STATE OF MICHIGAN

COURT OF APPEALS

DANIEL PAUL PEIFFER, Plaintiff-Appellant,	UNPUBLISHED January 11, 2018
v	No. 337543 Ionia Circuit Court
KERRY M COLE and COLE LAW, P.C., Defendant-Appellees.	LC No. 16-032193-NM

Before: METER, P.J., and BORRELLO and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the February 28, 2017 order of the trial court granting summary disposition in favor of defendants and dismissing plaintiff's legal malpractice case. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

After a criminal jury trial, plaintiff was convicted of operating a motor vehicle while intoxicated (third offense) (OUIL III), MCL 257.625(10)(c), and driving with a suspended license, MCL 257.904(3)a). Plaintiff was acquitted of fleeing and eluding a police officer, MCL 257.602a(2). Plaintiff was sentenced as a fourth habitual offender to 3 to 6 years' imprisonment for the OUIL III offense and a concurrent term of 6 month's imprisonment for driving with a suspended license.[1]

Subsequently, plaintiff brought this civil action in propria persona against his former criminal trial counsel (and his law firm) (hereinafter collectively "defendants"). Plaintiff alleged that defendants committed legal malpractice during his criminal trial by failing to raise a jurisdictional defense—specifically that the Clinton County Sheriff's Deputy who stopped his vehicle "had no authority to execute a misdemeanor traffic stop outside of his territorial jurisdiction." Plaintiff also alleged that defendants had generally failed to protect his rights and had violated the professional and ethical standards of a licensed Michigan attorney; however,

[1] See *People v Peiffer*, unpublished opinion per curiam of the Michigan Court of Appeals, issued June 28, 2016 (Docket No. 325148). This Court affirmed plaintiff's convictions and sentences.

plaintiff never elaborated or argued these general allegations before the trial court, nor does he pursue them on appeal.

Defendants moved for summary disposition under MCR 2.116(C)(8) (failure to state a claim for which relief could be granted) and (C)(10) (no genuine issue of material fact). Defendants argued that the criminal trial transcript demonstrated that Clinton County Sheriff's Deputy Andrew Wiswasser had observed plaintiff speeding while plaintiff was on the portion of Hubbardston Road contained within Clinton County[2], and that Wiswasser therefore had possessed the authority to pursue and stop plaintiff's vehicle. Further, defendants noted that MCL 257.726a gave Wiswasser the authority to enforce the motor vehicle code on a road that acts as a county boundary. Finally, defendants argued that even if Wiswasser's stop was extrajurisdictional, such a statutory violation would not have resulted in the exclusion of evidence of plaintiff's intoxication and lack of a valid license. Plaintiff argued that the curvature of Hubbardston road made it impossible for Wiswasser to have observed him speeding in Clinton County, and that once he was travelling southbound on the portion of Hubbardston Road that formed the border between Clinton and Ionia Counties, Wiswasser lacked the jurisdictional authority to arrest him.

The trial court granted summary disposition in favor of defendants under both MCR 2.116(C)(8) and (C)(10), stating:

> I think it's very clear from the statutes and from the case law that was outlined in the motion that this claim falls on its face right now. That there is no legal basis for the complaint . . . . I think it's well settled law that an officer, in this case a deputy, a Clinton County Deputy, certainly has the ability to enforce and has the jurisdiction to enforce traffic laws on what I think everybody agrees is a border road between the two counties. And even if that were not the case, it's very clear from the transcript as pointed out in the arguments here today, that the deputy observed the defendant violating, at a minimum, the basic speed law while in Clinton County, or at least portions of Clinton County.

This appeal followed. This Court denied plaintiff's motion to expand the lower court record to include a "demonstration video" that plaintiff asserts was "proffered" by his defense counsel during his criminal trial,[3] that allegedly would prove that Wiswasser's view of plaintiff

[2] A portion of Hubbardston Road serves as a dividing line between Clinton and Ionia Counties.

[3] It is not clear from plaintiff's motion whether the video was admitted and viewed by the jury during his criminal trial. Defendants speculated in their response to plaintiff's motion that plaintiff was referring to an exhibit admitted during the criminal trial that depicted a vehicle driving Northbound on Hubbardston Road.

while operating his vehicle on the Clinton County side of Hubbardston Road would have been blocked by a roadside sign.[4]

II. STANDARD OF REVIEW

We review de novo a trial court's grant of summary disposition. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone; all well-pleaded factual allegations are accepted as true and construed in the light most favorable to the nonmovant. *Id*. at 119. A motion under MCR 2.116(C)(10) tests the factual support for the plaintiff's claims. *Id*. at 120. We review the documentary evidence submitted, and all reasonable inferences therefrom, in the light most favorable to the nonmovant to determine whether a genuine issue of material fact exists. *Id*.

Plaintiff did not seek leave to amend his complaint with the trial court. We review for plain error a trial court's failure to sua sponte offer a plaintiff leave to amend his complaint under MCR 2.116(C)(8) after granting summary disposition in the defendant's favor. See *Kloain v Schwartz*, 278 Mich App 47, 51; 748 NW2d 671 (2006).

III. ANALYSIS

The trial court did not err by granting summary disposition in favor of defendants under either MCR 2.116(C)(8) or (C)(10).

The elements of a legal malpractice claim are "(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." *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 579 (1994) (quotation marks and citation omitted). In order to show proximate cause, a plaintiff must show that but for his attorney's malpractice he would have been successful in the underlying suit—frequently characterized as proving the "suit within a suit." *Id*. at 586-587.

A. MCR 2.116(C)(8)

In this case, plaintiff alleged that defendants' malpractice consisted of the failure to raise a jurisdictional defense, specifically, that Wiswasser lacked the authority to arrest plaintiff because he had observed plaintiff speeding in Ionia County, not Clinton County. With regard to the pleadings alone, and accepting all of plaintiff's factual allegations as true, see *Maiden*, 461 Mich at 119, plaintiff's claim is still legally deficient. Our Supreme Court has stated that even when an officer makes an arrest "outside his jurisdiction, without a warrant, not in hot pursuit, and not in conjunction with law enforcement officers having jurisdiction," the exclusion of evidence is not the appropriate remedy for a "statutorily illegal" but "constitutionally valid" arrest. *People v Hamilton*, 465 Mich 526, 530-535; 638 NW2d 92 (2002), abrogated in part on

[4] See *Peiffer v Cole*, unpublished order of the Michigan Court of Appeals, issued October 25, 2017 (Docket No. 337543).

other grounds by *Bright v Ailshie*, 465 Mich 770; 641 NW2d 587 (2002). The facts in *Hamilton* are squarely on point with the instant case, including that the challenged evidence was evidence of the plaintiff's intoxication and suspended license, and they compel the same result. Therefore, the trial court did not err by holding that plaintiff's complaint failed to state a claim on which relief could be granted, as plaintiff did not even allege a constitutional violation that, had it been raised in the criminal trial, would have warranted suppression of evidence as a remedy. MCR 2.116(C)(8).

Further, amendment of plaintiff's complaint would have been either futile or unduly prejudicial to defendants. *Lane v KinderCare Learning Centers, Inc*., 231 Mich App 689, 696; 588 NW2d 715 (1998). Any amendments to the complaint related to plaintiff's continued argument that Wiswasser was required to observe him speeding in Clinton County in order to have jurisdiction to arrest him in Ionia County would have been futile in light of *Hamilton*. And although plaintiff cursorily argues for the first time on appeal that Wiswasser lacked *any* probable cause to stop his vehicle because he could not have seen him speeding at all, he never argued that issue below; in fact, plaintiff continually framed his argument to the trial court as being that road geography had prevented Wiswasser from observing him speeding *in Clinton County*. If the trial court had permitted plaintiff to amend his complaint to allege that defendants should have argued that Wiswasser lacked probable cause to stop plaintiff, such an amendment would have added an entirely new claim—that defendants had failed to move for the suppression of evidence on Fourth Amendment grounds. Such a new allegation, essentially unrelated to the existing allegations in the complaint, would have prejudiced defendants. See *Knauff v Oscoda County Drain Com'r*, 240 Mich App 485, 493-494; 618 NW2d 1 (2000) (holding that the trial court did not abuse its discretion by denying the plaintiffs' request to amend their complaint to add a new claim after the defendants were granted summary disposition when there was "an absence of particular facts" to support a new claim and the plaintiffs could not "articulate with specificity" the grounds for the new claim.). But plaintiff never sought to amend his complaint, and never articulated with specificity any particular facts to support a constitutional claim. The trial court therefore did not err by failing sua sponte to allow plaintiff to amend his complaint to add a brand new allegation. *Id*.; *Kloain*, 278 Mich App at 51.

B. MCR 2.116(C)(10)

With regard to the existence of genuine issues of material fact, the trial court correctly noted that the parties had agreed that the portion of Hubbardston Road on which plaintiff was arrested formed a border between Ionia County and Clinton County. At the motion hearing, plaintiff acknowledged that "half the road is in Ionia County, half the road is in Clinton County." In fact, plaintiff agreed that, had he been travelling in the opposite direction on Hubbardston Road, he would have been in Clinton County.

MCL 257.726a provides:

> A peace officer of any county, city, village or township of this state may exercise authority and powers outside his own county, city, village or township when he is enforcing this act [the Michigan Vehicle Code] on a street or highway which is on the boundary of the county, city, village or township the same as if he were in his own county, city, village or township.

We need not belabor the point any further. Violation of a posted speed limit is a violation of the Michigan Vehicle Code, MCL 257.627(1), as is operating a vehicle while intoxicated, MCL 257.625, as is operating a vehicle with a suspended driver's license, MCL 257.904(3)a). The parties agreed that plaintiff was arrested on a road that formed the boundary between Clinton County and Ionia County; plaintiff himself described that portion of the road as "half in" each county. As a matter of law, Wiswasser possessed the authority to enforce the Michigan Vehicle Code when he stopped plaintiff's car on Hubbardston Road. MCL 257.726a; see also *People v Rowe*, 95 Mich App 204, 211 n 4; 289 NW2d 915 (1980). Failing to argue to the contrary in plaintiff's criminal trial would have been futile and did not constitute legal malpractice.

Affirmed.

/s/ Patrick M. Meter
/s/ Stephen L. Borrello
/s/ Mark T. Boonstra