STATE OF MICHIGAN

COURT OF APPEALS

V. ROBERT COLTON,

Plaintiff-Appellant/
Cross-Appellee,

v

DOEREN MAYHEW & CO., P.C., JAMES A. KOEPKE and JOSEPH DEGENNARO,

Defendants-Appellees/
Cross-Appellants,

and

ROBINS & SOLOMON, P.C., NORMAN G. SOLOMON, C.P.A., P.C., and NORMAN G. SOLOMON,

Defendants-Appellees.

UNPUBLISHED
October 8, 1996

No. 175462
LC No. 92-438854-NM

Before: Cavanagh, P.J., and Murphy and C.W. Simon, Jr.,* JJ

PER CURIAM.

Plaintiff appeals as of right from the February 9, 1994, judgment which incorporated a jury verdict of no cause of action on his claims for accounting malpractice and negligent misrepresentation. Defendants Doeren Mayhew & Co., P.C., James Koepke and Joseph DeGennaro have filed a cross appeal. We reverse and remand for a new trial.

I

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* Circuit judge, sitting on the Court of Appeals by assignment.

We hold that the trial court abused its discretion in admitting evidence of prior imprudent investments by plaintiff and thereby allowing the jury to improperly consider whether he was a prudent investor in the instant case based upon his past investments.

Defendants correctly point out that they were entitled to present evidence of plaintiff's comparative negligence regarding these transactions. See *Capital Mortgage Corp v Coopers & Lybrand*, 142 Mich App 531, 537; 369 NW2d 922 (1985). However, evidence of the imprudence of plaintiff's other investments was not properly admitted as evidence of his habit or routine. MRE 406; *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 255-256; 318 NW2d 639 (1982). There was no evidence regarding a pattern that plaintiff followed for every investment to show a habit or routine.

The trial court erred in ruling that plaintiff opened the door to evidence related to the wisdom of his prior investments. Plaintiff's references to his past record of investments in opening statements was not a proper basis for later admitting evidence of his past failed investments. Moreover, plaintiff did not open the door to the admission of this evidence in his testimony on direct examination.

Furthermore, the evidence should have been excluded under MRE 403 because the probative value was substantially outweighed by the prejudicial effect. MRE 403; *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361-362; 533 NW2d 373 (1995), lv pending. Evidence of other, unrelated acts of negligence may not be admitted to prove a party's negligence in the case at bar. *Berwald v Kasal*, 102 Mich App 269, 273; 301 NW2d 499 (1980). The admission of this evidence likely confused the jury and diverted its attention from the facts surrounding the transactions at issue. Defendants were still free to argue that plaintiff may have been negligent in monitoring this investment without the evidence of his past failed investments.

II

The trial court also erred when it allowed plaintiff to be cross-examined regarding prior litigation arising out of other investments. Although a trial court has broad discretion concerning the scope of cross-examination of witnesses, MRE 611; *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595; 474 NW2d 306 (1991), the parties stipulated that they would not mention or present any evidence of prior lawsuits plaintiff may have filed for other investments. The trial court should have enforced that stipulation. *People v Patricia Williams*, 153 Mich App 582, 586-588; 396 NW2d 805 (1986). Because defendants' cross-examination of plaintiff involved various tort theories, the questioning should have been precluded under the parties' stipulation. In addition, evidence of prior lawsuits or claims of misrepresentation should have been excluded under MRE 403.

III

In light of the above-discussed evidentiary rulings, the trial court abused its discretion in denying plaintiff's motion for a new trial. MCR 2.611(A); *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 411; 516 NW2d 502 (1994). The evidence of plaintiff's prior bad investments and prior litigation diverted the jury's attention from the events and transactions in this case. We do not

believe that the error was harmless because the evidence allowed the jury to decide the case on plaintiff's record of past investments rather than the actual claims at issue. See *Heshelman v Lombardi*, 183 Mich App 72, 82-86; 454 NW2d 603 (1990). The erroneous admission of this evidence also affected plaintiff's substantial rights. See *Williams v Coleman*, 194 Mich App 606, 621; 488 NW2d 464 (1992). The trial court therefore should have granted plaintiff's motion for a new trial.

IV

In their cross appeal, defendants first argue that plaintiff attempted to avoid the period of limitations by labeling one of his claims as an action for negligent misrepresentation rather than one for accounting malpractice. We believe plaintiff properly set forth a claim for negligent misrepresentation.

This issue was raised in defendants' motion for summary disposition, MCR 2.116(C)(7). Under that court rule, all of the plaintiff's well-pleaded factual allegations are accepted as true and are to be construed most favorably to the plaintiff as the nonmoving party. *Shawl v Dhital*, 209 Mich App 321, 323; 529 NW2d 661 (1996). The motion cannot be granted unless no factual development could provide a basis for recovery. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996), lv pending.

Plaintiff could not sustain an action for accounting malpractice against defendants for the work defendants performed for Monetary Investment Group. Plaintiff was not defendants' client for those services. Therefore, plaintiff could not allege the requisite facts for a malpractice action. *Law Offices of Lawrence J. Stockler, PC v Rose*, 174 Mich App 14, 31-32; 436 NW2d 70 (1989). However, plaintiff could maintain a claim for negligent misrepresentation regarding the services defendants provided to Monetary Investment Group. Because the period of limitations for negligent misrepresentation claims is six years, plaintiff's claim was timely filed. MCL 600.5813; MSA 27A.5813; *Blue Cross & Blue Shield of Michigan v Folkema*, 174 Mich App 476, 480-481; 436 NW2d 670 (1988).

V

In light of our analysis of defendants' Issue I, defendants' claim in their Issue II, regarding a three-year limitations period, is moot. Plaintiff's claim regarding work defendants performed for Monetary Investment Group was properly premised upon a negligent misrepresentation theory. Thus, the limitations period was six years, not three years. MCL 600.5813; MSA 27A.5813; *Folkema, supra*, 480-481.

VI

Defendants also argue that plaintiff's malpractice action was barred by the period of limitations. Because there were genuine issues of fact regarding this question, defendants were not entitled to summary disposition. MCR 2.116(C)(10). Specifically, there were questions of fact regarding when plaintiff discovered his cause of action for malpractice based upon defendants' preparation of his personal financial statements. The trial court therefore did not err in denying defendants' motion for

summary disposition. Although the jury found that plaintiff did not have a cause of action, the trial court was correct in ruling that it was for the jury to decide when plaintiff knew or should have known that he had an action for malpractice against defendants. *Kermizian v Sumcad*, 188 Mich App 690, 691-694; 470 NW2d 500 (1991).

Because we are remanding this matter back to the trial court for a new trial, further discussion of this issue is appropriate. Since the parties filed their briefs on appeal, our Supreme Court has held that the two-year malpractice limitations period, MCL 600.5805(4); MSA 27A.5805(4), applies to accounting malpractice claims. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 333; 535 NW2d 187 (1995). The Supreme Court also reversed this Court's decision in *Enzymes of America, Inc v Deloitte, Haskins & Sells*, 207 Mich App 28; 523 NW2d 810 (1994), rev'd 450 Mich 887 (1995). Although the panel in *Enzymes of America* originally held that there is no authority for a discovery rule in accounting negligence cases, this holding was vitiated by the Supreme Court's decisions in *Local 1064, supra*, and *Enzymes of America, supra*. Because the Supreme Court has recognized that accountants are subject to malpractice claims and that the malpractice limitations period applies, it logically follows that the six-month discovery rule, MCL 600.5838(2); MSA 27A.5838(2), should also apply to accounting malpractice cases as it applies to other types of malpractice claims. Accordingly, if defendants again raise the period of limitations at the retrial, the trial court should apply the six-month discovery rule to determine if plaintiff's malpractice action is time-barred.

VII

Finally, defendants argue that plaintiff should have been held liable for mediation sanctions. Although we need not decide this question since the matter is being remanded for a new trial, defendants were nevertheless not entitled to mediation sanctions under the facts of this case.

MCR 2.405 is the applicable court rule for resolving this issue. *Magnuson v Zadrozny*, 195 Mich App 581, 585; 491 NW2d 258 (1992). Pursuant to MCR 2.405, plaintiff made an offer of judgment to settle this matter before trial. Defendants did not make a counteroffer. Defendants contend that despite their failure to make a counteroffer, they should have been entitled to receive an award of mediation sanctions because plaintiff's offer was not a reasonable one. However, defendants' belief that plaintiff did not make a fair or reasonable offer does not excuse their failure to make a counteroffer. Defendants' failure to do so precludes an award of mediation sanctions. *Hovanesian v Nam*, 213 Mich App 231, 238; 539 NW2d 557 (1995).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Charles W. Simon, Jr