

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**HANTZ GROUP, INC and
HANTZ FINANCIAL SERVICES, INC,
Plaintiffs,**

v.

**Case No. 15-150486-CB
Hon. James M. Alexander**

**HERTZ SCHRAM, PC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant's Motion for Summary Disposition. Plaintiffs brought this action claiming that Defendant committed legal malpractice when it represented them in an action against Chemical Bank. Specifically, Plaintiffs allege two theories of malpractice. They first claim that Defendant committed malpractice by delaying the filing of the Chemical Bank Complaint. Second, Plaintiffs allege that Defendant failed to timely raise that Michigan law precludes Michigan Tort Reform Act allocation of a UCC conversion claim.

Defendant's motion only seeks to dismiss any claim based on the second allegation of malpractice, and it does so under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine

issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

As stated, Defendant seeks dismissal of any malpractice claim based on the allegation that it failed to raise the UCC argument when jury instructions were being decided after the closing of proofs in the Chemical Bank litigation.

The facts underlying said litigation are not in dispute. Plaintiffs are in the securities brokerage business. One of Plaintiffs' employees, Michael Laursen, embezzled approximately \$2.6 million from Plaintiffs' customers. His principal scheme involved opening a corporate bank account with Chemical Bank under the name Henary Firearms Services. He then directed Plaintiffs' clients to make investment checks payable to "HFS" – the same acronym as Plaintiff Hantz Financial Services.

He would then deposit the checks into his Henary Firearms Services account and withdraw the money for his own use. Ultimately, one client filed a FINRA arbitration claim in March 2008 – seeking an accounting of their investments. Laursen's scheme was then uncovered.

Plaintiffs hired Defendant to handle all aspects of the Laursen matter, including prosecuting claims against Chemical Bank. This underlying lawsuit alleged that Chemical Bank was liable to Hantz Financial for UCC conversion of approximately \$2 million.¹

The underlying litigation resulted in a two-day jury trial. At the close of proofs, the trial court conferred with counsel on jury instructions. Plaintiffs allege that Defendant then "agreed to allow the jury to allocate fault pursuant to the Michigan Tort Reform Act (MTRA) among third-party tortfeasors, including Laursen and his wife, [Hantz Financial], and the victims." The jury then

¹ The trial court granted Chemical Bank's partial summary motion regarding approximately \$1 million of alleged damages based on the three-year statute of limitations for said claim. This ruling is the basis for Plaintiffs' other

applied the allocations – finding Chemical Bank responsible for only 7% of the \$989,459.50 damage award (or \$69,262).

Plaintiffs claim that Defendant “violated the standard of care when it allowed the jury to apply the MTRA allocation model to a UCC Conversion claim,” which is not allowed under Michigan law.² Plaintiffs also claim that Defendant did not discover this error until after the verdict and raised the same in a motion for entry of judgment.

The trial court denied said motion, ruling (1) Michigan law does not allow the factfinder to allocate an award based on a violation of the UCC conversion statute, (2) Defendant forfeited the argument because it did not object to the verdict form, (3) a manifest injustice would result if the verdict was allowed to stand, and (4) the proper relief was to order a new trial.

After the trial court ordered a new trial, Chemical Bank filed a motion for leave to amend its affirmative defenses to allege UCC allocation provisions that it had previously failed to raise. The trial court granted this motion, and the parties ultimately stipulated to a bench trial based on the proofs presented in the original trial. The trial court ruled that Chemical Bank violated the UCC conversion statute and caused damages of \$989,459.50 and then applied the UCC allocation statutes to reduce the award to \$98,945.95 in Hantz Financial’s favor.

1. Plaintiffs’ disputed malpractice theory.

As stated, Plaintiffs’ disputed malpractice theory is that Defendant agreed or failed to object to a jury instruction applying the MTRA’s allocation model to their UCC claim. Had Defendant objected to the same as inapplicable under Michigan law, then Plaintiffs claim they would have

claim of malpractice.

² See *John Hancock Financial Services, Inc v Old Kent Bank*, 346 F3d 727 (CA 6, 2003).

received a judgment against Chemical Bank for the entire \$989,459.50 damages award. This is so because Chemical Bank failed to plead the affirmative defense of the UCC's allocation statutes,³ and its failure to do so would have resulted in the trial court's refusal to consider the same when instructing the jury.

2. Defendant's argument.

Defendant argues that Plaintiffs' disputed malpractice theory is impermissibly based on pure speculation and must be dismissed. This is so, Defendant argues, because Plaintiffs speculate that the trial court would not have allowed Chemical Bank to amend its affirmative defenses to include the UCC allocation statutes when Defendant raised the issue. And, Defendant points out, the trial court did allow said amendment after it ordered the new trial.

3. Analysis.

In order to succeed on a legal malpractice claim, a plaintiff must establish: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Pontiac Sch Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612-613; 563 NW2d 693 (1997) (internal citations and quotations omitted).

The proximate causation element includes both cause in fact and proximate cause. *Pontiac Sch Dist*, 221 Mich App at 613; *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The *Skinner* Court reasoned:

³ While Chemical Bank did raise the affirmative defense of MTRA's allocation scheme, the same was inapplicable.

The cause in fact element generally requires showing that “but for” the defendant's actions, the plaintiff’s injury would not have occurred. On the other hand, legal cause or “proximate cause” normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or “proximate cause” to become a relevant issue. *Skinner*, 445 Mich at 163 (internal citations omitted).

“To be adequate, a plaintiff’s circumstantial proof must facilitate reasonable inferences of causation, not mere speculation.” *Skinner v Square D Co*, 445 Mich at 164. The *Pontiac School District* Court applied *Skinner*’s causation reasoning to a legal malpractice claim. *Pontiac Sch Dist*, 221 Mich App at 613-615; *Skinner*, 445 Mich at 163-165.

The *Pontiac School District* Court observed:

In *Skinner*, the Court relied upon *Kaminski v. Grand Trunk W.R.Co.*, 347 Mich. 417, 421-422, 79 N.W.2d 899 (1956), which adopted the following test of conjecture when there were alternative theories of causation requiring a “rule of conjectural choice between equally plausible inferences”:

“As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.”

* * *

“If, however, plaintiff has proven sufficient facts to justify a verdict upon *one* theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury.” *Pontiac Sch Dist*, 221 Mich App at 613-14.

The *Skinner* Court continued:

We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. . . . [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not

enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Skinner, supra* at 164-165, citing *Kaminski*, 347 Mich 417.

Plaintiffs point to the following facts to support their malpractice claim. First, the jury returned a verdict in Plaintiffs' favor on their UCC claim. Second, the unused UCC allocation statutes were the only permissible mechanisms to allocate damages. Third, Chemical Bank failed to raise these affirmative defenses. Fourth, the trial would not have allowed use of MTRA to allocate any portion of the UCC conversion claim. Fifth, Defendant did not raise the issue with the trial court until after the verdict was rendered. Finally, because Defendant failed to raise the issue, the trial court found that argument was forfeited (and was, therefore, required to grant a new trial).

Plaintiffs claim these "undisputable facts" indicate a "logical sequence of cause and effect," which lead to the conclusion that, but for Defendant's negligence, Plaintiffs would have prevailed on their UCC conversion claims.

Defendant, on the other hand, argues that Plaintiffs simply speculate that the trial court would not have granted Chemical Bank's motion to amend its affirmative defenses to include the UCC allocation statutes.

But, as Plaintiffs' Response argues, Defendant ironically asks this Court to dismiss Plaintiffs' disputed claims on the basis of two "levels" of mere speculation – that (1) Chemical Bank would have filed a motion to amend its affirmative defenses, and (2) if said motion was filed, the trial court would have granted the same.

In its Reply Brief, Defendant points to the following facts in support of its speculation. First, Chemical Bank did move to amend its affirmative defenses after the trial court ordered a new trial.

And second, the trial court granted said motion. As a result, Defendant claims, there is no reason to believe that either Chemical Bank or the trial court would have acted any differently had the issue been raised in the first trial.

And based on the same, Defendant argues that Plaintiffs' causation theory is "at most, 'equally as probable' as the theory that Chemical Bank would have asked to amend its affirmative defenses." And under *Skinner*, Defendant claims that equally as probable is not enough, citing *Skinner*, 445 Mich at 172-73 (concluding "causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment").

In response, Plaintiffs argue that, had Defendant timely raised the issue, there is no reason to believe that the trial court would have permitted Chemical to amend its affirmative defenses.

And Plaintiffs claim that it is irrelevant how Chemical acted **after** the new trial was ordered because the foundation of the present claim is the fact that Defendant failed to timely raise the UCC allocation statutes during the original trial.

The Court recognizes that Plaintiffs' disputed malpractice theory relies on some speculation, but the same is supported by indisputable facts. But Defendant's summary motion offers mere speculation as an alternative, although supported by less persuasive facts.

Plaintiffs' theory is **more than** just a mere possibility or equally probable as Defendant's theory. Although Chemical Bank ultimately moved to amend its affirmative defenses to include the UCC allocation statutes, this wasn't done until **after** the trial court ordered a new trial.

As observed by the trial court, during the course of the original litigation and in response to Defendant's motion for entry of judgment, "Chemical relied, **and continues to rely**, on MCL §

600.2957 in support of its affirmative defenses.” [Opinion and Order Denying Plaintiff’s Motion for Entry of Judgment, at pg 2] (emphasis added). The trial court later noted, in response to Defendant’s motion, Chemical argued that “even if Hantz did not waive the issue, no instructional error occurred because the allocation of fault provisions of MCL 600.2957(1) is applicable to Hantz’s UCC-based conversion claim.” [Opinion, at pg 5, citing Chemical’s brief at pg 4]. Accordingly, Chemical Bank continued to rely on the MTRA even **after** the issue was raised by Defendant.

In other words, Defendant reliance on Chemical’s and the trial court’s actions **after** the new trial was ordered to speculate how Chemical would acted in the original trial are belied by Chemical’s actual actions. When the UCC allocation statutes were raised by Defendant, Chemical responded by continuing to assert and rely on the MTRA. Although not dispositive in itself, this fact is weighs in Plaintiffs’ favor.

4. Conclusion.

While this is admittedly a close call, for all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiffs, the Court finds that Plaintiffs have presented sufficient circumstantial evidence to facilitate a reasonable inference of causation (and beyond mere possibility or equally probable as Defendant’s theory) such that summary disposition based on the same is inappropriate and DENIED.

IT IS SO ORDERED

April 20, 2016
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge