In her deposition, plaintiff testified regarding the settlement agreement:

[Defendant] told me my risk factors were very, very strong in not getting this much, that I was risking the \$300,000 deal on the partnerships, to know what the judge would do. There were all these experts he had in, all kinds of stuff. I was scared out of my mind, man, that I was going to end up with a lot less than this.

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

The trial court granted defendants' summary disposition motion on the basis that plaintiff failed to raise a genuine factual issue regarding proximate cause. It denied plaintiff's motion for reconsideration.

On appeal, plaintiff raises several issues. She claims that defendant was negligent in failing to obtain temporary alimony; in not pursuing the issue of fault in the context of evidence of infidelity; and in giving advice regarding the division of the marital property that was not well founded in law. She claims that this negligence proximately caused plaintiff's acceptance of the settlement. Defendants challenge these claims of negligence. Defendants also argue that plaintiff is bound by her own testimony regarding her reasons for accepting the settlement agreement.

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

This Court reviews decisions on motions for reconsideration for an abuse of discretion. *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609-610; 450 NW2d 6 (1989).

In *Radtke v Miller, Canfield, Paddock & Stone*, 209 Mich App 606, 612; 532 NW2d 547 (1995), this Court set out the elements of a legal malpractice claim:

A claim of legal malpractice is grounded in professional negligence. A plaintiff in a legal malpractice action has the burden of proving the following: (1) the existence of an attorney-client relationship, (2) the acts that are alleged to have constituted the negligence, (3) that the negligence was the proximate cause of the alleged injury, and (4) the fact and extent of the alleged injury.

The *Radtke* Court stated, at 621:

Further, to establish legal malpractice, plaintiff must show proximate causation by demonstrating that, but for his attorney's alleged mistake in the underlying action, the result would have been more favorable. This showing involves a case-within-a-case analysis.

In *Espinoza v Thomas*, 189 Mich App 110, 123; 472 NW2d 16 (1991), this Court held:

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.

The alleged legal malpractice consisted of failing to bring an action within the statute of limitations. The *Espinoza* Court reversed a grant of summary disposition to the defendant on the basis that the plaintiff had provided sufficient evidence to raise a genuine factual issue regarding whether a low mediation award and the plaintiff's acceptance thereof resulted from the defendant's malpractice.

In *Lowman v Karp*, 190 Mich App 448; 476 NW2d 428 (1991), this Court reversed a grant of summary disposition to a legal malpractice defendant. The *Lowman* Court held that the plaintiff's settlement of the underlying suit was not an absolute bar to a subsequent legal malpractice action. *Id.* at 452-453. The court found that the plaintiff was "put in a position where settlement was her only reasonable choice despite her own reservations about the settlement" because defendant flatly refused to try the case when informed that the plaintiff did not want to settle. *Id.* at 453.

The present case is distinguishable from both *Espinoza* and *Lowman*. Here, plaintiff specifically stated in her deposition that she accepted the settlement agreement in order to avoid facing the risks and uncertainties of proceeding with trial. While plaintiff testified that she did not believe that defendant "had her heart in it," she acknowledged that defendant never refused to proceed with the trial or indicated that she was not prepared to do so. She further conceded that nobody, including defendant, could predict with certainty what the judge would decide. A party is bound by their own deposition testimony; a contradictory affidavit is insufficient to raise a genuine issue of fact. *Barlow v Crane-Houdaille, Inc.*, 191 Mich App 244, 250-251; 477 NW2d 133 (1991). Here, plaintiff's claims that her acceptance of an inadequate settlement agreement resulted from defendant's failure to pursue temporary alimony, failure to pursue the issue of fault and improper advice regarding property division are contrary to her own deposition testimony. Her deposition testimony that she accepted the settlement agreement to avoid the risks and uncertainties of trial belies any claim that she was "compelled" to accept the settlement agreement by any malpractice of defendant. See *Espinoza, supra* at 123. Therefore, the trial court appropriately found such claims insufficient to raise a genuine factual issue regarding proximate cause.

Plaintiff's claim that defendant's improper advice regarding the division of marital property resulted in her acceptance of an inadequate settlement agreement might have been colorable if she had testified that such advice caused her to improperly estimate the risks and uncertainties of trial. But plaintiff did not so testify. Her claim that defendant's advice *caused* her to accept an inadequate settlement agreement is contrary to her deposition testimony that no one could predict with certainty what the judge would decide. The advice about which plaintiff complains was defendant's advice that the judge might not award her an interest in certain partnerships. This advice that the judge was unlikely to order plaintiff and her husband into a partnership while dissolving their marital relationship (as opposed to awarding plaintiff an equitable share of the value of these interests) was well founded in law. See *Steckley v Steckley*, 185 Mich App 19, 22-24; 460 NW2d 255 (1990); *Kurtz v Kurtz*, 34 Mich

App 34, 36; 190 NW2d 689 (1971). “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 his client, he is not answerable for mere errors in judgment.” *Simko v Blake*, 448 Mich 648, 658; 532 NW2d 842 (1995). Accordingly, the trial court appropriately held that this claim would not amount to a breach of the standard of care that could have been a proximate cause of injury.

For these reasons, we find that the trial court properly granted defendants’ motion for summary disposition and accordingly did not abuse its discretion in denying plaintiff’s motion for reconsideration.

Affirmed.

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

/s/ Michael D. Schwartz

¹ Throughout this opinion, we will use defendant in the singular to refer to the individual attorney as opposed to her professional corporation.