

Swain v. Alterman, Not Reported in A.3d (2011)

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UNPUBLISHED OPINION. CHECK
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Superior Court of New Jersey,
Appellate Division.

Lisa SWAIN and Harry Swain, Plaintiffs–Appellants,

v.

J. Stuart ALTERMAN, Esquire,
Attorney–at–Law and Alterman &
Associates, Defendants–Respondents.

Argued Nov. 15, 2011. | Decided Dec. 9, 2011.

On appeal from the Superior Court of New Jersey, Law
Division, Camden County, Docket No. L–3647–10.

Attorneys and Law Firms

[Richard C. Borton](#) argued the cause for appellants ([Randy P. Catalano](#), attorney; Mr. Catalano, on the brief).

[Patricia E. Doran](#) argued the cause for respondents (Rivkin
Radler, L.L.P., attorneys; Ms. Doran, on the brief).

Before Judges [CARCHMAN](#) and [NUGENT](#).

Opinion

PER CURIAM.

*1 This is a legal malpractice action. Plaintiffs Lisa Swain and Harry Swain appeal from the March 4, 2011 order that dismissed their complaint because they failed to file an affidavit of merit as required by *N.J.S.A. 2A:53A–27*; and from the April 15, 2011 order that denied their motion for reconsideration. They argue they are not required to file an affidavit of merit because their theory of liability against defendants J. Stuart Alterman and Alterman & Associates¹ is based on common knowledge. Defendants counter that their affirmative defenses are inextricably intertwined with the elements of plaintiffs' affirmative malpractice claim; and their affirmative defenses require resolution of issues beyond the common knowledge of a lay person, and therefore require expert testimony and an affidavit of merit. We

conclude that plaintiffs' malpractice claim falls within the common knowledge exception to the Affidavit of Merit Statute. Consequently, we reverse and remand for further proceedings.

I

Plaintiffs, New Jersey residents, were traveling in their car in Delaware when they were injured in an accident caused by a New York driver. The accident occurred on June 9, 2006. On September 11, 2006, they met with defendant in his Cherry Hill office where they provided personal information and information about the accident. The information pertaining to each plaintiff was recorded in a “Client Information Sheet.” The information included the location of the accident, the name of the New York driver, and the injuries each had sustained in the accident. Mr. Swain signed an agreement bearing the letterhead of Alterman & Associates and containing, among other things, the following language:

I. INJURIES OR DAMAGES ... You agree that the Law Firm will make a claim on your behalf against others who are responsible for your injuries or damages. You feel the responsible parties are: _____.

II. LEGAL SERVICES

The Law Firm will protect your legal rights and do all necessary legal work to properly represent you in this matter.

The agreement also included a standard contingent fee provision.

The parties do not dispute that Mr. Swain signed an agreement between him and Alterman & Associates during the September 11, 2006 meeting, nor do they dispute that defendant did not file a lawsuit on behalf of either plaintiff and the statute of limitations for such an action expired. The record establishes that the only meeting between the parties was the September 11, 2006 meeting in defendant's office. Nothing in the motion record suggests defendant conducted any investigation, obtained plaintiffs' medical records, or attempted to refer plaintiffs to an attorney authorized to practice law in Delaware or New York.

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Defendant disputes that Ms. Swain signed a retainer agreement. He asserts that Ms. Swain, who had suffered neck and back injuries in the accident, was unsure about pursuing a claim because she had a substantial pre-existing back injury from a work-related accident that resulted in her undergoing surgery.

*2 According to defendant, he advised plaintiffs at the September meeting that he was not admitted to practice law in Delaware and might not be able to prosecute the claim in New Jersey, but would be able to refer the case to a Delaware attorney if plaintiffs so desired. Following the meeting, defendant and his staff made several verbal and written attempts to contact plaintiffs and obtain information necessary to prosecute their claim or forward it to Delaware counsel. Because plaintiffs did not respond to any of these inquiries, they “were notified that the firm would be closing [its] file *prior* to the expiration of the Statute of Limitations .”

Plaintiffs dispute defendant's assertions. They claim they both signed contingent fee agreements, but do not recall defendant providing them with copies. They insist that they both wanted to file a claim against the driver who caused the accident. Mr. Swain averred in an affidavit that he provided defendant with a computer printout supplied by the Delaware police officer who investigated the accident. Plaintiffs deny that they failed to cooperate with defendant. Mr. Swain claims he telephoned defendant's office on numerous occasions, left messages for defendant to call him about the case, but with two exceptions never received any written or verbal contact from defendant. Mr. Swain claims defendant had been a longtime friend and had Mr. Swain's cellular phone number.

Plaintiffs assert that as far as they knew, defendant was handling their case. They cite to a June 13, 2007 e-mail in which Ms. Swain contacted defendant about another matter, and received a return e-mail from defendant stating, among other things: “Also I need to speak to both of [you] about your [personal injury] cases and your status.” Plaintiffs also deny that defendant sent them a letter informing them of the statute of limitations, advising them to find another attorney, or informing them either that he no longer represented them or was dropping their case.

According to Mr. Swain, defendant called him at about 4:30 p.m. on June 9, 2008. Mr. Swain immediately returned the call but got no answer. Mr. Swain called again on June 10,

2008, and left a message for defendant to call him. Plaintiff's call was never returned. Mr. Swain later learned that June 9, 2008 was the deadline for filing a complaint.

Plaintiffs consulted with a new attorney, Randy Catalano, on February 4, 2009, at which time they signed a letter to defendant requesting that their file be forwarded to Catalano's office. Although engaged in a trial in Florida, defendant responded in a letter dated February 9, 2010, that the file was in storage and would be pulled “within the next couple of days.” The file was not forthcoming. Eventually, defendant communicated to Catalano that the file had been lost.

On July 21, 2010, plaintiffs filed a single-count complaint against defendants alleging, among other things, that defendants “failed to file a Complaint on behalf of plaintiffs within the requisite two (2) year statute of limitations.” Plaintiffs further alleged that defendants owed them a duty of care requiring defendants to pursue plaintiffs' interests “diligently and with the highest degree of fidelity and good faith which included their responsibility to file a Complaint before the statute of limitations expired.” Finally, plaintiffs alleged defendants breached the duty of care by not filing the complaint within the requisite statute of limitations, and that as a result plaintiffs were unable to recover damages for the injuries they had sustained in the underlying automobile accident.

*3 Defendants filed an answer on October 13, 2010, alleging eighteen separate defenses including plaintiffs' failure to file an affidavit of merit, plaintiffs' lack of cooperation with defendants, the non-existence of an attorney-client relationship between plaintiff Lisa Swain and defendants, and the absence of proximate cause between defendants' conduct and any damages alleged by plaintiffs.

On February 14, 2011, more than 120 days after filing their answer, defendants filed a motion to dismiss the complaint with prejudice because plaintiffs had failed to file an affidavit of merit. On March 4, 2011, the trial court granted the motion. The court determined that “this is not a statute of limitations case.” The court concluded that the “threshold determination, that is, did an attorney[-]client relationship exist, and if so, was it ever properly terminated prior to the [expiration] of the statute of limitation[s], relies on aspects beyond the basic knowledge possessed by laymen.” For those reasons, the court determined that an affidavit of merit was required and dismissed plaintiffs' case with prejudice.

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Plaintiffs filed a motion for reconsideration on March 21, 2011. In support of their motion, Catalano submitted a certification explaining that after he was told by defendant that plaintiffs' file had been lost, he had no documents to send to an expert. Consequently, he proceeded to file a complaint alleging defendant had not filed a complaint within the statute of limitations. Catalano believed this satisfied the common knowledge exception to the Affidavit of Merit Statute. Catalano further explained that in defendant's certification in support of his initial motion to dismiss the case, he had referred to "his files." Accordingly, Catalano asked defendants' counsel before oral argument on the first motion if she had reviewed a contingent fee agreement for Mr. Swain. She acknowledged that she had reviewed it, and that another attorney in her office had additional file materials that she had not seen. Catalano wrote to the other attorney after the initial motion hearing and demanded production of the files. The "files" had not been provided to Catalano as of the date he filed the motion for reconsideration.

In opposition to plaintiffs' motion for reconsideration, defendants' attorney disputed there was any conversation between counsel before oral argument on the initial motion. Instead, defendants' counsel averred that the conversation with Catalano took place after the oral argument on the initial motion. Upon returning to her office, defendants' attorney conferred with the other attorney in her office, obtained the existing documents from defendants' file, and sent them to Catalano. The documents included the client information sheets, the retainer agreement signed by Mr. Swain, a blank retainer agreement, and a blank medical authorization. Catalano claims he first saw the documents when he received the opposition to his motion for reconsideration.

*4 The trial court denied the motion in an oral opinion delivered from the bench on April 15, 2011. The court reiterated that plaintiffs failed to file an affidavit of merit, that the case did not fall within the common knowledge exception, and that plaintiffs had offered no new evidence on their motion for reconsideration. The court determined that defendants' "file" was not new evidence. Rather, "[t]here [was] ample evidence before the Court, that the parties knew that there was, at a minimum, a retainer agreement, and perhaps some other documents contained within what was to have been, or claimed to have been, a lost file." Finally, the court noted that plaintiffs had not complied with the

provision of the Affidavit of Merit Statute, *N.J.S.A. 2A:53A-28*, requiring a sworn statement in lieu of the affidavit setting forth that defendant had failed to provide records or information having a substantial bearing on the preparation of the affidavit. This appeal followed.

II.

We address first plaintiffs' argument that their case fell within the common knowledge exception to the statutory requirement that they file an affidavit of merit. Because that issue involves the interpretation of the law, our standard of review is de novo. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995).

Whether plaintiffs are required to file an affidavit of merit depends in part on whether they are required to produce an expert's testimony to prove the elements of their legal malpractice action. Legal malpractice is a variation on the tort of negligence. *McGrogan v. Till*, 167 N.J. 414, 425 (2001). To establish legal malpractice, a plaintiff must show: " '(1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) the breach of that duty; and (3) proximate causation.' " *Conklin v. Hannoch Weisman, P.C.*, 145 N.J. 395, 416 (1996) (quoting *Lovett v. Estate of Lovett*, 250 N.J. Super. 79, 87 (Ch. Div. 1991)). In most cases, expert testimony is required to establish the elements of a legal malpractice action. See *Kranz v. Tiger*, 390 N.J. Super. 135, 147 (App. Div.), *certif. denied*, 192 N.J. 294 (2007). "But when the attorney's 'duty is so basic that it may be determined by the court as a matter of law,' expert evidence is not required to establish the attorney's duty of care." *Ibid.* (quoting *Brizak v. Needle*, 239 N.J. Super. 415, 429 (App. Div.), *certif. denied*, 122 N.J. 164 (1990)).

This exception is often referred to as the common knowledge exception or doctrine. "The 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 the benefit of the specialized knowledge of experts.'" *Hubbard v. Reed*, 168 N.J. 387, 394 (2001) (quoting *Estate of Chin v. Saint Barnabas Med. Ctr.*, 160 N.J. 454, 469 (1999)).

*5 We turn now to the affidavit of merit requirement. In professional negligence actions, plaintiffs are required to file an affidavit of an appropriate licensed professional attesting

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to the probability that a defendant's care, skill or knowledge fell outside acceptable standards. *N.J.S.A. 2A:53A-27*. The Affidavit of Merit Statute provides in part:

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

[*Ibid.*]

The statute applies to legal malpractice actions. See *N.J.S.A. 2A:53A-26(c)*. In deciding whether an affidavit of merit is required in a legal malpractice claim, a court “should determine if the claim's underlying factual allegations require proof of a deviation from the professional standard of care applicable to [attorneys].... If such proof is required, an affidavit of merit is required for that claim, unless some exception applies.” *Couri v. Gardner*, 173 N.J. 328, 340 (2002).

The common knowledge doctrine is one such exception. “[A]n affidavit need not be provided in common knowledge cases when an expert will not be called to testify ‘that the care, skill or knowledge ... [of the defendant] fell outside acceptable professional or occupational standards or treatment practices.’ “ *Hubbard, supra*, 168 N.J. at 390 (quoting *N.J.S.A. 2A:53A-27*). As our Supreme Court has explained, “broadly speaking, an affidavit serves little purpose when a plaintiff intends to rely on common knowledge at trial. Put another way, in a common knowledge case an expert is no more qualified to attest to the merit of a plaintiff's claim than a non-expert.” *Id.* at 395.

Common knowledge legal malpractice actions include failing to timely and properly communicate with experts to ensure their attendance at trial, *Kranz, supra*, 390 N.J. Super. at

148; failing to brief an issue or to accurately convey a settlement offer, *Sommers v. McKinney*, 287 N.J. Super. 1, 12 (App.Div.1996); and failing to investigate a claim or commence an action within the statute of limitations, *Brizak, supra*, 239 N.J. Super. at 431-32. Here, plaintiffs argue that the trial court should not have dismissed their complaint because it stated a cause of action under the common knowledge doctrine. We agree.

*6 Plaintiffs' complaint asserts that they retained defendants to prosecute their automobile negligence claim and that defendants failed to commence an action within the statute of limitations. Failing to commence an action within the statute of limitations constitutes a common knowledge exception to the general rule requiring an expert to establish that a legal malpractice defendant has breached a duty to a plaintiff. *Ibid.* Consequently, plaintiffs were not required to file an affidavit of merit. *Hubbard, supra*, 168 N.J. at 390.

Defendants contend that their affirmative defenses and the issues they raised in their affidavits take this case outside of the common knowledge exception to the affidavit of merit requirement. They argue that they raised issues about whether an attorney-client relationship ever existed, whether it was properly terminated, and the scope, if any, of the duty owed by an attorney to non-cooperative clients; issues that all involve knowledge beyond that of lay persons and therefore require an expert. Defendants maintain that the trial judge construed the motion record in the light most favorable to plaintiffs and then properly determined that plaintiffs required expert testimony to prove their case. We disagree.

In *Hubbard*, the Supreme Court explained the purpose of the Affidavit of Merit Statute:

The primary purpose of the Affidavit of Merit Statute is to require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily [can] be identified at an early stage of litigation.... [T]he ... statute is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint, but with whether there is some objective threshold merit to the allegations.

[*Supra*, 168 N.J. at 394 (internal quotations and citations omitted).]

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The Court noted that “[i]f jurors, using ordinary understanding and experience and without the assistance of an expert, can determine whether a defendant has been negligent, the threshold of merit should be readily apparent from a reading of the plaintiff’s complaint.” *Id.* at 395.

Applying those principles to this case, we conclude that plaintiffs’ showing of a threshold of merit under the common knowledge doctrine is readily apparent from their complaint. As previously noted, plaintiffs allege that they retained defendant to represent them in a personal injury action, that he undertook their representation, that he failed to commence an action within the statute of limitations, and that they were thereby deprived of recovering compensatory damages for their injuries. The Affidavit of Merit Statute is not concerned with the ability of plaintiffs to prove the allegations contained in the complaint, but only whether a threshold showing of merit has been made. The plaintiffs have made that showing by pleading a cause of action that falls within the common knowledge doctrine.

*7 Even considering the parties’ pleadings in the motion record, plaintiffs have made more than a threshold showing of a cause of action for legal malpractice under the common knowledge doctrine; they have established a prima facie case. First, they established a prima facie case that an attorney-client relationship existed. The creation of an attorney-client relationship is established when “the prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so and preliminary conversations are held between the attorney and client regarding the case....” *Herbert v. Haytaian*, 292 N.J.Super. 426, 436 (App.Div.1996). An attorney-client relationship may be inferred “when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney’s professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.” *Id.* at 436 (citation and quotation marks omitted). Essentially, “[a]ll that is necessary is that the parties relate ‘to each other generally as attorney and client.’” *Petit-Clair v. Nelson*, 344 N.J.Super. 538, 543, (App.Div.2001) (quoting *In re Silverman*, 113 N.J. 193, 214 (1988)).

Here, plaintiffs met with defendant to seek his advice and assistance; the assistance sought pertained to a matter within the defendant’s professional competence; and, according to

plaintiffs, defendant agreed either to represent plaintiffs in a New Jersey action or seek the assistance of Delaware counsel to prosecute their personal injury claim in Delaware. Plaintiffs’ account of their initial meeting with defendant is corroborated by the retainer agreement signed by Mr. Swain and by the client intake forms.

Although defendant denies that Ms. Swain signed a retainer agreement, plaintiffs provided competent evidence that she signed such an agreement after consulting with defendant, and that defendant never provided her with a copy of the agreement. That evidence establishes a prima facie case that an attorney-client relationship existed. Under those circumstances, plaintiffs did not require expert testimony to establish the existence of an attorney-client relationship.

Moreover, it is undisputed that defendant did not file a complaint within the statute of limitations. No expert is needed to establish that fact. Lastly, plaintiffs do not need a legal malpractice expert to establish they were deprived of seeking compensatory damages for their personal injury claims when the complaint was not filed within the statute of limitations.

We understand but reject defendants’ arguments that the plaintiffs’ failure to cooperate, and defendant’s sending a letter to plaintiffs terminating his representation, trigger the need for expert testimony. Plaintiffs deny those allegations, assert that it was defendant who was uncooperative and incommunicative, and deny defendant ever sent a termination letter. Such disputed facts do not establish plaintiffs’ failure to make a threshold showing of merit or their failure to establish a prima facie case. Rather, they present triable issues that jurors can resolve without the assistance of experts.²

*8 Having said that, we reiterate that plaintiffs are at risk when they rely on the common knowledge doctrine in professional negligence cases. “Indeed, the wise course of action in all malpractice cases would be for plaintiffs to provide affidavits even when they do not intend to rely on expert testimony at trial.” *Hubbard, supra*, 168 N.J. at 397.

In view of our conclusion that plaintiffs made a threshold showing that their common knowledge legal malpractice action had merit, we need not decide their contention that defendants’ belated disclosure of file materials constituted exceptional circumstances justifying a further extension of time in which to file an affidavit of merit.

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Reversed and remanded.

Footnotes

- 1 We will refer to J. Stuart Alterman as “defendant” and to J. Stuart Alterman and the law firm, collectively, as “defendants.”
- 2 If the factfinder decides that Ms. Swain did not sign a retainer agreement, or that plaintiffs did not cooperate with defendant, or that defendant sent plaintiffs a termination letter, then some or all of plaintiffs' claims may be subject to a “no cause for action” verdict on the basis that expert testimony is needed to establish a duty in those situations.

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