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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KARL B. NICHOLAS,  
Plaintiff and Appellant,

v.

DAVID J. MILLSTEIN et al.,  
Defendants and Respondents.

A129568

(Marin County  
Super. Ct. No. CV-08-2086)

Court of Appeal First Appellate District  
**FILED**  
JUN 20 2011  
Diana Herben Clerk  
by \_\_\_\_\_ Deputy Clerk

Appellant Karl B. Nicholas sued his former attorney, David J. Millstein (Millstein) and his law firm, Millstein & Associates (collectively respondents) for legal malpractice and negligent infliction of emotional distress. Nicholas proceeded to trial in propria persona.<sup>1</sup> The trial court granted nonsuit (Code Civ. Proc., § 581c) in favor of respondents at the close of Nicholas's evidence on the ground that he could not prevail on his claims without expert testimony on the applicable standard of care. Nicholas contends that the court erred because no expert testimony was required. Since Nicholas fails to present a record adequate to permit our review of the issue, we must affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

In May 2004, Nicholas retained Millstein to represent him in his marital dissolution. As part of that representation, Millstein negotiated a stipulated custody and visitation agreement. The agreement gave Nicholas's ex-wife sole physical and legal custody of the couple's minor daughter, permitted mother and child to relocate to

<sup>1</sup> He also represents himself on this appeal.

Australia, allowed Nicholas supervised visitation with his daughter in Australia, and reserved jurisdiction in the Marin County court for a period of two years.

Nicholas later sued respondents for legal malpractice and negligent infliction of emotional distress, alleging that “Millstein failed to exercise reasonable care and skill in drafting and enforcing the marital settlement agreement . . . in that [Millstein] failed to protect [Nicholas’s] rights with respect to visitation of [his] minor child.”<sup>2</sup> Nicholas asserted: “As a proximate result of such negligence [he] has incurred fees, costs and expenses for attorney’s fees, document production, travel and lodging expenses for litigating custody and visitation issues in the Australian Family Court . . . .”

Respondents served a request for exchange of expert witness information. (Code Civ. Proc., § 2034.210.) Nicholas responded by stating that he did not intend to use an expert witness. The case proceeded to a jury trial. After Nicholas presented his opening statement, respondents filed a motion for nonsuit, arguing that Nicholas “cannot prove essential elements of his claims because he does not intend to produce an expert witness to opine that [respondents’] conduct fell below the applicable professional standard of care.” The trial court deferred its ruling to the close of Nicholas’s evidence and then granted respondents’ motion. Nicholas filed a timely notice of appeal.<sup>3</sup>

## II. DISCUSSION

Nicholas argues on appeal that the court erred by granting the motion for nonsuit. It is undisputed that respondents’ motion for nonsuit was granted after Nicholas presented his opening statement and his testimony to the jury. At the close of the plaintiff’s evidence, “ [t]he granting of a motion for nonsuit is warranted when, disregarding

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<sup>2</sup> Nicholas further alleged that Millstein’s representation was negligent because he “failed to follow Marin County Superior Court local rule number 6.33, causing expert and witness testimony to be excluded from trial . . . .”

<sup>3</sup> “[A]n order granting nonsuit is ordinarily an appealable order if it is in writing, signed by the court, and filed in the action. In such a case, it has the legal effect of a judgment. [Citations.]” (*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist.* (2001) 88 Cal.App.4th 439, 448, fn. 1.)

conflicting evidence, giving plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference that may be drawn from the evidence, the trial court determines that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff.' [Citations.]" (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580.)

"In negligence cases arising from the rendering of professional services, as a general rule the standard of care against which the professional's acts are measured remains a matter peculiarly within the knowledge of experts. Only their testimony can prove it, unless the lay person's common knowledge includes the conduct required by the particular circumstances. [Citation.] This rule applies to legal malpractice cases. [Citation.]" (*Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1239.) But, "[w]here the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required. [Citation.]" (*Wilkinson v. Rives* (1981) 116 Cal.App.3d 641, 647-648.) For example, in *Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502 (*Goebel*), no expert testimony was required when the legal malpractice defendant's "conduct demonstrate[d] a total failure to perform even the most perfunctory research." (*Id.* at p. 1508.) The court said: "[O]ne does not need the testimony of a bankruptcy specialist to establish that it is below the standard of care to advise a client to violate the Penal Code." (*Id.* at p. 1509.)

We cannot decide whether expert testimony was required under these standards because Nicholas elected to proceed on appeal with only a partial clerk's transcript. The only reporter's transcript provided is that of the hearing on respondents' motion for nonsuit, provided by respondents as a permitted augmentation of the record. We know that the court granted nonsuit on the ground that Nicholas could not establish, without expert testimony, that Millstein's representation fell below the applicable standard of care. The problem is that the parties disagree as to what errors or omissions serve as the basis for Nicholas's legal malpractice claim. As Nicholas frames the issue in his appellate brief, Millstein was negligent in failing to research the enforceability of the

custody agreement and provide for its registration in Australia.<sup>4</sup> Accordingly, Nicholas analogizes to *Goebel* and argues that the trial court erred in granting nonsuit because “[t]he testimony of an expert is not necessary . . . to decide whether [Millstein’s] failure to conduct a few minutes—or even a few hours—of legal research . . . was a violation of the applicable standard of care.” Respondents, on the other hand, assert: “The essence of Nicholas’ claim for legal malpractice at trial and expressed in his opening statement was that Millstein’s legal services fell below the applicable standard of care . . . because (1) Millstein was not adequately prepared for trial; and (2) Millstein should have negotiated a different marital settlement agreement . . . .”

The trial court clearly believed that respondents had accurately framed the issue raised by Nicholas’s opening statement and testimony. The trial court’s order provided:

“None of the cases that stand for the proposition that a legal expert witness is not required to support a claim for legal malpractice are the same as the case at issue here. The case before this court is not a clear or simple case, as [Nicholas] would describe it. The facts and circumstances alleged in this case, which were brought out in opening statement and in [Nicholas’s] testimony . . . presents the following question: whether the [respondents] should have negotiated a different settlement agreement for [Nicholas’s] benefit . . . in the face of somewhat cumbersome circumstances, including: (1) a family law case where [Nicholas] was being investigated for a criminal law violation of sexual misconduct with this daughter; (2) Mr. Nicholas’ refusal to testify in the family law

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<sup>4</sup> Nicholas relies on *In re Marriage of Condon* (1998) 62 Cal.App.4th 533 (*Condon*), in which the Second District Court of Appeal stated: “[B]efore permitting any relocation which purports to maintain custody and visitation rights in the nonmoving parent, the trial court should take steps to insure its orders to that effect will remain enforceable throughout the minority of the affected children.” (*Id.* at p. 547; see also *In re Marriage of Abargil* (2003) 106 Cal.App.4th 1294, 1299, 1303–1304; *In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 719, fn. 9.) In *Condon, supra*, 62 Cal.App.4th 533, a father presented authority showing that enforcement of a California family court’s orders in Australia could be problematic, but that registration of the California order with the Australian courts would provide some measure of protection. (*Id.* at pp. 541, fn. 9, 556–557, 559–560.)

matter because he, perhaps correctly, realized that he would expose himself to criminal sanction; and (3) Mr. Nicholas' continued interest, despite his refusal to testify, to obtain custody and visitation rights with his young daughter, who was also the alleged victim of the sexual indiscretions by Mr. Nicholas. In other words, one of the dispositive questions in this case, as in any other legal malpractice case is: did [respondents'] conduct fall below the applicable professional standard of care[?]

"One cannot reduce all of the facts and circumstances set forth in the underlying case to a simple question, as Mr. Nicholas would have it, of asking the jury whether the settlement agreement should have been registered in Australia or not and whether the registration of the settlement agreement should have been incorporated as a term into the settlement agreement. This is not precisely the question that is faced in this case. Indeed, there are a number of questions that the jury would face in order to reach a verdict. The whole issue of whether the standard of care is violated cannot be established by this jury . . . just by consideration of what might now be internet research about Australian registration rules.

"Here, the question presented to the jury relating to the legal malpractice claim would require testimony from an expert witness to establish the violation of duty. Consequently, [Nicholas] cannot prove his case . . . . Perhaps, more to the point, a jury cannot understand this case without the assistance of an expert witness. . . . In his opening statement and testimony, Mr. Nicholas admitted that he has no expert witness in support of his claims. Because [Nicholas] is required to offer expert witness testimony in order to sustain his burden on his claim for legal malpractice, which he cannot, the motion for nonsuit on the legal malpractice claim is granted. [¶] As to the motion for nonsuit on the negligent infliction of emotional distress cause of action, the motion is also granted. . . . A plaintiff must first establish negligence before it can recover on a claim of damages for negligent infliction of emotional distress. . . . Because [Nicholas] is required to offer expert witness testimony in order to sustain his burden on his claim for negligent infliction of emotional distress, which he cannot, the motion for nonsuit on the negligent infliction of emotional distress [cause of action] is granted."

Without a transcript from the trial we do not know what theory of the case Nicholas actually proceeded on. Accordingly, we cannot say that the trial court misconstrued the evidence, as Nicholas suggests. “The [appellant] must affirmatively show error by an adequate record. [Citations.] Error is never presumed. It is incumbent on the [appellant] to make it affirmatively appear that error was committed by the trial court. [Citations.] . . . ‘A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent . . . .’ [Citation.]” (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) On this record, we must presume that the trial court did not err.<sup>5</sup>

### III. DISPOSITION

The order granting respondents’ motion for nonsuit is affirmed.

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<sup>5</sup> We deny respondents’ request for judicial notice of an unpublished appellate opinion relating to the family law case. The opinion is irrelevant to the nonsuit inquiry.

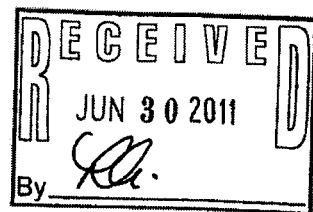
\_\_\_\_\_  
Bruiniers, J.

We concur:

\_\_\_\_\_  
Jones, P. J.

\_\_\_\_\_  
Needham, J.

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MARIN Ct. # CV-08-2086  
APPELLANT'S MOTION FOR REVIEW  
DE-NOVO

Appellant hereby requests the COURT REVIEW DE-NOVO this appeal ~~on~~ on the grounds that appellant has been incarcerated since November 3rd, 2010 and is expected to be released on or about July 4th, 2011. Appellant has not been able to augment the record while incarcerated, respond to any motion to augment the record, or provide a reply briefing because appellant has been proceeding in propria persona. Appellant will be able to provide a full record of the proceedings forthwith and requests the court grant appellant's motion to review the appeal de novo on the condition that appellant provide a full record of the trial court proceedings.

Dated: June 28, 2011

Karl Nicholas  
Karl Nicholas  
Appellant