STATE OF MICHIGAN

COURT OF APPEALS

PETER OLSEN,

Plaintiff-Appellant,

v

KENNETH H. KARAM,[1]

Defendant,

and

PATRICIA MACERONI,

Defendant-Appellee.

UNPUBLISHED
June 17, 2008

No. 277856
Macomb Circuit Court
LC No. 2005-005005-NM

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff Peter Olsen appeals as of right the trial court's order granting defendant-attorney Patricia Maceroni summary disposition under MCR 2.116(C)(10). Olsen also challenges the trial court's denial of his motion to change venue. We affirm.

I. Basic Facts And Procedural History

A. The Underlying Case

In 2000, Olsen and his wife lived in Ferndale, Michigan. At that time, his 91-year-old mother, Myrtle Olsen, was living in a mobile home in Palm Springs, California. Olsen testified that in late November 2000, his mother asked him to come get her from California because she could no longer live there alone. Although Olsen was hesitant at first, he agreed after his mother told him that she would "take of [him]" and "make it up to [him]." So, Olsen flew to California

[1] Olsen's claims against attorney Kenneth Karam were resolved pursuant to a settlement agreement. Thus, Karam is not a party to this appeal.

and then drove his mother back with him to Michigan in her car. Olsen claimed that after he arrived in California his mother told him that the mobile home belonged to him. Olsen also stated that he bought his mother's car from her for $1.[2]

When Olsen's mother arrived in Michigan, she had a revocable living trust (the Myrtle Olsen Trust), which held approximately $900,000. At that point, the trust had been amended four times. And under the fourth amendment to the trust, Olsen, his daughter, and his niece, Kimberly Davis, were each to receive one-third of the trust's remaining assets after the distribution of certain specific gifts (totaling $25,000).

Olsen testified that in January 2001, at his mother's request, he agreed to go back to California with her, and to live and care for her there. Olsen testified that his mother told him that if he and his wife moved to California with her, then "she would leave practically everything to [them]." Around the same time, Olsen called his mother's attorney in California and, allegedly pursuant to his mother's instructions, directed the attorney to amend the trust. In early February 2001, Myrtle executed the fifth amendment to her trust. Under the terms of the amendment, after the distribution of certain specific gifts (totaling $245,000, including $100,000 each to Davis and Olsen's daughter), Olsen was to receive the trust's remaining assets, including the mobile home. Essentially, the fifth amendment increased Olsen's share to two-thirds of the estate.

Olsen's mother lived with Olsen and his wife until the end of February 2001, when Olsen and his mother had a falling out. Olsen's mother briefly stayed with Davis's friend Kathryn Williams because Davis's children had the flu. But shortly thereafter, Olsen's mother moved in with Davis. Olsen claimed that it was his mother's idea to move out, but Davis testified that Olsen told her that it was his wife who wanted his mother to move out.

Olsen's mother had a neurological exam in February 2001, and she was found to be "mentally clear." During his deposition, Olsen agreed that his mother was "mentally clear" at that time.

In late March 2001, Olsen and his wife left Michigan and moved into his mother's mobile home in California. Olsen believed that his mother was going to join him there. And Davis confirmed that Olsen's mother expressed a desire to return to California. However, Olsen claimed that soon after he arrived in California, his mother called and "screamed in the telephone, get out of my house, you're not taking care of me and hung up." Olsen asserted that the phone call prompted him to consult an attorney about evaluating his mother's competency. Olsen also informed his mother's accountant, Carol Siebert, that he had contacted an attorney, and, according to Olsen, Siebert then "stirred up the hornet's nest" by immediately telling Davis.

Davis testified that in April 2001, Siebert called and told Olsen's mother that Olsen had "come to her office with his papers stating that he now had power of attorney and that he was in

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[2] Kimberly Davis, Olsen's niece, testified that, prior to going to California, Olsen had told her that he would not go unless his mother gave him her Cadillac.

charge of all her affairs and he wanted her safety deposit box." Siebert also allegedly stated that Olsen indicated that he was not going to take care of his mother himself, but rather put her "in a home." Davis claimed that after the phone call with Siebert, Olsen's mother "broke down crying" because she had believed that Olsen was going to take care of her. Davis testified that when she asked Olsen about it, he confirmed that he could not take of his mother and intended to "put her in a home close to [him]." Davis claimed that it was not until after Seibert's phone call that Olsen's mother called him and told him to get out of the house.

In March or April 2001, Olsen's mother met with attorney Robin Sosin to discuss amending her trust again. Davis testified that Olsen's mother had asked to see an attorney because she had "had it with Pete." Davis knew Sosin because he was the corporate attorney for her father's business. In early April 2001, Olsen's mother executed a durable power of attorney in favor of Davis. And in late May 2001, Olsen's mother executed the sixth amendment to her trust, which reduced Olsen's share of the trust assets to 10 percent, increased Davis's share to 75 percent, and left the balance to Olsen's daughter. The sixth amendment also contained an "anti-contest" clause that provided for the forfeiture of the share of any beneficiary who challenged the trust's provisions. Sosin and Williams witnessed the execution of the amendment. At that time, Olsen's mother's medical records indicated that she was "alert and oriented and capable of making her own decisions."

In early April 2001, Olsen's mother saw Dr. Daniel White, and he wrote the following observations in her chart:

> Here with her granddaughter, Kim, who seems to be sincerely interested in her affairs. The patient apparently has changed her will in February. Mrs. Olsen now, and at that time, was a delightful 92[-]year[-]old woman who was capable of making decisions. However, I am sure she could be easily persuaded to make changes. She is upset that certain changes were made in her will, but not upset enough with the fact that son made the changes. Apparently[,] the son has also been draining moneys from an account. I think that she could be easily manipulated, but I really can't state that she incompetent [sic] at this time. I recommend that she sees someone [sic] in Dr. Joel Young's group for a mental status exam. An independent person. I really think that Kim is 100% interested in taking care and doing what's best for her grandmother, and what her grandmother wants.

Olsen's mother never moved back to California. After spending periods of time living with Davis and then her grandniece, Olsen's mother moved into a nursing home in late October 2002 due to an injury suffered when she fell out of bed. At the time of her admission, her nursing center health care assessment plan stated that she was "[v]ery confused" and had recently thought that Davis's "family was out to kill her"; the assessment noted dementia in her diagnosis. Olsen's mother passed away in December 2002.

In January 2003, after learning about the sixth amendment, Olsen retained attorney Kenneth Karam to challenge the sixth amendment to the trust. Olsen believed that Davis had unduly influenced his mother to withdraw funds from her estate for Davis's benefit and to execute the sixth amendment.

Notably, between March 2001 and December 2002, the Myrtle Olsen Trust decreased in value from $867,701 to $552,002. According to Maceroni, though, between March and December 2002, the trust suffered substantial market losses. Medical expenses, living expenses, and gifts comprised the remainder of the diminution in value. During her deposition, in response to questioning about monthly expenditures from April 2001 to December 2002, Davis admitted to receiving gifts totaling approximately $75,000.

In February 2003, Sosin, serving as attorney for the trust, wrote to Karam and advised him that any challenge to the sixth amendment would be "frivolous and unsuccessful" and result in Olsen "getting nothing from the Trust." Sosin further stated:

> I drafted the subject Sixth Amendment after meeting with Myrtle for more than three (3) hours over two sessions in my office in April of 2001. We explored at length her desire to amend her Trust.
>
> Because of her age, I wanted to make certain she was of "sound mind" and capable of knowingly, freely[,] and voluntarily expressing her estate planning wishes. Therefore, I spent a lot of time with her alone in my office asking her questions about her estate planning desires, testing her memory and cognition, and ensuring her unfettered volition. I found her to be lucid, engaging, and fully possessed of her faculties. At all times, she was clear about her intentions. I felt she fully comprehended everything I said to her and wrote in the amended documents. She remained cogent and assured when she executed the Trust amendment on May 22, 2001.[3]

Sosin further advised Karam that, as successor trustee, Davis would "swiftly" distribute Olsen's share in exchange for a release that he would not challenge the sixth amendment and that Davis was willing to sell Olsen the mobile home, which Sosin was seeking to have appraised.

In March or April 2003, Karam enlisted Maceroni to assist him with the case. And in July 2003, Karam and Maceroni, acting on Olsen's behalf, filed with the Oakland Circuit Court, a three-count complaint against Davis, individually and as successor trustee of the trust. The complaint alleged that Olsen's mother had: (1) breached an oral contract with Olsen to give him what was provided in the fifth amendment in exchange for him moving to California to care for her, (2) been unjustly enriched by improvements that Olsen made to her California property, and (3) been unduly influenced by Davis at the time of the execution of the sixth amendment and lacked mental capacity. This complaint was filed after the Oakland Probate Court rejected a prior complaint filed by Karam and Maceroni on the ground that the probate court was not the proper forum.

In May 2004, Davis then moved for summary disposition on behalf of the trust, arguing that Olsen's mother's alleged agreement to leave him what was provided in the fifth amendment

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[3] Sosin also later testified that he spent "two plus hours" with Olsen's mother in connection with her revision of her trust and "had no doubt that she was of sound mind."

failed for lack of consideration because Olsen never took care of his mother in California. Moreover, regardless of the lack of consideration, Davis argued that the claimed oral agreement was unenforceable under the statute of frauds. With respect to the unjust enrichment claim, Davis asserted that because the mobile home was not part of the trust, there was not unjust enrichment to the trust, and, further, any improvements he made were gratuitous. Davis also argued that Olsen's mother was competent to execute the sixth amendment and was not subjected to undue influence. Last, Davis asserted that Olsen was not entitled to relief under the clean hands doctrine. Davis noted that in April 2003, Olsen had sent a copy of the fifth amendment and a copy of this mother's death certificate to the California Secretary of State and had the title in her mobile home transferred to him. According to Davis, Olsen effected the transfer despite his knowledge that the sixth amendment had been executed. Davis added that Olsen did not have a good relationship with his mother and that he essentially "dumped" her with Davis prior to moving to California.

While the motion for summary disposition was pending, case evaluation was held. The panel awarded Olsen $75,000 and recommended that the estate not challenge his ownership of the mobile home. Olsen rejected the case evaluation award, and the parties agreed to seek to adjourn the trial date and the pending hearing on the motion for summary disposition, and facilitate instead. But at a pretrial conference, the trial court insisted that the case move forward; Sosin and Karam then agreed to dismiss the case without prejudice in order to afford the parties time to facilitate.

In September 2004, the parties participated in facilitated, non-binding mediation. At the end of the session, Olsen agreed to accept $95,000, and title to the mobile home. Olsen later refused to formalize the agreement, but Davis was able to successfully enforce the agreement.

B. The Present Case

In December 2005, Olsen filed a three-count complaint against Karam and Maceroni in Macomb Circuit Court. In Count I, Olsen alleged professional negligence against both Karam and Maceroni. Counts II and III, which alleged breach of contract and fraud, were directed solely at Karam and his fee agreement. With respect to his negligence claims, Olsen alleged that the attorneys breached the applicable professional standard of care by failing to file the cause of action in the right court, failing to provide necessary discovery; falsely advising Olsen that they had the experience necessary to represent him; failing to keep Olsen advised about the lawsuit; "wrongfully advis[ing]" Olsen about the lawsuit; dismissing the lawsuit without Olsen's knowledge; failing to advise Olsen of his rights concerning the litigation; failing to conduct Davis's deposition before mediation; and failing to conduct various depositions, including of Sosin, Williams, Myrtle Olsen's physician, Dr. Daniel White, and Carol Siebert. With his complaint, Olsen provided the affidavit of attorney Lawrence Benton, who attested that, in their representation of Olsen, Karam and Maceroni breached the applicable professional standard of care by filing the underlying complaint in circuit court when the probate court actually had exclusive jurisdiction over proceedings concerning the validity of the trust. Benton further attested that Karam and Maceroni failed to conduct adequate discovery, including failing to take the depositions mentioned above.

Maceroni moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that Olsen's malpractice claims should be dismissed because Maceroni was immune from liability

under the attorney judgment rule and because the complained of conduct was causally irrelevant. Maceroni contended that Olsen "was lucky" to obtain the settlement that he received in light of the anti-contest clause in the sixth amendment. Maceroni further argued, alternatively, that Olsen's claims should be dismissed because he did not have a qualified expert witness to testify on the issues of standard of care and proximate cause. Maceroni noted that Olsen's purported expert—an estate planning attorney—was admittedly unqualified to testify regarding the standard conduct of litigators or to proximate cause.

While the motion for summary disposition was still pending, Olsen filed a motion to change venue. Olsen pointed out that, in her motion for summary disposition, Davis had noted that if the probate court did in fact have exclusive jurisdiction over the underlying case (as Olsen alleged), then the probate court would also likely have jurisdiction over the present legal malpractice case. Thus, without taking a position on the matter, Olsen requested that the trial court determine the proper venue. Maceroni responded, conceding that the Macomb Circuit Court did in fact have jurisdiction over Olsen's present claims because, while they arose out of a case challenging the validity of a trust, Olsen's present claims sounded fundamentally in legal malpractice.

After hearing oral arguments on the motion for summary disposition, the trial court took the matter under advisement and then issued a written opinion and order. After reviewing the applicable legal malpractice standards, the trial court concluded that Olsen had failed to establish that a question of fact existed as to causation by failing to provide sufficient evidence that he would have been successful on his claim to have the sixth amendment to the trust set aside based his mother's mental incompetency. The trial court noted that there was no evidence in the record that Olsen's mother was incompetent at the time she executed the sixth amendment; indeed, the evidence established that she was "'capable of making decisions'" approximately one month earlier.

The trial court then concluded that Olsen's remaining claims failed under the attorney judgment rule. The trial court pointed out that the attorneys had testified that they chose not to directly challenge the sixth amendment because of its temporal proximity to the fifth amendment, executed just three and one-half months before, and in light of the anti-contest clause. The trial court opined that any challenge to the sixth amendment would have failed. The trial court found the $95,000 settlement in which Olsen was also awarded the mobile home was "a reasonable settlement based upon the facts known at the time." The trial court added that even if the attorneys had known about the funds that Davis took from the trust under "questionable circumstances," Olsen's potential inheritance would not have "increased sufficiently to make the $95,000.00 settlement unreasonable." Last, the trial court concluded that Olsen had failed to demonstrate that the attorneys' failure to file the claim in probate court rather than circuit court, or the attorneys' dismissal of the his claims without prejudice, resulted in a lesser settlement. Accordingly, the trial court granted Maceroni's motion for summary disposition and dismissed her from the case.

Shortly after issuing the above opinion, the trial court heard oral arguments on Olsen's motion to change venue, and the trial court issued the following decision from the bench:

> I'm denying the motion for change of venue. A reading of MCL 600.601 and 700.21, in conjunction with [*Manning v Amerman*, 229 Mich App 608; 582

> NW2d 539 (1998)] and [*York v Isabella Bank & Trust*, 146 Mich App 1; 379 NW2d 448 (1985)], it's clear to me that this Court has jurisdiction over this case and I'm going to retain jurisdiction.

Accordingly, the trial court denied Olsen's motion to change venue.

Olsen now appeals.

II. Motion to Change Venue

A. Standard Of Review

Olsen argues that the trial court lacked jurisdiction to grant Maceroni's motion for summary disposition because the probate court had exclusive jurisdiction over the settlement of Myrtle Olsen's revocable trust. We review jurisdictional issues de novo.[4]

B. Jurisdiction

In *Manning v Amerman*, the plaintiffs, beneficiaries of a trust, filed suit against the trustee and his attorney, alleging that the trustee breached his fiduciary duties to the trust.[5] The plaintiffs also asserted claims for tortious interference with a prospective expectancy, tortious interference with a contractual relationship, infliction of emotional distress (both intentional and negligent), legal malpractice, breach of contract, and unjust enrichment.[6] The circuit court found that the plaintiffs' claims were all within the exclusive jurisdiction of the probate court and dismissed the complaint.[7] On appeal, the plaintiffs argued that the circuit court erred in concluding that the probate court had exclusive jurisdiction over their emotional distress and malpractice claims. This Court disagreed, concluding that, under the circumstances, the plaintiffs' malpractice claims clearly arose out of administration of the trust.[8]

In so concluding, this Court explained that "[c]ircuit courts are courts of general jurisdiction, vested with original jurisdiction over all civil claims and remedies 'except where exclusive jurisdiction is given in the constitution or by statute to some other court . . . .'"[9] "The probate court, on the other hand," this Court stated, "is a court of limited jurisdiction, deriving all of its power from statutes."[10] Accordingly, this Court turned to MCL 700.21, which, at that time,

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[4] *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003).

[5] *Manning*, *supra* at 609.

[6] *Id*. at 609-610.

[7] *Id*. at 610.

[8] *Id*. at 610, 613-614.

[9] *Id*. at 610, quoting MCL 600.605.

[10] *Id*. at 611.

set forth the jurisdiction of probate courts throughout the state.[11] More specifically, MCL 700.21 stated, in pertinent part, that the probate court had exclusive jurisdiction over "[p]roceedings concerning . . . the administration . . . of trusts . . . including, but not limited to . . . [d]etermine any question arising in the administration or distribution of any trust[.]"[12] This Court then found that the plaintiffs' emotional distress claims were based directly on alleged emotional distress caused by the defendants' breaches of duty in administering the trust and that plaintiffs' legal malpractice claim stemmed from the attorney's conduct during probate court proceedings regarding administration of the trust.[13] The *Manning* Court explained that in determining jurisdiction it is necessary to "look beyond a plaintiff's choice of labels to the true nature of the plaintiff's claim."[14]

Olsen argues that this case is similar to *Manning* because his claims that "Davis breached the fiduciary duty owed his mother's estate . . . [and] unduly influenced" his mother and that his mother lacked the mental capacity to amend the trust, all "fall within the exclusive jurisdiction of the probate court." Notably, these claims that Olsen refers to are his claims against *Davis*, not *Maceroni*, the relevant defendant herein.

Regardless, this case is distinguishable from *Manning*, because here, the legal malpractice is not aimed at Maceroni as attorney for the trustee of a trust and does not allege that she committed malpractice during the course of the administration of a trust. Rather, here, Olsen is a beneficiary bringing suit against his own attorneys over their alleged mishandling of litigation in which the validity of the trust was arguably potentially at issue. In other words, Olsen's present claims sound fundamentally in legal malpractice as a challenge to Maceroni's handling of the underlying case, not as a proceeding concerning the administration of a trust.

III. Motion For Summary Disposition

A. Standard Of Review

Olsen argues that the trial court erred in granting Maceroni summary disposition under MCR 2.116(C)(10) because a genuine issue of material fact existed regarding Maceroni's judgment in handling the case and regarding causation. Where, as here, the trial court grants a motion for summary disposition brought pursuant to both MCR 2.116(C)(8) and (C)(10), and it is clear that the trial court looked beyond the pleadings, this Court "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)," which "tests whether there is factual

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[11] *Id*. at 611-612. MCL 700.21 was repealed, effective April 1, 2000, 1998 PA 386, and replaced with MCL 700.1302, which includes virtually the same language: "The [probate] court has exclusive . . . jurisdiction of . . . [a] proceeding that concerns . . . the administration. . . of a trust . . . including, but not limited to, proceedings to . . . [d]etermine a question that arises in the administration or distribution of a trust[.]" MCL 700.1302(b).

[12] MCL 700.21(b).

[13] *Manning*, *supra* at 613.

[14] *Id*.

support for a claim."[15] We review de novo the trial court's ruling on a motion for summary disposition.[16]

B. General Legal Principles

To establish a claim of legal malpractice, a plaintiff must show: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff-client; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged.[17] To establish causation, a legal malpractice plaintiff must show that, but for the attorney's alleged malpractice, she would have been successful in the underlying suit.[18] "In other words, the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding."[19] The plaintiff must prove cause in fact by reasonable inference and not just by mere speculation and impermissible conjecture.[20]

C. Qualified Expert Testimony

A legal malpractice plaintiff bears the burden to produce a qualified expert to testify regarding proximate cause, unless the violation was so obvious that such testimony was not required.[21]

Here, Olsen identified attorney Lawrence Benton as his standard of care expert witness. At his deposition, Benton explained that he primarily practiced estate planning, and trust and estate administration. But Benton made it clear that he was not qualified to give expert testimony on either the standard of care or causation. Specifically, Benton testified that he has never held himself out to a litigator and that he had never litigated a case or taken a deposition in the last 20 years. More specifically, Benton admitted that he was not an expert on the standard of care for litigators or in legal malpractice cases, and that he had no experience litigating claims to challenge a trust on the basis of undue influence. Benton further stated that has never written about, lectured on, or been involved in a legal malpractice case, and he admitted that that he had never before been qualified as an expert. Benton also conceded that, other than what he learned in law school, he knew nothing about the rules of evidence, circuit court practice court rules, or litigation tactics.

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[15] *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000).

[16] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[17] *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994).

[18] *Id*. at 586.

[19] *Id*. (internal quotations and citations omitted).

[20] *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 615; 563 NW2d 693 (1997).

[21] *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989); *Beattie v Firnschild*, 152 Mich App 785, 792-793; 394 NW2d 107 (1986).

Further, with respect to the specific claims of malpractice at issue, Benton explained that, although he did know whether taking Sosin's deposition would have been helpful or harmful to Olsen's case, in his opinion, it was malpractice for Maceroni to not take Sosin's deposition based merely on the fact that he prepared the sixth amendment. Yet, Benton conceded that Sosin's February 2003 letter could "[p]erhaps" lead a reasonable person to conclude that Sosin would not testify that Olsen's mother lacked testamentary capacity. Benton also testified that he had no idea what Olsen's mother's physicians would have testified to had their depositions been taken, and he conceded that he had no knowledge of any facts that would indicate that Olsen's mother was incompetent to execute the amendment or was subjected to undue influence. Moreover, he could only "speculate" regarding whether Olsen's bargaining position was affected by the fact that the case was pending in circuit court rather than probate court.

Benton's deposition clearly shows that he would not have been able to provide competent testimony regarding the issue of Maceroni's trial strategy, which essentially was the basis of Olsen's malpractice claim against her.[22] Therefore, we conclude that the trial court properly granted Maceroni summary disposition.

D. Causation

We further note that, regardless of the lack of expert testimony, we agree with the trial court that, based on the record, Olsen failed to establish that a question of fact existed as to causation by failing to provide sufficient evidence that he would have been successful on his claim to have the sixth amendment to the trust set aside based his mother's mental incompetency. There was no evidence in the record that Olsen's mother was incompetent at the time she executed the sixth amendment; indeed, the evidence established that she was "'capable of making decisions'" approximately one month earlier. Therefore, again, the trial court properly granted Maceroni summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

[22] See *Dean v Tucker*, 205 Mich App 547, 550-551; 517 NW2d 835 (1994).