

STATE OF MICHIGAN
COURT OF APPEALS

PHILLIP D. HICKEY and CAROL HAIDY-
HICKEY,

UNPUBLISHED
February 28, 2006

Plaintiffs-Appellants,

v

LOPATIN, MILLER, FREEDMAN,
BLUESTONE, HERSKOVIC and DOMOL, P.C.,

No. 257093
Oakland Circuit Court
LC No. 2003-047083-NM

Defendant-Appellee.

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff¹ appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

In 1996, plaintiff underwent coronary bypass surgery. The operation was performed by James Byrne, M.D. of Cardiovascular and Thoracic Surgeons of Ann Arbor, P.C. (CATS). After being discharged from the hospital, plaintiff developed swelling around his chest incision. According to plaintiff, he contacted CATS several times over the following days to complain about this swelling, but CATS told him not to worry, and to wait until his next office visit. When plaintiff unexpectedly presented at Byrne's office several days later, he was diagnosed with a severe substernal infection, requiring immediate re-hospitalization.

Believing he had a valid medical malpractice claim, plaintiff retained counsel. An affidavit of merit on the issue of liability was signed by Dr. Rubin, and an affidavit of merit on the issue of proximate causation was signed by Dr. Crane. Both affidavits were expressly conditioned on the truth of plaintiff's assertion that he had reported his swollen incision to CATS and Byrne several times, receiving no response but to wait for his appointment. At some point, plaintiff's attorney lost his license to practice, and defendant was appointed as co-receiver of the

¹ Because Carol Haidy-Hickey's claim is derivative, we use the singular term "plaintiff" to refer solely to Phillip D. Hickey.

attorney's practice. Defendant asserts that it assumed plaintiff's case with the express understanding that it would not be required to obtain any additional expert support.

More than two years later, CATS and Byrne sought to depose Dr. Rubin. In the intervening years, Rubin had discarded plaintiff's 1996 medical records, and had only rarely communicated with defendant. When Rubin learned of his scheduled deposition, he contacted defendant and requested an additional copy of plaintiff's records for review. When Rubin had still not received the records by the day of his deposition, he based his testimony on his memory of plaintiff's case. Rubin testified that he did not recall any indication of medical malpractice in plaintiff's records, but testified that plaintiff's allegations of post-surgical telephone calls to CATS and Byrne had indicated possible malpractice in timely investigating, diagnosing, and treating plaintiff's infection.

CATS and Byrne moved for summary disposition. The court ruled that there was no genuine issue of material fact on the issue of proximate causation. At no time before, during, or after the trial court's ruling did defendant inform the court that Dr. Crane had provided a second affidavit of merit or that Crane had been named as a potential witness on causation.

Plaintiff brought this legal malpractice action, asserting that defendant's failure to present evidence of Crane's affidavit had resulted in the dismissal of the medical malpractice case. Defendant asserted that because Crane's affidavit and Rubin's affidavit were both based on the truth of plaintiff's allegations, Crane's opinions were speculative and equally as unavailing as those of Rubin. Defendant moved for summary disposition, justifying its omission of Crane's affidavit as a matter of professional judgment, and asserting that any evidence received from Crane would have been unpersuasive in light of the testimony already given by Rubin, which essentially destroyed plaintiff's chance of success on the underlying claim.

The trial court declined to grant summary disposition on the basis of the attorney judgment rule, but granted summary disposition on the alternative basis of proximate causation, ruling that plaintiff failed to establish a genuine issue of fact regarding the likelihood of success in the underlying medical malpractice action.

Plaintiff contends that the trial court erred in granting summary disposition in defendant's favor. We disagree with the trial court's determination that there was no genuine issue of fact on the issue of proximate causation in the underlying medical malpractice case, but conclude that summary disposition would have been proper under the attorney judgment rule.

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). This Court will not reverse a decision if the trial court reached the right result for the wrong reason. *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004).

Dismissal on the basis of the attorney judgment rule would have been proper in this case. "Although 'gross' errors in judgment can be actionable . . . mere errors in judgment by attorneys

acting in good faith are not.” *Mitchell v Dougherty*, 249 Mich App 668, 679; 644 NW2d 391 (2002). In his affidavit, plaintiff’s expert did not identify how defendant’s alleged negligence “was anything other than an honest belief well founded in the law.” *Id.* Thus, plaintiff failed to present sufficient documentary evidence to create a genuine factual dispute as to whether defendant had made gross errors in judgment in the underlying action. Accordingly, summary disposition would have properly been granted under the attorney judgment rule. Because the trial court reached the correct result, we affirm the order granting summary disposition.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly