Office Memorandum

To: Professor Cooney

From: 137910

RE: Lyon law firm vicarious liability & malpractice case.

Date: July 28, 2023

Questions Presented

1. Can the Lyon firm be vicariously liable under the respondeat superior doctrine, which says an employer is liable for the employee's tortious conduct committed in the course and within the scope of employment when Stafford misled Pettigrew by repeatedly telling him that his case was filed even though Stafford knew his case was not viable nor filed?
2. Can Pettigrew prove causation under the "suit within a suit" doctrine, which requires a plaintiff to prove that he would've succeeded in his underlying suit absent the attorney's negligence, when his case lost merit because of his expert witness's withdrawal of certification?

Brief Answers

1. Probably not. Employers are vicariously liable for their employees' tortious conduct committed in the course and within the scope of employment. But an employer is not vicariously liable if the employee's intentional misconduct was for their own benefit and not for the benefit of the employer. Here, lying to a client about something important that they should know about is not acting within the scope of employment. Because Stafford misled and lied to Pettigrew to hide his failure to have filed the case and because Lyon was not aware of the case, Stafford lied to both his client and withdrew something of relative importance from the Lyon firm. Therefore, the Lyon firm is not vicariously liable for Stafford's misconduct.

2. No. To prove legal malpractice, a plaintiff must prove that the attorney's omission was the cause-in-fact of their injury. This requires proof that but for the attorney's failure, the plaintiff's underlying suit would have succeeded. Here, Stafford failed to submit Pettigrew's case before the statute of limitations expired. However, before Pettigrew became aware of the filing mistake, his expert witness had withdrawn his certification. Essentially, this means that Pettigrew no longer had a strong case against his doctor. Therefore, Pettigrew cannot demonstrate a clear cause-and-effect relationship, and he won't be successful in either of the two cases.

Discussion

1. Lyon is not victoriously liable for Stafford's lying and misleading of a client's case because he was acting outside the scope of employment for his own purpose and not for the firm's benefit.

A. Overview

Pettigrew alleges that the Lyon firm is vicariously liable for Stafford's misconduct, arguing that he was an employee acting within the scope of his employment. But under the respondeat superior doctrine, employees who act for their own purposes and not in furtherance of the employer's business are acting outside the scope of employment. In this case, Stafford continued to lie and mislead Pettigrew to conceal his failure to file the case on time, a purpose unrelated to the firm's authorization, and deceiving a client falls outside the scope of employment, the court will likely find the Lyon firm not vicariously liable for Stafford's misconduct.

B. Vicarious Liability

Under the respondeat superior doctrine, employers are vicariously liable for their employees' tortious conduct committed in the course and within the scope of employment. *Mueller v. Brannigan Bro. Rest. & Tav. LLC*, 323 Mich. App. 566, 572, 918 N.W.2d 545, 551

(2018). An employee is acting within the scope of employment when "engaged in the service" of his employer or "while about his [employer's] business." *Matouk v. Michigan Mun. League Liab. & Prop. Pool*, 320 Mich. App. 402, 416, 907 N.W.2d 853, 862 (2017). But an employer is not vicariously liable for their employees' "intentional and reckless acts" that are outside the scope of employment. *Id*. at 419, 907 N.W.2d at 864. Acts made without the employer's authority or for the employee's own purposes are outside the scope of employment, *Mueller*, 323 Mich. App. at 572, 918 N.W.2d at 551.

A plaintiff could succeed in a vicarious liability suit if they can prove that the employee "accomplished the act in furtherance or…interest" of the employer. *Matouk*, 320 Mich. App. at 413, 907 N.W.2d at 861. The jury generally determines if the employee acted within the scope of employment. *Mueller*, 323 Mich. App. at 572, 918 N.W.2d at 551. But it may also be determined as a matter of law when it's "clear that the employee was acting to accomplish some purpose of his own." *Id*. at 572, 918 N.W.2d at 551.

B. Cases on Vicarious Liability

When employees deviate from the scope of employment, like a club bouncer, they act in their own interest and not in the interest of their employer. In *Mueller,* a patron was ejected from a bar after a dispute, and the bouncers chased and viciously attacked him. *Mueller*, 323 Mich. App. 566, 918 N.W.2d 545. The employer admitted that the attackers "were employed and working" when the incident happened. *Id*. at 573, 918 N.W.2d at 551. But he argues "that they acted completely outside the scope of their employment" when they chased the ejected patron down the street and beat him. *Id*. at 573, 918 N.W.2d at 551. The plaintiff argued that one of the bouncers testified that he participated in the act to protect the other bouncer because he believed that protecting other employees was part of his job.

The court held that the employer couldn't be held vicariously liable for his employees' misconduct. *Id*. at 579, 918 N.W.2d at 554. The court reasoned that the employees were "deviating from the scope and authority" of their employer "for their own purposes." *Id*. at 579, 918 N.W.2d at 554. And the plaintiff couldn't convince the court that the employer authorized the employer authorized the employees' acts. *Id*. at 574, 918 N.W.2d at 552. Because chasing a patron far away to beat him senseless was unauthorized, it did not fall within the bouncer's job duties or benefit the employer. *Id*. at 574, 918 N.W.2d at 552.

Even actions that require a higher level of awareness and are not necessarily harmful, when undertaken during working hours without the employer's authorization, fall outside the scope of employment. In *Matouk***,** the court held that a police officer was not within the scope of his employment when he assisted in an investigation outside of his jurisdiction that created a conspiracy case against him. *Matouk*, 320 Mich. App. 402, 907 N.W.2d 853. The court reasoned that the officer didn't have his department's authority to assist in that investigation, and thus any involvement was "outside…of his employment" and for his "individual interest," not the employers. *Id*. at 420, 907 N.W.2d at 864.

In an unpublished but strikingly similar case, the court of appeals found that a law firm was not vicariously liable for an attorney who lied to a client and misled him to hide that he hadn't filed his case on time. In *Potter v. Secrest, Wardle, Lynch, Hampton, Truex & Morley, P.C.*, No. 265002, 2007 Mich. App. LEXIS 1215 (May 8, 2007), the attorney failed to file his client's case before the statute of limitations expired and then misled the client for almost three years into believing his malpractice case was pending. During this time, the attorney joined another law firm and kept the case a secret while continuing to mislead the client. The client sued the firm, alleging that the attorney had committed fraud and breach of fiduciary duty and that the attorney

made representations he knew were false while employed. The firm argued that there wasn't a contingency fee between the attorney and the client, and that the attorney didn't notify anyone in the firm about the case, nor did he have the firm's authority to represent the client.

The court held that the law firm was "not vicariously liable" for the attorney's misconduct, fraud, and breach of fiduciary duty. *Potter*, 2007 Mich. App. LEXIS at *12-13. The court reasoned that the attorney's actions of "lying and dissembling" were for "covering up his potential liability" to his client, thus acts outside the scope of his employment. *Potter*, 2007 Mich. App. LEXIS at *19. The court found the plaintiff's claim of breach of fiduciary duty required "a more culpable state of mind," meaning that the attorney's misconduct to mislead the client was an intentional act. *Potter*, 2007 Mich. App. LEXIS at *8. The court found the same reasoning for the plaintiff's fraud claim; thus, the firm was not vicariously liable for the attorney's misconduct. *Potter*, 2007 Mich. App. LEXIS at *8.

These cases illustrate scenarios when the employer is not vicariously liable. This includes an attorney lying to a client and the law firm he works with. *Potter* demonstrates how lying and misleading a client was beyond the scope employment. Those acts were not to the benefit of his firm, and thus the employer was not vicariously liable.

C. Application

In our case, the court will probably conclude that Stafford acted beyond the scope of his employment. Like the employees in *Matouk* and *Potter*, who engaged in unauthorized activities that their employers did not know of, Stafford was secretly ``working`` on Pettigrew's case without the firm's authorization. Stafford's misconduct was for his purpose of concealing the truth from his client and his employer. Thus, a court would likely conclude like the Potter court did and find that Stafford acted entirely for his own interest and not for the Lyon firm.

Pettigrew alleges that the Lyon firm is vicariously liable for Stafford because he lied to him about the status of his case. In *Potter*, the attorney's alleged lying and dissembling were seen as intentional acts made for his own purpose and were not within the scope of his employment. In our case, even after learning from the expert witness that there was no case, Stafford continued lying to hide the truth. Stafford willfully decided to continue lying but later admitted he was covering up the fact that he didn't file Pettigrew's lawsuit on time. Thus, because lying and misleading a client is not within an employer's services, the court will find that the Lyon firm is not vicariously liable for Stafford's misconduct.

Next, Pettigrew cannot show that Stafford's actions to conceal the truth furthered the firm's business. The court will view these facts like the court in *Potter* viewed the attorney's misconduct, which found the attorney's alleged fraud and breach of fiduciary duty intentional. In *Potter*, the court concluded that the attorney was attempting to cover up his failure to have filed the plaintiff's case before the statute of limitations. Thus, in our case, the court will probably find Stafford's misconduct did not further the Lyon firm's business.

In summary, Pettigrew's direct claims against Stafford of fraud and breach of fiduciary reflect the facts of the *Potter* case. The court will probably decide as a matter of law that Lyon is not vicariously liable for Stafford's misconduct.

2. Pettigrew cannot establish causation-in-fact because he needs to prove that, but for Stafford's negligence, he would've succeeded in the underlying case. But he never had a viable medical malpractice case, so he may be unable to prove causation.

A. Overview

Pettigrew alleges Stafford committed legal malpractice because he had failed to file his case before the statute of limitations expired. To establish causation-in-fact under Michigan's suit-within-a-suit doctrine, a plaintiff must prove that, but for the attorney's negligence, they would've succeeded in the underlying case. Here, Pettigrew's expert witness withdrew his support for Pettigrew's underlying medical malpractice case, so even if Stafford did file the lawsuit on time, his case was not viable without the expert witness's support. Therefore, the court will conclude that Pettigrew cannot satisfy the causation element of his legal malpractice case.

B. Professional Malpractice Law

In a Michigan legal malpractice claim, a plaintiff must establish "the existence of an attorney-client relationship" and negligence in their legal representation. *Bowden v. Gannaway*, 310 Mich. App. 499, 503, 871 N.W.2d 893, 895 (2015). The plaintiff must also prove that the attorney's negligence "was the proximate cause" of their injury. *Charles Reinhart Co. v. Winiemko*, 444 Mich. 579, 585–86, 513 N.W.2d 775 (1994). And the plaintiff must also prove that the attorney's action "was the cause in fact" of the damage, that "but for the attorney's alleged malpractice," the plaintiff "would've been successful in the underlying suit." *Id*. at 586, 513 N.W.2d at 775-76. In other words, "the attorney's negligence…caused [the] loss or unfavorable result in the underlying litigation." *Id*. at 588, 513 N.W.2d at 776. Thus, a plaintiff seeking to recover from a legal malpractice claim has "the difficult task of proving two cases within a single proceeding." *Id*. at 586, 513 N.W.2d at 776.

Furthermore, the proximate cause analysis regarding the plaintiff's underlying case is a question of law. *Id*. at 589, 513 N.W.2d at 777. This is because the analysis depends on the law and procedural rules; otherwise, a question of fact would require the jury to act as judges. *Id*. at 590, 513 N.W.2d at 777.

C. Legal Malpractice Cases

The Michigan Court of Appeals has recently ruled that the attorney's professional malpractice was not the proximate cause of the plaintiff's alleged injuries due to the absence of the required expert certification at the time. In *Bowden*, the plaintiff hired an attorney to submit a health benefit appeal, but the attorney failed to file the appeal before the deadline. *Bowden*, 310 Mich. App. 499, 871 N.W.2d 893. The defendants argued that failing to file the appeal was not the proximate cause of any damage to the plaintiff because no physician would grant the plaintiff a permanency disability certification. To support their argument, the defendants argued that even if the appeal had been filed, the plaintiff's case would've not succeeded because she didn't have a physician's support or certification, which was necessary for her underlying case.

The court held that the plaintiff couldn't show that the attorney's negligence was the proximate cause of her injuries. *Id*. at 505-06, 871 N.W.2d at 896. The court reasoned that without a physician's certification indicating she was permanently disabled; she wouldn't have prevailed in the underlying case even if it had been timely filed. *Id*. at 505–06, 871 N.W.2d at 896.

In close comparison, the *Potter* case illustrates how the plaintiff couldn't prove proximate cause or damages based on the attorney's failure to have filed his lawsuit on time because he didn't have a valid underlying case. *Potter v. Secrest, Wardle, Lynch, Hampton, Truex & Morley, P.C.,* No. 265002, 2007 Mich. App. LEXIS 1215 (May 8, 2007). The plaintiff in *Potter* based his

malpractice claim on the "lying, dissembling and distortion of the legal work" by his attorney. *Potter*, 2007 Mich. App. LEXIS at *16. The defendants argued that "the plaintiff's legal malpractice case [was] defective" because the plaintiff failed to show a "valid underlying medical malpractice case." *Potter*, 2007 Mich. App. LEXIS at *15. The trial court concluded that the plaintiff's legal malpractice case was properly dismissed despite his attorney's failure to "competently pursue his medical malpractice cause of action." *Potter*, 2007 Mich. App. LEXIS at *17-18.

The appellate court ruled that the plaintiff couldn't prove "proximate cause and damages for his legal malpractice claim." *Potter*, 2007 Mich. App. LEXIS at *18. The court reasoned that the firm wasn't liable for the plaintiff's alleged damages in any form because the plaintiff "did not allege a valid underlying medical malpractice case." *Potter*, 2007 Mich. App. LEXIS at *18. And because the plaintiff couldn't "prove the underlying cause of action," he couldn't "prove the requisite proximate cause and damages." *Potter*, 2007 Mich. App. LEXIS at *18. Finally, the court disregarded the plaintiff's claims of "lying and dissembling" related to his legal malpractice claim because the firm was not vicariously liable for the attorney's acts. *Potter*, 2007 Mich. App. LEXIS at *18.

In summary, these cases demonstrate that a plaintiff must have a valid underlying case to prevail in a legal malpractice suit.

D. Application

In our case, the court will probably conclude that Stafford's alleged negligence was not the cause-in-fact of Pettigrew's apparent injuries. Like the plaintiff in *Bowden*, Pettigrew did not have a viable lawsuit because his expert witness withdrew his initial opinion, losing his required expert testimony. In other words, he doesn't have a valid medical malpractice case against his

physician. Thus, Stafford's alleged malpractice caused Pettigrew no harm, and he cannot prove a successful underlying case.

In the *Potter* case, the defendants argued that although the client had entered an attorney-client relationship with the attorney, no one at the firm was aware of the agreement nor that the firm benefited financially from it. Here, Pettigrew entered an attorney-client relationship with Pettigrew as a solo practitioner. When he started with the Lyon firm, no one was aware of that client-attorney relationship, and Lyon also didn't benefit financially from that relationship.

As a matter of law, a court may dismiss Pettigrew's legal malpractice claim because he cannot prove causation-in-fact, nor that he would've succeeded in his underlying medical malpractice case, thus failing to satisfy the suit-within-a-suit doctrine. Therefore, the court may apply the same reasoning as in the Potter case and dismiss Pettigrew's claim.

Conclusion

The court will determine that the Lyon firm is not vicariously liable for Stafford's misconduct because Stafford acted entirely outside the scope of his employment during his time at the Lyon firm. Because his actions of lying and misleading a client are not within the firm's area of business and because he acted without the firm's authority, the firm is not vicariously liable.

The court will also find that Pettigrew does not have a viable underlying case because his expert witness had withdrawn his support for Pettigrew's medical malpractice case. Thus, Stafford's alleged negligence did not affect Pettigrew's case, and he cannot prove causation-in-fact because he wouldn't have succeeded either way.