# NEWSLETTERS



THE PASCHOS LAW UPDATE NEWSLETTER



## October, 2012

## I. GENERAL LITIGATION

### Attorney-Client Privilege Bars Communications With Former Lawyer From Disclosure

In *O'Kinsky v. Perrone*, 2012 WL 4835316 (E.D.Pa., October 11, 2012), unpublished, plaintiff, Edward J. O'Kinsky, brought a legal malpractice action against defendants, William Luby and Alasdair Richie. Plaintiff's counsel asserted the attorney-client privilege during plaintiff's deposition in response to questions asking to reveal the content of communications plaintiff had with his former attorney, Ivan J. Kaplan, Esquire of Becker Meisel, LLC. The District Court held there was no dispute that the attorney-client privilege applied. The court noted that Mr. Kaplan was acting as legal counsel to plaintiff when the communications were made, the communications related to a fact of which Mr. Kaplan was informed by Mr. O'Kinsky, the communications were made without the presence of strangers for the purpose of securing primarily either an opinion of law or legal services, and not for the purpose of committing a crime or tort. However, the dispute between the parties concerned whether plaintiff waived the privilege either (1) by filing this legal malpractice action, or (2) by partially disclosing the advice from Mr. Kaplan in an e-mail sent by plaintiff to two of the defendants.

The court found that plaintiff did not waive the attorney-client privilege by filing the legal malpractice action. The court noted that it is true that the privilege may be waived when the client sues his attorney for malpractice. Here, however, plaintiff has not filed a claim against attorney Kaplan, but against defendant attorneys and parties, unaffiliated with Mr. Kaplan. Plaintiff's communications to Mr. Kaplan regarding the transaction which is the subject of this legal malpractice action against defendants may be relevant to the claims in the Complaint, such as showing plaintiff's knowledge or state of mind. However, the court provided that relevance alone does not constitute a waiver of the attorney-client privilege.

Regarding the disclosure of Mr. Kaplan's opinion in an email to the defendants, the court held that there was no dispute that plaintiff has waived the attorney-client privilege as to the contents of this e-mail. The court held that the defendants may introduce this e-mail at trial, and question plaintiff as to its authenticity. The court refused to impose a full waiver as to all communications between plaintiff and Mr. Kaplan finding that the "fairness doctrine" does not justify the disclosure of all confidential communications between Mr. Kaplan and plaintiff, whether on the same subject matter as the e-mail, or on a different subject matter.

## II. PROFESSIONAL MALPRACTICE

### Expert Testimony Not Needed in Professional Malpractice Action Against Lawyer Involved In Real Estate Transaction

In *Vasquez v. Macri*, 2012 WL 4856024 (N.J.Super.A.D., October 15, 2012), unpublished, Plaintiff, Marina Vasquez, appealed from the order of the Law Division dismissing her complaint against her former attorney Marc Macri and the law firm of Sokolich & Macri. The trial court granted defendants' motion to dismiss plaintiff's complaint based on her failure to produce expert opinion articulating the standard of professional care applicable to defendants in the course of representing plaintiff in the purchase of her home. The trial court also rejected plaintiff's invocation of the common knowledge doctrine as a substitute for expert testimony, finding that a reasonable lay juror was not capable of determining

what an attorney's responsibilities are in connection with representing a buyer of residential property.

Plaintiff filed her legal malpractice complaint against Macri and his firm in June 2008. After joinder of issue, the case proceeded to discovery. In the course of his deposition, Macri conceded that it was his responsibility, as the buyer's attorney, to ensure that the seller obtain and deliver, at or before the closing of title, a valid CCO issued by the Borough. Macri further conceded that at the time of closing, the seller's real estate agent provided him with a Certificate of Occupancy (CO). Although, according to Macri, a CO is a document that indicates that the property passed a more stringent inspection, a CO is not a substitute for the required CCO. Macri accepted the CO under the mistaken belief that it was in fact a CCO. Macri then proceeded to close title under this admittedly factually mistaken—and, from plaintiff's perspective, legally significant—belief that he had done all that was required of him for his client to receive clear title to the property.

The question before the court was whether plaintiff is required to present expert testimony to prove her case against Macri. Plaintiff argued that she does not need to present expert testimony because defendant's professional carelessness here "is readily apparent to anyone of average intelligence and ordinary experience." Specific to the facts of this case, plaintiff argued that "[o]btaining a CCO to transfer title properly in the town [sic] of Fairview is not esoteric. It wasn't complex. It's the most basic step an attorney has to do to assure that the property purchased is done properly under law."

Macri's counsel argued that plaintiff needed an expert to explain to the jury "that the standard of care for any lawyer is whatever is delivered to him he would have to look at that and determine whether that complied with the local requirements in that particular town."

The appeals court held that a reasonable jury could determine the question of negligence against the professional defendants without expert testimony. The court found that the viability of plaintiff's claim is not dependent upon establishing Macri's negligence, because Macri's deposition testimony is both clear and dispositive on this issue. Macri conceded that: (1) the Borough requires a CCO upon the transfer of title; (2) as attorney for the buyer, he was responsible for ensuring that plaintiff obtained clear title to the property; and (3) he mistakenly believed the seller's agent obtained and delivered to him a CCO at the time of closing. Based on these undisputed facts, the court found that lay jurors could determine whether Macri should be held liable for any monetary damages incurred by plaintiff as a proximate cause of his failure to deliver clear title.

## III. EMPLOYMENT LAW

### Supervisor's "Old Man" Comments Held Sufficient to Cause Hostile Work Environment

In *Farrell v. Toys R' Us*, 2012 WL 4069515 (N.J.Super.A.D. September 18, 2012), plaintiff, Michael Farrell, challenged the trial court's order granting summary judgment to his former employer, defendant Toys R' Us (TRU), and individual supervisor, defendant Cary Regnenye. Plaintiff's complaint alleged hostile work environment, disparate treatment, and wrongful retaliation, contrary to the New Jersey Law Against Discrimination, (NJLAD) and a common-law claim for intentional infliction of emotional distress. Plaintiff claimed that he was subjected to an age-based hostile work environment in violation of the NJLAD because his supervisor referred to him on a number of occasions as the "old man," often in front of other employees.

On appeal, Farrell argued, among other things, that the trial court erred in finding that no reasonable jury could conclude he was subjected to a hostile work environment based upon his age. The appeals court agreed that summary judgment was improperly granted. The court held, based on precedent, that a supervisor calling an employee "old" is sufficient for a plaintiff's claim to survive summary judgment. In analyzing whether the conduct violated the prongs of the hostile work environment test, the court focused on whether defendant's conduct was "severe or persuasive." The court noted that Regnenye was Farrell's supervisor and could not quantify the number of times he referred to Farrell as "old man." Other employees corroborated Regnenye's harsh treatment towards Farrell, as well

as his reference to Farrell as “old man.” During the same time period, Farrell's work performance declined, although in prior years, under different supervisors, he received favorable reviews. This satisfied the court that a reasonable jury could conclude that Regnenye's treatment towards Farrell would not have occurred but for Farrell's age and that his conduct towards Farrell was sufficiently pervasive or severe to lead a reasonable person of Farrell's age to conclude that the conditions of his employment had been altered. As such, it held that the trial court erred in granting summary judgment on this claim.

Finally, the court held that Regnenye, as defendant's immediate supervisor, controlled the day-to-day working environment to which Farrell was subjected, and TRU delegated to Regnenye the authority that enabled him to engage in the harassing conduct. Therefore, TRU may be found to be vicariously liable for Regnenye's conduct. The court also held Regnenye's individually liable based on the finding that he aided and abetted the harassment at issue.

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