

STATE OF MICHIGAN
COURT OF APPEALS

MARSHALL STILLMAN,

Plaintiff- Appellant,

v

MARVIN SHWEDEL, d/b/a FAINTUCK,
SHWEDEL & WOLFRAM,

Defendant- Appellee.

UNPUBLISHED

November 21, 1997

No. 194441

Oakland Circuit Court

LC No. 95-499761-NM

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals from the trial court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) and dismissing plaintiff's legal malpractice action. We affirm.

Plaintiff, a federal parolee, was involved in an altercation in a bar and was subsequently charged with felonious assault. Plaintiff reported the incident to his parole officer who allegedly told plaintiff that he would not violate his parole for a misdemeanor conviction resulting from the incident. Plaintiff's counsel, defendant Shwedel, negotiated for plaintiff to plead guilty to misdemeanor assault, MCL 750.81; MSA 28.276. Before he pled guilty to the offense, plaintiff allegedly told defendant that he would not plead guilty to any charge if there was even a chance that his federal parole would be violated. Defendant allegedly told plaintiff that he could rely on the parole officer's statement and advised him to plead guilty. On that basis, plaintiff pled guilty to a misdemeanor charge of assault and battery. Subsequently, plaintiff's parole was revoked and his "street time"¹ was forfeited. The Parole Commission found that defendant violated his parole by twice leaving the district without permission, by violating the law when he possessed false identification to obtain a driver's license and by violating the law when he committed an assault. The Commission noted its concern about the fact that plaintiff was caught leaving the district twice and that a handgun was found in his home but noted that it considered the assault the most serious of the charges.

Plaintiff subsequently filed a legal malpractice suit against defendant alleging that defendant's bad advice to plead guilty to the assault charge resulted in his parole being revoked and his loss of "street

time.” Defendant moved for summary disposition claiming that plaintiff could not show that but for defendant’s alleged negligence, plaintiff’s parole would not have been revoked in light of plaintiff’s other parole violations. The trial court agreed and granted defendant’s motion.

On appeal, plaintiff first claims that the trial court erred in granting summary disposition in favor of defendant on the ground that plaintiff could not establish proximate cause since proximate cause is a question for the jury. We disagree.

In order to establish a claim for legal malpractice, plaintiff must prove, among other things, that defendant’s negligence was the proximate cause of the injury. *Gebhardt v O’Rourke*, 444 Mich 535, 544; 510 NW2d 900 (1994); *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612-613; ___ NW2d ___ (1997). Generally, proximate causation is an issue for the trier of fact to resolve. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 590; 513 NW2d 773 (1994).

Here, plaintiff failed to show that his parole would not have been revoked but for defendant’s alleged negligence. Plaintiff may not rest on mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Allen v Comprehensive Health Services*, 222 Mich App 426, 433-434; ___ NW2d ___ (1997). Plaintiff failed to set forth in any affidavit or other documentary evidence specific facts showing that but for defendant’s alleged negligence, his parole would not have been revoked. In an effort to establish proximate cause, plaintiff presented affidavits of two attorneys experienced in the area of federal parole revocation law. However, a careful review of these affidavits reveals that the experts never stated that plaintiff’s parole would not have been revoked had he not pleaded guilty to the misdemeanor assault. Moreover, even if defendant had been acquitted at a criminal trial of the assault charges, the Parole Commission could still have revoked his parole based on the underlying conduct since the criminal charges require proof beyond a reasonable doubt while the revocation of plaintiff’s parole would be based on a preponderance of the evidence. See 28 CFR 2.19. Further, plaintiff’s parole could have been revoked based on an independent finding of criminal conduct related to defendant’s possession of false identification. See 28 CFR 2.21(a)(2).² Finally, the Parole Commission could have revoked plaintiff’s parole even if they found only administrative violations. See 28 CFR 2.21-01, Notes and Procedures. Therefore, no question of fact existed regarding whether defendant’s alleged negligence caused plaintiff to have his parole revoked.

Plaintiff also asserts that the trial court erred in finding that plaintiff had to show that he would not have had his parole revoked but for defendant’s negligence when all plaintiff had to show is that he suffered a longer period of incarceration because of defendant’s negligence. While we agree that such a showing would be sufficient to avoid summary disposition, we disagree that plaintiff has made such a showing.

Plaintiff does not have to show that he would have prevailed completely in the underlying lawsuit; rather, he need only show that, but for his attorney’s alleged mistake in the underlying action, the result would have been more favorable. *Schlumm v O’Hagan*, 173 Mich App 345, 359; 433 NW2d 839 (1988). In the case at bar, even viewing the evidence in plaintiff’s favor, we do not find a genuine issue of fact existed regarding whether defendant’s alleged negligence caused plaintiff to lose his

street time. That is, plaintiff has not presented evidence which would establish that he could have avoided a conviction following trial and thus avoid losing his street time.

Affirmed. Defendant may tax costs.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Peter D. O'Connell

¹ “Street time” refers to the period of time from the date of a parolee’s release on parole to the date of execution of a parole violator warrant. 28 CFR 2.66(i).

² See, e.g., MCL 257.324; MSA 9.2024, MCL 257.901; MSA 9.2601.