IN THE COURT OF APPEALS OF IOWA

No. 7-392 / 05-1575
Filed January 16, 2008

DENNIS J. PICKENS,
Plaintiff-Appellant,

vs.

STEVEN GARDNER and THE LAW FIRM OF KIPLE, DENEFE, BEAVER, GARDNER & ZINGG, L.L.P.,
Defendants-Appellees.

Appeal from the Iowa District Court for Wapello County, Darrell Goodhue, Judge.

Dennis Pickens appeals the district court's grant of summary judgment in favor of the defendants in a legal malpractice suit. **AFFIRMED.**

Dennis J. Pickens, Pro Se, Ottumwa, for appellant.

John A. McClintock and Alexander E. Wonio of Hansen, McClintock & Riley, Des Moines, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Eisenhauer, JJ.

Baker, J. takes no part.

VAITHESWARAN, J.

Dennis Pickens appeals the district court's grant of summary judgment in favor of the defendants in a legal malpractice suit.

I. Background Facts and Proceedings

Pickens was employed by Soo Line Railroad (Soo Line). After sustaining an on-the-job injury to his back, Pickens sued his employer under the Federal Employee Liability Act. He prevailed in that action. Pickens returned to his employment with Soo Line and to his previous position as a conductor. He was eventually terminated.

Pickens again sued his employer, this time under the Americans with Disabilities Act. A jury awarded him substantial damages. However, a federal district court granted Soo Line's motion for judgment notwithstanding the verdict and, in a split decision, a federal appeals court affirmed that ruling.

Pickens sued the lawyer and law firm representing him in the ADA action. He alleged they committed legal malpractice.[1] According to Pickens, his claim was "premised on the fact that [the defendants] failed to dispute numerous untrue and unfounded allegations and contentions proffered by ADA defendant Soo Line Railroad during the course of litigating Plaintiff's underlying ADA case." The defendants moved for summary judgment, which the district court granted. This appeal followed.

"Legal malpractice consists of the failure of an attorney to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly

[1] Pickens asserted several causes of action, but the district court determined all were essentially subsumed under legal malpractice.

possess and exercise in the performance of the task which they undertake." *Martinson Mfg. Co., Inc. v. Seery*, 351 N.W.2d 772, 775 (Iowa 1984) (citations omitted). To establish a prima facie claim of legal malpractice, Pickens had to prove (1) the existence of an attorney-client relationship, (2) breach of duty, (3) proximate cause, and (4) injury. *See Benton v. Nelsen*, 502 N.W.2d 288, 291 (Iowa Ct. App. 1993) (citing *Dessel v. Dessel*, 431 N.W.2d 359, 361 (Iowa 1988)).

The key element here is proximate cause. On this element, the Iowa Supreme Court has stated:

> The burden of proving proximate cause in a legal malpractice action is the same as any other negligence action. To recover, the injured must show that, but for the attorney's negligence, the loss would not have occurred. In an action based upon the negligent handling of a law suit, the plaintiff must prove that absent the lawyer's negligence, the underlying suit would have been successful.

Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg, 428 N.W.2d 288, 290 (Iowa 1988) (citations omitted). "[Q]uestions of proximate cause are generally for the jury and only in exceptional cases may they be decided as matters of law." *Id.* at 291. However, there must be sufficient evidence to connect the loss with the defendants' negligence. *Id.*

It is undisputed that the loss in this case was the federal district court's grant of Soo Line's motion for judgment notwithstanding the verdict. Pickens maintains this loss was caused by his lawyer and law firm's omissions in the ADA case. Specifically, he urges that they failed to "competently dispute" Soo Line's assertions that (1) he had excessive absences, (2) posed a safety threat, and (3) represented on an application for disability benefits that he was disabled. In his

view, if the lawyer and law firm had presented evidence to counter these assertions, the federal district court would not have granted the motion for judgment notwithstanding the verdict. The transcript from the ADA trial reveals that Pickens's lawyer and law firm in fact presented evidence to counter Soo Line's three assertions.

With respect to the allegation of excessive absences, the following colloquy between Pickens and his attorney is instructive:

> Q. When you say you were able to work two or three days, what would you do if your condition got to the point where you didn't feel physically capable? A. When my back hurt, I couldn't work, I would call up to what they call the crew management system that they call us from, and you basically tell them -- I tell them that I needed to lay off or take a day off with my back and remove myself from the board so that I wasn't available for call.
>
> Q. Did the Soo Line allow you to do that? A. Yes, they did.
>
> Q. Did the Soo Line allow you to do that on a regular basis? A. Yes, they did.

Later, his attorney asked him,

> Q. Now, you've indicated that you were allowed to call in and lay off when you felt physically incapable, is that fair? A. That's correct.
>
> Q. And did this practice continue for an extended period of time? A. Well, there was -- yes, it went for a couple of months, I guess, a little over two months . . . .
>
> Q. At any point during the two months that you were working the schedule, did any of your supervisors of the Soo Line Railroad Company complain that this reduced schedule wasn't workable? A. No.

With respect to the charge that Pickens posed a safety threat, Pickens's attorney elicited the following testimony from Pickens:

> Q. And during that time frame, can you tell us whether or not you were capable -- when you would work, were you capable of safely performing the work? A. Absolutely . . . .
>
> Q. In other words, when you felt physically capable of working, you did go to work? A. I did.

> Q. And were you able to perform all of your duties? A. Yes.
> Q. And were you able to perform those safely? A. Yes.
> Q. And can you tell us whether you have an opinion whether the schedule was a reasonable way to accommodate your disability? . . . . A. I believe under our work rules and basically lack of schedule, yes, it was very reasonable.
> Q. And did any of your supervisors or representatives of the railroad during that time frame make any claim to you that it was in any way unreasonable for you to work this reduced schedule? A. No, they didn't.
> Q. In other words, did you receive any complaints at all from your supervisors at the Soo Line Railroad Company? A. No.
> Q. And so long as you and the Soo Line continued to work the schedule, was there any risk to the safety of yourself or others? A. Absolutely not.

Later, Pickens was asked whether he could have continued to work the reduced work schedule after he was terminated. He answered "[y]es, I could have." He was then asked whether he could have continued to work safely. He answered, "[y]es, I could have." When questioned about whether he would have "been a threat to yourself or any other person," he answered, "No, I wouldn't."

The attorney also asked Pickens about a highly-charged letter he sent to Soo Lines, that Soo Lines sought to introduce into evidence. Pickens stated:

> My intent in writing this letter was to get back to work, whatever I needed to do. I wanted to know what I had to do to get back to work. I was upset when I wrote it, and I wrote a statement. I believe I wrote something in the fashion of that I would totally disregard safety and common sense if this is required.

The attorney then asked Pickens "who did you mean when you said 'if this is required?'" Pickens answered:

> My intention was to try to impress upon Soo Line that I did not want to go out and work when I shouldn't because it was going to create an unsafe condition, and if they were going to keep pulling me out of service the way they were doing and deny me my income, that, you know, it was going to create a situation where, you know, I may hesitate to lay off when I should because I would be afraid they were going to pull me out of service, and then I may

> work when I shouldn't, and it was going to be an unsafe situation, and I just -- the way I stated it may not have been very well, but actually I was upset.

With respect to Pickens's application for disability benefits mentioned by the federal district court in the JNOV ruling, his attorney again made efforts to mitigate the effect of it by eliciting testimony that Pickens was receiving disability benefits based on Soo Line's refusal to accommodate his disability.

In short, Pickens's attorney and law firm in the ADA case disputed the cited "contentions proffered by ADA defendant Soo Line Railroad during the course of litigating Plaintiff's underlying ADA case." Even with this evidence in the record, the federal district court granted Soo Line's motion for judgment notwithstanding the verdict. As a matter of law, therefore, the lawyer and law firm's conduct during the ADA trial could not have been the proximate cause of the federal district court's ruling on Soo Line's motion for judgment notwithstanding the verdict. *See Nelsen*, 502 N.W.2d at 291-92.

As Pickens could not prove that his lawyer and law firm's inaction proximately caused the loss of his jury award in the ADA case, the district court did not err in granting their motion for summary judgment. We find it unnecessary to address the remaining issues raised on appeal.

AFFIRMED.