

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0468, Richard G. Kahn v. Jon Meyer, Esq. & a., the court on November 6, 2008, issued the following order:

The plaintiff's motion to strike and for other relief is denied. The plaintiff, Richard G. Kahn, appeals an order of the superior court granting summary judgment in favor of the defendants, Jon Meyer, Esq. and the law firm of Backus, Meyer, Solomon and Branch, LLP, on his claims of legal malpractice. The trial court concluded that the plaintiff failed to disclose sufficient expert testimony to establish legal causation and damages. We affirm in part, reverse in part, and remand.

In reviewing the trial court's grant of summary judgment, we consider the summary judgment record, and all reasonable inferences drawn from it, in the light most favorable to the nonmoving party. See Dent v. Exeter Hosp., 155 N.H. 787, 791 (2007). Summary judgment is required where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. See *id.* at 792; RSA 491:8-a, III (1997).

To establish legal malpractice, it is the plaintiff's burden to prove: "(1) that an attorney-client relationship existed, which placed a duty upon the attorney to exercise reasonable professional care, skill and knowledge in providing legal services to that client; (2) a breach of that duty; and (3) resultant harm legally caused by that breach." Carbone v. Tierney, 151 N.H. 521, 527 (2004). Proof of both breach of the standard of care and causation in a legal malpractice action ordinarily requires expert testimony. See *id.* at 528; see also Estate of Sicotte v. Lubin & Meyer, P.C., 157 N.H. ___, ___ (decided September 12, 2008). Although the trial court may properly grant summary judgment if the plaintiff fails to disclose required expert testimony, see Dent, 155 N.H. at 795-96, the trial court has discretion to excuse a failure to timely disclose expert testimony, see Gulf Ins. Co. v. AMSCO, 153 N.H. 28, 33 (2005).

In this case, the plaintiff, a retired attorney, alleged that he began receiving total disability insurance benefits in 1989. In 1997, the insurer began to demand that the plaintiff undergo independent medical examinations (IMEs) pursuant to the policy, a demand he resisted unless the insurer would assent to the attendance of his own physician or attorney at the IMEs. In 1998, after the

insurer refused the plaintiff's terms, he engaged the defendants to represent him in the dispute with the insurer.

In January 1999, the insurer sent the defendants a letter declaring that its continued payment of benefits was pursuant to a reservation of rights, and that it would be rescheduling IMEs. The insurer later scheduled the IMEs for October 1999, and notified the defendants. The defendants, however, neither advised the plaintiff of the reservation of rights and that the insurer had scheduled IMEs, nor advocated his position that he was entitled under the policy to the attendance of his own representative at the IMEs. The plaintiff failed to attend the IMEs, the insurer terminated the policy, and the plaintiff, represented by the defendants, commenced litigation with the insurer. The insurer counterclaimed for benefits paid under the reservation of rights.

During the underlying litigation, the plaintiff alleges, *inter alia*, that the defendants failed: (1) to research, develop, and assert viable claims; (2) to vigorously and expeditiously prosecute the litigation; (3) to initially sue the proper party; and (4) to develop an appropriate budget and litigation strategy. In December 2000, the plaintiff allegedly learned of, and confronted the defendants about, a conflict of interest. The plaintiff subsequently terminated the attorney-client relationship, and proceeding *pro se*, settled with the insurer for \$220,000.

Thereafter, the plaintiff commenced the present action, asserting numerous violations of professional obligations. He claimed that the defendants' actions, both prior to and during the litigation, caused him to lose insurance benefits prematurely, to incur litigation expenses, and to settle for an amount less than the value of the benefits due him under the policy. He sought to recover the difference between the settlement and the total value of the insurance benefits, the legal fees he paid the defendants, the expenses he incurred in the underlying case and would incur in the malpractice case, and the value of the time he devoted to the underlying case and would devote to the malpractice case.

Prior to trial, the plaintiff disclosed himself as his sole expert witness, and produced an eighty-three page report detailing his claims. The defendants moved to strike the plaintiff as an expert witness, and for summary judgment on the basis that because the plaintiff had not disclosed expert opinion testimony as to the reasonable settlement value of the underlying case, or that he was, in fact, medically disabled, he could not establish causation or damages. The plaintiff countered that his report cited, and he had produced, videotaped depositions of medical experts from the underlying case, and that he himself was qualified to testify as to the value of his disability benefits. The trial court denied the motion

to strike, and denied summary judgment “without prejudice to any pretrial [and] trial evidentiary objections[.]”

Shortly before trial, a different trial judge granted a motion *in limine* to preclude the medical depositions taken in the underlying case on the basis that the defendants had either not participated in them, or had participated only as the plaintiff’s counsel. Recognizing that the order would “prejudice [the plaintiff] in the damage phase of his upcoming trial,” however, the trial court bifurcated the case, ruling that the scheduled trial would address “the liability portion of the plaintiff’s case,” with a separate trial “to decide the plaintiff’s damage claims after the plaintiff ha[s] had the opportunity to redepose his medical experts with the defendants being able to participate in that process.” The trial court denied a second motion *in limine* to preclude the plaintiff from acting as his own expert or introducing testimony regarding the value of future benefits.

The scheduled trial did not go forward, however, and the case was transferred to another county. At the trial management conference, a third trial judge referred to the order denying summary judgment, and asked whether the plaintiff had disclosed any new experts. When the plaintiff responded that the bifurcation order still stood, and that the trial court had already ruled that he was qualified to provide expert testimony as to liability, the trial judge stated that she was going to reexamine the summary judgment motion. Thereafter, the trial court granted the motion, finding that because the plaintiff had not disclosed medical testimony that he was disabled, or evidence as to the settlement value of the underlying case, he could not meet his burden.

On appeal, the plaintiff argues that the trial court erred by excluding the medical depositions taken in the underlying case. In the event the trial court properly excluded such depositions, the plaintiff challenges the granting of summary judgment, arguing that the finding that he had failed to disclose medical testimony and evidence concerning the settlement value of the underlying case was inconsistent with the bifurcation of the case. Finally, the plaintiff argues that the trial court erred by denying certain motions to compel discovery responses, and that neither the trial judge who excluded the depositions, nor the trial judge who granted summary judgment, was impartial.

We address first whether the trial court erred by excluding as hearsay the plaintiff’s medical expert depositions. We review the trial court’s rulings on the admissibility of hearsay evidence for an unsustainable exercise of discretion. See *Carlisle v. Frisbie Mem. Hosp.*, 152 N.H. 762, 777 (2005).

Upon this record, the trial court was not compelled to find that the medical experts were “unavailable,” a prerequisite to the admissibility of the

depositions under either Rule 804(b)(1) or Rule 804(b)(6) of the New Hampshire Rules of Evidence. See *Carlisle*, 152 N.H. at 777-78. Moreover, given the defendants' role as counsel for the plaintiff in the underlying proceedings, the trial court was not compelled to find that they had a motive to develop the experts' testimony through cross-examination, see *N.H.R. Ev.* 804(b)(1), or that admission of the depositions would serve the interests of justice, see *N.H.R. Ev.* 804(b)(6)(C). Accordingly, we reject the plaintiff's arguments that the depositions were admissible under Rules 804(b)(1) and 804(b)(6), or that the general equities of the case required their admission.

Nor were the depositions rendered admissible by the plaintiff's reliance upon them in his expert disclosure. While an expert may properly rely upon hearsay in forming an opinion under Rule 703, and may be cross-examined regarding the hearsay under Rule 705, nothing in these rules "magically render[s] the hearsay evidence admissible." *Carignan v. N.H. Int'l Speedway*, 151 N.H. 409, 418 (2004) (quotation omitted). The trial court was not required to admit the depositions merely because the plaintiff may have cited them in his expert report. See *id.*

To the extent the plaintiff argues that the trial court ignored non-hearsay purposes for the evidence, he does not dispute the defendants' assertion that he never raised the argument at trial, but contends that he was not required to raise it. We disagree. See *State v. Brum*, 155 N.H. 408, 417 (2007).

We conclude, therefore, that the trial court did not unsustainably exercise its discretion by excluding the medical depositions from evidence. The trial court went further, however, and bifurcated the case into "liability" and "damages" phases, so that if the plaintiff prevailed on liability, his damage claims would be determined at a later date "after the plaintiff ha[s] had the opportunity to redepose his medical experts with the defendants being able to participate in that process." We agree with the plaintiff that, under these circumstances, the trial court erred by granting summary judgment for failure to disclose medical testimony or proof of the value of the underlying case.

At the outset, we reject the defendants' contention that because causation is a component of liability, the plaintiff's failure "to disclose medical and causation of damages experts needed to prove causal negligence" at an initial trial on "liability" entitled them to summary judgment. In context, we construe the bifurcation order to have required a "liability" trial on the first two elements of the plaintiff's legal malpractice claims – namely, "(1) that an attorney-client relationship existed, which placed a duty upon the attorney to exercise reasonable professional care, skill and knowledge in providing legal services to that client; [and] (2) a breach of that duty." *Carbone*, 151 N.H. at 527. The

“damages” trial was to address the “resultant harm legally caused by that breach.” *Id.* In other words, in the event the plaintiff established that the defendants breached professional standards of care, a second trial would decide the “case within the case,” or “what should have happened in the original [disability] action” had the defendants not breached their obligations. *Witte v. Desmarais*, 136 N.H. 178, 189 (1992). It was to the merits of the underlying disability claim that the medical experts’ testimony was material, and it would have made no sense for the trial court to have required a second trial on “damages” so that the medical experts could be re-deposed, but to have also required their testimony “to prove causal negligence” at the initial liability trial.

Nor was the bifurcation order altered by the subsequent continuance of the liability trial. While the trial court stated that “[t]he jury empanelled on January 8, 2007 will hear the liability portion of the plaintiff’s case only,” the bifurcation order was neither contingent upon that trial going forward as scheduled, nor vacated subsequent to the continuance.

The requirement that parties disclose anticipated expert opinion evidence prior to trial “rests upon the premise that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information.” *Gulf Ins. Co.*, 153 N.H. at 33 (quotation omitted). Here, the defendants were well aware that the plaintiff intended to rely upon the medical experts and his own testimony as to the amount of disability benefits due him under the policy to prove his underlying disability claim, as evidenced by their motions *in limine*. In addition to bifurcating “damages” from “liability,” the trial court denied the motion to preclude the plaintiff’s testimony, and the defendants have cross-appealed neither of these rulings.

Implicit in these rulings was a determination that, after the re-deposition of the medical experts, the substance of their opinions, and the opinion of the plaintiff, would be sufficiently disclosed as to eliminate surprise at any future trial on damages. *See id.* Under these circumstances, it was error for the trial court to grant the defendant’s motion for summary judgment.

We next address whether the trial court erred by denying the plaintiff’s motions to compel discovery responses. Whether to compel pretrial discovery is a matter left to the sound discretion of the trial court. *See Bennett v. ITT Hartford Group*, 150 N.H. 753, 760 (2004). Any motion to compel an answer to an interrogatory or the production of a record must be filed within twenty days of the objectionable discovery response. *See Super. Ct. R.* 36. The trial court here denied the motions in part on timeliness grounds. The record reflects that the motions were filed several months after the defendants served their discovery responses. They were not, as the plaintiff suggests, “pretrial

motions,” but were motions to compel governed by Rule 36. Upon these facts, the trial court did not unsustainably exercise its discretion.

Finally, we reject the plaintiff’s arguments concerning judicial bias. Having reviewed the record, we cannot conclude either that a reasonable person would have questioned the impartiality of the trial judges in question, or that any factors that would have *per se* disqualified them were present. See *State v. Bader*, 148 N.H. 265, 268-71 (2002).

Affirmed in part; reversed in part; remanded.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**