STATE OF MICHIGAN

COURT OF APPEALS

ELDON VANCE, Plaintiff-Appellant,	UNPUBLISHED December 16, 2004
v	No. 248464 Saginaw Circuit Court
COVENANT MEDICAL CENTER, INC., Defendant-Appellee.	LC No. 99-029074-NZ

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this wrongful termination case, plaintiff appeals as of right the trial court's entry of a judgment of no cause of action in favor of defendant, following a jury verdict that defendant had just cause to terminate plaintiff.[1] We affirm.

Background Facts

Plaintiff was hired by defendant on March 12, 1998. At that time, the parties entered into a "physician employment agreement" which provided in pertinent part:

> 2.A.(3) Doctor shall, as a condition of employment hereunder, obtain and maintain medical staff membership and clinical privileges at Hospital in accordance with the normal policies and procedures of Hospital . . . .
>
> 4.A. Doctor's employment shall commence on April 30, 1998 (the "Effective Date"), and shall continue for a period ending June 30, 2001. . . . This Employment Agreement may be terminated earlier as follows:

[1] As an initial matter, we note that several issues set forth in plaintiff's table of contents and the body of plaintiff's brief on appeal do not correspond with the issues as set out in plaintiff's statement of questions involved, and therefore are not properly presented for review. *Grand Rapids Employees Credit Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999); *Hammack v Lutheran Social Services*, 211 Mich App 1, 7; 535 NW2d 215 (1995); MCR 7.212(C)(5) and (7).

(1) Upon mutual consent of the parties

(2) Upon discharge of Doctor by Hospital for just cause. For purposes [o]f this Employment Agreement, "just cause" includes, without limitation: Doctor's conviction of a felony; loss of license to practice medicine in the State of Michigan; the revocation, termination, or material reduction of staff privileges pursuant to the provisions of the ten effective medical staff bylaws at Hospital for reasons related to the professional performance or personal misconduct of Doctor; failure to perform duties and responsibilities hereunder with reasonable proficiency. . . .

Plaintiff was hired to work in a new family practice clinic that was scheduled to open in Birch Run. Plaintiff contacted Audrey Sebert, a former employee, about her interest in becoming a clinical medical assistant at the new clinic. Sebert had worked for plaintiff in 1991, and they had been in an intimate relationship for approximately one year around that time. Both Sebert and plaintiff explained that they had had sexual contact, but never had intercourse. Sebert left plaintiff's employ after their intimate relationship ended.

According to Sebert, plaintiff contacted her twice about the job opening at the clinic, and she told him that she was not interested. Plaintiff contacted Sebert again, explained the excellent benefits available from defendant, and stated that he had written a letter of resignation and would only be employed by defendant for a few more months. Patricia Henige, defendant's practice manager, eventually interviewed Sebert, and Sebert accepted the position because she would be reporting to Henige, would not be alone with plaintiff, and because she was under the impression that plaintiff would be leaving in a few months. When Sebert was hired, neither plaintiff nor Sebert revealed that they had a prior intimate relationship.

The Birch Run clinic opened on November 3, 1998. Sebert testified that shortly after the clinic opened, plaintiff came up behind her and kissed her while he was giving her a tour of the unfinished suites in the new building. Sebert testified that she pulled away from plaintiff and walked away. Plaintiff admitted that he and Sebert kissed, but claimed that the kiss was mutual and that Sebert initiated the kiss with her body language and by being "bubbly and flirtatious." According to plaintiff, "certainly it wasn't [him] grabbing her," and Sebert "absolutely" did nothing to physically push him away. Sebert did not report the incident to anyone at the hospital.

On January 5, 1999, Sebert asked Henige for a transfer to a different facility. When Henige asked Sebert her reason for wanting a transfer, Sebert told Henige about plaintiff's unwanted advances, and explained her prior relationship with plaintiff. Sebert stated that plaintiff would become angry when she refused his advances. Henige testified that Sebert did not want to file a complaint against plaintiff at that time, because she was afraid of losing her job. Henige documented her meeting with Sebert in a memo, and later documented three instances in which it appeared that plaintiff arranged to be alone with Sebert by changing the clinic work schedule. Henige learned of two instances from Sebert and personally witnessed the other instance.

A few days after Sebert's request for a transfer, plaintiff asked Sebert and another staff member to accompany him to a meeting with a client. Sebert was invited to the meeting because she was the contact person for the client. Plaintiff asked Mary Cronkwright, the other staff

member, to drive separately to the meeting. On the way back to work, plaintiff drove past the clinic and stopped at a restaurant for dessert, even though Sebert did not want dessert. Sebert testified that when she returned from the restroom, plaintiff had ordered a single dessert with two spoons, and said it was "more romantic" that way. Plaintiff admitted that he ordered the dessert with two spoons "in case [Sebert] wanted some so she wouldn't have to lick off mine," and claims that if he said it was "more romantic," it was "a purely flippant remark." After the dessert incident, plaintiff made Cronkwright the client contact person, instead of Sebert.

Sebert also told Henige that plaintiff had invited her to go to Las Vegas and to concerts with him. Plaintiff did not deny this, but claimed that they were merely social invitations, and that his wife was also included. Henige documented her conversations with Sebert in a memo, and told Sebert that she would have to inform Raymond Miles, director of defendant's management services, about Sebert's encounters with plaintiff. According to Miles, Henige informed him that plaintiff was "hitting on" Sebert and that Sebert wanted it to stop, but did not want to file a complaint. Miles sought advice from defendant's legal counsel, because he was unsure how to proceed, given Sebert's desire not to file a complaint. Defendant's legal counsel told Miles to meet with plaintiff to inform him of the allegations and to instruct him that if the allegations were true, to stop his behavior immediately.

At a January 13, 1999, meeting, Miles confronted plaintiff with Sebert's allegations. He told plaintiff that if the allegations were true, they could be construed as sexual harassment and that any similar behavior toward Sebert had to stop immediately and that any such conduct would not be tolerated. Plaintiff assured Miles that he would stop pursing Sebert, and that he had not intended to make her feel uncomfortable. However, Miles found it "curious" that plaintiff did not deny the allegations. Plaintiff admitted that Miles told him to "cease and desist" his behavior toward Sebert, but maintained that "unless something's happened to begin with, you can't cease and desist it . . . [s]o [he] left the conversation alone . . . and didn't argue with [Miles]."

Miles' employment with defendant was terminated in February 1999. Sebert testified that plaintiff told her that because Miles was no longer employed by defendant, no one else viewed him as a "sexual harasser[,] so his slate was wiped clean." However, plaintiff maintained that he did not recall making, and would not have made, such a statement. Sebert testified that plaintiff told her that he was the only friend she had, that Henige was not her friend, and that she, Sebert, was viewed as a troublemaker. Despite Miles' warnings to stop any advances toward Sebert, plaintiff's inappropriate behavior continued.[2]

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[2] On one occasion, plaintiff told Sebert that he wanted to spend two nights with her on a cruise that some staff members in the office were taking, and that she would need the other two nights of the trip to recuperate. Plaintiff admitted making the comment, but claimed that it was in response to Sebert's teasing him about canceling the trip.

On another occasion, plaintiff followed Sebert out to her car and confronted her about her feelings toward him, and indicated that he wanted to spend more time with her. Sebert reminded plaintiff that he was married, and informed him that she did not have intimate feelings toward

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Sebert testified that on May 10, 1999, plaintiff asked her for a kiss while they were in the basement of the clinic. Sebert explained that she and another employee had taken a box of supplies to the basement, and that plaintiff had followed them downstairs. After the other employee went back upstairs, plaintiff grabbed Sebert's arm and asked her where she was going, and told her that he just wanted a kiss. Sebert pulled her arm away, said "no," and went back upstairs. When plaintiff came upstairs, he slammed the door to his office. Plaintiff's version of the incident is similar; however, plaintiff claims that Sebert volunteered to go to the basement with him, and that Sebert was acting "real cutsie" and "flirtatious," and stood so close to him that he thought she wanted a kiss.

Shortly after the incident, Sebert told Henige that plaintiff had attempted to kiss her in the basement. Henige documented her conversation with Sebert in a memo, and contacted Anne Marie Garbinski, the person who had taken over Miles' job duties. Henige also contacted defendant's legal counsel. On May 12, 1999, Henige met with Garbinski and Mary Beth Ciesla, defendant's director of human resources.

On May 13, 1999, Garbinski and Ciesla met with plaintiff to discuss Sebert's allegations as relayed to them through Henige. Ciesla first confirmed that the January 1999 meeting between plaintiff and Miles had occurred. Ciesla then confronted plaintiff with Sebert's allegation that he asked her for a kiss, and plaintiff acknowledged that the incident had occurred. After discussing the remainder of the allegations, Ciesla informed plaintiff that an investigation would be conducted and that he should not talk to Sebert, because it could be viewed as intimidation and retaliation. Plaintiff was not scheduled to work the following day, and was told to have no contact with Sebert. Plaintiff maintained that Ciesla told him that she "preferred" he not talk to Sebert.

Despite Ciesla's instruction to refrain from having contact with Sebert, plaintiff went to the clinic the following day for the specific purpose of meeting with Henige and Sebert. Plaintiff claimed that he only intended to talk to Henige, but that he wanted Sebert present to listen. Sebert testified that plaintiff "started hollering" at her and Henige; however, plaintiff maintained that he "went in and did not scream, did not yell." Plaintiff and Henige both testified that plaintiff threatened legal action against defendant, and stated that he would recover enough money on which to retire. Plaintiff also told Henige that he would "make a fool out of [her]" at trial. Plaintiff made several demands that he wanted Henige to take to Garbinski. Plaintiff

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him, and that she just wanted a working relationship and "wasn't interested." Plaintiff did not deny asking Sebert about her feelings, but claimed that he merely intended to determine whether she was interested in a friendly platonic relationship or a strictly business relationship. Plaintiff maintained that his confrontation had nothing to do with romantic feelings toward Sebert, and that he did not intend to have a romantic relationship with Sebert.

On another occasion, plaintiff attempted to show Sebert pornographic material on his office computer. Sebert also testified about an incident where a physician's assistant had done a gynecological examination on a young girl, instead of plaintiff who usually performed the examinations. Plaintiff was disgruntled because he had not performed the exam, and stated "well, at least I get to sniff the sheets." Plaintiff did not deny that these incidents occurred, but maintained that they were taken out of context.

informed Sebert that he would no longer protect her and asked if she had told anyone about their prior relationship. Plaintiff admitted stating that if he was fired, he would sue defendant. Henige and Sebert were upset by the meeting and intimidated by plaintiff's behavior.

Following the meeting, Henige contacted Garbinski about the incident, and documented the encounter in a memo. Ciesla and Garbinski continued their investigation into the original complaint by speaking with Henige and Sebert on May 14, 1999. Sebert described numerous other incidents with plaintiff at that time; however, Ciesla testified that the additional incidents did not play a role in the decision to terminate plaintiff's employment. Ciesla recommended that plaintiff's employment be terminated because his behavior was such that she did not feel he would follow defendant's directives. First, Miles instructed plaintiff to refrain from making further advances toward Sebert, but he admittedly did so by asking her for a kiss on May 10, 1999. Second, Ciesla instructed plaintiff to have no further contact with Sebert following their May 13, 1999, meeting, but he met with Sebert and Henige the very next day, in direct contravention of Ciesla's order.

Garbinski had the final authority to terminate plaintiff. In addition to the issues on which Ciesla's recommendation to terminate plaintiff was based, Garbinski also based her decision on plaintiff's failure to follow through on his contractual obligation to obtain staff privileges. The application that plaintiff had submitted for staff privileges was incomplete, and Sheila Duby, an associate medical staff coordinator for defendant, notified plaintiff that his application was incomplete in March 1999. In April 1999, plaintiff provided a handwritten response to the request for additional information; however, the supplemental information was inadequate to process plaintiff's application any further. Duby again requested the required information, but plaintiff failed to supply her with an acceptable response.

Ciesla and Garbinski met with plaintiff to terminate his employment, which was effective May 25, 1999. Plaintiff brought suit against defendant for wrongful discharge, and claimed that there was no just cause to terminate his employment, as required by the employment contract. Following trial, the jury found that there was "a contract between plaintiff and defendant which provided that plaintiff could only be terminated for just cause," and that "defendant ha[d] just cause for plaintiff's termination." Plaintiff appeals as of right the trial court's entry of a judgment of no cause of action in favor of defendant.

Arguments on Appeal

Plaintiff first argues that the trial court erred in failing to order a change of venue for trial. Specifically, plaintiff claims that an impartial trial could not be held in Saginaw County because almost all of the jurors had been treated, or knew someone that had been treated, by defendant hospital. MCR 2.221(A) provides that "[a] motion for change of venue must be filed before or at the time the defendant files an answer." MCR 2.221(C) provides that "[a]n objection to venue is waived if it is not raised within the time limits imposed by this rule." Here, plaintiff never moved for a change of venue at any stage of the proceedings; therefore, his objection to venue on appeal is waived.

To the extent plaintiff argues that the trial court should have sua sponte ordered a change of venue pursuant to MCR 2.222(A), because "an impartial trial [could not] be had where the action [wa]s pending," MCR 2.222(B) provides that "[i]f the venue of the action is proper, the

court may not change the venue on its own initiative, but may do so only on motion of a party." Again, because plaintiff failed to move for a change of venue, he has waived the issue. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Plaintiff next argues that the trial court erred in failing to instruct the jury that defendant, as a corporation, was responsible for the acts and decisions of its employees. We disagree. To preserve an instructional issue for appeal, a party must request the instruction before the instructions are given and must object on the record before the jury retires to deliberate. MCR 2.516(C); *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000). The objection must specifically state the objectionable matter and the ground for the objection. MCR 2.516(C); *Hammack v Lutheran Social Services*, 211 Mich App 1, 10; 535 NW2d 215 (1995). Plaintiff did not request an instruction on or object to the trial court's failure to instruct the jury that defendant was responsible for the acts and decisions of its employees; therefore, the issue is not preserved for review. Failure to timely and specifically object precludes appellate review absent a showing of plain error that affected the claimant's substantial rights, i.e., plaintiff must show a clear or obvious error that affected the outcome of the case. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Our Supreme Court has stated that "[j]ury instructions should include 'all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them.'" *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), quoting *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Further, "[i]nstructional error warrants reversal if the error 'resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'" *Cox*, *supra* at 8, quoting *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985).

Here, plaintiff's cause of action against defendant was for breach of his employment contract. Plaintiff did not allege that defendant was vicariously liable for any tortious conduct of its employees. Further, defendant did not argue that it was not responsible for the actions and decisions of Garbinski in terminating plaintiff. The jury instructions included "all the elements of [] plaintiff's claims," and did not "omit material issues, defenses, or theories" that were supported by the evidence. *Cox*, *supra* at 8. The trial court did not err in failing to instruct the jury that defendant, as a corporation, was responsible for the acts and decisions of its employees. Plaintiff has failed to demonstrate error; therefore, he is not entitled to relief on this issue.

Plaintiff next argues that the trial court abused its discretion when it sustained defendant's objection to testimony regarding plaintiff's offer to compromise, pursuant to MRE 408. We ordinarily review preserved evidentiary issues for an abuse of the trial court's discretion. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001). However, because plaintiff is apparently arguing a different ground for admission of the evidence on appeal than he did at trial, the issue is not properly preserved for appellate review. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997); *In re Leone Estate*, 168 Mich App 321, 322; 423 NW2d 652 (1988); MRE 103(a). Review of unpreserved evidentiary issues is to determine whether there was plain error affecting a party's substantial rights. *Hilgendorf*, *supra* at 700.

MRE 408 provides in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Here, plaintiff sought to testify regarding a meeting he had with Henige and Sebert, during which he threatened litigation against defendant and made the following demands: that he be given an apology; that he be given one weeks' notice before he was discharged; and that he be paid retroactively for overtime hours. Plaintiff requested Henige to inform Garbinski of his demands. Defense counsel objected on the basis of MRE 408, arguing that such testimony was inadmissible because it constituted an offer to accept a valuable consideration in attempting to compromise a claim, i.e., if defendant acquiesced in plaintiff's demands, plaintiff would refrain from filing suit against defendant for wrongful termination. Following an extensive offer of proof concerning plaintiff's proposed testimony, the trial court sustained defendant's objection.[3]

On appeal, plaintiff does not dispute that his statements during the meeting were made in pursuit of a compromise, and therefore excluded by MRE 408. Rather, plaintiff initially argues that the evidence was being offered for a purpose that was not excludable under the rule.

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[3] Although not challenged on appeal, the trial court's reasoning appears to be correct. MRE 408 is identical with FRE 408. An authors' comment on FRE 408 states that "Rule 408 protects only offers to compromise and compromises of claims that are disputed as to either validity or amount." Further, "[a]lthough the formal commencement of legal proceedings is sufficient to establish the existence of a dispute, neither it nor the threat of legal action is necessary for a dispute to be found." Stated another way, the threat of legal action is sufficient to constitute a dispute for purposes of the rule. Here, during his meeting with Henige and Sebert, plaintiff preemptively threatened to file suit against defendant for breach of his employment contract in the event that he was fired because of his sexual advances toward Sebert. The fact that plaintiff had not yet been fired is irrelevant. Plaintiff's threatened legal action was sufficient to constitute a dispute for purposes of MRE 408. Next, an authors' comment to FRE 408 explains that "[r]ule 408 protects statements only if they constitute or are made in pursuit of a compromise," and "[t]he context and character of the statement or offer must evince some element of concession." Here, plaintiff made demands to Henige, and requested that she take them to Garbinski. Plaintiff's demands were clearly made in pursuit of a compromise, i.e., if defendant acquiesced in plaintiff's demands, plaintiff would refrain from filing suit against defendant for wrongful termination. Therefore, plaintiff's statements and defendant's responses to those statements were protected by the rule, and the trial court properly excluded such evidence.

However, plaintiff does not state for what proper purpose he sought to offer the evidence. Plaintiff cites *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 638; 329 NW2d 760 (1982) for the proposition that evidence is admissible under MRE 408 where it is introduced to negate a defendant's contention that the plaintiff's performance of a contract was unsatisfactory. However, plaintiff does not go on to argue, and it is difficult to see, how testimony concerning his meeting with Henige and Sebert could negate defendant's contention that he breached his employment contract.

Plaintiff's primary argument on appeal is the alleged detriment he suffered as a result of the trial court's exclusion of testimony concerning his meeting with Henige and Sebert. Specifically, plaintiff complains that he was prejudiced because he could not testify regarding his "tone" during the meeting. Plaintiff claims that his testimony would have refuted a memo written by Henige summarizing the meeting, which, according to plaintiff, portrayed plaintiff as intimidating and unreasonable. Plaintiff claims that the trial court's exclusion of his proposed testimony allowed defendant to "maintain the lie that plaintiff was threatening and out of control." However, the memo was admitted at trial by stipulation of the parties, and "[a] party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).[4]

Further, while plaintiff complains that the trial court's exclusion of statements made during the May 14, 1999 meeting was detrimental to his case in that the jury was prevented from hearing evidence that plaintiff had a calm demeanor during the meeting, MRE 408 specifically provides that "[e]vidence of conduct" made in compromise negotiations is not admissible. Therefore, there was no plain error affecting plaintiff's substantial rights, and even if the issue had been properly preserved, the trial court did not abuse its discretion in sustaining defendant's objection to plaintiff's proposed testimony. See *Weiss, supra* at 39.

Plaintiff also inquires "[h]ow can the [trial court] allow the defendant's attorney to object to something he feels the plaintiff is going to say[?]," and argues that the trial court "did not know what [he] was going to testify to exactly." However, plaintiff clearly does not have an understanding of the basic evidentiary concepts of objections and offers of proof. MRE 103. The record reveals that defense counsel made an appropriate objection on the basis of MRE 408, plaintiff's counsel made an offer of proof regarding plaintiff's proposed testimony, and the trial court then sustained defense counsel's objection, all of which were proper under MRE 103.

Plaintiff also argues that the trial court's ruling did not comport with MRE 103(a)(2), which provides in pertinent part:

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[4] To the extent plaintiff conversely argues that he *wanted* the Henige memo admitted because it portrayed him as being reasonable, the memo was admitted. In any event, plaintiff mischaracterizes the memo, which stated that plaintiff asked Henige if she thought his *demands* were reasonable, not whether he was acting reasonably. Henige stated: "I said I didn't think [the demands] were unreasonable and so I guess that makes them reasonable."

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

However, the record reveals that before sustaining defendant's objection to plaintiff's testimony on the basis of MRE 408, plaintiff's counsel gave an extensive offer of proof to the trial court concerning plaintiff's proposed testimony. And because plaintiff's substantial rights were not affected, no error can be predicated on the trial court's ruling on defendant's objection. The trial court properly sustained defendant's objection to testimony regarding plaintiff's offer to compromise, pursuant to MRE 408.

Plaintiff next argues that the verdict was against the great weight of the evidence. To be preserved for appeal, a challenge to a verdict on the ground that it is against the great weight of the evidence, MCR 2.611(A)(1)(e), must be raised in a motion for a new trial. *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997). Failure to raise the issue by the appropriate motion waives the issue on appeal unless failure to consider the issue would result in a miscarriage of justice. *Id*.

Here, the jury chose to believe Sebert's account of her encounters with plaintiff, as opposed to plaintiff's version of the events. Further, the jury found the testimony of Henige, Miles, Ciesla, and Duby to be more credible than plaintiff's testimony. And it is well settled that the jury has the unique opportunity to observe witnesses and has the responsibility to determine the credibility and weight of trial testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). The jury believed that defendant had just cause to terminate plaintiff under the terms of his employment contract. Because there is competent evidence to support the jury's verdict, it should not be set aside, and plaintiff has waived this unpreserved issue. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999); *Hyde*, *supra* at 525.

Finally, plaintiff argues that he was denied the effective assistance of counsel. However, it is well settled that claims of ineffective assistance of counsel are inapplicable in civil cases. In *United States v $100,375 in US Currency*, 70 F3d 438, 440 (CA 6, 1995), the Court of Appeals for the Sixth Circuit noted that the Sixth Amendment right to effective assistance of counsel is "explicitly confined" to criminal prosecutions. Similarly, Const 1963, art 1, § 20 provides that "[i]n every *criminal prosecution*, the accused shall have the right . . . to have the assistance of counsel for his or her defense . . . ." (emphasis added). Accordingly, plaintiff's claim of ineffective assistance of counsel is without merit, because he is not entitled to such a right as a civil litigant.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio