STATE OF MICHIGAN

COURT OF APPEALS

REGIONAL EMERGENCY MEDICAL SERVICES, INC., d/b/a REGIONAL EMS, and TWIN CITY INSURANCE COMPANY,

Plaintiffs-Appellants,

v

DALE L. GUDENAU,

Defendant-Appellee.

UNPUBLISHED
June 21, 2005

No. 251900
Oakland Circuit Court
LC No. 2002-040562-NM

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and denying plaintiffs' motion to amend the complaint in this legal malpractice action. We affirm.

Plaintiff Regional Emergency Medical Services, Inc. (REMS) is a non-profit corporation that operates an ambulance service. Plaintiff Twin City Insurance Company is the liability insurance carrier for REMS.[1] In the underlying suit, defendant Dale Gudenau was retained by Twin City to represent REMS in an action alleging negligence, gross negligence, and breach of contract filed by Linda Crouch on behalf of herself and as conservator for her husband, Chad Crouch.[2] The complaint in the Crouch lawsuit alleged that Chad suffered from post-traumatic stress disorder, depression, and alcohol abuse and that for three days prior to August 11, 1997, he stopped taking his prescribed medication. On August 11 at approximately 6:15 p.m. Linda made a call for police assistance after Chad became agitated and distressed. Deputy Matthew Gallagher of the Genesee County Sheriff's Department was dispatched to the Crouch residence and placed Chad in protective custody in a police car. Deputy Gallagher subsequently called for an ambulance to transport Chad to the hospital. At approximately 8:25 p.m., an ambulance owned and operated by REMS arrived at the Crouch home. Chad was placed in the ambulance

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[1] The use of the term "Plaintiffs" refers to REMS and Twin City collectively.

[2] The use of the term "Crouch" refers to Linda Crouch and Dale Crouch collectively.

and seated in an upright position in the rear of the main cabin. REMS employee Jeffrey assisted Chad in fastening his seat belt and proceeded to take a seat in the front of the main cabin. Carrie Stevens, the driver of the ambulance, shut and locked the rear door of the ambulance. According to the complaint, the ambulance proceeded to the hospital on US 23 "in a non-emergency mode, without lights and sirens, at a speed of approximately 70 m.p.h." Chad did not receive any emergency medical treatment. As the ambulance was traveling on US 23, "Chad removed his seat belt, opened the back door of the ambulance, and exited." Chad was seriously injured.

Crouch filed a complaint against REMS alleging, in part, that its employees' negligent failure to properly secure Chad in the ambulance was the proximate cause of his injuries. With regard to the negligence claim Crouch specifically pleaded that the immunity from ordinary negligence available under the Emergency Medical Services Act (EMSA), MCL 333.20965, did not apply because a medical emergency did not exist, the ambulance ride was made strictly for transportation purposes, an no emergency medical care was ever rendered. Gudenau filed an answer to the complaint as well as affirmative defenses, including the immunity provided under the EMSA.

Crouch moved for partial summary disposition of the immunity defense, citing *Knight v Limbert,* 170 Mich App 410; 427 NW2d 637 (1988), in support of the argument that the EMSA does not apply to non-emergency situations such as the transport in this case. At a hearing held on May 11, 2000, the parties stipulated on the record that the defense be stricken.

In November 2000 Twin City retained new counsel, attorney Orlando Blanco, to represent REMS. Blanco moved to set aside the prior stipulation regarding the EMSA defense, arguing that the stipulation was based upon a mutual mistake with regard to whether the statute applied to non-emergency ambulance services. In support of this argument, Blanco cited *Neves v Jackson Emergency Medical Services,* unpublished opinion per curiam of the Court of Appeals, issued February 27, 1996 (Docket No. 165885), and argued that the 1990 amendment to the EMSA changed the scope of the act's limited immunity provision so that, after the amendment, emergency medical personnel were immune from ordinary negligence claims even in non-emergency situations such as the transport context that existed in the Crouch case. The trial court denied the motion to set aside the stipulation in its June 21, 2001, order, which explains the court's reasons as follows:

> No mutual mistake of fact existed between the parties when they stipulated to withdraw the affirmative defense regarding the Emergency Medical Services Act; plaintiff's reliance on an unpublished opinion is not precedentially binding under the rule of stare decisis pursuant to MCR 7.215(C)(1); discovery/mediation have been conducted in reliance on the stipulation with the understanding that negligence and not gross negligence must be shown – setting aside the stipulation would result in undue prejudice to plaintiff.

REMS and Twin City thereafter entered into a settlement with Crouch in the amount of $1.2 million.

In the present legal malpractice action plaintiffs alleged that defendant's stipulation to dismiss the EMSA immunity defense was a negligent act that breached the standard of care of an attorney. Defendant moved for summary disposition before the close of discovery. The trial

court denied the motion without prejudice. Plaintiffs sought leave to amend their complaint to plead fraud. The proposed amendment was premised upon Gudenau's letters to Twin City that failed to explain that the immunity defense was withdrawn by stipulation rather than by entry of a contested order. The trial court denied the motion to amend as futile.

Following discovery, defendant renewed his motion for summary disposition and plaintiffs again moved to amend the complaint. Following a hearing, the trial court granted the motion for summary disposition and denied the motion to amend. The court stated in relevant part:

> At the heart of this dispute today is defendant's allegation that he properly applied the law as it existed at that time and stipulated to dismissal for a striking of the immunity defense. Plaintiffs argue otherwise. Thus, in order to determine the causation element of a legal – of this legal malpractice case, the parties seek a determination from this Court whether statutory immunity barred the claims against Regional in the underlying action.

After addressing the holdings in *Knight, supra,* and *Pavlov v Community Emergency Medical Services, Inc,* 195 Mich App 711; 491 NW2d 874 (1992), that the EMSA does not apply to non-emergency situations, the trial court continued:

> In the underlying case, Regional was transporting a man to a care facility on a non-emergency basis. The Crouch complaint clearly states that at no time during the course of this transportation run – run did a medical emergency exist nor was one declared by emergency medical services personnel; that the ambulance ride was made strictly for transportation purposes and that no medical care was ever rendered.
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> Given the state of the law in 2000, the deposition transcript of Gudenau, and the plethora of exhibits presented, the Court finds that Gudenau's dismissal of the immunity defense falls within the scope of the professional judgment rule. The stipulated dismissal of the immunity defense was based on the published legal principles of *Knight* and *Pavlov.* Consequently, Gudenau cannot be held liable for dismissing the immunity defense as that decision appears to have been made under an honest belief and interpretation of the case law.
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> Moreover, plaintiffs failed to demonstrate the required element of causation. The element of causation requires proof that but for the attorney's alleged malpractice the plaintiff would have succeeded in the underlying suit. (Citations omitted.) Applying this principle to the case at bar plaintiffs failed to demonstrate that but for the dismissal of the immunity defense Regional would have prevailed in the underlying case. In other words, plaintiff failed to demonstrate that the immunity defense would have defeated Crouch's claim of negligence. As earlier stated, the stipulated dismissal of the immunity defense was based on published case law.

On appeal, plaintiffs argue that the trial court erred by granting summary disposition in favor of defendants. This Court reviews summary disposition decisions de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004).

In order to establish a claim of legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was the proximate cause of an injury, and (4) the fact and extent of the injury alleged. *Estate of Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002). In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff must show that, but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the "suit within a suit" requirement in legal malpractice cases. *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004).

An attorney is obligated to use reasonable skill, care, discretion, and judgment in representing a client. *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995). "Further, according to SJI2d 30.01, all attorneys have a duty to behave as would an attorney of ordinary learning, judgment or skill ... under the same or similar circumstances.'" *Id*. An attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law. *Id*. Thus, Michigan attorneys must know what the "prevailing Michigan law" is, and where that law is uncertain or changing, must act to protect their clients' interests in the same way as an ordinarily qualified attorney would.

In the underlying action, Crouch alleged that REMS simply transported Chad in a non-emergency situation. REMS employee Stevens testified in his deposition that the "run code" used in the Crouch case was "2/3," with the "2" being the code for "non-emergency" and the "3" being the code used to represent that the ambulance was being used as "a taxi for transportation." Stevens testified that a medical emergency situation was not presented.

In *Knight, supra,* the plaintiff was allegedly injured while being transferred from one hospital to another. This Court concluded that the statutory grant of immunity provided by the EMSA applies only to care rendered in emergency situations and did not apply to non-emergency situations such as the transfer in that case. *Knight* interpreted the version of the EMSA in effect at the time the plaintiff's claim arose. The applicable statute provided:

> When performing services consistent with the individual's training, acts, or omissions of an ambulance attendant . . . do not impose liability on those individuals in the treatment of a patient when the service is performed outside a hospital. Such acts or omissions also do not impose liability on . . . the ambulance operation . . . . All persons named in this section are protected from liability unless the act or omission was the result of gross negligence or willful misconduct. [MCL 333.20705(3).]

In interpreting the EMSA, this Court stated:

> The legislative history indicates that the statute is situation oriented rather than profession oriented. The current statute is in Part 207 of the Public Health Code, added by 1981 PA 79, which is entitled "Emergency Medical Services,"

> while its immediate predecessor, MCL 338.1925, was part of the Emergency Personnel Act, 1976 PA 290. This change of emphasis from emergency personnel to emergency services indicates that the Legislature intended to grant immunity in emergency care situations rather than to all duties of ambulance attendants. As the title "Emergency Medical Services" clearly indicates, the statute was intended to apply to emergency medical services, not non-emergency medical services. [*Knight, supra* at 414.]

See also *Pavlov, supra.*

The entire EMSA was repealed by 1990 PA 1979, effective July 2, 1990, but reenacted in substantially similar form as MCL 333.20965. At the time the Crouch claim arose, MCL 333.20965 (1) provided:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, or medical director of a medical control authority or his or her designee while providing services to a patient outside a hospital, or in a hospital before transferring patient care to hospital personnel, that are consistent with the individual's licensure or additional training required by the local medical control authority, including, but not limited to, services described in subsection (2), do not impose liability in the treatment of a patient on those individuals . . .

Plaintiffs argue that the holdings in *Knight* and *Pavlov* do not apply to the 1990 version of the EMSA and that defendant negligently relied on the holdings in those cases in stipulating to the withdrawal of the immunity defense. We disagree.

In *Malcolm v East Detroit,* 180 Mich App 633; 447 NW2d 860 (1989), rev'd 437 Mich 132; 468 NW2d 479 (1991), this Court held that "the [1981] version of the EMSA created an exception to governmental immunity in cases of gross negligence or willful misconduct in the provision of medical services." The purpose of repealing and reenacting the EMSA immunity section in 1990 was "to make clear that MCL 333.20965 does not take away any immunity enjoyed by a governmental entity under the GTLA [governmental tort liability act]." *Omelenchuk v City of Warren,* 466 Mich 524, 529 n 8; 647 NW2d 493 (2002). The core provisions of the EMSA were not significantly altered. There is no indication that the EMSA was repealed and reenacted in response to the *Knight* decision.

The Supreme Court's adoption of a standard jury instruction in January 1996 further supports the conclusion that *Knight* remains good law after the reenactment of the EMSA. SJI2d 14.20[3] states:

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[3] A standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2); *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; (continued…)

> An emergency medical services worker acting in an emergency situation is liable for injuries to a patient caused by the worker's conduct or failure to act only if the conduct or failure to act constitutes gross negligence or willful misconduct.

The "Note on Use" to 14.20 states:

> The Emergency Medical Services Act applies only to emergencies. *Knight v Limbert,* 170 Mich App 410; 427 NW2d 637 (1988); *Pavlov v Community Emergency Medical Services, Inc,* 195 Mich App 711; 491 NW2d 874 (1992).

In light of *Knight* and *Pavlov,* as well as SJI2d 14.20, defendant's conclusion that the EMSA did not apply under the facts of this case and that the immunity defense was not applicable was consistent with prevailing law. The trial court properly granted summary disposition in favor of defendant.

Plaintiffs also argue that the trial court erred by denying their motion to amend their complaint to allege a cause of action for fraud based on defendant's fraudulent representation that the court struck the immunity defense when in fact defendant stipulated to withdrawal of the immunity defense. This Court reviews a trial court's decision on a motion to amend for an abuse of discretion. *Frank W Lynch & Co v Flex Techs, Inc,* 463 Mich 578, 583; 624 NW2d 180 (2000).

Particularized reasons for denying a motion to amend include: (1) undue delay; (2) the movant's bad faith or dilatory motive; (3) repeated failures to cure deficiencies by amendments previously allowed; (4) undue prejudice to the nonmoving party; and (5) futility. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000).

In *Kassab v Michigan Basic Property Ins Ass'n,* 441 Mich 433, 442; 491 NW2d 545 (1992), the Michigan Supreme Court set forth the elements for a claim of fraud or misrepresentation as follows:

> The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [Citations omitted.]

See also *DiPonio Construction Co v Rosati Masonry Co, Inc*, 246 Mich App 43, 51; 631 NW2d 59 (2001).

While it is true that leave to amend shall be freely given when justice so requires, MCR 2.118; *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1995), the trial court did

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(…continued)

563 NW2d 693 (1997).

not violate this rule in concluding that it would be futile to allow plaintiffs to amend the complaint to allege a cause of action for fraud because plaintiffs could not show injury due to reliance on defendant's representation. *Hord v Environmental Research Institute,* 463 Mich 399, 405; 617 NW2d 543 (2000). Whether the court struck the immunity defense, or whether defendant stipulated to withdrawing the defense, is immaterial in light of prevailing law holding that the EMSA does not apply in non-emergency situations. Thus, defendant's misrepresentation was not a cause in fact of the claimed injury.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter