**IN THE COURT OF APPEALS OF IOWA**

No. 3-978 / 13-0410
Filed November 20, 2013

**GAYLORD NORDINE, M.D., and MIDWEST CLINICAL ASSOCIATES, P.C.,**
Plaintiffs-Appellants,

**vs.**

**CHESTER C. WOODBURN and PROASSURANCE WISCONSIN INSURANCE COMPANY,**
Defendants-Appellees.

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Appeal from the Iowa District Court for Polk County, Terry Rickers, Judge.

Plaintiffs appeal from the district court's order granting summary judgment in favor of defendants. **AFFIRMED.**

Peter C. Riley of Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

Nicholas J. Kilburg and Patrick M. Roby of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellee Woodburn.

Nancy J. Penner and Robert D. Houghton of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellee ProAssurance.

Heard by Vogel, P.J., and Potterfield and McDonald, JJ.

**McDONALD, J.**

Dr. Gaylord Nordine and Midwest Clinical Associates, P.C., (collectively, hereinafter "Nordine parties") appeal the ruling and order of the district court granting summary judgment and dismissing their claim for legal malpractice. Because we conclude that the district court did not err, we affirm the judgment of the district court.

I.

Dr. Nordine was a licensed psychiatrist practicing through his professional corporation, Midwest Clinical Associates. On June 14, 2005, Dr. Nordine pleaded guilty to the offense of sexual exploitation by a counselor or therapist, in violation of Iowa Code sections 709.15(2)(b) and 709.15(4)(b) (2001). At the time of the plea colloquy, under oath, Dr. Nordine stated that between November 2002 and April 2004 he engaged in sexual conduct with an emotionally dependent patient or former patient, L.L., within one year of the termination of the provision of mental health services to L.L., for the purpose of arousing or satisfying his own sexual desires:

> THE COURT: Doctor Nordine, between the time of November 2002 until April 2004 in Polk County, Iowa, did you engage in sexual conduct with an emotionally dependent patient?
> DEFENDANT: Yes.
> THE COURT: Was this for the purpose of arousing or satisfying your sexual desires?
> DEFENDANT: Yes.
> . . . .
> MR. KUTMUS: Just to define a sex act, did you kiss or fondle this person here in Polk County, Iowa?
> DEFENDANT: Yes.
> . . . .
> MR. JUDISCH: Is the patient we're talking about, is that [L.L.]?
> DEFENDANT: Yes.

> MR. JUDISCH: Did the sex acts include sexual intercourse?
> DEFENDANT: Yes.

The district court found the plea was knowing and voluntary. The district court found a factual basis existed to support the guilty plea. The district court accepted and entered Dr. Nordine's plea of guilty, ordered judgment be deferred, and ordered Dr. Nordine be granted probation. Dr. Nordine's counsel of record in the criminal case was William Kutmus.

At the same time Dr. Nordine pleaded guilty to sexually exploiting L.L., the Nordine parties were defending a civil proceeding brought by L.L. In the civil proceeding, L.L. claimed that Dr. Nordine's sexual exploitation of her breached his duty of care owed a patient or former patient and that the breach caused her damages. Chester Woodburn was counsel of record in the civil proceeding. Woodburn was retained by the Nordine parties' insurance carrier, ProAssurance Wisconsin Insurance Company f/k/a Physicians Insurance Company (hereinafter "ProAssurance").

On September 29, 2006, the district court in the civil proceeding granted L.L.'s motion for partial summary judgment. The district court concluded that Dr. Nordine's criminal conduct constituted negligence per se, that Dr. Nordine's violation of Iowa Code section 709.15 gave rise to a private cause of action, and that Dr. Nordine's guilty plea precluded relitigation of whether he sexually exploited L.L. The district court held that liability was thus established as a matter of law and that the only matters left for trial were causation and damages. Subsequently, the civil proceeding was resolved when L.L. accepted Dr. Nordine's offer to confess judgment in the amount of $530,000 subject to the

condition that L.L. could seek payment and satisfaction of the judgment only from ProAssurance.

Five years later, the Nordine parties commenced this action against Woodburn and ProAssurance, asserting a single claim for legal malpractice. The district court dismissed the Nordine parties' claim on summary judgment, holding the Nordine parties could not, as a matter of law, establish liability or damages in this proceeding due to the preclusive effect of Dr. Nordine's guilty plea. After dismissing the Nordine parties' claim, the district court denied their subsequent motion for enlargement filed pursuant to Iowa Rule of Civil Procedure 1.904(2).

II.

The court first addresses its jurisdiction to consider this appeal. Generally, notice of appeal must be filed within thirty days after the filing of a final order or judgment. *See* Iowa R. App. P. 6.101(1)(b). "However, if a motion is timely filed under Iowa R. Civ. P. 1.904(2) . . . the notice of appeal must be filed within 30 days after the filing of the ruling on such motion." *Id.* This tolling period applies only where the motion is both timely and proper. *See Harrington v. State*, 659 N.W.2d 509, 513 (Iowa 2003) ("If the rule 1.904(2) motion is not timely filed, however, it will not toll the thirty-day time period for filing a notice of appeal."); *Bellach v. IMT Ins. Co.*, 573 N.W.2d 903, 904-05 (Iowa 1998) (stating that an improper motion will not toll the time period to file an appeal). The district court's ruling and order was filed on January 10, 2013. Dr. Nordine timely served and filed his motion for enlargement of findings. The district court denied the motion for enlargement on February 15, 2013. Dr. Nordine filed his notice of appeal on March 20, 2013. The thirty-day appeal period commencing after the order

denying the motion for enlargement expired over a weekend; the Nordine parties filed their notice of appeal on the first business day following. If the Nordine parties' Rule 1.904 motion tolled the appeal period, this appeal is timely filed. If the motion did not toll the appeal period, the appeal is untimely, and we are without jurisdiction.

ProAssurance contends that the Nordine parties' motion for enlargement was improper because Rule 1.904(2) cannot be used to seek reconsideration of questions of law on summary judgment. Rule 1.981(3) explicitly makes Rule 1.904(2) applicable here. *See* Iowa R. Civ. P. 1.981(3) ("If summary judgment is rendered on the entire case, rule 1.904(2) shall apply."); *see also People's Trust & Sav. Bank v. Baird*, 346 N.W.2d 1, 3 (Iowa 1984) (explaining that an amendment to Rule 1.981(3) abrogated prior cases holding Rule 1.904(2) was not available following summary judgment). While ProAssurance is correct that our case law appears to append to the otherwise plain language of Rule 1.981(3) an additional requirement that Rule 1.904(2) is not proper merely to "rehash legal issues," *Bellach*, 573 N.W.2d at 905; *see also In re Estate of Hord*, 836 N.W.2d 1, 4 (Iowa 2013), it appears that those cases rely on an older line of authority predating amendment to Rule 1.981(3) and not particularly relevant to motions for summary judgment. Isn't much of the hashing and rehashing on summary judgment about legal issues? In any event, we need not reconcile the issue—the Nordine parties sought an enlargement and not rehashing of the district court's legal conclusions regarding an exception to the doctrine of issue preclusion. The plaintiffs' Rule 1.904(2) motion was thus "an appropriate means to challenge the summary judgment ruling." *Tenney v. Atlantic Assocs.*, 594 N.W.2d 11, 14 (Iowa

1999). Therefore, the thirty-day appeal period was tolled, and this appeal is timely filed.

III.

"The court reviews a district court decision to grant or deny a motion for summary judgment for correction of errors at law." *Griffin Pipe Prods. Co., Inc. v. Bd. of Review*, 789 N.W.2d 769, 772 (Iowa 2010). "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. The court reviews the evidence in the light most favorable to the nonmoving party." *Id.*

The Nordine parties' claim appears to be that Woodburn's alleged failure to timely conduct discovery or an investigation in the civil proceeding hindered Kutmus's defense of the Nordine criminal proceeding thereby compelling Dr. Nordine to plead guilty. To establish a claim of legal malpractice the Nordine parties were required to show: (1) the existence of an attorney-client relationship giving rise to a duty; (2) the attorney breached that duty; (3) the attorney's breach of duty caused injury to them; and (4) they sustained actual injury, loss, or damage. *See Ruden v. Jenk*, 543 N.W.2d 605, 610 (Iowa 1996). To establish causation and damages in an action arising out of negligent representation in a legal proceeding, the plaintiff is essentially required to try the underlying proceeding within the malpractice action to establish that he or she would have prevailed in the underlying proceeding. *See Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288, 290 (Iowa 1988) (stating that "the plaintiff must prove that absent the lawyer's negligence, the underlying suit would have been successful"); *Burke v.*

*Roberson*, 417 N.W.2d 209, 211 (Iowa 1987) (stating this requires a showing that the malpractice plaintiff would have succeeded in the underlying proceeding); *Shannon v. Hearity*, 487 N.W.2d 690, 692 (Iowa Ct. App. 1992) (stating that this requires the claimant to try a case within a case to demonstrate that he could have prevailed on the underlying case). The district court concluded that it was impossible for Dr. Nordine to establish that he would have prevailed in the underlying proceedings because Dr. Nordine's guilty plea had preclusive effect.

"Issue preclusion prevents parties from relitigating in a subsequent action issues raised and resolved in a previous action." *Employers Mut. Cas. Co. v. Van Haaften*, 815 N.W.2d 17, 22 (Iowa 2012) (internal quotation marks omitted). The party seeking preclusion must establish: (1) the issue in the present action is identical to the issue in the prior action; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination must have been essential to the resulting judgment. *See id.* Further, when used offensively, as here, the court must also consider whether the party in the earlier action was afforded a full and fair opportunity to litigate the issue and whether any other circumstances are present that would justify granting the party resisting issue preclusion occasion to relitigate the issue. *See id.*

It is well established that "a validly entered and accepted guilty plea precludes a criminal defendant from relitigating essential elements of the criminal offense in a later civil case arising out of the same transaction or incident." *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 244-45 (Iowa 2000). This is true without regard to whether judgment was entered following the plea or whether

judgment was deferred, as is the case here. *See Employers Mut. Cas. Co.*, 815 N.W.2d at 24 ("[I]t is the court's factual-basis determination when accepting the plea that provides the plea's preclusive effect, not the subsequent sentence and deferred judgment."). The Nordine parties' argument that they should be allowed to relitigate the issues of when the sexual relationship started and whether L.L. was, in fact, emotionally dependent is thus misplaced. Those issues are essential elements of the offense that cannot now be relitigated. *See Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 295 (Iowa 1982) ("Once a guilty plea is accepted, a judicial determination has thus been made with respect to the essential elements of the crime. . . . We think a result is fair which precludes relitigation concerning an essential element of a crime when the accused has tendered a guilty plea, which necessarily admits the elements of the crime, and the court has ascertained that a factual basis exists for the plea and accepts it.").

The Nordine parties argue that a guilty plea resulting from legal malpractice should not be afforded preclusive effect. The Nordine parties' argument that the plea was the result of legal malpractice has several significant problems related to their case specifically. There is nothing in the summary judgment record establishing Woodburn had an attorney-client relationship with the Nordine parties in the Nordine criminal proceeding. There is thus no duty. Next, there is little in the record to support any coherent theory of causation. The court finds it incredible to believe that Dr. Nordine and his counsel of record in the Nordine criminal proceeding were unable to determine—without Woodburn's investigation—whether L.L. was Dr. Nordine's patient during the relevant time period, whether Dr. Nordine was having a sexual relationship with L.L. during the

relevant time period, and whether he might have information available to defend against the charge. Third, again related to causation, Dr. Nordine seems to forget he stated under oath that he, in fact, committed the offense.

More important, and more generally, the Nordine parties cannot establish that the guilty plea resulted from legal malpractice until such time as Dr. Nordine obtains relief in the underlying criminal proceeding. *See Trobaugh v. Sondag*, 668 N.W.2d 577, 583 (Iowa 2003) (stating that "a defendant [must] achieve relief from a conviction before advancing a legal malpractice action against his former attorney"). To hold otherwise would allow a criminal defendant essentially to attack a valid plea collaterally through a civil malpractice action. This "approach best preserves key principles of judicial economy and comity, including the avoidance of multiple proceedings related to the same factual and procedural issues, respect for other statutorily created processes such as postconviction relief, and the prevention of potentially wasteful practices." *Id.* This approach also prevents the anomalous result of inconsistent adjudications arising out of the same facts and circumstances.

A guilty plea has significant legal consequences, one of which is the preclusive effect of the guilty plea in civil proceedings arising out of the same facts and circumstances of the criminal offense. *See Employers Mut. Cas. Co.*, 815 N.W.2d at 17. Dr. Nordine's motivation in deciding to plead guilty—allegedly the pressure to avoid trial and more significant criminal exposure—is not relevant to whether his plea has preclusive effect. *See Aid Ins. Co. v. Chrest*, 336 N.W.2d 437, 440 (Iowa 1983) (stating that the preclusive effect of a guilty plea "does not depend on the accused person's motivation in entering the guilty plea . . . . It

merely requires a valid plea . . .”). So long as there is a valid plea, without regard to what motivated the decision to plead guilty, Dr. Nordine is precluded from relitigating the essential elements of the offense in any subsequent proceeding. This necessarily precludes him from establishing causation and damages in this proceeding.

**AFFIRMED.**