

STATE OF MICHIGAN
COURT OF APPEALS

RONALD WASHINGTON,

Plaintiff-Appellant,

UNPUBLISHED
November 21, 1997

v

AMY NEVILLE,

Defendant-Appellee.

No. 192321
Wayne Circuit
LC No. 95-511258-NM

Before: Holbrook, Jr., P.J. and White and R.J. Danhof,* JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10), on the grounds that plaintiff failed to plead or support a claim of negligence, and that plaintiff's claim was also barred by governmental immunity. We affirm.

In 1990, plaintiff was convicted, following a bench trial, of armed robbery, MCL 750.529; MSA 28.797, and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. He was thereafter found guilty in a separate proceeding of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Plaintiff was sentenced to twenty to forty years' imprisonment for the armed robbery conviction and twelve to twenty years' imprisonment for the assault conviction. The State Appellate Defender's Office was appointed to represent plaintiff on appeal and defendant, an assistant defender with SADO, was assigned to handle plaintiff's appeal.

Defendant ultimately filed an appeal brief on plaintiff's behalf raising four issues: (1) plaintiff did not voluntarily and knowingly waive his right to a jury trial on the underlying charges; (2) plaintiff's jury waiver did not apply to the habitual offender charge; (3) the trial court improperly considered evidence outside the record in deciding plaintiff's guilt; and (4) plaintiff was denied a fair trial because of prosecutorial misconduct. Plaintiff subsequently filed a delayed pro se motion to remand for a *Ginther*¹

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

hearing or resentencing, which this Court denied. On

November 30, 1993, this Court affirmed plaintiff's armed robbery and assault convictions, but reversed his habitual offender conviction, vacated his enhanced sentences, and remanded for further proceedings on the habitual offender charge.² The Michigan Supreme Court thereafter denied plaintiff's application for leave to appeal. 445 Mich 914. Afterwards, on remand, plaintiff was again convicted of being an habitual offender, second offense, and was resentenced to twenty to forty years' imprisonment.

Plaintiff subsequently filed this legal malpractice action against defendant, alleging negligent representation in the handling of plaintiff's criminal appeal. Defendant moved for summary disposition under MCR 2.116(C)(7), (C)(8) and (C)(10). The trial court granted summary disposition under subsections (C)(8) and (C)(10), finding that plaintiff failed to plead or adequately support a cause of action for malpractice.³ The trial court also determined that summary disposition was justified under subsection (C)(7), on the basis that SADO was a governmental agency and that defendant, as an employee of SADO, was therefore protected by governmental immunity.

We first consider whether summary disposition was proper under either MCR 2.116(C)(8) or (C)(10). The standard for reviewing a summary disposition motion under MCR 2.116(C)(8) and (C)(10) is set forth in *Stehlik v Johnson (On Remand)*, 206 Mich App 83, 85; 520 NW2d 633 (1994):

Summary disposition is reviewed de novo, because this Court must review the record to determine whether the moving party was entitled to judgment as a matter of law. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts. Only if the allegations fail to state a legal claim is summary disposition pursuant to MCR 2.116(C)(8) valid. *Radtke v Everett*, 442 Mich. 368, 373-374; 501 NW2d 155 (1993). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. 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 damages 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. *Radtke*, p 374.

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 a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). The plaintiff must adequately allege and prove each of these elements in order to prevail on a claim of legal malpractice. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

In order to prove proximate cause in a legal malpractice action, a plaintiff must establish that the defendant's action was a "cause in fact" of the claimed injury. *Charles Reinhart Co, supra*. To prove cause in fact, the plaintiff "must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit." *Id.* Moreover,

[i]n a legal malpractice action alleging negligence in an appeal a plaintiff must prove two aspects of causation in fact: whether the attorney's negligence caused the loss or unfavorable result of the appeal, and whether the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation. *Id.* at 588.

The issue whether the underlying appeal would have been successful is resolved by legal principles and, therefore, is a question for the court to decide. *Id.* at 592.

On appeal, plaintiff focuses on four separate aspects of defendant's representation in support of his claim that defendant committed legal malpractice. Plaintiff first argues that defendant committed malpractice by failing to raise as an issue in his criminal appeal a claim that his arrest in the underlying action was illegal. We disagree. The submitted documents establish that defendant correctly informed plaintiff that, even if his arrest was illegal, the remedy for an illegal arrest is suppression of evidence obtained as a result of the arrest, not dismissal of the charges. *City of Lansing v Hartsuff*, 213 Mich App 338, 352; 539 NW2d 781 (1995). Defendant elected not to raise the arrest issue because no evidence was obtained as a result of plaintiff's arrest. Plaintiff's malpractice complaint does not allege that any evidence was obtained as a result of his arrest, nor has plaintiff submitted any documentation to that effect. Thus, there is no basis for concluding that plaintiff's appeal would have been successful had the arrest issue been raised. Therefore, summary disposition of this theory of malpractice was proper under MCR 2.116(C)(8) and (10).

Second, plaintiff argues that defendant committed malpractice by failing to raise as an issue in his criminal appeal a claim that his trial attorney was constitutionally ineffective. The submitted evidence reveals that defendant elected not to pursue this issue after concluding that it had no merit. Nonetheless, defendant did provide plaintiff with procedural advice and clerical assistance so that he could raise the issue on his own, in propria persona.⁴ An appellate attorney's decision regarding which issues to raise is a matter of judgment and generally is not grounds for a malpractice claim if the attorney acts in good faith and exercises reasonable care. *Simko, supra* at 658. To successfully establish ineffective assistance of counsel, a criminal defendant must show, first, that his attorney's performance was deficient and, second, that the deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). We have reviewed the numerous exhibits submitted by plaintiff in opposition to defendant's motion for summary disposition and find that they fail to establish factual support for the contention that an ineffective assistance of counsel claim would have been successful. Therefore, summary disposition of this theory of legal malpractice was proper under MCR 2.116(C)(10).

Third, plaintiff argues that defendant's failure to timely file the appeal brief constituted malpractice. Each of the cases cited by plaintiff involve situations where an attorney's failure to meet a deadline resulted in the loss of a client's right to maintain an action or right to bring an appeal. Here, defendant's failure to timely file plaintiff's appeal brief resulted only in a loss of oral argument, see MCR 7.212(A)(4) and MCR 7.214(A); plaintiff did not lose his right to have his appeal heard and decided by the appellate court. On the contrary, plaintiff's appeal was fully considered by the appellate court, which accorded him the relief to which he was entitled. Plaintiff has neither alleged nor presented any facts supporting a conclusion that his appeal would have been decidedly differently had oral argument been preserved. Therefore, summary disposition of this theory of malpractice was proper under MCR 2.116(C)(8) and (10).

Finally, plaintiff argues that defendant committed malpractice because she did not request a default when the prosecutor failed to timely file a responsive brief, or move to strike the prosecutor's late brief. However, the penalty for an appellee's failure to timely file a responsive brief is loss of oral argument, not a default. MCR 7.212(A)(4). Moreover, even if the prosecutor's brief had been stricken, as a matter of law an appellee's failure to file a responsive brief may not properly be considered a confession of substantive error. *People v Smith*, 439 Mich 954; 480 NW2d 908 (1992). Thus, plaintiff's complaint does not allege a valid cause of action for legal malpractice with respect to this theory and summary disposition was therefore proper under MCR 2.116(C)(8).

For the reasons discussed above, we hold that the trial court properly granted summary disposition in favor of defendant under MCR 2.116(C)(8) and (C)(10).⁵

In light of our conclusion that summary disposition was properly granted under MCR 2.116(C)(8) and (C) (10), it is unnecessary to decide whether summary disposition was also justified under MCR 2.116(C)(7), on the basis of governmental immunity.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ Robert J. Danhof

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² *People v Washington*, unpublished opinion per curiam, released November 30, 1993 (Docket No. 136571).

³ Plaintiff claims that the trial court lacked the authority to grant defendant's summary disposition motion because it had already denied the motion in a status conference scheduling order dated August 18, 1995. This claim is not factually supported by the record. The record indicates that the trial court's August 18, 1995, scheduling order did not dispose of defendant's motion, but rather, in accordance

with MCR 2.401(B)(2)(a), simply set forth dates for the exchange of witness lists, the completion of discovery, mediation and a settlement conference. The court dispensed with oral argument and took defendant's motion for summary disposition under advisement. The court ultimately decided the motion in a written opinion and order dated January 16, 1996.

⁴ By providing procedural advice and clerical assistance, defendant satisfied Standard 11 of the approved minimum standards for indigent criminal appellate defense services. See Administrative Order No. 1981-7, 412 Mich lxv, lxxxix.

⁵ Plaintiff also argues that summary disposition was improperly granted because defendant "committed the crime of fraud on a number of occasions." This argument is without merit because, first, plaintiff's complaint does not allege a cause of action for fraud and, second, an opportunity to amend would not be justified, see MCR 2.116(I)(5), because the submitted evidence establishes that the statements and communications in question do not constitute fraud. *James v City of Burton*, 221 Mich App 130, 134-135; 560 NW2d 668 (1997).