

STATE OF MICHIGAN
COURT OF APPEALS

FREDDIE ELMER BUCHANAN, JR.,

Plaintiff-Appellant,

v

JOHN A. STREBY,

Defendant-Appellant.

UNPUBLISHED

June 25, 1996

No. 175255

LC No. 93-021724

Before: Michael J. Kelly, P.J., and Bandstra and S.B. Miller,* JJ.

PER CURIAM.

Plaintiff sued defendant, his former attorney, for malpractice. The Genesee County Circuit Court granted defendant's motion for summary disposition under MCR 2.116(c)(10). Plaintiff appeals as of right.

Plaintiff was arrested and charged with OUIL in December of 1985. Plaintiff failed to appear for the scheduled arraignment and on January 18, 1986, a warrant was issued for his arrest. Nothing happened for five years on the warrant until plaintiff applied for a driver's license. Plaintiff was denied a license and retained defendant to represent him on the outstanding OUIL charge. Defendant negotiated a plea with the prosecutor and plaintiff pleaded guilty to and was convicted of his fifth OUIL. As a result of this conviction plaintiff was fined, placed on probation for twenty-four months, and his license was suspended by the Secretary of State for five years. Plaintiff then discharged defendant and hired another attorney.

Plaintiff's new counsel then filed a motion to set aside the plea of guilty which the district court denied. Counsel then appealed the district court conviction and sentence to the circuit court which denied plaintiff relief. Plaintiff then sued defendant for malpractice.

Plaintiff's principal claim of malpractice by defendant was that defendant failed to raise the constitutional issue of denial of a speedy trial and defendant's failure to advise him of his right to a

* Circuit judge, sitting on the Court of Appeals by assignment.

speedy trial. Defendant's motion for summary disposition under MCR 2.116(C)(7) and (C)(10) was granted. The court found that there was no genuine issue of fact on the proximate cause of plaintiff's injury. The court noted that plaintiff failed to plead or offer proof that but for defendant's failure to raise the speedy trial issue plaintiff would have been acquitted of the OUIL charge and/or not received a license suspension by the Secretary of State. The court further found that plaintiff's criminal conduct and his fully informed plea of guilty was the cause of his alleged injuries.

Moreover, plaintiff failed even to raise the speedy trial defense, with new counsel, in his motion for reconsideration of the sentence and his appeal to the circuit court of the district court conviction. The court found that plaintiff had not made a showing that a better result would have been attained had defendant raised the speedy trial issue.

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis of the nonmoving party's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The court deciding a motion for summary disposition must consider the pleadings and all of the evidence available to it. *Radtke*, 442Mich at 374. The court must determine whether a record might be developed which would leave an issue upon which reasonable minds could differ. *Farm Bureau Ins v Stark*, 437 Mich175, 184-185; 468 NW2d 408 (1991). A party may not create a factual issue by submitting an affidavit that contradicts his prior testimony. *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993). The court must draw all inferences in favor of the non-moving party. *Dagen v Hastings Mutual Ins Co* 166 Mich App 225, 229; 420 NW2d 111 (1987).

The trial court's grant of a motion for summary disposition is reviewed de novo on appeal. This Court must determine whether the defendant was entitled to judgment as a matter of law. *Borman v State Farm*, 198 Mich App 675, 678; 499 NW2d 419 (1993).

We find no issue of material fact exists as to plaintiff's assertion that defendant proximately caused plaintiff's injuries. The trial court properly granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

In an action alleging legal malpractice, the plaintiff has the burden of proving that the negligence was a proximate cause of plaintiff's injuries. *Coleman v Gurwin*, 443 Mich 59,63; 503 NW2d 435 (1993); *Simko v Blake*, 201 Mich App 191, 193; 506 NW2d 258 (1993). Proof of negligence is established by showing that the attorney failed to exercise reasonable skill, care, discretion and judgment in the conduct of the case. *Radtke v Miller, Canfield, Paddock & Stone*, 209 Mich App 606; 532 NW2d547 (1995). To show proximate cause, the plaintiff must prove that but for the attorney's negligent representation the plaintiff would have been successful in the matter at hand. *Coleman, supra* 443 Mich at 63; *Radtke, supra* at 2.

Plaintiff's specific allegation of negligence is that defendant failed to move for dismissal grounded on the people's failure to provide a speedy trial, or to inform plaintiff of the legal parameters for such a

motion. The primary issue to be resolved is whether a speedy trial defense would have been successful. The trial court found that the speedy trial defense would not have succeeded, therefore, defendant was not a proximate cause of plaintiff's injuries. The reason for the five year delay was entirely attributable to plaintiff's failure to appear for two arraignment dates. In his complaint, plaintiff admitted that he was issued the two citations on December 4, 1985. When plaintiff failed to appear for his original arraignment date, the court issued a notice for a second arraignment date of January 19, 1986, which was also ignored.

Plaintiff subsequently asserted that he was never issued the citations and did not receive notice of the second arraignment date. In support of this contention plaintiff offered his own affidavit wherein he states that he has no recollection of receiving the citations or the notice. As plaintiff's affidavit is contrary to his previous admission in the complaint, the contention that he did not receive the citations does not create a factual issue. *Aetna Casualty & Surety Co. Ralph Wilson Plastics Co.*, 202 Mich App 540; 509 NW2d 520 (1993).

At no time during the five year hiatus did plaintiff assert his right to a speedy resolution of the pending charges against. This failure to assert his right to a speedy trial weighs against a finding that plaintiff was denied this right. *People v Wickham*, 200 Mich App 106; 503 NW2d 701 (1993).

Neither plaintiff's complaint, his brief in opposition to summary disposition, or his brief on appeal, identifies any specific prejudice to plaintiff caused by the delay. Plaintiff was not incarcerated for any period following the initial arrest, nor was his life impacted during the time when he was avoiding prosecution of the charges. The trial court properly granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

Review of the remaining issue of estoppel is not considered as plaintiff identifies no issue on which discovery would change the trial court's finding regarding a proximate cause. The summary disposition of the trial court is not in error.

Affirmed.

/s/ Michael J. Kelly
/s/ Richard P. Bandstra
/s/ Stephen B. Miller