STATE OF MICHIGAN

COURT OF APPEALS

RONALD EUGENE. STARKS, JR.

Plaintiff-Appellant,

v

RONALD J. VARGA,

Defendant-Appellee.

UNPUBLISHED
April 8, 1997

No. 188486
Cheboygan Circuit Court
LC No. 94-4011-NM

RONALD EUGENE STARKS, JR.

Plaintiff-Appellant,

v

DANIEL W. WHITE,

Defendant-Appellee.

No. 190657
Alpena Circuit Court
LC No. 95-001493-NM

Before: Markman, P.J., and O'Connell and D. J. Kelly,* JJ.

PER CURIAM.

Plaintiff appeals by right from trial court orders granting defendants' motions for summary disposition regarding plaintiff's legal malpractice claims. We affirm.

These cases arose out of defendants' representation of plaintiff in a criminal matter. Plaintiff was arrested and charged with various drug-related offenses. At his criminal trial, he insisted on conducting his own defense to a large extent, utilizing his defense attorneys as legal advisors. Plaintiff went through a succession of defense attorneys, accusing them of incompetence and conspiring with the trial judges and prosecutor to cover up prosecutorial misconduct in investigating and charging him. Specifically, he

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

claims that the judges, prosecutor and his own counsel conspired to conceal the identity of a confidential informant and expose plaintiff to perjury charges, which charges were used as a tool to pressure plaintiff into accepting a plea bargain. Plaintiff also filed grievances against his defense attorneys, two trial judges and the prosecutor. Defendant Varga was the second of plaintiff's attorneys. Plaintiff claims Varga was unprepared, failed to present critical evidence, and subjected him to a perjury charge in connection with the alleged conspiracy. Defendant White was plaintiff's final defense attorney, who, while representing plaintiff, sought, over plaintiff's objections, to have plaintiff declared incompetent to assist in his own defense. A forensic examiner apparently found plaintiff incompetent to assist in his own defense but indicated that with proper treatment he could recover in time for his trial. Plaintiff also accused White of participating in the alleged conspiracy. The criminal charges against plaintiff were ultimately resolved by a plea bargain.

In # 190657, plaintiff first argues that the trial judge erred in refusing to sua sponte disqualify himself to avoid the appearance or actuality of impropriety, bias and injustice, and that the chief judge also abused his discretion in denying plaintiff's motion to disqualify the trial judge. (The trial judge in the present matter presided over at least one hearing in the underlying criminal matter; the chief judge presided over the underlying criminal matter.) We review decisions regarding disqualification of a judge for an abuse of discretion. *People v Bero*, 168 Mich App 545, 549; 425 NW2d 138 (1988). MCR 2.003 governs disqualification of judges. "A judge is disqualified when he cannot hear a case *impartially* pursuant to MCR 2.003(B). The court rule sets forth a list of situations that are deemed to be the equivalent of an inability to hear a case impartially." *Cain v Dep't of Corrections*, 451 Mich 470, 494; 548 NW2d 210 (1996).

In *In Re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992), this Court held:

> An actual showing of prejudice is required before a trial judge will be disqualified. The party who challenges a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. [Citations omitted.]

In *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995), this Court held:

> However, that showing is not required in situations where experience teaches us that the possibility of actual bias is too high to be constitutionally tolerable, such as where the judge has a financial stake in the outcome, has been the target of personal abuse or criticism by a party, is enmeshed in other legal matters involving a party, or may have prejudged the case because of previous participation in the proceedings.

First, we note that the trial judge properly dismissed plaintiff's motion on procedural grounds because it was not accompanied by a brief and plaintiff's affidavit was defective. See MCR 2.119(A)(2), MCR 2.119(B)(1) and MCR 2.003(C)(2). Whether the disqualification issue was properly decided is not preserved for appellate review when the motion is defective under the court

rules. *People v Bettistea*, 173 Mich App 106, 123; 434 NW2d 138 (1988). Accordingly, the issue here is exclusively whether the circumstances warranted sua sponte disqualification.

Plaintiff suggests numerous theories indicating bias on the part of the trial judge. MCR 2.003(B)(1) provides that a judge is disqualified when he cannot impartially hear a case because he is "personally biased or prejudiced or prejudiced for or against a party or attorney." Plaintiff contends that disqualification was required because the trial judge had presided over a hearing in the underlying criminal matter as well as previous criminal matters involving plaintiff. However, "[m]erely proving that a judge was involved in a prior trial or other proceeding against the same defendant does not amount to proof of bias for purposes of disqualification." *People v Upshaw*, 172 Mich App 386, 388; 431 NW2d 520 (1988), citing *People v White*, 411 Mich 366, 386, 308 NW2d 128 (1981). Plaintiff next claims that disqualification was required because he filed a complaint regarding the trial judge with the Judicial Tenure Commission. The *Bero* Court stated, at 552:

> [W]e disagree that the mere filing of a party's or attorney's complaint is sufficient to require automatic disqualification. To hold otherwise would allow an attorney to judge shop by filing even frivolous grievances. We note that the Judicial Tenure Commission's proceedings are confidential as to the judge until a complaint is filed by the commission, the judge is privately censured, or the investigation is dismissed. MCR 9.207. Hence, we believe that disqualification is not required until the judge is privately censured or a complaint is filed by the Judicial Tenure Commission itself.

Here, there is no evidence that plaintiff's complaint to the Judicial Tenure Commission proceeded to the point that disqualification was required. Plaintiff next contends that disqualification was required because defendant and the trial judge were friends and because defendant practiced before the trial judge. However, plaintiff failed to sufficiently substantiate this claim to meet his burden of demonstrating that the relationship between the trial judge and defendant actually biased the judge in favor of defendant, i.e., to overcome the presumption of judicial impartiality. See *Forfeiture*, *supra* at 151. "[S]uspicions do not constitute proof of partiality or prejudice." *Upshaw*, *supra* at 388. None of plaintiff's allegations of bias by the trial judge demonstrate actual bias or overcome the presumption of judicial impartiality. Plaintiff's allegations of bias by the trial judge in #188486 (who was completely uninvolved in the underlying criminal proceedings) similarly fail to demonstrate actual bias or overcome the presumption of judicial impartiality.

More problematic is plaintiff's claim in #190657 that the trial judge and chief judge should have disqualified themselves because they were named as alleged coconspirators in plaintiff's complaint.[1] MCR 2.003(B)(2) and (B)(6)(d) state:

> A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
>
> (2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(6) The judge . . .

> (d) is to the judge's knowledge likely to be a material witness in the proceeding.

Ordinarily, a judge should disqualify himself when specifically named as a conspirator in a complaint because "the possibility of actual bias is too high to be constitutionally tolerable." *Wayne Co Prosecutor*, *supra* at 155. See also *Aetna Life Ins Co v Lavoie*, 475 US 813, 822; 106 S Ct 1580; 89 L Ed 2d 823 (1986) ("[U]nder the Due Process Clause no judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.'") Indeed, we can envision few situations in which disqualification would not be required when, as in the present case, a judge is named in a complaint as a conspirator in wrongdoing.

Here, however, the highly unusual circumstances demonstrate that the possibility of actual bias was not so high as to require disqualification. During the underlying criminal proceedings, plaintiff was found incompetent to assist in his own defense. In motions, grievances, and the present malpractice actions, plaintiff pursued a conspiracy theory that he alleged included both defendants, the prosecutor and both the trial judge and chief judge in #190657. We note that while plaintiff alleged in his complaint in #190657 that both the trial judge and chief judge were a part of this conspiracy, he did not name them as parties.[2] Our review of the record indicates that plaintiff has failed to provide any corroboration of this conspiracy theory. If plaintiff could have raised a genuine factual issue regarding this theory, he would have done so in response to defendants' motions for summary disposition. As discussed below, in both #188486 and #190657, the trial judges appropriately granted the summary disposition motions, which required consideration of the substance of plaintiff's conspiracy claims. Plaintiff has had several opportunities to present evidence confirming this conspiracy theory and has failed to do so. When a party makes unsubstantiated charges toward a judge, we cannot ignore the possibility that such charges are an attempt to judge-shop. Here, plaintiff leveled unsubstantiated conspiracy charges at virtually everybody involved in his criminal proceedings, as well as making independent charges of bias against the trial judge in #188486.[3] In *Bero*, *supra* at 522, this Court specifically found that "the mere filing of a party's or attorney's complaint" with the Judicial Tenure Commission did not require automatic disqualification in part because "to hold otherwise would allow an attorney to judge-shop by filing even frivolous grievances." Similarly, automatic disqualification on the mere filing of a complaint naming a judge would allow plaintiffs to judge-shop by including frivolous allegations of wrongdoing by a judge in a complaint. Our review of the record here convinces us that plaintiff utterly failed to substantiate the conspiracy allegations and that the trial judge and chief judge accordingly did not abuse their discretion in failing to disqualify themselves on the basis of such allegations.

Further, we believe that it is relevant to note that the judicial action at issue is a decision on a motion for summary disposition that we review de novo. See *Stehlik v Johnson (On Hearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). Plaintiff accordingly had an appeal of right, of which he availed himself, before an panel which was not obligated to accord any deference to the substantive determination of the trial court. Therefore, the circuit court's actions in this case were subject to an additional check.. We note that if it had been necessary to remand this matter for fact-finding or trial,

reassignment to another judge would have been appropriate in light of the allegation that the trial judge was a co-conspirator.

While it is the extraordinarily rare case in which a judge ought to be permitted to sit in judgment on a matter in which he is allegedly involved, we believe this to be such a case. If there were one shred of evidence supporting the alleged conspiracy, we would view this case differently. However, to require the judicial system to devote additional resources to this matter is necessarily to require that it devote fewer resources to substantially less frivolous matters. We cannot allow excessively contumacious litigants to unduly burden the justice system with unsubstantiated claims at their pleasure and thereby require the diversion of such resources. Further, we believe that the integrity of the court system is implicated, not only by judges presiding in matters in which they have a potential interest, but also by the potential for judge-shopping inherent in the instant conduct.

Next, plaintiff claims in both #188486 and # 190657 that the trial courts erred in granting defendants' motions for summary disposition. This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

> MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts. Only if the allegations fail to state a legal claim is summary disposition pursuant to MCR 2.116(C)(8) valid. [*Id*.]
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> MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id*.]

In *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995), the Court set forth the elements of a legal malpractice claim:

> In order to state an action for legal malpractice, the plaintiff has the burden of adequately alleging the following elements:
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> (1) the existence of an attorney-client relationship;
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> (2) negligence in the legal representation of the plaintiff;
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> (3) that the negligence was a proximate cause of an injury; and
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> (4) the fact and extent of the injury alleged.

In *Schlumm v Terrance J O'Hagen, PC*, 173 Mich App 345; 433 NW2d 839 (1988), as in the present cases, the plaintiff sued his attorney for legal malpractice after pleading guilty to criminal charges. This Court affirmed summary disposition in favor of the defendant because "the injuries alleged arose from plaintiff's incarceration for his guilty plea, not defendant's negligence." *Schlumm*, at 361. Here, plaintiff's guilty plea, reflecting commission of the charged criminal offense, rather than any alleged negligence by defendants, proximately caused his incarceration. Accordingly, the trial courts properly granted defendants' motions for summary disposition because no factual development could possibly justify recovery. See *Simko*, *supra* at 654.

Moreover, even if the complaints at issue could be construed to allege injuries other than plaintiff's incarceration (e.g., a *longer* incarceration than if defendants had not engaged in the alleged malpractice), summary disposition would have been warranted pursuant to MCR 2.116(C)(10). Plaintiff failed to provide documentary evidence that raised a genuine factual issue regarding negligence on defendants' part. That is, he failed to raise a factual issue regarding whether defendants "acted as would an attorney of ordinary learning, judgment, or skill under the same or similar circumstances" or whether any "alleged acts or omissions were a matter of trial tactics based on reasonable professional judgment." *Simko*, *supra* at 659. Accordingly, summary disposition in favor of the defendants was proper on this basis as well.

Finally, in #190657, plaintiff claims that the trial court violated his due process rights by denying him reasonable access to the court by refusing him permission to appear in person for a pretrial conference. A prisoner's right to appear in civil proceedings "rests in the sound discretion of the trial court." *Hall v Hall*, 128 Mich App 757, 761-762; 341 NW2d 206 (1983). The *Hall* Court stated that relevant factors in exercising this discretion include:

> whether the prisoner's presence will substantially further the resolution of the case, the security risks presented by the prisoner's presence, the expense of the prisoner's transportation and safekeeping, and whether the suit can be stayed until the prisoner is released without prejudice to the cause asserted. [*Hall*, at 762.]

Here, plaintiff's presence at the pretrial conference would not have substantially furthered resolution of the case, nor was it essential to maintaining his action. Accordingly, we find no abuse of discretion in the trial court's denial of his motion to be present at the conference in person or by conference call.

For these reasons, we affirm the orders granting defendants' motions for summary disposition.

Affirmed. Defendants being the prevailing parties, they may tax costs pursuant to MCR 7.219.

/s/ Stephen J. Markman
/s/ Peter D. O'Connell
/s/ Daniel J. Kelly

[1] Plaintiff's complaint in # 190657 is missing from the lower court record. However, in his June 21, 1995 motion to disqualify the judges, he avers that they are both named in his complaint as coconspirators. Also, in # 188486, plaintiff named the chief judge as a coconspirator in his complaint and named both the chief judge and trial judge as witnesses.

[2] Further, if plaintiff *had* attempted to bring an action against the judges, he would have had to contend with the immunity accorded judges under MCL 691.1407(5); MSA 3.996(107)(5).

[3] We also note that the judge originally assigned to # 188486 sua sponte disqualified himself on the basis that defendant Varga "has regularly appeared, and will continue to appear under contract . . . as counsel for indigent defendants" before him.