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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0899-20**

**COWEN & JACOBS,**

Plaintiff-Respondent,

v.

**HAGIT LEVINSON,**

Defendant-Appellant.

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Submitted February 14, 2022 – Decided May 17, 2022

Before Judges Fasciale and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5406-18.

Hegge & Confusione, LLC, attorney for appellant (Michael J. Confusione, of counsel and on the briefs).

Cowen & Jacobs, attorneys for respondent (Barbara E. Cowen, on the briefs).

**PER CURIAM**

Following a bench trial in this dispute over attorney's fees plaintiff Cowen & Jacobs claimed are due from defendant Hagit Levinson, the trial court entered a \$53,613.14 judgment in plaintiff's favor. Defendant appeals from the judgment and orders denying her motion to dismiss the complaint, granting plaintiff's motion to dismiss her legal malpractice counterclaim, and denying her motion for reconsideration of the order dismissing the counterclaim. We affirm.

## I.

The dispute arises out of plaintiff's representation of defendant in a matrimonial case against her former husband, Ilan Levinson. Defendant was first represented by other counsel during the matrimonial case in the Family Part. At the request of, and with the consent of, defendant and Ilan Levinson, in June 2015, the court entered an order referring all issues in the matter to binding arbitration. The consent order provided that "[a]ll discovery must be completed prior to the commencement of the arbitration subject to the arbitrator determining that additional discovery is beneficial to the arbitrator's conclusion."

Defendant appeared at a November 11, 2015 arbitration proceeding as a self-represented litigant. During that proceeding, the arbitrator explained the limitations on discovery, noting that if documents had not been exchanged

during discovery in the Family Part proceeding, they would not be admitted as evidence in the arbitration absent extraordinary circumstances.

Four days later, on November 15, 2015, defendant executed a written retainer agreement with plaintiff. The agreement provided that plaintiff would "administratively assist[]" defendant in obtaining additional discovery, speaking to witnesses, and preparing for the arbitration proceedings. The agreement also provided defendant would "continue to be self-represented during the course of arbitration unless and until" the parties amended their retainer agreement "to include additional services."

On December 1, 2015, plaintiff and defendant entered into an amended retainer agreement pursuant to which plaintiff agreed to represent defendant at the arbitration proceeding. The agreement stated plaintiff could not "predict or guarantee what [defendant's] final bill will be," the fees "will depend on the amount of time spent on [the] case and amount of other expenses," and a case can "require much more time and expense than originally anticipated." The agreement also incongruously stated plaintiff "agreed to cap [its] fees at \$20,000, \$5,000 of which" defendant had paid, and that "[i]n the event these fees are depleted [defendant] will be required to immediately provide an

additional retainer upon notice from this office." The amended agreement also set forth plaintiff's hourly billing rate of \$400 per hour.

Over the next two-and-a-half years, one of plaintiff's attorneys appeared as defendant's counsel during the arbitration. During that time, the parties had disputes and communications concerning the fees for plaintiff's services. At a June 2, 2016 hearing, the arbitrator addressed an email from defendant stating she wished to terminate plaintiff's services. The arbitrator explained he would consider an application for plaintiff to be relieved as counsel only if the request was presented in a formal motion.

In a June 7, 2016 email, defendant advised plaintiff she agreed to amend the agreement to cap the fees at \$35,000. Defendant also claimed she "told [plaintiff] to 'drop your pen' once you" reach the \$35,000 cap. Defendant further stated she was willing to represent herself, but the arbitrator would not allow it. In another email that day, defendant informed plaintiff she intended to continue the arbitration proceeding on her own.

In emails exchanged the following day, defendant disputed the amounts allegedly due plaintiff. An email also reflects a putative agreement between plaintiff and defendant pursuant to which plaintiff agreed to reduce an amount then due from \$7,335.77 to \$5,000 and cap the fees at \$8,000 moving forward.

The email also states defendant then owed a total of \$23,000 that had "to be paid at some point." At a June 9, 2016 proceeding, defendant advised the arbitrator she no longer wished to proceed on her own, stating she and plaintiff had "resolved the issues."

In July 2016, the attorney successfully convinced the arbitrator to permit the testimony of a Dr. Mary Ann Picone on defendant's behalf despite the fact the testimony would "delay [the] hearing," which "extremely disturbed" the arbitrator. Permission from the arbitrator was required because Dr. Picone's testimony was not adduced during the pre-arbitration discovery in the Family Part. Dr. Picone's testimony related to issues affecting defendant's ability to work.

A May 23, 2017 email to defendant from the attorney representing defendant on plaintiff's behalf states, "pursuant to the terms of my retainer agreement I will have to withdraw based upon your refusal to follow my advice and instructions." The email further states, "I will not do anything that I know is contrary to your best interests and certainly will not be told how best to represent you and to conduct myself in the course of my diligent efforts on your behalf."

The attorney moved to withdraw as counsel in May 2017. The attorney certified defendant failed to follow her advice "on a particularly material issue affecting her interest" and defendant wanted plaintiff "to do something right now on her behalf that my experience leads me to know will likely harm her."

The arbitrator addressed the motion at a June 8, 2017 hearing, explaining "there is no way on the last day of testimony that [he] would allow [plaintiff] to withdraw as counsel." (Emphasis added). The arbitrator asked defendant if she "sought retention of alternative counsel" and defendant responded, "we figured it out and [plaintiff] will continue." The attorney stated, "I'm representing her," and the hearing continued.

At the hearing, the attorney successfully convinced the arbitrator to allow her to recall Ilan Levinson as a witness and question him about various financial transactions. The next day, plaintiff subpoenaed bank records related to Ilan Levinson's business account. That information had not been sought by plaintiff or her prior counsel during the pre-arbitration judicial proceedings. Plaintiff moved to reopen testimony at the arbitration to address the information obtained through the subpoena.

In January 2018, the arbitrator denied defendant's motion to reopen testimony seeking additional testimony concerning the newly discovered bank

and business records. The arbitrator found the parties had been provided "ample opportunity to present testimony" as well as evidence and concluded that permitting the requested reopening of testimony "would mean that [the arbitration] proceedings would never conclude."

On May 14, 2018, the arbitrator issued his final decision, awarding \$23,000 per year in child support and limited durational alimony for seven years and five months, initially at \$115,000 per annum and \$102,500 per annum commencing January 2021. He ordered the sale of the former couple's home in Tenafly, New Jersey, despite defendant's "unrealistic" insistence the house be retained "under all circumstances."

Three months later, plaintiff filed suit seeking damages for attorney's fees allegedly due from defendant. Defendant filed an answer and a counterclaim alleging plaintiff committed legal malpractice during its representation of her during the arbitration by failing to: timely subpoena bank records; refer to Ilan Levinson's alleged concealed bank account during closing arguments; and recognize errors made by an expert that resulted in an undervaluation of Ilan Levinson's income. Defendant also claimed plaintiff "obsess[ed]" about liquidating property she and Ilan Levinson owned in Pennsylvania, and "withheld critical information from the arbitrator" that would have established

the arbitrator's appointed realtor was not impartial due to a prior business relationship with Ilan Levinson. The counterclaim included numerous other averments of substandard performance by plaintiff during the arbitration, including refusing to assist defendant in her filing of motions for reconsideration of the arbitration award and to vacate the arbitration award.

Defendant also moved to dismiss the complaint and for reinstatement of a malpractice complaint against plaintiff. The court denied the motion, finding defendant's denial of the allegations in the complaint did not constitute grounds for its dismissal. The court also rejected defendant's motion for reinstatement of a malpractice complaint because there was no prior dismissed malpractice complaint that could be reinstated.

Plaintiff moved for dismissal of defendant's counterclaim, arguing it did not state a cause of action because it was not supported by a timely filed affidavit of merit as required under N.J.S.A. 2A:53A-27. In response to the motion, defendant made arguments addressed to the merits of the malpractice claim.

The court granted plaintiff's motion, finding defendant failed to file an affidavit of merit and therefore did not state a cause of action for legal malpractice. See N.J.S.A. 2A:53A-29. The court entered an April 1, 2019 order dismissing the counterclaim.



Defendant filed a motion for reconsideration, arguing for the first time she was not obligated to file an affidavit of merit because her malpractice claim fell within the "common knowledge" exception to N.J.S.A. 2A:53A-27. At oral argument on the motion, defendant noted she was "taken by surprise" by the affidavit of merit requirement and asserted her malpractice claim against plaintiff had merit.

In a June 17, 2019 statement of reasons accompanying its order denying defendant's motion, the court found defendant offered no basis for reconsideration. The court reiterated that defendant's counterclaim required expert testimony and her failure to serve an affidavit of merit was fatal to her malpractice claim.

The court conducted a twelve-day bench trial on plaintiff's complaint. Defendant appeared as a self-represented litigant, and the attorney who represented defendant in the arbitration appeared on plaintiff's behalf. Defendant, the attorney representing plaintiff, plaintiff's office manager, and defendant's forensic accountant during the divorce proceedings all testified.<sup>1</sup>

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<sup>1</sup> We do not summarize the testimony presented by the witnesses at trial because the parties, by agreement, have not provided a complete set of the trial transcripts. See Rule 2:5-3(c)(1). We therefore lack the ability to provide a complete summary of the evidence presented. We note, however, that defendant

Following the presentation of the evidence, the parties submitted written summations to the court. Plaintiff's summation focused on its claim it was entitled to the fees it claimed due under a quantum meruit theory of recovery. Plaintiff asserted the evidence demonstrated defendant agreed to pay the attorney's fees, and defendant reneged on the agreement. Plaintiff further argued the evidence established the services were provided in good faith, defendant accepted the services, plaintiff expected to be paid, and the services provided were "reasonable under the facts and circumstances."

In her written summation, defendant claimed plaintiff agreed to a cap on the fees that precluded a proper award of the sum sought in the complaint. She disputed the amounts reflected in plaintiff's invoices, and she reprised her allegations of malpractice that had been asserted in her dismissed counterclaim. Defendant further argued plaintiff misrepresented that an agreement had been reached for fees paid on an hourly basis without a cap, plaintiff's invoices were not reliable, and the invoices were sent "for the first time [two] years later." She

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does not challenge the court's factual findings, and instead limits her arguments on appeal to claims the court erred by either failing to apply the appropriate legal standard to its findings of fact or failing to correctly apply the legal standards to its findings of fact.

also asserted plaintiff violated their agreement by conditioning the provision of legal services on being paid after she had paid plaintiff in full.

On November 23, 2020, the court entered a judgment awarding plaintiff \$53,613.14 plus interest and costs. In its detailed decision accompanying the order, the court found "defendant was informed of the limited nature of arbitration . . . and she was advised by the arbitrator that exhibits in the arbitration would be limited to what had been exchanged in discovery before [arbitration] absent an 'extraordinary reason.'"

The court also found plaintiff's billing records were disorganized at the outset of its representation of defendant until it hired a new office manager in February 2017. The court detailed invoices that were sent to defendant and found that on April 7, 2016, defendant sent an email explaining that she "promised to pay an additional \$15,000 above the \$20,000 cap they had agreed to, for a total of \$35,000, but that she could not commit to pay more than the extra \$15,000 she had promised." The court determined the evidence made "clear they had modified the second written retainer agreement, that plaintiff was continuing to provide services, that defendant had agreed to pay more than the \$20,000.00 cap in the" December 1, 2015 amended retainer agreement and defendant said she would represent herself "when that amount was exhausted."

The court found that in May 2016, Ilan Levinson sought leave to sell the marital home, defendant opposed the request, and defendant pressed plaintiff "to invest the substantial time and effort needed to counter the motion, but had not paid the amounts agreed and was not committing to pay for the additional work she wanted done." The court found the emails reflected defendant's understanding that plaintiff would stop work when the \$35,000 cap was reached, but defendant simultaneously wanted plaintiff to continue working.

The court found that on June 2, 2016, the arbitrator was made aware by the parties that they were seeking plaintiff's withdrawal as counsel, but he would not permit it. The court also noted the arbitrator "stated his hope or expectation that the arbitration was nearing completion."

The court found the parties then reached a new agreement pursuant to which plaintiff agreed to compromise the amounts due for services rendered if defendant paid her the agreed-upon amount, and they also agreed to cap further fees at \$8,000. They informed the arbitrator the issue was resolved on June 9, 2016.

The court determined defendant did not make the agreed payments and plaintiff continued to work on the matter. It also found the scope of services following the parties' June 2016 agreement "far exceed[ed]" what could have

been contemplated with the \$8,000 cap. "And, as it turned out, the arbitration was far from completion, and more hearing days followed the June 2016 agreement than had preceded it."

The court also noted defendant's opposition to the sale of the marital home pendente lite, the reopening of Ilan Levinson's testimony, and the reopening of testimony concerning defendant's ability to work presented issues that had not been previously identified and each required motion practice following the parties' exchanges concerning an \$8,000 cap. The court also noted custody issues unexpectedly arose during the arbitration, "which led to reevaluations and further proceedings, with concomitant cost."

The court determined defendant caused the scope of plaintiff's work to expand by "taking unreasonable positions, changing positions, and refusing to follow plaintiff's advice." The court noted, for example, that defendant had agreed to accept \$100,000 for her share of Ilan Levinson's medical practice, but then changed her mind during the arbitration. Then, "[a]fter the expense of an arbitrator-appointed expert and more forensic accounting services for both parties," defendant agreed to settle the claim for \$105,000.

The court also noted the issue presented at arbitration by the sale of the former couple's Pennsylvania property, which "protracted the [arbitration]

process." Although defendant agreed on the record the property would be sold, she refused to sign the listing and insisted that plaintiff move to bar the sale, as plaintiff had also done at defendant's request with the Tenaflly residence. The court found the attorney representing defendant on plaintiff's behalf "repeatedly attempted to explain to defendant that the same case law that had favored the result concerning Tenaflly worked against her position on [the Pennsylvania property], and that filing the motion would likely harm her standing with the arbitrator."

The court explained "[n]o agreement in writing after June 2016 modifies the \$8,000 cap," but the court determined the legal work defendant demanded and required thereafter far exceeded "what could reasonably be expected to have been performed for that amount." The court found, in a May 2017 email from plaintiff to defendant, plaintiff stated it expected to be paid for the time it had spent on the matter above any cap, but defendant "insisted she had no money to pay plaintiff and would not pay any more unless the arbitrator ordered her husband to pay." While claiming she had no money, defendant also insisted "that plaintiff tell the arbitrator 'that [she had] the money to finish the case without'" requiring the sale of the Pennsylvania property that Ilan Levinson sought.

The court found that:

Defendant knew the nature of the work being performed. She knew from the period of representation by her prior attorney how quickly legal fees accumulate. She was told on several occasions by the arbitrator that properties would have to be liquidated so the professionals could be paid. She knew the fees she was accruing and paying for court-appointed experts and her own experts. Her expectation that plaintiff would work without payment was inexplicable and unsupportable.

On May 25, 2017, plaintiff filed a motion to be relieved as counsel, however the arbitrator denied the request. On June 8, 2017, the parties advised the arbitrator they had resolved their issues.

Although the court found there was no "agreement in writing" that modified the \$8,000 cap on fees, the court determined the parties reached an oral agreement plaintiff would be paid for the services provided without any cap. The court relied on plaintiff's testimony that in May 2017 defendant agreed to pay plaintiff at the \$400 per hour rate for the services provided without regard to any cap. The court relied on the attorney's testimony that plaintiff withdrew its motion to be relieved after the parties reached the agreement, and the court found the existence of the agreement "was reinforced by" plaintiff's office manager's testimony that defendant said, "she would pay plaintiff for the work."

The court found defendant was "not clear or credible about what the May 2017 agreement was, although she told the arbitrator they had an agreement." The court characterized defendant's position to be, "if defendant received an award from the arbitrator consistent with everything she requested, she would pay plaintiff from those proceeds. Otherwise, she would pay nothing, and plaintiff would receive only what the arbitrator ordered Ilan [Levinson] to pay." However, the court reasoned that the attorney "would not have told the arbitrator she had agreed to continue representing defendant had defendant told her she was not agreeing to pay anything."

The court addressed plaintiff's breach of contract claim, finding "[a]bsent a clear writing setting forth the terms of the fee agreement, and the conflicting testimony, the court concludes defendant must pay plaintiff the reasonable value of the services provided." The court found as fact defendant agreed to pay a fair amount for plaintiff's services and had breached the agreement "by declaring she would pay nothing and denying any agreement to pay."

The court concluded plaintiff was entitled to the claimed fees on a quantum meruit basis, finding that even had there been "no agreement, plaintiff would still be entitled to receive payment for the reasonable value of her services because . . . it would be unjust to permit defendant to have received the legal



services rendered without paying fairly for them." The court also found plaintiff accurately tracked the time devoted to the services provided and that "[t]he hourly rate of \$400 is a fair and reasonable rate for the services." It noted defendant agreed to the hourly rate in the retainer agreements and the court found the rate to be "commensurate with hourly rates in this geographic area for attorneys with [plaintiff's] level of experience in matrimonial law."

The court noted "[d]efendant challenges the time spent on some tasks and claims she did not receive benefit because the amounts the arbitrator awarded to her were far less than the amounts she requested." The court rejected the challenges, finding:

Defendant ignores the many benefits achieved—she was permitted to reopen the record to present proofs about her disability, she was permitted to reopen the record to question Ilan [Levinson] about the checks she discovered, plaintiff defeated Ilan[] [Levison's] effort to sell the marital home pendente lite and defendant was permitted to remain there while the case was pending, and her concerns about her son were heard and addressed by recalling the guardian ad litem.

The court determined "[p]laintiff billed defendant \$110,413.14, credited defendant with payments of \$56,800, and seeks the balance of \$53,613.14." The court stated it was "satisfied the total amount billed was reasonable." The court summarized the testimony of plaintiff's office manager and concluded

"[d]efendant likely receive[d] the benefit of credit for payments she never made." It further explained its "conclusion is reinforced by defendant's total failure to introduce a shred of evidence about payments she made."

The court also explained "[d]efendant's credibility came into question on many subjects" including her understanding of the parties' May 2017 agreement. It noted defendant "provided no proofs of payments made[,] her testimony regarding "cash payments to plaintiff were not believable[,] and "[h]er testimony about payments to her forensic accountant" were similarly "unsupported and not credible." The court observed that, "[e]ven on seemingly inconsequential issues, [defendant] persisted in presenting testimony contradicted by the evidence."

The court also found "defendant caused the arbitration proceedings to be prolonged, increasing the attorney time needed and the concomitant cost." The court observed that defendant "insisted adamantly on having things her way and would not heed any advice from her lawyer if it disagreed with her plans." Similarly, the court found defendant's "behavior during the trial demonstrated an inability or unwillingness to accept the court's authority or to follow the most basic instructions for trial conduct and courtroom behavior[,] and "the arbitration reflects similar disruptive behavior."

The court determined the attorney who represented defendant, and plaintiff's office manager, "testified credibly to many hours of legal services provided by plaintiff for which" defendant was not billed. Thus, the court found "plaintiff provided legal services of value greater than that for which [it] billed, was paid less than the amount [it] credits to defendant's account, and has earned the amount sought." Accordingly, the court entered judgment for plaintiff in the amount of \$53,613.14, plus interest and costs. This appeal followed.

## II.

### A.

Defendant challenges the court's October 17, 2018 order denying her motion to dismiss the complaint, which plaintiff recognizes alleges a breach of contract claim. Defendant contends the court erred by denying her motion because the complaint refers to two retainer agreements—the December 1, 2015 retainer agreement and "a subsequent fee agreement made in or about March 2017"—that defendant claims are invalid and unenforceable as a matter of law under Rule 5:3-5.

We decline to consider the argument because it was not made before the motion court, and it does not involve jurisdictional or public interest concerns. J.K. v. N.J. State Parole Bd., 247 N.J. 120, 138 n.6 (2021); see also Zaman v.

Felton, 219 N.J. 199, 226-27 (2014); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Defendant's singular argument before the motion court was that based on her version of the facts, plaintiff violated the agreements by charging fees in excess of those to which she allegedly agreed. Defendant did not file a summary judgment motion in accordance with Rule 4:46, and the court correctly determined that because the complaint asserted a legally cognizable claim—breach of contract as defendant concedes in her argument on appeal—dismissal of the complaint under Rule 4:6-2(e) was not warranted. See, e.g., Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019) (finding only "if the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed").

We also observe the complaint is limited not to the breach of contract claim defendant acknowledges was asserted. When considering a motion to dismiss under Rule 4:6-2(e), a court must view the complaint with "liberality" to determine "whether the fundament of a cause of action may be gleaned," Lembo v. Marchese, 242 N.J. 477, 495-96 (2020) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)), and a court should grant a motion to dismiss only where "the complaint states no claim that supports

relief, and discovery will not give rise to such a claim," Dimitrakopoulos, 237 N.J. at 107.

The complaint states plaintiff's claims are brought "pursuant to N.J.S.A. 2A:13-6," which provides "[e]very attorney and counsellor may commence and maintain an action for the recovery of reasonable fees, charges or disbursements against his [or her] client." Although the complaint refers to the parties' agreements, plaintiff's reference to N.J.S.A. 2A:13-6, when coupled with the factual allegations, broadly suggests a fundament of a legal claim under any legal theory supporting the recovery of attorney's fees, charges, and disbursements due from a client. Thus, as argued during the subsequent trial without objection, the complaint includes the claim defendant concedes was averred—for breach of contract—and also a claim for recovery on a quantum meruit basis. See, e.g., Starkey, Kelly, Blaney & White v. Est. of Nicolaysen, 172 N.J. 60, 67 (2002) (explaining "[a]lthough the contingent fee agreement is unenforceable, [the Court] must determine whether [the plaintiff] is entitled to recover the reasonable value of his [or her] services under a quantum meruit theory"); La Mantia v. Durst, 234 N.J. Super. 534, 544 (App. Div. 1989) (recognizing in the absence of a written contingent fee agreement between a law firm and a client, a law firm would normally only be entitled to quantum meruit

recovery of the fees for its services in a settled case). We therefore affirm the October 17, 2018 order denying defendant's motion to dismiss the complaint.

B.

Defendant also appeals from an April 1, 2019 order granting plaintiff's motion to dismiss her counterclaim for legal malpractice, and from a June 17, 2019 order denying her motion for reconsideration of the April 1, 2019 order. The court dismissed the counterclaim based on its determination defendant failed to state a cause of action for legal malpractice because she did not provide an affidavit of merit in accordance with N.J.S.A. 2A:53A-27. See N.J.S.A. 2A:53A-29 (providing a failure to provide an affidavit of merit as required under N.J.S.A. 2A:53A-27 "shall be deemed a failure to state a cause of action"). We review de novo a decision whether a professional malpractice "cause of action is exempt from the affidavit of merit requirement" imposed under "[t]he New Jersey Affidavit of Merit Statute, set forth at N.J.S.A. 2A:53A-26 to -29." Cowley v. Virtua Health Sys., 242 N.J. 1, 14-15 (2020).

Defendant does not dispute her counterclaim asserts a legal malpractice claim or that she did not provide an affidavit of merit. Instead, she argues her failure to provide an affidavit of merit is not fatal to her malpractice claim

because an affidavit is unnecessary under the common knowledge exception to the requirements of N.J.S.A. 2A:53A-27.

We reject defendant's argument the court erred in its application of the common knowledge exception to N.J.S.A. 2A:53A-27 because the argument was not made before the motion court when it considered plaintiff's dismissal motion and entered the April 1, 2019 order, and the argument does not go to the jurisdiction of the court or involve matters of public concern. J.K., 247 N.J. at 138 n.6; see also Zaman, 219 N.J. at 226-27 (2014). As we explain, we also reject the argument because the common knowledge exception is inapplicable here.

A plaintiff asserting an

act of malpractice or negligence by a licensed person in his profession . . . shall . . . provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited[,] . . . practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards.

[N.J.S.A. 2A:53A-27.]

A plaintiff's failure to provide "an affidavit or a statement in lieu thereof" as required under N.J.S.A. 2A:53A-27 "shall be deemed a failure to state a cause of action." N.J.S.A. 2A:53A-29; see also Buck v. Henry, 207 N.J. 377, 382

(2011) ("[T]he failure to file an appropriate affidavit within the statutory time limits may result in dismissal of even meritorious cases."). This requirement applies where, as here, a professional malpractice claim is asserted in a counterclaim. Charles A. Manganaro Consulting Eng'rs, Inc. v. Carneys Point Twp. Sewerage Auth., 344 N.J. Super. 343, 349 (App. Div. 2001).

In Hubbard v. Reed, the Court recognized an exception to N.J.S.A. 2A:5A-27's requirements in "common knowledge" malpractice cases where "an expert is not needed to demonstrate defendant breached a duty of care." 168 N.J. 387, 394-95 (2001). The common knowledge "doctrine applies where 'jurors' common sense as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without the 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 common knowledge "exception is properly invoked only when 'jurors are competent to assess simple negligence . . . without expert testimony to establish the standard of ordinary care.'" Cowley, 242 N.J. at 19 (quoting Nowacki v. Cmty. Med. Ctr., 279 N.J. Super. 276, 292 (App. Div. 1995)). In the "exceptionally rare cases in which the common knowledge exception applies . . . an expert is not needed to demonstrate that a defendant professional



breached some duty of care 'where the carelessness of the [professional] is readily apparent to anyone of average intelligence.'" Id. at 17 (quoting Rosenberg v. Cahill, 99 N.J. 318, 325 (1985)).

In legal malpractice cases, application of the common knowledge exception is limited to cases in which an attorney "failed to fulfill the most basic obligations," Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 12 (App. Div. 2001), such as a failure to arrange for the appearance of an essential witness at trial, Kranz v. Tiger, 390 N.J. Super. 135, 148 (App. Div. 2007), or a failure to file a client's complaint prior to the running to the statute of limitations, Brizak v. Needle, 239 N.J. Super. 415, 431 (App. Div. 1990). However, where a trier of fact is required to "evaluate an attorney's legal judgment concerning a complex legal issue," our courts "have required expert testimony be presented." Brach, Eichler, 345 N.J. Super. at 13.

Defendant's claim the common knowledge exception excused her failure to provide an affidavit of merit ignores that her malpractice claim requires an evaluation of numerous instances of plaintiff's exercise of legal judgment in a complex and lengthy arbitration proceeding involving a myriad of legal and procedural issues. Those issues are complicated by the Family Part litigation

prior to the arbitration, the limitations placed on the evidence that could be introduced at arbitration, and the myriad of decisions requiring the exercise of professional judgment the attorney representing defendant on plaintiff's behalf was required to make during the arbitration proceeding.

Defendant's attempt to simplify her malpractice claims by broadly characterizing them as alleged failures to fulfill basic obligations owed by an attorney to a client is unavailing and belied by the record. Defendant's malpractice claims are not founded on a missed statute of limitations or a simple failure to call an essential witness; her claims require an assessment of numerous instances of alleged negligence in a complex matter.<sup>2</sup> The standards of care applicable to the claims are beyond the knowledge and experience of the ordinary juror, and defendant required expert testimony to establish plaintiff breached them. Hubbard, 168 N.J. at 395. Lacking support in an affidavit of

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<sup>2</sup> As detailed in her brief on appeal, defendant alleged plaintiff committed malpractice by: failing to obtain and submit evidence and other documentation that "would have demonstrated" defendant's husband engaged in fraud; failing to "expose obvious deficiencies" in defendant's husband's expert's report; being "unprepared throughout the arbitration"; submitting "unreviewed certifications that prejudiced defendant"; failing to include in summation "kid's saving" as defendant requested; and negligently causing a marital asset—a home in Pennsylvania—to be sold for half the price listed in defendant's husband's case information statement. Defendant further asserts those alleged acts of negligence and others "contributed to the poor outcome of the arbitration."

merit, plaintiff's complaint failed to state a cause of action for legal malpractice, N.J.S.A. 2A:53A-29, and the court correctly dismissed defendant's counterclaim.

Defendant also argues the court erred by denying its motion for reconsideration of the April 1, 2020 order dismissing her counterclaim. We review a court's decision on a reconsideration motion for an abuse of discretion. Kornbleuth v. Westover, 241 N.J. 289, 301 (2020). We find no abuse of discretion in the court's denial of the reconsideration motion because, for the reasons noted, the court correctly dismissed the counterclaim. Thus, defendant could not, and did not, demonstrate the April 1, 2020 order was "premised on a palpably incorrect or irrational basis, or the court did not consider or failed to appreciate the significance of probative, competent evidence." Matter of T.I.C.-C, 470 N.J. Super. 596, 606 (App. Div. 2022). Moreover, defendant's reliance on an argument—the common knowledge exception excused her failure to serve an affidavit of merit—that she did not make in her opposition to plaintiff's dismissal motion did not provide the court with proper grounds for reconsideration. See Medina v. Pitta, 442 N.J. Super. 1, 18 (App. Div. 2015) (explaining "a motion for reconsideration does not provide the litigant with an

opportunity to raise new legal issues that were not presented to the court in the underlying motion").

C.

Defendant also challenges the court's judgment directing she pay plaintiff \$53,613.14 on a quantum meruit basis for the legal services plaintiff provided during the arbitration. Defendant claims the court did not apply the correct legal standard in making the quantum meruit award, and the court otherwise failed to make adequate factual findings under the correct legal standard supporting its award. Defendant further argues the court erroneously failed to consider her claim plaintiff provided substandard and negligent services in its calculation of the quantum meruit award.

We review "a 'trial court's determinations, premised on the testimony of witnesses and written evidence at a bench trial, in accordance with a deferential standard.'" Nelson v. Elizabeth Bd. of Educ., 466 N.J. Super. 325, 336 (App. Div. 2021) (quoting D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013)). "[W]e do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence so as to offend the interests of justice[.]" D'Agostino, 216 N.J. at 182 (quoting

Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)) (alteration in original). We owe no deference to the court's legal conclusions which we "review de novo." Ibid.

"Quantum meruit means, literally, 'as much as is deserved.'" N.J. Land Title Assoc. v. Rone, 458 N.J. Super. 120, 132 (App. Div. 2019) (quoting Kas Oriental Rugs, Inc. v. Ellman, 394 N.J. Super. 278, 286 (App. Div. 2007)). Quantum meruit recovery is "quasi-contractual recovery for services rendered when a party confers a benefit with a reasonable expectation of payment." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 437-38 (1992).

In Starkey, our Supreme Court explained that where a fee agreement between an attorney and client is unenforceable, it must be determined whether the attorney "is entitled to recover the reasonable value of his [or her] services under a quantum meruit theory." 172 N.J. at 67. The Court held that to recover attorney's fees on a quantum meruit basis, a plaintiff must establish "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." Id. at 68 (quoting Longo v. Shore & Reich, Ltd., 25 F.3d 94, 98 (2d Cir. 1994)). An attorney seeking recovery of fees on a quantum meruit basis "must also establish a 'reasonable expectation of

payment' and that the services were performed 'under circumstances that should have put the [client] on notice' that the [attorney] expected to be paid." N.J. Land Title, 458 N.J. Super. at 132 (quoting Weichert Co. Realtors, 128 N.J. at 437-38).

Here, the trial court first found plaintiff "established the first three elements" of the Starkey standard. That is, the court determined plaintiff demonstrated its services were performed in good faith, the services were accepted by defendant, and plaintiff reasonably expected compensation for the services. The court's determination plaintiff satisfied those elements is supported by its factual findings, made throughout its statement of reasons, including its determination "defendant agreed she would pay a fair amount for the services" provided by plaintiff, defendant "breached the agreement by declaring she would pay nothing and denying any agreement to pay," and "[a]t best [defendant] misled plaintiff by assuring [plaintiff] she would be fair and pay" for the services "while having no intention to do so." Those findings find ample support in the evidentiary record, and they provide the foundation for the court's determination plaintiff satisfied the first three factors of the Starkey standard. See Starkey, 172 N.J. at 68. Defendant does not argue otherwise.

The court also made express findings on the final Starkey factor, analyzing the reasonableness of the services for which the attorney's fee award was sought. See *ibid.* The court noted the hourly rate charged for the service was fair and reasonable, found plaintiff tracked the time spent providing services to defendant, and detailed issues related to payments made by defendant and plaintiff's records concerning the amounts billed and paid. The court also credited the testimony of the attorney who represented defendant on plaintiff's behalf concerning the "many hours of legal services provided," and the court determined "plaintiff provided legal services of greater value than that for which [it] billed" defendant and plaintiff "has earned the amount sought." Again, the court's findings are supported by substantial credible evidence, and we discern no basis to reverse them.

We reject defendant's claim the court did not consider defendant's assertion plaintiff provided substandard services requiring some reduction, or perhaps a total reduction, in the amount due for the services provided. In the first instance, plaintiff points to no evidence demonstrating any substandard performance by plaintiff, and defendant did not offer any expert testimony establishing plaintiff did not provide fully competent services. In fact, other than defendant's conclusory assertions, the record is bereft of any basis

supporting a reduction in fees based on issues related to plaintiff's performance during the arbitration. Further, the court's decision makes clear that many of the difficulties defendant encountered in the arbitration were of own her making.

Additionally, the court in fact noted defendant's challenges to the amount of time plaintiff spent on certain tasks for which she billed defendant, as well as defendant's claims she did not benefit from the time plaintiff spent on certain tasks "because the amounts the arbitrator awarded to her were far less than the amounts she requested." However, as detailed in the court's opinion, defendant's arguments critical of plaintiff's services ignore the "many benefits achieved" by plaintiff during the arbitration.

For example, the court noted plaintiff obtained a reopening of the questioning of defendant's husband about certain financial transactions based on plaintiff's demonstration of "extraordinary circumstances." The court also explained plaintiff defeated defendant's husband's effort to sell the marital home pendente lite and, as a result, defendant was permitted to remain in the marital home during the multi-year arbitration proceeding. The court further noted plaintiff's counsel obtained a reopening of the arbitration to address defendant's concerns related to her and her husband's son.



We are not persuaded by defendant's claim the court erred by failing to apply the standard for the determination of a quantum meruit attorney fee award set forth in La Mantia, 234 N.J. Super. at 544. As the Court explained in Starkey, La Mantia "involved the issue of how two law firms should split a contingency fee; it did not involve the question whether the client should pay." Starkey, 172 N.J. at 70. Thus, contrary to defendant's contention, the La Mantia standard is inapplicable here; this case does not involve a dispute involving the manner in which two law firms should split a fee.<sup>3</sup> See ibid. The motion court was required

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<sup>3</sup> Defendant ignores the Starkey standard and attempts to repackage the La Mantia standard in support of her contention it is applicable here. The La Mantia standard, in its listing of the pertinent factors to be considered, is tailored to an analysis of the quantum meruit allocation of fees among multiple counsel. The standard requires consideration of:

[(1)] [T]he length of time each of the firms spent on the case relative to the total amount of time expended to conclude the client's case. [(2)] The quality of that representation is also relevant. . . . [(3)] [T]he result of each firm's efforts as well as the reason the client changed attorneys are factors to be considered. [(4)] Viability of the claim at transfer also bears upon the value of a former firm's contribution—if the case was initially speculative but concrete by the time the cause of action moved to the second firm, that factor should bear upon the distribution. [(5)] The amount of the recovery realized in the underlying lawsuit also impacts upon the quantum meruit valuation. . . . [(6)] A]ny pre-existing partnership agreements between the members

to decide only whether defendant owed plaintiff fees for legal services on a quantum meruit basis, and Starkey established the standard for the resolution of that issue. See Starkey, 172 N.J. at 68.

In sum, in our view the court adequately addressed the appropriate legal standard for an award of fees under the Starkey standard.<sup>4</sup> We defer to the court's findings supporting its application of the standard because they are supported by substantial credible evidence. See D'Agostino, 216 N.J. at 182. We therefore affirm the court's judgment awarding plaintiff \$53,613.14 on a quantum meruit basis.

Our determination the court correctly entered judgment against defendant on a quantum meruit basis renders it unnecessary to address defendant's claim the court erred by also finding the judgment should be entered because defendant breached an enforceable agreement to provide legal services. We therefore do

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of the firms who now compete for a percentage of the contingency fee. [(7) And w]here one attorney "jumps ship" and takes the client with him, his relationship with the former firm will impact upon the distribution of the fee.

[La Mantia, 234 N.J. Super. at 540-42 (citations omitted).]

<sup>4</sup> The court also considered the application of R.P.C. 1.5 in its determination of the reasonableness of the fees due plaintiff.

not address defendant's argument the court erred by finding she breached an agreement with plaintiff because the agreement did not satisfy the requirements of Rule 5:3-5. See generally Glick v. Barclays De Zoete Wedd, Inc., 300 N.J. Super. 299, 309 (App. Div. 1997) (explaining a contingent fee retainer agreement that did not satisfy the requirement of Rule 1:21-7, which requires such agreements to be in writing, is unenforceable). We note only that in its brief on appeal, plaintiff does not dispute defendant's argument that any purported contract between the parties was unenforceable because it did not comply with Rule 5:3-5's requirements.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION