

STATE OF MICHIGAN
COURT OF APPEALS

HARVEY GRACE,

Plaintiff-Appellant,

v

BRUCE LEITMAN and BRUCE LEITMAN, P.C.,

Defendants-Appellees.

UNPUBLISHED

March 16, 2006

No. 257896

Oakland Circuit Court

LC No. 2002-045572-NM

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

This Court reviews de novo a circuit court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law." *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

To establish a claim for legal malpractice, the plaintiff must allege: (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. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). An attorney is obligated to use reasonable skill, care, discretion, and judgment in representing a client. *Id.* at 656. "Further, according to SJI2d 30.01, all attorneys have a duty to behave as would an attorney 'of ordinary learning, judgment or skill . . . under the same or similar circumstances.'" *Id.* An attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law. *Id.* However, there is no malpractice liability created by losing a case if the attorney has acted with the requisite diligence and his actions were "in the best interests of his client." *Id.* at 658.

Mere errors in judgment by a lawyer are generally not grounds for a malpractice action where the attorney acts in good faith and exercises reasonable care, skill, and diligence. *Id.* at 658. Thus,

there can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight. . . . To hold that an attorney may not be held liable for the choice of trial tactics and the conduct of a case based on professional judgment is not to say, however, that an attorney may not be held liable for any of his actions in relation to a trial. He is still bound to exercise a reasonable degree of skill and care in all his professional undertakings. [*Id.* at 658-659, quoting *Woodruff v Tomlin*, 616 F2d 924, 930 (CA 6, 1980) (citations omitted).]

In affirming the dismissal of the plaintiffs' malpractice case in *Simko*, our Supreme Court considered the attorney's failure to call additional defense witnesses and held that the "[p]laintiffs' claim that certain witnesses should have been called is nothing but an assertion that another lawyer might have conducted the trial differently, a matter of professional opinion that does not allege violation of the duty to perform as a reasonably competent criminal defense lawyer." *Id.* at 660-661.

In this case, plaintiff's claims that defendants mishandled the issue of the valuation of Grace & Wild in the underlying fraud action do not establish malpractice. The evidence demonstrates that defendants fashioned a trial strategy consistent with governing principles of law and reasonable professional judgment. *Id.* at 661. Even accepting that defendants inaccurately informed plaintiff that they had retained an expert who could offer testimony regarding value, plaintiff has not demonstrated that the defense was harmed because of it, see *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994), nor has plaintiff demonstrated that defendants failed to exercise professional judgment by pursuing a strategy of attempting to discredit Brooke Grace's valuation expert in lieu of presenting their own valuation testimony in the fraud action.

Defendants' failure to call the bank loan officer who handled plaintiff's loan application also implicates defendants' exercise of professional judgment and, as such, may not establish liability for legal malpractice.

The record does not support plaintiff's claim that defendants improperly advised him to proceed to trial in the underlying fraud action. Rather, the evidence discloses that defendants repeatedly sought a settlement and urged plaintiff that a settlement would be in his best interests. Nor is there any merit to plaintiff's claim that defendants improperly handled an appeal in this Court in Docket No. 163344. The evidence discloses that defendants were not involved in the handling of that appeal.

Although plaintiff also alleges that defendant Leitman made certain misstatements at the trial of the underlying fraud action, there is no basis for concluding that those minor

misstatements affected the outcome of that trial. As such, they do not support an action for legal malpractice. *Charles Reinhart Co, supra* at 586.

The trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot