SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4465-15T1

SHERRY DUDAS, JIM KINSEL
and HOLLOWAY LAND, LLC,

Plaintiffs-Appellants,

v.

STEVEN P. GRUENBERG, ESQUIRE and
SCHOLL, WHITTLESEY & GRUENBERG,
LLC,

Defendants-Respondents.

Argued January 9, 2018 – Decided February 12, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1764-13.

David J. Byrne argued the cause for appellants (Ansell Grimm & Aaron, PC, attorneys; Breanne M. DeRaps and Mark M. Wiechnik, on the briefs).

Christopher J. Carey argued the cause for respondents (Graham Curtin, attorneys; Christopher J. Carey, of counsel; Venanzio E. Cortese, on the brief).

PER CURIAM

Plaintiffs Sherry Dudas and Jim Kinsel and their company Holloway Land, LLC (Holloway)[1] appeal from the May 10, 2016 summary judgment dismissal of their legal malpractice action against defendants Steven P. Gruenberg, Esquire and Scholl, Whittlesey and Gruenberg, LLC (SWG). We affirm.

I.

The claim of legal malpractice arises out of a dispute between plaintiffs and neighboring property owners. On August 20, 2007, plaintiffs purchased farm property on Chesterfield-Georgetown Road in Chesterfield. In connection with this purchase, plaintiffs procured a title insurance policy issued by Commonwealth Land Title Insurance Company (Commonwealth). Pertinent to this appeal, the policy specifically excludes title risks that are known to the property owner, but not to Commonwealth, as of the policy date, unless they appear in the public records. The policy also contains exceptions for: (1) easements, encroachments, and boundary line disputes that a survey would disclose, and which are not shown by the public record; and (2) any facts about the land that a correct survey would disclose, and which are not shown by the public record.

[1] For convenience and ease of reference, we will hereafter refer to plaintiffs collectively unless the context makes clear that we refer to any of them separately.

In October 2009, John and Carleen Niemiec (the Niemiecs) filed a lawsuit against plaintiffs claiming they had an access agreement that allowed them to travel over a lane on plaintiffs' adjoining property (the easement litigation). The Niemiecs sought an injunction restraining plaintiffs from obstructing or otherwise interfering with their use of the access easement, together with compensatory and punitive damages. Attached to the Niemiecs' verified complaint was a May 13, 2009 letter from Kinsel to John Niemiec. In relevant part, Kinsel's letter stated: "Prior to the closing on [our] property . . . you advised us you believed you had an access easement on our farm lane which is owned by us in fee simple."

Plaintiffs retained defendants to represent them in the easement litigation. Plaintiffs and Gruenberg appeared in court on April 15, 2011, for oral argument on a motion to enforce litigant's rights. During oral argument, the judge engaged counsel for the parties in settlement discussions. Plaintiffs then went into the jury room with Gruenberg and the Niemiecs' counsel, where the settlement terms were reduced to writing. The judge then entered an order incorporating the parties' handwritten settlement. In relevant part, the April 15, 2011 order dismissed with prejudice both the Niemiecs' complaint and plaintiffs' counterclaim, and allowed the Niemiecs a twelve-foot easement over

plaintiffs' property for the limited purpose of ingress and egress only.

Shortly thereafter, plaintiffs terminated defendants' services and retained the law firm of Wilentz, Goldman & Spitzer, P.A. (Wilentz) to represent them in the easement litigation. On May 4, 2011, Wilentz filed a motion on behalf of plaintiffs seeking to vacate the April 15, 2011 order because it purportedly violated an existing restrictive easement and various statutes. On July 29, 2011, the court granted the motion in part and amended the April 15, 2011 order "to reflect that it is subject to the review and approval of all other regulatory authorities, including but not limited to – township, county, and state."

In September 2011, plaintiffs moved to vacate the April 15, 2011 order in its entirety on the basis that the settlement was entered into involuntarily and without their authority. The trial court scheduled an evidentiary hearing on the motion and required Gruenberg to attend. However, prior to the hearing, Wilentz negotiated a new settlement with the Niemiecs on plaintiffs' behalf. Among other things, the May 11, 2012 settlement agreement vacated the April 15, 2011 order. Plaintiffs agreed to pay the Niemiecs $21,000 toward the cost of constructing a new driveway on the Niemiecs' property, and the Niemiecs agreed to relinquish any right to use the access lane on plaintiffs' property.

Plaintiffs commenced the present legal malpractice action on July 12, 2013. Plaintiffs alleged defendants were negligent in failing to present a timely claim to Commonwealth for coverage under the title policy in the easement litigation. They also alleged Gruenberg committed malpractice by settling the easement litigation without their authorization.

Defendants moved for summary judgment at the conclusion of discovery. In granting the motion, the trial court found: (1) plaintiffs had no valid claim for coverage against Commonwealth due to the policy's exceptions and exclusions; (2) plaintiffs failed to present expert testimony or case law that the title policy's exclusions and exceptions are invalid or that Commonwealth would have provided coverage had a claim been asserted against the policy; and (3) plaintiffs failed to present any expert testimony to support their claim that defendants' representation with respect to the settlement was deficient. The court entered an order on May 10, 2016, dismissing the complaint with prejudice. This appeal followed.

II.

When reviewing the grant of summary judgment, we analyze the decision applying the "same standard as the motion judge." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

> That standard mandates that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."
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> [Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)).]

"To defeat a motion for summary judgment, the opponent must 'come forward with evidence' that creates a genuine issue of material fact." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012)). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted). "When no issue of fact exists, and only a question of law remains, [we] [afford] no special deference to the legal determinations of the trial court." Templo Fuente, 224 N.J. at 199 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

To establish legal malpractice, plaintiffs were

> required to show that competent, credible evidence existed to support each of the elements of that negligence action, i.e., "1) the existence of an attorney-client relationship creating a duty of care upon the attorney; 2) that the attorney breached the

> duty owed; 3) that the breach was the proximate cause of any damages sustained; and 4) that actual damages were incurred."
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> [Cortez, 435 N.J. Super. at 598 (quoting Sommers v. McKinney, 287 N.J. Super. 1, 9-10 (App. Div. 1996)).]

The first element requires an attorney "to exercise on his client's behalf the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession similarly situated and to employ reasonable care and prudence in connection therewith." Lamb v. Barbour, 188 N.J. Super. 6, 12 (App. Div. 1982). At a minimum, an attorney must take "any steps necessary" to properly handle a case, including carefully investigating the facts, formulating a legal strategy, filing appropriate papers, and communicating with the client. Ziegelheim v. Apollo, 128 N.J. 250, 260-61 (1992) (citing Passanante v. Yormark, 138 N.J. Super. 233, 238-39 (App. Div. 1975)). The second element requires a breach of these duties. Additionally, a plaintiff alleging legal malpractice must file an expert affidavit stating that there is a reasonable probability that the attorney's actions fell outside of acceptable professional standards. N.J.S.A. 2A:53A-27. As to the third element, plaintiffs must prove they suffered damages as a proximate consequence of defendants' breach of duty. Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 179 N.J. 343, 357 (2004).

A.

On appeal, plaintiffs renew their argument that defendants committed malpractice by failing to submit the Niemiecs' easement claim to Commonwealth to provide coverage and a defense under the title policy. In rejecting this contention, the motion judge found plaintiffs did not present expert testimony opining that Commonwealth would have defended or covered the claim in light of the clear terms of the policy, including its exclusions and exceptions. The judge concluded plaintiffs "failed to do that so there's not any evidence to present to the jury that the breach was the proximate cause of the damages."

With respect to the third element of a malpractice action, "an attorney is only responsible for a client's loss if that loss is proximately caused by the attorney's legal malpractice[,]" that is, "the negligent conduct is a substantial contributing factor in causing the loss." 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 487 (App. Div. 1994). Therefore, a plaintiff bears the burden of showing, by a preponderance of the competent, credible evidence, "what injuries were suffered as a proximate consequence of the attorney's breach of duty." Id. at 488 (citing Lieberman v. Emp'rs Ins. of Wausau, 84 N.J. 325, 341 (1980)). The burden is not satisfied by mere "conjecture, surmise or suspicion." Ibid. (quoting Long v. Landy, 35 N.J. 44, 54 (1961)). Ordinarily,

the measure of damages is what result the client would have obtained in the absence of attorney negligence. Garcia, 179 N.J. at 358. Thus, to prove such injury, "the client must demonstrate that he or she would have prevailed, or would have won materially more . . . but for the alleged substandard performance." Lerner v. Laufer, 359 N.J. Super. 201, 221 (App. Div. 2003).

Plaintiffs submitted expert reports by Andrew Rubin, Esquire, and John A. Cannito, Esquire, to support their contention that defendants were negligent in failing to submit a timely claim to Commonwealth under the title insurance policy. As noted, the motion judge found this expert evidence insufficient to demonstrate that defendants' failure to submit the claim was the proximate cause of any damages plaintiffs sustained. We agree.

Rubin's report dated June 17, 2014 states: "Commonwealth affirmed that if timely notice had been given, and if the case had not been settled, . . . it would have defended and covered the claim." This is an inaccurate recitation of Commonwealth's July 25, 2011 letter, which rejected plaintiffs' claim because it was untimely. It is true that Commonwealth stated: "As the [l]itigation involves an alleged easement on the Insured Property, this claim would at first appear to involve a covered matter." However, Commonwealth went on to state that it "retained the right

to supplement this letter" and "to deny this claim based on additional grounds."

It is uncontroverted that plaintiffs were aware of the Niemiecs' claimed access easement over their property prior to closing, that the easement was not shown on the public records, and Commonwealth was unaware of its potential existence when it issued the policy. As the motion judge recognized, these uncontroverted facts clearly implicated an exclusion from coverage under the policy. In his report, Rubin failed to explain if or why the exclusion would not apply to negate coverage.

Rubin was questioned about this exclusion during his August 25, 2015 deposition. He responded, without any support, that the exclusion was "ambiguous" and not enforceable. Such response is insufficient to establish proximate cause because it merely represents Rubin's own personal interpretation of the policy, and, more importantly, ignores existing case law to the contrary. See Manchester Fund, Ltd. v. First Am. Title Ins. Co., 332 N.J. Super. 336, 346-47 (Law Div. 1999) (finding a similar policy exclusion unambiguous, thus precluding coverage and a defense for an insured who was aware of a title defect and failed to disclose it).

Cannito's report and deposition testimony are no more helpful to plaintiffs' cause. In his July 21, 2014 report, Cannito acknowledged that, in denying coverage due to the untimely filing

of the claim, Commonwealth reserved its rights under the policy, although its denial letter did not specifically mention whether any of the exclusions or exceptions applied. Cannito offered no opinion whether the policy's prior knowledge exclusion or the survey exceptions negated coverage. Rather, he stated only, "the insurer has the burden of proving that the claim falls outside the coverage under the policy or within the exceptions or exclusions."

Cannito did, however, acknowledge Kinsel's May 13, 2009 letter, in which Kinsel stated John Niemiec advised him of his claimed access easement prior to closing. In his report, Cannito opined: "Whether or not this correspondence and the conditions depicted by a survey would have provided Commonwealth with the basis to ultimately deny coverage based on the exceptions and exclusions set forth in the [p]olicy is at best speculative." Cannito was then asked directly about the letter at his August 11, 2015 deposition. Cannito conceded Kinsel's letter reflected that plaintiffs knew of the Niemiecs' claim of a right to an easement on plaintiffs' property prior to closing.

Cannito testified that Commonwealth's intent was to exclude from coverage risks that are known to the insured but not to the insurer as of the policy date. When asked squarely whether the exclusion applied in this case, Cannito responded: "I did not reach a conclusion one way or another."

Simply put, neither Rubin nor Cannito provided a sufficient expert opinion that Commonwealth would likely have provided coverage or a defense had defendants submitted a claim under the title policy at the outset of the easement litigation. Without such an opinion, a jury would be left to speculate as to the result had the claim been timely presented. Consequently, the motion judge correctly concluded there was insufficient evidence to demonstrate that defendants' failure to timely submit the easement claim to Commonwealth was a proximate cause of plaintiffs' damages.

B.

Plaintiffs also renew their claim that defendants committed legal malpractice in settling the easement litigation without their authorization. Defendants dispute this contention, and the motion judge correctly recognized that summary judgment was inappropriate where such a disputed factual issue exists. Notwithstanding, the judge dismissed the complaint based on plaintiffs' failure to proffer any expert testimony to establish the standard of care owed by an attorney representing a client in a settlement, or whether defendants deviated from that standard.

Generally, the testimony of an expert is required in legal malpractice cases to supply the standard of care against which the lawyer's conduct is to be evaluated. Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 14 (App. Div. 2006) (stating "[b]ecause the

duties a lawyer owes to his client are not known by the average juror, a plaintiff will usually have to present expert testimony defining the duty and explaining the breach."); Taylor v. DeLosso, 319 N.J. Super. 174, 179 (App. Div. 1999). The existence of a duty of care and the standards defining such a duty are legal questions determined by the court as a matter of law. See Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 322 (2013); Ziegelheim, 128 N.J. at 261-62.

Plaintiffs do not dispute that their malpractice claim relating to the April 15, 2011 settlement is unsupported by expert testimony. Instead, they contend their claim is subject to the common knowledge exception to that requirement. This exception applies "where the questioned conduct presents such an obvious breach of an equally obvious professional norm that the fact-finder could resolve the dispute based on its own ordinary knowledge and experience and without resort to technical or esoteric information." Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 12 (App. Div. 2001). We are not persuaded by this argument.

Here, it is undisputed that plaintiffs were present in court when the terms of the settlement were discussed on the record. They then had the opportunity to discuss the settlement with Gruenberg in the jury room, where the settlement was reduced to

writing and incorporated into the April 15, 2011 order. Expert testimony was required to establish the standard of care Gruenberg owed to plaintiffs during the settlement process, and how his actions deviated from that standard of care. Accordingly, the motion judge properly determined the common knowledge exception did not apply, and the absence of expert testimony as to the standard of care and whether defendants breached their duty of care was fatal to plaintiffs' claim.

Affirmed.