STATE OF MICHIGAN

COURT OF APPEALS

J. EDWARD KLOIAN, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED October 22, 2009
v	No. 286924 Oakland Circuit Court
KIERAN F. CUNNINGHAM and STROBL & SHARP, P.C., Defendants/Counter-Plaintiffs-Appellees.	LC No. 2007-083833-NM

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

In this legal malpractice case, plaintiff/counter-defendant J. Edward Kloian appeals as of right the trial court's order granting defendants/counter-plaintiffs Kieran F. Cunningham and Strobl & Sharp, P.C.'s[1] motion for summary disposition under MCR 2.116(C)(7) and (C)(10). We affirm.

I. Basic Facts And Procedural History

On June 20, 2007, Kloian filed his two-count complaint, seeking damages for two separate instances of malpractice against his former attorney, Cunningham, and Cunningham's law firm, Strobl & Sharp, P.C. Kloian explained in his complaint that he had retained Cunningham to represent him in a number of previous lawsuits. According to Kloian, Cunningham committed various acts of legal malpractice during the course of his representation in those cases.

More specifically, in his first count, Kloian stated that he retained Cunningham to represent him in *Kloian v Domino's Pizza, LLC*, Washtenaw Circuit Court No. 03-517-CK. In that case, Kloian sought to recover damages against Domino's for breach of a lease agreement.

[1] Kloian's claims against Strobl & Sharp, P.C. are derivative of his claims against Cunningham; therefore, we will refer to both defendant/counter-plaintiffs as "Cunningham," unless otherwise stated.

Kloian alleged that, in that case, Cunningham failed to adequately prepare for trial and failed to conduct adequate discovery. Kloian further alleged that Cunningham entered into a settlement agreement with Domino's without Kloian's consent and, in fact, contrary to Kloian's express instructions. Kloian also alleged that Cunningham improperly insisted that the settlement check be issued to Cunningham and that Cunningham refused to tender the check to Kloian. Finally, Kloian alleged that he suffered from mental depression and disability, of which Cunningham was aware and actually used against Kloian for Cunningham's own personal benefit and advantage. In his second count, Kloian stated that he also retained Cunningham to represent him in *In re Kloian*, United States Bankruptcy Court No. 99-51514, to revoke the appointment of a guardian ad litem. Kloian alleged that, in that case, Cunningham had failed to take depositions and conduct other discovery that was necessary to prove that the guardian ad litem was not acting in Kloian's best interests and that the trustee was not acting in the best interests of Kloian's estate.

Cunningham filed a countercomplaint, alleging breach of contract and unjust enrichment, and seeking $8,520.22 in allegedly unpaid legal fees for his representation of Kloian in *Domino's Pizza* and *In re Kloian*. Cunningham alleged that, with Kloian's authorization, he had negotiated a settlement with Domino's in the amount of $48,000; however, according to Cunningham, Kloian later refused to complete the settlement "for reasons known only by him." Domino's then moved to enforce the settlement, and the Washtenaw Circuit Court granted the motion and ordered that the settlement check be made payable jointly to Kloian and Cunningham. Cunningham noted that Kloian unsuccessfully appealed that decision to this Court.[2] According to Cunningham, after receiving the settlement check from Domino's on February 13, 2007, he sent a series of three letters to Kloian advising him of that receipt and also notifying him of the outstanding balance owed to Cunningham. In the first letter, dated February 14, 2007, Cunningham suggested that, upon Kloian's consent, the check would be cashed in a client trust account and then a check for the balance less the legal fees could be issued to Kloian. Cunningham received no response from Kloian, so he sent a second letter on March 6, 2007, that simply reminded Kloian of the first letter. A month later, Kloian called Cunningham and requested that the original letter be resubmitted or clarified. Cunningham complied and, on June 19, 2007, he sent the third letter, in which he offered to settle the unpaid fees in the amount of $8,000, contingent on execution of a signed, mutual release. Cunningham alleged that he had received no further communication from Kloian regarding the check or fees.

Cunningham moved for summary disposition under MCR 2.116(C)(7) arguing that the applicable two-year period of limitations time barred Kloian's complaint. More specifically, Cunningham argued that his representation of Kloian in the bankruptcy proceeding ended on June 1, 2005, per Kloian's request, and that his representation of Kloian in the *Domino's Pizza* case ended, effective June 3, 2005, pursuant to a June 23, 2005 court order allowing Cunningham to withdraw from representation in that case. Therefore, Cunningham argued, Kloian's June 20, 2007 complaint was untimely.

Kloian responded, first arguing that his June 20, 2007 complaint was timely filed because (1) a February 3, 2006 order from the bankruptcy court stated that Cunningham was being

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[2] *Kloian v Domino's Pizza*, LLC, 273 Mich App 449; 733 NW2d 766 (2006).

replaced as counsel, effective July 20, 2005, and (2) in the *Domino's Pizza* case, the period of limitations ran from the date of entry of the court's June 23, 2005 order, not the backdated date of June 3, stated within the order. Kloian also argued that the period of limitations had been tolled under MCL 600.5851(1) because the bankruptcy court had declared Kloian incompetent. Cunningham responded to this last point, noting that MCL 600.5851(1) tolls application of a statute of limitations for persons that are "insane" at the time their claim accrues, which Kloian was not.

Kloian then moved to amend his complaint to add a count for declaratory relief that would require Cunningham to disgorge any legal fees and costs that Kloian paid to him because the contract between the parties was voidable when Kloian was incompetent at the time that he engaged Cunningham's services. Cunningham argued that the trial court should deny the motion because it would be futile when there was no merit to his claim that he could not contract due to alleged incompetency.

After hearing oral arguments on both Cunningham's motion for summary disposition and Kloian's motion to amend his complaint, the trial court issued a written opinion and order granting Cunningham's motion and denying Kloian's motion. With respect to the date of Cunningham's date of discontinuation of services in the *Domino's Pizza* case, the trial court explained that the June 23, 2005 order was the result of a June 3, 2005 hearing, during which Cunningham requested on the record to withdraw as Kloian's counsel, Kloian consented and stated that he was prepared to proceed without assistance, and the court granted the request on the record. The trial court found that the June 23, 2005 order was merely the court's exercise of its authority to enter an order nunc pro tunc to formalize its June 3 decision. Accordingly, the trial court concluded that "there is no question" that Cunningham was relieved of his obligations to Kloian on June 3, 2005.

The trial court further found that Kloian failed to provide any admissible evidence that he was "insane" within the meaning of the tolling statute. The trial court noted that the bankruptcy court order appointing Kloian a guardian ad litem, on which Kloian relied to support his claim, did not support that Kloian was suffering from a mental derangement or was unable to comprehend his rights. Indeed, the trial court pointed out that the United States Court of Appeals for the Sixth Circuit explained in its opinion reviewing the bankruptcy court's findings that Kloian had been declared "mentally incompetent in the 'very limited sense' of bankruptcy-litigation incompetence due to his severe clinical depression."[3] The trial court further stated that Kloian "appeared lucid and competent at the hearing on this motion. He admitted to assisting in preparing his brief and signed an affidavit in response to the motion. These observations are implicit evidence that, whatever psychological or cognitive disorders [Kloian] claims that he suffers from, those disorders do not prevent him from comprehending his rights."

With respect to the date of Cunningham's date of discontinuation of services in the bankruptcy case, the trial court first explained that, based on its finding that Cunningham filed a general appearance, the appropriate test was to determine when Cunningham was relieved of his

[3] See *In re Kloian*, 179 Fed Appx 262, 263 (CA 6, 2006).

obligations by the client or the court, not the test based on the date that professional services were last provided, which only applied when an attorney was hired to perform a specific function. The trial court then noted that the record supported that the court formally relieved Cunningham of his obligations effective July 20, 2005. But, the trial court continued, the question then became whether Kloian relieved Cunningham of his obligation to represent him before the substitution order was entered. The trial court noted that Kloian conceded Cunningham's claims regarding their June 1, 2005 conversation in which Kloian told Cunningham that he no longer needed Cunningham as counsel. The trial court also found it significant that Kloian sent Cunningham a letter on June 2, 2005, discharging him from service and stating that he was "not representing [Kloian's] best interests." And, contrary to Kloian's argument that Cunningham's representation should be deemed to have continued until the court's formal order in July, the trial court pointed out that a client's instruction that the attorney no longer provide any further services is sufficient to terminate representation. Accordingly, the trial court concluded that Kloian terminated Cunningham's representation in the bankruptcy matter on June 1, 2005.

Turning to Kloian's motion to amend the complaint, the trial court explained that an attorney's services are "usually considered as necessaries, and a promise to pay for them will be implied when rendered in a proceeding personal to an infant or other person incapable of entering into a contract . . . ."[4] And the trial court rejected Kloian's apparent argument that MCL 600.5851(1), or any other statute, abrogated the case law. Accordingly, the trial court denied Kloian's motion.

Kloian then moved for reconsideration, arguing that Cunningham was still representing him when the order enforcing the settlement agreement that Cunningham negotiated was entered on June 20, 2005, and when Cunningham was named as Kloian's attorney on the February 6, 2007 settlement check. Indeed, according to Kloian, Cunningham represented Kloian up until the time that Cunningham finally disbursed the settlement check funds to Kloian after commencement of this action. Kloian also argued that the trial court should refer the matter of his competency to the probate court for a proper determination. During a subsequent hearing, the trial court denied the motion. The trial court explained that it did not need to refer the issue of Kloian's competency to the probate court because the case that Kloian relied on stated that such procedure was only necessary when the trial court itself questions the competency of the party. But, here, the trial court stated, it had no questions regarding Kloian's competency.

Cunningham then moved for entry of default and default judgment on his counterclaim or other sanctions for Kloian's failure to serve responses to discovery requests as ordered by the trial court or to file a timely and adequate witness list. Cunningham explained that in February 2008, the trial court entered an order requiring Kloian to fully comply with Cunningham's discovery requests on or before March 19, 2008, including delivering items listed in Cunningham's request for production of documents. However, Kloian failed to respond. Further, the trial court had also ordered Kloian to serve and file witness lists on or before March 19, 2008. Cunningham conceded that Kloian attempted to comply with this order; however, his

[4] See *Lyon v Freshour's Estate*, 174 Mich 114, 120; 140 NW 517 (1913).

witness list failed to comply with MCR 2.401(I). Kloian responded, arguing that he was unable to comply with the trial court's discovery compliance order because he was suffering from a "dangerous level of blood pressure[.]" Kloian also admitted that his witness list did not contain any witness addresses, but he contended this omission was not prejudicial given that the list was mostly comprised of attorneys (and staff) who were listed in the Michigan Bar Journal and Cunningham already had possession of the other witnesses' addresses.

During the hearing on the motion, Kloian submitted documents in an attempt to comply with the trial court's discovery order. On review of the documents, the trial court found that Kloian's responses to Cunningham's interrogatories were deficient and noted that he failed to sign the documents, thereby attesting to the veracity of his answers. With respect to his witness list, Kloian admitted that, in addition to omitting the necessary contact information, he also failed to indicate whether any of the witnesses would be called as experts; Kloian explained that he did not realize that was a requirement. The trial court found that the witness list failed to comply with the court rule. The trial court then found that Kloian's failures to provide information regarding his expert witnesses in either the interrogatory responses or the witness list prejudiced Cunningham. Accordingly, the trial court ordered stricken any witness being called for expert witness purposes. The trial court also ordered monetary sanctions in the amount of $450 in attorney fees be imposed against Kloian for his failure to comply with the trial court's order by not providing timely, good faith responses to Cunningham's interrogatories. The trial court further found that whether any additional sanctions should be imposed would depend on whether Cunningham could show any further prejudice from Kloian's deficiencies on the remaining interrogatories not related to expert testimony. Accordingly, the trial court ordered that the parties filed supplemental briefs regarding that issue.

In his supplemental brief, Cunningham argued that Kloian's failure to adequately respond to the interrogatories or provide supporting documents prevented Cunningham from being able to properly prepare for trial. Cunningham also moved for entry of default judgment against Kloian based on the trial court's order of default against Kloian for his failure to attend a mandatory settlement conference. Although declining to enter the default judgment at that time, the trial court ordered monetary sanctions in the amount of $900 in attorney fees be imposed against Kloian for his failure to appear. Kloian objected to the award of sanctions, arguing that the award of attorney fees to Cunningham was improper because he was representing himself. The trial court confirmed its ruling, stating that Kloian was free to raise that issue in a motion for rehearing supported by relevant authority.

Cunningham's counter claim finally proceeded to trial in May 2008, and the jury awarded him $5000.

Kloian then filed a post-trial motion, seeking an evidentiary hearing on the reasonableness Cunningham's attorney fees. The trial court granted the motion. And, following the hearing, the trial court found that Cunningham's fees were reasonable. In so finding, the trial court also addressed Kloian's argument that Cunningham, as an attorney representing himself, was not entitled to attorney fees. Although acknowledging that case law did support that Michigan courts "have denied requests for attorney fee awards by pro se litigants[,]" the trial court found it significant that "none of the cases . . . addresses [sic] the award of attorney fees as a sanction for failure to attend a court-ordered settlement conference or similar misconduct by a party." Assuming, however, that case law did preclude the trial court from awarding sanctions in

the form of attorney fees to a pro se attorney litigant, the trial court then went on to find that the award of sanctions was appropriate as an award of costs incurred by Cunningham's firm for his inability to work on other client files while handling Kloian's case. In other words, the trial court found the award of sanctions appropriate in the form of costs for Cunningham's lost opportunity to perform other work for his employer. The trial court further found that the appropriate measure of those costs was the value of Cunningham's billable hours, which Cunningham testified were $225 an hour and which the trial court found reasonable for the locality and Cunningham's experience.

The trial court entered its final judgment, awarding Cunningham the $5000 jury award, pre-judgment interest in the amount of $253.41, and the $900 sanctions (Kloian has already paid the $450 sanction), for a total judgment of $6,153.41. Kloian now appeals.

II. Legal Malpractice

A. Standard Of Review

Under MCR 2.116(C)(7), a party may move for summary disposition on the ground that a claim is barred by a statute of limitations. Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence.[5] The plaintiff's well-pleaded factual allegations must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant.[6] We review de novo whether the cause of action is barred by a statute of limitations.[7]

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[8] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[9] We review de novo the trial court's ruling on a motion for summary disposition.[10]

B. Legal Principles

MCL 600.5805 provides, in pertinent part:

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[5] *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[6] MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Gortney v Norfolk & W R Co*, 216 Mich App 535, 538-539; 549 NW2d 612 (1996).

[7] *Colbert v Conybeare Law Office*, 239 Mich App 608, 613; 609 NW2d 208 (2000).

[8] MCR 2.116(G)(3)(b) and (4); *Maiden*, *supra* at 120.

[9] MCR 2.116(G)(5); *Maiden*, *supra* at 120.

[10] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> * * *
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> (6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.

Further, MCL 600.5838 provides:

> (1) . . . [A] claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.
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> (2) . . . [A]n action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.

Accordingly, a legal malpractice claim must be brought within one of the following timeframes: two years of the date that the attorney discontinues serving the plaintiff or six months after the plaintiff discovers or should have discovered the claim, whichever is later.[11] For purposes of applying the malpractice statute of limitations, an attorney is deemed to have discontinued serving a client when the client or the court relieves the attorney of that obligation.[12] Further, an attorney is deemed to have discontinued serving a client when the client instructs the attorney that he or she need not perform any more services for the client, regardless of a later entered formal order of the court allowing the attorney to withdraw from representation.[13]

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[11] *Seebacher v Fitzgerald, Hodgman, Cawthorne & King, PC*, 181 Mich App 642, 646; 449 NW2d 673 (1989).

[12] *Dowker v Peacock*, 152 Mich App 669, 672; 394 NW2d 65 (1986).

[13] *Basic Foods Industries, Inc v Travis, Warren, Nayer & Burgoyne*, 60 Mich App 492, 496-497; 231 NW2d 466 (1975).

C. Analysis

With respect to the effective date for the running of the period of limitations in the bankruptcy action, Kloian argues that the trial court erred in dismissing his legal malpractice claims based on the statute of limitations because Cunningham admitted in a letter that his representation ceased on July 7, 2005, or, in the alternative, because the bankruptcy court issued an order discharging him from service as of July 20, 2005.

As Cunningham points out, the letter that mentioned the July 7, 2005 date was not presented to the trial court. And because our review is limited to review of the trial court record,[14] we will not allow Kloian to enlarge the record on appeal.[15]

The trial court did recognize that the bankruptcy court formally discharged Cunningham of his obligations effective July 20, 2005. We agree with the trial court, however, that the operative date was June 1, 2005, when Kloian indicated that he no longer wished for Cunningham to serve as his counsel and stated that he would seek alternative counsel.[16] Kloian contends that the trial court erred in finding that he did not dispute the June 1 conversation. But even in so arguing, he admits that, during the June 1 conversation, he told Cunningham that "[he] breached the standard of care, [his] negligence and failure to take actions had cost [Kloian] a fortune and that [Kloian] would attempt to find an attorney to substitute in for [him] in the Bankruptcy case." After accusing Cunningham of malpractice and stating that he would be seeking alternative counsel, Kloian's alleged apparent intention that Cunningham remain as his counsel until he could secure that new counsel is irrelevant. Therefore, we conclude that the operative date for calculating the running of the period of limitations in the bankruptcy case was June 1, 2005.

With respect to the effective date for the running of the period of limitations in the *Domino's* case, Kloian argues that the trial court erred in dismissing his legal malpractice claims based on the statute of limitations because the trial court had no authority to backdate its June 23, 2005 to June 3, 2005. Kloian also argues, alternatively, that Cunningham continued to represent Kloian until he disbursed the settlement funds to Kloian.

Kloian contends that nunc pro tunc orders "can only be entered when they refer to a specific ruling on a prior date[,]" and that, "[h]ere, there was no ruling on July 3, 2005 [sic] that Cunningham's representation ceased." This contention is erroneous. The function of a nunc pro tunc order "is to supply an *omission in the record* of action previously taken by the court but not properly recorded[.]"[17] Here, as the trial court found, the June 23, 2005 order was the result of a June 3, 2005 hearing, during which Cunningham requested on the record to withdraw as Kloian's counsel, Kloian consented and stated that he was prepared to proceed without assistance, and the

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[14] *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

[15] *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005).

[16] *Basic Foods Industries*, *supra* at 496-497.

[17] *Sleboede v Sleboede*, 384 Mich 555, 558-559; 184 NW2d 923 (1971) (emphasis in original).

court granted the request on the record. Specifically, the following exchange transpired on the June 3, 2005 record:

> *Mr. Cunningham*: Good Morning, Your Honor, Keiran Cunningham, I've been representing Mr. Kloian. He indicated he wished me to be discharged from the case last evening. I'd like to briefly address the Court as to that issue before we commence on the motions.
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> *The Court*: Sure.
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> *Mr. Cunningham*: Thank you.
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> *The Court*: First, Mr. Juliar [Domino's counsel], do you have any objection to Mr. Cunningham withdrawing as counsel?
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> *Mr. Juliar*: No, Your Honor.
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> *The Court*: All right. Mr. Kloian, is that your desire?
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> *Mr. Kloian*: Yes, Your Honor.
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> *The Court*: And, then you are prepared to proceed on this motion today without the assistance of counsel?
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> *Mr. Kloian*: Yes, Your Honor.

Therefore, we agree with the trial court that the June 23, 2005 order was merely the court's exercise of its authority to enter an order nunc pro tunc to formalize its June 3 decision.

Moreover, the fact that Cunningham received the settlement check on behalf of Kloian does not alter this decision. It is well established that "[s]ome of a lawyer's duties to a client survive the termination of the attorney-client relationship[.]"[18] And "[t]o hold that . . . follow-up activities attendant to otherwise completed matters of representation necessarily extends the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention."[19] Therefore, we conclude that the operative date for calculating the running of the period of limitations in the Domino's case was June 3, 2005.

Kloian also argues that application of the statute of limitations was tolled when the bankruptcy court declared him incompetent. We disagree. MCL 600.5851(1) states that if a person is "insane at the time the claim accrues, the person . . . shall have 1 year after the disability is removed . . . to . . . bring the action although the period of limitations has run." The statute goes on the state, "The term insane . . . means a condition of mental derangement such as

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[18] *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 539; 599 NW2d 493 (1999).

[19] *Id*.

to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane."[20] Here, we agree with the trial court that Kloian failed to provide any admissible evidence that he was "insane" within the meaning of the tolling statute. And contrary to Kloian's contentions, the bankruptcy court order appointing a guardian ad litem for Kloian did not support that he was suffering from a mental derangement or was unable to comprehend his rights.

In sum, we conclude that the trial court did not err in dismissing Kloian's malpractice claims on the ground that they were time barred.

III. Amendment Of Complaint

A. Standard Of Review

"This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice."[21] An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.[22]

B. Applicable Legal Principles

Leave to amend a complaint shall be freely given when justice so requires.[23] However, a trial court may deny leave to amend a complaint for particularized reasons such as:

> "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."[24]

A trial court should support its decision to deny an amendment with specific findings,[25] and failure to "specify one of the *Fyke* reasons in its denial . . . constitutes error requiring a reversal unless such amendment would be futile."[26] Moreover, "On a motion to amend, a court should ignore the substantive merits of a claim or defense *unless* it is legally insufficient on its face and, thus, . . . it would be 'futile' to allow the amendment."[27]

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[20] MCL 600.5851(2).

[21] *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

[22] *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

[23] MCR 2.118(A)(2).

[24] *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973), quoting *Foman v Davis*, 371 US 178, 182; 83 S Ct 227, 230; 9 L Ed 2d 222, 226 (1962).

[25] *Ben P Fyke & Sons*, *supra* at 656-657.

[26] *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1990).

[27] *Ben P Fyke & Sons*, *supra* at 660 (emphasis added).

C. Analysis

Kloian argues that the trial court erred in refusing to permit him to amend his complaint on the ground that doing so would be futile. We disagree. Kloian sought to amend his complaint to add a count seeking declaratory relief that would require Cunningham to disgorge any legal fees and costs that Kloian paid to him on the ground that the contract between the parties was voidable when Kloian was incompetent at the time that he engaged Cunningham's services. However, there was no merit to Kloian's claim of alleged incompetency. And, even assuming there was merit to his claim, this Court has held that "The services of an attorney will usually be considered as necessaries, and a promise to pay for them will be implied when rendered in a proceeding personal to [a] . . . person incapable of entering into a contract[.]"[28] Therefore, we conclude that the trial court did not err in denying Kloian's motion to amend his complaint on the ground that allowing amendment would be futile.

IV. Mental Competence

A. Standard Of Review

We review de novo questions of law.[29]

B. Analysis

Kloian argues that the trial court erred in refusing to refer the issue of his mental competence to the probate court pursuant to *Redding v Redding*.[30] We disagree. In *Redding*, this Court stated that "the appropriate practice where a circuit court questions the competency of an adult is to refer the matter to the probate court for an appropriate determination about possible guardianship."[31] But, here, the trial court found that it did not need to refer the issue of Kloian's competency to the probate court because it had no questions regarding Kloian's competency. Indeed, the trial court noted that Kloian "appeared lucid and competent at the hearing on this motion. He admitted to assisting in preparing his brief and signed an affidavit in response to the motion. These observations are implicit evidence that, whatever psychological or cognitive disorders [Kloian] claims that he suffers from, those disorders do not prevent him from comprehending his rights." We find no error in this decision.

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[28] *Lyon*, *supra* at 120.

[29] *Livonia Hotel, LLC v Livonia*, 259 Mich App 116, 123; 673 NW2d 763 (2003).

[30] *Redding v Redding*, 214 Mich App 639, 645; 543 NW2d 75 (1995).

[31] *Id*. at 643-644.

V. Sanctions

A. Standard Of Review

We review a trial court's decision whether to impose discovery sanctions for an abuse of discretion.[32] We also review for an abuse of discretion a trial court's determination of the amount of sanctions imposed.[33]

B. Analysis

Kloian argues that the trial court erred in awarding sanctions against him at all because he was not "culpable" for failing to appear at the settlement conference and for failing to adhere to the trial court's orders because he was "overloaded" and suffered from medial difficulties. However, we cannot conclude that the trial court abused its discretion in imposing sanctions against Kloian.

Kloian also argues that the trial court erred in awarding attorney fees to Cunningham as a pro se party in the form of sanctions against Kloian. We disagree and conclude that the trial court's decision on reconsideration, re-categorizing the award of sanctions as costs instead of direct attorney fees, was within the trial court's discretion to design an appropriate sanction.[34]

And Kloian argues that the trial court erred in concluding that the award of attorney fees was reasonable. We find no merit to this claim. Kloian requested and received an evidentiary hearing on the reasonableness of Cunningham's fees, and we find no error in the trial court's decision. In sum, we conclude that the trial court did not err in imposing sanctions on Kloian for his disregard of the trial court's orders and failure to appear at the settlement conference.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro

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[32] *Bass v Combs*, 238 Mich App 16, 26; 604 NW2d 727 (1999).

[33] *Maryland Casualty Co v Allen*, 221 Mich App 26, 32; 561 NW2d 103 (1997).

[34] See *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 719, 727; 591 NW2d 676 (1998) (holding that attorney fee sanctions are not available under MCR 2.114(F), but that MCR 2.114(E) grants the trial court discretion to fashion an "appropriate sanction," which may include, but is not limited to, an order to pay the opposing party the reasonable expenses incurred (including attorney fees).)