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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-62 / 90-655

MOUSSA NASSAR and **MUHAMMAD NASSAR,**

Plaintiffs-Appellants,

105

vs.

ALFREDO PARRISH,

Defendant-Appellee.

Appeal from the Iowa District Court for Webster County, Allan L. Goode, Judge.

Plaintiffs appeal a jury verdict for defendant in a legal malpractice action. **AFFIRMED.**

Kevin A. Fors and Black Parker of Parker & Fors, Fort Dodge, for appellants.

Max Exline, Artis Reis, and Alfredo Parrish of Parrish, Kruidenier & Exline, Des Moines, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ. Habhab, J., takes no part.

SACKETT, J.

This appeal follows a jury verdict for defendant lawyer in a legal malpractice action.

Defendant-appellee Alfredo Parrish served as attorney for plaintiffs-appellants Moussa Nassar and Moussa's minor son Muhammad Nassar in a claim for injuries Muhammad received when assaulted at Charlie Brown's Cafe in Fort Dodge. Defendant filed a petition in plaintiffs' behalf against Charlie Brown's, claiming damages under negligence and dram shop theories. Charlie Brown's dram shop insurer offered to settle the dram shop claim for $1,000. With defendant's advice, plaintiff accepted the settlement and gave Charlie Brown's a covenant not to sue. The negligence action ultimately was tried to a jury and a verdict of $90,000 entered. On appeal, this court found the covenant was a bar to any further recovery and dismissed the case. The supreme court denied further review.

Plaintiffs filed suit against defendant for breach of contract and negligence. Defendant counterclaimed for unpaid legal fees, including fees for representing Moussa's other children on unrelated matters. The case was tried to a jury. The jury found defendant was not negligent. The jury returned a verdict for defendant on his counterclaim of $17,127.70.

Plaintiffs appeal. They contend (1) testimony by defendant's expert witness Nick Critelli should have been

excluded, (2) the trial court made a series of incorrect evidentiary rulings, (3) they established their case as a matter of law, (4) the trial should not have been bifurcated, and (5) they should have a new trial. We affirm the trial court.

I.

The plaintiffs' first contention is the trial court abused its discretion in allowing Nick Critelli, a Des Moines attorney, to testify as an expert witness for defendant because defendant failed to comply with discovery requirements.

Defendant was not in total compliance with discovery requirements in disclosing Critelli as an expert witness and disclosing his proposed testimony. Because of defendant's failures, at trial time plaintiffs had not had an opportunity to depose Critelli for discovery purposes. Plaintiffs were, however, provided that opportunity on the evening of the first day of trial. Critelli appeared as defendant's witness on the second day of trial.

On this issue, the trial court is granted considerable discretion. See generally Kendall/Hunt Pub. Co. v. Rowe, 424 N.W.2d 235, 242 (Iowa 1988); Sullivan v. Chicago & Northwest Transportation Co., 326 N.W.2d 320, 324 (Iowa 1982); Wernimont v. International Harvester Corp., 309 N.W.2d 137, 143 (Iowa App. 1981). Plaintiffs contend the trial court abused its discretion. Plaintiffs contend in

other cases similar behaviors have drawn sanctions. Plaintiffs also argue had they known Critelli's theories earlier, they would have sought an expert to discredit them. On oral argument, plaintiffs advanced they did not have time to adequately prepare for Critelli's deposition, and did not have adequate time to formulate the necessary objections to his testimony. At no time did plaintiffs seek a continuance.

Expert testimony on defendant's alleged negligence came from testimony given by Art Johnson and Critelli. Johnson, an experienced and well-recognized Fort Dodge attorney, testified in part:

> Q. From your review of the file, do you have an opinion as to whether or not the Defendant, Mr. Alfredo Parrish, while acting in the capacity of a lawyer for the Plaintiffs, Muhammad and Moussa Nassar in this cause and who was the Plaintiff in cause number 51201, which was the underlying cause, used such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of similar tasks undertaken by them? A. Yes, I do have such an opinion.
>
> Q. And what is that opinion? A. I find from my review of all various things I've told the jury about, that there was an utter failure on the part of counsel for the Plaintiffs in that case to use good judgment, to use good diligence, and to use such expertise and skill as any ordinary lawyer in this community at least and probably in the state of Iowa would possess and use under like circumstances when they were engaged in such activity as this. And that that, in my opinion, constitutes negligence, which I interpret -- interpolate it to mean malpractice.

And when asked about the Covenant Not to Sue, Johnson testified:

Q. Is there any special care that needs to be taken when executing a document such as this in regards to a single Defendant? A. Yes, and I think perhaps that people on the other side don't realize this. If you are going to have a single Defendant, such as you had in this case, Willie L. Smith, d/b/a Charlie Brown's Restaurant, execute any type of a document which in effect is going to do away with any claim which that Plaintiff has, you better be sure that you reserve and retain the right to pursue any other claims that might arise out of the same transaction as there was here.

Q. Was there anything in this document reserving such claim? A. None. And if you'll -- If you'll read the decision of the Court of Appeals, the Court makes specific mention of that fact.

Mr. Critelli testified on direct for the defendant in part as follows:

Q. And you certainly read the Court of Appeals opinion? A. Oh, yes, that's attached to the Petition for Further Review.

Q. And you read the determination by the Supreme Court to deny further review? A. Yes.

Q. From your review of these documents, did you formulate any opinion as to whether Mr. Parrish was negligent regarding the signing of the Covenant Not to Sue? A. Yes.

Q. And what opinion did you formulate? A. It was my opinion that at that time, Mr. Parrish's representation did not violate the standards of care that existed at the time and that he, accordingly, was not negligent.

Q. And in your opinion, if you had been faced with the same kind of situation at that time in 1984, would you or could you possibly have done the same thing that Mr. Parrish did? A. I would have done the same thing. I'd do it today if it wasn't for that opinion from the Court of Appeals.

Q. In your opinion, did the decision by the Court of Appeals in this case change what's required for the -- for an attorney to do when a Covenant Not to Sue is signed? A. I have a hard time with the Court of Appeals decision, trying to figure out

> exactly what they did decide, okay. What the bottom line is is that you've got the decision now. It came out in what, 1988.
>
> Q. Yes. A. And it tells you, you know, in this situation, don't do this. Well, you'd be a fool to do it now, okay. I'm -- As far as changing the law, yes, I think -- I don't want to get in a position where I'm sitting in judgment on the Court of Appeals, you know. I can only tell you what the practice was in the state, certainly my practice, when that Covenant Not to Sue was signed and what it would be today but for that decision.
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> Q. Now, the jurors heard Art Johnson from Fort Dodge here to testify a couple of hours ago. Mr. Johnson stated that absolutely in his opinion no attorney who was practicing diligently would have in 1984 allowed his client to sign this Covenant Not to Sue. Do you disagree with Mr. Johnson's opinion? A. Yes, I do.

Johnson and Critelli gave conflicting testimony. The area covered by their testimony was very limited and focused. Johnson's testimony was that defendant was clearly negligent in allowing his client to give the requested covenant without a reservation of the right to sue on the negligence claim. Critelli's testimony was defendant was not negligent in allowing his client to give the covenant.

Plaintiffs were given the opportunity to depose attorney Critelli prior to his testimony. This was a straightforward legal issue on which plaintiffs' attorney also had expertise and could understand and interpret Critelli's testimony. Critelli's testimony was contrary to Johnson's. Any additional expert testimony contradicting Critelli's would have been cumulative to Johnson's. While

we agree with plaintiff that the trial court would have been within its discretion in not allowing Critelli to testify, that is not the issue. The issue is whether the trial court abused its discretion in allowing him to testify. We find the trial court did not. We affirm on this issue.

II.

Plaintiffs contend the trial court erred in the admission of certain testimony. Plaintiffs' first claim goes to testimony by defendant on direct examination. Defendant's counterclaim asked for attorney fees defending a criminal charge. Defendant's attorney asked defendant about any unusual or difficult aspect of the criminal case. The challenged testimony includes defendant's statements that in investigating the criminal charge he found facts indicating some of Moussa's children may have been involved in the crime. Defendant said part of a plea bargaining negotiation with the county attorney concerned Moussa's children. No plea bargain was ever reached. Defendant could not remember whether plaintiff Muhammad Nassar was one of the children involved. The defendant testified "one of the biggest complicating factors was Moussa's concern about the protection of his kids in hopes that they would not have criminal charges filed against them." Defendant testified he put in considerable time on the defense, to offer an adequate defense and to protect Moussa's family.

The plaintiffs argued the probative value of the testimony was outweighed by its prejudicial effect. The plaintiffs further argue this evidence went to discussions and potential plea bargains which were never reached and there were no subsequent charges brought against any of the children.

The trial court ruled defendant ought to be able to explain this because "it is relevant, probative and indeed is very important as to an explanation as to why he went to the extent he did in the defense of his client."

Defendant's counterclaim for legal fees was part of the lawsuit. Testimony as to what defendant did to earn his fees is relevant to his claim for fees. The trial court did not abuse its discretion on this issue.

Plaintiffs also argue certain objections to Critelli's testimony should have been sustained. Critelli was asked on redirect if a person who hasn't argued an appeal before the supreme court for fifteen years could give expert testimony about appellate work and whether an expert who hadn't handled a dram shop case for the last seven or eight years could qualify as an expert to give an opinion on the value of a dram shop case. Critelli answered both questions in the affirmative. This testimony was obviously intended to attack the expertise of Art Johnson who had not handled an appeal or dram shop case for a considerable period of time. We recognize Johnson had more than

adequate credentials to testify about the standard of care defendant should have exercised when giving of the covenant not to sue. Whether Johnson had personally handled an appeal or dram shop case had no real relevance to his expertise on the covenant not to sue issue. Plaintiffs' complaint is the questions were beyond the scope of the cross-examination. Plaintiffs' cross-examination addressed the background and experience of the experts. The questions clearly were within the scope of the cross-examination. See State v. Reynolds, 250 N.W.2d 440, 441 (Iowa 1977).

Plaintiffs next contend defendant's attorney should not have been allowed to ask Mr. Critelli "Would you say Mr. Parrish is more concerned with his clients than fraternizing with other members of the bar?" Plaintiffs contended at trial the question called for an opinion from Critelli that he had no basis to give. Plaintiffs also advanced the question called for Critelli to guess what defendant was thinking. The court overruled plaintiffs' objection. The witness answered yes. Plaintiffs now argue this testimony was calculated to play to the passions of the jury and there was no factual basis in the record for Mr. Critelli to have answered such a question. We question the relevance of this testimony, but we do not find plaintiffs' trial objection to this testimony to have merit. Critelli and defendant both practice law in Des

Moines. Critelli testified he is active in a number of bar related activities, and he has professional encounters with defendant. Critelli had a basis to testify as to his observations of how defendant fraternized with other lawyers and treated his client. We find no abuse of discretion.

Plaintiffs argue defendant should not have been allowed to enter untrue nonresponsive answers. The defendant during his testimony discussed a postconviction relief action where he represented Mr. Nassar. Defendant's attorney asked whether another attorney eventually took over the case. Defendant answered his firm was notified by Mr. Nassar they were ineffective and Kevin Fors wanted to take the job over and file an ineffective assistance of counsel claim against defendant's firm. Defendant said at that point he withdrew. Plaintiffs objected to this as being a nonresponsive answer and asked the objection precede the answer and the answer be stricken. The trial court overruled the objection. Plaintiffs contend this answer was not responsive. We reject this contention.

Plaintiffs also objected that testimony as to what happened after defendant withdrew from the postconviction relief proceeding was immaterial and would confuse the jury. This objection was also overruled. Plaintiffs argue this was error because the testimony was calculated to prejudice the jury against the plaintiffs' attorney.

Plaintiffs also contend the testimony was not true. Plaintiffs' attorney Fors advances he was not acquainted with Moussa Nassar until the court appointed him as attorney in the postconviction relief proceeding. He contends he was appointed in response to a motion filed by defendant to allow for an ineffective assistance review of the case. Fors contends Moussa could not have made such a statement concerning ineffective assistance of counsel since he never met him until after he was appointed on the postconviction relief. We find no basis for plaintiffs' argument. Plaintiffs could have introduced evidence at trial seeking to show defendant's testimony was not true. The jury could then have made a determination whether defendant was credible. We affirm on this issue.

III.

Plaintiffs next argue evidence of offers to settle the underlying action should not have been admitted into evidence. Defendant advanced an affirmative defense of plaintiff's contributory negligence. Defendant admits he was asked to explain the impact of the Covenant Not to Sue and Indemnity Agreement. Plaintiffs turned down offers on the $90,000 judgment against Charlie Brown's. Plaintiffs contend the trial court erred in finding the evidence was relevant on the issue of contributory negligence. The jury found no negligence on the part of defendant. Therefore, any error was harmless.

IV.

Plaintiffs contend the trial court erred in bifurcating the trial and in submitting the issue of collectibility of the claim against Charlie Brown's to the jury. The jury found no liability on the part of defendant. Therefore, the issue of collectibility of the judgment against Charlie Brown's did not need to be reached.

V.

The plaintiffs' last contention is the trial court erred in refusing to order a new trial. We disagree.

AFFIRMED.