2019 IL App (2d) 181005-U
No. 2-18-1005
Order filed June 21, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WILLIAM F. SCHMID, Plaintiff-Appellant, v. WILLIAM A. FEDA and McNAMEE and MAHONEY, LTD., Defendants-Appellees, (Robert J. Krupp and The Law Offices of Robert J. Krupp, Defendants).	)	Appeal from the Circuit Court of Kane County. No. 15-L-395 Honorable James R. Murphy, Judge, Presiding

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Birkett and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: As the plaintiff could not prove his malpractice case without an expert, and as the trial court did not abuse its discretion in not allowing the plaintiff additional time to disclose an expert, summary judgment in the defendants' favor was proper.

¶ 2 The defendant, William Feda, represented the plaintiff, William Schmid, in Schmid's marriage dissolution proceedings. Following the divorce, Schmid filed a legal malpractice action against Feda and his law firm, McNamee & Mahoney (McNamee), asserting that Feda's representation of him was unreasonable because Feda failed to call two experts that would have

bolstered his case and weakened that of his former wife. The circuit court of Kane County granted Feda and McNamee summary judgment on Schmid's malpractice complaint. Schmid appeals from that order. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 20, 2009, Karla Schmid, the plaintiff's former wife, filed for divorce. Thereafter, Schmid hired numerous attorneys to represent him in the divorce proceedings. On January 12, 2012, he hired Feda to represent him. A trial was conducted on the divorce petition over six days, beginning on February 7, 2012, and ending on October 3, 2012. Two of the issues at trial were (1) Schmid's unemployment and his ability to pay maintenance and (2) Karla's health and her ability to work.

¶ 5 On November 15, 2012, the divorce court issued its judgment. As relevant here, it found that Schmid's attempts to secure full-time employment during the previous year were "half-hearted," and that Schmid was able to earn substantial income from future employment. The divorce court also found that Karla was not presently capable of earning significant income due to her poor health and her lack of any employment experience during the marriage. The divorce court therefore ordered Schmid to pay Karla maintenance in the amount of $1,500 per month, or 40% of his gross income from employment, whichever was greater.

¶ 6 On February 22, 2013, Schmid filed a timely notice of appeal. He retained attorney Robert Krupp to prosecute that appeal. However, Schmid's appeal was ultimately dismissed for want of prosecution.

¶ 7 On November 14, 2014, Schmid filed a legal malpractice against Feda, McNamee, and Krupp.[1] Schmid alleged that Feda was negligent because he: (1) failed to conduct the necessary

[1] Schmid and Krupp ultimately settled, and Krupp is not a party to this appeal.

discovery in order to ascertain the extent of Karla's medical condition and her ability to work and (2) failed to present the necessary evidence to demonstrate that Schmid was making a concerted effort to obtain work but was unable to do so because of his age and economic conditions. Schmid alleged that McNamee was vicariously liable for Feda's negligence.

¶ 8 The parties conducted discovery from December 3, 2015, through April 12, 2018.

¶ 9 On May 16, 2018, Feda and McNamee filed a motion for summary judgment. Feda and McNamee asserted that the Schmid's primary complaint in his lawsuit was that Feda was negligent for failing to retain experts who would opine that: (1) Schmid could not find a job in the coal industry because President Barack Obama ruined the economy; and (2) Schmid's ex-wife was faking her medical conditions. Feda and McNamee argued that the decision not to retain employment and medical experts was protected by the judgmental immunity doctrine. Further, Feda and McNamee maintained that even if Feda should have retained those experts, Schmid could not prove that the absence of those opinions was the proximate cause of the divorce court's judgment.

¶ 10 On June 20, 2018, Schmid filed a response in opposition to the motion for summary judgment. He asserted that summary judgment was inappropriate because (1) Feda was not protected by the judgmental immunity doctrine and (2) the element of proximate cause had been established.

¶ 11 On July 12, 2018, the trial court conducted a hearing on the motion. At the hearing, Schmid first raised the issue that the motion for summary judgment was premature because the trial court had not yet set a date for the disclosure of expert witnesses. Schmid acknowledged that he did not raise this issue in his response to the motion for summary judgment. At the close

of the hearing, the trial court granted the motion for summary judgment. The trial court explained:

> "There's no legal malpractice expert testimony for plaintiff's position. There is now at argument an assertion that [it] is premature to get that but there is nothing in the response to say that it's premature and that [Schmid] need[s] to have additional time. This was the time to do it.
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> There's no material question of fact and there is *** judgment immunity that applies and there's no proximate cause established. *** There is no case by plaintiff and an expert, if one was sought, should have been sought and [Supreme Court] Rule 191(b) [eff. Jan. 4, 2013] should have been used if there was going to be additional testimony needed to defend against the motion for summary judgment."

¶ 12 On August 27, 2018, Schmid filed a motion to reconsider, contending that he should have been given more time to disclose an expert witness. He did not disclose any expert in his motion. On November 8, 2018, the trial court denied the motion. Schmid thereafter filed a timely notice of appeal.

¶ 13 II. ANALYSIS

¶ 14 On appeal, Schmid argues that the trial court erred in granting the motion for summary judgment because it did so without first allowing him time to disclose expert opinions that Feda had breached the applicable standard of care. Further, Schmid contends that summary judgment was improper because there were still outstanding factual questions.

¶ 15 The purpose of a motion for summary judgment is to determine whether a genuine issue of material fact exists (*People ex rel. Barsanti v. Scarpelli*, 371 Ill. App. 3d 226, 231 (2007)),

and such a motion should be granted only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (735 ILCS 5/2-1005(c) (West 2018)). In determining the existence of a genuine issue of material fact, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Coleman v. Provena Hospitals*, 2018 Il App (2d) 170313, ¶ 15. Summary judgment may be granted only where the facts are susceptible to a single reasonable inference. *Consolino v. Thompson*, 127 Ill. App. 3d 31, 33 (1984). An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment is incorrect as a matter of law. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997). We review *de novo* the trial court's grant of a motion for summary judgment. *AUI Construction Group, LLC v. Vaessen*, 2016 IL App (2d) 160009, ¶ 16.

¶ 16 "To state a cause of action for legal malpractice, the plaintiff must allege facts to establish (1) the defendant attorney owed the plaintiff client a duty of due care arising from an attorney-client relationship, (2) the attorney breached that duty, (3) the client suffered an injury in the form of actual damages, and (4) the actual damages resulted as a proximate cause of the breach." *Nelson v. Quarles and Brady, LLP*, 2013 IL App (1st) 123122, ¶ 28. A legal malpractice suit is by its nature dependent upon a predicate lawsuit. *Claire Associates v. Pontikes*, 151 Ill. App. 3d 116, 122 (1986). Thus, a legal malpractice claim presents a "case within a case." *Id.* "[N]o malpractice exists unless counsel's negligence has resulted in the loss of an underlying cause of action, or the loss of a meritorious defense if the attorney was defending in the underlying suit." *Id.*

¶ 17 Attorneys are liable to their clients for damages in malpractice actions only when they fail to exercise a reasonable degree of care and skill. *Barth v. Reagan*, 139 Ill. 2d 399, 407 (1990). The law distinguishes between errors of negligence and those of mistaken judgment. *Id.* The standard of care against which the attorney defendant's conduct will be measured must generally be established through expert testimony. *Id.* As such, the failure to present expert testimony is usually fatal to a plaintiff's legal malpractice action. *Id.* However, our Illinois courts have recognized that where the common knowledge or experience of lay persons is extensive enough to recognize or infer negligence from the facts, or where an attorney's negligence is so grossly apparent that a lay person would have no difficulty in appraising it, expert testimony as to the applicable standard of care is not required. *Id.*

¶ 18 Here, Schmid argues that Feda was negligent because he failed to call two expert witnesses whose testimony at Schmid's divorce trial would have caused the divorce court to lower the amount of maintenance that it awarded to Schmid's former wife. We cannot say that Feda's failure to call certain witnesses was negligence so grossly apparent that a lay person would have had no difficulty recognizing it. Indeed, Schmid does not even argue that Feda's alleged negligence would have been grossly apparent to a lay person. Thus, in order to establish that Feda's actions were negligent, Schmid needed to present expert testimony in his malpractice action that Feda's actions were indeed negligent. His failure to do so is fatal to his action. See *id.*

¶ 19 Schmid's only hope, therefore, is if we determine that the trial court erred in not allowing him sufficient time to retain an expert. Generally, a trial court's rulings on discovery matters will not be disturbed on appeal absent a manifest abuse of discretion. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 54 (2002). Where a plaintiff has ample time to disclose an expert before a hearing

on the defendant's motion for summary judgment but fails to so, no abuse of discretion will be found. See *Smith v. Bhattacharya*, 2014 IL App (2d) 130891, ¶ 21.

¶ 20 In *Smith*, the plaintiff filed a medical malpractice action based on the defendants' alleged negligence that occurred in 2007. *Id.* ¶ 3. In 2012, the trial court ordered the plaintiff to disclose his expert witnesses. *Id.* ¶ 6. He did not disclose any. *Id.* ¶ 7. On May 29, 2013, the defendants filed a motion for summary judgment. *Id.* At a subsequent hearing, the plaintiff indicated that he had scheduled a meeting with an expert on June 21, 2013. *Id.* The trial court then set a response date of June 26, 2013, and a hearing on the summary judgment motion for July 30, 2013. *Id.* The trial court explained that it had done so to allow the plaintiff the opportunity to present an expert in his response. *Id.*

¶ 21 On July 30, 2013, the plaintiff still had not disclosed an expert witness and had not presented any expert evidence in response to the motion for summary judgment. *Id.* ¶ 9. The trial court indicated that if the plaintiff had produced an affidavit stating that he had an expert, it would have probably granted him additional time. *Id.* However, since years had passed since the alleged negligence and because the plaintiff had missed multiple opportunities to disclose an expert, the trial court granted the defendants' motion for summary judgment. *Id.*

¶ 22 On appeal, this court affirmed. *Id.* ¶ 24. We explained that because the plaintiff had ample opportunities to locate an expert but had failed to do so, summary judgment was appropriate. *Id.* ¶ 21.

¶ 23 Here, as in *Smith*: (1) six years had passed since the alleged negligence and the hearing on the motion for summary judgment; (2) discovery was open for multiple years but no plaintiff's expert was ever disclosed; and (3) the plaintiff was unable to prove his malpractice case without any expert testimony. Accordingly, as in *Smith*, we hold that because Schmid had

ample time to disclose an expert but failed to do so, the trial court did not abuse its discretion in not allowing Schmid more time before ruling on Feda's motion for summary judgment. *Id.*

¶ 24 In so ruling, we find Schmid's reliance on *Besco v. Henslee, Monek & Henslee*, 297 Ill. App. 3d 778, 783 (1998), *Gelsomino v. Gorov*, 149 Ill. App. 3d 809, 815 (1986), and *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 690 (2000), to be misplaced. In each of those cases, the plaintiff disclosed an expert. See *Besco*, 297 Ill. App. 3d at 784 (after defendant filed motion to bar plaintiffs' expert disclosure, plaintiffs filed a disclosure statement naming their expert witness); *Gelsomino*, 149 Ill. App. 3d at 812 (plaintiffs presented their expert witnesses' affidavits upon filing their motion for reconsideration of the trial court's order granting summary judgment); *Williams*, 316 Ill. App. 3d at 694 (same). As noted above, Schmid never disclosed an expert in this case.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 27 Affirmed.