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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-4334-15T1

JIMMY L. TRANG,

Plaintiff-Appellant,

v.

RONALD S. MARKIZON and JOAN  
S. MARKIZON,

Defendants,

and

VASILIOS J. KALOGREDIS and  
KALOGREDIS, SANSWEET, DEARDEN  
AND BURKE, LTD.,

Defendants-Respondents.

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JIMMY L. TRANG,

Plaintiff,

v.

AFFILIATED PODIATRISTS OF  
SOUTH JERSEY, LTD., and RONALD  
S. MARKIZON,

Defendants.

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Argued February 14, 2018 – Decided May 3, 2018

Before Judges Koblitz, Manahan and Suter.

On appeal from Superior Court of New Jersey,  
Law Division, Union County, Docket No. L-1667-  
13.

Paul E. Paray argued the cause for appellant  
(Zimmerman Weiser & Paray LLP, attorneys; Paul  
E. Paray, on the brief).

Joanna Piorek argued the cause for respondents  
Vasilios J. Kalogredis and Kalogredis,  
Sansweet, Dearden and Burke, Ltd. (Wilson,  
Elser, Moskowitz, Edelman & Dicker, LLP,  
attorneys; Thomas F. Quinn and Joanna Piorek,  
of counsel and on the brief; Michael R.  
McAndrew; on the brief).

PER CURIAM

In this legal malpractice action, plaintiff, Dr. Jimmy Trang  
appeals from a December 3, 2015 order granting summary judgment  
in favor of defendants Vasilios Kalogredis and his law firm  
Kalogredis, Sansweet, Dearden and Burke, Ltd. (KSDB)  
(collectively, defendants). Trang also appeals from the provision  
of the order dismissing his claims with prejudice for failure to  
comply with a court order per Rule 4:37-2(a). We affirm.

We derive the following facts from the record, viewed in the  
"light most favorable to plaintiff[], the non-movant[]." Schiavo  
v. Marina Dist. Dev. Co., 442 N.J. Super. 346, 366 (App. Div.  
2015) (citation omitted).

In 2008, after a two-year residency at Affiliated Podiatrists of South Jersey, Limited (Affiliated), Trang was offered a partnership with Dr. Ronald Markizon. Trang retained Mark Abruzzo, one of three attorneys referred to him by Kalogredis, as his attorney for the negotiations of his buy-in into Affiliated in 2008 and subsequent buy-out in 2013. Kalogredis was retained by Markizon to represent himself and Affiliated throughout the negotiations. During the initial negotiations, Abruzzo reviewed Affiliated's financial statements sent to him from its accountant, Alan Roomberg.

Trang resigned from Affiliated on September 15, 2012 due to dissatisfaction with his financial status as a partner. In accord with the partnership agreement, Roomberg provided Trang with a buy-out calculation. Subsequent to receipt of the calculation, Trang filed suit against Markizon, his wife, Joan Markizon, and Affiliated.<sup>1</sup>

In his complaint, Trang averred legal fraud, negligent misrepresentation, equitable fraud, unconscionability, misrepresentations after the execution of the agreements, unjust enrichment, civil conspiracy to commit fraud, breach of contract,

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<sup>1</sup> In May 2016, Trang's claims against the Markizons and Affiliated were settled and a stipulation of dismissal between the parties was filed.

violations of the implied duty of good faith, and accounting. KSDB entered a notice of appearance on behalf of the Markizons. Trang then filed an amended complaint naming defendants and alleging as a basis for the claim that they owed a limited duty to Trang to act in good faith and breached that duty when they "facilitated an improper transaction" and represented the Markizons and Affiliated in violation of R.P.C. 3.7.

On December 12, 2014, the Law Division judge granted defendants' motion to serve a subpoena duces tecum on Abruzzo. The judge denied Trang's cross-motion for a protective order based upon attorney-client privilege and his motion to quash the subpoena.

After a case management conference in July 2015, the judge entered an order extending discovery. The order stated that the deposition of Abruzzo would take place on August 11, 2015. Notwithstanding the order, the dispute over Abruzzo's deposition continued, resulting in a telephonic conference with the judge and the parties. During that conference, the judge held the subpoena issued on Abruzzo governed. The judge also limited the deposition to three hours.

In August 2015, Trang served the expert report of an attorney, Scott Piekarsky. In the report, Piekarsky opined that defendants deviated from the requisite standard of care. Piekarsky stated

that since Abruzzo was an acquaintance of Kalogredis, Abruzzo's representation of Trang was a conflict and required a waiver. Piekarsky concluded defendants were liable for the conflicted status, which resulted in insufficient representation under Petrillo v. Bachenberg, 139 N.J. 472, 483-84 (1995). The report also stated that defendants should have disclosed to Trang that Roomberg had a criminal record and that the failure to do so caused him to suffer damages.<sup>2</sup>

Thereafter, defendants filed a motion to enforce the prior order compelling the deposition of Abruzzo. The judge granted the motion by order of September 4, 2015. The order further compelled Abruzzo to appear for his deposition on September 14, 2015. The judge provided his reasons for granting the motion:

Counsel for Dr. Trang continues to insist on this pending motion that some or all of Mr. Abruzzo and his file regarding Dr. Trang are protected by the attorney-client privilege. I repeat what was stated in the December 2014 ruling, any such privilege has been waived. Apparently, because of the persistent claim of the attorney-client privilege being made by counsel for Dr. Trang, the deposition of Mr. Abruzzo has not gone forth. The [c]ourt is very discouraged by this.

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<sup>2</sup> The record reflects Roomberg pled guilty in December 1990 to several felonies involving fraud and the filing of false tax returns in Pennsylvania. In August 1996, Roomberg's license to practice as a certified public accountant was suspended for five years by the Pennsylvania State Board of Accountancy.

Throughout the litigation Dr. Trang, through counsel, has vehemently expressed the need to get this matter to trial as soon as possible and the [c]ourt has tried to accommodate that goal. However, defendants have a right to defend themselves and if critical discovery is denied by repeated claims of privilege, which I have already determined have been waived, any trial must be delayed.

The Abruzzo deposition may be critical to the parties' expert's opinions and the opinions – and the expert[']s opinions may certainly be supplemented based upon pertinent information revealed by Mr. Abruzzo's deposition and his file, which must be produced. As a result, I am signing a new case management order which will extend the discovery date and necessarily delay this matter coming to trial. As much as the [c]ourt wants to assist the litigants by managing cases to get matters to trial, the [c]ourt will not prejudice litigants who have obstructed by obtaining discoverable information. Any further delay in the Abruzzo deposition and file production may result in plaintiff's complaint being dismissed.

In the accompanying order, the judge stated that by bringing a legal malpractice action against defendants, Trang waived all claims of privilege regarding Abruzzo. Further, the judge made clear that "[a]ny further delay or obstruction of the Abruzzo deposition may well result in Dr. Trang's claims being dismissed." The judge also granted Affiliated and the Markizons' cross-motion, ordering the waiver of attorney-client privilege between Trang and

Abruzzo encompassing both Abruzzo's entire file and all communications between Trang and Abruzzo.

On September 16, 2015, Abruzzo filed a separate motion in Chester County, Pennsylvania for declaratory relief which included a protective order. Counsel for Abruzzo notified the parties of the motion.

Abruzzo's deposition was held on September 30, 2015. Despite the September 4, 2015 order, during the deposition, Paul E. Paray, counsel for Trang, continued to assert the attorney-client privilege. During the deposition, Joanna Piorek, counsel for KSDB, asked Abruzzo, "Do you have an understanding as to how Dr. Trang came to call you?" Paray opposed stating, "I would object to the extent it involves any communications between Dr. Trang and Mr. Abruzzo." As a result of this continuing objection, no testimony was taken from Abruzzo relative to his representation of Trang.

On October 23, 2015, defendants filed a motion for summary judgment and a motion to dismiss Trang's complaint with prejudice for failure to comply with a court order. Defendants argued in the motion for summary judgment that the facts did not support a claim for third-party legal malpractice and Trang's expert report constituted a net opinion that should be barred. In the motion to dismiss, defendants argued Trang continuously, purposefully,

and willfully disregarded the court's order waiving the privilege as to Abruzzo. On December 3, 2015, following oral argument and supplemental submissions by the parties, the complaint was dismissed with prejudice on both the grounds of summary judgment and failure to comply with a court order.

Regarding the motion to dismiss for failure to comply with a court order, the judge provided the following reasons:

During the deposition, plaintiff's counsel objected to routine questions regarding Mr. Abruzzo's retention by Dr. Trang, yet plaintiff's counsel asked similar questions when it was his turn. Plaintiff's counsel would not allow Mr. Abruzzo to answer questions concerning the various drafts of the ultimate Partnership Agreement.

The deposition is replete with plaintiff's counsel improperly interfering with the fair pursuit of discoverable information from Mr. Abruzzo. More egregiously, plaintiff's counsel barred the production of Mr. Abruzzo's complete file. He did this even though counsel for Mr. Abruzzo advised that his complete file was available. Plaintiff's counsel simply refused to allow Mr. Abruzzo to produce his entire unredacted file.

I detailed the above with some specificity, because to dismiss a complaint with prejudice based upon discovery violations is a harsh remedy. However, I find the conduct of [plaintiff] and his counsel has been unconscionable and "prejudicial to the administration of justice." Rule of Professional Conduct, 8.4(d).

. . . .



Because . . . of the vexatious conduct described above, I must grant the relief the defense seeks. I am dismissing the legal malpractice case against Mr. Kalogredis and his law firm, Bender [v.] Adelson, 187 N.J. 411, a 2006 case.

Regarding the motion for summary judgment, the judge provided the following reasons:

Almost completely absent from that [expert] report is any discussion of the role Mr. Abruzzo had in advising his client, Dr. Trang, from 2008 to 2013. Certainly, the report does not and cannot discuss Mr. -- Mr. Abruzzo's version of events. That was because the deposition of Mr. Abruzzo was stalled and obstructed by plaintiff's counsel.

In fact, in spite of [c]ourt [o]rders, plaintiffs prevented the defense from ever reviewing Mr. Abruzzo's file in the case and interfered with the attempted deposition of Mr. Abruzzo to the extent that the deposition was made virtually useless, because of a bogus claim of attorney[-]client privilege.

Under those circumstances, it is understood why this expert report does not discuss the advice and guidance of Mr. Abruzzo and what he was saying to Dr. Trang all along.

. . . .

Plaintiff's proffered expert [report] is a net opinion. For those reasons also the legal malpractice claim must be dismissed, because it's not supported by an expert who has offered an opinion based upon the actual factual circumstances. How could he? Mr. Abruzzo, a key person with knowledge of the transaction, was blocked from providing any factual information.

Trang filed a motion for reconsideration, which was denied.  
This appeal followed.

On appeal, Trang raises the following points:

POINT I

THERE WERE NO GROUNDS TO DISMISS THIS ACTION  
UNDER [RULE] 4:37-2(A) GIVEN PLAINTIFF DID NOT  
VIOLATE ANY RULE OR COURT ORDER.

1. Applicable standard for dismissal based on the violation of a rule or [c]ourt [o]rder.
2. The [m]otion [c]ourt did not cite any specific [r]ule or [c]ourt order actually violated by [p]laintiff.
3. The ruling of Pennsylvania Judge Mahon preserving privilege in Abruzzo's file and in communications with Dr. Trang should prevail on comity grounds.
4. The [m]otion [c]ourt's sua sponte implied waiver ruling is directly contradicted by a federal decision, O'Kinsky v. Perrone.<sup>[3]</sup>
5. The [m]otion [c]ourt's sua sponte implied waiver ruling runs counter to the "at issue" implied waiver rule.

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<sup>3</sup> No. 10-6075, 2012 U.S. Dist. LEXIS 56871 (E.D. Pa. Apr. 20, 2012).

6. The [m]otion [c]ourt's [sic] did not weigh lesser sanctions available for its perceived discovery violations.

## POINT II

THE MOTION COURT IMPROPERLY REJECTED  
PLAINTIFF'S MALPRACTICE ACTION BASED ON THE  
"NET OPINION" RULE.

1. Plaintiff's expert report provides a thorough analysis with supporting facts for its conclusion that the Kalogredis [d]efendants committed malpractice.
2. The undisputed evidence adduced in discovery is enough to show the Kalogredis [d]efendants committed malpractice under Davin v. Daham.<sup>[4]</sup>
3. Evidence improperly withheld by the Kalogredis [d]efendants further cements Dr. Trang's malpractice claim.

### I.

We begin with Trang's arguments regarding the dismissal of his claims with prejudice for failure to comply with a court order per Rule 4:37-2(a). Trang argues the judge improperly granted the defendants' motion to dismiss as he did not violate a court order. Having reviewed the record, we disagree.

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<sup>4</sup> Davin, LLC v. Daham, 329 N.J. Super. 54 (2000).

The standard of review that applies to the "dismissal of a complaint with prejudice for discovery misconduct is whether the trial court abused its discretion, a standard that cautions appellate courts not to interfere unless an injustice appears to have been done." Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 517 (1995). Moreover, we must defer to the trial court's findings of fact and conclusions of law "unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (quoting Fagliarone v. Twp. of No. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)).

Rule 4:37-2(a) states that "[f]or failure of the plaintiff . . . to comply with . . . any order of court, the court in its discretion may on defendant's motion dismiss an action or any claim against the defendant. Such a dismissal shall be without prejudice unless otherwise specified in the order." The Supreme Court has stated that the "ultimate sanction" of dismissal of a complaint with prejudice should be imposed "only sparingly." Zaccardi v. Becker, 88 N.J. 245, 253 (1982).

"The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation

of the cause of action, or whether the refusal to comply is deliberate and contumacious." Abtrax Pharm., 139 N.J. at 514 (quoting Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 339 (1951)). In addition, because "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 Zaccardi, 88 N.J. at 253).

Here, there is sufficient credible evidence in the record to support the judge's findings that Trang's failure to comply with the court order was deliberate and contumacious. It is clear that Trang failed to comply with the order holding the attorney-client privilege was waived as to Abruzzo; an order which Trang did not appeal.<sup>5</sup> Trang did not produce Abruzzo for the first deposition dates, causing the judge to expand the discovery dates and hold additional conferences on the matter. When Abruzzo's deposition

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<sup>5</sup> Despite not designating the waiver order in the notice of appeal, Trang's counsel referenced the order's validity during oral argument. An appeal is limited to those judgments or orders, or parts thereof, designated in the notice of appeal. Pressler & Verniero, Current N.J. Court Rules, cmt. 6.1(f)(1) on R. 2:5-1 (2018); see also Campagna ex rel. Greco v. Am. Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div. 2001) (refusing to consider a challenge to an order not listed in the notice of appeal). We find no basis to consider the order not under review.

was conducted, Trang's counsel objected and instructed Abruzzo not to answer on grounds of attorney-client privilege.

## II.

We next address Trang's second argument regarding the judge's grant of summary judgment to defendants.

"When, as in this case, a trial court is 'confronted with an evidence determination precedent to ruling on a summary judgment motion,' it 'squarely must address the evidence decision first.'" Townsend v. Pierre, 221 N.J. 36, 53 (2015) (citation omitted). "Appellate review of the trial court's decisions proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Ibid.

The decision to admit or exclude expert testimony is left to the sound discretion of the trial court. Id. at 52 (citing State v. Berry, 140 N.J. 280, 293 (1995)). It will be reversed only upon a showing that that discretion was abused. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011).

Subsequently, "[a]n appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). We "must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and,

if not, whether the moving party is entitled to summary judgment as a matter of law." Ibid.; see R. 4:46-2(c).

We consider all facts in a light most favorable to plaintiff, the non-movant, Robinson v. Vivirito, 217 N.J. 199, 203 (2014), keeping in mind "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). "The practical effect of this rule is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat, 217 N.J. at 38.

We commence our brief discussion with the judge's holding that Trang's expert's report was a net opinion. We have defined a net opinion as one based on speculation or mere possibilities. Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 11 (App. Div. 2001); Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 (App. Div. 1990). Such an opinion is inadmissible. Brach, 345 N.J. Super. at 11. A net opinion violates the requirement set in N.J.R.E. 703 that an expert's opinion must be based on "facts, data, or another expert's opinion, either perceived by or made

known to the expert, at or before trial." Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 78-79 (App. Div. 2007) (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002)).

A plaintiff in a legal malpractice case has an affirmative duty to present expert testimony on the issue of breach. See Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 14 (App. Div. 2006). An expert's opinion in a legal malpractice action must be based "on standards accepted by the legal community and not merely the expert's personally held views." Carbis, 397 N.J. Super. at 79. The expert must offer "some evidential support . . . establishing the existence of the standard." Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999). The expert generally must "explain a causal connection between the [alleged malpractice] and the injury or damage allegedly resulting therefrom." Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102 (App. Div. 2001) (quoting Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)). In other words, the expert must "give the why and wherefore of his [or her] expert opinion, not just a mere conclusion." Ibid. (quoting Jimenez v. GNOC Corp., 286 N.J. Super. 533, 540 (App. Div. 1996)).

Here, the judge did not abuse his discretion when he barred the expert's report. In the absence of Abruzzo's testimony



relating to the legal advice he provided to Trang prior to the buy-in, the judge held, and we agree, the report lacked the factual predicate necessary to render an opinion helpful to the trier of fact.

While we acknowledge that the factual scenario presented herein may not snugly fit the "net opinion" paradigm often referenced by our courts, we discern no error. Stated directly, an expert may not omit relevant considerations in arriving at their opinion. Here, the expert report opined that a conflict of interest existed between Kalogredis and Abruzzo which resulted in "insufficient representation" of Trang. Yet the opinion was devoid of any information from Abruzzo on the issue of the conflict and on the issue of the sufficiency of Trang's representation. The failure to include that information renders the expert's opinion conclusory as without an adequate basis. As such, the "opinion is inadmissible and 'insufficient to satisfy a plaintiff's burden on a motion for summary judgment.'" Satec v. Hanover Ins. Grp., 450 N.J. Super. 319, 330 (App. Div. 2017) (citation omitted).

Absent the expert's opinion, "plaintiff [is] unable to satisfy [his] burden of establishing the applicable standard of care and a breach of that standard," and "defendants are entitled to judgment as a matter of law." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 414 (2014).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION