SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0177-15T4

RANDY B. ROSENBLATT,

Plaintiff-Appellant,

v.

VINCENT STRIPTO, ESQ., AND DRAZIN & WARSHAW, P.C., HOWARD BACHMAN, ESQ. AND GOLDSTEIN & BACHMAN, ATTORNEYS AT LAW,

Defendants-Respondents.

Submitted January 18, 2017 – Decided August 2, 2017

Before Judges Ostrer and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-12-13.

Ginsberg & O'Connor, P.C., attorneys for appellant (Gary D. Ginsberg and Stephen P. Burke, Jr., on the brief).

Giordano, Halleran & Ciesla, P.C., attorneys for respondents Vincent Stripto and Drazin & Warshaw, P.C. (Michael J. Canning, of counsel; Mr. Canning and Matthew N. Fiorovanti, on the brief).

Kaufman Dolowich & Voluck, LLP, attorneys for respondents Howard Bachman and Goldstein & Bachman, Attorneys at Law (Iram P. Valentin,

of counsel; Mr. Valentin and David J. Gittines, on the brief).

PER CURIAM

In this attorney malpractice case, we review the trial court's requirement that plaintiff provide expert testimony to establish proximate cause. Plaintiff Randy Rosenblatt sued two of her former divorce attorneys and their respective law firms, Vincent Stripto of Drazin & Warshaw, P.C., and Howard Bachman of Goldstein & Bachman. Plaintiff alleged that the two failed to notify her that she might have a Tevis claim, which negatively affected the outcome of her divorce. The trial court concluded that expert testimony was necessary to prove proximate causation, and eventually granted summary judgment for defendants once it became clear that plaintiff had not offered such testimony.

On appeal, plaintiff challenges the court's evidentiary ruling and the entry of summary judgment. We affirm.

I.

Bachman succeeded Stripto as plaintiff's divorce attorney. Stripto began representing plaintiff in 2000. He filed and then, at plaintiff's request, withdrew complaints on her behalf in 2000, 2001 and 2002. The following year, he filed the complaint that was later amended and ultimately litigated. Stripto also represented plaintiff in a related domestic violence action, which

resulted in a January 2004 final restraining order (FRO) against her husband.

Plaintiff substituted Bachman for Stripto later that year. During Bachman's representation, plaintiff and her husband agreed to binding arbitration of their divorce case. Plaintiff discharged Bachman in 2006 after receiving the arbitration decision.

In November 2007, after consulting with another attorney, plaintiff claimed she discovered for the first time that she had a potential marital tort claim against her husband under Tevis v. Tevis, 79 N.J. 422 (1979).[1] The potential claim related to three altercations in 2002, 2003 and 2004. She alleged that in 2002, her husband grabbed her arm so firmly it left a black and blue mark that lasted a week; in 2003, he pushed her against a wall, causing short-lived pain to her neck and one of her hands (she could not recall which); and in 2004, he butted heads with her in the midst of an argument.

She contended neither Stripto nor Bachman ever informed her that she had a potential tort claim, which was now barred. Plaintiff filed her legal malpractice action on December 28, 2012,

[1] Stripto and his law firm contested this assertion during discovery, stating that another attorney at Drazin & Warshaw explicitly discussed and recommended against filing a Tevis claim. However, for purposes of our review, we assume — as did the trial court — the truth of plaintiff's allegation.

seeking damages that she allegedly would have recovered had the claim been brought. Plaintiff also sought damages for the "severe, temporary and permanent physical and mental injuries requiring medical and psychological care and treatment and will require such care in [the] future." She produced no medical records or expert testimony to support her claim of permanent injury, however.

Although the attorneys did not discuss a potential Tevis claim or file one on plaintiff's behalf, they were aware of the incidents. Stripto referred to them in plaintiff's claim for divorce based on extreme cruelty. The 2004 incident also prompted the domestic violence complaint (although the prior history of domestic violence added only the 2003 incident and did not allege any physical injury from that prior event). Bachman, in turn, relied on the FRO during the arbitration hearings in an attempt to gain sole legal custody of the children.

Both attorneys explained they did not discuss the possibility of a Tevis claim with plaintiff because they did not believe the incidents provided a viable claim for such relief. In particular, they noted plaintiff did not suffer any documented long-term physical or psychiatric injury from the events. Moreover, plaintiff never received medical treatment or medication for any resulting injuries, nor did she seek any psychological or psychiatric treatment for emotional or verbal abuse by her husband.

As a result, they believed that the Tevis claim would be neither successful nor cost-effective for plaintiff.

In support of her malpractice claim, plaintiff relied on the expert opinion of attorney Ronald Edelman. In his brief report, Edelman opined that plaintiff had a "potential Tevis claim" and, further, that defendants "had the obligation to advise her of her Tevis rights" and "to protect her rights." The report did not expressly address whether defendants breached their duty of care by not filing such claims, nor did it discuss whether they would have succeeded.

The court granted in part and denied in part without prejudice defendant's first motion for summary judgment, which was filed before the end of discovery. In an oral decision in March 2015, Judge Katie A. Gummer dismissed plaintiff's claim for damages tied to alleged permanent physical or mental injury. Specifically, the court noted, "it is undisputed that plaintiff did not suffer any permanent physical injuries as a result of the purported physical and verbal abuse inflicted upon her by her former husband." The court concluded that plaintiff "neither factually nor legally" established that she had suffered any "disability or ongoing physical or mental injury" or that she was entitled to damages flowing therefrom. Nonetheless, Judge Gummer concluded plaintiff had a viable Tevis claim for damages arising out of the injury she

allegedly experienced after the three assaults. The court rejected defendants' argument, which relied on Merenoff v. Merenoff, 76 N.J. 535 (1978), that the husband's actions and plaintiff's injury were too trivial to be litigable.

The court also concluded that because plaintiff's malpractice action concerned "the soundness of decisions made by lawyers as to what they should relay to their clients and what actions to take in a matrimonial matter[,]" expert testimony would be required to establish proximate causation. The court noted that plaintiff had not alleged (at least at that point) that she would have filed a Tevis claim if her attorneys had informed her of the potential claim. The judge stated it was unclear whether Edelman's opinion that the attorneys had failed to protect plaintiff's interests was intended to convey a view on proximate causation. However, giving plaintiff the benefit of the doubt, the court assumed it did, subject to clarification in discovery.

In his subsequent deposition, Edelman denied opining "as to whether any actions of the lawyers proximately caused any damage to" plaintiff. He stated his report focused on "whether or not the attorney[s] fulfilled [their] obligation to [their] client," by failing "to advise the client of her Tevis rights." Edelman stated he did not form an opinion as to the value of the Tevis claim, whether it was negligent of the attorneys to conclude it

should not be filed, whether plaintiff would have pursued the claim if she had been advised about it, or the impact of filing the claim on other issues in the divorce.[2]

Defendants submitted an expert report by attorney David Wildstein, who stated he had extensive experience with Tevis claims. He explained that, in general, Tevis claims are "a rarity" in matrimonial matters. He noted that successful claims usually require "medical or expert testimony and serious or substantial injury." He asserted it was "doubtful" that plaintiff would have succeeded if she had brought a claim. Wildstein stated, "Plaintiff has failed to provide any evidence that she would have prevailed in recovering damages." He endorsed Bachman's strategic decision to utilize the FRO in connection with the custody dispute rather than bring a Tevis claim.

Wildstein also noted that the filing of a weak Tevis claim would disadvantage the client's case in the matrimonial matter. For example, "if a non-viable Tevis count was filed, it could be viewed by a Judge or arbitrator as a legal tactic to obtain leverage which could prejudice plaintiff's custody case." He also

[2] Edelman admitted a plausible reason not to pursue the Tevis claim in this case was the fact that it would have opened the door for plaintiff's husband to introduce evidence of plaintiff's alleged extramarital affair, which had prompted his verbal and physical response.

stated that "the Court frowns upon weak or non-viable Tevis claims which may be used as leverage."

In the meantime, plaintiff filed a certification stating that she would have pursued a Tevis claim if she had been informed about the possibility. She filed no further expert certifications or other reports.

Based on this expanded record, Judge Gummer granted defendants' renewed motion for summary judgment. She concluded that Edelman's deposition clarified he was not, in fact, offering an opinion as to proximate cause. Reaffirming her prior holding regarding the necessity of expert testimony on this subject for plaintiff's prima facie case, the judge concluded that its omission was fatal to plaintiff's cause of action. The court entered final orders dismissing plaintiff's malpractice complaint with prejudice. This appeal followed.

II.

"The necessity for, or propriety of, the admission of expert testimony, and the competence of such testimony, are judgments within the discretion of the trial court." State v. Zola, 112 N.J. 384, 414 (1988), cert. denied, 489 U.S. 1022, 109 S. Ct. 1146, 103 L. Ed. 2d 205 (1989). Accordingly, we must "generously sustain" such determinations, so long as they are "supported by credible evidence in the record." Estate of Hanges v. Metro.

Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010). Conversely, if the trial court applies the wrong legal test when analyzing admissibility, we apply de novo review. Konop v. Rosen, 425 N.J. Super. 391, 401 (App. Div. 2012).

The evidentiary question here is whether the trial court appropriately required expert testimony to establish proximate cause in plaintiff's legal malpractice claim. As a general matter, expert testimony is barred "unless it relates to a subject matter which is so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman." Boland v. Dolan, 140 N.J. 174, 188 (1995) (internal quotation marks and citation omitted). Although N.J.R.E. 702 speaks permissively — stating that "[i]f . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . [an expert witness] may testify thereto" (emphasis added) — "New Jersey courts have required expert testimony to explain complex matters that would fall beyond the ken of the ordinary juror." State v. Fortin, 189 N.J. 579, 596 (2007).

Legal malpractice actions often present such complex matters. The elements of legal malpractice consist of: "(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." Jerista v. Murray, 185 N.J. 175, 190-91 (2005) (internal quotation marks and citation omitted). The client bears the burden of proof. Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996).

The attorney's duty of care involves the "exercise [of] the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated" and the "exercise [of] a reasonable degree of care and prudence having reference to the character of the service [an attorney] undertakes to perform." Passante v. Yormark, 138 N.J. Super. 233, 238 (App. Div. 1975), certif. denied, 70 N.J. 144 (1976). Whether an attorney has fulfilled that duty is not ordinarily a matter within the jury's common experience or knowledge. Brizak v. Needle, 239 N.J. Super. 415, 432 (App. Div.), certif. denied, 122 N.J. 164 (1990).

Accordingly, we generally require expert testimony to establish the first two elements of a malpractice claim. See Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 78 (App. Div. 2007) (internal quotation marks and citation omitted); Restatement (Third) of Law Governing Lawyers § 52, comment g (2000) ("[A] plaintiff alleging professional negligence . . . ordinarily must introduce expert testimony concerning the care reasonably required

in the circumstances of the case and the lawyer's failure to exercise such care."). Only in the exceptional case, where the breach of duty is basic or obvious, is an expert not required. See Brizak, supra, 239 N.J. Super. at 431-32 (App. Div.) (no expert needed when attorney "fail[ed] to conduct any investigation" into client's alleged malpractice claim); see also Sommers, supra, 287 N.J. Super. at 10 ("In rare cases, expert testimony is not required in a legal malpractice action where the duty of care to a client is so basic that it may be determined by the court as a matter of law.").

The third element, proximate cause, requires a showing that the malpractice was a "substantial factor in bringing about" an injury. Conklin v. Hannoch Weisman, 145 N.J. 395, 419 (1996) (internal quotation marks and citation omitted). Proof must be based on "competent credible evidence," Sommers, supra, 287 N.J. Super. at 10, and not "mere conjecture, surmise or suspicion," 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 488 (App. Div. 1994) (internal quotation marks and citation omitted). Here as well, our courts have required the use of expert testimony except when "the causal relationship between the attorney's legal malpractice and the client's loss is so obvious that the trier of fact can resolve the issue as a matter of common knowledge." Id. at 490; see also Sommers, supra, 287 N.J. Super. at 11 (accord);

4 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice, § 37:23, at 1653 (2013 ed.) ("[U]nless the causal link is obvious or can be established by other evidence, expert testimony may be essential to prove [causation.]"); Allen v. Martin, 203 P.3d 546, 569 (Colo. App. 2008) (noting "most jurisdictions have concluded that causation in a legal malpractice action must be proved by expert testimony, unless causation is within the jury's common understanding" and collecting cases); Bozelko v. Papastavros, 147 A.3d 1023, 1030 (Conn. 2016) ("Because a determination of what result should have occurred if the attorney had not been negligent usually is beyond the field of ordinary knowledge and experience possessed by a juror, expert testimony generally will be necessary to provide the essential nexus between the attorney's error and the plaintiff's damages.").

Whether a particular causal chain is so obvious that expert testimony is unnecessary is a fact-sensitive inquiry. We required expert testimony when the alleged malpractice concerned the manner in which a complex transaction had been structured. 2175 Lemoine Ave. Corp., supra, 272 N.J. Super. at 487-90. Conversely, we concluded that no expert testimony was required to demonstrate that an attorney's misrepresentation about the strength of an adversary's position had a substantial, negative impact on the terms of his client's settlement. Sommers, supra, 287 N.J. Super.

at 8-9. Although we held that the plaintiff needed an expert to challenge the quality of work done on her behalf, an expert was not required "to announce that an attorney may not charge for work that has not been performed . . . . [or] to establish the causal connection between a charge for services not performed and lesser proceeds to the plaintiff." Id. at 14.

Here, the trial court found expert testimony was required to establish proximate cause. We will not disturb that discretionary conclusion. It bears repeating that the alleged malpractice here pertains to a failure to notify plaintiff of a potential claim under Tevis during the course of a matrimonial dispute.

Accordingly, in order to meet the proximate cause prong of her negligence claim, plaintiff had to demonstrate: (1) that she would have brought the Tevis claim; (2) that the Tevis claim would have produced an award greater than the cost of bringing it; and (3) that such a net award would not have been offset by negative repercussions in the broader matrimonial litigation. This is a far more attenuated and intricate chain of causation than was presented in Sommers. Even assuming plaintiff would have filed a Tevis claim, the second and third elements implicate complex questions of the law beyond the ken of average jurors.

Plaintiff had to demonstrate she would have brought the Tevis claim because she provided no evidence that defendants would have

acceded to a request, if she made one, to file such a claim on her behalf. As noted above, the attorneys believed the claim would have been ill-advised and counter-productive, assertions corroborated by Bachman's expert. Edelman admittedly offered no opinion on whether defendants' actions caused plaintiff compensable harm.

Plaintiff also had to demonstrate not only that the Tevis claim would succeed, but it would produce a net positive award. There is no evidence that an attorney would have pursued the claim on a contingency basis (even assuming doing so would not run afoul of Rule of Professional Conduct 1.5(d)(1)). Plaintiff thus may have been required to incur fees and costs to pursue the claim. To prove damage, plaintiff would need to establish that those fees and costs did not exceed the value of a recovery for the tort.

Furthermore, filing the claim could have complicated and prolonged the underlying matrimonial litigation and increased costs. Perhaps more significantly, it could have resulted in a less favorable outcome on other issues of value and importance to plaintiff in the divorce case. For example, as noted above, the Tevis claim may have opened the door to evidence about plaintiff's alleged extra-marital affair, which may have had an impact on custody and financial issues pertinent to both alimony and equitable distribution.

Additionally, if plaintiff secured any recovery in a Tevis action, the court would subsequently need to guard against a double-recovery based on application of the same facts to the calculation of equitable distribution. As we have warned:

> [P]laintiff's age, physical and emotional health and occupational limitations, if any, attributable to defendant's tortious conduct, may not again be considered in evaluating the equitable division of property issues. Likewise, defendant's actual liability in tort resulting in judgment must be considered in the court's decision respecting the division of property. The judgment debt owed plaintiff must also be considered in evaluating plaintiff's demand for alimony and particularly defendant's ability to pay alimony. There may not be a double recovery from defendant.
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> [Giovine v. Giovine, 284 N.J. Super. 3, 29 (App. Div. 1995) (authorizing marital tort claim for battered woman's syndrome).]

One treatise has observed that, although practitioners would be well-advised to "re-examine the financial viability" of marital tort claims after cases like Giovine, "most matrimonial practitioners recognized that these types of claims were illusive, spurious, inciteful [sic], rarely financially fruitful, and might, in some cases . . . invite an undesired and financially dysfunctional judicial response . . . ." 1 Gary N. Skoloff & Laurence J. Cutler, New Jersey Family Law Practice § 1:67 (15th ed. 2013) (emphasis added).

Accordingly, we discern no abuse of discretion by the trial court in its decision to require expert testimony on proximate cause.

Further, we reject plaintiff's argument that she could have proceeded without expert testimony because she could have established causation at trial in the "suit within a suit." Put simply, this argument confuses a procedural trial framework with plaintiff's prima facie burden.

The "suit within a suit" approach allows a plaintiff to prove proximate cause by "present[ing] the evidence that would have been submitted at a trial had no malpractice occurred." Garcia v. Kozlov, 179 N.J. 325, 358 (2004). Notably, the Court has emphasized that this is only one of a number of procedures available to the parties in a malpractice suit. Lieberman v. Employers Ins. of Wausau, 84 N.J. 325, 343-44 (1980). Another option is the "use of expert testimony as to what as a matter of reasonable probability would have transpired at the original trial." Ibid.

But this procedural choice does not relieve plaintiff of her substantive, prima facie burden as plaintiff seems to suggest. Just because the parties choose to proceed by a "suit within a suit" instead of by expert certifications does not mean that a trial court cannot still require expert testimony as part of

plaintiff's proofs. See 4 Mallen, supra, § 37:23, at 1650 ("In the trial-within-a-trial context, expert testimony that would have been mandatory remains such."); cf. Cellucci v. Bronstein, 277 N.J. Super. 506, 520-24 (App. Div. 1994) (reviewing expert testimony regarding negligence offered at a "suit within a suit" proceeding), certif. denied, 139 N.J. 441 (1995).

Plaintiff may not have needed an expert to establish the merits of her Tevis claim — that is, that her husband assaulted her, that she suffered pain, and that a monetary award is appropriate to compensate her for that pain. But, as we noted, it was beyond the ken of the average juror to determine whether such a compensatory award would have been offset by the direct costs of bringing it and the indirect costs upon her other claims in the divorce case. Only expert testimony could remedy that gap in understanding. The "suit within a suit" procedure would not suffice.

To the extent not already discussed, plaintiff's remaining claims lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In sum, we discern no abuse of discretion in the court's determination that plaintiff required expert testimony to meet her prima facie showing of proximate cause. As plaintiff failed to

do so, we affirm the court's grant of summary judgment for defendants.

Affirmed.