

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

**DOROTHY PALMER, as Executrix of the
Estate of GEORGE PALMER, deceased, and
Individually as Wife/Widow of GEORGE
PALMER,**

Appellant

v.

**BRIAN P. KENNEY, ESQ. and BRIAN P.
MCCAFFERTY, ESQ. and KENNEY &
MCCAFFERTY, P.C. and PROVOST
UMPHREY LAW FIRM L.L.P.,**

Appellees

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: TRIAL DIVISION- CIVIL
:
: JANUARY TERM, 2012
: No. 2512
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: Superior Court No.
: 2361 EDA 2012
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OPINION

PROCEDURAL HISTORY

Plaintiff appeals this Court's Orders dated July 5, 2012 granting the Preliminary Objections submitted by Defendants Brian P. Kenney, Esq., Brian P. McCafferty, Esq. and Kenney & McCafferty, P.C. and by Provost Umphrey Law Firm L.L.P. thereby dismissing Plaintiff's Second Amended Complaint. Plaintiff also appeals this Court's Order of July 19, 2012, declining to reconsider the Orders of July 5, 2012.

FACTUAL BACKGROUND

George Palmer, Plaintiff's husband was diagnosed with silicosis and asbestosis in 2002. (Second Amended Complaint, ¶ 7). In August 2002, Defendants Brian P. Kenney, Esq., Brian P. McCafferty, Esq. and Provost Umphrey Law Firm L.L.P.¹ (hereinafter

¹ The attorney of record with Provost Umphrey Law Firm L.L.P. is Guy Fisher, Esq.; however, Mr. Fisher is not a named Defendant

“Defendants”) commenced a silicosis lawsuit in the Philadelphia Court of Common Pleas on behalf of Mr. and Mrs. Palmer (Docket # 020802327).²

On or about January 22, 2008, Mr. Palmer was diagnosed with lung cancer, and he died shortly thereafter on August 6, 2008. (Second Amended Complaint, ¶¶ 10-11). In September 2008, Plaintiff provided Defendants with a certificate of death from the Commonwealth of Pennsylvania, which listed Mr. Palmer’s immediate cause of death as “non-small cell lung cancer” and also listed the other significant conditions regarding Mr. Palmer’s death as “emphysema, interstitial lung disease.” (Second Amended Complaint, ¶ 12).

On September 10, 2009, Defendants filed a suggestion of death in the silicosis lawsuit, and in October 2009, Plaintiff was substituted as the personal representative of the estate of George Palmer. (Second Amended Complaint, ¶¶ 13-14). Plaintiff subsequently settled the silicosis lawsuit for \$272,992.08.

Plaintiff, Dorothy Palmer commenced this action for legal malpractice in connection with the silicosis lawsuit by filing her Complaint on January 20, 2012. (See Docket). Plaintiff alleges that because Defendants failed to file a survival action on the Palmer family’s behalf and recommended releases, which were subsequently executed by Plaintiff, Defendants caused her to sustain great economic loss. (Second Amended Complaint, ¶¶ 16-20). These allegations form the basis of Plaintiff’s Complaint in the instant action.

On March 13, 2012, Defendants Brian P. Kenney, Esq., Brian P. McCafferty, Esq. and Kenney & McCafferty P.C. filed Preliminary Objections to Plaintiff’s Complaint as

² Plaintiff also has a survival action and wrongful death suit pending against various asbestos defendants in the Philadelphia Court of Common Pleas (#100800518).

well as a Notice of Intent to enter Judgment of Non Pros for Failure to File a Certificate of Merit. (See Docket). Defendant Provost Umphrey Law Firm, L.L.P. filed a similar notice on March 14, 2012. (See Docket).

Plaintiff filed an Amended Complaint on April 2, 2012. (See Docket). Plaintiff filed a Certificate of Merit as to all Defendants on April 10, 2012. (See Docket). On April 27, 2012, Defendants Brian P. Kenney, Esq., Brian P. McCafferty, Esq. and Kenney & McCafferty P.C. filed Preliminary Objections to Plaintiff's Amended Complaint. (See Docket). Defendant Provost Umphrey Law Firm L.L.P. filed Preliminary Objections to Plaintiff's Amended Complaint on April 30, 2012. (See Docket).

Plaintiff filed a Second Amended Complaint on May 17, 2012. (See Docket). On May 24, 2012, Defendant Provost Umphrey Law Firm L.L.P. filed Preliminary Objections to Plaintiffs Second Amended Complaint, and the three remaining Defendants filed Preliminary Objections on June 6, 2012. (See Docket). Plaintiff filed Answers to both sets of Preliminary Objections on June 25, 2012. (See Docket). Defendant Provost Umphrey Law Firm L.L.P. and Defendants Brian P. Kenney, Esq., Brian P. McCafferty, Esq. and Kenney & McCafferty P.C. filed Replies in Support of the Preliminary Objections on July 2, 2012. (See Docket). On July 5, 2012, this Court entered two Orders sustaining Defendants' Preliminary Objections and dismissing Plaintiff's Second Amended Complaint against Provost Umphrey Law Firm L.L.P. and against Brian P. Kenney, Esq., Brian P. McCafferty, Esq. and Kenney & McCafferty P.C.

Plaintiff filed a Motion for Reconsideration on July 10, 2012. (See Docket). Provost Umphrey Law Firm L.L.P. filed an Answer to the Motion for Reconsideration on

July 13, 2012, and Brian P. Kenney, Esq., Brian P. McCafferty, Esq. and Kenney & McCafferty P.C. answered the Motion on July 16, 2012. (See Docket). On July 20, 2012, this Court ordered that the Orders of July 5, 2012 were not reconsidered. (See Docket).

On July 25, 2012, Plaintiff appealed both the Orders of July 5, 2012 and the Order of July 20, 2012 declining reconsideration³ of the July 5th Orders. (See Docket). On August 8, 2012, this Court directed Plaintiff to file her 1925(b) Statement of Errors Complained of on Appeal. (See Docket). Plaintiff filed her Statement of Matters on August 23, 2012. (See Docket).

The sole issue to be addressed on appeal is whether this Court erred by sustaining Defendants' Preliminary Objections and dismissing Plaintiffs' Second Amended Complaint with prejudice on the basis that Plaintiff was precluded from pursuing a legal malpractice lawsuit against Defendants after settling the underlying lawsuit.

LEGAL ANALYSIS

A Preliminary Objection in the nature of a demurrer tests the legal sufficiency of the Plaintiff's Complaint. *Smith v. Wagner*, 403 Pa. Super. 316, 320, 588 A.2d. 1308, 1310 (1990). The standard of review in granting Preliminary Objections is that "all material facts set forth in the Complaint, as well as all inferences reasonably deducible therefrom, are admitted as true." *Youndt v. First Nat'l Bank*, 2005 Pa. Super. 42, P2, 868 A.2d 539, 542 (2005). "A preliminary objection in the nature of a demurrer must be sustained where it is clear and free from doubt that the law will not permit recovery under

³ An Order declining reconsideration is not appealable. "Pennsylvania case law is absolutely clear that the refusal of a trial court to reconsider, rehear, or permit reargument of a final decree is not reviewable on appeal." *Provident Nat'l Bank v. Rooklin*, 250 Pa. Super. 194, 202 (Pa. Super. Ct. 1977)

the facts alleged.” *Petsinger v. Dept. of Labor & Indus.*, 988 A.2d 748, 753 (Pa.Comm. Ct. 2010) (citing *Africa v. Horn*, 701 A.2d 273 (Pa.Comm. Ct. 1997)).

The Supreme Court has described the heavy burden facing an appellant from a discretionary trial court determination: “[I]t is not sufficient to persuade the appellate court that it might have reached a different conclusion if, in the first place, charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power.” *In re Estate of Mackarus*, 431 Pa. 585, 596, 246 A.2d 661, 666-67 (1968). An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused. *Brown v. Delaware Valley Transplant Program*, 371 Pa. Super. 583, 586, 538 A.2d 889, 891 (1988). If there is any basis for the trial court's decision, the decision must stand. *Id.*

Pennsylvania Rule of Civil Procedure 1028(a)(4) establishes the right of a party to file preliminary objections to any pleading on the grounds of legal insufficiency.

In *Muhammad v. Strassburger, et al.*, 526 Pa. 541, 546, 587 A.2d 1346, 1348 (1991), Pamela and Abdullah Muhammad brought a medical malpractice action to recover damages arising from the death of their infant son from pulmonary edema during surgery. After depositions of the named physicians, defendants offered \$23,000 to the Muhammads in settlement of their claims, and the Muhammads accepted. At a pre-trial conference, the court suggested that the offer be increased to \$26,500, the defendants agreed, and the Muhammads accepted the increased settlement offer.

Sometime after the acceptance, the Muhammads became dissatisfied with the settlement amount. The defendants subsequently filed a Rule to Show Cause why the settlement agreement should not be enforced, and following an evidentiary hearing, the trial court ordered the defendants to pay the settlement funds and instructed the prothonotary to mark the case settled. The Muhammads obtained new counsel to appeal the settlement, but the Superior Court affirmed the settlement order.

The Muhammads' new counsel then filed a legal malpractice action against the settling attorneys. The trial court granted defendants' preliminary objections on the basis of collateral estoppel, and the Superior Court reversed. The Supreme Court then granted allocatur and held that the Muhammads' legal malpractice case was not barred by collateral estoppel, but that the Muhammads had failed to alleged sufficient facts, which if proved, would entitle them to relief. The Supreme Court concluded:

Simply stated, we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action. An action should not lie against an attorney for malpractice based on negligence and/or contract principles when that client has agreed to a settlement. Rather, only cases of fraud should be actionable. *Muhammad v. Strassburger, et al.*, 526 Pa. 541, 546, 587 A.2d 1346, 1348 (1991).

The Supreme Court articulated the reasoning behind their decision, stating,

It becomes obvious that by allowing suits such as this, which merely 'second guess' the original attorney's strategy, we would permit a venture into the realm of the chthonic unknown. It is impossible to state whether a jury would have awarded more damages if a suit had been filed against another potential party or under another theory of liability. It is indeed possible that a smaller verdict would have been reached or a defense verdict ultimately would have been rendered. Thus, sanctioning these 'Monday-morning-quarterback' suits would be to permit lawsuits based on speculative harm; something with which we cannot agree. *Id.* at 554, 1352. See *Piluso v. Cohen*, 2000 Pa. Super. 335, P7, 764 A.2d 549, 551 (2000).

The Supreme Court in *Muhammad* did however carve out an exception for litigants who believe they have been fraudulently induced into settling their claims. *Id.* at 552, 1351. The Court proscribed that a litigant who believes he has been fraudulently induced into settling must set forth the allegations of fraud in the pleadings in compliance with the standard of specificity articulated in Pennsylvania Rule of Civil Procedure 1019(b). *Id.* at 553, 1352. If the allegations do not meet the standard of specificity, the case will be dismissed upon the defendant's filing of preliminary objections. *Id.*

In *McMahon v. Shea*, 547 Pa. 124, 688 A.2d 1179 (1997), the Supreme Court applied *Muhammad* to a legal malpractice action based upon alleged attorney negligence in the drafting and execution of a property settlement agreement in a domestic relations matter. Plaintiff alleged that defendant attorneys committed legal malpractice by incorporating but not merging the Property Settlement Agreement into the final divorce decree, which resulted in Plaintiff's continuing obligation to pay alimony to his ex-wife following her remarriage two months after the divorce decree had been entered. The Court in *McMahon* distinguished the facts presented with those in *Muhammad*, reasoning:

There is no element of speculation as to whether a jury would return a verdict greater than the amount recovered by a settlement. Also, Mr. McMahon is not attempting to gain additional monies by attacking the value that his attorneys placed on his case. Instead, Mr. McMahon is contending that his counsel failed to advise him as to the possible consequences of entering into a legal agreement. The fact that the legal document at issue had the effect of settling a case should not exempt his attorneys from liability. *McMahon v. Shea*, 547 Pa. 124, 130, 688 A.2d 1179, 1182 (1997). *See also Moon v. Ignelzi*, 2009 Pa. Super. LEXIS 7016 (Pa. Super. Ct. 2009)(concluding that the legal malpractice action, which claimed that the Moons' attorneys were negligent in not advising them of the subrogation lien and in not allocating a portion of the settlement to Maria Moon's loss of consortium claim, was essentially a

challenge to the attorney's judgment regarding an amount to be accepted in settlement of their claims).

The *Muhammad* and *McMahon* decisions seem to suggest a distinction between a legal malpractice claim based on a challenge to an attorney's professional judgment regarding an amount to be accepted in settlement of a claim and a claim based upon an attorney's failure to recognize and advise his client of the legal consequences of settlement, resulting in defined financial harm to the client. However, it is also important to recognize that *Muhammad* was a majority opinion while *McMahon* was not.

In the instant matter, the facts more closely resemble those presented in *Muhammad*. Here, Plaintiff alleges that Defendants were negligent in not filing a survival action on her behalf following the death of her husband in August 2008 from non-small cell lung cancer. However, Plaintiff and her husband voluntarily signed releases with the various silica defendants, thereby releasing the silica defendants from future claims, including potential malignancy claims. Whether or not a potential survival action would have resulted in a recovery greater than the \$272,922.08 settlement amount is mere speculation, and therefore the failure to advise Plaintiff to pursue a survival action is not actionable legal malpractice. Unlike *McMahon*, Plaintiff cannot point to a procedural or substantive error that definitively resulted in harm to her position.

Furthermore, Plaintiff has not alleged that she was fraudulently induced into settling her claims. Therefore, the exception in *Muhammad* does not apply.

The Supreme Court in *Muhammad* precluded Plaintiffs from consenting to the settlement of their claims and then suing their attorneys for legal malpractice based upon dissatisfaction with the amount of settlement. There are no allegations of fraud in the inducement or legal error. Any assertion that advising Plaintiff to pursue a separate

survival action rather than settling her claims would have resulted in a greater recovery is specious. Therefore, Plaintiff's claim that her attorneys committed legal malpractice in advising her to settle the silicosis case must fail.

CONCLUSION

For the foregoing reasons, this Court respectfully requests that its decision to grant Defendants Brian P. Kenney, Esq., Brian P. McCafferty, Esq. and Kenney & McCafferty, P.C. and Provost Umphrey Law Firm L.L.P.'s Preliminary Objections, thereby dismissing Plaintiffs' Complaint be **AFFIRMED**.

BY THE COURT:

10/1/2012

DATE

ALLAN L. TERESHKO, J.

cc:
All Counsel
Matthew B. Weisberg, Esq., for Appellant
James Robert Kahn, Esq./Tamara Chasan, Esq., for Appellee Provost Umphrey Law Firm
Matthew Steven Marron, Esq., for Appellee Brian P. Keeney, et al.