STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

JODY WELLS #320901,

Plaintiff,

v

File No. 04-23557-NM
HON. PHILIP E. RODGERS, JR.

JAMES MARCHANT,

Defendant.
/

Plaintiff in Pro Per

Mark P. Bickel (P23903)
Attorney for Defendant

DECISION AND ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

On November 29, 2000, a Genesee County Circuit Court jury convicted the Plaintiff of first degree murder. The Plaintiff thereafter retained the firm of Miller and Associates to appeal his conviction. Miller and Associates assigned the case to the Defendant to prepare and file a brief with the Michigan Court of Appeals. On May 13, 2002, the Court of Appeals affirmed the conviction.

On March 17, 2004, the Plaintiff filed this legal malpractice action claiming that the Defendant omitted significant and obvious issues from his appeal which would have resulted in reversal of his conviction. On November 1, 2004, the Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). On November 2, 2004, the Court issued a pre-hearing order giving the Plaintiff 21 days from the date of the order to file and serve a response to the motion and giving the Defendant 28 days from the date of the order to file and serve a reply. These time limits have now expired.

The Court dispenses with oral argument pursuant to MCR 2.119(E)(3) and issues this written decision and order. For the reasons stated herein, the Defendant's motion for summary disposition is granted.

The Defendant argues that the Plaintiff is unable to meet his burden of proof because the allegations in the Complaint require the use of expert testimony and the Plaintiff has no expert

witness testimony to offer. The Defendant primarily focuses on the lack of an expert to establish that the Defendant's negligence was the proximate cause of any alleged injury.

The Plaintiff admittedly does not have an expert witness. The Plaintiff contends, however, that he does not need an expert to testify in this case.

STANDARD OF REVIEW[1]

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant 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. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may

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[1]The Plaintiff relies upon the outdated "where a record might be developed that would leave open an issue on which reasonable minds could differ" standard of review enunciated in *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 NW2d 316 (1973).

not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

ISSUE

WHETHER EXPERT TESTIMONY IS REQUIRED IN ORDER TO ESTABLISH LEGAL MALPRACTICE

The elements of legal malpractice 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. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). Further, where the alleged malpractice results from the failure to diligently pursue or timely file a client's claim, a plaintiff seeking to establish the third and fourth elements of the claim, i.e., proximate cause and damages, must show that but for the attorney's alleged malpractice she would have been successful in the underlying suit. *Id* at 586; *Basic Food Industries v Grant*, 107 Mich App 685, 691; 310 NW2d 26 (1981).

It is undisputed that there was an attorney-client relationship between the parties in this case. Since an attorney-client relationship existed, a duty to use and exercise reasonable care, skill, discretion, and judgment with regard to the representation of the client existed as a matter of law. *Simko v Blake*, 448 Mich 648, 655-656; 532 NW2d 842 (1995), quoting *Eggleston v Boardman*, 37 Mich 14, 16 (1877). An attorney is obligated to act as an attorney of ordinary learning, judgment, or skill would under the same or similar circumstances. *Id* at 656. However, an attorney is not 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. *Id.* "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." *Id* at 658. Therefore, the issue presented here is whether this Defendant breached the standard of care by failing to present significant and obvious issues on the Plaintiff's behalf that would have resulted in a reversal of his conviction.

In professional malpractice actions, an expert is usually required to establish the standard of conduct, breach of the standard, and causation. *Dean v Tucker*, 205 Mich App 547, 550; 517 NW2d 835 (1994); *Law Offices of Lawrence J Stockler PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989).

In a legal malpractice action alleging negligence during an appeal, the issue of proximate cause is usually an issue of law to be decided by the court. *Reinhart v Winiemko*, 444 Mich 579,582; 513 NW2d 773 (1994). In *Reinhart*, a client sued his attorney for malpractice. The trial court entered judgment on the jury verdict awarding damages to the client. The attorney appealed. The Court of Appeals, 196 Mich App 110; 492 NW2d 505, affirmed in part, reversed in part and remanded for further proceedings. Appeal was taken. Our Supreme Court held that in a legal malpractice action involving appellate advocacy, the question whether the client would have prevailed on appeal but for the alleged malpractice of the attorney was a question of law to be decided by the court. The Court said:

> 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." *Id.* In other words, "the client seeking recovery from his attorney is faced with the difficult task of proving two cases within a single proceeding." *Id* at 64; 503 NW2d 435, quoting *Basic Food Industries, Inc v Grant*, 107 Mich App 685, 691; 310 NW2d 26 (1981), quoting 45 ALR2d 5, § 2, p 10. To hold otherwise would permit a jury to find a defendant liable on the basis of speculation and conjecture. 443 Mich 65; 503 NW2d 435. Although the "suit within a suit" concept is not universally applicable, it applies where the alleged negligent conduct involves the failure of an attorney to properly pursue an appeal. *Id.*
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> In a legal malpractice action alleging negligence in an appeal a plaintiff must prove two aspects of causation in fact: whether the attorney's negligence caused the loss or unfavorable result of the appeal, and whether the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation. 2 Mallen & Smith, Legal Malpractice (3d Ed.), § 24.39, p 538. Whether the court as a matter of law or the jury as an issue of fact determines these aspects of proximate cause is the issue in the instant case.
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> . . .whether an appeal lost because of an attorney's negligence would have succeeded if properly pursued is an issue for the court because the resolution of the underlying appeal originally would have rested on a decision of law. See, e.g., *Chocktoot v Smith*, 280 Or 567, 574-575; 571 P2d 1255 (1977). With rare exception, appeals are based on and resolved as matters of law, not fact. *Demill v Moffat*, 45 Mich 410; 8 NW 79 (1881); *Keiser v Enterprise Foundry Co*, 357 Mich 159; 97 NW2d 737 (1959). Thus, an appellate malpractice action presents an issue of law regarding the success of the underlying appeal within its proximate cause analysis.
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> Indeed, "courts will not permit even expert witness testimony on a question of . . . law because it is the exclusive responsibility of the trial judge to find and interpret the applicable law." *People v Lyons*, 93 Mich App 35, 46; 285 NW2d 788 (1979).

Reinhart, supra at 586-588. See also, *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122-123; 559 NW2d 54 (1996) ("an expert cannot testify regarding questions of law or legal conclusions").

Despite *Reinhart*, the Defendant argues, that the Plaintiff "still carries the burden of presenting evidence that he was likely to prevail" and "[a] failure to present such evidence must result in a dismissal of his case," citing the Court of Appeals unpublished opinion in *Starks v Ramey,* Docket No. 218717 (2001). In *Starks*, the Court of Appeals affirmed the trial court's grant of summary disposition in favor of the defendant on plaintiff's various claims of legal malpractice because, *as a matter of law*, the proximate cause of the plaintiff's conviction was his guilty plea, not defendant's alleged acts of legal malpractice. *Starks* does not support the Defendant's argument.

The Defendant also relies upon another unpublished Court of Appeals opinion, *Tull v State Appellate Defender Office*, Docket No. 244982 (2004). In that case, the plaintiff alleged that the defendant's failure to timely file an application for leave to appeal resulted in plaintiff's felony murder conviction being upheld. It was undisputed that the defendant failed to timely file for leave to appeal on behalf of the plaintiff. However, there was nothing in the record to indicate that the appellate court would have granted leave or that, if it had, the plaintiff would have prevailed on appeal. The plaintiff's complaint merely set forth conclusory assertions concerning his desired success on appeal. The Court said:

> . . . to create a fact question, plaintiff would have had to rely on some expert opinion that the appeal would have been granted and successfully resulted in a favorable decision for plaintiff. There is no such support for plaintiff's

> claim. Therefore, the trial court's grant of summary disposition in favor of defendant was proper.

There is no way to reconcile the holding in *Tull* with the holding in *Reinhart*. Being an unpublished opinion, *Tull* has no precedential value. *Reinhart*, does have precedential value, and, *Reinhart* directs this Court to decide, as a matter of law, whether the plaintiff has a viable underlying appeal. Otherwise, expert witnesses would be required to testify on questions of law, thereby invading the province of the courts to find and interpret applicable law.

In *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004), another panel of the Court of Appeals followed *Reinhart*. In *Manzo*, a hospital employee brought a legal malpractice action against the attorneys who represented him in his Whistleblowers' Protection Act (WPA) claim against the hospital peer review committee. The trial court denied the defendant attorneys' motion for summary disposition brought pursuant to MCR 2.116(C)(10). The defendants appealed. In lieu of granting leave to appeal, our Supreme Court remanded the case to the Court of Appeals for consideration. The Court of Appeals reversed.

The defendants claimed the trial court erred in denying their motion for summary disposition because the plaintiff was unable to meet his burden of proving causation; to-wit, he could not show that, but for an attorney's alleged malpractice, he would have been successful in the underlying suit. The Court said:

> This Court reviews de novo the trial court's decision concerning a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). If genuine issues of material fact do not exist and the moving party is entitled to judgment as a matter of law, summary disposition pursuant to MCR 2.116(C)(10) is appropriate. *West, supra* at 183; 665 NW2d 468. 'A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.' *Id*, citing *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997); *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996). Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo. *Phinney v Perlmutter*, 222 Mich App 513, 553; 564 NW2d 532 (1997). We also apply review de novo to questions of statutory interpretation. *Frank W Lynch Co v Flex Technologies Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001).

In the instant case, whether, but for the Defendant's omission of significant and obvious issues, the Plaintiff's appeal would have resulted in reversal of his conviction, is a question of law for this Court to decide.

Before reaching this causation issue, however, the Court must decide whether the Plaintiff can establish the standard of care and breach of that standard without expert testimony. Again, the Defendant argues that Michigan precedent has long required expert testimony on these issues. *Dean v Tucker*, 205 Mich App 547, 550 (1994) and *Stockler v Rose*, 174 Mich App 14, 18 (1989). In *Stockler*, the Court said:

> Expert testimony may be admitted if it will be useful in understanding the 'evidence or to determine a fact in issue.' MRE 702. In a malpractice action, expert testimony is usually required to establish a standard of conduct, breach of that standard of conduct, and causation. *Thomas v McPherson Community Health Center*, 155 Mich App 700, 705; 400 NW2d 629 (1986). Where 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. *Joos v Auto-Owners Ins Co*, 94 Mich App 419, 422-424, 288 NW2d 443 (1979), lv den 408 Mich. 946 (1980).

Joos, supra, involved the defendant attorney's failure to inform the plaintiff client of offers to settle prior to trial and refusal to settle on the second day of trial when he received authority to do so. In that case, the Court held:

> Although proof of purported negligence arising from pretrial or trial strategy may or may not require expert testimony, plaintiffs' allegation that defendant breached the applicable standard of care when he failed to inform Avery of the offers by Joos to settle prior to trial and their allegation that he refused to settle on the second day of trial when he received authority to do so does not. We do not hesitate to hold that under the allegations of facts before us, an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle. It is well within the ordinary knowledge and experience of a layman jury to recognize that, under facts such as those alleged in the instant case, the failure of an attorney to disclose such information is a breach of the professional standard of care. 94 Mich App 424; 288 NW2d 443.

Thus, before addressing the causation issue, this Court must first decide whether the Plaintiff can meet his burden of proof to establish the standard of care and breach of that standard without any

expert testimony. Stated alternatively, can lay opinion establish professional negligence where Plaintiff claims that the Defendant failed to brief the most significant and obvious issues on appeal.

Under the standards for both legal malpractice and ineffective assistance of counsel, counsel must act reasonably and the client must show that trial counsel's alleged deficiency affected the outcome of the criminal trial. *Barrow v Pritchard* 235 Mich App 478; 597 NW2d 853 (1999). Once an appellate court has rejected an ineffective assistance of counsel claim in an appeal from the criminal prosecution, or the trial court in the criminal prosecution rejects an ineffective assistance of counsel claim and the defendant does not appeal, the criminal defendant may not challenge the attorney's conduct in a subsequent legal malpractice action.[2] Therefore, we can look to the case law regarding ineffective assistance of counsel for guidance in this legal malpractice case.

An appellate attorney's failure to raise an issue may result in counsel's performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial. However, appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. Counsel must be allowed to exercise **reasonable professional judgment** in selecting those issues most promising for review. *People v Reed*, 449 Mich 375, 392; 535 NW2d 496 (1995). Appellate counsel's decision to focus on those issues that are more likely to prevail is not evidence of ineffective assistance. Nor is the failure to assert all arguable claims sufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues presented. The question is whether a reasonable appellate attorney could conclude that certain issues were not worthy of mention on appeal. See, *Jones v Barnes*, 463 US 745; 103 S Ct 3308; 77 L Ed2d 987 (1983).

Here, the only way for the Plaintiff to prove professional malpractice is to establish, through expert testimony, that the Defendant did not exercise reasonable professional judgment. Without expert testimony, the ordinary juror cannot determine if a defendant professional has fulfilled his duty of professional care. *Bryant v Oakpointe Villa Nursing Centre,* 471 Mich 411; 684 NW2d 864 (2004), citing *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW.2d 455 (1999).

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[2]It is important to note that the Plaintiff in this case did not appeal the Court of Appeals affirmation of his conviction. He could have raised an ineffective assistance of appellate counsel claim on direct appeal to the Supreme Court.

Just as experts are required to testify in medical malpractice cases because a layperson cannot assess a failure or omission arising from a claimed lapse in a physician's professional medical judgment, an expert would have to testify in a legal malpractice case regarding a failure or omission arising from an alleged lapse in an attorney's professional judgment.

CONCLUSION

In this legal malpractice action, the Plaintiff is required to prove that the Defendant failed to exercise reasonable professional judgment when he selected only certain issues for review on appeal. The only way the Plaintiff can prove this claim is through expert testimony establishing the standard of care and breach of that standard.

Not having presented any deposition testimony, affidavits or other documentary evidence of expert testimony to support his claim of legal malpractice, the Plaintiff will not be able to sustain his burden of proof in this case. For this reason, the Defendant's motion for summary disposition is granted. This case is dismissed.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 12/08/04