STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH KENT GILLETTE,[1]

Plaintiff-Appellant,

v

KIM DONALD SHAW and MARTIN T. LIEVOIS,

Defendants-Appellees.

UNPUBLISHED
November 20, 2001

No. 224149
Genesee Circuit Court
LC No. 98-063843-NM

Before: Zahra, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting defendants' motions for summary disposition. We affirm.

Plaintiff was placed on three years' probation in 1986, after he pleaded guilty to attempted breaking and entering of an occupied dwelling. It is undisputed that plaintiff stopped reporting to probation and owed $140 for court costs in 1988. Consequently, a bench warrant issued for plaintiff's arrest in 1988. Since 1988, plaintiff continued to have numerous contacts with police because of his behavior or actions. Some contacts resulted in criminal convictions, but the 1988 bench warrant was not executed. In 1996, police were advised of an altercation involving plaintiff. Plaintiff was not arrested based on the altercation, but for the outstanding bench warrant that had issued eight years earlier. Defendant Shaw represented plaintiff at the probation violation hearing. Defendant Shaw did not challenge the staleness of the bench warrant, and plaintiff pleaded guilty to one of the violations. As a result of the plea, plaintiff was sentenced to ninety days in jail, completion of Special Alternative to Incarceration (SAI) or boot camp, a three-year extension of probation, and payment of supervision costs. Plaintiff retained defendant Lievois to challenge the boot camp portion of his sentence. After five days in the boot camp program, it is undisputed that plaintiff quit the program. Plaintiff was resentenced to eighteen months to five years' in prison. Plaintiff filed this litigation, alleging that defendants committed legal malpractice and caused his incarceration by failing to challenge the staleness of the bench warrant.

[1] There is evidence in the record indicating that the actual spelling of plaintiff's last name is "Gillett." However, we have prepared the caption in accordance with the appellate docketing statement that is based on the orders appealed.

Plaintiff first argues that the trial court erred in granting summary disposition to defendants as a matter of law. We disagree. We review the grant or denial of summary disposition de novo. *The Herald Co v Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000). Four elements must be proved by the plaintiff to establish a legal malpractice claim: (1) the existence of the attorney-client relationship; (2) the acts which were alleged to have constituted the negligence; (3) that the negligence was the proximate cause of the injury; and (4) the fact and extent of the injury alleged. *Basic Foods Industries, Inc v Grant*, 107 Mich App 685, 690; 310 NW2d 26 (1981). To establish the last two elements of a legal malpractice action, the plaintiff had to prove that he would have been successful in the underlying action if it were not for the action or inaction by the defendant. *Id*. at 691-693. This Court noted that the "suit within a suit" concept was not required in all cases. *Id*. However, if the alleged malpractice occurred in the course of representation in an underlying criminal action, the plaintiff must prove that he would have received a better result or a lesser prison sentence but for the attorney's negligence. See *Schlumm v Terrence J O'Hagan, PC*, 173 Mich App 345, 349-350; 433 NW2d 839 (1988). The plaintiff bears the burden of establishing a better result and may not rely on speculation or conjecture. *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 621; 563 NW2d 693 (1997).

In the present case, defendants presented evidence that, even if they had challenged the timeliness of the execution of the bench warrant based on *People v Ortman*, 209 Mich App 251; 530 NW2d 161 (1995), the prosecutor would have disputed this or any other defense. Additionally, defendants presented evidence that the trial judge would have allowed the bench warrant to be amended to include recent violations by plaintiff. Indeed, plaintiff had extensive criminal contacts and convictions that would have justified amendment of the bench warrant. Plaintiff failed to meet his burden of demonstrating that he would have received a better result or a lesser sentence. *Miller, supra*; *Schlumm, supra*. Accordingly, the trial court properly granted defendants' motions for summary disposition.[2]

Plaintiff next argues that the trial court erred in considering the untimely affidavit of Judge Robert Ransom and erred in refusing to consider the depositions taken in a related action. We disagree. The timeliness of the affidavit was not raised and addressed in the lower court. Therefore, the issue is not preserved for appellate review. *Camden v Kaufman*, 240 Mich App 389, 400 n 2; 613 NW2d 335 (2000). Furthermore, we note that the affidavit was timely based on the trial court's scheduling ruling at the hearing regarding defendant Lievois' motion for protective order. Additionally, the trial court did not abuse its discretion in refusing to consider the deposition testimony taken in a related action. *Lombardo v Lombardo*, 202 Mich App 151,

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[2] The trial court granted defendant Lievois' motion by holding that the attorney had not breached the standard of care. However, disputed issues of fact underlying this determination preclude us from affirming on this basis. Those disputed factual issues are not implicated in the determination of the "suit within a suit" concept. We may affirm the trial court's decision when it reaches the correct result for the wrong reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

154; 507 NW2d 788 (1993). Plaintiff failed to move for and demonstrate good cause to extend the discovery period to include the depositions of these individuals. MCR 2.306(B)(2).

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ William B. Murphy