STATE OF MICHIGAN

COURT OF APPEALS

DAVID ASHEN,

Plaintiff-Appellant,

v

JEFF HOLMSTROM, also known as JEFFREY HOLMSTROM,

Defendant-Appellee.

UNPUBLISHED
April 30, 2020

No. 347291
Van Buren Circuit Court
LC No. 17-067778-NM

Before: MARKEY, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM.

In this legal malpractice action, plaintiff David Ashen, proceeding *in propria persona*, filed suit against his former attorney, defendant Jeff Holmstrom, asserting that Holmstrom's deficient performance led to Ashen's losing in a civil lawsuit. The trial court granted summary disposition in favor of Holmstrom. Ashen appeals by right. We affirm.

Holmstrom is a licensed attorney who represented Ashen in a property dispute. The property at issue in the civil case was owned by Ashen's sister between 1989 and 2013, but after she sold it to Scott and Stacy Assink in 2013, Ashen filed suit against the Assinks, contending that he had acquired title through adverse possession. The trial court granted summary disposition to the Assinks and quieted title in their favor. Ashen later appealed, and this Court affirmed in *Ashen v Assink*, unpublished per curiam opinion of the Court of Appeals, issued April 20, 2017 (Docket No. 331811). Ashen then filed the current malpractice lawsuit against Holmstrom. The trial court granted summary disposition to Holmstrom under MCR 2.116(C)(8) and (10).

On appeal, Ashen first asserts that the trial court erred by granting summary disposition in favor of Holmstrom under MCR 2.116(C)(8) and (10) because he stated a claim for legal malpractice and material questions of fact existed. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Hanlin v Saugatuck Twp*, 299 Mich App 233, 239; 829 NW2d 335 (2013).

> Summary disposition is proper under MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted." A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone. All well-pleaded allegations must be accepted as true and construed in the light most favorable to the nonmoving party. Only when no factual development could possibly justify recovery, should the motion be granted.
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> Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." A motion under MCR 2.116(C)(10) tests the factual support of a complaint. A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. "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*. (citations omitted; alteration and omission in original).]

In an action for legal malpractice, the plaintiff bears the burden of proving: "(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." *Estate of Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002). In this case, the existence of an attorney-client relationship is undisputed; the material questions are whether Holmstrom was negligent and whether his alleged negligence was a proximate cause of an injury to Ashen. With regard to negligence, "[i]t is well established that an attorney is obligated to use reasonable skill, care, discretion and judgment in representing a client." *Simko v Blake*, 448 Mich 648, 656; 532 NW2d 842 (1995) (quotation marks, citation, and alteration omitted). Our Supreme Court also observed:

> An attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law. However, an attorney does not have a duty to insure or guarantee the most favorable outcome possible. An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. [*Id*.]

Moreover, on matters of trial strategy, courts will "afford latitude to the attorney" in making tactical decisions. *Id*. at 660. "[I]t is the duty of the attorney who is a professional to determine trial strategy. If the client had the last word on this, the client could be his or her own lawyer." *Id*. (quotation marks and citation omitted; alteration in original). Although gross errors in judgment may be actionable, mere errors in judgment by counsel acting in good faith are not. *Estate of Mitchell*, 249 Mich App at 679. Regarding proximate cause, "[a]s 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." *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, the plaintiff would have been successful in the underlying lawsuit. *Id*. Stated otherwise, the client seeking recovery from his or her former attorney is faced with the difficult task of proving two cases within a single proceeding—the "suit within a suit" concept. *Id*. at 586-587. To hold

otherwise would permit a jury to find a defendant attorney liable on the basis of speculation and conjecture. *Id.*

Here, Ashen asserts that Holmstrom provided deficient representation that led to Ashen's defeat in the underlying civil lawsuit. In the suit, however, Ashen's claim of adverse possession was ultimately unsuccessful because of a key piece of evidence—construction liens Ashen filed on the disputed property. Ashen filed these liens before Holmstrom became involved in the property dispute. Notably, in the lien documents, Ashen acknowledged under oath that the property belonged to another, and he sought payment for improvements to the property of another, both contrary and inconsistent with his claim that his occupation of the property was hostile. Instead, his filing of a construction lien demonstrated that he believed he had permission to be on the land for the purposes of improving and maintaining it. *Ashen*, unpub op at 6-7. The Assinks introduced these lien documents as well as other evidence when moving for summary disposition. See *id*. at 6.

In responding to the Assinks' motion for summary disposition motion, Holmstrom "presented affidavits of numerous witnesses to support [Ashen's] claim that he stored personal items on the property, maintained the property, and constructed a fence and patio there." *Id*. And, at the August 31, 2015 hearing on the Assinks' motion for summary disposition, Holmstrom argued that questions of fact remained and that the liens were not dispositive.[1] Despite the evidence and arguments Holmstrom offered on Ashen's behalf, the trial court concluded—and this Court agreed—that the construction liens were fatal to Ashen's claim of adverse possession. *Id.* at 7.

Ashen, dissatisfied with the result in the property dispute, now claims that Holmstrom should have done more when responding to the Assinks' motion for summary disposition, including offering additional evidence such as correspondence, maps, affidavits, e-mails, and evidence that his sister signed her affidavit under duress. We conclude, however, that Holmstrom's decisions related to the response to the Assinks' motion for summary disposition, including what arguments to make and what evidence to present, were tactical. There is no indication that Holmstrom made these tactical decisions with less than the knowledge, skill, and ability of an average attorney. See *Simko*, 448 Mich at 656-657, 660. Although Holmstrom was ultimately unsuccessful in opposing the summary disposition motion, this fact alone does not give rise to a malpractice claim because Holmstrom did not have a duty to ensure a favorable outcome. *Id*. at 656. Indeed, Ashen fails to explain how the evidence in question could have overcome the pivotal construction liens. And without some indication that some other evidence not offered by

[1] Addressing the construction liens in particular, Holmstrom argued that they were not dispositive because the first lien was filed before the 15-year period of adverse possession expired, meaning that Ashen did not own the property when he filed it. He also contended that until there was an adjudication of Ashen's ownership and an award of fee title, the filing of a construction lien was not inconsistent with an adverse possession claim but should instead be viewed as an "alternate theory" of recovery filed to preserve Ashen's rights related to the improvement of the property in the event that Ashen was determined not to be the owner of the property.

Holmstrom could have altered the outcome, it cannot be concluded that Holmstrom performed unreasonably by failing to present what appears to be nothing more than unnecessary and superfluous evidence. In sum, even if Holmstrom could have presented more or different evidence, Ashen's "allegations could not support a breach of duty because they are based on mere errors of professional judgment and not breaches of reasonable care." *Id*. at 659. Accordingly, to the extent Ashen's malpractice complaint relates to Holmstrom's tactical decisions regarding what evidence to present in the underlying case, summary disposition was properly granted to Holmstrom.[2] See *id*. at 654.

In addition to Ashen's complaints about the evidence that Holmstrom offered or didn't offer in response to the Assinks' summary disposition motion, Ashen also challenges Holmstrom's handling of several procedural matters in the property dispute. For example, Ashen asserts that Holmstrom should have: (1) objected to the reassignment from Judge Jeffrey J. Dufon to Judge David J. DiStefano, (2) challenged Judge DiStefano's modification of the scheduling order, elimination of mediation, and removal of the property dispute from case evaluation, (3) informed Ashen of a "crucial" May 2015 status conference so that Ashen could attend, and (4) objected to Judge Dufon's later denial of a stay. Ashen's allegations do not support a claim for legal malpractice. As an initial matter, Ashen's allegations are conclusory in nature, failing to set forth the basis on which Holmstrom could have, or should have, objected to the reassignment, the scheduling order, or the denial of a stay. Further, this Court has already concluded that Judge DiStefano had the authority to modify the scheduling order, that he did not abuse his discretion by removing the matter from case evaluation, and that Ashen had no right to be heard at the status conference. See *Ashen*, unpub op at 4-5. Collateral estoppel precludes Ashen from relitigating these issues in the context of his malpractice claim. See *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 346-357; 657 NW2d 759 (2002). And, because these arguments lack merit, it is clear that Holmstrom did not breach a duty to Ashen by failing to file superfluous and meritless motions or objections. See *Simko*, 448 Mich at 657. Also, even if Holmstrom could have raised viable objections to, for example, the reassignment to Judge DiStefano,[3] the end of case evaluation or mediation, or the denial of a stay, there is no allegation or evidence to suggest that Holmstrom's decisions regarding these matters was not a matter of professional judgment. *Id*. at 658. Such exercises of judgment are not actionable for malpractice. *Id*.

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[2] Ashen also asserts in passing that Holmstrom could have moved for reconsideration in the property dispute. But there is no indication that a motion for reconsideration would have succeeded. To the contrary, this Court's affirmance of the grant of summary disposition supports a conclusion that a motion for reconsideration would not have succeeded. In these circumstances, Holmstrom did not perform unreasonably by failing to bring a superfluous motion. Moreover, Ashen cannot show that he was injured by Holmstrom's not moving for reconsideration. See *Simko*, 448 Mich at 657; *Charles Reinhart Co*, 444 Mich at 586.

[3] In this Court's previous decision, the panel did not actually determine whether the reassignment procedure was improper, noting instead that "even if this Court were to adjudge the reassignment improper, [Ashen] fail[ed] to show plain error because he suffered no prejudice from the reassignment" given that Judge DiStefano was not biased. See *Ashen*, unpub op at 4.

Additionally, even accepting Ashen's assertion that Holmstrom failed to keep him adequately informed of proceedings in the property litigation, such as the status conference, or that Holmstrom otherwise acted unreasonably in regard to the procedural issues raised by Ashen on appeal, the fact remains that Ashen cannot establish proximate causation. See *Kloian v Schwartz*, 272 Mich App 232, 241; 725 NW2d 671 (2006). Ashen's claim of injury is that Holmstrom's conduct caused him to lose the underlying property litigation. But his "complaint is silent regarding the effect, if any, of the alleged instances of negligence on the outcome or resolution of the underlying" case, and he offers no evidence to suggest that resolution of the underlying case was affected by these procedural issues. *Id*. To the contrary, as discussed, the construction liens were found to be dispositive for purposes of summary disposition as affirmed on appeal to this Court, and Ashen identifies no connection between his procedural concerns and the resolution of the case. Absent some explanation for how Holmstrom's handling of these procedural issues caused him injury, Ashen cannot maintain a claim for legal malpractice, and summary disposition was properly granted. See *id*. at 240-241.

Finally, aside from allegations relating to Holmstrom's tactical decisions regarding evidence and procedural matters in the property dispute, Ashen also accuses Holmstrom of more serious misconduct, including concealing evidence, lying to Ashen and the trial court about the case and the evidence, engaging in unspecified acts of fraud, committing perjury, making veiled threats to the judge, and colluding with the Assinks and others to effectuate a "land grab" to Ashen's detriment. Although such gross misconduct, if true, could not be excused simply as tactical decisions undertaken in good faith, many of Ashen's allegations regarding this purported misconduct are conclusory, unsupported by allegations of fact and insufficient to state a cause of action. See *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014). This is particularly true of Ashen's allegations involving fraud, which requires pleading with particularity. See *id*. Moreover, even if these more serious allegations were sufficient to survive a motion under MCR 2.116(C)(8), Holmstrom also moved for summary disposition under MCR 2.116(C)(10). In responding to the motion under MCR 2.116(C)(10), Ashen offered absolutely no evidence to substantiate his allegations of collusion, fraud, and other acts of deception or wrongdoing. When responding to a motion under (C)(10), "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." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Given Ashen's failure to present any evidence to support his sweeping assertions of collusion, deception, and fraud, the trial court properly granted summary disposition on these claims under MCR 2.116(C)(10). See *Quinto*, 451 Mich at 363.

In sum, the trial court did not err by granting summary disposition under MCR 2.116(C)(8) and (10). As a matter of law, the majority of Ashen's allegations failed to state a claim of malpractice on which relief could be granted because he did not adequately allege a breach of duty and proximate cause. See *Simko*, 448 Mich at 654; *Kloian*, 272 Mich App at 240-241. Ashen's more serious allegations of fraud, collusion, and deliberate deception, consist of largely conclusory statements, insufficient to state a claim on which relief can be granted, *State ex rel Gurganus*, 496 Mich at 63, and, in any event, in responding to the motion under MCR 2.116(C)(10), Ashen failed to present any evidence to support these more serious allegations. For these reasons, the trial court properly granted summary disposition to Holmstrom.

Next, Ashen asserts on appeal that he was denied due process because he did not receive notice of a summary disposition hearing. "Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). "In any proceeding involving notice, due process requires that the notice given be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Vicencio v Ramirez*, 211 Mich App 501, 504; 536 NW2d 280 (1995).

Ashen maintains that he did not receive notice that a hearing on September 26, 2018, would include argument on Holmstrom's motion for summary disposition. Although it is true that Ashen did not receive a written re-notice of hearing for the summary disposition motion on September 26, 2018, the hearing was a continuation of a summary disposition hearing held on September 4, 2018. At the September 4, 2018 hearing, Ashen received actual notice that the hearing would be continued and that the next hearing would include, in addition to other issues, "a continuation of the hearing on summary disposition." Ashen in fact appeared at the September 26, 2018 hearing, and he offered arguments in opposition to the motion for summary disposition. Having received actual notice of the summary disposition hearing and a meaningful opportunity to be heard, Ashen received all that due process requires. See *Cummings*, 210 Mich App at 253-254. At most, Ashen has identified a potential procedural defect, but even assuming that Holmstrom erred by failing to serve a written re-notice of hearing, we conclude that Ashen is not entitled to relief on this basis given that he had actual notice and he in fact appeared at the hearing on September 28, 2018, to present his arguments.[4] See MCR 2.613(A).

Finally, Ashen contends that Judge DiStefano—who also presided over the underlying property action—was biased and therefore erred by denying Ashen's motion for disqualification under MCR 2.003.[5] This argument lack merit. Under MCR 2.003(C)(1)(a), disqualification of a judge is warranted if "[t]he judge is biased or prejudiced for or against a party or attorney." "A trial judge is presumed to be fair and impartial, and any litigant who would challenge this

[4] On appeal, Ashen also asserts that the trial court erred by hearing the summary disposition motion before mediation and case evaluation in violation of the court's scheduling order. This argument lacks merit. First, contrary to Ashen's assertions, the scheduling order was followed in this case insofar as the summary disposition hearings were held in September 2018, before the November 29, 2018 deadline in the scheduling order. Second, even assuming some deviation from the scheduling order occurred, Ashen provides no support—and we are not aware of any authority—for the proposition that failure to adhere to a scheduling order renders a grant of summary disposition invalid or otherwise warrants relief on appeal. See generally MCR 2.613(A). To the contrary, the enforcement of scheduling orders—or the decision to allow deviations from a scheduling order—is a matter within the trial court's discretion. See *Edi Holdings LLC v Lear Corp*, 469 Mich 1021 (2004); see also *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963).

[5] To the extent Ashen's argument can be read as a challenge to Judge DiStefano's involvement in the property dispute, we note that collateral estoppel precludes this argument in light of this Court's previous decision. See *Keywell & Rosenfeld*, 254 Mich App at 346-348.

presumption bears a heavy burden to prove otherwise." *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002).

> The mere fact that a judge ruled against a litigant, even if the rulings are later determined to be erroneous, is not sufficient to require disqualification or reassignment. Judicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality. [*In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009) (quotation marks, citations, and alteration omitted).]

Moreover, "[m]erely proving that a judge was involved in a prior trial or other proceeding against the same defendant does not amount to proof of bias for purposes of disqualification." *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988).

In this case, Ashen's claim of bias rests on nothing more than the facts that Judge DiStefano presided over the property case and ruled against him in that lawsuit. These facts alone do not overcome the heavy presumption of impartiality, particularly when Judge DiStefano stated on the record in this case that he only "vaguely" remembered the previous case, that he had "no reason to be biased against" Ashen, and that he could provide a "fair and impartial ruling" in the current case. There is no evidence of deep-seated favoritism or antagonism. And, without more, the mere fact that Ashen is unhappy with Judge DiStefano's ruling in the underlying property case is not grounds for disqualification in the current malpractice action.[6] See *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 728-729; 591 NW2d 676 (1998). Accordingly, Judge DiStefano did not err by denying Ashen's motion for disqualification.

We affirm. Having fully prevailed on appeal, Holmstrom may tax costs under MCR 7.219.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Mark T. Boonstra

[6] Ashen's disqualification argument appears to solely implicate actual bias under MCR 2.003(C)(1)(a). But we briefly note that Judge DiStefano's involvement and rulings in the prior case also did not create a constitutionally intolerable risk of bias in the current case or an appearance of impropriety so as to warrant disqualification under MCR 2.003(C)(1)(b). Cf. *Kloian*, 272 Mich App at 245.