STATE OF MICHIGAN

COURT OF APPEALS

FRANK RICHARD JACOBSON, Plaintiff-Appellant,	UNPUBLISHED April 12, 2011
v	No. 294929 Washtenaw Circuit Court
JOSEPH LLOYD and CHARD & LLOYD, Defendants-Appellees.	LC No. 08-001083-NM

Before: O'CONNELL, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this legal malpractice claim, plaintiff appeals as of right the circuit court's grant of summary disposition in defendants' favor. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiff entered into a purchase agreement with Norfolk Development Corporation (Norfolk) to build a house. Norfolk allegedly began to suspect credit problems and demanded that plaintiff provide proof of financing. When plaintiff failed to provide assurance of adequate credit, Norfolk rescinded the purchase agreement. Plaintiff filed suit against Norfolk for breach of contract and misrepresentation.

Norfolk moved for summary disposition of plaintiff's claim on the ground that the contract allowed Norfolk to rescind the agreement if they determined that plaintiff did not meet their credit requirements. Norfolk asserted it sent plaintiff numerous requests for proof of financing and that plaintiff failed to respond. Norfolk sent plaintiff a letter dated February 23, 2006, notifying plaintiff that Norfolk would cancel the contract if he did not provide proof of his ability to obtain financing within ten days. Plaintiff failed to respond to the letter, so Norfolk rescinded the agreement.

Before Norfolk's motion for summary disposition was heard, plaintiff's attorney withdrew. Plaintiff then retained defendants to represent him in the matter. On plaintiff's behalf, defendants presented three arguments in opposition to Norfolk's summary disposition motion: (1) that plaintiff had sufficient assets and financing to purchase the home and Norfolk was aware of that at all times; (2) that the contract language barred Norfolk from declaring the agreement null and void; and (3) that Norfolk was estopped from declaring the contract void, or that they had waived the right. Defendants supported the response with an affidavit from a bank

official stating that plaintiff had been approved for a mortgage and that Norfolk had never made any inquires regarding plaintiff's credit. Defendants also attached an affidavit from plaintiff that stated he had had been approved for a mortgage. The circuit court granted defendant's motion, and this Court upheld that ruling on appeal. *Jacobson v Norfolk Dev Corp*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2008 (Docket No. 273708).

Plaintiff then filed the present complaint against defendants for legal malpractice. The crux of plaintiff's complaint was that defendants were negligent by failing to submit any evidence that proved plaintiff had provided proof of financing to Norfolk. Washtenaw Circuit Judge Melinda Morris was assigned to the case and signed a scheduling order that required the parties to exchange expert and lay witness lists by June 24, 2009.

At one point during the course of a contentious discovery period, defendants served interrogatories and a request for production of documents upon plaintiff. Plaintiff did not respond to the interrogatories or produce the requested documents in a timely manner. Defendants filed several motions to compel and, eventually, two motions to dismiss pursuant to MCR 2.313 and 2.504(f). A hearing on defendants' second motion to dismiss was held, at which Judge Morris sua sponte disqualified herself because of her long standing relationship with defendants. The case was then reassigned to Washtenaw Circuit Judge David Swartz. One week before the deadline to exchange witness lists, plaintiff filed a motion to suspend Judge Morris's scheduling order. Defendants stipulated and a new scheduling conference had been scheduled for July 23, 2009, and subsequently adjourned to September 2, 2009.

Before a new scheduling order was issued, defendants moved for summary disposition on the basis that plaintiff could not make out a prima facie claim of legal malpractice without an expert witness,[1] and that plaintiff's suit was barred by the "attorney judgment rule." Plaintiff responded to the motion by arguing that no expert was required because defendants' breach was clear and obvious. Additionally, plaintiff requested that he be allowed to amend his pleadings to add counts of fraud and breach of contract.

In the alternative, if an expert was needed, plaintiff argued that the motion for summary disposition was premature because discovery had not concluded. Plaintiff attached an affidavit pursuant to MCR 2.116(H), in which he averred that he had retained an expert who was unable to review the files and form an initial opinion regarding whether defendants breached a standard of care prior to the hearing on the motion for summary disposition. However, plaintiff believed that his expert was likely to find that defendants had breached a standard of care in the Norfolk litigation. At the subsequent hearing, the circuit court granted defendants' motion from the bench, explaining that "plaintiff's promise of producing at some point the necessary expert testimony is insufficient to create a genuine issue of material fact."

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[1] Plaintiff indicated in his responses to interrogatories dated May 6, 2009, and in this deposition testimony taken May 8, 2009, that he had not retained an expert.

Plaintiff then filed a motion for reconsideration and attached an affidavit from his expert to his motion. The expert's affidavit stated that he had reviewed all the materials related to the plaintiff's dispute with Norfolk, and his initial opinion was that defendants breached a standard of care in handing plaintiff's case. The expert stated that defendants breached a standard of care by not providing evidence showing plaintiff had responded to Norfolk's demands for proof of financing despite the fact that defendants had such evidence. Furthermore, the expert stated that defendants allowed the record to appear as if Norfolk had realistic concerns over plaintiff's creditworthiness. Additionally, defendants failed to argue that Norfolk was the first party to commit a substantial breach, and therefore, they had no right to assert plaintiff was in breach. Had it not been for defendants' breaches, plaintiff's expert believed that a different outcome would have occurred. The circuit court denied plaintiff's motion for reconsideration, reasoning that the motion presented the same issues that had previously been ruled on. The court refused to consider plaintiff's expert's affidavit because the affidavit had not been before the court during the motion for summary disposition.

II. DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Plaintiff argues that summary disposition was improper because defendants failed to properly support their motion, and because plaintiff had filed an affidavit pursuant to MCR 2.116(H). We review de novo a trial court's decision granting summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court considers the pleadings and documentary evidence submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court's review is limited to the evidence that was available to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

Plaintiff argues that defendants' motion for summary disposition was premature because discovery had not yet completed and that the circuit court erred when it granted summary disposition because plaintiff submitted an affidavit pursuant to MCR 2.116(H). Generally, summary disposition is premature if it is granted before discovery is complete unless further discovery does not present a fair likelihood of uncovering factual support for the opposing party's position. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). A party believing that summary disposition is premature is obligated to "provide some independent evidence that a factual dispute exists." *Michigan Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). This includes supplying an affidavit under MCR 2.116(H) "indicating the probable testimony of witnesses whose affidavits in support of the plaintiff['s] contentions could not be procured." *Marilyn Froling Revocable Living Trust*, 283 Mich App at 293 n 60.

In this case discovery had not been completed prior to defendants' motion for summary disposition. However, in light of plaintiff's failure to procure an expert witness during the ten months the case was pending, it was not unreasonable for defendants to believe that further discovery would not present a fair likelihood of uncovering factual support for plaintiff's claim. *Id.* at 292. Therefore, defendants' motion for summary disposition was not premature.

Additionally, defendants' motion was properly supported. When a party moves for summary disposition under MCR 2.116(C)(10), the party must specifically identify the issues as to which they believe there is no genuine issue as to any material fact. MCR 2.116(G)(4). In this case, defendants' motion alleged that plaintiff lacked the necessary expert witness, citing plaintiff's failure to name an expert witness over ten months litigation had been pending. Defendants noted that plaintiff failed to name an expert in his responses to interrogatories and deposition testimony. Therefore, defendants' motion was properly supported and the burden shifted to plaintiff to produce evidence that showed a genuine issue of disputed fact existed. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006).

Normally, an affidavit submitted under MCR 2.116(H) is a proper response to a motion for summary disposition brought before discovery had concluded, *Marilyn Froling Revocable Living Trust*, 283 Mich App at 293 n 60. However, MCR 2.116(H)(1) requires that the party "state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts." Plaintiff's affidavit states in part:

> Based on my written responses to the motion for summary disposition, and the attached interrogatory responses and documentary evidence, I reasonably believe, based on good faith inquiry into fact and law, that [my expert], in an initial opinion, subject to deposition and other discovery, is likely to indicate that Defendants breached a duty or an appropriate standard of care when representing me, relative to the allegations of malpractice in my complaint, and that he will be able to testify to those facts, as well as to facts pertaining to causation.

This statement is general and conclusory, and it does not indicate the reason for plaintiff's belief that the expert would conclude defendants breached a duty of care. Plaintiff also did not include any representations made by the expert that would support plaintiff's claims, nor did he cite to any specific evidence in the record that would lead the expert to conclude that defendants breached their duty of care. Rather, plaintiff merely referenced other documents in the record. Therefore, the affidavit did not comply with the requirements of the court rule.

Furthermore, the circuit court correctly noted that the affidavit constituted nothing more than a mere possibility that plaintiff's claim might be supported by expert testimony. Plaintiff's expert did not make any statements or representations supporting plaintiff's claim. The affidavit only established that an expert had agreed to look over plaintiff's files. Therefore, all that the circuit court had was a possibility that an expert might provide testimony in support of plaintiff's claim after he looked at the evidence. Normally, a mere possibility that the claim might be supported by evidence is insufficient to survive summary disposition. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

III. EXPERT REQUIREMENT

Next, plaintiff argues that summary disposition was improper because defendants' breach was clear and obvious such that no expert testimony was required. We disagree. As a general rule, expert testimony is required in a legal malpractice action in order to establish the applicable standard of conduct, the breach of that standard, and causation. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). However, "[w]here the

absence of professional care is so manifest that within the common knowledge and experience of an ordinary layman it can be said that the defendant was careless, a plaintiff can maintain a malpractice action without offering expert testimony." *Id*., citing *Joos v Auto-Owners Ins Co*, 94 Mich App 419, 422-424; 288 NW2d 443 (1979).

Plaintiff's malpractice claim is based on the argument that defendants were negligent in formulating and supporting a response to Norfolk's motion for summary disposition. This involves the implemented litigation strategy. Litigation strategy is not the type of knowledge that would be in an ordinary lay juror's experience. An expert would be needed to examine the circumstances of the case and ascertain the applicable standard of care, and whether defendant's breached that standard. *Id*.

Plaintiff argues that defendants violated the court rules, and that those violations are clear and obvious such that no expert witness is needed. Plaintiff asserts that defendants violated MCR 2.116(F)[2] because defendants procured an affidavit from plaintiff's first attorney but never determined whether the affidavit was grounded in fact. Additionally, plaintiff argues that defendants violated MCR 2.119(B)(2)[3] because defendants failed to attach documents the bank official referred to in his affidavit. Finally, plaintiff argues that defendants violated MCR 2.116(G)(4)[4] because they advised him that the issue of default was a factual issue not susceptible to summary disposition.

There is no evidence that defendants violated the rules plaintiff is referring to. Plaintiff's first attorney prepared an affidavit at the direction of defendants. However, that affidavit was never submitted to the court, so it could not have been submitted in violation of MCR 2.114. MCR 2.116(F). The affidavit from the bank official only generally referred to "occasional documents" he received from Norfolk, not to any specific documents. Therefore, there were no particular papers that defendants would have been required to attach to the affidavit pursuant to MCR 2.119(B)(2). Finally, under MCR 2.116(G)(4), once a motion has been properly brought under MCR 2.116(C)(10), "an adverse party . . . must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." Therefore, the

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[2] MCR 2.116(F) provides, "A party or an attorney found by the court to have filed a motion or an affidavit in violation of the provisions of MCR 2.114 may, in addition to the imposition of other penalties prescribed by that rule, be found guilty of contempt."

[3] "Sworn or certified copies of all papers or parts of papers referred to in an affidavit must be attached to the affidavit . . . ." MCR 2.119(B)(2) (listed exceptions inapplicable).

[4] MCR 2.116(G)(4) provides in relevant part:

When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

question is not whether defendants' advice to plaintiff violated MCR 2.116(G)(4), but whether defendants' response to the motion for summary disposition violated MCR 2.116(G)(4). This would ultimately revolve around litigation strategy and require an expert witness.

Furthermore, even if it were assumed that defendants violated the court rules, as plaintiff alleges, that would still not negate the requirement of expert testimony. Plaintiff argues that violating the court rules was also a violation of MRPC 1.1 through 1.3. Violations of MRPC create a rebuttable presumption of actionable malpractice. *Beattie v Frinschild*, 152 Mich App 785, 791; 394 NW2d 107 (1986). However, a violation of MRPC is not negligence per se. *Id.* at 793. A plaintiff's "allegations that the Disciplinary Rules have been violated, rather than an allegation that the common-law standard had been breached, does not relieve them of the obligation to present expert testimony, unless the violation was so obvious that such testimony was not required." *Id.* Furthermore, MRPC 1.0 states that "[t]he rules do not . . . give rise to a cause of action . . . for failure to comply with an obligation or prohibition imposed by a rule." The comments to MRPC 1.0 explain further that "a violation of a rule does not give rise to a cause of action, nor does in create any presumption that a legal duty has been breached." Therefore, even assuming plaintiff's allegations were true, expert testimony would still be required.

Finally, plaintiff's reliance on the doctrine of res ipsa loquitor is without merit. The '"purpose of the doctrine of res ipsa loquitor is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act.'" *Maiden*, 461 Mich at 127 (citation omitted). In this case, plaintiff alleges that the doctrine applies because defendants failed to notify him that work has resumed on the house, and as a result, he was unable to point out defects that existed behind the drywall.

Plaintiff retained defendants to negotiate with Norfolk over several defects in the house while construction was ongoing. Plaintiff alleges that during this time defendants failed to notify him that work has resumed on the house, and as a result, he was unable to point out defects that existed behind the drywall. Plaintiff's asserts that this would not have happened but for the negligence of defendants, and that defendants were exclusive control of this information. Plaintiff's argument, however, is based on conduct that occurred prior to the underlying litigation. The allegations in plaintiff's complaint do not relate to defendants' representation of plaintiff over the defects in the house while construction ongoing. Furthermore, the evidence in the record shows that plaintiff received notice from Norfolk that construction had begun. Therefore, the doctrine of res ipsa loquitor has no application.

IV. MOTION TO AMEND THE PLEADINGS

Plaintiff argues that the circuit court abused its discretion when it denied his request to amend his complaint to add counts of fraud and breach of contract. We review the court's decision for an abuse of discretion and will be only reverse "if it occasions an injustice." *Boylan v Fifty-Eight LLC*, ___Mich App___, ___; ___ NW2d ___ (2010).

MCR 2.116(I)(5) provides that if the pleadings show that a party is entitled to judgment as a matter of law under MCR 2.116(C)(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." "A court should freely grant the nonprevailing party leave to amend" and leave should only be denied for particularized reasons, such as futility, undue delay, bad faith, and undue prejudice. *Id.*, citing *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004); *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). We conclude that the court did not err because, as the court correctly noted, amendment would be futile.

If a party "attempts to characterize a malpractice claim as a fraud or other type of claim, a court will look through the labels placed on the claim and will make its determination on the basis of the substance and not the form." *Brownell v Garber*, 199 Mich App 519, 532-533; 503 N.W.2d 81 (1993). In order to make out a prima facie case of fraud, a plaintiff must prove the following:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [*Id.* at 533 (citation and internal quotation marks omitted).]

Furthermore, allegations of fraud, and the circumstances constituting fraud must be stated with particularity. MCR 2.112(B)(1). General allegations or mere speculation are insufficient. *LaMothe v Auto Club Ins Ass'n*, 214 Mich App 577, 586; 543 NW2d 42 (1995).

Plaintiff's allegation of fraud is premised on two theories: (1) that defendants' failed to make use of his former attorney's affidavit, and (2) that defendants colluded with his former attorney to conceal the attorney's negligence in not responding to Norfolk's demands for proof of financing. However, the decision not to use the former attorney's affidavit sounds in negligence, not fraud. Additionally, plaintiff's allegations of collusion are mere speculation predicated on a false dilemma. Specifically, plaintiff asserts that either defendants did not properly review his file when taking over his representation, or defendants must have deliberately suppressed certain evidence. Neither plaintiff's complaint nor any of his exhibits alleged any instances where defendants made representations that they either knew to be false or made with reckless disregard for their truth or falsity. Therefore, plaintiff's claim is insufficient to support a claim for fraud.

Plaintiff's breach of contract argument is similarly without merit. Although plaintiff asserts that the claim is premised on the existence of a special agreement, the substance of the claim is malpractice. Plaintiff argues that defendants failed to prepare a rebuttal brief after agreeing to submit one. Not preparing a rebuttal brief is a manifestation of a litigation strategy, and the circuit court correctly concluded that it would be futile to add a breach of contract claim because it was duplicative of the legal malpractice claim.

V. MOTION FOR RECONSIDERATION

Finally, we disagree with plaintiff that the circuit court abused its discretion when it denied his motion for reconsideration. A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. *Id.* at 605-606. The circuit court is given considerable discretion in ruling on a motion for reconsideration. *Al-Maliki v LaGrant*, 286 Mich App 483, 486; 781 NW2d 853 (2009). A trial court does not abuse its discretion when it denies a motion for reconsideration "resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order." *Woods v SLB Property Management*, LLC, 277 Mich App 622, 630; 750 NW2d 228 (2008) (citation omitted).

Although the legal theories presented in plaintiff's motion for reconsideration were the same, the facts seemingly were not. Specifically, plaintiff attached an affidavit to his motion for reconsideration from his expert that supported plaintiff's claim that defendants breached a duty of care in handling his case. Although the original deadline for obtaining expert witnesses had passed, Judge Morris's scheduling order was suspended and a new deadline had yet to be established. Therefore, plaintiff was technically not under an obligation to procure an expert witness at the time the motion for summary disposition was filed.

Furthermore, in its order denying reconsideration, the circuit court stated that it would be improper for the court to consider the affidavit because it was not before the court during the original motion for summary disposition, relying on *Spectrum Mfg Corp v Bank of Lansing*, 118 Mich App 25, 31; 324 NW2d 523 (1982). In *Spectrum Mfg Corp*, in the context of reviewing a grant of summary disposition, this Court stated that "[w]hen passing upon a motion under this subrule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then available to it." *Id.* Nowhere in the opinion, however, did the Court state that a trial court is limited in a motion for reconsideration to the record before it during the original motion for summary disposition. To the contrary, a trial court is given broad discretion in granting a motion for reconsideration, *Al-Maliki*, 286 Mich App at 486, and a trial court is not prohibited from considering new facts so long as they were not available during original motion for summary disposition. See generally *Woods*, 277 Mich App at 630.

If considered in isolation, this stated reason for declining to consider the affidavit could be construed as implying that the trial court believed it lacked the discretion to consider the affidavit. This would have constituted an error of law, which by definition constitutes an abuse of discretion. *People v Giovannini*, 271 Mich App 409, 417; 292 NW2d 191 (1980). Likewise, a trial court necessarily abuses its discretion by failing to exercise it when called upon to do so. *King v State*, 488 Mich 208, 216; 793 NW2d 673 (2010). However, the trial court clearly did not limit its consideration strictly to the fact that the affidavit had not previously been filed. The trial court also relied on defendants' arguments, which, as the trial court observed at the initial grant of summary disposition, explained that plaintiff had already had more than ample time in which to find an expert. The trial court specifically found at the summary disposition motion that even adjourning that motion further would be inappropriate.

The trial court was not prohibited from considering the affidavit, but it was also not required to do so. In context, it appears that the trial court appropriately exercised its discretion

and refused to consider the affidavit as simply being grossly untimely. We are unable to conclude that this fell outside the range of principled outcomes.

VI. CONCLUSION

Both parties address the attorney judgment rule, but because that issue was never addressed by the trial court and would not affect the outcome of this case before this Court, we likewise decline to address it. The trial court properly granted defendants' motion for summary disposition. An expert was required in order for plaintiff make out a claim for legal malpractice, and plaintiff's request to amend his pleadings would have been futile. Although plaintiff's motion for reconsideration seemed to raise new facts that ostensibly should have been considered, it is clear from context that the trial court *did* consider the new facts in the context of the rest of the case and did not abuse its discretion by denying reconsideration.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kristen Frank Kelly
/s/ Amy Ronayne Krause