

STATE OF MICHIGAN
COURT OF APPEALS

GLORIA JONES,

Plaintiff-Appellant,

and

LEON JONES,

Plaintiff,

v

STEVE LOCKHART,

Defendant-Appellee.

UNPUBLISHED

November 13, 2003

No. 241412

Wayne Circuit Court

LC No. 99-929377-CZ

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Plaintiff Gloria Jones (plaintiff) appeals as of right the trial court's entry of a judgment of no cause of action in this attorney malpractice case. We affirm.

Plaintiff and her son¹ were involved in an altercation with a Michigan State Trooper and City of Detroit Police Officers. During the incident, the state trooper kicked plaintiff in the right thigh. Plaintiff claimed that the kick was unprovoked, but testimony was also presented that it occurred during a struggle over her purse, after she informed the trooper that it contained a properly registered gun. Plaintiff was arrested and charged with disorderly conduct. Defendant represented plaintiff and her son in the criminal trial, and both were acquitted.

Plaintiff and defendant also entered into a contingency fee agreement to pursue a civil action against the officers. On or about January 15, 1997, defendant realized that he had missed the applicable two-year period of limitations by one day. Plaintiff and her son filed a complaint alleging that defendant had committed legal malpractice by failing to timely file suit within the

¹ Leon Jones prevailed in the trial court and is not a party to this appeal.

two-year period of limitations. After a bench trial, the court awarded damages to Leon Jones but concluded that plaintiff failed to establish by a preponderance of the evidence that she would have prevailed had her claim not been dismissed on statute of limitations grounds.

I

Plaintiff first asserts that the trial court's finding that her underlying civil claim was not proved by a preponderance of the evidence was against the great weight of the evidence and was based on the trial court's bias. We disagree.

The argument that a verdict in a bench trial was against the great weight of the evidence is reviewed under the clearly erroneous standard. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651 n14; 662 NW2d 424 (2003). A trial court's findings are clearly erroneous when, although there is evidence to support them, on review of the entire record, this Court is left with the definite and firm conviction that a mistake has been made. *Peters v Gunnell, Inc*, 253 Mich App 211, 222; 655 NW2d 582 (2002). This Court gives deference to the trial court's superior ability to assess the credibility of the witnesses. *Amb's, supra* at 652.

To establish a claim of legal malpractice, a plaintiff must prove: (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 extent of the injury alleged. *Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002). When the alleged malpractice is failure to timely file the plaintiff's claim, in order to prove proximate cause and injury the plaintiff must show that, but for the attorney-defendant's untimely filing, the plaintiff would have prevailed in the underlying suit. *Id.*

A

There is no dispute regarding the first two elements. Both parties agreed that they entered into an attorney-client relationship. Defendant admitted that he was negligent in his legal representation of plaintiff by failing to file her claim within the applicable period of limitations. The second two elements pertaining to causation, however, are contested. Plaintiff argues that the trial court's determination that she failed to show that she would have prevailed by a preponderance of evidence was based on the trial court's bias toward "defendant's witnesses."²

As defendant notes, however, plaintiff offers no explanation of how the court was biased except to imply that its analysis and conclusions with respect to their testimony was different than that of the judge in the criminal case, and different from plaintiff's version of the events.

² The trial court heard live testimony only from plaintiff, her son, and defendant. The parties stipulated to supply the court the testimony in the underlying criminal case. We assume that by "defendant's witnesses" plaintiff is referring to defendant and the officers in the criminal trial.

The findings of fact and conclusions of law of the court in the criminal trial, however, were excluded from the trial court's review.

A party alleging bias or prejudice bears the burden of overcoming the presumption of judicial impartiality, and mere dissatisfaction with the final judgment does not satisfy this burden. *Arnholt v Arnholt*, 129 Mich App 810, 817-818; 343 NW2d 214 (1983). The determination whether a verdict was induced by bias or prejudice is limited to objective considerations related to the actual conduct at trial or the evidence adduced. *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 688-689; 607 NW2d 123 (1999). Further, to establish judicial bias, a party must demonstrate that the trial court displayed a deep-seated favoritism or antagonism that would make fair judgment impossible. *Eldred v Ziny*, 246 Mich App 142, 152; 631 NW2d 748 (2001).

The trial record does not support plaintiff's allegations. The trial court displayed no bias or favoritism during the presentation of the "live" testimony. Further, the court's opinion on the record explicitly stated legitimate reasons why, based on its review of the officers' testimony and of the witnesses present during the altercation, plaintiff would not have prevailed by a preponderance of the evidence. The record does not support that the trial judge was biased, but rather, indicates that he accorded the most weight to the independent witnesses' testimony.

There is no indication of "deep-seated favoritism or antagonism," and on review of the entire record, we are not left with the definite and firm conviction that a mistake has been made. *Eldred, supra* at 152; *Peters, supra* at 222. Although the testimony was in conflict with that of plaintiff and her son, "the credibility of the witnesses and the weight of the evidence were for the trial court." *Jones v Eastern Michigan Motorbuses*, 287 Mich 619, 643; 283 NW 710 (1939). Because the trial court's finding that plaintiff would not have prevailed by a preponderance of the evidence in her underlying civil suit was based primarily on its assessment of the independent witnesses' testimony, we cannot now say that it was clearly erroneous.

II

Plaintiff also argues that the trial court should not have admitted into evidence a letter that she received from another attorney whom she contacted about the case, because it was protected by the attorney-client privilege, and that she should have been present during the deposition of that attorney. We disagree.

Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). If a party contributes to the error, this Court's review of the issue is waived. *Id.* at 538.

Plaintiff's challenges are waived because plaintiff presented the attorney's letter for admission and plaintiff stipulated below to admission of the attorney's deposition. Thereafter, she failed to object to questions regarding the letter, and failed to object to the use of the deposition. Plaintiff's counsel had been notified of the deposition and appeared. Defendant cannot be faulted for plaintiff's failure to attend that deposition. Under these circumstances, we conclude that the trial court did not err in admitting the disputed evidence.

Affirmed.

/s/ William D. Schuette

/s/ Mark J. Cavanagh

/s/ Helene N. White