IN THE COURT OF APPEALS OF IOWA

No. 0-356 / 09-1634
Filed June 16, 2010

ROBERT DOWELL,
Plaintiff-Appellant,

vs.

ALEXANDRA NELISSEN,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel, Judge.

Plaintiff appeals the district court order granting summary judgment to defendant on his claims of legal malpractice, breach of fiduciary duty, and breach of contract. **REVERSED AND REMANDED.**

David Leitner of Leitner Law Office, West Des Moines, for appellant.

Jolie Juckette of Nelissen & Juckette, P.C., Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, J.

TABOR, J.

I. Background Facts & Proceedings

Robert Dowell retained attorney Alexandra Nelissen to represent him in a modification of his dissolution of marriage decree. Dowell and his ex-wife, Gabrielle Rodriquez, met with Nelissen in her office on November 19, 2004, and reached an agreement to modify the decree. Dowell and Rodriquez signed a stipulation modifying physical care of their minor children and reducing Dowell's child support obligation from $348 per month to $200 per month. Rodriquez also signed an affidavit stating she was aware Nelissen was not representing her interests.

Nelissen did not file the stipulation with the district court and, as a result, the dissolution decree was not modified. Dowell filed a petition against Nelissen on April 14, 2008, raising claims of legal malpractice, breach of fiduciary duty (punitive damages), and breach of contract. Dowell alleged Nelissen promised to file the stipulation on the next business day and led him to believe the decree had been modified. Dowell further alleged that in reliance on his attorney's representations, he reduced his child support payments and subsequently became delinquent in his child support obligation.

On March 19, 2009, Nelissen filed a motion for summary judgment and supporting statement claiming Dowell had failed to designate an expert witness within 180 days of her answer, as required by Iowa Code section 668.11 (2007). Nelissen also raised a factual issue, stating that Rodriquez contacted her after the meeting and told her she wanted her previous attorney to look over the

stipulation before it was filed. Nelissen submitted a deposition in which she testified she informed Dowell she was not going to file the stipulation.

Dowell resisted the motion for summary judgment, asserting that proof of negligence was so clear in this case that no expert witness was needed. Dowell asked for summary judgment in his favor on the issue of liability. Dowell submitted an affidavit stating he had not been informed of the failure to file the stipulation for six months. He stated that after he became aware Nelissen failed to file the stipulation, Nelissen offered several different excuses, including that she suffered a brain injury. Nelissen stated in her deposition that she could not recall such an injury. Nelissen resisted Dowell's motion for summary judgment on the ground it was untimely under the court's scheduling order.

The district court granted Nelissen's motion for summary judgment, and denied Dowell's motion. The court found, as follows:

> The Court finds that expert testimony is required to establish what, if any, duties were owed by Ms. Nelissen to Mr. Dowell under the facts presented. This is particularly true where the relationship and duties between Ms. Nelissen and Mr. Dowell were complicated by her meeting with Mr. Dowell's former spouse, who was unrepresented, and then not filing the modification after Ms. Rodriguez told her she wanted her attorney to review it.

The court concluded Dowell's claims could not be established without an expert witness, and thus summary judgment was appropriate based upon his failure to timely certify an expert. Furthermore, the court concluded "Dowell's contract claim also fails for he has offered no evidence, other than his own self-serving statements, to support this claim requiring summary judgment be entered as to breach of contract."

Dowell filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) asserting there were genuine issues of material fact as to whether Rodriquez had contacted Nelissen to ask that her former attorney look over the stipulation before it was filed and whether Nelissen informed Dowell she was not filing the stipulation. He also argued Nelissen's conduct was so clearly below applicable standards no expert witness was required. The district court denied Dowell's motion. He appeals.

II. Standard of Review

We review the district court's ruling on a motion for summary judgment for the correction of errors at law. *See* Iowa R. App. P. 6.907 (2009). Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the non-moving party. *Kern v. Palmer College of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008). In determining whether there is a genuine issue of material fact, the court affords the non-moving party every legitimate inference the record will bear. *Id.*

III. Expert Witness

To establish a prima facie claim of legal malpractice, a plaintiff must introduce substantial evidence to show: (1) the existence of an attorney-client relationship giving rise to a duty; (2) the attorney, either by an act or failure to act, violated or breached that duty; (3) the attorney's breach of duty proximately caused injury to the client; and (4) the client sustained actual injury, loss, or

damages. *Schmitz v. Crotty*, 528 N.W.2d 112, 115 (Iowa 1995). An attorney is "obligated to use the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances." *Kubik v. Burk*, 540 N.W.2d 60, 64 (Iowa Ct. App. 1995).

Generally, expert testimony on the standard of care is required in a legal malpractice action. *Crookham v. Riley*, 584 N.W.2d 258, 266 (Iowa 1998). This requirement for expert testimony relates to the plaintiff's burden to show the attorney failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the task which is undertaken. *See Vande Kop v. McGill*, 528 N.W.2d 609, 611 (Iowa 1995). Expert testimony is needed for highly technical questions that are outside the understanding of a layperson. *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989).

No expert testimony is required where "the proof is so clear and obvious that a trial court could, with propriety, rule as a matter of law whether the lawyer met applicable standards." *Baker v. Beal*, 225 N.W.2d 106, 112 (Iowa 1975). An exception also arises where "the asserted shortcomings of the lawyer are so plain they may be recognized or inferred from the common knowledge or experience of laymen." *Id.*; *see also Benton v. Nelsen*, 502 N.W.2d 288, 290 (Iowa Ct. App. 1993).

Where expert testimony is required in a professional liability case brought against a licensed professional, section 668.11(1)(a) provides the expert must be designated within 180 days after the defendant's answer unless the court for

good cause extends the time of disclosure. Dowell did not designate an expert within 180 days after Nelissen's answer, and he did not request an extension. Summary judgment is appropriate in a case where expert testimony is required to establish negligence, and expert testimony is unavailable due to a failure to follow section 668.11, because the plaintiff is unable to present a prima facie case of legal malpractice. *See Kubik*, 540 N.W.2d at 64-65.

The district court determined Dowell needed to present expert testimony to establish his claims of negligence and for punitive damages. The court noted the duties of Nelissen were complicated by the fact that Rodriquez was not represented by an attorney. The court also found that the situation was problematic because Rodriquez told Nelissen she wanted her former attorney to review the stipulation.

We disagree with the district court's determination that Dowell's claims required expert testimony. Nelissen's duties to Dowell remained the same despite the fact Rodriquez did not have her own counsel. Nelissen attempted to address any potential for misunderstanding regarding divided loyalties by asking Rodriquez to sign an affidavit of non-representation. Dowell alleges Nelissen breached a reasonable standard of care by not filing the request for modification and by not informing him that his child support obligation remained unchanged. A lay person could recognize or infer that not filing the agreed-upon request to modify and not informing the client of the inaction failed to meet a reasonable standard of care. Basic deficiencies in legal representation do not require illumination by an expert. *See Schmitz*, 528 N.W.2d at 116 n.1 (no expert

testimony required where attorney failed to verify legal descriptions once informed of their inaccuracy); *Benton*, 502 N.W.2d at 290-91 (no expert testimony necessary if plaintiff's versions of facts were believed and attorney did not communicate contents of creditor's memorandum and deadline for settling). Dowell's failure to designate an expert within 180 days after Nelissen's answer is not cause for summary judgment where an expert is not necessary to establish plaintiff's cause of action.

This is not a case like *Koeller v. Reynolds*, 344 N.W.2d 556, 561 (Iowa 1983), where the attorney accused of malpractice had qualms about whether maintaining the action would be just. Nelissen asserts only that she waited to file the modification papers when later contacted by Rodriquez. There exists a genuine issue of material fact as to whether Rodriquez contacted Nelissen after the meeting to ask for time to have her former attorney review the modification before it was filed.

IV. Contract Claim

Dowell's petition included a claim that the parties had entered into a contract, that the terms of the contract included "an agreement that Defendant would competently and expeditiously file and prosecute the aforementioned application to amend the dissolution decree and other matters entrusted to her, and to provide true and accurate status reports regarding the matters so entrusted," and that Nelissen had breached the contract. In her answer Nelissen admitted she entered into a contract with Dowell, and the terms of that contract as stated in the petition. She denied she had breached the contract.

Nelissen's motion for summary judgment was based on Dowell's failure to designate an expert within the time guidelines of section 668.11. Section 668.11(1) specifically states that it applies to a "case brought against a licensed professional pursuant to this chapter . . . ." Chapter 668 applies to tort claims, not those brought in contract. *See Frunzar v. Allied Prop. & Cas. Ins. Co.*, 548 N.W.2d 880, 890 (Iowa 1996); *State v. Paxton*, 674 N.W.2d 106, 109 (Iowa 2004) (noting breach of contract claims are not included within the scope of chapter 668).

The district court granted summary judgment on the contract claim on the ground that Dowell had "offered no evidence, other than his own self-serving statements, to support this claim . . . ." As noted above, however, Nelissen admitted in her answer that she had entered into a contractual agreement with Dowell, and that among the terms of that contract was an agreement that she would competently and expeditiously file and prosecute the application to amend the dissolution decree as well as other matters entrusted to her, and she would provide true and accurate status reports regarding the matters entrusted to her. We conclude the district court improperly granted summary judgment to Nelissen on the contract claim.

We reverse the grant of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.