

IN THE COURT OF APPEALS OF IOWA

No. 0-381 / 09-0231
Filed August 25, 2010

**JUDITH CRONE, f/k/a
JUDITH A. BEECHNER,**
Plaintiff-Appellant,

vs.

BRUCE D. NESTOR,
Defendant-Appellee.

Appeal from the Iowa District Court for Johnson County, Marsha A. Bergan, Judge.

Judith Crone appeals the district court's grant of summary judgment on her claims for legal malpractice and for emotional-distress damages. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

John Daufeldt of Daufeldt Law Firm, P.L.C., Conroy, for appellant.

Robert Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellee.

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

TABOR, J.

Judith Crone appeals the district court's grant of summary judgment on her claims for legal malpractice and for emotional-distress damages. Crone contends that the district court misapplied Iowa's discovery rule for legal malpractice cases and as a result erroneously determined her suit was time barred. She also contends that emotional distress was a reasonably foreseeable result of her attorney's purported malpractice and that expert testimony is not required to establish a claim for emotional distress. Because we find a genuine issue of material fact exists concerning whether Crone had the requisite knowledge to trigger the statute of limitations and when her cause of action accrued, we reverse on that ground and remand. Because the record reveals no factual dispute regarding Crone's damages for emotional distress, we affirm the district court's grant of summary judgment on that claim.

I. Background Facts and Procedures

In 2001, attorney Bruce D. Nestor represented Crone in her divorce from Donald A. Beechner. In conjunction with the divorce proceeding, the parties entered into a stipulation of settlement resolving the issues of alimony and property division. The stipulation required Beechner to establish a trust for the benefit of Crone, funded by his retirement annuity,¹ within ten days of the entry of the dissolution decree—that is, by March 5, 2001. In the event that Beechner died before Crone, the trust would pay the balance of the mortgage on the parties' home, which had been awarded to Crone, and five years of monthly

¹ The retirement plan was administered by TIAA-CREF and was valued at \$117,519 on December 31, 1999—the parties' agreed date of division.

alimony payments of \$350. On February 21, 2001, the court approved the stipulation and issued the divorce decree. Nestor contends that his representation of Crone ended in February 2001 when he provided Crone with the “finalized papers” in her divorce proceeding and simultaneously told her that “this ended [his] representation of her.”

Beechner paid both the monthly alimony and mortgage payments on time each month. But no trust was created and, on May 30, 2005, Beechner died. Consequently, Crone’s alimony payments ceased immediately, the mortgage defaulted as the balance was not paid from Beechner’s retirement annuity, and Crone lost her home in a 2006 foreclosure sale. Crone testified that losing her home was an emotionally distressing event.

On May 25, 2007, Crone filed a petition alleging that her attorney, Nestor, committed legal malpractice by failing to ensure that the trust had been created for the benefit of his client. She filed an amended petition on June 28, 2007. In Crone’s answers to interrogatories she asserted a claim for an unknown amount of emotional distress damages “to be determined by the jury.” On September 22, 2008, Nestor filed a motion for summary judgment alleging that Crone’s cause of action was barred by the five-year statute of limitations and that she was precluded from recovering emotional-distress damages. On December 5, 2009, the district court granted Nestor’s motions for summary judgment. Crone now appeals.

II. Standard of Review

We review the grant of summary judgment for corrections of errors at law. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* “When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party.” *Eggiman v. Self-Insured Serv. Co.*, 718 N.W.2d 754, 763 (Iowa 2006).

III. Analysis

A. Statute of Limitations

Iowa sets a five-year statute of limitations for legal malpractice claims. Iowa Code § 614.1(4) (2007); *Venard v. Winter*, 524 N.W.2d 163, 166 (Iowa 1994). We apply the discovery rule in legal malpractice actions. *Millwright v. Romer*, 322 N.W.2d 30, 33 (Iowa 1982). The discovery rule provides that the statute of limitations does not begin to run in malpractice cases “until the date of discovery, or the date when, by the exercise of reasonable care, plaintiff should have discovered the wrongful act.” *Id.* Fundamental concerns, unique to the attorney-client relationship, support application of the discovery rule in attorney-malpractice cases: protecting the client’s “right to rely upon the superior skill and knowledge of” the attorney representing her, and ensuring the attorney fulfills his or her duty to “make full and fair disclosure to the client.” *Id.* at 34 (“[T]he absence of such a rule denigrates the duty of the attorney to make full and fair disclosure to the client.”).

The district court granted Nestor's motion for summary judgment holding that the five-year statute of limitations in legal malpractice cases barred Crone's claim. The court determined that Crone's cause of action accrued on March 5, 2001—the date by which Crone's ex-husband was to establish the trust and failed to do so. The court reasoned that Crone's cause of action accrued on this date because:

This was the date on which Plaintiff had the right to the property interest she bargained for in her dissolution and the date on which she should have known—and could have known—that her property interest had not been established. On this date, a person of reasonable prudence—receiving no confirmation that the trust had been established—would make inquiry as to why she had received no confirmation of the trust.

In short, the court held that had Crone exercised the reasonable care required of her, she would have discovered Nestor's breach of duty on March 5, 2001. Consequently, her petition filed May 25, 2007, fell outside the five-year statute of limitations and was, therefore, barred.

We believe that a genuine issue of material fact exists regarding whether Crone knew or should have known on March 5, 2001, that the trust had not been set up. Crone's responsibility to verify that Beechner established the trust as required by the stipulation is incumbent on her attorney fully disclosing their respective obligations prior to terminating the attorney-client relationship. This fact question directly implicates one of the fundamental justifications for applying the discovery rule—ensuring that attorneys execute their duty to make full and fair disclosure to their clients. The conclusion reached by the trial court

does not adequately take into account the attorney's duty of disclosure to the client; a genuine issue of material fact exists on this point.

An attorney-client relationship existed between Crone and Nestor for the duration of the dissolution proceedings and Nestor, therefore, owed Crone a duty of disclosure during their relationship. See *Dudden v. Goodman*, 543 N.W.2d 624, 627 (Iowa Ct. App. 1995) (explaining that the attorney owed a duty of full and fair disclosure to the clients with whom he had an attorney-client relationship); cf. *Millwright*, 322 N.W.2d at 34 (stating that no attorney-client relationship ever existed between the parties). Importantly, Iowa courts apply the discovery rule, in part, to protect the client's right to full and fair disclosure from their attorney. *Millwright*, 322 N.W.2d at 34. The *Millwright* court determined that the plaintiffs, who were not clients of the attorney alleged to have committed malpractice, should be charged with knowledge of the rule against perpetuities. See *id.* at 33–34 (invoking the common maxim that every person is assumed to know the law). The court explained that absent an attorney-client relationship, the concerns underlying the discovery rule did not excuse the plaintiff's knowledge of the law. *Id.* In this case, an attorney-client relationship existed and Nestor does not seek to hold Crone accountable for knowledge of the law. Rather, he seeks to charge her with knowledge of facts regarding their respective responsibilities—specifically, her personal responsibility—to ensure that a substantial portion of the stipulation agreement was implemented after Nestor terminated his representation. The fundamental distinctions between this case and *Millwright* demonstrate that a closer inspection of the disclosures that Nestor

made to Crone are important in determining when Crone possessed the requisite knowledge and the proper application of the discovery rule.

The existence of the attorney-client relationship, Nestor's termination of representation prior to the stipulation's implementation, and the nature of the knowledge charged to the client implicate the concerns underlying the discovery rule. Whether Crone knew or should have known that the trust was not set up for her benefit turns in part on the disclosures that Nestor made to her in conjunction with his termination of the attorney-client relationship. Nestor does not assert that Crone was entitled to notice that the trust had been established under Iowa Code chapter 633A. Iowa trust Code § 633A. Nor does he allege that the agreement between the parties provided that Crone would receive notice that the trust had been set up. Thus, Crone would not necessarily have expected to receive notice of the trust's creation and, likewise, would not have been on notice of the failure to create the trust by virtue of failing to receive confirmation as the district court suggests. Absent a showing that Crone had reason to expect notice, the knowledge Crone needed to protect her property interests would derive, in part, from her attorney's disclosures.

Consequently, the disclosures that Nestor made before terminating the attorney-client relationship are an issue of material fact that impact whether Crone had the requisite knowledge to trigger the statute of limitations on the date the trust was to have been established. On the facts in this case, barring Crone's claim without ascertaining whether her attorney provided her with the knowledge she needed to protect her interest before he terminated the relationship would

serve to denigrate the attorney's disclosure duty and potentially disrupt proper application of our discovery rule. There is a genuine issue of material fact whether Crone knew or should have known on March 5, 2001, that the trust had not been set up, which derives from whether Nestor informed Crone that she bore the responsibility to "follow up" to make sure the trust was set up for her benefit. Therefore, summary judgment was not appropriate on this issue.

In addition, we find a genuine issue of material fact exists as to whether Crone's cause of action may have accrued later than March 5, 2001. See, e.g., *McGee v. Weinberg*, 159 Cal. Rptr. 86 (Cal. Ct. App. 1979) (applying the discovery rule and holding that the statute of limitations began to run in an attorney-malpractice action on the date of the plaintiff's ex-husband's death when the payments to which she was entitled to under a stipulation agreement ceased, rather than the earlier date on which the attorney's negligence actually occurred). Nestor's alleged breach of duty could have been remedied anytime before Beechner's death on May 30, 2005, by taking action to enforce the stipulation requiring Beechner to establish the trust. Crone suffered no harm in terms of missed mortgage or alimony payments until Beechner's death when the payments ceased. These facts may support a conclusion that the statute of limitations did not commence until Beechner's death. Cf. *Neylan v. Moser*, 400 N.W.2d 538, 542 (Iowa 1987) (applying the discovery rule and stating that "the date of injury 'coincides with the last possible date when the attorney's negligence becomes irreversible'" (citing Ronald E. Mallen & Victor B. Levit, *Legal Malpractice* § 390, at 457 (2d ed. 1981))). We reverse the district court's

grant of summary judgment on the statute of limitations issue and remand for further proceedings.

B. Emotional Distress Damages

“[U]nder Iowa law, the general rule is that in cases grounded in negligence, emotional distress damages are not recoverable unless accompanied by physical injury.” *Lawrence v. Grinde*, 534 N.W.2d 414, 421 (Iowa 1995). An exception excuses the physical injury requirement “where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm.” *Id.* (citing *Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990)). “Iowa courts have only recognized a duty to protect against emotional anguish in circumstances involving a contractual relationship for ‘contractual services that carry with them deeply emotional responses in the event of breach.’” *Id.* (citing *Oswald*, 453 N.W.2d at 639). A review of Iowa cases reveals that courts have allowed recovery of emotional distress damages only in situations involving “both a close nexus to the action at issue and extremely emotional circumstances.” *Id.*

Moreover, the majority of American jurisdictions hold that “emotional distress is not a reasonably foreseeable consequence of and does not ‘naturally ensue’ from an act of legal malpractice.” *Id.* at 422. “Only in special cases involving peculiarly personal subject matters do the majority of jurisdictions recognize that mental anguish may be a foreseeable damage resulting from attorney negligence.” *Id.* (citing *Oswald*, 453 N.W.2d at 639). Crone’s

representation by Nestor did not involve such personal subject matter as to merit designation as a “special case” where mental anguish would be foreseeable.

The district court found it significant that Crone did not offer any medical evidence supporting her emotional distress claim. Crone accurately notes that Iowa courts have departed somewhat from the strict requirement that parties present expert testimony on the issue of emotional-distress damages. See *Campbell v. Delbridge*, 670 N.W.2d 108, 112 (Iowa 2003) (stating in its analysis of the emotional distress issue that, at least in the context of medical malpractice, expert testimony is not invariably required and “a lay fact finder is qualified and capable to resolve issues that are only peripheral to the medical decisions”). But as the district court pointed out in its summary judgment ruling, in *Campbell* the plaintiff had seen a psychiatrist four times, and the psychiatrist referred her to a counselor. The *Campbell* court considered the counselor’s report, in conjunction with the plaintiff’s testimony, as an adequate factual basis for the emotional distress damage claim. *Campbell*, 670 N.W.2d at 113. We find no similar support for Crone’s claim for emotional-distress damages.

The district court properly determined that Crone failed to identify a physical injury resulting from Nestor’s representation and failed to show this requirement was excused because the contract between Crone and Nestor for legal services was not the sort of contractual relationship that carried with it a deeply emotional response in the event of a breach. See, e.g., *Oswald*, 453 N.W.2d at 639 (citing the negligent performance of services incident to a funeral

and burial as a service carrying a deeply emotional response where damages for emotional injury were appropriate).

Moreover, Crone failed to establish a causal link between Nestor's purported negligence and her emotional distress. Her testimony indicated that she began experiencing depression and emotional distress by the late 1980s, long before Nestor's representation, and that she began medication for her distress in the late 1980s as well—before the events giving rise to her cause of action against Nestor. No factual dispute exists concerning the link between Nestor's alleged negligence and Crone's emotional distress.

Consequently, the district court's grant of defendant's motion for summary judgment on the issue of emotional-distress damages is affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.