STATE OF MICHIGAN

COURT OF APPEALS

RICHARD KRANIAK,

Plaintiff-Appellant/Cross-Appellee,

V

COX, HODGMAN & GIARMARCO, P.C., JULIUS GIARMARCO and MICHAEL NOVAK,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
June 11, 2002

No. 230028
Wayne Circuit Court
LC No. 99-928864-NM

Before: Markey, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this legal malpractice case. Defendants cross-appeal, arguing that, in granting their motion for summary disposition, the trial court erred in determining that plaintiff's claims were not barred by res judicata. We affirm.

Plaintiff, Robert Fox and Michael Tinik were the three shareholders of Brass Ring Productions ("Brass Ring"). Plaintiff was also an employee of Brass Ring. In the 1980s, defendants were hired by Brass Ring to perform legal services and act as general counsel. As part of their duties for Brass Ring, defendants performed personal legal services for plaintiff, Fox, and Tinik.[1] Plaintiff was not billed for these legal services because they fell under the umbrella of services defendants provided to employees of Brass Ring.

In December 1997, Novak presented plaintiff with documents (the "stock purchase agreement"), which the evidence suggests either Novak or Giarmarco had prepared at the direction of Fox. The stock purchase agreement would have required plaintiff to sell to Fox 2,750 of his five thousand shares in Brass Ring. Portions of the stock purchase agreement were backdated to January 1, 1996, and January 1, 1997, so the agreement would have required

[1] Michael Novak's legal services for plaintiff and his family included, *inter alia*, reviewing paperwork in connection with real estate closings, dealing with an insurance claim, a name change, a controversy with a travel company, appointment of a trustee for an aunt, and several traffic tickets. Julius Giarmarco's legal services for plaintiff included dealing with an estate plan for plaintiff and his wife.

plaintiff to falsely acknowledge that he signed it on those dates. According to plaintiff, Novak told him that he would be fired from Brass Ring if he did not sign the agreement. When plaintiff expressed concern about signing the agreement, Novak advised him to obtain independent counsel. Plaintiff claims that Novak did not advise him to obtain independent *legal* counsel, but only advised him to obtain an independent accountant to advise him. Nonetheless, plaintiff hired a tax attorney and appeared at a Brass Ring meeting with this attorney to advise him. Plaintiff refused to sign the stock purchase agreement. As a direct result of that refusal, Brass Ring, at the direction of Fox, fired plaintiff.

Plaintiff filed suit against Brass Ring, Fox, and Tinik based on his termination from Brass Ring ("the Fox case").[2] Plaintiff then filed suit against defendants in the instant case, alleging legal malpractice. One week later, the parties in the Fox case reached a settlement agreement after a trial, but before the jury reached a verdict. In the Fox case settlement agreement, plaintiff dismissed his claims in exchange for $587,500 from Brass Ring. Defendants subsequently filed a motion for summary disposition in the instant case, arguing, in part, that they did not breach a fiduciary duty to plaintiff by representing Brass Ring in the stock purchase agreement matter, their actions did not cause plaintiff damage because plaintiff never signed the stock purchase agreement, and plaintiff's claims against Novak were barred by res judicata. The trial court granted summary disposition for defendants.

We review de novo a trial court's decision on a motion for summary disposition. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party, *Maiden, supra*. The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue as to any material fact. *Id.*

On appeal, plaintiff argues that defendants breached their fiduciary duties to him by telling him to sign the backdated stock purchase agreement while having an attorney-client relationship with both him and Brass Ring.

> [T]o establish a claim of legal malpractice, a plaintiff must prove (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. [*Mitchell v Dougherty*, 249 Mich App 668, 676; __ NW2d __ (2002), citing *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994).]

We conclude that plaintiff has failed to establish the causation element of his claim. To prove proximate cause in a legal malpractice action, the plaintiff must establish that the defendant's action was a cause in fact of the claimed injury. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 613; 563 NW2d 693 (1997).

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[2] *Kraniak v Fox*, Wayne Circuit Court Case No. 98-816260-CK.

> Causation in fact is one aspect of, and distinguishable from, legal or proximate cause. . . . The question of fact as to whether the defendant's conduct was a cause of the plaintiff's injury must be separated from the question as to whether the defendant should be legally responsible for the plaintiff's injury. . . . Legal cause is often stated in terms of foreseeability. [*Id.* at 613, quoting *Charles Reinhart Co, supra* at 586 n 13.]
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> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. A plaintiff must adequately establish cause in fact in order for legal cause or "proximate cause" to become a relevant issue. [*Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994) (citations omitted).]

In the instant case, Fox directed defendants to draft the stock purchase agreement. Plaintiff presented evidence that Novak told plaintiff that he would be terminated from Brass Ring unless he signed the agreement. However, it is undisputed that plaintiff did not follow Novak's advice and refused to sign the stock purchase agreement. Plaintiff was then fired for his refusal to sign the agreement. Accordingly, plaintiff's damages could not have stemmed from defendants' advice to sign the stock purchase agreement because plaintiff never signed the agreement. Plaintiff's only damages arose from being fired by Brass Ring, as directed by Fox. Therefore, the issue is whether Brass Ring's firing of plaintiff may be said to have been caused by defendants' act of drafting, at the behest of Fox, the stock purchase agreement. We conclude, as a matter of law, that defendants' drafting of the stock purchase agreement was not a cause in fact of plaintiff's firing.

Fox testified at deposition that he decided to fire plaintiff because he no longer trusted plaintiff after plaintiff reneged on his promise to sign the stock purchase agreement. There is no evidence directly disputing Fox's claim that plaintiff was fired due to such lack of trust. Under these circumstances, there is no evidence that defendants' act of drafting the agreement caused plaintiff to be fired. Plaintiff suffered no damages from defendants' drafting of the agreement or their presenting it to him. The damages were caused by Fox and Brass Ring when Fox decided to fire plaintiff for his refusal to sign the agreement. Defendants had no authority to fire plaintiff. Moreover, as recognized by the trial court, it is likely that had defendants not drafted the agreement, plaintiff would have been presented a similar agreement and subsequently fired. Fox sought to secure plaintiff's shares in Brass Ring by way of an agreement. The fact that defendants were the ones to draft the agreement Fox intended does not create a causal connection between the drafting of the agreement and the ultimate firing of plaintiff. Because plaintiff's legal malpractice claim fails on the causation element, we need not address the other elements of the claim.

Next, plaintiff argues that there is a question of fact in regard to whether defendants breached their fiduciary duty to plaintiff by aiding and abetting Fox's breach of fiduciary duty to him. In support of his argument that attorneys can breach a fiduciary duty by assisting in a third-party's breach of a fiduciary duty, plaintiff cites *Pierce v Lyman*, 3 Cal Rptr 2d 236 (Cal App, 1991). No such cause of action in relation to a legal malpractice claim has been recognized in

Michigan and we are not inclined to create such a claim in this case. Moreover, the facts of this case are distinguishable from the facts in *Pierce*. Thus, even if there were authority to support such a claim in Michigan, plaintiff's claim would fail.

In *Pierce*, the California Court of Appeals determined that the trust beneficiary plaintiffs stated a valid cause of action against attorneys who represented former trustees for breach of fiduciary duty. *Id.* at 243. Significantly, however, the plaintiffs in *Pierce* made claims against the former trustees as well as their attorneys. *Id.* at 239. In the instant case, plaintiff did not bring claims against Fox for breach of fiduciary duty in his complaint.[3] Plaintiff previously made claims directly against Fox in the Fox case, but that case settled. Therefore, there is no underlying breach of fiduciary duty in this case in which plaintiff may attach his "aiding and abetting" a breach of fiduciary duty claim. This Court has held that a plaintiff's claim of civil conspiracy must fail where the plaintiff fails to allege any tortious action as the basis for the conspiracy. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). This same principle would apply in the instant case. Because plaintiff has not stated a claim for breach of fiduciary duty against Fox, he may not claim that defendants aided and abetted such a breach.[4]

Given our conclusion that the trial court properly granted defendants' motion for summary disposition, we need not address defendants' res judicata issue on cross-appeal.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Talbot
/s/ Brian K. Zahra

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[3] Instead, plaintiff merely alleged in his first amended complaint: "25. By engaging in the acts in this First Amended Complaint defendants aided and abetted Robert Fox's breach of fiduciary duty to Kraniak."

[4] To the extent that plaintiff now argues on appeal that Fox breached his fiduciary duty to plaintiff, such argument lacks merit. The issue of Fox's liability for breach of fiduciary duty was settled and is not at issue in the instant case.