

STATE OF MICHIGAN
COURT OF APPEALS

GLENN R. UNDERWOOD,

Plaintiff-Appellant,

v

ROCKWOOD W. BULLARD III, RAE
ANDERSON, and BULLARD ANDERSON, P.C.,

Defendants-Appellees.

UNPUBLISHED

January 20, 2009

Nos. 279457; 280528

Oakland Circuit Court

LC No. 2007-080087-NM

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

In Docket No. 279547, plaintiff Underwood appeals as of right from the trial court's June 5, 2007, order granting defendants' motion for summary disposition. In Docket No. 280528, Underwood appeals as of right from the trial court's August 23, 2007, order awarding defendants sanctions in the amount of \$7,500 pursuant to MCR 2.114(E). We affirm.¹

I. Background

This action arises from an underlying lawsuit in which Underwood's siblings sued him and others in regard to their involvement with the Underwood Property Management Company, a partnership that owned and managed numerous real estate properties. Approximately two months after the lawsuit was filed, Underwood hired defendants to represent him in the lawsuit. By the time defendants filed their appearance, Underwood, acting in propria persona, had already

¹ We reject defendants' challenge to this Court's jurisdiction in Docket No. 279457. Defendants challenge this Court's jurisdiction on the ground that, although plaintiff timely filed his appeal within 21 days after entry of the July 2, 2007, order denying his motion for reconsideration, the motion for reconsideration was not filed within the 14-day period prescribed by MCR 2.119(F)(1). For appellate purposes, however, MCR 7.204(A)(1)(b) provides that an appeal by right may be filed within 21 days after entry of an order denying a motion for reconsideration if the motion for reconsideration was filed within the initial 21-day appeal period. Plaintiff's motion for reconsideration was filed on June 26, 2007, 21 days after entry of the order granting defendants summary disposition. Therefore, this Court has jurisdiction over this appeal.

filed an answer to the complaint and unsuccessfully defended against a motion for a restraining order, accounting, and injunction regarding the partnership assets.

On January 13, 2005, Underwood terminated defendants' services because of monetary concerns and because he did not believe defendants were properly addressing his interests. After defendants withdrew, Underwood obtained new counsel and was represented throughout the remainder of underlying litigation by the successive representation of two different attorneys. After the plaintiffs in the underlying case filed an amended complaint, Underwood's new counsel filed an amended answer with affirmative defenses and a counter-complaint. The parties then filed cross-motions for summary disposition. The plaintiffs were granted summary disposition on their breach of fiduciary duty claim against Underwood and on Underwood's counter-complaint. Underwood was granted summary disposition on the plaintiffs' fraud and conversion claims against him. The underlying suit concluded after a trial on damages, with a significant judgment being entered against Underwood.

Plaintiff, proceeding in propria persona, thereafter filed this action against defendants, alleging claims for breach of contract (count I); breach of professional conduct involving competence, diligence, and misconduct (count II); professional misconduct (count III); and excessive, unfair, and unjust legal fees (count IV). The trial court granted defendants' motion for summary disposition and request for sanctions pursuant to MCR 2.114(E). Underwood's untimely motion for reconsideration was denied. Following a two-day evidentiary hearing, the trial court awarded defendants sanctions in the amount of \$7,500 based on the "totality of the circumstances."

II. Unpreserved Claims

On appeal, Underwood presents several issues that were not raised below and, therefore, are unpreserved. We review these issues for plain error. *In re App of Consumers Energy Co*, 278 Mich App 547, 568; 753 NW2d 287 (2008). Underwood first argues that his due process rights were violated when the trial court decided defendants' summary disposition motion without giving him notice of a hearing or an opportunity to be heard. We disagree.

Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner, but an oral hearing is not always necessary. Only if the property interest involved presents the potential deprivation of the financial means by which to live is an evidentiary hearing required. *York v Civil Service Comm*, 263 Mich App 694, 702; 689 NW2d 533 (2004). Such was not the case here. There was no hearing here because the trial court decided to dispense with oral argument, which it was authorized to do under MCR 2.119(E)(3). Underwood was allowed to respond in writing to defendants' summary disposition motion and the trial court considered his written response before deciding the motion. The trial court did not abuse its discretion in deciding that oral argument would not aid its decision-making process where it was fully apprised of the parties' positions by way of their briefs. *Fast Air, Inc v Knight*, 235 Mich App 541, 550; 599 NW2d 489 (1999). Therefore, Underwood's right to due process was not violated.

Underwood next argues that because there was no hearing and no discovery, the record is insufficient for this Court's review. The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law.

Shepherd Montessori Ctr Milan v Ann Arbor Twp, 259 Mich App 315, 324; 675 NW2d 271 (2003). The lower court record is complete and contains all the pertinent filings, including Underwood's complaint, the parties' motion briefs, and the trial court's detailed opinion and order. The record is sufficient to review the trial court's decisions.

Underwood also argues that the trial court's summary disposition decision violated his right to trial by jury. We disagree. As further discussed below, summary disposition was properly granted pursuant to MCR 2.116(C)(8) (failure to state a claim for relief). When a case boils down to a legal question formed by uncontested facts, a court may decide the question and grant summary disposition without violating the right to a jury trial. *Moll v Abbott Laboratories*, 444 Mich 1, 27-28; 506 NW2d 816 (1993).

Lastly, Underwood argues that the trial court's act of granting of summary disposition without the benefit of a hearing and before discovery had been conducted somehow equates to the imposition of a stricter standard on him as a pro se litigant. Again, we disagree. There is no indication that the trial court held Underwood to a stricter standard as a pro se litigant than if he had been represented by an attorney. The standard summary disposition process was followed. That Underwood suffered the negative consequences of failing to comply with the court rules on occasion does not mean that a stricter standard was imposed on him. See *Bachor v Detroit*, 49 Mich App 507, 512; 212 NW2d 302 (1973) (appearance in propria persona does not excuse compliance with court rules).

III. Summary Disposition

The trial court granted defendants summary disposition pursuant to MCR 2.116(C)(8) and (10). Underwood argues that the trial court erred in granting defendants summary disposition because he sufficiently alleged causes of action and supported them with factual allegations and evidence, and defendants failed to meet their burden of production and persuasion. We conclude that summary disposition was proper under MCR 2.116(C)(8).

We review de novo a trial court's decision regarding a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). Summary disposition may be granted under MCR 2.116(C)(8) when a plaintiff fails to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Feyz, supra* at 672. It may not be supported with documentary evidence. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Dep't of Transportation v N Central Coop, LLC*, 277 Mich App 633, 636; 750 NW2d 234 (2008), rev'd on other grounds 481 Mich 862 (2008). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

A. Michigan Rules of Professional Conduct (MRPC)

One reason the trial court gave for granting defendants' motion was that Underwood's claims were rooted in the MRPC. Violations of the MRPC do not give rise to a civil cause of

action. MRPC 1.0(b). Underwood asserts that he stated claims independent of the MRPC. In each count, however, Underwood cites the MRPC rule pursuant to which the count was brought as the basis for the claim. We agree with the trial court that Underwood improperly asserted causes of action based on alleged violations of the MRPC.² Therefore, the trial court properly granted summary disposition to defendants under MCR 2.116(C)(8). Although this reason alone is sufficient to affirm the trial court's dismissal of Underwood's complaint, we will further address the individual counts in the complaint as they relate to Underwood's claims on appeal.

B. Legal Malpractice (Counts II and III)

Counts II and III of Underwood's complaint are most aptly characterized as claims for legal malpractice. "To state a claim for legal malpractice, a 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 the proximate cause of an injury, and (4) the fact and extent of the injury alleged." *Kloian v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006). The trial court found that Underwood failed to state the second and third elements because the complaint did not even broach the concepts of duty, breach, and proximate cause.

Although Underwood's complaint is inartfully drafted, his allegations can reasonably be interpreted as asserting various breaches. Regardless, in neither count II nor count III does Underwood state the specific duty(ies) allegedly breached separate from his references to the MRPC. Furthermore, Underwood's allegations of proximate cause are also severely lacking. "To establish proximate cause, a plaintiff must show that the defendant's action was a cause in fact of the claimed injury." *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). Underwood alleges numerous times that defendant Bullard's conduct or failure to act caused him "judicial prejudice." He also alleges that Bullard's conduct "was prejudicial to the administration of justice." However, he fails to include factual allegations explaining how the specific instances of alleged malpractice caused this prejudice. Mere conclusory statements are insufficient to state a cause of action. *Kloian, supra* at 241. Moreover, Underwood never explains how this alleged prejudice was injurious. The judgment in the underlying lawsuit was entered 16 months after defendants' representation ceased and after the court had fully considered all of Underwood's claims and defenses presented through new counsel. Accordingly, the trial court here did not err in granting defendants summary disposition on these counts pursuant to MCR 2.116(C)(8).

C. Breach of Contract (Count I)

Attorneys may be held liable under a contract theory, but only when it is shown that the attorney breached a "special agreement" rather than a general agreement to provide requisite skill or adequate legal services. *Brownell v Garber*, 199 Mich App 519, 524-526; 503 NW2d 81

² For example, count I (breach of contract) was brought pursuant to MRPC 1.7(a)(2) and MRPC 1.7(b)(2), which involve conflicts of interest in client representation. Underwood's allegations in support of this count relate to defendant Bullard's representation of Charles Underwood, who was a codefendant in the underlying suit.

(1993). A “special agreement” is a “contract to perform a specific act,” as opposed to a general agreement “to exercise appropriate legal skill in providing representation in a lawsuit.” *Barnard v Dilley*, 134 Mich App 375, 378; 350 NW2d 887 (1984). Underwood’s argument that his contract with defendants was a special agreement is without merit. The plain language of the contract states that it was for representation in all matters pertaining to the underlying case. It was not for a specific act, such as drafting a will. Additionally, Underwood’s allegations in count I relate to defendants’ failure to represent him adequately, which is a claim grounded in malpractice not contract. *Id.* Therefore, the trial court did not err in dismissing this count pursuant to MCR 2.116(C)(8).

D. Legal Fees (Count IV)

In Underwood’s final count, he alleges that defendants overcharged him in the underlying action. The trial court interpreted this claim as one for attorney fees and dismissed it because no statute, court rule, or exception authorized the award of attorney fees based on the facts of the case. We disagree with the trial court’s characterization of the claim. Attorney fees in the context discussed by the trial court are fees that are awarded to a prevailing party in litigation as recoverable costs. MCL 600.2405; MCR 2.625. The legal fees involved in this claim are those incurred by an attorney’s client for services rendered pursuant to a contract. Thus, it is governed by contract law. We nevertheless affirm the trial court’s ruling because it reached the right result. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005). Underwood failed to state a cause of action because he did not sufficiently plead damages. *Alan Custom Hones, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Although he attached paid invoices to the complaint, he did not allege whether he was seeking reimbursement for specific legal fees reflected in the invoices or some other measure of damages. Therefore, the trial court did not err in dismissing this claim under MCR 2.116(C)(8).

E. Summary Disposition Premature

Underwood also argues that the trial court erred in granting defendants summary disposition before discovery had been conducted. Summary disposition is only premature if it is granted before discovery on a disputed issue is complete, *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002), unless further discovery does not stand a reasonable chance of uncovering factual support for the opposing party’s position, *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003). Here, Underwood does not identify the disputed facts that discovery would support. We therefore consider this argument abandoned. *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007) (appellant may not merely announce his position and leave it up to this Court to discover the basis for his argument). Regardless, because summary disposition was proper under MCR 2.116(C)(8), discovery would not have aided Underwood’s position.

Additionally, Underwood appears to argue that the trial court should have allowed him to amend his complaint to correct any pleading deficiencies before it granted summary disposition. MCR 2.116(I)(5) states, “If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” Leave to amend should be freely given. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684

NW2d 320 (2004). Here, Underwood never requested an opportunity to amend his complaint. Accordingly, we find no error.

IV. Motion for Reconsideration

Underwood also argues that the trial court erred in denying his motion for reconsideration. We review for an abuse of discretion a trial court's decision on a motion for reconsideration. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). MCR 2.119(F) governs motions for reconsideration. The version of the rule in effect at the time Underwood filed his motion stated:

Unless another rule provides a different procedure for reconsideration of a decision (see, e.g., MCR 2.604[A], 2.612), a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order deciding the motion. [MCR 2.119(F)(1).]³

The trial court entered its order granting defendants summary disposition on June 5, 2007. Underwood filed his motion for reconsideration on June 26, 2007, 21 days after the entry of the trial court's order. Because Underwood's motion was clearly untimely, the trial court did not abuse its discretion in denying and striking it for this reason.

V. Sanctions

Underwood challenges the trial court's decision to grant sanctions and also the amount of sanctions awarded. This Court reviews for clear error a trial court's decision whether to grant sanctions under MCR 2.114(E) for a violation of the requirements of MCR 2.114(D). *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* This Court reviews the trial court's determination of the amount of sanctions imposed for an abuse of discretion. *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002).

A. Entitlement to Sanctions

The trial court awarded sanctions because it found that Underwood violated MCR 2.114(D)(2), which provides in part that a party, by signing a document, certifies that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." Whether the inquiry was reasonable is determined by an objective review of the effort taken to investigate the claim before filing suit.

³ This court rule was amended, effective September 1, 2008, to extend the period for filing the motion to 21 days.

Attorney Gen v Harkins, 257 Mich App 564, 576; 669 NW2d 296 (2003). If a violation of MCR 2.114 is found, sanctions are mandatory. MCR 2.114(E).

Underwood first argues that defendants were not entitled to sanctions because they failed to file a separate motion. Defendants requested sanctions in their motion for summary disposition. Underwood cites no authority to support his position that a separate motion was required. We therefore consider this argument abandoned. *DeGeorge, supra* at 594-595.

Underwood next argues that his claims had a reasonable basis in fact and did not violate MCR 2.114(D). We disagree. First, Underwood impermissibly pleaded his claims pursuant to the MRPC. Therefore, they were not warranted by law. Second, Underwood's breach of contract claim was not well grounded in fact or warranted by law. The contract was clearly a general agreement and Underwood's allegations did not even pertain to a breach of contract claim. They pertained to alleged conflicts of interest. Third, Underwood's legal malpractice claim was not well grounded in fact or warranted by law. Underwood failed to allege the duty(ies) breached independent from the MRPC. He also failed to sufficiently plead proximate cause. Fourth, Underwood's allegations regarding legal fees that he unjustly paid were not well grounded in fact. Underwood simply made assertions and did not allege a cognizable claim. Most glaring is Underwood's complete failure to state his damages.

Moreover, Underwood failed to cite any legal authority to support his position in his responsive briefs to defendants' summary disposition motion, contrary to MCR 2.119(A)(2). Underwood also violated the trial court's April 9, 2007, scheduling order that specifically pertained to defendants' summary disposition motion. The order required that "the responding party's(ies) brief(s)" be filed by May 2, 2007. Although Underwood's amended responsive brief was filed on April 30, 2007, he did not seek leave to file the amended brief until May 29, 2007. Even though Underwood was a pro se litigant, had he made a reasonable inquiry into the law, he would have discovered the factual and legal deficiencies in his complaint and motions. Accordingly, the trial court did not clearly err in awarding sanctions pursuant to MCR 2.114(D) and (E).

Underwood asserts that the purpose of the rule was not served by imposing sanctions in this case. He cites his age and the fact that the instant case was the first lawsuit he had filed. The purpose of imposing sanctions under MCR 2.114 is to deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or which are intended to serve an improper purpose. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 719; 591 NW2d 676 (1998). The purpose of the rule is to serve as a deterrent for anyone, not only career litigants. Underwood's age and inexperience with civil litigation are not reasons to overturn the trial court's award of sanctions.

B. Amount of Sanctions

Underwood argues that the trial court abused its discretion in awarding a sanction of \$7,500 because defendant Bullard's reasonable expenses totaled only \$40. MCR 2.114(E) states:

If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to

pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

The trial court found that Bullard was not entitled to attorney fees because he proceeded in propria persona. Pro se parties are not eligible for attorney fee sanctions under MCR 2.114. *FMB, supra* at 719.

Underwood argues that the most the trial court could have awarded as a sanction was \$40, the only other reasonable expense for which defendants presented evidence. Underwood bases his argument on the trial court's reference to "reasonable expenses" in its order awarding sanctions. The trial court granted sanctions and ordered defendants to file a motion regarding the amount of reasonable expenses he incurred. We do not read the trial court's reference to "reasonable expenses" as a limitation on its award.

Underwood further argues that because the award amount exceeded \$40, the trial court in essence awarded attorney fees despite concluding that defendants were not entitled to them. A sanction under MCR 2.114(E) is not restricted to attorney fees and expenses. Rather, the rule provides that the court shall award an "appropriate sanction," which may include reasonable expenses and attorney fees. Thus, in awarding sanctions under MCR 2.114(E), the trial court may fashion an appropriate remedy, which is not limited to expenses incurred, but excludes punitive damages. *FMB, supra* at 719. The trial court determined that \$7,500 was an appropriate sanction amount considering the amount of time defendant Bullard was required to expend to defend against the lawsuit, and the emotional turmoil in doing so. In addition, Underwood continually failed to comply with the court rules. Based on the totality of the circumstances, the amount awarded is within the range of reasonable and principled outcomes and, therefore, is not an abuse of discretion.

Affirmed.⁴

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly

⁴ Defendants' request for appellate costs and attorney fees pursuant to MCR 7.216(C)(1)(a) is not properly before this Court because defendants have not filed a motion under MCR 7.211(C)(8).