

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE COPELAND,

Plaintiff-Appellant/Cross-Appellee,

v

DAVID RICHARDS and VANDERWAL,
SPRATTO & RICHARDS, PC,

Defendants-Appellees/Cross-
Appellants,

and

KRISTINE SCHIMKE, DAVID SCHIMKE, and
BAUER HOUSE, LLC,

Defendants.

Before: REDFORD, P.J., and MARKEY and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court’s order granting summary disposition in favor of defendants/cross-appellants David Richards (Richards) and Vanderwal, Spratto & Richards, PC (VSR) (collectively, defendants¹) under MCR 2.116(C)(10) (no genuine issue of material fact). Defendants cross-appeal, arguing that the trial court erred when it found that plaintiff was not required, in this accounting malpractice action, to present expert testimony to establish the standard

¹ Defendants Kristine and David Schimke and Bauer House, LLC, are not parties to this appeal. We therefore will refer to Richards and VSR collectively as “defendants.”

of care required of an accountant, and in denying defendants' motion for summary disposition under MCR 2.116(C)(7) (statute of limitations). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff formerly owned and operated an adult foster care home called "Bauer House AFC"² on property that she was in the process of purchasing under a land contract. During the time plaintiff operated the home, her daughter, defendant Kristine Schimke (Kristine), and Kristine's husband, defendant David Schimke (David), resided there with her; Kristine assisted plaintiff in operating the business and David performed maintenance and other tasks. In October 2015, plaintiff and Kristine met with Richards, a certified public accountant and principal of VSR; plaintiff requested Richards's assistance in helping to manage the business's debt.

The scope of the resulting professional relationship between plaintiff and defendants is unclear because there was no formal engagement letter or contract. Plaintiff testified that she wanted the business's money to "run through" Richards and that he was responsible for paying its bills. Kristine testified that Richards assumed "responsibility of all the financial matters" on behalf of the business and that plaintiff had discussed handing everything over to Richards so that he could try to save the business. Richards testified that he was retained by plaintiff on behalf of the business to do "whatever [he] could do to get them out of [the] situation." He further testified that he paid the current and past bills of the business, determined whether expenses were necessary business expenses, and signed checks from the business bank account. After plaintiff met with Richards in October 2015, she traveled to Florida and did not return until February 2016. Kristine continued to operate the business while plaintiff was in Florida.

In February 2016, David established a legal entity known as Bauer House, LLC (the LLC). David was its sole owner. Richards and Kristine both testified that Richards did not create the LLC. Richards testified that the LLC was created after the State of Michigan threatened to revoke plaintiff's adult foster care license. In December 2015, a State of Michigan Adult Foster Care Licensing Bureau employee had contacted plaintiff and asked her to surrender her license, as the license required that she be present in the adult foster care home. Plaintiff did so, and David then applied for a license and obtained a license for the LLC. However, although the LLC began to operate the adult foster care home (formerly operated by plaintiff) in February or March 2016, it operated for several months, according to Kristine, without a valid license.³ Richards testified that plaintiff could not own the LLC because of her licensing issue.

² It appears that Bauer House AFC was not a legal entity, but was the name that plaintiff used in the operation of her adult foster care business.

³ Although the parties did not provide this level of detail in their depositions, pleadings, or briefs, for clarity's sake we note that an adult foster care license may be held by an LLC, but, in order to do so, a "licensee designee" must be designated to act on behalf of the LLC and must meet several criteria; additionally, an "administrator" must be designated as the person responsible for daily operation of the facility. It is unclear from the record in this case whether David, or another

A separate bank account was opened on behalf of the LLC. David was the only authorized signatory on the LLC's bank account and he had full authority to withdraw money from the account. However, Richards issued and endorsed checks for the LLC by using a signature stamp. A transfer of \$4,037.15 was made from plaintiff's business bank account into the LLC's bank account when the LLC began operating the adult foster care home. Richards testified that all of the outstanding bills of plaintiff's business were also transferred, which exceeded the amount of cash that was transferred into the LLC bank account. Richards testified that he did not notify plaintiff of the fund transfer because she left him in charge of her business's finances.

Plaintiff testified that Richards told her about the LLC account in March 2016, and that Kristine and David had not told her that they owned the LLC. She further testified that Richards did not call or consult with her after she left for Florida on October 15, 2015, although she admitted that she did not call Richards or ask him for information during the time she was in Florida. Richards testified that Kristine and David told him that they had kept plaintiff informed concerning her business and the LLC, and that plaintiff never objected to the LLC operating the adult foster care home.

In October 2016, plaintiff and James Eble (Eble) advised Kristine and David that Eble, through his business, Weldon Group, LLC, planned to acquire plaintiff's business and the property on which the adult foster care home was operating. Eble applied for an adult foster care license, David withdrew his license application, and Kristine and David left the home at Eble's request. Bank records indicate that a \$5,200 check was issued from the LLC's bank account to Kristine on October 19, 2016. Kristine acknowledged the \$5,200 payment, but she did not recall what it was for; however, she theorized that it was reimbursement for "back petty cash." Richards denied authorizing the payment or withdrawal of funds, and assumed that David had made the withdrawal.

On October 17, 2018, plaintiff filed a complaint against defendants, the Schimkes, and the LLC. With respect to defendants, plaintiff asserted claims for breach of contract, negligence (i.e., professional malpractice), negligent misrepresentation, breach of fiduciary duty, and civil conspiracy. Plaintiff alleged that she had suffered financial losses and other damages as a direct and proximate result of defendants' mishandling of her finances.

After discovery, defendants moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). The trial court found that plaintiff's breach of contract, breach of fiduciary duty, and negligent misrepresentation claims were duplicative of her professional malpractice claim and granted defendants' motion for summary disposition as to those claims. The trial court also dismissed plaintiff's civil conspiracy claim because it found no underlying actionable tort and plaintiff had agreed to dismiss her claims against Kristine, David, and the LLC. The trial court found that the statute of limitations did not bar plaintiff's professional malpractice claim and that

individual, was the properly designated licensee designee of the LLC or the administrator of the adult foster home when the LLC took over operation, which could explain the period of time in which Kristine testified there was no validly licensed operator of the home. See "Get Licensed as an Adult Foster Care Home", available at https://www.michigan.gov/lara/0,4601,7-154-89334_63294_5529-314135--,00.html (last visited January 5, 2021).

expert testimony was not required to establish the standard of care for the malpractice claim. However, the trial court further concluded that plaintiff had failed to demonstrate that there was a genuine issue of material fact regarding causation, and on that ground it granted summary disposition in favor of defendants on plaintiff's professional malpractice claim under MCR 2.116(C)(10).

This appeal and cross-appeal followed. On appeal, plaintiff does not challenge the dismissal of her breach of contract, breach of fiduciary duty, negligent misrepresentation, or civil conspiracy claims, but only the trial court's order granting summary disposition on her professional malpractice claim. The cross-appeal is similarly limited to the trial court's holdings regarding plaintiff's professional malpractice claim.

II. STANDARD OF REVIEW

"This Court reviews de novo whether a trial court properly granted a motion for summary disposition." *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court's review is "limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009). We review de novo whether a cause of action is barred by the applicable statute of limitations. *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345, 354; 771 NW2d 411 (2009).

III. SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendant on her professional malpractice claim under MCR 2.116(C)(10). We disagree, but we do so because we agree with defendants on their cross-appeal that the trial court erred by holding that plaintiff did not need to provide expert testimony establishing the standard of care, and that it therefore should have granted summary disposition in favor of defendants on that basis.

Summary disposition under MCR 2.116(C)(10) is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018) (quotation marks and citations omitted).

In presenting a motion for summary disposition [under MCR 2.116(C)(10)], the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Quinto v Cross and Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996) (citations omitted).]

In this case, plaintiff asserted a claim of professional (accounting) malpractice. “A professional malpractice claim is a tort claim predicated on the failure of the defendant to exercise the requisite professional skill.” *Broz v Plante & Moran, PLLC (On Remand)*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 340381); slip op at 6 (citations omitted). MCL 600.2962(1) provides, in pertinent part:

A certified public accountant is liable for civil damages in connection with public accounting services performed by the certified public accountant only in 1 of the following situations:

(a) Subject to subsection (2), a negligent act, omission, decision, or other conduct of the certified public accountant if the claimant is the certified public accountant’s client.

(b) An act, omission, decision, or conduct of the certified public accountant that constitutes fraud or an intentional misrepresentation.

An accountant is subject to common-law malpractice liability. *Broz*, ___ Mich App at ___; slip op at 6. “Generally, to state a claim for malpractice, a plaintiff must allege (1) the existence of a professional relationship, (2) negligence in the performance of the duties within that relationship, (3) proximate cause, and (4) the fact and extent of the client’s injury.” *Id.* at ___; slip op at 8. “[A] malpractice claim requires proof of simple negligence based on a breach of a professional standard of care” and that “the element of negligence encompasses breach of the standard of care.” *Id.* at ___; slip op at 8 (quotation marks, alteration, and citation omitted).

We have held, with respect to an accounting malpractice claim, that a plaintiff is “required to demonstrate the standard of care and that defendant breached that standard of care to survive summary disposition of their claim of professional negligence (malpractice).” *Id.* at ___; slip op at 7-8. “To establish the applicable standard of care and that the professional breached the standard of care, the plaintiff usually is required to introduce expert testimony unless the lack of professional care is so obvious as to be within the common knowledge and experience of an ordinary layman.” *Id.* at ___; slip op at 8. The standard of care required of accountants is “the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities.” *Id.* at ___; slip op at 6. A malpractice claim is subject to dismissal when a plaintiff fails to provide expert testimony establishing the applicable standard of care. *Id.* at ___; slip op at 8.

In *Broz*, the plaintiff sued the defendant for malpractice regarding the preparation of the plaintiff’s tax returns. *Id.* at ___; slip op at 2, 3. We concluded that the trial court did not err when it found that expert testimony was required to establish the standard of care because of “the complex accounting transactions involved.” *Id.* at ___; slip op at 8.

Here, the trial court concluded that expert testimony was not required to prove the alleged breach of duty. We conclude that this was error. Plaintiff explicitly acknowledged that Richards’s professional relationship with her extended beyond that of “the norm for an accountant in Manistee.” Richards also testified that his business relationship with plaintiff was “an unusual situation from day one.”

The business arrangements here were both complex and ill-defined. Defendants represented plaintiff in her business affairs, which apparently were not conducted through a legal entity. They sought to manage her personal and business debt, including under a land contract. Defendants also represented the LLC, which was solely owned by David. They were involved in the day to day operations of a specialized business requiring special licensure. They assisted in managing the finances of the business, both on behalf of plaintiff and on behalf of the LLC. And all of their actions were carried out amidst a confusing array of relationships between plaintiff, her unincorporated business, the Schimkes and the LLC. Because of the complex nature of defendants' professional representations, expert testimony was required to establish the standard of care required of an accountant in the same or similar localities because the standard of care and breach was not "so obvious as to be within the common knowledge and experience of an ordinary layman." *Id.* at ___; slip op at 8.

For these reasons, the trial court erred when it concluded that expert testimony was not required and when it denied defendants' motion for summary disposition on that ground. Without establishing the appropriate standard of care, plaintiff could not establish a genuine issue of material fact regarding whether defendants had breached that standard of care. Accordingly, the trial court should have granted summary disposition in favor of defendants because plaintiff had failed to present expert testimony on the standard of care and whether defendants had breached that standard. Nonetheless, the error was harmless because the court granted defendants' motion for summary disposition under MCR 2.116(C)(10) on other grounds. MCR 2.613(A); see also *Gleason v Michigan Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) (noting that a trial court's ruling may be upheld on appeal in which the right result was issued, albeit for the wrong reason).⁴

Because we affirm on this basis, we need not address defendant's alternative statute of limitations argument.

Affirmed.

/s/ James Robert Redford

/s/ Jane E. Markey

/s/ Mark T. Boonstra

⁴ Because plaintiff failed to establish standard of care or breach, the trial court should not have reached the causation question. Without establishing duty and breach, plaintiff could not establish whether defendant's conduct was a factual or legal cause of her injuries, which "requires determining whether *the actor's breach of a duty to the plaintiff* was a proximate cause of the plaintiff's injury . . ." *Ray v Swager*, 501 Mich 52, 65; 903 NW2d 366, 372 (2017) (emphasis added). Therefore, the court did not err when it granted summary disposition under MCR 2.116(C)(10) in favor of defendants, although it should have done so for different reasons than those it stated. See *Gleason*, 256 Mich App at 3.