

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RONALD E. STARKS,

Plaintiff-Appellant,

v

STEVEN A. RAMEY,

Defendant-Appellee.

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UNPUBLISHED

April 20, 2001

No. 218717

Ingham Circuit Court

LC No. 98-088803-NM

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant on plaintiff's various claims of legal malpractice. We affirm.

Plaintiff filed this legal malpractice claim against defendant, one of several appellate attorneys who represented him following his criminal conviction in 1993. Plaintiff pleaded guilty to one count of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). He was sentenced to ten to twenty years' imprisonment, ten years being the mandatory minimum. This Court affirmed that conviction on appeal and the Supreme Court denied leave to appeal. *People v Starks*, unpublished opinion per curiam of the Court of Appeals, issued September 5, 1997 (Docket No. 167554).

Plaintiff first claims that the trial court erred in not requiring defendant to file an answer to the malpractice complaint before filing a motion for summary disposition. MCR 2.108(A)(1) and (2) provide that a defendant must file an answer or take other action permitted by law or the rules within twenty-one days of personal service of the summons and complaint or twenty-eight days after mail service, respectively. Other action permitted by the court rules includes filing a motion for summary disposition under MCR 2.116 and MCR 2.119. In fact, MCR 2.108(C)(1) specifically contemplates the filing of a motion for summary disposition before filing an answer. Therefore, the court rules do not prohibit a defendant from filing a motion for summary disposition before filing an answer. Here, defendant filed the motion within the prescribed twenty-eight day time limit.

Moreover, plaintiff never properly requested or obtained entry of either a default or a default judgment. Here, plaintiff attempted to secure a default judgment, without first obtaining

a default as required by MCR 2.603, through filing a motion, but failed to file the required motion fee. Where a motion is defective under the court rules, the issue raised therein is not properly preserved for appellate review. *People v Bettistea*, 173 Mich App 106, 123; 434 NW2d 138 (1988), *aff'd* on other grounds after remand, 181 Mich App 194; 448 NW2d 781 (1989).

Plaintiff next claims that he presented sufficient evidence to prove he was indigent and unable to pay motion fees and that the trial court erred in not waiving them. We disagree. The record evidence supports the court's implicit finding that plaintiff was not indigent, as manifested in the court's reiteration in the order granting summary disposition of its earlier ruling suspending payment of the initial filing fee but requiring plaintiff to pay the fee in full over time.

Plaintiff next argues that the trial court should not have granted defendant's motion for summary disposition because defendant had not yet answered interrogatories from plaintiff. This Court reviews *de novo* a trial court's grant of summary disposition. *Blackwell v Citizens Ins Co of America*, 457 Mich 662, 667; 579 NW2d 889 (1998). When opposing a motion for summary disposition with the claim that discovery is still outstanding, a party is required to do more than make that broad pronouncement. Summary disposition is not premature if the discovery does not stand a fair chance of uncovering factual support opposing the motion for summary disposition. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), quoting *Prysak v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992). The trial court did not err in rejecting plaintiff's argument that summary disposition was premature because discovery was outstanding. Summary disposition was not premature because plaintiff's discovery did not stand a fair chance of establishing factual support for any of plaintiff's three malpractice theories.

Finally, plaintiff argues that summary disposition of his three malpractice theories was not proper. A legal malpractice claim requires that plaintiff plead and prove (1) an attorney-client relationship, (2) negligence in the legal representation, (3) proximate cause, and (4) injury. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). As the Supreme Court stated in *Simko*, "attorneys must only act as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances," and theories arising from "trial tactics based on good faith and reasonable professional judgment" will not support a claim of malpractice. *Id.* at 650. In a legal malpractice action alleging negligence during an appeal, the issue of proximate cause is an issue of law to be decided by the court. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 582; 513 NW2d 773 (1994). Finally, an appellate attorney need not raise every claim of arguable legal merit to constitute effective assistance of appellate counsel. *People v Reed*, 449 Mich 375, 381-382; 535 NW2d 496 (1995).

The trial court properly found that defendant had no duty to plaintiff to report alleged violations of the Michigan Rules of Professional Conduct (MRPC) by other attorneys, the prosecutor, and the trial judge. In defining the scope and applicability of the rules of professional conduct, MRPC 1.0(b), and the comments thereto, state that the rules do not create any legal duty, create a presumption of a breach of a legal duty, give rise to a cause of action, or provide a basis for civil liability. Even if a general duty did exist, there was no breach because an attorney is not required to raise every arguable meritorious issue on appeal to constitute effective assistance of counsel. *Reed, supra*. Finally, the proximate cause of plaintiff's conviction was

his guilty plea, not defendant's failure to report alleged MRPC violations. See *Schlumm v Terrence J O'Hagan, PC*, 173 Mich App 345, 360-361; 433 NW2d 839 (1988).

Second, plaintiff claims that defendant did not properly present and pursue his appellate argument that he did not knowingly, unequivocally, and intelligently waive his Sixth Amendment right to assistance of counsel. Plaintiff admitted in his complaint that defendant did raise the issue in plaintiff's criminal appeal, but averred that, "the Sixth Amendment violation issue was stronger than the one presented on appeal by the Defendant." Plaintiff's apparent position is that defendant pursued the argument with negligently inadequate vigor. However, this malpractice theory arising from plaintiff's subjective critique of defendant's "trial tactics based on good faith and reasonable professional judgment" will not support a claim of malpractice. *Simko, supra*. As already noted, the trial court properly found that the proximate cause of plaintiff's conviction was his guilty plea, not defendant's alleged malpractice. *Schlumm, supra*.

Third, plaintiff claims that it was malpractice for defendant not to advise plaintiff about the statute of limitations on a possible claim against a different appellate attorney. The trial court properly found that the elements of proximate cause and injury were lacking in this malpractice theory because plaintiff failed to articulate any actionable theory of malpractice against the attorney and because plaintiff failed to present evidence to suggest that he was likely to prevail on the merits in the theoretical case against the attorney. On this record, the trial court did not err in granting summary disposition on this theory.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Jane E. Markey  
/s/ Jeffrey G. Collins