IN THE COURT OF APPEALS OF IOWA

No. 9-104 / 08-0925
Filed April 8, 2009

JOHN MCALLISTER and MARIE MCALLISTER,
Plaintiffs-Appellants,

vs.

MICHAEL M. PEDERSEN and LARRY J. COHRT,
Defendants-Appellees.

Appeal from the Iowa District Court for Howard County, Margaret L. Lingreen, Judge.

Plaintiffs appeal the district court order granting the defendants' motions for summary judgment. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.C., Cedar Rapids, for appellants.

James R. Hellman of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellee-Pedersen.

Larry J. Cohrt of L.J. Cohrt Law Firm, Waterloo, pro se.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ.

SACKETT, C.J.

John and Marie McAllister appeal from a ruling on summary judgment dismissing their legal malpractice action against Michael M. Pedersen and Larry J. Cohrt. The district court in dismissing the claim found there was no evidence to establish liability in the absence of expert testimony establishing a standard of care. The McAllisters contend expert testimony is not necessary given admissions of Pedersen and Cohrt in their deposition testimony and in their briefs. We affirm.

SCOPE OF REVIEW. Summary judgment is proper only when the entire record before the court shows there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Vande Kop v. McGill*, 528 N.W.2d 609, 611 (Iowa 1995); *Downs v. A & H Constr., Ltd.*, 481 N.W.2d 520, 522 (Iowa 1992); *Hike v. Hall*, 427 N.W.2d 158, 159 (Iowa 1988). In determining whether the district court appropriately granted summary judgment, we review for errors at law. *See* Iowa R. App. P. 6.4.

BACKGROUND AND PROCEEDINGS. Pedersen represented the McAllisters when the McAllisters were sued on July 3, 2003, by First Southeast Bank (Southeast) seeking judgment on four promissory notes and foreclosure of a mortgage executed by the McAllisters between 1998 and 2000. Southeast filed a motion for summary judgment on March 18, 2004. Pedersen, on behalf of the McAllisters, filed a resistance to the motion stating that despite numerous requests, Southeast had not furnished the McAllisters with an accounting documenting the amount owed and that amount was in dispute. The resistance

was supported by an affidavit of John McAllister stating that he had ascertained discrepancies in Southeast's claims of amounts due and that since Southeast had not itemized the notes, he could not compute an accurate accounting. John also stated that he had signed a number of notes at Southeast and because of Southeast's practices of not identifying which notes were paid and how his payments were applied, some of the notes were paid more than once, notes were generated where no proceeds were applied for his benefit, and payments he made were applied to notes for which he was not liable. He also asserted his situation with Southeast was entwined with those of his sons and no complete accounting could be generated without examining the Southeast records. John further stated a certified public accountant who was his agent went to Southeast to examine the records and despite Southeast having releases of information executed by his sons and their spouses, Southeast refused to permit the certified public accountant to examine the records.

Southeast Vice President Judith Johnson filed a supplemental affidavit to support Southeast's summary judgment motion. The affidavit stated the McAllisters for the past few years had made vague complaints about the amount of their debt but never made a specific allegation. She further related that McAllister brought an action against Granger State Bank and Southeast, as successor in interest of Granger State Bank, for an accounting of the McAllisters' debts owed to Southeast. In addition, she stated that the McAllisters ignored Southeast's attempts to open discussions from July of 2003 until January of 2004 when Southeast invited the McAllisters, their attorney, and accountant to review

bank records and catalog their concerns and the McAllisters agreed. She then stated that the McAllisters' accountant, Jeff Thelen, visited Southeast's office for several hours and reviewed the files of the McAllisters and their sons. Thelen told Southeast he might want more bank statements and would request them in writing in a day or two. She further stated on March 30, 2004, and April 5, 2004, Thelen requested more records, which were sent to him on April 5, 2004.

Southeast's motion for summary judgment came on for hearing on April 12, 2004. Cohrt, standing in for Pedersen, appeared. The court found no genuine issue of material fact noting that while the McAllisters raised generic allegations disputing Southeast's proof, the McAllisters set forth no specific facts to support their general allegations.

Appeal was taken from the summary judgment. The case was assigned to this court. In *First Southeast Bank v. McAllister*, No. 04-1757 (Iowa Ct. App. June 15, 2005), we found that Southeast's motion for summary judgment was properly supported and the McAllisters' resistance to the motion was insufficient to avoid summary judgment. We noted that the McAllisters had never filed or served an answer denying their execution or delivery of the four notes and the mortgage at issue. We further found that the McAllisters' affidavit did not identify any notes thought to be a problem and did not address specific instances of alleged deceit or specific mistakes by Southeast, nor did McAllister allege fraud or mistake in connection with the notes. We concluded the district court was correct in sustaining the motion for summary judgment.

The McAllisters also claimed in the appeal the district court erred in not granting their request for a delayed ruling pursuant to Iowa Rule of Civil Procedure 1.981(6).[1] We found that error was not preserved on that issue and did not address it. This holding appears to have ultimately formed the basis for the McAllisters' suit against Pedersen and Cohrt which is the subject of this appeal.

The suit against the attorneys was filed on January 5, 2007. It alleged that Pedersen was negligent in not seeking additional time to resist the motion for summary judgment and in not presenting a written statement of John McAllister to the court. It alleged Cohrt was negligent in advising John McAllister not to file a written statement explaining the reasons he did not have an expert opinion (apparently from his accountant). The attorneys both filed answers. The McAllisters designated as their expert witnesses Joseph A. Peiffer, Bruce Erusha, Lewis M. Churbuck, Christopher O'Donohue, and John Titler.

Pedersen and Cohrt filed the motions for summary judgment that led to this appeal. Pedersen contended that the McAllisters filed a designation of expert witnesses naming five attorneys, one of whom is deceased, to testify on their behalf. He further alleged that the other four attorneys, Joseph Peiffer, Bruce Erusha, Christopher O'Donohoe, and John Titler, all signed affidavits

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[1] Iowa Rule of Civil Procedure 1.981(6) provides:

> *When affidavits are unavailable*. Should it appear from the affidavits of a party opposing the motion that the party for reasons stated cannot present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

stating they were not familiar with the facts of the foreclosure action and had not formulated any opinions regarding the applicable standard of care, or whether Pedersen and Cohrt violated the standard of care in their representation of the McAllisters.

Pedersen's statement of undisputed facts to support his motion for summary judgment also related that Pedersen contacted the accountant, Jeff Thelen. Thelen told Pedersen he had been to Southeast for an audit and, although the report was not complete, it did not appear the McAllisters' complaints were founded or if they were, any discrepancies would be minor. Thelen also related to Pedersen that John McAllister was aware of the findings but had tried to convince Thelen that Thelen was wrong. Pedersen also contended at the time both attorneys had serious concerns about John McAllister's credibility and the implications of John giving a false affidavit as John had given the attorneys inconsistent versions of his complaints against Southeast. Pedersen stated for this and other reasons explained in the statement of undisputed facts, he did not believe it would be helpful to seek an affidavit from the accounting firm to resist the summary judgment motion.

Cohrt also filed a motion for summary judgment. The McAllisters' claim against Cohrt was based on his advice to John McAllister to not file a written statement explaining why an expert opinion was not being presented at the hearing and Cohrt's failure to preserve error by not having a record made of his alleged request for additional time at the hearing.

ANALYSIS. We first address the McAllisters' claim on appeal that their defense against Southeast was harmed when they were unable to obtain a delayed ruling pursuant to Iowa Rule of Civil Procedure 1.981(6). Whether this was the result of Pedersen's failing to request it, or Cohrt's failing to preserve the record on a request if made, the issue is the same—was there a breach of the attorneys' duty to the McAllisters?

To establish a prima facie claim of legal malpractice a plaintiff must produce substantial evidence showing (1) the existence of an attorney-client relationship giving rise to a duty, (2) the attorney either by an act or a failure to act, breached that duty, (3) the attorney's breach of duty proximately caused injury to the plaintiff, and (4) the plaintiff sustained actual injury, loss, or damage. *See Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997).

The focus here is on breach of duty. An attorney breaches the duty of care owed to a client when the attorney fails 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]." *Vande Kop*, 528 N.W.2d at 611-12. There is no expert testimony that the attorneys breached a duty in failing to make the motion or in failing to preserve error on the issue. Expert 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. *Benton v. Nelsen*, 502 N.W.2d 288, 290 (Iowa Ct. App. 1993) (citing *Martinson Mfg. Co.*

v. Seery, 351 N.W.2d 772, 775 (Iowa 1984); *Baker v. Beal*, 225 N.W.2d 106, 112 (Iowa 1975); *Koeller v. Reynolds*, 344 N.W.2d 556, 561 (Iowa Ct. App. 1983)). We cannot say from the material before us that as a matter of law Pedersen and Cohrt failed to meet an applicable standard, nor can we say that their conduct which is claimed to be negligent is so clear it can be recognized or inferred by a person who is not an attorney. *See Kubik v. Burk*, 540 N.W.2d 60, 64 (Iowa Ct. App. 1995). The fact a motion can be made does not alone establish an attorney is negligent in not making it. Whether not making the motion is negligent can only be determined by considering the facts and circumstances of the case. Expert testimony was needed to show that Pedersen and Cohrt breached their duty to the McAllisters by not requesting a continuance under rule 1.981(6) or by not making a record of such request, or by not supplementing the record in the Southeast action with a statement by John McAllister explaining why there was no accountant's testimony. The district court did not err in sustaining Pedersen's and Cohrt's motions for summary judgment when such expert testimony was absent from the record.

AFFIRMED.