

STATE OF MICHIGAN
COURT OF APPEALS

TORIANO JACOE TISDALE,

Plaintiff-Appellant,

v

LAURA KATHLEEN SUTTON,

Defendant-Appellee.

UNPUBLISHED

July 30, 2009

No. 285267

Wayne Circuit Court

LC No. 07-707476-NM

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

This legal malpractice dispute arises out of defendant's legal representation during an MCR 6.502 motion for relief from judgment. Plaintiff appeals the trial court's decision to grant defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was seeking relief from judgment for a 1996 second-degree murder conviction where his post-arrest confession was critical evidence. Defendant entered into an agreement to represent plaintiff in the matter, and plaintiff's motion for relief from judgment was filed in Wayne Circuit Court on August 9, 2004. The court denied the motion, and a subsequent motion for reconsideration. While the reconsideration motion was pending, plaintiff asked defendant to supplement the pleadings with claims of perjurious testimony and Fourth Amendment violations. Defendant declined, and plaintiff ended the representation soon after.

In November 2006, plaintiff filed a request for investigation with the Attorney Grievance Commission (AGC), which was denied. On March 20 2007, plaintiff filed the malpractice complaint in Wayne Circuit Court. Plaintiff alleged that he would have prevailed on his motion for relief from judgment if defendant had raised the issues of illegal search and seizure, *Brady*¹ violations, and perjurious testimony. The *Brady* violations and perjurious testimony centered on the ninth floor log-in sheet² from the night of plaintiff's confession, which allegedly proves the

¹ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963) (holding a criminal defendant has a due process right of access to certain information possessed by the prosecution).

² The police officer testified that on the day he obtained plaintiff's confession, interrogation ended prior to 5:30 p.m. He further testified that plaintiff was taken to the ninth floor lockup (continued...)

police officer who obtained the confession gave false testimony. On April 16, 2008, the trial court granted defendant's motion for summary disposition.

Plaintiff first argues that the trial court erred as a matter of law when it granted defendant's motion for summary disposition. We disagree. This Court reviews a circuit court's decision on a motion for summary disposition de novo. *Latham v Barton Marlow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Pursuant to MCR 2.116(C)(10), summary disposition is proper 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 genuine issue of material fact exists when the record, viewed in the light most favorable to the non-moving party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). The disputed factual issue must be material to the dispositive legal claims. *Auto Club Ins Ass'n v State Automobile Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003). A mere possibility that the claim might be supported by evidence at trial is insufficient. *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006).

The elements necessary for a legal malpractice claim in Michigan are: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) proof 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). The allegations of illegal search and seizure, *Brady* violations, and perjurious testimony by the police officer do not allege breaches of reasonable care or proximate cause. To prove proximate cause in a legal malpractice action, a plaintiff "must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit." *Id.*

Counsel may not raise grounds for relief absent a reasonable belief they will succeed. MCR 2.114(D)(2)(3). As a matter of law, MCR 6.508(D)(2) bars litigation of previously raised issues on a motion for relief from judgment. MCR 6.508(D)(3)(a) requires a showing of good cause and actual prejudice from failing to raise issues that could have been raised. Therefore, even if the illegal search and seizure was not decided against plaintiff in a prior appeal or proceeding, he has not demonstrated good cause for not raising the issue on appeal and actual prejudice as a result. There were no grounds for the defendant to raise the *Brady* violation because there was no reasonable probability that admission of the ninth floor log-in sheet as evidence would have resulted in a different outcome. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Further, even if the police officer's testimony were false, the evidence of the perjury would not have caused a different result. *People v Mechura*, 205 Mich App 481; 517 NW2d 797 (1994). Because plaintiff can show no genuine issue of material fact that a malpractice claim exists, the trial court's decision to grant defendant's motion for summary disposition should be affirmed.

(...continued)

before dinner; however, the ninth floor log-in sheet showed that plaintiff was placed on or signed out of the ninth floor at 10 p.m.

Plaintiff next argues that the trial court abused its discretion when it decided to disallow plaintiff an opportunity to amend his pleadings. We disagree. This Court reviews a trial court's decision to deny leave to amend pleadings for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). Upon the grant of summary disposition, leave to amend pleadings should be freely given to the non-prevailing party unless the amendment would be futile or otherwise unjustified. *Id.* at 52-53. An amendment to a pleading would be futile if: (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction. *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006). Plaintiff's amended complaint would have been futile for the first two reasons because it was legally insufficient on its face and merely restated allegations already made. Thus, the trial court did not abuse its discretion when it refused to allow an opportunity to amend the complaint.

Plaintiff also argues that the trial court violated plaintiff's due process and equal protection rights under state and federal law when it abused its discretion in denying pre-trial discovery motions. We disagree. This Court reviews a trial court's decision in limiting discovery for an abuse of discretion. *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996). "While Michigan is strongly committed to open and far reaching discovery, a trial court must also protect the interests of the party opposing discovery so as not to subject that party to excessive, abusive, or irrelevant discovery requests." *Id.* at 386. A trial court's decision to grant summary disposition before discovery is complete is not necessarily untimely or otherwise inappropriate. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; ___ NW2d ___ (2009). The determining factor is whether there is a fair chance that further discovery could uncover factual support for the opposing party's position. *Id.* The party opposing summary disposition cannot simply state summary disposition is premature, but must identify a disputed issue and offer the required affidavits under MCR 2.116(H), with the probable testimony to support their contentions. *Id.* In addition, the equal protection guarantee is a measure of our constitution's tolerance of government classification schemes, not a source of substantive rights or liberties. *Doe v Dep't of Social Services*, 439 Mich 650, 661; 487 NW2d 166 (1992). There is no evidence that defendant was being treated differently based on any government classification. Therefore, there is no equal protection claim.

Plaintiff contends that his initial request for admissions should have been deemed admitted because defendant failed to respond. He further contends that the sufficiency of defendant's answers on the second request should have been determined because defendant gave unsigned, evasive, and incomplete answers. As the trial court held, plaintiff did not specify which alleged admissions support denial of the motion for summary disposition, and failed to explain how or why the alleged admissions support his position. To show summary disposition is premature, plaintiff must at least identify which admissions support denial of summary disposition. Plaintiff failed to do so. Plaintiff also has failed to offer the necessary evidence pursuant to MCR 2.116(H) to justify keeping discovery open to prove defendant committed legal malpractice. Because plaintiff has not shown any evidence there was a fair chance that further discovery would have proved legal malpractice, the trial court did not abuse its discretion in denying pre-trial discovery motions and granting defendant's motion for summary disposition was proper and not premature.

Finally, plaintiff lacks factual support for his various claims of Michigan Rules of Professional Conduct (MRPC) violations on the part of defendant. Further, the alleged MRPC violations are insufficient to support a claim for legal malpractice because they would not have led to a different outcome in the underlying suit.

Affirmed. Defendant may tax costs.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Stephen L. Borrello