STATE OF MICHIGAN

COURT OF APPEALS

TYRONE D. DAVIDSON,

Plaintiff-Appellant,

v

LAW OFFICES OF SCOTT E. COMBS, P.C., and SCOTT E. COMBS,

Defendants-Appellees.

UNPUBLISHED
September 30, 2004

No. 248877
Oakland Circuit Court
LC No. 2002-043566-NZ

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

In this legal malpractice, fraud, and intentional infliction of emotional distress case, plaintiff appeals by right from orders granting summary disposition to defendants. We affirm.

Plaintiff worked for the Michigan Department of Corrections. On April 14, 1997, plaintiff filed a complaint with the EEOC alleging racial discrimination. According to plaintiff, he was involved in an incident with a white employee where he was accused of using vulgar language, when in fact, it was the other employee who used such language. On November 16, 1998, plaintiff was terminated.

Plaintiff hired defendants in November 1998, and they filed a complaint in both Ingham County and the Wayne Circuit Court alleging violations of the Michigan Whistleblowers' Protection Act ("WPA"), MCL 15.361 *et seq.*, the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq*., the Michigan Civil Rights Act ("CRA"), MCL 37.2101 *et seq*., and 31 USC 3730 (retaliation claim under federal false claim act). Both courts dismissed the complaint.

Eventually plaintiff filed the complaint at hand, alleging legal malpractice, fraud, and intentional infliction of emotional distress. The trial court granted summary disposition in favor of defendants on the legal malpractice claim pursuant to MCR 2.116(C)(10) because plaintiff did not provide any evidence that he had a meritorious WPA claim. Plaintiff contends that the trial court erred. We disagree.

This Court reviews the grant of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id.* at 120. In evaluating a motion under this subsection, a trial court considers

affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* "The determination whether the evidence established a prima facie case under the WPA is a question of law to be determined de novo." *Phinney v Perlmutter*, 222 Mich App 513, 553; 564 NW2d 532 (1997).

The elements of a legal malpractice action are: (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. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). The most troublesome element of a legal malpractice claim is that of proximate causation. *Id.* at 586. "As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant's action was a cause in fact of the claimed injury." *Id.* "Hence, a plaintiff 'must show that but for the attorney's alleged malpractice, [the plaintiff] would have been successful in the underlying action.'" *Id.*, (emphasis omitted), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).

As stated in its title, the WPA provides protection to employees who report a violation or suspected violation of state, local, or federal law. "Employee" is defined as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied," and "[e]mployee includes a person employed by the state or a political subdivision of the state except state classified civil service." MCL 15.361(1)(a). Because plaintiff is a state classified civil service employee, he comes within the above exception and could not bring a WPA action. Therefore, plaintiff cannot show that but for defendant's alleged malpractice, plaintiff would have been successful in the underlying WPA action. We also note that plaintiff would not have been successful with an internal grievance. According to the applicable grievance procedures, plaintiff had fifteen days from the date he became aware of the violation in which to file the complaint. Based on the record before us, plaintiff became aware of a whistleblower claim no later than September 3, 1998, but failed to file a grievance within fifteen days. Plaintiff did not even hire defendants until November 1998, well after the fifteen-day period had run. Therefore, defendant's alleged negligence could not have had an effect on any internal grievance involving the Department of Corrections. Thus, the trial court properly granted summary disposition in favor of defendants on this claim.

Plaintiff also contends that the trial court erred in granting summary disposition in favor of defendants on the intentional infliction of emotional distress claim. Again, we disagree.

In order to establish a claim of intentional infliction of emotional distress, a plaintiff must show the following: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). "Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Id.* It is initially a matter for the trial court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999) (citations omitted). But "'where reasonable [persons] may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.'" *Id.*, quoting *Doe v*

Mills, 212 Mich App 73, 92; 536 NW2d 824 (1995), citing 1 Restatement Torts, 2d, § 46, comment h, p 77.

We have reviewed the record, and we agree with the trial court that reasonable jurors could not conclude that defendants' conduct was so extreme and outrageous as to permit recovery. Therefore, the trial court properly granted summary disposition in favor of defendants on this issue.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey