STATE OF MICHIGAN

COURT OF APPEALS

JEFF WALKER,

Plaintiff-Appellant,

v

THOMAS D. ESORDI and KITCH, DRUTCHAS, WAGNER, VALITUTTI & SHERBROOK, P.C.,

Defendants-Appellees,

and

MICHAEL BOYLE,

Defendant.

UNPUBLISHED
June 16, 2009

No. 285042
Oakland Circuit Court
LC No. 2007-080590-NM

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10) in this legal malpractice action. We affirm.

I. Background

Plaintiff Jeff Walker is an engineer who also has a background in business, marketing, and media relations, including some training in video production. In 1994, Walker hired Brian Donovan, a professional dog trainer, to assist in training Walker's dog. Walker came up with an idea to produce, distribute, and market dog-training videos. Walker and Donovan agreed to form a company to produce and sell the videos. Walker provided his video-production and marketing skills and the capital to start the business, and Donovan provided his dog-training expertise and starred in the videos. Walker and Donovan executed an operating agreement in 1995 forming Sirius Productions, L.L.C., which was organized to operate the business. Walker and Donovan each had a fifty percent (50%) membership interest in the company. This company later became

Dogstar Productions, L.L.C. (DSP), in 1998, with Donovan and Walker holding 50% interests.[1] The company produced and marketed dog-training videos as envisioned, selling them to various local pet stores, as well as Petland, a national chain, which sold the videos in its stores across the country. Donovan devoted full-time hours to DSP, and Walker also lent his time and efforts to growing the company, although he did retain his full-time employment as an engineer. The business venture was financially successful and lucrative for both men. By 2003, however, Walker and Donovan were experiencing personal and business differences, and the relationship became extremely acrimonious. Donovan hired his girlfriend to work for the business, and Walker expressed concerns that the pair was becoming increasingly secretive about company business and finances. Walker believed that Donovan was usurping company opportunities for his own benefit. Also, Donovan had fired Walker's wife, who had been working for the company. Walker and Donovan began discussing different avenues by which to dissolve their business relationship; negotiations between the two regarding various buyout options failed to result in any agreement.

In late summer 2003, Walker retained the legal services of defendant Kitch, Drutchas, Wagner, Valitutti & Sherbrook, P.C. (Kitch) to assist in negotiations with Donovan. Walker chiefly consulted with defendant Esordi.[2] Various buyout options, with accompanying dollar amounts and conditions, were explored, but discussions and negotiations were unfruitful. Walker had demanded $300,000 to buy out his interest, but Donovan was not agreeable. At some point in time, Walker had rejected Donovan's offer to sell Donovan's interest to Walker for $300,000, nor was a $100,000 sale accepted by Walker because of conceived inadequacies related to non-competition promises. Negotiations reached an impasse, and in August 2004, Donovan filed suit against Walker, DSP, and DST, requesting an order to wind up the affairs of the two LLCs. The Donovan complaint alleged that Donovan had made several unsuccessful requests to Walker to agree either to an alteration of DSP's operating agreement to stem deadlocks, to a buyout of Donovan's interests in DSP and DST, or to a sale of Walker's interests in DSP and DST to Donovan. The Donovan complaint also alleged that Walker was uncooperative in winding up the business affairs of DSP and DST. Walker filed a counterclaim alleging claims under the Michigan Limited Liability Company Act, MCL 450.4101 *et seq.*, breach of fiduciary duty, usurpation of business opportunity, defamation and slander of business goodwill, and tortious interference with business relationships. After the Donovan litigation was commenced, exhaustive negotiations were conducted, comparable to efforts made pre-lawsuit. We shall discuss the nature of relevant communications and interactions between Walker and defendant Esordi below in our analysis. A settlement was subsequently reached, pursuant to which Walker was to receive $300,000 for his interest payable over a four-year period. The settlement was partially and relevantly encompassed in a "Membership Unit Redemption Agreement" (redemption agreement) between Walker and DSP. The redemption agreement was

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[1] Walker and Donovan also formed Brian Donovan's Dogstar Training, L.L.C. (DST), in 1998, which focused on dog-training sessions at veterinary clinics in Southeast Michigan. Each had a 50% membership interest.

[2] Attorney Michael Boyle was also consulted, and he was named as a party defendant. A stipulation and order for dismissal as to defendant Boyle only was entered in this case.

drafted by corporate counsel for DSP, and numerous early drafts had been exchanged, reviewed, and rejected before the final version was accepted by the parties. In section 8 of the redemption agreement entitled "Non-Solicitation," Walker covenanted and agreed that during the restraint period, which covered a 48-month timeframe commencing with execution of the agreement, he would not, directly or indirectly, "[s]olicit or provide services to any Customer; or . . . [c]ontact, whether orally, in writing (including electronically) or otherwise, any Customer . . . ." A "customer" was defined in the redemption agreement as "anyone who is: (i) a customer of the Company [DSP] on the Effective Date; (ii) *who becomes a customer of the Company during the Restraint Period*; or (iii) who was a customer of the Company during the three (3) year period immediately preceding the Effective Date." (Emphasis added.) The emphasized language is at the heart of the dispute. An earlier draft of the redemption agreement contained non-competition language that would have prevented Walker from competing with respect to any of the business activities conducted or engaged in by DSP; this language did not make the final cut of the redemption agreement.

In February 2007, Walker filed the instant suit against Esordi, Boyle, and Kitch. Walker alleged that he lacked any legal training or experience, that he was entirely dependent on defendants during the course of the prior litigation instituted by Donovan, and that defendants precipitated unnecessary, lengthy, and protracted litigation. Walker further alleged that defendants failed to request available statutory remedies, failed to seek receivership relative to dissolution, failed to tender or recommend payment of $100,000 to Donovan, which amount Donovan had once demanded in order to sell his interest, and failed to conduct adequate discovery. Additionally, Walker alleged that defendants failed to prepare for possible trial, failed to carefully inspect and understand the redemption agreement, failed to secure complete business valuations, failed to act on Donovan's violation of DSP's operating agreement, failed to appreciate tax ramifications relative to the settlement, failed to secure adequate guarantees of payment under the settlement, and charged excessive and unnecessary fees. After stating that defendants were responsible for negotiating the terms of the redemption agreement, Walker alleged as follows:

> During the course of the discussion regarding the settlement, Plaintiff Jeff Walker specifically inquired of Defendant Esordi regarding the language of the release to ensure that it did not prelude him from pursuing other business interests, that he intended to pursue, within the same industry (i.e., dog training, veterinary services, video production).
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> [Defendants were negligent and committed malpractice when they] [a]greed to non-competition provisions in the settlement documents that were onerous, exceeded the standard of care, exceeded the standards in the industry, and which were misrepresented to Walker at the time of his signing when he specifically inquired of Esordi regarding the provisions of the non-competition clause.
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> * * *

> Walker [s]uffered the onerous provisions of the non-competition requirements of the settlement documents, including inability to engage in business within the same industry.[3]

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that Walker failed to prove the elements of a legal malpractice action as a matter of law, given the lack of supporting documentary evidence. Defendants maintained that Walker did not show a breach of the standard of care, where Esordi's conduct during the Donovan litigation, including recommendations and negotiations, were covered by the attorney judgment rule. Defendants further contended that Walker could not show that, but for any act or omission of attorney Esordi, Walker would have faired better in either the litigation or settlement with Donovan. Finally, defendants argued that Walker's damage claims were based on nothing more than mere speculation and conjecture, thereby failing to establish the fact and extent of the alleged injuries.

The trial court granted defendants' motion for summary disposition. Ruling from the bench, the court first noted that section 8 of the redemption agreement was unambiguous and that Esordi made it clear to Walker that he could not solicit the business of past or future DSP clients. The trial court also stated that, with respect to communications between Walker and Esordi prior to execution of the redemption agreement, Walker made it clear that he understood the terms of the agreement relative to what solicitation of customers meant. The court further ruled that there was not enough evidence to overcome the proximate cause issue. The court stated, "I don't think there's any evidence that's been presented that shows that a . . . future agreement would've been different enough in the terms to be able to allow Walker to solicit a past client to create a new business." Finally, on the topic of damages, the court ruled, "I don't think there's been any evidence, certainly not enough evidence, to prove the damages in terms of Walker being able to solicit a past client, start up a new business, and have it be more successful than the business he already started."

II. Analysis

A. Walker's Appellate Arguments

On appeal, Walker argues that the trial court erred in finding that there was no material issue of fact regarding proximate causation. Walker further maintains that the trial court erred in ruling that summary disposition was appropriate on the basis that Walker unambiguously agreed to a non-compete agreement that precluded him from starting up a new company.[4] More

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[3] We note that, while Walker continually refers to the language in section 8 of the redemption agreement as being "non-compete" language, we find that section 8 is correctly entitled a "non-solicitation" section. For reasons set forth below, the clear and unambiguous language of section did not preclude Walker from starting a comparable business and generally competing against DSP or Donovan. Rather, Walker was merely prohibited from soliciting and servicing past, current, and future customers as confined within certain timeframes.

[4] We note that, although Walker's complaint alleged numerous instances of legal malpractice and
(continued…)

particularly, Walker asserts that the business was earning profits in excess of $300,000 per year, of which 50% belonged to Walker. Over a four-year period, which was the restraint period, Walker would have been entitled to $600,000 had he stayed in the business with Donovan. Therefore, it would have made no sense for Walker to accept a $300,000 settlement for his interest in the business if there was a prohibition against starting his own competing company.[5] Walker contends that the acceptance of the $300,000 buyout "was based upon Mr. Esordi's assurances that he could start up his own business." Accordingly, and relative to the issue of causation, Walker "lost both the profits he would have earned from Dog Star for a four year period, but also the ability to initiate a separate company that would solicit business from clients other than Dog Star's clients." Walker argues that he was adamant that he wanted no agreement that would impair his ability to start up his own business.

Walker additionally argues that it was never his intention to start a new company that involved solicitation of past or current DSP customers. Walker states "he was perfectly amenable to work only with customers who had never had any relationship with Dog Star." According to Walker, Esordi assured him that the redemption agreement would allow Walker to do so; however, after the redemption agreement was executed, Esordi changed his tune, which established that Esordi had effectively misled Walker into executing the agreement. Walker claims that the troubling language in section 8 of the redemption agreement is that which defines a "customer" as including anyone "who becomes a customer of the Company during the Restraint Period." Walker interprets this language as precluding him from starting up his own business. The event that led to this conclusion occurred when, following execution of the redemption agreement, Walker informed Esordi that he intended to start a competing business and planned to contact a person who had moved on from a company that was a DSP customer to another company that was not a DSP customer. Esordi responded by telling Walker, "I wouldn't do that if I were you."

Although not included in a statement of the issues or arguments presented on appeal, as required by MCR 7.212(C)(5) and (7), Walker makes a cursory argument that discovery was not yet completed when the motion for summary disposition was granted, that Donovan had not been deposed, nor expert depositions taken, which would have provided a more fully developed record for purposes of summary disposition, and that it is generally improper for a court to grant summary disposition before completion of discovery.

B. Standard of Review and Summary Disposition Tests

(…continued)

the summary disposition briefs touched on these allegations, ultimately the focus of the parties and the court at the summary disposition hearing was on the non-solicitation language included in the redemption agreement. The order granting defendants' motion for summary disposition resulted in the dismissal of Walker's entire complaint, which necessarily encompassed all the alleged instances of legal malpractice. On appeal, Walker only addresses the dismissal of his claims related to the non-solicitation section of the redemption agreement. Therefore, the only issues that we shall address pertain to the non-solicitation language.

[5] Walker states that "[i]t would have been nonsensical . . . for [him] to accept $300,000 for his interest in Dog Star, unless he had the ability to begin his own, similar business, and to recoup those lost profits through the ability to continue with a pet industry company of his own."

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto, supra* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

C. Legal Malpractice and Contract Principles

In a legal malpractice action, the plaintiff has the burden of proving: (1) the existence of an attorney-client relationship; (2) negligent representation by the attorney; (3) that the attorney's negligence was a proximate cause of an injury; and (4) the fact and extent of the alleged injury. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). An attorney owes a duty to his or her client to use and exercise reasonable skill, care, discretion, and judgment in the management and conduct of a cause for which the attorney was retained. *Id.* at 655-656. Further, an attorney has a duty to fashion a strategy that is consistent with the prevailing law. *Id.* at 656. An attorney, however, has no duty to insure or guarantee the most favorable outcome possible. *Id.* "An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession." *Id.* Allegations of mere errors of professional judgment, as opposed to alleged breaches of reasonable care, will not suffice to establish a case of legal malpractice. *Id.* at 659.

A plaintiff in a legal malpractice action must generally show that, but for the negligence of counsel, the outcome in the underlying litigation would have been favorable to the plaintiff. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996). "In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury." *Manzo v Petrella and Petrella & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). This constitutes the "suit within a suit" requirement that exists in legal malpractice cases. *Id.*; see also *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994) (a client pursuing a legal malpractice action against his or her former attorney faces the difficult task of proving two cases within a single proceeding). Absent this causation requirement, an attorney could be held liable on the basis of speculation and conjecture. *Id.* at 586-587.

In *Lowman v Karp*, 190 Mich App 448, 452-453; 476 NW2d 428 (1991), this Court held that, in the context of a legal malpractice action, a party's settlement of the underlying action

does not act as an absolute bar to the subsequent malpractice case. The *Lowman* panel rejected the defendant attorney's argument that the plaintiff was estopped from suing him because she knowingly and voluntarily decided to settle the underlying suit. *Id.* at 453. The Court reached this conclusion because an essential feature of the plaintiff's malpractice case was that she informed the defendant attorney that she did not want to settle, but she did eventually settle after the attorney flatly refused to try the case shortly before trial. *Id.* at 453-454. In *Espinoza v Thomas*, 189 Mich App 110, 117-118; 472 NW2d 16 (1991), this Court made the following observations regarding underlying consent judgments entered pursuant to settlement agreements that were precursors to legal malpractice claims, as opposed to underlying verdicts arrived at after trial:

> Essentially, when a judge or jury adjudicates a claim, it only determines, on the basis of the evidence and the law before it, whether the defendant caused the plaintiff's injury and the amount of the plaintiff's damages for which the defendant is liable.
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> A consent judgment, however, differs substantially from the usual litigated judgment because it is primarily the act of the parties rather than the considered judgment of the court. In nearly every settlement, the total extent of the plaintiff's damages is but one of the many factors considered. Rather, the parties will take into consideration such factors as "the forum of the action, the collectibility of the defendant, the appearance and demeanor of the potential witnesses and the skill of opposing counsel, to mention only a few of the pragmatic considerations which no one would suggest this Court should consider in determining what is full satisfaction for a particular injury." [Citations omitted]

This discussion suggests that, simply because a party may have obtained a better result following a trial than that obtained by settlement, a subsequent legal malpractice action by a settling party must be scrutinized, keeping in mind the various factors that were contemplated in settling the underlying suit.

This case also entails construction of the redemption agreement that partially encompassed the settlement agreement between Walker and Donovan. "'An agreement to settle a pending lawsuit is a contract and is to be governed by the legal principles applicable to the construction and interpretation of contracts."' *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006), quoting *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 571; 525 NW2d 489 (1994). "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "If the language of [a] contract is unambiguous, we construe and enforce the contract as written." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). A contract is ambiguous if its provisions are capable of conflicting interpretations. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003).

D. Discussion

1. Documentary Evidence of Communications between Walker and Esordi

The focus of Walker's appeal is on his claim that attorney Esordi, in the context of negotiating the redemption agreement, did not abide by his expressed wishes concerning the scope of any non-competition provision, nor did Esordi honor Walker's desire to start a business comparable to that operated by DSP. We begin by summarizing the communications between Walker and Esordi prior to execution of the redemption agreement. There was a flurry of emails between the two, along with conversations. There were also multiple drafts of the redemption agreement sent back and forth between the parties before one was finalized and executed. A pre-execution email from Walker to Esordi contained a bullet point that stated, "No Non-Compete or just limited to current client[] contacts." A later pre-execution email from Esordi to DSP's corporate counsel indicated that Esordi needed to talk to Walker about the latest revision and that Esordi and Walker "agree[d] to a non-solicit only." In a subsequent email from Walker to Esordi, also pre-execution of the redemption agreement, Walker stated:

> The non-compete is too broad under section 8.a – will not sign as is. As we have always discussed I want to list specifically the customers that I cannot contact – Petland, Nutro, Innotek, Tomlyn, Coastal over two years. Am I permitted to go out and create a duplicate company to sell to other customers? I need this to be yes.[6]

In several subsequent, pre-execution emails from Walker to Esordi, Walker listed a number of concerns with language in the redemption agreement, none of which pertained to solicitation of customers, Walker's ability to compete through creation of a comparable business, or customers in general. In a later email, Walker informs Esordi that "[t]he non-solicitation language prevents me from using this document with current and future customers."[7] In interrogatory answers, Walker stated:

> Non-compete did not meet expectations – Tom [Esordi] advised me that it is good and this document does what it should for me. I later called (after signature) to tell Tom about starting a competing business using other contacts and Tom advised against contacting anyone. This took me by surprise.
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> I asked in early meeting that a non-compete be limited to current clients . . . . It was always a "current clients" situation. . . . Initial meeting, noted desire to start a competing business, using other clients than current.

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[6] The record does not contain any specific email response to these matters.

[7] Walker argues that "what he was conveying in this e-mail was that he needed to utilize the Agreement to obtain loan approval, but understood that he could not disclose 'this document' to past or future clients. Put another way, the e-mail does *not* say 'I cannot solicit past or future customers,' rather, it states that the agreement 'prevents me from using *this document* with past or future customers.'" We note that Walker did not provide this explanation of the email language when asked at his deposition.

Depositions were taken of Esordi and Walker. In Esordi's deposition, he testified as follows concerning discussions about non-competition:

> Well, we talked extensively, as you can see from the various drafts of the Redemption Agreement that was negotiated, that he didn't want a noncompete against current customers, and we were able to obtain that from him because there was no noncompete in the agreement. What we did talk about was the solicitation of future clients of Dogstar Productions, and [plaintiff] told me specifically that he was not concerned about that because he was ten times the salesman Brian Donovan was, and that that would not be an issue, he would easily be able to out sell and obtain these outside companies as clients.

Esordi acknowledged that Walker and his wife desired to start a comparable business. Esordi emphasized that there was no non-compete provision in the redemption agreement and that Walker could start a comparable business, as long as he did not solicit prior, current, and future customers of DSP. In regard to soliciting future customers, Esordi indicated that a future customer would be someone who entered into a business relationship with DSP within four years of execution of the redemption agreement. With respect to the conversation with Walker, following execution of the redemption agreement, about Walker approaching and soliciting a particular individual in hopes of developing a customer relationship should Walker start a new business, Esordi conceded that he told Walker to slow down and talk about the situation before going forward. However, he gave Walker this warning because the individual at issue, while not a DSP customer, nor affiliated with a DSP customer, used to work for a company that was a DSP customer. Esordi was unsure whether the redemption agreement precluded Walker from soliciting the individual.

Walker testified in his deposition that he always made it perfectly clear to Esordi that he wished to form a comparable business and did not want to be prevented from competing against Donovan and DSP. Walker reiterated throughout his deposition that he was only accepting of a non-competition or non-solicitation restriction if it related solely to current DSP customers, of which position Esordi was well aware.[8] Walker believed that the redemption agreement's language that defined "customer" as including anyone who, within the restraint period, became a

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[8] Walker testified:

> [B]ut I want to, again, reiterate, that no-compete by definition . . . means no-compete on the current clients, the very limited scope of current clients. It's a very limited scope of clients. There's about six or seven that Dog Star currently has business with, and those would not be – you could not contact them . . . . If I sold that entity or he [Donovan] sold it, the other person could not compete with those people. That's what it was limited to and that's what it meant, and other correspondence, other e-mails back that up, so I want to clarify that here for the record.

customer of DSP prevented Walker from going out and starting his own competing business. Walker reasoned:

> So in other words, if I'm talking to someone about starting a business and I want to have a partnership with them, if Donovan approaches them then, then Donovan can . . . claim rights to that customer and then sue me and hold open a threat of a lawsuit and stop payment and do all the other things that would prevent me from having any type of a reasonable chance in a new business.

In regard to the post-execution conversation with Esordi about calling on a person who was once a customer of DSP, Walker testified that the individual, with whom he had a close relationship, was the owner of veterinary clinics and offered to assist Walker in making contacts with pet pharmaceutical companies. Walker stated that he did not ask Esordi why the contact would be problematic, nor did Walker speak any more with Esordi about starting up a comparable business and whether the redemption agreement would prohibit such an action. Walker acknowledged that he had read the drafts of the redemption agreement and had read the finalized agreement before executing it at Esordi's office, although he maintained that they were difficult to understand for a non-lawyer.[9] Walker also acknowledged familiarity with the redemption agreement's definition of the term "customer," which encompassed past, current, and future customers. When asked whether he understood, at the time of execution, that the redemption agreement would prevent him from soliciting future DSP customers, Walker began his response by referencing his email to Esordi which indicated that the non-solicitation language prevented Walker from using the agreement with current and future customers. Walker then stated, "I'm referring to the fact that I do not want to solicit and be a competitor with [DSP] but I want to go out and start a competing business and not be under some scrutiny."

Walker also testified to business opportunities and projects that were available to him or that could have been pursued following execution of the redemption agreement; however, he did not pursue them because of his belief, grounded in part on Esordi's post-execution comments,[10] that the agreement would not allow his participation.

2. Our Holding and Reasoning

We hold that Walker's cause of action fails on multiple levels. First, the plain language of section 8 of the redemption agreement did not prevent Walker from starting a business comparable to the business operated by DSP. We can find no language whatsoever in the agreement that suggests, expressly or implicitly, that Walker could not start his own comparable business. Further, the plain language of section 8 of the redemption agreement did not preclude Walker from generally competing against DSP; it simply limited his ability to solicit and do

[9] Walker did state that he understood the papers "a little bit better" than a layman.

[10] Walker testified that another attorney, a friend, also warned him that the agreement could create problems for Walker should he start a comparable company.

business with past, present, and future DSP customers,[11] leaving wide open as potential customers the remaining entities doing business in the pet industry, as well as other potential customers who might be interested in a dog-training video product. Walker's only problem is with the future customer language contained in section 8, so he was already indisputably accepting of some limitation on any business venture, given that past and current DSP customers could not be solicited. Under the pertinent language in section 8, Walker could not solicit or provide services to anyone who became a DSP customer during the restraint period. The language clearly and unambiguously means that, by way of example, if after execution of the redemption agreement and before expiration of the restraint period, company X enters into an agreement to purchase DSP's products, thereby becoming a DSP customer, Walker would not be permitted to solicit company X. Walker read and was familiar with the future customer language and proceeded to execute the redemption agreement. Indeed, the record reflects that Walker was deeply engaged in scrutinizing the redemption agreement. After unacceptable non-compete language was removed from the agreement and numerous drafts had been reviewed, Walker voiced no concerns in his emails about the future customer language at issue.

Contrary to Walker's assertion, the future customer language in no way prevented him from soliciting a company simply because DSP might also be soliciting the company. Only if and after DSP were to make the company an actual customer would Walker have to drop his solicitation attempts. Furthermore, assuming that Walker communicated to Esordi that the future customer language was unacceptable up to the time of execution, Walker read the agreement, executed the agreement, and acknowledged his familiarity with the future customer language. The language so clearly entails future customers, a lawyer's insight was unnecessary to recognize the language's implications, especially considering Walker's business background. Additionally, Walker acknowledged in an email that the agreement prevented him from soliciting future DSP customers, and Walker's attempt to argue away this email is inconsistent with his deposition testimony. With respect to Esordi's conversation with Walker after execution of the redemption agreement, the situation involved a unique circumstance where Walker wanted to contact a person who was previously, but no longer, affiliated with a former DSP customer. Esordi simply indicated that it was not clear under the redemption agreement whether the contact would be proper. It defies logic to conclude that Esordi was suggesting that Walker could not start a comparable company or generally compete with DSP, nor does the plain and unambiguous language of the redemption agreement make such a suggestion.

On the basis of our construction of the redemption agreement, and assuming a failure by Esordi to exercise reasonable care, along with assuming that a more favorable outcome would have occurred in the Donovan litigation, two rather large assumptions, Walker cannot show a causal connection between the presumed negligence and any business loss injury. This is so because Walker did not even make an attempt to start a new business, a right that he did have under the redemption agreement, let alone show lost revenues and profits tied to being prevented from soliciting future DSP customers. Indeed, we find that all of Walker's causation and damages arguments are pure speculation and conjecture.

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[11] Again, we note that the limitations on solicitation are confined to certain timeframes.

In sum, we find that Walker failed to create an issue of fact on any of the elements of a legal malpractice claim.

We also reject the discovery argument. "Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003) (citations omitted). There is no indication here that further discovery stands a reasonable chance of uncovering factual support for Walker's case.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray