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David J. Gittines, Esq.
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December 31, 2025

Via eCourts
Hon. Sarah B. Johnson, J.S.C.
Atlantic County Superior Court
1201 Bacharach Blvd.
Atlantic City, NJ 08401

Re: Barber v. Tumelty, et al.
Docket No.: ATL-L-2794-25

Dear Judge Johnson:

This office represents Defendants John W. Tumelty, Esq. and Law Office of John W. Tumelty, Esq. (together, "Defendants") in the above-referenced matter. Please accept this letter brief in lieu of a more formal filing as Defendants' reply to Plaintiff Devon Tyler Barber's ("Plaintiff") opposition to Defendants' Motion to Dismiss for Failure to State a Claim in Lieu of an Answer. The motion is returnable before the Court on January 9, 2025.

I. ALL OF PLAINTIFF'S CLAIMS RELATE TO HIS LEGAL MALPRACTICE CLAIMS AND, AS SUCH, MUST BE DIMISSED.

Plaintiff has not yet received post-conviction relief for the underlying crime which serves as the basis for his legal malpractice claims against the Defendants. As such, Plaintiff's legal malpractice claims against the Defendants are not ripe and should be dismissed for failure to state a claim upon which relief may be granted.

Plaintiff asserts claims for legal malpractice, breach of fiduciary duty, unjust enrichment, fraud, and violations of the New Jersey Consumer Fraud Act in his First Amended Complaint and Second Amended Complaint. (*See* Plaintiff's First Amended Complaint attached to Defendants'

moving papers as Exhibit "A" and Plaintiff's Second Amended Complaint attached to the Certification of David J. Gittines, Esq.[1] as Exhibit "A.") All of the claims relate to Defendants' defense of Plaintiff in the underlying criminal matter during Plaintiff's 2022 criminal representation in *State v. Barber*, Indictment Nos. ATL-22-002292 & 002313. (*See id*.) All of the claims against the Defendants sound in legal malpractice.

In opposition, Plaintiff argues that his claims for breach of fiduciary duty, unjust enrichment, fraud, and violations of the NJ Consumer Fraud Act, are independent of his legal malpractice claims and as such, should survive dismissal. Plaintiff's argument is incorrect. Each of these claims, no matter how asserted or described, are offshoots of his legal malpractice claim and, absent the post-conviction relief, should be dismissed.

A. Breach of Fiduciary Duty

Plaintiff asserts a claim for breach of fiduciary duty against the Defendants in Count II of his Second Amended Complaint. Plaintiff claims that the Defendants, as his attorneys, breached fiduciary duties created by the attorney-client relationship and owed to Plaintiff. These claims are related to and a reiteration of his legal malpractice claims. Plaintiff does not identify any other fiduciary relationship between him and the Defendants in the First of Second Amended Complaints, then the attorney-client relationship. Plaintiff has failed to distinguish in his opposition or his complaint his breach of fiduciary duty claims from his legal malpractice claims.

In *Cortez v. Gindhart,* 435 N.J. Super. 589 (App. Div. 2014), the Appellate Division ruled that a plaintiff's claims for legal malpractice and breach of fiduciary duty were one and the same and when the plaintiff failed to offer any other fiduciary relationship and the plaintiff failed to

[1] Hereinafter referred to as the "Gittines Cert."

distinguish between the two claims. *Id*. at 608. The Appellate Division dismissed the breach of fiduciary duty claims as being repetitive of the legal malpractice claims and having no support.

Accordingly, Plaintiff's legal malpractice and breach of fiduciary duty claims are indistinguishable, and both require the same post-conviction relief before they may be prosecuted. It is respectfully submitted that Plaintiff's breach of fiduciary duty claim must also be dismissed by the Court for failure to state a claim upon which relief may be granted.

B. New Jersey Consumer Fraud Act Claims

In Count IV of the First Amended Complaint and Second Amended Complaint, Plaintiff asserts a claim for a violation of the New Jersey Consumer Fraud Act, *N.J.S.A.* 56:8–1 to –20, against the Defendants. The New Jersey Consumer Fraud Act does not apply to attorneys in New Jersey. *See Suarez v. E. Int'l Coll.,* 428 N.J. Super. 10, 38 (App. Div. 2012), *certif. denied,* 213 N.J. 57 (2013) ("The Consumer Fraud Act, *N.J.S.A.* 56:8–1 to –20, does not apply to services performed by members of a learned profession that is subject to its own strong regulatory regime.) Attorneys in New Jersey are subject to their own strict regulatory scheme and are not subject to claims brought under the New Jersey Consumer Fraud Act. *See also Portes v. Tan*, No. A-3940-11T3, 2014 WL 463140, at *9 (N.J. Super. Ct. App. Div. Feb. 6, 2014) (where the Appellate Division properly upheld the dismissal of consumer fraud claims against an attorney.)[2]

Accordingly, it is respectfully submitted that Plaintiff's claim against the Defendants under the New Jersey Consumer Fraud Act must be dismissed with prejudice for failure to state a claim upon which relief may be granted.

C. Fraud Claims

[2] *See* copy of the unpublished opinion *Portes v. Tan*, No. A-3940-11T3, 2014 WL 463140 (N.J. Super. Ct. App. Div. Feb. 6, 2014), attached to the Gittines Cert. as Exhibit "B."

If a plaintiff bases his or her fraud claim on the same allegations as the malpractice claim, "merely adding the label 'fraud' to" them without alleging the elements of legal or equitable fraud, then it may not be treated as a separate and distinguishable claim. *Levinson v. D'Alfonso & Stein,* 320 N.J. Super. 312, 315, 318 (App. Div. 1999).

Here, Plaintiff simply reasserts his legal malpractice claims as fraud claims. These are not separate claims and as such Plaintiff's fraud claims are susceptible to dismissal. Further, pursuant to *R*. 4:5-8, fraud claims are to be plead with specificity. Plaintiff has failed to do so here. Accordingly, it is respectfully submitted that Plaintiff's fraud claim against the Defendants must be dismissed with prejudice for failure to state a claim upon which relief may be granted.

D. Breach of Contract

In Count I of the First Amended Complaint and Second Amended Complaint, Plaintiff asserts a claim for breach of contract (retainer agreement) against the Defendants. (*See* Plaintiff's First Amended Complaint at Count I, attached to Defendants' moving papers as Exhibit "A" and Plaintiff's Second Amended Complaint at Count I, attached to the Gittines Cert. as Exhibit "A.") Plaintiff claims that Defendants breached the retainer agreement by 1) failing to file a detention-review motion; 2) failing to communicate; 3) failing to investigate; and 4) failing to perform services for which payment was made. (*See id.)*

Breach of contract requires the plaintiff "to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract and that the plaintiff sustained damages as a result." *Murphy v. Implicito,* 392 N.J. Super. 245, 265 (App. Div. 2007). When the "essential factual allegations upon which [a plaintiff's claim] rests" are that the defendants' performance of the professional work for which the plaintiff retained them fell short of the skill that an average member of the defendants' profession ordinarily possesses, and of the

care that an average member ordinarily exhibits in similar circumstances, **the claim is one for professional malpractice, even if the plaintiff denominates it as a claim for breach of contract.** *Charles A. Manganaro Consulting Eng'rs, Inc. v. Carneys Point Twp. Sewerage Auth.,* 344 N.J. Super. 343, 349 (App. Div. 2001). (Emphasis added.)

As such, Plaintiff's breach of contract claim is simply a repacking of his legal malpractice claim. The breach of contract claim is clearly one for professional malpractice, which again requires the same post-conviction relief before it may be prosecuted. It is respectfully submitted that Plaintiff's breach of contract claim should be dismissed for failure to state a claim upon which relief may be granted.

E. Unjust Enrichment

To demonstrate unjust enrichment, "a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust" and that the plaintiff "expected remuneration" and the failure to give remuneration unjustly enriched the defendant. *EnviroFinance Grp., LLC v. Env't Barrier Co., LLC*, 440 N.J. Super. 325, 350 (App. Div. 2015), *citing VRG Corp. v. GKN Realty Corp.,* 135 N.J. 539, 554 (1994). Plaintiff asserts a claim for unjust enrichment in Count VII of his First Amended Complaint and Second Amended Complaint. This claim is premised upon the recover of the $5,000 which Plaintiff paid Defendants for representation in the underlying criminal matter. The unjust enrichment claim is linked, as are all of Plaintiff's claims, to his legal malpractice claims. Plaintiff cannot pursue such claims absent the post-conviction relief for the underlying criminal matter.

E. Rules of Professional Conduct

Plaintiff argues in his opposition that his claims that Defendants violated the Rules of Professional Conduct ("RPCs") should survive the dismissal of his legal malpractice claims, due

to the lack of post-conviction relief. Plaintiff is incorrect. A cause of action for malpractice cannot be based exclusively on the asserted breach of an *RPC. See Gilles v. Wiley, Malehorn & Sirota*, 345 N.J. Super. 119, 125 (App. Div. 2001).

Accordingly, it is respectfully submitted that Plaintiff's claims under the RPCs against the Defendants should be dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

Accordingly, it is respectfully submitted that the Court should grant Defendants' motion and dismiss Plaintiff's First and Second Amended Complaint against the Defendants for failure to state a claim for which relief may be granted.

Thank you for your attention and courtesy in this matter.

Respectfully submitted,

KAUFMAN DOLOWICH LLP

By: /s/ David J. Gittines
DAVID J. GITTINES

DJG:rm
Enclosure

CC: Devon Tyler Barber, *Pro Se* (via eCourts and email)

KAUFMAN DOLOWICH LLP
Iram P. Valentin, Esq. – Bar #010222002
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Attorneys for Defendant John W. Tumelty, Esq. and The Law Office of John W. Tumelty

DEVON TYLER BARBER, Plaintiff, vs. JOHN W. TUMELTY and THE LAW OFFICE OF JOHN W. TUMELTY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ATLANTIC COUNTY Docket No: ATL-L-2794-25 Civil Action **CERTIFICATION OF COUNSEL**

I, David J. Gittines, Esq., of full age, hereby certify as follows:

1. I am an attorney at law of the state of New Jersey. I am of counsel with the law firm of Kaufman Dolowich LLP, attorneys for Defendants John W. Tumelty, Esq. and The Law Office of John W. Tumelty (together, "Defendants"). I am involved in the defense of this matter and am fully familiar with the facts herein. I submit this certification in support of Defendants' Reply Brief to the Opposition to the Motion to Dismiss.

2. Attached hereto as Exhibit "A" is a true and correct copy of Plaintiff's Second Amended Complaint.

3. Attached hereto as Exhibit "B" is a true and correct copy of the unpublished opinion *Portes v. Tan*, No. A-3940-11T3, 2014 WL 463140 (N.J. Super. Ct. App. Div. Feb. 6, 2014).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, then I am subject to punishment by the Court.

Kaufman Dolowich LLP
Attorneys for Defendant John W. Tumelty, Esq. and The Law Office of John W. Tumelty

By: /s/ David J. Gittines
DAVID J. GITTINES

Dated: December 31, 2025

EXHIBIT A

BARBER, DEVON TYLER, **Plaintiff**, *Pro Se*
325 E. Jimmie Leeds Rd., Suite 7-333
Galloway Township, Atlantic County, New Jersey
(609) 862-8808 — Tylerstead@ProtonMail.com

DEVON TYLER BARBER, **Plaintiff**, v. JOHN W. TUMELTY and THE LAW OFFICE OF JOHN W. TUMELTY, **Defendants**.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: ATLANTIC COUNTY** DOCKET NO.: ATL-L-002794-25 Civil Action **NOTICE OF FILING:** **SECOND AMENDED COMPLAINT**

TO: The **Honorable** Sarah B. Johnson, **J.S.C.**
Superior Court of New Jersey, Law Division
Atlantic County

PLEASE TAKE NOTICE that Plaintiff, **Devon Tyler Barber**, hereby files the attached **Second Amended Complaint** pursuant to Rule 4:9-1. This amendment is filed as of right prior to the entry of any responsive pleading and in further response to Defendants' pending ***Motion to Dismiss*** under Rule 4:6-2(e).

The **Second Amended Complaint** clarifies and amplifies Plaintiff's factual allegations, **separates conviction-dependent claims from independent claims**, and further demonstrates that **multiple tort, contract, and consumer-fraud causes of action** remain viable regardless of any *post-conviction proceedings*.

Plaintiff respectfully requests that the Court deem the pending ***Motion to Dismiss*** moot or, in the alternative, deny the *motion* for the reasons set forth in Plaintiff's concurrently filed **Brief in Opposition**.

Respectfully submitted,

s/ Devon Tyler Barber
DEVON TYLER BARBER
Plaintiff, Pro Se
Dated: 11/25/2025

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Cases

Other Authorities

Rules

BARBER, DEVON TYLER, **Plaintiff**, *Pro Se*
325 E. Jimmie Leeds Rd., Suite 7-333
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(609) 862-8808 — Tylerstead@ProtonMail.com

DEVON TYLER BARBER, Plaintiff, v. JOHN W. TUMELTY and THE LAW OFFICE OF JOHN W. TUMELTY, Defendant(s).	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: ATLANTIC COUNTY** DOCKET NO.: ATL-L-002794-25 Civil Action **SECOND AMENDED COMPLAINT**

1. Plaintiff, **Devon Tyler Barber**, an individual who resides in Atlantic County, New Jersey, hereby files this **Second Amended Complaint** against Defendants **John W. Tumelty, Esq.** and the **Law Office of John W. Tumelty**, and alleges as follows:

PRELIMINARY STATEMENT

2. This civil action arises from *attorney* **misconduct**, **fee fraud**, **breach** of fiduciary **duty**, **abandonment**, and **actionable commercial misrepresentations** committed by Defendants after accepting a $5,000 retainer to represent Plaintiff in pretrial detention proceedings in matters **ATL-22-002292** and **ATL-22-002313**. Those proceedings originated from what was, in substance, **a civil wage and property dispute** between Plaintiff and his **former employers**. Plaintiff's **former employers** generated a misleading criminal narrative following Plaintiff's requests for unpaid wages and the return of his property. Defendants were retained specifically to expose the ***civil nature*** of

the dispute, challenge the inaccurate narrative, and **protect** Plaintiff's liberty interests. Defendants **failed** to do so, resulting in prolonged detention, increased pressure on Plaintiff's plea decision, and the injuries set forth herein.

3. Although a limited subset of malpractice allegations may intersect with issues bearing on the ultimate validity of Plaintiff's conviction, the **majority of claims asserted in this pleading arise from independent torts, contractual breaches, retainer-based misrepresentations, and consumer-fraud violations**. These claims concern Defendants' **pretrial conduct**, **commercial inducements**, **failures to act**, and **breaches of professional** *and* **fiduciary obligations**, and **do not require overturning or collaterally attacking any conviction** to proceed.
4. Pursuant to ***McKnight v. Office of the Public Defender***, 197 N.J. 180 (2008), and ***Rogers v. Cape May County Office of the Public Defender***, 208 N.J. 414 (2011), only those portions of a legal-malpractice claim that require undermining the validity of a criminal conviction are subject to the exoneration rule and may be stayed pending post-conviction review. All **independent tort, contract, fiduciary-duty, and consumer-fraud claims** proceed immediately and are not barred by the exoneration doctrine.

JURISDICTION AND VENUE

5. The Court has subject-matter jurisdiction over this action pursuant to **N.J. Const. art. VI, § 3, ¶ 2** and **N.J.S.A. 2A:3-1**, which vest the Superior Court, Law Division, with original jurisdiction over all civil actions.
6. Venue is proper in **Atlantic County** under **R. 4:3-2(a)** because the acts and omissions alleged in this Complaint occurred in this county, and Defendants **regularly transact** business here.

PARTIES

7. **Plaintiff Devon Tyler Barber** is a natural person residing in Atlantic County, New Jersey, who conducts lawful contracting and home-improvement work through duly formed business entities and/or beneficial legal arrangements. Plaintiff appears in this matter in his personal capacity as the party injured by Defendants' acts and omissions.
8. **Defendant John W. Tumelty, Esq.** is a natural person and attorney licensed to practice law in the State of New Jersey, who publicly advertises himself as a "**Certified Criminal Trial Attorney**" pursuant to **R. 1:39**.
9. **Defendant The Law Office of John W. Tumelty** is a New Jersey law practice and business entity located in Atlantic County, New Jersey, and conducts the commercial offering of legal services throughout the State.

FACTUAL ALLEGATIONS

A. The Underlying July 2022 Events

10. In July 2022, Plaintiff was performing authorized renovation and property-maintenance work at **1525 W. Aloe Street, Galloway Township**, pursuant to a labor-for-lodging and wage arrangement with the property owners and their business entities.
11. When Plaintiff sought payment for completed work, the property owners and associated individuals responded with escalating hostility. They unlawfully destroyed portions of Plaintiff's personal property, scattered his belongings, and forced him from the premises in retaliation for his unpaid-wage demands, as well as for Plaintiff's ongoing work with a licensed contractor who had entrusted him with a company work truck for both on-duty and authorized off-duty use.

12. The ensuing police response incorrectly treated the matter as a criminal incident, despite clear indicators that the underlying dispute involved **civil wage issues, a work-for-lodging arrangement, and a tenancy/occupancy conflict**, none of which were investigated or presented by defense counsel.

B. Detention Hearing Violations

13. At Plaintiff's initial detention hearing, Plaintiff was electronically **mute**, unable to meaningfully participate, and prevented from presenting evidence of his lawful residence, wage-based employment, work-for-lodging arrangement, and **tenancy status**.
14. Assigned counsel at that hearing **failed** to challenge the prosecution's mischaracterizations and presented no evidence regarding Plaintiff's employment history, community ties, or the ***civil nature*** of the underlying dispute.

C. Retainer and Representations by Defendant Tumelty

15. Shortly after the hearing, Plaintiff's family retained Defendant Tumelty and paid a **$5,000** flat fee in reliance on Defendant's advertisements, assurances, and express promises that he would:

    (a) **File** a **second detention-review motion**;
    (b) Present **evidence** of Plaintiff's residence, employment, and civil wage dispute;
    (c) **Investigate** the incident as a civil matter rather than a violent crime; and
    (d) Communicate regularly, act diligently, and **protect** Plaintiff's liberty interests.
16. Defendant Tumelty expressly held himself out as a "Certified Criminal Trial Attorney" and an "aggressive advocate," representing that he possessed the skill and experience necessary to secure Plaintiff's pretrial release.
17. These written and verbal representations induced Plaintiff and his family to retain him and pay the $5,000 retainer.

D. Defendants' Abandonment and Failures

18. Despite repeated assurances, Defendants never filed a detention-review motion, even though such filings could have been submitted electronically through JEDS.

19. Defendants never investigated or preserved the civil-nature evidence, never secured Plaintiff's phone records or wage documentation, and never obtained the corroborating materials that were readily accessible and essential to correcting the prosecution's narrative.

20. Defendants failed to communicate with Plaintiff, failed to challenge the State's mischaracterizations, and visited Plaintiff only once during his 108-day confinement.

21. As alleged herein, Plaintiff remained confined between July 11 and October 26, 2022 as a direct result of Defendants' inaction, neglect, and abandonment—not because of any legal determination challenged in this civil action.

E. Damages

22. As a direct and proximate result of Defendants' misconduct, Plaintiff suffered:

    (a) loss of liberty for 108 days;

    (b) physical injury and unsafe confinement conditions;

    (c) psychological harm, including anxiety, trauma, and post-concussive symptoms;

    (d) business interference, lost wages, and disruption to contracting opportunities;

    (e) destruction of personal property;

    (f) reputational harm affecting employment, housing, and credit; and

    (g) loss of the unearned $5,000 retainer.

23. These injuries arise from Defendants' independent torts, contractual breaches, and fiduciary misconduct and **do not depend on overturning, challenging, or undermining the validity of any conviction**, and therefore fall outside the exoneration rule.

24. Plaintiff incorporates by reference his Certifications filed November 7–8, 2025 (including supporting exhibits), each of which is based on personal knowledge and submitted pursuant to R. 1:4-4.

CAUSES OF ACTION

COUNT I – BREACH OF CONTRACT (Retainer Agreement)

25. Plaintiff repeats and realleges the above paragraphs.
26. Plaintiff and Defendants entered into a **retainer agreement** for legal representation.
27. Defendants breached the agreement by:
    (a) Failing to file a detention-review motion;
    (b) Failing to communicate;
    (c) Failing to investigate;
    (d) Failing to perform services for which payment was made.
28. Plaintiff suffered ascertainable loss, including the **$5,000 fee** and consequential damages.

COUNT II – BREACH OF FIDUCIARY DUTY

29. Defendants owed Plaintiff fiduciary duties of **loyalty, diligence, candor, and communication**.
30. Defendants abandoned Plaintiff, withheld action, and failed to protect Plaintiff's liberty interests.
31. Under Baxt v. Liloia, 155 N.J. 190 (1998), Lash v. State, 169 N.J. 20 (2001), and Baldasarre v. Butler, 132 N.J. 278 (1993), an attorney's fiduciary obligations—including loyalty, diligence, candor, and communication—are independent of negligence principles, and breaches of those duties are fully actionable as stand-alone claims.
32. Plaintiff suffered emotional, economic, and liberty-based injury as a result.

COUNT III – FRAUD / FRAUDULENT INDUCEMENT

33. Defendants made material misrepresentations, including:

    (a) Claims of certification and aggressive representation,

    (b) Promises of immediate detention-review filings,

    (c) Assertions of strategic action that never occurred.

34. Plaintiff reasonably relied on these statements when paying $5,000.

35. Defendants knew or should have known these statements were false or misleading.

36. Plaintiff suffered damages as a result.

COUNT IV – CONSUMER FRAUD (N.J.S.A. 56:8-1 et seq.)

37. Plaintiff repeats and realleges the above paragraphs.

38. Defendants' advertising, marketing, and retainer-inducement statements constitute **unlawful commercial practices** under:

    - **Blatterfein v. Larken Assocs.**,
    - **Cox v. Sears**,
    - **Gennari v. Weichert**.

39. Defendants knowingly induced Plaintiff into a transaction using misrepresentations.

40. Plaintiff suffered **ascertainable loss** including the $5,000 retainer and consequential damages.

41. Plaintiff is entitled to **treble damages**, fees, and costs.

COUNT V – NEGLIGENCE / GROSS NEGLIGENCE (Independent of conviction validity**)**

42. Defendants owed Plaintiff a duty of reasonable care in representation.

43. Defendants breached this duty by failing to:

    (a) communicate;

(b) investigate;

(c) preserve evidence;

(d) file a detention review motion;

(e) protect Plaintiff from continued pretrial detention and worsening confinement conditions.

44. These failures were **pre-conviction** and independent of any plea.

45. Plaintiff suffered economic, psychological, and liberty-based injuries as a direct result.

COUNT VI – LEGAL MALPRACTICE (Conviction-Dependent Portion Only; To be stayed if Court deems appropriate)

46. To the extent any malpractice claim requires establishing innocence or reversal of conviction, Plaintiff pleads such counts in the alternative.

47. Plaintiff acknowledges that the conviction-dependent portion of this count may be stayed pending post-conviction proceedings consistent with **McKnight** and **Rogers**.

48. This does not affect his independent non-malpractice claims in **Counts I–V** and **VII**.

COUNT VII — UNJUST ENRICHMENT

49. Plaintiff repeats and realleges all preceding paragraphs as though fully set forth herein.

50. Plaintiff conferred a material benefit upon Defendants by paying a $5,000 retainer for legal services that Defendants promised, but failed, to perform.

51. Defendants knowingly accepted and retained that benefit while failing to act, failing to communicate, failing to investigate, and abandoning Plaintiff during critical pretrial detention proceedings.

52. Defendants' retention of the retainer fee, despite their nonperformance and misrepresentations, is unjust, inequitable, and contrary to principles of good conscience.

53. Plaintiff suffered ascertainable economic loss in the form of the $5,000 payment and consequential damages.

54. Equity demands the return of the $5,000 and such further relief as the Court deems just.

DEMAND FOR JUDGMENT

55. **WHEREFORE**, Plaintiff demands judgment as follows:

(a) Compensatory damages, including loss of liberty, emotional distress, lost wages, reputational harm, and property loss;

(b) Return of the **$5,000 retainer**;

(c) Treble damages under the CFA;

(d) Punitive damages as permitted by law;

(e) Attorney's fees and costs where allowed;

(f) Pre- and post-judgment interest;

(g) Declaratory and equitable relief;

(h) Any other relief this Court deems just and proper.

JURY DEMAND

Plaintiff hereby demands trial by jury on all claims and all issues so triable as of right pursuant to **R. 4:35-1** and the Seventh Amendment to the United States Constitution, as incorporated through Article I, Paragraph 9 of the New Jersey Constitution.

CERTIFICATION (R. 1:4-4)

I certify that the foregoing statements made by me are true to the best of my knowledge, information, and belief. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: November 25, 2025
Atlantic County, New Jersey

s/ Devon Tyler Barber
Devon Tyler Barber
Plaintiff, Pro Se

EXHIBIT B

2014 WL 463140
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Fernando A. PORTES, Plaintiff–Appellant,
v.
Herbert TAN, Herbert Tan LLC, Eldridge Hawkins, Defendants–Respondents.

A-3940-11T3
|
Argued Jan. 14, 2014.
|
Decided Feb. 6, 2014.

Synopsis

Synopsis

Background: Client brought action against attorneys and law firm, alleging legal malpractice and related claims. The Superior Court of New Jersey, Law Division, Hudson County, dismissed client's claims. Client appealed.

Holdings: The Superior Court, Appellate Division, held that:

[1] trial court properly excluded client's expert reports as net opinions;

[2] client's legal malpractice claim was not subject to the common knowledge exception, and thus, an expert was required in assessing attorneys' and firm's strategic decisions;

[3] the Consumer Fraud Act did not apply to legal malpractice claim;

[4] client failed to mention intent or any other condition of mind as required to support fraud claim; and

[5] client's breach of contract claim as not separable from legal malpractice claim.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (6)

[1] **Summary Judgment** Duties and liabilities of practitioners; negligence and malpractice

Client's expert reports in legal malpractice action against attorneys and law firm lacked explanations to support their conclusions that client would have prevailed on his failure to hire claim in underlying employment discrimination lawsuit if attorneys and firm had not deviated from the standard of care, and therefore, for purposes of summary judgment dismissal, trial court properly excluded the reports as net opinions.

[2] **Attorneys and Legal Services** Necessity of expert evidence

Client's legal malpractice claim against attorneys and firm was not subject to the common knowledge exception, and thus, an expert was required in assessing attorneys' and firm's strategic decisions, where it would have been necessary for the jury to assess the adequacy of the record in the underlying case to establish the required elements of client's failure to hire claim under the Law Against Discrimination (LAD) against former employer, the efforts that attorneys and firm made to generate an adequate record and present it at trial, the standard of care for attorneys in handling such LAD claims, attorneys' and firm's adherence to or deviation from that standard, and the effect of any deviation on the trial result. N.J.S.A. 10:5-1 et seq.

[3] **Antitrust and Trade Regulation** Legal

professionals; attorney and client

The Consumer Fraud Act did not apply to client's legal malpractice claims against attorneys and law firm; services performed by members of a learned profession were subject to the profession's own strong regulatory regime. N.J.S.A. 56:8–1 et seq.

[4] Attorneys and Legal Services Pleadings

Client failed to mention intent or any other condition of mind as required to support fraud claim against attorneys and firm; allegations in client's complaint contained only a listing of attorneys' and firm's failures to perform and the unfavorable results that attorneys and firm achieved, and client's fraud count simply referenced those allegations, without adding any explanation how they could establish or lead to evidence of the necessary intentionality.

[5] Conspiracy Fraud

Trial court properly dismissed client's conspiracy claim against attorneys and law firm in the absence of a claim for an underlying tort, which in client's case were fraud and consumer fraud claims that client had inadequately pleaded and was unable to sustain.

2 Cases that cite this headnote

[6] Attorneys and Legal Services Nature and form

Client's breach of contract claim against attorneys was not separable from client's legal malpractice claim, where "zero chance of settlement" provision in attorney's retainer agreement did not recite any kind of instruction, rather, it simply observed the unlikelihood of settlement, attorney did not settle the underlying case, so he did not violate any conceivable implication of the provision other than an implicit admonition to perform to the best of his ability, which was to say, not to fall short of the standard of care.

1 Case that cites this headnote

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L–1519–10.

Attorneys and Law Firms

Fernando A. Portes, appellant, argued the cause pro se.

Eldridge Hawkins, respondent, argued the cause pro se.

Herbert Tan and Herbert Tan LLC, respondents, have not filed a brief.

Before Judges ALVAREZ, OSTRER and CARROLL.

Opinion

PER CURIAM.

***1** Plaintiff Fernando A. Portes appeals from summary judgment dismissal by the Law Division of his complaint alleging legal malpractice and related claims against defendants Herbert Tan and Herbert Tan, LLC (collectively Tan) and Eldridge Hawkins. Plaintiff argues, among other things, that the trial court erred in ruling that all of his causes of action essentially sounded in legal malpractice, that expert opinion was necessary to establish them, that plaintiff's legal malpractice expert provided only an inadmissible net opinion, and that dismissal of his claims was therefore required. Having reviewed plaintiff's arguments in light of the facts and applicable law, we affirm.

I.

We begin by briefly recounting the underlying litigation that gave rise to plaintiff's malpractice action. Plaintiff was a managerial employee at Johnson & Johnson (J & J).

He had unsuccessfully sought numerous other positions within the company, and was subsequently terminated. In November 2004, he brought suit against J & J, claiming discrimination on the basis of ethnicity, hostile work environment, failure to hire, and retaliatory discharge for having filed internal discrimination complaints and a complaint with the United States Equal Employment Opportunity Commission (EEOC), all in violation of the Law Against Discrimination, *N.J.S.A.* 10:5–1 to –42(LAD), as well as wrongful discharge in violation of public policy, common law retaliatory discharge, breach of employment contract, and intentional and negligent infliction of emotional distress.

Plaintiff was represented by various other attorneys until he retained Tan in November 2007. At that point, prior counsel had engaged in extensive discovery and secured expert reports.

On January 7, 2008, the court denied plaintiff's motion to extend discovery. The court noted that the case already had 1013 days of discovery with seven extensions, and ruled that plaintiff's retention of new counsel, i.e., Tan, "is not a good faith basis to extend discovery." On January 30, 2008, plaintiff moved to suppress J & J's answer for failure to comply with discovery. On March 5, 2008, the court denied the motion.

J & J moved for summary judgment, in response to which Tan submitted a seventy-two page brief. Tan's brief discussed why plaintiff was more qualified than the other successful candidates, but for only three of the twenty-nine positions that he had applied for. At the April 11, 2008, summary judgment hearing, Tan confirmed that plaintiff was conceding the twenty-six other positions, and that he was relying only on the remaining three.

In his April 17, 2008, oral decision, Judge John A. O'Shaughnessy noted that plaintiff had also conceded his claims for wrongful discharge in violation of public policy, common law retaliatory discharge, breach of employment contract, and intentional and negligent infliction of emotional distress. The court's April 25, 2008 order memorialized those concessions and dismissed those claims on summary judgment, leaving surviving only the LAD claims of failure to hire for the three remaining positions, discriminatory discharge based on ethnicity, retaliatory discharge for filing an EEOC complaint, and hostile work environment.

***2** Prior to trial, J & J made a settlement offer that the court in the malpractice action would later characterize as "substantial." Plaintiff declined to accept it, and opted to proceed to trial.

Plaintiff's retainer agreement authorized Tan to bring in outside counsel and, at some point before trial, Tan brought in Hawkins to try the case. The retainer agreement also contained a handwritten notation that stated "zero chance of settlement." On June 25, 2008, after the close of evidence at trial, the court dismissed the failure to hire claim for the remaining three positions as untimely under the LAD. On July 21, 2008, the jury returned a verdict for J & J on plaintiff's other LAD claims. Plaintiff appealed, and we affirmed. *Portes v. Johnson & Johnson,* Docket No. A–6025–07 (App.Div. Oct. 3, 2011) (slip op. at 2).

II.

On March 5, 2010, while his appeal of the underlying action was still pending, plaintiff commenced this malpractice action against Tan and Hawkins. Plaintiff's main claim was defendants' negligence in disregarding the information he had provided them concerning the twenty-six conceded positions. He alleged common law fraud (count one) on the ground that defendants never intended to provide the "minimum acceptable legal representation," which he understood required them to prepare for trial by studying and exploiting all the evidence that he had submitted to them, including his assessments of all twenty-nine positions for which he had unsuccessfully applied at J & J. He also pled breach of contract (count two), legal malpractice (count three), consumer fraud (count four), negligence (count five), and conspiracy to commit fraud and consumer fraud (count six). Like count one, counts two, three, four and five similarly alleged that defendants failed to provide the "legal work" and the "legal representation expected [from] or [of] New Jersey attorneys."

On October 12, 2010, plaintiff moved for discovery of Tan's and Hawkins's tax returns and bank statements for 2008 and 2009. He contended that their gross derelictions justified suspicions that J & J had paid them to undermine his underlying case against the company. On October 29, 2010, the court denied the motion.

On March 7, 2011, plaintiff moved to compel Tan to immediately return $2402.24 of his retainer as Tan had allegedly promised, which represented the fee of plaintiff's damages expert for an updated report. On April 1, 2011, the court denied the motion on the ground that plaintiff had not provided evidence of a "written agreement" for Tan to refund portions of his retainer.

To establish his allegations against defendants, plaintiff submitted the January 24, 2011 report of William Michelson, Esq., his legal malpractice expert. Michelson opined that an associate of Tan had mishandled the motion to extend discovery, by making easily avoidable ministerial mistakes and omissions. He stated that J & J had failed to produce "evidence of the handling of other people's job applications," which he did not name or characterize, and of plaintiff's EEOC grievance, "as its own rules required to be done." Further discovery would have yielded such information to bolster plaintiff's case, or revealed the destruction of such information to support a spoliation claim. Alternatively, a discovery extension would have at least bought extra time before plaintiff had to respond to J & J's summary judgment motion.

***3** Michelson deemed Tan's brief in opposition to J & J's summary judgment motion substantively sound, except that it addressed only three of the twenty-nine positions for which plaintiff had unsuccessfully applied. Michelson did not see a substantive reason for Tan to concede the large majority of those positions, given plaintiff's belief that he could have established his superiority for at least twelve of them.

Michelson stated that plaintiff's claim of failure to hire required him to establish four elements: that the plaintiff belonged to a protected class, he applied for a position for which he "was qualified," and was rejected "despite adequate qualifications," while the employer continued to seek applicants who were not more qualified. He explained that plaintiff was a member of a protected class and had suffered the adverse employment action of being denied numerous positions, which plainly established two of the required elements. He believed that plaintiff presented evidence at trial to satisfy a third element, which was that he performed to his employer's expectations, until the stress of the mistreatment from his supervisor began to impede his work.

However, the fourth element, that employees outside the plaintiff's protected class did not suffer similar adverse employment actions, was "lost" when Tan chose not to contest twenty-six of the denied promotions. Michelson opined that the sheer number of denials for positions for which plaintiff had adequate qualifications could have affected the result: "Had the [twenty-six] missing applications each come before the jury, it would have been instructed to apply these tests, and I think the sheer multiplicity of these instances would have worked to [p]laintiff's benefit."

On June 13, 2011, following his deposition, Michelson issued a "clarification," which the trial judge later deemed to be a supplemental report. It elaborated on his prior opinion that Hawkins spent insufficient time preparing for trial and reviewing the available information, that Hawkins's decisions on what evidence to use reflected his lack of preparation rather than a deliberate choice based on strategy and client consultation, and that preparing for and conducting a trial in such a manner was negligent. Michelson suggested that Hawkins could not be responsible for any failures that had occurred before he agreed to handle the case, but in the alternative, he proposed that Tan and Hawkins were joint venturers and therefore fully responsible for each other's negligence.

Prior to trial, defendants moved to bar Michelson's expert opinions as net opinions, and to dismiss plaintiff's complaint on that basis. The trial judge held a hearing, during which Michelson provided voir dire testimony about his reports. He explained that he "didn't have any criticism of [Hawkins] in terms of the actual handling of the trial," and that Hawkins "lived up to ordinary care in the handling of a trial." Rather, he faulted the inadequate preparation that eliminated certain evidence before the trial began. Michelson was asked to identify any report or evidence that plaintiff had provided as to which Hawkins had "breached the duty of care by not accepting it and moving it into evidence." Michelson's response was that "I haven't been through those one by one. It would have been an enormous task." He opined that Hawkins's liability would arise solely from being "in a joint venture with" Tan and other prior counsel who "gave you a booby trapped case that had already sustained a lot of damage before it went to trial."

***4** Michelson testified that Tan briefed the case well and that "he understood the law on point." His criticism was that Tan failed to address twenty-six of the positions for which plaintiff had applied, but Michelson himself was unable to say whether plaintiff had a valid cause of action for any of them. Michelson nonetheless believed that "the loss of those issues was a substantial contributing factor in weakening the case as a whole," and that Tan did not have "the right" to make a discretionary decision not to pursue them without the client's approval. When asked specifically whether, "after consultation with a client, a lawyer has to pursue causes of action that he knows are inappropriate, invalid and have no support," Michelson agreed that it was not categorically required, although the problem here was that Tan could not have performed such an assessment of plaintiff's case against J & J due to the incompleteness of discovery.

At the February 22, 2012, motion hearing, the court granted defendants' motion to bar the opinion of plaintiff's legal malpractice expert for being a net

opinion. The court accordingly dismissed the legal malpractice claim. It ruled that the remaining claims amounted to legal malpractice claims and dismissed them on the same ground, while also ruling that consumer fraud was unavailable because attorneys were members of a regulated profession. At the April 2, 2012, hearing, the court denied plaintiff's motion for reconsideration. Plaintiff appealed, and on April 10, 2012, Judge Christine Farrington issued a comprehensive thirteen-page letter decision, pursuant to *Rule* 2:5–1(b), in which she cogently summarized the basis for her prior rulings. The judge explained:

> Mr. Michelson makes no analysis of Judge O'Shaughnessy's decision nor gives an opinion why the Judge's decision was correct. Mr. Michelson fails to note that based upon Mr. Tan's brief, plaintiff survived the summary judgment motion but he did not win at trial. There is no analysis of what the merits were, if any, of the 26 conceded applications. There is no specific example of any action or inaction on the part of Hawkins during the trial which failed to meet the standard of care other than in the amended report, which states that it was negligent for Mr. Hawkins not to meet with plaintiff "thoroughly and extensively;" and, if Hawkins had not read most of the material "... his lack of readiness for trial was negligent;" and his failure to object about points of fact from plaintiff's subsequent employment was negligent, and a failure "to introduce a self-assessment report from J & J Director of Diversity to the jury" was negligent. Michelson Supplement Report of June 13, 2011, pp. 1–2. All of the foregoing without reference to the trial transcript, without quoting the self-assessment report, and without analysis as to how Hawkins' lack of readiness for trial was demonstrated by the trial transcript.
>
> ...
>
> There is no finding based upon specific facts in either the fifteen page report dated January 24, 2011, or its three page supplement dated June 13, 2011 [,] ... that Hawkins or Tan failed to exercise that degree of skill, care and diligence commonly exercised by an ordinary member of the legal community and the client incurred damages as a direct result of the attorney[s'] actions. There is not a single transcript reference to the summary judgment motion for which Tan is faulted, or the lengthy underlying trial to demonstrate malpractice on the part of Hawkins.
>
> ***5** The [c]ourt finds the Michelson reports to be net opinions, and therefore inadmissible. Because the [c]ourt had previously determined that an expert opinion was necessary for plaintiff to prove what is in essence a complaint for malpractice against the defendants stated in multiple counts, the [c]ourt dismisses those counts. The [c]ourt found that the consumer fraud count does not apply to attorneys, and therefore dismissed that count also.

III.

Attorneys owe a duty to their clients to provide their services with reasonable knowledge, skill, and diligence. *St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden,* 88 *N.J.* 571, 588, 443 A.2d 1052 (1982). The Supreme Court has consistently recited that command in broad terms, for lawyers' duties in specific cases vary with the circumstances. *Ziegelheim v. Apollo,* 128 *N.J.* 250, 260, 607 A.2d 1298 (1992). Accordingly, "[w]hat constitutes a reasonable degree of care is not to be considered in a vacuum but with reference to the type of service the attorney undertakes to perform." *St. Pius, supra,* 88 *N.J.* at 588, 443 A.2d 1052.

Included within this duty is the obligation to take "any steps reasonably necessary in the proper handling of the case." *Passanante v. Yormark,* 138 *N.J.Super.* 233, 239, 350 A.2d 497 (App.Div.1975), *certif. denied,* 70 *N.J.* 144, 358 A.2d 191 (1976). Those steps will include, among other things, a careful investigation of the facts of the matter, the formulation of a legal strategy, the filing of appropriate papers, and the maintenance of communication with the client. *Id.* at 238–39, 350 A.2d 497.

To present a prima facie legal malpractice claim, a plaintiff must establish the following elements: "(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, 883 A.2d 350 (2005) (internal quotation omitted). In the context of a failure to assert a claim in an underlying action, a breach of duty is established by showing an ability to prevail on the unasserted claim. *Id.* at 191, 883 A.2d 350. The "ultimate issue in the legal malpractice action is whether the defendant-lawyers' decision to omit [a claim or party]

was a reasonable exercise of professional judgment." *Prince v. Garruto, Galex & Cantor,* 346 *N.J.Super.* 180, 189, 787 A.2d 245 (App.Div.2001). The proximate causation prong is satisfied when the attorney's negligent conduct is a substantial contributing factor in causing the client's loss. *Lamb v. Barbour,* 188 *N.J.Super.* 6, 12, 455 A.2d 1122 (App.Div.1982), *certif. denied,* 93 *N.J.* 297, 460 A.2d 693 (1983).

A plaintiff in a legal malpractice case has an affirmative duty to present expert testimony, when required, on the issue of breach. *Stoeckel v. Twp. of Knowlton,* 387 *N.J.Super.* 1, 14, 902 A.2d 930 (App.Div.), *certif. denied,* 188 *N.J.* 489, 909 A.2d 724 (2006). "Expert testimony is required in cases of professional malpractice where the matter to be addressed is so esoteric that the average juror could not form a valid judgment as to whether the conduct of the professional was reasonable." *Sommers v. McKinney,* 287 *N.J.Super.* 1, 10, 670 A.2d 99 (App.Div.1996). Where "the adequacy of an investigation or the soundness of an opinion is the issue, a jury will usually require the assistance of an expert opinion." *Id.* at 11, 670 A.2d 99. However, expert testimony is not required "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, 783 A.2d 246 (App.Div.2001). Strategic decisions tend to be an area where expert testimony is required. *See Prince, supra,* 346 *N.J.Super.* at 190, 787 A.2d 245 (App.Div.2001) (using expert testimony to determine whether strategic decision not to join additional defendant was professionally negligent). Distinguishing the cases where expert testimony is required from those where it is not is whether they "require[ ] the trier of fact to evaluate an attorney's legal judgment concerning a complex legal issue." *Brach, supra,* 345 *N.J.Super.* at 13, 783 A.2d 246.

***6** We first address plaintiff's arguments that the trial court erred by excluding Michelson's reports as net opinions or, alternatively, that expert testimony was required to prove his legal malpractice claim.

Experts must base their opinions on "factual evidence," *Buckelew v. Grossbard,* 87 *N.J.* 512, 524, 435 A.2d 1150 (1981), which may be "facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial." *Rosenberg v. Tavorath,* 352 *N.J.Super.* 385, 401, 800 A.2d 216 (App.Div.2002). *See also N.J.R.E.* 703. They may rely on their "knowledge, skill, experience, training, or education," *N.J.R.E.* 702, but they may not give a "net opinion," which is one unsupported by any factual evidence or data. *In re Yaccarino,* 117 *N.J.* 175, 196, 564 A.2d 1184 (1989); *Buckelew, supra,* 87 *N.J.* at 524, 435 A.2d 1150; *Rosenberg, supra,* 352 *N.J.Super.* at 401, 800 A.2d 216. The expert must give "the why and wherefore of his expert opinion, not just a mere conclusion." *Jimenez v. GNOC, Corp.,* 286 *N.J.Super.* 533, 540, 670 A.2d 24 (App.Div.), *certif. denied,* 145 *N.J.* 374, 678 A.2d 714 (1996). "Supporting data and facts are vital" to an expert opinion that " 'is seeking to establish a cause and effect relationship.' " *Myrlak v. Port Auth. of N.Y. & N.J.,* 302 *N.J.Super.* 1, 9, 694 A.2d 575 (App.Div.1997) (quoting *Rubanick v. Witco Chem. Corp.,* 242 *N.J.Super.* 36, 49, 576 A.2d 4 (App.Div.1990), *aff'd as mod. on other grounds,* 125 *N.J.* 421, 593 A.2d 733 (1991)), *rev'd in part and remanded on other grounds,* 157 *N.J.* 84, 723 A.2d 45 (1999).

As noted, plaintiff's claims against J & J in the underlying action included failure to hire and other conduct in violation of the LAD. Under the LAD, it is unlawful "[f]or an employer, because of the race, ... national origin, ancestry, [or] age ... of any individual, ... to discriminate against such individual in compensation or in terms, conditions or privileges of employment." *N.J.S.A.* 10:5–12(a). When the LAD claim is a discriminatory failure to hire, plaintiffs must present a prima facie case that has four prongs: (1) they were members of a class that the LAD protects; (2) they were objectively qualified for the desired positions; (3) they were denied the positions; and (4) the employer gave the positions to persons outside the plaintiffs' class with similar or lower qualifications. *Dixon v. Rutgers, State University,* 110 *N.J.* 432, 443, 541 A.2d 1046 (1998); *Andersen v. Exxon Co., U.S.A.,* 89 *N.J.* 483, 492–93, 446 A.2d 486 (1982). Employees do not have to show that the prohibited reason was the employer's sole reason, but rather just that it was one of the employer's but-for reasons. *Slohoda v. United Parcel Serv., Inc.,* 207 *N.J.Super.* 145, 155, 504 A.2d 53 (App.Div.), *certif. denied,* 104 *N.J.* 400, 517 A.2d 403 (1986).

To rebut the prima facie case, an employer only needs to articulate "some legitimate, nondiscriminatory reason for the employee's rejection," *Andersen, supra,* 89 *N.J.* at 493, 446 A.2d 486, such as the successful candidates' superior qualifications. At that point all presumptions

disappear, and plaintiffs have the burden "of persuading the trier of fact that the defendant intentionally discriminated against" them, *ibid.,* such as by demonstrating that the employer's articulated reason was contrary to the evidence or otherwise pretextual.

***7** [1] In the present case, the harm that plaintiff claims from defendants' alleged malpractice was the loss of his opportunity to proffer and argue the twenty-six positions that Tan had conceded. To prevail in the underlying action, plaintiff would have needed to convince the jury that discrimination in violation of the LAD was a substantial reason for J & J's failure to hire him for those positions, to which he was equally or better qualified. We agree with the trial court that Michelson's reports did not contain an opinion based on the facts or allegations in the record to establish such malpractice. While Michelson named standards of care, he never addressed the nature of the twenty-six positions in question. He did not name the qualifications that J & J required for them, let alone discuss whether the requirements were legitimate, and he did not discuss whether plaintiff was as qualified as the successful candidates in terms of the nominal requirements, or in terms of any alternatives that might arguably have been less discriminatory to him. He conceded in his voir dire testimony that he could not state whether plaintiff had a valid cause of action as to any of those twenty-six conceded positions. Instead, Michelson limited himself to the empty generality that "the sheer multiplicity of" twenty-nine claims would have impressed the jury, whether or not plaintiff's qualification for them was actually demonstrated.

Michelson also failed to identify other evidence that defendants could have presented to support an inference of discrimination, and that they accordingly should have tried to develop through further discovery. Additionally, he did not acknowledge the extensive discovery that plaintiff's prior counsel had conducted, much less suggest that prior counsel had deviated from the standard of care or that defendants should not have trusted the adequacy of their work for other reasons. Speculative claims about the utility of further discovery are insufficient to prevent summary judgment, *Auster v. Kinoian,* 153 *N.J.Super.* 52, 55–56, 378 A.2d 1171 (App.Div.1977), and thus the trial court was correct in excluding Michelson's opinions concerning discovery failures and their effects as equally speculative.

In short, Judge Farrington properly reasoned that Michelson's reports lacked explanations to support their conclusions that plaintiff would have prevailed on his failure to hire claim if defendants had not deviated from the standard of care, and hence properly excluded them as net opinions.

In the alternative, plaintiff claims that the court erred in finding that an expert was required to establish whether defendants had committed legal malpractice. He argues that defendants' failure to develop the record through further discovery, and the concession of twenty-six of the twenty-nine positions in question, were sufficiently obvious for a jury to assess on the basis of their ordinary knowledge and experience. We disagree.

The common knowledge doctrine applies "where 'jurors' common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without a benefit of the specialized knowledge of experts .' " *Hubbard v. Reed,* 168 *N.J.* 387, 394, 774 A.2d 495 (2001) (quoting *Estate of Chin v. Saint Barnabas Med. Ctr.,* 160 *N.J.* 454, 469, 734 A.2d 778 (1999)).

***8** We have held the common knowledge doctrine applies when an attorney has failed to communicate with an expert to assure his attendance at trial, and the expert's testimony was essential to prove the plaintiff's injuries were caused by the accident on defendant's property. *Kranz v. Tiger,* 390 *N.J.Super.* 135, 148, 914 A.2d 854 (App.Div.), *certif. denied,* 192 *N.J.* 294 (2007). Expert testimony was not required where the plaintiff alleged the attorney failed to brief an issue, misrepresented the case's status, and failed to accurately report a settlement discussion. *Sommers, supra,* 287 *N.J.Super.* at 12, 670 A.2d 99. Also, an expert is not needed to establish negligence where an attorney fails to record a mortgage. *Stewart v. Sbarro,* 142 *N.J.Super.* 581, 591–92, 362 A.2d 581 (App.Div.), *certif. denied,* 72 *N.J.* 459, 371 A.2d 63 (1976).

To generalize, experts are not needed in "that category of cases that are so straightforward in nature that expert testimony is not required." *Brach, supra,* 345 *N.J.Super.* at 12, 783 A.2d 246. "A common thread runs through these cases, namely none of them required the trier of fact to evaluate an attorney's legal judgment concerning a complex legal issue." *Id.* at 13, 783 A.2d 246; *see* Ronald E. Mallen & Jeffrey M. Smith, 4 *Legal Malpractice* § 37:23 at 1659 (2013 ed.) ("The situations in which expert testimony was not required have typically involved egregious and extreme instances of negligence.").

Where an attorney has conducted some investigation of a client's claim, but the malpractice plaintiff asserts it was

insufficient, the standard of care is unlikely to fall within a jury's common knowledge.

> Although expert opinion is not necessary to establish the negligence of a personal injury attorney who fails to conduct any investigation of his client's claim, where the attorney has undertaken some investigation, a jury will rarely be able to evaluate its adequacy without the aid of expert legal opinion.
>
> [*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).]

In *Aldrich v. Hawrylo,* 281 *N.J.Super.* 201, 214, 656 A.2d 1304 (App.Div.1995), *appeal dismissed,* 146 *N.J.* 493, 683 A.2d 197 (1996), we reversed the trial court's determination that expert testimony was unnecessary. We stated, "A jury would not be able to evaluate the adequacy of the investigation or the opinion without the aid of expert legal testimony." *See also* *Sommers, supra,* 287 *N.J.Super.* at 12, 670 A.2d 99 (citing *Aldrich, supra,* for principle that adequacy of investigation generally requires expert testimony).

[2] Applying these principles, we agree with the trial court's assessment that plaintiff's malpractice claim was not subject to the common knowledge exception, and that an expert was especially important in assessing defendants' strategic decisions. Here, it would have been necessary for the jury to assess the adequacy of the record in the underlying case to establish the required elements of the LAD failure to hire claim, the efforts that defendants made to generate an adequate record and present it at trial, the standard of care for attorneys in handling such LAD claims, defendants' adherence to or deviation from that standard, and the effect of any deviation on the trial result. We agree with the trial court that such matters were not " 'readily apparent to anyone of average intelligence and ordinary experience.' " *Estate of Chin, supra,* 160 *N.J.* at 469–70, 734 A.2d 778 (quoting *Rosenberg by Rosenberg v. Cahill,* 99 *N.J.* 318, 325, 492 A.2d 371 (1985)); *accord* *Brach, supra,* 345 *N.J.Super.* at 14–15, 783 A.2d 246.

***9** We also find no merit in plaintiff's argument that the court erred in dismissing his claims for fraud, consumer fraud, breach of contract, and conspiracy. He contends that such claims can coexist with a legal malpractice claim, and that such claims do not require expert testimony merely because a legal malpractice claim that may require it is also present. Similar to his malpractice claim, he argues that all of these additional claims were proven by defendants' unjustifiable concession of twenty-six of the twenty-nine positions without his consent, their failure to pursue further discovery and adequately prepare for trial, and their reliance on the prospect of settlement contrary to the terms of the retainer agreement.

Count one of plaintiff's complaint described defendants' alleged fraud as their failure to advise him that they had no intention of performing the work that was necessary. That work was to study the information he prepared for them, and to perform within the standard of care by seeking to extend discovery or pursue a spoliation claim in the underlying action, by avoiding concession of the failure to hire claim for twenty-six of the positions for which he was not hired, and by avoiding dismissal as to the remaining three positions.

Count two, in one paragraph, summarized defendants' alleged breach of contract as the failure to satisfy their contractual obligations, with reference to all the allegations in the complaint that preceded this count. Count three used the same language as count two to summarize defendants' alleged legal malpractice. Count six, conspiracy to commit fraud and consumer fraud, also used the same language as count two, while adding references to plaintiff's allegations about defendants' inadequate performance before and at trial.

The court found that all of plaintiff's counts sounded as legal malpractice claims, and that the Consumer Fraud Act did not apply to legal malpractice claims. We agree.

The sufficiency of a complaint in pleading a particular cause of action is a question of law. *See In re the Trust Under the Will of Maxwell,* 306 *N.J.Super.* 563, 586, 704 A.2d 49 (App.Div.1997), *certif. denied,* 153 *N.J.* 214, 708 A.2d 65 (1998); *see also* *Scheck v. Houdaille Constr. Materials, Inc.,* 121 *N.J.Super.* 335, 344, 297 A.2d 17 (Law Div.1972). It is therefore subject to de novo review without deference to a lower court's assessment. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378, 658 A.2d 1230 (1995).

[3] The court was correct to dismiss the consumer fraud claim. The Consumer Fraud Act, *N.J.S.A.* 56:8–1 to –20, does not apply to services performed by members of a learned profession that is subject to its own strong regulatory regime. *Suarez v. E. Int'l Coll.,* 428 *N.J.Super.* 10, 38 (App.Div.2012), *certif. denied,* 213 *N.J.* 57 (2013).

Ordinary fraud requires a material factual

misrepresentation, knowledge of the falsity, an intent to induce reliance on it, and actual reliance that results in monetary damages. *Jewish Ctr. of Sussex Cnty. v. Whale,* 86 *N.J.* 619, 624, 432 A.2d 521 (1981). *Accord Gennari v. Weichert Co. Realtors,* 148 *N.J.* 582, 610, 691 A.2d 350 (1997). Fraud must be pled with particularity, *In re Contest of Nov. 8, 2005 Gen. Election for Mayor of Parsippany–Troy Hills,* 192 *N.J.* 546, 567, 934 A.2d 607 (2007), although the element of "[m]alice, intent, knowledge, and other condition of mind of a person may be alleged generally." *R.* 4:5–8(a); *State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l, Inc.,* 387 *N.J.Super.* 469, 484, 904 A.2d 775 (App.Div.2006).

***10** [4] The general allegations in the complaint did not mention intent or any other condition of mind that could establish fraud. They contain only a listing of defendants' failures to perform and the unfavorable results that defendants achieved. The fraud count simply referenced those allegations, without adding any explanation how they could establish or lead to evidence of the necessary intentionality. If a plaintiff bases his or her fraud claim on the same allegations as the malpractice claim, "merely adding the label 'fraud' to" them without alleging the elements of legal or equitable fraud, then it may not be treated as a separate and distinguishable claim. *Levinson v. D'Alfonso & Stein,* 320 *N.J.Super.* 312, 315, 318, 727 A.2d 87 (App.Div.1999).

[5] The elements of civil conspiracy are the " 'combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or an injury upon another, and an overt act that results in damage.' " *Banco Popular N. Am. v. Gandi,* 184 *N.J.* 161, 177, 876 A.2d 253 (2005) (quoting *Morgan v. Union Cnty. Bd. of Chosen Freeholders,* 268 *N.J.Super.* 337, 364, 633 A.2d 985 (App.Div.1993) (citation omitted), *certif. denied,* 135 *N.J.* 468, 640 A.2d 850 (1994)). *Accord LoBiondo v. Schwartz,* 199 *N.J.* 62, 102, 970 A.2d 1007 (2009). Civil conspiracy is not a cause of action by itself, but rather an additional claim that requires an underlying "overt act" that caused the harm in question. Here, the trial court was correct to dismiss the conspiracy count in the absence of a claim for an underlying tort, which in this case were the fraud and consumer fraud claims that plaintiff inadequately pleaded and was unable to sustain.

Breach of contract requires the plaintiff "to show that the parties entered into a valid contract, that the defendant failed to perform his obligations under the contract and that the plaintiff sustained damages as a result." *Murphy v. Implicito,* 392 *N.J.Super.* 245, 265, 920 A.2d 678 (App.Div.2007). When the "essential factual allegations upon which [a plaintiff's claim] rests" are that the defendants' performance of the professional work for which the plaintiff retained them fell short of the skill that an average member of the defendants' profession ordinarily possesses, and of the care that an average member ordinarily exhibits in similar circumstances, the claim is one for professional malpractice, even if the plaintiff denominates it as a claim for breach of contract. *Charles A. Manganaro Consulting Eng'rs, Inc. v. Carneys Point Twp. Sewerage Auth.,* 344 *N.J.Super.* 343, 349, 781 A.2d 1116 (App.Div.2001).

[6] However, a claim that an attorney violated the express terms of the retainer agreement may be distinguished from the malpractice claim if the breach does not require "expert evaluation of professional standards applicable in the circumstances." *Levinson, supra,* 320 *N.J.Super.* at 317, 727 A.2d 87. In *Levinson,* the plaintiff alleged that his counsel's settlement of his case violated the provision in the retainer agreement that prohibited settlement without his approval. *Id.* at 316, 727 A.2d 87. We found that claim to be separable, and reinstated it even while affirming the dismissal of the malpractice claim for want of the statutorily required affidavit of merit. *Id.* at 316–17, 727 A.2d 87.

***11** In this case, the "zero chance of settlement" provision in Tan's retainer agreement did not recite any kind of instruction. It simply observed the unlikelihood of settlement. More important, Tan did not settle the case, so he did not violate any conceivable implication of the provision other than an implicit admonition to perform to the best of his ability, which is to say, not to fall short of the standard of care. Under these facts, we agree with the trial court that plaintiff's claim for breach of contract also was not separable from the malpractice claim in the manner that *Levinson* described.

Finally, plaintiff argues that the court erred by denying (1) his motion to compel defendants to provide their bank statements and tax filings for 2008 and 2009; and (2) a partial refund of his retainer that Tan had allegedly agreed to pay. He further requests, without any supporting authority, that our opinion in this matter remain confidential. We reject these arguments as lacking sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E).

Affirmed.

Not Reported in Atl. Rptr., 2014 WL 463140

All Citations

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