

STATE OF MICHIGAN
COURT OF APPEALS

DAVID DIEHL,

Plaintiff-Appellant,

v

FREDERIC S. ABOOD,

Defendant-Appellee.

UNPUBLISHED

February 11, 2000

No. 215793

Gratiot Circuit Court

LC No. 97-004727-NM

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), in this legal malpractice case. We affirm.

This case arises out of defendant's legal representation of plaintiff in a criminal proceeding. In the underlying criminal action, plaintiff was convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, and felony-firearm, MCL 750.227b; MSA 28.424(2). Plaintiff contends that defendant was negligent in not calling certain witnesses and not requesting jury instructions on self-defense. Plaintiff also contends defendant's negligence was a breach of contract. The trial court granted defendant's motion for summary disposition because plaintiff's complaints related to trial tactics within the discretion of trial counsel.

On appeal, plaintiff argues the court committed error requiring reversal when it granted defendant's motion for summary disposition because there were genuine issues of material fact for trial. This Court reviews de novo a grant of summary disposition under MCR 2.116(C)(10), based on a finding that there was no genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999); *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 86; 514 NW2d 185 (1994). In so doing, the entire record is reviewed, including affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in the light most favorable to the nonmovant, and making all legitimate inferences in the nonmovant's favor. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Where there is no genuine issue of material fact, upon motion for summary disposition, a movant is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(10). *Smith, supra* at 454-455; *McClusky v Womack*, 188 Mich

App 465, 469; 470 NW2d 443 (1991). A party opposing a summary disposition motion on this ground may not rest on his or her pleadings but must set forth specific facts that there is a genuine issue of material fact for trial by submitting affidavits, depositions, admissions or other documentary evidence. *Smith, supra* at 455; *McClusky, supra* at 469.

In a legal malpractice action, a plaintiff must prove (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) the negligence was the proximate cause of an injury, and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995); *McClusky, supra* at 473.

Plaintiff argues that there was a genuine issue of material fact regarding whether defendant was negligent in failing to produce expert witness testimony at his criminal trial regarding ballistics evidence and lighting conditions, and that defendant was negligent in failing to call paramedics as witnesses. We disagree.

It is a tactical decision whether to call particular witnesses, as long as the attorney acts with full knowledge of the law and in good faith. *Simko, supra* at 660. This Court will not question an attorney's tactical decision. *Id.* There is no allegation here that defendant acted in bad faith or without full knowledge of the law in regard to his decisions not to call these witnesses at plaintiff's criminal trial. Consequently, as a matter of law, plaintiff cannot sustain his claim of legal malpractice.

Next, plaintiff argues that there was a genuine issue of material fact regarding whether defendant was negligent in failing to request jury instructions on self-defense in plaintiff's criminal trial. There is no merit to this issue.

At his criminal trial, plaintiff denied that he aimed his shotgun at the police officers. There was thus no basis for an instruction on self-defense. Furthermore, had plaintiff defended on the ground of self-defense, it is evident from the record that the trial court would have allowed the prosecution to introduce evidence of plaintiff's prior criminal sexual conduct conviction for impeachment purposes. Defendant thought this would be detrimental to his client and plaintiff acknowledged in his deposition in this case that he wanted evidence of his prior conviction excluded from the jury's consideration. Under these circumstances, defendant's decision not to seek instructions on self-defense was a tactical one. Tactical decisions are not grounds for malpractice and this Court will not question or second-guess an attorney's tactical decision. *Simko, supra* at 660. Again, as a matter of law, plaintiff cannot sustain his claim of legal malpractice.

Plaintiff also argues that there was a genuine issue of material fact as to whether defendant breached his contract with plaintiff. We disagree.

There is some authority for holding an attorney liable under a contract theory. *Brownell v Garber*, 199 Mich App 519, 525; 503 NW2d 81 (1993). However, a lawyer is not an insurer of the result in a case in which he is employed, unless he makes a special contract to that effect. *Id.*, citing *Babbitt v Bumpus*, 73 Mich 331, 337-338; 41 NW 417 (1889). Plaintiff does not allege any special contract with defendant. The grounds for breach of contract alleged by plaintiff are indistinguishable

from the duty to render legal services in accordance with the applicable standard of care and are merely duplicative of his legal malpractice claim. *Id.* Consequently, because plaintiff's grounds for his legal malpractice claim are all based on defendant's tactical decisions, plaintiff's contract claim must fail as well.

Finally, defendant raises issues of collateral estoppel in his brief on appeal. To preserve an issue for review, an appellee must cross-appeal. MCR 7.207; *Barnell v Taubman Co*, 203 Mich App 110, 123; 512 NW2d 13 (1993). Because defendant failed to cross-appeal, his arguments regarding collateral estoppel are not preserved for appeal and this Court will not review them.

Affirmed.

/s/ Michael J. Talbot

/s/ Roman S. Gibbs

/s/ Patrick M. Meter