NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4839-13T1

PETER VICINIO,

Plaintiff-Appellant,

v.

CARLUCCIO, LEONE, DIMON,
DOYLE & SACKS, LLC,

Defendants-Respondents.

Argued September 1, 2015 – Decided November 16, 2015

Before Judges St. John and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-4292-10.

Anthony F. Malanga, Jr. argued the cause for appellant.

Wendy B. Shepps argued the cause for respondents (Podvey, Meanor, Catenacci, Hildner, Cocoziello & Chattman, P.C., attorneys; Ms. Shepps, of counsel and on the brief).

PER CURIAM

In this legal malpractice matter, plaintiff Peter Vicinio appeals from a March 10, 2014 order granting summary judgment in favor of defendant, Carluccio, Leone, Dimon, Doyle & Sacks, LLC

(Carluccio), as well as the May 23, 2014 order denying plaintiff's motion for reconsideration. We affirm.

Plaintiff's mother, Philomena, lived with her husband in Kenilworth for fifty-three years. In May 2002, Philomena's husband suffered a stroke, and in July 2002, Philomena began to devise an asset protection plan. The plan included transferring the property owned by she and her husband to plaintiff and his sister, Roseann Pakay (Roseann), and alternate monthly gifting of $5500 to plaintiff and Roseann. Philomena's husband died three months after the stroke.

As her physical and mental health deteriorated, Philomena sought on several occasions to reside with Roseann. However, the change in residence did not last due to their strained relationship. Philomena eventually took up residence with plaintiff and resided with him from November 2002 until June 2006. Plaintiff purchased a home to accommodate his family and Philomena, and also undertook the responsibility of overseeing the maintenance, renovation and leasing of the Kenilworth property. During this time, plaintiff's relationship with Roseann also deteriorated.

In April 2003, Philomena executed a will bequeathing her estate to plaintiff and Roseann in equal shares. Shortly thereafter, in May 2003, Philomena transferred all of her liquid

assets to plaintiff. In June 2003, using a different attorney than the one she used to prepare and witness the April 2003 will, Philomena transferred the Kenilworth property to plaintiff.

In June 2004, Roseann initiated an action in the Superior Court, Somerset County, naming plaintiff as defendant. Roseann alleged that plaintiff was interfering with her visitation of Philomena. By that time, Philomena's physical and mental health had significantly deteriorated due to the onset of Alzheimer's disease and the degeneration of her hearing and eyesight. In June 2004, the judge in the Somerset County matter issued an order setting forth procedures the parties were to follow to allow equitable visitation. Philomena died testate on October 11, 2007.

Subsequent to Philomena's death, Roseann filed suit in the Superior Court, Ocean County, naming plaintiff as defendant and challenging the June 2003 will. The complaint alleged breach of fiduciary duty, negligent misrepresentation, fraud and unjust enrichment. Roseann sought to remove and replace plaintiff as the executor of the estate and void the inter vivos transfers of liquid assets and real estate from Philomena to plaintiff.

Carluccio represented plaintiff in the Ocean County action. At trial, Carluccio did not call as witnesses the attorneys used

by Philomena to prepare and witness the 2003 will or to transfer the Kenilworth property. In place of the "live" testimony, the parties stipulated to the submission of certifications from the two witnesses.[1] Following a three day bench trial, the probate judge found that plaintiff had exercised undue influence over Philomena and entered an order directing plaintiff to return the property and liquid assets back to Philomena's estate.

Plaintiff appealed the decision, and we affirmed. In re Estate of Vicinio, No. A-4775-08T3 (App. Div. May 10, 2010). In reaching our decision, we rejected plaintiff's claim for unjust enrichment, a theory plaintiff raised for the first time on appeal. Id. at 10.

In October 2010, plaintiff filed a legal malpractice action against Carluccio alleging as a basis for the action that Carluccio "should have known" that plaintiff "had a substantial claim for quantum meruit." Additionally, the complaint alleged that Carluccio failed to elicit testimony regarding the value added to the Kenilworth home by plaintiff, and that "key pieces of evidence were omitted" at trial in part because Carluccio opted to stipulate to certain facts presented by way of certifications rather than by live testimony.

[1] Plaintiff asserts that Carluccio failed to introduce other documentary evidence at trial.

In support of his allegations, plaintiff retained an expert who opined Carluccio deviated from the requisite standard of care by relying on certifications of two non-party witnesses, by failing to secure payment of counsel fees and costs by the estate, and by failing to assert a quantum meruit claim for the work performed and expenses incurred by plaintiff with respect to the Kenilworth property.

Carluccio moved for summary judgment. On March 10, 2014, following oral argument and supplemental submissions by the parties, the motion judge granted the motion in a comprehensive written opinion. Plaintiff filed a motion for reconsideration, which was denied in an oral decision on May 23, 2014. This appeal followed.

On appeal, plaintiff raises the following arguments:

POINT I

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

A. The trial court erred in ruling that plaintiff's liability expert's opinion was a net opinion.

B. The trial court erred in ruling that plaintiff failed to show that defendant's breach was the proximate cause of the damages sustained by plaintiff.

C. The trial court erred in ruling that plaintiff failed to

establish proximate cause for defendant's failure to present the quantum meruit claim at trial.

POINT II

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION.

A trial court must grant a summary judgment motion if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.; see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). On appeal, we employ the same summary judgment standard. Townsend v. Pierre, 221 N.J. 36, 59 (2015).

If there is no factual dispute, and only a legal issue to resolve, the standard of review is de novo and the trial court rulings "are not entitled to any special deference." Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). However, we review a trial court's decision regarding the

admissibility of expert evidence for an abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008). The abuse of discretion standard applies to evidentiary rulings regarding the evaluation, admission or exclusion of expert testimony. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010); State v. Torres, 183 N.J. 554, 572 (2005).

A claim for legal malpractice is "a variation on the tort of negligence." Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 179 N.J. 343, 357 (2004). To establish a prima facie case of legal malpractice, a plaintiff must demonstrate: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney to the plaintiff; (2) the breach of that duty by the attorney; and (3) such breach was the proximate cause of the damages sustained by the plaintiff. See, e.g., Jerista v. Murray, 185 N.J. 175, 190-91 (2005); Kranz v. Tiger, 390 N.J. Super. 135, 147 (App. Div.), certif. denied, 192 N.J. 294 (2007). The proximate causation prong is satisfied when the attorney's negligent conduct is a substantial contributing factor in causing the client's loss. Lamb v. Barbour, 188 N.J. Super. 6, 12 (App. Div. 1982) (citation omitted), certif. denied, 93 N.J. 297 (1983).

We commence our discussion with the motion judge's determination that plaintiff's expert's report constituted a net

opinion. This court has defined a net opinion as one based on speculation or mere possibilities. Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 11 (App. Div. 2001); Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 (App. Div.), certif. denied, 122 N.J. 333 (1990). Such an opinion is inadmissible. Brach Eichler, supra, 345 N.J. Super. at 11. A net opinion violates the requirement set in N.J.R.E. 703 that an expert's opinion must be based on "facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial." Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 78-79 (App. Div. 2007) (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002)).

A plaintiff in a legal malpractice case has an affirmative duty to present expert testimony, when required, on the issue of breach. Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 14 (App. Div.), certif. denied, 188 N.J. 489 (2006). An expert's opinion in a legal malpractice action must be based "on standards accepted by the legal community and not merely the expert's personally held views." Carbis, supra, 397 N.J. Super. at 79. The expert must offer "some evidential support . . . establishing the existence of the standard." Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999). The expert generally

must "'explain a causal connection between the [alleged malpractice] and the injury or damage allegedly resulting therefrom.'" Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102 (App. Div. 2001) (quoting Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)). In other words, the expert must "'give the why and wherefore of his or her opinion, rather than a mere conclusion.'" Ibid. (quoting Jimenez v. GNOC Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996)).

Here, in finding the expert opinion was a net opinion the motion judge noted the expert's exclusive reliance on his personal experience and the failure to cite case law or recognized standards:

> While there is no question that [the expert] is well qualified, the fact that he would have tried the case differently is of little moment. His personal disdain for [Carluccio]'s trial tactics does not morph into the deviation from accepted practice which is the predicate for proving malpractice. Indeed, while the expert purports to be prescient, it is telling that neither [of the proposed witnesses] were ever deposed in this matter to discern what their testimony would have been before [the judge]. We are thus left to speculate, which is, in and of itself, a fundamental flaw. Because [the expert's] opinion is premised upon his personally held views and there is no factual evidence to support that personal opinion, the [c]ourt is constrained to find that his opinion is a net opinion.

The judge further held that the proffered opinion failed to explicate how the alleged breach of Carluccio's duty of care to plaintiff was a proximate cause of his injuries. In particular, the judge relied on our decision affirming plaintiff's direct appeal, and concluded:

> it is incongruous for any trier of fact to find that, had [the proposed witnesses] testified on the witness stand, the outcome of the previous litigation would have been different. Although [the expert] opined that "had this been done, [plaintiff] would have overcome the presumption at trial," once again, there is no factual evidence to support that assertion. In fact, the factual evidence indicates that [the judge in the Ocean County action] primarily relied on (1) [p]laintiff's own testimony as to his mother's mental status and (2) the "suspicious circumstances" as to the transfers of the properties in reaching its decision.

We are in agreement with the motion judge that the opinion did not provide the requisite "why" or "wherefore." See Buckelew, supra, 87 N.J. at 524. The opinion did not recite why Carluccio's tactical decision to utilize uncontroverted certifications fell outside the accepted standards in the legal community. See Carbis, supra, 397 N.J. Super. at 79. In its place, the opinion was premised upon the author's personal standard without resort or reference to "evidential support," Taylor, supra, 319 N.J. Super. at 180, or "explain[ing] a causal connection" between Carluccio's alleged malpractice and

plaintiff's resultant injuries. Kaplan, supra, 339 N.J. Super. at 102. The opinion provided anecdotal assertions regarding the author's personal disdain for the use of certifications and his speculation as to how the probate matter would have resulted differently had the witnesses testified. Again, as we have held, "[s]upporting data and facts are vital" to an expert opinion that "'is seeking to establish a cause and effect relationship.'" Myrlak v. Port Auth. of N.Y. & N.J., 302 N.J. Super. 1, 9 (App. Div. 1997) (quoting Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 49 (App. Div. 1990), aff'd as mod. on other grounds, 125 N.J. 421 (1991)), rev'd in part and remanded on other grounds, 157 N.J. 84 (1999). Here, no such data or facts were offered by plaintiff's expert.

With respect to plaintiff's assertion that Carluccio should have asserted a quantum meruit claim, the judge found there was "at least a genuine issue of material fact as to whether [d]efendant breached a duty to [p]laintiff . . . ." However, the judge found there was insufficient evidence to establish that "any such breach was the proximate cause of [p]laintiff's damages." The judge again relied on our decision in the Ocean County action, where we held in part that plaintiff failed to prove he "expected remuneration for his labor and mileage at the time he performed the services of conferred a benefit[,]" and

that no arrangement existed contemplating payment for such labor and mileage and "[p]laintiff undertook the services of his own volition with no reasonable expectation of payment . . . ." See Vicinio, supra, slip op. at 10-11. The motion judge concluded, "it cannot be reasonably expected that the outcome of the trial before [the judge in the Ocean County action] would have been different, even if [d]efendant articulated the theory of quantum meruit at trial in conjunction with the proofs which were, in fact, reviewed below."

The motion judge also determined that the proofs failed to establish the elements of a quantum meruit claim. In our decision on the direct appeal, we held:

> However, [plaintiff] failed to articulate what amount of loss, if any, he sustained or to submit any proofs for the court to have calculated a reasonable quantum of compensation. Nor did [plaintiff] articulate to the trial court the theory of unjust enrichment that he now raises on appeal. [Plaintiff] has failed to convince us that a remand on this issue is in order.
>
> . . . To establish unjust enrichment, the proponent must show both that a benefit was bestowed, and that retention of that benefit without payment would be unjust. Assocs. Commercial Corp. v. Wallia, 211 N.J. Super. 231, 243 (App. Div. 1986). [Plaintiff] has failed to articulate what benefit, if any, Roseann or the estate gained other than the generalized allegation that the property has appreciated in value because of his labor. Additionally, [plaintiff's] failure to show that he

> expected remuneration for his labor and mileage at the time he performed the services or conferred a benefit unequivocally precludes the argument that Roseann or the estate has been unjustly enriched. See VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554 (1994); Assocs. Commercial, supra, 211 N.J. Super. at 244 (App. Div. 1986). [Plaintiff] was reimbursed for his out-of-pocket costs of materials by the offset of rent. Although Roseann confirmed that her brother performed significant labor on the property, there never existed any arrangement whereby appellant would be paid for such labor or reimbursed mileage. It is clear [plaintiff] undertook the services of his own volition with no reasonable expectation of payment and no demand for payment from Philomena or Roseann. Accordingly, [plaintiff] is now precluded from asserting his theory of unjust enrichment.
>
> [Vicinio, supra, slip op. at 10-11.]

Accordingly, because plaintiff could not have recovered under a theory of quantum meruit, he cannot demonstrate that he suffered damages or that Carluccio's alleged malpractice was a "substantial factor" contributing to any alleged damage. See, e.g., Lamb, supra, 188 N.J. Super. at 12; Froom v. Perel, 377 N.J. Super. 298, 313 (App. Div.) (citation omitted), certif. denied, 185 N.J. 267 (2005).

Turning to the judge's denial of plaintiff's motion for reconsideration, we will not disturb a trial judge's denial of a motion for reconsideration absent an abuse of discretion. Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010).

Applying that standard, we discern no reason to disturb the judge's decision.

Affirmed.