

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

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CENTRA, INC.,

Plaintiff–Appellant,

v

JAFFE, RAITT, HEUER & WEISS, P.C.,

Defendant–Appellee.

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UNPUBLISHED  
September 6, 1996

No. 181803  
LC No. 93-327681-NZ

Before: Hood, P.J., and Griffin and J.F. Foley\*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court’s order granting summary disposition in favor of defendant law firm. Plaintiff also challenges the protective order entered by the circuit court prohibiting the disclosure, dissemination or use by plaintiff of certain of defendant’s billing records. Finally, plaintiff appeals as of right the circuit court’s order denying its motion for leave to file an amended complaint. We affirm in part, reverse in part, and remand.

This suit against defendant law firm arises from a dispute involving control of plaintiff CenTra, Inc. In 1986, plaintiff’s stock was held by Tuffick J. Moroun and his four children, son, M.J. Moroun (“M.J.”), and daughters, Agnes Ann Moroun (“Anne”), Florence M. McBrien and Victoria M. Baks (“the sisters”). Although Tuffick and the sisters controlled a majority of the corporation’s voting stock, M.J. managed CenTra’s daily operations. In 1991, Tuffick and the sisters, acting as a quorum, adopted a resolution authorizing the formation of a review committee to investigate M.J.’s business practices. In 1992, the sisters, with defendant as counsel, filed suit in Oakland Circuit Court in their names and in the name of CenTra, Inc., against M.J. By mandamus, the complaint sought to enforce payment of a dividend declared by CenTra’s board of directors. In addition, the complaint set forth claims which included breach of fiduciary duties and usurpation of corporate assets.<sup>1</sup> While the Oakland County case was pending, Truffick died, Anne changed sides in the dispute, and M.J. gained

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

control of CenTra. In 1993, plaintiff filed this action in Wayne Circuit Court alleging that defendant breached duties which it owed to the corporation by virtue of the firm's representation of CenTra in the Oakland County case.

Defendant ultimately moved for, and the trial court granted, summary disposition in favor of defendant. The trial court characterized the Oakland County case as a shareholder derivative action brought by the sisters on behalf of the corporation. The court held that defendant owed no duty to CenTra because the firm represented the sisters, not the corporation, in that dispute.

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant and dismissing the case on the basis that defendant owed no duty to plaintiff. We agree. We review the trial court's grant of summary disposition de novo to determine if a defendant was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Township*, 209 Mich App 484, 486; 532 NW2d 183 (1995). MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim, and permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact . . ." *Johnson v Wayne County*, 213 Mich App 143, 149; 540 NW2d 66 (1995). All pleadings, affidavits, depositions, admissions, and any other documentary evidence are considered in favor of the opposing party. *Id.*

Implicit in the concept of a shareholder derivative suit is the notion that the action is undertaken without the corporation's approval or consent. See e.g. *Kamen v Kemper Financial Services, Inc.*, 500 US 90; 111 S Ct 1711; 114 L Ed 2d 152, 163-164 (1991); Delaware Chancery Rule 23.1; MCL 450.1493a; MSA 21.200(493). Here, we find that an issue of fact exists with respect to whether the Oakland County suit was initiated by the sisters as a derivative action on behalf of the corporation. The evidence submitted by the parties in the instant case suggests that the corporation itself was actively involved in the retention of defendant as counsel and the institution of legal proceedings in Oakland County. During the year preceding commencement of the Oakland County case, several meetings of CenTra's board of directors were held. Principals and employees of defendant law firm attended these meetings at the invitation of the board of directors. At one such meeting, Tuffick and the sisters declared a resolution authorizing the formation of a review committee. Defendant was retained to serve as counsel for that committee. Although these actions were ostensibly undertaken by the sisters, they did so acting in their capacity as a quorum of the board of directors. In fact, in response to plaintiff's interrogatories, defendant admitted that it was retained by the corporation as opposed to the sisters individually. After claiming that it never represented plaintiff in the "traditional sense," defendant stated:

[A]t the direction of CenTra's board of directors and its authorized committee, JRH&W was retained in the limited capacity to investigate and seek redress for certain breaches of fiduciary duty perpetrated on CenTra by M.J. Moroun, R.W. Lech and N. Harned. Pursuant to this retention and at the direction of CenTra's Board of Directors and its authorized committee, JRH&W caused a complaint to be filed in the Oakland County Circuit Court.

It, thus, appears as if the retention of defendant as counsel and the initiation of the legal proceedings in Oakland County were actions undertaken by the corporation, not the sisters.

Further indication that the corporation acted as an entity separate and distinct from the sisters comes from a dispute which occurred in the Oakland County case between defendant and the law firm of Dykema Gossett. In responding to a special appearance filed by Dykema Gossett on behalf of CenTra, defendant drew a distinction between the sisters and the corporation. In its response, defendant objected to Dykema's attempt to intervene. Defendant alleged that the Oakland County case was filed with the approval of CenTra's board of directors and that the interests of the corporation were "aligned with and not adverse to those of the sisters." Moreover, defendant alleged that CenTra had "standing to enforce its own rights," regardless of any damages which the sisters may have suffered individually.<sup>2</sup> There was also evidence in the lower court record, in the form of letters, indicating that defendant held itself out to be a representative of the corporate entity.<sup>3</sup>

Even if defendant was not actually serving as counsel for CenTra, the firm may nevertheless have entered into a fiduciary relationship with the corporation. The existence of an attorney-client relationship merely establishes a per se rule that the attorney owes fiduciary duties to the client. *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 514-515; 309 NW2d 645 (1981). Fiduciary duties may still arise, even absent such a relationship, where one reposes faith, confidence and trust in the judgment and advice of another. *Id.* at 515. Here, there is evidence indicating that the sisters, acting in their capacity as a quorum of the board of directors, solicited information from Ira Jaffe during a board meeting. Moreover, the record contains a letter addressed to CenTra's board of directors in which defendant offered legal advice regarding the board's declaration of a dividend at the June 22, 1992, meeting. In light of the evidence submitted by the parties, we conclude that a genuine issue of material fact exists regarding whether defendant owed a duty to CenTra. Accordingly, the trial court erred in granting summary disposition in favor of defendant.<sup>4</sup>

Plaintiff further argues that the trial court erred in entering a protective order prohibiting the disclosure, dissemination or use by plaintiff of certain of defendant's billing records. We agree. Communications by one or more clients made to their attorney regarding the subject of the joint representation are entitled to protection against disclosure, and this privilege cannot be waived without the consent of all of the joint clients. See generally 81 Am Jur 2d ¶ 383, pp 349-350. This rule, however, simply means that the attorney cannot be compelled to give testimony in relation to privileged communications without the unanimous consent of the joint clients. *Id.* Here, plaintiff obtained a copy of the billing records from Anne, not defendant. Anne owed no fiduciary duty to her sisters. Under these circumstances, we find that Anne had a right to release the information. We therefore conclude that the trial court erred in ruling that the consent of all three sisters was necessary to effectuate a waiver of the privilege.

Plaintiff also claims that the trial court abused its discretion in denying its motion for leave to amend the complaint. We disagree. Leave to amend a complaint should be freely given when justice so requires, and denied only for particularized reasons, such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiency by amendments previously allowed, undue prejudice to the opposing

party, or futility. MCR 2.118(A)(2); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). Absent an abuse of discretion that results in injustice, this Court will not reverse a trial court's decision on a motion to amend a complaint. *Price v Long Realty, Inc*, 199 Mich App 461, 469; 502 NW2d 337 (1993). Here, although the amended complaint details defendant's pre-suit conduct with far greater specificity than the original complaint, both pleadings essentially set forth the same claims. Because the amended complaint added nothing new to the case, allowing such an amendment would have been futile. See *Dukeherer Farms, Inc v Director of the Dep't of Agriculture*, 172 Mich App 524, 530; 432 NW2d 721 (1989).

Defendant argues that alternative grounds exist which support the trial court's decision to dismiss plaintiff's complaint. First, defendant argues that plaintiff failed to state a claim for malicious prosecution. We agree. MCR 2.116(C)(8) permits summary disposition when the "opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8) determines whether the opposing party's pleadings allege a prima facie case. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). In order to state a prima facie case of malicious prosecution, the plaintiff must prove: (1) prior proceedings terminated in favor of the present plaintiff; (2) Absence of probable cause for those proceedings; (3) Malice, defined as a purpose other than that of securing the proper adjudication of the claim; and (4) A special injury that flows directly from the prior proceedings. *Payton v Detroit*, 211 Mich App 375, 394-395; 536 NW2d 233 (1995).

In this case, plaintiff's malicious prosecution claim was based on defendant's alleged misrepresentation of CenTra in the Oakland County case. At the time plaintiff filed its complaint in this case, the Oakland County matter was still pending. Because the tort of malicious prosecution requires that the prior proceeding be terminated in favor of the person who was prosecuted, plaintiff failed to state a claim as a matter of law. Even if the Oakland County matter had been terminated, it could not have resulted in a judgment in CenTra's favor. Pursuant to the stipulation entered into by the parties in Oakland County, CenTra was made a nominal party for both sides in that proceeding.

We also find that Count IX of plaintiff's complaint was properly dismissed. Plaintiff has cited no authority establishing that intentional interference with stockholder and director relationships is cognizable in Michigan. This Court will not reverse the decision by the trial court where the right result is reached, but for the wrong reason. *Wayne County v Britton Trust*, 211 Mich App 688, 692; 536 NW2d 598 (1995).

We, however, find no merit in defendant's contention that Count V of plaintiff's complaint (knowing violation of the Michigan Rules of Professional Conduct) failed to state a legally cognizable claim. It is true that failure to comply with an obligation or prohibition imposed by the Code does not give rise to a cause of action for enforcement of a rule or damages incurred as a result of such noncompliance. MRPC 1.0(b). A violation of the MRPC, however, does constitute rebuttable evidence of legal malpractice. *Hooper v Hill Lewis*, 191 Mich App 312, 316; 477 NW2d 114 (1991). Because the essence of plaintiff's claim is that defendant breached duties which it owed to the corporation, summary disposition as to Count V was not appropriate.

Counts VII and VIII of plaintiff's complaint pertain to actions allegedly taken by defendant in connection with administrative hearings held before the Nebraska Department of Insurance. Although corporate espionage and intentional interference with corporate opportunities and advantages are not cognizable torts, the allegations contained in plaintiff's complaint may state a valid claim for tortious interference with business relationships. See e.g. *Lakeshore Community Hospital, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). Moreover, pursuant to MCR 2.116(C)(10), viewing the evidence in the light most favorable to the non-moving party, we find that a genuine issue of fact exists with regard to defendant's involvement in the Nebraska proceedings. Finally, there is no merit to defendant's contention that Counts VII and VIII are barred by the doctrines of res judicata and collateral estoppel. There is nothing in the record which would suggest that issues related to the Nebraska proceeding were actually and necessarily litigated in prior proceedings. See *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). Accordingly, the trial court erred in dismissing Counts VII and VIII.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Richard Allen Griffin

/s/ John F. Foley

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<sup>1</sup> M.J. filed a counter-complaint against the sisters and CenTra, Inc., alleging that the sisters, with the assistance of defendant law firm, had engaged in an "illegal scheme" to extort a buy-out of their interest in the corporation.

<sup>2</sup> Defendant's response to Dykema's special appearance suggests that CenTra, as represented by defendant, was more than a nominal party in the Oakland County case.

<sup>3</sup> For example, on September 28, 1992, defendant sent a letter to Kemp, Klein, Umphrey & Endelman, a Michigan law firm, stating "This firm represents CenTra in limited actions which have been specifically authorized by the Board of Directors."

<sup>4</sup> Defendant argues that this Court should look beyond the corporate form and, like the trial court, view this case as an action instituted by M.J. individually. We, however, find no circumstances which would justify piercing CenTra's corporate veil. M.J. is not relying on the corporate form to defraud a creditor or avoid a legal obligation. In addition, defendant's reliance on *Berger v Reynolds Metal Co*, 39 FRD 313 (ED Pa, 1966) and *Burg v Horn*, 37 FRD 562 (ED NY, 1965) is misplaced. Neither case addressed the issue of whether a corporation's status as a party should be ignored where a derivative action is brought by a shareholder of a closely held corporation.