

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS VERTIN,

Plaintiff-Appellant,

v

GOLDSCHMID & KOZMA, P.C.,

Defendant-Appellee,

and

ROBERT GOLDSCHMID and
GARY A. KOZMA,

Defendants.

UNPUBLISHED

July 5, 1996

No. 178586

LC No. 92-214178-NM

Before: Murphy, P.J., and Markman and Karl V. Fink,* JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals by right a 1994 order granting defendant's motion for summary disposition. Plaintiff, who is currently serving a sentence for a 1973 first-degree murder conviction, filed a complaint in pro per against defendants for alleged errors in representing him in federal habeas corpus proceedings. We affirm.

Prior to retaining defendants, plaintiff had engaged in several appeals of his conviction, including two habeas corpus petitions. Once retained, defendant Goldschmid filed a third federal habeas corpus petition raising two issues: that the trial court erred in failing to give a lesser included offense instruction on second-degree murder as requested by the prosecutor and that plaintiff was denied effective assistance of counsel by his trial counsel's objection to the second-degree murder instruction. The U.S. District Court denied the application for writ of habeas corpus and plaintiff's subsequent appeal and request for a certificate of probable cause. Goldschmid left the firm and defendant Kozma continued

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

representation of plaintiff. The Sixth Circuit Court of Appeals denied plaintiff's appeal of the denial of his motion for certificate of probable cause. In its order, it stated in pertinent part:

The district court adopted the magistrate judge's report recommending denial of the petition. It was noted that the failure to give a lesser included offense instruction in a non-capital case is a basis for habeas relief only where it results in a complete miscarriage of justice. See *Bagby v Sowders*, 894 F 2d 792, 797 (6th Cir) (en banc), cert denied, 110 S Ct 2626 (1990). In this case, no miscarriage of justice was found because there was substantial evidence of premeditation. The district court also rejected the ineffective assistance claim, as the decision to request only an instruction on first degree murder was a strategic choice, and as such, virtually unchallengeable. See *Strickland v Washington*, 466 US 668, 690 (1984).

Upon review, it is concluded that the district court's findings are correct. Moreover, it also appears that this petition could properly have been dismissed as successive. See *McClesky v Zant*, 111 S Ct 1454, 1470 (1991).

Plaintiff filed the present legal malpractice action against Goldschmid, Kozma and the law firm. In his complaint, plaintiff alleged that Goldschmid failed to competently handle his legal matters, failed to file pleadings complying with the court rules, neglected to move for oral argument, failed to file objections to the Magistrate's report and fraudulently concealed that he planned to leave the country and would be unable to perform his contractual and legal duties. Plaintiff alleged that these failures resulted in the unjust loss of his appeal. He alleged that Kozma failed to competently handle his legal matters, failed to file pleadings complying with the court rules and failed to keep plaintiff reasonably informed of the status of the habeas corpus action resulting in the loss of the opportunity to move for reconsideration and the loss of over one-third of the available time to seek certiorari in the U.S. Supreme Court.

Goldschmid was dismissed from the case because he was never served. The mediation evaluation was \$1000 for plaintiff against the law firm and \$0 against Kozma (the case was not mediated with respect to plaintiff's claims against Goldschmid). Kozma and plaintiff accepted the mediation recommendation with respect to the claims against Kozma; thus, he was dismissed. The trial court dismissed the case without prejudice because of plaintiff's failure to appear for the final pretrial/settlement conference, but this Court reversed that order. *Vertin v Goldschmid and Kozma, PC*, unpublished opinion per curiam of the Court of Appeals, issued 6/3/94 (Docket No. 162286).

Defendant then filed a motion for summary disposition pursuant to MCR 2.116(C)(10). It contended that there was no genuine factual issue with respect to proximate cause and that plaintiff had failed to timely file a witness list and would therefore be unable to present expert testimony to establish a breach of the standard of care. The trial court granted defendant's summary disposition motion and stated:

Plaintiff has failed to meet his burden of proof in this legal malpractice action by failing to establish a proximate link between defendant's alleged negligence and the failure of plaintiff's habeas corpus petition. . . . In addition, as to two of his claims of professional negligence, plaintiff cannot prove a breach of the standard of care.

* * *

Plaintiff's witness list in this case contains plaintiff Dennis Vertin and defendants Robert Goldschmidt and Gary A. Kozma. Plaintiff has listed and may call those two defendants to establish the applicable standard of care at trial. However, plaintiff has failed to list any witness who could otherwise establish a breach of the professional standard. Since no reasonable minds could differ as to plaintiff's failure to show that the defendants breached the standard of care and that their negligence was a proximate cause of plaintiff's damages, the court rules that it would be impossible for plaintiff's malpractice claim to be supported by evidence at trial.

On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on several bases. This Court reviews grants and denials of summary disposition motions de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

In an action for legal malpractice, the plaintiff has the burden of proving:

- (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. [*Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).]

Plaintiff first argues that the trial court erred in granting defendant's summary disposition motion because it failed to review all the relevant documents, including an affidavit. However, plaintiff failed to provide these documents to the trial court. If such documents would have established a genuine factual issue as to defendant's negligence and proximate causation of damage, it was plaintiff's obligation to provide them with his response to the summary disposition motion. See MCR 2.116(G)(4). Therefore, the court properly ruled on defendant's motion on the basis of the pleadings and documentary evidence before it.

Plaintiff next claims that the trial court erred in granting defendant's summary disposition motion with respect to his claims of breach of contract and constructive fraud. Plaintiff concedes that a legal malpractice claim regarding an appeal raises an issue of law. See *Charles Reinhart Co v Winiemko*, 444 Mich 579, 589, 592; 513 NW2d 773 (1994). But he contends that his breach of contract and constructive fraud claims were issues of fact that should have gone to the jury. In his answer to defendant's summary disposition motion, plaintiff cited *Charles Reinhart*, *supra* at 590, n 22, which states in pertinent part:

If the malpractice action is not one focused exclusively on the appellate process or issues of law, but is focused on malpractice occurring during litigation or settlement negotiations, then proximate cause often is an issue of fact.

Defendants' only involvement with plaintiff was in connection with his appeals from his criminal conviction. Accordingly, his malpractice action was focused on the appellate process and the trial court appropriately determined the issue of proximate cause as a matter of law. The Sixth Circuit Court of Appeals stated that plaintiff had to demonstrate "a complete miscarriage of justice" to succeed in his habeas petition, which effort failed because of the "substantial evidence of premeditation" and that plaintiff's ineffective assistance of counsel claim was a challenge to a "strategic choice" and was therefore "virtually unchallengeable." The outcome of plaintiff's criminal appeal turned on actions that occurred in 1973; plaintiff failed to raise a genuine factual issue to indicate that anything defendants did, or failed to do, changed the outcome of the appeal. Accordingly, the trial court appropriately granted defendant's summary disposition motion on the basis of his failure to demonstrate proximate cause.

Plaintiff next claims that the trial court erred in granting defendant's summary disposition motion in part on its conclusion that plaintiff failed to list witnesses who could establish a breach of the professional standards. "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). A plaintiff may establish the standard through defense witnesses. *Porter v Henry Ford Hospital*, 181 Mich App 706, 710; 450 NW2d 37 (1989). In *Carlton v St John Hospital*, 182 Mich App 166; 451 NW2d 543 (1989), a medical malpractice plaintiff appealed summary disposition of her claim arguing that the defendants themselves could have testified regarding the standard of care. The *Carlton* Court affirmed the summary disposition and stated at 172-173:

Plaintiff failed to produce proofs in response to the motion which would show a genuine issue of material fact as to the standard of care for surgeons and the breach of that standard of care. Plaintiff's claim that the necessary testimony "could be obtained . . . at trial" is, if not too little, too late.

Here, plaintiff similarly failed to provide documentary evidence in response to the summary disposition motion to show that there was a genuine factual issue regarding a breach of the standard of care. While plaintiff could have established what the standard of care was through examination of defendants, he provided no documentary evidence to indicate that defendants breached the standard of care. He

accordingly failed to raise a genuine factual issue on this point. The trial court therefore appropriately granted defendant's summary disposition motion on this basis.

Our resolution of these issues makes it unnecessary for us to address plaintiff's contention that this matter should be assigned to a different judge on remand.

For these reasons, we affirm the trial court order granting defendant's summary disposition motion.

Affirmed.

/s/ William B. Murphy
/s/ Stephen J. Markman
/s/ Karl V. Fink