

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

BONNIE CRUICKSHANK-WALLACE, :
 :
 Plaintiff, :
 :
 v. :
 :
 KLEHR, HARRISON, HARVEY, :
 BRANZBURG & ELLERS LLP, :
 :
 Defendant. :

AUGUST TERM, 2009
NO 03546
COMMERCE PROGRAM
Control Nos. ~~1105070~~, 11055171,
11080488

BOOKETED
DEC 21 2011
C HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this 20th day of December, 2011, upon consideration of defendant's two Motions for Summary Judgment and its Motion to Strike/Reply, the responses thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** as follows:

1. Defendant's Motion for Summary Judgment on plaintiff's claims is **GRANTED in part** and plaintiff may not recover as damages in this action the damages she sought to recover in the underlying action against Mercantile County Bank. The remainder of the Motion is **DENIED**.
2. Defendant's Motion for Summary Judgment on its Counterclaim is **DENIED**.
3. Defendant's Motion to Strike/Reply is **GRANTED in part** and its proffered Reply was considered in rendering the court's Opinion. The remainder of the Motion is **DENIED**.

BY THE COURT,

Cruickshank-Wallace Vs -ORDOP



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PATRICIA A. McNERNEY, J.

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OPINION

This action is the third in a series of related actions. In the first lawsuit, Mercantile County Bank (“Mercantile”) sued the plaintiff here, Bonnie Cruikshank-Wallace, for fraudulent conveyance in connection with Mercantile’s attempts to recover on a commercial loan guaranty made by plaintiff’s husband. In the second action, defendant Klehr, Harrison, Harvey, Branzburg & Ellers, LLP (“Klehr Harrison”) represented plaintiff in her suit against Mercantile and its attorneys for abuse of process and wrongful use of civil proceedings (the “Underlying Action”). The claims in the Underlying Action were dismissed before trial and that dismissal was affirmed on appeal.

Plaintiff then filed this suit for legal malpractice against Klehr Harrison. Plaintiff asserts claims for breach of fiduciary duty, fraud, professional negligence, and breach of contract. Plaintiff asserts two factual bases for her claims: 1) Klehr Harrison failed to plead and prosecute her claims properly in the Underlying Action; and 2) Klehr Harrison developed, and failed to disclose to plaintiff, a conflict of interest during the course of the Underlying Action.

Klehr Harrison has moved for summary judgment on all of plaintiff’s claims. In order to avoid summary judgment, plaintiff must point to evidence establishing each element of her

causes of action. Specifically, she must proffer evidence of: 1) either a contractual or a societal duty owed by Klehr Harrison to her; 2) Klehr Harrison's breach of that duty; and 3) damages she suffered as a result of that breach.¹

In support of her claims, plaintiff offers the expert opinion of Neil Jokelson, Esq.² He opines that Klehr Harrison breached its duties to plaintiff by laboring under a conflict of interest, failing to properly plead abuse of process, and failing to take discovery in the Underlying Action.

In support of his opinion regarding the conflict of interest, Mr. Jokelson points to the following facts alleged in the Complaint:³

April, 2006 - Plaintiff retained Klehr Harrison to commence the Underlying Action.

October, 2006 - While the Underlying Action was pending, Klehr Harrison's existing client, PNC Bank, entered into an agreement to acquire Mercantile, the defendant in the Underlying Action.

November, 2006 – In an internal memorandum, Klehr Harrison recognized the proposed acquisition “will certainly impact our ongoing representation of [plaintiff].”

March, 2007 - While the Underlying Action was still pending, PNC acquired Mercantile.

August, 2007 - The Underlying Action was dismissed.

September, 2007 - Klehr Harrison first notified plaintiff of the conflict.⁴

¹ See Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (fraud); Kituskie v. Corbman, 552 Pa. 275, 281, 714 A.2d 1027, 1029 (1998) (professional negligence); Estate of Stetson, 463 Pa. 64, 84, 345 A.2d 679, 690 (1975) (breach of fiduciary duty); Pittsburgh Constr. Co. v. Griffith, 834 A.2d 572, 580 (Pa. Super. 2003) (breach of contract).

² At least one of Mr. Jokelson's two opinions was filed late in violation of this court's Case Management Order. Under that Order, plaintiff's expert report was due on or before March 7, 2011. Plaintiff's first expert report is a letter from Mr. Jokelson dated March 7, 2011, which defense counsel claims to have received for the first time when it was attached to plaintiff's April 15, 2011 Response to Klehr Harrison's first Motion for Summary Judgment. The second opinion letter/expert report is dated July 22, 2011, and was submitted in late response to Klehr Harrison's May 16, 2011 Motion for Summary Judgment.

³ March 7, 2011 Report, pp. 1-2. Most of these facts are not disputed by Klehr Harrison.

⁴ Klehr Harrison disputes when it first gave notice of the conflict to plaintiff and claims these facts do not give rise to a true conflict of interest.

Mr. Jokelson then cites governing law regarding an attorney's duty of loyalty to his/her client.⁵ Based on the cited facts and law, he concludes that Klehr Harrison's conduct was "improper" and "below the standard of care due and owing [plaintiff]."⁶ His opinion constitutes sufficient evidence of duty and breach based on a conflict of interest to defeat a motion for summary judgment.

With respect to plaintiff's claim that Klehr Harrison did not properly represent plaintiff in the Underlying Action, Mr. Jokelson's opinion notes that: 1) Klehr Harrison undertook no discovery in the Underlying Action despite time in which to do so; and 2) the action was dismissed by the court. Based on these facts, he concludes that Klehr Harrison failed "to provide adequate and competent representation" and provided "representation below the standard of care due and owing to [plaintiff]."⁷ His opinion constitutes sufficient evidence of duty and breach based on a failure to take discovery.

With respect to his "opinion" that the abuse of process claim in the Underlying Action was not properly pled, Mr. Jokelson offers no facts or law in support. In his initial report, Mr. Jokelson did not assert that Klehr Harrison improperly pled the claim, although plaintiff alleged it in her Complaint. In his second report, Mr. Jokelson remarks that plaintiff's counsel "asked me to comment on . . . whether Klehr Harrison caused harm to [plaintiff] by failing in the case within the case to appropriately plead an abuse of process and/or intentional infliction of emotional distress [claim]."⁸ However, Mr. Jokelson fails to describe what was omitted or

⁵ Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277 (1992).

⁶ March 7, 2011 Report, pp. 2-3.

⁷ *Id.* at p. 3.

⁸ July 22, 2011 Report, p. 1.

misstated in the pleadings in the Underlying Action. Instead, he makes vague and conclusory statements:

Had the underlying case been properly pled . . . a jury may well have found in favor of [plaintiff]. . . . [A] jury may further well determine that the conflict of interest of which Klehr Harrison was aware . . . was causative in the failure of Klehr Harrison to properly plead the abuse of process . . .⁹

Such statements alone are not sufficient evidence that Klehr Harrison breached its professional duty to plaintiff by failing properly to plead her claims in the Underlying Action.

In her brief, plaintiff argues Klehr Harrison should have pled that Mercantile abused legal process by prosecuting its action against plaintiff with the improper motivation of causing her emotional harm.¹⁰ Arguments in a brief are not evidence and cannot defeat a motion for summary judgment. Furthermore, the affidavit from plaintiff's husband,¹¹ who is not offered as an attorney expert, is not sufficient evidence of Klehr Harrison's breach of its professional duties to plaintiff. Instead, expert evidence is necessary to describe what Klehr Harrison should have pled.¹² Since plaintiff has offered no such expert evidence, plaintiff's claims based on Klehr Harrison's improper pleading must be dismissed.

Plaintiff has satisfied her burden of presenting evidence of duty and breach with respect to two of her three claims, *i.e.*, she produced expert evidence that Klehr Harrison had a conflict of interest and neglected to conduct discovery in the Underlying Action. However, to defeat

⁹ *Id.* at p. 5.

¹⁰ See Plaintiff's Memorandum of Law in Opposition to Klehr Harrison's Motion for Summary Judgment ("Responsive Brief"), pp. 17-18.

¹¹ See *id.*, Ex. A-1.

¹² See Storm v. Golden, 371 Pa. Super. 368, 376, 538 A.2d 61, 65 (1988) (recognizing "the complex determination required of a claim of breach of duty involving the attorney's choice of trial tactics in which a layperson's judgment obviously requires guidance" from an expert.)

summary judgment, plaintiff must also present evidence to establish the third element of her claims, namely that she suffered damages caused by Klehr Harrison's breaches of duty.

Plaintiff demands as damages in this action: 1) the damages she should have recovered in the Underlying Action;¹³ and 2) the attorneys' fees she paid to Klehr Harrison to represent her in the Underlying Action. As Mr. Jokelson notes, the attorneys' fees paid to Klehr Harrison are recoverable to the extent they were earned while Klehr Harrison was laboring under an impermissible conflict of interest.¹⁴

In order to recover here the damages she did not receive in the Underlying Action, plaintiff must prove that, but for Klehr Harrison's misconduct, she would have prevailed in the Underlying Action.¹⁵ This is colloquially called proving "the case within the case." If plaintiff cannot show she would have succeeded in the Underlying Action, if represented properly, then she cannot recover any claimed damages from that action as damages in this action.¹⁶

Plaintiff must offer evidence to prove that Klehr Harrison's breaches of its professional duties caused plaintiff not to obtain her damages claimed in the Underlying Action.¹⁷ This issue

¹³ She demands reimbursement for legal fees incurred and emotion distress suffered in connection with the action brought against her by Mercantile.

¹⁴ See Maritrans, 529 Pa. at 258, 602 A.2d at 1285 ("Courts throughout the country have ordered the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible conflicts of interests.") For this reason, Klehr Harrison's Motion for Summary Judgment on its Counterclaim for fees that remain unpaid must be denied.

¹⁵ See Kituskie, 552 Pa. at 282, 714 A.2d at 1030 ("[A] legal malpractice action is distinctly different from any other type of lawsuit brought in the Commonwealth. A legal malpractice action is different because, as described above, a plaintiff must prove a case within a case since he must initially establish by a preponderance of the evidence that he would have recovered a judgment in the underlying action . . . It is only after the plaintiff proves he would have recovered a judgment in the underlying action that the plaintiff can then proceed with proof that the attorney he engaged to prosecute or defend the underlying action was negligent in the handling of the underlying action and that negligence was the proximate cause of the plaintiff's loss since it prevented the plaintiff from being properly compensated for his loss.")

¹⁶ *Id.*

¹⁷ *Id.*

of causation is a complicated one because it requires a determination of the viability of plaintiff's legal claims and the sufficiency of Klehr Harrison's professional acts in the Underlying Action. Plaintiff must submit expert evidence on this issue in order to withstand a motion for summary judgment.¹⁸

The only expert evidence plaintiff offers is Mr. Jokelson's opinion, but he fails to describe how Klehr Harrison's breaches of duty caused the dismissal of the Underlying Action. He does not point to any particular evidence that should have been presented, nor arguments that should have been made, by Klehr Harrison. Instead, he asks the court to refer the issue to the jury for decision despite the lack of evidence. In doing so, he relies upon a medical malpractice doctrine applicable in those cases where a plaintiff's medical expert is unable to opine that the defendant doctor's deviation from the standard of care was "the proximate cause" of plaintiff's harm.¹⁹ In such cases, the expert is permitted to opine that the doctor's deviation from the standard of care "increased the risk of harm" to plaintiff.²⁰

Based on this borrowed doctrine, Mr. Jokelson opines as follows:

[A]pplying the standards set forth in Meitzelfelt [sic], Klehr Harrison's conduct in acting as counsel for [plaintiff], once the conflict of interest developed, did result in an increased risk of harm to the plaintiff. In turn, it is a jury question as to whether such conduct was a substantial factor in producing the harm in the underlying case, which was, inter alia, a failure to properly plead an abuse of process and to conduct discovery, all of which contributed to the dismissal of her action in the underlying case. Such a jury determination is, in my opinion, akin to the causative issues that arise in a claim for legal malpractice where the underlying litigation is dismissed because of the attorney's failure to file within the statute of limitations. Here, as in the statute of limitations situation, the underlying case was not tried to a jury because the case was dismissed prior to any jury determination or even presentation of evidence to a jury. Had the

¹⁸ See Storm, 371 Pa. Super. at 376, 538 A.2d at 65.

¹⁹ See Mitzelfelt v. Kamrin, 526 Pa. 54, 584 A.2d 888 (1990).

²⁰ See *id.*

underlying action been properly pled, and had discovery into, inter alia, the medical records and treatment of [plaintiff] been properly conducted, a jury may well have found in favor of [plaintiff]. The derelictions of Klehr-Harrison, however, prevented that determination from being made. In the present case, a jury may further well determine that the conflict of interest of which Klehr Harrison was aware of [sic] (as reflected vividly in the November 21, 2006 memorandum written by Mr. Tabasso to his managing partner, William Harvey), was causative in the failure of Klehr Harrison to properly plead the abuse of process or to engage in any meaningful discovery in the underlying case.

Accordingly, a jury should properly assess the causative nature of the harm caused by Klehr Harrison, given that Klehr Harrison's tortious actions and derelictions increased the risk of harm to [plaintiff] and may be found to have caused the dismissal of what should have been a meritorious and successful prosecution of claims in the underlying case.²¹

Unlike the expert contemplated in Mitzelfelt, Mr. Jokelson does not describe in this opinion how the breaches of Klehr Harrison's professional duties increased the risk that plaintiff's case would be wrongfully dismissed. Specifically, Mr. Jokelson fails to describe what evidence in plaintiff's medical records could have made a difference to the outcome of the underlying abuse of process case and how it could have done so.

Evidence of plaintiff's treatment for anxiety²² may be evidence of some of the damages she claimed in the Underlying Action, but it is not alone proof of abuse of process. Such evidence does not establish that Mercantile acted with an improper purpose in bringing or continuing its action against plaintiff.²³ Anxiety may be caused by legitimate use of legal process as well as illegitimate use.

The court cannot allow the jury in this legal malpractice action to speculate regarding causation without any evidence upon which to base its decision. Plaintiff, through its expert, was

²¹ July 22, 2011 Report, p. 5.

²² Although Mr. Jokelson does not discuss the contents of the medical records, plaintiff does. *See* Responsive Brief, pp. 11-12.

²³ *See McGee v. Feege*, 517 Pa. 247, 259, 535 A.2d 1020, 1025 (1987) (“[T]he tort of abuse of process is concerned with a perversion of the legal process. When the legal process is perverted and directed toward a victim for a purpose other than that for which the process was designed, a cause of action for abuse of process exists . . .”)

required to describe the professional acts Klehr Harrison should have taken to avert dismissal of, and to enable plaintiff to prevail in, the Underlying Action. Without such evidence of causation, plaintiff cannot recover as damages in this action the damages she claims she should have recovered in the Underlying Action.

CONCLUSION

For all the foregoing reasons, Klehr Harrison's Motion for Summary Judgment on plaintiff's claims is granted in part and denied in part and Klehr Harrison's Motion for Summary Judgment on its Counterclaim is denied.

BY THE COURT,


PATRICIA A. McINERNEY, J.