

STATE OF MICHIGAN
COURT OF APPEALS

JESSE LEE CODDINGTON,

Plaintiff-Appellant,

v

GERALD M. LORENCE, P.C.,

Defendant-Appellee.

UNPUBLISHED

April 21, 1998

No. 191608

Wayne Circuit Court

LC No. 94-436461-NM

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

Summary disposition was granted pursuant to MCR 2.116(C)(10) for defendant on plaintiff's claims of fraudulent misrepresentation and legal malpractice. Plaintiff's motions for summary disposition and sanctions were subsequently dismissed as moot. Plaintiff appeals as of right. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

Plaintiff was convicted of first-degree murder, MCL 750.316; MSA 28.548; second-degree murder, MCL 750.317; MSA 28.549; felonious assault, MCL 750.82; MSA 28.277, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). See *People v Coddington*, 188 Mich App 584; 470 NW2d 478 (1991). The convictions arose from the shooting deaths of Jean Coddington (plaintiff's sister-in-law) and Julie Mendoza (Jean's sister), and the assault of Mary Coddington (plaintiff's mother).

After plaintiff's conviction, but prior to sentencing, a fellow inmate suggested that plaintiff retain attorney James Lawrence as his appellate attorney. Subsequently, plaintiff and his sister engaged in several conversations with Lawrence on the telephone, and it was decided that Lawrence would handle the appeal. At some later time in 1988 (the dates are disputed by the parties) defendant was in a position to retain attorney Lawrence. He therefore asked his mother to contact Lawrence. Mary had lost Lawrence's business card and mistakenly called defendant, Gerald Lorence, after finding his number in the telephone book. Plaintiff alleges that Mary told defendant that she was contacting him pursuant to previous conversations and wished to retain him. Plaintiff further alleges that defendant failed to advise

Mary that he had never spoken to plaintiff, his sister or anyone else on plaintiff's behalf and that defendant, knowing he was not the attorney plaintiff wanted to retain, deceitfully agreed to represent him.

Plaintiff and defendant communicated by telephone and through letters after defendant was retained to handle the criminal appeal. They first met in 1989 during the three-day Ginther¹ hearing, which took place on September 7, September 15, and October 10. In fact, plaintiff and defendant sat together during the three days of evidentiary testimony. At no time did plaintiff express that defendant was not the attorney he sought to hire. He claims that due to his "devastated mental state after conviction", he was unable to realize that defendant was not James Lawrence, with whom he had previously spoken. Plaintiff allegedly first discovered the mistake in the identity of the attorneys after this Court affirmed all of his convictions, except the second-degree murder conviction, which was reduced to voluntary manslaughter. *Coddington, supra* at 608-609. After the Supreme Court denied leave to appeal, 439 Mich 970; 483 NW2d 364 (1992), plaintiff hired James Lawrence to file a motion for rehearing on the application for leave, which was also denied. Plaintiff then sued defendant herein for fraudulent misrepresentation and legal malpractice.

First, plaintiff argues that the trial court erred in granting summary disposition to defendant pursuant to MCR 2.116(C)(10) regarding his fraudulent misrepresentation claim. We review de novo the trial court's grant of summary disposition, *Stevens v Inland Waters, Inc*, 220 Mich App 212, 214; 559 NW2d 61 (1996), and conclude that plaintiff failed to raise a genuine issue of material fact that would support a fraudulent misrepresentation claim.

Fraud and misrepresentation are similar and require proof that

(1) defendants made a material representation; (2) it was false; (3) when defendants made it, defendants knew that it was false or made recklessly without knowledge of its truth or falsity; (4) defendants made it with the intent that plaintiffs would act upon it; (5) plaintiffs acted in reliance upon it; and (6) plaintiffs suffered damage. [*Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996), quoting *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994).]

In this case, plaintiff provided no evidence that defendant falsely represented himself as James Lawrence. Plaintiff does not, and cannot, point to any false representations made by defendant. Instead, plaintiff claims that defendant committed fraud when he failed to inform plaintiff's mother that she had reached the wrong attorney when she called to retain defendant to handle plaintiff's criminal appeal.

In a silent fraud case, "[t]he false material representation needed to establish fraud may be satisfied by the failure to divulge a fact or facts that defendant has a duty to disclose." *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 508; 538 NW2d 20 (1995); *Lorenzo v Noel*, 206

Mich App 682, 684-685; 522 NW2d 724 (1994). A claim of silent fraud therefore requires the plaintiff to allege that the defendant intended to induce plaintiff to rely on his nondisclosure and that defendant had an affirmative duty to disclose. *Clement-Rowe, supra*. Even if we were to conclude that defendant failed to correct a material misapprehension, plaintiff has not alleged that defendant owed him or his mother any affirmative duty to disclose that defendant had never before spoken to plaintiff regarding his appeal. Further, at the time plaintiff complains defendant should have informed Mary about his identity, defendant owed plaintiff no duty to disclose. He had not entered into a contractual relationship with plaintiff, nor did defendant stand in any other fiduciary relationship with plaintiff that would have required him to disclose information to plaintiff. Summary disposition was appropriate on the fraudulent misrepresentation claim where plaintiff failed to allege that defendant had a duty to disclose and failed to offer evidence, testimony, or facts that could support a finding that there is a genuine issue of material fact as to the fraudulent misrepresentation claim.

We also note that the fact that a mediation panel awarded a sum in plaintiff's favor is not indicative that there is a genuine issue of material fact sufficient to allow a trial to proceed. Plaintiff's claim that his case must have merit because the mediators awarded a sum in his favor illustrates plaintiff's fundamental lack of understanding of the purpose and effect of the mediation process. We conclude that the trial court properly granted defendant summary disposition pursuant to MCR 2.116(C)(10).

Next, plaintiff argues that his legal malpractice claim should not have been dismissed. Again, we disagree.

In an action for legal malpractice, the plaintiff has the burden of proving 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. *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993) (footnotes and citation omitted). "Hence, a plaintiff in a legal malpractice action must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit." *Id.*

Plaintiff claims that defendant's failure to cite federal case law in his appellate brief in the underlying criminal case constituted legal malpractice. However, plaintiff presents only this general argument, and has failed to specify which issues defendant failed to "federalize". Because there is no indication as to what specific issues defendant allegedly mishandled, there can be no genuine issue of material fact as to whether there was negligence in the representation with respect to those issues. Therefore, we conclude that the trial court did not err by granting defendant summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff's legal malpractice claim that defendant failed to federalize important issues.

Plaintiff also claims that defendant committed legal malpractice when he failed to challenge out-of-court statements, which plaintiff maintains were erroneously admitted in his underlying criminal trial, and the jury instructions pertaining to those statements. Our review of the record indicates that prior to the granting of summary disposition, plaintiff never identified the precise statements that defendant

negligently failed to challenge. In fact, he failed to provide the trial court with any information other than complaining that taped or prior statements were admitted and allowed to be considered as substantive evidence and should not have been. Therefore, the trial court did not err when it granted defendant summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff's claim that defendant negligently failed to challenge the admission of out-of-court statements in plaintiff's criminal appeal. There were simply no questions of material fact presented as to those statements².

Plaintiff also claims that defendant unnecessarily and negligently requested that this Court remand his criminal case for an evidentiary (Ginther) hearing. While this allegation has merit with regard to the need for a remand to determine if a manslaughter instruction had been requested by the trial attorney³, defendant was in no way injured or prejudiced by defendant's request for an evidentiary hearing. In fact, the information garnered at the evidentiary hearing enabled defendant to raise before this Court the ineffective assistance of counsel issues with regard to trial counsel's failure to object to juror misconduct and with regard to a "spat" between defendant and trial counsel, which was apparently witnessed by the jury. *Coddington, supra* at 607-608. Moreover, plaintiff received a favorable ruling from this Court regarding the criminal trial court's improper denial of trial counsel's request for a manslaughter instruction. *Id.* at 604-606, 608-609. Thus, the evidentiary hearing was not a proximate cause of any injury to plaintiff. We conclude that the trial court did not err by granting defendant summary disposition as to plaintiff's claim that defendant negligently requested an evidentiary hearing. There was no question of material fact as to whether plaintiff suffered any injury by defendant's request for a Ginther hearing.

Plaintiff next claims that when the trial court granted defendant's motion for summary disposition, it erroneously dismissed as moot plaintiff's motion for sanctions against defendant for allegedly filing a frivolous, prior motion for summary disposition. We agree. "An issue is moot when the occurrence of an event renders it impossible for the court to fashion a remedy." *Crawford Co v Secretary of State*, 160 Mich App 88, 93; 408 NW2d 112 (1987). The trial court's grant of summary disposition to defendant regarding plaintiff's fraud and legal malpractice claims did not render it impossible for the trial court to consider the merits of plaintiff's unrelated motion for sanctions regarding a separate, prior motion for summary disposition by defendant. Therefore, the trial court's grant of summary disposition to defendant did not render moot plaintiff's motion for sanctions. We remand to the trial court for a determination as to whether defendant signed a frivolous pleading under MCR 2.114(D) that entitles plaintiff to sanctions under MCR 2.114(E) and (F), and whether defendant's failure to appear at the August 25, 1995 summary disposition hearing subjects him to an assessment of costs and penalties under MCR 2.119(E)(4)(b). We note, however, that plaintiff's motion for costs pursuant to MCL 600.2591; MSA 27A.2591 need not be considered by the trial court because plaintiff was not a prevailing party.

Finally, plaintiff argues that when the trial court granted defendant's motion for summary disposition, it erroneously dismissed as moot plaintiff's own motion for summary disposition. We disagree. Plaintiff and defendant both sought summary disposition on plaintiff's complaint. Because the trial court's proper grant of summary disposition to defendant "renders it impossible for the court to

fashion a remedy” to plaintiff’s request for summary disposition, *Crawford, supra*, we conclude that the trial court properly dismissed plaintiff’s summary disposition motion as moot.

Affirmed regarding the trial court’s grant of summary disposition to defendant on all counts of plaintiff’s complaint, and remanded for a determination on the merits of plaintiff’s motion for sanctions. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Stephen J. Markman

/s/ Michael J. Talbot

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

² After the trial court granted summary disposition, plaintiff filed objections to the order. Attached to his objections was a copy of the brief in support of reconsideration, which was filed with the Supreme Court by James Lawrence after that Court denied leave on the underlying criminal appeal. In that document, references are made to the criminal trial transcript and to some statements, which allegedly should not have been admitted. However, without being provided with the transcripts and without knowing the relevant information: including the entire contents of the statements, when and why they were made, why they were actually admitted at trial, and for what purposes they were admitted, the trial court could not review the evidence to determine whether there was an issue of material fact as to whether it was malpractice to fail to challenge the statements. Similarly, this Court cannot, based on the record, determine whether there was any issue of material fact as to whether defendant should have challenged out-of-court statements that were admitted at trial.

³ Defendant moved for a remand, arguing that plaintiff’s criminal trial counsel had rendered ineffective assistance because he had argued with plaintiff before the jury and had neglected to request manslaughter instructions on the record. He also claimed that an evidentiary hearing was necessary to determine whether jurors in plaintiff’s criminal trial read trial-related publicity during the trial. Defendant was incorrect that trial counsel had neglected to request manslaughter instructions on the record. His request for such instructions is noted in the trial transcript. Thus, it was unnecessary to remand for a hearing on that issue. When reviewing the trial transcript, defendant should have found trial counsel’s request for the manslaughter instruction.