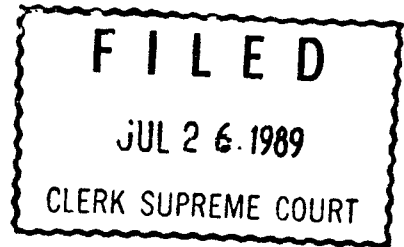


IN THE COURT OF APPEALS OF IOWA



EVERETT LINDER,)
Plaintiff-Appellant,)
vs.)
DOUGLAS E. JOHNSTON,)
Defendant-Appellee.)

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9-160
88-710

Appeal from the Iowa District Court for Muscatine County (C 4037-287), Edward B. de Silva, Jr., Judge.

Plaintiff appeals from the district court's ruling in a legal malpractice suit. **AFFIRMED.**

John O. Moeller, Davenport, and Clemens Erdahl, Iowa City, for the plaintiff-appellant.

David W. Newell, Muscatine, for the defendant-appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

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This is plaintiff-appellant Everett Linder's appeal in a legal malpractice action tried to the district court which ruled defendant-appellee Douglas E. Johnston's negligent representation of Mr. Linder during a 1983 dissolution proceeding was not the proximate cause of Mr. Linder's damages. We affirm.

In 1983 Mr. Linder employed Mr. Johnston to represent him in a dissolution action. On May 11, 1983, the petition was served on Mr. Linder's wife Anna. The decree was filed on August 9, 1983, before the statutory 90-day waiting period expired. The decree adopted a settlement agreement between Mr. Linder and Anna which provided her with a \$12,000 property settlement and no alimony. On November 21, 1983, Anna filed an application to modify the settlement contending it was obtained as a result of duress, coercion, and fraud by Mr. Linder who misrepresented the value of the assets and convinced her she did not need an attorney. Anna later filed a motion for summary judgment seeking to set aside the 1983 decree based on the violation of the jurisdictional waiting period. The district court granted this motion vacating the original decree. After a hearing the court granted Anna \$400 a month alimony in addition to the property settlement she had already received.

In this legal malpractice action, the district court ruled Mr. Johnston was negligent in failing to determine the presence of the expiration of the 90-days jurisdictional requirement. The court concluded, however, the proximate cause of Mr. Linder's damages, i.e., the additional \$400 a month alimony, was the nature of the equitable facts presented in the dissolution hearing which supported the award.

Our scope of review is for correction of errors at law, and the district court's findings of fact have the effect of a special verdict. Iowa R. App. P. 4; Whiteaker v. State, 382 N.W.2d 112, 114 (Iowa 1986). In legal malpractice cases the plaintiff has the burden to show: (1) existence of an attorney-client relationship giving rise to a duty, (2) the attorney, either by an act or failure to act, violated or breached that duty, (3) the attorney's breach of duty proximately caused injury to the client, and (4) the client sustained actual injury, loss or damage. Burke v. Roberson, 417 N.W.2d 209, 211 (Iowa 1987) (citing D. Meiselman, Attorney Malpractice: Law and Procedure, § 3.1, at 39-40 (1980)). A showing of proximate cause requires the plaintiff to establish the injury or damage would not have occurred had it not been for some act or omission on the part of the attorney. Burke at 211. In other words, but for the negligence of the lawyer, the client's cause of action or defense in the underlying

action would have been successful. Id. The trial court concluded and we agree the additional award of alimony to Anna was due to the equities surrounding the parties' dissolution and not caused by the attorney's failure to establish the jurisdictional requirement of the 90-day waiting period. But for this negligence the trial court was still free to not accept a settlement agreement of the parties. In re Marriage of Shima, 360 N.W.2d 827, 829 (Iowa 1985). We affirm the trial court's conclusion the burden to prove proximate cause was not carried in this case.

AFFIRMED.