STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.		**SUPERIOR COURT**
	(FILED: March 10, 2020)	
GERALD RICHARD	**:**	
	:	
v.	**:**	**C.A. No. KC-2011-378**
	:	
STEVEN A. ROBINSON	**:**	

DECISION

LANPHEAR, J. This case is before the Court posttrial on Defendant Steven A. Robinson's Motion for Judgment as a Matter of Law.

I

Facts

For purposes of this motion, the Court makes the following findings of fact. In 2003, Plaintiff Gerald Richard and his wife Deborah agreed to divorce. Together they met with a mediator in an effort to finalize the financial terms of their divorce. They came to an agreement on the terms, which was contained in a draft, unsigned Memorandum of Understanding. Tr. Ex. 1. Mr. Richard wanted to move out of their home but needed monies upfront to relocate. The couple agreed that he would sign a quitclaim deed to Deborah, Deborah would refinance the home, and provide him with the $20,000 he requested. In fact, this agreement was written onto the mediator's draft Memorandum of Understanding. *Id.* at 3. On July 26, 2004, Mr. Richard executed the deed to Jennifer. Tr. Ex. 2. Mr. Robinson did not prepare the deed and testified he knew nothing of the deed. It was notarized by another attorney.

Attorney Robinson was retained by Mr. Richard to represent him in the divorce. He was shown the mediator's unsigned memorandum, apparently to use as a guide. In early July 2004, Mr. Richard met with Mr. Robinson, and Mr. Robinson described the various forms that would

need to be completed. In drafting the Property Settlement Agreement for the divorce, Mr. Robinson indicated that Deborah would pay $60,000 to Mr. Richard upon the occurrence of any one of three events.[1] One of the three events which would require the prompt payment of $60,000 was the sale of the home. Mr. Richard took the various forms provided by Mr. Robinson to obtain the required information and then returned them to Mr. Robinson's office. The forms were finalized by Mr. Robinson and submitted to the Rhode Island Family Court on July 27, 2004. Mr. Robinson was not familiar with the separate agreement that Deborah would own the home and then mortgage the property to raise money for Mr. Richard. [Frankly, Mr. Richard was attempting to minimize expenses by handling some of the transactions on his own.]

The Property Settlement Agreement was signed on August 31 and September 2, 2004 and filed with the Family Court shortly thereafter by Mr. Robinson. At that time, it was Mr. Robinson's understanding that the property was valued at about $460,000, an outstanding mortgage on the property was valued at $234,000, and the equity remaining in the property was about $226,000. The agreement specifically and clearly stated that Deborah would "refinance . . . and pay . . . $20,000" in the future (although she had already done so) and would then pay $60,000 to Mr. Richard upon one of the three events. Tr. Ex. 3 at 3-4. At a hearing before the Family Court in October 2004, Mr. Richard testified that he had read and understood the Property Settlement Agreement. Clearly, by November 1, 2004 Mr. Richard knew that his name had been removed from the title to the property.

[1] By the Property Settlement Agreement, "Wife shall pay to Husband an additional $60,000.00 upon the happening of any of the following events, whichever may occur first: (a) Wife's remarriage; (b) The minor child []'s eighteenth birthday; (c) Wife's sale of the property." Tr. Ex. 3, at 3-4.

Mr. Richard was familiar with the acquisition and financing of real estate. He had signed several deeds and mortgages before. When he deeded the home to Deborah he realized and knew that the property would belong to Deborah alone, and she could borrow by using the property as security, without his signature. Mr. Richard also knew the Property Settlement Agreement was not recorded when he gave Deborah the quitclaim deed. He received the $20,000 while his divorce was still pending; knew that he did not sign any of the loan papers; knew that Deborah had applied for the loan individually; and knew the property was deeded to Deborah alone. No bank had contacted him before this payment so Deborah's ability to borrow without his prior knowledge was clear. Mr. Richard realized that Deborah could then borrow money without his knowledge or consent, using the property as collateral. He knew, and should have known from his real estate experience, that he was exposed to this risk in September 2004 at the latest.

After the divorce was complete, Deborah again refinanced the home in 2006, removing another $45,000 in equity. Effectively, with the decline in the value of the market, this ended almost any security which Mr. Richard may have had in the property, as he had no recorded interest. Hence, Mr. Richard was harmed in September 2006 when Deborah's mortgage was taken out.[2]

At some point, Mr. Richard learned that Deborah's property was being sold. He then recorded the Property Settlement Agreement. In 2010, he filed a motion to recover the $60,000 from the Rhode Island Family Court. As the money was due under the express terms of the Property Settlement Agreement, the Family Court ordered Deborah to pay the $60,000 within

[2] Trial exhibit 5 is the mortgage, though oddly only a portion of the mortgage deed was introduced as an exhibit.

thirty days. In the interim, Deborah then filed for bankruptcy. After the bankruptcy, Mr. Richard received $11,999, leaving an unsatisfied debt of $48,001.

With Deborah being judgment proof by the bankruptcy, Mr. Richard filed suit against his former attorney, Mr. Robinson, filing this action on March 22, 2011.

II

Travel

The Complaint herein was filed on March 22, 2011. The defense of statute of limitations was pled in Mr. Robinson's Answer.

While the Complaint originally sounded in three counts, only the negligence count against Mr. Robinson was tried. The matter was tried before a jury in January 2020. At the conclusion of Mr. Richard's case, Mr. Robinson moved for judgment as a matter of law pursuant to Super. R. Civ. P. 50(a), which was renewed at the conclusion of all of the evidence. The Court reserved. The jury found for Mr. Richard and rendered a verdict for him in the amount of $28,097.78. Mr. Robinson renewed his motion and the Court indicated it would reconsider the reserved motion thereafter and welcomed additional memoranda. The Court has reviewed the memoranda filed posttrial.

III

Analysis

Under Rule 50(a)(1) of the Superior Court Rules of Civil Procedure,

> "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

The Court must "examine 'the evidence in the light most favorable to the nonmoving party, without weighing the evidence or evaluating the credibility of witnesses, and draw from the record all reasonable inferences that support the position of the nonmoving party.'" *O'Connell v Walmsley*, 93 A.3d 60, 66 (quoting *Oliveira v. Jacobson*, 846 A.2d 822, 829 (R.I. 2004)). However, "a trial justice should enter judgment as a matter of law 'when the evidence permits only one legitimate conclusion in regard to the outcome.'" *Lemont v. Estate of Ventura*, 157 A.3d 31, 36 (R.I. 2017) (quoting *Roy v. State*, 139 A.3d, 480, 488 (R.I. 2016) (quoting *Hough v. McKiernan*, 108 A.3d 1030, 1035 (R.I. 2015))).

Mr. Robinson's Motion for Judgment as a Matter of Law focused on two issues: Statute of limitations and the lack of an appropriate expert.

1

Statute of limitations

Legal malpractice actions have their own, specific statute of limitations. G.L. 1956 § 9-1-14.3 states:

> "Notwithstanding the provisions of §§ 9-1-13 and 9-1-14, an action for legal malpractice shall be commenced within three (3) years of the occurrence of the incident which gave rise to the action; provided, however, that:
> "(1) One who is under disability by reason of age, mental incompetence, or otherwise, and on whose behalf no action is brought within the period of three (3) years from the time of the occurrence of the incident, shall bring the action within three (3) years from the removal of the disability.
> "(2) In respect to those injuries due to acts of legal malpractice which could not in the exercise of reasonable diligence be discoverable at the time of the occurrence of the incident which gave rise to the action, suit shall be commenced within three (3) years of the time that the act or acts of legal malpractice should, in the exercise of reasonable diligence, have been discovered." Section 9-1-14.3.

The cause of action here arose on November 1, 2004, at the latest. By then, Deborah signed the Property Settlement Agreement and the Rhode Island Family Court accepted the agreement after receiving assurances from Mr. Richard that he understood it and agreed to it. Mr. Richard

had deeded his entire interest to Deborah. By then Mr. Richard knew Deborah would owe a debt to him in the future, and he knew he had completely deeded the property to her. He also knew, or should have known, that no document was recorded on his behalf nor was any mortgage signed by Deborah to secure the debt. The right to institute this action to recover would have expired in November 2007, unless one of the statutory exceptions applied. Mr. Richard does not claim disability, but claims he was limited by his late discovery.

Section 9-1-14.3(2) codifies what is commonly referred to as the discovery rule. Under the discovery rule, when the cause of an injury is not immediately known to the plaintiff, the statute of limitations will not run until the plaintiff, in the exercise of reasonable diligence, should have discovered the injury or some injury-causing wrongful conduct. *See Martin v. Howard*, 784 A.2d 291, 299 (R.I. 2001).

The reasonable diligence standard is based upon the perception of a reasonable person placed in circumstances similar to the plaintiff's, and also upon an objective assessment of whether such a person should have discovered that the defendant's wrongful conduct had caused him or her to be injured. If a reasonable person in similar circumstances should have discovered that the wrongful conduct of the defendant caused her injuries as of some date before the plaintiff alleged that she made this discovery, then the earlier date will be used to start the running of the limitations period. *Id.* at 300.

This Court, in its objective analysis, finds that a reasonable person in Mr. Richard's circumstances should have and would have discovered that he was at risk for injuries and Mr. Robinson's conduct may have left him at risk. Granting the deed to the property placed him at

risk. A reasonable person should have recognized that.[3] To agree that he would be paid back when his child reached eighteen or when the property was sold became a mere promise without any security. An objective individual should have noticed that he was at risk when he signed the deed, and frankly Mr. Richard appeared to be intelligent and familiar with real estate acquisition and financing when he testified.

In a similar case against one's domestic relations counsel:

> "Behroozi posits that she did not appreciate that she had an [*sic*] legal malpractice claim against the defendant at the time of the occurrences and seemingly attempts to invoke the discovery-rule exception to the statute of limitations. The discovery-rule exception serves to protect individuals suffering from latent or undiscoverable injuries who then seek legal redress after the statute of limitations has expired for a particular claim. *Sharkey*, 19 A.3d at 66 (quoting *Canavan v. Lovett, Schefrin and Harnett*, 862 A.2d 778, 783 (R.I. 2004)). The standard applied to this exception is objective: [I]t requires only that the plaintiff be aware of facts that would place a reasonable person on notice that a potential claim exists. *Id.* (quoting *Canavan*, 862 A.2d at 784). As the trial justice pointed out, Behroozi continuously questioned Kirshenbaum about the adequacy of his representation, particularly with regard to Kirshenbaum's accounting of her ex-husband's income for purposes of calculating how much alimony was owed to her. Behroozi was clearly aware of facts that would lead her to believe she had a potential malpractice claim, and the trial justice did not err in concluding that the discovery rule did not toll the statute of limitations in this scenario." *Behroozi v. Kirshenbaum*, 128 A.3d 869, 873 (R.I. 2016) (internal quotation marks omitted).

Less than one year ago, the high court underscored this analysis

> The discovery-rule exception, codified in § 9-1-14.3(2), '"requires only that the plaintiff be aware of facts that would place a reasonable person on notice that a potential claim exists."' *Sharkey v. Prescott*, 19 A.3d 62, 66 (R.I. 2011) (quoting *Canavan*, 862 A.2d at 784). '"The discovery rule does not require perfect crystallization of the nature and extent of the injury suffered

[3] At trial, Mr. Richard revealed he had been through several closings, was a retired police officer, and had some knowledge of deeds, mortgages, and recording. See trial exhibits B through I, inclusive. Regardless, the Court will not impute any additional knowledge to him, but objectively assesses that a reasonable person placed in circumstances similar to him should have recognized the alleged wrongdoing of Mr. Robinson.

or a clear-cut anchoring to the allegedly negligent conduct of a defendant."' *Fogarty v. Palumbo*, 163 A.3d 526, 534 (R.I. 2017) (quoting *Bustamante v. Oshiro*, 64 A.3d 1200, 1207 (R.I. 2013)). Rather, a legal-malpractice plaintiff is afforded three years to commence suit from "the time that the act or acts of the malpractice should, in the exercise of reasonable diligence, have been discovered." Section 9-1-14.1(3). *Broccoli v. Manning*, 208 A.3d 1146 (R.I. 2019).

Mr. Richard had notice of the potential claim years before, when the divorce was complete.[4] The statute of limitations for his claim had expired well before this suit commenced.

2

Lack of an appropriate expert

While this Court concludes that the Complaint was filed after the statute of limitations had expired and that is dispositive to the case, this Court believes it is prudent and necessary to address the second ground upon which Mr. Richard moved for judgment as a matter of law: Failure to have an expert testify on the appropriate standard of care.

At trial, Mr. Richard called Attorney Matthew Slepkow. He testified that he is a Rhode Island attorney with a concentration in real estate. He described his practice to include conducting commercial and residential transactions and doing title searches. In reviewing the documents, Mr. Slepkow concluded, in his testimony, that Deborah was the sole owner after Mr. Richard signed the deed. He also opined that if Mr. Richard had not signed the deed, his signature would have been required on any subsequent mortgage. He testified that he had seen other property settlement

[4] In self-serving testimony, Mr. Richard claimed that he was anxious to obtain the $20,000 and discussed it with Mr. Robinson. He testified that Deborah wanted the deed to refinance. Mr. Robinson denied this conversation, and this Court does not find this topic was discussed. Assuming, in *arguendo*, that Mr. Richard's revelation was true, his dilemma would have made it obvious that the deed conveyed exclusive ownership, and he would be left without a lien or mortgage on the property. Hence, the statute of limitations would still bar this action.

agreements recorded, and if this agreement had been recorded, any title attorney searching that title would be put on notice of its terms. On cross-examination, he acknowledged that a recorded property settlement agreement did not create a lien, that Mr. Richard gave up his equity interest when he signed the deed, and that the $60,000 need not be paid from the real estate proceeds.

Mr. Slepkow did not claim to be an expert in family law, nor did he testify about divorce practice in the Family Court. He never testified concerning the standard of care for attorneys in Mr. Robinson's position. This Complaint sounds in negligence. Mr. Richard's case is based on the allegation that Mr. Robinson failed to protect the real estate by recording the Property Settlement Agreement, or some other document, reflecting Mr. Richard's contingent interest. Mr. Richard alleged that a reasonably prudent attorney would have done so. However, no family law attorney testified to establish the standard.

In *Cronan v. Iwon*, 972 A.2d 172 (R.I. 2009), our high court held "[a] party opposing a motion for summary judgment on a legal malpractice claim 'generally must present expert evidence, in the form of an affidavit or otherwise, establishing the standard of care' and the alleged deviation therefrom that caused damages." (quoting *Ahmed v. Pannone*, 779 A.2d 630, 633 (R.I. 2001)) (citing *Focus Investment Associates, Inc. v. American Title Insurance Co.*, 992 F.2d 1231, 1239-40 (1st Cir. 1993)). Expert evidence is required "unless the attorney's lack of care and skill is so obvious" that it would be a matter of common knowledge. *Focus Investment Associates, Inc.*, 992 F.2d at 1239. "Cases which fall into the 'common knowledge' category are those where the negligence is 'clear and palpable,' or where no analysis of legal expertise is involved." *Id.*; *accord Suritz v. Kelner*, 155 So.2d 831, 833-34 (Fla. Dist. Ct. App. 1963) (expert testimony not required where attorney directed clients not to answer interrogatories in violation of judge's order to answer on penalty of dismissal); *Collins v. Greenstein*, 595 P.2d 275, 276, 282 (Haw. 1979) (expert

testimony not required where attorney failed to file suit within the appropriate statute of limitations period); *Sommers v. McKinney*, 670 A.2d 99, 105 (N.J. Super. Ct. App. Div. 1996) (no expert testimony needed to evaluate attorney's failure to inform client of settlement offer).

Without expert testimony, Mr. Richard is unable to establish the appropriate standard of care or Mr. Robinson's alleged breach thereof, as required to prove a claim of legal malpractice.

In *Behroozi*, a *pro se* plaintiff alleged that her attorney failed to adequately represent her in attempts to recover alimony from her ex-husband. The post-judgement divorce proceedings were in Family Court. Ms. Behroozi indicated that she would not engage an expert witness to testify. Our high court held:

> "More significantly, Behroozi's malpractice claims necessarily fail because she has not retained an expert witness to testify in support of her case. On many occasions we have stated that 'in a legal malpractice action, a plaintiff opposing a motion for summary judgment generally must present expert evidence, in the form of an affidavit or otherwise, establishing the standard of care.' *Ahmed v. Pannone*, 779 A.2d 630, 633 (R.I. 2001). It is undisputed that Behroozi has not produced any expert testimony to establish the standard of care purportedly applicable to Kirshenbaum's representation; indeed, it is her contention that she need not provide any expert testimony because the 'conduct and misrepresentations to [Behroozi] are so obvious * * * [that n]o specialized knowledge is needed for the trier of fact to understand the evidence or determine a fact at issue.' We disagree. Behroozi is correct in that there is an exception to the general rule requiring expert testimony to establish the standard of care "when the malpractice 'is so obvious that the trier of fact can resolve the issue as a matter of common knowledge.'" *Id.* at 633 n.1 (quoting *Focus Investment Associates, Inc. v. American Title Insurance Co.*, 992 F.2d 1231, 1239 (1st Cir. 1993)). However, this is not such a scenario. . . . *See Cronan v. Iwon*, 972 A.2d 172, 174 (R.I. 2009) (mem.). As such, summary judgment on Behroozi's malpractice claims was also appropriate because she has not retained, and has unequivocally stated that she does not intend to retain, an expert witness to testify as to the applicable standard of care and any breach thereof."

Here, while Mr. Richard did retain an attorney to testify on real estate matters, he never claimed to be an expert in the field of family law. He never testified on the appropriate standard of care for an attorney in Mr. Robinson's position. This is not a case where the conduct and

representations of the attorney-defendant is so obvious that no specialized knowledge is needed for the trier of fact. As our Supreme Court specifically stated in Behroozi: "We have previously recognized that family law is a complicated facet of the law and that expert testimony is required to establish the standard of care in a legal malpractice claim in the family law contest." *Behroozi*, 128 A.3d at 874 (citations omitted).

Accordingly, Mr. Richard's case must fail as an appropriate expert never testified on the applicable standard of care. Without that, there was insufficient evidence for the factfinders to establish a breach of duty.

IV

Conclusion

For the reasons stated, Mr. Robinson's Motion for Judgment as a Matter of Law is granted. Judgment shall enter for Mr. Robinson. Mr. Robinson shall submit an appropriate judgment forthwith.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Gerald Richard v. Steven A. Robinson**
CASE NO:	**KC-2011-378**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**March 10, 2020**
JUSTICE/MAGISTRATE:	**Lanphear, J.**

ATTORNEYS:

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