

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1822

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

JAMES F. KARLS,

PLAINTIFF-APPELLANT,

V.

**DAVID P. GERAGHTY, ABC INSURANCE COMPANY, AND
DEF INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Richland County:
KENT C. HOUCK, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. James Karls appeals from a judgment granting defendant's motion for summary judgment that dismissed his legal malpractice claim against Attorney David Geraghty. The issue on appeal is whether the facts of this case constitute an exception to the expert testimony requirement for legal

malpractice claims, and if so, whether summary judgment is nonetheless appropriate for appellant's failure to disclose expert testimony. We conclude that while the facts of the case constitute an exception to the expert testimony requirement, no reasonable jury could find that Geraghty's negligence was causal. Summary judgment was therefore appropriate, and we affirm.

BACKGROUND

This case focuses on legal services rendered by David Geraghty in his representation of James Karls in the circuit court in Richland County, Wisconsin. Karls sought the return of an airplane allegedly in the possession of Randy Walsh. While the civil case was pending, Karls was charged with being party to the crime of first-degree intentional homicide while using a dangerous weapon. Walsh was the victim of this crime. The criminal trial was scheduled to begin, but Karls failed to appear. The court revoked Karls' bond and issued a warrant for his arrest.

Geraghty then filed a motion to withdraw as counsel in the civil case. Walsh's attorney filed a motion to dismiss on the grounds that Karls had failed to contact him to assist in the discovery requests. On November 13, 1992, the court granted Geraghty's motion to withdraw and Walsh's motion to dismiss. Karls did not attend this hearing.

Karls was arrested in Costa Rica, extradited to Dane County, convicted on the homicide charge and sentenced to life imprisonment. Karls commenced this legal malpractice action claiming that Geraghty was negligent in failing to inform him of the November 13, 1992 hearing and of Geraghty's intention to withdraw as counsel in the civil case. On November 5, 1996, the court issued an order requiring Karls to notify Geraghty of his expert witnesses and to

provide a summary of their anticipated testimony. Karls did not do so. Instead, he stated that expert testimony was not required for him to prevail in this action. Geraghty filed a motion for summary judgment. He argued that Wisconsin case law requires a plaintiff to produce expert testimony in order to sustain a legal malpractice claim with two exceptions, neither of which applies here. The court granted Geraghty's motion for summary judgment, concluding that this action did not fit into one of the exceptions.

STANDARD OF REVIEW

We review summary judgments de novo, using the same methodology as the trial court. *Green Springs Farms v. Kersten*, 136 Wis.2d 304, 315-16, 401 N.W.2d 816, 820 (1987). Summary judgment should be granted only if it is clear that the non-moving party cannot prevail under any circumstances. *See generally id.*

DISCUSSION

In order to be successful in a legal malpractice action, the plaintiff has the burden of proving the following: (1) existence of an attorney and client relationship; (2) acts or omissions constituting negligence; (3) the negligence was the cause of its injury; and (4) the existence and extent of the injury. *See Lewandowski v. Continental Cas. Co.*, 88 Wis.2d 271, 277, 276 N.W.2d 284, 287 (1979). Expert testimony is required to prove these elements. *Cook v. Continental Cas. Co.*, 180 Wis.2d 237 246, 509 N.W.2d at 100, 103 (Ct. App. 1993). Without such testimony, a jury has no standard that enables it to determine whether the defendant has breached the standard of care that the profession requires. *See id.*

The Wisconsin Civil Jury Instructions set out the applicable standard of care to which an attorney must adhere. “It is a lawyer’s duty, in rendering legal services to a client, to exercise that degree of care, skill, and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in this state.” *See id.* at 245-46, 509 N.W.2d at 103 (adopting WIS J I—CIVIL 1023.5). Further, an attorney is bound to exercise the best judgment in light of his or her education and experience, but is not held to a standard of perfection. *See id.* at 246, 509 N.W.2d at 103 (quoting *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis.2d 94, 111, 362 N.W.2d 118, 128 (1985)).

Expert testimony is required for matters involving special knowledge, skill or experience on subjects which are not within the realm of ordinary experience of mankind, and which require special learning, study or experience. *See Olfe v. Gordon*, 93 Wis.2d 173, 181, 286 N.W.2d 573, 576 (1980) (quoting *Cramer v. Theda Clark Mem’l Hosp.*, 45 Wis.2d 147, 150, 172 N.W.2d 427, 429 (1969)). There are two circumstances when expert testimony is not required. First, it is not required when the matters to be proven are within the area of common knowledge and lay comprehension. *See id.* Second, it is not required where the attorney’s breach is so obvious that it may be determined by the court as a matter of law. *See Helmbrecht*, 122 Wis.2d at 112, 362 N.W.2d at 128.

Whether an attorney has breached the standard of care in representing the client is a question of fact to be determined through expert testimony and usually cannot be decided as a matter of law. *See Cook*, 180 Wis.2d at 248, 509 N.W.2d at 104. Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and the moving party is entitled to summary judgment as a matter of law.”
Section 802.08 (2), STATS.

Karls claims that Geraghty’s actions fall within exceptions to the expert testimony requirement. He states that it is common knowledge that an attorney would be negligent if he or she failed to inform his client of a court appearance and the attorney’s intention to withdraw from the case. We agree. Accepting as true Karl’s assertion that Geraghty failed to notify him of the hearing, we agree with Karl that it is an area of common knowledge that an attorney must inform a client of court appearances.¹ An attorney who fails to notify a client of a court appearance, causing the client damage, is negligent as a matter of law.

But that does not end the matter. Negligence must be causal if a plaintiff is to recover. *Menick v. City of Menasha*, 200 Wis.2d 737, 747, 547 N.W.2d 778, 782 (Ct. App. 1996). We must consider whether the outcome of the litigation would have changed had Geraghty notified Karls of the hearing. We conclude that no reasonable jury could find that Karls would have returned from Costa Rica for the hearing.

In November 1991, Karls was charged in Dane County with first-degree intentional homicide. On May 19, 1992, Karls signed a bond which allowed him to be released from jail. The bond restricted him to intrastate travel to and from Dane and Milwaukee County. Additionally, he was allowed to travel in South Carolina, North Carolina, Georgia, Florida and Tennessee. He was

¹ Geraghty’s affidavit, as well as other affidavits, dispute Karls’ claim that Geraghty failed to notify Karls of the hearing. However, for our analysis, we must assume that Karls’ assertions are true.

required to report weekly to Marion Johnson, presumably a probation agent. A previous bond had required him to surrender his passport. No bond permitted or suggested that he could travel to Costa Rica.

On September 14, 1992, the Richland County circuit court ordered that discovery in Karls' civil suit in Richland County be completed by November 15, 1992. Karls' criminal case was to begin on Monday, October 26, 1992. The previous Saturday, Karls was scheduled to come to his attorneys' offices to prepare for trial, but he did not keep the appointment. Nor did he appear on October 26 for jury selection. The Dane County Circuit Court issued a bench warrant for his arrest.

On October 30, 1992, Karls' attorneys moved to withdraw from the Richland County case. The defendant in the Richland County civil case moved to dismiss the case for failure to prosecute and failure to comply with its discovery order. The various motions were heard on November 13, 1992. This was the hearing for which Karls asserts that he received no notice. Karls did not appear at this hearing, and the circuit court granted all motions. In December 1992, Karls was arrested in Costa Rica, and after extensive attempts to resist extradition failed, he was returned to Dane County in January of 1994.

We conclude that had Karls been notified of the November 13, 1992 hearing, he would not have appeared. At that time, he was a fugitive. He knew from the terms of his bail bond that he was not permitted to travel to Costa Rica. He knew that he failed to appear for a criminal trial, and that if convicted, he would have been sentenced to life imprisonment. There is no reasonable inference but that he intended to abscond from Wisconsin to avoid the possibility of life imprisonment. There is no reasonable inference that he would have risked arrest

by appearing for a hearing in Richland County. Thus, even if Geraghty had notified Karls of the November 13, 1992 hearing, no reasonable jury could have concluded that he would have appeared and avoided the orders signed by the trial court. Thus, the asserted negligence of Geraghty was not causal, as a matter of law. Geraghty was entitled to summary judgment. We therefore affirm the trial court's judgment dismissing Karls' complaint.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

