STATE OF MICHIGAN

COURT OF APPEALS

HARK ORCHIDS LP,

Plaintiff-Appellant,

v

WILLIAM BUIE and CONKLIN BENHAM, PC,

Defendants-Appellees.

UNPUBLISHED
May 4, 2023

No. 361175
Kalamazoo Circuit Court
LC No. 2020-000263-NM

Before: SHAPIRO, P.J., and REDFORD and YATES, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(8). On appeal, plaintiff contends that the trial court erred by holding that plaintiff failed to state a claim upon which relief can be granted under (C)(8) when plaintiff pleaded that defendants' negligent conduct caused plaintiff to expend attorney fees in prior litigation. We affirm.

I. BACKGROUND

This case arose out of defendants' legal representation of plaintiff in a workers' compensation action brought by a former employee. During negotiations, the employee informed defendants that she believed she had additional meritorious claims against plaintiff and would settle those claims in a global settlement for $125,000. Defendants never informed plaintiff of the additional claims or global settlement offer and settled the workers' compensation claim for $35,000. The employee filed a subsequent action against plaintiff. Plaintiff hired Warner, Norcross, and Judd (WN&J) to defend against the action. WN&J discovered the employee's offer for a global settlement. Ultimately, plaintiff expended over $312,000 in attorney fees and costs to defend against that suit.

Plaintiff brought this action against defendants to recover the attorney fees it expended defending itself against the employee's second litigation. Plaintiff asserted that defendants acted negligently when they failed to inform plaintiff of the employee's threat of additional litigation and offer to settle. The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(8) because plaintiff pleaded that defendants acted negligently when the prior litigation

exception to the American rule required a pleading of malice, fraud, or other similar wrongful conduct to recover damages.

Plaintiff now appeals.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition under MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Id*. at 119-120 (quotation marks and citations omitted).]

"A mere statement of a pleader's conclusions and statements of law, unsupported by allegations of fact, will not suffice to state a cause of action." *Varela v Spanski*, 329 Mich App 58, 72; 941 NW2d 60 (2019).

III. LAW AND ANALYSIS

Plaintiff argues that it only needed to plead negligence to state a claim for attorney fees under the prior litigation exception to the American rule. We disagree.

Michigan follows the "American rule" with respect to the payment of attorney fees and costs. *Dessart v Burak*, 470 Mich 37, 42; 678 NW2d 615 (2004). The American rule states that "attorney fees are not ordinarily recoverable unless a statute, court rule, or common-law exception provides the contrary." *Id*. (quotation marks and citation omitted). Generally, a party may not recover attorney fees as costs or damages absent a recognized exception to the American rule. *Burnside v State Farm Fire & Cas Co*, 208 Mich App 422, 426-427; 528 NW2d 749 (1995).

Exceptions to the general rule are construed narrowly. *Brooks v Rose*, 191 Mich App 565, 575; 478 NW2d 731 (1991). The exception to the American rule relevant to this case is the prior litigation exception. Under this exception, recovery of attorney fees is permitted when "a defendant's wrongful conduct has forced a party to incur legal expenses in prior litigation with a third party." *Id*.

This Court addressed this standard as far back as 1976. This Court recognized the prior litigation exception to the American rule and held that the exception "is intended to be applied where the party at fault is guilty of malicious, fraudulent or similar wrongful conduct, not of simple

negligence." *G & D Co v Durand Milling Co, Inc*, 67 Mich App 253, 257, 260; 240 NW2d 765 (1976).[1]

Plaintiff argues that *G & D* does not apply to this case because it involved a products liability action instead of legal malpractice. This argument ignores the scope of the prior litigation exception to the American rule. The Court in *G & D* explained that the prior litigation exception "allows recovery of reasonable attorneys fees incurred in prior litigation with a third party[.]" *Id*. at 257.

Regardless of plaintiff's treatment of *G & D*, precedential authority in this jurisdiction continues to follow the standard articulated in *G & D*. In *Brooks*, 191 Mich App at 569, two real estate partners had sought a judicial declaration that a third person was no longer a partner. The third person countersued and won a judgment based on the two partners' breach of fiduciary duty and improper termination of the partnership. *Id*. at 570. One of the issues on appeal was whether the third partner was entitled to recover attorney fees from the two real estate partners in related litigation to protect her opportunity to purchase real estate subject to the partnership. *Id*. at 574.

This Court recognized that recovery of attorney fees

> has been allowed in limited situations where a party has incurred legal expenses as a result of another party's fraudulent or unlawful conduct. Recovery has also been permitted where a defendant's wrongful conduct has forced a party to incur legal expenses in prior litigation with a third party. [*Id*. at 575 (citations omitted).]

This Court has since affirmed the malice, fraud or wrongful conduct standard in several cases. See *Mieras v DeBona*, 204 Mich App 703, 709; 516 NW2d 154 (1994) (explaining that the "wrongdoer must be guilty of malicious, fraudulent or similar wrongful conduct, rather than negligence."); *In re Thomas Estate*, 211 Mich App 594, 602; 536 NW2d 579 (1995) (citing *G & D* to explain that the prior litigation exception was not applicable when the defendant's conduct was not wrongful as interpreted by this Court).

Despite controlling authority to the contrary, plaintiff cites the holding in *Coats v Bussard*, 94 Mich App 558; 288 NW2d 651 (1980), for the contention that negligence is the appropriate standard for recovery of attorney fees for prior litigation. In that case, the plaintiffs brought an action against their attorney for negligent conduct in prior litigation and won a jury verdict. *Id*. at 562. The trial court had granted the defendant's motion for a judgment notwithstanding the verdict, in large part, on its analysis that defendant's actions were questions of attorney judgment. *Id*. This Court disagreed and remanded to reinstate the jury verdict, reasoning that "whether a defendant attorney was negligent does not render the defendant's conduct a question of judgment

[1] Court of Appeals cases decided before November 1, 1990, are not binding. MCR 7.215(J)(1). Although this Court is not "*strictly required* to follow uncontradicted opinions from this Court decided prior to November 1, 1990," those opinions are "nevertheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018), lv den 504 Mich 873 (2019).

as a matter of law." *Id*. at 563. The Michigan Supreme Court reversed the Court of Appeals judgment and remanded the case for retrial as ordered by the trial court. *Coats*, 409 Mich 858.

Plaintiff also cites *Warren v McLouth Steel Corp*, 111 Mich App 496, 508; 314 NW2d 666 (1981), for the contention that a party seeking attorney fees as damages who has been forced to expend money to mitigate malpractice are recoverable. That case involved a third-party defendant's appeal from a jury verdict finding it liable for indemnification to a third-party plaintiff. *Id*. at 499. This Court held that the prior litigation exception was "broad enough to encompass the factual situation where a passive tortfeasor has been forced to defend against the claims of a plaintiff because of the injuries caused by the active tortfeasor." *Id*. at 508.

Plaintiff argues that *Coats* and *Warren* are authoritative. However, both of these cases were published before 1990, and authority to the contrary was published after 1990. See MCR 7.215(J)(1). Therefore, neither are binding on this Court. Instead, this Court is bound by its holding that the party seeking attorney fees under the prior litigation exception must plead that the wrongdoer's conduct was malicious, fraudulent, or similarly wrongful. *In re Thomas Estate*, 211 Mich App at 602; *Brooks*, 191 Mich App at 575.

Finally, plaintiff argues that this Court should treat actions for attorney fees involving legal malpractice differently than recovery of attorney fees in other proceedings. Essentially, plaintiff has asked this Court to carve out a mitigation and legal malpractice exception to the prior litigation exception. However, neither of these concepts conflict with the prior litigation exception. Attorney fees are available in legal practice actions if the party can plead malice, fraud, or similar wrongful conduct. See *Mieras*, 204 Mich App at 709. This same logic applies to plaintiff's argument that the duty to mitigate conflicts with this rule. Mitigation damages in the form of attorney fees are available if sufficiently plead.

Plaintiff was required to plead that defendants engaged in malicious, fraudulent, or similarly wrongful conduct to survive a motion for summary disposition under MCR 2.116(C)(8). *In re Thomas Estate*, 211 Mich App at 602; *Brooks*, 191 Mich App at 575. Plaintiff pleaded only that defendants were negligent. Therefore, the trial court did not err in granting defendants' motion for summary disposition under MCR 2.116(C)(8).[2]

Affirmed.

/s/ James Robert Redford
/s/ Christopher P. Yates

[2] Plaintiff also raised the issue of whether the trial court should have denied defendants' summary disposition on MCR 2.116(C)(10) grounds. Because this Court affirmed the trial court's holding under MCR 2.116(C)(8), plaintiff's arguments regarding MCR 2.116(C)(10) are foreclosed.

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SHAPIRO, P.J. (*concurring*).

I agree with the majority that this case is controlled by *Mieras v DeBona*, 204 Mich App 703; 516 NW2d 154 (1994), rev'd on other grounds 452 Mich 278; 55 NW2d 202 (1996). Because that case is binding precedent I am compelled to concur. However, I disagree with its holding and would support a request for a conflict panel pursuant to MCR 7.215(J).

Plaintiff company's employee was injured at work and she filed a worker's compensation claim, which plaintiff disputed. Defendants represented plaintiff in the worker's compensation claim. During settlement discussions, the employee's counsel advised defendants that the employee also planned to file a civil suit against plaintiff. The employee's attorney advised defendants that she would be willing to settle the worker's compensation claim for $75,000 or would settle that claim as well as her planned civil claim, i.e., a global settlement, for $125,000, later reduced to $100,000.[1] Defendants did not inform plaintiff of the global settlement offers. Plaintiff alleges that the failure to communicate that offer constituted legal malpractice and that plaintiff is entitled to damages, including the sums it paid to different counsel to successfully defend against the later-filed civil case.

Plaintiff seeks those attorney fees as part of its damages in its malpractice suit. Defendants rely on the "American Rule" barring an award of the prevailing party's attorney fees against the non-prevailing party. Plaintiff does not argue that we should alter or eliminate this fundamental

[1] The worker's compensation claim was eventually settled for $35,823.84.

rule, pointing out that it does not seek to recover as compensable damages the attorney fees expended in prosecuting the instant malpractice case. Instead, it seeks to recover the cost of defending the civil suit brought by its employee, which plaintiff argues would have been avoided by settlement had counsel conveyed the employee's willingness to enter into a global settlement.

The relevant law in Michigan is not exactly clear. The majority relies on *G & D Co v Durand Milling Co, Inc*, 67 Mich App 253; 240 NW2d 765 (1976), which held that "where the present defendant has by his wrongful conduct, be it tort or breach of contract, caused the present plaintiff to defend or prosecute [p]revious legal proceedings, the law . . . allows the plaintiff to recover all the expense, including attorney fees, reasonably incurred by him in the [p]rior litigation." *Id*. at 257 (quotation marks and citation omitted). The opinion goes on to state that

> [t]he rule enabling recovery of attorneys' fees is designed to prevent the injustice of a situation where a blameless party must prosecute or defendant action in which the true party at fault cannot be brought into the litigation and made to indemnify the blameless party. The rule was created to aid the party who must litigate two actions to vindicate his rights[.] [*Id*. at 258.]

However, as defendants point out, there is other language in *G & D Co* stating "the attorneys' fee rule is intended to be applied where the party at fault is guilty of malicious, fraudulent or similar wrongful conduct, not of simple negligence as is alleged here." *Id*. at 259-260. While the case was not decided on this basis,[2] this standard has been followed in other cases.[3]

As noted, the case most significant to our decision is *Mieras*, 204 Mich App 703, a legal malpractice action in which the plaintiffs sought recovery of attorney fees they incurred in an earlier will contest that was allegedly the result of the attorney's negligent drafting of the will. Relying on *G & D Co*, the entirety of this Court's discussion of the issue was as follows:

> Generally, awards of costs or attorney fees are not allowed unless expressly authorized by statute or court rule. However, a party may recover as damages the costs, including attorney fees, expended in a prior lawsuit he was forced to defend or prosecute because of a third party's wrongdoing. *Bonner v Chicago Title Ins Co*, 194 Mich App 462; 487 NW2d 807 (1992). The wrongdoer must be guilty of

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[2] The *G & D Co* majority concluded that the sought attorney fees arose out of the pending, rather than prior, litigation. *G & D Co*, 67 Mich App at 258.

[3] In his dissent, Judge KELLY pointed out that while some cases have required a showing of fraud, "there is also authority to the contrary," citing *Dassance v Nienhuis*, 57 Mich App 422; 225 NW2d 789 (1975) ("any costs of litigation including attorneys' fees, incurred by plaintiffs in commencing and prosecuting the [prior] action . . . are recoverable as an element of damages[.]"), and *State Farm v Allen*, 50 Mich App 71; 212 NW2d 821 (1973) ("reasonable attorneys' fees incurred in prior litigation with 'a third party—not with the defendant' may be recoverable."). *G & D Co*, 67 Mich App at 261-264 (KELLY, J., dissenting). Neither of these cases indicated that fraud was a requirement to fall within this exception to the American Rule.

> malicious, fraudulent or similar wrongful conduct, rather than negligence. *G & D Co v Durand Milling Co, Inc*, 67 Mich App 253, 259-260; 240 NW2d 765 (1976).
>
> Plaintiffs have alleged only negligence, not fraud or malice in defendant's execution of his legal services . . . . As a consequence, their claim for the costs of defending against [the] will challenge fails. [*Mieras*, 204 Mich App at 710.]

There was no discussion of whether the requirement of fraud or similar wrongful conduct was applicable to the legal malpractice context.[4]

The majority points out that the only published case that actually binds us is *Mieras* and given the dates of the other cases, this cannot be disputed. However, I question the rationale of requiring a showing of fraud or malice to collect what are plainly consequential damages of the defendant's negligence in a different case, and other than talismanic references to the American rule, I do not discern a reasoned basis for that requirement. Indeed, other courts have recognized that the attorney fees from the underlying action merely represent a component of the plaintiff's damages in legal malpractice cases, rather than the recovery of attorney fees as such. See *Quad City Bank & Trust v Elderkin & Pirnie, PLC*, 870 NW2d 249, 259-260 (Iowa App, 2015) (holding that attorney fees from the underlying action are recoverable in malpractice cases because the "[t]he goal of malpractice actions is to put the plaintiff back into the position it would have been had the lawyer not been negligent."); *RAS Group, Inc v Rent-A-Center East, Inc*, 335 SW3d 630, 642 (Tex App, 2010) ("In a legal malpractice case, the plaintiff's damages may include the attorney's fees paid to the defendant-attorney in the underlying case. Also, when the defendant's tort requires a party to protect its own interests by bringing or defending an action against a third party, the plaintiff may recover from the defendant the attorney's fees incurred in the action against the third party.") (citation omitted); *Sindell v Gibson, Dunn & Cruther*, 54 Cal App 4th 1457, 1471; 63 Cal Rptr 2d 594 (1997) ("The theory of recovery is that the attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action. In such cases there is no recovery of attorney fees qua attorney fees.") (quotation marks, citation, and emphasis omitted).

[4] Requiring a showing of fraud or other wrongdoing to recover attorney fees against a third party makes sense in "a situation where a blameless party must prosecute or defend an action in which the true party at fault cannot be brought into the litigation and made to indemnify the blameless party." *G & D Co*, 67 Mich App at 258. This is consistent with the right to common-law indemnification, which "is based on the equitable theory that where the wrongful act of one party results in another party's being held liable, the latter party is entitled to restitution for any losses." *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 62; 807 NW2d 354 (2011). However, in a legal malpractice action, the plaintiff is not seeking indemnification from the attorney on the basis that the attorney was the "true party at fault" whose wrongful conduct caused the plaintiff to be liable in the underlying action. Rather, the plaintiff is merely attempting to recover damages for the attorney's negligent representation in the prior action.

For these reasons, I would request a conflict panel pursuant to MCR 7.215(J). Since my colleagues do not agree, *Mieras* remains binding authority absent action by the Michigan Supreme Court and so I concur.

/s/ Douglas B. Shapiro