

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2169-16T2

MODESTA M. MEZA-ROLE,
and ELOY A. ROLE,

Plaintiffs-Appellants,

v.

TRIARSI, BETANCOURT, WUKOVITS
& DUGAN, LLC, and HOWARD LESNIK,

Defendants-Respondents.

Argued February 27, 2018 - Decided March 23, 2018

Before Judges Yannotti and Carroll.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. L-4191-
16.

Modesta M. Meza-Role and Eloy A. Role,
appellants, argued the cause pro se.

Howard P. Lesnik argued the cause for
respondents (Triarsi, Betancourt, Wukovits &
Dugan, LLC, attorneys; Howard P. Lesnik, of
counsel and on the brief).

PER CURIAM

Plaintiffs Modesta M. Meza-Role and Eloy A. Role appeal from
a January 6, 2017 order dismissing their legal malpractice

complaint against defendants Triarsi, Betancourt, Wukovits & Dugan, LLP and Howard P. Lesnik, Esq. for failure to file an affidavit of merit (AOM). We affirm.

I.

The claim of legal malpractice arose from defendants' representation of plaintiffs in various matters relating to plaintiffs' occupancy of a Newark apartment. Specifically, plaintiffs retained defendants to represent them in a suit against their landlord alleging claims of uninhabitable conditions, trespass, and retaliatory and constructive eviction; and in an action for personal injuries sustained by Meza-Role when an upstairs tenant allegedly used chemicals to unclog a drain, causing acid to break through the pipes and discharge onto her. In their second amended complaint, plaintiffs asserted claims of legal malpractice and breach of fiduciary duty relating to defendants' representation of them in these matters, including negotiations defendants entered into with the landlord's insurance company.

After defendants answered, plaintiffs filed a motion seeking permission to proceed without an AOM. On October 17, 2016, the trial court denied the motion, but granted plaintiffs a sixty-day extension until December 10, 2016, to serve the AOM.

On November 30, 2016, plaintiffs filed a second motion to waive the AOM requirement. Plaintiffs argued the common knowledge

exception applied and no expert witness was needed to prove their claims. Defendants opposed the motion, and filed a motion to dismiss the complaint with prejudice for failure to serve an AOM. The trial court treated plaintiffs' second application as a motion for reconsideration, and entered an order denying the motion on December 16, 2016. On January 6, 2017, the court granted defendants' motion and dismissed the complaint with prejudice for failure to file an AOM as required by N.J.S.A. 2A:53A-27 and the October 17, 2016 order.

This appeal followed. Plaintiffs argue they did not need to serve an AOM because the malpractice portion of their complaint falls within the common knowledge doctrine, and because defendants failed to produce discovery. They also contend the court erred in dismissing their claim for breach of the various retainer agreements, which they assert is based on contract, not negligence. Plaintiffs further contend defendants failed to advise them of a trial date, resulting in the dismissal of the trespass claim against their landlord. We do not find these arguments persuasive.

II.

A.

We first address whether plaintiffs' complaint was exempt from the AOM requirement based on the common knowledge doctrine. Whether a cause of action implicates the AOM statute is a legal

conclusion, reviewed de novo. See Triarsi v. BSC Group Servs., LLC, 422 N.J. Super. 104, 113 (App. Div. 2011) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)); see also Meehan v. Antonellis, 226 N.J. 216, 230 (2016).

"The stated purpose of the AOM statute . . . is laudatory – to weed out frivolous claims against licensed professionals early in the litigation process." Meehan, 226 N.J. at 228 (citing Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 146 (2003)); see also Buck v. Henry, 207 N.J. 377, 383 (2011). Moreover, "[t]he submission of an appropriate [AOM] is considered an element of the claim." Id. at 228 (citing Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 244 (1998) (holding that a plaintiff's failure to submit the required AOM "goes to the heart of the cause of action as defined by the Legislature")); see also N.J.S.A. 2A:53A-29. "Failure to submit an appropriate affidavit ordinarily requires dismissal of the complaint with prejudice." Ibid. (citing Cornblatt, 153 N.J. at 243).

The AOM statute requires a plaintiff who alleges professional negligence to provide an expert's affidavit stating the action has merit. N.J.S.A. 2A:53A-27. The statute is consistent with the general requirement that expert testimony is required to establish the standard of care that is an essential element of a plaintiff's professional negligence claim.

To establish legal malpractice, a plaintiff must show "(1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) the breach of that duty; and (3) proximate causation." Because the duties a lawyer owes to his client are not known by the average juror, a plaintiff will usually have to present expert testimony defining the duty and explaining the breach.

[Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 14 (App. Div. 2006) (quoting Conklin v. Hannoeh Weisman, 145 N.J. 395, 416 (1996)).]

See also Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 12 (App. Div. 2001) ("[T]he party asserting malpractice must, under New Jersey case law, present expert testimony that establishes the standard of care against which the attorney's actions are to be measured." (citations omitted)).

However, our Supreme Court has held that an AOM is not required in those cases where, under the common knowledge doctrine, expert testimony would not be required to establish a deviation from the standard of care. Hubbard v. Reed, 168 N.J. 387, 390 (2001) (holding AOM was not required in case where dentist removed the wrong tooth). The common knowledge doctrine applies "where 'jurors common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without a benefit of the specialized

knowledge of experts.'" Id. at 394 (quoting Estate of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 469 (1999)).

The Hubbard Court warned that the common knowledge exception to the AOM requirement must be construed narrowly, stating that "[i]n most . . . cases, expert testimony will be required to establish both a standard of care and breach of that standard by the defendant" Id. at 397. Moreover, the applicability of the common knowledge doctrine should be clear on the face of the complaint. Id. at 395 (stating "the threshold of merit should be readily apparent from a reading of the plaintiff's complaint").

We have held the common knowledge doctrine applies when an attorney has failed to communicate with an expert to assure his attendance at trial, and the expert's testimony was essential to prove the plaintiff's injuries were caused by the accident on defendant's property. Kranz v. Tiger, 390 N.J. Super. 135, 146 (App. Div. 2007). Expert testimony was not required where the plaintiff alleged the attorney failed to brief an issue, misrepresented the case's status, and failed to accurately report a settlement discussion. Sommers v. McKinney, 287 N.J. Super. 1, 12 (App. Div. 1996). Also, an expert is not needed to establish negligence where an attorney fails to record a mortgage. Stewart v. Sbarro, 142 N.J. Super. 581, 591 (App. Div. 1976).

To generalize, an expert opinion is not required in "that category of cases that are so straightforward in nature that expert testimony is not required." Brach, 345 N.J. Super. at 12. "A common thread runs through these cases, namely none of them required the trier of fact to evaluate an attorney's legal judgment concerning a complex legal issue." Id. at 13; see 4 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 37:23 at 1659 (2013 ed.) ("The situations in which expert testimony was not required have typically involved egregious and extreme instances of negligence.").

In cases where an attorney has conducted some investigation of a client's claim, but the malpractice plaintiff asserts it was insufficient, the standard of care is unlikely to fall within a jury's common knowledge.

Although expert opinion is not necessary to establish the negligence of a personal injury attorney who fails to conduct any investigation of his client's claim, where the attorney has undertaken some investigation, a jury will rarely be able to evaluate its adequacy without the aid of expert legal opinion.

[Brizak v. Needle, 239 N.J. Super. 415, 432 (App. Div. 1990).]

In Aldrich v. Hawrylo, 281 N.J. Super. 201, 214 (App. Div. 1995), we reversed the trial court's determination that expert testimony was unnecessary. We stated, "[a] jury would not be able to

evaluate the adequacy of the investigation or the opinion without the aid of expert legal testimony." See also Sommers, 287 N.J. Super. at 11 (citing Aldrich for the principle that adequacy of investigation generally requires expert testimony).

Applying these principles, we agree with the trial court's assessment that plaintiffs' claims are not subject to the common knowledge exception to the AOM requirement. The common knowledge doctrine's applicability may not be discerned from the face of plaintiffs' complaint, as Hubbard requires.

To the contrary, plaintiffs' second amended complaint asserts that defendants misapplied various legal doctrines. Examples include plaintiffs' references to issues of claim preclusion and the entire controversy doctrine. Plaintiffs further allege defendants were negligent in filing, or failing to file, various motions and pleadings; in failing to properly negotiate a settlement with the landlord's insurance company; and in pursuing certain legal strategies. Also, plaintiffs at least implicitly fault defendants' investigation, including a request made under the Open Public Records Act to obtain records with respect to the landlord's registration and inspections of the leased premises, and defendants' efforts to obtain the declarations page of the landlord's liability insurance policy.

Here, the underlying factual allegations in the complaint require proof of the standard of care for an attorney charged with the evaluation and pursuit of these various matters. Accordingly, the common knowledge exception does not apply and an AOM was required to determine whether defendants deviated from the applicable standard of care.

B.

Plaintiffs additionally argue that defendants' failure to comply with discovery should relieve them of their obligation to provide an AOM. We disagree.

The statute provides:

An affidavit shall not be required pursuant to section 2 of this act if the plaintiff provides a sworn statement in lieu of the affidavit setting forth that: the defendant has failed to provide plaintiff with medical records or other records or information having a substantial bearing on preparation of the affidavit; a written request therefor along with, if necessary, a signed authorization by the plaintiff for release of the medical records or other records or information requested, has been made by certified mail or personal service; and at least 45 days have elapsed since the defendant received the request.

[N.J.S.A. 2A:53A-28.]

The timing of the sworn statement is deemed to relate back to the written request for records, if made. Aster v. Shoreline Behavioral Health, 346 N.J. Super. 536, 544-45 (App. Div. 2002).

Otherwise, it is subject to the same sixty-day period set forth in N.J.S.A. 2A:53A-27. Id. at 550.

"N.J.S.A. 2A:53A-28 reflects a legislative recognition that a plaintiff may be prevented from making [a threshold showing that the claims asserted are meritorious] if a defendant fails to produce essential medical records or other information." Scaffidi v. Horvitz, 343 N.J. Super. 552, 558 (App. Div. 2001). However, a defendant's failure to timely respond to a document request does not invariably relieve a plaintiff from complying with the AOM Statute. Ibid.

N.J.S.A. 2A:53A-28 applies only to "medical records or other records or information having a substantial bearing on preparation of the affidavit[.]" A plaintiff may request a great variety of documents to assist in the preparation of a case that are not essential for the preparation of an [AOM]. Moreover, it generally would be difficult, if not impossible, for a defendant to distinguish between documents that have "a substantial bearing on preparation of the [AOM]" and documents that may simply aid the plaintiff in the eventual proof of a case at trial. Therefore, N.J.S.A. 2A:53A-28 must be construed to require a plaintiff to identify with specificity any medical records or other information he [or she] believes are needed to prepare an [AOM], in order to trigger the running of the forty-five day period for a response.

[Id. 558-59.]

Here, defendants produced 314 pages of discovery in response to plaintiffs' interrogatories and request for the production of documents. Plaintiffs fail to clearly delineate the records or documents that were withheld by defendants. They also fail to clearly specify what records or other information are needed to prepare the AOM. For these reasons, plaintiffs are not entitled to relief under N.J.S.A. 2A:53A-28.

C.

Plaintiffs also attempt to couch their claims against defendants as a breach of the various retainer agreements. However, plaintiffs' claims are not saved by characterizing them as breach of contract claims. We recognize that an AOM is not required to support a breach of contract claim that does not implicate a professional standard of care. Couri v. Gardner, 173 N.J. 328, 340 (2002). Here, however, plaintiffs admit defendants performed legal work for them. The gravamen of their complaint is that defendants performed the work improperly. Since plaintiffs' claims clearly implicate a professional standard of care, and whether defendants breached that standard, an AOM was needed to support plaintiffs' claims.

D.

Finally, we reject plaintiffs' contention that defendants committed malpractice when they failed to advise plaintiffs of the

June 6, 2016 trial date on their trespass claim against the landlord. Plaintiffs discharged defendants before the trial date, and opted to represent themselves in the matter. It is undisputed that plaintiffs failed to appear for trial, and consequently the case was dismissed.

Contrary to plaintiffs' argument, the record shows that on April 17, 2016, Meza-Role sent Lesnik an e-mail entitled "Trial scheduled for June 6, 2016 and related issues." It is thus abundantly clear that plaintiffs were aware of the scheduled trial date.

To the extent we have not specifically addressed any of plaintiffs' remaining claims, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION