STATE OF MICHIGAN

COURT OF APPEALS

DAVID DWAYNE EVANS,

Plaintiff-Appellant,

v

JEROME L. FENTON,

Defendant-Appellee.

UNPUBLISHED
July 20, 2006

No. 265688
Oakland Circuit Court
LC No. 2002-040224-NM

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendant in this legal malpractice case. We affirm.

Plaintiff's first claim is that the trial court erred in allowing defendant to amend his pleadings. We disagree. Decisions granting motions to amend pleadings are within the sound discretion of the trial court, and reversal is only appropriate when the trial court abuses that discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." A motion to amend should ordinarily be granted. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). Reasons why a motion to amend should not be granted include undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, and futility. *Sands Appliance Service, Inc, supra* at 239-240, quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

In this case, the trial court, after noting that leave to amend is freely given, chose to grant defendant's motion to amend his affirmative defenses. Plaintiff provides no reason why defendant's motion to amend should not have been granted. Defendant wished to amend his affirmative defenses because of facts that were revealed during discovery. Plaintiff never established how he would be prejudiced by the amendment or that defendant was acting in bad

faith. Under the circumstances, the trial court did not abuse its discretion in granting the motion to amend. *Weymers, supra*.

Plaintiff next alleges that the trial court erred in granting defendant's motion for summary disposition.[1] We disagree. In order to establish a claim of legal malpractice, a plaintiff must prove (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of plaintiff, (3) that the negligence was the proximate cause of an injury, and (4) the fact and extent of the injury alleged. *Estate of Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002). 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. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). A plaintiff must show that but for the attorney's alleged malpractice, he would not have been injured. A claim of malpractice requires a showing of actual injury, not just the potential for injury. *Colbert v Conybeare Law Office*, 239 Mich App 608, 620; 609 NW2d 208 (2000).

On appeal, a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition, a court must consider the entire record in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Review is limited to the evidence presented to the trial court at the time the motion was made. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Where the burden of proof at trial rests on the nonmoving party, as is the case here, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id*.

In this case, it is undisputed that an attorney-client relationship existed between plaintiff and defendant. At issue is whether defendant was negligent in advising plaintiff to plead guilty to the charges against plaintiff and whether that alleged negligence resulted in damages to plaintiff. Defendant owed plaintiff the duty to exercise reasonable skill, care, discretion, and judgment in representing him. Defendant was not a guarantor of the most favorable outcome, nor must he exercise extraordinary diligence or act beyond the knowledge and skill, and ability ordinarily possessed by members of the legal profession. An attorney is not answerable for mere errors in judgment. *Estate of Mitchell, supra*.

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[1] Defendant moved for summary disposition based on MCR 2.116(C)(7), (8), and (10). Because of our conclusion that summary disposition was proper based on MCR 2.116(C)(10), we need not address the remaining challenges.

In this case, plaintiff never went beyond the allegations in his complaint to show that a genuine issue of material fact existed regarding the elements of his legal malpractice claim. Defendant provided the transcript of plaintiff's plea, in which plaintiff informed the judge that he was voluntarily pleading guilty to the crimes he was charged with and that he was satisfied with the advice given to him by defendant. Defendant also provided an affidavit in which he asserted that he had extensive discussions with plaintiff regarding the crimes charged against him and that plaintiff expressed a desire at all times to plead guilty in order to avoid a trial and spare his family any publicity and exposure.

Beyond providing transcripts of his conversations with undercover police, plaintiff offered no documentary evidence that defendant failed to adequately research and prepare for plaintiff's criminal case. Moreover, plaintiff provided nothing to show that it was defendant's advice that caused plaintiff to plead guilty to crimes he did not commit and that he suffered an injury as a result of his plea, instead of just a potential injury.[2] Plaintiff failed to set forth specific facts showing that genuine issues of material fact existed in this case and therefore, summary disposition was properly granted.

Lastly, plaintiff alleges that the trial judge was biased against him. The procedure for disqualification of a trial judge because of bias or prejudice against a party is provided by MCR 2.003. Generally, that procedure is exclusive and must be followed. *Czuprynski v Bay Circuit Judge*, 166 Mich App 118, 123-124; 420 NW2d 141 (1988). Plaintiff sent a letter to the Chief Judge alleging that the trial judge was biased against plaintiff, but he failed to follow the proper procedure provided for in MCR 2.003, which requires that plaintiff make a motion to disqualify within 14 days after he discovers the grounds for disqualification. Therefore this issue is unpreserved. Unpreserved issues are reviewed for plain error. To avoid forfeiture under the plain error rule, the error must have occurred, it must have been plain, i.e., clear or obvious, and

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[2] Generally, expert testimony is needed to establish a standard of conduct, breach, and causation. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). However, where the absence of professional care is so manifest that it falls within the common knowledge and experience of an ordinary layman, a plaintiff may maintain a malpractice action without offering expert testimony. *Id*. Plaintiff made blanket assertions in the record below that expert testimony was not required because he was innocent of the charges and entrapment was an applicable defense. However, in the information submitted by plaintiff, the correspondence revealed that plaintiff had prior contacts with police because of a telephone relationship with a minor. Despite this prior police contact, plaintiff corresponded with and continued to correspond with what he believed was a mother and minor daughter dominatrix team wherein he delineated the sexual acts that he would engage in with the minor alone. Under the circumstances, plaintiff's assertions that expert testimony was not required is erroneous because a layman would not have an understanding of the applicable criminal elements and defenses. Moreover, although defendant asserted that he is innocent in the legal malpractice case, the correspondence and factual basis to support the guilty plea contained graphic details supporting the elements of the offenses. Although plaintiff continually asserts that he did not get a "deal" for his plea, the trial court agreed to impose a sentence that was far below the potential maximum in light of the guilty plea.

it must have affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

MCR 2.003(B)(1) and (5) provide that a judge is disqualified when the judge cannot impartially hear a case. *Olson v Olson*, 256 Mich App 619, 642; 671 NW2d 64 (2003). As a general rule, a judge is not disqualified absent a showing of actual bias or prejudice against a party or a party's attorney. *Armstrong v Ypsilanti Charter Township*, 248 Mich App 573, 597; 640 NW2d 321 (2001). Opinions formed by a judge on the basis of facts introduced or events occurring during the course of the proceedings or of prior proceedings do not constitute bias unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Schellenberg v Rochester Michigan Lodge No. 2225*, 228 Mich App 20, 39; 577 NW2d 163 (1998). Likewise, critical, disapproving, or hostile remarks made during the course of trial do not ordinarily support a bias challenge. *Id*. Repeated rulings against a litigant, even if erroneous, are not grounds for disqualification. *Armstrong, supra*. A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise. *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002).

We conclude that plaintiff has failed to overcome the presumption of fairness and impartiality. The trial judge did rule against plaintiff a number of times, but there is no evidence that he treated the parties differently and his rulings did not display deep-seated favoritism or antagonism. The trial judge did make some remarks critical of plaintiff, but those opinions were clearly formed on the basis of events occurring during the course of the proceedings.[3]

Affirmed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood

[3] For example, plaintiff filed the action in Oakland County, and then filed a motion for change of venue because of the financial burden involved in prosecuting the case in that county.