STATE OF MICHIGAN

COURT OF APPEALS

MARION BEDNARSKI, Plaintiff-Appellant,	UNPUBLISHED July 12, 2011
v	No. 296979 Wayne Circuit Court
STEVEN E. SMITH d/b/a STEVEN SMITH & ASSOCIATES, Defendant-Appellee.	LC No. 08-015271-NM

Before: MURRAY, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition and dismissing his legal malpractice claim. We affirm.

I. BACKGROUND

The cause of this controversy is simple: plaintiff desired to open an adult entertainment club; but after obtaining the necessary zoning approval for the club's construction, plaintiff was unable to obtain any interest in the club from his putative partners. Plaintiff blames defendant, his former attorney, for the failure to secure his interests. Defendant counters that plaintiff cannot prove that his alleged "bad advice" caused plaintiff's damages.

The events underlying this case stretch back to 2003. In December of that year, defendant submitted an application on plaintiff's behalf to the Lincoln Park planning commission to operate an "adult cabaret" on Lot 25 (the north lot on Papalas Drive) in the city of Lincoln Park. Defendant also assisted plaintiff in forming corporate entities – Oval Office Investment, L.L.C. and MB & CK, Inc., for the club's operation. Although the commission eventually approved the application, plaintiff's relationship with his business partner apparently soured and the two did not proceed with their plans.

Several years later, in 2006, plaintiff and another investor, Charles Shattelroe, discussed entering into a joint venture to form a new adult entertainment club. A subsequent "letter of understanding" between those parties dated May 10, 2006, showed that plaintiff owned Lot 25 and reflected the parties' intent that Shattelroe and possibly others would invest in plaintiff's "business enterprise" to open "an adult entertainment facility/bar" and become a 50/50 partner(s). Notably, the letter also indicated that Shattelroe and his investors were free to

abandon the transaction "at any time before execution of definitive transaction documents without any liability to [plaintiff]."

Despite this putative arrangement, on June 23, 2006, the Lincoln Park community planners declined to approve plaintiff's subsequent application for a site plan review on Lot 25 because plaintiff's prior approval from the planning commission had lapsed as construction had failed to commence within one year of the original approval, and because approval had since been granted for the construction of a church within 450 feet of Lot 25 – a fact that would preclude construction of an adult business on Lot 25 under city ordinances.

Around this same time, Shattelroe entered into a partnership with Frank Didario and formed Papalas Drive Development, L.L.C. ("Papalas"). Plaintiff averred that these investors were previously unable to obtain approval for a club and therefore wanted to make a deal with plaintiff because he was "well-connected" in Lincoln Park. According to defendant, plaintiff informed him that he had a new club deal with new investors, and left defendant with the understanding that the investors would own the club building through Papalas, while plaintiff would have a 20 percent share in the profits through Elliptical, L.L.C. Thus, with plaintiff having failed to obtain approval for Lot 25, Papalas purchased the adjacent property, Lot 24, with the hope that plaintiff could have his prior approval "reissued but transferred" to that lot.

According to plaintiff, Shattelroe and Didario were clear that plaintiff and defendant were responsible for obtaining approval for Lot 24, and plaintiff was under the impression that he would receive a 20 percent interest in equity or profits. To negotiate this arrangement, plaintiff hired two attorneys that did not include defendant; however, neither was ultimately successful in obtaining an agreement. Notably, Didario testified that defendant did not negotiate on plaintiff's behalf, and plaintiff admits that defendant was not one of the attorneys he hired to negotiate with Papalas.

Papalas subsequently contacted defendant in October 2006 to obtain approval from the planning commission due to his proven expertise in obtaining the prior approval for Lot 25. Although he had not seen a signed document, defendant testified that he was under the impression that plaintiff and Papalas had reached an agreement and indicated at the November 8, 2006, planning commission hearing that he represented both Papalas and plaintiff since "they were a team" and he considered them "one and the same." Plaintiff, however, claimed that he had retained defendant before the hearing and that on the night of the hearing defendant had advised him that although there was no written agreement with Papalas, plaintiff's interests were protected because the approval would be issued in plaintiff's name. Plaintiff averred that but for this advice, he would not have proceeded with the hearing to obtain the necessary approval.

The planning commission subsequently granted approval to build an adult entertainment club on Lot 24, but it was not issued in plaintiff's name. When negotiations to reach a deal between plaintiff and Papalas faltered, Papalas sued plaintiff alleging in part that plaintiff had attempted to extort Papalas rather than accept a minority interest in the new club project. Plaintiff filed a counterclaim and impleaded Shattelroe and Didario, claiming that he was misled or lied to regarding his compensation or ownership interest in the club venture and that his relationship with defendant Smith was manipulated.

After that case settled, plaintiff filed the malpractice complaint underlying this appeal on November 6, 2008. Specifically, plaintiff alleged that defendant (1) failed to advise plaintiff of his conflict of interest with Papalas, (2) failed to encourage plaintiff to seek alternative counsel due to this conflict of interest, (3) failed to advise plaintiff against seeking transfer of the approval of Lot 25 to Lot 24 until obtaining an enforceable agreement providing an ownership interest in Papalas, (4) sought the transfer of approval without first obtaining an agreement from Papalas securing plaintiff's ownership interest, and (5) engaged in representation of both plaintiff and Papalas despite a conflict of interest. Defendant answered and, following discovery, filed a motion for summary disposition and sought sanctions for a frivolous lawsuit.

In his motion, defendant argued that plaintiff could not show that defendant's representation of plaintiff before the planning commission was the proximate cause of his damages where plaintiff had retained other counsel to secure an ownership interest agreement with Papalas, plaintiff's prior approval of Lot 25 had already lapsed (and thus no "transfer" could occur), and plaintiff had yet to obtain an ownership interest in the new club from Papalas at the time of the planning commission meeting. Additionally, defendant noted that his representation of plaintiff was limited to obtaining plan approval for Lot 24, and therefore matters pertaining to the negotiation of his ownership interest with Papalas were outside the scope of the attorney-client relationship.

Plaintiff responded that defendant's failure to secure an agreement from Papalas detailing plaintiff's interest in the club was the proximate cause of his damages given that any attorney would know to obtain such an agreement. Additionally, plaintiff alleged a genuine issue of material fact existed regarding plaintiff's reasonable expectation of the scope of defendant's representation in light of defendant's knowledge of plaintiff's goal to obtain an interest in such a club coupled with the large retainer defendant charged ($4,500).

At the ensuing motion hearing, the circuit court – after noting its familiarity with the underlying litigation between plaintiff and Papalas – ruled that summary disposition was appropriate considering that: no transfer had actually occurred, plaintiff's claim was speculative, plaintiff had failed to object to the alleged conflict of interest, and plaintiff was represented by other counsel for negotiations. As the court explained:

> [T]he claim is that [defendant] should not have let [plaintiff] "transfer" the site plan approval from lot 25 to 24 without an enforceable agreement with Papalas Drive. That would be giving [plaintiff] an ownership interest in the Papalas Drive and the business on lot 24. First of all, there was no transfer. The site approval was null and void because the construction had not begun within the 12 months. And in addition to that within the 12 months a church site had been approved and the ordinance say[s] that lot 25 was within 450 feet of where the church was going to be. [Plaintiff] never had a chance to build anything on lot 25. I think plaintiff's claim is so speculative there is no evidence to support that but for [defendant's] omission plaintiff would have resulted [sic] a profitable relationship with Papalas Drive. The underlying lawsuit was aggressively litigated by both parties. With many allegations the least of which was lot 24. [Plaintiff is] basically arguing the breach by quote [defendant] [sic] caused a third-party to breach this "alleged agreement" which there never was; there was a letter of intent. In addition to that plaintiff himself was at this meeting where they

> approved lot 24 and never objected to Smith appear[ing] at the hearing on behalf of himself and Papalas Drive. The other – in addition to that [plaintiff] did have other attorneys that were representing him on this letter of intent with Papalas Drive, Inc. Your motion is granted.

Despite this ruling, the court declined to award sanctions although it found the prospect "tempting."

After entry of the order reflecting this ruling, plaintiff filed a motion for reconsideration, arguing that the court's ruling constituted palpable error where there was no evidence that Papalas sought a transfer of the Lot 25 approval and defendant's representation of plaintiff had been ongoing despite defendant's own denial that he was representing plaintiff whom he realized was seeking approval in exchange for an ownership interest in the club. Dispensing with oral argument, the court issued an order denying this motion pursuant to MCR 2.119(F)(3) on February 19, 2010. This appeal ensued.

II. ANALYSIS

As he did below, plaintiff argues on appeal that but for defendant's advice, which was given despite a conflict of interest, he would not have sought approval for the club without a written agreement from Papalas securing his interest in the club.

The Court reviews de novo an appeal from an order granting a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth satisfactory evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

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 the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella & Petrella & Assoc, PC*, 261 Mich App 705, 712; 683 NW2d 699 (2004). Central to plaintiff's claim is the element of causation.[1] As our Supreme Court has explained:

[1] In addressing the central issue of causation, we proceed with the assumption that an attorney-client relationship between plaintiff and defendant in fact existed. Indeed, despite defendant's

> Often the most troublesome element of a legal malpractice action is proximate cause. As in any tort action, to prove proximate cause a plaintiff in a legal malpractice action must establish that the defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit. [*Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994) (quotation marks and citations omitted).]

Plaintiff hinges his entire theory of causation on an exchange allegedly occurring between himself and defendant just prior to the planning commission meeting. Specifically, plaintiff alleges that defendant advised him to proceed despite not having obtained a written agreement from Papalas because the approval would subsequently be issued in plaintiff's name thereby securing his interests. Plaintiff averred that defendant also assured him that defendant would prepare a written agreement the following day and record the ensuing negotiation with the Papalas investors.[2] As previously noted, defendant stated that he proceeded to the hearing under the belief that plaintiff's agreement with Papalas was already completed. But even after resolving these versions of events in plaintiff's favor, plaintiff cannot show that but for his reliance on defendant's alleged advice, he would have obtained an enforceable agreement from Papalas.

For starters, even if plaintiff had elected against advocating for the commission's approval of the Lot 24 site plan, plaintiff cannot show that Papalas would not have otherwise obtained the approval. Indeed, defendant explained that the planning commission was required to give site plan approval if the proposed project met their criteria *irrespective of the identity of the applicant.* Thus, while plaintiff's advocacy before the commission certainly *may have been* advantageous for Papalas, plaintiff's advocacy was not the dispositive factor concerning the board's granting the approval.

This fact is important given plaintiff's explanation that his value to Papalas was his ability to secure the Lot 24 site plan approval.[3] Thus, bearing in mind that plaintiff was not dispositive in obtaining the approval, plaintiff can show nothing more than a mere possibility that but for defendant's advice, he would have obtained an enforceable agreement. "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation

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testimony that he considered himself as representing only Papalas, he told the planning commission that he represented both parties.

[2] As we address later in this opinion, defendant's argument that plaintiff's averments contradicted his prior deposition testimony goes to whether there was a conflict of interest, rather than whether defendant provided the alleged "bad advice." Additionally, we decline to consider as evidence mere allegations contained in Papalas's lawsuit that plaintiff refused to engage in good faith negotiations.

[3] Plaintiff claims the trial court erred in framing the issue as whether there had been a legal transfer of the approval from Lot 25 to Lot 24. However, it was plaintiff who injected the issue of transfer into this case, having alleged throughout his complaint that both he and the planning commission treated the issue as one involving the transfer of approval. Regardless, the issue of transfer has no bearing on whether defendant's alleged advice caused plaintiff's damages.

or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Pontiac Sch Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 615; 563 NW2d 693 (1997) (quotation marks and citation omitted). Such speculation or conjecture is likewise insufficient to oppose a motion for summary disposition. *Libralter Plastics, Inc v Chubb Group*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

Further revealing the speculative nature of plaintiff's claim is the fact that negotiations between plaintiff and Papalas continued through January 2007 – nearly two months after the commission granted the approval. On this very point, Didario even testified that "we were trying to fit [plaintiff] into a piece of the operation" long after the commission granted approval. To counter this, plaintiff offers only the naked assertion that he lost his "bargaining chip" by obtaining the site approval. However, this falls far short of plaintiff's burden to "present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Pontiac Sch Dist*, 221 Mich App at 614 (quotation and citation omitted). Moreover, not a shred of evidence exists showing that defendant's alleged advice caused these subsequent negotiations to fail. Thus, we are again left with only the possibility that defendant's alleged advice was responsible for plaintiff's damages.

Contesting that his damages are speculative, plaintiff points to an email from Papalas's attorney as well as defendant's own affidavit. Both acknowledge that plaintiff would receive a "substantial" 20 percent interest in the club. Plaintiff's argument, however, misses the key to the causation analysis: it is not whether the amount of the interest at stake was speculative, but whether but for defendant's alleged advice, plaintiff would have obtained that interest. Regardless, both the email and defendant's affidavit reveal that the interest at stake was only *potential* in nature: the email "*anticipated*" a 20 percent investment return for the venture's members and the affidavit indicated defendant's belief that plaintiff "*would become* a 20 percent owner . . . ." (Emphasis supplied.) This is also consistent with the Letter of Intent detailing that Shattelroe and his investors were free to abandon the transaction "at any time before execution of definitive transaction documents without any liability to [plaintiff]." Consequently, the email and affidavit of defendant merely reveal the status of the ongoing negotiations and hardly present a basis upon which to conclude that but for defendant's advice, plaintiff would have had an enforceable agreement.

Additionally, we reject plaintiff's claim that summary disposition was inappropriate because defendant acted in violation of the conflict of interest rule, Model Rules of Professional Conduct 1.7(a)(1).[4] See *Beattie v Firnschild*, 152 Mich App 785, 791; 394 NW2d 107 (1986) (although MRPC 1.0 provides that violations of the MRPC do not give rise to a cause of action, violations of the MRPC may create a rebuttable presumption of malpractice). Indeed, notwithstanding that plaintiff hired two other lawyers expressly for the purposes of negotiating a deal with Papalas, plaintiff admitted in his deposition that he authorized defendant to seek

[4] That rule prohibits a lawyer from representing a client if the representation of that client would be directly adverse to another client unless, "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client." MRPC 1.7(a)(1).

approval of the Lot 24 site plan on behalf of plaintiff and Papalas "as partners." This is consistent with defendant's understanding that plaintiff and Papalas were acting as "a team," and as "one and the same," and had already reached an agreement.[5]

Before moving on, we note that plaintiff appears to argue that summary disposition was inappropriate because genuine issues of material fact existed based on evidence that plaintiff "would have shown" had the case gone to trial.[6] However, a party opposes a motion for summary disposition by setting forth specific facts, not pledging to do so at some future date. *Smith v Globe Life Ins Co*, 460 Mich 446, 455, 455 n 2; 597 NW2d 28 (1999). And, without any record citations from plaintiff on this score, we will not scour the record in the vain hope of finding implicit support for plaintiff's claim. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). This argument is wholly without merit.

This brings us to plaintiff's final assignment of error: that the circuit court erred in denying his motion for reconsideration. A motion for rehearing or reconsideration under MCR 2.119(F) requires the moving party to "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." We review a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In raising this issue, plaintiff either reiterates arguments previously presented in opposing summary disposition, or fails to provide any citation to the record in support of his argument that an official from the City of Lincoln Park opined that no ordinance precluded construction of an adult cabaret club on Lot 25. As for the former, a motion for reconsideration that merely presents the same issues already ruled on by the court generally will not be granted, *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82-83; 669 NW2d 862 (2003); as for the latter, plaintiff has abandoned his argument, *Mudge*, 458 Mich at 105. There was no abuse of discretion.

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[5] We decline to construe plaintiff's affidavit (in which he averred that defendant gave him "bad advice") as an objection to the purported conflict of interest since it is clear such an interpretation would conflict with his prior deposition testimony noted *supra*. See *Casey v Auto Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006) ("a witness is bound by his or her deposition testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition."). By this same token, it is of no moment that defendant is alleged to have stated that he was "representing the other side" (i.e., Papalas) even though he informed the planning commission that he represented both Papalas and plaintiff, or that defendant allegedly received retainers from both parties, given plaintiff's deposition testimony.

[6] That evidence included: that expired site plan approvals are often reinstated; that Lincoln Park city officials had opined that the existence of a church would not have precluded an adult entertainment club on Lot 25; and that plaintiff did in fact object to the purported conflict of interest.

Affirmed.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause