

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT G. THOMPSON,

Plaintiff-Appellant,

v

ROBERT L. LOUCKS and MARK BARON,

Defendants-Appellees.

UNPUBLISHED

December 3, 1996

No. 188020

LC No. 95-005644-NM

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,* JJ.

PER CURIAM.

Plaintiff appeals as of right the orders granting summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) in favor of defendants on plaintiff's claim of legal malpractice. We affirm.

On appeal, plaintiff argues that defendants committed legal malpractice in their representation of plaintiff in his underlying criminal case. Initially, we note that a substantial portion of plaintiff's argument rests on the premise that the trial court in the criminal case erroneously granted a mistrial based on manifest necessity. Plaintiff disputes the trial court's finding that the jury could not reach a verdict with respect to both counts charged against him. However, that issue is not properly before this Court. Plaintiff exhausted his appellate remedies in his criminal case, and he cannot now use this civil action to further attack his criminal conviction.

Turning to the merits of plaintiff's claim, plaintiff asserts that the lower court should not have granted defendants' motions for summary disposition as plaintiff stated a claim for, and presented genuine issues of material fact in, six instances of alleged legal malpractice. This Court reviews de novo a lower court's ruling on a motion for summary disposition. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993).

First, plaintiff contends that defendant Loucks committed malpractice by not requesting that a unanimous jury verdict be accepted, when it was announced in open court that the jury had reached a verdict on Count I, before sending the jury back to deliberate on Count II. We disagree. Defendant

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

Loucks stated in his answer to plaintiff's complaint and affirmative defenses that he did not request that a unanimous jury verdict be accepted at that time as a result of his stated trial strategy of attempting to obtain a mistrial and thereafter negotiate a plea bargain permitting plaintiff to plead guilty to second-degree murder. That outcome is exactly what occurred in this case, although plaintiff ultimately rejected the plea bargain. Trial strategy that is consistent with prevailing law does not amount to legal malpractice. *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995). Therefore, defendant Loucks' failure to request that the verdict be accepted as to Count I does not substantiate a claim for legal malpractice.

Plaintiff next contends that the trial court's instructions to the jury to return to deliberations as to Count II before the court would take a verdict on both counts confused the jurors, who thereafter believed they must reach a unanimous verdict on both counts in order to render a verdict. Plaintiff argues that defendant Loucks should have objected to this instruction, and by failing to do so he committed malpractice. We find this contention meritless as plaintiff has presented no facts to illustrate the jury's confusion.

Under MCR 6.420, a trial court has great discretion in the manner of its acceptance of verdicts. Therefore, the court cannot be said to have abused its discretion by sending the jury back for further deliberation before accepting the verdict on Count I. Further, the jury was provided with two verdict forms and was presumably informed that it was to consider each count separately. Had the jury reached a unanimous decision as to guilt or innocence on either count, there certainly was nothing to prevent it from announcing it. Therefore, plaintiff fails to state a claim for legal malpractice as to this issue.

Plaintiff's claims of legal malpractice against defendant Baron are wholly unsupported by the record. Plaintiff first contends that defendant Baron committed malpractice by failing to request a unanimous verdict on Count I at the end of jury deliberations. However, it is clear from the record that the jury advised the court that at that point it could not reach a verdict on the charges. Therefore, it would have been futile for Baron to request a unanimous verdict on count I, as one did not exist.

Plaintiff also contends that defendant Baron failed to advise and/or consult plaintiff on his decision to consent to a mistrial in the judge's chambers. However, no consent is necessary when a mistrial is based on manifest necessity. *People v Anderson*, 409 Mich 474, 483-484; 295 NW2d 482 (1980). An example of manifest necessity is where the jury fails to agree on a verdict. *People v Thompson*, 424 Mich 118, 123; 379 NW2d 49 (1985). Therefore, as plaintiff's consent was not necessary here, counsel's failure to obtain such consent cannot form the basis for a claim of legal malpractice.

Plaintiff's final contention that both defendants violated the standard of care owed a criminal defendant under the Michigan Rules of Professional Conduct is meritless. In support of this allegation, plaintiff points to his above-outlined contentions as examples of the fact that defendants were not competent to handle a case of this magnitude and needed to do further investigation or to consult with someone who was competent. However, as noted above, none of plaintiff's contentions rise to the level

of negligent breach of duty. Therefore, plaintiff has failed to state a claim of legal malpractice on this issue.

Finally, because we affirm the lower court's ruling granting defendants' motions for summary disposition on plaintiff's legal malpractice claim, we decline to address plaintiff's contention that a partner in a law practice should be held responsible for the wrongful acts of a co-partner.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Nicholas J. Lambros