IN THE COURT OF APPEALS OF IOWA

No. 7-945 / 07-0095
Filed May 14, 2008

JAMES MICHAEL HANISCH,
Plaintiff-Appellant,

vs.

WILLIAM "BILL" BRACKER,
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland, Judge.

Plaintiff appeals from a district court order dismissing his legal malpractice action. **REVERSED AND REMANDED.**

Scott A. Lautenbaugh of Nolan, Olson, Hansen, Lautenbaugh & Buckley, LLP, Omaha, for appellant.

Brent B. Green, Bradley C. Obermeier, and Kirk W. Bainbridge of Duncan, Green, Brown & Langeness, P.C., Des Moines, for appellee.

Heard by Miller, P.J., Vaitheswaran and Baker, JJ.

MILLER, J.

James Michael Hanisch appeals from a district court order dismissing his legal malpractice action against his former attorney, William C. Bracker. We reverse the judgment of the district court and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

Bracker represented Hanisch in criminal proceedings in Iowa and Nebraska. In March 2000, Hanisch pled guilty to unlawful delivery of methamphetamine in violation of Iowa Code section 124.401(1)(b)(7) (1999) pursuant to a plea agreement that Bracker negotiated with the State of Iowa. He was sentenced to an indeterminate term of imprisonment not to exceed twenty-five years.

Hanisch filed an application for postconviction relief following his guilty plea and sentence. He claimed Bracker provided ineffective assistance of counsel because he did not inform the district court about his agreement with the State to waive the mandatory minimum sentence. *See* Iowa Code § 124.413. The district court denied Hanisch's application for postconviction relief. Hanisch appealed, and we reversed, finding he received ineffective assistance of counsel. We vacated the sentence and plea agreement and remanded for further proceedings. *Hanisch v. State*, No. 02-1011 (Iowa Ct. App. Aug. 27, 2003).

Hanisch filed a legal malpractice action against Bracker in August 2005. His petition alleged Bracker committed malpractice in his representation of him in the Iowa and Nebraska criminal proceedings. Hanisch was required to designate expert witnesses by May 31, 2006, pursuant to a scheduling order. He filed a "Motion to Extend Deadlines and Continue" on May 30, requesting that he be

allowed an additional ninety days to designate expert witnesses. The district court did not enter a ruling on this motion.

In September 2006, Bracker filed a motion to dismiss. He argued that the case should be dismissed because Hanisch did not designate an expert witness as required by Iowa Code section 668.11 (2005). Hanisch filed a resistance and a "Renewed Motion to Extend Deadlines and Continue." He argued that expert testimony was not necessary because in the postconviction relief proceeding "[Bracker's] assistance has been deemed to be ineffective." In an affidavit dated October 3, 2006, the date of the hearing on Bracker's motion to dismiss, Hanisch further asserted that Bracker had "failed to provide affective [sic] legal counsel in Iowa by his own admissions." In the alternative, he requested that the court extend his deadline for designating expert witnesses.

An unreported hearing was held on the motions on October 3, 2006. Following the hearing, the district court entered a ruling denying Hanisch's motion for additional time to designate expert witnesses and granting Bracker's motion to dismiss under section 668.11.

Hanisch filed a "Motion for Rehearing/Motion for Retrial/Motion to Recuse," which asserted that at the October 3, 2006 hearing, the district court judge "divulged certain opinions and information regarding the parties herein, and an offer was made by the Judge to recuse himself on the request of either party."[1] He contended that instead of ruling on the pending motions, the judge

[1] Hanisch's attorney attempted to email the judge after the October 3, 2006 hearing to request that he recuse himself and to inquire as to "whether [the judge] was going to do so upon . . . request, or if [he] needed . . . to file a motion so requesting." The judge did not receive the email because it was sent to an incorrect email address.

should have recused himself due to the statements he allegedly made at the hearing.

A hearing on Hanisch's motions was held on November 20, 2006, before the same judge who had presided at the October 3, 2006 hearing. At the hearing, Hanisch's attorney presented an affidavit to the district court detailing his recollection of the judge's statements at the October 3rd hearing. In the affidavit, Hanisch's attorney stated that after counsel finished their arguments, the judge stated he was familiar with both of the parties, believed one to be dishonest, and knew the other and frequently had lunch with him. Hanisch's attorney further stated that in response to a question the judge stated he did not know if he had ever represented Hanisch, but might have. He recalled that the judge "then offered to recuse himself at the request of either party."

Bracker's attorney recalled that the judge said he did "have lunch with Mr. Bracker," and that at another point, the judge said he was aware that one of the parties was dishonest. However, he believed the judge made those statements at the beginning of the hearing. He also disputed Hanisch's attorney's contention that the judge offered to recuse himself upon request. Instead, he recalled that the judge asked whether either party was going to file a motion to recuse.

The judge stated at the hearing that his "recollection of events. . . . is virtually 100 percent in accord with what [Bracker's attorney] said." He thereafter denied Hanisch's motions, stating, "The fact that [Hanisch] has not designated any expert is clear and undisputed. The law was followed as it should have been. There is no impropriety or irregularity, and recusal is not warranted."

Hanisch appeals. He claims the district court judge abused his discretion in denying his motion to recuse. He further claims the district court erred in granting Bracker's motion to dismiss.

II. SCOPE AND STANDARDS OF REVIEW.

"We review a court's decision to recuse or not to recuse itself for an abuse of discretion." *Taylor v. State*, 632 N.W.2d 891, 893 (Iowa 2001). We likewise review the district court's decision on whether to extend the time allowed under Iowa Code section 668.11 to designate an expert witness for an abuse of discretion. *Donovan v. State*, 445 N.W.2d 763, 766 (Iowa 1989). An abuse of discretion is found when such discretion is exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

However, "[a] district court's order sustaining or overruling a motion to dismiss does not depend on the court's discretion." *Venard v. Winter*, 524 N.W.2d 163, 165 (Iowa 1994). "The ruling must rest on legal grounds and is subject to review by us" to determine whether the "court's ruling . . . was legally correct." *Id.* (citing Iowa R. App. P. 6.4).

III. MERITS.

A. Motion to Recuse.

According to the Iowa Code of Judicial Conduct, "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," such as where the "judge has a personal bias or prejudice concerning a party." Iowa Code of Judicial Conduct canon 3(C)(1)(a); *see also* Iowa Code § 602.1606(1) (stating a judge "is disqualified" if the judge "has a personal bias or prejudice concerning a party"). To be a disqualifying

factor, the bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *State v. Smith*, 282 N.W.2d 138, 142 (Iowa 1979). "The burden is on a party seeking recusal to establish the basis for it, and the determination is committed to the judge's discretion." *In re Marriage of Clinton*, 579 N.W.2d 835, 837 (Iowa Ct. App. 1998).

Hanisch also has a "duty to 'provide a record on appeal affirmatively disclosing the alleged error relied upon.'" *In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007) (citation omitted). "[W]here a party claims a judge made a remark requiring us to rule on the propriety of the remark, the remark should be contained in the record." *Id.* "If a party wants to appeal unreported remarks, that party needs to establish the record, . . . through a bill of exceptions under Iowa Rule of Civil Procedure 1.1001 or a statement of evidence under Iowa Rule of Appellate Procedure 6.10(3)." *Id.* at 363.

The October 3, 2006 hearing at which the district court judge allegedly made statements indicating a personal bias or prejudice towards the parties was not reported. Although Hanisch's counsel filed an affidavit regarding his recollection of the judge's statements, he did not file a bill of exceptions or a statement of evidence. Thus, while the judge's alleged statements at the hearing raise the issue of recusal, the lack of a record regarding those statements precludes us from deciding the issue. *Id.* at 362. We therefore turn to the final issue raised by Hanisch: whether the district court erred in granting Bracker's motion to dismiss.

B. Motion to Dismiss.

Hanisch initially claims the district court erred in granting the motion to dismiss, because he did not need to designate an expert witness in order to establish the standard of care in this case. "In a legal malpractice action, expert testimony upon the standard of care *is usually required*." *Crookham v. Riley*, 584 N.W.2d 258, 266 (Iowa 1998) (emphasis added). *But see Kubik v. Burk*, 540 N.W.2d 60, 64 (Iowa Ct. App. 1995) ("[E]xpert testimony that an attorney's conduct is negligent is necessary unless proof is so clear a trial court can rule as a matter of law that the professional failed to meet an applicable standard or the conduct claimed to be negligent is so clear it can be recognized or inferred by a person who is not an attorney."). Hanisch argues that expert testimony was not necessary here due to our finding in his appeal from his postconviction relief proceeding that Bracker provided ineffective assistance of counsel. *See Hanisch v. State*, No. 02-1011 (Iowa Ct. App. Aug. 27, 2003). He asserts that finding and Bracker's admissions in the postconviction relief proceeding that he provided Hanisch with ineffective assistance "should certainly be considered *evidence* of the standard herein and that the Court had concluded that there was a violation thereof." (Emphasis added.)

Iowa Code section 668.11 provides, in relevant part:

> 1. A party in a professional liability case . . . *who intends to call an expert witness of their own selection*, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:
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> a. The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause and not ex parte extends the time of disclosure.
>
> . . . .
>
> 2. If a party fails to disclose an expert . . . the expert shall be prohibited from testifying in the action unless leave for the expert's testimony is given by the court for good cause shown.

(Emphasis added). Both the above-emphasized language from *Crookham*, 584 N.W.2d at 266, and that from section 668.11(1)(a) suggest that in some cases involving claims of professional negligence an expert witness may not be required. "[N]othing in section 668.11 requires a dismissal of any action for a party's failure to designate experts. The only penalty the section spells out is that the undesignated or late designated experts cannot testify." *Venard*, 524 N.W.2d at 168. In a case involving alleged dental negligence we noted that "the overwhelming weight of authority holds . . . that extrajudicial admissions can supply the necessary expert testimony in malpractice cases," and held that "extra judicial statements can constitute the direct expert testimony needed to show malpractice." *Hill v. McCartney*, 590 N.W.2d 52, 57 (Iowa Ct. App. 1998).

Hanisch has at all relevant times asserted that Bracker has made admissions rendering it unnecessary for Hanisch to call an expert witness at trial. Depending upon the nature and content of any admissions made by Bracker, Hanisch may not need to designate an expert witness to support his claim of legal malpractice. *See, e.g., Oswald v. LeGrand*, 453 N.W.2d 634, 638-40 (Iowa 1990) (holding, in a medical malpractice case, that the district court erred in granting summary judgment as to claims the plaintiffs might prove through the defendant's own testimony). The motion and resistance before the district court did not present a situation conclusively demonstrating that Hanisch needed an expert witness to support his claim. We conclude the district court thus erred in sustaining Bracker's motion to dismiss.[2] We therefore reverse the court's

[2] We need not and do not address the question of whether our previous determination that Bracker rendered ineffective assistance of counsel in a criminal case would be

dismissal of Hanisch's petition and remand for further proceedings not inconsistent with this opinion.

As part of his claim that the district court erred in dismissing his petition Hanisch claims, in the alternative, that the court abused its discretion in denying his motion for extension of time to designate an expert witness. Because this issue may arise on remand, we choose to address it.

"Good cause [for an extension of time to designate experts] under section 668.11 must be 'more than an excuse, a plea, apology, extenuation, or some justification for the resulting effect.'" *Thomas v. Fellows*, 456 N.W.2d 170, 172 (Iowa 1990) (citation omitted). Instead, in order to establish good cause to extend the time of disclosure, the movant must show a "sound, effective, truthful reason" for the delay. *Donovan*, 445 N.W.2d at 766.

If Hanisch needs an expert to support his claim of malpractice he was required to designate his expert witnesses by May 31, 2006, pursuant to the scheduling order entered in this case. He requested an extension of time on May 30, but the district court did not issue a ruling on that request. Hanisch had still not designated an expert witness by the October 3, 2006 hearing on Bracker's motion to dismiss. At the time of the hearing, the case had been on file for more than a year. Hanisch did not advance any reason for his substantial delay in designating an expert witness, other than his argument that expert testimony was not necessary. We conclude the district court did not abuse its broad discretion in denying his motion for extension of time to designate expert witnesses. *See, e.g., id.* (finding the court did not abuse its discretion in refusing to extend time to

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admissible, or if admissible, would be sufficient to submit Hanisch's claim in this case to a fact finder.

designate expert witnesses where the plaintiff had conducted no discovery and the deadline had run several months previously).

IV. CONCLUSION.

Although the district court judge's alleged statements at the unreported hearing on Bracker's motion to dismiss raise the issue of recusal, the lack of a record regarding those statements precludes us from deciding the issue. The court erred in sustaining Bracker's motion to dismiss, as the record did not present a situation conclusively demonstrating that Hanisch needed an expert witness to support his claim. The district court did not abuse its discretion in denying Hanisch's motion for extension of time to designate expert witnesses. We reverse and remand for further proceedings.

REVERSED AND REMANDED.