

STATE OF MICHIGAN
COURT OF APPEALS

JACKOB TRAKHTENBERG,,

Plaintiff-Appellant,

v

DEBORAH H. MCKELVY,

Defendant-Appellee.

UNPUBLISHED

October 27, 2009

No. 285247

Oakland Circuit Court

LC No. 2008-088401-NM

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff Jakob Trakhtenberg appeals as of right an order granting defendant Deborah H. McKelvy's motion for summary disposition under "MCR 2.116(C)(8) and/or (10)" based on collateral estoppel and the attorney judgment rule. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

Defendant is an attorney who was appointed to represent plaintiff after he was charged with five counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Following a bench trial on January 19, 2006, plaintiff was convicted of three counts of CSC II and sentenced to three concurrent prison terms of 4 to 15 years. The victim was plaintiff's then 9-year-old daughter. Plaintiff appealed to this Court. Plaintiff's sole argument on appeal was that defendant was ineffective for failing to impeach the victim's mother (and plaintiff's ex-wife) with evidence that she was biased against him. This Court noted that because plaintiff failed to raise the issue in a motion for a new trial or evidentiary hearing, review was limited to the existing record. *People v Trakhtenberg*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 268416), slip op at 1. This Court found that plaintiff failed to establish that defendant's representation was ineffective and affirmed defendant's convictions. *Id.*, slip op at 2. Our Supreme Court denied leave to appeal. *People v Trakhtenberg*, 480 Mich 856; 737 NW2d 729 (2007).

On February 6, 2006, the victim and her mother filed a civil complaint against plaintiff and Golda Noble.¹ The complaint contained claims for intentional infliction of emotional distress and assault and battery (both as a result of plaintiff's sexual abuse of the victim), as well as a claim for fraudulent conveyance, which alleged that plaintiff fraudulently conveyed real property to Noble for no consideration and with the intent to defraud the victim and her mother. The case resulted in a judgment of no cause of action.

On about December 31, 2007, plaintiff filed a legal malpractice complaint against defendant. In the complaint, plaintiff claimed that defendant breached her duty to exercise the knowledge, skill, ability and care ordinarily possessed by attorneys. Plaintiff alleged the following acts of legal malpractice on the part of defendant:

41. The Defendant's (Deborah H. McKelvy, Jakob Trakhtenberg's attorney in the criminal case) failure to call crucial witness to testify in the Plaintiff's (Jakob Trakhtenberg, the defendant in the criminal case) criminal case is below the standards of what a criminal defense attorney of ordinary learning, judgment, or skill in Oakland County, Michigan or any similar community, would do under the same or similar circumstances.
42. The Defendant's . . . failure to meaningfully cross examine the prosecutor's witnesses in the Plaintiff's . . . criminal case is below the standards of what a criminal defense attorney of ordinary learning, judgment, or skill in Oakland County, or any similar community, would do under the same or similar circumstances.
43. The Defendant's . . . persuasion of the Plaintiff . . . with regards to waiving his right to a jury trial in his criminal case, under these circumstances was something that a criminal defense attorney of ordinary learning, judgment, or skill in Oakland County, or any similar community, would not do.
44. The Defendant's . . . failure to generally test the prosecutor's case in the Plaintiff's criminal case is below the standards of what a criminal defense attorney of ordinary learning, judgment, or skill in Oakland County, or any similar community, would do under the same or similar circumstances.
45. The Defendant's . . . failure to generally defend the Plaintiff . . . in his criminal case inclusive of failing to call and list appropriate defense witnesses, failing to properly examine the witnesses that were called, and failing to introduce or reference any exhibits or documents is below the standards of what a criminal defense attorney of ordinary learning,

¹ Golda Noble is an adult daughter of plaintiff. It appears from the record that the victim's mother is not the mother of Golda.

judgment, or skill in Oakland County, or any similar community, would do under the same or similar circumstances.

46. Defendant attorney . . . breached the duties stated above, among others, in the following respects:
- a. The Defendant . . . failed to call certain indispensable witnesses on behalf of her client, the Plaintiff
 - b. The Defendant . . . failed to cross examine the alleged victim's mother, even though there was ample evidence that she harbored extreme contempt, bias, and motive to lie against the plaintiff . . . prior to any of these allegations of criminal sexual conduct as was evidenced through existing evidence.
 - c. The Defendant . . . failed to interview, depose, or call to testify at the underlying criminal trial, the Plaintiff's son, Hesskel Trakhtenberg, who was a witness to many of the alleged victim's attempts to go into the Plaintiff's room, as well as the many times the Plaintiff sent her back to her own room, and other testimony that Hesskel Trakhtenberg could have provided to contradict the prosecutor's evidence in the underlying criminal case and thus assist in proving Jakob Trakhtenberg's innocence.
 - d. The Defendant . . . failed to ask intelligent or meaningful questions of the various witnesses on cross examination and failed to adequately conduct direct examination of her own client, Jakob Trakhtenberg.
 - e. The Defendant . . . failed to protect the legal rights of the Plaintiff.
 - f. The Defendant . . . committed the acts set forth elsewhere in this complaint.
 - g. The Defendant . . . failed in other ways to comply with the standard of practice and care, the canons of ethics, the Michigan Rules of Professional Conduct, and ethical considerations applicable to attorneys in the State of Michigan.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Citing *Barrow v Pritchard*, 235 Mich App 478; 597 NW2d 853 (1999), defendant argued that a criminal defendant who unsuccessfully asserts an ineffective assistance of counsel claim in a criminal case is barred from relitigating the same claim in a legal malpractice claim and that plaintiff's legal malpractice claim was therefore barred by the doctrine of collateral estoppel. Defendant also argued that summary disposition was proper based on the attorney judgment rule because plaintiff's allegations regarding defendant's ineffectiveness concerned matters of trial strategy, and the attorney judgment rule protects attorneys from malpractice liability when the

attorney makes strategic decisions, as long as the attorney acts in good faith and in the client's best interests.

Plaintiff argued that the doctrine of collateral estoppel did not apply to bar his legal malpractice claim because the issue of defendant's effectiveness as defense counsel was not actually litigated because it was not raised in the trial court. Citing the Restatement Judgments, 2d, plaintiff also argued that collateral estoppel did not preclude his legal malpractice claim because the results of prior litigation were inconsistent. On the one hand, defendant was found criminally guilty of sexually assaulting the victim; however, in a civil case, the jury determined that the victim did not prove by a preponderance of the evidence that plaintiff sexually assaulted the victim. Plaintiff finally argued that summary disposition was not appropriate based on the attorney judgment rule because defendant failed to provide the court with an adequate and full explanation for the reasoning behind her trial strategy.

The trial court ruled that the doctrine of collateral estoppel barred plaintiff's legal malpractice action because this Court had determined that plaintiff did not receive ineffective assistance of counsel during his criminal trial. In so ruling, the trial court rejected plaintiff's conflicting judgment argument, ruling that there were different elements to the allegations in the victim and her mother's civil complaint against plaintiff and the offenses for which plaintiff was criminally convicted. The trial court also ruled that the attorney judgment rule applied. Citing *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1995), the trial court rejected plaintiff's argument that defendant was required to explain her decisions to call or not call certain witnesses. The trial court also determined that defendant's advice to plaintiff regarding waiver of his right to a jury trial was a matter of trial strategy. Thus, the trial court granted defendant's motion for summary disposition.

II. Analysis

A. Standard of Review

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Barrow, supra* at 480.

When deciding a motion brought under MCR 2.116(C)(8), a court considers only the pleadings. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). A motion under this subrule "tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden, supra* at 119. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other

documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court “must consider the documentary evidence presented to the trial court ‘in the light most favorable to the nonmoving party.’” *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) “if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

B. Attorney Judgment Rule

Plaintiff argues that the trial court erred in granting summary disposition of his legal malpractice claim against defendant based on the attorney judgment rule.

In order to establish a claim of legal malpractice, a plaintiff must prove (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, supra* at 655.

The issue in this case is whether defendant negligently represented plaintiff in his criminal trial or whether defendant’s conduct in representing plaintiff is protected by the attorney judgment rule. In legal malpractice actions, a duty exists as a matter of law if there is an attorney-client relationship. *Id.* There is no dispute regarding the existence of an attorney-client relationship between plaintiff and defendant in this case. An attorney has an implied duty to exercise reasonable skill, care, discretion and judgment in representing a client. *Mitchell v Dougherty*, 249 Mich App 668, 677; 644 NW2d 391 (2002). Furthermore, an attorney has a duty to act as an attorney of ordinary learning, judgment or skill would act under the same or similar circumstances. *Simko, supra* at 656. An attorney is not, however

a guarantor of the most favorable possible outcome, nor must an attorney exercise extraordinary diligence or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. Further, “where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of [the] client, [the attorney] is not answerable for mere errors in judgment.” [*Mitchell, supra* at 677 (citations omitted).]

Plaintiff alleged in his legal malpractice complaint that defendant committed the following acts of malpractice: failing to call crucial witnesses (such as plaintiff’s son, Hessel Trakhtenberg), failing to meaningfully cross-examine prosecution witnesses, failing to cross-examine plaintiff’s ex-wife, persuading plaintiff to waive his right to a jury trial, failing to conduct adequate direct examination of plaintiff, failing to generally test the prosecutor’s case, failing to generally defend plaintiff’s case by failing to call defense witnesses, failing to properly

examine the witnesses that were called, and failing to introduce or reference any exhibits or documents, failing to protect plaintiff's legal rights, and failing to comply with the standard of practice and care, the canons of ethics, and the Michigan Rules of Professional Conduct.²

We find that defendant acted as would an attorney of ordinary learning, judgment or skill under the same or similar circumstances, and her alleged acts and omissions were matters of trial tactics based on reasonable professional judgment.

Plaintiff was convicted of three counts of CSC II, MCL 750.520c(1)(a), which provides:

(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

MCL 750.520a(q) defines "sexual contact" as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification"

In this case, plaintiff did not dispute the victim's age, and plaintiff admitted at his criminal trial that he touched the victim's vagina. Therefore, the primary issue at trial was whether plaintiff engaged in contact with the victim "for the purpose of sexual arousal or gratification[.]" MCL 750.520a(q). A reasonable person standard governs a determination of the purpose for the contact. *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997). "[A] jury is properly limited to a determination whether the defined conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose." *Id.*

At trial, plaintiff testified that he touched the victim's vagina to apply ointment and as a remedy for her stomach pain. Given the narrow issue at trial, it was reasonable for defendant to conclude that numerous witnesses would not benefit plaintiff's case. Plaintiff testified regarding why he touched the victim's vagina. It is difficult to conceive how additional witnesses could shed light on this issue, and plaintiff does not explain how the testimony of additional witnesses would have explained whether plaintiff touched the victim "for the purpose of sexual arousal or gratification[.]" MCL 750.520a(q). Because "it is a tactical decision whether to call particular witnesses" and there is no evidence that defendant did not act with full knowledge of the law or in good faith, defendant's decision not to call additional witnesses was within the protection of the attorney judgment rule. *Simko, supra* at 660.

² Plaintiff's allegations regarding defendant's failure to protect plaintiff's legal rights and plaintiff's failure to comply with the standard of practice and care, the canons of ethics and the Michigan Rules of Professional Conduct are general allegations and will not be addressed separately from plaintiff's other more specific allegations because they are not addressed in plaintiff's brief on appeal.

Similarly, defendant's decision not to cross-examine plaintiff's ex-wife and her cross-examination of other prosecution witnesses and direct examination of plaintiff were also matters of trial strategy. Even if another attorney would have elected to cross-examine plaintiff's ex-wife or asked different questions in cross-examining other prosecution witnesses and direct examining plaintiff, there is no evidence that defendant did not act with full knowledge of the law and in good faith. Decisions such as whether to cross-examine a witness and the extent to cross-examine witnesses are tactical decisions, which "do not constitute grounds for a legal malpractice action." *Id.*

Defendant's advice to plaintiff regarding his right to a jury trial is also a matter of trial strategy. Plaintiff alleges that defendant persuaded him to waive his right to a jury trial. The transcript of plaintiff's criminal trial indicates that defendant and plaintiff discussed at length plaintiff's waiver of his right to a jury trial. Thus, even if defendant made an error in judgment in advising plaintiff to waive his right to a jury trial and another attorney would not have so advised plaintiff, this is a tactical decision and is not a ground for a legal malpractice action. See *id.* Furthermore, there is no evidence that defendant did not act with full knowledge or in good faith in this regard.

Defendant's decision not to introduce or refer to any exhibits was also not actionable. On appeal, plaintiff does not assert what exhibits or documents defendant should have introduced or referenced. In any event, decisions regarding what evidence to present is a matter of trial strategy. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Plaintiff also argues on appeal that there is a genuine issue of material fact regarding whether defendant committed legal malpractice by failing to move for a directed verdict of acquittal at trial. This issue is arguably not preserved for appellate review because plaintiff did not allege in his legal malpractice claim that defendant committed legal malpractice by failing to move for a directed verdict of acquittal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). In any event, this issue is without merit even if it was preserved. Because plaintiff's criminal trial was a bench trial, there was no jury, and the trial court was acting as the trier of fact. It was a reasonable trial strategy for defense counsel not to move for a directed verdict of acquittal at the close of the prosecution's proofs for two reasons. First, the prosecution presented sufficient evidence to establish the elements of CSC II, at least with respect to three of the charges. Second, the case hinged on the trial court's assessment of the witnesses' credibility,³ and plaintiff had not yet testified on his own behalf. It was a reasonable trial strategy for defense counsel to wait and let the trial court, as the trier of fact, determine the credibility of witnesses and make a decision regarding plaintiff's guilt after the presentation of all the evidence.

Plaintiff also argues that summary disposition based on the attorney judgment rule was improper because defendant failed to attach to her motion for summary disposition an affidavit or any explanation for the decisions she made in representing plaintiff in his criminal case.

³ Credibility determinations are matters for the trier of fact to decide. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

Plaintiff cites no authority to support her assertion that plaintiff was required to provide an affidavit to explain her trial strategy or decisions. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). We find that plaintiff's argument is implicitly refuted by *Simko*, the leading Michigan case regarding the attorney judgment rule. In *Simko*, our Supreme Court affirmed the trial court's grant of summary disposition under MCR 2.116(C)(8) based on the attorney judgment rule. "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the basis of the pleadings alone to determine whether the plaintiff has stated a claim upon which relief can be granted." *Morden v Grand Traverse Co*, 275 Mich App 325, 331; 738 NW2d 278 (2007); MCR 2.116(G)(5). Therefore, in *Simko* no evidence outside the pleadings was considered. Thus, *Simko* implicitly rejects any suggestion that a defendant attorney in a legal malpractice case must submit an affidavit in order to invoke the attorney judgment rule.

Furthermore, defendant moved for summary disposition under both MCR 2.116(C)(8) and (10). The trial court did not articulate on what ground summary disposition was appropriate under the attorney judgment rule, but summary disposition would have been appropriate under either MCR 2.116(C)(8) or (10). To the extent that the trial court granted summary disposition based on the attorney judgment rule under MCR 2.116(C)(8), it would have been improper for the trial court to consider any affidavit submitted by defendant to explain her trial strategy. To the extent that the trial court relied on documentary evidence in granting summary disposition based on the attorney judgment rule under MCR 2.116(C)(10), defendant attached ample documentary evidence to her brief and reply brief in support of her motion for summary disposition, and defendant's documentary evidence was sufficient, even without an affidavit from defendant, to establish that defendant's conduct in representing plaintiff in his criminal trial was a matter of trial strategy.

Finally, plaintiff argues that the stark contrast between the presentation of evidence in his criminal case and the victim and her mother's civil case against him and the divergent results of the criminal case (guilty verdicts on three charges) and the civil case (judgment of no cause of action) create a genuine issue of material fact regarding whether defendant's conduct is protected by the attorney judgment rule. The fact that there was a judgment of no cause of action in a civil case against plaintiff that contained some tort claims that were based on plaintiff's convictions of sexually abusing the victim is not germane to whether defendant's representation of plaintiff in the criminal case was deficient. The issue is whether, in defending plaintiff in the criminal case, defendant acted with the knowledge, skill, and ability ordinarily possessed by members of the legal profession and whether she acted in good faith and with the honest belief that her acts were well founded in the law and in the best interests of plaintiff. See *Mitchell, supra* at 677. For all the reasons stated above, we find that defendant acted as would an attorney of ordinary learning, judgment or skill under the same or similar circumstances, and her alleged acts and omissions were a matter of trial tactics based on reasonable professional judgment. Therefore, the trial court did not err in granting summary disposition of plaintiff's legal malpractice claim based on the attorney judgment rule.

III. Conclusion

Because summary disposition of plaintiff's legal malpractice claim against defendant was proper based on the attorney judgment rule, we need not address plaintiff's arguments regarding collateral estoppel.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Stephen L. Borrello