STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER L. TULL, Plaintiff-Appellant,	UNPUBLISHED June 29, 2004
v	No. 244982 Washtenaw Circuit Court
STATE APPELLATE DEFENDER OFFICE, Defendant-Appellee.	LC No. 01-000756-NM

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

In this legal malpractice claim, plaintiff appeals as of right from the trial court order granting defendant's motion for summary disposition. Although the motion was filed pursuant to MCR 2.116(C)(8), the trial court looked beyond the pleadings to the evidentiary support for the claim. Thus, we review the trial court's decision under the standard applicable to MCR 2.116(C)(10). *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). We affirm.

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim, and we must consider the pleadings, together with any affidavits, depositions, admissions or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists. MCR 2.116(G)(2); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

In this case, defendant failed to timely file an application for leave to appeal plaintiff's 1995 conviction for felony murder.[1] As a result, this Court dismissed plaintiff's delayed

[1] Plaintiff's appeal as of right was dismissed by this Court on December 5, 1996, because his request for appellate counsel was untimely under MCR 6.425(E)(1)(c); that is, he failed to (continued…)

application for leave to appeal pursuant to MCR 7.205(F)(3), because the application was not filed within twelve months and none of the exceptions to the rule set forth in MCR 7.205(F)(4) were applicable. Plaintiff then filed this legal malpractice claim against defendant, alleging that defendant had committed malpractice by irretrievably losing his right to appeal. Plaintiff alleged that but for defendant's negligence, he would have succeeded in his appeal of the underlying action, i.e., his criminal conviction. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), alleging that: 1) plaintiff was required to offer expert witness testimony to establish that defendant's actions constituted legal malpractice; 2) plaintiff failed to name an expert witness; and 3) without expert witness testimony, plaintiff did not make out a prima facie case of legal malpractice, thereby failing to state a claim upon which relief could be granted. At the hearing on defendant's motion for summary disposition, there was no oral argument. Rather, the trial court noted that it had reviewed defendant's motion, and characterized defendant's argument as "center[ing] around [sic] the question of whether there's any testimony on the breach of the standard of care." The trial court granted summary disposition in favor of defendant, and plaintiff now appeals that ruling.

On appeal, plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition because the trial court failed to respond to his motion for guidance. We disagree. Plaintiff, who represented himself in the lower court, insists that he could only proceed with providing a list of expert witnesses after the trial court had answered his questions regarding how to proceed with expert testimony. The fundamental problem we observe with this argument is that the questions posed to the trial court were, in essence, a request for legal advice. The motion for guidance asked the trial court:

> If Plaintiff does in fact need an expert witness:
>
> a. What would be the purpose?
>
> b. What would their qualifications have to be?
>
> c. Would an attorney suffice?
>
> d. Would the attorney have to be an appellate specialist?

Michigan courts must maintain their independence from the litigants before the court. The Michigan Code of Judicial Conduct, Canon 2A requires a judge to avoid all impropriety and the appearance of impropriety. Canon 2B requires a judge to promote public confidence in the integrity and impartiality of the judiciary at all times. Moreover, as a general rule, a trial judge may be disqualified if there is an appearance of bias towards one of the parties such that the judge is "unable to hold the balance between vindicating the interests of the court and the interests of the [affected party]." *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995) (citations omitted). Therefore, if the trial court heard plaintiff's motion for guidance and answered plaintiff's questions, the court would not be remaining impartial or independent – it would be giving legal advice to a party on how to proceed. Thus, plaintiff's argument that

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(…continued)

request counsel within forty-two days of his November 14, 1995, sentence.

summary disposition was inappropriate because he was waiting for the court to answer his motion for guidance is without merit.

Next, plaintiff argues that expert testimony was unnecessary because any lay person could see that MCR 7.205(F)(4) was violated when defendant failed to file the claim of appeal within twelve months of plaintiff's criminal sentence. While that may be true, it is insufficient to support a claim for legal malpractice.

The elements of a legal malpractice action are: (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. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). "As in other tort actions, the plaintiff has the burden of proving all the elements of the suit to prevail." *Id*. at 586. With regard to the third element, the plaintiff/client must prove 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" In other words, "'"the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding."'" To hold otherwise would permit a jury to find a defendant liable on the basis of speculation and conjecture. Although the "suit within a suit" concept is not universally applicable, it applies where the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal. [*Id.* at 586-587 (internal citations omitted).]

Our Supreme Court explained: "[t]hus, essential to the determination of proximate cause in a legal malpractice action is the plaintiff's ability to show that the appellate court even would have addressed the issue: 'Specifically, the plaintiff must show that an appellate court would have had jurisdiction to hear the appeal, that the appellate court would have granted review when review is discretionary, and that the trial court's judgment would have been modified on review.'" *Id*. at 587 n 15, quoting Comment, *Attorney malpractice: Problems associated with failure-to-appeal cases*, 31 Buffalo L R 583, 589 (1982).

In the instant case, plaintiff failed to create a genuine issue of material fact on his malpractice claim inasmuch as he failed to plead any facts or come forward with any competent evidence to establish either component of the "suit within a suit" analysis. It is undisputed that defendant failed to timely file for leave to appeal on behalf of plaintiff. However, there is nothing in the record to indicate that this Court would have granted leave to appeal, or that if this Court granted leave, that he would have prevailed on appeal. Plaintiff's complaint does not even address whether this Court would have granted leave to appeal, and merely sets forth conclusory assertions concerning his success on appeal:

> As a direct and proximate result of the breaches of the duties already listed, Plaintiff has been affected in the following respects:

a. He has lost his opportunity to appeal his conviction and sentence by leave in the Michigan Court [o]f Appeals.

b. He may never be able to have the merits of his appealable issues heard, which would condemn him to a natural life sentence, *when clearly, his appeal would have been successful*.

c. He remains convicted of first degree felony murder, *when his appealable issues clearly show that he would have received substantial relief on appeal*. [Emphasis added.]

Further, to create a fact question, plaintiff would have had to rely on some expert opinion that the appeal would have been granted and successfully resulted in a favorable decision for plaintiff. There is no such support for plaintiff's claim. Therefore, the trial court's grant of summary disposition in favor of defendant was proper.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette