STATE OF MICHIGAN

COURT OF APPEALS

WHITWOOD, INC., and WHITTON-WOODWORTH CORPORATION, Plaintiffs-Appellants, v CYRIL HALL, Defendant-Appellee.	UNPUBLISHED February 25, 2010 No. 286521 Oakland Circuit Court LC No. 2007-086344-CH

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs, Whitwood, Inc. and Whitton-Woodworth Corporation, appeal by right from the trial court's order granting summary disposition in favor of defendant, Cyril C. Hall. Because plaintiffs did not establish a question of fact regarding a cause of action for legal malpractice, we affirm.

This attorney malpractice dispute stems from earlier litigation between plaintiffs and Dirk and Ruth Dieters, a married couple, in 1999. In that matter, plaintiffs engaged attorney Lawrence Stockler to recover money owed to plaintiffs as a result of the litigation between plaintiffs and the Dieters. Stockler seized property owned by the Dieters known as the "Tuscola Property" in an attempt to satisfy plaintiffs' judgment against the Dieters. While it appears that plaintiffs and/or Stockler believed that the seizure of the Tuscola Property would completely satisfy the judgment amount, it did not. As a result, plaintiffs later sought to attach another property owned by the Dieters known as the Fair Oaks property. When the attachment process began, Stockler learned that the Dieters had sold the Fair Oaks property to their son, Robert Dieters, on September 17, 1999, for the sum of $1. Plaintiffs sought to have the transfer of the Fair Oaks property set aside as a fraudulent conveyance, filing a motion in circuit court in November 2005. At the same time, plaintiffs began to have a disagreement with Stockler over his attorney fees for services rendered. Plaintiffs discharged Stockler as their attorney. Plaintiffs then sought out defendant for representation against Stockler in the attorney fee matter, and also engaged defendant to replace Stockler in their attempt to have the Dieters transfer of the Fair Oaks property to their son set aside.

Defendant represented plaintiffs at a motion concerning the legality of the conveyance in Oakland Circuit Court, before Judge Gene Schnelz, on June 7, 2006. Defendant presented several arguments on plaintiffs' behalf, including that the doctrine of marshaling assets applied

such that plaintiffs could only proceed against one parcel of property at a time in satisfaction of the amount owed. He also asserted, on plaintiffs' behalf, that a six-year statute of limitations applied to the transfer, and thus the motion was timely filed and the Fair Oaks property transfer should be set aside. The trial court determined that plaintiffs had the opportunity to marshal any and all of the Dieter's property in satisfaction of their judgment, and further tacitly determined there was no reason that they had to assert their rights against one parcel at a time. The trial court also held that both the one-year and the six-year statutes of limitations applied and ruled in favor of the Dieters.

The following day, June 8, 2006, defendant attorney sent a letter to his clients, plaintiffs, explaining the ruling and urging them to appeal the trial court's decision. Plaintiffs responded with a letter dated June 14, 2006, wherein they asserted that it was defendant attorney who "put our company in a position of having to appeal Judge Schnelz's decision. This results in further delay and additional monetary costs, which we believe that you should absorb rather than us." In the letter, plaintiffs requested that defendant call them to "discuss these matters" due to the "short time in which to appeal[.]" Plaintiffs failed to appeal the matter. Plaintiffs then commenced the instant action against defendant in 2007 alleging legal malpractice. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). Plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(I)(2). The trial court granted defendant's motion for summary disposition and denied plaintiffs' motion holding that:

> . . .Plaintiffs have failed to establish that they would have been successful in the underlying lawsuit. The one year statute of limitations applies to fraudulent transfer actions pursuant to MCL 566.39(b). It is undisputed that the alleged fraudulent transfer in the underlying action took place, at the latest, on September 25, 1999. In order to attack that transfer, an action would have to have been brought no later than September 25, 2000. Defendant did not begin representing Plaintiffs until 2005. Therefore, the Court finds that Plaintiffs cannot show that any action taken by Defendant in the underlying lawsuit is the proximate cause of an injury.

Plaintiffs filed a motion for reconsideration that the trial court denied. Plaintiffs now appeal by right.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 123; 693 NW2d 374 (2005). Viewing the documentary evidence submitted by the parties in a light most favorable to the non-moving party, summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). Motions under MCR 2.116(C)(8) are proper if the nonmoving party "has failed to state a claim on which relief can be granted." Such claims must be "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (internal citation omitted). In reviewing a MCR 2.116(C)(8) motion, the "factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*.

Plaintiffs argue that a principal issue in the underlying Dieter case involved the time limitations for post-judgment relief and assert that, under the facts of this case, the applicable time limitations for setting aside the subject fraudulent transaction was six years, not one. Plaintiffs assert that since the applicable statute of limitations was six years, defendant committed malpractice by failing to attach the Fair Oaks property within the six-year statute of limitations when he filed the required pleading six weeks late. Defendant counters that no malpractice occurred because the proper statute of limitations was one year and had expired far prior to defendant's representation of plaintiffs.

The Uniform Fraudulent Transfer Act provides that a transfer made by a debtor is fraudulent to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." MCL 566.34(1)(a). MCL 566.39 sets forth the statute of limitations with respect to fraudulent transfers. It states as follows:

> A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:
>
> (a) Sections 4(1)(a) and (b)[1] and 5(1),[2] within the time period specified in sections 5813 and 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.

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[1] "Sections 4(1)(a) and (b)" reference MCL 566.34(1) entitled "Fraudulent transfer or obligation, generally; determination of actual intent" that states as follows:

> Sec. 4. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
>
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

(b) Section 5(2),[3] within 1 year after the transfer was made or the obligation was incurred. [MCL 566.39.]

Those transfers deemed fraudulent pursuant to MCL 566.39(a) are subject to either a two year, MCL 600.5855, or six year, MCL 600.5813, statute of limitations. Those transfers deemed fraudulent pursuant to MCL 566.39(b) are subject to a one-year statute of limitations.

The record reveals that the Dieters made the transfer of the Fair Oaks property to their son, an insider, pursuant to both MCL 566.31(g)(i)(A) and MCL 566.31(g)(ii)(F),[4] for an

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(…continued)

[2] "Section[] . . . 5(1)" references MCL 566.35 entitled "Fraudulent transfer or obligation; claim of creditor arising prior to transfer or obligation" that states as follows:

> Sec. 5. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

[3] "Section 5(2)" references the second section of MCL 566.35 that states as follows:

> Sec. 5. (2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

[4] MCL 566.31(g) defines "insider" as follows:

> (g) "Insider" includes all of the following:
>
> (i) If the debtor is an individual, all of the following:
>
> (A) A relative of the debtor or of a general partner of the debtor.
>
> (B) A partnership in which the debtor is a general partner.
>
> (C) A general partner in a partnership described in sub-subparagraph (B).
>
> (D) A corporation of which the debtor is a director, officer, or person in control.
>
> (ii) If the debtor is a corporation, all of the following:
>
> (A) A director of the debtor.
>
> (B) An officer of the debtor.

(continued…)

antecedent debt regarding the restaurant transaction that was the subject of the underlying lawsuit, that the Dieters were insolvent, and that their son knew that they were insolvent at the time of the transfer. An affidavit signed by the Dieters' son, Robert Dieters, is part of the lower court record and fully supports these conclusions. Attached to Robert Dieters' affidavit are copies of canceled checks made out to Dirk Dieters, dated prior to the property transfer date of September 17, 1999. The check copies indicate that Dirk Dieters directly endorsed at least one of the checks to "Whitton" as part of a "closing amount." The affidavit and check copies clearly evince that Robert Dieters loaned his parents money as part of the restaurant transaction that was the subject of the underlying lawsuit. In fact, it does not appear that plaintiffs actually contest any of these facts and only declare, without explanation, that the statute of limitations was six years rather than one year. Hence, our review of the facts surrounding the Dieters' transfer of the Fair Oaks property to their son reveals that the transfer meets the requirements set out in MCL 566.35(2) and thus, pursuant to MCL 566.39(b) the applicable statute of limitations was one year.

Turning specifically to the attorney malpractice claim in the instant case, to establish a claim of 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). Being that the applicable statute of

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(…continued)

(C) A person in control of the debtor.

(D) A partnership in which the debtor is a general partner.

(E) A general partner in a partnership described in sub-subparagraph (D).

(F) A relative of a general partner, director, officer, or person in control of the debtor.

(iii) If the debtor is a partnership, all of the following:

(A) A general partner in the debtor.

(B) A relative of a general partner in, a general partner of, or a person in control of the debtor.

(C) Another partnership in which the debtor is a general partner.

(D) A general partner in a partnership described in sub-subparagraph (C).

(E) A person in control of the debtor.

(iv) An affiliate, or an insider of an affiliate as if the affiliate were the debtor.

(v) A managing agent of the debtor.

limitations was one year from the date of transfer on September 17, 1999, plaintiffs would have had until September 17, 2000 to bring an action to set aside the fraudulent transfer. It is undisputed that defendant did not represent plaintiffs at that time and in fact did not begin representing plaintiffs until 2005. Therefore, plaintiffs are unable to establish a question of fact regarding even one of the elements of legal malpractice. *Id.* Summary disposition was proper pursuant to both MCR 2.116(C)(8) and (C)(10).

Plaintiffs also assert that defendant committed legal malpractice by failing to bring several other arguments to the court's attention in this matter including waiver, res judicata, estoppel, marshaling of assets, and law of the case. Plaintiffs did not adequately brief any of these issues, and did not support their arguments by citations to the record or any legal precedent. "It is not enough for an appellant in his brief simply to announce a position or assert an[] error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. If a party fails to adequately brief a position, or support a claim with authority, it is abandoned." *Moses, Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006) (internal citations omitted). However, while plaintiffs' argument is legally unsupported, we can glean from what is presented that the crux of plaintiffs' argument is that defendant failed to exercise such skill, care, discretion, and judgment in his representation of plaintiffs during the proceedings. Indeed, an attorney has a duty to exercise reasonable skill, care, discretion, and judgment in the conduct of the cause and representation of his or her client. *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995). Were we to review this issue, we would conclude that it is readily apparent from the record that defendant attempted to circumvent the one-year statute of limitations with creative legal argument clearly exercising reasonable skill, care, discretion, and judgment. *Id*. But the one-year statute of limitations was applicable and no amount of clever legal maneuvers would defeat it. Plaintiffs have not shown error.

Plaintiffs also argue that the trial court erred when it denied plaintiffs the opportunity to conduct discovery before granting defendant's motion for summary disposition. Specifically, plaintiffs assert that they wanted to take the deposition of Judge Schnelz to determine "what he meant by his pronouncement" that both the one-year and six-year statute of limitations barred recovery. Again, this case boils down to the fact that the one-year statute of limitations applied to the facts of the case. What Judge Schnelz was thinking when he stated that both statutes of limitations applied is irrelevant when he did find that the one-year statute applied. "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 stood a reasonable chance of uncovering factual support for plaintiffs' case. *Id*.

Plaintiffs finally argue that the trial court abused its discretion by awarding plaintiffs only $500 in attorney fees for setting aside a default. Plaintiffs specifically contend that they properly submitted their list of taxable costs in the amount of $4,007.50, which the trial court originally granted, but that the trial court abused its discretion when it so drastically reduced the amount to only $500 on defendant's motion. Defendant responds that plaintiffs' bill of costs was clearly outrageous and thus, the trial court's award of $500 was a principled outcome.

We review the trial court's decision under MCR 2.603(D)(4) whether to impose discretionary costs and conditions, such as a reasonable attorney fee, for abuse of discretion. *Reppke v Macomb Circuit Judge*, 394 Mich 462, 462; 231 NW2d 644 (1975). The abuse of discretion standard acknowledges that there will be circumstances in which there will be more than one reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). When the trial court selects one of these principled outcomes, it has not abused its discretion. *Id*. In other words, an abuse of discretion occurs only when the court's decision is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

The trial court granted defendant's motion to set aside the default subject to MCR 2.603(D)(4)[5]. Plaintiffs filed a bill of taxable costs in the amount of $4,007.50 with an itemization of claimed attorney costs incurred of 11.45 hours billed at $350 per hour, totaling $4,007.50. The trial court ultimately denied the full amount of attorney fees and instead ordered attorney fees in the amount of $500. We take no issue with that decision based on the record. Plaintiffs filed their complaint by personal service on October 8, 2007, but it was missing three attachments. Defendant called plaintiffs' counsel and notified him of the missing attachments. Defendant received the missing documentation on October 11, 2007. Defendant filed his answer and affirmative defenses on November 1, 2007, 21 days after receiving the missing attachments. However, plaintiff had already filed his default earlier in the day, along with the three missing attachments to his complaint. That same day, defendant contacted plaintiff via letter notifying him that he had filed his answer and affirmative defense that day and requesting the plaintiffs' reconsider their motion for entry of default judgment. Because of the slight procedural issue involved as well as only a relatively minor delay, it is plausible that the trial court reasonably concluded that plaintiffs' counsel spent an inordinate amount of time related to this matter. Thus, plaintiffs have not established an abuse of discretion and we do not find error.

Affirmed. Costs to defendant.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens

[5] "An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee."