NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1577-13T4

LAURA HIGGINS and ROBIN CALCATERRA,

Plaintiffs-Appellants,

v.

MARY F. THURBER and THURBER CAPPELL, LLC,

Defendants-Respondents.

Argued November 12, 2014 – Decided April 17, 2015

Before Judges Fisher, Nugent and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1329-07.

Gerald J. Monahan argued the cause for appellants (The Law and Mediation Offices of Gerald J. Monahan; Mr. Monahan, of counsel and on the briefs).

Robert B. Hille argued the cause for respondents (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Hille, of counsel and on the brief; John W. Kaveney, on the brief).

PER CURIAM

Plaintiffs Laura Higgins and Robin Calcaterra appeal another dismissal of the legal malpractice action they brought

against defendants Mary Thurber and Thurber Cappell, LLC. We previously reversed a dismissal based on the entire controversy doctrine. Higgins v. Thurber, 413 N.J. Super. 1 (App. Div. 2010), aff'd, 205 N.J. 227 (2011). We now reverse again.

Following extensive discovery proceedings since our last remand, defendants moved for summary judgment. On May 21, 2013, a judge granted partial summary judgment in favor of defendants on the legal malpractice action. A few months later, another judge conducted a Lopez[1] hearing, following which plaintiffs' remaining claims were dismissed by order entered on October 22, 2013. Plaintiffs then filed this appeal, challenging only the May 21, 2013 order and arguing in a single point that summary judgment "was based on nothing more than impermissible speculation and fact finding." We agree that the judge exceeded the role assigned to him by our summary judgment procedures, see Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), and that he misapplied the legal principles that govern the claim.

Most of the convoluted circumstances that bring us here are more thoroughly described in our earlier opinion, Higgins, supra, 413 N.J. Super. at 5-11, and need not be repeated at length here. In a nutshell, the disputes at hand spring from

[1]Lopez v. Swyer, 62 N.J. 267 (1973).

the 1996 death of Salvatore John Calcaterra, the father of five children: Laura Higgins and Robin Calcaterra, who are the plaintiffs in this action, and three other siblings, one of whom is Michael Calcaterra, the estate's executor. Soon after his appointment, Michael brought suit against his father's second wife, Donna, alleging she had improperly transferred to herself four of six seats decedent held on the New York Mercantile Exchange (NYMEX); defendants were engaged to represent the plaintiffs in that matter. As the lawsuit progressed, the estate had difficulty staying current with accruing legal fees and reached an agreement with defendants that entitled defendants to a portion of the estate's gross recovery in the NYMEX suit. Id. at 7. At the conclusion of a bench trial, a judge ruled that Donna was entitled to two and the estate entitled to four of the NYMEX seats. We affirmed that determination by way of an unpublished opinion. Ibid.

There followed additional litigation in the probate part concerning, among other things, Donna's accusations about Michael's performance as executor and Michael's interim accounting. Later, when plaintiffs commenced this action in the Law Division, defendants convinced the trial court that because some of the allegations were asserted in earlier probate actions, this malpractice action was barred by the entire

controversy doctrine. As mentioned above, we reversed that determination, 413 N.J. Super. at 24, and the Supreme Court affirmed our decision, 205 N.J. at 230.

In granting summary judgment on the legal malpractice claim — in which plaintiffs chiefly assert that defendants were negligent in advising in 2001 that two NYMEX seats be sold to pay the estate's obligations — the motion judge concluded that defendants were the attorneys only for the estate and executor, not the decedent's beneficiaries, and he adopted a legal theory that we find inconsistent with the concepts outlined and firmly established in Petrillo v. Bachenberg, 139 N.J. 472 (1995). That is, the judge first observed that "[p]laintiffs point to no authority to support that an attorney for the [e]state has a duty to its heirs," and then concluded, in relying on a trial court opinion, Barner v. Sheldon, 292 N.J. Super. 258 (Law Div. 1995), aff'd, 292 N.J. Super. 157 (App. Div. 1996),[2] that "[i]n fact, the opposite is true."

[2]We question whether Barner may be so construed when the trial judge there also observed that case law "demonstrates that there may be situations where a duty to the beneficiary should be impressed on the attorney." 292 N.J. Super. at 266. In addition, even if Barner could be understood in the sense for which it was cited by the trial judge here, that construction would not only place Barner in direct conflict with our own earlier decision in Albright v. Burns, 206 N.J. Super. 625 (App. Div. 1986), but, more importantly, with Petrillo, which was decided two months before, although not cited in Barner.

From the mistaken conclusion that an attorney representing an estate, as a matter of law, owes no duty to beneficiaries, the judge granted summary judgment:

> [t]he attorney for an [e]state has a duty to advise the [e]xecutor. A duty to an heir cannot arise [o]n the off chance that the best interests of the [e]state and its heirs are aligned. That coincidence should not permit a malpractice claim.

We reject this conclusion. Not only should an attorney representing an estate be aware that advice given to an executor may have an impact on the estate's heirs, but the attorney should also be aware that laypersons may not fully grasp the significance of the limits on the scope of the attorney's role in such matters. To be sure, whether a defendant owes a duty of care presents a question of law for the court, Wang v. Allstate Ins. Co., 125 N.J. 2, 15 (1991), but whether an attorney owes a duty to a non-client will often turn on the surrounding circumstances, which may appear disputed or uncertain. By holding that defendants were only the attorneys for the estate or the executor, the judge failed to appreciate the significance of the Court's holding in Petrillo: "that attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorneys' representations and the non-clients are not too remote from the attorneys to be entitled to protection." 139 N.J. at 483-84.

Here, defendants had actually represented these plaintiffs in the earlier, related litigation; this fact alone could certainly have contributed to reasonable misunderstandings about the scope of defendants' representation at any subsequent stage. In addition, the record contains a letter, dated February 28, 2001, sent by defendants to all beneficiaries, including plaintiffs, Michael, and another sibling,[3] that was captioned "Estate of Salvatore Calcaterra" and addressed, "Dear Clients." In that letter, defendants advised the addressees of an "extremely complex" tax problem and expressed other concerns about the estate's obligations, as well as the timing and amount of future distributions from the estate. Defendants stated that, in consultation with the executor, it was "determined that we should schedule a joint meeting for the five of us."[4] Defendants also advised "that on our further review of the law, the income, and the expenses that should be allocated to principal, it is clear that the estate should sell two [NYMEX] seats in order to satisfy its obligations to pay expenses and make distributions." And defendants further suggested that the

[3]Decedent's fifth child was a minor and represented by Robin, who had been appointed as the minor's guardian. 413 N.J. Super. at 8.

[4]This letter certainly seems dispositive, at least for summary judgment purposes, on the "remoteness" aspect of the Petrillo holding.

beneficiaries might consider "purchas[ing] a seat from the estate" in light of the "belie[f] that the executor will find it necessary to sell the two seats in the very near future."

In granting summary judgment, the judge found little or no significance to this "Dear Clients" letter:

> Although [p]laintiffs allege [defendants] once addressed a letter to them, "Dear Clients," [p]laintiffs also testified that [defendant Mary Thurber] was not their attorney.[5] Accordingly, the [p]laintiffs are non-clients.
>
> [Citations to the record omitted.]

Again, we conclude that the judge's interpretation of these facts departs from both Brill and Petrillo. Even if plaintiffs acknowledged in their depositions that defendants were not their attorneys in fact, that alone is not dispositive of their legal malpractice claims because Petrillo recognizes that attorneys may, in some circumstances, owe a duty of care to non-clients.

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[5]This conclusion oversimplifies the meaning of plaintiffs' deposition testimony. For example, plaintiff Laura Higgins testified that Thurber did say at their meeting that "she represented Michael," but that she (Laura) was "not quite sure what that meant" because of the years the attorney had sent the beneficiaries information, leading Laura to conclude that she "considered her my attorney." And when asked whether she considered talking to any other professionals, "like a lawyer or accountant," Laura responded that Thurber "was my lawyer," and: "I trusted her. She was my lawyer." Plaintiff Robin Calcaterra provided similar testimony at her deposition.

The judge also determined that Petrillo's application did not compel a denial of summary judgment because plaintiffs failed to demonstrate their reliance on the alleged negligent advice. The judge based this conclusion on his determination that even if the advice was negligent, plaintiffs were powerless to do anything about Michael's decision to follow the advice, holding:

> The existence of alternatives is speculative and the [e]xecutor, who ultimately took [d]efendant[s'] advice, does not challenge it. Even if advice was obtained that [there] were alternatives to sale, what would be the result? The [e]xecutor might well continue on the same path and sell the seats. Plaintiffs had no ability to act on any advice contrary to that of [d]efendants because they lacked the authority.

First, if there is to be any interpretation or speculation about the meaning of the facts in the record, that interpretation or speculation should favor the opponent, not the movant. Brill, supra, 142 N.J. at 540. More importantly, in speculating about what plaintiffs might have done if other advice regarding the NYMEX seats had been given, the judge seems not to have considered that other, allegedly better, advice might have persuaded Michael from following the course suggested by defendants. Further, the judge appears not to have considered the possibility that plaintiffs, if better informed,

might have been able to persuade their brother to adopt a different course.

In light of the judge's mistaken application of the principles contained in Brill and Petrillo, we reverse the summary judgment entered in defendants' favor on the legal malpractice claim.

Reversed and remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.