STATE OF MICHIGAN

COURT OF APPEALS

GREAT AMERICAN INSURANCE COMPANIES,

Plaintiff-Appellant/Cross-Appellee,

v

GARAN, LUCOW, MILLER, SEWARD, COOPER & BECKER, P.C. and THOMAS F. MYERS,

Defendants-Appellees/
Cross-Appellants.

UNPUBLISHED
September 4, 1998

No. 203014
Oakland Circuit Court
LC No. 95-504656 NM

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

PER CURIAM.

Plaintiff appeals as of right from an order of summary disposition in favor of defendants. We affirm.

Defendants were retained by plaintiff to represent plaintiff's insured, the J.F. Cavanaugh Co. (Cavanaugh), in a personal injury action brought by Thomas Tricoff. At trial, during a discussion about the proposed jury instructions, defendant Myers indicated that the parties had agreed that they would not be "doing any present values or any of that." The jury returned a verdict in favor of Tricoff and found damages in the amount of $8.6 million, with a lump sum of $5 million attributable to future damages. Defendant Myers did not request that the jury be instructed to allocate Tricoff's future damages by year, and the jury was not given the year-by-year verdict form described in SJI 66.01A. After the verdict, the court indicated several times, at various hearings, that it understood the parties to have agreed that *the court* would reduce the award of future damages to present value. However, in its final opinion and order, the court reconsidered its original ruling and held that the award of future damages would not be reduced to present value. In so ruling, the court explained that, contrary to its original understanding, defendant Myers had waived the present value jury instructions in exchange for Tricoff's waiver of the interest and inflation jury instructions, and that it could not fairly reduce the verdict to present value without the use of the year-by-year verdict form described in SJI 66.01A.

Cavanaugh then filed a claim of appeal and the case eventually settled for $6.1 million before this Court could hear the appeal.

After Cavanaugh's appeal was dismissed, plaintiff brought this legal malpractice action against defendants under an equitable subrogation[1] theory. Plaintiff alleged that defendant Myers was negligent for agreeing to waive the reduction to present value. Plaintiff moved for partial summary disposition, seeking a determination that the court in the underlying case had properly held that defendant Myers waived the reduction to present value. In response, defendants filed a cross motion for summary disposition and then later filed two additional motions for summary disposition asserting various grounds for dismissal. Ultimately, the trial court issued an order granting summary disposition in favor of defendants. The trial court explained that plaintiff had forfeited its claim against defendants when Cavanaugh abandoned its appeal in the underlying case.

Plaintiff first argues on appeal that the trial court erred in "denying" its motion for partial summary disposition. Although the trial court never specifically ruled on plaintiff's motion for partial summary disposition, plaintiff preserved the issue by raising it below and pursuing it on appeal. See *Caron Fisher Potts v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996). However, given our resolution of the other issue before us, we need not address this issue.

Plaintiff also argues that the trial court erred in granting defendants' motion for summary disposition. Although we agree with plaintiff's contention that the instant legal malpractice action was not foreclosed by Cavanaugh's eventual settlement with Tricoff, cf. *Lowman v Karp*, 190 Mich App 448, 453; 476 NW2d 428 (1991), we nevertheless conclude that defendants were entitled to summary disposition.[2] Instead of granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), the trial court should have granted the motion pursuant to MCR 2.116(C)(10).[3] A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Foster v Cone-Blanchard Machine Co*, 221 Mich App 43, 48; 560 NW2d 664 (1997).

In an action for legal malpractice, a plaintiff must establish the existence of an attorney-client relationship, negligence in the legal representation of the plaintiff, that the negligence was a proximate cause of the injury, and the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). In this case, it is essentially undisputed that, based on the record, one of two things transpired in the underlying case. Either (1) the court was correct in its original understanding that there had been an agreement between the parties and the court at trial that it, rather than the jury, would be responsible for reducing the award of future damages to present value, or (2) the court was correct in its final understanding that defendant Myers agreed to waive reduction to present value in exchange for Tricoff's waiver of the inflation and interest instructions. Defendants contend that the court was correct in its original understanding of the situation, and plaintiff contends that the court was correct in its final determination.

To preclude a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the disputed factual matter must be material to the issue in dispute. See *State Farm & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1991). Here, under either understanding of the facts, plaintiff cannot show that defendant Myers engaged in legal malpractice, because plaintiff cannot show "the fact and extent of the injury alleged." *Simko*, *supra* at 655. If defendant Myers correctly understood that the court, rather than the jury, was to reduce the award of future damages to present value, the alleged injury would have been a result the court's decision to reverse its prior ruling, rather than attorney malpractice. Certainly, defendant Myers was entitled to rely on such an agreement with the court. Moreover, both parties to this appeal agree that it is possible for a court to reduce future damages to present value without a verdict specifically allocating future damages by year. On the other hand, if defendant Myers waived reduction to present value in exchange for a waiver of the instructions on interest and inflation, it would be impossible to determine whether there was any injury without engaging in improper speculation. See *Stockler v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989) (explaining that recovery in tort is not permitted for remote, contingent, or speculative damages). This is so, because no trier of fact could determine what effect instructions on interest and inflation, if given, would have had on the jury's verdict. Accordingly, we hold that because summary disposition should have been granted pursuant to MCR 2.116(C)(10), *Foster*, *supra* at 48, plaintiff is not entitled to relief on appeal.

Affirmed.

/s/ Harold Hood
/s/ Michael J. Talbot

[1] See *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 254-255; 571 NW2d 716 (1997).

[2] On cross appeal, defendants argue that the trial court could have granted their motion(s) for summary disposition on several additional grounds. Cross appeal is not necessary to urge an alternative ground for affirmance. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). In analyzing this issue, we have considered together all of the parties' various arguments regarding the trial court's decision to grant defendants' motion for summary disposition.

[3] In granting defendant's motion for summary disposition, the trial court explained that MCR 2.116(C)(7) provides that a claim may be summarily dismissed if there was some other disposition of the claim before the commencement of the action. Although we disagree with the trial court's characterization of Tricoff's action against Cavanaugh as a prior disposition of plaintiff's claim against defendants, we will not reverse where the correct result is reached for the wrong reason. See, e.g., *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).