STATE OF MICHIGAN

COURT OF APPEALS

JOHN E. SVOBODA,

Plaintiff-Appellant,

v

MICHAEL J. CUNNINGHAM and SOMMERS, SCHWARTZ, SILVER & SCHWARTZ, PC,

Defendants-Appellees.

UNPUBLISHED
March 6, 2007

No. 271797
Oakland Circuit Court
LC No. 2005-069780-NM

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants in this legal malpractice action. We affirm.

I

On August 6, 2002, plaintiff was injured in an automobile accident, in which plaintiff's car was "rear-ended." At the time of the accident, plaintiff was considering legal action to recover for injuries that he had sustained in a slip and fall that occurred in August 1999, and had consulted with defendant Michael Cunningham, an attorney with defendant Sommers, Schwartz, Silver, and Schwartz, P.C., to represent him in the slip and fall (premises liability) action. Plaintiff subsequently signed a retainer agreement, dated August 20, 2002, engaging Cunningham to represent him in the "slip [&] fall" action.

During the course of the slip and fall action, plaintiff discussed his automobile accident with Cunningham. It is undisputed that Cunningham investigated the potential for a third-party no-fault action on behalf of plaintiff against the other driver, but ultimately declined to undertake the action.

In November 2004, plaintiff contacted his automobile insurer, Auto Club of Michigan (AAA), to file a personal injury protection (PIP) claim related to injuries he sustained in the automobile accident. AAA denied the claim because it was not filed within the one-year time limit for making a claim, as provided in plaintiff's automobile insurance policy.

In October 2005, plaintiff filed this legal malpractice action, alleging that Cunningham failed to advise plaintiff of his entitlements under the no-fault act[1] and failed to timely submit plaintiff's first-party claims for no-fault benefits. The trial court granted defendants' motion for summary disposition, finding that, (1) plaintiff failed to establish that any breach of duty by defendants caused plaintiff to lose his PIP benefits, because plaintiff knew or should have known of the PIP benefits under his no-fault policy, and (2) defendants owed no duty to plaintiff with regard to a claim for PIP benefits because there was no evidence of an attorney-client relationship pertaining to the separate matter of first-party no-fault benefits.

II

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition. We disagree.

A

This court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In deciding a motion under MCR 2.116(C)(10), the trial court must consider the pleadings, affidavits, depositions, admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. *Id*.; *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

B

The elements of a legal malpractice action are: (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. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). The trial court concluded that plaintiff failed to establish element (1), the existence of an attorney-client relationship with respect to plaintiff's PIP claim, and element (3), causation.

1

With regard to element (1), the existence of an attorney-client relationship, the trial court concluded that plaintiff failed to show that his agreement with Cunningham for legal representation included the matter of no-fault PIP benefits. Accordingly, defendants owed no duty to plaintiff to advise him of his entitlement to PIP benefits or the time limitations for a claim.

---

[1] MCL 500. 3101 *et seq*.

The court noted that the parties entered into a specific retainer agreement for the slip and fall case, and that plaintiff did not recall executing a retainer agreement for the no-fault case. Further, a November 10, 2003, letter from Cunningham to plaintiff noted that Cunningham instructed plaintiff to follow-up with a medical doctor concerning injuries to his nose stemming from the automobile accident, that there was no indication that plaintiff had done so, and that Cunningham enjoyed working with plaintiff on his *premises liability case* (emphasis added). Moreover, Cunningham's letter indicated that in light of plaintiff's failure to follow-up on his nose injury, Cunningham presumed that plaintiff had abandoned the claim. The court observed that plaintiff's mere subjective belief that Cunningham was representing him was insufficient to create an attorney-client relationship.

We find no error in the court's conclusion given the evidence. In his deposition, plaintiff stated that he could not recall whether he signed a retainer agreement with Cunningham with regard to his no-fault case, although he believed that he did. There was no evidence that an agreement was discussed or executed. Further, in response to questioning at his deposition, plaintiff recalled few details about this entire matter, let alone any specific facts to support a conclusion that Cunningham's representation included plaintiff's first-party no-fault claims.

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Smith supra* at 455 (citations omitted).]

Plaintiff failed to meet his burden of establishing that an attorney-client relationship existed with regard to plaintiff's first-party no-fault claims, or, in other words, that the scope of Cunningham's representation extended to plaintiff's claim for PIP benefits from his own insurer.

To the extent that plaintiff argues that the court erred in concluding that an attorney's obligation to a client may only arise through a written contractual agreement, we find plaintiff's factual premise for this argument inaccurate. The trial court did not so conclude. The court noted that an attorney-client relationship is contractual in nature, and therefore, whether an attorney is retained to undertake a particular matter depends on the relations and mutual understanding of the parties, what was said and done, and all the facts and circumstances, *Case v Ranney*, 174 Mich 673, 682; 140 NW 943 (1913). We agree.

A formal contract is unnecessary to create an attorney-client relationship; a contract may be implied from the parties' conduct. *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Schools*, 455 Mich 1, 11; 564 NW2d 457 (1997). The relationship is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in a particular legal matter. *Id*. Here, the court found such evidence lacking.

Plaintiff also argues that the trial court erred in granting summary disposition on the ground that he failed to establish the requisite element of causation. Having determined above that summary disposition was proper because plaintiff failed to show an attorney-client relationship, we need not address the trial court's additional basis for granting summary disposition. Nonetheless, we concur in the court's conclusion that plaintiff failed to carry his burden in response to defendants' motion for summary disposition on the element of causation.

"Often, the most troublesome element of a legal malpractice claim is that of proximate causation. As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant's action was a cause in fact of the claimed injury." *Charles Reinhart Co, supra* at 586; see also *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 613; 563 NW2d 693 (1997).

> "Causation in fact is one aspect of, and distinguishable from, legal or proximate cause. . . . The question of fact as to whether the defendant's conduct was a cause of the plaintiff's injury must be separated from the question as to whether the defendant should be legally responsible for the plaintiff's injury. Legal cause is often stated in terms of foreseeability. [*Id*., quoting *Charles Reinhart Co, supra* at 586 n 13.]

The trial court concluded that, even assuming that defendants failed to advise plaintiff of his entitlements to PIP benefits or advise him of the one-year limitation for submitting a claim, plaintiff failed to show that defendants' alleged failure caused plaintiff to lose his PIP benefits. The court noted that plaintiff "knew or should have known about his potential claim, by virtue of the AAA policy, and the subsequent telephone calls and written correspondence" from his AAA claims adjuster following the automobile accident, which notified plaintiff of his entitlements and the one-year limitation. Accordingly, because plaintiff was obligated to read his policy and is presumed to have received the written notification from the AAA claims adjuster, plaintiff's own negligence, rather than defendants' alleged negligence, caused him to lose out on his no-fault benefits.

Plaintiff argues that the court erred in concluding that plaintiff's own negligence defeated a finding of causation with respect to defendants' alleged negligence. Plaintiff contends that there may be more than one proximate cause of injury and, moreover, any issue whether plaintiff was negligent, as well as issues of comparative negligence, must be submitted to the jury, rather than decided by the court as a matter of law. While we agree that the issue of comparative negligence may be an appropriate question for the jury in a legal malpractice case, *Pontiac School Dist, supra* at 626-627, we nonetheless find no error in the court's conclusion that plaintiff failed to establish the necessary element of causation.

To establish proximate cause, a plaintiff must prove two distinct elements: (1) cause in fact, and (2) legal cause, also termed "proximate cause." *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The element of cause in fact generally requires proof that "but for" the defendant's conduct, the plaintiff would not have been injured. *Id*. at 163. A plaintiff must first demonstrate cause in fact before legal cause or "proximate cause" becomes relevant. *Id*. While causation is normally a question for the jury, the trial court may decide the issue as a

matter of law if there is no issue of material fact. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003).

It was undisputed that plaintiff received a copy of his insurance policy and reviewed it, at least in part, although he did not recall reading the PIP provisions at issue. Regardless, an insured is presumed to have knowledge of the contents of the policy, in the absence of fraud, even though the insured did not read it. *Rory v Continental Ins Co*, 473 Mich 457, 489-490 n 82; 703 NW2d 23 (2005). Moreover, it was undisputed that the AAA claims adjuster made numerous phone calls to plaintiff and mailed him correspondence notifying him of his PIP benefits and the one-year limitation for submitting a claim. Although plaintiff denied any recollection of the phone messages from the adjuster or receiving the correspondence from her, there was no dispute that the correspondence was properly addressed and mailed. As the court observed, a presumption therefore arose that the letter was delivered by the post office. *Goodyear Tire & Rubber Co v Roseville*, 468 Mich 947; 664 NW2d 751 (2003).

The record reflects that despite numerous contacts and opportunities to become aware of, and pursue a claim for, PIP benefits available to him, plaintiff did not do so. Plaintiff failed to present evidence that the alleged lack of information about the benefits from Cunningham caused him to forego his PIP claim. That is, plaintiff failed to show that "but for" defendants' alleged negligence, he would have secured his PIP benefits. Any alleged causation was based on circumstantial evidence, and mere conjecture and speculation.

A plaintiff may establish causation based on circumstantial evidence, but this proof must be based on reasonable inferences and not mere conjecture and speculation. *Skinner, supra* at 164. "[A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id*., quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956). At a minimum, a causation theory must have some basis in established fact. To meet this evidentiary standard, "[a] plaintiff must present *substantial evidence* from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Skinner, supra* at 164-165 (emphasis added). In this case, plaintiff failed to meet the threshold evidentiary standard. See *id*. at 165.

Affirmed.

/s/ Donald S. Owens
/s/ Janet T. Neff