

STATE OF MICHIGAN
COURT OF APPEALS

GEBRE ADAMASU,

Plaintiff-Appellant,

V

GIFFORD, KRASS, GROH, SPRINKLE,
ANDERSON & CITKOWSKI, P.C., and ELLEN
S. COGEN,

Defendants-Appellees.

UNPUBLISHED

May 15, 2008

No. 273895

Oakland Circuit Court

LC No. 2004-062607-NM

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) in this legal malpractice action. For the reasons set forth in this opinion, we affirm.

This case arises out of defendants' representation of plaintiff with respect to the revival of an abandoned United States patent application regarding a vehicle guidance system. In September 2000, plaintiff retained defendants to revive the application, which resulted in the issuance of U.S. Patent No. 6,314,368, or "the 368 patent." Plaintiff obtained two agreements that included the 368 patent. In exchange for \$150,000, plaintiff granted Alpine Electronics, Inc. ("Alpine") a release and covenant not to sue regarding five of plaintiff's patents, including the 368 patent. Plaintiff also executed a similar agreement with Thales Navigation, Inc. ("Thales") for \$200,000. Plaintiff alleged that the manner in which defendants revived the patent application resulted in the patent's greatly reduced life expectancy and the ensuing loss of potential royalties and licensing fees. The trial court granted summary disposition for defendants on the basis that plaintiff failed to produce evidence to enable a jury to determine what the manufacturers would have paid had the 368 patent been issued with a longer life.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the

nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact for resolution at trial. *Id.* at 31.

To state a claim for legal malpractice, a plaintiff must show: “(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.” *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004), lv den 472 Mich 865 (2005). To establish proximate cause, a plaintiff must show that the defendants’ act was the cause in fact of the injury. *Id.* “Hence, a plaintiff must show that, but for an attorney’s alleged malpractice, the plaintiff would have been successful in the underlying suit.” *Id.* This requirement has been referenced as the “suit within a suit,” or “case within a case,” doctrine. *Id.* See also, *Coble v Green*, 271 Mich App 382, 387; 722 NW2d 898 (2006).

Plaintiff argues that the trial court erred by applying the “case within a case” doctrine rather than the “lost opportunity” doctrine because his claim arose from representation that was transactional in nature. The record does not support plaintiff’s contention. The trial court did not apply the “case within a case” doctrine, but rather, applied *Ignotov v Reiter*, 425 Mich 391; 390 NW2d 614 (1986), a plurality decision, to the facts of this case as plaintiff advocated. The trial court determined, however, that plaintiff failed to present evidence sufficient to enable a jury to determine what the manufacturers with agreements, i.e., Alpine and Thales, would have paid had the 368 patent been issued with a longer life. The trial court opined that this determination could not be made absent evidence of how plaintiff’s patents worked and how the manufacturers’ operations infringed on the patents. Thus, the court concluded that plaintiff’s evidence was insufficient to create a question of fact regarding whether defendants’ conduct caused plaintiff to lose an opportunity to earn more money from its licensing efforts. Accordingly, the trial court did not apply the “case within a case” doctrine as plaintiff argues.¹

Plaintiff also argues that the trial court erred by determining that expert testimony was necessary to establish causation² and damages because these issues were too complex for an ordinary layperson. Plaintiff maintains that, “stripped to its bare essence,” his claim presented the issue of whether defendants’ conduct shortened the life of the patent, thus causing economic harm.

“In professional malpractice actions, an expert is usually required to establish the standard of conduct, breach of the standard, and causation.” *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994), lv den 447 Mich 1044 (1994). If the absence of professional care is so manifest, however, that it can be determined within the common knowledge and experience of an ordinary layman that the defendants were careless, a plaintiff may maintain a malpractice

¹ Although the trial court erroneously indicated that *Ignotov* involved a jury trial, this misconception is not relevant to our review of the court’s decision.

² Although plaintiff explicitly argues that expert testimony was not necessary to establish damages, it appears from the context of his argument that he is making this assertion with respect to causation as well.

action absent expert testimony. *Law Offices of Lawrence J. Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989), lv den 434 Mich 862 (1990).

Whether defendants' actions shortened the life of the patent and caused plaintiff economic harm is not an issue within the common knowledge and experience of an ordinary layman. Regarding the causation element, plaintiff was required to "present substantial evidence from which a jury may conclude that more likely than not, but for the [defendants'] conduct, the plaintiff's injuries would not have occurred." *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 614; 563 NW2d 693 (1997), citing *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994), reh den 445 Mich 1233 (1994). At a hearing before the trial court, counsel for plaintiff conceded that damages could only be recovered from manufacturers that ultimately entered into agreements with plaintiff. Thus, the trial court opined that plaintiff could establish his claim by proving the underlying patent infringement claim or by inquiring of the manufacturers what they would have paid had the 368 patent been issued with a longer lifespan. Plaintiff, however, declined to pursue either of these options and chose instead to prove his claim using lay and expert testimony. Thus, plaintiff apparently recognizes, despite his argument to the contrary, that some expert testimony was necessary to prove his claim.

Plaintiff relied on the report of his expert, James J. Hill, to establish damages. Hill's report demonstrated the necessity of expert testimony to prove damages. In the report, Hill asserted that he was prepared to testify regarding such matters as royalty rates for similar patents in similar industries, the nature and scope of a license, the existing value of plaintiff's invention, and the cost of designing a comparable system performing a similar function that may not infringe the patent. Clearly, these matters are not within the common knowledge and experience of an ordinary layman. Accordingly, expert testimony was required to establish damages.

Plaintiff also contends that the trial court erred by disregarding the lay testimony of David Wright and James Belshe, the attorneys directly involved in negotiating licenses for plaintiff's patents. The trial court determined that Wright and Belshe did not have the technical expertise to explain to a jury how the 368 patent worked or how manufacturers were infringing on the patent.

Wright and Belshe provided deposition testimony regarding their efforts to market the 368 patent and negotiate licenses for the patent. Belshe and Wright testified that, generally, manufacturers were unwilling to discuss the 368 patent because it had expired. In addition, Wright opined that the 368 patent could have been licensed for more money than the licensees paid if it had not prematurely expired. The trial court did not err by disregarding Wright's and Belshe's testimony. At most, their testimony explained that manufacturers *may* have been willing to discuss the 368 patent had it not expired. Further, Wright's opinion that the 368 patent could have been licensed for more money had it not expired prematurely is purely speculative and insufficient to establish that defendant's actions caused plaintiff's alleged damages. A theory of causation must have some basis in established fact and a "plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the [defendants'] conduct, the plaintiff's injuries would not have occurred." *Pontiac School Dist*, *supra* at 614. Wright's testimony did not meet this standard. Plaintiff could have proffered expert testimony to establish its causation theory, but failed to do so. In short, plaintiff failed to

present evidence that manufacturers would have paid more for the 368 patent had it been issued with a longer life. See generally *Pontiac School Dist*, *supra* at 621.

Further, plaintiff argues that the trial court erred by disregarding Hill's testimony pertaining to damages. Hill purported to offer expert testimony regarding the quantum of damages that plaintiff suffered as a result of defendants' alleged malpractice. A review of Hill's deposition testimony reveals that he is unable or unqualified to testify regarding many of the topics listed in his report. Foremost, he misunderstands the nature of the invention at issue in the 368 patent. Although Hill testified that the invention projects the optimal or best route when a vehicle approaches an intersection, plaintiff himself testified that the invention does not necessarily compute the shortest or fastest route, but merely computes *a* route. Hill also testified that he is not an expert regarding the scope or content of the 368 patent, had no knowledge of any products covered by the patent, and had not analyzed the patent's validity.

Further, regarding important factors that contribute to the value of the 368 patent, Hill opined that the broad scope of the technology involved could be employed not just with land vehicles but also with combination land/water vehicles. However, he was unable to offer any explanation regarding what he meant by a vehicle with "combination land/water use." He further opined that important factors contributing to the 368 patent's value were that the people at the firms that prepared the patent applications for the 368 patent were "smart" and that plaintiff, the inventor, is "an extremely competent person."

This testimony by Hill illustrates only a few of the instances in which his deposition testimony failed to properly address the matters listed in his report, regarding which he was expected to testify. Perhaps the best example regarding the value of Hill's testimony to a determination of damages, however, was his response when asked about the quantum of damages that plaintiff had suffered. Referencing the Alpine agreement, Hill testified:

So secondly, we do know that a license has been proposed and it's my understanding it's accepted. It's true that that license has been for \$150,000 for a group of patents, some of which had terms beyond the one year and one of which is the '368 patent which was actually licensed in this agreement.

* * *

The problem with the agreement is it has no specific valuation, so the jury is, first of all, going to have to come up with that valuation of what portion of the actual license fee was for the '368 patent. That will be determined by the importance that the '368 patent and its one year of prospective use was available; that is, to what extent – They're going to have to make an evaluation of the significance of that versus the significance of the other patents.

So there is some portion of \$150,000 which was attributable to the single year of infringement. Right now, I don't have enough to feel comfortable about giving you a specific number, but I would, if I had to state a range, based upon my understanding that [plaintiff] can establish that the '368 patent in its totality on a year per year basis had greater commercial value than the remaining licensed patent[s], that the bottom number on that is \$50,000.

Whatever that number is, it's the jury – I'm not going to invade the jury's province, but I'll use that by way of example.

* * *

So I'm not going to give you a range, I'm going to give you a base number, how to determine a base number, the minimum damages.

You take that number, \$50,000 times the number of years of lost patent term. That's an issue of fact for the jury, so I'm just going to use N.

The other factor in this kind of licensing is that volume almost always increases from a licensee's first use. You never plunge into this thing – Your best year is never your first year, let's put it that way.

So for each of the remaining years of this number of years N, the jury is going to have to determine based on the evidence at trial what additional increase, which I'll call I, per year, as a matter of fact, this thing would have been valuable to the infringers for each of the remaining years.

Hill further testified that the jury would be required to evaluate an additional seven factors, including plaintiff's loss of leverage in asserting the patent and the loss of accumulating interest on damages. In addition, Hill testified that the jury would have to consider the profitability of related products and the applicability of the 368 patent to a number of different products.

The trial court properly determined that sufficient evidence was not produced to enable a jury to determine plaintiff's damages, i.e., what licensees would have paid had the 368 patent been issued with a longer life. Hill presupposed that no less than \$50,000 of the \$150,000 Alpine agreement was attributable to the 368 patent, but as previously indicated, Hill's testimony was purely speculative. Moreover, plaintiff proffered no evidence from which a jury could consider the factors that Hill opined were relevant to determining plaintiff's damages, such as the significance of the 368 patent versus the significance of the remaining four patents in the Alpine and Thales agreements. The trial court correctly concluded that plaintiff's damages could not be determined without evidence of how plaintiff's patents worked and how they were infringed on. Accordingly, the trial court did not err by determining that, given plaintiff's evidence, any determination with respect to damages could only be based on speculation and conjecture.

The trial court properly granted summary disposition for defendants because plaintiff failed to present evidence sufficient to create a genuine issue of fact regarding the causation and damages elements of his legal malpractice claim. Although plaintiff relies on the Alpine and Thales agreements to establish his damages, the agreements do not establish what the manufacturers would have paid had the 368 patent been issued for a full term and do establish that the manufacturers would have paid more had the patent not expired prematurely. Thus, the agreements did not create questions of fact sufficient to survive defendants' motions for summary disposition.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Stephen L. Borrello