

STATE OF MICHIGAN
COURT OF APPEALS

GARY S. HANN,

Plaintiff-Appellant,

v

THOMAS M. LOEB,

Defendant-Appellee.

UNPUBLISHED

October 17, 2006

No. 268928

Oakland Circuit Court

LC No. 2005-065804-NM

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant summary disposition in this legal malpractice action. We affirm.

Plaintiff argues that the trial court erred in granting defendant summary disposition of his legal malpractice claim. Plaintiff contends that defendant unlawfully entered a nolo contendere plea on plaintiff's behalf in the underlying criminal case. We disagree. Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10), and the trial court granted the motion under MCR 2.116(C)(10), considering evidence outside the pleadings. Therefore, this Court reviews the decision using the standard for MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

We review de novo a trial court's decision with regard to a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). When reviewing a summary disposition motion granted under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the party opposing the motion. *Id.* Summary disposition was appropriate if, except for the amount of damages, there was no genuine issue regarding any material fact and the moving party was entitled to judgment as a matter of law. *Id.*

The elements of a legal malpractice claim 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." *Manzo v Petrella (On Remand)*, 261 Mich App 705, 712; 683 NW2d 699 (2004). The plaintiff bears the burden of proving the elements of a legal malpractice claim. *Id.* at 715, 718; *Barrow v Pritchard*, 235 Mich App 478, 483-484; 597 NW2d 853 (1999). Plaintiff maintains that defendant was negligent during the course of the underlying representation, in particular by

entering a nolo contendere plea even though plaintiff was innocent. At the plea hearing, plaintiff responded to the trial court's questions regarding his plea. Plaintiff indicated that he understood that he had the right to a trial, the right to have an attorney represent him throughout a trial and sentencing, the right to have all witnesses testify against him, and the right to testify at trial if he chose. The trial court found that plaintiff's plea was "understanding, accurate, and voluntary," and it accepted the plea. Plaintiff's entire argument is misplaced because it is apparent from the transcript that plaintiff entered the nolo contendere plea himself. There is no evidence to support plaintiff's contention that defendant entered the plea without plaintiff's consent.

Further, a plaintiff in a legal malpractice action is obligated to offer expert witness testimony about the applicable standard of care and the alleged violation of the standard of care unless it is within the common knowledge and experience of an ordinary layperson. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989); *Joos v Auto-Owners Ins Co*, 94 Mich App 419, 422-424; 288 NW2d 443 (1979). Under the circumstances of this case, the alleged violation of the standard of care was not within the common knowledge and experience of an ordinary layperson, and there is no evidence that plaintiff offered the required expert witness testimony. Therefore, the trial court did not err in granting defendant summary disposition with regard to plaintiff's malpractice claim.

Regarding plaintiff's breach of contract claim, this Court has held, albeit in a different context, that it is the gravamen of an action, not its wording, that is our primary consideration. *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490; 458 NW2d 671 (1990). Moreover, although an attorney may be held liable for poor representation under a breach of contract theory, a "special contract" is required, whereby the attorney agrees to provide services above the level required by the standard of care. *Brownell v Garber*, 199 Mich App 519, 525; 503 NW2d 81 (1993). Plaintiff never asserted that defendant agreed to provide services above the required standard of care, and the fee agreement does not contain any such provision. The "breach of contract" claim was, in actuality, a malpractice claim, and the trial court properly treated plaintiff's breach of contract claim as a legal malpractice claim and properly granted summary disposition as discussed above.

Plaintiff also claims that the trial court erred in limiting its review of his remaining claims to the nominal titles in his complaint, i.e., "Ineffectiveness," "Violations of the Michigan Rules of Professional Conduct," "Perjury and Conflict of Interest at Plea Colloquy," "Making a Plea of Conviction in Place of Client," and "Sentencing Proceeding Failures." We find no error with regard to the court's ruling. Indeed, these various claims, in substance, were clearly legal malpractice claims,¹ and therefore the trial court properly treated these claims as legal malpractice claims and properly granted summary disposition as discussed above.

Plaintiff contends that he was denied his right to a jury trial under MCR 2.116(I)(3). We disagree. We review de novo questions of law, including the proper interpretation and application of court rules. *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2001).

¹ Further, regarding plaintiff's claim of "Sentencing Proceeding Failures," we note that the lower court file does not contain a sentencing transcript or presentence information report.

MCR 2.116(I)(3) provides that the trial court may order a trial to resolve disputed issues of fact or order an immediate trial “if the grounds asserted are based on subrules (C)(1) through (C)(6), or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing.” Because the plea transcript from the underlying criminal case demonstrates that plaintiff entered a plea of nolo contendere, plaintiff’s basis for asserting defendant’s negligence in representing him was meritless. Therefore, there was no disputed issue of fact, and plaintiff would have only been entitled to a trial based on MCR 2.116(C)(4), which pertains to subject-matter jurisdiction.

It is not apparent how the trial court may have lacked subject-matter jurisdiction, and plaintiff has failed to articulate this argument or provide any authority to support this assertion on appeal. “It is not sufficient for a party ‘simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.’” *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). “[F]ailure to properly address the merits of [t]his assertion . . . constitutes abandonment of the issue.” *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004).

MCR 2.116(I)(1) provides that a trial court “shall render judgment without delay” if “the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact[.]” Here, because the proofs showed that there was no genuine issue of material fact, the trial court properly rendered judgment without delay and without providing plaintiff a jury trial.

Plaintiff asserts that the trial court erred in citing the standards for MCR 2.116(C)(10) when the substance of its ruling concerned subrule (C)(8). When a motion for summary disposition is filed under MCR 2.116(C)(8) and (C)(10), it will be reviewed under subrule (C)(10) if the trial court considered evidence outside the pleadings. *Steward, supra* at 554-555. Because it is clear that the trial court considered plaintiff’s plea in the underlying criminal case, this Court must review the opinion and order using the standard for MCR 2.116(C)(10). *Id.* Even if the substance of the trial court’s ruling applied MCR 2.116(C)(8) as plaintiff alleges, he has not provided any authority to show that this was an error entitling him to relief. The issue is deemed abandoned. *Wilson, supra* at 243; *Thompson, supra* at 356.

Plaintiff asserts a variety of procedural and discovery violations. Because none of these issues were raised before or addressed by the trial court, they have not been properly preserved for appellate review. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). We therefore review them for plain error. “To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000), quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Plaintiff claims that he desired a clearer motion for summary disposition from defendant and that the trial court refused to rule on his motion for a more definite statement under MCR 2.111(A)(1). The lower court file does not contain a reply to defendant’s motion for summary disposition or a motion for a more definite statement, and the lower court “docket display” does

not indicate that either was properly filed. Therefore, this argument is misplaced. Further, MCR 2.111(A)(1) provides that “[e]ach allegation of a pleading must be clear, concise, and direct.” Defendant’s motion for summary disposition was clear, concise, and direct. Plaintiff’s assertion that defendant’s brief is 250 pages long is belied by the document itself; the entire motion and brief combined do not fill nineteen pages. We note that one of the appendices is plaintiff’s sixty-eight-page pleading with the United States District Court for the Eastern District of Michigan, which includes an eleven-page attachment. Accordingly, even if plaintiff had properly filed a motion for a more definite statement under MCR 2.111(A)(1), denial of the motion would have been proper.

Plaintiff also asserts that the trial court refused to allow him to amend his answer to defendant’s motion for summary disposition under MCR 2.116(I)(5). However, the lower court file does not contain a motion to amend an answer, and the lower court “docket display” does not indicate that anything of that sort was properly filed. If plaintiff prepared such a motion, he failed to properly file it.

MCR 2.116(I)(5) generally provides that the trial court shall give the parties an opportunity to amend their pleadings in accordance with MCR 2.118 if summary disposition is sought under MCR 2.116(C)(8), (C)(9), or (C)(10). Here, plaintiff has not asserted what he would have amended if such an amendment had been granted or how such an amendment might have affected the trial court’s analysis. The issue has been abandoned. *Wilson, supra* at 243; *Thompson, supra* at 356.

Plaintiff contends that the trial court erred in not responding to his requests for telephone conferences at all proceedings. The lower court file contains only two requests for telephone conferences. On October 17, 2005, plaintiff requested telephonic attendance at the pretrial hearing, which was purportedly scheduled for October 25, 2005. However, the lower court file does not indicate that a pretrial hearing was conducted on October 25, 2005. On November 3, 2005, plaintiff requested telephone attendance at the hearing scheduled for November 16, 2005. Although plaintiff does not specify to which hearing his appellate argument is referring, on November 16, 2005, the trial court entered three orders: an order denying plaintiff’s motion for a default judgment, an order granting defendant’s motion for a protective order, and an order granting defendant’s motion for a stay of discovery.

MCR 2.119(E)(3) provides the trial court with discretion to dispense with or limit oral argument on contested motions. MCR 2.402 governs the participation of parties by telephone conference. Upon the written request of a party, the trial court may direct that communication equipment be used for a motion hearing. MCR 2.402(B). If a party desires to use communication equipment, he must submit a written request to the trial court at least seven days before the hearing is scheduled. MCR 2.402(B). Although plaintiff submitted a written request that he prepared on November 3, 2005, the date stamp indicates that the trial court did not receive the request until November 28, 2005, twelve days after the orders were entered. Therefore, plaintiff did not properly request the use of communication equipment, and the trial court did not commit plain error in conducting the November 16, 2005, hearing or hearings without plaintiff’s “telephonic presence.”

Plaintiff claims that the trial court denied discovery after he submitted interrogatories and requests to produce documents and after the trial court ordered that discovery would proceed.

On August 13, 2005, the trial court entered a scheduling order, which provided for discovery to be completed by December 22, 2005. On appeal, plaintiff simply does not articulate how the trial court denied discovery or otherwise develop this argument. Accordingly, the issue has been abandoned. *Wilson, supra* at 243; *Thompson, supra* at 356.

Plaintiff also seems to challenge the trial court's grant of summary disposition before discovery was completed. If summary disposition is granted before discovery on a disputed issue is complete, it is generally considered premature. *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006). However, summary disposition may be appropriate "if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Id.* (internal citations and quotation marks omitted). Further, although defendant moved for summary disposition on November 30, 2005, before discovery was complete on December 22, 2005, the trial court did not grant summary disposition until February 24, 2006. Therefore, even if there was reasonable chance that further discovery would uncover factual support for plaintiff's position, plaintiff's argument is misplaced.

The trial court did not err in granting summary disposition to defendant. Given our disposition of this case, we need not address plaintiff's remaining claims.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter

/s/ Pat M. Donofrio