

CHITTENDEN COUNTY CLERK  
FILED IN CLERKS OFFICE

SEP 14 2001

DIANE A LAYALLEE  
CLERK

ENTRY REGARDING MOTION

TITLE OF MOTION: DEF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNTERCLAIM &  
ON PLTF'S DECLARATORY JUDGMENT REQUEST

RESPONSE FILED:

09/05/01 PLAINTIFF'S OPPOSITION

COMPLIANCE BY \_\_\_\_\_

X DENIED (1)

\_\_\_\_ SCHEDULED FOR HEARING ON: \_\_\_\_\_ at \_\_\_\_\_; TIME ALLOTTED: \_\_\_\_\_

  X   OTHER (2) and (3)

1. A cause of action for legal malpractice normally requires an expert opinion on the duty owed to the client, and whether that duty was breached, and whether any such breach was the proximate cause of harm to plaintiff. Tetreault v. Greenwood, 165 Vt. 577 (1996). The exception is if the lack of care is so apparent that only common knowledge and experience are needed to comprehend it. Estate of Fleming v. Nicholson, 168 Vt. 495 (1998). The exception does not apply on these facts. If the alleged negligent conduct involves judgment unique to the profession, then the elements of negligence must be established by expert testimony. Tetreault v. Greenwood, 165 Vt. 577 (1996). When an attorney obtains a result for a client that is less than optimal for the client, that fact alone does not show a breach or proximate cause, even if the outcome is later modified or amended. Because an expert opinion is required, Defendant has not shown facts supporting judgment as a matter of law, and the Motion for Summary Judgment is denied, both on the Counterclaim and on the Plaintiff's Declaratory Judgment Request.

2. Plaintiff's request appears to be a request for an advisory opinion rather than a declaration of rights in an actual or justiciable controversy. Anderson v. State, 168 Vt. 641 (1998); Doria v. University of Vermont, 156 Vt. 114 (1991). The requirement of a justiciable controversy is jurisdictional, and may not be waived by either the parties *or the tribunal*. Cavendish v. Vt. Public Power Supply Auth., 141 Vt.



144 (1982). Plaintiff has until September 27, 2001 to file a memo supporting a claim that there exists a justiciable controversy. If none is filed the Plaintiff's Complaint will be dismissed.

3. Regarding Plaintiff's use of Magistrate Devine as an expert witness in defending the Counterclaim, the attorneys are referred to In Re Charles Wilkinson, 165 Vt. 183 (1996). Based on the reasoning and the principles expressed in the opinion of the Vermont Supreme Court, it appears that it would be clear error for the court to permit Magistrate Devine to be an expert witness in this case. Any memo seeking to support a different conclusion on this issue must be filed no later than September 27, 2001.

*Mary M. Seachrist*  
\_\_\_\_\_  
SUPERIOR COURT JUDGE

*9/14/01*  
\_\_\_\_\_  
DATE

COPIES SENT TO:

T. Heilmann, Esq.  
D. Mullett, Esq.