

STATE OF MICHIGAN
COURT OF APPEALS

ARTHUR STENLI,

Plaintiff-Appellant,

v

DOUGLAS A. KEAST and CHIRCO,
HERRINGTON, RUNDSTADLER & THOMAS,
L.L.P.,

Defendants-Appellees.

UNPUBLISHED
February 25, 2003

No. 237741
Macomb Circuit Court
LC No. 01-000498-NM

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

This appeal arises from a legal malpractice suit brought by plaintiff, Arthur Stenli, against his former attorney, defendant Douglas A. Keast, and Keast's law firm, Chirco, Herrington, Rundstadler & Thomas, L.L.P., for Keast's alleged negligent representation of Stenli in a separate lawsuit. The underlying action involved a claim in the 37th District Court against Asaad Alam and Marcelle Alam ("the Alams") for the recovery of \$65,000 in payment on a promissory note. Following a bench trial, the district court found that the promissory note had been fully paid and, accordingly, dismissed the case. Stenli filed an appeal with the circuit court. However, the appeal was dismissed for Stenli's failure to respond to the Alams' motion for summary disposition and failure to appear at the motion hearing. Stenli subsequently brought a legal malpractice suit against Keast, alleging legal malpractice. Defendants moved for summary disposition. The circuit court granted summary disposition and dismissed the case with prejudice. Stenli appeals as of right, raising several claims of error. We reverse and remand.

I. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider, in addition to the pleadings, all affidavits, depositions, admissions and other documentary evidence submitted, and must construe all such evidence in a light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The motion must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). The moving party must

specifically identify the issues having no disputed material facts. MCR 2.116(G)(4). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact material to the dispositive legal claims exists. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990).

A trial court's findings of fact may not be set aside unless they are clearly erroneous. MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Meek v Dep't of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000).

II. Analysis

Stenli argues that the circuit court erred in concluding that he would not have prevailed in the underlying lawsuit and, accordingly, no legal malpractice was committed by Keast. Particularly, Stenli argues that he had standing to bring the underlying lawsuit, and that the circuit court erred when it determined that payment on the promissory note was satisfied.

In a legal malpractice action, a plaintiff has the burden of establishing four elements: “(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.” *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). “As in other tort actions, the plaintiff has the burden of proving all the elements of the suit to prevail.” *Id.* at 586. Thus, a plaintiff who alleges legal malpractice must prove professional negligence, in that counsel failed to exercise reasonable skill, care, discretion, and judgment in the conduct and management of the underlying case. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996). The plaintiff also must establish that, but for the negligence, the outcome of the case would have been favorable to the plaintiff. *Id.* As our Supreme Court explained:

Often the most troublesome element of a legal malpractice action is proximate cause. 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. Hence, a plaintiff must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit. In other words, “the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding.” [*Charles Reinhart, supra* at 586 (citations and footnotes omitted).]

Thus, it was incumbent upon Stenli to prove to the circuit court that Keast was negligent in his representation of Stenli in the underlying lawsuit, and that, but for Keast's negligence, Stenli would have been successful in the underlying lawsuit.

A. Stenli's Standing to Bring the Underlying Lawsuit

The first issue on this appeal concerns the validity of the July 1990 assignment and Stenli's standing to bring suit on the promissory note against the Alams. At the bench trial,

Keast introduced into evidence a hand-written note, not notarized, in which Stenli, as president of Dutch Oven, Inc., assigned to himself “all rights to sue” the Alams.¹ The Alams challenged the validity of the assignment by inquiring into whether the corporation was in existence at the time of the assignment. Stenli was unable to discern whether the corporation, in fact, existed at the time, and explained that he issued the assignment upon the advice of his former counsel. The district court asked Keast about the validity of the assignment. Keast merely asserted that no evidence had been presented to suggest that the corporation was not in existence at the time. Because Stenli was unable to prove the existence of the corporation at the time of the assignment, the district court dismissed the case, partially due to the questionable validity of the assignment.

A corporation may be dissolved automatically, under MCL 450.922, for failure to file an annual report or pay the filing fee. MCL 450.1801(1)(f). Stenli does not now dispute that Dutch Oven was dissolved at the time of the assignment. Rather, he asserts that the assignment was an act of winding up the affairs of the dissolved corporation. Defendants do not contest this assertion; rather, they claim that the assignment was invalid merely because the corporation was dissolved at the time it was effected.

By statute, corporations can still assign their legal rights even though they are dissolved. MCL 450.2833. MCL 450.2834(b) provides that a dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred and that title to the corporation’s assets remains in the corporation until transferred by it in the corporate name. Thus, we conclude that the assignment, effected about two months after the corporation was automatically dissolved, was a valid exercise in winding up the dissolved corporation’s affairs. The circuit court erred in concluding otherwise.

Further, we disagree with the circuit court’s conclusion that Stenli was required to show that he was a payee on the promissory note and that the assignment, itself, was vague. “Generally, all legitimate causes of action are assignable.” *Grand Traverse Convention & Visitor’s Bureau v Park Place Motor Inn, Inc*, 176 Mich App 445, 448; 440 NW2d 28 (1989). An assignment is valid only if, at the time of the assignment, the assignor possessed the rights which he is assigning. *Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165 (1987). A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Id.* at 242. Here, the legal claims against the Alams belonged to the dissolved corporation. The instrument properly assigned the right to sue the Alams on all of the corporation’s claims. Therefore, the circuit court erred in ruling that the assignment was invalid and that Stenli lacked standing to bring the underlying lawsuit.

Moreover, because the circuit court found no error, it did not address Keast’s alleged negligence in his representation of Stenli. Stenli asserted that Keast was negligent in failing to properly prepare for the case by learning the relevant laws pertaining to the rights and powers of dissolved corporations, and failed to provide the trial court with the relevant statutory provisions for an accurate determination. The trial transcript shows that Keast, himself, introduced the assignment to establish Stenli’s standing as a party in interest on the promissory note that was the

¹ We do not address an earlier assignment that Stenli submits on appeal for the first time.

subject of the underlying case. The mere existence of the assignment suggests that Stenli required something more than just his capacity as the officer and sole shareholder of the dissolved corporation to bring the underlying suit. Because the assignment was handwritten and not notarized, the corporation was dissolved, and the sale transaction that resulted in the creation of the promissory note was detailed and complex, Keast should have reasonably assumed that the assignment would be challenged. See *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995). The record shows that Keast was not prepared for such a challenge and was unaware of the relevant law, and thus, was unable to properly represent his client at trial.

However, we disagree with Stenli's assertion that defendants should have been barred from asserting the defense of Stenli's lack of standing because this defense was not pleaded affirmatively. *Leite v Dow Chemical Co*, 439 Mich 920; 478 NW2d 892 (1992).

B. The \$65,000 Promissory Note

Stenli argues that both the district court and the circuit court erred in determining that he had been fully paid on the \$65,000 promissory note. Stenli argues that Keast failed to properly prepare for the case, failed to present the facts of the complex sale transaction in a concise and comprehensible manner, and failed to call as witnesses his former partner and attorney who were part of that transaction, and who would have clarified the issues at trial. Stenli argues that, as a result of Keast's unpreparedness, the district court confused the promissory note with the \$85,000 Dillon Group mortgage. We agree.

The trial court record shows that the district court agreed with the Alams' theory of the case - - that the alleged \$65,000 promissory note, if it existed, was nothing other than the balance of \$85,000 Dillon Group mortgage, or that the alleged \$65,000 promissory note was part of the \$85,000 that Stenli alleged in his complaint, and that the note simply did not exist because it had been paid in full separately from the \$85,000 Dillon Group mortgage.

The evidence in the underlying case showed that the gross selling price to the Alams was \$395,861. From that amount, Stenli received at closing a cash deposit of \$15,000, leaving an adjusted balance of \$380,861. The Warren Bank mortgage for the sale was actually \$250,000, but the bank retained \$10,000 for the liquor license, and issued a check for the amount of \$240,000. The Dillon Group received \$200,000 of the \$240,000 check, while Stenli received the remaining \$40,000. An existing lien of \$85,000 with the Dillon Group was to be assumed by the Alams. These figures do not add up to the sale price of \$380,861. According to the theory proffered by the Alams -- that the \$85,000 alleged in Stenli's complaint as owing, was nothing other than the \$85,000 Dillon Group mortgage - - then the sale price was covered by the \$240,000 Warren Bank check and the \$85,000 Dillon Group Mortgage only. These two figures total \$325,000, leaving an unaccounted difference of \$55,861. If, however, the Alams' theory of the case was that they had owed Stenli an additional \$85,000, then the figures still fail to add up. In such a scenario, the sale price would have been \$410,000.

The Alams also asserted that the \$85,000 alleged in Stenli's complaint as owing, was satisfied by the conveyance of a \$20,000 house, the aforementioned \$10,000 liquor license that Stenli retained, the aforementioned \$15,000 deposit, and the aforementioned \$40,000 of the remainder of the Warren Bank check. Yet, the Alams failed to explain why, if the above were presented as payment for the \$85,000 assumption of the Dillon Group mortgage, the instrument

effecting that mortgage was created at closing without any reference to those transfers which also took place at closing. There is nothing in the record to explain the instrument calling for ten years' worth of monthly installment payments to pay off the \$85,000 mortgage. Nor did the above calculations take into account the \$4,000 that the Alams did not deny that they had paid in monthly installments following the closing.

Importantly, defendants' own calculation with respect to the alleged payment on the \$85,000 debt, that they claimed was the only one in existence, differs from the Alams' calculation. This shows that even defendants are confused over the nature of the transaction and over whether, in fact, any payment had been made to the promissory note other than the undisputed payment of \$4,000 that the Alams had paid. Defendants' calculations on appeal amounts to \$74,000, leaving an unaccounted difference of \$11,000. In this respect, the circuit court failed to scrutinize the calculations provided by the Alams and defendants. The discrepancies in the calculations alone shows that summary disposition in favor of defendants was improper.

However, a review of the transcript also shows confusion and difficulties in understanding the nature of the sale transaction of the underlying case, particularly because Stenli's hearing loss and memory lapses proved him to be a difficult witness, Keast was unfamiliar with a certain important document that the Alams introduced, and because of the noticeable absence of the recorded \$65,000 promissory note itself.

"It is well established that '[a]n attorney is obligated to use reasonable skill, care, discretion and judgment in representing a client.'" *Simko, supra* at 656 (citations omitted). An attorney must act with the skill, learning, and ability of the average practitioner of law. *Id.* at 657. An attorney's mere errors in judgment are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence. *Id.* at 658. As this Court succinctly stated in *Schunk v Zeff & Zeff, PC*, 109 Mich App 163, 187; 311 NW2d 322 (1981):

A lawyer licensed to practice law in the State of Michigan is presumed to be knowledgeable as to what facts are fundamentally relevant to determining the existence of a bona fide claim. Legal minds may differ substantially as to the likelihood of success on the merits, and lawyers certainly cannot be and should not be insurers of success. Where the facts are in doubt, the attorney should be entitled to resolve those doubts in favor of the client. But legal minds should not differ in evaluating whether a lawyer has satisfied the minimal requirement that he advance only tenable claims or whether the preliminary investigation into the facts and available evidence has been deficient.

In the underlying case, the Alams asserted, as an affirmative defense, that Stenli failed to properly plead or produce the alleged promissory note, that the transaction on that promissory note was never completed, that Stenli had settled the matter with the Dillon Group, the Warren Bank and with the Alams, and that he had released all claims to any interest in the matter. From the Alams' responsive pleading, it may be assumed that an attorney would reasonably anticipate a challenge to all aspects of the underlying sale transaction, particularly the existence of the promissory note that is the center of the underlying case.

Additionally, the record shows several serious deficiencies on the part of Keast's knowledge of the facts of the case which he was litigating and his performance as legal counsel. First, Keast failed to amend the complaint filed by his predecessor. The complaint had erroneously claimed the existence of an \$85,000 *promissory note*, when Stenli testified at trial that none existed. Second, at trial, Keast introduced only a copy of the \$65,000 promissory note, and Stenli testified that the original was lost or misplaced. Keast attempted to prove of the existence of the \$65,000 promissory note by referring to another sales document that mentioned it. Third, Keast expressly stated his confusion over the exact amount of the debt that Stenli owed the Dillon Group at the time of the sale transaction. Stenli testified that he owed the Dillon Group only \$75,000. However, the Alams introduced a contract between them and the Dillon Group, which stated that Stenli actually owed the Dillon Group \$335,920. In that document, the Dillon Group agreed to reduce Stenli's debt to \$85,000 in exchange for receipt of \$200,000 from the Warren Bank check at closing. Keast expressly stated that he was unfamiliar with this document. Further, Stenli repeatedly testified that he was unaware of the details of the underlying transaction because he had left that to his former counsel. A review of the record shows that the Alams' counsel successfully presented the Alams' theory of the case because he provided the district court with some sort of sense of what may have occurred at the sale transaction.

The circuit court should have inquired into whether Keast should have known that Stenli's lack of knowledge of the details of the sale transaction and memory loss would make him an unreliable witness. The circuit court also should have inquired into the reason why Stenli's former partners, the Dillon Group, or Stenli's former counsel who handled the sale transaction, were not called as witnesses to provide a clearer understanding of the transaction, or why Keast failed to ask them for copies of the documents of the sale. Most importantly, the circuit court should have inquired into the reason for Keast's failure to acquire any and all recorded instruments that resulted from the sale.

A review of the circuit court's opinion and order shows that the circuit court failed to review copies of the recorded instruments that Stenli proffered in opposition to summary disposition. Stenli provided the circuit court with a copy of the recorded \$65,000 promissory note that dispels any doubts the district court may have had with respect to the existence of that note. The recorded instrument also supports Stenli's theory of the underlying case, that the sale transaction produced three separate and distinct mortgages -- the \$85,000 Dillon Group mortgage, the \$65,000 promissory note, and the \$240,000 Warren Bank mortgage. The three recorded instruments that were before the circuit court also show that the Dillon Group mortgage and the \$65,000 promissory note were subrogated to the Warren Bank mortgage. The existence of the recorded instruments and the fact that the Alams never presented any documented proof that they fully paid the \$65,000 promissory note would have resulted in a different outcome at trial.

In light of the above deficiencies, we conclude that Stenli sustained his burden in showing that, but for Keast's negligence, he would have succeeded in the underlying lawsuit. Accordingly, we hold that summary disposition in favor of defendants was improper, and the circuit court erred in dismissing the case. Stenli's remaining issues on appeal were not addressed by the circuit court, and because they are not dispositive in this appeal, we decline to address them.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Michael R. Smolenski