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THE PASCHOS LAW UPDATE NEWSLETTER

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I. BEST STRATEGIES IN DEFENDING LEGAL MALPRACTICE ACTIONS IN NEW JERSEY

New Jersey legal malpractice actions are based on the tort of negligence.[1] Thus, a plaintiff must prove a deviation from the standard, proximate causation, and damages.[2] The elements of a cause of action for legal malpractice are (1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and (3) proximate causation of the damages claimed by the plaintiff.[3] The question of whether the attorney owes a duty to the client is a question of law to be decided by the court.[4]

Generally speaking, a lawyer is required to exercise that "degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise."[5] In most cases, the testimony of an expert is necessary to establish that the conduct of an attorney fell below the standard of care required of the profession.[6] Exceptions exist, such as "where the questioned conduct presents ... an obvious breach of an equally obvious professional norm."[7] For example, New Jersey courts have held a defendant attorney is required to inform his client of all settlement offers, and that a plaintiff need not produce an expert opinion confirming that obligation.[8] In such cases, the layman possesses sufficient ordinary knowledge to recognize the attorney's deviation from the standard of care. However, "a plaintiff's attorney who litigates a legal malpractice claim without the opinion testimony of a legal expert unnecessarily exposes his client to a serious risk of dismissal."[9]

Proving Causation

In the area of legal malpractice, the method by which a plaintiff must establish a claim against an attorney turns on the element of causation. To establish causation, the plaintiff must prove that the underlying case would have been successful absent the alleged malpractice. Evaluation of a legal malpractice claim against a defendant requires the court to determine the value of the plaintiff's claim against the defendant in the underlying action. There are several ways that a plaintiff in a legal malpractice case may go about proving causation and damages. Parties in New Jersey regularly use the "case within a case" method in which a plaintiff presents the evidence that would have been submitted at trial had no malpractice occurred. In short, a plaintiff in a legal malpractice action must prove two cases: the legal malpractice case against the attorney defendant and the underlying action in which the alleged malpractice occurred.

The plaintiff must prove that the former attorney was the proximate cause of the alleged injuries. Plaintiff's burden is to prove by a preponderance of the evidence that but for the malpractice or other misconduct he would have recovered a judgment in the action against the main defendant, the amount of that judgment and the degree of collectability of such judgment.[10] If the third element, the degree of collectability, is at issue, the case should be bifurcated, and the questions of malpractice and the amount of the judgment that would have been recoverable in the underlying action are tried first.[11] If plaintiff obtains a favorable verdict, the defendants may move for a trial as to the collectability of the judgment. In that proceeding, the burden of proof of non-collectability is on defendants.[12]

At times, there is a need to modify the "case within a case" method. The New Jersey Supreme Court opened the door in *Lieberman v. Employers Insurance of Wausau*[13] to use alternative approaches to the "case with in a case" method when in the interest of justice proving a legal malpractice claim through the conventional mode[14] is not feasible. There, in finding the approach improper, the court relied primarily on the reversed roles of the parties in the malpractice and underlying actions: the plaintiff in the malpractice case had

been the defendant in the underlying suit. The court identified the presence in that case of three extraordinary factors which warranted a departure from the conventional mode. First, the plaintiff there proceeded against dual defendants on different theories; one was a malpractice claim against an attorney, and the other was a breach of contract claim against an insurer. Second, as stated earlier, there was a reversal of roles in which the plaintiff in the malpractice action was a defendant in the underlying negligence action so that a "case within a case" framework would be "awkward and impracticable" and "could well skew the proofs." The third factor was the passage of time.

With factors such as these present there is the potential that the legal malpractice trial would not really mirror the earlier suit and thus a jury in the legal malpractice case would not obtain an accurate evidential reflection of the original action, a facsimile which the "case within a case" approach is designed to present. Some of the alternatives presented by the court included a modified version of the "case within a case" approach, using expert testimony as to what as a matter of reasonable probability would have transpired at the original trial. Ultimately it is within the discretion of the trial judge as to the manner in which the plaintiff may proceed to prove his claim for damages. New Jersey later expanded on this flexible approach and permitted a hybrid approach in which a full "case within a case" providing evidence to support the jury verdict was produced and expert testimony was offered as an adjunct to address a different issue, the effect of the earlier settlement.[15]

Damages Recoverable

Reasonable legal expenses and attorney fees incurred in prosecuting the legal malpractice action are recoverable. Economic damages may be recovered in all forms of legal malpractice cases. In litigation cases, economic damages may include any elements of damages that the client could have recovered in the underlying litigation, including out of pocket losses, mental anguish damages recoverable[16] in the underlying litigation, lost pre-judgment and post-judgment interest, and lost court costs. In New Jersey emotional distress damages are generally not awarded in legal malpractice cases in the absence of egregious or extraordinary circumstances. However, New Jersey courts have allowed a claim for emotional distress damages in a case where a client brought a legal malpractice action against a former attorney when the client's relationship with the former attorney was predicated upon liberty interest (the client's interest in not being incarcerated for a crime), rather than purely economic interest. In one such case[17] , the plaintiff did not retain counsel to prosecute a claim for economic loss. Rather, counsel was retained to provide a defense to criminal prosecution. The loss that plaintiff complained of was not purely pecuniary. Plaintiff complained of a twenty-month loss of liberty in a maximum security penitentiary. The court held that the client could recover damages for emotional distress.

Defenses

There are several defenses available to lawyers who are subject to legal malpractice action in New Jersey. Failure to file the action within the applicable statute of limitations will result in dismissal of the action. Under New Jersey law, legal malpractice claims are subject to a six year statute of limitations.[18] That period begins to run when a claim accrues, which is governed by the "discovery rule," which operates "to postpone the accrual of a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim."[19] A legal malpractice claim accrues when the client gains knowledge of two elements: "fault" and "injury" (which is synonymous with "damage").[20]

Plaintiffs are also required to file an Affidavit of Merit. The New Jersey Affidavit of Merit statute[21] specifically prescribes that:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

A "licensed person" is particularly defined in the statute as a defendant on an enumerated list of professionals, including "any person who is licensed as ... *an attorney admitted to*

practice law in New Jersey."[22] If a plaintiff does not file and serve a timely affidavit of merit as required under the statute, "it shall be deemed a failure to state a cause of action," thereby subjecting the malpractice complaint to dismissal.[23] Significantly, the Appellate Division has held that although New Jersey's Affidavit of Merit Statute does not list a Law Firm as a "licensed person" against whom an Affidavit of Merit is required in a legal malpractice suit, the law firm entity is to be considered a "licensed person" within the meaning of the statute. [24]

Res judicata and collateral estoppel are sometimes raised as defenses to a legal malpractice case, however, most courts have rejected these arguments and have required the lawyer to defend the malpractice lawsuit.

II. BEST STRATEGIES IN DEFENDING LEGAL MALPRACTICE ACTIONS IN PENNSYLVANIA

An action for legal malpractice may be brought in either contract or tort.[25] To establish a legal malpractice action sounding in negligence, a plaintiff must prove1) employment of the attorney or other basis for a duty; 2) the failure of the attorney to exercise ordinary skill and knowledge; and 3) that such negligence was the proximate cause of damage to the plaintiff.[26] The third element, concerning the client's loss, is not satisfied unless the client shows that there is an actual amount of damages which the client would have recovered but for the attorney's negligence.[27] With regard to a breach of contract claim, "an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large."[28] To avoid waiver of either claim, a plaintiff is required to assert them to-gether in one action, because the claims arise from the same 'transaction or occurrence' against the 'same person.'"[29]

Expert testimony is generally required in legal malpractice cases, unless the issue is so simple or the lack of skill or want of care is so obvious as to be within the range of an ordinary layperson's experience and comprehension.[30] In a legal malpractice action the question of whether expert testimony is required depends on whether the issue of negligence is sufficiently clear so lay persons could understand and determine the outcome , or whether the alleged breach of duty involves complex legal issues which require expert testimony to amplify and explain it for the fact finder.[31]

Proving Causation

The essential element to a legal malpractice cause of action in Pennsylvania is proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm or the threat of future harm.[32] A legal malpractice action in Pennsylvania requires the plaintiff to prove a "case with in a case." In other words, the plaintiff must prove that he or she had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case.[33]

The Pennsylvania Supreme Court has ruled that "only after the plaintiff proves he would have recovered a judgment in the underlying action that the plaintiff can then proceed with proof that the attorney he engaged to prosecute or defend the underlying action was negligent in the handling of the underlying action and that negligence was the proximate cause of the plaintiff's loss since it prevented the plaintiff from being properly compensated for his loss." [34]

Damages Recoverable

The measure of damage in legal malpractice actions is the actual loss sustained by theclient. Duke & Co v. Anderson, 418 A.2d 613 (Pa. Super. 1980). Proof of actual loss and harm that is not merely speculative or nominal is an essential element to the cause of action for legal malpractice. Rizzo v. Haines, 520 Pa. 484, 499, 555 A.2d 58, 65 (1989). Damages are considered remote or speculative only if there is uncertainty concerning the identification of the existence of damages rather than the ability to precisely calculate the amount or value of damages. *Id.*

Actual losses in a legal malpractice action are measured by the judgment the plaintiff lost in the underlying action. Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998). The Pennsylvania Supreme Court reasoned that "it would be inequitable for the plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the plaintiff would

have collected from the third-party; the plaintiff would be receiving a windfall at the attorney's expense." *Id*. Claimed damages are inadmissible "only if there is uncertainty concerning the identification of the existence of damages rather than the ability to precisely calculate the amount or value of the damages." *Id*.

Defenses

Defenses to malpractice claims in Pennsylvania include many of the standard professional malpractice defenses including: failure to bring a claim within the statute of limitations; failure to demonstrate that the plaintiff would have prevailed in the underlying action; failure to establish an attorney-client relationship or some other basis for a duty; and failure to proffer expert testimony establishing the standard of care.

In Pennsylvania, the applicable statute of limitation for a claim of negligence against an attorney is two years.[35] However, claims for breach of contract are governed by a four year statute and courts have applied the four-year statute where there has been a written or oral retainer agreement and the plaintiff claims that there was a breach of an implied duty of proper professional service or explicit promises.[36]

Failure of a plaintiff to file a Certificate of Merit may result in dismissal of the cause of action. Because a legal malpractice action, whether based in tort or contract, requires the plaintiff to prove that the attorney failed to exercise the ordinary skill and knowledge of a member of the profession at large, the plaintiff must file a certificate of merit as required by Pennsylvania Rule of Civil Procedure 1042.3. Regarding an action for professional liability, the Pennsylvania Rule of Civil Procedure 1042.3 provides [37]:

> (a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within 60 days after the filing of the complaint, a certificate of merit signed by the attorney or party that either
>
> (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or
>
> (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or
>
> (3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

In addition, Pennsylvania recognizes two unique defenses to legal malpractice claims. The first is often known as the "Muhammed Doctrine" which precludes negligence or breach of contract actions against lawyers subsequent to the negotiation and acceptance of a settlement. [38] The doctrine requires that plaintiffs allege with specificity fraudulent inducement of a settlement to prevail on a legal malpractice claim arising out of the settlement.

The other unique defense is "collectibility." Pennsylvania courts have ruled that "collectability" is an affirmative defense that must be plead and proven by the defendant attorney.[39] The Supreme Court of Pennsylvania held that collectibility of damages is an issue which should be considered in a legal malpractice case, but that it would "adopt the minority position and hold that a defendant/lawyer in a legal malpractice action should plead and prove the affirmative defense that the underlying case was not collectible by a preponderance of the evidence."[40]

[1]McGrogan v. Till, 167 N.J. 414, 425, 771 A.2d 1187 (2001), certif. denied, 192 N.J. 294 (2007).

[2]Id.

[3]Id.

[4] . DeAngelis v. Rose, 320 N.J.Super. 263, 274, 727 A.2d 61 (App.Div.1999).

[5] Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J.Super. 1, 12, 783 A.2d 246 (App.Div.2001) (quoting St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden, 88 N.J. 571, 588, 443 A.2d 1052 (1982)).

[6] Sommers v. McKinney, 287 N.J.Super. 1, 10-11, 670 A.2d 99 (App.Div.1996); Brizak v. Needle, 239 N.J.Super. 415, 432, 571 A.2d 975 (App.Div.), certif. denied, 122 N.J. 164, 584 A.2d 230 (1990).

[7]Brach, 345 N.J.Super. at 12, 783 A.2d 246.

[8]Sommers 287 N.J.Super. at 12, 670 A.2d 99 .

[9]Brizak, supra, 239 N.J.Super. at 432, 571 A.2d 975.

[10]Hoppe v. Ranzini, 158 N.J.Super. 158, 165, 385 A.2d 913 (A.D.1978).

[11]Id. at 170, 385 A.2d 913.

[12]Id. at 170-71, 385 A.2d 913.

[13]84 N.J. 325, 419 A.2d 417 (1980).

[14]Id. at 342-43, 419 A.2d 417.

[15]Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 179 N.J. 343, 359, 845 A.2d 602 (2004).

[16]Saffer v. Willoughby 143 NJ 256, 670 A.2d 527 (1996).

[17]Lawson v. Nugent, 702 F.Supp. 91 (D.N.J. 1988).

[18]See N.J. Stat. Ann. § 2A:14-1; Grunwald v. Bronkesh, 131 N.J. 483, 621 A.2d 459, 461 (1993), cf. McGrogan v. Till, 327 N.J.Super. 595, 744 A.2d 255 (A.D.2000), cert. granted 165 N.J. 132, 754 A.2d 1209, aff'd as modified 167 N.J. 414, 771 A.2d 1187 (Applying two-year statute of limitations to former client's legal malpractice claim against attorney for alleged negligence in criminal defense that was provided, rather than six-year statute of limitations that governed economic injuries.)

[19]Grunwald, 621 A.2d at 463.

[20]Id.

[21]N.J.S.A. 2A:53A-27 (emphasis added).

[22]N.J.S.A. 2A:53A-26(c) (emphasis added).

[23]N.J.S.A. 2A:53A-29.

[24]Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J.Super. 1, 3 A.3d 518 (N.J.Super.A.D. 2010).

[25]Wachovia Bank N.A. v. Ferretti, 935 A.2d 565, 570 (Pa. Super. 2007)

[26]Kituskie v. Corbman, 552 Pa. 275, 281, 714 A.2d 1027, 1029 (1998).

[27]Id.

[28]Wachovia, 935 A.2d at 571

[29]Id. at 570-71, citing Pa.R.C.P. 1020(d) and D'Allessandro v. Wassel, 526 Pa. 534, 537-38, 587 A.2d 724, 726 (1991) (indicating that actions in the nature of trespass or assumpsit arising from the same occurrence must be joined).

[30]Rizzo v. Haines, 520 Pa. 484, 502, 555 A. 2d 58, 67, n. 10 (1989).

[31]Storm v. Golden, 538 A.2d 61 (Pa. Super. 1988).

[32]Kituskie v. Corbman, 552 Pa. at 281, 714 A.2d 1027.

[33]Id. (citation omitted).

[34]Id. at 282.

[35]Glenbrook Leasing Co. v. Beausang, 839 A.2d 437 (Pa.Super. 2003).

[36]Gorski v. Smith, 812 A. 2d 683 (Pa. Super 2002), alloc. den'd, 2004 Pa. LEXIS 1566 (Pa. 2004). But see Costello v. Primavera, 39 D&C 4th 502 (Phila. C.P. 1988), aff'd mem., 748 A.2d 1257 (Pa. Super. 1999), alloc. den'd, 563 Pa. 687, 760 A.2d 854 (Pa. 2000).

[37]Pa.R.C.P. 1042.3(a). (emphasis added).

[38]Muhammed v. Strassburger, 526 Pa. 541, 587 A.2d 1346 (1991).

[39]Kituskie, 552 Pa. 275, 714 A.2d 1027 (1998).

[40]Id. at 285.

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