

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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EARL D. BLACK,

Plaintiff/Counterdefendant-Appellant,

v

MITCHELL M. MUSIAL, II, and MITCHELL M.  
MUSIAL, PLLC,

Defendants/Counterplaintiffs-  
Appellees.

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UNPUBLISHED  
October 29, 2020

No. 350132  
Oakland Circuit Court  
LC No. 2016-156184-CZ

Before: BOONSTRA, PJ., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals by right the trial court’s order granting defendants’ motion for summary disposition under MCR 2.116(C)(10) and dismissing his claim for malpractice. We affirm and remand for defendants’ remaining counterclaim against plaintiff to proceed.<sup>1</sup>

**I. FACTUAL BACKGROUND**

This is the second time that this case is before this Court.<sup>2</sup> In our prior decision, we provided many of the facts at issue, and we will therefore provide only a brief overview. Defendant Musial and plaintiff entered into an attorney-client relationship in 2014. Musial is a patent law attorney, and plaintiff retained Musial to prepare and file a patent application for plaintiff’s “packaging invention.” Musial filed the application in November 2014. On March 15, 2016, the United States Patent and Trademark Office (USPTO) sent Musial a letter informing him that it required additional information within 60 days to accept the application; this is what is known

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<sup>1</sup> Defendants have an outstanding counterclaim against plaintiff for attorney fees; this is not at issue in this appeal.

<sup>2</sup> See *Black v Musial*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 338411).

within the patent industry as an “election requirement.” An applicant must make a specific claim to a single invention, and the USPTO often finds that an applicant has made claims to too many inventions. The applicant must then choose which of the inventions, or “elections,” to select.

In early April 2016, the attorney-client relationship between Musial and plaintiff broke down, and Musial recommended that plaintiff seek different counsel. Plaintiff retained new counsel, but this appears to have only been to pursue potential claims against Musial. In early May 2016, plaintiff’s counsel informed Musial that he was representing plaintiff in his case against Musial, and Musial replied that there was an upcoming deadline, May 15, 2016, for plaintiff’s application. Musial also stated that he was precluded from taking any further action on plaintiff’s behalf. Plaintiff’s counsel responded and informed Musial that he would be held responsible for any missed deadlines regarding the application, and Musial sent a formal letter of termination.<sup>3</sup> The deadline for the application passed, Musial and plaintiff took no action regarding it, and the USPTO deemed the application abandoned on October 3, 2016.

Plaintiff filed this action, alleging several claims including, for purposes of this appeal, legal malpractice. In our prior decision, we agreed with the trial court that the remaining claims were redundant and essentially reiterations of the legal malpractice claim, and we affirmed the trial court’s dismissal of those other claims. On remand, the trial court agreed with defendants’ argument that plaintiff required expert testimony to establish the standard of care, breach, and causation, and concluded that plaintiff had failed to put forth any such expert. The trial court thus granted defendants’ motion for summary disposition on plaintiff’s legal malpractice claim. On appeal, plaintiff challenges the trial court’s determination, arguing that plaintiff was not required to present expert testimony because Musial’s actions amounted to ordinary negligence and concerned matters within the jurors’ common knowledge. Plaintiff also argues in the alternative that he could have utilized Musial, as well as cross-examination of Musial’s expert witness, to establish the standard of care.

## II. ANALYSIS

### A. STANDARD OF REVIEW

This Court reviews de novo the trial court’s decision on a motion for summary disposition. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). A motion is properly granted pursuant to MCR 2.116(C)(10) when “there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law.” *Dextrom*, 287 Mich App at 415. This Court “must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence.” *Id.* at 415-416. “This Court is liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

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<sup>3</sup> Musial had also sent a request to withdraw to the USPTO, which was at first denied, but later approved.

Lastly, questions of law are similarly reviewed de novo. *Sills v Oakland Gen Hosp*, 220 Mich App 303, 307; 559 NW2d 348 (1996).

## B. EXPERT TESTIMONY

We agree with the trial court that plaintiff was required to have an expert establish the standard of care and to show breach and causation. Even if plaintiff could have utilized Musial and his expert to establish the standard of care, plaintiff needed his own expert to show breach and causation, which he failed to do.

To succeed on a claim of legal malpractice, a plaintiff must prove four elements: “(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.” *Manzo v Patrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004). “A malpractice claim requires proof of simple negligence based on a breach of a professional standard of care.” *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 409; 516 NW2d 502 (1994), overruled on other grounds by *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004). “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). Notwithstanding this general rule, “[w]here the absence of professional care is so manifest that within the common knowledge and experience of an ordinary layman it can be said that the defendant was careless, a plaintiff can maintain a malpractice action without offering expert testimony.” *Law Offices of Lawrence J. Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989).

In the present case, plaintiff alleged in his complaint that Musial provided no value in his services, engaged in self-dealing, misrepresented the type of patent search he was going to do, misled plaintiff concerning the legal services necessary to file a patent application, failed to have an undivided loyalty to plaintiff’s interests, and placed his own fees above plaintiff’s interests. Plaintiff asserted that “Musial’s misrepresentations, broken promises, and neglect in representing [plaintiff] and in prosecuting his patent application culminated in the application being deemed abandoned by the USPTO, and collectively they deprived [plaintiff] of the value of the competent legal services he paid for and was entitled to receive.”

Plaintiff’s allegations raised issues not within an ordinary layperson’s knowledge; they were matters of patent law. The question of whether Musial provided value in his services would require a determination into what is the value that an ordinary patent law attorney typically provides to his client. Plaintiff would need expert testimony to establish the typical value of such services and, more importantly, to show what, if any, value Musial provided. Additionally, the patent illustration process would require an expert to describe what this process entailed and whether Musial’s actions constituted negligence. The same rationale applies to the election request and the withdrawal procedure, especially as it relates to the element of causation. Plaintiff required an expert to describe the election request and withdrawal processes, including the special rules that are peculiar to the area of patent law. An ordinary lay juror could not determine if Musial was negligent without first knowing the specific rules surrounding this area of law. Moreover, plaintiff needed to show that such negligence was the actual and proximate cause of his damages, i.e., the abandonment of the patent application. As described by both Musial and his expert, there is a

specific procedure for patent applications and how the election request typically proceeds. An ordinary layperson could not be expected to have such knowledge.

Plaintiff argues that his allegations did not raise questions of “professional judgment” but “the absence of professional judgment.” We believe this is a distinction without a difference. Plaintiff required expert testimony to show that Musial’s absence of professional judgment rose to the level of negligence within the patent law profession and that this negligence was the cause of plaintiff’s injury. We see no difference in needing an expert to address professional judgment versus the failure to exercise that professional judgment.

Additionally, in an apparent attempt to avoid the expert witness requirement, plaintiff appears to attempt to couch his malpractice claim as one of ordinary negligence. He consistently reiterates that his claims amount to basic parts of the attorney-client relationship and involved mere negligence. However, plaintiff’s complaint, based on its substance and also its form, is clearly one of legal malpractice involving specifics peculiar to patent law; even its title was that of “Professional Negligence and Malpractice.” Moreover, his claims explicitly addressed areas peculiar to the area of patent law, such as abandonment and the election process. Plaintiff may not avoid the “requirements of a malpractice action by couching [his] cause of action in terms of ordinary negligence.” *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999).

This does not halt our analysis, however, because plaintiff argues that he could have utilized Musial, who is a patent attorney, and Musial’s expert to establish the standard of care. Plaintiff is correct that, in a malpractice case, the defendant may provide the necessary expert testimony for the standard of care. See, e.g., *Rice v Jaskolski*, 412 Mich 206, 212; 313 NW2d 893 (1981) (stating that a plaintiff may use the defendant’s expert in a medical malpractice case). However, regardless of whether plaintiff could utilize Musial and Musial’s expert to establish the standard of care, this did not address plaintiff’s need for expert testimony to show both *breach* and *causation*. See *Dean*, 205 Mich App at 550 (stating that expert testimony is generally required also for breach and causation).

In the present case, both Musial and his expert affirmed in affidavits that Musial’s actions were not negligent and did not cause abandonment. They explained that only the inventor and applicant, i.e., plaintiff, could have responded to the USPTO’s March 15, 2016 letter by the May 15, 2016 deadline and that a patent law attorney is prohibited from responding without the applicant’s consent. Plaintiff did not provide this consent to Musial. Musial and his expert also explained that the USPTO’s letter was routine and a common procedure within patent law. Moreover, Musial and his expert affirmed that plaintiff’s conduct required Musial to withdraw from representation and prohibited him from taking any further action regarding the application. They explained that there were special rules addressing withdrawal for patent attorneys and that these rules required Musial to immediately seek withdrawal. Accordingly, the Michigan Rules of Professional Conduct were not the only rules governing Musial’s conduct. Finally, Musial and his expert affirmed that abandonment was caused solely by plaintiff’s failure as the inventor and applicant to respond to the USPTO’s March 15, 2016 letter. They further explained that there were numerous remedies available to plaintiff, including seeking a deadline extension and a petition to revive the application after abandonment. They affirmed that both were routine procedures that would likely have been granted in this case.

Plaintiff could not rely on Musial or his expert to show breach and causation because their positions were diametrically opposed to his own. Plaintiff needed his own, separate expert, but he failed to present one despite the extensive litigation of this case. Accordingly, we discern no error in the trial court's decision.

### C. SUMMARY DISPOSITION

Given that plaintiff failed to provide any expert in support of his claims for breach and causation, the trial court did not err by determining that there was no genuine issue of material fact and that defendants were entitled to judgment as a matter of law. Musial's expert affirmed that he had examined the entirety of the record and application, that Musial's actions were proper and within the standard of care for patent law attorneys, that Musial had provided excellent value for the fees he charged, that plaintiff's actions discharged Musial and prohibited continued representation, and that abandonment rested solely on plaintiff's failure to respond to the USPTO letter. Plaintiff provided no expert testimony in rebuttal. Musial's expert addressed each of plaintiff's examples of supposed negligence. He addressed and dispensed with plaintiff's claim that Musial mishandled the patent search process, with plaintiff's claim that the application contained errors, with plaintiff's claim that Musial had provided no value for the fees he charged, and with plaintiff's claim that Musial improperly withdrew from representation.

Additionally, the documentary evidence supported defendants' position. The USPTO's letter of abandonment stated that it was based on the *applicant's* failure to respond to the March 15, 2016 letter, and plaintiff was the applicant, not Musial. The 2014 engagement letter contained no mention of a patentability search or, indeed, any search whatsoever. Musial and his expert both explained the difference between the expensive patentability search process versus the preliminary search that Musial performed in this case and for every other patent application he filed. Additionally, the correspondence from plaintiff's counsel to Musial clearly evidenced that the attorney-client relationship had broken down, and to claim that Musial was still retained by plaintiff to represent him in the application process is a fantastic position. Moreover, plaintiff failed to address the special rules surrounding withdrawal for patent attorneys.

Plaintiff's primary piece of evidence was his own affidavit in which he made generic claims of misrepresentation and negligence without documentary or expert support. A party may not create a *genuine* issue of fact by submitting their own affidavit containing generic and conclusory allegations. See *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364-365; 480 NW2d 275 (1991) (explaining that conclusory allegations do not create a genuine issue of material fact). Plaintiff required an affidavit from a patent law expert to proceed past summary disposition. Without it, there was no genuine issue of material fact regarding breach and causation, and the trial court did not err by granting summary disposition.

Affirmed and remanded for the trial court to address defendants' remaining counterclaim.

We do not retain jurisdiction.

/s/ Mark T. Boonstra

/s/ Jane E. Markey

/s/ Karen M. Fort Hood