Analysis
As of: Jun 26, 2013

MERRICK WILSON, Plaintiff-Appellant, and PRESIDENTIAL HILL, LLC, and PENNINGTON HILLS, LLC, Plaintiffs, v. ROBERT A. GLADSTONE, ESQUIRE, Defendant, and CHARLES J. CASALE, JR., ESQUIRE, Defendant-Respondent.

DOCKET NO. A-1774-11T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2013 N.J. Super. Unpub. LEXIS 1200

April 17, 2013, Argued
May 17, 2013, Decided

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PRIOR HISTORY: [*1]

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1089-09.
Greenwood v. Mayor & Twp. Comm. of Hopewell, 2008 N.J. Super. Unpub. LEXIS 275 (App.Div., Aug. 14, 2008)

COUNSEL: Merrick Wilson, appellant, argued the cause Pro se.

John L. Slimm argued the cause for respondent (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Mr. Slimm, on the brief).

JUDGES: Before Judges Axelrad, Sapp-Peterson and Happas.

OPINION

PER CURIAM

Plaintiff Merrick Wilson appeals from summary judgment dismissal of his legal malpractice claim against defendant Charles J. Casale, Jr., the third attorney who unsuccessfully represented him and other property owners in a challenge to Hopewell Township's zoning ordinance. He argues, in part: (1) there were material issues of fact as to the authority of the steering committee to bind all plaintiffs, as to Casale's legal obligations towards him individually, and as to whether Casale used reasonable judgment in preparing and trying the case; (2) the judge erred in finding Wilson assigned decision-making authority to the steering committee, in dismissing his expert report as a net opinion, in finding he did not present a prima facie case for legal malpractice, and in denying him a jury trial. We are not persuaded by Wilson's arguments and affirm.

I.

In April [*2] 2009, Wilson, individually and on behalf of Presidential Hill, LLC, and Pennington Hills,

LLC, of which he was sole shareholder, filed a legal malpractice complaint against Casale and his predecessor, Robert A. Gladstone, for their work in the underlying case of *Greenwood v. Mayor & Township Committee of Township of Hopewell*, Nos. MER-L-3594-01 and MER-L-3597-01 (Law Div. Oct. 3, 2006), *aff'd, No. A-1910-06T2, 2008 N.J. Super. Unpub. LEXIS 275 (App. Div. Aug. 14, 2008), certif. denied, 197 N.J. 15, 960 A.2d 745 (2008)*. Casale and Gladstone filed responsive pleadings. Casale moved for summary judgment, after which plaintiffs and Gladstone filed a stipulation of dismissal with prejudice.

On November 16, 2011, Judge Darlene Pereksta granted summary judgment in favor of Casale. Her ruling was memorialized in an order of November 18, 2011 dismissing the complaint. Wilson appealed.

II.

Wilson and his entities own vacant land in Hopewell totaling approximately eighty-eight acres identified as Block 75, Lot 1.02, Block 72, Lot 1.12, and Block 65, Lot 13, that he is presumably holding for development. In 2002, Hopewell adopted an ordinance that established Mountain Resource Conservation and Valley Resource Conservation zoning districts that increased [*3] the minimum lot requirements and affected Wilson's properties. Plaintiffs and other property owners known as Hopewell Valley Association of Citizens for Reasonable and Equitable Zoning (HV ACREZ) challenged the down-zoning accomplished by the creation of these districts, asserting it was driven entirely by water resource concerns that were unfounded, ill-founded, and beyond Hopewell's zoning authority.[1] Arthur Sypek was the plaintiffs' first attorney but he withdrew in May 2004, after which Gladstone was substituted in for all the plaintiffs; in July 2004 he signed a retainer agreement with Wilson.[2]

1 By letter Wilson requested his suit be consolidated with HV ACREZ' suit.

2 Neither party provided Gladstone's or Casale's retainer agreements in their appendix.

Gladstone stated in his deposition that a "steering committee" of the plaintiffs was formed prior to the time he entered the case. Wilson's malpractice expert Andrew Rubin, Esquire, acknowledged that Wilson was in agreement with the other property owners in appointing a steering committee to act on behalf of all the plaintiffs. The steering committee was authorized to receive and disburse funds and pay for litigation on the signature [*4] of two members of the steering committee. This included making "decisions relating to the collection and retention of funds, approval of invoices for legal services, expert witnesses, exhibits and transcripts and approval of legal strategy." The retainer agreement also stated that Wilson was assessed $1640 for his share of cost of the lawsuit.

On July 27, 2004, Wilson wrote to Gladstone and stated:

> [T]he retainer agreement you asked me to sign on behalf of myself and as a corporate officer of Presidential Hill L.L.C. is being *done with the explicit understanding that my responsibility for payment for your services is only being done as a shared member of the group HV ACREZ.* All of your services will be billed to HV ACREZ, not to Merrick Wilson or Presidential Hill L.L.C.; and HV ACREZ will be paying for your services, not Merrick Wilson or Presidential Hill L.L.C.
>
> [(Emphasis added).]

Thomas Niederer certified that it was agreed the plaintiff group "would act by consensus and specifically through a Steering Committee which would act as liaison with counsel[,]" of which he was the head and acted as coordinator with counsel. He remembered Wilson being present at some of the steering committee [*5] meetings and noted that Wilson could have opted out if he did not agree with the decisions of the group. Another member of the steering committee, John Bleimaier, Esquire, testified similarly in depositions, commenting that Wilson never stated he wanted to go his own way. Wilson, however, posited that the steering committee's task was merely to handle bookkeeping and specifically how to pay counsel. He claimed there were no powers delegated to the committee, and it did not have authority to act on behalf of any individual litigant.

Niederer certified that the group decided not to pursue an "as-applied" challenge to the ordinance. That decision was reached by a consensus of the steering committee when Gladstone was present.

In January 2006, Wilson sent a letter to the "ACREZ litigants," suggesting our decision in *Bailes v. Township of East Brunswick, 380 N.J. Super. 336, 882 A.2d 395 (App. Div.), certif. denied, 185 N.J. 596, 889 A.2d 443 (2005)* be used as a roadmap, and recommending Casale replace Gladstone as counsel. Casale was retained in February and picked up the file from Gladstone, which contained a 2004 report from Thomas Dwyer, a hydrogeologist who had been retained by the plaintiffs.

In depositions Casale [*6] stated he had a separate retainer agreement with each person he represented in the lawsuit, including Wilson. Wilson acknowledged in his interrogatory answers that he entered into a retainer agreement with Casale on February 15, 2006. Casale testified that there was no delegation of authority in the retainer agreements and they had been worked out before Casale became involved in the case, nor was there any specific language about a steering committee. Pursuant to everyone's understanding and prior practices, however, the steering committee worked by consensus, and Casale primarily passed information through Niederer, the head of the committee.

Niederer, Bleimaier, and Casale agreed that Casale had urged the steering committee to retain Dwyer for trial, but the group reached a consensus not to spend the additional money, which included as minimum costs a $2880 preparation fee and a $15,000 retainer towards testimony/court time, incidentals, and travel. The committee did, however, agree to retain Dennis Hudacsko, a planner, who testified as their expert at trial. Casale further explained that by the time he got into the case, discovery was complete, expert reports had been obtained and [*7] exchanged, and money was a big problem. The court adjourned the trial date to May to give him sufficient time to prepare the case.

Specifically, on March 16, 2006, Casale sent a letter to "all plaintiffs" advising of the deadline for submission of briefs and witness lists and the May 15 peremptory trial date. He informed them it was necessary to have the assistance of the hydrogeology and planning experts to prepare for trial, who required retainers for continued services. He requested the plaintiffs promptly contact Niederer to make their contributions. By letter of March 28 to all plaintiffs, Casale detailed the strategy he, Niederer, Bleimaier, and two other individuals decided upon at a meeting on March 22 and of the decision not to present Dwyer based on the determination that it was "not worthwhile to proceed [with] the argument that the down-sizing is not supported by the desire to conserve water resources in the valley and mountain zones." Bleimaier confirmed that he remembered receiving this letter and it accurately summarized the decision of the group.

In depositions Casale elaborated that Wilson was at some of the meetings where they discussed the case, and Wilson did not [*8] contact him in response to the March 28 letter. Moreover, subsequent to being advised of the group's consensus that fiscal constraints precluded retaining the hydrogeologist as a trial witness, Casale told Wilson and others that it was practically impossible to prove the case without such a witness. It is undisputed Wilson never offered to pay Dwyer's fees. In fact, Wilson never made a payment beyond his initial assessment of $1640 despite several letters advising him that he owed an additional $4770 as his share of fees and costs of the litigation. Casale prepared for trial and produced as his expert witness the planner authorized and paid for by the steering committee.

Judge Linda Feinberg held an eleven-day bench trial in May and June 2006, during which Hudacsko, Niederer, and Wilson testified for the plaintiffs. Hopewell presented the testimony of planners, an engineer, and a hydrogeologist. The judge found in favor of Hopewell and held that the challenged ordinances were a valid exercise of authority under the Municipal Land Use Law, which we affirmed.

III.

Rubin, Wilson's expert in the legal malpractice case, opined that Casale's[3] deviation from the legal standard of care was his [*9] failure to present the testimony of a hydrogeologist regarding the "as applied" challenge and the broad challenge to the ordinance, which was a proximate cause of the dismissal of the plaintiffs' underlying case against Hopewell. He maintained that mere cross-examination of Hopewell's experts was insufficient to satisfy the burden of proof regarding water recharge and damages values. Rubin opined that if the use of a hydrogeologist were a cost issue, the cost should have been budgeted and escrowed, and it was Casale's responsibility to inform the plaintiffs and oversee the process. Wilson also presented expert reports as to the issue of damages. Casale presented competing expert reports by Lewis Goldshore, Esquire.

3 Rubin included Gladstone in the analysis, but we omit his name as it is not relevant to this appeal.

In her oral opinion granting summary judgment in favor of Casale, Judge Pereksta found Wilson was a member of the steering committee of the plaintiffs' group in the underlying case, which agreed to operate by consensus, and "his vote as far as how to handle that litigation on behalf of the plaintiffs in that matter apparently was not in sync with the majority vote." She summarized [*10] Wilson's position that the underlying litigation failed because Casale committed malpractice by failing to produce expert testimony and to call the Department of Environmental Protection (DEP) officials as witnesses at trial. Affording Wilson all favorable inferences, *Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995)*, the judge found no grounds for the malpractice claim and no showing of a breach of a duty of a standard of care.

Specifically the judge noted that Wilson did not allege he was unaware of the decision of the steering committee but, rather, Wilson's premise was that he disagreed with that decision. Nor was there anything in the record that Wilson was unaware of "how this steering committee was to operate and how this case was going to be prosecuted." Additionally, the record was devoid of any testimony or evidence of Wilson notifying Casale that he wanted to proceed separately from the HV ACREZ plaintiffs or offering to personally pay the hydrogeologist's expenses to testify. Judge Pereksta concluded that Wilson's current position was essentially "Monday morning quarterbacking." She further determined as a matter of law that Casale was representing the group [*11] of plaintiffs who had formed a steering committee and agreed to act by consensus, and thus he did not have an independent obligation to go to each of the plaintiffs to make sure they were on board with the trial decisions or to represent each individually as they so chose.

The judge also found it speculative that subpoenaing DEP officials to testify on the plaintiffs' behalf at the underlying trial would necessarily have produced a favorable outcome.

IV.

On appeal, Wilson argues:

I. APPELLANT WAS A SEPARATE PLAINTIFF IN THE UNDERLYING CIVIL ACTION AND NEVER ASSIGNED DECISION-MAKING AUTHORITY TO ANY OTHER INDIVIDUAL OR STEERING COMMITTEE AS TO THE PRODUCTION OF EXPERT WITNESSES OR EXPERT REPORTS IN DEFENSE OF CLAIMS.

II. THE LOWER COURT COMMITTED AN ERROR OF LAW AND/OR ABUSE OF DISCRETION BY ARBITRARILY DISMISSING THE POTENTIAL TESTIMONY OF NJDEP OFFICIALS.

III. THE LOWER COURT COMMITTED AN ERROR OF LAW AND/OR ABUSE OF DISCRETION BY CONCLUDING THAT CASALE RELIED UPON THE STEERING COMMITTEE TO MAKE DECISIONS FOR FINANCIAL REASONS, AND THAT THIS DOES NOT DEMONSTRATE A BREACH OF THE STANDARD.

IV. THE LOWER COURT COMMITTED AN ERROR OF LAW AND/OR ABUSE OF DISCRETION BY GRANTING SUMMARY JUDGMENT [*12] TO THE DEFENDANTS' MOTION DESPITE THERE BEING GENUINE ISSUE OF MATERIAL FACTS IN DISPUTE.

V. THE LOWER COURT COMMITTED AN ERROR OF LAW AND/OR ABUSE OF DISCRETION BY DISMISSING THE PLAINTIFFS' EXPERT REPORT AS A NET OPINION.

VI. PLAINTIFFS ASSERT A PRIMA FACIE CLAIM FOR LEGAL MALPRACTICE.

VII. CAUSATION IS A FACTUAL MATTER FOR THE JURY.

VIII. THE LOWER COURT

COMMITTED AN ERROR OF LAW AND/OR ABUSE OF DISCRETION BY DENYING THE PLAINTIFF A RIGHT TO A TRIAL BY JURY IN ACCORDANCE WITH THE *UNITED STATES CONSTITUTION, SEVENTH AMENDMENT*.

When reviewing the grant of summary judgment, we apply the same standard as the trial court. *Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167, 704 A.2d 597 (App. Div.), certif. denied, 154 N.J. 608, 713 A.2d 499 (1998)*. We first decide whether there was a genuine issue of fact, and if there was not, we decide whether the trial court's ruling on the law was correct. *Ibid.* Additionally, "[b]are conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." *U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400, 170 A.2d 505 (App. Div. 1961)*. The legal conclusions of the trial court are [*13] reviewed de novo, without any special deference. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995)*.

We first dispose of Wilson's claim in Issue IV that there were numerous contested material facts that preclude granting summary judgment in Casale's favor, essentially being the allegations in his complaint. Specifically, he claims he was an individual plaintiff in the underlying suit, he was never informed by Casale that he was going to trial without experts, he implored Casale to obtain a hydrogeologist, Casale never presented him with a retainer agreement that specifically noted decision-making authority was assigned to a steering committee, Casale committed legal malpractice, there was no financial reason why Dwyer or a representative of the DEP did not testify at trial, one of his properties fit the roadmap in *Bailes* for an "as applied" challenge, *Bailes* was a clear roadmap for Casale to follow, and Niederer's and Bleimaier's testimony was of questionable weight and reliability. These accusations are merely bald allegations or self-serving assertions which are insufficient to create a question of material fact to defeat summary judgment. *See Puder v. Buechel, 183 N.J. 428, 440-41, 874 A.2d 534 (2005)*; [*14] *Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323, 787 A.2d 948 (App. Div. 2002)*.

The case was ripe for summary judgment and Judge Pereksta's rulings were correct as a matter of law as addressed in connection with Wilson's other points. We similarly reject Wilson's final argument that he was constitutionally entitled to a jury trial. In *Brill*, the Supreme Court held, "the right to a jury trial has never prevented our courts from granting summary judgment in an appropriate case[.]" *Supra, 142 N.J. at 537*.

We next address Wilson's first challenge to the authority of the steering committee. While it is not clear from the record which individuals were on the steering committee or whether Wilson was one of them for all or part of the time, it is clear he attended a number of meetings where the steering committee made decisions. Further, in his letter to Gladstone, Wilson identified himself as a member of HV ACREZ and stated that his responsibility for payment for services was as a shared member of the group.

In joining the HV ACREZ group, consolidating his case with theirs before Judge Feinberg, participating in strategy sessions, and testifying on behalf of the plaintiffs in the underlying trial, [*15] Wilson was not entitled to individual legal representation by Casale distinct from the other plaintiffs. While the parties have not included any of the retainer agreements in their appendices, it is clear Casale made decisions on how to proceed with the consolidated case based on discussions with the steering committee and the consensus of the plaintiffs. Wilson acknowledged in his deposition he was aware that if he disagreed with the opinion of the other plaintiffs, he had the right to "de-consolidat[e] [his] case from the other case," explore getting other counsel, or actually retain someone other than Casale. He further acknowledged, however, that there was no point after February 2006 that he took any of those steps. Nor did he offer to individually fund Dwyer's litigation costs until the plaintiffs lost the underlying case and he needed to find a scapegoat. Thus, even affording Wilson all favorable inferences, his conduct constituted a de facto assignment of decision-making authority to the steering committee and there was no legal impediment to Casale's reliance on the consensus of that committee. Wilson's reliance on the Rules of Professional Conduct, the New Jersey Constitution, [*16] and *Tax Authority, Inc. v. Jackson Hewitt, Inc., 187 N.J. 4, 898 A.2d 512 (2006)* is misplaced because Casale did not settle the case nor was this a class action.

Wilson's second claim of malpractice by Casale was not subpoenaing DEP personnel to testify at trial that Hopewell used improper methodology to support its conclusions as to the availability of water for residential development on one or two acre lots. Wilson relied, in part, on a November 21, 2001 letter from Karl Muessig, a DEP Geologist, to Hopewell's Planning Board, enclosing a review of a March 2, 2001 report prepared by M2 Associates entitled "Evaluation of Groundwater Resources of Hopewell Township, Mercer County, New Jersey." He claimed the report demonstrated the DEP had disputed conclusions in the M2 report that Hopewell relied on in its zoning decision, and the information would have rebutted the proofs in Hopewell's hydrogeology report. Accordingly, Wilson urged that Judge Pereksta erred in concluding this malpractice claim was speculative.

As explained, in part, in Goldshore's report, the DEP was a non-party State agency in the underlying litigation. We cannot imagine the DEP would have provided a letter opinion or testified [*17] to the position that Wilson cavalierly asserts at this juncture. We agree with the motion judge that it is purely speculative as to what the witness would have testified to at trial and whether it would have been favorable to the plaintiffs' position.

Lawyers are obligated to exercise the degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise. *St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 588, 443 A.2d 1052 (1982)*; *Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 72, 746 A.2d 1034 (App. Div. 2000)*. An attorney is not a guarantor, nor is he or she answerable for every "error of judgment in the conduct of a case or for every mistake which may occur in practice." *2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 486, 640 A.2d 346 (App. Div.)* (quoting *McCullough v. Sullivan, 102 N.J.L. 381, 384, 132 A. 102 (E. & A. 1926)), certif. denied, 137 N.J. 311, 645 A.2d 140 (1994)*. "A lawyer's liability for malpractice cannot be established on an expert's premise of 'I know it when I see it.' It has to be premised on recognized standards of care that repose liability for deviations from those standards." *Cellucci v. Bronstein, 277 N.J. Super. 506, 524, 649 A.2d 1333 (App. Div. 1994), certif. denied, 139 N.J. 441, 655 A.2d 444 (1995)*.

"That [*18] standard requires the attorney, among other obligations, to formulate a reasonable legal strategy." *Charter Oak Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co., 344 N.J. Super. 408, 415, 782 A.2d 452 (App. Div. 2001)*. An attorney must "use reasonable professional judgment in so doing, whether or not that strategy is ultimately successful." *Id. at 416*. "What constitutes a reasonable degree of care is not to be considered in a vacuum but with reference to the type of service the attorney undertakes to perform." *Ziegelheim v. Apollo, 128 N.J. 250, 260, 607 A.2d 1298 (1992)* (internal quotation marks and citation omitted).

Casale made a strategic decision on how to prosecute the case based on his experience and the fiscal constraints of his clients.[4] Wilson's claims on this point are purely speculative and just another example of "Monday morning quarterbacking."

> 4 We also assume Casale analyzed our decision in *New Jersey Farm Bureau, Inc. v. Township of East Amwell, 380 N.J. Super. 325, 882 A.2d 388 (App. Div.), certif. denied, 185 N.J. 596, 889 A.2d 443 (2005)* and made a tactical decision not to argue *Bailes, supra*, before Judge Feinberg.

For the reasons already discussed, there is no merit to Wilson's next claim of error in the motion judge's finding [*19] that Casale did not breach his standard of care in relying on the steering committee to make a decision for financial reasons.[5] The record clearly shows that Wilson and the HV ACREZ plaintiffs retained Casale to represent them in the underlying lawsuit and he did so to the best of his ability within the financial constraints and direction of the consensus of the group.

> 5 Wilson's reference to an argument concerning an appraisal he obtained for one of his properties on April 15, 2011, postdating the underlying trial, and apparently not presented to the motion judge in opposition to the summary judgment motion, is not properly before this court. *R. 2:5-4*.

Although Goldshore contended that Rubin's report was a net opinion, the motion judge did not actually make that finding and grant summary judgment on that basis. She did find, however, that even with all favorable inferences to Wilson, the factual evidence did not support Rubin's conclusions, which were largely speculative. *See Rosenberg v. Tavorath, 352 N.J. Super. 385, 401, 800 A.2d 216 (App. Div. 2002)* (requiring "an expert 'to give the why and wherefore' of his or her opinion, rather than a mere conclusion" to be admissible) (citation omitted).

[*20] This conclusion is amply supported by the record.

Wilson failed to establish a prima facie case that Casale breached his duty of care, the second element of a legal malpractice claim, *Sommers v. McKinney, 287 N.J. Super. 1, 9-10, 670 A.2d 99 (App. Div. 1996)*. There was no reason to reach the balance of the elements, i.e., proximate cause and damages. Thus, summary judgment dismissal of his complaint was proper.

Affirmed.