

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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JAMES VOWELS,

Plaintiff,

v

File No. 01-21564-NM  
HON. PHILIP E. RODGERS, JR.

DONALD BRANDT and BRANDT, FISHER,  
ALWARD & ROY, P.C.,

Defendants.

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Mark A. Hullman (P15254)  
Attorney for Plaintiff

Richard G. Bensinger (P23906)  
Attorney for Defendants

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DECISION AND ORDER REGARDING  
DEFENDANTS' RENEWED MOTION FOR SUMMARY DISPOSITION

This is a legal malpractice action. The Plaintiff owned U&I Truck Rentals ("U&I"). He entered into a merger agreement with the principals of HSI, Inc. ("HSI"), Lon Husbands, David Bury and George Higgins. U&I became a wholly owned subsidiary of HSI.

HSI subsequently encountered financial problems and obtained a sizeable loan from First of America Bank/National City Bank (the "Bank"). When HSI was faltering, the Plaintiff tried to reach an agreement with Husbands, Bury and Higgins to rescind the merger. The rescission never took place. HSI was ultimately forced into bankruptcy and liquidated.

Vowels filed this action alleging that Defendant Donald Brandt ("Brandt") "breached the standard of care by failing to advise the Plaintiff that the assets of U&I could be recovered without the consent of the minority shareholders or the [Bank] while the Plaintiff and Husbands were in control of HSI, if a majority of the directors of HSI who had no interest in the transaction approved the sale by HSI of its stock in U&I to the Plaintiff." He further alleges that Brandt "breached the standard of care by failing to recover the assets of U&I for the Plaintiff while Plaintiff and Husbands were in control of HSI and a director, Husbands, was prepared to approve and ratify a sale by HSI

of its stock in U&I to Plaintiff.” Vowels seeks to recover “an amount sufficient to fully and adequately compensate Plaintiff for damages suffered by him on account of the malpractice committed by the Defendant Donald Brandt.”

On August 23, 2001, the Defendants filed a motion for summary disposition. After a hearing on November 5, 2001, the Court granted the motion. The Plaintiff was given 21 days to amend his complaint. The Plaintiff filed a second amended complaint on November 20, 2001. The only difference between Plaintiff’s first amended complaint and second amended complaint is the deletion of the word “independent” in paragraphs 70 and 71.

The Defendants have renewed their motion for summary disposition pursuant to MCR 2.116(C)(10). They argue that rescission of the merger was not possible because it required the approval of a majority of the independent directors, which could not occur in this case because Vowels and Husbands were interested in this matter as officers, directors and employees of HSI and personally liable for the corporation’s debt owed to the Bank. Furthermore, the Bank would not consent to rescission of the merger which would be a default under the loan agreement and Bury and Higgins would not have approved the rescission.

The Plaintiff filed a response to the renewed motion. The Plaintiff claims that the Defendants had several alternative means whereby they could have recovered the assets of U&I for the Plaintiff, but that they did not pursue them. The Plaintiff further contends that Husbands did not have any interest in the rescission transaction and, therefore, had the authority to approve it. MCL 450.1545a(2) allows approval of the transaction by the majority of the directors who have no interest in the transaction. Lon Husbands had no interest in the transaction because no money or assets would have been received by Husbands if the transaction had taken place. The Plaintiff further contests the Defendants’ assertion that stock or assets of U&I could not be sold without violating the loan agreement with the Bank. The Plaintiff contends that the agreement could have been structured so that it would not have triggered a default under the loan documents. Besides HSI was already in default for nonpayment. And, finally, the Plaintiff denies that rescission of the merger was not in the best interest of HSI since it would have reduced HSI debt and removed a drag on the earnings of the corporation, thus improving its ability to pay its debts and stay in business.

By way of background, when it appeared that HSI was in trouble, Vowels and Husbands joined forces and, since together they controlled the majority of the shares of stock, they voted themselves in as directors to the exclusion of Bury and Higgins. According to MCL 450.1545a(2), they could have approved a sale of U&I stock and assets to Vowels. However, according to Husbands' and Higgins' deposition testimony, the principals were all involved in ongoing negotiations that included the Bank, and they were close to reaching an agreement regarding rescission of the merger. One of the exhibits referred to at the depositions was a letter from the attorney for HSI, Kurt Bowden, to Defendant Brandt dated December 10, 1998 that says "it appears that the best interest of the corporation requires that it carry through with the rescission of the U&I Truck Rental's transaction as agreed." The letter also included the statement that this course of action should be pursued with the utmost haste since bank approval had already been obtained. (Higgins dep at p 64.)

Another exhibit referred to at the depositions was a response letter from Brandt dated December 11, 1998 in which he refused to pursue the rescission of the merger any further. (Higgins dep at p 65.)

Eventually, Husbands decided to sell his stock back to HSI and get out altogether. He testified at his deposition as follows:

My decision was to sell the stock back to the corporation after Jim [Vowels] and I did this is because I found out that Jim was trying to buy the corporation and not pay back the partners that I was still liable for. And when I discussed that with Jim, I was told that was between Don Brandt and himself and that the previous owners would not be paid back. And I felt it was wrong, especially when we promised to pay back the other owners. So I had a disagreement with Jim Vowels."

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I felt the previous owners should have been paid. They worked hard to get where they were, and I just didn't believe in taking people.

After the negotiations regarding rescission of the merger were unsuccessful, HSI was forced into bankruptcy and ultimately dissolved. Vowels bought back some of the assets of U&I.

The Defendants argue that there is no factual basis for the allegation that "Husbands was prepared to approve and ratify a sale by HSI of its stock in U&I to Plaintiff" as stated by Plaintiff in his second amended complaint. The Defendants claim that this action is based on the "unknown

hypothetical question” regarding what Husbands might have done three years ago and cannot form the basis for a legal malpractice action.

The Court heard the oral arguments of counsel on April 1, 2002 and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, grants the Defendants’ motion.

#### STANDARD OF REVIEW

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):

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).

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 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).

## II.

The Court has reviewed the briefs, exhibits, deposition excerpts and other submissions. Viewed in the light most favorable to the Plaintiff, the submissions show that there is no genuine issue of material fact, and the Defendants are entitled to judgment as a matter of law.

HSI had financial problems, in part due to Vowels' misrepresentation regarding the value of U&I's assets in the first place and also his inability to contain costs. HSI terminated his employment contract and obtained a sizeable loan from the Bank. The principals were all personally liable on the loan. HSI could not pay back the loan or its other creditors. Vowels was interested in recapturing U&I and proposed a rescission of the merger. Depending on how that deal was structured, it may have been in the best interest of HSI to sell U&I back to Vowels. As the Plaintiff notes, it would have reduced HSI's debt load and have removed a financial drain on the corporation. There were ongoing negotiations. The Bank was involved in the negotiations. Everyone was willing to go through with the rescission provided an agreement could be reached regarding the allocation of debt.

In December of 1998, Kurt Bowden wrote to Brandt about getting the deal done and indicated that the Bank had already approved of the deal. For unknown reasons, Brandt did not pursue rescission of the merger any further.

However, by this time Husbands had become aware that Vowels was trying to take advantage of the other members of HSI. He testified that Vowels was trying to take back U&I and did not intend to pay off his portion of the debt. Husbands decided he did not want anything to do with Vowels "taking" the principals of HSI, and he sold his stock in HSI back to the corporation.

This is not, however, the basis for the Defendants' motion. The Defendants focus on the fact that Vowels cannot prove that Husbands would have agreed to the rescission. Husbands did not say that he would have agreed to the rescission in his deposition. He said there were ongoing

negotiations, they were close to having a deal and he would have agreed if all of the details could have been worked out, but they could not agree on the allocation of the debt. If rescission was in the best interest of HSI and approved by the Bank, then Husbands would have been remiss in not approving the deal.

It appears from Kurt Bowden's December 1998 letter that they had reached an agreement and Bank approval had been obtained, but Brandt refused to pursue the rescission any further. According to Brandt's deposition testimony he suspended negotiations and notified the Bank to take whatever action it deemed in its best interest because the Bank had agreed "to consider" a private sale of U&I assets to Vowels.

At the oral arguments, counsel for Vowels was unable to specify exactly what the Defendants could have and should have done that had a reasonable probability of resulting in Vowels' successfully regaining U&I. Counsel for Vowels was also unable to provide the Court with a reasonable range of damages Vowels suffered as a result of the Defendants' conduct. Counsel agreed that HSI had a value of \$2.4 million, but had debt in the amount of \$2.5 million. One million of the value of HSI was in the U&I assets. The Bank did not have a security interest in U&I assets, but U&I was a wholly owned subsidiary of HSI and HSI had guaranteed the debt. All of the principals of HSI testified that they were amenable to rescinding the merger, but only if the parties could agree on how much debt Vowels would assume. According to Husbands, Vowels was trying to take back the U&I assets without assuming any of the debt. This is corroborated by Vowels' admission at the hearing that he had not arranged financing to accomplish the rescission. This is further corroborated by the fact that Vowels did not have financing to purchase the U&I assets at auction when HSI was liquidated.

The Court of Appeals dealt with an analogous legal malpractice issue in *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997). In that case, the school district sued a law firm for three counts of legal malpractice in connection with representation on a bond issue. One of the issues before the Court was whether plaintiff introduced sufficient evidence to show that defendant was a proximate cause of the damages. Or, put another way, whether plaintiff showed that the members of the board of education would have adopted the

alternative bond structure that borrowed less money on different terms as outlined by plaintiff's damages expert had the law firm proposed it. Discussing this issue, the Court said:

In *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994), a legal malpractice case alleging appellate malpractice, the Court observed:

A unanimous opinion of this Court recently defined the elements of a legal malpractice action in Michigan:

- (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. [*Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993).]

As in other tort actions, the plaintiff has the burden of proving all the elements of the suit to prevail. *Id.*

In *Winiemko*, *supra* at 586; 513 NW2d 773, the Court observed that '[o]ften the most troublesome element of a legal malpractice action is proximate cause,' noting:

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. [*Id.*]

In a footnote, the Court further observed:

Causation in fact is one aspect of, and distinguishable from, legal or proximate cause. . . . The question of fact as to whether the defendant's conduct was a cause of the plaintiff's injury must be separated from the question as to whether the defendant should be legally responsible for the plaintiff's injury. . . . Legal cause is often stated in terms of foreseeability. [*Id.*, n. 13.]

The Court also noted that a jury cannot rely on "speculation and conjecture" in finding a defendant liable. *Id.* at 587; 513 NW2d 773.

In *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994), the Court observed that '[a] plaintiff must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue.' See also *Dedes v Asch*, 446 Mich 99, 106, n 2; 521 NW2d 488 (1994). In *Skinner*, the Court relied upon

*Kaminski v Grand Trunk WRCO*, 347 Mich 417, 421-422; 79 NW2d 899 (1956), which adopted the following test of conjecture when there were alternative theories of causation requiring a 'rule of conjectural choice between equally plausible inferences':

As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

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If, however, plaintiff has proven sufficient facts to justify a verdict upon one theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury. [Citations omitted.]

After noting that *Kaminski* 'highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof,' the *Skinner* Court stated:

As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the 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. [*Skinner, supra* at 164-165; 516 NW2d 475.]

The Court also noted that it has consistently applied this standard of factual causation in negligence cases:

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter



remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Mulholland (v DEC Intl Corp*, 432 Mich 395, 416, n 18; 443 NW2d 340 [1989] ), quoting Prosser & Keeton, Torts (5th ed.), § 41, p 269.] [*Skinner, supra* at 165; 516 NW2d 475.]

After thoroughly reviewing the record, the Court concluded that the plaintiff had failed to present substantial evidence from which a jury could infer that defendant's legal malpractice was a cause in fact of plaintiff's damages. The plaintiff had relied upon testimony in which he opined that the public bodies can reasonably be expected to implement bond structures that serve the taxpayer's interests. However, there was no testimony that if the attorney had advised the board to adopt an alternative bond structure that borrowed less money on different terms, then the board would have adopted it. Even though the plaintiff established that a reasonably informed board of education would have adopted his alternative bond structure, plaintiff failed to elicit any testimony from the board members themselves to the effect that they would have adopted such an alternative bond structure had the attorney proposed it. "[I]t could not be assumed, without relying upon speculation and conjecture, *Winiemko, supra* at 586; 513 NW2d 773, that the board would have adopted an alternative bond structure."

In the instant case, Vowels' theory of liability is based upon pure speculation and conjecture. All of the materials before the Court indicate that Vowels wanted to recover U&I, but did not want to assume any of the outstanding debt. Husbands testified at his deposition that he would not have agreed to rescind the merger unless an agreement could be reached on how much debt Vowels would assume. The Bank was owed \$1.5 million and would only approve the rescission if it was going to be paid. Vowels did not or could not arrange financing to assume a proportionate share of the debt. Vowels relies solely upon his assertion that Husbands would have approved the merger when he and Vowels were in control of HSI if only Brandt had advised them that they could do so. This assertion is, at best, pure speculation and conjecture.

The only reasonable inference that can be drawn from the facts in the instant case is that the rescission of the merger was illusory. Thus, the fact that Defendant Brandt did not pursue the rescission is immaterial. Without Vowels' willingness and ability to assume a proportionate share

of the debt, the outcome would have been the same - Vowels would not have been able to regain U&I - regardless of what advice the Defendant gave or what course of action the Defendant pursued.

#### CONCLUSION

Viewing the documentary evidence that was submitted by the parties in the light most favorable to the Plaintiff, the Court finds that reasonable minds cannot differ. The Plaintiff's efforts to retake U&I were doomed, not by what Defendant Brandt did or did not do, but rather by the fact that the Plaintiff did not or could not secure the requisite financing. Thus, the Plaintiff did not suffer injury as a result of any advice given or not given or any course pursued or not pursued by Defendant Brandt. This case is dismissed with prejudice. The Defendants may tax costs pursuant to MCR 2.625. This decision and order resolves the last pending issue and resolves the case.



HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

Dated: 5/24/02