

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0061

JOHN G. AUGMAN

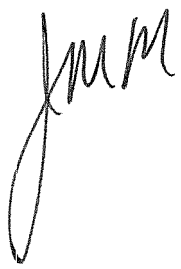
VS.

LYNDEN BURTON

JUDGMENT RENDERED: NOV - 3 2006

ON APPEAL FROM THE
SIXTEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 109,922, DIVISION B
PARISH OF ST. MARY, STATE OF LOUISIANA

HONORABLE PAUL J. DEMAHY, JUDGE



JOHN G. AUGMAN
KINDER, LA

PLAINTIFF/APPELLANT IN PROPER
PERSON

JOEL E. GOOCH
LAFAYETTE, LA

COUNSEL FOR DEFENDANTS/APPELLANTS
LYNDEN J. BURTON, WESTPORT
INSURANCE COMPANY, SIXTEENTH
JUDICIAL INDIGENT DEFENDER BOARD
AND DENISE ROBERTSON

BEFORE: CARTER, C.J., WHIPPLE AND MCDONALD, JJ.

*Carter J. Carter
Whipple J. concurs -*

MCDONALD, J.

In January 2001, John Augman (Augman) was arrested and charged under La. R.S. 14:95.1, possession of a firearm by a convicted felon. Lyndon Burton (Burton), an attorney with the 16th Judicial District, Parish of St. Mary Indigent Defender Board, was appointed to represent Augman in defending against these charges. A criminal jury trial was held in October 2001, and Augman was found guilty as charged. The conviction was appealed and affirmed by this court.

On or around October 16, 2002 Augman filed the instant suit alleging legal malpractice against Burton. The suit was later amended to add additional defendants and their insurers. Following lengthy and extensive procedural developments¹, a hearing was held on a motion for summary judgment filed on behalf of Burton; Denise Robertson; 16th Judicial District, Parish of St. Mary, Indigent Defender Office; and Columbia Casualty Insurance Company. The trial court granted the defendants' motion for summary judgment and dismissed Augman's case on February 1, 2005.

Augman appeals, alleging 17 assignments of error: (1) error in not finding violation of the 15-day service rule of La. C.C.P. art. 966; (2) error in denying motion to enforce stay order; (3) error to exclude Augman's expert opinion; (4) error to exclude expert's supplemental opinion offered on day of hearing; (5) error to refuse to allow Augman to proffer evidence by allowing expert to testify; (6) error in granting summary judgment that was obtained by fraud and ill practices; (7) error for the trial judge not to recuse himself; (8) error for the clerk of court to assign recusal motion to Judge

¹ In addition to proceedings connected with his criminal charge and conviction, Augman has filed 23 separate matters for this court's consideration.

Comeaux; (9) error for Judge Comeaux not to recuse himself from presiding over recusal hearing; (10) error in failing to grant Augman's declaratory judgment on validity and enforceability of Guidry Stipulation; (11) trial court erred in failing to enforce law of the case doctrine; (12) error in failing to enforce Augman's right to enforce Guidry Stipulation; (13) error to apply principles of *Schwehm v. Jones* in granting defendants motion for summary judgment; (14) error in allowing use of inadmissible criminal appeal opinion to support granting summary judgment; (15) error in not finding existence of a fourth amendment violation based on new evidence and expert testimony; (16) error in granting summary judgment when Burton conspired with others to deprive Augman of his constitutional rights; (17) error in failing to grant new trial motion.

Initially we note that the only matters properly before this court are those related to the judgment that is on appeal. The issues regarding the recusal of Judge Comeaux are not properly before this court. The issue regarding an alleged violation of the Fourth Amendment of the United States Constitution concerns someone who is not a party to this suit, and whether a search of a car (in which Augman's prohibited gun was found) was voluntary, which matter is not properly before this court.

Basically, Augman contends that Burton's representation of him constituted legal malpractice. Specifically, Augman alleges that Burton failed to ensure the testimony of Jerome Guidry or the submission to the jury of the "Guidry stipulation" at his criminal trial, that Burton failed to properly locate and interview witnesses, and other acts that constituted malpractice. Augman also asserts several procedural violations in the hearing on the summary judgment motion.

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2); *Rambo v. Walker*, 96-2538 (La. App. 1st Cir. 11/7/97), 704 So.2d 30, 32. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); *Collins v. Randall*, 02-0209 (La. App. 1st Cir. 12/20/02), 836 So.2d 352, 354. In determining whether summary judgment is appropriate, appellate courts conduct a *de novo* review of the evidence, employing the same criteria that govern the district court's determination of whether summary judgment is appropriate. *Sanders v. Ashland Oil, Inc.*, 96-1751 (La. App. 1st Cir. 6/20/97), 696 So.2d 1031, 1035, *writ denied* 97-1911 (La. 10/31/97), 703 So.2d 29.

The initial burden of proof is on the moving party. However, on issues for which the moving party will not bear the burden of proof at trial, the moving party's burden of proof on the motion is satisfied by pointing out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the nonmoving party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial; failure to do so shows that there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2); *Davis v. Specialty Diving, Inc.*, 98-0458 (La. App. 1st Cir. 4/1/99), 740 So.2d 666, 669, *writ denied*, 99-1852 (La. 10/8/99), 750 So.2d 972. Because it is the applicable substantive law that determines

materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Zeringue v. Karl Ott Poles & Pilings*, 00-0522 (La. App. 1st Cir. 5/11/01), 808 So.2d 628, 631.

To establish a prima facie case for legal malpractice, a plaintiff must prove there was an attorney-client relationship, the attorney was guilty of negligence in his handling of the client's case or professional impropriety in his relationship with the client, and the attorney's misconduct caused the client some loss or damage. *Prestage v. Clark*, 97-0524 (La. App. 1st Cir. 12/28/98), 723 So.2d 1086, 1091, *writ denied*, 99-0234 (La. 3/26/99), 739 So.2d 800. The proper method of determining whether an attorney's malpractice is a cause in fact of damage to his client is whether the proper performance of that act would have prevented the damage. *Ault v. Bradley*, 564 So.2d 374, 379 (La. App. 1st Cir.), *writ denied*, 569 So.2d 967 (La. 1990). In Augman's case, it would be necessary for him to prove that absent Burton's malpractice, he would not have been convicted.

After careful review of the record in this matter, we find that even assuming that it was negligence on Burton's part not to ensure the admission of the Guidry stipulation, it would not have resulted in a different verdict in Augman's criminal trial. Further, Burton's explanation of his decision with regard to Guidry's testimony is sufficient to convince this court that there was no negligence in not ensuring that Guidry testified. Our review convinces us that Augman's actions and his own testimony at trial were sufficient to convict him, regardless of any of Burton's acts or omissions of which he complains. While we do find that *Schwehm v. Jones*, 2003-0109 (La. App. 1st Cir. 2/23/04), 872 So.2d 1140 is distinguishable in that the appeal courts had already considered and denied a claim of ineffective

assistance of counsel, we do not find any support in that case for Augman's contention that a different result is required here.

We have also given thorough consideration to Augman's allegation of procedural errors by the trial court. The trial court made a factual finding that Augman had received service of the motion and attachments within the time delays provided by law. We find no error in this factual finding, and no error in any of the procedures in the trial court. In short, we find no merit in Augman's appeal. We believe, as Dr. Martin Luther King said², that injustice anywhere is a threat to justice everywhere. This court is not only committed to justice, but also to truth. We are, therefore, disturbed when we find evidence that matters submitted for our consideration are so distorted as to bear little resemblance to the truth. The judgment of the trial court granting summary judgment on behalf of the defendants is affirmed.

Augman also filed motions to supplement the record in this matter, which were referred to this panel. The motions are denied. The motion of defendants-appellees requesting dismissal of Augman's motions for failure to conform to the Uniform Rules was also denied. This court has repeatedly made allowances for Augman because he was proceeding pro se. However, the court must also be mindful of its responsibility to be judicious in the commitment of its resources, and the fairness inherent in all litigants being subject to the same rules. The Uniform Rules, Courts of Appeal, Rule 2-12.2.(1) requires that briefs on 8 1/2 x 14 paper shall not exceed twenty-eight pages. The brief submitted by Augman was 38 pages, not counting the pages incorrectly unnumbered. Pursuant to Rule 2-12.13, it is within our prerogative to strike non-conforming briefs, in whole or in part; in the

² Letter from Birmingham jail, April 16, 1963.

interest of justice, we did not do so. However, Augman is advised that further deviations from procedural rules will incur appropriate consequences.

Costs of this appeal are assessed to plaintiff/appellant, John G. Augman. This opinion summarily affirming the judgment of the trial court is issued in accordance with Uniform Rules - Courts of Appeal, Rule 2-16.2 A (6), (7) and (10).

AFFIRMED.