STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. STOCKBRIDGE,

Plaintiff-Appellant,

v

GEORGE H. CHEDRAUE,

Defendant-Appellee.

UNPUBLISHED
February 26, 1999

No. 206942
Wayne Circuit Court
LC No. 96-632067 NM

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff, in pro per, appeals as of right from an order granting defendant's motion for summary disposition. We affirm.

As part of a plea agreement, plaintiff pleaded guilty to three counts of first-degree criminal sexual conduct. The charges arose out of plaintiff's ongoing sexual molestation of his minor stepdaughter. Plaintiff was sentenced to serve three concurrent terms of fifteen to thirty years' imprisonment. Following sentencing, defendant was appointed to represent plaintiff on appeal. Finding plaintiff's sentences proportionate, we affirmed in a memorandum opinion. *People v Stockbridge,* unpublished opinion memorandum of the Court of Appeals, issued June 30, 1994 (Docket No. 166220). Thereafter, plaintiff filed this action wherein he alleged that defendant committed legal malpractice when he failed to argue in the criminal appeal that the sentencing guidelines were improperly scored in plaintiff's case. Plaintiff further contends that defendant's negligent representation was a proximate cause of plaintiff's current incarceration for fifteen to thirty years.

Defendant moved for summary disposition pursuant to both MCR 2.116(C)(8) and (C)(10). The trial court granted defendant's motion after concluding that plaintiff's pleadings were deficient in that plaintiff had failed to allege facts which would establish that he would have prevailed on appeal had the appeal been prosecuted in the manner he suggested. Plaintiff contends on appeal that his pleadings were sufficient to withstand summary disposition. We disagree.

In order to prevail in a legal malpractice case, 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 a proximate cause of an injury, and (4) the fact and extent of the injury alleged. *The Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994) (opinion by Riley, J.). With respect to the issue of proximate cause, the Supreme Court in *Winiemko, supra* at 586, stated:

> As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff "must show that *but for* the attorney's alleged malpractice, he would have been successful in the underlying suit." [Emphasis in original.]

The foregoing concept is the "suit within a suit" analysis and it applies where the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal. *Id.* at 587. This means that in the case of alleged appellate malpractice a plaintiff must prove two aspects of causation in fact: "whether the attorney's negligence caused the loss or unfavorable result of the appeal, and whether the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation." *Id.* at 588. Further, the question whether an underlying appeal would have been successful is reserved to the court "because whether an appeal would have been successful intrinsically involves issues of law within the exclusive province of the judiciary." *Id.* at 608.

In this case, plaintiff's claims must fail because plaintiff has neglected to plead or present any facts that would establish that, had defendant raised the guidelines scoring issue in the criminal appeal, plaintiff would have been successful on appeal and, in turn, in the trial court. Plaintiff was sentenced under a guidelines range of ten to twenty-five years. He contends that Offense Variable 12 was improperly scored and, had it been properly scored, he would have moved to a guidelines range of eight to fifteen years. Under either guidelines range, plaintiff's minimum sentence of fifteen years was presumptively proportionate because it fell within the original guidelines range as well as the adjusted guidelines range. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Furthermore, although a sentence within the guidelines range can conceivably violate proportionality in unusual circumstances, *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990), plaintiff did not plead facts establishing unusual circumstances that would have been available for this Court to consider in plaintiff's criminal appeal to overcome the presumption of proportionality. Consequently, even if the alleged scoring error had been brought to this Court's attention in plaintiff's criminal appeal, the outcome would be the same. Therefore, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin