

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

---

BUDDY JOHNSON,

Plaintiff-Appellant,

and

NANCY JOHNSON,

Plaintiff,

v

JAMES K. FETT and MUTH & FETT, P.C.,

Defendants-Appellees,

and

ANDREW L. FANTA and WASHTENAW LEGAL  
CENTER, P.C.,

Defendants.

---

UNPUBLISHED

August 20, 1999

No. 207351

Washtenaw Circuit Court

LC No. 95-001861 NM

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff Buddy Johnson<sup>1</sup> filed a legal malpractice action against defendants James Fett and Fett and Muth, P.C., arising from Fett's representation of Buddy Johnson in a wrongful discharge suit, and against Andrew L. Fanta and Washtenaw Legal Center, P.C., arising from Fanta's concurrent representation of plaintiff in a Chapter 7 bankruptcy proceeding. Plaintiff's malpractice action was premised upon the allegation that the bankruptcy proceeding adversely affected plaintiff's recovery in the wrongful discharge action. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that defendants' representation of plaintiff did not include

the bankruptcy proceeding.<sup>2</sup> Plaintiff appeals as of right the grant of summary disposition. We affirm in part and reverse in part.

In June 1991, plaintiff was discharged from his employment at Dexter Automatic Products Company. In December 1991, plaintiff retained defendant Fett<sup>3</sup> to represent him in a wrongful discharge suit. Several months after the wrongful discharge action was filed, plaintiff sought defendant's advice concerning mounting debts. Defendant allegedly informed plaintiff that filing bankruptcy might be beneficial to the wrongful discharge claim because a jury would be more sympathetic. However, defendant informed plaintiff that he did not practice bankruptcy law and that plaintiff would need to retain other counsel for bankruptcy advice. Defendant furnished plaintiff with the name of a bankruptcy attorney, Andrew Fanta, who subsequently filed a Chapter 7 bankruptcy for plaintiff and his wife, Nancy.

The bankruptcy court appointed a Chapter 7 bankruptcy trustee. Three months after filing bankruptcy, plaintiff learned that the bankruptcy trustee would take control of his wrongful discharge suit. Plaintiff alleged that neither defendant nor Fanta informed plaintiff before filing bankruptcy that the bankruptcy trustee would assume control of the suit. However, Fanta indicated that he informed plaintiff that the trustee would be in charge of the suit.

After the trustee was appointed, defendant entered into an agreement to represent the trustee in plaintiff's wrongful discharge suit. Plaintiff averred that defendant did not notify plaintiff that he no longer represented plaintiff's interests nor that plaintiff should seek new counsel. Defendant continued to work with plaintiff in preparing the wrongful discharge suit, and in a letter to plaintiff in November 1992 defendant provided plaintiff detailed legal advice regarding his wrongful discharge suit and his bankruptcy proceeding. Defendant recommended that plaintiff reject the mediation award in his wrongful discharge suit.

During the March 1993 trial of the wrongful discharge suit, plaintiff sat with defendant at the plaintiff's table and defendant made an opening statement and presented witnesses on plaintiff's behalf. The bankruptcy trustee appeared periodically during the trial. On the third day of trial, the trustee agreed to settle plaintiff's wrongful discharge suit for \$85,000, which was less than defendant's estimated value of the claim, which defendant at one point advised was in excess of one million dollars, and less than the \$175,000-\$200,000 minimum settlement defendant and plaintiff agreed upon before trial. Despite plaintiff's objections, the bankruptcy court approved the trustee's settlement recommendation.

Plaintiff first claims that summary disposition was improperly granted because questions of fact exist with regard to the elements of a cause of action for legal malpractice. On appeal, we review a grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Giving the benefit of reasonable doubt to the nonmovant, we must determine whether a record might be developed that will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

To establish a prima facie case of legal malpractice, a plaintiff must show (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 involved. *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). Here, plaintiff asserted two independent bases for his legal malpractice claim. First, plaintiff claimed that defendant breached a duty to advise plaintiff that a Chapter 7 bankruptcy would adversely affect his wrongful discharge suit. Plaintiff argues that such advice was within the scope of defendant's responsibility as a wrongful discharge attorney, and further that defendant gave erroneous advice regarding bankruptcy. Second, plaintiff alleges malpractice on the basis of a conflict of interest.

With regard to the first claim, plaintiff has not alleged that defendant's suggestion and advice was not in good faith. "Where an attorney acts in good faith and in honest belief that his acts and omission are well-founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment." *Simko v Blake*, 448 Mich 648, 658; 532 NW2d 842 (1995). Further, defendant emphasized that plaintiff should consult a bankruptcy attorney, and plaintiff admitted that he did not rely on defendant's advice regarding bankruptcy. Hence, no basis exists for plaintiff's legal malpractice claim against defendants regarding the bankruptcy.

Nevertheless, plaintiff argues that defendant did not exercise reasonable care, skill, and diligence as plaintiff's wrongful discharge counsel. When an attorney is retained in a cause, he has a duty to use and exercise reasonable skill, care, discretion, and judgment in the conduct thereof. *Simko, supra* at 655-656. Expert testimony is usually required in a legal malpractice action to establish the requisite standard of conduct, and breach thereof, absent a matter so manifest that an ordinary layman would determine the defendant was careless. *Stockler v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). Here, the trial court properly determined that no cause of action existed because plaintiff presented no evidence establishing the standard of conduct with regard to bankruptcy filing during the course of a wrongful discharge action. Indeed, defendant presented documentary evidence that he told plaintiff that he would "have to consider a bankruptcy attorney because his field of endeavor was not bankruptcy."

With regard to the second claim, plaintiff contends that defendant committed legal malpractice in representing both plaintiff and the bankruptcy trustee. Plaintiff's contention is supported by defendant's November 3, 1992, letter to plaintiff clarifying mediation and plaintiff's rights vis-a-vis the bankruptcy trustee. In the letter, defendant stated:

To date, the bankruptcy trustee, Basil Simon, has been cooperative and I have every reason to believe that he will to [sic] continue to be cooperative. However, his interests as representative of the bankruptcy estate (i.e. to protect the interests of your creditors) may soon conflict with yours.

Plaintiff contends that although defendant undertook to represent the bankruptcy trustee, his representation of plaintiff continued at least until the bankruptcy court entered the order allowing settlement. Defendant contends that the attorney-client relationship ended by operation of law when plaintiff filed bankruptcy because plaintiff was no longer a party to the action.

Where an attorney is involved in ongoing litigation, the only way he can be relieved of his representation of his client is “by a formal discharge by his client or upon the attorney’s own motion with or without his client’s consent and a subsequent order of the court relieving the attorney of his representation.” *Chapman v Sullivan*, 161 Mich App 558, 561; 411 NW2d 754 (1987). Hence, an attorney owes a duty of care to his client until he is discharged by the client or the court. *Lipton v Boesky*, 110 Mich App 589, 599; 313 NW2d 163 (1981). Defendant has cited no authority, and our research has unveiled none, to support the position that his representation of plaintiff terminated by operation of law when defendant was retained by the bankruptcy trustee.

Indeed, a review of defendant’s conduct contradicts his position that his representation of plaintiff terminated by operation of law. Defendant concedes that he never told plaintiff that he no longer represented plaintiff or that plaintiff should get another attorney. Defendant continued to work with plaintiff, met with him immediately before the settlement conference on March 15, 1993, and agreed that they would not settle the case for less than \$200,000. Defendant included plaintiff at the plaintiff’s table at trial, and made an opening statement and called witnesses on behalf of plaintiff.

Further, the Michigan Rules of Professional Conduct provide that a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation would violate the rules of professional conduct. MRPC 1.16(a)(1). The rules also provide that:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Upon termination of representation, a lawyer must take reasonable steps to protect a client’s interests. MRPC 1.16(d). The ethics rules do not allow withdrawal without notice to the client. *Pascoe v Sova*, 209 Mich App 297, 299, n 2; 530 NW2d 781 (1995). Here, issues of material fact exist regarding whether defendant violated the ethics rules. Defendant stated that plaintiff was informed that the bankruptcy trustee retained defendant as special counsel and, therefore, was informed that defendant no longer represented plaintiff. Defendant contends that he did not have a conflict of interest because he no longer represented plaintiff. Plaintiff, however, continued to believe that defendant was representing both the trustee and plaintiff. In Michigan, a violation of the rules of professional conduct is rebuttable evidence of malpractice. *Lipton, supra* at 598.

Summary disposition is appropriate where “no factual development could reveal a case of malpractice.” *Simko, supra* at 650. This Court should be liberal in finding a genuine issue of material fact, and the benefit of any reasonable doubt should be given to the nonmovant. *Lipton, supra* at 598. Here, plaintiff set forth sufficient facts to survive defendant’s motion for summary disposition on the basis of a conflict of interest.

Plaintiff next contends that the trial court erred by summarily dismissing plaintiff’s claim for negligent referral on the ground that negligent referral is not actionable in Michigan. A review of the

record, however, reveals that the trial court did not specifically address negligent referral and did not conclude that negligent referral is not actionable. Rather, the court concluded that:

As to the other claims, the defendants and only plaintiff Buddy Johnson signed an agreement for representation regarding plaintiff Buddy Johnson's wrongful discharge claim. The scope of that representation did not encompass plaintiffs filing a bankruptcy which was handled separately by a bankruptcy attorney. The bankruptcy and its incidents and effects were not the responsibility of defendant Fett but rather it was up to the bankruptcy attorney to effectively communicate the scope of the bankruptcy proceedings to the plaintiff as well as the ramifications of that proceeding.

Plaintiff has not challenged the trial court's reasoning with respect to the negligent referral claim and, therefore, we decline to disturb the trial court's summary disposition of the claim.

Affirmed in part and reversed in part. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Martin M. Doctoroff

<sup>1</sup> Plaintiff's wife, Nancy Johnson, was a named plaintiff in the action against defendants Fett and Muth & Fett, P.C. However, plaintiffs consented to the summary dismissal of Nancy's claim against these defendants. Accordingly, use of the term "plaintiff" herein refers to Buddy Johnson.

<sup>2</sup> Plaintiff thereafter settled the claim against Fanta and Washtenaw Legal Center, P.C.

<sup>3</sup> Use of the term "defendant" herein refers to James K. Fett.