FIFTH DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BARRY SCHRAGER, Plaintiff-Appellant, v. DAVID P. SCHIPPERS, JAMES M. BAILEY, and BRIAN T. BAILEY, Defendants (James T. Hynes, Defendant-Appellee).	))))))))))))))))))	Appeal from the Circuit Court of Cook County No. 02 L 8027 Honorable Daniel J. Pierce, Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

Held: Where trial court barred plaintiff's expert witness as a discovery sanction, plaintiff could not prevail on his legal malpractice claim. Summary judgment affirmed.

¶ 1 Plaintiff, Barry Schrager, appeals the trial court's grant of summary judgment in favor of James T. Hynes, the only remaining defendant in this litigation. Plaintiff maintains that under the facts of this case an expert witness is not required to prevail on his malpractice claim. We affirm.

BACKGROUND

¶ 2 This litigation arises out of four underlying lawsuits this court previously summarized:

"First Filing

In April 1995, plaintiff filed a complaint in the United States District Court for the Northern District of Illinois naming as defendants Jeffrey Grossman, Donald Grauer, Barbara Lux, Midwestern Financial Consultants, Ltd., Quinlan & Tyson Realty Partners, Ltd., and Highland Park Corporation (*** Case I). The complaint alleged civil Racketeer Influenced and Corrupt Organizations Act 18 U.S.C.S. 1964 violations as well as several state common law claims including fraud, conspiracy, and breach of fiduciary relationships.

Plaintiff subsequently filed first and second amended complaints. The second amended complaint named as additional defendants the Kimberly Anne Grossman Trust; the Trina Elyse Grossman Trust, the Kimberly Anne Grossman Subchapter S Trust, Trina Elyse Grossman Subchapter S Trust, Allen Engerman, Michael Mandell, Bette Grossman, Eagle Partners, Ltd., 2780 Ridge Corporation, 1255 Building Corporation, Churchill Capital, Ltd., ENP II, ENP II, Ltd., Churchill Venture One, Ltd., Magnolia Homes Corporation, Magnolia Estates Corporation, Oxford Funding Group, Ltd., Churchill Venture, Ltd., and Executive Travel. The second amended complaint contained counts alleging mail and wire fraud, RICO, unjust enrichment and accounting, and common law fraud.

On March 12, 1997, a dispositive order was entered that stated, 'plaintiff

voluntarily dismisses with prejudice the claims brought under RICO. The remaining claims are dismissed without prejudice with leave to re-file them in the state court.'

Second Filing

In March 1996, while Case I remained pending, plaintiff filed a complaint in the circuit court of Lake County, Illinois, against defendants Eagle Partners, Riverwoods Partnership, 2780 Ridge Corporation, Bette Grossman, as trustee of the Trina Elyce Grossman Family Trust and as trustee of the Kimberly Anne Grossman Family Trust, Donald Grauer, Jeffrey Grossman, Larry Kanar, and American National Bank and Trust Company of Chicago (*** Case II). The complaint sought to enjoin the sale of certain real estate and a declaration nullifying the loan guarantee because the signature purporting to be plaintiff's was, in fact, a forgery.

On January 10, 1997, plaintiff amended his complaint setting forth allegations of common law fraud, conspiracy, use of the mails and interstate wires in furtherance of a scheme and artifice to defraud, breaches of fiduciary relationships, and for an accounting. The claims set forth in the original complaint were completely absent from the amended complaint.

On February 5, 1997, the defendants removed the matter to the Federal District Court for the Northern District of Illinois. The case was dismissed on February 13, 1997, as duplicative of Case I. Specifically, the order stated: 'The court grants defendants' motion to dismiss and dismisses plaintiff's cause of action before this court as duplicative of the cause of action pending before Judge Marovich in case

No. 95 C 2214. The court denies defendants' motion to consolidate as moot.'

Third Filing

On April 2, 1996, plaintiff filed a complaint against defendants ENP II, Ltd., Donald Grauer and Jeffrey Grossman in the circuit court of Cook County (*** Case III). Count I alleged breach of a promissory note against ENP II, Ltd., and count II alleged breach of promise to guarantee the note by defendants Grossman and Grauer. The promissory note was executed by ENP, II., Ltd., on July 10, 1995 in the amount of $ 271,667. Defendants filed a motion to dismiss contending the facts alleged in this case arose from the same core of operative facts as Case I pending in federal court. Plaintiff's motion for a voluntary dismissal was granted on October 10, 1996, prior to the court ruling on defendants' motion to dismiss.

Fourth Filing

On March 27, 1997, plaintiff filed yet another complaint in the circuit court of Cook County **** (*** Case IV). The complaint named the same defendants as were named in the second amended complaint in Case I and stated causes of action for tortious conspiracy to commit fraud, unjust enrichment and accounting, fraud, negligence, and punitive damages.

On June 26, 1997, defendants filed a motion to dismiss pursuant to Sections 2-619(a)(4) and (a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(4), (a)(9) (West 1998)) arguing the claims were barred by Illinois' single-refiling rule (735 ILCS 5/13-217 (West 1998)) and the doctrines of *res judicata* and collateral estoppel.

> The court originally granted defendants' motion and dismissed plaintiff's complaint on November 17, 1997. However, upon entertaining plaintiff's motion to reconsider, the court reversed itself and entered an order denying defendants' motion to dismiss." *Schrager v. Grossman*, 321 Ill. App. 3d 750, 751-53 (2000).

This court reversed on appeal, holding the single-refiling rule bars Case IV. *Id.* The supreme court denied leave to appeal.

¶ 3 In 2002, plaintiff filed the instant malpractice lawsuit against his former attorneys: David P. Schippers, James M. Bailey, Brian T. Bailey, and James T. Hynes. "The basic thrust of [his] complaint was that the defendants' negligence in litigating [the] four underlying cases caused plaintiff to lose his underlying cause of action." All defendants except Hynes, who claims a subordinate role in only one of the four underlying cases, settled.

¶ 4 In 2009 Hynes moved for summary judgment, claiming in part:

> "1. Plaintiff's Third Amended Complaint seeks to recover for alleged attorney malpractice. Paragraph 19 of that Complaint alleges that the defendants breached the standard of care by failing to prepare and prosecute Plaintiff's claims against his former business partner and others and causing the voluntary dismissal of a lawsuit filed on behalf of Plaintiff, when they knew or should have known that any further refiling was prohibited by section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217 (West 1996)), causing Plaintiff's inability to pursue his claims and obtain recovery.
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> 2. More, specifically, Plaintiff contends that Defendant Hynes breached the

> standard of care by: (a) giving advice that caused the voluntary dismissal of the first lawsuit filed on his behalf in federal court (Case I) or failing to advise Plaintiff that Case I should not be dismissed; and (b) failing to cause the dismissal order in Case I to be corrected to reflect that the state law claims were being 'transferred' to state court. Plaintiff contends that the dismissal of Case I resulted in the loss of his ability to pursue his claims because any further refiling was prohibited by the one refiling rule (735 ILCS 5/13-217).
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> 3. Summary judgment should be granted Defendant because Plaintiff cannot establish the standard of care or that Defendant breached that standard without expert testimony, and Plaintiff has been barred by the Court from identifying an expert due to his failure to comply with discovery rules and the Court's orders."

The trial court agreed, granting Hynes' motion. Plaintiff's motion to reconsider was found "totally lacking in merit" and denied. Plaintiff appeals.

ANALYSIS

¶ 5 Summary judgment is intended to determine whether triable issues of fact exist and "is appropriate where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 333 (1996).

> "A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing

> inferences from those facts. Although summary judgment is an expeditious method of disposing of a lawsuit, it is a drastic remedy and should be allowed only when the right of the moving party is free and clear from doubt." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999).

Our review is *de novo*. *Busch*, 169 Ill. 2d at 333.

¶ 6 To prevail in this malpractice action plaintiff must "establish that but for the negligence of counsel, he would have successfully prosecuted or defended against the claim in the underlying suit." *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 525-26 (1995).

> "Attorneys are liable to their clients for damages in malpractice actions only when they fail to exercise a reasonable degree of care and skill. [Citations.] The law distinguishes between errors of negligence and those of mistaken judgment. [Citations.] *** Because the concept of *res ipsa loquitur* is not applicable in legal malpractice cases [citation], the standard of care against which the attorney defendant's conduct will be measured must generally be established through expert testimony. [Citations.]
>
> Failure to present expert testimony is usually fatal to a plaintiff's legal malpractice action. [Citations.] However, 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." *Barth v. Reagan*, 139

Ill. 2d 399, 406-08 (1990).

Plaintiff claims this "common-knowledge" exception here, and he maintains the procedural history of this case and Hynes' deposition obviate the need for expert testimony.

¶ 7 According to plaintiff:

> "This Court's opinion in *Schrager v. Grossman* [(321 Ill. App. 3d 750 (2000))] stands as a binding determination the second state case was barred because it was the improper filing of the first federal case. Consequently there is no need to for expert testimony to address whether Hynes committed legal malpractice when he allowed the first federal case to be voluntarily dismissed. This issue has already been decided by three 'experts,' namely the three Justices of this Court who issued the *Schrager v. Grossman* decision. The second state case was barred because of the voluntary dismissal of the first federal case; *ergo*, it was legal malpractice for Hynes to voluntarily dismiss the first federal case.
>
> ***
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> Plaintiff submits this case is a classic instance of the exception to the *Barth* rule: since this Court has already determined the voluntary dismissal of the first federal case barred the second state case, plaintiff does not need an expert to repeat this Court's own ruling that Hynes was negligence in taking a voluntary dismissal of the first federal case."

This argument fails. *Schrager* has no bearing on the instant lawsuit, for we must view Hynes' conduct "in the context of events prevailing at the time of the alleged malpractice, not in light of

subsequent developments." *Gruse v. Belline*, 138 Ill. App. 3d 689, 696 (1985). Regardless, Hynes' alleged negligence was not at issue in that case. The question there was whether the single-refiling rule barred Case IV. *Schrager,* 321 Ill. App. 3d at 754. It did. *Id.* at 758-59. While that ruling triggered the instant litigation, it did not determine negligence on the part of any of plaintiff's attorneys. It remains plaintiff's burden to establish Hynes caused the dismissal of Case IV and that his actions relating thereto were negligent as opposed to a mere mistake in judgment. It is not enough to state the conclusion that Hynes was negligent. Rather, plaintiff must establish that Hynes failed to exercise a reasonable degree of care and skill in his representation.

¶ 8 Plaintiff maintains expert testimony is not required to establish that standard because

> "by Hynes' own admission, he was present when the district court stated it was dismissing portions of the first federal case with prejudice and was remanding the remaining counts to state court. Further, and again by Hynes' own admission, he knew the minute order incorrectly stated there was a voluntary dismissal [as opposed to a remand]. Then, and yet again by Hynes' own admission, Hynes astonishingly did nothing to correct the error.
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> Plaintiff submits that the common knowledge or experience of lay persons is extensive enough to recognize Hynes' legal malpractice from his admitted failure to do anything to correct an order that he knew was entered in error."

Even if Hynes admitted failing to rectify the district court order, an issue we do not reach, plaintiff must nevertheless establish that error foreclosed Case IV, as well as breached Hynes' applicable standard of care. We agree with the trial court:

> "Hynes' alleged misconduct does not constitute negligence so grossly apparent that a lay person could have no difficulty appraising it without expert testimony. *** the underlying facts are complex: the interaction between lead and junior counsel in client representation; concepts of *res judicata*; what constitutes refiling; how seemingly diverse claims might arise out of the same core operative facts; the relationship or requirements of federal jurisdiction; the procedural movement of cases between state and federal courts; voluntary and involuntary dismissals with or without prejudice; and, transfer and removals or remands."

These matters clearly fall outside the common knowledge of a lay person. Expert testimony is required to establish Hynes' alleged negligence. We affirm the trial court's summary judgment order. Plaintiff cannot prevail on the record *sub judice* absent an expert witness.

CONCLUSION

¶ 9 The trial court is affirmed. Plaintiff requires expert testimony to prove his malpractice claim.

¶ 10 Affirmed.