STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. ROOSENBERG, M.D.,

Plaintiff-Appellant,

V

JAMES ZERRENNER and ZERRENNER & ROANE,

Defendants-Appellees.

UNPUBLISHED
May 5, 2009

No. 280235
Kent Circuit Court
LC No. 04-003796

Before: Murray, P.J. and Markey and Wilder, JJ.

PER CURIAM.

In this action alleging legal malpractice, plaintiff appeals by right the circuit court's orders granting defendants' motion for summary disposition, and its order denying plaintiff's motion to file an amended complaint. Plaintiff argues that the circuit court erred in finding no genuine issue of material fact regarding causation-in-fact. Defendants cross-appeal, presenting alternative arguments for affirming. We affirm.

I

A

Zerrenner represented Roosenberg[1] in divorce proceedings in which plaintiff claims that legal malpractice occurred, and caused damages. The divorce in question ended Roosenberg's second marriage, which was to another opthamologist, Jane Lubin. Roosenberg married Lubin in 1993. In 1999, Lubin and Roosenberg separated, and Lubin filed for divorce. Roosenberg hired Zerrenner to represent him. Lubin and Roosenberg agreed to binding arbitration. The order for binding arbitration stated that "[t]he parties hereby acknowledge that complete disclosure and candor [are] essential to an effective arbitration process," and that "the parties . . . will submit all written briefs, documentation, exhibits, etc., to be considered by the arbitrator to the arbitrator's office . . . ." The arbitrator was Ronald Kooistra.

[1] Because Roosenberg was a defendant in the underlying case, and is plaintiff herein, proper names will be used to refer to the parties, to avoid confusion.

In August 2000, Kooistra ruled on a number of preliminary matters. Subsequent to these rulings, correspondence was exchanged between Zerrenner and Lubin's attorney, Michael Quinn, mostly regarding discovery, and between Zerrenner and Roosenberg. Zerrenner and Quinn filed briefs to Kooistra on behalf of Roosenberg and Lubin, respectively.

On November 14, 2000, Kooistra met with the parties and their counsel to discuss the case. After the arbitration on November 14, both sides filed supplemental briefs.

On December 28, 2000, Kooistra issued his arbitration opinion. The opinion stated that "[t]he Arbitrator is satisfied that all pertinent information has been made available to him." The arbitration opinion was generally more favorable to Lubin than to Roosenberg, although it did not grant Lubin spousal support.

Kooistra concluded that both Lubin and Roosenberg had premarital real property that he did not consider to be marital property. Roosenberg had a home on Cascade Terrace, a Hilton Head timeshare, and a condominium in Traverse City. Lubin had a home in Gloucester, and three townhouses in Cambridge, Massachusetts. Proceeds of the sales of Lubin's properties were used to buy Lubin's Chicago condominium, which Kooistra also excluded from the marital estate. Kooistra addressed personal property, tangible and intangible, and made findings regarding premarital value and increases in value during the marriage.

Kooistra rejected Roosenberg's theory that, during the marriage, Lubin and Roosenberg led separate economic lives, and that Lubin contributed little or nothing toward the marital home. After considering evidence regarding the value of the marital home on Placita Court, and the mortgage on which, at that time, $190,000 was owed, as well as evidence regarding Roosenberg's renovations to the home, Kooistra concluded that the equity in the home was $550,000. Kooistra set the net marital value of Roosenberg's medical practice at $344,390. Kooistra rejected Lubin's and Roosenberg's allegations of fault.

Kooistra awarded the marital home to Roosenberg, with a lien to Lubin for the balance owed to her under Kooistra's opinion. Kooistra also ruled that the value of Lubin's claim to Roosenberg's opthamology business and related enterprises was $172,195.00, and made other rulings not relevant here. Given all of his specific rulings, Kooistra concluded that Roosenberg owed Lubin $611,760 for equalization.

Zerrenner then filed with Kooistra a motion for reconsideration asserting that Kooistra had made various miscalculations and reached erroneous conclusions. Zerrenner asked that Kooistra reconsider premarital equity in an airplane and vehicles of Roosenberg, a joint bank account, valuation of the marital home, funds gifted by Lubin to her son during the marriage, furnishings in the Chicago condo, and removal of tangible personalty from the marital home. The motion also challenged the property settlement. Quinn opposed the motion. In February 2001, Zerrenner filed a reply, asking for time to present additional proofs. Later, Zerrenner filed with Kooistra a motion to produce documents regarding a Lubin family trust. During this time, Roosenberg complained to Zerrenner about his performance and the arbitration results. On February 27, 2001, Zerrenner filed a supplemental brief in support of the motion for reconsideration, disputing Kooistra's evaluations.

In June 2001, Kooistra issued an amended opinion, adjusting the value of Lubin's bank account upward by approximately $24,000, and adjusting the value of Roosenberg's account downward to approximately $245,500. Kooistra further ruled that Roosenberg would receive the furniture in the Chicago condo, except for two pieces of art, but that Roosenberg must pay Lubin $60,000 upon entry of judgment. Kooistra reaffirmed his ruling that Lubin's Chicago condo was a premarital asset, notwithstanding Roosenberg's argument to the contrary. Kooistra further reaffirmed his ruling regarding the marital home, and reiterated his conclusion that the mortgage was clearly paid-off during the marriage. Kooistra concluded that Roosenberg was largely responsible for the aborted sale of Lubin's Chicago condo, and the resulting costs, and as a result, assessed $5,000 in costs against Roosenberg. Kooistra also determined that Roosenberg had not raised objections to the funds contributed to Lubin's son being treated as gifts, and that it would be inappropriate to try to reconstruct every expenditure made during the marriage in the context of the arbitration. Finally, Kooistra concluded that Roosenberg should contribute $2,000 toward the payment of Lubin's attorney's fees. Judgment was entered on the arbitration, as amended.

Roosenberg sent Zerrenner a letter asserting that he had obtained information that Lubin had transferred a great deal of money from a Smith Barney account to buy a second condo in Chicago. Roosenberg expressed concern that Lubin had failed to disclose all of her assets, and requested further discovery regarding her Old Kent bank account and her Chicago condos, protesting Kooistra's rulings, and asking what could be done about them.

Zerrenner then filed a motion to correct errors by the arbitrator in the circuit court. The circuit court denied the motion, on the basis that (1) the motion was untimely, because it was filed 21 days after entry of the judgment based on the arbitration award, and not filed as required within 21 days after *receipt* of the arbitration award, and (2) the circuit court was required to give deference to the arbitrator's findings.

On January 23, 2002, Zerrenner sent Roosenberg a letter advising him that he had 21 days from January 11, 2002, to appeal the circuit court's ruling denying the motion to vacate the arbitration. No appeal was taken. Roosenberg then hired successor counsel, Mark Haslem and Joseph Doele, to replace Zerrenner.

On March 14, 2002, Haslem and Doele, filed a motion to vacate the arbitration award, and for relief from the judgment, alleging fraud by Lubin. After a hearing, the trial court took the motion under advisement, but ordered discovery for the limited purpose of verifying or negating the alleged fraud. After extensive discovery, Roosenberg and Lubin agreed to rearbitrate the entire divorce case. However, Lubin later had second thoughts about the rearbitration and ordered Quinn to back out of the rearbitration agreement. Quinn withdrew as Lubin's counsel. Lubin's successor counsel, N. Stevenson Jennette and Jude W. Pereira, filed a motion to vacate the decision to rearbitrate, and to enforce the original judgment.

On January 31, 2003, the trial court denied Lubin's motion to vacate, and ordered rearbitration with arbitrator Bruce Neckers (Neckers). The trial court entered an order in March 2003, finding Roosenberg's and Lubin's agreement to rearbitrate enforceable.

After additional proceedings in the circuit court, the parties rearbitrated before Neckers. Rearbitration covered the property, spousal support, attorney fees, and pension or retirement property issues. In November 2003, Neckers issued an opinion. In general, it was less favorable to Lubin than Kooistra's.

Neckers concluded that Lubin should have been much more forthcoming with releases, to allow her Massachusetts attorney, Field, to produce documents, and that Lubin's behavior was sanctionable, because she did not waive the attorney-client privilege until her deposition, in 2003. Neckers also concluded that Roosenberg did not tell the whole truth at his deposition. Given his findings that each party failed to be completely forthcoming with information, Neckers decided not to sanction either Roosenberg or Lubin.

Neckers found that Lubin did not intend to mislead Kooistra, since she did not have an opportunity to review the brief filed by Quinn on her behalf for the first arbitration. Neckers also found that the parties lived separate economic lives, and that Lubin never merged her finances with Roosenberg's. She never put Roosenberg's name on the title to her property, until she was fearful that a creditor of her brother would attach the property for a debt on which she cosigned. Then she put Roosenberg's name on the title to her Chicago condo. She never commingled her very substantial salary from Roosenberg's opthamology business either. Neckers found that Lubin had a right not to commingle her income and assets, but that it was then inconsistent that she ask the arbitrator to give her exclusively her own earnings during the marriage, plus a share of the earnings of Roosenberg: "[F]airness requires that I not try to force an economic marriage at the termination of it," since the parties did not have an economic marriage.

Neckers carefully considered the spousal support factors, and concluded that, as of the date of separation, Lubin should have received spousal support for two years as rehabilitative alimony. Neckers awarded Lubin spousal support of $4,000 per month for two years.

Neckers concluded that the Hilton Head time share and Traverse City condo were Roosenberg's separate property. Neckers awarded Lubin's Chicago and Massachusetts properties, and their proceeds, to Lubin, as her separate property. Lubin managed the Massachusetts properties on her own during the marriage, sold the Massachusetts properties during the marriage, placed the sale proceeds in an account, and used the proceeds to buy two Chicago condos.

Neckers acknowledged that over $144,000 of marital assets went into Lubin's separate assets during the marriage. But he concluded that she should not be charged with that. While Lubin and Roosenberg mingled some assets together, they did so only nominally, and Neckers declined "to unscramble that egg." Neckers concluded that under Michigan law, the Traverse City, Massachusetts and Chicago properties never became marital assets, and that he could not sort out the extent of increases in the value of these assets after the marriage.

Lubin and Roosenberg had agreed that the value of the marital home was $740,000, and that it would be awarded to Roosenberg. Neckers concluded that the parties jointly owned the marital home during the marriage; that none of the *Sparks* factors required any part of the marital home to be awarded to Lubin, as her ownership interest was merely formal. All contributions were by Roosenberg. Roosenberg spent more on the marital home than it is worth, so it did not appreciate in value. Neckers concluded that the marital home's value was not accumulated

through the joint efforts of the parties during the marriage, and awarded it free and clear to Roosenberg.

Neckers concluded that the increases in both Roosenberg's and Lubin's non-retirement investment accounts were marital assets and should be awarded to each. Neckers also concluded that the retirement accounts were not marital assets, because the parties never put their financial fortunes together.

Regarding the value of Roosenberg's ownership interest in his opthamology business, Lubin and Roosenberg stipulated that the business had an increase in value, from 1993 to 1999, of $300,000, and an additional increase in value, from the time of separation to the second arbitration, of $75,000. Neckers concluded that all of the increase in its value, till the time of separation, was a marital asset. Neckers awarded Roosenberg his interest in his opthamology business. Finally, in order to equalize the marital-property balance sheet between Lubin and Rosenberg, Neckers required Roosenberg to pay Lubin $187,438.50.

Thus, while Kooistra had awarded Lubin a substantial share of the equity in the marital home, Neckers gave her no share of that equity. As a result, the equalization payment required from Roosenberg fell to $187,438.50. Neckers also awarded Lubin rehabilitative alimony of $98,000.

B

Zerrenner filed a motion for summary disposition with the circuit court, presenting several arguments, including that there was a lack of evidence that any alleged malpractice was a cause-in-fact of Roosenberg's alleged injuries. In December 2006, the circuit court denied the motion in part and granted the motion in part. The circuit court asked the parties to further brief the issue of whether plaintiff had presented legally sufficient evidence that, but for malpractice by defendants, the outcome of the first arbitration would have been significantly more favorable to him. The circuit court also vacated the case evaluation, and ordered a reevaluation, after the court had resolved the issue of proximate cause. Finally, the circuit court granted plaintiff's motion to compel depositions of defendants' experts.

The parties further briefed the issue of causation, and Roosenberg filed a motion to amend his complaint, which the circuit court denied. In August 2007, the circuit court granted defendants' motion for summary disposition, finding insufficient evidence of causation.

II

A

We first consider Roosenberg's argument that the circuit court erred in granting summary disposition to defendants on the basis of lack of proof of factual causation. We disagree. Summary dispositions are reviewed de novo. *Ligon v City of Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007).

Proximate cause has two components: (1) cause-in-fact, and (2) proximate or legal cause. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 218; 761 NW2d 293 (2008).

Cause-in-fact requires plaintiff to show that *but for* (or, in Latin, "*sine qua, non,*" meaning "without which, not") the defendants' actions, the injury in question would not have occurred. *Id*. Legal or proximate cause, by contrast, normally involves examining the foreseeability of consequences. *Id*.

"Hence, a plaintiff must show that but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the 'suit within a suit' requirement in legal malpractice cases." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004), citing *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-587; 513 NW2d 773 (1994).

The question here is factual causation. Cause-in-fact requires more than a mere *possibility* of causation:

> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. A valid theory of causation, therefore, must be based on facts in evidence. *And while the evidence need not negate all other possible causes, . . . [it must] exclude other reasonable hypotheses with a fair amount of certainty*. [*Craig, supra* at 87-88 (second emphasis added; internal quotation marks, brackets and footnotes omitted).]

A party seeking to prove factual causation may not rely on speculation. *Mettler Walloon LLC, supra* 218, citing *Skinner v Square D Co*, 445 Mich 153, 166, 516 NW2d 475 (1994), and *Ensink v. Mecosta Co Gen Hosp*, 262 Mich App 518, 524-525; 687 NW2d 143 (2004). Rather, the proof of but-for causation must "'amount to a reasonable likelihood . . . rather than a possibility. The evidence need not negate all other possible causes, but . . . must exclude other reasonable hypotheses with a fair amount of certainty.'" *Skinner, supra* at 166 (citation omitted).

In other words:

> [A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. *Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theor*y. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Skinner, supra* at 164-165 (emphasis added).]

Here, plaintiff's theory of factual causation savors too much of speculation. Despite plaintiff's claim that Zerrener failed to properly conduct discovery, the unfavorable[2] aspects of the first arbitration might, equally plausibly, have been caused by other factors:

- Kooistra's exercise of his judgment regarding the circumstances of the divorce case, and how property should be classified and divided, including his judgment that Lubin should share in the increase in value of Roosenberg's business during the course of the marriage, since she contributed to the business; and

- Neckers simply exercised his discretion differently than Kooistra, and viewed the equities involved differently.

In our view, because these other potential causal factors seem at least equally as plausible as plaintiff's causation theory, plaintiff's causation theory fails to exclude, as required, other possible causes to a fair amount of certainty. *Skinner, supra* at 166 (citation omitted). Accordingly, the circuit court correctly granted defendants' motion for summary disposition.

B

Plaintiff next argues that the trial court erred in granting summary disposition of his claims for exemplary damages, a refund of fees paid to defendants, attorney's fees and costs incurred to mitigate alleged damages, and mental anguish damages. Because we find that there is insufficient evidence of causation-in-fact, this issue is rendered moot. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 61; 744 NW2d 174, 179 (2007).

C

Finally, plaintiff argues that the trial court abused its discretion in denying his motion for leave to amend the complaint. We disagree.

First, the trial court had already ruled in its December 2006 order, granting in part and denying in part Zerrenner's motion for summary disposition, that there was insufficient evidence to support a mental anguish claim. Defendant's motion for leave to amend is more properly characterized as an untimely motion for reconsideration of the trial court's prior order. Second, the deadline for proposed amendments established by the trial court's scheduling order had long expired, and Roosenberg failed to show good cause for non-compliance with the scheduling order. A trial court may properly enforce its scheduling order and decline to permit amendments to the pleadings that are violative of the trial court's scheduling order. See, e.g., *EDI Holdings LLC v Lear Corp (EDI Holdings II)*, 469 Mich 1021, 1021; 678 NW2d 440 (2004). Third, in

[2] Not all the aspects of the first arbitration were unfavorable. Kooistra did not award spousal support to Lubin, while Neckers did. Plaintiff seeks to "cherry-pick" the aspects of each of the arbitrations that he likes. In our view, this suggests that the differences in the arbitrations was caused not by malpractice, but by the different arbitrators' different judgments of what was just and equitable under the circumstances.

light of our finding of insufficient evidence of causation-in-fact, this issue is also moot. *The Healing Place at North Oakland Med Ctr*, *supra* at 61.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Kurtis T. Wilder