STATE OF MICHIGAN

COURT OF APPEALS

JOHN BARBER,

Plaintiff-Appellant,

and

DENNIS BARBER, d/b/a/ BARBER FARMS, and HAROLD BARBER,

Plaintiffs,

v

WILLIAM J. DRILLOCK and LAW OFFICES OF WILLIAM J. DRILLOCK,

Defendant-Appellees.

UNPUBLISHED
February 7, 1997

No. 179974
Huron Circuit Court
LC No. 93-8404-NM

Before: Reilly, P.J., and White, and P.D. Schaefer,* JJ.

PER CURIAM.

Plaintiff John Barber[1] appeals as of right a circuit court order granting defendant's motion for summary disposition and awarding defendants sanctions in this legal malpractice action. We affirm.

The underlying action in this case, Sanilac County Circuit Court file no. 88-17096-NP, filed in June 1988, was brought by plaintiffs against Keys Refrigeration, Inc., (Keys) DeLaval Agricultural Division of Alfa-Laval (DeLaval), and Peter Kavanagh. Plaintiffs alleged that a milking system purchased from Keys, and manufactured or distributed by DeLaval caused mastitis in plaintiffs' cows. Keys was a duly authorized dealer for DeLaval Products. Kavanagh was the president of Keys. According to the complaint, the system was originally installed in 1977, and was extended in February, 1981. Plaintiffs alleged that the system as originally installed and as extended was not installed properly, that in the spring of 1986, the herd began experiencing high somatic cell counts and mastitis, and in June,

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

1986, a veterinarian discovered the problems with the milkline of the system. Plaintiffs alleged that the defendants breached the "express warranties and implied warranties of merchantibility and implied warranties of fitness for a particular purpose." Plaintiffs further alleged, in Count II, that Keys and DeLaval "negligently designed, laid out and installed the milking system . . . ." Following a motion for summary disposition by the defense, the case was dismissed as barred by the statute of limitations. The court found the four-year "U.C.C. statute of limitations" applicable. Plaintiffs did not appeal the dismissal.

In the present action, Huron County Circuit Court file no. 93-008404, the complaint alleged that plaintiffs were represented by defendants, Drillock and his firm, in the lawsuit involving the milking system. Plaintiffs alleged professional negligence that

> "consisted of but is not limited to: failing to file the action of John Barber and Dennis Barber, d/b/a Barber Farms and Harold Barber v Keys Refrigeration, Inc.; DeLaval Agricultural Division of Alfa-Laval, Inc. a Missouri Corporation, and Peter Kavanagh, Jointly and Severally, Sanilac County Circuit Court File No. 88-17096-NP, within the statute of limitations, which action was subsequently dismissed as being not filed within the statute of limitation period.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) and for sanctions pursuant to MCR 2.625 and 2.114. According to defendants, plaintiffs' depositions indicated that they first went to see attorney Drillock in August, 1986, which was five and a half years after the last installation occurred and eighteen months after the four-year statute of limitations had expired. Defendants asserted that the action was frivolous, that the action was signed in violation of MCR 2.114, and that the allegations in paragraph six of plaintiffs' complaint were false. (This paragraph alleged that consultation between Drillock and plaintiffs occurred "within four years of the date of the last installation.")

Plaintiffs filed a response asserting that when plaintiffs hired defendants to represent them, they had "a viable claim for improper installation and fraud against [Keys]", because the U.C.C. did not apply to these claims. In addition to legal authority, plaintiffs attached an affidavit of a veterinarian stating that in his opinion the milking system was not properly installed.[2]

At oral argument, defense counsel first explained that improper installation was subject to the four-year statute of limitations, and that res judicata precluded plaintiffs from litigating that issue again. With respect to the fraud or misrepresentation, defense counsel argued that the complaint against Drillock did not allege that he missed a fraud and misrepresentation claim.

The court concluded that Drillock could not be held liable for failing to file a lawsuit that was untimely when plaintiffs first consulted Drillock. The court also agreed with defense counsel that plaintiffs' contention that Drillock failed to bring a fraud claim was not alleged in the complaint and was "a red herring" raised to salvage the case from summary disposition. The court granted sanctions on the basis of the untrue statement in paragraph six of the complaint.

We agree with the trial court that defendants were entitled to summary disposition. The complaint against defendants alleged that the negligence consisted of failing to timely file "Sanilac County Circuit Court File No. 88-17096-NP." On appeal, plaintiff does not challenge the trial court's determination that the improper installation and warranty claims asserted in No. 88 17096-NP were already barred by the statute of limitations when plaintiffs consulted with Drillock. Rather, plaintiff contends that there are genuine issues of material fact regarding what types of claims were viable in 1986 and should have been pursued by Drillock. Although plaintiffs attempted to avoid summary disposition by asserting that a fraud claim could have been asserted against Keys, the complaint against defendants did not allege negligence on this basis. The types of claims that could have been brought are not material to the allegation in the complaint against Drillock and his firm that the complaint in the underlying action was not timely. Because there was no genuine issue of material fact concerning the legal malpractice as alleged in the complaint, the court properly granted defendants' motion for summary disposition.[3]

Plaintiff also argues that the trial court erroneously granted sanctions pursuant to MCR 2.625 and MCR 2.114. The trial court's reasons for granting sanctions are as follows:

> In addition the question of sanctions, I think that there's a legitimate claim for sanctions in this case because the plaintiff has – as pointed out by the defendant, has stated that the – where is that, is that paragraph – which paragraph is it, Mr. Rinn [defense counsel], where the time of contact was asserted, Paragraph Number 6?
>
> MR. RINN: Paragraph Number 6 in the complaint.
>
> THE COURT: Within four years from the date of the last installation, plaintiffs entered the law offices of the defendants. That is clearly an untrue statement by everyone, everyone agrees with that. The plaintiffs entered the law offices of the defendant five and a half years after the last installation, everyone agrees with that, even the – even the plaintiff can't – isn't asserting otherwise.
>
> And that's basically what the basis of this case was, that the defendant had an opportunity to file this lawsuit within the statute of limitations because it had not run. And the truth of the matter was, and the plaintiff—plaintiff's counsel would have to be charged with notice of the fact that that was not true, and that's the whole basis for this lawsuit. For that reason I will grant the sanctions.

The court's comments suggest that the court was relying on a violation of MCR 2.114(D)(2) as the basis for imposing sanctions under MCR 2.114(E). Plaintiff contends that his attorney had a reasonable basis for believing that the statement was true because, in his deposition, plaintiff used the word "installation" in reference to changes to the milk system made in 1984-5 and 1986. Thus, plaintiff argues, "At the time of the pleadings, it was not at all clear what the date of the final 'installation' was for the purposes of the milking system lawsuit." This argument does not persuade us that the trial court's findings were clearly erroneous. When it dismissed the underlying action, the court determined

that the claims arose from the original installation in 1977 and subsequent extension in 1981. Plaintiff has not asserted that there were later "installation[s]" to the milking system that were relevant to the allegations against Keys, DeLaval, and Kavanagh. At most, plaintiff's argument shows that his attorney failed to make a reasonable inquiry about the date of the last installation that was pertinent to the allegations in the complaint. We are not left with a definite and firm conviction that the trial court made a mistake in finding that the complaint was signed in violation of MCR 2.114. *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990).

Finally, plaintiff argues that defendant "Law Offices of William J. Drillock" is not entitled to attorney fees for work performed by Mr. Rinn while he was a member of the Drillock firm. At issue is $2,377.95 (calculated at the rate of $85 per hour) of the bill submitted by Rinn for time spent on the case while he was employed by the Drillock firm. Plaintiff contends that no fees were paid by the firm for Rinn's services on this case while he was an employee, and therefore, plaintiff and his attorney should not be required to pay $2,377.95 as a sanction. We disagree. Under MCR 2.114(E), the court was required to impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." Rinn could have been working on other files had he not been working on the case against the law firm. Regardless of whether the expense of Rinn's services while he was an employee should be treated as attorney fees, the cost of his service was an expense to the law firm, which the court could consider when determining the amount of the sanction.

We have considered the argument made by defendants with respect to sanctions under MCR 7.216(C), and we are not persuaded that this case warrants the sanctions requested.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Philip D. Schaefer

[1] The judgment from which John Barber appeals dismissed Dennis Barber and Barber Farms from the action and stated that John Barber was "the only proper party Plaintiff as to the action." The propriety of the dismissal of Dennis Barber and Barber Farms is not challenged on appeal. Before the judgment was entered, plaintiff Harold Barber assigned his rights to John Barber. "Plaintiff" in the singular form will refer to John Barber, and in the plural, will refer to John Barber, Dennis Barber, Harold Barber and Barber Farms.

[2] Plaintiffs also attached an affidavit of John Barber that addressed an argument made by defendants in a separate motion for summary disposition that suit was not properly brought in the name of the Barber Farms partnership because a certificate of partnership had not been filed. This affidavit does not concern the matters that are at issue in this appeal, and therefore, we will not discuss it further.

[3] In the discussion of this issue, plaintiff asserts that the court should have allowed the complaint to have been amended. This issue is not identified as an issue in the statement of questions presented, and therefore, is not properly presented for review. MCR 7.212(C)(5); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Furthermore, the evidence that plaintiff contends would have supported a fraud claim suggests that Kavanagh, representing Keys, failed to recognize the source of the problem when he examined the milking system. There is no indication that Kavanagh recognized the problem and fraudulently concealed it. Therefore, the amendment of the complaint against Drillock to allege that he should have asserted a fraud claim against Keys would have been futile.