DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BARRY ATKINS, a married man dealing with his sole and separate property, Plaintiff/Appellant, v. SNELL & WILMER, L.L.P., an Arizona limited liability partnership; DONALD W. BIVENS and PATRICIA LEE REFO, husband and wife; ROBERT M. KORT and MYNDI M. KORT, husband and wife, Defendants/Appellees.	1 CA-CV 12-0018 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-052858

The Honorable Linda H. Miles

REVERSED IN PART, AFFIRMED IN PART

Barry M. Atkins — Carefree
In Propria Persona

Fennemore Craig, P.C. — Phoenix
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Attorneys for Defendants/Appellees

G O U L D, Judge

¶1 Barry Atkins ("Atkins") appeals the dismissal of his claims against Snell & Wilmer, LLP; Donald Bivens and Patricia Refo, husband and wife; and Robert and Myndi Kort, husband and wife (collectively "Defendants") for legal malpractice, breach of fiduciary duty, fraud, and punitive damages. Atkins also challenges the denial of his motions for sanctions, for a change of judge, and to amend his complaint. For the reasons stated below, we affirm in part and reverse in part the court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2005, Randall Zeller ("Zeller") agreed to loan Atkins $220,000 in order to fund an ongoing lawsuit Atkins was pursuing in Florida. The arrangement between Atkins and Zeller included a promissory note and security agreement stating, in relevant part, that Atkins would repay the $220,000 at ten percent interest (eighteen percent in the event of a default). Atkins and Zeller also entered into a Participation Agreement, under which Atkins agreed to pay Zeller ten percent of any net recovery in the Florida lawsuit. Zeller also loaned Atkins an additional $140,000 in personal loans.

¶3 Atkins received a multi-million dollar settlement in the Florida lawsuit. Atkins repaid the $220,000 loan plus interest and $100,000 of the $140,000 personal loans. However,

Atkins decided not to pay Zeller ten percent of the recovery pursuant to the Participation Agreement because Atkins believed the Participation Agreement constituted an unenforceable loan under Florida usury law. Zeller then sued Atkins in Arizona, where Atkins was residing, claiming he was entitled to ten percent of the settlement proceeds under the Participation Agreement, as well as the outstanding $40,000 personal loan balance.

¶4 Atkins hired Snell & Wilmer to defend him in the Zeller lawsuit. Snell & Wilmer filed successful motions to resolve all claims against Atkins except Zeller's claim based on the breach of the Participation Agreement.

¶5 Zeller eventually filed a motion for summary judgment regarding Atkins' alleged breach of the Participation Agreement. Snell & Wilmer successfully opposed the motion, which was denied by the court. In denying the motion, the Zeller court concluded there was a question of fact for the jury regarding Zeller's alleged corrupt intent for purposes of applying Florida usury laws.

¶6 Following this ruling, the Zeller court ordered the parties to attend a settlement conference. Prior to the settlement conference, Defendants sent Atkins a settlement conference memorandum providing their evaluation of Atkins' case. Defendants also sent Atkins an email analyzing Atkins'

"best case, worst case" scenarios at trial. This analysis included the necessary attorneys' fees to take the case to trial. Under Defendants' "best case" scenario, even if Atkins prevailed in the case, his recovery was limited to the $35,750 in interest he had already paid to Zeller. In addition, Defendants advised Atkins that it would cost an additional $100,000 to $150,000 in attorneys' fees to take the case through trial, and that Atkins' fees were not recoverable from Zeller even if he prevailed at trial.

¶7 Based on Defendants' analysis, Atkins settled with Zeller and agreed to pay Zeller $300,000 distributed in six monthly installments. The settlement provided for a stipulated judgment of $635,000 in the event Atkins defaulted. After three payments, Atkins defaulted, and Zeller recorded the stipulated judgment. At that time, Atkins had paid Defendants $120,000 in legal fees.

¶8 Atkins brought this action against Defendants asserting claims for legal malpractice, breach of fiduciary duty, fraud, and punitive damages. Atkins' claims are premised on two core factual allegations. First, Atkins alleges that based on Florida usury law, Zeller's lawsuit should have been dismissed pursuant to a motion to dismiss or a motion for summary judgment. Defendants' failure to file such a motion

constituted, in Atkins' view, legal malpractice, fraud, and a breach of fiduciary duty.

¶9 The second, or alternative basis for liability alleged in Atkins' complaint, is that when he "settled the Zeller Lawsuit and entered into the Settlement Agreement he did so based solely upon intentionally incomplete, defective, deficient, and intentionally improper legal direction, counsel and advice" provided by Defendants. Atkins alleges that prior to and during the settlement conference, Defendants provided negligent legal advice by failing to properly advise him as to his liability, remedies, defenses and potential recovery under Florida law. Atkins further alleges that if Defendants "had exercised proper care and skill in representing" him, he "would not have settled the Zeller lawsuit."

¶10 Defendants filed a motion to dismiss pursuant to Arizona Rules of Civil Procedure Rules 12(b)(6), 8, and 9. Atkins responded that his complaint, when read as a whole, set forth sufficient allegations in support of his claims to withstand a motion to dismiss. Atkins also argued that if the court found the allegations in his complaint were insufficient, he should be allowed to amend his complaint.

¶11 Atkins also filed a motion for Rule 11 sanctions, claiming that Defendants and their attorneys intentionally misstated the law in their motion to dismiss. After oral

argument, the trial court denied the motion for sanctions and granted the motion to dismiss, both without comment. Atkins filed a motion to amend his complaint after this order, but prior to the entry of a final judgment.[1]

¶12 Atkins also filed a separate motion for change of judge, alleging the trial judge was biased against him. The motion for change of judge was transferred to another judge, who denied the motion, finding that the trial judge demonstrated no bias or prejudice.

¶13 On December 19, 2011, the trial court signed a final judgment granting the motion to dismiss and denying the motion for sanctions. Atkins filed a timely notice of appeal from that judgment. This court has jurisdiction over the appeal from the December 19, 2011 judgment pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2011).

DISCUSSION

I. MOTION TO DISMISS

¶14 The notice pleading standard in Arizona Rule of Civil Procedure 8 ("Rule 8") governs the sufficiency of claims for relief. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 418, ¶ 1, 189 P.3d 344, 345 (2008). The purpose of the standard is to "give the opponent fair notice of the nature and basis of the

[1] Because we reverse the trial court's decision granting Defendants' motion to dismiss, we do not address the trial court's denial of Atkins' motion to amend his complaint.

claim and indicate generally the type of litigation involved." *Cullen,* 218 Ariz. at 419, ¶ 6, 189 P.3d at 346 (internal citation omitted). Dismissal of a complaint for failure to state a claim is appropriate if "as a matter of law . . . the plaintiff would not be entitled to relief under any interpretation of the facts." *Bunker's Glass Co. v. Pilkington PLC*, 202 Ariz. 481, 484-85, 47 P.3d 1119, 1122-23 (App. 2002) (citations omitted), *aff'd,* 206 Ariz. 9, 75 P.3d 99 (2003). We review a trial court's decision to dismiss a complaint de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, 356-57, ¶¶ 7-8, 284 P.3d 863, 866-67 (2012).

¶15 In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pled factual allegations and indulge all reasonable inferences from those facts. *Cullen*, 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. "[C]ourts look only to the pleading itself" when adjudicating a motion to dismiss. *Id.* If "matters outside the pleading" are considered, the motion must be treated as one for summary judgment. Ariz. R. Civ. P. 12(b). A complaint's exhibits, or public records regarding matters referenced in a complaint, are not "outside the pleading," and courts may consider such documents without converting a motion to dismiss into a summary judgment motion. *See Strategic Dev. & Constr.,*

Inc. v. 7th & Roosevelt Partners, LLC, 224 Ariz. 60, 63-64, ¶¶ 10, 13, 226 P.3d 1046, 1049-50 (App. 2010).

A. Legal Malpractice Claim

¶16 Atkins contends the court erred in dismissing his malpractice claim because the complaint set forth sufficient facts showing he was entitled to relief. *See Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 111, ¶ 23, 170 P.3d 712, 720 (App. 2007)("a complaint need merely set forth a short and plain statement showing the plaintiff is entitled to relief in order to survive a motion to dismiss"). In addition to allegations of duty, breach, and damages, "[i]n a legal malpractice action, the plaintiff must prove that but for the attorney's negligence, he would have been successful in the prosecution or defense of the original suit." *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986). "Success" by the defendant in the underlying case is not limited to a finding of no liability, but may also be a reduction in liability. *See Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 184 Ariz. 120, 131-32, 907 P.2d 506, 517-18 (App. 1995)(finding that jury could have reasonably concluded that, but for attorney's legal malpractice, client could have significantly reduced his liability in underlying litigation).

¶17 We conclude the trial court properly dismissed the allegation in Atkins' complaint that "he should have won on

summary judgment or other motion practice." As the Zeller court noted in denying Zeller's motion for summary judgment, "[O]n this record, a reasonable juror could conclude after considering all of the circumstances that the intent of the lender [Zeller] was to avoid the application of Florida's usury laws." The Zeller court determined, based on Florida law, that whether the Participation Agreement constituted a usurious loan was a question of fact for the jury. For the reasons discussed below, we conclude this was a correct analysis of Florida law.

¶18 In order to prove usury under Florida law, one of the elements that must be proved to a jury is that the lender possessed a corrupt intent to take more than the legal rate for the use of the money loaned. *Kraft v. Mason*, 668 So.2d 679, 683 (Fla. Dist. Ct. App. 1996). The determination of intent, or "corrupt purpose," is a question of fact for the jury that "'is to be gathered from the circumstances surrounding the entire transaction[]'" and not from "mathematical calculations alone[.]" *Kraft*, 668 So.2d at 683-84 (*quoting Jersey Palm-Gross, Inc. v. Paper*, 658 So.2d 531, 534 (Fla. 1995)). Thus, the fact that Zeller admitted he knew the amount of interest exceeded the lawful rate did not entitle Atkins to judgment as a matter of law. *Id.*

¶19 Additionally, the Zeller court found that whether the existence of a contingency precluded application of the Florida

usury law was one of many factors the trier of fact had to take into consideration in determining the usurious nature of the Participation Agreement. *See In re Transcapital Fin. Corp.*, 433 B.R. 900, 907-910 (2010). Florida law states that a "financing agreement will not be deemed to be usurious when repayment is made subject to the occurrence of a contingency." *Id.* at 907. *Transcapital*, *id.*, and *Kraft*, 668 So.2d. 679, both involved similar litigation financing agreements. Both Florida courts held that where the "repayment is subject to an express contingency, the occurrence of which is uncertain, the risk is deemed to be sufficiently 'substantial' to remove the transaction from the operation of the usury laws." *Transcapital*, 433 B.R. at 910. *See also Kraft*, 668 So.2d at 684. Florida courts have held that usury laws do not apply where "only the payment of the return was expressly subject to a contingency." *Transcapital, id.* (*citing Kraft, id.* and *Valliappan v. Cruz*, 917 So.2d 257, 260 (Fla. Dist. Ct. App. 2005)).

¶20 The Participation Agreement made payment of ten percent of the lawsuit proceeds contingent on Atkins prevailing in the underlying litigation financed by Zeller. The Zeller court correctly concluded that this contingency created a question of fact under Florida usury law. Atkins unsuccessfully attempted to distinguish these cases on their facts.

¶21 Although *Transcapital* is a federal bankruptcy case, its holding is premised on Florida case law. 433 B.R. at 907-08. The purpose of the loan in *Transcapital* was to provide funds to allow the borrower to continue litigation. *Id.* at 903. The lender provided $125,000 in return for the right to receive four times that amount ($500,000) to be paid only from any proceeds recovered in the litigation, "plus an additional one percent of the [litigation] proceeds." *Id.* at 904. The loan and return were "contingent upon the [borrower] ultimately prevailing in the [litigation] and realizing proceeds from which [the lender] could be paid." *Id.* After receiving a multi-million dollar settlement, the lender sought to recover the amounts due under the financing agreement. *Id.* at 906. The borrower objected on the grounds that the agreement constituted a criminally usurious loan. *Id.* Applying Florida law, the bankruptcy court held that "a loan or financing agreement will not be deemed usurious when repayment is made subject to the occurrence of a contingency." *Id.* at 907 (*citing inter alia, Kraft,* 668 So.2d at 684; *Valliappan,* 917 So.2d at 260).

¶22 *Kraft* also involved a loan to finance on-going litigation. 668 So.2d at 681. *Kraft* is more on-point because, like the Zeller loan, the $100,000 loan principal was guaranteed and subject to interest payments and only the recovery of a percentage of any proceeds from the lawsuit was contingent upon

the outcome of the lawsuit. *Id.* After a partial settlement, the lender was repaid $85,000 of principal. *Id.* The borrower stopped making interest payments and refused to distribute any other funds after he had settled the lawsuit for over five million dollars, claiming the loan was usurious. *Id.* at 681-82. The court held the loan was not usurious because the additional payment depended upon a contingency. *Id.* at 684 (citing *Bailey v. Harrington,* 462 So.2d 861 (Fla. Dist. Ct. App. 1985); *Schwab v. Quitoni,* 362 So.2d 297 (Fla. Dist. Ct. App. 1978)). The court concluded the agreement was not usurious because the lender may not have collected anything beyond the loan principal if the lawsuit had been unsuccessful. *Id.* Such a contingency rendered the agreement non-usurious. *Id.*

¶23 Given this case law, we conclude that Atkins could not establish that he would have prevailed in the Zeller lawsuit on summary judgment based on any usury defense. Thus, the Zeller court properly set the matter for a jury trial. Atkins could not predict the outcome of a jury trial to the degree necessary to prove proximate cause and damages. Therefore, causation and damages in the malpractice action were purely speculative.

¶24 However, we conclude the trial court erred when it dismissed Atkins' allegation that he "would not have settled the Zeller lawsuit" if Defendants "had exercised proper care and skill in representing" him. To survive a motion to dismiss,

Atkins need only allege that his liability would have been reduced but for Defendants' negligent legal advice. Here, Atkins alleges that Defendants advised him his "best case scenario" was a return of the interest paid on the Participation Agreement, and that even if he prevailed at trial, he could not recover his attorneys' fees.

¶25 If in fact Defendants provided such advice, a triable issue exists as to whether it was correct. Under Florida law, the remedy for civil usury, which involves a loan of $500,000 or less and an interest rate of greater than 18% but less than 25%, is an award of double the interest paid. Fla. Stat. § 687.04(remedy); Fla. Stat. § 687.03(1)(2012)(civil usury defined). When a debt has an interest rate of greater than 25%, it is criminally usurious, and the remedy is cancellation of the debt and a return of the amounts paid by the borrower to the lender. Fla. Stat. § 687.071; *Velletri v. Dixon*, 44 So.3d 187, 189 (Fla. Dist. Ct. App. 2010). In addition, pursuant to Fla. Stat. § 687.147, a borrower who is "injured" by a criminally usurious loan "shall" be entitled to an award of reasonable attorneys' fees.

¶26 Thus, under Florida usury law, Atkins alleges that contrary to Defendants' advice, his "best case" scenario was not a recovery of the interest he paid to Zeller ($35,750) with no basis for recovery of his attorneys' fees. Rather, the "best

case" scenario included a potential recovery of the full amount he paid Zeller under the Participation Agreement ($220,000), as well as recovery of all or a portion of his attorneys' fees ($100,000-$150,000). Atkins alleges that had he received competent, accurate legal advice from Defendants about the relevant Florida law, he would not have agreed to the settlement, *e.g.*, that ultimately lead to the $650,000 judgment being entered against him.

¶27 We conclude that Atkins' complaint sufficiently stated a claim for legal malpractice regarding the settlement, and the judgment dismissing Atkins' complaint on this ground should be reversed. Whether Defendants provided Atkins with negligent legal advice regarding his possible remedies under Florida law is a question of fact that cannot be resolved in the context of a motion to dismiss.

¶28 Finally, Defendants assert that we should affirm the dismissal of Atkins' legal malpractice claim because he failed to certify whether he needed expert testimony to prove the standard of care as required by Arizona law. A.R.S. § 12-2602(A). However, before dismissal is appropriate under this statute, a plaintiff must be provided the opportunity to cure the expert deficiency. *See* A.R.S. § 12-2602(E)(when trial court determines affidavit is required, it must "set a date and terms for compliance"); *see also Warner v. Southwest Desert Images,*

LLC, 218 Ariz. 121, 129, ¶ 19, 180 P.3d 986, 994 (App. 2008) (finding trial court abused its discretion in dismissing plaintiff's claims based on plaintiff's failure to submit timely expert affidavit to prove licensed professional's standard of care without giving plaintiff opportunity to cure).

B. Breach of Fiduciary Duty

¶29 Atkins also alleged a claim for breach of fiduciary duty. Under the majority view, "'the essential elements of legal malpractice based on breach of fiduciary duty include the following: (1) an attorney-client relationship; (2) breach of the attorney's fiduciary duty to the client; (3) causation, both actual and proximate; and (4) damages suffered by the client.'" *Cecala v. Newman*, 532 F. Supp. 2d 1118, 1135 (D. Ariz. 2007) (citations omitted).

¶30 We affirm the trial court's dismissal of Atkins' breach of fiduciary duty claim to the extent it is based on Defendants' failure to obtain a dismissal of the Zeller lawsuit. As noted above, triable issues of fact exist on the issue of causation that prevented Defendants from obtaining a dismissal by motion. *See supra*, pgs. 10-11.

¶31 However, with respect to Atkins' claim regarding the settlement agreement in the Zeller case, Atkins' complaint sufficiently alleges all of the requisite elements for a breach

of fiduciary duty claim.[2] The complaint alleges that Defendants, in their capacity as legal counsel for Atkins, charged Atkins over $146,000 for negligent legal advice prior to entering the settlement agreement which caused Atkins to suffer "financial loss and damages." Thus, in regards to Defendants' advice pertaining to the Zeller settlement agreement, we conclude the trial court erred in entering its judgment dismissing Atkins' claim for breach of fiduciary duty.

C. Fraud

¶32 Defendants contend that Atkins' complaint fails to meet the heightened pleading requirements for fraud because the complaint "concludes that such representations were false without detail or explanation" and fails to identify the "who, what, where, when, and how" of the alleged fraudulent statements. In response, Atkins argues his complaint satisfied the heightened pleading requirements set forth in Rule 9(b) for fraud.

¶33 Rule 9(b) requires that all averments of fraud shall be stated with particularity. To state a claim for fraud the complaint must allege "that the defendant made a false, material representation that he knew was false or was ignorant of its truth, with the intention that the hearer of the representation

[2] Atkins also "re-alleged" ¶¶ 1-XCII in support of his breach of fiduciary duty claim.

act on it in a manner reasonably contemplated, that the hearer was ignorant of the representation's falsity, rightfully relied on the truth of the representation, and sustained consequent and proximate damage." *Haisch v. Allstate Ins. Co.*, 197 Ariz. 606, 610, ¶ 14, 5 P.3d 940, 944 (App. 2000). The purpose of the particularity requirement in Rule 9(b) is to eliminate surprise and allow for full and meaningful discovery prior to trial. *Spudnuts, Inc v. Lane*, 131 Ariz. 424, 426, 641 P.2d 912, 914 (App. 1982).

¶34 Once again, with respect to Atkins' claim that Defendants failed to obtain a dismissal of the case by a motion to dismiss and/or a motion for summary judgment, we affirm the trial court's judgment dismissing this claim. Based on Florida usury law, Atkins' complaint lacks sufficient, well-plead allegations to prove causation. *See supra*, pgs. 10-11.

¶35 However, with respect to Defendants' advice pertaining to the Zeller settlement agreement, we conclude Atkins has alleged a cognizable claim. In his claim for fraud, Atkins listed documents and motions, as well as several conversations and meetings, where Defendants purportedly made false representations to Atkins, the Zeller Court and the Mediator about the Participation Agreement and the relevant Florida usury law. The complaint also contains several specific allegations concerning the purported misrepresentations Defendants made

about Florida law. Read as a whole, these allegations sufficiently placed Defendants on notice as to the nature and scope of Atkins' fraud claim. Therefore, the judgment dismissing Atkins' claim for fraud based on the Zeller settlement agreement is reversed.

D. Punitive Damages

¶36 With respect to Atkins' allegation concerning the Zeller settlement agreement, Atkins has alleged sufficient facts to support his claims for legal malpractice, breach of fiduciary duty, and fraud, Atkins pled sufficient facts to support his claim for punitive damages. Punitive damages are only appropriate "in the most egregious of cases, where [a plaintiff proves by clear and convincing evidence that the defendant engaged in] reprehensible conduct and acted with an evil mind." *Warner v. Southwest Desert Images, LLC*, 218 Ariz. 121, 130, ¶ 24, 180 P.3d 986, 995 (App. 2008). Here, if Atkins prevails on his claim against Defendants, he may be able to prove sufficient facts establishing Defendants acted with an "evil mind." As a result, we reverse the judgment dismissing Atkins' punitive damages claim.

II. MOTION FOR RULE 11 SANCTIONS

¶37 Atkins sought sanctions under Rule 11(a)[3] alleging Defendants' motion to dismiss was a deliberate effort to mislead the court, harass Atkins, and unjustly deny relief to Atkins. The trial court denied the motion without comment. On appeal, Atkins argues sanctions were warranted because Defendants misstated Florida law to the trial court.

¶38 An appellate court reviews de novo a decision to deny a motion for sanctions. *City of Casa Grande v. Ariz. Water Co.*, 199 Ariz. 547, 555, ¶ 27, 20 P.3d 590, 598 (App. 2001). Sanctions are appropriate when an attorney files a pleading with no reasonable basis or for the purpose of harassment, coercion, extortion, or delay. *Boone v. Superior Court*, 145 Ariz. 235, 241-42, 700 P.2d 1335, 1341-42 (1985). We apply an objective standard of reasonableness in considering such conduct. *Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 230, 866 P.2d 889, 898 (App. 1993).

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[3] Pursuant to Rule 11(a), an attorneys' signature on a pleading certifies:

> that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

¶39 We conclude that sanctions against Defendants were not warranted. Defendants had a reasonable basis for filing their motion, and there is no evidence showing Defendants filed the motion with the intent to harass, coerce, extort, or delay. We affirm the denial of Atkins' motion for sanctions.

III. MOTION FOR CHANGE OF JUDGE

¶40 While a party may only seek appellate review for the denial of a peremptory notice of change of judge by special action, challenges for cause may be reviewed on appeal. *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996). An appellate court reviews a trial court's denial of a motion for change of judge for an abuse of discretion. *Anderson v. Contes*, 212 Ariz. 122, 228, 128 P.3d 239, 241 (App. 2006). Moreover, a presumption exists that a trial judge is free of bias and prejudice. *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 38, 124 P.3d 756, 768 (App. 2006).

¶41 Here, Atkins argues the trial court was biased because it granted Defendants' motion to dismiss and denied Atkins' motion to amend his complaint. Atkins' challenge is based on the rulings of the trial court, which Atkins believes were erroneous. However, to show bias Atkins must point to facts other than the trial judge's decisions in the case, and adverse rulings do not demonstrate bias or prejudice. *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977).

Accordingly, we conclude the trial court did not abuse its discretion in denying Atkins' motion for change of judge.

COSTS AND FEES ON APPEAL

¶42 Atkins requests an award of his costs on appeal. He cites no authority or facts in support of this request. Accordingly, we deny his request. *See Ezell v. Quon*, 224 Ariz. 532, 539, ¶ 31, 233 P.3d 645, 652 (App. 2010)(holding that a request for attorneys' fees on appeal must include the legal basis for the request).

¶43 Defendants request an award of attorneys' fees pursuant to Arizona Rule of Civil Appellate Procedure 25 as a sanction for this appeal on the grounds that it is frivolous. Because we find merit in Atkins' appeal, we deny Defendants' request.

CONCLUSION

¶44 We reverse the dismissal of Atkins' claims against Defendants to the extent they are based on the alleged negligent advice Defendants provided to Atkins regarding settlement of the Zeller lawsuit. We affirm the dismissal of Atkins' claims against Defendants to the extent they are based on Defendants failure to obtain a dismissal of the Zeller lawsuit pursuant to a motion to dismiss or a motion for summary judgment. We also affirm the denial of Atkins' motion for sanctions and motion for change of judge. Finally, we deny both parties' request for an award of attorneys' fees on appeal.

/S/_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Presiding Judge

/S/_____
DONN KESSLER, Judge