STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 165-4-20 Wncv

MICHAEL J. LEWIS,
Plaintiff,

v.

LAW OFFICES OF WILLIAM W. COBB,
Defendant.

FILED

DEC 28 2021

VERMONT SUPERIOR COURT
WASHINGTON CIVIL

RULING ON MR. LEWIS'S MOTION TO RECONSIDER AND
MR. COBB'S MOTION TO ENTER JUDGMENT AGAINST HIM

This is a legal malpractice action filed by former client Michael Lewis against Attorney William Cobb. Attorney Cobb represented Mr. Lewis for a time in a postconviction relief case that Mr. Lewis had filed pro se. In this case, Mr. Lewis alleges that Mr. Cobb negligently amended the complaint, dropping claims attacking predicate convictions used to support a habitual offender enhancement on the basis of ineffective assistance alleged to have occurred in the course of those predicate cases. In a July 2021 decision, the court granted summary judgment to Mr. Cobb on that claim, explaining that Mr. Lewis's guilty plea to the enhanced sentence waived his collateral attacks on the predicates because he entered it without reserving the right to pursue those collateral attacks. Because the collateral attacks on the predicates were not viable, the court reasoned, Mr. Cobb could not have been negligent in dropping those claims, even if he did so for other reasons.

The court noted that one claim survived the summary judgment decision. Mr. Lewis has asserted one contract law claim: that he and Mr. Cobb specifically agreed that he would pay an additional $1,000 to Mr. Cobb, and Mr. Cobb would use that money to hire an "appellate guy," ostensibly to help draft one of the amended pleadings or otherwise for consultation purposes. Mr. Lewis evidently made a $100 deposit towards that sum, never paid the rest, and Mr. Cobb never hired an appellate guy and never returned the deposit.[1] The parties have not litigated this contract claim in earnest.

Following the July summary judgment decision, Mr. Lewis filed a motion to reconsider the legal malpractice issue, and Mr. Cobb filed a motion requesting that the court simply enter judgment against him for $100 on the contract claim, thus ending this case in a manner minimizing expense to the parties and further exhaustion of the court's

[1] Mr. Cobb disputes that they ever had such an agreement or that Mr. Lewis ever paid him to hire an appellate guy.

resources.[2]

Reconsideration

The court's decision that Mr. Lewis could not collaterally attacked his predicate convictions for having failed to reserve a right to do so arises directly out of the law in this area, specifically: *In re Lewis*, 2021 VT 24, ¶ 7; *In re Benoit*, 2020 VT 58, ¶¶ 16–21, 212 Vt. 507; *In re Gay*, 2019 VT 67, ¶¶ 10–12, 211 Vt. 122; *In re Torres*, 2004 VT 66, ¶ 9, 177 Vt. 507. The established law required Mr. Lewis to reserve the right to wage those collateral attacks at the time he entered the relevant plea. On reconsideration, Mr. Lewis argues that ineffective assistances claims, what he was trying to assert, are exempt from that rule and are nonwaivable. His authority for this appears to be footnote 3 in paragraph 11 of his own appeal of his PCR case. That footnote reads as follows:

> We have recognized that the broad waiver of nonjurisdictional challenges is not a blanket waiver. See *State v. Phillips*, 2018 VT 85, ¶ 14 n.7, 208 Vt. 145, 195 A.3d 1099 (noting that "the 'knowing and voluntary' requirement necessarily compels a number of limited exceptions to the general rule that a defendant can waive virtually any nonjurisdictional right"); *In re Torres*, 2004 VT 66, ¶ 9, 177 Vt. 507, 861 A.2d 1055 (mem.) (citing cases recognizing host of rights that defendants who plead guilty cannot waive, *including, among others, right to challenge ineffective assistance of counsel,* competency determination, and right against self-incrimination at sentencing); see also *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (holding that, although guilty plea waives most claims of error, it does not preclude attack on voluntary and intelligent character of plea itself).

In re Lewis, 2021 VT 24, ¶ 11 n.3 (emphasis added). The *Lewis* decision cites the *Torres* decision for the general proposition that ineffective assistance of counsel claims cannot be waived by a plea *without further explication.* The cited paragraph of *Torres*, however, is as follows:

> Turning to the post-conviction claim on appeal, we hold that defendant waived his right to challenge his conviction under 13 V.S.A. § 1044(a)(2) when he pled guilty. "It is well settled that a defendant who knowingly and voluntarily enters a guilty plea waives all non-jurisdictional defects in the prior proceedings." *United States v. Garcia*, 339 F.3d 116, 117 (2d Cir. 2003); see also *State v. Armstrong*, 148 Vt. 344, 346, 533 A.2d 1183, 1184 (1987) ("A voluntary plea of guilty waives all nonjurisdictional defects in the proceedings leading up to the plea ...."). Nevertheless, we recognize the limited exceptions to the waiver rule inherent in the requirement that pleas be made "knowingly and voluntarily." E.g., *State v. Cleary*, 2003 VT 9, ¶ 10, 175 Vt. 142, 824 A.2d 509 (appeal of competency determination is exception to waiver rule); *State v. Merchant*, 173 Vt.

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[2] Technically, Mr. Lewis filed a request for relief under Rule 60(b). That rule, however, applies only after a final judgment, which has not occurred in this case. In effect, then, Mr. Lewis has simply asked the court to exercise its intrinsic discretion to review an interlocutory decision.

249, 258, 790 A.2d 386, 393 (2001) (citing *Mitchell v. United States*, 526 U.S. 314, 325–29, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) (defendants who enter guilty pleas retain self-incrimination rights at sentencing to prevent involuntary pleas)); *United States v. Taylor*, 139 F.3d 924, 929 (D.C.Cir.1998) (same); *United States v. Schuman*, 127 F.3d 815, 818–19 (9th Cir.1997) (Kozinski, J., concurring) (listing issues that a defendant who waives his right to appeal will nevertheless be allowed to appeal). *Defendants who plead guilty upon the advice of counsel, for example, "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice they received from counsel" constituted ineffective assistance of counsel. Hill v. Lockhart*, 474 U.S. 52, 56–57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (quoting *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973)); *United States v. Muench*, 694 F.2d 28, 34 (2d Cir.1982) (allowing direct appeal challenging effective assistance of counsel, notwithstanding waiver rule).

In re Torres, 2004 VT 66, ¶ 9, 177 Vt. 507 (emphasis added). The reference to the nonwaivability of ineffective assistance claims in the emphasized language of *Torres* is expressly referring to ineffective assistance inducing the subsequent plea, not ineffective assistance rendered in a predicate case for which the right to challenge should have been preserved, and the cited cases in *Torres* are all to that effect. None addresses predicates.

Mr. Lewis did not preserve the right to collaterally challenge predicates when he entered his 2009 plea. His ability to challenge those predicates for purposes of that conviction was thus waived. In his PCR case, he did not raise a claim that his 2009 plea counsel was ineffective. In this case, he never pleaded any claim that Mr. Cobb was negligent for not having raised that claim in the PCR case. His claim against Mr. Cobb has always been about dropping the claims that had been raised pro se—collateral challenges to the predicates on the basis of ineffective assistance but without having preserve the right to do so in the course of entering the 2009 plea. *Torres* and subsequent cases make his malpractice claim a nonstarter. There is no error in the July decision.

Breach of contract

Mr. Lewis opposes the entry of judgment against Mr. Cobb. He insists that he is entitled to a jury trial, to some sort of concession by Mr. Cobb that he is liable, and to unexplained damages exceeding $100.

To the extent that Mr. Cobb consents to the entry of judgment against him for the full value of Mr. Lewis's claim, there is no controversy between the parties, and no basis for a trial, jury or otherwise. To be clear, the liability that Mr. Lewis may or may not be entitled to in this case is the judgment itself. The law does not require a party to admit liability in some other way, apologize, or otherwise make moral amends.

The only question, then, is whether Mr. Lewis's contract damages are limited to $100. "Few modern actions against attorneys are for breach of a written or an express contract." 1 Ronald E. Mallen, Legal Malpractice § 8:26. Nevertheless, where there is a sufficiently specific

promise that does not amount to a tort in disguise, a breach of contract claim may be had. *Id.* § 8:27.

Mr. Lewis claims that he and Mr. Cobb had a specific agreement to hire an appellate guy. But there was no guarantee as to what doing so would achieve. Assuming without deciding that Mr. Cobb's performance would have been triggered by the payment of a $100 deposit only, there is no dispute that no appellate guy ever was hired. An obvious measure of damages is the amount Mr. Lewis spent for nothing in return, $100.

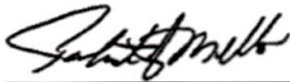
Mr. Lewis has not described what harm he believes not hiring the appellate guy caused. Any such harm presumably would be based on whatever the unidentified appellate guy would have done, if hired, and what difference, also unidentified, that would have made for his PCR case. But any such showing would be inherently speculative. "Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." Restatement (Second) of Contracts § 352; see also *id.* § 352 cmt. a ("Courts have traditionally required greater certainty in the proof of damages for breach of a contract than in the proof of damages for a tort.").

The court concludes that the reasonable measure of damages for Mr. Lewis's contract claim is the amount of the funds expended on a service that was not provided, $100. Because Mr. Cobb assents to the entry of judgment against him for that amount, Mr. Lewis is entitled to judgment for $100 on his remaining claim.

Order

For the foregoing reasons, Mr. Lewis's motion for reconsideration is denied. Mr. Cobb's motion to enter judgment is granted. Any other pending motions are moot. Mr. Cobb shall submit a form of judgment promptly. V.R.C.P. 58(d).

SO ORDERED this 27th day of December, 2021.



Robert A. Mello
Superior Judge