NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1753-14T4

BARBARA SHAPIRO,

Plaintiff-Appellant,

v.

MARK RINALDI, ESQ.,

Defendant-Respondent.

Argued February 23, 2016 – Decided March 18, 2016

Before Judges Hoffman, Leone and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-6288-13.

Kathleen F. Beers argued the cause for appellant (Westmoreland, Vesper, Quattrone & Beers, P.A., attorneys; Ms. Beers, on the briefs).

John L. Slimm argued the cause for respondent (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Mr. Slimm, Dante C. Rohr and Jeremy J. Zacharias, on the brief).

PER CURIAM

Plaintiff Barbara Shapiro appeals from the dismissal of her legal malpractice claim against defendant Mark Rinaldi, Esq. via summary judgment. Plaintiff argues there were genuine issues of material fact to withstand summary judgment. We affirm.

I.

We discern the following facts from the motion record, viewed in the light most favorable to plaintiff as the non-moving party. On January 19, 2013, plaintiff tripped and fell when she stepped in a pot hole near a street corner in Ventnor City, after exiting a car on a dark night. Plaintiff fell on her left side, and experienced extreme pain in her left shoulder. She called the emergency room, and was instructed to ice her shoulder that night at home. The following day, plaintiff went to a local medical center where an x-ray indicated that her shoulder had separated. She was provided a sling and a "strong prescription for pain," and advised to see an orthopedic doctor. Plaintiff then saw an orthopedist, who recommended physical therapy. After completing therapy, there were many activities plaintiff still could not do easily.

On March 1, 2013, forty days after her injury, plaintiff decided to contact an attorney as her shoulder pain continued. On that date, plaintiff called defendant's office, as defendant had represented plaintiff's companion in 2012, in an unrelated landlord-tenant matter. When plaintiff called the office, she spoke with Nancy, defendant's secretary. Plaintiff asked Nancy if defendant handled personal injury cases involving trip and falls in the street; Nancy responded "absolutely," and suggested

that plaintiff e-mail defendant photos she had taken of the area where she fell. Plaintiff subsequently e-mailed four photos (in four separate e-mails) to "Nancy M." The fifth e-mail to "Nancy M." said:

> Hi Nancy:
>
> Did you get photos OK? New e-mail and I'm not as good with it yet.
>
> Barbara Shapiro

One minute later, Nancy responded:

> I got them Barbara. I'm going to print them out and give them to Mark.
>
> He's going to give you a call to discuss it.

Following this exchange, plaintiff never received further contact from Nancy or any contact from defendant. According to plaintiff, she "thought they would be investigating the circumstances, the street, taking a look, sending somebody to photograph it." After almost three months of waiting, at some point in May, plaintiff decided to contact another attorney. Plaintiff noted "[defendant] wasn't calling me back and I was still hurting and I wanted to pursue this and so I decided to look into it, get legal advice elsewhere."

On May 30, 2013, plaintiff made contact via e-mail with another attorney. On June 3, 2013, she spoke with the attorney, who explained to her for the first time that there was a statute

that set a time limit for filing a tort claim notice with the City. Plaintiff testified that she was "shocked" when she learned about these requirements. The attorney referred plaintiff to another attorney. On June 7, 2013, plaintiff contacted this attorney, and learned that a notice of motion seeking permission to file "a late notice claim"[1] had to be filed in order to pursue a claim against the City. Such a motion was filed on plaintiff's behalf on August 16, 2013, with plaintiff providing a certification of relevant events and facts following her accident, including her contact with defendant's secretary, the fact that she never spoke with defendant, and that she did not learn of the requirement to file a tort claim notice until June 3, 2013.

On September 12, 2013, the Law Division denied plaintiff's motion to file a late notice of claim, concluding that plaintiff did not exercise reasonable diligence in pursuing her claim. Notwithstanding plaintiff's lack of knowledge of the ninety-day time limit for filing a tort claim notice, N.J.S.A. 59:8-8, the court ruled that plaintiff failed to demonstrate the "extraordinary circumstances" required by N.J.S.A. 59:8-9 to allow her to file a late notice of claim.

[1] N.J.S.A. 59:8-9.

At her deposition, Nancy acknowledged providing plaintiff her e-mail address and seeing the photos plaintiff sent; however, she related she had been working on something else at the time, and neglected to print the photos or advise defendant of plaintiff's claim. Nancy explained that the procedure in place for matters similar to this case is to "print the pictures, type up the information on a memo and give it to Mark, put it on his desk." However, Nancy admittedly failed to follow this procedure, both by failing to write down the telephone message for defendant, and by failing to type up a memo and print the photographs for defendant.

At his deposition, defendant stated he never had a file for plaintiff's case because he never knew about her accident until he received correspondence on October 9, 2013, informing him of the malpractice action filed against him. Defendant testified as to the procedure in place at his law office – a solo practice – to commence a new personal injury case:

> If I'm in the office and a phone call comes in and it is whether – whether it's a new client that I've never heard of before or an existing client and if it's a new personal injury case, Nancy knows that, especially with personal injury, if I'm in the office, I want to speak to the person and I always do.
>
> . . . .

> [For a new personal injury case,] [s]he either takes notes or she types directly on the computer and gives me a typed memorandum.

After completion of discovery, defendant filed the motion for summary judgment under review. Following oral argument, Judge Nelson C. Johnson granted defendant's motion and set forth his reasons in an eight-page written decision. The judge cited the absence of any evidence that defendant ever "knew or should have known that [p]laintiff relied on him for legal representation" in concluding that there was no attorney-client relationship between the parties, and thus "no duty owed by [d]efendant to [p]laintiff."

II.

Plaintiff argues on appeal that Judge Johnson erred by failing to view the facts in the light most favorable to plaintiff, by holding that there was no implied attorney-client relationship, by holding that the stringent standard under the tort claims act did not require a higher standard for the legal professional, and by finding that defendant was not liable for the actions of his employee. We disagree.

We review the entry of summary judgment de novo, applying the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Summary judgment is mandated where "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). We determine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact . . . ." Ibid.

"[T]he usual principles of negligence apply to legal malpractice." Conklin v. Hannoch Weisman, 145 N.J. 395, 416 (1996). "The requisite elements of a cause of action for legal malpractice are: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) the breach of that duty; and (3) proximate causation." Ibid. (citation and internal quotation marks omitted); accord Jerista v. Murray, 185 N.J. 175, 190-91 (2005); Froom v. Perel, 377 N.J. Super. 298, 310 (App. Div.) ("The existence of an attorney-client relationship is, of course, essential to the assertion of

a cause of action for legal malpractice."), certif. denied, 185 N.J. 267 (2005). The plaintiff bears the burden of establishing each element of a legal malpractice claim. Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996).

When there is conflicting evidence about those elements essential to an attorney-client relationship, the existence of the relationship is an issue of fact. See Froom, supra, 377 N.J. Super. at 311-12 (holding existence of attorney-client relationship could not be determined as a matter of law due to conflicting evidence). On the other hand, "[w]here the predicate facts are not in dispute, the existence of an attorney-client relationship presents an issue of law for the court[.]" Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice, § 35.15 at 1250 (2009). See also Estate of Spencer v. Gavin, 400 N.J. Super. 220 (App. Div.) (vacating trial court decision and finding, based on factual record, that the defendant had attorney-client relationship with the plaintiff), certif. denied, 196 N.J. 346 (2008).

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or

> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services[.]
>
> [Herbert v. Haytaian, 292 N.J. Super. 426, 437 (App. Div. 1996) (quoting Restatement of the Law Governing Lawyers (Proposed Final Draft No. 1) § 26 (1996)).]

"'[R]epresentation is inherently an aware, consensual relationship' . . . founded upon the lawyer affirmatively accepting a professional responsibility." In re Palmieri, 76 N.J. 51, 58 (1978) (citation omitted). Parties typically establish the relationship by express agreement. The relationship can also be implied by the parties' conduct. See id. at 58-59 (recognizing that attorney's "acceptance need not necessarily be articulated, in writing or speech but may, under certain circumstances, be inferred from the conduct of the parties"); Herbert, supra, 292 N.J. Super. at 436 (stating that the relationship is created when the "prospective client requests the lawyer to undertake the representation, the lawyer agrees to do so and preliminary conversations are held between the attorney and client regarding the case").

Applying these principles, we conclude that Judge Johnson correctly determined that there were no genuine issues of material fact in dispute. The record lacks any evidence of an attorney-client relationship based upon an express agreement.

As Judge Johnson noted, "Defendant never spoke with or communicated in any way with [p]laintiff." Further, plaintiff never came to defendant's office nor did defendant ever send plaintiff a retainer agreement.

The record also lacks sufficient evidence of an attorney-client relationship based upon implication to create a genuine issue of material fact. For attorney-client relationships created by implication, the "common thread" in the case law is the "reliance by the 'client' on the professional skills of the attorney coupled with the attorney's awareness of that reliance and tacit acceptance of it." Kevin H. Michels, New Jersey Attorney Ethics § 13:4-1 at 258 (2016). Both elements of this "common thread" are absent here. First, any "reliance by the client" here was unreasonable. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 180-81 (2005) (discussing reasonable reliance on representations). As plaintiff conceded at appellate oral argument, Nancy never stated that defendant would take the case in her telephone conversation with plaintiff. When plaintiff received no contact, response, or acknowledgement from defendant, after Nancy advised her that "[h]e's going to give you a call to discuss it[,]" plaintiff should have realized that her claim was not being pursued. Additionally, defendant was not aware of plaintiff's alleged reliance, because of

Nancy's failure to provide him with any information about plaintiff's case.

Plaintiff also submitted an expert report in support of her claim. Plaintiff's expert relied, in part, on Rule of Professional Conduct (RPC) 5.3(b) for the proposition that defendant "had a duty to 'make reasonable efforts to ensure that [(non-lawyer assistant/legal secretary's)] person's conduct is compatible with the professional obligations of the lawyer; . . ." Without citation to any case law or other authority, plaintiff's expert interpreted RPC 5.3(b) to require defendant to train his staff to be in a position to alert new potential clients of important rights, like an impending expiration of a time limitation.

However, the opinion of plaintiff's expert ignores the fact that a lawyer may not employ a non-lawyer assistant to advise clients with respect to their legal rights. Michels, supra, § 40:11-2; see also Advisory Comm. Op. 296 (Supp.) (Feb. 12, 1976). Informing a potential client of deadlines to file a claim would clearly constitute "advis[ing] clients with respect to their legal rights." See N.J. Comm. on Unauth. Pract. Op. 41 (Oct. 25, 2004) ("the practice of law includes . . . the giving of legal advice with regard to any document or matter.").

Moreover, Judge Johnson specifically found that defendant did make reasonable efforts to ensure that his secretary complied with his professional obligations:

> [G]iven all the circumstances — a solo practitioner with a single, unlicensed, lay assistant — that [d]efendant did make reasonable efforts to ensure that his secretary complied with his professional obligations. [Defendant's] office procedures require[] his secretary to gather basic information and put the call through to him if he is in the office. The secretary is also required to take notes and provide [defendant] with a typed memorandum of a potentially new personal injury case. These office procedures are reasonable for a solo practitioner. It is unrealistic to expect more in such a law practice.

Even assuming, arguendo, that defendant did violate RPC 5.3(b), our Supreme Court has concluded that a violation of the RPCs by an attorney will not, standing alone, create a cause of action for damages in favor of a person allegedly aggrieved by that violation. Baxt v. Liloia, 155 N.J. 190, 197, 201 (1998). Rather, the RPCs were intended to regulate lawyer conduct through the disciplinary process, not to serve as a basis for civil liability. Id. at 197-98.

Plaintiff further argues that "[s]ince the ninety-day statutory notice [requirement] under Title 59 is uncommon and mostly unknown to the public, public policy dictates a higher standard for attorneys to notify potential clients of this very

stringent" time limit. Plaintiff fails to cite any case law or other authority in support of this argument. In the absence of an attorney-client relationship, express or implied, the argument lacks merit.

In the absence of an attorney-client relationship, express or implied, there exists no basis for holding defendant liable for malpractice in this case. It is undisputed that defendant had no knowledge of plaintiff's accident. The fact that plaintiff and defendant had dealings in an unrelated landlord-tenant matter in the past did not commit him to represent her in this case. The record clearly indicates that defendant was entirely unaware of plaintiff's interest in retaining him.

Finally, we reject plaintiff's argument that defendant should be held vicariously liable for his secretary's oversight. Plaintiff again fails to cite any case law or other authority in support of this argument. Defendant's secretary is not an attorney and owed no duty to plaintiff. See Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013). Without a basis to hold defendant's secretary liable to plaintiff, there exists no basis for finding defendant liable based upon respondeat superior.

Affirmed.