

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT
PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JACE FRANK EDEN, *Plaintiff/Appellant*,

v.

CRISS E. CANDELARIA and CRISS CANDELARIA LAW OFFICE, P.C.,
Defendants/Appellees.

No. 1 CA-CV 15-0623
FILED 11-3-2016

Appeal from the Superior Court in Navajo County
No. S0900CV201400434
The Honorable Donna J. Grimsley, Judge

AFFIRMED

COUNSEL

Jace Frank Eden, Show Low
In Propria Persona Plaintiff/Appellant

Broening Oberg Woods & Wilson, PC, Phoenix
By Donald Wilson, Jr., Jathan P. McLaughlin
Counsel for Defendants/Appellees

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MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Maurice Portley¹ joined.

T H O M P S O N, Judge:

¶1 Plaintiff Jace Frank Eden appeals a summary judgment dismissing his legal malpractice claim against Criss Candelaria and the Criss Candelaria Law Office, P.C. (collectively, Candelaria). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY²

¶2 Eden filed this lawsuit alleging that Candelaria, a licensed attorney, mishandled litigation relating to property owned by Branding Iron Plaza, LLC, Candelaria's client, which caused Eden to suffer approximately \$11 million in damages. Eden alleged and certified in the complaint that expert testimony was not necessary to prove standard of care or liability. *See* Ariz. Rev. Stat. (A.R.S.) § 12-2602(A) (2016).

¶3 Candelaria moved for summary judgment, arguing that Eden could not prove his claim without expert testimony, which Eden "has indicated he will not obtain."³ Eden conceded he did not "intend to obtain [an] expert," but argued (i) expert testimony was unnecessary, *see Asphalt*

¹ The Honorable Maurice Portley, Retired Judge of the Court of Appeals, Division One, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² On appeal from the grant of summary judgment, we view the facts and inferences drawn therefrom in the light most favorable to the party against whom judgment was entered. *See Weitz Co. L.L.C. v. Heth*, 235 Ariz. 405, 408, ¶ 2, 333 P.3d 23, 26 (2014) (citation omitted)

³ Apparently, Eden is a member of the Branding Iron LLC. For purposes of the summary judgment motion, Candelaria conceded he had an attorney-client relationship with Eden in the Branding Iron litigation.

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Eng'rs, Inc. v. Galusha, 160 Ariz. 134, 770 P.2d 1180 (App. 1989), and (ii) Candelaria waived the lack of an expert because Candelaria did not raise the issue as an affirmative defense in his answer.

¶4 The superior court granted the motion and entered judgment dismissing Eden's complaint with prejudice. Eden timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (2016).⁴

DISCUSSION

I. Summary Judgment.

¶5 Eden argues that the superior court erred in granting Candelaria's motion for summary judgment.⁵ He contends that the court failed to consider that he filed a response and erred by saying the motion was uncontested.

¶6 We review a ruling granting summary judgment de novo. *See Parkway Bank & Trust Co. v. Zivkovic*, 232 Ariz. 286, 289, ¶ 10, 304 P.3d 1109, 1112 (App. 2013). The motion should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); Ariz. R. Civ. P. 56(c)(1). We will independently determine whether there are any genuine issues of material fact and if the superior court properly applied the law. *Parkway Bank*, 232 Ariz. at 289, ¶ 10, 304 P.3d at 1112. Moreover, we can affirm summary judgment on any basis in the record, even if not relied on by the superior court. *See Mutschler v. City of Phx.*, 212 Ariz. 160, 162, ¶ 8, 129 P.3d 71, 73 (App. 2006).

⁴ We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

⁵ A *pro per* litigant "is held to the same familiarity with court procedures and the same notice of statutes, rules, and legal principles as is expected of a lawyer." *Higgins v. Higgins*, 194 Ariz. 266, 270, ¶ 12, 981 P.2d 134, 138 (App. 1999); *see also Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 16, 17 P.3d 790, 793 (App. 2000) ("[A] party who conducts a case without an attorney is entitled to no more consideration from the court than a party represented by counsel, and is held to the same standards expected of a lawyer.").

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¶7 Because the crux of Eden’s complaint is a claim for legal malpractice, to prevail, he would have to prove (1) the existence of an attorney-client relationship that imposes a duty on the attorney to exercise that degree of skill, care, and knowledge commonly exercised by members of the profession; (2) breach of duty; (3) the defendant’s negligence was the actual and proximate cause of the injury, and (4) the nature and extent of damages. See *Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 12, 88 P.3d 26, 29 (2004) (citation omitted).

A. *Breach of Duty.*

¶8 Expert testimony is generally required “to establish the standard of care by which the professional actions of an attorney are measured and to determine whether the attorney deviated from the proper standard.” *Baird v. Pace*, 156 Ariz. 418, 420, 752 P.2d 507, 509 (App. 1987). Expert testimony is not required, however, “where the negligence is so grossly apparent that a lay person would have no difficulty recognizing it.” *Asphalt Eng'rs*, 160 Ariz. at 135-36, 770 P.2d at 1181-82.

¶9 Here, Eden alleged numerous instances in which Candelaria purportedly failed to meet the standard of care in defending the Branding Iron litigation from “incorrectly answer[ing]” the complaint to not timely filing the proper post-trial motions, all of which he urges a lay person would recognize as negligence.⁶ Unlike the negligence in *Asphalt Engineers*, which Eden relies on, Candelaria’s alleged negligence is not apparent in the context of the underlying action, which turned on the parties’ interest in the real property. Accordingly, expert testimony was necessary to establish the standard of care and whether Candelaria fell below that standard.

⁶ Among other things, Eden alleged that Candelaria failed to comply with court orders; grasp the scope of the case (*e.g.*, understand and/or argue chain of title of the parcels in question); communicate with and/or follow instructions from the client (*e.g.*, with regard to filing a counterclaim, third-party claims, and post-trial motions); timely inform the client that the court had granted a preliminary injunction; report unprofessional conduct by opposing party’s counsel; “acquire” Eden’s testimony; object to perjured testimony; and file documents with the county recorder.

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B. Causation.

¶10 “A necessary part of the legal malpractice plaintiff’s burden of proof of proximate cause is to establish that ‘but for the attorney’s negligence, he would have been successful in the prosecution or defense of the original suit.’” *Glaze*, 207 Ariz. at 29, ¶ 12, 88 P.3d at 29 (quoting *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986)). “This is commonly called a ‘case within the case.’” *Frey v. Stoneman*, 150 Ariz. 106, 111 (1986). Absent specific evidence establishing causation, expert testimony is required “to substantiate the link between the claimed breach and the alleged injury.” *Mann v. GTCR Golder Rauner, L.L.C.*, 351 B.R. 685, 703 (D. Ariz. 2006) (citations omitted); see A.R.S. § 12-2602(B)(4). The rationale behind this requirement “stems from the basic principle that a plaintiff has the burden of proving his or her injuries were caused by defendant’s conduct.” *Benkendorf v. Adv. Cardiac Spec. Chartered*, 228 Ariz. 528, 530, ¶ 9, 269 P.3d 704, 706 (App. 2012) (discussing expert medical testimony establishing causation). Although causation is generally a question of fact for the jury to resolve, see *Gipson v. Kasey*, 214 Ariz. 141, 143, ¶ 9, 150 P.2d 228, 230 (2007), the court may resolve the issue if the evidence is insufficient to allow a jury to reasonably infer that “the negligent conduct on the part of the defendant was a proximate cause of plaintiff’s injuries.” *Ritchie v. Krasner*, 221 Ariz. 288, 298, ¶ 23, 211 P.3d 1272, 1282 (App. 2009); see *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 358, 706 P.2d 364, 368 (1985) (“The question of proximate cause is usually for the jury and it is only when reasonable persons could not differ that the court may direct a verdict on the issue.”).

¶11 Eden argues that Candelaria failed to prove the Branding Iron defendants “owned all 3 estates required to cause a merger of the greater and lesser landowners” and that the negligent conduct “caused the court to grant [plaintiff] a conveyance to use the 1955 easement,” which in turn caused his damages. However, without expert testimony, Eden cannot establish he would have been successful in defending this “case within the case” but-for Candelaria’s alleged negligence. See *Mann*, 351 B.R. at 703.

C. A.R.S. § 12-2602.

¶12 In his complaint, Eden “certif[ied] that expert opinion testimony is not necessary to prove the licensed professional’s standard of care or liability for this claim.” See A.R.S. § 12-2602(A). Because Candelaria’s answer did not raise the lack of an expert as an affirmative defense, Eden argues Candelaria waived any objection to lack of an expert. Regardless of whether Candelaria should have challenged the

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“certification” or otherwise pled the lack of an expert as an affirmative defense, Eden was still required, as a matter of law, to prove causation, including that he would have been successful but for the alleged negligence, and cannot do so without expert testimony.

¶13 Eden argues in his reply brief that he be allowed to cure his failure to produce an expert. *See* A.R.S. § 12-2602(E)-(F). Because Eden did not request additional time to obtain an expert before the court ruled on the motion for summary judgment, *see* Ariz. R. Civ. P. 56(f), he has waived the issue on appeal.

II. Remaining Issue.

¶14 Eden also argues the superior court erred in denying a motion for default judgment he filed early in the case. However, Eden’s failure to clearly argue the issue results in waiver of it. *See, e.g., Carrillo v. State*, 169 Ariz. 126, 132, 817 P.2d 493, 499 (App. 1991) (“Issues not clearly raised and argued on appeal are waived.”).

CONCLUSION

¶15 For the foregoing reasons, we affirm. Further, we award Candelaria his costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court
FILED: AA