

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN G. RUSIECKI,

Plaintiff-Appellant,

v

STATE APPELLATE DEFENDER OFFICE and
DEBRA GUTIERREZ,

Defendants-Appellees.

UNPUBLISHED

June 4, 2002

No. 235206

Marquette Circuit Court

LC No. 00-37779-NM

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants in plaintiff's suit alleging legal malpractice. We affirm.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis of a claim.¹ In evaluating a motion for summary disposition on the ground that there is no genuine issue of material fact, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). The motion is proper if no genuine issue of material fact exists, thereby entitling the moving party to judgment as a matter of law. *Koenig v City of South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

This legal malpractice action filed against defendants Debra Gutierrez and the State Appellate Defender Office (SADO) arises from SADO attorney Gutierrez' representation of plaintiff at the appeal stage following a plea-based conviction on March 21, 1997, for third-

¹ Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court's order did not indicate which subsection of MCR 2.116 supported its grant of summary disposition. Because the trial court considered documentary evidence beyond the pleadings in evaluating the motion, this Court reviews its decision as having been decided under MCR 2.116(C)(10). *DeHart v Joe Lunghamer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417 (1999).

degree criminal sexual conduct involving sexual contact with an underage victim. Plaintiff is currently serving a seven- to fifteen-year prison term for this offense. In August 1997, defendant SADO was assigned to represent plaintiff in his appeal and defendant Gutierrez was assigned by SADO to represent plaintiff. In the months following her assignment, Gutierrez, on behalf of plaintiff, and plaintiff individually and pro se, both filed several motions to withdraw plaintiff's guilty plea and to seek a *Ginther*² hearing. On October 21, 1998, the trial court issued a written opinion and order denying plaintiff's motions. It is undisputed in this case that defendant Gutierrez subsequently failed to file a timely appeal from the trial court's order. The application for leave to file a delayed appeal, dated December 9, 1998, was denied by this Court on January 22, 1999, for failure to comply with MCR 7.205(F)(3).³

Plaintiff then filed a delayed application for leave to appeal to the Michigan Supreme Court. On January 21, 2000, the Supreme Court issued an order in lieu of granting leave to appeal, directing that the case be remanded to the Court of Appeals with instructions to further remand it back to the circuit court for the purpose of scheduling a *Ginther* hearing to determine whether defendant Gutierrez' failure to file a timely application deprived plaintiff of effective assistance of counsel. The Court further directed that "[i]f the trial court finds in favor of defendant's [plaintiff herein] claim, then the Court of Appeals shall treat defendant's application as having been timely filed, and shall then either grant or deny the application."

Following the *Ginther* hearing, the trial court found that defendant Gutierrez did in fact deprive plaintiff of effective assistance of counsel by failing to timely file an application for leave to appeal. With representation by a substitute court-appointed appellate attorney, plaintiff then filed a supplemental delayed application for leave to appeal with this Court. In an order dated July 17, 2000, this Court issued an order denying plaintiff's application "for lack of merit in the grounds presented."

Plaintiff subsequently initiated the present action in circuit court alleging malpractice, negligence, fraud, and deceit on the part of defendant Gutierrez arising out of her failure to file a timely appeal and her failure to raise certain issues in the trial court and this Court, i.e., that the guilty plea was the product of a period of illegal detention and therefore not voluntarily made, and that the increase in the charge in advance of the guilty plea was the result of prosecutorial vindictiveness. Plaintiff alleged damages consisting of wrongful imprisonment and incarceration of seven to fifteen years based on a constitutionally invalid guilty plea, loss of wages and reputation, and emotional distress. Defendants Gutierrez and SADO responded with their motion for summary disposition, which is the subject of this appeal, arguing in essence that plaintiff's claims were heard by this Court, a decision was rendered on the merits, and plaintiff's continued incarceration is a result of the fact that the appellate issues raised in his criminal case were without merit, rather than the product of professional negligence on the part of defendant Gutierrez. The trial court granted defendants' motion, holding that plaintiff was not prejudiced by defendant Gutierrez' alleged acts of professional negligence. Plaintiff now appeals.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ In the interim, the circuit court issued an order granting defendant Gutierrez' motion to withdraw as plaintiff's counsel.

Plaintiff first contends on appeal that the trial court erred in granting summary disposition because it is undisputed that defendant Gutierrez was found to have rendered ineffective assistance of counsel and in so doing, violated plaintiff's civil rights. Plaintiff maintains that he may recover nominal as well as punitive damages even if a violation of his civil rights caused no actual injury. As a preliminary matter, we agree with the trial court's assessment of the nature of this case when it stated, "It is important to recognize that this is a suit for legal malpractice, not for a violation of civil rights." Plaintiff's complaint pleads professional negligence. Although plaintiff attempts to characterize the present action as a claim for violation of his civil rights due to his alleged failure to receive effective assistance of counsel, the record clearly indicates that plaintiff ultimately received effective assistance of counsel and was successful in having his claims heard, on the merits, by this Court. Thus, we view this case as one premised on legal malpractice, not a civil rights violation.

A claim of legal malpractice is grounded in professional negligence. In order to establish a cause of action for legal malpractice, a plaintiff has the burden of establishing the following elements: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). With regard to the third element, factual causation, the plaintiff/client must establish that, but for the attorney's negligence, he would have prevailed in the underlying suit:

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." [*Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994) (emphasis in original).]

This so-called "suit within a suit" analysis applies where the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal. *Id.* at 587. Consequently, in a legal malpractice action alleging negligence in an appeal, 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. 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 the instant case, plaintiff's claim must fail because plaintiff has failed to plead or present any facts that would establish either component of the "suit within a suit" analysis. It is undisputed that defendant Gutierrez failed to file a timely appeal. However, plaintiff's right to have his claims heard on appeal was nonetheless preserved and the merits of the issues raised by plaintiff concerning his criminal conviction were ultimately considered and rejected by this Court. Thus, plaintiff has failed to demonstrate that he was prejudiced by defendant Gutierrez' actions.

As previously noted, on this Court's initial denial of plaintiff's application for leave to appeal in January 1999, plaintiff filed a delayed application for leave to appeal to the Michigan

Supreme Court. The Supreme Court issued an order in lieu of granting leave to appeal directing that plaintiff's application for leave to appeal be considered timely and either granted or denied, if the trial court concluded that plaintiff did not receive effective assistance of counsel in connection with his appeal. By virtue of this order, the Supreme Court relieved plaintiff of any negative effect resulting from the missed deadline. Thus, when the circuit court conducted its *Ginther* hearing and found that defendant Gutierrez had provided ineffective assistance of counsel, plaintiff was in fact given the opportunity to be heard by this Court. Pursuant to an order of the circuit court, plaintiff was provided with new appellate counsel who, in conformance with the Supreme Court's order, filed a brief in support of the supplemental delayed application for leave to appeal in this Court. The appellate brief addressed, among other issues, challenges to the efficacy of plaintiff's guilty plea (illegal detention and prosecutorial vindictiveness) and the operative allegations of ineffective assistance of counsel that form the basis for plaintiff's current claim of professional negligence. The appellate challenges to plaintiff's underlying conviction and his claims arising out of defendant Gutierrez' handling of his appeal were therefore considered on their merits by this Court which, having given full consideration to the issues raised by plaintiff, denied his application "*for lack of merit in the grounds presented.*" The underlying criminal conviction was thus reviewed by this Court and plaintiff's claims were found to be unmeritorious. Under these circumstances, plaintiff is unable to demonstrate the requisite "suit within a suit" causation elements necessary to sustain a legal malpractice action: that defendant Gutierrez' negligence "caused the loss or unfavorable result of the appeal" and that "the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation." *Winiemko, supra* at 588. The trial court therefore properly granted summary disposition in favor of defendants.

Plaintiff further claims that the trial court abused its discretion when, in granting summary disposition in favor of defendants, it also allowed defendants, as the prevailing parties, to tax costs against plaintiff when no such motion was pending before the court. However, pursuant to MCR 2.625, no motion is necessary. Plaintiff's argument is therefore without merit.

Affirmed.

/s/ Richard Allen Griffin
/s/ Harold Hood
/s/ David H. Sawyer