STATE OF MICHIGAN

COURT OF APPEALS

JACK C. CHILINGIRIAN,

Plaintiff-Appellant,

v

MIRO WIENER & KRAMER, P.C., THOMAS W. CRANMER, and MATTHEW F. LEITMAN,

Defendants-Appellees.

UNPUBLISHED
November 18, 2004

No. 247798
Wayne Circuit Court
LC No. 01-134777-NZ

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff, a formerly-licensed attorney, acting *in propria persona*, appeals as of right from the trial court's orders granting summary disposition to defendants, Thomas Cranmer and Matthew Leitman, and their law firm, Miro, Weiner & Kramer, P.C. (hereafter collectively referred to as "defendants"), and denying plaintiff's motion to file an amended complaint. We affirm.

I. Basic Facts and Procedural History[1]

In April 1997, plaintiff was indicted on various charges of conspiracy, mail fraud, wire fraud, aiding and abetting the interstate transportation of funds taken by fraud, and witness tampering. He retained Cranmer and Leitman to represent him. Following a bench trial that concluded in April 1999, plaintiff was convicted of conspiracy to commit money laundering, contrary to 18 USC 1956(a)(1)(A)(i), (B)(i) and (B)(h). See *United States v Chilingirian*, 280 F3d 704 (CA 6, 2001). He was sentenced to thirty-seven months' imprisonment and ordered to

[1] Throughout this opinion are references and citations to proceedings in the underlying federal case. MRE 201(b) provides in relevant part that, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Accordingly, to the extent that the record of the underlying criminal action was not before the trial court when it issued its decision denying plaintiff's motion to amend the complaint, we take judicial notice of those proceedings. MRE 201(c) and (e).

pay restitution of $335,167.50. Plaintiff pro se filed a appeal. The United States government filed a cross appeal claiming the district court sentenced plaintiff under incorrect sentencing guidelines, resulting in an inappropriately lenient sentence. While that appeal was pending, plaintiff filed the instant case alleging defendants committed legal malpractice while defending plaintiff in the criminal case. On February 13, 2002, the Sixth Circuit affirmed plaintiff's conviction, but remanded for resentencing finding the United States government's appeal meritorious. After a May 23, 2002 de novo hearing, the district court resentenced plaintiff to eighty-seven months' imprisonment, with no changes to the other terms of the original sentence.

Subsequently, in July 2002, defendants moved for summary disposition in the instant case. Plaintiff did not respond to the motion. The trial court, in a written opinion dated March 12, 2003, granted defendants' motion for summary disposition as to all claims asserted in the original complaint. The trial court's opinion noted that "[m]any of the issues that form the basis of plaintiff's malpractice claims against defendant's [sic] were resolved against plaintiff by the Sixth Circuit." Those claims included an alleged "unconstitutional amendment to the indictment," the "failure to argue that it was inconsistent for him to be convicted of money laundering when he was acquitted of mail and wire fraud," and several arguments relating to defendants alleged failure to obtain bond pending appeal. Thus, the trial court found that because the Sixth Circuit had rejected the merits of these claims, plaintiff cannot establish that, but for the defendants' alleged errors, he would have had a more favorable result.

The trial court also addressed the merits of plaintiff's claims that the Sixth Circuit did not expressly reject. First, the trial court addressed whether defendants improperly stipulated to the interstate commerce element of his offense. The trial court found "[t]here is no question of fact on this issue and there would not have been one at trial." The trial court also rejected the merits of defendant's claims related to the sentencing proceedings, and also noted that, "[a]t the May 23, 2002 re-sentencing, the district court relied upon a newly prepared PIR," and that plaintiff had objected to each claimed sentencing error at the sentencing hearing. Therefore, the trial court concluded, plaintiff cannot establish that, but for the defendants' alleged errors, he would have had a more favorable result.

Although plaintiff did not respond to defendants' motion for summary disposition, plaintiff did file a motion to amend the complaint on August 5, 2002. In response to this argument, defendant argued that plaintiff's new claims were frivolous and pleaded only to avoid the consequences of the Sixth Circuit opinion. Nonetheless, the trial court addressed plaintiff's motion, and dismissed it finding the proposed amendments futile.

Meanwhile, following his resentencing hearing on May 23, 2002, plaintiff again pro se filed an appeal to the Sixth Circuit. On April 9, 2004, the Sixth Circuit again reversed plaintiff's sentence, remanding for the limited purpose of determining if the 2001 version of the guidelines results in a lower total offense level than the calculation under the 1995 guidelines, and if so, re-sentence defendant pursuant to the 2001 version. *United States v Chilingirian*, No. 02-1695 (CA 6, April 9, 2004).

II. Motion to Amend Complaint

Plaintiff claims that the trial court abused its discretion in denying his motion to amend with respect to eight new theories of malpractice that were alleged in the proposed amended complaint.

A. Standard of Review

Plaintiff did not challenge the trial court's decision granting defendants summary disposition with respect to plaintiff's original complaint.[2] However, our Supreme Court, in *Ormsby v Capital Welding* 471 Mich 45, 52-53; 684 NW2d 320 (2004), stated the applicable standard of review in this procedural context:

> When a trial court grants summary disposition pursuant to MCR 2.116(C)(8), or (C)(10), the opportunity for the nonprevailing party to amend its pleadings pursuant to MCR.118 should be freely granted, unless the amendment would not be justified. MCR 2.116(I)(5). An amendment, however, would not be justified if it would be futile. *Weymers v Khera,* 454 Mich 639, 658, 563 NW2d 647 (1997). We will not reverse a trial court's decision to deny leave to amend pleadings unless it constituted an abuse of discretion. *Id.* at 654.

B. Analysis

To establish legal malpractice, a plaintiff must show (1) an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the alleged injury. *Charles Reinhart Co v Winiemko,* 444 Mich 579, 585-586; 513 NW2d 773 (1994). The negligence element generally requires proof that the attorney failed to act as an attorney of ordinary learning, judgment and skill under the same or similar circumstances. *Mitchell v Dougherty,* 249 Mich App 668, 677; 644 NW2d 391 (2002). The proximate cause element of a legal malpractice claim actually involves two elements: (1) cause in fact; and (2) legal or "proximate cause." *Charles Reinhart Co, supra* at 586. The cause in fact element generally requires a showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. *Skinner v Square D Co,* 445 Mich 153, 163; 516 NW2d 475 (1994). A plaintiff must establish cause in fact before legal or "proximate" cause becomes relevant. *Pontiac School Dist v Miller, Canfield, Paddock & Stone,* 221 Mich App 602, 613; 563 NW2d 693 (1997). In a legal malpractice action involving an attorney's representation of an accused in a criminal case, the cause in fact element generally involves the "suit within a suit" concept. The plaintiff must show that he or she would have received a better result or lesser sentence but for counsel's negligence. *Schlumm v Terrence J O'Hagan, PC,* 173 Mich App 345, 360-361; 433 NW2d 839 (1988).

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[2] For this reason, we deem abandoned plaintiff's claim that trial court improperly granted defendants summary disposition on the original complaint. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald,* 237 Mich App 186, 197; 602 NW2d 834 (1999).

We initially note that plaintiff has failed to identify the specific allegations in his proposed amended complaint that form the basis of the various malpractice theories raised on appeal. A party may not leave it this Court to search for a factual basis to sustain or reject a position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). However, even if we were to examine plaintiff's proposed theories in light of the allegations in his proposed amended complaint, we would not reverse.

a. Alleged Sentencing Errors

Plaintiff's argues that the trial court erred in refusing to allow him to amend his complaint to include three theories of malpractice that are each based on defendants' failures to challenge original sentencing errors. Defendant's case has twice been remanded for resentencing, including a de novo hearing. *United States v Chilingirian*, No. 02-1695 (CA 6, April 9, 2004), slip op at 8. Just as plaintiff is able to present these alleged errors to this Court, so also could plaintiff have presented these alleged errors at the resentencing proceedings. Therefore, plaintiff cannot establish that defendants' failure to raise these arguments would have resulted in his receiving a lesser sentence. *Schlumm*, *supra*. Accordingly, amending the complaint to include these theories would have been futile.

b. Double Jeopardy

Plaintiff next argues that the trial court erred in not allowing plaintiff to amend his complaint to include a theory of malpractice based on defendants' failure to raise a double jeopardy challenge to the third superceding indictment in the underlying case. Plaintiff maintains that the trial court failed to recognize that his double jeopardy theory differs from that decided by the Sixth Circuit in its February 13, 2002, opinion in plaintiff's criminal case. However, the trial court's opinion stated:

> Even if all of the counts in the indictment had contained specific monetary amounts as proffered by Mr. Chilingirian, the fact remains that the double jeopardy protections would not be implicated because Mr. Chilingirian faced the multiple charges in a single proceeding. Chilingirian, *supra.* Therefore, while this double jeopardy argument is slightly different from the one made on appeal, the ruling of the Sixth Circuit remains applicable.

The trial court addressed plaintiff's distinct malpractice theory. Further, the trial court properly concluded that double jeopardy protections would not be implicated because plaintiff faced multiple charges in a single proceeding. See *United States v Barrett*, 933 F2d 355, 360 (CA 6, 1991). Plaintiff's double jeopardy theory of malpractice is futile, and therefore, the trial court did not abuse its discretion in denying plaintiff's motion to amend the complaint based on this malpractice theory.

3. Constitutionality of Money Laundering Statute

Plaintiff next argues that the trial court erred in deciding not to allow plaintiff to amend his complaint to include a theory of malpractice based on defendants failure to challenge the constitutionally of the money laundering statute. However, defendant raised the issue of the statute's constitutionality before the district court, and the district court addressed it, stating that

the motion had been denied, but preserved for review. Indeed, defendant complained to the district court that it had not cited a basis for its decision, and the district court replied, "[i]s that good for you, or not?" Plaintiff then stated, "I guess it is. . . " Therefore, because the issue was raised and considered by the district court, plaintiff cannot show that he would have received a better result if defendants had raised the issue. *Schlumm, supra*. Further, plaintiff concedes in his brief on appeal that the Sixth Circuit affirmed the district court's interpretation of the federal money laundering statute, which constitutes the basis of this claim. Thus, regardless of whether the Sixth Circuit's interpretation of the money-laundering is proper, plaintiff cannot show that he would have received a better result if defendants had raised the issue. *Id*.

4. Sufficiency of Money Laundering Conviction

Plaintiff next argues that the trial court erred in deciding not to allow plaintiff to amend his complaint to include plaintiff's theory of malpractice based on defendants failure to challenge the government's alleged failure to establish that the funds he laundered were the proceeds of unlawful activity.

First, the record indicates that this is the same malpractice theory set forth in ¶ 8(G) of plaintiff's original complaint. An amendment is futile if it merely restates allegations previously made. *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). Thus, the trial court properly denied plaintiff's motion in this regard. Further, resolution of this issue necessarily rests upon plaintiff's claim that because he was acquitted for mail and wire fraud, his conviction for money laundering cannot stand. The Sixth Circuit Court of Appeals reviewed this issue as an issue of first impression, and rejected it. *Chilingirian, supra* at 710-711. Therefore, because the Sixth Circuit rejected the legal premise underlying the present malpractice theory, plaintiff cannot show that he would have received a better result if defendants had raised the issue. *Schlumm, supra*.

5. Multiplicity and Duplicitous

Plaintiff next argues that the trial court erred in deciding not to allow plaintiff to amend his complaint to include plaintiff's theory of malpractice based on defendants failure to raise a multiplicity argument. "The rule against multiplicity is violated only when an indictment charges a single offense in several counts." *United States v Davis*, 306 F3d 398, 418 n 2 (CA 6, 2002). Although the distinction between the elements of offenses is generally an appropriate consideration when multiplicity is alleged, *United States v Vartanian*, 245 F3d 609, 616 (CA 6, 2001), a single count in an indictment may allege a single conspiracy having diverse objectives, *United States v Reyes*, 930 F2d 310, 312 (CA 3, 1991). Relevant factors to consider include whether the conspiracies involved the same time period, alleged coconspirators, places, and overt acts, and whether the two conspiracies depend on each other for success. See *United States v Adkins*, 274 F3d 444, 449 (CA 7, 2001).

The trial court properly concluded that this malpractice theory was futile. Here, there is no evidence to indicate that defendants could have successfully argued in the federal district court that count 1, the alleged fraud conspiracy involving three individuals (plaintiff, Jack Rashid, and Charles Rashid) for a time period spanning 1988 to April 1997, and count 33, alleging a money laundering conspiracy between two individuals (plaintiff and Jack Rashid) from approximately December 1994 to October 1996, were the same conspiracy. Even if

plaintiff's "one conspiracy" theory had merit, there is no evidence to support an inference that a timely pretrial motion to challenge the indictment in the federal district court would have precluded the government from prosecuting the conspiracy count upon which plaintiff was convicted. Potentially, the government could have taken some action to amend the indictment before trial. See *United States v Quintanilla,* 2 F3d 1469 (CA 7, 1993) (in general, an indictment may not be amended, except by resubmission to the grand jury, unless the change is merely one of form). It follows that plaintiff cannot establish that, but for defendants' alleged negligence, he would have received a better result. Thus, the trial court reached the correct result in denying plaintiff's motion to amend his complaint on the ground that this malpractice theory was futile.

Last, plaintiff argues that the trial court erred in denying his motion to amend his complaint to include a malpractice theory based on defendants' failure to challenge count 33 on the basis of duplicity. Notably, this theory was not alleged in plaintiff's proposed amended complaint, but because the trial court addressed the issue when denying plaintiff's motion, we shall consider the merits of plaintiff's argument.

> An indictment is duplicitous if it "joins in a single count two or more distinct and separate offenses." The vice of duplicity is that a "jury may find a defendant guilty on the count without having reached a unanimous verdict on the commission of any particular offense." By collapsing separate offenses into a single count, duplicitous indictments "prevent the jury from convicting on one offense and acquitting on another." Therefore, duplicitous indictments implicate the protections of the Sixth Amendment guarantee of jury unanimity. [*United States v Campbell,* 279 F3d 392, 398 (CA 6, 2002) (citations omitted).]

First, duplicity concerns are not directly implicated here because plaintiff was tried before the court, not a jury. On appeal, plaintiff asserts that Count 33 pleaded both a conspiracy offense and the substantive offenses of concealing and promoting under 18 USC 1956. However, the record reflects that the district court, as well as the Sixth Circuit on appeal, treated count 33 as charging a conspiracy under 18 USC 1956(h) that had the objectives of violating 18 USC 1956(a)(1)(A)(i) and (B)(i). Indeed, count 33 is replete with allegations about plaintiff conspiring with Jack Rashid for the specified unlawful activity. Therefore, there is no evidence that plaintiff could have successfully argued that count 33 was duplicitous. Accordingly, because plaintiff cannot establish that, but for defendants' alleged negligence, he would have received a better result, we affirm the trial court's determination that this malpractice theory was futile.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra