

STATE OF MICHIGAN
COURT OF APPEALS

SHAPOOR ANSARI,

Plaintiff-Appellant,

v

JOHN F. SCHAEFER and THE LAW FIRM OF
JOHN F. SCHAEFER, L.L.C.,

Defendants-Appellees.

UNPUBLISHED

July 28, 2005

No. 260744

Oakland Circuit Court

LC No. 04-059049-NM

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff appeals as of right from the trial court's grant of defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and the dismissal of plaintiff's claim. We affirm.

I

This case arose out of defendants' representation in an underlying divorce action between plaintiff and his former wife, Sue Ann Marie Ansari. The divorce action was filed in September 2000 and settled in February 2002.¹ On March 11, 2004, plaintiff filed the instant complaint alleging that defendants' malpractice caused plaintiff losses of approximately \$75 million in his stock portfolio because market values plummeted during the eighteen months that the divorce action was pending.

In particular, plaintiff claimed that defendants were responsible for the decline in the value of plaintiff's investments in several accounts, approximately \$26 million between September 21, 2000 and October 13, 2000, because a temporary restraining order prevented plaintiff from managing his accounts. Plaintiff also claimed that defendant provided negligent advice concerning the validity of a prenuptial agreement, which induced plaintiff to settle the divorce action to his disadvantage. Plaintiff sought damages for his financial losses and for mental anguish.

¹ Plaintiff states that he signed a settlement agreement on February 14, 2002, which was incorporated in the judgment of divorce entered on March 15, 2002.

The trial court granted defendants' motion for summary disposition, concluding that although plaintiff's evidence showed that his accounts declined in value, no evidence existed regarding causation. Further, the existence of damages related to the prenuptial agreement was uncertain and speculative.

II

On appeal, plaintiff contends that the trial court erred in granting summary disposition in favor of defendants where there were clear legal errors and there existed genuine issues of material fact regarding causation. We disagree.

A

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Our review is limited to the evidence before the trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Because the trial court considered evidence beyond the pleadings in ruling on the motion for summary disposition, we analyze the trial court's decision under the standard for MCR 2.116(C)(10). *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1997).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim based on the documentary evidence submitted by the parties. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In evaluating such a motion, a reviewing court must consider the whole record in the light most favorable to the nonmoving party, including affidavits, pleadings, depositions, admissions, and other evidence offered by the parties. *Id.* Such documentary evidence to support a position is required when judgment is sought based on the lack of a material factual dispute. MCR 2.116(G)(3)(b). "When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial that is material to the dispositive legal claims." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 16 n 14; 672 NW2d 351 (2003). While speculation and conjecture are insufficient, a nonmovant is not required to rebut every possible theory that could be supported by the evidence. *Id.* at 17 n 4. When the evidence demonstrates that no genuine issue of material fact exists, the movant is entitled to judgment as a matter of law. *Corley, supra* at 278.

Regarding plaintiff's claim of legal errors, we note that the alleged errors are directly related to plaintiff's argument that the court erred in finding no genuine issues of material fact concerning plaintiff's legal malpractice claim. Therefore, we will address the alleged legal errors as relevant to our analysis of the latter argument.

B

The trial court found that plaintiff failed to show a causal connection, sufficient to support his legal malpractice claim, between defendants' alleged failure to expedite removal of the original temporary restraining order (TRO) and the decrease in the value of plaintiff's accounts. To establish a claim of legal malpractice, a plaintiff must demonstrate that (1) an attorney-client relationship existed; (2) the attorney was negligent in the legal representation of the plaintiff; (3) the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004), citing *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994).

To establish proximate cause, a plaintiff must prove two distinct elements: (1) cause in fact, and (2) legal cause, also termed "proximate cause." *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The element of cause in fact generally requires proof that "but for" the defendant's conduct, the plaintiff would not have been injured. *Id.* at 163. However, legal cause or "proximate cause" generally requires examining the foreseeability of consequences and whether a defendant should be held legally responsible for the consequences. *Id.* A plaintiff must first demonstrate cause in fact before legal cause or "proximate cause" becomes relevant. *Id.* While causation is normally a question for the jury, the trial court may decide the issue as a matter of law where there is no issue of material fact. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003).

We concur with the trial court's conclusion that plaintiff failed to establish the necessary element of causation between the alleged malpractice and plaintiff's loss in the stock value. Plaintiff has argued various factual bases of injury, but has failed to show the requisite causal link between those injuries and the alleged malpractice. *Skinner, supra* at 163. Any alleged causation is based on circumstantial evidence, and mere conjecture and speculation.

A plaintiff may establish causation based on circumstantial evidence, but this proof must be based on reasonable inferences and not mere conjecture and speculation. *Id.* at 164. "[A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id.*, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956). "[A]t a minimum, a causation theory must have some basis in established fact." *Skinner, supra* at 164. To meet this evidentiary standard, a plaintiff must 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. *Id.* at 164-165.

In his complaint, plaintiff alleged two injuries: (1) the loss of \$75 million that otherwise would have been transferred to an account in Switzerland, and (2) mental anguish. With regard to the \$75 million loss, plaintiff argued that defendants' failure to seek a modification of the TRO to permit plaintiff to transfer \$75 million from his H & R Block retirement account to the UBS Bank in Switzerland for more conservative management was malpractice.

Plaintiff's assertions that counsel would have been successful in obtaining a modification of the TRO to permit plaintiff to transfer \$75 million to an account in Switzerland, and thereby avoid a financial loss, are pure conjecture. Given plaintiff's contentious divorce action and the dispute over the assets in the marital estate, it is unlikely that plaintiff's former wife and her

counsel would have stipulated to the removal of the \$75 million or that the court would have otherwise have granted the modification.² Moreover, there was evidence that plaintiff's losses generally resulted from his investment decisions, including his decision to ride out the downturn in the market and his inability to liquidate his holdings because he owned large blocks of lightly traded stock.

Plaintiff's claims with respect to other allegations of malpractice are similarly flawed. Plaintiff argued that defendants' malpractice in failing to timely modify the TRO caused a decline in his stock portfolio of nearly \$26 million between September 12, 2000 and October 13, 2000, including the \$2,866,828 decline in his Morgan Stanley personal investment account, the \$842,775.89 decline in his Charles Schwab account, and the \$21,237,808.50 loss in his Raymond James personal investment account. As with the \$75 million loss, plaintiff has failed to show that the outcome would have been any different absent the alleged negligence of defendants. Other than evidence that the Schwab account was temporarily frozen, plaintiff presented no evidence that any changes were attempted or desired in these accounts. Whether the TRO could have been lifted or modified sooner, and whether plaintiff could have or would have avoided the decline in his stock value, is mere speculation and conjecture.

For the same reasons, plaintiff has failed to show that any alleged delay in settling the divorce caused his losses. The terms of the modified TRO, in place during the divorce proceedings, did not cause the financial loss to plaintiff. The modified TRO prevented plaintiff from removing assets from his accounts, not from managing, i.e., buying, selling and trading, his assets within his accounts.

In an affidavit, plaintiff averred that he had no knowledge that the modified TRO permitted him to manage and trade his assets and that defendants failed to timely inform his brokerage firms of the significance of the modified TRO. Plaintiff asserted that, when he eventually saw the modified TRO, it appeared that he was still prevented from transferring certain of his assets to a bank in Switzerland as previously planned. Plaintiff asserted that he believed that defendant Schaefer's actions and inactions proximately caused his damages.

However, the record indicates that plaintiff not only had knowledge that he could manage and trade his assets, but also that he did just that. Plaintiff's financial statements after the date that the modified TRO was entered showed that plaintiff managed and sold various assets within his accounts. The deposition testimony of Edward Gold, the attorney who represented defendant's former wife in the divorce action, further supports that the ultimate decline in the value of plaintiff's investments was caused by plaintiff's decisions rather than defendants' action or inaction. Gold testified that as opposing counsel in the divorce proceedings, his firm received monthly financial statements of plaintiff's investments accounts. Gold stated repeatedly in his deposition that during the divorce proceedings plaintiff continued to manage and trade within his accounts as he had previously done.

² Further, according to plaintiff, he ordered H & R Block to transfer the \$75 million in August 2000 (before the divorce was filed and before the ex parte TRO), but H & R Block completely failed to do so.

Finally, although plaintiff claims that it was foreseeable that he would suffer damages as the result of defendants' allegedly negligent advice regarding the enforceability of the prenuptial agreement, plaintiff again relies on mere speculation alone to support his claim. Plaintiff contends that he would not have signed the settlement agreement had defendant Schaefer not advised him that the prenuptial agreement was likely unenforceable. However, there is no evidence that the settlement of the divorce resulted in plaintiff's alleged injuries. A malpractice claim requires proof that the malpractice caused actual injury and not just the potential for injury. *Colbert v Conybeare Law Office*, 239 Mich App 608, 620; 609 NW2d 208 (2000).

Plaintiff has failed to show that his losses were caused by defendants' malpractice rather than the contentious divorce proceedings and his investment decisions. Plaintiff therefore failed to show a genuine issue of fact regarding proximate cause. Summary disposition under MCR 2.116(C)(10) is proper where no genuine issues of material fact remain in dispute, excluding the amount of damages. The trial court properly granted defendants' motion for summary disposition after concluding that plaintiff failed to show that his damages were caused by the alleged malpractice.³

III

Plaintiff contends that the trial court erred in granting defendants' motion for summary disposition where no discovery had been conducted. However, at the hearing on defendants' motion for summary disposition, plaintiff's counsel specifically denied that his discovery argument formed the basis of his opposition to defendants' motion. "Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence," plaintiff waived appellate review of this issue. *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998).

In any event, we conclude for the reasons discussed above that the trial court's grant of summary disposition was not premature. Summary disposition is not premature if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Peterson Novelties, supra* at 25. It is unlikely that further factual development would support plaintiff's position.

IV

Plaintiff claims that defendant Schaefer entered into an unethical fee agreement that violated the Michigan Rules of Professional Conduct ("MRPC") and created a rebuttable presumption of legal malpractice. An attorney has a responsibility to follow the rules of

³ To the extent that plaintiff has presented additional claims of error that we have not directly addressed, plaintiff has failed to sufficiently brief the merits of these arguments, e.g., the trial court's failure to view the evidence in the light most favorable to plaintiff; the disputed issues involved matters of credibility, intent or state of mind; and the court's failure to address enforceability of the prenuptial agreement. They are therefore deemed abandoned. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). In any event, we find the arguments without merit.

professional conduct, which are generally based on ethical principles. *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714 (2000), citing MRPC 1.0(b). However, while failure to comply with the obligations of a rule of professional conduct may provide grounds for invoking the disciplinary process, such failure will not give rise to a cause of action to enforce the rule or for damages caused by failure to abide by the rule. *Watts, supra*, p 607 n 1. Even assuming that defendants violated a rule of professional conduct, such a violation did not form the basis of plaintiff's legal malpractice claim. In any event, as previously noted, plaintiff's claims fail based on the lack of causation.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Michael J. Talbot