

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LERROY CAUDILL,

Plaintiff-Appellant,

v

SHELDON MILLER LAW FIRM, LEIB AND  
LEIB LAW FIRM, SHELDON MILLER,  
ANDREW ROGERS, and JEFF LEIB,

Defendants-Appellees.

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UNPUBLISHED  
November 19, 2013

No. 310714  
Oakland Circuit Court  
LC No. 2011-122545-NM

Before: SAWYER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants, Sheldon Miller Law Firm, Sheldon Miller, and Andrew Rogers (Miller Defendants).<sup>1</sup> We affirm.

**I. SUMMARY DISPOSITION**

Plaintiff's claims initially arose out of the distribution of proceeds from a real estate transaction in 2004. Plaintiff alleged that he was entitled to certain proceeds, which the closing agent had distributed to Charles Bailey. Plaintiff sued the closing agent, who in turned sued Bailey in a third-party complaint. The closing agent eventually assigned its claims against Bailey to plaintiff and was dismissed from the underlying suit. Plaintiff proceeded in the suit against Bailey, and the Miller Defendants began representing him in that suit when his initial attorney withdrew. After various proceedings, including a notice of default against Bailey and a subsequent stipulation, the Miller Defendants withdrew as plaintiff's counsel. Plaintiff went to trial against Bailey, and Bailey prevailed.

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<sup>1</sup> The trial court granted summary disposition on January 4, 2012, in favor of Leib & Leib Law Firm and Jeff Leib (Leib Defendants), and ordered that the Leib Defendants be removed from the case. The court granted summary disposition on May 2, 2012, in favor of the Miller Defendants.

Plaintiff then sued the Miller Defendants and others, alleging legal malpractice and other claims. The trial court granted summary disposition in favor of all defendants in separate orders. Plaintiff now contends that the trial court erred in granting defendants' motions for summary disposition because defendants committed malpractice in several ways and engaged in other improper actions. We disagree.

#### A. PRESERVATION AND STANDARD OF REVIEW

"Generally, an issue is not properly preserved if it is not raised before, addressed by, or decided by the lower court or administrative tribunal." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). The trial court's May 2, 2012, order addressed only the following five issues: (1) the Miller Defendants' failure to pursue a default judgment against Charles Bailey, (2) the Miller Defendants' failure to sue the purchasers, (3) the Miller Defendants' failure to include in the settlement agreement a requirement that the closing agent, Shamil Halabu, appear at trial, (4) the Miller Defendants' failure to inform plaintiff of a malpractice claim against his first attorney, Richard Poling, and (5) the Miller Defendants' withdrawal from the case 18 days before trial. These issues are preserved.

Plaintiff's complaint contained additional claims, which the trial court did not address. Plaintiff raises many of those arguments again on appeal. Plaintiff also makes some arguments on appeal that were not raised below. These issues are unpreserved. With regard to plaintiff's claims against the Leib Defendants, it is unclear if they are preserved. Nonetheless, we may address any unpreserved issues if "the failure to consider an issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Gen Motors Corp*, 290 Mich App at 387.

This Court reviews de novo a trial court's decision on a motion for summary disposition. Under MCR 2.116(C)(10), the motion tests the factual adequacy of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. The trial court in deciding the motion must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. "Summary disposition is appropriate . . . if there is no genuine issue regarding 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, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." [*Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 303005, issued August 6, 2013) (slip op at 2) (citations omitted).]

We review unpreserved issues for plain error affecting substantial rights. *Local Emergency Fin Assistance Loan Bd v Blackwell*, 299 Mich App 727, 738; 832 NW2d 401 (2013).

#### B. LEGAL MALPRACTICE CLAIMS ADDRESSED BY THE TRIAL COURT

A claim for legal malpractice has four elements: “(1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was the proximate cause of an injury, and (4) the fact and the extent of the injury alleged.” *Kloian v Schwartz*, 272 Mich App 232, 240; 725 NW2d 671 (2006). “If there is an attorney-client relationship, a duty to use and exercise reasonable care, skill, discretion, and judgment with regard to the representation of the client exists as a matter of law.” *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001). Our Supreme Court has explained:

An attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law. However, an attorney does not have a duty to insure or guarantee the most favorable outcome possible. An attorney is never bound to exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. [*Simko v Blake*, 448 Mich 648, 655-656; 532 NW2d 842 (1995)]

In this case, the trial court did not address, and the Miller Defendants do not dispute, the first element—the existence of an attorney-client relationship. We must determine whether there is a genuine issue of material fact with regard to the other elements of plaintiff’s claim of legal malpractice. To make that determination, we review the record in light of plaintiff’s specific allegations of malpractice against the Miller Defendants.

#### 1. FAILURE TO ENTER DEFAULT JUDGMENT AGAINST BAILEY

First, plaintiff contends that the Miller Defendants committed malpractice by failing to submit an order for a default judgment to be entered against Bailey and by entering into a stipulation setting aside the default. The trial court concluded that the Miller Defendants’ representation was reasonable with regard to the default proceedings. Specifically, the court found that Bailey had filed an answer, and that as such there was little chance that a default judgment would have been obtained.

The record supports the trial court’s finding. The record contains a letter signed by an attorney who represented a party in the underlying action. The letter indicates that the attorney received Bailey’s answer on or around December 10, 2008, which was approximately one month after the third-party complaint was filed. The record also indicates that Bailey’s answer was filed by at least May 18, 2009, which was approximately five days after the Miller Defendants had filed the notice of default against Bailey. Given that Bailey’s answer had been filed shortly after the notice of default, the Miller Defendants could have reasonably believed the default would have been set aside. Accordingly, their decision not to pursue a default judgment was reasonable and cannot constitute malpractice.

Plaintiff argues that the stipulation regarding the default was improper and contends that the Miller Defendants did not represent him when it was signed. The record negates plaintiff’s contention. The stipulation is dated June 5, 2009, and is signed by the Miller Defendants as plaintiff’s attorney. According to the record, the Miller Defendants continued to represent plaintiff until September 2009, when plaintiff requested that they withdraw their representation. Moreover, plaintiff’s letter appears to acknowledge that the Miller Defendants had not pursued a default, as follows: “you allowed [Bailey] to slide around the default judgment . . . .”

Plaintiff maintains that an October 2009 letter indicates the stipulation was signed in October, after he had instructed the Miller Defendants to withdraw. We disagree. The October 2009 letter indicates the Leib Defendants (who represented Bailey in the underlying suit) could not find the original stipulation, and they asked the Miller Defendants to sign another stipulation. In the letter, the Leib Defendants acknowledged the Miller Defendants withdrawal from their representation of plaintiff. This letter does not create an issue of fact concerning the date of the original stipulation.<sup>2</sup> Thus, plaintiff has failed to establish that the Miller Defendants acted outside of their representation at the time they originally entered into the stipulation.

## 2. FAILURE TO SUE LEISURE LAND AND LORRAINE BAILEY

Plaintiff next argues that the Miller Defendants committed malpractice by failing to sue Leisure Land and Lorraine Bailey, who, according to plaintiff, were involved in the underlying real estate transaction. The trial court found that plaintiff failed to articulate on what basis these persons could be liable to plaintiff.

In the malpractice complaint, plaintiff alleged that the Miller Defendants were hired to sue Leisure Land and Lorraine Bailey. Plaintiff also claimed that Judge Daniel P. O'Brien, the judge in plaintiff's legal malpractice suit against his first attorney, found that the Miller Defendants should have sued Leisure Land and Lorraine Bailey. Although plaintiff claimed that Leisure Land and Lorraine Bailey would be liable for fraud and breach of contract, he failed to allege or establish the elements of either claim. Accordingly, plaintiff failed to establish negligence or proximate causation as against the Miller Defendants for malpractice. Moreover, plaintiff fails to provide any support for his claim that the Miller Defendants were hired for the specific purpose of suing Leisure Land and Lorraine Bailey. The exhibits in the record indicate that plaintiff retained the Miller Defendants to sue Charles Bailey. Thus, the Miller Defendants were entitled to judgment as a matter of law on this claim.

## 3. FAILURE TO REQUIRE HALABU TO APPEAR AT TRIAL

Plaintiff contends that the Miller Defendants committed malpractice by failing to include in the settlement agreement a requirement that closing officer Shamil Halabu appear for trial. Plaintiff further argues that he could not have obtained a subpoena because the Miller Defendants withdrew as his counsel on the last day that motions could be filed. The trial court found that plaintiff could have served Halabu with a subpoena to appear.

In the complaint, plaintiff claimed that he lost the misrepresentation claim in his underlying action against Bailey because Halabu was not present to rebut Bailey's testimony. Plaintiff, however, could have subpoenaed Halabu and, thus, the Miller Defendants' failure to include such provision was not the proximate cause of plaintiff's injury. We reject plaintiff's claim that the Miller Defendants' untimely withdrawal prevented him from issuing a subpoena to Halabu. First, plaintiff failed to provide evidence that the Miller Defendants withdrew on the

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<sup>2</sup> Plaintiff claims that various documents in the record are forgeries, but he has not provided sufficient offers of proof to support these claims.

last day motions could be filed. The scheduling order plaintiff attached to his complaint indicates that motions had to be heard by June 30, 2010, before the Miller Defendants' withdrawal. Second, a subpoena is not a motion, and plaintiff provided no evidence that the subpoena could not have been filed after the last day for motions. MCR 2.506(C)(1) provides:

The signer of a subpoena must issue it for service on the witness sufficiently in advance of the trial or hearing to give the witness reasonable notice of the date and time the witness is to appear. Unless the court orders otherwise, the subpoena must be served at least 2 days before the witness is to appear.

Thus, under MCR 2.506(C)(1), plaintiff could have served a subpoena on Halabu before the trial in the underlying action. The Miller Defendants were entitled to judgment as a matter of law on this claim.

#### 4. FAILURE TO INFORM PLAINTIFF OF MALPRACTICE CLAIM

Plaintiff contends that the Miller Defendants committed malpractice by failing to inform him of a malpractice claim against his first attorney, Poling. Plaintiff argues that although he filed a malpractice suit against Poling, most of his claims were dismissed because the statute of limitations had expired, and the other claim was dismissed because plaintiff did not have an expert witness. The trial court found that plaintiff filed a malpractice claim and failed to assert any additional grounds on which he could have filed a claim.

There is no evidence in the record that plaintiff's claims against Poling were dismissed based on the statute of limitations and, thus, that the Miller Defendants' failure to inform plaintiff of a claim was the proximate cause of his injuries. Plaintiff failed to submit any documentary evidence indicating why his 2011 suit against Poling did not succeed. The order granting summary disposition in favor of Poling does not provide the rationale for the decision. Accordingly, the Miller Defendants were entitled to judgment as a matter of law on this claim.

#### 5. WITHDRAWAL

Plaintiff contends that the Miller Defendants committed malpractice by withdrawing as his attorneys just before trial. Plaintiff further argues that the Miller Defendants had purposefully angered him so that he would not oppose their withdrawal. Plaintiff claims that the trial court failed to recognize that he did not have time to file an adjournment. The trial court found that the withdrawal was by leave of the court and that plaintiff did not oppose it.

In his complaint, plaintiff alleged that the Miller Defendants resigned, leaving him with no witnesses and no time to file any motions. The trial court correctly found that the Miller Defendants moved to withdraw and there is no evidence that plaintiff opposed the motion. The Miller Defendants' motion to withdraw was granted by the trial court. Because the withdrawal was permitted, the trial court did not err in finding the Miller Defendants were entitled to judgment as a matter of law on this claim. Moreover, plaintiff failed to assert what he would have done differently if he had been able to obtain an adjournment, other than subpoena Halabu.

#### C. PLAINTIFF'S ADDITIONAL ARGUMENTS

Plaintiff makes several additional arguments that the trial court did not address. Some of those arguments were raised in the complaint. Although plaintiff made numerous arguments below in his motions and briefs, he may only litigate issues or claims that he raised in his complaint. *Lenawee Co v Wagley*, 301 Mich App 134,160; 836 NW2d 133 (2013).

### 1. FAILURE TO SUE BAILEY

Plaintiff contends that the Miller Defendants committed malpractice by failing to sue Bailey for theft. The trial court did not address this issue.

Plaintiff claims that the Miller Defendants committed malpractice by failing to sue Bailey for fraud, deceit, breach of contract, and larceny. Plaintiff argues that the jury wanted to find Bailey guilty of fraud in the underlying action, but could not because the Miller Defendants failed to allege fraud against Bailey. Plaintiff submitted the Miller Defendants' motion to withdraw, which indicated that the lawfirm was retained to pursue a claim for damages in a contract matter against Bailey. Even assuming the failure to sue Bailey for breach of contract or theft constituted negligence, plaintiff has failed to allege, or provide any evidence, that this negligence was the proximate cause of any injury. Plaintiff argues only that the failure to sue for fraud may have resulted in injury, but there is no evidence that the Miller Defendants were retained to sue for fraud. Moreover, plaintiff provides no support for his claim that the jury in the underlying action wanted to find Bailey guilty of fraud. The Miller Defendants were entitled to judgment as a matter of law on this claim.

### 2. MAKING CALL TO COURT

Plaintiff contends that the Miller Defendants and the Leib Defendants arranged for a third party to call the court, pretend to be plaintiff, and ask the judge to allow Miller to continue to represent plaintiff at the October 21, 2009, hearing. The trial court did not address this issue.

In the complaint, plaintiff alleged that the Miller Defendants had a third party call the court pretending to be plaintiff and asking the judge to allow Miller to remain as plaintiff's attorney. Plaintiff failed to submit any evidence in support of this claim. The Miller Defendants were entitled to judgment as a matter of law on this claim.

### 3. MAIL FRAUD

Plaintiff contends that the Miller Defendants committed mail fraud by mailing a notice of the October 21, 2009, hearing, which they claimed was for their release, but they instead used the hearing to enter the stipulation setting aside the default. The trial court did not address this issue.

In the complaint, plaintiff claimed that the Miller Defendants said they sent a copy of the notice of the hearing to him when they did not and this constituted mail fraud. Plaintiff also claimed that the Miller Defendants mailed a notice and praecipe of the hearing at which they wanted the court to release them as plaintiff's attorneys, but instead used the hearing to reinstate Bailey.

Assuming for the purposes of argument that there is a private cause of action for mail fraud, plaintiff failed to provide evidence of the elements of mail fraud.

To allege a violation of the mail fraud statute, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud. [*Schreiber Distrib Co v Serv-Well Furniture Co, Inc*, 806 F2d 1393, 1399-1400 (CA 9, 1986).]

Plaintiff's allegations do not fulfill these elements, and the record contains no evidence to create an issue of fact on the elements. Plaintiff submitted no evidence that the Miller Defendants formed a scheme with any specific intent to defraud plaintiff. The Miller Defendants were entitled to judgment as a matter of law on this claim.

#### 4. REPRESENTING BAILEY

Plaintiff argues that the Miller Defendants became Bailey's attorney and had inappropriate meetings with Bailey. Plaintiff also argues that the Miller Defendants represented Bailey in presenting motions before the court. The trial court did not address this issue.

In the complaint, plaintiff claimed that the Miller Defendants had inappropriate contact with Bailey. Plaintiff attached the June 5, 2009, letter from Leib to Miller, in which Leib stated that "Mr. Bailey was led to believe by you that no default would be filed." Plaintiff claims this letter shows that Miller made a deal with Bailey. However, this letter does not establish that Miller met with or had inappropriate contact with Bailey. Plaintiff failed to provide any other evidence that the Miller Defendants met with Bailey or were representing Bailey. The Miller Defendants were entitled to judgment as a matter of law on this claim.

#### 5. MOTION FOR SUMMARY DISPOSITION

Plaintiff contends that after the Miller Defendants were reinstated, they filed a motion for summary disposition, but did not make a genuine effort at the hearing. The trial court did not address this issue.

In the complaint, plaintiff claimed that in February 2010 the Miller Defendants begged plaintiff not to sue them and said they could obtain a summary disposition. In support, plaintiff submitted a transcript of a hearing. The transcript does not create a factual issue on plaintiff's claim. The transcript indicates that the hearing was a pretrial hearing, not a hearing on a motion for summary disposition. At the hearing, Miller did argue that plaintiff was entitled to summary disposition; however, that does not appear to have been the purpose of the hearing. Rather, Miller was informing the court of the status of the case. Plaintiff failed to establish whether the Miller Defendants filed a motion for summary disposition or that the Miller Defendants were negligent. The Miller Defendants were entitled to judgment as a matter of law on this claim.

#### 6. FALSE DOCUMENTS AND MISREPRESENTATION

Plaintiff contends that the Miller Defendants submitted four false documents and made misrepresentations to him and the court. Plaintiff also argues that Miller knew that the checks submitted by Bailey were false and let the time run out to file a motion in limine to exclude them. The trial court did not address these issues.

The four documents plaintiff argues were false are: (1) the May 18, 2009, letter from Harmon-Kuhl, (2) the June 5, 2009, letter from Leib, (3) the October 9, 2009, letter from Leib, and (4) the assignment. Plaintiff failed to submit any evidence that these documents were false. Similarly, there was no evidence that the checks submitted by Bailey were false. Plaintiff claims that, given that some of the checks are dated after the closing, they could not constitute a basis for Bailey to say plaintiff owed him the money taken at the closing. Nonetheless, plaintiff failed to show that the failure to exclude these checks resulted in plaintiff losing the case against Bailey. The Miller Defendants were entitled to judgment as a matter of law on this claim.

#### 7. BRIBERY

Plaintiff contends that the Miller Defendants accepted a bribe in order to prevent Bailey from being liable and to keep Leisure Land from being sued. He also claims the Miller Defendants were bribed not to send in an order for a default judgment. The trial court did not address this issue.

Plaintiff failed to submit any evidence that the Miller Defendants accepted a bribe. The Miller Defendants were entitled to judgment as a matter of law on this claim.

#### 8. FAILURE TO KEEP INFORMED

Plaintiff contends that the Miller Defendants failed to communicate with him and keep him informed of matters, including the setting aside of the default. The trial court did not address this issue.

Plaintiff did not allege a failure to communicate in the complaint. Plaintiff did, however, mention the failure to communicate in his motion for reconsideration. Plaintiff provided letters he wrote to the Miller Defendants, which suggest he was not being kept informed. However, plaintiff has failed to establish that the failure to keep him informed was the proximate cause of any injury. The Miller Defendants were entitled to judgment as a matter of law on this claim.

#### 9. FRAUD

Plaintiff contends that the Miller Defendants committed fraud by encouraging plaintiff to sign the settlement agreement and accept the assignment, which was worthless because of a prior accord and settlement signed between Halabu and Bailey. He also claims the settlement did not include all the details that were discussed. Plaintiff argues that Miller knew the settlement would have adverse consequences. He claims he was deceived at the signing. The trial court did not address this issue.

Plaintiff failed to submit any evidence that the settlement was not presented to him or that the Miller Defendants knew the settlement and assignment would have adverse consequences for plaintiff. Although Bailey admitted there was an accord and satisfaction in his answer to the third-party complaint, there is no indication what the terms of the accord and settlement were. The Miller Defendants were entitled to judgment as a matter of law on this claim.

#### 10. LARCENY



Plaintiff also contends that Miller, Rogers, and Leib are guilty of larceny by protecting Bailey after he stole money. The trial court did not address this issue, and plaintiff did not make this claim in his complaint. Nonetheless, larceny is a criminal offense, and plaintiff has failed to show that he may maintain a private suit for larceny. Plaintiff also failed to submit evidence that the Miller Defendants or Leib Defendants were guilty of larceny. The Miller Defendants were entitled to judgment as a matter of law on this claim.

## 11. FAILURE TO INVESTIGATE

Plaintiff contends that the Miller Defendants failed to investigate. The trial court did not address this issue, and plaintiff did not make this claim in his complaint. Plaintiff has failed to articulate what investigation the Miller Defendants should have done or what it would have revealed. The Miller Defendants were entitled to judgment as a matter of law on this claim.

### D. CLAIMS AGAINST LEIB DEFENDANTS

Plaintiff also makes several arguments relating to the Leib Defendants, including that: (1) Leib influenced plaintiff's attorneys, (2) Leib sent false documents, and (3) Leib asked Miller to backdate the stipulation. Plaintiff argues that the trial court should not have released Leib because he thwarted the case.

The trial court granted the Leib Defendants' motion for summary disposition and released them from the case. In his complaint, plaintiff claimed that Leib improperly influenced his attorneys, committed fraud in reinstating Bailey, asked Miller to backdate the stipulation, thwarted the case, and arranged with Miller for a third party to call the court pretending to be plaintiff. In his motion for reconsideration, plaintiff argued that Leib presented false checks, made misrepresentations, committed larceny, committed fraud, perpetrated fraud on the court, bribed Miller, and committed tortious interference. The record contains no evidence sufficient to create a question of fact on these claims. Thus, summary disposition was proper on plaintiff's claims against the Leib Defendants.

### E. CONCLUSION

The trial court did not err in granting the Miller Defendants' motion for summary disposition. Summary disposition was also appropriate on the other claims against the Miller Defendants, including those claims that the trial court did not address and the claims against the Leib Defendants.

## II. ERRORS REGARDING DISCOVERY

Plaintiff contends that the trial court erred by (1) failing to uphold the order to compel, denying his motion to show cause, and hearing the Miller Defendants' renewed motion for summary disposition, (2) cutting off discovery early, and (3) refusing to sign subpoenas. We disagree.

### A. PRESERVATION AND STANDARD OF REVIEW

Plaintiff filed a motion to show cause regarding the Miller Defendants' failure to comply with the order to compel, and the trial court entered a denial of the motion to show cause. Plaintiff subsequently filed another motion to show cause, and, after the trial court had granted summary disposition, plaintiff filed requests for subpoenas. The trial court denied the requests.

“This Court reviews rulings on motions to compel discovery for an abuse of discretion.” *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). We also review the denial of a discovery motion for an abuse of discretion. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011). “An abuse of discretion is not simply a matter of a difference in judicial opinion, rather it occurs only when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Id.* We review unpreserved issues for plain error affecting substantial rights. *Local Emergency Fin Assistance Loan Bd*, 299 Mich App at 738.

#### B. FAILURE TO UPHOLD ORDER TO COMPEL AND DENIAL OF MOTION TO SHOW CAUSE

Plaintiff contends that the trial court erred in refusing to enforce the order to compel. Plaintiff also argues that the trial court erred by stalling and denying his motions to show cause after the Miller Defendants failed to comply with the order to compel. Plaintiff further claims that it was error to allow the Miller Defendants to file their second motion for summary disposition while they were in default for failing to comply with the order to compel.

With regard to the renewed motion for summary disposition, plaintiff contends that the Miller Defendants should not have been permitted to file a second motion for summary disposition making the same arguments and when the time limit for filing a renewed motion had expired. Plaintiff further argues that the trial court erred in hearing the motion for summary disposition before hearing the motion to show cause and dismissing plaintiff’s motion without explanation.

The trial court granted plaintiff an order to compel discovery on March 7, 2012. The order required the Miller Defendants to comply with the discovery requests within 14 days. On March 28, 2012, plaintiff filed a motion to show cause, arguing that the Miller Defendants failed to comply with the order to compel. On April 2, 2012, the Miller Defendants replied that although their answers to the interrogatories were late, they had complied with the order to compel. On April 4, 2012, the trial court denied plaintiff’s motion to show cause, finding plaintiff was not entitled to the relief sought. Plaintiff filed another motion to show cause on April 10, 2012. On April 11, 2012, the Miller Defendants claimed they complied with the discovery requests. On April 20, 2012, plaintiff filed an affidavit, arguing that the answers were late and incomplete. The trial court granted the Miller Defendants’ renewed motion for summary disposition without expressly addressing plaintiff’s motion to show cause.

MCR 2.313(B)(2) provides that the trial court may order sanctions if a party fails to obey an order to provide or permit discovery. After plaintiff’s March 28, 2012, motion, the trial court did not order sanctions, even though the Miller Defendants admitted their answers to the interrogatories were late. The trial court did not provide a rationale for its decision. However, there is evidence that the Miller Defendants complied with all discovery requests, although the answers to the interrogatories were late. The Miller Defendants previously answered the

complaint and admissions. They did not refile answers, but the order to compel did not explicitly require this. The Miller Defendants attached affidavits and a letter indicating they sent answers to interrogatories and documents. Accordingly, there was no error warranting reversal in the denial of plaintiff's motion to show cause.

Plaintiff's subsequent motion to show cause on April 10, 2012, was not specific. It only stated plaintiff was still waiting for discovery. Moreover, plaintiff's April 20, 2012, affidavit makes the same arguments that the court apparently rejected. Thus, there was no error warranting reversal in the court's failure to reconsider the issue.

The trial court also did not err in hearing the Miller Defendants' renewed motion for summary disposition. Contrary to plaintiff's assertions, the Miller Defendants were not in "default" on April 3, 2012, when they filed their renewed motion for summary disposition. Plaintiff provides no support for his argument that a party is in default if it fails to comply with an order to compel discovery. Moreover, the Miller Defendants were not prohibited from filing a second motion for summary disposition. MCR 2.116(E)(3) allows a party to file more than one motion for summary disposition, provided the motion is not in bad faith, MCR 2.116(F).

### C. TERMINATION OF DISCOVERY

Plaintiff contends that the trial court cut off discovery early and did not allow depositions of Miller, Rogers, Leib, and Patricia Stolman.<sup>3</sup>

Plaintiff provided no evidence that discovery ended early. The December 31, 2011, scheduling order allowed discovery until July 20, 2012. The record contains no objections by plaintiff to the scheduling order. In his brief in support of plaintiff's answer to the motion for summary disposition, plaintiff requested pretrial depositions of the Kuhl, Zeluff and Wright Law Firm, but did not file a motion confirming that request. There is no evidence plaintiff filed requests for any subpoenas until after entry of the May 2, 2012, final order.

### D. FAILURE TO GRANT SUBPOENAS

Plaintiff argues that the trial court refused in January, February, March, and May 2012 to sign subpoenas of Leib, Kuhl, and Michael Zeluff<sup>4</sup> that would show that a fax letter and other evidence were false, and the trial court's refusal allowed perjury and fraud. Neither the register of actions, nor the lower court file contains any requests for subpoenas. The only evidence plaintiff provides is an e-filing queue showing that his requests for subpoenas on May 29, 2012, were rejected. However, these requests were filed after the May 2, 2012, order. Because the final order had been entered, the trial court did not abuse its discretion in rejecting his request.

## III. DISQUALIFICATION

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<sup>3</sup> According to the complaint, Stolman was the Miller Defendants' secretary.

<sup>4</sup> It appears that Zeluff is part of the same law firm as Harmon-Kuhl.

Plaintiff contends that the trial court judge was biased against him and should have been disqualified. We disagree.

“In reviewing a motion to disqualify a judge, this Court reviews the trial court’s findings of fact for an abuse of discretion and the court’s application of those facts to the relevant law de novo.” *Olson v Olson*, 256 Mich App 619, 637-638; 671 NW2d 64 (2003). We review unpreserved issues for plain error affecting substantial rights. *Local Emergency Fin Assistance Loan Bd*, 299 Mich App at 738.

Initially, we note that plaintiff’s motion was untimely. “MCR 2.003(C)(1) (now [D][1]) requires that a motion to disqualify ‘be filed within 14 days after the moving party discovers the ground for disqualification,’ and provides that ‘untimeliness . . . is a factor in deciding whether the motion should be granted.’” *In re MKK*, 286 Mich App 546, 565; 781 NW2d 132 (2009) (citing MCR 2.003(C)(1)). Plaintiff’s motion was filed more than 14 days after plaintiff discovered the basis for disqualification. Thus, plaintiff’s motion was properly denied.

Moreover, plaintiff failed to establish a ground for disqualification.

MCR 2.003(B)(1) and (5) provide that a judge is disqualified when the judge cannot impartially hear a case, including but not limited to circumstances in which the judge is personally biased or prejudiced for or against a party or attorney, or where the judge knows he has an economic interest in the subject matter of the controversy “or has any other more than de minimis interest that could be substantially affected by the proceeding.” In addition, where the requirement of showing actual bias or prejudice under MCR 2.003(B)(1) has not been met, a party may pursue disqualification pursuant to the Due Process Clause, which requires an unbiased and impartial decision maker. . . . [T]he United States Supreme Court has identified situations “where ‘experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable’”, and disqualification is warranted without a demonstration of actual bias. One of these situations is where the judge or decision maker is “‘enmeshed in [other] matters involving [the moving party].’” However, . . . disqualification on this basis is only required “in the most extreme cases.” [*Olson*, 256 Mich App at 642 (citations omitted).]

Similarly:

A trial judge is presumed to be impartial and the party who asserts partiality has a heavy burden of overcoming that presumption. A showing of prejudice usually requires that the source of the bias be in events or information outside the judicial proceeding. Disqualification on the basis of bias or prejudice cannot be established merely by repeated rulings against a litigant, even if the rulings are erroneous. Further, while personal animus toward a party requires disqualification . . . [a] generalized hostility toward a class of claimants does not present disqualifying bias. Further, a trial judge’s remarks made during trial, which are critical of or hostile to counsel, the parties, or their cases, ordinarily do

not establish disqualifying bias. [*In re MKK*, 286 Mich App at 566-567 (citations omitted).]

Plaintiff argues that the trial court judge was biased based on the following grounds: (1) she refused to uphold the order to compel, (2) she cut off discovery, refused depositions, and refused subpoenas, (3) she ignored the facts and law to help her friends, (4) she called Miller by his first name, (5) she found Halabu could have been subpoenaed, (6) her decision to grant the Miller Defendants' motion for summary disposition, (7) Miller's statement to the trial court judge at the end of the April 25, 2012, hearing, indicating that they discussed something and the judge signed something, (8) Miller's statement at the end of the March 7, 2012, hearing and in a telephone call to plaintiff that the trial court judge would not rule against him because of what he knew about her, and (9) the trial court judge or Cooley Law School sent the police to plaintiff's house after he visited the school to conduct legal research. Plaintiff argues that, as a result of her bias, the trial court judge did not have jurisdiction to enter the May 2, 2012, order.

Plaintiff has failed to overcome the presumption of impartiality. *In re MKK*, 286 Mich App at 566. The trial court's rulings against plaintiff do not establish prejudice. *Id.* Moreover, hostility toward a class of complainants, such as plaintiffs who represent themselves in propria persona, does not constitute bias. *Id.* The trial court judge's calling Miller by his first name and familiarity with him also do not establish bias or prejudice. With regard to the statements at the end of the hearings and in a telephone call to plaintiff, there is no evidence that they were made. Finally, the event involving the police is not part of the lower court record. Plaintiff's motion was properly denied, and the trial court did not lack jurisdiction to enter the May 2, 2012, order.

Affirmed.

/s/ David H. Sawyer  
/s/ Peter D. O'Connell  
/s/ Kirsten Frank Kelly