SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3201-20

BROOKS BANKER, individually and as Executor of the ESTATE OF CARYLE BILLINGS BANKER,

Plaintiff-Appellant,

v.

DAVIDSON, DAWSON & CLARK LLP, and P. GREGORY HESS, ESQ.,

Defendants-Respondents.

Argued March 7, 2023 – Decided March 24, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-0497-18.

Michael Confusione argued the cause for appellant (Hegge & Confusione, LLC, attorneys; Michael Confusione, of counsel and on the briefs).

David A. Tango argued the cause for respondents (Lewis Brisbois Bisgaard & Smith LLP, attorneys;

Jeffrey Spiegel and David A. Tango, of counsel and on the brief; Brian J. Frederick, on the brief).

PER CURIAM

Plaintiff Brooks Banker, individually and as executor of the estate of Caryle Billings Banker, appeals from a Law Division order that granted summary judgment dismissing the remaining count of plaintiff's complaint, which alleged defendants Davidson, Dawson & Clark LLP and P. Gregory Hess, Esq. engaged in the unauthorized practice of law in violation of N.J.S.A. 2C:21-22a. The underlying dispute concerns defendants' representation of plaintiff and decedent, who was plaintiff's mother, in the drafting of decedent's last will and testament. We affirm.

I.

Hess is licensed to practice law in New York but not New Jersey. In 1999, decedent retained Hess to assist with the creation of her will. At the time, she was a resident of New York. Eight years later, decedent relocated to New Jersey and had Hess prepare a new will. And in 2014, Hess was again retained to render legal services regarding decedent's will.

Thereafter, in early 2015, decedent fell seriously ill with lymphoma. Plaintiff emailed Hess stating decedent was unwell and needed assistance with her will before she passed away. In February 2015, with decedent's health

failing, Hess met with her at the hospital and a new will was prepared. On March 13, 2015, Hess drove from New York to the hospital in Morristown and met with plaintiff and decedent at her bedside. During that second meeting, Hess supervised the execution of decedent's new will.

Decedent passed away on March 26, 2015. That same day, Hess hand-delivered decedent's new will to plaintiff along with a partially completed probate form, advising plaintiff to "review the form for accuracy and provide the missing information. We will add and then submit to the [c]ourt."

Throughout the estate planning, Hess advised decedent that Goodfriend, her husband, could exercise his right of election and claim the statutory elective share of one-third of her augmented estate. Goodfriend did not execute a waiver relinquishing these rights. After decedent's passing, a dispute arose between Goodfriend and plaintiff concerning whether Goodfriend's inheritance would be held in trust and how to calculate the value of the augmented estate.

In turn, plaintiff filed a probate petition and Goodfriend filed a complaint for his statutory elective share against the Estate. Defendants did not represent the Estate in the elective share action. The elective share action, which involved a dispute over how to calculate the value of the augmented estate and whether Goodfriend could receive his share outright rather than through a trust, settled.

The settlement agreement provided for a $55,000 lump sum payment to Goodfriend from the Estate and a $115,000 payment to fund the marital trust created by the March 2015 Will.

Plaintiff then filed a complaint in the Law Division against defendants alleging: (1) legal malpractice based on conflict of interest (count one); (2) legal malpractice based on failure to advise (count two); (3) legal malpractice based on refusal to co-operate (count three); (4) legal malpractice based on unauthorized practice of New Jersey Law (count four); and (5) a statutory civil claim for unauthorized practice of law pursuant to N.J.S.A. 2C:21-22a (count five).

Plaintiff did not retain a causation expert. Following discovery, defendants moved for summary judgment as to all counts. Plaintiff cross-moved for summary judgment. On May 22, 2020, the motion judge heard argument and granted defendants' summary judgment dismissing counts one through four because plaintiff failed to proffer expert testimony.[1] The judge also directed the parties to submit additional briefing regarding count five. After considering the additional briefing, the judge issued an amended order that granted summary judgment dismissing count five. In an accompanying statement of reasons, the

[1] Plaintiff did not appeal that ruling.

judge concluded that without expert testimony, plaintiff could not prove the required element of proximate causation as required by the statute.

On appeal, plaintiff argues:

> THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CIVIL CLAIM FOR THE UNAUTHORIZED PRACTICE OF LAW UNDER N.J.S.A. 2C:21-22A.
>
> > A. Plaintiff is Not Required to Present Expert Testimony to Sustain the Civil Claim Provided by the Unauthorized Practice of Law Statute.
> >
> > B. The Summary Judgment Record Shows that Plaintiff Was Entitled to a Trial on His Statutory Claim.

We affirm substantially for the reasons expressed by Judge Peter A. Bogaard in his comprehensive statement of reasons. We add the following comments.

We review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show there are no "genuine issues of material fact," and that "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint

Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). We must give the non-moving party "the benefit of the most favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-El, 218 N.J. 72, 86 (2014)). We owe no special deference to the motion judge's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018).

N.J.S.A. 2C:21-22 establishes criminal penalties for the unauthorized practice of law. The statute's civil counterpart, N.J.S.A. 2C:21-22a, establishes a private cause of action for persons injured by a wrongdoer's unauthorized practice of law. Count five asserts a civil claim for damages proximately caused by the unauthorized practice of law pursuant to N.J.S.A. 2C:21-22a(a), which provides:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of any action or inaction by a person who knowingly engaged in the unauthorized practice of law in violation of section 1 of P.L.1994, c.47 ([N.J.S.A.] 2C:21-22) may bring a civil action in any court of competent jurisdiction.
>
> [N.J.S.A. 2C:21-22a(a).]

The trial court reasoned that the statute's

> "ascertainable loss" requirement compels a showing that any loss was due to the acts or omissions of the person or lawyer in question. In other words, some act or omission must be a causative or substantial contributing factor to the alleged loss. Under the circumstances herein, . . . expert testimony is required to demonstrate the necessary causal link.

The trial court also explained:

> [T]he "practice of law does not lend itself 'to [a] precise and all-inclusive definition.'" N.J. State Bar Ass'n v. N.J. Mortg. Assoc., 32 N.J. 430, 437 (1960) (quoting Auerbacher v. Wood, 142 N.J. Eq. 484, 485 (E. & A. 1948)). The practice of law is not "limited to the conduct of cases in court but is engaged whenever and wherever legal knowledge, training, skill and ability are required." Stack v. P.G. Garage, Inc., 7 N.J. 118, 121 (1951). Defining the practice of law generally requires a case-by-case analysis because of the broad scope of the field of law. In re Op. No. 24 of Comm. on the Unauth. Practice of Law, 128 N.J. 114, 122 (1992).

Neither statute defines "unauthorized practice of law," however, we have established that "[t]he practice of law is unauthorized when conducted by persons not licensed to practice in New Jersey or not specially admitted under [New Jersey] court rules." Johnson v. McClellan, 468 N.J. Super. 562, 581 (App. Div. 2021) (citing In re Jackman, 165 N.J. 580, 585-86 (2000)).

Here, defendants acknowledged that Hess engaged in the practice of law in connection with the preparation of decedent's wills. Hess is not licensed to

practice law in New Jersey. Nor did defendants register with the Clerk of the New Jersey Supreme Court as a multijurisdictional and cross border practitioner not admitted to plenary practice in New Jersey in accordance with Multijurisdictional or Crossborder Prac. Under RPC 5.5(b)(3), Op. 49 (Comm. on Unauthorized Prac. of L. Oct. 3, 2012).

In Johnson, we found "the plain language of . . . N.J.S.A. 2C:21-22a(a) requires that plaintiff prove defendant's unauthorized practice of law proximately caused plaintiff to suffer an ascertainable loss." 468 N.J. Super. at 585. "Thus, to prevail [in a civil action] under N.J.S.A. 2C:21-22a, plaintiff must prove the following elements by a preponderance of the evidence: 1) defendant engaged in the unauthorized practice of law, as prohibited by N.J.S.A. 2C:21-22; 2) plaintiff suffered an ascertainable loss; and 3) a causal relationship between defendant's unauthorized practice of law and the ascertainable loss." Id. at 587-88.

The trial court rejected plaintiff's request to consider his pro se status in connection with the failure to serve an expert report, noting plaintiff is an attorney and had served an affidavit of merit. The court also rejected plaintiff's argument that an expert was unnecessary because the case would proceed as a bench trial and the trial judge has the necessary expertise to evaluate the estate

planning, statutory, and legal issues involved. The court found plaintiff's "argument is wholly without merit and overlooks a long and consistent body of jurisprudence that requires (absent certain narrow exceptions, none of which apply herein) expert testimony be produced when it is alleged that a licensed professional failed to follow the rules, regulations and/or standards applicable to their profession."

Plaintiff argued the court should find as a matter of law that Hess engaged in the unauthorized practice of law by violating RPC 5.5 (Lawyers Not Admitted to the Bar of this State and the Lawful Practice of Law). Defendants responded that their legal relationships with decedent first arose in New York and that any further work done was at best "occasional." Defendants contended that the alleged negligent act or omission must be the proximate cause of the loss claimed and that but for the alleged unauthorized practice of law, Goodfriend would not have filed the elective share action and the result of the litigation would have been different. Defendants further contended that their actions fell within the safe harbor provided in RPC 5.5.

We recognize that "[e]xpert testimony may not be appropriate or necessary to establish proximate cause in every legal malpractice case, particularly where the causal relationship between the attorney's malpractice and

the client's loss is so obvious that the trier of fact can resolve the issue as a matter of common knowledge." 2175 Lemoine Ave. v. Finco, Inc., 272 N.J. Super. 478, 487 (App. Div. 1994). We do not view this case as falling under the common knowledge exception. Proximate causation is not obvious in this case.

The trial court found the absence of an expert report was fatal to plaintiff's statutory claim, particularly on the issue of proximate causation. The court further found "that the alleged violation of a RPC does not in and of itself establish civil liability in a legal malpractice action as a matter of law." We concur. See Petrillo v. Bachenberg, 263 N.J. Super. 472, 483 (App. Div. 1993) (violation of a rule of professional conduct does not per se give rise to malpractice); Albright v. Burns, 206 N.J. Super. 625, 634-35 (App. Div. 1986) (even if a plaintiff establishes a rule violation, the plaintiff must still establish proximate cause).

Additionally, standing alone, violation of N.J.S.A. 2C:21-22a(a) does not subject defendants to civil liability. As correctly recognized by the trial court, plaintiff must still prove "the requisite elements of proximate causation and damages." Without an expert report, plaintiff is unable to prove proximate cause and cannot prevail on his statutory claim.

Based on our careful review of the record, we are convinced that the judge's factual findings are supported by the record and his legal conclusions are consonant with applicable legal principles. We discern no basis to disturb the summary judgment dismissal of count five.

Affirmed.