

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

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MARVIN SWOPE

Plaintiff-Appellant,

v

ELSA SHARTSIS,

Defendant-Appellee.

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UNPUBLISHED

April 4, 1997

No. 188891

LC No. 94-486950 NM

Before: Michael J. Kelly, P.J., and Saad and H.A. Beach,\* JJ.

PER CURIAM.

In this legal malpractice action, plaintiff, Marvin Swope, appeals as of right from the order granting summary disposition in favor of defendant, Elsa Shartsis pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff retained defendant to represent him in a first-party no-fault (PIP) claim against Farm Bureau Insurance Company (Farm Bureau). Plaintiff sought to recover monthly medical expenses of approximately \$681.00 per month, which he alleged were required as a result of injuries he sustained in an automobile accident. Plaintiff's case against Farm Bureau went to trial and, at the close of plaintiff's proofs, Farm Bureau moved for a directed verdict, and argued that plaintiff failed to establish that the monthly medical bills were caused by the accident. According to plaintiff, before deciding the motion, the trial judge met with the parties in chambers and indicated that he was inclined to grant the motion for directed verdict if the case was not settled. The parties then agreed to a settlement in the amount of \$7,500.00 and to a release of all past, present, and future claims against Farm Bureau arising out of the accident. Plaintiff agreed to the settlement in open court.

Plaintiff subsequently filed this legal malpractice claim against defendant, and contended that defendant failed to (1) present expert medical testimony at trial to establish causation; (2) inform him that the settlement agreement included a release of all future claims against Farm Bureau, and (3) request a voluntary dismissal of the case, so as to preserve plaintiff's future rights against Farm Bureau. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that

plaintiff's settlement of the underlying litigation precluded him from maintaining the present legal malpractice action. The trial court granted defendant's motion pursuant to MCR 2.116(C)(10).

On appeal, an order granting summary disposition is reviewed de novo. *Michigan Mutual Insurance Company v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Michigan Mutual, supra*, 204 Mich App 85. The motion may be granted when, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented. *Id.*

A party's settlement of a lawsuit is not an absolute bar to a subsequent legal malpractice action against the party's lawyer in the underlying lawsuit. *Espinoza v Thomas*, 189 Mich App 110; 472 NW2d 16 (1991); *Lowman v Karp*, 190 Mich App 448; 476 NW2d 428 (1991). Although a legal malpractice claim may be more difficult to establish when a case ends in a settlement, the claim may be established if it is shown that the client's assent to the settlement was compelled because the lawyer's malpractice left no other recourse. *Espinoza, supra*, 189 Mich App 124.

Here plaintiff failed to establish that defendant's malpractice compelled him to accept a settlement which he believed to be inadequate. In support of her motion for summary disposition, defendant submitted the *de bene esse* deposition of an expert witness, Dr. Podolsky, which was apparently admitted as evidence in the underlying litigation. Dr. Podolsky testified that plaintiff's injuries resulted from the accident. In response to defendant's motion, plaintiff submitted her own affidavit in which she stated that Dr. Podolsky was ready and willing to provide testimony relating plaintiff's medication expenses to the accident. As noted by the trial court, plaintiff's position would have been much better supported if he had obtained an affidavit of Dr. Podolsky indicating that he would have provided the testimony. Without knowing whether an expert was available and willing to testify that plaintiff's medication expenses resulted from the accident, it can not be determined whether defendant committed malpractice by failing to present such testimony. Furthermore, at the time of the settlement plaintiff expressed no dissatisfaction with the settlement. Because plaintiff failed to establish that defendant's malpractice compelled the settlement, summary disposition was properly granted. Accordingly, we need not address plaintiff's claims that defendant committed malpractice by not informing him that the settlement waived future claims, and by not requesting a voluntary dismissal of the case.

Affirmed.

/s/ Michael J. Kelly  
/s/ Henry William Saad  
/s/ Harry A. Beach