IN THE COURT OF APPEALS OF IOWA

No. 0-006 / 98-1824
Filed February 23, 2000

FILED
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CLERK SUPREME COURT

THOMAS M. RICHMOND,
Plaintiff-Appellant,

vs.

MARY KENNEDY and JOHNSTON, POTTERFIELD & NATHANSON, Attorneys at Law,
Defendants-Appellees.

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Thomas Richmond appeals from the district court's order granting summary judgment in favor of the defendants in his action for attorney malpractice. **AFFIRMED.**

Richard H. Zimmermann of Zimmermann Law Office, Iowa City, for appellant.

C.A. Frerichs of Frerichs Law Office, P.C., Waterloo, for appellee - Mary Kennedy.

Gregory M. Lederer of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellee - Johnston, Potterfield & Nathanson.

Heard by Huitink, P.J., and Hecht, J., and Schlegel, S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

HECHT, J.

Thomas Richmond ("Richmond") appeals from the district court's order granting summary judgment in favor of the defendants, Mary Kennedy and Johnston, Potterfield & Nathanson, in his action for attorney malpractice. We affirm.

I. Factual Background and Proceedings. In the spring of 1995, Johnston, Potterfield & Nathanson ("law firm") employed Mary Kennedy ("Kennedy") as an attorney. Kennedy was appointed to represent Richmond in a Black Hawk County Juvenile Court case. At the time, Richmond was incarcerated at the Iowa Men's Penitentiary in Fort Madison, Iowa. Kennedy also represented several other inmates at the prison, including Rick Peeples ("Peeples") with whom she had an intimate relationship.

During the course of the representation, Richmond asked Kennedy if he could take her out to lunch when he was released from prison to thank her for the work she had done for him. Kennedy's answer was evasive, but the record does not indicate she took offense to the question. Several weeks later, Peeples summoned Richmond to his prison cell and told him to stay away from Kennedy because she was "his lady."

Thereafter, Richmond made several phone calls to Kennedy's office inquiring about papers she had promised but failed to send him. Approximately three weeks later, Peeples approached Richmond in the prison and told Richmond he had "pissed Mary Kennedy off" and he was going to get an "ass-whipping." Peeples then assaulted Richmond and caused him serious injury.

On April 2, 1997, Richmond filed this action alleging Kennedy, as agent and employee of the law firm, negligently breached her duty of confidentiality and placed him in imminent danger by divulging the content of attorney-client conversations to Peeples. Kennedy filed her answer on April 21, 1997, and the law firm answered on June 2, 1997. Richmond failed to certify an expert witness on liability within 180 days after the answers were filed pursuant to Iowa Code section 668.11(1)(a) (1997) and failed to seek an extension of time in which to designate an expert.

On December 31, 1997, the district court entered an order holding the matters Kennedy allegedly divulged to Peeples were not confidential communications. In its order, the district court also found the matters allegedly communicated by Richmond to Kennedy were not secrets.

On April 7, 1998, some 169 days after expiration of the deadline to certify experts, Richmond served supplemental discovery responses indicating his intention to call an expert witness to testify Kennedy's disclosures to Peeples constituted a violation of Kennedy's ethical duty to preserve the secrets of her client. Thereafter, both Kennedy and the law firm filed motions for summary judgment. On September 11, 1998, the district court concluded Richmond had failed to generate a genuine issue of material fact as to the alleged breach of duty by Kennedy and granted summary judgment in favor of both defendants.

II. Motion to Supplement Brief on Appeal. Richmond filed a motion to supplement his brief prior to oral argument. No objection was made. Counsel for

the law firm indicated during oral argument he did not wish to supplement his brief. This court sustained the motion during oral argument.

III. Standard of Review. Our review of a grant or denial of summary judgment is at law. Iowa R. App. P. 4; *Gabrilson v. Flynn*, 554 N.W.2d 267, 270 (Iowa 1996). Summary judgment is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Phipps v. IASD Health Servs Corp.*, 558 N.W.2d 198, 201 (Iowa 1997). We review the record in the light most favorable to the party against whom the summary judgment was granted. *Smith v. CRST Int'l, Inc.*, 553 N.W.2d 890, 893 (Iowa 1996); *Ruden v. Jenk*, 543 N.W.2d 605, 607 (Iowa 1996).

IV. Richmond's Failure to Timely Certify Expert. Richmond asserts a claim against a licensed professional. Iowa Code section 668.11 provides in relevant part:

> 1. A party in a professional liability case brought against a licensed professional pursuant to this chapter who intends to call an expert witness of their own selection, shall certify to the court and all other parties the expert's name, qualifications and the purpose for calling the expert within the following time period:
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> *a.* The plaintiff within one hundred eighty days of the defendant's answer unless the court for good cause not ex parte extends the time for disclosure.

Iowa Code § 668.11. Richmond clearly failed to certify a liability expert within the time allowed by the statute. He sought no extension of time for good cause to certify an expert. Though Richmond did, in his resistance to the motion for summary judgment, assert a good cause justification for his failure to timely certify an expert within 180 days of defendants' answers, the district court did not

make findings upon that specific claimed justification. We also find no indication in the record Richmond sought a ruling on his good cause claim in the district court by motion pursuant to Iowa Rule of Civil Procedure 179(b). A motion to enlarge or amend the district court's ruling is essential to preservation of error when the court fails to resolve an issue, claim, defense, or legal theory submitted to it for adjudication. *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984). We conclude Richmond did not preserve error on his contention good cause existed for his noncompliance with Iowa Code section 668.11.

We proceed then to determine whether Richmond's failure to timely certify a liability expert is fatal to his claim. Richmond contends expert testimony is not essential to establish either the standard of care or its breach because: (1) Iowa Code of Professional Responsibility DR 4-101[1] establishes the duty owed by Kennedy, and (2) Kennedy's breach is so obvious expert testimony is not required.

The Iowa Code of Professional Responsibility does not define standards of civil liability, but a violation of its provisions constitutes some evidence of

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[1] DR 4-101 reads, in relevant part:

> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of a client.
> (2) Use a confidence or secret of a client to the disadvantage of the client.
> . . . .

negligence. *Ruden,* 543 N.W.2d at 611. In a legal malpractice action, expert testimony regarding the standard of care is usually required. *Crookham v. Riley,* 584 N.W.2d 258, 266 (Iowa 1998). Expert testimony establishing the standard of care and breach of the standard is required unless proof of those matters is so clear they can be determined by a person who is not an attorney. *Kubik v. Burk,* 540 N.W.2d 60, 64 (Iowa App. 1995); *Benton v. Nelsen,* 502 N.W.2d 288, 290 (Iowa App. 1993).

Richmond argues the duty owed by Kennedy and its breach were so obvious they are susceptible to determination by laypersons without expert testimony. We disagree. The nature and extent of an attorney's professional duty to maintain confidences and secrets of a client are not sufficiently obvious to, or widely known by, lay people to permit their determination by jurors unassisted by expert testimony. Furthermore, the information (*viz.*, that Richmond had asked her to lunch and chided her for failing to send him legal forms he had requested) Kennedy allegedly disclosed to Peeples was not substantively of a nature that would permit jurors to determine, without the benefit of expert testimony, whether a breach of duty arising from a lawyer-client relationship had occurred. Accordingly, we conclude expert testimony was essential to Richmond's prima facie case.

Summary judgment is appropriate where expert testimony is required to establish negligence and expert testimony is not produced. *Kubik,* 540 N.W.2d at 64-65 (citing *Kennis v. Mercy Hosp. Medical Ctr.,* 491 N.W.2d 161, 167 (Iowa 1992)). Richmond failed in his resistance to the motion for summary judgment to

demonstrate a genuine issue of material fact as to Kennedy's professional duty and breach of that duty. The district court properly granted summary judgment.

AFFIRMED.