IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Mark R. Nowalski,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19 L 7664
	)	
Martay & Martay and David W. Martay,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Expert testimony in a legal malpractice action is not needed if jurors' knowledge or experience can recognize or infer negligence from the facts or if an attorney's negligence is so grossly apparent that jurors would have no difficulty in appraising it. In this case, it is reasonable to conclude that jurors may be able to appraise the defendants' alleged negligence in preparing a workers' compensation settlement. The defendants' summary judgment motion must, therefore, be denied.

Facts

Mark Nowalski sued David Martay and his law firm, Martay & Martay (together "Martay"), for legal malpractice arising out of Martay's representation of Nowalski in a workers' compensation claim. Nowalski claims, among other things, that Martay failed to: (1) proceed to a hearing before the commission that would have yielded a better result than the settlement Martay convinced Nowalski to accept; (2) calculate Nowalski's settlement based on the life table commonly used in workers' compensation claims, denying Nowalski substantial monthly payments and a lump-sum payment; (3) draft the necessary documents for a Medicare set aside and negotiate directly with the Center for Medicare and

Medicaid Services, resulting in Nowalski having to pay extraordinarily high prices for non-Medicare-approved medications; (4) investigate all the medications to be covered by the Medicare set aside; (5) negotiate a suitable settlement; and (6) recognize that some non-Medicare-approved medications are more effective than approved medications, resulting in Nowalski paying hundreds of dollars more for his prescriptions.

On February 22, 2021, this Court entered an order barring Nowalski from naming Supreme Court Rule 213(f)(3) legal expert witnesses based on his excessive delays and repeated failures to comply with this court's disclosure orders. On March 15, 2021, Martay filed a summary judgment motion, arguing that Nowalski's inability to name a legal expert witness makes it impossible for him to prove his case. Nowalski responded that he does not need an expert witness to prove his legal malpractice claims against Martay.

Analysis

The Code of Civil Procedure authorizes the issuance of summary judgment "if 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. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Ed. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). A defendant moving for summary judgment may disprove a plaintiff's case by showing the plaintiff lacks sufficient evidence to prove an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only if the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate that he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day*

Spas, Inc., 2012 IL App (2d) 110624, ¶ 33. A plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.*

Martay argues that Nowalski cannot meet his burden of establishing each necessary element to a legal malpractice cause of action. To state a claim for legal malpractice, a plaintiff must prove: "(1) the defendant attorneys owed the plaintiff a duty of due care arising from the attorney-client relationship; (2) the defendants breached that duty; and (3) as a direct and proximate result of that breach, the plaintiff suffered injury." *Stevens v. McGuireWoods LLP*, 2015 IL 118652, ¶ 12 (citing *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 306 (2005)). Martay correctly points out that, with respect to the breach of duty, the standard of care against which an attorney's conduct is measured must generally be established through expert testimony. *Barth v. Reagan*, 139 Ill. 2d 399, 407 (1990). Nowalski counters, however, by identifying the "common knowledge" exception to the need for expert testimony. *Id.* at 406. As *Barth* explains:

> 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. at 407 (citing cases).

Martay argues that workers' compensation litigation is a specialized practice area and the negligence alleged is not so obvious or grossly apparent that a layperson would be able to conclude that Martay breached the standard of care absent expert testimony. In response, Nowalski argues that a layperson would easily be able to understand that Martay should have, at a minimum, inquired into and negotiated the future cost of medications into a settlement sum. Nowalski has the better argument.

Martay's argument presumes Nowalski will be unable to present a full and complete recitation of the facts on which the jury will decide whether Martay committed legal malpractice. That presumption may ultimately prove to be true, and Nowalski certainly has the burden of proof, yet, as noted above, all inferences are to be drawn in favor of the non-moving party. It remains to be seen what evidence Nowalski presents and how clearly he presents it to the jury. If he is unable to do so, it will be his own fault for having violated numerous court orders to name a Rule 213(f)(3) legal expert witness. Until that time, however, it is reasonable to infer that Nowalski can meet his burden by presenting the jury with evidence from which to conclude that Martay committed legal malpractice.

Conclusion

For the reasons presented above, it is ordered that:

The summary judgment motion is denied.

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John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUN 08 2021

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