

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2008-139

NOVEMBER TERM, 2008

Edward A. Deptula	}	APPEALED FROM:
	}	
	}	
v.	}	Franklin Superior Court
	}	
	}	
Paula J. Kane	}	DOCKET NO. S318-06 Fc

Trial Judge: Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Plaintiff in this legal malpractice action appeals pro se from a summary judgment in favor of defendant Paula K. Kane, Esq. Plaintiff essentially argues that the trial court erroneously: (1) failed to address his breach of contract claim; and (2) ruled that expert evidence was required to establish that defendant committed malpractice in filing counterclaims and representing conflicting interests in the underlying lawsuit. We affirm.

This is the third appeal to reach the Court in connection with this longstanding dispute between plaintiff and a homeowners' association over the payment of annual fees. An action in the early 1990's in which plaintiff claimed that the fees were excessive resulted in a superior court decision holding that the fees were reasonable and warning plaintiff that he could become liable for future litigation expenses if he continued to withhold payments. The conflict continued, however, and in 1997 the homeowners' association initiated an action against plaintiff and several other property owners to collect unpaid assessments. In early 1998, plaintiff and the other co-defendants named in the association's complaint retained attorney Kane to defend them, and subsequently filed an answer and counterclaim alleging that the fees were excessive and illegal, violated the consumer fraud act, and had already been paid (accord and satisfaction). In a series of rulings, the trial court granted the association's motion for summary judgment and dismissed the counterclaims, ruling that plaintiff was barred under the doctrine of collateral estoppel from contesting the reasonableness of the fees. This Court affirmed, rejecting plaintiff's claim that collateral estoppel was inapplicable because of a lack of privity and because the factual circumstances had so changed that the subject matter in dispute was different. See Alpine Haven Property Owners Assoc., Inc. v. Deptula, 2003 VT 51, ¶¶ 11-17, 175 Vt. 559 (mem.). We affirmed the trial court's dismissal of the consumer-fraud claim and accord-and-satisfaction defense for similar reasons. Id. at ¶¶ 18-20.

The trial court subsequently granted the association's motion for attorney's fees incurred in defending against the counterclaims in the amount of \$39,914.65. We again affirmed, noting that plaintiff had been unsuccessful in prior litigation and had been warned that he could become liable for future litigation expenses if he continued to refuse to pay the fees. Alpine Haven Property Owners Assoc. v. Orrock, No. 2005-107 (Oct. 28, 2005) (unreported mem.).

Following the second appeal, plaintiff filed this malpractice action against attorney Kane (hereafter "defendant"), who had withdrawn in favor of another attorney while the underlying suit was pending. Plaintiff alleged that defendant negligently failed to advise him that filing the counterclaims could subject him to liability for litigation expenses; failed to undertake a thorough examination of the claims to determine whether they would subject him to liability; and failed to advise him that his interests were sufficiently different from the other homeowner defendants that defendant's joint representation resulted in a conflict of interest. Plaintiff stated claims for breach of contract "to provide competent legal services," professional malpractice, and violation of Rule 1.7 of the Rules of Professional Conduct, which prohibits representation of clients with conflicting interests.

Plaintiff moved for summary judgment and defendant filed a cross-motion for summary adjudication on her counterclaim for unpaid attorney's fees. The court issued a brief entry order denying plaintiff's motion, and thereafter issued a written decision on its own motion granting summary judgment in favor of defendant on all of plaintiff's claims. The court ruled in this regard that expert evidence was required to establish essential elements of plaintiff's claims, and that his failure to adduce such evidence entitled defendant to judgment as a matter of law. The court also ruled against defendant on her counterclaim for unpaid attorney's fees. A subsequent motion to alter or amend the judgment was denied. This pro se appeal followed.

Although plaintiff lists numerous issues on appeal, his briefing and arguments focus on essentially three. First, he contends the court erroneously failed to address his claim for breach of contract. The trial court acknowledged that plaintiff had stated claims for breach of contract and malpractice but observed that, as they were "both based on an allegation of negligence [it] . . . would consider them as one." We have explained that "an action to recover for legal malpractice lies in tort, on the theory of the attorney's negligence," Bloomer v. Gibson, 2006 VT 104, ¶ 24, 180 Vt. 397, and it is readily apparent that plaintiff's action for breach of contract "to provide competent legal services" was, as the trial court here found, merely a restatement of the negligence claim. See id. (where plaintiff did not allege that defendant attorney "breached any special obligation in his employment contract" court correctly treated plaintiff's complaint as "a tort claim veiled as a breach of contract claim") (quotation omitted). Accordingly, we find no error.

Plaintiff next asserts that the court erred in ruling that expert evidence was essential to establish his malpractice claims. We find no error. As we have explained, "[g]enerally, negligence by professionals is demonstrated using expert testimony to: (1) describe the proper standard of skill and care for that profession, (2) show that the defendant's conduct departed from that standard of care, and (3) show that this conduct was the proximate cause of plaintiff's harm." Estate of Fleming v. Nicholson, 168 Vt. 495, 497 (1998). We have recognized an exception to the requirement of expert testimony where "a professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it." Id. at 497-

98. Although plaintiff maintains that this case falls within the exception to the general rule, it is readily apparent that no lay person could evaluate the legal merits of the counterclaims asserted in the underlying action or determine whether it violated objective standards of professional competence to raise them. See *id.* at 498 (explaining that the evaluation of tasks “unique to the profession” such as the process performed during a title search require expert evidence to establish both the standard of care and whether there was a breach while mere “failure to disclose important information” does not). Expert evidence was plainly required to resolve this issue, as well as the question of whether defendant’s representation of plaintiff and the other homeowners in the lawsuit violated a rule of professional conduct or somehow constituted malpractice. See, e.g., *Geiserman v. MacDonald*, 893 F.2d 787, 793-94 (5th Cir. 1990) (holding that malpractice claim premised on alleged “breach of a fiduciary duty or a conflict of interest requires proof of expert testimony”); *Northwestern Life Ins. Co. v. Rogers*, 573 N.E.2d 159, 163-64 (Ohio Ct. App. 1989) (where plaintiff claimed that lawyer’s conflict of interest “constituted malpractice per se,” court held that “the very nature and complexity of the Code of Professional Responsibility” necessitated expert testimony to support the claim).

The trial court thus properly held that plaintiff had failed to establish an essential element of his claim, and correctly entered summary judgment in favor of defendant.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice