

No. 1-19-0555

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAWRENCE DASSINGER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Illinois.
)	
v.)	No. 17 L 3341
)	
THOMAS R. LICHTEN and THOMAS R.)	
LICHTEN, LTD.,)	Honorable
)	Ronald F. Bartkowicz,
Defendants-Appellants.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Mikva and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Summary judgment in favor of plaintiff-appellee reversed where there was a question of fact regarding whether defendants-appellants breached their duty owed to plaintiff.

¶ 2 Defendants-appellants Thomas R. Lichten and Thomas R. Lichten, Ltd. (collectively, Lichten), appeal the circuit court of Cook County’s decision granting summary judgment in favor of plaintiff-appellee Lawrence Dassinger on his complaint for legal malpractice. On appeal, Lichten contends that he raised questions of fact surrounding breach, proximate cause,

and damages. For the reasons that follow, we reverse the judgment of the circuit court of Cook County and remand the case for further proceedings.

¶ 3

BACKGROUND

¶ 4 Dassinger and Lichten's relationship began in January 2004, when Dassinger retained Lichten to pursue a worker's compensation claim against Dassinger's employer at the time, Tiffany Express, Inc. Dassinger claimed that he had injured his right shoulder, arm, and hand, while "cranking a dolly" at work on December 30, 2003.

¶ 5 On January 27, 2004, Lichten filed an application for adjustment of Dassinger's claim pursuant to the Workers' Compensation Act (820 ILCS 305/1, *et seq.* (West 2002)).

¶ 6 Four years later, in mid-2008, Lichten claimed that Tiffany had agreed to a settlement but was delaying signing a settlement contract. According to Lichten, the parties had agreed that Tiffany would pay Dassinger \$100,000 as well as Dassinger's unpaid medical bills and out of pocket costs. In addition, Tiffany had agreed to pay the Medicare lien and the Medicare set-aside amount. Tiffany, on the other hand, claimed that it had agreed only to the \$100,000 lump sum, but disputed its liability for Dassinger's medical expenses and Medicare liens and set-asides.

¶ 7 The record reveals that on November 23, 2009, the case was dismissed for want of prosecution because Dassinger failed to appear. The arbitrator reinstated the case on March 4, 2010, on claimant's motion. Three months later, on June 4, 2010, Lichten moved, *inter alia*, to enforce the parties' alleged settlement agreement.

¶ 8 In October 2011, Tiffany filed the first of five applications for issuance of a *dedimus postatem*, seeking to schedule the deposition of Dr. David Tulipan, a physician who examined

Dassinger at Tiffany's request. The deposition was scheduled for September 26, 2012, but did not occur due to Lichten's conflict. Tiffany then filed a fifth *dedimus postatem* application (which Lichten claimed to have received on October 16, 2012). On October 4, 2012, the matter was set for a status call at which time the arbitrator set the matter for hearing on October 19, 2012.

¶ 9 On October 18, Lichten emailed the arbitrator and informed him that he was on trial in another case in Urbana, Illinois the next day. In his email, Lichten stated that he had telephoned and left a message for opposing counsel on October 15 notifying him of his unavailability.

¶ 10 On October 19, the arbitrator called the matter for hearing, and, finding that Dassinger, through Lichten, had failed to appear, dismissed the matter for want of prosecution. Lichten moved to reinstate the case before the commission in February 2013, stating that his failure to appear on the October date was due to a "miscommunication" between himself and his clerk, wherein he believed that the case had been continued (versus set for hearing) at the October 4 status call. The arbitrator denied Lichten's motion on June 10, 2013, and Lichten sought review by the Illinois Industrial Commission, which affirmed the dismissal.

¶ 11 Lichten then appealed to the circuit court of Will County, which confirmed the decision of the Commission in May 2015. Finally, this court affirmed on November 16, 2016, finding that the arbitrator did not abuse his discretion in denying the motion to reinstate.

¶ 12 Dassinger filed the instant legal malpractice case against Lichten in April 2017. Specifically, he alleged that Lichten breached his duty to exercise reasonable care in the prosecution of Dassinger's claim by allowing it to be dismissed for want of prosecution. Dassinger further alleged that the dismissal was the proximate cause of his inability to recover compensation for his injuries in the amount of \$100,000.

¶ 13 Dassinger moved for summary judgment in June 2018. In support of his motion, he attached his own affidavit averring that he was injured while working for Tiffany and that he retained Lichten to file a claim against Tiffany. He further averred that he agreed to accept \$100,000 as compensation for his injuries. In response, Lichten argued that issues of fact surrounded the elements of breach, causation, and damages. Dassinger's reply attached an affidavit from Tiffany's counsel, Daniel Crowe, who averred that (1) Dassinger had been injured in the course of his employment, (2) Tiffany had no defense to Dassinger's worker's compensation claim, and (3) that Tiffany had agreed to pay \$100,000 to settle Dassinger's claim and only disputed its liability for medical bills.

¶ 14 The circuit court of Cook County granted Dassinger's motion in a written order of February 14, 2019, and one week later entered a memorandum of judgment incorporating the order and awarding damages in the amount of \$100,000. Lichten timely appeals.

¶ 15 ANALYSIS

¶ 16 We note that we have jurisdiction to review this matter, as Lichten filed a timely notice of appeal from the circuit court's entry of summary judgment. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. July 1, 2017).

¶ 17 Summary judgment is appropriate only when "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." *1010 Lake Shore Ass'n v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 20 (quoting 735 ILCS 5/2-1005(c) (West 2008)). All supporting materials are strictly construed against the movant and in favor of the opposing party. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. We review *de*

novo an order granting summary judgment. *Nationwide Financial, LP v. Pobuda*, 2014 IL 116717, ¶ 24. ¶ 16

¶ 18 In order to prevail on a claim of legal malpractice, the plaintiff must prove that the defendant attorney owed him a duty of due care arising from the attorney-client relationship, that the attorney breached that duty, and that the breach proximately caused him injury. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 225-26 (2006).

¶ 19 Initially, Lichten argues that he raised a question of fact regarding whether he breached his duty to Dassinger by failing to appear at the October 19 court date. Proof of breach in a legal malpractice action ordinarily requires expert testimony regarding the standard of care. *Barth v. Regan*, 139 Ill. 2d 399, 406 (1990). However, 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 is not required. *Id.* at 407-08.

¶ 20 Here, while there was no expert testimony establishing the standard of care, Dassinger maintains that Lichten’s failure to appear at the October 19 court date was so grossly negligent that it would be obvious to a layperson. We disagree. Significantly, in advance of the October 19 date, Lichten informed both opposing counsel and the arbitrator that he would be unable to attend due to another pending matter. Moreover, according to Lichten’s un rebutted affidavit, the case had not been set for trial on October 19, but was merely a date to obtain a ruling on Tiffany’s application for a *dedimus postatum*. Thus, he had no expectation of a substantive ruling on that date. To be sure, Lichten’s request for a continuance of the October 19 court date did not conform to the Workers’ Compensation Commission’s rules, but, according to his affidavit, Lichten had been practicing workers’ compensation law for over 40 years and was

familiar with the standard of custom and practice before the Commission. Lichten's argument suggests that based on his experience practicing before the Commission, he expected that his e-mail to the arbitrator and opposing counsel in advance of the October 19 hearing would have been sufficient to avoid a dismissal of the case.

¶ 21 Taken together, these circumstances raise an issue of fact as to whether Lichten's conduct was a breach of the standard of care. As such, the court's decision to grant summary judgment in favor of Dassinger was in error.¹

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand the matter for further proceedings in accordance with this decision.

¶ 24 Reversed and remanded.

¹ Because we conclude that Lichten raised an issue of fact with respect to breach, we need not consider whether issues of fact also surround whether Lichten's alleged breach proximately caused Dassinger's damages and whether Dassinger established damages to a reasonable degree of certainty.