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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

EUGENE FORTE,

Plaintiff and Appellant,

v.

LARRY LICHTENEGGER et al.,

Defendants and Respondents.

F062558

(Super. Ct. No. M70711)

OPINION

APPEAL from a judgment of the Superior Court of Monterey County. Lydia M. Villarreal, Judge.

Eugene Forte, in pro. per., for Plaintiff and Appellant.

Gerard A. Rose for Defendants and Respondents.

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Plaintiff Eugene Forte sued his former attorney, Larry Lichtenegger, and the law firm of Lichtenegger & Lee (collectively defendants) for alleged legal malpractice. Defendants had represented plaintiff in an action for specific performance of a real estate purchase contract. Plaintiff's complaint in the present case alleged that defendants committed malpractice by failing to advise him of the statute of limitations for certain *other* claims that plaintiff may have had against other parties. At the commencement of the trial below, after plaintiff made his opening statement to the jury, defendants moved for nonsuit on the ground that plaintiff had no expert witness and therefore could not prove that defendants' conduct fell below the applicable standard of care. The trial court agreed, granted nonsuit and entered judgment in favor of defendants. Plaintiff appeals. We will affirm.

FACTS AND PROCEDURAL HISTORY

Pleadings and Related Cases

In July 2004, plaintiff filed his "COMPLAINT FOR DAMAGES FOR MALPRACTICE" (the complaint) against defendants in Monterey County Superior Court. The complaint alleged that in March 2000, plaintiff retained the legal services of defendants "to represent plaintiff as plaintiff's attorney(s) at law ... in the case of *Forte v. Powell*, M45327...." *Forte v. Powell* was a lawsuit for specific performance of a real estate purchase contract in which plaintiff sought to enforce his rights under that contract as the prospective buyer.¹ The gist of plaintiff's malpractice claim against defendants herein

¹ Plaintiff's lawsuit for specific performance was unsuccessful and judgment in favor of the Powells was affirmed by the Sixth District Court of Appeal's nonpublished opinion in *Forte v. Powell* (Mar. 27, 2003, H023259). The rationale of the trial court's decision, which was upheld on appeal, was that plaintiff repudiated the agreement. Plaintiff blamed defendants—his trial attorneys—for that unsuccessful outcome, alleging they mishandled the prosecution of the trial. The *present* case, however, does not concern the manner in which defendants conducted the *Forte v. Powell* lawsuit. That was the subject of a separate action for legal malpractice by plaintiff against defendants. In

was that during the course of defendants’ representation of plaintiff in the *Forte v. Powell* lawsuit, defendants should have—but did not—advise plaintiff of the statute of limitations deadline relating to distinct claims against other parties. Specifically, plaintiff’s complaint alleged that defendants “negligently and carelessly failed to advise plaintiff regarding the statute of limitations” for filing a complaint for legal malpractice against plaintiff’s prior attorneys, Michael Albov, Peter Williams and the Hudson Martin Ferrante & Street law firm (collectively the Hudson firm), who had represented plaintiff during the underlying real estate purchase escrow. Apparently, while escrow was pending, the Hudson firm gave plaintiff legal advice that backfired and allowed the sellers (the Powells) to cancel or rescind the contract, which they did, resulting in plaintiff’s potential legal malpractice claim against the Hudson firm. According to plaintiff, since defendants herein did not inform plaintiff of the statute of limitations deadline for filing a complaint against the Hudson firm, plaintiff allegedly “lost the ability to recoup his damages in the [attempted] purchase of the property.”

In 2001, plaintiff had commenced an action against the Hudson firm for legal malpractice stemming from the alleged bad advice given by that law firm during the real estate purchase escrow.² That case, *Forte v. Albov*, was resolved in the trial court in favor of the Hudson firm on motion for summary judgment based on the expiration of the one-year statute of limitations relating to attorney malpractice (Code Civ. Proc., § 340.6). On appeal, we affirmed the judgment of the trial court because under the undisputed facts, the statute of limitations had expired. (See *Forte v. Albov* (Nov. 3, 2008, F055229) [nonpub. opn.])

that separate action, defendants prevailed in the trial court and we affirmed the judgment for defendants. (See *Forte v. Lichtenegger* (Feb. 3, 2011, F057677) [nonpub. opn.])

² Plaintiff filed his complaint against the Hudson firm more than one year after (i) the Powells cancelled their contract with plaintiff and (ii) plaintiff incurred attorney fees in seeking specific performance.

In our nonpublished opinion in *Forte v. Albov*, *supra*, F055229, we briefly summarized some of the events preceding the Powells' decision (as sellers of the subject real estate) to cancel the sale. We reiterate here, as background, a portion of that summary:

“On June 11, 1999, [plaintiff] entered into a contract with William Powell, Jr. and Collien Powell (the Powells) for the purchase of real property known as 806 Quail Ridge Lane (Parcel D). [Plaintiff] was a tenant of the Powells. [¶] On July 19, 1999, [plaintiff] retained [the Hudson firm] to provide legal advice in connection with his attempt to purchase Parcel D. [Plaintiff] was concerned that the Powells had misrepresented the property line and wished to obtain legal advice on his options for dealing with the property line issue without giving the Powells a chance to rescind the contract. [¶] [Plaintiff] alleged that [the Hudson firm] negligently and carelessly advised him to (1) renegotiate the purchase contract while escrow was still pending, (2) make the purchase of Parcel D contingent upon the sale of a neighboring lot, Parcel C, that was owned by the father of William Powell, Jr., (3) make an implied threat of a lawsuit concerning the misrepresentation of the property line, and (4) send a letter dated July 28, 1999 to the Powells containing the foregoing elements.” (*Id.* at pp. *3-4

Plaintiff purportedly followed that advice and, almost immediately thereafter, the Powells cancelled the contract and escrow. Thus, the sale never occurred and plaintiff believed the Hudson firm was at fault for giving him erroneous legal advice. However, as noted above, plaintiff delayed too long before filing suit against the Hudson firm and that firm prevailed based on the statute of limitations.

When plaintiff began to realize that his case against the Hudson firm might be time-barred, he commenced the instant action against defendants.³ As noted, plaintiff alleged that defendants committed legal malpractice by not advising him of the statute of limitations regarding plaintiff's potential claim against the Hudson firm. Of course, for

³ The present action was filed in July 2004, at about the time that plaintiff's opposition to the Hudson firm's motion for summary judgment (regarding the statute of limitations) was filed in *Forte v. Albov*.

any plaintiff to prevail in a cause of action for legal malpractice, he or she must be able to prove that the attorney's act or omission constituted a breach of *the applicable standard of care* under the circumstances. (See, e.g., 1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, §§ 285, 288-291, pp. 359-360, 364-368.) The difficulty here, as will be seen, is that such a showing could not be made in this case without expert testimony—and plaintiff did not designate an expert witness. That failure on plaintiff's part was fatal to his case, as the trial court correctly recognized in granting nonsuit. We now briefly describe the motions that led to that determination.

Motion to Dismiss

Prior to trial, defendants filed a motion asking the trial court to dismiss plaintiff's action. The motion was made on the ground that plaintiff could not prove his case of legal malpractice against defendants without expert testimony and that plaintiff was precluded under Code of Civil Procedure section 2034.300 from introducing any expert testimony.⁴ Defendants' motion established that they made a timely, formal demand for exchange of expert trial witnesses, a specific date of exchange was set, and plaintiff failed to designate any expert witnesses. In addition, defendants' motion to dismiss pointed out that (i) defendants were hired solely to try the *Forte v. Powell* case; (ii) the issue of a potential claim for malpractice against the Hudson firm was never discussed and defendants were never asked to render an opinion about the statute of limitations for such a claim against the Hudson firm; and (iii) plaintiff hired another attorney in another law

⁴ Code of Civil Procedure section 2034.300 states, in relevant part: “[O]n objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following: [¶] (a) List that witness as an expert under Section 2034.260. [¶] (b) Submit an expert witness declaration. [¶] (c) Produce reports and writings of expert witnesses under Section 2034.270. [¶] (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).”

firm (i.e., Jeffrey Widman) to investigate the possible cause of action against the Hudson firm for legal malpractice.⁵

The trial court denied the motion to dismiss, without prejudice. The trial court explained its ruling from the bench: “I’m going to deny the motion because I do believe it’s premature. You’re certainly welcome to raise it again at trial. But for the moment, the motion is denied.”

Motion for Nonsuit

After the jury was selected, plaintiff made an opening statement in which he presented to the jury what he believed the evidence would show. Plaintiff told the jury he would be demonstrating what “any lay person” would understand an attorney should do, and that “you don’t need a whole bunch of expert witnesses to tell you what’s wrong simply about basic standard of care.” At the end of plaintiff’s opening statement, and out of the presence of the jury, defendants renewed their motion to dismiss the action, but this time the motion was formally couched as a motion for a judgment of *nonsuit* under Code of Civil Procedure section 581c. The trial court agreed with defendants’ motion, explaining to plaintiff that “[y]ou have no expert. You can’t represent to the jury that you have an expert, and the case simply cannot be proven without an expert.”⁶ Accordingly,

⁵ In the *Forte v. Albov* case, plaintiff submitted the declaration of Mr. Widman to oppose the Hudson firm’s motion for summary judgment on statute of limitations grounds.

⁶ We note that during in limine proceedings heard prior to the nonsuit motion, plaintiff argued that defendants’ expert should be excluded from testifying on the ground that no expert was necessary in the case. The trial court disagreed, and a back-and-forth exchange occurred between the trial court and plaintiff. In that exchange, the trial court explained at length why plaintiff could not prove his case without an expert witness. Illustrative of the trial court’s many attempts to help plaintiff understand was the following: “[Y]ou don’t have an expert. So you don’t have anyone who is going to be able to testify to the jury regarding the standard of care in terms of whether or not Mr. Lichtenegger should have told you about the statute of limitations. And then

the motion for nonsuit was granted. On January 13, 2011, the trial court entered its judgment of nonsuit in favor of defendants.

Plaintiff's timely appeal to the Sixth District Court of Appeal followed. On May 25, 2011, the Supreme Court ordered the appeal transferred to this court.

DISCUSSION

I. Standard of Review

Under Code of Civil Procedure section 581c, subdivision (a): "Only after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit." A nonsuit on the opening statement is warranted only if it is clear there will be no evidence of sufficient substantiality to support a judgment in favor of the plaintiff. (*Willis v. Gordon* (1978) 20 Cal.3d 629, 633.)

"The standard of review for a nonsuit after [the] conclusion of the opening statement is well settled. Both the trial court in its initial decision and the appellate court on review of that decision must accept all facts asserted in the opening statement as true and must indulge every legitimate inference which may be drawn from those facts. [Citations.] A nonsuit at this early stage of the proceedings is disfavored. [Citation.] It can only be upheld on appeal if, after accepting all the asserted facts as true and indulging every legitimate inference in favor of plaintiff, it can be said those facts and inferences lead inexorably to the conclusion plaintiff cannot establish an essential element of its cause of action or has inadvertently established uncontrovertible proof of an affirmative defense. [Citations.]' [Citation.]" (*Galanek v. Wismar* (1999) 68 Cal.App.4th 1417, 1424.)

secondly, you don't have anyone to provide evidence to the jury regarding the viability of the underlying lawsuit."

II. Nonsuit Properly Granted

The ground on which the trial court granted nonsuit was that plaintiff could not prove his case for legal malpractice without expert testimony. On appeal, plaintiff argues that the trial court erred in so concluding. We disagree.

We begin with a summary of the applicable legal principles. “In civil malpractice cases, the elements of a cause of action for professional negligence are: “(1) the duty of the attorney to use such skill, prudence and diligence as members of the profession commonly possess; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage. [Citations.]” [Citation.]’ [Citations.]” (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 356-357.)

As a general matter, an attorney’s standard of care must be established by expert testimony. “The fact of breach is proved by expert opinion on whether the attorney followed the standards of skill and diligence prevailing in the profession.” (1 Witkin, Cal. Procedure, *supra*, Attorneys, § 291, p. 367.) “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; accord, *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093.) The exception to the general rule has been stated elsewhere as follows: “[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.” [Citations.]” (*Goebel v. Lauderdale* (1989) 214 Cal.App.3d 1502, 1508; accord, *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1146-1147 [expert testimony was not required to sustain a finding of negligence where attorney committed numerous

“blatant” and “egregious” violations of professional ethical standards as prescribed by the State Bar Rules of Professional Conduct].)

The case before us plainly comes within the general rule that expert testimony is necessary to prove the applicable standard of care of an attorney. The question of whether defendants’ alleged conduct (i.e., failure to advise plaintiff on the statute of limitations regarding potential claims against the Hudson firm) fell below the applicable standard of care was *not* something that could be resolved by the jury based on mere common sense or general knowledge of laypersons. Rather, an expert witness would have to inform the jury with respect to the applicable standard of care under all the circumstances of this case. We believe some of the relevant circumstances that such an expert would have to consider would include the following: (i) the limited scope of what defendants were hired to do in representing plaintiff in *Forte v. Powell*; (ii) the extent to which plaintiff had a reasonable basis to expect defendants to engage in a broader legal representation of plaintiff’s interests that would include plaintiff’s potential claims against other parties and the statute of limitations for such claims; (iii) whether plaintiff had retained other counsel to look into the potential claims against the Hudson firm; and (iv) the extent to which the parties understood that plaintiff would be relying on other counsel with respect to the potential claims against the Hudson firm. These complexities fly in the face of plaintiff’s contention that a jury could have readily determined the attorney’s standard of care or breach thereof. Quite to the contrary, it is clear that plaintiff could not prove the standard of care in this case in the absence of opinion testimony of an expert witness concerning the standard of care of an attorney.

Defendants point out there was another element of plaintiff’s case that could not be proven without expert testimony. In addition to the standard of care for defendants’ representation of plaintiff, plaintiff would *also* have to prove the elements of causation and damages by evidence that *but for* defendants’ negligence, plaintiff would have been successful in the underlying malpractice case against the Hudson firm. (*Blanks v.*

Seyfarth Shaw LLP, supra, 171 Cal.App.4th at p. 357 [referring to this as the trial within a trial]; *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241.) To do so here, plaintiff would have to be able prove (among other things) that the Hudson firm’s advice during the escrow was “so legally deficient when it was given that he [or she] may be found to have failed to use “such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.” [Citation.]” (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 397.) The trial court in our case noted that this issue as well would require expert testimony. We agree. The mere fact that the Powells were able to successfully cancel the transaction after plaintiff sent his letter raising the property boundary issues did not mean that defendants’ advice was so clearly or blatantly below the standard of care such that no assistance of an expert witness would be needed by the jury.

We conclude that since plaintiff could not prove his case for legal malpractice without the opinion testimony of an expert witness, and because plaintiff was barred from introducing such evidence pursuant to Code of Civil Procedure section 2034.300, the trial court correctly granted the motion for nonsuit. (*Lipscomb v. Krause* (1978) 87 Cal.App.3d 970, 975-976 [where plaintiff failed to produce expert testimony on standard of care, grant of nonsuit affirmed].)

III. Plaintiff’s Counter Arguments

We have concluded from the entire record that the trial court properly granted defendants’ motion for a judgment of nonsuit. Without an expert, plaintiff could not prove his case—therefore, a judgment of nonsuit was appropriate. Although unnecessary to do so, we now briefly comment on and dispose of several contentions and arguments raised by plaintiff.

First, plaintiff argues that inasmuch as the Court of Appeal determined in *Forte v. Albov*, that he, as a mere layman, had a reasonable suspicion of wrongdoing which triggered the running of the statute of limitations for his claims against the Hudson firm

(see *Forte v. Albov*, *supra*, F055229, at pp. *28-29), defendants *must have* breached the standard of care *as a matter of law* when they, as attorneys, failed to advise him about the statute of limitations. Plaintiff's argument is flawed for several reasons, including that it confuses the minimum threshold to trigger the statute of limitations—i.e., whether plaintiff had sufficient knowledge or notice of facts to create a suspicion of wrongdoing⁷—with the applicable standard of care of an attorney. Plaintiff simply assumes, without evidence or authority, that if a limitations period has started to run on a potential claim of his, it automatically means that attorneys representing him in a different context would have a duty to advise him of same. But the mere fact the statute of limitations was deemed to be triggered in *Forte v. Albov* does not establish that defendants violated the standard of care in this case. In other words, nothing in *Forte v. Albov* obviated the need for plaintiff to prove his malpractice cause of action at trial with competent evidence—including expert evidence to inform the jury of the applicable standard of care. Moreover, our nonpublished opinion in *Forte v. Albov*, *supra*, F055229, was careful to point out that suspicion of wrongdoing in a lay sense was the test for purposes of the statute of limitations, not knowledge that the attorney's act or omission failed to meet the professional's standard of care, and we repeatedly emphasized that the latter technical or legal understanding was not required to start the running of the statute of limitations. (*Id.* at pp. *27-29, 33-34.) For all of these reasons, we reject plaintiff's argument that the holding in *Forte v. Albov*, *supra*, F055229, somehow established defendants' liability for attorney malpractice without the need of competent expert witness testimony.

⁷ The case law is clear that once a plaintiff suspects or should suspect his or her injury was caused by wrongdoing, the statute of limitations begins to run. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110; *Curtis v. Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 501.)

Second, plaintiff contends that the trial court was “premature” in granting nonsuit. Plaintiff argues that even though he did not designate his own expert, defendant’s expert might have surprised everyone by adopting plaintiff’s position that defendants breached the standard of care, or plaintiff might possibly have elicited such expert testimony via cross-examination. Plaintiff’s argument is mistaken because unless he was able to prove his case with competent evidence, defendants did not need to put their expert on the stand at all.⁸ As defendants’ brief on appeal stated: “[I]t was [plaintiff] who had the initial burden of establishing a breach of the standard of care, and if he failed in that duty, there was no need for [defendants] to call anyone, including an expert.” Moreover, under Code of Civil Procedure section 2034.300, where a party has failed to designate an expert when required to do so, the trial court on objection must exclude the expert opinion of *any witness* who was offered by that party.⁹ That rule would defeat what plaintiff is suggesting here.

Third, plaintiff makes the argument that somehow the proposed jury instructions he submitted to the trial court obviated the need to introduce expert testimony on the applicable standard of care. This argument is without merit. If plaintiff cannot prove his case, his proposed jury instructions are completely irrelevant.

Fourth, plaintiff makes a vague accusation that the trial judge should have disqualified herself. Plaintiff’s argument is difficult to decipher, but appears to be premised on the fact that the trial judge denied plaintiff’s motion to continue the trial

⁸ As the trial court attempted to explain to plaintiff: “You can’t use [defendants’ expert’s] testimony because before we even get to his testimony, you have to prove your case.”

⁹ Plaintiff does not argue that the exceptions set forth at Code of Civil Procedure section 2034.310 may have applied here; therefore, any such argument is abandoned. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700.)

date. However, that denial was apparently based on the trial judge’s concern about the approach of the five-year dismissal statute and, in any event, plaintiff has not demonstrated that the denial was unreasonable or an abuse of the court’s broad discretion under the circumstances. We fail to see how any lack of impartiality could possibly be inferred from that ruling.¹⁰ Plaintiff next suggests—without any evidentiary support or sound reason—that merely because the trial judge was on the Monterey County Superior Court bench, she could not impartially hear the case. Lastly, plaintiff asserts that the trial judge had previously disqualified herself from hearing any of plaintiff’s cases, but plaintiff fails to cite to any record of such a disqualification decision, notice or order. Nor does plaintiff substantiate that he timely followed statutory procedures for raising an objection based on alleged disqualification. In short, plaintiff’s claim the trial judge should have disqualified herself is completely unsupported by an adequate record or coherent legal argument.¹¹ We accordingly reject it.

¹⁰ Defendants note that plaintiff had long had notice that he needed an expert, as his earlier lawsuit against defendants had been dismissed for that very reason.

¹¹ This amounts to a failure to meet his burden as the appealing party. “A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.” (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Because a trial court’s order is presumed to be correct, error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Thus, an appellant must affirmatively show prejudicial error based on adequate legal argument and citation to the record. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; *McComber v. Wells* (1999) 72 Cal.App.4th 512, 522-523.) These requirements apply equally to appellants acting without an attorney. (*McComber v. Wells, supra*, at p. 523.) When points are perfunctorily raised, without adequate analysis and authority or without citation to an adequate record, we pass them over and treat them as abandoned. (*People v. Stanley, supra*, 10 Cal.4th at p. 793; *Landry v. Berryessa Union School Dist., supra*, 39 Cal.App.4th at pp. 699-700.) Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants.

Kane, J.

WE CONCUR:

Cornell, Acting P.J.

Detjen, J.