ANTHONY VENTRE, EXECUTOR OF THE ESTATE OF FRANCESCO VENTRE AND ANTHONY VENTRE, INDIVIDUALLY, Plaintiffs, vs. ARTHUR E. BALSAMO, ESQ.; JOHN DOES, ESQS., (names being fictitious and unknown); and ABC BUSINESSES 2-100 (Names being fictitious and unknown), Defendants.	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : DOCKET NO.: A-003276-22 : : On Appeal From: : SUPERIOR COURT OF NEW JERSEY : LAW DIVISION: PASSAIC COUNTY : DOCKET NO.: PAS-L-523-23 : : : Sat Below: : Hon. Vicki A. Citrino, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT ANTHONY VENTRE, EXECUTOR OF THE ESTATE OF FRANCESCO VENTRE AND ANTHONY VENTRE, INDIVIDUALLY

SIMON LAW GROUP LLC
40 West High Street
Somerville, NJ 08876
(800) 709-1131
Attorney for Plaintiff

Of Counsel and on the Brief:
Kenneth S. Thyne, Esquire
kthyne@simonattorneys.com
#025951990

Dated: October 19, 2023

TABLE OF CONTENTS

TABLE OF CONTENTS CONT'D

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

INTRODUCTORY STATEMENT

Plaintiff-Appellant Anthony Ventre's father, Francesco Ventre wanted to benefit his son by forgiving upon his death, his son's obligation on the mortgage he held on his son's house. Because the Defendant-Respondent in this matter, Arthur Balsamo failed to draft an unambiguous provision accomplishing this objective in Francesco's will, the Probate Court was required to interpret the provision and it interpreted it to deprive Anthony Ventre of his inheritance. The Trial Court below held that the failure to sue the scrivener of the will in the Probate matter and the decision of the Probate Court insulate the scrivener from liability. Plaintiff-Appellants submit this result is not just nor in accordance with our precedent.

This Appeal presents several questions to this Court. First, has the Supreme Court's holding that *all* legal malpractice claims are exempted from the entire controversy doctrine been overruled by an unpublished opinion of this Court?

Second, does the reliance upon the Supreme Court's holding referenced in the first question preclude a Court from barring a subsequent action when no demonstrable prejudice was in the record and the failure to join the prior claim was excusable and would have made no difference to the outcome in the prior case.

Third, is an attorney who negligently fails to convey a testator's wishes in his will by drafting an ambiguous provision insulated from liability by a probate's court application of the doctrine of probable intent?

Finally, can a Court ignore a discrete allegations of liability on a motion to dismiss and still dismiss the entire case?

This is an action for legal malpractice alleging that the Defendant, Arthur Balsamo, Esq. ("Balsamo") was negligent in his representation of both Anthony Ventre, individually and Anthony's father, Francesco Ventre ("Francesco"). It is undisputed that the key provision of Francesco's will was ambiguously drafted by Balsamo. An action captioned "In The Matter of Francesco Ventre", (hereafter "The Probate Action"), the Probate Court, found the provision was ambiguous. While the Probate Court, after finding the provisions ambiguous, applied the doctrine of probable intent so as to defeat the bequest to Anthony Ventre and to the benefit his now ex-wife, the issue of Balsamo's negligence was not before the Probate Court and should not estop a fact found reaching a different conclusion in this action.

It is submitted that the Trial Court's dismissal of this matter pursuant to the entire controversy doctrine is contrary to black letter precedent of our Supreme Court. Additionally, the Trial Court's holding as to collateral estoppel essentially immunizes attorneys from liability for the negligent drafting of wills. An attorney now need not comply with his duties to adhere to the standard of care and convey a testator's wishes unambiguously; an ambiguously drafted will subsequently construed by the Court using the doctrine of probable intent will govern and the beneficiary's and testator's estate will have no grounds to seek damages for the

attorney's negligence in failing to adhere to the standard of care and communicate the testator's actual intent. That is not the law in this state and trial court erred below. Justice demands that the Court reverse the dismissal and remand this matter for discovery and trial.

PROCEDURAL HISTORY

This is an action for legal malpractice against Defendant Balsamo for his negligence in drafting a provision of Francesco Ventre's will and for the negligent advice he gave Anthony Ventre with regards to a mortgage. Prior to the filing of this action the Chancery Division, Probate Part in the Probate Action had ruled the specific provision in Francesco Ventre's will was ambiguous and the Court construed Francesco's probable intent so as to benefit his former daughter in-law at the expense of his beloved son, Plaintiff-Appellant Anthony Ventre.

This action was instituted by complaint filed on April 26, 2023(Pa000001). The Defendants filed a Motion to Dismiss in lieu of filing an Answer(Pa000009). The Motion to Dismiss was supported by the Certification of Karlee M. Martin, Esq.(Pa000011) which authenticated exhibits. No evidence was submitted from Defendant-Respondent Balsamo or any other person pursuant to R.1:6-6 factually supporting any allegation that Plaintiff's failure to notify the Court of Plaintiff's legal malpractice claims against Balsamo in the Probate action was inexcusable or that the Defendant had suffered substantial prejudice as a result of the failure to

assert the legal malpractice claims in that action.

Plaintiff filed Opposition to the Motion to Dismiss and a Cross Motion for Partial Summary Judgment on April 27, 2023(Pa000097). Plaintiff filed a Statement of Material Facts in Support of Plaintiff's Cross Motion for Partial Summary Judgment(Pa000099). Plaintiff also submitted the Certification of Anthony Ventre(Pa000107) with exhibits. After hearing oral argument, the Court granted the Motion to Dismiss in an Order dated May 17, 2023 (Pa000337) and denied Plaintiff's Cross Motion for Summary Judgment. Plaintiff-Appellant timely filed a Notice of Appeal and Plaintiff-Appellant has filed a request for oral argument with this brief. Plaintiff if not appealing the denial of the Motion for Partial Summary Judgment.

FACTS

The focal issue in the Probate Action was what Francesco Ventre ("Francesco") intended by the ambiguous Article Third in his July 9. 2014 Last Will and Testament (the "Will") in which he gifted the unpaid principal and accrued interest under the mortgage that he held on property located at 533 Art Lane, Ridgefield, New Jersey to his son, Anthony Ventre ("Anthony") and directed that the mortgage debt be forgiven and the mortgage lien canceled as of record. The ambiguity results from Defendant's negligence as scrivener and his failure to make clear that his bequest was intended to benefit only his beloved son and not his

daughter in-law Carol.

Francesco Ventre ("Francesco") was born in the province of Calabria, Italy. His wife, Annuziata Ventre ("Annuziata"), was born in a neighboring town in the same province. They married in Italy and immigrated to the United States in approximately 1957. At the time of his death, Francesco had been married to Annuziata for 56 or 57 years. (Pa000134). Plaintiff, Anthony Ventre ("Anthony") is their only son (Pa000134-135).

Anthony worked side by side with Francesco for nearly 50 years. Anthony had a close relationship with his father and considered him to be his best friend(Pa000133). Francesco's native language was Italian. He spoke broken English(Pa000135). While Francesco could read a Shop-Rite circular, he could not read legal papers or novels or similar documents (Pa000134). Anthony translated for Francesco at real estate closings and matters involving civil litigation (Pa000136).

Anthony and his wife, Carol started having marital problems between 2010 and 2012. Francesco knew that Anthony was having marital problems at that time (Pa000137). Francesco was present when Anthony and Carol argued over finances (Pa000170). Francesco witnessed a lot of arguments between Anthony and Carol. Francesco knew of Anthony's home situation and spoke with Anthony about it. (Pa000137).

Initially, Francesco was very happy with Carol when she was dating his son

and when they first married. However, things began to sour between them from 2010 to the end of his life (Pa000137-Pa000138,Pa000170).

Anthony purchased a property located at 533 Art Lane, Ridgefield, New Jersey in 2002. He purchased the property in his own name (Pa000138). As was the case with other properties, Francesco financed Anthony's purchase of the property. Anthony ultimately decided to build a two-family house on the property and obtained construction financing. (Pa000139).

At some point after the house was built, Anthony and Carol decided to live at the property. They needed financing, which they obtained through Community Bank of Bergen County. (Pa000140). Once Anthony and Carol secured financing from the Community Bank of Bergen County, Carol was added to the deed. (Pa000141). Francesco knew that Carol was being added to the deed at that time and wanted a mortgage and note to protect his interest. (Pa000141-Pa000145). Francesco's dominant plan and purpose under the Will was to leave his estate to his wife and children, Anthony and Carmela. His Will reflects that he made certain specific bequests to Anthony and Carmela and left the remainder of his Estate to his wife, Annuziata. In Article Third of his Will, Francesco gifted the unpaid principal and accrued interest under the mortgage to Anthony and directed that the debt be forgiven and the lien cancelled. Francesco did not leave any portion of his estate of his daughter-in-law, Carol.

Defendant, Arthur Balsamo, Esq. ("Balsamo") prepared the mortgage and mortgage note. (Pa000141, Pa000144). He also prepared the deed, which transferred title from Anthony individually to Anthony and Carol as husband and wife as tenants by the entireties (Pa000197-Pa000198). Mr. Balsamo used a form to prepare the mortgage note, which he modified. He prepared the language that appears in the Payments Section of the mortgage note. (Pa000195-000196). The Payments Section of the mortgage note provided, "I will pay principal and interest on demand or in the event the property secured by the mortgage which is being executed simultaneously herewith is sold or in the event of a divorce of the above-named mortgagors." That sentence was included in the mortgage note because Francesco wanted to protect his investment in the property. He wanted to be repaid in the event the property was sold or Anthony and Carol divorced. (Pa000145-00146). Mr. Balsamo confirmed that the sentence imposed an obligation on the borrowers, i.e., husband and wife, to repay the loan in the event they divorced. (Pa000195-000196).

Anthony and Carol started having marital problems between 2010 and 2012. Francesco was aware of their marital problems and wanted to protect his interest in the property, in the event they divorced. In 2013, Anthony and Carol signed a mortgage and mortgage note in Francesco's favor, prepared by Balsamo. The mortgage gave Francesco the right to collect on the mortgage note from either Anthony or Carol. The mortgage note contains an acceleration clause, which

requires payment on demand in the event Anthony and Carol divorce.

Francesco was thereafter diagnosed with a life-threatening condition, which prompted him to have a Will prepared. (Pa000147-000148). Anthony and Francesco went to Mr. Balsamo for his advice and assistance. Id. According to Mr. Balsamo, he was told that Francesco was scheduled for surgery and needed a Will before he underwent the surgery on an emergency basis. (Pa000197).

Mr. Balsamo has been a licensed attorney since 1973. His practice includes, among other areas, simple Will preparation. His practice does not include estate or tax planning. (Pa000192-193)

Prior to meeting with Mr. Balsamo, Francesco and Anthony discussed how Francesco wanted to distribute his assets to his wife, to Anthony, and to Carmela. At that time, Francesco had concerns about his wife's health, which had started to decline. Francesco wanted Anthony to inherit the $500,000 from the mortgage and note and the interest thereon, so that Anthony could continue with the business and take care of his mother. (Pa000151-000152).

Francesco met with Mr. Balsamo on July 1, 2014. Anthony attended the meeting because Francesco did not speak English very well. Mr. Balsamo confirmed that he met with Francesco and Francesco did not speak English very well. (Pa000154). Mr. Balsamo confirmed that he met with Francesco and Anthony and that Anthony attended the meeting because "his father didn't speak English and they

needed to communicate to me what was to go in the will, as I said, on an emergency basis prior to surgery." (Pa000199).

During the meeting, Mr. Balsamo asked questions about Francesco's assets, how he wanted them to be distributed and any concerns that he had. (Pa000155).

Francesco told Mr. Balsamo that he wanted his assets distributed between his wife and children. (Pa000155,Pa000200). Francesco wanted (i) his wife to have the house, (ii) Carmela to be repaid some monies that she had loaned to him and (iii) his business to go to Anthony. As for the mortgage on the property, he wanted Anthony to have the mortgage and note. (Pa000156).

Mr. Balsamo did not discuss estate or inheritance taxes with Anthony or Francesco during the July 1, 2014 meeting or at any time. (Pa000202,Pa000212). The only reason why Mr. Balsamo addressed the issue of taxes in the Certification that he signed and provided to Mr. Lamatina Carol's divorce attorney was because Mr. Lamatina had raised the issue in his draft Certification and Mr. Balsamo believed it was important to Mr. Lamatina. (Pa000212-Pa000215). Mr. Balsamo was the municipal prosecutor in Cliffside Park where Mr. Lamatina was mayor. (Pa000108). Mr. Balsamo prepared drafts of the Will, which Anthony picked up and reviewed with Francesco. Changes were made and the marked-up drafts were returned to Mr. Balsamo's office. (Pa000157-Pa000159, Pa000208). Mr. Balsamo did not draft the language in Article Third to minimize estate tax exposure. (Pa000212).

Francesco signed his Will on July 9, 2014. Article Third in the Will states:

> I do give, devise and bequeath the unpaid principal balance and accrued interest, if any, in and to a certain mortgage lien which I hold on the property known and as by the street address 533 Art Lane, Ridgefield, NJ unto my son Anthony. It is my wish and I direct that such debt be forgiven and the mortgage lien cancelled of record by my Executor. (Pa000264).

The Probate Court found this provision was ambiguous and interpreted it to the benefit OF Carol and to Anthony's detriment. (Pa000270).

In Article III of the will, Balsamo attempted to accomplish Francesco's intention to gift the unpaid principal and accrued interest under the mortgage to Anthony Francesco understood the language in the first sentence of Article Third, which addressed the mortgage on the property. It was consistent with his intention to give the monies from the mortgage to Anthony. (Pa000160).

Mr. Balsamo understood the first sentence in Article Third meant that the unpaid balance of the loan, whatever it may be, would go to Anthony. (Pa000214). Francesco conceptually understood the second sentence of Article Third to mean that his gift would be protected from being challenged. (Pa000161). Mr. Balsamo understood that the second sentence meant that the mortgage debt would be forgiven and the lien canceled, which means that Anthony would have the property free and clear from Francesco's lien. (Pa000215-Pa00216).

Francesco intended that the debt was to be forgiven and the mortgage lien

canceled of record for Anthony's benefit. (Pa000214). Francesco was referring to Anthony's obligation specifically when he discussed it with Mr. Balsamo. (Pa000202,Pa000254). Francesco never told Mr. Balsamo that he intended to forgive the debt as to Carol. (Pa000216-Pa000222, Pa000254).

Francesco's relationship with his daughter-in-law, Carol deteriorated over the years while Anthony and Carol's marital problems progressed. It is not surprising then that Francesco never mentioned Carol to Mr. Balsamo at any time during their meetings and did not include Carol as a beneficiary under his Will.

Article Third of the Will was intended by the scrivener to mean that Francesco gifted the unpaid principal balance and accrued interest under the mortgage solely to Anthony and directed that the debt be forgiven and the mortgage lien canceled solely as to Anthony. That intent was frustrated by Defendant's negligent drafting of Article Third of Francesco's Will. That negligence caused the Probate litigation and resulted in a windfall to Carol at Anthony's expense.

Francesco did not intend for Carol to benefit from his Will. (Pa000156). Carol was never mentioned during Francesco's discussions with Anthony concerning his intentions leading up to the July 1, 2014 meeting with Mr. Balsamo. (Pa000156-Pa000157, Pa000166). She was not mentioned during the July 1, 2014 meeting between Mr. Balsamo, Francesco and Anthony. (Pa000156-Pa000157, Pa000202). Carol's name was not mentioned at any time while Francesco reviewed the drafts of

the Will with Anthony. (Pa000156-Pa000157, Pa000165). Nor was Carol mentioned during the meeting between Francesco and Mr. Balsamo when Francesco signed the Will. (Pa000212,Pa000215).

Mr. Balsamo believed that canceling the debt had an indirect impact on Carol, because the debt was a joint and several obligation; Mr. Balsamo did not, however, discuss his belief with Francesco. (Pa000216,Pa000259). Francesco died on January 23, 2015. His Will was probated by the Bergen County Surrogate's Court and Letters Testamentary were issued to Anthony. Anthony and Carol became embroiled in a contentious divorce. Carol took the position in the divorce action that Francesco forgave the mortgage debt in its entirety as to her and Anthony. As a result of Defendant's legal malpractice and finding of the Court in the Probate Action, Carol received a portion of the equity Francesco held in the subject property, which he intended to leave to Anthony.

Francesco wanted a mortgage to protect his interest in the property in the event Anthony and Carol divorced. He subsequently gifted the unpaid principal and accrued interest under the mortgage solely to Anthony under his Will and directed that the mortgage debt be forgiven. Arthur Balsamo, Esq., the scrivener of the Will, confirmed that when Francesco spoke to him about forgiving the mortgage debt, Francesco was referring to Anthony's obligation. Francesco never told Mr. Balsamo that he intended to forgive the debt as to Carol.

During a deposition in the divorce action, Anthony first became aware that Carol intended to assert the position that Francesco forgave the mortgage debt as to both her and Anthony and that the mortgage lien should be cancelled as to both her and Anthony. Anthony and Francesco were clients of Balsamo. Balsamo without providing notice to Anthony, either individually or as Executor of Francesco's Estate, executed a certification in favor of Carol contradicting Francesco's intent in the Will to forgive the mortgage debt as to Anthony only. Balsamo's execution of the certification without notice to Anthony, as either Executor of individual client, was a breach of his fiduciary duty to Anthony and his deceased client, Francesco. Balsamo failed to give Anthony the appropriate advice at the time of the execution of the mortgage of the deeding of the property to Carol. (Pa000003).

The Probate Action was commenced to constitute Article III in Chancery Division, Probate Part. (Pa000011). Balsamo negligently drafted the Will of Francesco so that it was found to be vague and ambiguous by the Court, and the Court's holding resulted in an award to Carol of forgiveness of the mortgage which was contrary to Francesco's intent and which damaged Anthony and Francesco's Estate. (Pa000003).

In the Probate Action, the Honorable Edward A. Jerejian, P.J.Ch. held that after hearing Mr. Balsamo's testimony that the provision he drafted regarding forgiving of the mortgage was ambiguous and that ambiguity had to be resolved.

(Pa000280). Judge Jerejian found that Carol was never mentioned in Francesco's discussions with Mr. Balsamo and that he never wanted to benefit her. Id The Court found that because of the ambiguity in the Will, that it construed the Will to find that Francesco wanted peace in the family. (Pa000297). The Court cited the testimony that Mr. Balsamo stated "My belief was that he [Francesco] wanted to make it clear that the loan, whatever the unpaid balance was, was going to be – would go to his son Anthony."(Pa000304). If Mr. Balsamo had properly questioned Francesco, there would have been no ambiguity and Plaintiff, Anthony Ventre, would have received the benefit of the forgiveness that his father intended. (Pa000108).

In his decision, the Judge concluded that Article Three contained "an ambiguity ... that ha[d] to be resolved" in that from reading the article's two sentences it was not clear whether Francesco intended to forgive the debt as to Anthony only or "that he want[ed] the entire debt forgiven." Relying on our Supreme Court's opinion in *In re Estate of Munger*, 63 N.J. 514, 521 (1973), the Judge explained that the presence of the ambiguity called for application of the doctrine of probable intent. The Judge, quoting from the Court's opinion, stated the following:

> The obligation of the Court when a question is presented, is to effectuate the [probable intent] of the testator when consideration of the will as a whole together with extrinsic evidence demonstrates under all the circumstances that a patent or latent ambiguity exists and the language used and as such intent overcoming the mere literal reading of the instrument is thereby made manifest.
> This power must be carefully exercised and should not be utilized

> unless the Court is thoroughly convinced that it is required. The need for its exercise must be manifest, otherwise exercise would amount to varying the terms of the will as distinguished from merely effectuating a testator's intent. *Matter of Ventre*, No. A-0011-21, 2022 WL 2542293 (N.J. Super. Ct. App. Div. July 8, 2022).

Despite the fact that Defendant Balsamo drafted an ambiguous testamentary instrument causing Anthony Ventre as Executor of the Estate and individually to expend counsel fees to have the provision construed and as a result of the Judge's application of the Doctrine of Probable Intent to lose a major portion of his inheritance, the Defendants moved to dismiss. In support of this motion, Defendants first argued that the entire controversy doctrine barred Plaintiff's claims due to the failure to raise same in the Probate Action. Second, Defendants argued that the doctrine of collateral estoppel precluded this action. Defendants motion completely ignored the allegations in paragraph 16 of the complaint, which alleged that Balsamo was negligent in drafting of the mortgage while acting as Anthony Ventre's attorney.

The Plaintiff cross-moved for Partial Summary Judgment as to Balsamo's liability for negligently drafting an ambiguous testamentary provision. The Plaintiff-Appellant is not seeking Appellate review of the denial of that motion.

The Trial Court granted Defendants Motion to Dismiss holding in pertinent part:

> The Court turns to the entire controversy doctrine. Plaintiff asserts that the present claim is not barred by the doctrine, as the New Jersey Supreme Court in Olds v. Donnelly held that "the entire controversy doctrine no longer compels the assertion of a legal-malpractice claim in an underlying action that gives rise to the claim." Id. at 443. 150 N.J. 424, 44-49 (1997). However, as Defendant highlights, Olds merely holds

that the doctrine does not bar a legal malpractice action against an attorney who represented a client in the prior action. Balsamo had not represented Plaintiff in the prior Chancery matter, and thus Olds is thus not instructive in this respect.

. . .

Considering the Plaintiff brought the prior Chancery case in an effort to contest the will, and correspondingly Defendant Balsamo's composition of the will, any claims Plaintiff may have had against Balsamo should have been brought against him in the prior case where Balsamo extensively testified as to his interpretation of Francesco's intent. The current claim is precisely the type of fragmentation that courts in New Jersey seek to avoid under the entire controversy doctrine. See also Highlands Lakes Country Club & Cmty. Ass'n v. Nicastro, 201 N.J. 123(2009).

. . .

However, Plaintiff has failed to show how that duty was breached as the Chancery Division already found that Francesco's intent was to forgive the debt in its entirety. (Defendant's Exhibit D). While Plaintiff alleges that he believed the mortgage was to be forgiven only as to himself and that he or the estate was to collect on the payments from Carol, Plaintiff fails to demonstrate how many ambiguities as found by the courts in the prior litigation equates to a breach of duty. While the prior litigation did not involve an exact claim of negligence against Balsamo, any facts as to the decedent's intent, would be the same facts underlying the claim of negligence, and were necessarily resolved in the prior litigation. As Plaintiff cites, collateral estoppel "must be applied equitably, not mechanically." In re Tanelli, 194 N.J. Super. 492, 497 (App Div.), certif. denied, 99 N.J. 181(1984). The Court finds that Plaintiff is not entitled to relitigate the drafting of the decedent's will by Balsamo as the Chancery Division has found and enforce the Will pursuant to the decedent's intent which is contrary to the allegations made here by Plaintiff. Said decision has been confirmed by the Appellate Division. Defendant's Motion to Dismiss is therefore granted. (Pa342-345).

The Appellant now presents four (4) errors in the Trial Court's opinion for this Courts de novo review. First, the Trial Court misapplied the entire controversy doctrine by implicitly overruling Olds v. Donnelly based upon an unpublished case of the Appellate Division. Second, the Probate Action failed to consider the requirements of substantial prejudice and inexcusable failure to join legal malpractice claims when dismissing Plaintiff's claims with prejudice. Third, the Court improperly applied the

doctrine of collateral estoppel to the Probate Actions' construction of an ambiguous testamentary instrument and thereby substituted the Probate Action Judge's conclusions as to proximate cause on an issue that was not before the Probate Judge and which should rightly be decided by a jury. Finally, the Court ignored Plaintiff's claims with regards to drafting of the mortgage as to Anthony Ventre. Additionally, the Court ignored the damages caused Plaintiffs by the expense of litigation occasioned by the ambiguous instrument and adopting a holding which essentially immunizes scriveners from negligent drafting of wills.

These errors require a reversal of the Trial Court's order of remand of this matter for discovery and Trial.

ARGUMENT

I. THE APPELLATE COURT'S REVIEW OF THIS MATTER IS DE NOVO (APPEALING THE APPELLATE DIVISION OPINION DECIDED JULY 8, 2022 FOUND AT PA000065)

An appellate court reviews de novo the trial court's determination of the motion to dismiss under Rule 4:6-2(e). Stop & Shop Supermarket Co., LLC v. County of Bergen, 450 N.J. Super. 286, 290,(App. Div. 2017). It owes no deference to the trial court's legal conclusions. *Dimitrakopoulous v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C.*, 237 N.J. 91, 108 (2019).

A. "ALL" LEGAL MALPRACTICE CLAIMS ARE EXEMPT FROM THE ENTIRE CONTROVERSY DOCTRINE; THIS IS A LEGAL MALPRACTICE CLAIM (APPEALING THE ORDER DATED MAY 17, 2023 FOUND AT PA000337 AND ORDER DATED MAY 26, 2023 FOUND AT PA000351)

The reach of the Entire Controversy Doctrine was at its most expansive following the Court's 1995 decisions in *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, P.C.*, 142 N.J. 280 (1995). Eventually the Court moderated its approach by reinterpreting the doctrine as it related to parties and certain claims and, in that context, by directing the Civil Practice Committee to propose revisions to the relevant Rules. See *Olds v. Donnelly*, 150 N.J. 424, 444–49 (1997). Rule 4:5–1(b)(2) was amended as part of changes made in 1998 to the Rules governing mandatory joinder.

Our Supreme Court finally resolved these issues concerning non-joinder of attorneys by holding that the entire controversy doctrine did not bar subsequent lawsuits for legal malpractice. *Olds v. Donnelly*, 150 N.J. 424, 428 (1997); *Karpovich v. Barbarula* 150 N.J. 473, 476 (1997); *Donohue v. Kuhn*, 150 N.J. 484, 485 (1997). In reaching its determination in *Olds*, supra, the Court acknowledged the criticism leveled at the entire controversy doctrine and mandatory joinder of parties as well as the sanction of preclusion. 150 N.J. at 444–46. In its decision, the

Court emphasized "that preclusion is a remedy of last resort." Id. at 446 (citing *Gelber v. Zito Partnership*, 147 N.J. 561, 565 (1997)). While recognizing that the purpose of the doctrine is to encourage litigants to bring to the trial court's attention persons who should be joined, not to bar meritorious claims, the Court acknowledged the reality that there exists some attorneys who "have elected to conceal or withhold claims against additional parties." *Olds*, supra, 150 N.J. at 447 (citations omitted).

There is no dispute that this matter alleges claims of legal malpractice arising out of a transaction. Our Supreme Court held that such transactional malpractice claims are exempt from the entire controversy doctrine.

The *Olds* Courts set forth:

> With transactional malpractice, such as negligence in drafting a contract or will or performing a real estate closing, the need for an exception to the entire controversy doctrine is not as compelling. The attorney is not saddled with the conflicting roles of advocating on behalf of the client in the underlying litigation and representing his or her own interests as a defendant. Moreover, a legal-malpractice claim alleging transactional negligence is a claim against a primary tortfeasor. As such, the entire controversy doctrine's purposes are served by requiring plaintiffs to notify the trial court of their potential malpractice claims. The attorney, like the other defendants, is a potential cause of a plaintiff's damages. *See Circle Chevrolet, supra*, 142 N.J. at 286–87, 662 A.2d 509 (characterizing attorneys' negligence as involving an erroneous interpretation of a lease clause); *Mystic Isle, supra*, 142 N.J. at 320–21, 662 A.2d 523 (describing plaintiff's allegations that its attorneys inappropriately represented plaintiffs in the attorneys' attempts to obtain sewage permits).
>
> The line between transactional and litigation representation, however, is not always clear. Often, the same law firm or even the same attorney may represent a client in both transactional and litigation matters. Thus, transactional attorneys and

their firms often have a ongoing relationship with their clients. Requiring a client to notify a trial court of a potential malpractice claim relating to one transaction when the attorney or firm continues to represent the client on other matters can intrude unduly on the attorney–client relationship.

Basing the application of the entire controversy doctrine on the nature of the alleged malpractice would be difficult to administer. The better response is not to distinguish litigation malpractice from other kinds of malpractice, but to **exempt all attorney-malpractice actions from the entire controversy doctrine,** *Olds v. Donnelly*, 150 N.J. 424, 442, 696 A.2d 633, 642–43 (1997). [emphasis added].

The *Olds* Court concluded by imparting to the Civil Practice Committee and its Entire Controversy Doctrine Subcommittee the responsibility to examine the exemptions that should apply to mandatory joinder, as well as any amendments that should be made to *R*. 4:30A. *Id*. at 449. It identified the "need for a procedural device, such as a Rule 4:30A, to protect parties, the courts and the public from excessive and costly litigation." *Id*. at 447–48 (citations omitted). The Court stressed that "mandatory joinder should not be confused with mandatory preclusion." Id. at 448.

In considering the sanction to be imposed for failure to give the required notice the Court said, "[i]f a remedy other than preclusion will vindicate the cost or prejudice to other parties and the judicial system, the court should employ such a remedy." Ibid. (citation omitted). Quoting from its decision in Abtrax Pharmaceuticals, Inc. v. Elkins–Sinn, Inc., the Court emphasized, " '[s]ince dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-

delinquent party, or when the litigant rather than the attorney was at fault.' " Ibid. (quoting Abtrax Pharmaceuticals, Inc. v. Elkins– Sinn, Inc., 139 N.J. 499, 514 (1995) (quoting Zaccardi v. Becker, 88 N.J. 245, 258 (1982) (citations omitted))).

As a result of its decision in *Olds*, the Supreme Court, in September 1998, amended R. 4:30A, removing the previous provisions related to non-joinder of parties and limiting its application to nonjoinder of claims. The Court also adopted R. 4:29–1(b), which permits the trial court, on its own motion, to "order the joinder of any person subject to service of process whose existence was disclosed by the notice required by R. 4:5–1(b)(2) or by any other means who may be liable to any party on the basis of the same transactional facts." The Court further revised R. 4:5–1(b)(2), which now provides:

> Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29–1(b) because of potential liability to any party on the basis of the same transactional facts. Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification. The court may require notice of the action to be given to any non-party whose name is disclosed in accordance with this rule or may compel joinder pursuant to R. 4:29–1(b). If a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action against a party whose existence

> was not disclosed or the imposition on the noncomplying party of litigation expenses that could have been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action. [R. 4:5–1(b)(2) (emphasis added).]

The revised version of R. 4:5–1(b)(2) thus "... addresses the issue of sanctions for failure to make the required disclosures. The court is authorized to impose monetary sanctions and/or counsel fees later incurred that would have been avoidable by disclosure." Pressler, Current N.J. Court Rules, comment 3 on R. 4:5–1 (1999). Preclusion is, therefore, available as a sanction only in the limited circumstances where a lesser sanction is not sufficient to remedy the problem caused by an inexcusable delay in providing the required notice, thereby resulting in substantial prejudice to the non-disclosed party's ability to mount an adequate defense. Substantial prejudice in this context means substantial prejudice in maintaining one's defense. Generally, that implies the loss of witnesses, the loss of evidence, fading memories, and the like." Ibid. In Escalante v. Township of Cinnaminson, we observed that the delay alone does not serve to create substantial prejudice. 283 N.J.Super. 244, 253, 661 A.2d 837 (App.Div.1995) (citing Kleinke v. Ocean City, 147 N.J.Super. 575, 581, 371 A.2d 785 (App.Div.1977)). Instead, it is the lack of availability of information which results from the delay that is, for the most part, determinative of the issue of substantial prejudice. Id. at 252–53, 661

A.2d 837. Thus, a party's "access to relevant information is largely dispositive of the 'substantial prejudice' issue...." Lamb v. Global Landfill Reclaiming, 111 N.J. 134, 152, 543 A.2d 443 (1988). *Mitchell v. Procini*, 331 N.J. Super 445, 453 (App. Div. 2000).

The Trial Court's failure to credit *Olds v. Donnelly*, 150 N.J. 424, 443 (1997) and its holding exempting all legal malpractice claims from the entire controversary doctrine is not cured by the citation to *Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C*. 237 N.J. 91 (2019). That case simply delt with the issue of when a client is sued by an attorney for fees whether the client has a duty to assert as a counterclaim for legal malpractice. The Court held that when a client is sued by a lawyer for fees, the Court must look to see whether or not the entire controversary doctrine requires a client to assert his or her claim against a former attorney when they are already adversaries in a lawsuit. Certainly, that is not the case here. Indeed, the Dimitrakopoulos Court reiterated the holding in Olds v. Donnelly, 150 N.J. 424, 443 (1997) that "the entire controversary doctrine does not require an attorney's current or former client to assert a legal malpractice claim against that attorney in the litigation that gave rise to the malpractice claim even if the two claims arise from the same or related facts and otherwise would be subject to mandatory joinder.". 237 N.J. at 112. The Court further reiterated that it declined to adopt a separate rule for the application of the

entire controversary doctrine to legal malpractice claims from transactional matters and thus all of those claims were also exempt from application of the doctrine. Id. see note 4. See also Sklodowsky v. Lushis, 417 N.J. Super. 648 (App. Div. 2011); Short Hills Associates in Clinical Psychology v. Rothbard, Rothbard, Kohn & Kellar, (Pa332).

B. DEFENDANTS FAILED TO SHOW INEXCUSABLE CONDUCT OR SUBSTANTIAL PREJUDICE (APPEALING THE ORDER DATED MAY 17, 2023 FOUND AT PA000337 AND ORDER DATED MAY 26, 2023 FOUND AT PA000351)

The entire controversary doctrine proscribes dismissal of a successive suit unless both inexcusable failure to comply with the notice provision and substantial prejudice are established by the undisclosed party. The party asserting the entire controversy doctrine as a defense, bears "the burden of establishing both inexcusable conduct and substantial prejudice." Hobart Bros. v. Nat'l Union Fire Ins. Co., 354 N.J. Super. 229, 242 (App. Div.), certif. denied, 175 N.J. 170 (2002) (emphasis added). In Mitchell v. Charles P. Procini, D.D.S., P.A., 331 N.J. Super. 445, 454 (App. Div. 2000) (Mitchell II), the Court considered the meaning of "substantial prejudice" in the second prong of the analysis and held that "substantial prejudice" means "the loss of witnesses, the loss of evidence, fading memories, and the like." Ibid.

Even if both prongs are proved, courts may, instead, consider lesser

sanctions. The basis for the imposition of less draconian remedies follows long-standing jurisprudential tenets. As the Court explained in Alpha Beauty v. Winn–Dixie Stores, 425 N.J. Super. 94, 102 (App. Div. 2012):

> Our Court Rules, from their inception, have been understood as "a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits." Ragusa v. Lau, 119 N.J. 276, 284 (1990).
>
> As a result, the Supreme Court has recognized a "strong preference for adjudication on the merits rather than final disposition for procedural reasons." Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 356 (2001) (quoting Mayfield v. Cmty. Med. Assocs., P.A., 335 N.J. Super. 198, 207 (App. Div. 2000)).

The Trial Court in deciding an entire controversy dismissal motion must first determine from the competent evidence before it whether a Rule 4:5–1(b)(2) disclosure should have been made in a prior action because a non-party was subject to joinder pursuant to Rule 4:28 or Rule 4:29–1(b). If so, the court must then determine whether (1) the actions are 'successive actions,' (2) the opposing party's failure to make the disclosure in the prior action was 'inexcusable,' and (3) 'the right of the undisclosed party to defend 'the successive action has been substantially prejudiced by not having been identified in the prior action.' [700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 236 (App. Div. 2011) (quoting R. 4:5– 1(b)(2)).] "If those elements have been established, the trial court may decide to impose an appropriate sanction. Dismissal is a sanction of last resort." Id. at 236–37 (citing Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co., 207 N.J.

428, 453–54 (2011).

R. 4:5-1(b) analysis in this case must start with the understanding that legal malpractice actions are exempt from the entire controversy doctrine: "the entire controversy doctrine no longer compels the assertion of a legal malpractice claim in an underlying action that gives rise to the claim". Olds. V. Donnelly, 150 N.J. 424, 443 (1997). Olds dictates that "all attorney malpractice actions" are exempt from the entire controversy doctrine. Id. at 442. [emphasis added] Accordingly, since a legal malpractice action is not required to be joined with pending litigation, it cannot consider an action subject to joinder under R. 4:5-1(b)(2).

The purpose of the R. 4:5-1(b) certification is to "implement the philosophy of the entire controversy doctrine." See Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 to R. 4:5-1. Defendant Balsamo had to establish that he was a party subject to joinder under R. 4:28 or R. 4:29-1(b). See R. 4:5- 1(b)(2). As Plaintiff's claim against Defendant Balsamo is for legal malpractice, it was not subject to joinder in the underlying litigation, and Balsamo's motion fails. In addition to failing to demonstrate that Defendant was a party subject to joinder, which the Defendants' motion papers below made no attempt to establish, the Defendants' next burden would be to establish that any failure to identity them was inexcusable. Here, the Plaintiffs' failure to identify Defendant Balsamo in the R. 4:5-1(b)(2) certification was excusable because it was made based on an analysis performed by

its counsel at the time determining that the R. 4:5-1(b)(2) rules would not require naming Defendant Balsamo given the black letter law of Olds v. Donnelly, 150 N.J. 424, 443 (1997).

As set forth above, not only was the failure to amend the R.4:5-1 claim excusable, the Defendants incurred no substantial prejudice. The loss of evidence or ability to find witnesses is not even claimed. The Trial Court erroneously focused on its perception of duplicate of litigation - this is not a appropriate consideration under the current case law concerning the entire controversy doctrine. The Court identifies no prejudice in a means of loss witnesses or evidence of the like occasion by the Defendants.

The Trial Court's dismissal of this matter pursuant to the entire controversy doctrine was erroneous.

C. THE WILL NEGLIGENLY DRAFTED BY DEFENDANT WAS AMBIGUOUS AND *PIVNIVK* AND COLLATERAL ESTOPPEL DO NOT BAR THIS CLAIM (APPEALING THE ORDER DATED MAY 17, 2023 FOUND AT PA000337 AND ORDER DATED MAY 26, 2023 FOUND AT PA000351)

This case is distinguishable from *Pivnick v. Beck,* 165 N.J. 670 (2000). Defendants' argument that Plaintiff was collaterally estopped from litigating the issue of whether or not Defendant was negligent in drafting Francesco Ventre's Will was wholly based on the case of *Pivnick v. Beck*. supra. As this was the only authority

cited for Defendant's contention that Plaintiff's claims be dismissed , it is important to compare the holding in *Pivnick v. Beck* with the instant case.

There was no holding in *Pivnick v. Beck* that the trust instrument was ambiguous. Indeed, the Supreme Court made plain that the instruments in question were "unambiguous". 165 N.J. at 671. In *Pivnick v. Beck*, there was no claim that the instrument was ambiguous, in fact, Plaintiff in the malpractice action has sought a reformation of the trust agreement in recognition that the trust agreements expressed an intention contrary to what the Plaintiff maintained was the testator's actual intent. Here, no one is claiming that the Will clearly expressed Francesco's intention – the Probate Court has found that it was ambiguous, thus requiring the importation of the doctrine of probable intent.

It is Plaintiff's position that had Defendant drafted an unambiguous Will reflecting Francesco's intention, there would have been no litigation and Anthony would have received the benefit of the forgiveness of the mortgage as Francesco had intended. This allegation must be credited on a Motion to Dismiss.

Indeed, the contrast between this action and *Pivnick v. Beck* is plain from a reading of that decision. The *Pivnick* Court descried the case before thus "In this case Plaintiff attempted to prove malpractice by contradicting a solemn doctrine that was clear on its face." *Pivnick*. Supra. at P.491 (emphasis added). Here, Plaintiff alleges that "Balsamo negligently drafted the Will of Francesco so that it was found

to be vague and ambiguous by the Court, and the Court's holding resulted in an award to Carol for the forgiveness of the mortgage, which was contrary to Francesco's intent and which damaged Anthony and Francesco's estate.

As set forth by the *Pivnick* Court, in order for the doctrine of collateral estoppel to apple, the party asserting the bar must show that: (1) the issue to be precluded is identical to the issue decided in the previous proceeding; (2) the issue was actually litigated in the prior action *i.e*., there was a full and fair opportunity to litigate the issue in the prior action; (3) a final judgment on the merits was issued in prior proceeding; (4) the determination of the issue was essential to prior judgement; and (5) the party against whom preclusion is asserted was a party to or in privity with a party to the earlier proceeding. 326 N.J. Super. at 485.

Here, at least three of the five requirements for collateral estoppel are absent: (1) the issue of whether Defendant Balsamo negligently drafted Francesco's Will was not decided in the prior proceeding, (2) the issue of whether or not Defendant Balsamo negligently drafted Francesco's Will was not litigated in that proceeding. Collateral estoppel does not bar Plaintiff's claims. The issue of whether Balsamo was negligent in drafting the ambiguous provision was not before the Probate Court.

Collateral estoppel, however, "must be applied equitably, not mechanically." *In re Tanelli*; 194 N.J. Super. 492, 497 (App. Div.)*, certify.* denied 99 *N.J.* 181 (1984). Moreover, because collateral estoppel is an equitable doctrine, it should only

be applied when fairness requires. *State v. Gonzalez*, 75 N.J. 181, 191 (1977). Or, as explained by the court in **662 *Continental Can Co. v. Hudson Foam Latex Prod. Inc.,* 129 *N.J. Super* 426,430,324 A.2d 60 (App. Div. 1974), whether collateral estoppel applies depends on a variety of factors, "all of which are considered because they contribute to the greatest good for the greatest number so long as fairness is not sacrificed on that altar." *Pivnick v. Beck*, 326 N.J. Super. 474, 485-86(App. Div. 1999), aff'd, 165 N.J. 670(2000).

Certainly, there can be no claim that the issue of whether the advice Balsamo gave to the client, Anthony at the time of the deed and mortgage was negligent as alleged in Paragraph 16 of the Complaint can be subjected to collateral estoppel. The Court in the Probate Action's decision in no way touched on this advice and Defendant's motion ignores this allegation.

Furthermore, the issue of whether or not Francesco Ventre intended to benefit his daughter in law at the expense of his son, Anthony Ventre should not be binding in this action, Plaintiff-Appellant submits that such matter of approximate cause are to be determined by a jury, furthermore the Probate Action's findings still would not preclude Anthony Ventre's claim for the legal fees and expenses caused by the necessity to litigate this ambiguous provision.

It is respectfully submitted that this issue of collateral estoppel does not bar this claim and that this matter should remanded for Trial on the merits and decision

by the jury as to whether or not Balsamo's negligence proximately caused damages to the Plaintiffs.

Here, there is nothing in the record which will support a finding of inexcusable conduct by the Plaintiff or substantial prejudice suffered by the Defendant.

D. THE COURT MADE NO FINDING AS TO PLAINTIFF CLAIMS FOR ATTORNEYS FEES IN THE PROBATE ACTION AND CLAIMS ARISING OUT OF BALSAMO'S NEGLIGENT ADVICE CONCERNING THE MORTGAGE. (APPEALING THE ORDER DATED MAY 17, 2023 FOUND AT PA000337 AND ORDER DATED MAY 26, 2023 FOUND AT PA000351)

As said forth above, the Probate Court made no findings as to whether or not Balsamo's negligence caused the attorneys fees in the Probate Action expended by the Plaintiffs or as to his negligent advice regarding the provision of the mortgage. It was error for the Court to dismiss Plaintiff's complaint in the entirety without addressing these allegations.

CONCLUSION

For the foregoing reasons, the Court should reverse the Order Dismissing Plaintiff's case and reinstate same for discovery and Trial.

Respectfully submitted,

/s/Kenneth S. Thyne

KENNETH S. THYNE, ESQ.

Dated: October 19, 2023

ANTHONY VENTRE, EXECUTOR OF THE ESTATE OF FRANCESCO VENTRE AND ANTHONY VENTRE, INDIVIDUALLY,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003276-22
Plaintiffs-Appellants,	:	ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY Docket No.: PAS-L-523-23
v.	:	
ARTHUR E. BALSAMO, ESQ., JOHN DOES 1-100 (names being fictitious and unknown); and ABC BUSINESSES 2-100 (names being fictitious and unknown),	:	CIVIL ACTION
Defendant-Respondent.	:	SAT BELOW: HON. VICKI A. CITRINO, J.S.C.

BRIEF ON BEHALF OF DEFENDANT/RESPONDENT ARTHUR E. BALSAMO, ESQ.

ECKERT SEAMANS CHERIN & MELLOTT, LLC
Marshall D. Bilder Esq. (Attorney ID# 030521989)
mbilder@eckertseamans.com
Karlee Martin Esq. (Attorney I.D. #240742018)
kmartin@eckertseamans.com
Physical Address: 2000 Lenox Drive, Suite 203
Lawrenceville, NJ 08648
Mailing Address: P.O. Box 5404, Princeton, NJ 08543
Telephone: (609) 392-2100 | Facsimile: (609) 392-7956
Attorneys for Defendant, Arthur E. Balsamo, Esq.

Of Counsel and On the Brief:
Marshall D. Bilder, Esq.

On the Brief:
Karlee M. Martin, Esq.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Preliminary Statement

We represent defendant-respondent, Arthur E. Balsamo, Esq. ("Balsamo"), and respectfully submit this brief in opposition to the appeal of plaintiff, Anthony Ventre ("Anthony"), Executor of the Estate of Francesco Ventre, and Anthony Ventre, Individually (collectively, "plaintiffs"), from an adverse Law Division order dismissing plaintiffs' complaint on summary judgment. As explained below, the Law Division's order was correct and should be affirmed.

According to their complaint, plaintiffs' principal claim is that Balsamo, an attorney, committed legal malpractice in "negligently" drafting a Will for Anthony's father, Francesco Ventre ("Francesco"), "result[ing] in an award to [Anthony's ex-wife] Carol of forgiveness of [a joint] mortgage which was contrary to Francesco's intent and which damaged Anthony and Francesco's Estate." (Pa000003 at ¶17.)[1] *Notably absent from the complaint was any mention of the fact that Anthony's precise claim was previously litigated to conclusion in the Chancery Division.*

After a 3-day trial, Anthony's claim was entirely rejected. The trial court ruled that Francesco did intend to forgive the subject mortgage as to Carol.

[1] "Pa" refers to Plaintiff's Appendix.

Unhappy with that outcome, Anthony appealed, a fact also not mentioned in the complaint. In The Matter of Francesco Ventre, deceased, Appellate Division, Docket No. A-0011-21 (hereinafter "App.Div. Opinion") (Pa000065.)

On July 8, 2022, this Court issued an opinion affirming the trial court's decision. (Id.) This Court held, among other things, that the trial court properly applied the doctrine of "probable intent" to determine that Francesco intended to discharge the subject mortgage entirely, even as to Carol, who divorced Anthony some 4 years after the Will was executed. This Court observed:

> There was nothing in the evidence direct or extrinsic that supported the contention that Francesco intended that Carol remain liable for a loan originally taken by Anthony in his own name so that he could purchase the Ridgefield property. [Pa000082.]

The underlying Law Division action represented Anthony's legally improper effort to collaterally attack the final adjudication of the precise issue at the heart of his malpractice action: whether Balsamo drafted a Will that did not reflect his father's true intent. The Chancery judge ruled that the Will did reflect Francesco's intent, and this Court affirmed that decision.

The Law Division correctly held that plaintiffs could not proceed with a legal malpractice claim premised on the assertion that Balsamo did not capture Francesco's testamentary intent after the trial court and Appellate Division held that he did. This is long-settled law in New Jersey. Pivnick v. Beck, 326 N.J. Super. 474 (App.Div. 1999), aff'd 165 N.J. 670 (2000) (holding that collateral

estoppel precludes a legal malpractice case based on an attorney's alleged failure to capture testamentary following a Probate action finding that testamentary intent was properly captured). In addition, the Law Division properly determined that plaintiffs' action was also barred by the entire controversy doctrine, consistent with this Court's decision in Schindel v. Feitlin, No. A-2888-19, 2021 N.J. Super. Unpub. LEXIS 1119 (Super. Ct. App. Div. June 11, 2021).(Pa000090) The final order of the Law Division should be affirmed.

PROCEDURAL HISTORY

We take no issue with the factual portion of plaintiffs' procedural history of this matter. We object to plaintiffs' improper argument contained within the procedural history section.

COUNTERSTATEMENT OF FACTS

This purported legal malpractice action arises from Anthony's unhappiness that his father Francesco released Anthony's Ex-wife (Carol) from a mortgage under which she and Anthony were joint mortgagors. All of the pertinent facts can be gleaned from Anthony's complaint in this action and this Court's prior opinion deciding the precise issue that plaintiffs raise in this action; whether Balsamo properly captured Francesco's testamentary intent.

According to his complaint, Anthony "purchased property located at 533 Art Lane, Ridgefield, New Jersey, in 2002 with financing from his father, Francesco. Anthony built a two-family house on the property." (Pa000002 at ¶s 4-5.) Anthony states that "[i]n 2013, [he] and his wife, Carol Ventre ("Carol") obtained long-term financing, moved into the house, and Carol was placed on the deed." (Id. at ¶6.)

Anthony next asserts that he "and Carol began having marital problems between 2010 and 2012. When they obtained the aforementioned long-term financing and when Carol was being placed on the deed, Francesco wanted to

protect his interests. Anthony and Francesco consulted with Defendant Balsamo who prepared a mortgage and mortgage note in Francesco's favor. The mortgage note required payment on demand in the event Carol and Anthony divorced." (Id. at ¶s 7-8.)

Critically, Carol and Anthony did not divorce while Francesco was alive and at no time did Francesco demand repayment in any amount. (Pa000081-Pa000082.)

Anthony states that in 2014, again while still married to Carol, "Francesco was diagnosed with a life-threatening condition…which prompted him to have a will prepared. Francesco and Anthony met with Balsamo on July 1, 2014 regarding preparation of a will. Francesco signed the will on July 9, 2014 and left his estate to his wife and his children, Anthony and Carmela Ventre ("Carmela")." (Pa000002 at ¶10.)

Some four years later, "Carol commenced a divorce action in 2018, and during a deposition Anthony first became aware that Carol intended to assert the position that Francesco forgave the mortgage debt as to both her and Anthony and that the mortgage lien should be cancelled as to both her and Anthony." (Pa000003 at ¶12.) In response to Carol's claim, Anthony commenced litigation in Probate by way of complaint dated September 14, 2020. (Pa000014.)

Anthony claimed that Francesco's intent in his 2014 Will was to release only him but not Carol from their joint mortgage obligation. The Will provided in relevant part:

> I do give, devise and bequeath the unpaid principal balance and accrued interest, if any, in and to a certain mortgage lien which I hold on the property known and as by the street address 533 Art Lane, Ridgefield, NJ unto my son Anthony Ventre. It is my wish and I direct that such debt be forgiven and the mortgage lien cancelled of record by my Executor. [Pa000019 at ¶38.]

Plaintiffs seized upon the first sentence in this provision to argue that Francesco only intended to release Anthony, but not Carol. (Pa000018 at ¶26, Pa000019 at ¶s 34-36.) Plaintiffs advanced this argument even though Balsamo, who drafted the subject provision, was absolutely clear in his understanding that Francesco intended to forgive the entire debt and discharge the mortgage. As this Court previously explained:

> According to Balsamo, he was careful to confirm with Francesco he wanted the debt forgiven and the mortgage cancelled because the effect would be that Francesco's wife would not receive any portion of the funds owed once Francesco passed away. In response to Balsamo's inquiries, Francesco repeatedly stated he wanted the debt and lien cancelled so there would be no more debt. According to Balsamo, Francesco understood that Anthony and Carol would "have the property free and clear of the debt." Balsamo's notes from his meeting with Francesco made reference to Francesco wanting to "forgive this debt." [Pa000071.]

Balsamo never wavered from his clear understanding of what Francesco intended. Nevertheless, Anthony maintained that his father only wanted the debt cancelled as to him alone, leading to a three-day trial. (Pa000073.)

The trial judge concluded that the Will was ambiguous with respect to what Francesco intended and applied the "doctrine of probable intent" to conclude that Francesco intended to discharge the mortgage entirely, just as Balsamo had understood. This Court also addressed this outcome in its prior Opinion:

> The judge found that Anthony's testimony was clouded by his involvement in the divorce litigation and his understanding of article three did not make sense, especially regarding his claim that the loan was only forgiven as to him, not Carol. The judge found Balsamo was very credible, especially given his thirty-year relationship with Francesco and his familiarity with the entire family. The judge accepted Balsamo's testimony that once he was alone "behind closed doors" with his client, without Anthony, Francesco was "unequivocal" that he wanted the debt forgiven and the mortgage cancelled. Moreover, Balsamo found it "clear as day" that what Francesco "wanted was going to indirectly benefit Carol." The judge concluded that Balsamo was not the type of person who would say anything a client or anyone else wanted if not true as demonstrated by his refusal to sign the original certification presented by Carol's attorneys in the divorce and that Balsamo "never wavered" that the forgiveness of the debt was what Francesco wanted. The judge found that as Balsamo explained, the first sentence of article three was the lawyer's language, and the second sentence was Francesco's emphasizing that "he wanted the debt cancelled of record." [Pa000075.]

This Court affirmed the trial court's ruling in its July 8, 2022 opinion.

This court held "[t]here was nothing in the evidence direct or extrinsic that supported the contention that Francesco intended that Carol remain liable for a

loan originally taken by Anthony in his own name so that he could purchase the Ridgefield property." (Pa000082.) Conversely, Balsamo was certain "that Francesco directed [him] to include in his will a provision that directed the debt be forgiven and the mortgage discharged." (Id.)

Ignoring the outcome at trial and affirmance on appeal, on or about November 17, 2022 plaintiffs brought a new action arguing that Balsamo committed legal malpractice in drafting a Will that "was contrary to Francesco's intent and . . . damaged Anthony and Francesco's Estate." (Pa000003 at ¶17.) We moved for dismissal based principally on collateral estoppel and the entire controversy doctrine. By order dated May 17, 2023, the motion judge ordered dismissal of Francesco's complaint leading to this appeal.

Legal Argument

Point I

Collateral Estoppel Precluded Plaintiffs' Action

(Responding To Appellants' Argument, Point I. C)

Anthony claims that Balsamo failed to capture his father's intent that the subject debt and mortgage be cancelled as to him alone, and not his wife at the time the Will was executed. This was the precise issue litigated in the Chancery action, a point Anthony concedes on appeal: "[t]he focal issue in the Probate Action was what Francesco Ventre ("Francesco") intended" by his Will. (Appellant's Brief at 4-5.)

As detailed above, the Chancery judge, following full presentation of all the evidence plaintiffs wished to present, concluded that Francesco intended to forgive the debt and cancel the mortgage entirely. That finding precluded Anthony's legal malpractice claim as a matter of law.

In Pivnick v. Beck, 326 N.J. Super. 474 (App.Div. 1999), aff'd 165 N.J. 670 (2000), this Court held that collateral estoppel precludes a legal malpractice action based on an attorney's alleged failure to capture testamentary following a Probate action finding that testamentary intent was properly captured. Plaintiffs' complaint in this case failed to state a viable claim for relief because

the premise on which the claims were based -- that the Will Balsamo drafted "was contrary to Francesco's intent" -- had been conclusively rejected.

Whether or not the Will was ambiguous was irrelevant except insofar as it opened the door for plaintiffs to persuade the trial judge of their interpretation of the Will. But, they failed. The trial judge's final judgment on this issue precludes plaintiffs' current claims no matter how they may be recrafted to make it appear otherwise.

The fact pattern of this case mirrors that presented in Pivnick, supra, in all material respects. According to the this Court's synopsis of the facts in that case, Leonard Pivnick ("Leonard") filed a "legal malpractice claim against [attorney] Beck and his firm from which this appeal emanates. The crux of Leonard's complaint was that Beck's negligence in preparing the Trust Agreement yielded an outcome directly contrary to [his father's] Harry's intent, which was allegedly to disinherit [his sister] Audrey and leave his entire estate to Leonard." Pivnick, supra, 326 N.J. Super. at 480.

The Court first addressed Beck's argument that Leonard could not proceed with his claims at all because of the absence of privity between him and Beck. The Court declined to preclude all actions by unhappy beneficiaries but held that public policy would be "satisfactorily protected by enhancing the applicable burden of proof in this type of legal malpractice action." Id. at 483.

Specifically, where a purported beneficiary asserts that an attorney failed to capture a testator's intent, a "clear and convincing burden of proof shall be required[.]" Id. at 485-486.

This Court next considered the impact of the fact that Leonard, in his capacity as an executor of Harry's estate, argued in a Probate action that "the Trust Agreement, as prepared by Beck, did not reflect his father's intent and, therefore, the trust should be reformed." Id. at 478. Leonard argued that his father's intent was to disinherit his sister. The Probate judge rejected Leonard's claim. Id. at 479-480.

Leonard then sued Beck for legal malpractice arguing, just as plaintiffs argue in this case, that Beck committed legal malpractice by not capturing his father's true testamentary intent. The trial judge "dismissed plaintiff's complaint because the probate action had previously determined that the will and Trust Agreement expressed Harry's intent as to the disposition of his property and, therefore, plaintiff was collaterally estopped from relitigating the issue of his father's intent." Id. at 481.

On appeal, this Court held that the legal malpractice claim was properly dismissed based on collateral estoppel. According to the Court, for the doctrine of collateral estoppel to apply, the party asserting the bar must show that:

> (1) the issue to be precluded is identical to the issue decided in the previous proceeding; (2) the issue was actually litigated in the

> prior action, i.e., there was a full and fair opportunity to litigate the issue in the prior action; (3) a final judgment on the merits was issued in prior proceeding; (4) the determination of the issue was essential to prior judgment; and (5) the party against whom preclusion is asserted was a party to or in privity with a party to the earlier proceeding. [Id. at 485.]

The Court next explained why collateral estoppel precluded Leonard's malpractice claims, just as they precluded plaintiffs' claims in this case:

> Here, the issues in the two proceedings were identical, whether the Trust Agreement accurately reflected Harry's intent; second, the issue was actually litigated in the first proceeding because the probate judge heard cross motions for summary judgment after discovery and oral argument by the parties' attorneys; third, a final judgment on the merits was entered because the probate decision was affirmed by the Appellate Division and the Supreme Court denied certification; fourth, the issue was essential to the prior judgment because the ultimate issue the probate judge decided was whether the Trust Agreement accurately reflected Harry's intent; and fifth, the party against whom the doctrine was asserted was a party to the earlier proceeding, i.e., Leonard was a defendant in the probate action. Accordingly, Judge Schott correctly precluded plaintiff's action. [Id. at 486-487.]

The present case contains all the elements requiring collateral estoppel, precluding plaintiffs from arguing that Francesco's Will did not reflect his true intent.

First, and as plaintiffs concede, the issue in the Probate action and this case was whether the Will accurately reflected Francesco's intent. Second, the issue was actually litigated to conclusion following a three-day trial. Third, there was a final judgment on the merits insofar as the Probate judge entered an Order

of Judgment dated July 21, 2021. (Pa000063.) Fourth, the issue decided in the Probate action (i.e., whether Balsamo captured Francesco's true intent to discharge his mortgage entirely) was essential to the judgment. Fifth, Anthony was a party to the Probate action. In sum, the doctrine of collateral estoppel applies to this action.

Finally, to the extent it might be relevant, we note that this case presents an even more compelling case for application of collateral estoppel compared with Pivnick. As noted above, in Pivnick, the Probate judge applied a clear and convincing standard to Leonard's claims. One of Leonard's arguments on appeal was that a less onerous preponderance standard should have been applied to his legal malpractice claim (an argument this Court also rejected).

Here, by contrast, the Probate judge applied the less onerous preponderance standard to Anthony's claim, and yet Anthony still failed. (Pa000076, quoting the Probate Judge: "I cannot conclude based on the evidence before me that the plaintiff has proven by a preponderance of the evidence that the probable intent of the father was not to forgive Carol from this loan, it was just to forgive Anthony, and not discharge the entire loan[.]")

If Anthony could not meet the preponderance standard applied by the Probate judge, he certainly cannot meet the heightened "clear and convincing" standard of proof required by Pivnick in this type of case. Since all of plaintiffs'

legal malpractice claims require plaintiffs to show that Francesco did not intend to release Carol from her mortgage obligations, and because they are collaterally estopped from doing so, the Law Division properly dismissed this case.

Plaintiffs advance three arguments why Pivnick should not bar their claims. First, plaintiffs argue that this case is distinguishable from Pivnick because in that case the Trust was clear on its face but in this case the Chancery Judge found the Will to be ambiguous. This distinction is legally irrelevant.

While the Trust in Pivnick may have been clear in its wording, according to the plaintiff in that case, the wording was clearly wrong and opposite of the testator's intent, solely because of the defendant lawyer's negligence. Just as in this case, Pivnick was not decided based on face of the instrument, but on the totality of the evidence regarding the testator's intent. It was *that decision on testamentary intent* after a full and fair opportunity to litigate the issue that barred the subsequent legal malpractice claim. Pivnick at 486-487.

Whether the instrument leading to litigation was clear, but allegedly completely wrong, or merely ambiguous, has no bearing on the legal effect to be afforded a final judgment after a full and fair trial. It would also make no sense to preclude a claim against an attorney who allegedly drafted a Trust that was allegedly completely wrong (as in Pivnick), but to permit a claim against an attorney who drafted a Will that was merely allegedly ambiguous (as here).

In this case, the Chancery Judge found the Will ambiguous, but after considering all the evidence, a judicial determination was made that Francesco intended to discharge the mortgage entirely. Again, it is this decision, which was reached after a full and fair opportunity to litigate the issue, that precludes the current action. Ibid. Balsamo cannot be found negligent for an outcome that has been conclusively determined to be the correct outcome.

Finally, and to state the obvious, plaintiffs assume that the ambiguity harmed their interests when the opposite is true. Balsamo, who drafted the Will, was always clear about what Francesco intended and what he (Balsamo) intended by the words he used. The ambiguity allowed plaintiffs to attempt to persuade the Chancery judge that Balsamo was mistaken despite Balsamo's clarity as to what was intended. Plaintiffs failed both at the trial court level and on appeal; the law precludes the proverbial "third bite."

Plaintiffs next claim that "at least three of the five requirements for collateral estoppel are absent" (Appellant's Brief at 31), but then identify only one substantive issue. Plaintiffs assert that Balsamo's negligence was not at issue in the Chancery action. This argument is entirely unavailing.

The procedural posture of this case and Pivnick are identical. In neither case was attorney negligence at issue in the Probate/Chancery actions. The relevant and controlling issue was that of testamentary intent.

Pivnick precludes re-litigation of the issue of testamentary intent, and by extension also precludes any legal malpractice claim premised on the assertion that the testator had a different intent than that determined in the first action. Given the Chancery Judge's final judgment finding that Francesco's testamentary intent was fulfilled, there can be no malpractice claim because the ultimate outcome was correct as a matter of law. Stated differently, plaintiffs cannot claim they were damaged by the total forgiveness of the mortgage because they are precluded from arguing that this was not Francesco's true wish. Plaintiffs already fought and lost that fight.

Finally, plaintiffs urge what amounts to a wholesale reversal of Pivnick: "the issue of whether or not Francesco Ventre intended to benefit his daughter in law at the expense of his son, Anthony Ventre should not be binding in this action[.]" (Appellant's Brief at 32). Plaintiffs provide no compelling explanation why Pivnick (which merely applied settled principles of collateral estoppel) was wrongly decided. This argument should be rejected.

In sum, Pivnick provides ample support for the dismissal of plaintiffs' claims. The Law Division order dismissing this action should be affirmed.

Point II

Plaintiffs' Action Was Barred By The Entire Controversy Doctrine

(Responding To Appellants' Argument, Point I. A and B)

In addition to collateral estoppel as explained above, dismissal of plaintiffs' action was also warranted based on the entire controversy doctrine ("ECD"). The ECD, codified at New Jersey Court Rule 4:30A, requires that all claims arising between the same parties be included in one action. See N.J. Ct. R. 4:7-1 (identifying mandatory and permissive claims). Specifically, Rule 4:30A states: "Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine[.]"

The ECD respects "our long-held preference that related claims and matters arising among related parties be adjudicated together rather than in separate, successive, fragmented, or piecemeal litigation." Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co., 207 N.J. 428, 443 (2011). See also Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 23 (1989) (noting "[f]ragmented and multiple litigation" is detrimental to the parties, the judicial system, and the public).

Our Supreme Court has stated:

> Underlying the Entire Controversy Doctrine are the twin goals of ensuring fairness to parties and achieving economy of judicial

> resources. As this Court has recognized, "[t]he purposes of the doctrine include the needs of economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition through the avoidance of 'piecemeal decisions.'" Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15, 560 A.2d 1169 (1989) (citing 2 State of New Jersey Constitutional Convention of 1947, Committee on the Judiciary Report § 11(J) at 1187 (1947)); accord Oliver v. Ambrose, 152 N.J. 383, 392-93, 705 A.2d 742 (1998). [Kent Motor Cars, supra, 207 N.J. at 443.]

As such, the ECD "requires joinder in one action of all legal and equitable claims related to a single underlying transaction[.]" Manhattan Woods Golf Club, Inc. v. Arai, 312 N.J. Super. 573, 577 (App. Div.), certif. denied, 156 N.J. 411(1998).

In support of the ECD, Rule 4:5-1(b)(2) requires a party to certify in his initial pleading "the names of any non-party who should be joined in the action . . . or who is subject to joinder . . . because of potential liability to any party *on the basis of the same transactional facts*." Schindel v. Feitlin, No. A-2888-19, 2021 N.J. Super. Unpub. LEXIS 1119, at *6 (Super. Ct. App. Div. June 11, 2021) (emphasis in original) (citing N.J. Ct. R. 4:5-1(b)(2))**.** (Pa000095.) The purpose of the disclosure requirement ensures that the "ultimate authority to control the joinder of parties and claims remains with the court; the parties may not choose to withhold related aspects of a claim from consideration." Schindel, at *6 (quoting Kent Motor Cars, supra 207 N.J. at 446).

In this case, plaintiffs indisputably knew that the Will Balsamo drafted did not clearly provide for what they claim Francesco had intended. They brought an action in Chancery to pursue their proposed interpretation of the Will, and Balsamo was a key witness in that action.

Yet, at no time did plaintiffs identify Balsamo as a person who might be potentially liable as required by under Rule 4:5-1(b)(2). This deprived the trial judge of the opportunity to decide how best to proceed and, more importantly, was fundamentally unfair to Balsamo who was unaware that he needed to protect his personal interests. Simply put, plaintiffs needed to pursue all of their potential claims in the Chancery action and failed to do so.

In Schindel, supra, a three-judge panel of the Appellate Division addressed the application of the ECD in a context substantially identical to this case, concluding that plaintiff's failure to pursue a legal malpractice claim in an earlier probate action precluded the later claim. Schindel provided a separate basis for dismissing plaintiffs' complaint in this case.

When evaluating the applicability of the ECD, a court makes its initial inquiry as to whether the claims "arise from related facts or the same transaction or series of transactions." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 109(2019) (quoting DiTrolio v. Antiles, 142 N.J. 253(1995)). The ECD does not require that successive claims share

common legal issues for the doctrine to bar a subsequent action. Ibid. (citing Wadeer v. N.J. Mfrs. Ins. Co., 220 N.J. 591, 605 (2015); DiTrolio, 142 N.J. at 271). Rather, "the determinative consideration is whether distinct claims are aspects of a single larger controversy because they arise from interrelated facts." Ibid. (quoting DiTrolio, 142 N.J. at 271).

In Schindel, the decedent, Arnold, executed three wills which the son, David, contested on the grounds of undue influence. During the probate action, David's attorney deposed the drafting attorney. Upon conclusion of the probate action, David filed a legal malpractice claim against the drafting attorney alleging that the drafting attorney knew or should have known of the undue influence and Arnold's lack of testamentary capacity. This Court affirmed the Law Division's dismissal of the legal malpractice complaint pursuant to the ECD.

The Schindel court first noted that David's malpractice complaint had two specific claims: the drafting attorney knew or should have known that Arnold lacked testamentary capacity when he executed the will; or, alternatively, defendant knew or should have known of the undue influence over Arnold. Schindel, at *8. The Court stated that these were the exact same contentions David raised in the probate case, and it was indisputable that the two "distinct

claims . . . [arose] from interrelated facts." Ibid. (quoting DiTrolio, 142 N.J. at 271).

The Schindel court rejected the argument that the malpractice claim did not accrue until the probate case ended. "It suffices to say the accrual date in the legal malpractice setting is when 'the essential facts of the malpractice claim are reasonably discoverable' and the client "sustain[s] actual damage." Schindel, at *8-9 (citing Dimitrakopoulos, 237 N.J. at 116). Accordingly, David's claim accrued when he knew that the drafting attorney had drafted the will at issue and his shares were reduced. Ibid. (citing Pivnick, 326 N.J. at 483).

Applying these same principles in this case, the Law Division judge properly determined that the ECD barred plaintiffs' legal malpractice claim. Here, plaintiffs' claim is that Balsamo committed legal malpractice by "negligently" drafting a Will for Anthony's father, Francesco "result[ing] in an award to [Anthony's ex-wife] Carol of forgiveness of [a joint] mortgage which was contrary to Francesco's intent and which damaged Anthony and Francesco's Estate." (Pa000003 at ¶17.) These are the exact same contentions plaintiff raised in the Chancery Division, and the Appellate Division on appeal from the Chancery Division order. It is indisputable that the two "distinct claims . . . arise from interrelated facts." Ibid. (quoting DiTrolio, 142 N.J. at 271). Similarly, given plaintiffs' duplicative contentions, there is no doubt that there was

standing to pursue a legal malpractice claim during the probate matter. Ibid. (citing Pivnick, 326 N.J. at 483). Dismissal on these facts was proper and the final order of dismissal should be affirmed.

On appeal, plaintiffs first argue that the ECD exempts "all" (plaintiff's emphasis) legal malpractice claims. Plaintiff is wrong. In Dimitrakopoulos v. Borrus, Goldin, supra, 237 N.J. at 91, the Supreme Court extensively discussed the ECD and specifically the exemption of certain legal malpractice claims.

The Court clarified that the legal malpractice claims exempt from the entire controversy doctrine under Olds v. Donnelly, 150 N.J. 424 (1997), are those where the "attorney in the underlying litigation" also "represents the client" in that action. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 99 (2019). Here, Balsamo did not represent plaintiff in the Chancery Action, and nothing otherwise exempts this case from the ECD. Plaintiffs' successive litigation was properly dismissed.

Plaintiffs next assert that their failure to provide the notice required by Rule 4:5-1 did not substantially prejudice Balsamo. Once again, they are wrong. This precise issue was also addressed by this Court in Schindel, which specifically addressed the substantial prejudice that would accrue to an attorney in Balsamo's position.

This Court stated that "substantial prejudice may result from a party's inexcusable failure [to notify or join a party] and the resulting 'potential impact of the particular legal framework in which the claims in th[e] litigation have been brought.'" The Court also discussed the fact that the attorney defendant in that case had been deposed in connection with the probate case.

Here, not only was Balsamo deposed in the Chancery Action, he was a featured witness at trial. Quite obviously, had plaintiff joined Balsamo in the Chancery Action and/or notified him of the potential for a legal malpractice claim, the truthful testimony that Balsamo provided would have been seen as against his own self-interest. Indeed, even without this component, the trial judge Found that "Balsamo was very credible" and "was not the type of person who would say anything a client or anyone else wanted if not true[.]" (Pa000075.)

The trial judge should have been given the chance to rule on the alleged malpractice claim. The rules of civil practice, Rule 4:5-1, required he be given that chance. We think it is clear how the judge would have ruled. Plaintiffs' inexcusable failure to comply with Rule 4:5-1 should also be deemed to bar this claim pursuant to the ECD.

Point III

Plaintiffs' Claims Based On Negligent Advice And Attorneys Fees Are Groundless

(Responding To Appellants' Argument, Point I. D)

(a) The negligent advice claim.

Plaintiffs assert that they should have been allowed to pursue the Law Division action based on a single, vague allegation contained in paragraph 16 of their complaint. (Appellant's Brief at 32). Paragraph 16 of the complaint provides:

> 16. Balsamo failed to give Anthony the appropriate advice at the time of the execution of the mortgage or the deeding of the property to Carol. [Pa000003.]

Notably, nowhere in plaintiffs' 34-page submission do they describe the alleged basis for this claim or why it has any substantial merit. This failure is the functional equivalent of failing to brief an issue at all, and it should be rejected on that basis alone. An issue not briefed on appeal is deemed waived. Jefferson Loan Co. v. Session, 397 N.J.Super. 520, 525 n. 4(App.Div. 2008); Zavodnick v. Leven, 340 N.J.Super. 94, 103(App.Div. 2001).

Plaintiffs' failure to brief the "merits" of this issue was no oversight. In the underlying motion proceedings, plaintiffs *did* endeavor to explain this claim, and we thoroughly debunked it.

In his underlying opposition to our motion to dismiss, plaintiffs explained that "the mortgage and deed could have been prepared in such a way so that Anthony's then wife, Carol was provided a smaller interest in the property that reflected the fact that it was completely purchased by Anthony's premarital funds; Anthony never received this advice from Defendant." (Da006[2].) The facts of record eliminated this orphan claim.

To begin, Anthony testified that his wife Carol was put on the deed in connection with a loan from Bergen Community Bank,[3] not the loan from Francesco, and it was that commercial loan that caused Francesco to want a mortgage from Carol to protect his interests, not the plaintiff's interests:

> Q. Did you ever add Carol Ventre to the deed for the 533 Art Lane property?
>
> A. Yes, yes. I mean, there came a point in time when we had secured the financing from Bergen Community Bank and my father understood and, you know, I had told him that my father understood that, you know, Carol would come on to the deed, but he had money invested there. I mean, he wanted his money protected so he wanted a mortgage and to protect his money, you know, this was a third party coming in. He trusted me. But, you know what? Who knows about Carol? You know? [Pa000141 at T32:9-19.]

---

[2] Da refers to Defendants Appendix.

[3] We assume based on common knowledge that adding Carol to the mortgage was a condition of financing imposed by Bergen Community Bank.

The problem plaintiffs allege in this case has nothing to do with Carol's "interest in the property," the deed, or the loan from Bergen Community Bank. Rather, the alleged problem was Francesco's decision to release Carol, which fact plaintiffs refuse to accept.

The "premarital funds" that Anthony used to buy the subject (and eventual marital) property were not his; rather, they were the funds provided by Francesco. (Pa000082.) The mortgage securing Francesco's funds was at the center of the Chancery Action and now this action.

According to plaintiffs, Francesco "wanted his money protected so he wanted a mortgage and to protect his money[.]" (Pa000141 at T32:9-19.) Adding Carol to the mortgage was "protection" for Francesco and not Anthony personally; plaintiffs concede this point.

Francesco decided to forgive the mortgage debt entirely, and plaintiffs cannot avoid this result by reframing their claims. All of the funds involved in this case originated from Francesco. It was Francesco, not plaintiffs, that needed "protection." It was Francesco's choice alone to forgive the mortgage entirely, and he did.

Clearly, for plaintiffs to have sustained damages based on any of their claims inevitably requires a conclusion that Francesco did not intend to forgive Carol, but he did. Plaintiffs cannot sensibly argue that adding Carol to the

mortgage did not accomplish the stated objective, "to protect [Francesco's] money." The problem for plaintiffs was the discharge of the mortgage, not its creation. No matter how plaintiffs may try and recast the issue, collateral estoppel bars the claim.

(b) The attorney's fee claim.

Finally, plaintiffs argue that the trial court erred in failing to address their meritless claim for attorney's fees. Plaintiffs claim that Balsamo's alleged negligence in drafting an allegedly ambiguous Will caused plaintiffs' damages in the form of attorney's fees to litigate the matter. This claim is groundless on many fronts.

First, and most basically, there is no privity between plaintiffs and Balsamo with respect to the drafting of the Will. Francesco was Balsamo's only client. The issue of privity is extensively discussed in Pivnick. There, defendant argued that the absence of privity precluded the legal malpractice claim entirely. This Court held that a person in plaintiff's position (as a potential beneficiary) had standing to assert a legal malpractice claim with certain safeguards such as a heightened burden of proof.

However, this Court never remotely suggested that the attorney would have to finance the efforts of the nonclient seeking to enforce his personal view of testamentary intent. Anthony was not Balsamo's client on the Will, and he

has no entitlement to seek damages based on the expense of his failed litigation. The absence of privity precludes such a claim.

Second, and putting aside the absence of privity, Anthony's assertion that he would have avoided litigation if the Will was not "ambiguous" is demonstrably wrong. Plaintiffs initiated the Chancery Action after Carol claimed that she was discharged from the subject mortgage. (Pa000003 at ¶s 12-17.) Anthony believed that the Will was clear (not ambiguous) in his favor and used the Will to argue that Carol was not discharged. In other words, Anthony argued that the Will as drafted was consistent with Francesco's intent to discharge only him. (Pa000020 at ¶ 41.)

The Chancery Judge's eventual finding of ambiguity did not cause the litigation. Rather, the litigation was a consequence of Carol's claim and the later ambiguity finding was a consequence of plaintiffs bringing litigation that should never have been brought in first place. Plaintiffs were well aware of Balsamo's position as to Francesco's intent (Id. at ¶ 44), and the fact that plaintiffs disregarded that position and sued anyway cannot provide the foundation for a damages claim against Balsamo.

Balsamo was clear at all times that Francesco intended the complete discharge of the mortgage. Balsamo spoke to Francesco alone about the issue and Balsamo was the scrivener. Regardless of whether the Will could be

construed as ambiguous, Balsamo as the scrivener knew what Francesco intended and what he (Balsamo) had intended to convey by the words Balsamo used in the Will.

Balsamo was unwaveringly certain that Francesco intended a complete discharge. In this factual setting, the "ambiguity" finding -- which opened the door for plaintiffs to put forward all of their evidence and arguments despite Balsamo's position -- was a potential win for the plaintiffs, not a loss.

Given the strength of Anthony's conviction that Francesco only intended to discharge him, it also strains credulity for him to suggest that he would have abandoned his claim if the Will by its terms incontestably called for a complete discharge. Plaintiffs would undoubtedly still have pursued the Chancery Action arguing that the Will was wrong and negligently drafted just as in Pivnick.

Regardless, Anthony's unsuccessful effort to turn an alleged ambiguity in his favor does not render Balsamo liable in any respect, particularly given the trial judge's wholesale rejection of Anthony's position which was affirmed on appeal. If the Will was indeed ambiguous, that ambiguity could only have harmed Carol if the mortgage had not been discharged. Once again, and as a matter of law, Francesco intended the discharge. Balsamo told Anthony and swore in an early certification that was what Francesco intended. If plaintiffs

wanted to litigate anyway, they needed to pay for the endeavor. Plaintiffs cannot offload the costs of their rejected claims on Balsamo.

Conclusion

For all of the foregoing reasons, defendant, Arthur E. Balsamo, Esq., respectfully requests that this Court affirm the final order of the Law Division granting summary judgment in all respects.

ECKERT SEAMANS CHERIN & MELLOTT, LLC
Attorneys for Defendant, Arthur E. Balsamo, Esq.

By: */s/ Marshall D. Bilder*
Marshall D. Bilder, Esq.
Karlee M. Martin, Esq.

Dated: December 12, 2023

SIMON LAW GROUP LLC

40 WEST HIGH STREET, SOMERVILLE, NEW JERSEY 08876
(800) 709-1131 FAX (800) 709-1141

BRITT J. SIMON * + ◇
STEPHEN ZULLO
JOEL A. FRIEDMAN
JOHN A. KELLEHER
KENNETH S. THYNE
ERIK FRINS
JOHN E. MALCHOW

Of Counsel:
ANGELA M. ROPER

Paralegal:
HELEN DONIS

New York Bar *
Commonwealth of Pennsylvania ◇
District of Columbia Bar +

January 22, 2024

VIA ECOURT APPELLATE
Clerk, Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
P.O. Box 006
Trenton, New Jersey 08625-0970

RE: Anthony Ventre, Executor of The Estate of Francesco Ventre and Anthony Ventre, Individually, v. Arthur Balsamo, Esq.
Trial Court Docket No.: PAS-L-523-23
Appellate Docket No.: A-003276-22

Dear Honorable Judges of the Appellate Division:

Please accept this letter brief in lieu of a more formal brief as a short reply to the opposition the Defendant-Appellants filed in this matter.

SIMON LAW GROUP LLC
40 WEST HIGH STREET, SOMERVILLE, NEW JERSEY 08876
(800) 709-1131 FAX (800) 709-1141

TABLE OF CONTENTS

SIMON LAW GROUP LLC
40 WEST HIGH STREET, SOMERVILLE, NEW JERSEY 08876
(800) 709-1131 FAX (800) 709-1141

LEGAL ARGUMENT

I. *PIVNICK V. BECK* DEALT WITH AN INSTRUMENT THAT THE COURT FOUND UNAMBIGUOUS; THE COURT HERE FOUND THE INSTRUMENT DRAFTED BY DEFENDANT WAS AMBIGUOUS.

The *Pivnick v. Beck*, Appellate Court set forth that "in this case, Plaintiff attempted to prove malpractice by contradicting a solemn document that was clear on its face (emphasis added). 326 N.J. 474 at 491. The Supreme Court described the *Pivnick* case "Plaintiff undertook to have an unambiguous Will and Trust agreement reformed." *Pivnick v. Beck*, 615 N.J. 670 (2000). Thus, in addition to relying on a case that did not involve an ambiguous document, the Defendants completely ignore the Plaintiff's argument that the giving collateral estoppel effect when a Court applies the doctrine of probable intent to construe an ambiguous instrument thereby immunizes negligent attorneys for liability for drafting ambiguous testamentary instruments. There is no sound basis in policy or law or fairness for such immunity.

II. THERE IS ABSOLUTELY NO EVIDENCE IN THE RECORD THAT DEFENDANTS SUFFERED SUBSTANTIAL PREJUDICE

As below, Defendants do not identify a single way in which they are prejudiced nevermind substantially prejudiced by the failure to bring to the Trial

SIMON LAW GROUP LLC
40 WEST HIGH STREET, SOMERVILLE, NEW JERSEY 08876
(800) 709-1131 FAX (800) 709-1141

Court's attention the potential litigation against the Defendant in the probate matter. The party asserting the entire controversary doctrine as a defense bears "the burden of establishing both inexcusable conduct and substantial prejudice." *Hobart Bros. Co. v. Nat'l Union Fire Ins. Co.*, 354 N.J. Super. 229, 242 (App. Div. 2002). Substantial prejudice in this context means substantial prejudice in maintaining one's defense." *Mitchell v. Charles P. Procini, D.D.S., P.A.*, 331 N.J. Super. 445, 454 (App. Div. 2000). Typically, this requirement is met where there has been a loss of witnesses, evidence, and the passage of time such that memories have faded. Ibid. An undisclosed party must proffer "specific difficulties in mounting a defense" to claims that are "significantly different from that normally encountered." Id. at 456. Ultimately, "[t]he phrase 'substantial prejudice' is used in [R.] 4:5-1(b)(2) as a limitation on the court's exercise of the power of dismissal as a sanction" and is therefore, "consistent with our general preference for addressing disputes on the merits and reserving dismissal for matters in which those lesser sanctions are inadequate." *Kent Motor Cars, Inc.,* 207 N.J. at 447.

Indeed, the holding below is at odds with *Old v. Donnelly's* holding that all legal malpractice claims are exempt from the entire controversary doctrine. The

SIMON LAW GROUP LLC
40 WEST HIGH STREET, SOMERVILLE, NEW JERSEY 08876
(800) 709-1131 FAX (800) 709-1141

suggestion in the Defendant's brief that the Defendant would have testified differently under oath if he'd known his testimony might be relevant in a subsequent legal malpractice action is difficult to credit from a member of the bar.

III. THE ESTATE OF FRANCESCO VENTRE IS IN PRIVITY WITH THE DEFENDANTS

The Defendants finally claim that Plaintiff was required to on a Motion to Dismiss (not a Motion for Summary Judgment) to spell out all of the details on the claim that Balsamo's advice to Anthony Ventre was negligent and harmed Anthony is incorrect. As the Court knows on a Motion to Dismiss the allegations of the complaint are taken as true, *Nostrame v. Santiago,* 213 N.J. 109(2013). Defendants here never submitted a statement of fact or met any of the procedural requirements necessary for a Court to grant Summary Judgment.

Furthermore, the Defendants claim that they were not privity with Plaintiffs are nonsensical. The action was brought by the executor of Francesco Ventre's Estate; Francesco Ventre is the testator.

SIMON LAW GROUP LLC

40 WEST HIGH STREET, SOMERVILLE, NEW JERSEY 08876
(800) 709-1131 FAX (800) 709-1141

CONCLUSION

The Courts granting a Motion to Dismiss was contrary to the entire controversary doctrine and collateral estoppel. Clients who have an attorney draft a will should be able to rely upon the attorney unambiguously setting forth their intent and not have to wait for a Judge who they never met with or spoke with to decide their probable intent. The decision below should be reversed and remanded for discovery, Trial and the merits.

Respectfully submitted,

/s/ Kenneth S. Thyne

Kenneth S. Thyne, Esq.

KST/hd

Dated: January 22, 2024