

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD PASSENO and ROSEANN
PASSENO,

Plaintiffs-Appellants,

v

MARK A. HULLMAN,

Defendant-Appellee.

UNPUBLISHED
April 26, 2005

No. 252486
Grand Traverse Circuit Court
LC No. 02-022513-NM

RICHARD PASSENO and ROSEANN
PASSENO,

Plaintiffs-Appellants,

v

MARK A. HULLMAN,

Defendant-Appellee.

No. 254227
Grand Traverse Circuit Court
LC No. 02-022513-NM

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from summary dismissal of their legal malpractice case under MCR 2.116(C)(10), as well as from an order imposing sanctions pursuant to MCR 2.114(E). We affirm.

Plaintiffs first argue that the trial court erred in holding that expert testimony was required to establish that defendant breached the standard of care by failing to inform them that the statute of limitations for collection on a judgment is ten years. After de novo review, we disagree. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

To establish a legal malpractice claim, a plaintiff must prove that an attorney-client relationship existed and that the attorney was negligent in the legal representation of the plaintiff which proximately caused injury resulting in damages. *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). Here, it is undisputed that defendant advised plaintiffs that the

contractor defendant in the underlying suit was not collectible and that if they won a judgment against the contractor defendant, it would likely be discharged in bankruptcy through a Chapter 7 proceeding. Plaintiffs averred that defendant was negligent because he failed to advise them that they had ten years, by statute, to collect any judgment against the defendant contractor and thus they were misled into settling the underlying case at the mediation stage.

Defendant filed his motion for summary disposition arguing that plaintiffs could not establish a genuine issue of material fact as to his alleged negligent legal representation because they failed to retain an expert witness to establish the standard of care and its breach. Defendant also filed an affidavit from the contractor defendant in the underlying case who stated that, if plaintiffs had obtained a judgment against him, he would have filed a Chapter 7 bankruptcy proceeding. In addition, defendant filed affidavits from two experts, attorneys, who opined that the contractor defendant was likely not collectible even if plaintiffs won a judgment against him, he could likely discharge any such judgment in bankruptcy, and that any challenge to the discharge of the judgment would likely fail, including an allegation of fraud. Both further opined that defendant did not breach the standard of care in any manner.

The trial court granted defendant's motion, holding that expert testimony was necessary because issues of collectibility, bankruptcy law, and creditors rights were outside the common knowledge of a layperson. We agree with the trial court. "In professional malpractice actions, an expert is usually required to establish the standard of conduct, breach of the standard, and causation." *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994). Although in *Beattie v Firnschild*, 152 Mich App 785, 792-793; 394 NW2d 107 (1986), this Court noted an exception to the requirement where the standard of care and breach are so obvious that such testimony is not required, the exception is rare. See, also, *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14; 436 NW2d 70 (1989).

Here, whether defendant was correct in advising that the contractor defendant was not collectible, that the contractor defendant was entitled to file a bankruptcy proceeding, that any judgment plaintiffs won could be discharged in a bankruptcy proceeding, and whether MCL 600.5809 would be applicable to a judgment secured by plaintiffs if the judgment was discharged in bankruptcy are some of the issues that would require expert witness testimony. Plaintiffs claim that this is merely a case about whether defendant adequately informed them of their legal rights is an unpersuasive oversimplification. Further, without an expert, plaintiffs would be unable to show that defendant proximately caused an injury resulting in damages, including that they would have been successful in the underlying action. See *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996). Without expert testimony, plaintiffs are unable to establish a genuine issue of material fact on the issues of standard of care, breach, and proximate cause; thus, the trial court properly dismissed the case. In light of this conclusion we need not address plaintiffs' issues whether the trial court improperly "usurped the role of the finder of fact in the bankruptcy court" or "erred in finding that plaintiffs did not suffer an injury."

Plaintiffs next argue that the trial court's decision to grant sanctions under MCR 2.114(E) was clearly erroneous because the complaint was not signed without a reasonable inquiry. After review of the findings of fact of the trial court, we disagree and conclude that they are not clearly erroneous. See *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

“If a party is represented by an attorney, the attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed.” *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). “[T]he reasonableness of the inquiry is determined by analysis under an objective standard.” *Davids v Davis*, 179 Mich App 72, 89; 445 NW2d 460 (1989). Once a court concludes that a pleading has been improperly certified, then sanctions are mandatory. *In re Forfeiture of Cash and Gambling Paraphernalia*, 203 Mich App 69, 73; 512 NW2d 49 (1993).

An attorney’s belief that a claim might be supportable is insufficient to avoid sanctions. In this case, plaintiffs’ attorney Harold Dunne conducted essentially no investigation before preparing the malpractice complaint against defendant. Dunne admitted that he consulted only his opinion to determine whether defendant had committed malpractice and made no independent inquiry into the contractor defendant’s financial status or collectibility. He also theorized that plaintiffs were damaged by the decision to settle the claim against the contractor because, even if he went bankrupt, plaintiffs could have argued to the bankruptcy court that their judgment should not be discharged because it was the result of fraud. However, Dunne acknowledged to the court that the fraud counts in the complaint against the contractor defendant had been resolved before the settlement. In sum, the trial court conducted a lengthy inquiry into this matter and we agree with its conclusion that there was a failure to make a reasonable inquiry into the factual and legal viability of the malpractice complaint before it was signed.

Finally, plaintiffs argue that the court abused its discretion in calculating the amount of the sanctions it imposed. See *Maryland Casualty Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997). We disagree. This is not an extreme case in which the result was so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. See *Dep’t of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

After finding that plaintiffs filed a frivolous action under MCR 2.114(E), the court calculated a sanction by considering three factors: the overhead costs defendant incurred during the hours spent defending the case (\$4,100); a daily sanction for his aggravation during the 282 days the suit was active (\$5,640); and an hourly sanction for the 67.9 hours he spent on the case pro se, computed by using the value of “an average person’s time” rather than defendant’s hourly attorney fee rate (\$1,358). Regarding the sanction for overhead expenses, plaintiffs’ entire argument on appeal is that “[t]he trial court did not conduct an evidentiary hearing to determine whether Hullman’s claim of 33 percent overhead is accurate. Additionally, the trial court did not point to any case law allowing for an award based on ‘overhead.’” These observations do not qualify as argument. “A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim.” *In re Coe Trusts*, 233 Mich App 525, 537; 593 NW2d 190 (1999). Accordingly, we need not address this claim. Plaintiffs also argue that the award of \$20 a day for each day the suit was active to compensate defendant “for aggravation” constituted an abuse of discretion. Again, plaintiffs fail to support this argument with relevant legal authority, thus, we consider it waived.

Lastly, plaintiffs argue that the sanction awarded of \$20 an hour for the time defendant spent defending the case before he retained counsel constituted an abuse of discretion. Plaintiffs argue that this is simply an award of attorney fees to a pro se litigant, which is forbidden by *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 729; 591 NW2d 676 (1998). However,

FMB-First Michigan Bank does not “forbid” an award of attorney fees for pro se litigants under MRE 2.114(E); in fact, it noted that “MCR 2.114(E) does not restrict the sanction to expenses or costs incurred.” *Id.* at 726. In any event, the trial court specifically indicated that it was not awarding attorney fees and, obviously, \$20 an hour could not reasonably be interpreted as an attorney fee. Accordingly, we cannot conclude that the trial court abused its discretion.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Hilda R. Gage