# STATE OF MICHIGAN

# COURT OF APPEALS

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FABIAN ANDRIACCHI,

Plaintiff, Counter-Defendant, Appellant,

v

ANDREW H. WISTI and WISTI & JAASKELAINEN, P.C.,

Defendants, Counter-Plaintiffs, Appellees.

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UNPUBLISHED
November 25, 1997

No. 198237
Marquette Circuit Court
LC No. 91-025895-NM

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Plaintiff, a mineworker, appeals by right from an order disposing of all claims between the parties and, by implication, refusing to revise an earlier order granting summary disposition for defendants pursuant to MCR 2.116(C)(10) with regard to plaintiff's claims. Plaintiff brought a legal malpractice action against defendants as a result of their representation of him in a personal injury case between 1982 and 1990; plaintiff alleged that defendants had breached professional duties owed to him in that they failed to identify and sue all potentially negligent parties before the applicable limitations period had expired. We affirm.

Plaintiff's underlying personal injury complaint alleged that he sustained injuries when, as he tried to straighten up inside a three foot square entryway at his workplace, he struck his head against the edge thereof. Specifically, plaintiff's underlying claim alleged, inter alia, negligent design and/or construction of the entryway, and was supported by the affidavit of plaintiff's expert asserting that the entryway had been constructed in violation of applicable building codes and/or regulations.

I

Plaintiff contends that his expert's unrebutted affidavit was sufficient to raise a question of fact regarding the existence of a building code that an unknown defendant may have violated in designing and/or constructing the entryway, and that it was therefore error for the trial court to prematurely resolve this issue. We disagree. We note that the affidavit does not specify which building codes and/or regulations were violated, and that plaintiff failed to produce such specifics in over eight months

between the motion hearing and the trial court's decision, despite the trial court's direct request.[1] As a result, the affidavit was an averment of opinion without a basis in fact, and was therefore violative of MCR 2.119(B)(1), did not satisfy MCR 2.116(G), and could not have precluded summary disposition of that issue. See *SSC Associates Limited Partnership v Gen'l Retirement System of the City of Detroit*, 192 Mich App 360, 364-366; 480 NW2d 275 (1991).[2]

II

Turning to the remainder of plaintiff's appeal, we initially note our agreement with plaintiff that the case of *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 384-385; 491 NW2d 208 (1992), which was directed toward a failure to warn theory of liability, was inapposite to plaintiff's claims of negligent design and/or construction of the entryway. However, we will not reverse a lower court if the right result is reached for the wrong reason. *Welch v Dist Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996). With regard to negligent design and/or construction, the applicable test is simply "whether the risks were unreasonable in light of the foreseeable injuries." *Owens v Allis-Chalmers Corp*, 414 Mich 413, 425; 326 NW2d 372 (1982). Here, we find that there was simply no risk at all inherent in the use of the 3' x 3' entryway. Although one who uses such a small entryway faces the possibility that he may bump his head on it, such "risk" is not inherent to the entryway, but rather in the inattentiveness of the user.[3] Further, even assuming arguendo that a risk was presented, plaintiff has not adduced evidence to show the risk was "unreasonable" in the sense that a practicable "alternative design" would have presented a lesser risk. *Id.* at 429.

We further note and reject plaintiff's argument that the decision of our Supreme Court in *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), dictates a different result. The Court in *Bertrand* explicitly noted that it was addressing *premises liability* cases regarding the scope of a *property owner's duty to business invitees*. *Id*. at 609. As noted by the trial court, plaintiff was not an invitee, nor was any potential third party defendant a property owner.[4]

We affirm.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Richard A. Bandstra

[1] We find plaintiff's implication on appeal that discovery regarding this detail was incomplete to be without merit. Plaintiff never indicated to the trial court that he needed additional time to offer such codes or regulations, but simply failed to produce them.

[2] We also disagree with plaintiff that the trial court improperly presumed as a matter of law that plaintiff would necessarily have had to prove a building code violation in order to have recovered in his underlying injury action. Rather, the record reveals that the trial court so concluded solely with regard to plaintiff's theory of negligent design and/or construction *given the instant circumstances* (i.e., the lack of risk inherent in use of the entryway).

[3] Plaintiff himself admits that he knew of the entryway's dimensions and that it was "awkward" to use.

[4] We also note that plaintiff's invocation of a 1995 case such as *Bertrand* adds nothing to the analysis of defendants' alleged professional negligence in this legal malpractice case because defendants could not have been charged with the knowledge of it at the time they represented plaintiff from 1982 to 1990.