STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: January 28, 2019]

SERGIO A. DeCURTIS,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2012-4078**
	:	
	:	
VISCONTI, BOREN & CAMPBELL LTD.	:	
and RICHARD A. BOREN,	:	
Defendants.	:	

DECISION

CARNES, J. Before this Court are cross-motions for partial summary judgment. Plaintiff Sergio A. DeCurtis (DeCurtis) moves for partial summary judgment on four matters to find 1) that *Marsocci v. Marsocci*, 911 A.2d 690 (R.I. 2006) did not preclude DeCurtis from protecting certain earnings in the prenuptial and postnuptial agreements; 2) that Defendant Richard A. Boren (Boren) erred in drafting the prenuptial and postnuptial agreements, as they were not properly constructed to protect DeCurtis' earnings; 3) that the voluntary payment defense does not preclude DeCurtis from recovering damages; and 4) that this Court certify the *Marsocci* issue to the Rhode Island Supreme Court. Defendants filed a timely objection and cross-motion for partial summary judgment asserting that 1) as a matter of law, Boren did not err in drafting the prenuptial and post nuptial agreements; 2) Boren is protected by judgmental immunity with respect to the language he chose to use in the prenuptial and postnuptial agreements; 3) *Marsocci* changed the state of the law in Rhode Island such that marital income may not be excluded from the equitable distribution process in a divorce, regardless of any prenuptial or postnuptial agreement; 4) DeCurtis cannot prove the damages element of his negligence-based legal

malpractice claim; and 5) DeCurtis was a voluntary payer, and thus may not recover from Defendants. In this context, the Court will decide the narrow issue of Boren's alleged professional negligence in drafting prenuptial and postnuptial agreements for DeCurtis. This matter is before this Court pursuant to Super. R. Civ. P. 56.

I

Facts and Travel

In 2000, DeCurtis and Michelle Tondreault (Michelle)[1] agreed to enter into a prenuptial agreement in contemplation of their marriage. DeCurtis spoke to his corporate attorney, Stephen Brusini (Brusini), who was an associate at Visconti, Boren & Campbell Ltd. (VBC). Brusini introduced DeCurtis to Boren. Boren and VBC[2] drafted the prenuptial agreement. The prenuptial agreement was delivered to Michelle and her attorney and signed by Michelle and DeCurtis on or about March 22, 2000. On March 28, 2000, Michelle and DeCurtis were married. The couple has two children together.

On December 2, 2003, Michelle filed the first of several actions in Family Court. Boren represented DeCurtis, and the parties reconciled. On August 5, 2005, Michelle filed another complaint—this time for divorce—in Family Court. DeCurtis hired Boren again, and the action ended in a settlement in which the parties agreed to enter into a postnuptial agreement. Michelle again filed for divorce in Family Court on June 18, 2010, and again, DeCurtis hired Boren to represent him. During that litigation the question arose as to whether the prenuptial and postnuptial agreements were applicable—specifically, whether assets created during a marriage could be protected via a prenuptial or postnuptial agreement under Rhode Island law.

[1] To distinguish between certain parties, first names may be used. No disrespect is implied or intended.

[2] Whether Boren alone drafted the prenuptial agreement or whether he had assistance from Brusini is a factual dispute between the parties at this time.

The divorce trial was scheduled to begin on June 21, 2011 in the Family Court before Judge John E. McCann, III (Judge McCann). Settlement negotiations began before and continued after this scheduled date. At the outset of the first day of the trial, Judge McCann stated:

> "Well, before we get started, I just wanted to set the stage, so everyone knows, I've re-read all of the pretrial memorandums, and the Court's interpretation of the Uniform Premarital Agreement Act, and, more specifically, 15-17-1 through 15-17-11, and, more specifically, the issue addressed by Defendant's counsel relative to the term "property" which is in the definition clause set forth in 15-17-1.
>
> "As to the issue, as I understand it, the threshold issue is whether or not any income that was derived during the period of marriage is excluded by the prenup agreement. I'll advise you that I have read the statute, and it's the Court's interpretation that it does not. In fact, the Court does not find that 15-17-1, under the Section entitled "Property" excludes any income or earnings that were derived during the marriage, in terms of the argument posed by Defendant's counsel in his memorandum.
>
> "I further have reviewed the prenup agreement and the post-nup agreement and do not find that the provisions of the contract, as read by the Court at this juncture without further testimony or evidence that would supplement the contract, would indicate that the income derived during the period of marriage is excluded. . . ." (Pl.'s Ex. 9, Tr. 3:16-25–4:1-16, June 21, 2011; *see also* Defs.' Ex. M, Tr. 3:16-25–4:1-16, June 21, 2011.)

Judge McCann then asked DeCurtis whether he understood, but DeCurtis' response was "the exact opposite" of what Judge McCann had said; therefore, Judge McCann rephrased it in simpler terms, and conversed with DeCurtis and the attorneys:

> "THE COURT: What I just indicated to you is any income that you derived during the period of your marriage, in accordance with the Uniform Premarital Agreement Act, 15-17-1 through 15-17-11, does not provide, in my opinion, based upon a reading of the statute and reading of the agreement and a reading of the definitions as set forth in 15-17-1, provide you one iota of protection concerning income that was derived during the period of

the marriage. It would be the Court's interpretation, in reading both the prenup and the post-nup agreement, and further reading what I think is a very well-prepared memorandum by your counsel, would it indicate that the Court is going to exclude any income during the period of marriage. That's exactly opposite of what your understanding of it is, so you know ahead of time. I thought you should be aware of that and that the contract has now been marked as a full exhibit. I'm assuming further neither counsel is going to provide any type of oral testimony to explain the contract, is that correct?

MR. ORTOLEVA: That's correct, Your Honor.

"THE COURT: You want a few moments? Do you understand what we're talking about here, sir?

"MR. DECURTIS: I do. But I don't understand. If the definition includes income and earnings that the State has set forth, how could the Court --

"THE COURT: They are talking about separate property. They are not talking about property acquired during the period of marriage. I also indicated to you folks in chambers, the other day when you were here, that it's the Court's interpretation, having read numerous cases across the country on prenups, and also my former office, law office, being involved in several of the preeminent prenup cases or the interpretation of the Supreme Court's prenups, that, at this particular juncture, if you attempted to convince the Supreme Court or this particular jurist that your income derived during the period of marriage is excluded, Number 1, I don't think you're going to be successful before this particular jurist; nor, is it the Court's interpretation based upon its dealings with the Supreme Court which it has over the last 37 years, would they entertain that thought either.

. . . .

"MR. BOREN: I respectfully disagree with Your Honor's interpretation . . . [a]nd I believe that the prenuptial agreement is clear and unambiguous and that, when you read it in conjunction with the Uniform Premarital Agreement Act, that any and all income and earnings, whether premarital or post-marital, under the definition of property, combined with what I put into the premarital agreement, would be excluded. I think my client has a very difficult time understanding how Your Honor could interpret the premarital agreement and the statute differently; and I think the

> real problem is, although under 408, Rule 408 of the rules of evidence, any settlement discussions wouldn't necessarily—wouldn't be subject to evidentiary testimony. I think the real issue in this case, and perhaps it shouldn't be on the record, is how we can go about fashioning a form of settlement." (Pl.'s Ex. 9, Tr. 5:14–7:1-7; 7:20–8:1-14, June 21, 2011; *see also* Defs.' Ex. M, Tr. 5:14–7:1-7; 7:20–8:1-14, June 21, 2011.)

Later in 2011, the parties agreed to a settlement, and a judgment of final divorce was entered by the Family Court on December 13, 2011 (Defs.' Ex. N). Thereafter, on August 8, 2012, DeCurtis filed the instant legal malpractice action in the Superior Court against Defendants. On February 21, 2018, DeCurtis filed a motion for partial summary judgment, and on June 18, 2018, Defendants filed their objection to that motion as well as a cross-motion for partial summary judgment. On December 10, 2018, DeCurtis filed a reply memorandum. Discovery is still ongoing.

II

Standard of Review

When deciding a motion for summary judgment, the Court must keep in mind that it "'is a drastic remedy and should be cautiously applied."' *Steinberg v. State*, 427 A.2d 338, 339–40 (R.I. 1981) (quoting *Ardente v. Horan*, 117 R.I. 254, 256-57, 366 A.2d 162, 164 (1976)). Further, summary judgment should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law." *Plunkett v. State*, 869 A.2d 1185, 1187 (R.I. 2005). Summary judgment should only be granted when the Court finds that there are no genuine issues of material fact when viewing "the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party." *Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Educ.*, 93 A.3d

949, 951 (R.I. 2014). In such circumstances, the moving party is entitled to judgment as a matter of law. *Id.* However, the party opposing a motion for summary judgment may defeat the motion by "proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1225 (R.I. 1996).

III

Analysis

A

Marsocci Question Certification

In their cross-motions for partial summary judgment, both parties request clarification on the meaning of *Marsocci*—namely, as to whether or not the case changed the state of the law in Rhode Island such that marital income may not be excluded from the equitable distribution process in a divorce, regardless of any prenuptial or postnuptial agreement. In the alternative, DeCurtis requests this Court to certify this question to the Rhode Island Supreme Court. It is well-settled that without an agreed statement of facts and "without careful consideration being given as to whether [the facts] were really as perplexing as they might at first seem" it would not be appropriate to certify a question. *Richardson v. Bevilacqua*, 115 R.I. 49, 52, 340 A.2d 118, 120 (1975) (citing *Jerome v. Pratt*, 111 R.I. 56, 58, 298 A.2d 806, 808 (1973)). Here, the request to certify a question to the Rhode Island Supreme Court regarding the meaning of *Marsocci* is premature, as there is no agreed statement of facts between the parties at this time and further factual development is necessary.

Moreover, a question should be certified to the Supreme Court of Rhode Island "[w]henever in any proceedings, civil or criminal, legal or equitable, in the superior court or in

any district court, any question of law shall arise . . . which, in the opinion of the court, . . . is of such doubt and importance and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings, the court in which the cause is pending shall certify the question or motion to the supreme court for that purpose and stay all further proceedings until the question is heard and determined . . .” G.L. 1956 § 9-24-27. Once the parties have filed an agreed statement of facts with the clerk’s office, “the court shall certify the action to the supreme court to be there heard and determined.” Sec. 9-24-25.

However, the Court has stressed that “careful consideration [as to whether the issues were really as perplexing as they might at first seem] is a precondition to certification under the statute, but, even then, a trial justice should not certify unless, after first having had the benefit of adequate research by counsel and informed arguments, he [or she] continues to entertain such doubts concerning the question that he [or she] feels unable to resolve it satisfactorily.” *Richardson,* 115 R.I. at 52, 340 A.2d at 120 (citing *Jerome*, 111 R.I. at 58, 298 A.2d at 808. Further, the Court will not “encourage short-circuiting of proper trial procedure by entertaining improperly certified questions” in circumstances in which certification was “motivated primarily by the desire of the parties to reach promptly a final decision by this court.” *Id.* Questions should not be certified to the Rhode Island Supreme Court “unless and until the trial justice, after careful consideration, aided by the research and arguments of counsel is unable to reach a satisfactory conclusion.” *State v. Walsh*, 108 R.I. 518, 522, 277 A.2d 298, 301 (1971). Accordingly, without an agreed statement of facts and in light of the need for further factual development, certification is not appropriate at this time.

B

Voluntary Payment Defense and Damages

Defendants contend that DeCurtis was a voluntary payer, and thus, he may not recover from Defendants. Conversely, DeCurtis contends that the voluntary payment defense does not preclude him from recovering damages.

The voluntary payer doctrine is an affirmative defense that bars a plaintiff from recovering payments which were made with "full knowledge of the facts." *Roadepot, LLC v. Home Depot, U.S.A., Inc*., 163 A.3d 513, 523 (R.I. 2017). However, due to the limited discovery and since it is a fact-intensive inquiry as to whether DeCurtis was a voluntary payer, the cross-motions for summary judgment on this issue must be denied.

Defendants also assert that DeCurtis cannot prove the damages element of his negligence-based legal malpractice claim. Defendants further contend that DeCurtis is under a duty to mitigate his damages. The extent to which he has mitigated his damages would be a jury question. *See D'Andrea v. Calcagni*, 723 A.2d 276, 278 (R.I. 1999). This issue also deserves further discovery and cannot be decided as a matter of law at this time. Thus, summary judgment on this matter is denied.

C

Duty Related to Professional Negligence

In their cross-motions for partial summary judgment, there are three final matters on which the parties request summary judgment. First, DeCurtis asks this Court to find as a matter of law that Boren erred in drafting the prenuptial and postnuptial agreements, as they were not properly constructed to protect DeCurtis' earnings. Conversely, in Defendants' cross-motions for partial summary judgment, Defendants contend that this Court should hold that Boren did not err

in drafting the prenuptial and postnuptial agreements. Third, and finally, Defendants ask this Court to find that Boren is protected by judgmental immunity with respect to the language he chose to use in those agreements. These three matters involve a question of duty: Boren's duty related to professional negligence in drafting the prenuptial and postnuptial agreements. Specifically at issue is whether Boren needed to have included some or any additional language in the prenuptial and postnuptial agreements.

The elements of a negligence claim are '"a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage."' *Wells v. Smith*, 102 A.3d 650, 653 (R.I. 2014) (quoting *Brown v. Stanley*, 84 A.3d 1157, 1161-62 (R.I. 2014)). As such, the threshold question of any negligence claim is whether the defendant owed the plaintiff a legal duty. *Gushlaw v. Milner*, 42 A.3d 1245, 1252 (R.I. 2012). Further, it is well-settled that "[w]hether a defendant is under a legal duty in a given case is a question of law." *Brown*, 84 A.3d at 1162 (citing *Willis v. Omar*, 954 A.2d 126, 129 (R.I. 2008)).

To determine whether there is a legal duty, the Court "employ[s] an *ad hoc* approach that 'turns on the particular facts and circumstances of a given case.'" *Woodruff v. Gitlow*, 91 A.3d 805, 814 (R.I. 2014) (quoting *Ouch v. Khea*, 963 A.2d 630, 633 (R.I. 2009)). "In the absence of such a duty, 'the trier of fact has nothing to consider and a motion for summary judgment must be granted.'" *Wyso v. Full Moon Tide, LLC*, 78 A.3d 747, 750 (R.I. 2013) (citing *Holley v. Argonaut Holdings, Inc.*, 968 A.2d 271, 274 (R.I. 2009)). The Court must consider '"all relevant factors, including the relationship of the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations, and notions of fairness."' *Gushlaw*, 42 A.3d at 1252 (quoting *Volpe v. Gallagher*, 821 A.2d 699, 705 (R.I. 2003)). Further, while there

is no clear-cut rule to determine whether a duty exists in a particular case, there are five factors that the Court should examine when considering the issue of duty. These factors are case specific. The factors are:

> '"(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of connection between the defendant's conduct and the injury suffered, (4) the policy of preventing future harm, and (5) the extent of the burden to the defendant and the consequences to the community for imposing a duty to exercise care with resulting liability for breach."' *Woodruff*, 91 A.3d at 815 (quoting *Bucki v. Hawkins*, 914 A.2d 491, 495–96 (R.I. 2007)).

At the time of drafting the prenuptial and postnuptial agreements, there is no question that an attorney-client relationship had been established between DeCurtis and Boren. An attorney must, as his or her duty to the client, deliver the requisite "ordinary skill and care in the management of the business entrusted to him." *Holmes v. Peck*, 1 R.I. 242, 245 (1849). With respect to the first duty factor, it was foreseeable that—should Boren have improperly drafted the prenuptial and postnuptial agreements—DeCurtis could lose a substantial amount of money upon divorce from Michelle. DeCurtis suffered an injury in that he settled the divorce with Michelle and, in so doing, surrendered more money to her than he contemplated when he executed the prenuptial and postnuptial agreements. As to the third factor, Boren drafted the agreements that ultimately (likely) did not offer enough protection to prevent Michelle from reaching certain assets that the agreements purported to protect. As such, it would appear that this factor also would be resolved in favor of DeCurtis.

DeCurtis asserts that certain, necessary language would have made the prenuptial and postnuptial agreements enforceable in their entirety. However, as Boren points out, <u>at the time</u> that he drafted the agreements, there was no indication that the language he used would be ineffective in protecting the assets that DeCurtis sought to protect. (Emphasis added.) No case

law or statute in Rhode Island at that time suggested that the assets could not be protected or that attorneys needed to use certain phrasing or language. (Emphasis added.) In fact, attorney Ronald J. Resmini, in a Suffolk University Law Review article entitled *The Law of Domestic Relations in Rhode Island* declared "parties . . . may also contract with respect to any matter involving marital property." 29 Suffolk U. L. Rev. 379, 391 (1995) (citing § 15-17-3(a)(1)-(3)); *Penhallow v. Penhallow*, 649 A.2d 1016, 1020 (R.I. 1994). A Rhode Island Bar Journal article further echoed these sentiments in 2000—the year that Boren drafted the prenuptial agreement for DeCurtis:

> "The judicial trend and the Uniform Premarital Agreement Act ("UPAA") has made premarital agreements more readily enforceable with no regard for their potential harm to a contracting party. Rhode Island is no exception. On the contrary, our modifications to the UPAA establish a greater burden to prove a premarital agreement unenforceable than does the original UPAA." Suzanne D. Albert, *The Perils of Premarital Provisions*, R.I. B.J. 5 (2000).

As such, at the time of drafting, the prenuptial and postnuptial agreements would have been adequate to protect DeCurtis' assets. It was not until 2006, when *Marsocci* was decided, that the law may have changed. However, "[t]he status of a legal proposition can vary with time. That which seems indisputably correct today may be deemed clearly erroneous tomorrow" and thus, lawyers are not liable for changes in the law. 2 Ronald E. Mallen, *Legal Malpractice* § 19:8 (2019 ed.). Whether or not *Marsocci* changed the state of the law going forward with respect to what property can be protected in prenuptial and postnuptial agreements or what specific language was needed to protect that property is important because both agreements were drafted and signed by the parties before *Marsocci* was decided in 2006. (Emphasis added.) Therefore, Defendants maintain the connection between the agreements Boren drafted for DeCurtis

purportedly in accordance with the law at the time of drafting, and the injury DeCurtis suffered, is severed by the potential change in the law caused by *Marsocci*.

It follows that the fourth factor—preventing future harm—and the fifth factor—the burden on the defendant and the consequences to the community for imposing a duty—also weigh in favor of Boren. If this Court were to hold that Boren had a duty to incorporate specific language into the agreements when, at the time, no Rhode Island case law or statute imposed such a duty, and reliable secondary sources did not indicate that special language was necessary at the time, then attorneys would be essentially "required to predict infallibly how a court will interpret documents that they drafted." 2 Ronald E. Mallen, *Legal Malpractice* § 19:14 (2019 ed.). This type of holding would not prevent future similar harms, and importantly, it would be a near impossible burden for attorneys to meet.

This Court finds that Boren did have a duty to his client—to draft prenuptial and post-nuptial agreements that were in compliance with the law at the time in Rhode Island. However, upon considering the five duty factors, the Court declines to unilaterally impose the duty on Boren to have included additional language in the prenuptial and postnuptial agreements. For the aforementioned reasons, summary judgment is granted in favor of Defendants on the narrow issue of Boren's duty relating to the prenuptial and postnuptial agreements.

D

***Marsocci* Interpretation**

Lastly, both parties moved for partial summary judgment regarding the Court's interpretation of *Marsocci*. When interpreting Rhode Island Supreme Court opinions, it is important to pay heed to the Court's own words that '"the opinions of this Court speak forthrightly and not by suggestion or innuendo"' and it is '"not the role of a trial justice to

attempt to read 'between the lines' of our decisions."' *Willis v. A.T. Wall*, 941 A.2d 163, 166 (R.I. 2008) (quoting *Fracassa v. Doris*, 876 A.2d 506, 509 (R.I. 2005)). The difficulty of the issue is "completely irrelevant to the grant or denial of summary judgment . . . In some situations, a fuller development of the facts may serve to clarify the law or help the court determine its application to the case." 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2725 (4th ed. 2018 update). As the Court in *Miller v. Gen. Outdoor Advert. Co.* noted, "there are instances where summary judgment is too blunt a weapon with which to win the day." 337 F.2d 944, 948 (2d Cir. 1964).

Here, further factual elucidation is necessary for this Court to render its decision. Neither DeCurtis' expert nor Boren have been deposed—only DeCurtis has given a deposition. There are three components that are all required in order to find that a premarital agreement is not enforceable: involuntary execution, unconscionability, and lack of disclosure. *Marsocci*, 911 A.2d at 697. Whether these factors were met is a matter of fact which requires expert testimony. Further, it is necessary for DeCurtis' expert to opine as to what the expert contends should have been in the prenuptial and postnuptial agreements at the time of drafting before this Court can assess the merits and assign the drastic remedy of summary judgment. In this case, unlike in *Marsocci*, the agreements that Boren drafted did have an anti-transmutation clause.[3] However, post-*Marsocci*, even with an anti-transmutation clause, the Family Court would have had the power to equitably distribute the marital assets anyway:

> "We are of the opinion, however, that the agreement does not preclude the Family Court from assigning the appreciation in value or an interest in David's property that increased in value as a result

[3] "2.6 TRANSMUTATION. Regardless whether the parties in the future file joint or separate tax returns, pay debts and bills from a joint checking account or combine income, commonly use household furniture, furnishings and effects, there shall be no transmutation of separate property into marital property." Defs.' Ex. E at 4.

> of the efforts of either spouse during the marriage under § 15–5–16.1(b) (footnote omitted).
>
> Although counsel for defendant strenuously argued before this Court that the assets listed in the agreement and their proceeds or substitutions were forever frozen as David's separate property and, as such, should be immune to transmutation and active appreciation, he is incorrect. *Premarital assets that were transmuted into marital assets* ***and*** *any appreciation of David's assets resulting from marital efforts are marital property subject to equitable distribution.* Accordingly, we vacate the judgment and remand this case for further proceedings, including a valuation and equitable distribution of those assets comprising the marital estate." *Marsocci*, 911 A.2d at 699 (emphasis added).

Accordingly, since further factual findings are necessary, each party's motion for summary judgment with respect to interpreting the *Marsocci* decision as it applies to this case is denied.

IV

Conclusion

For the reasons stated herein, summary judgment is granted in favor of Boren on the very narrow issue of defining the duty with respect to professional negligence in drafting the prenuptial and postnuptial agreements. All other aspects of the parties' cross-motions for partial summary judgment are denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Sergio A. DeCurtis v. Visconti, Boren & Campbell Ltd. and Richard A. Boren
CASE NO:	PC-2012-4078
COURT:	Providence County Superior Court
DATE DECISION FILED:	January 28, 2019
JUSTICE/MAGISTRATE:	Carnes, J.
ATTORNEYS:	
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For Defendant:	J. Renn Olenn, Esq.; Michael B. Forte, Jr., Esq.; Joseph F. Penza, Jr., Esq.