STATE OF MICHIGAN

COURT OF APPEALS

NELSON S. PO,

Plaintiff-Appellant,

v

ROBERT T. BENEFIEL and ROBERT K. MESTON,

Defendants-Appellees.

UNPUBLISHED
September 22, 2005

No. 255546
Wayne Circuit Court
LC No. 02-227864-NM

NELSON S. PO,

Plaintiff-Appellee,

v

ROBERT T. BENEFIEL,

Defendant-Appellant,

and

ROBERT K. MESTON,

Defendant.

No. 257084
Wayne Circuit Court
LC No. 02-227864-NM

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

In Docket No. 255546, plaintiff Nelson S. Po appeals as of right the order granting summary disposition pursuant to MCR 2.16(C)(10) in favor of defendants Robert T. Benefiel

and Robert K. Meston[1] in this legal malpractice action. In Docket No. 257084, defendant Benefiel appeals as of right the order denying his motion for sanctions. We affirm.

This action for legal malpractice arises out of attorney Benefiel's representation of plaintiff in a third-party automobile negligence action against plaintiff's wife. Plaintiff retained Benefiel to sue his wife for third-party negligence on the theory that she negligently moved the car while he was under it.[2] Plaintiff sustained an injury to his left eye when a vehicle that he was working on fell off the jacks used to prop up the vehicle. But an Oakwood Hospital emergency room record completed on the day of the accident indicates that plaintiff stated that his injury occurred when one of plaintiff's Dobermans knocked over the jack and caused the vehicle to fall. The trial court ruled that the hospital record was admissible. After consultation with plaintiff, Benefiel decided to introduce the Oakwood Hospital records in plaintiff's case rather than have defendant produce the adverse evidence. The jury returned a verdict of no cause of action. This Court affirmed, concluding that plaintiff waived review of the issue of introduction of the hospital record because plaintiff introduced the evidence. This Court also concluded that plaintiff waived the issue that the verdict was against the great weight of the evidence by failing to file a motion for new trial in the trial court and that it "could discern no miscarriage of justice warranting further review." *Po v Po*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2002 (Docket No. 229473).

After plaintiff's unsuccessful appeal in the underlying action, he filed the present legal malpractice action, alleging in pertinent part that Benefiel committed legal malpractice in the underlying action by introducing the hospital record and by failing to file or inform plaintiff of the necessity of filing a motion for new trial or judgment notwithstanding the verdict to preserve the right to raise on appeal an issue regarding the great weight of the evidence.[3] The trial court granted Benefiel's motion for summary disposition, finding (1) that the trial court had properly ruled that the hospital record was admissible and that Benefiel's trial strategy to introduce the record and then discredit its content did not constitute an error or a failure on his part to use his best judgment, and (2) that the verdict was not against the great weight of the evidence and, therefore, a motion for new trial or for JNOV would have been futile.

---

[1] Meston was retained to provide appellate representation to plaintiff after Benefiel informed plaintiff that an appeal would be "fruitless" and a waste of money. Although Meston timely filed plaintiff's claim of appeal, he neglected to file a motion for new trial or judgment notwithstanding the verdict. Meston declined to provide plaintiff further legal representation without payment of an additional retainer, resulting in plaintiff retaining another attorney to complete the appeal process.

[2] The complaint also included a first-party claim against the insurer that was settled.

[3] Although plaintiff's complaint alleged legal malpractice under five theories, only two of these theories are challenged on appeal.

To establish a claim of legal malpractice, a party must prove: (a) the existence of an attorney-client relationship; (b) negligence in the legal representation of the plaintiff; (c) that the negligence was a proximate cause of an injury; and (d) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995); *Persinger v Holt*, 248 Mich App 499, 502; 639 NW2d 594 (2001). A plaintiff must demonstrate that but for the attorney's alleged malpractice he or she would have been successful in the underlying proceeding. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996); *Colbert v Conybeare Law Office*, 239 Mich App 608, 619-620; 609 NW2d 208 (2000).

Plaintiff first argues that Benefiel was negligent in failing to object to the admission of the hospital record and instead introduced the record in plaintiff's case-in-chief. Notably, three separate trial court judges concurred regarding the admissibility of the disputed medical record. The "attorney judgment rule" recognizes that decisions made involving trial tactics or litigation strategy may avoid the issue of legal liability. An attorney is responsible for fashioning a strategy or representation that is consistent with the law, but does not have to insure the most favorable possible outcome. An attorney may make "mere errors in judgment" if the attorney has acted in good faith and has demonstrated reasonable skill, care, discretion and judgment equivalent to that of the average practitioner, in performing the legal representation. *Simko, supra* at 655-658. Given the trial court's ruling regarding the admissibility of the disputed record, Benefiel acted in good faith and demonstrated reasonable skill, care, and discretion in fashioning the strategy of introducing the record to diminish its possible impact upon the jury and discredit the accuracy of its content.

Plaintiff also argues that Benefiel negligently failed to pursue an appeal and to file a motion for new trial or judgment notwithstanding the verdict to permit a challenge to the jury's verdict. He contends that, but for Benefiel's failure, he would have prevailed on appeal on his argument that the verdict was against the great weight of the evidence. A plaintiff cannot prevail on a claim for legal malpractice merely by alleging he might have prevailed in the underlying lawsuit. A plaintiff must prove that absent the attorney's negligence he or she would have succeeded in the underlying case. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). To demonstrate proximate cause, a plaintiff must prove that "'but for the attorney's alleged malpractice, he would have been successful in the underlying suit.'" *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993) (citations omitted). This concept has been construed to be applicable "where the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal." *Charles Reinhart Co, supra* at 587. This showing encompasses a demonstration that the appellate court "would have had jurisdiction to hear the appeal, that the appellate court would have granted review when review is discretionary, and that the trial court's judgment would have been modified on review." *Id.* (citations omitted). Despite Benefiel's failure to perfect a claim of appeal, plaintiff did not demonstrate that, even if this Court had ruled on the merits of the issues raised on appeal, that it would have resulted in a different outcome. Plaintiff's assertion that this Court could have ruled differently than the trial court is not sufficient to meet the burden of proof in opposing summary disposition.

On appeal, Benefiel asserts the trial court erred in determining that plaintiff's claim of malpractice was not frivolous and the subsequent denial of requested attorney fees and costs as sanctions. A trial court's determination that a claim or defense was frivolous will not be reversed on appeal unless it is clearly erroneous. *Attorney General v Harkins*, 257 Mich App 564, 575; 669 NW2d 296 (2003), citing *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

Frivolous claims are subject to costs in accordance with MCR 2.625(A)(2). MCR 2.114(F). The frivolous claims provisions within the Court Rules impose an affirmative duty on attorneys to conduct reasonable inquiries into the factual and legal viability of a pleading prior to it being signed. *Harkins, supra* at 576. The reasonableness of the inquiry is evaluated under an objective standard. *Id.* The focus is placed upon the effort undertaken to investigate a claim prior to filing suit, and a determination of reasonable inquiry depends on the facts and circumstances of the case. The subjective good faith of the attorney is deemed irrelevant. *Id.* Later, if it is determined or discovered that the facts, as alleged, are not true, it does not invalidate a prior reasonable inquiry. *Id.* MCL 600.2591(1) further supports imposition of sanctions for frivolous claims.

To impose sanctions, a claim or pleading is defined as being "frivolous" if: (a) the party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party; (b) the party had no reasonable basis to believe that the facts underlying their legal position were true; or (c) the party's legal position was devoid of arguable legal merit. *Kitchen, supra* at 662; MCL 600.2591(3)(a). Sanctions are deemed mandatory if a trial court determines that a pleading was signed in violation of a court rule or a frivolous action or defense was pleaded. *Harkins, supra* at 576; see also MCR 2.114(E).

The underlying purpose of MCL 600.2591 is "to sanction attorneys and litigants who file lawsuits or defenses without reasonable inquiry into the factual [or legal] basis of a claim or defense, not to discipline those whose cases are complex or face an 'uphill fight.'" *Louya v William Beaumont Hosp*, 190 Mich App 151, 163-164; 475 NW2d 434 (1991). In evaluating Po's claims of legal malpractice, the trial court specifically noted that Benefiel's possible ethical violations in the loaning of funds to his client and the resultant conflict of interest, precluded the trial court's determination that Po's claim was frivolous. The trial court indicated its concurrence that Benefiel had not properly protected the underlying record and Po's appellate rights in failing to object to the admission of the adverse medical document on the record, even though the trial court did not dispute the admissibility of the document and Benefiel's ultimate decision to present the record in his case in chief.

Notably, while citing MCL 600.2591(3)(a)(i) regarding assertion of a claim or defense for an improper purpose, Benefiel never delineated or explained any basis for this theory to substantiate the imposition of sanctions. The implication or inference that a claim was brought with an improper purpose, without more, is insufficient to support an award of sanctions. A party may not assert a position then leave it to this Court to search for the factual support for their claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Benefiel's motion for sanctions fails to implicate MCL 600.2591(3)(a)(ii), which requires:

> The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

Although Benefiel argues that contrary testimonial evidence existed to dispute certain assertions by plaintiff, he does not dispute the primary factual allegations which serve as the basis for plaintiff's claim of legal malpractice: (a) the failure to preserve or object to the admissibility of the adverse medical record and (b) the failure to file or inform plaintiff of the necessity to file a motion for new trial or judgment notwithstanding the verdict to preserve a claim of appeal.

Consequently, Benefiel's motion for sanctions is dependent upon a determination that plaintiff's "legal position was devoid of arguable legal merit." MCL 600.2591(3)(a)(iii). The trial court construed plaintiff's claims pertaining to Benefiel's conflict of interest and possible ethical violations and failure to preserve the trial court record to have "legal merit." With reference to plaintiff's claim that Benefiel had committed malpractice by failing to act to preserve the record for appeal, noting the complexity of the issue, the amount of time, effort and argument dedicated to it, the trial court indicated it could not deem the claim to be frivolous.

Contrary to Benefiel's assertion, plaintiff's failure to establish that the jury verdict was against the great weight of the evidence and inability to defeat his motion for summary disposition, do not merit a determination that plaintiff's claims were frivolous. *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). The fact that a party does not ultimately prevail is not indicative that his arguments or position were inherently frivolous. *Kitchen, supra* at 663. Hence, we find no clear error in the trial court's determination that plaintiff's claims of legal malpractice were not frivolous.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly