

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

MAURICE ROMY, M.D.,	: MAY TERM, 2002
THE SPINE CENTER OF PENNSYLVANIA, P.C.,	
THE SPINE CENTER OF NEW JERSEY, P.C.	: No. 1236
AMERICAN LIFECARE, INC. and	
TSC MANAGEMENT OF PENNSYLVANIA, INC.	:
v.	:
	:
MICHAEL R. BURKE, ESQUIRE,	
KALOGREDIS, SANSWEET, DEARDEN & BURKE, LTD.	: Commerce Program
WILLIAM BLAEUER, DAVID BLAEUER	
PAIN & REHABILITATION INSTITUTE	:
OF PENNSYLVANIA, P.C.,	
PLEASANT HILL CONSULTING, INC.,	:
WILLIAM TINDALL, JR., RIC MARTELLO, CPA,	
HEALTHCARE CONSULTING ASSOCIATES, LLC.,	:
P.M. HEALTHCARE, INC., and	
NORTHEAST MANAGEMENT CONSULTING	: Control No. 062670
ASSOCIATES, INC.,	

ORDER

AND NOW, this 28th day of December 2004, upon consideration of the Motion for Summary Judgment of Michael R. Burke, Esquire and Kalogredis, Sansweet, Dearden & Burke, Ltd., the plaintiffs' response in opposition, the respective memoranda, all matters of record, and in accord with the contemporaneous Opinion, it is **ORDERED** that said motion is **DENIED**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. December 28, 2004

The Motion for Summary Judgment of defendants, Michael R. Burke, Esq. and Kalogredis, Sansweet, Dearden & Burke, Ltd. (the “Attorney defendants”) is presently before the court. In this action, plaintiffs, The Spine Center of Pennsylvania, P.C., The Spine Center of New Jersey, P.C., and TSC Management of Pennsylvania, Inc. (the “plaintiffs”),¹ claim that the Attorney defendants represented plaintiffs in connection with their medical business, and subsequently represented defendants, William Blaeuer, David Blaeuer, William Tindall, Jr., and

¹ The claims of plaintiffs, Maurice Romy, M.D. and American Life Care, Inc. were dismissed upon Preliminary Objections.

Ric Martello, CPA, (the “individual defendants”) all of whom were officers, directors, or employees of, or were otherwise associated with, plaintiffs, in connection with setting up and/or operating certain competing medical businesses, Pleasant Hill Consulting, Inc., Pain & Rehabilitation Institute of Pennsylvania, P.C., Healthcare Consulting Associates, LLC, P.M. Healthcare, Inc., and Northeast Management Consulting Associates, Inc. (the “Corporate Defendants”).

Plaintiffs have asserted the following claims against the Attorney defendants all of which the Attorney defendants seek to have the court dismiss:

Count I for negligence in that the Attorney defendants “failed to exercise the ordinary skill and knowledge of lawyers in the legal community” by engaging in “multiple representations in the face of an obvious conflict-of-interest.” Sixth Amended Complaint, ¶ 198.

Count II for negligence in that the Attorney defendants breached their duty as general counsel to plaintiffs by forming the Corporate Defendants to serve the interests of persons and entities other than plaintiffs. *Id.* ¶¶ 201-2.

Count III for breach of fiduciary duty in that the Attorney defendants engaged in the representation of the Corporate and individual defendants, which created a conflict of interest and thereby breached the duty of undivided loyalty that the Attorney defendants owed to plaintiffs. *Id.* ¶¶ 207-8.

Count IV for breach of contract in that the Attorney defendants “failed to exercise the ordinary skill and knowledge of lawyers in the legal community” by engaging in “multiple representations in the face of an obvious conflict-of-interest.” *Id.* ¶ 214.

Clearly, plaintiffs cannot collect damages on all such claims, since several of them are duplicative, but if plaintiffs can point to evidence of record that satisfies each element of each claim they may proceed to trial on all such claims. *See Gorski v. Smith*, 812

A.2d 683, 705, n. 9 (Pa. Super. 2002).²

² Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine

**I. Attorney Defendants’ Motion for Summary Judgment
On Plaintiffs’ Claim for Breach of Fiduciary Duty is Denied.**

“At common law, an attorney owes a fiduciary duty to his client; such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest. . . .[A]n attorney’s representation of a subsequent client whose interests are materially adverse to a former client in a matter substantially related to matters in which he represented the former client constitutes an impermissible conflict of interest actionable at law.” Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 252-3, 602 A.2d 1277, 1282-3 (1992). “[C]ourts have . . . allowed civil actions for damages for an attorney’s breach of fiduciary duties by engaging in conflicts of interest.” *Id.*, 529 Pa. at 258-9, 602 A.2d at 1286 (the court also acknowledged that “damages might later be obtained for breach of fiduciary duties and a confidential relationship, but that remedy would be inadequate to correct the harm that could be prevented by injunctive relief.”).

A former client seeking damages from a law firm that subsequently represents an adverse party “has the burden of proving: (1) that a past attorney/client relationship existed which was

issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999). When confronted with a motion for summary judgment,

[t]he adverse party may not rest upon the mere allegations or denials of his pleading, but must file a response . . . identifying (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

Pa. R. Civ. P. 1035.3.

adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; (3) that the member of the law firm . . . acquired knowledge of confidential information from or concerning the former client, actually or by operation of law;” and (4) the former client was damaged thereby. *See In re Estate of Walter C. Pew, Deceased*, 440 Pa. Super. 195, 244, 655 A.2d 521, 545-6 (1994).

In this case, plaintiffs have proffered evidence of the following in support of their claim for breach of fiduciary duty:

- 1) The Attorney defendants represented plaintiffs from approximately December, 1996 through November, 2001, when the Attorney defendants resigned. *See PRMSJ*,³ Ex. 10; ADMSJ, Ex. K.
- 2) In 2001, the Attorney defendants, at the request of the Individual defendants, did legal work for the Corporate Defendants. *See PRSJM*, Ex. 25-7
- 3) Some of the work that the Attorney defendants did for the Corporate Defendants was substantially similar to the work that they did for the plaintiffs. *Compare PRMSJ*, Ex. 24 (Attorney defendants’ Opinion Letter to Individual defendant on behalf of plaintiffs) *and PRMSJ*, Ex. 41 (electronic mail from Individual defendant to Attorney defendant regarding Corporate Defendants).
- 4) The Corporate Defendants were potential competitors of plaintiffs. *See PRSJM*, Ex. 8, p. 10; *Id.*, Ex. 7, p.9.
- 5) Plaintiffs claim to have suffered economic losses in that they were driven into liquidation by the Corporate Defendants’ unfair competition. *See Id.*, Ex. 9.

³ For purposes of citation in this Opinion, the Attorney defendants’ Motion for Summary Judgment shall be referred to as “ADMSJ,” and plaintiffs’ Response shall be referred to as “PRMSJ.”

This evidence, if found to be credible by the trier of fact, is sufficient to justify a finding that Attorney defendants breached their fiduciary duty to plaintiffs.

II. Attorney Defendants' Motion for Summary Judgment on Plaintiffs' Claims For Professional Negligence and Breach of Contract is Denied.

A plaintiff must establish three elements in order to recover in negligence for attorney malpractice: “(1) the employment of the attorney or other basis for duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that the attorney’s failure to exercise the requisite level of skill and knowledge was the proximate cause of damage to plaintiff.”

Fiorentino v. Rapoport, 693 A.2d 208 (Pa. Super. 1997). Similarly “if a plaintiff demonstrates by a preponderance of the evidence that an attorney has breached his or her contractual duty to provide legal service in a manner consistent with the profession at large, then the plaintiff has successfully established a breach of contract claim against the attorney.” Gorski v. Smith, 812 A.2d 683, 697 (Pa. Super. 2002).

In this case, plaintiffs have shown that they employed the Attorney defendants. In addition, plaintiffs’ expert opines that the Attorney defendants’ “practices and procedures with respect to identifying and monitoring conflicts of interest were inadequate and fell below the standard of care” and that the Attorney defendants “did not fulfill [their] duty to decline a representation that was a conflict of interest of a client or to seek the client’s full and knowing consent following consultation.” PRMSJ, Ex. 7, pp. 9-10. On the other hand, the Attorney defendants’ expert opines that “[i]t was reasonable for [the Attorney defendants] to take [Individual defendants’] word that the purpose of the representation [of the Corporate Defendants] was to bring additional revenue to the [plaintiffs].” ADMSJ, Ex. W, p. 10. Furthermore, he opines that the Attorney defendants “had no reason to believe that the interests

of the [plaintiffs] and [the Corporate Defendants] were directly adverse.” *Id.*, p. 12. It is therefore a question of fact whether the Attorney defendants failed to exercise the requisite level of skill and knowledge when they performed services for the Individual and Corporate Defendants, *i.e.*, whether the Attorney defendants knew or should have known that the activities in which they were participating were not being undertaken for the benefit of the plaintiffs and/or were otherwise improper.

Furthermore, “[i]t is beyond cavil that, whether the allegation that an attorney has breached his or her professional obligations to a client is denominated in trespass or assumpsit, an essential element of the cause of action is proof of actual loss.” Fiorentino v. Rapoport, 693 A.2d 208, 215 (Pa. Super. 1997). In this case, it is a question of fact whether the Attorney defendants’ professional negligence, if any, caused plaintiffs to go out of business. *See Id.* (“Unless the evidence is such that reasonable people cannot disagree, the question of whether [an attorney’s] conduct is the cause of [his former client’s] injury or loss is for the jury.”) Therefore, the Attorney defendants’ Motion for Summary Judgment with respect to plaintiffs’ claims for negligence and breach of contract must be denied.

IV. Expert Testimony as To The Standard of Care Is Appropriate In This Case.

Expert testimony is generally required in legal malpractice cases, unless the issue is so simple or the lack of skill or want of care is so obvious as to be within the range of an ordinary layperson's experience and comprehension. *See Rizzo v. Haines*, 520 Pa. 484, 502, 555 A.2d 58, 67, n. 10 (1989) (“Whether proof of negligence . . . is beyond the comprehension of laypersons and requires expert testimony depends on the particular facts and circumstances of the case.”); Storm v. Gordon, 371 Pa. Super. 368, 376, 538 A.2d 61, 64 (1988) (“Expert testimony becomes necessary when the subject matter of the inquiry is one involving special skills and training not

common to the ordinary person.”) In this case, the court believes that expert testimony regarding the Attorney defendants’ duty of care, particularly with respect to conflicts of interest, would be helpful to the jury. *See Gorski v. Smith*, 812 A.2d 683, 694-6 (Pa. Super. 2002) (court relied heavily on expert testimony that “supported the jury’s conclusion that [the attorney] failed to fulfill his contractual duty to represent [plaintiffs] in a manner which comported with the standards of the profession at large”); *Fiorentino v. Rapoport*, 693 A.2d 208 (Pa. Super. 1997) (court relied heavily on testimony of plaintiff’s expert which “was sufficient, if believed by the fact finder, to prove that [the attorneys] failed to exercise the ordinary skill and knowledge expected of a lawyer . . .” and therefore that that the attorneys could be held liable in both tort and contract).

CONCLUSION

For these reasons, the Attorney defendants’ Motion for Summary Judgment is denied in its entirety. The court will issue an Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.