RENDERED: August 30, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 94-CA-1443-MR

KARL W. HUBBARD — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 92-CI-000710

MARCIA L. SPARKS; KEVIN P. KELLER; DAVID L. VAN ZANT; HUDDLESTON & VAN ZANT, P.S.C.; AND HAROLD K. HUDDLESTON — APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: GUDGEL, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a summary judgment entered against appellant in his legal malpractice action against appellees for negligent representation of him in a previous divorce action. Appellant's arguments center around his claim that appellees negligently failed to give him tax advice regarding the capital gains consequences of selling the marital property he received in the settlement agreement. After

reviewing appellant's arguments, the record herein and the applicable law, we affirm.

The underlying action which gave rise to the present case was a bitter divorce action between appellant, Dr. Karl Hubbard and his wife, Dr. Laura Hubbard. After much negotiation and upon the strong recommendation of the domestic relations commissioner, the parties entered into a settlement agreement whereby Karl received property valued by his expert at $627,923 or by Laura's expert at $1,300,000, including a residence, his medical practice, his interest in a rehabilitation center, certain other real property and various personal property. Laura received property valued by her expert at $164,164 or by Karl's expert at $162,225. To make up for the large discrepancy, Karl agreed to pay Laura $350,000, $200,000 of which was to be paid within 30 days and the remainder to be paid over two years. Karl is an orthopedic surgeon whose salary at the time of the settlement exceeded $400,000. Laura, an anesthesiologist, was not working outside the home, but was caring for the two pre-school children of the Hubbards at the time of the settlement.

Karl Hubbard brought the action herein on May 14, 1992, against appellee attorneys, Marcia Sparks, Kevin P. Keller and David Van Zant, who represented him at various times in the divorce action, and against appellee attorney, Harold Huddleston. The main claim in his complaint that he raises on appeal is that appellees failed to advise him that he might have to pay capital gains tax on the property he received through the settlement if

and when he ever sold the property. The court entered summary judgment against Karl Hubbard, relying upon Mitchell v. Transamerica Insurance Co., Ky. App., 551 S.W.2d 586 (1977), for the conclusion that the damages asserted by appellant were too speculative and, thus, as a matter of law, it would be impossible for appellant to prevail at trial. This appeal by Karl Hubbard followed.

In viewing the evidence in the record with regard to the alleged negligence of appellees, we see that the only such evidence is in Karl Hubbard's deposition. In that deposition he testifies that he consulted with two other attorneys, Mr. Searcy and Mr. Mobley, both of whom told him that his attorneys in the divorce action were negligent for failing to give him tax advice relative to the capital gains consequences of selling any of the property he received in the settlement. He mentions an opinion letter from Searcy on the issue, but no such letter was ever entered in the record. Nor does the record contain any affidavit from any expert stating that the appellees' conduct constituted professional negligence. In most professional negligence cases, expert witness testimony is necessary to establish negligence because the nature of the inquiry is such that jurors are not competent to draw their own conclusions from the evidence without the aid of such expert testimony. See Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122 (1991). In the present case, the only evidence of said negligence was the hearsay testimony of

the appellant that certain experts told him that appellees were professionally negligent.

Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991) adopted the summary judgment standard in Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985) that summary judgment should only be granted when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor. In the case at bar, given the necessity of expert testimony to establish professional negligence, we do not believe that hearsay testimony of appellant, without more, is sufficient to withstand a motion for summary judgment.

We shall next address the reason given by the trial court for granting summary judgment -- that damages were too speculative in this case to prevail in an action for legal malpractice. In Mitchell v. Transamerica Insurance Co., Ky. App., 551 S.W.2d 586 (1977), an attorney failed to file suit in Kentucky within the statute of limitations. The clients retained another attorney who filed suit in Indiana, where the action was not time-barred. The Indiana case settled and thereafter the clients sued their former counsel in Kentucky for missing the Kentucky statute of limitations, arguing that they would have received more in damages if the case had been held in Kentucky. The case went to trial and a verdict was entered against the attorney. The Court of Appeals reversed the judgment and ordered dismissal of the complaint against the lawyer in the form of a

judgment N.O.V. The Court reasoned that damages were too speculative in that there was no way of knowing what a Kentucky jury would have done if the case had actually been tried. The Court stated:

> It seems to us that the Mitchells' argument as to damages is an exercise in the pyramiding of an inference upon an inference. Trying to predict what a jury might do at any given time or place is hazardous and is one of the vagaries of life.

Id. at 588. The Court also felt it was significant that the client settled his case in Indiana instead of trying it.

> [I]t may have been a different case if the Mitchells had tried their case in Indiana and had come away with patently inadequate damages. The fact is that they settled their case . . .

Id.

Likewise, in the present case, we agree with the trial court that the appellant's claim is fraught with speculation, even more so than in Mitchell, supra. As the trial court so aptly stated:

> The dispositive feature of the present case is that the plaintiff settled his divorce case. Thus, one can only speculate whether he would have fared better had the divorce case been litigated to a conclusion. Likewise, one can only speculate as to whether (and to what extent) the plaintiff may be adversely affected by his potential capital gains tax liability upon his sale of the assets which he received by virtue of the divorce settlement. The adverse capital gains tax impact upon the plaintiff will be affected by such unknown factors as what assets he sells, the price attained, allowable depreciation, and future changes in the income tax laws by the Congress or by the Kentucky General Assembly.

Accordingly, summary judgment was also proper for the reasons cited by the trial court.

As to appellant's claim that his attorneys were negligent for failing to advise him regarding the ramifications of the pending medical malpractice action against him, said claim was not raised below in appellant's complaint, thus, it cannot be raised for the first time on appeal.

For the reasons stated above, the judgment of the Hardin Circuit Court is affirmed.

GUDGEL, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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