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MARCO BIANCHI,

Plaintiff/Appellant,

v.

BORIS LADJEN, NADIA LADJEN, MAIN STREET TITLE & SETTLEMENT SERVICES, LLC and ANDREW G. FREDA, ESQ. JOHN DOES 10-10 (said names being fictitious, trust names presently unknown), ABC CORP. 1-10 (said names being fictitious, true names presently unknown) AND XYZ CORP. 1-10 (said names being fictitious, true names presently unknown)

Defendant/Respondent.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-3310-15T4

Civil Action

Superior Court of New Jersey
Bergen County
Docket No.: BER-L-3010-14

Sat Below:

Hon. Greg A. Padovano, J.S.C.

BRIEF OF AMICUS CURIAE NEW JERSEY STATE BAR ASSOCIATION

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PROCEDURAL HISTORY AND STATAMENT OF FACTS

The New Jersey State Bar Association (NJSBA) relies upon the Procedural History and Statement of Facts as submitted by the parties. The NJSBA notes, however, that this brief is submitted pursuant to the court's August 10, 2017 invitation to the NJSBA, among other groups, to participate in this matter as amicus curiae, and the court's September 26, 2017 Amicus Scheduling Order

PRELIMINARY STATEMENT

To prove professional malpractice, a plaintiff must establish two things: that the professional owed the plaintiff a duty and that the professional breached that duty. This case raises important questions about the duties of professionals involved in real estate transactions and how far those duties extend.

The NJSBA, with over 18,000 New Jersey attorneys as members, has a keen interest in ensuring that an attorney not be subject to a potential legal malpractice claim for duties outside the scope of his or her representation. This is of critical importance in the context of real estate transactions, where the attorney's role and responsibilities in some aspects of the settlement process have become more limited, and the role of other professionals has increased, due in part to strict federal

regulations recently promulgated by the Consumer Financial Protection Bureau.

In this case, it is alleged that an attorney negligently breached his duty to his client, the plaintiff-purchaser, by failing to provide advice about purchasing homeowners insurance. This allegation is made even though the purchase or lack thereof had no effect on the ability of the attorney to handle the issues he had been retained to perform: concluding the actual transaction. For the reasons explained below, the NJSBA strongly urges the Court to confirm that it is within the authority of a court to determine, as a matter of law, that no such duty exists absent an express agreement to the contrary.

It is well settled that the determination of the existence and scope of a duty is the responsibility of the courts. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993). Thus, it is the role of the court, not a jury, to make an initial determination, as a matter of law, about whether a duty exists on which a malpractice claim can proceed.

To make that determination, a court should rely on professional standards of care established by a recognized authority and supported by objective criteria that is substantial enough to put an attorney on notice of the

standards governing his or her conduct. Personal experience or observation of a proffered expert is not enough. Otherwise, a proffered expert's opinion amounts to nothing more than inadmissible net opinion.

In this case, the NJSBA submits that the trial court correctly found as a matter of law that, absent express agreement otherwise, an attorney does not have a duty to advise a real estate purchaser client about purchasing optional homeowners insurance. "Expert" testimony by another real estate attorney relating that attorney's routine practices when representing real estate clients does not constitute a recognized authority or objective criteria to give rise to an established standard of care. Accordingly, the NJSBA further submits that the trial court correctly barred plaintiff's expert testimony as inadmissible net opinion.

In sum, the NJSBA urges this court to affirm the trial court's determination as a matter of law that a legal malpractice claim cannot be premised on a non-existent duty supported by an expert's opinion that is based solely on the subjective personal experience of the proffered expert, rather than recognized authority and objective criteria.

I. WHETHER A DUTY EXISTS THAT WOULD FORM THE BASIS OF A LEGAL MALPRACTICE ACTION IS A QUESTION OF LAW FOR THE COURT

Generally, the determination of the existence and scope of a duty is the responsibility of the courts. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993); Kelly v. Gwinnell, 96 N.J. 538, 552 (1984). It is a question of law, McIntosh v. Milano, 168 N.J. Super. 466, 495 (1979), and, hence, appropriate for summary judgment in a proper case.

There is ample reason for duty to be decided by the court, not the jury. First, "[w]hether a duty exists is ultimately a question of fairness." Weinberg v. Dinger, 106 N.J. 469, 485 (1987). Although in the case of a legal malpractice claim, the court must apply the usual negligence principles, including an analysis of foreseeability, Conklin v. Hannoch Weisman, 145 N.J. 395, 422 (1996), whether a duty exists must be determined in light of public policy. Hopkins, supra, 142 N.J. at 439. That is not a consideration with which the jury is equipped to deal.

Further, "[t]hat inquiry involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Id. Moreover, "[t]he analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case ***and*** generate intelligible

and sensible rules to govern future conduct." Id. (emphasis added).

Second, while duty is neither abstract nor absolute, "it 'is largely grounded in the natural responsibilities of social living and human relations, such as have the recognition of reasonable men' [and women]." McIntosh, supra, 168 N.J. Super. at 481. Courts recognize, however, that duty has "many of the characteristics of an abstract term as defined in standard dictionaries, and thus may be difficult or impossible to define in absolute and precise terms, even when applied to specific facts." Id. Even courts, thus, have "carefully refrained from treating questions of duty in a conclusory fashion. . . ." Weinberg, supra, 106 N.J. at 485.

Finally, the existence of a duty not statutorily imposed is, of course, a part of the common law. The common law "embod[ies] underlying principles of public policy and perceptions of social values. Because public policy and social values evolve over time, so does the common law." Hopkins, supra, 132 N.J. at 435. As can be seen, each factor in the determination of whether a duty exists involves aspects of the public interest and public policy.

It is for these reasons that such determination is, and should be, made by the court. Id. at 439.

II. AS A MATTER OF LAW, THE DUTY OF REAL ESTATE ATTORNEYS TO THEIR CLIENTS DOES NOT EXTEND BEYOND THEIR ROLE IN THE TRANSACTION, UNLESS OTHERWISE AGREED

In this case, the trial court was faced with a determination as to whether the attorney for a buyer in a residential real estate transaction is obligated to provide guidance and advice regarding the pros and cons of purchasing homeowners insurance. The court was called upon further to decide whether the failure to provide such guidance and advice could constitute a breach of duty to form the basis of a legal malpractice claim. Absent an express agreement by the attorney to provide such advice, however, there is no basis on which to claim an attorney has such a duty.

At its most basic, the role of a buyer's attorney in a real estate transaction is primarily to ensure the effective exchange of a buyer's funds for the legal ownership rights to real property. Subsumed therein are a number of possible specific obligations dependent upon the dynamics of the transaction, including, for example, who is serving as the settlement agent or whether a loan is involved. The duties of the buyer's attorney arise from those variables. Many of these duties are discussed in various cases and provide context and framework for the obligations of the attorneys involved in a real estate transaction. Sears Mortgage Corp. v Rose, 134 N.J. 326 (1993);

St. Pius X House of Retreats v. Camden Diocese, 88 N.J. 571, 588 (1982).

However, the idea that buyers' attorneys have a duty to provide advice and recommendations to their clients about whether and when to purchase homeowners insurance is simply unsupported by any legal authority. Extending that obligation to every attorney in a traditional house closing would exceed the scope of services that buyers' attorneys are typically retained to perform for their clients. This is underscored by the fact that this plaintiff and his expert fail to provide any legal authority to substantiate such an expansive view of an attorney's duty.

The purchasing of homeowner's insurance, while required by mortgage providers to secure a mortgage, is not otherwise legally required. It is a personal decision homeowners can make for themselves. Outside of the requirement of a mortgage company, securing insurance has nothing to do with the law or the client's ability to purchase a piece of property. Imposing such a duty on an attorney expands his or her obligation beyond securing the transfer of ownership of real property to include an affirmative duty to advise clients about protection for their new home. One could posit that, if an attorney has the obligation alleged here, then an attorney has many other obligations related to the purchase, including but not limited

to advising clients about the benefits of purchasing a home security system or warranties for their home appliances. To expand the duty of attorneys to include this sort of advice and guidance would effectively turn them into insurers against any peril home buyers might encounter in connection with buying a home. The court should reject such efforts.

This entire issue must also be put into context given the recent shifting of roles and responsibilities in a typical real estate transaction. Policies stemming from the Dodd-Frank Act ("Dodd-Frank") (12 U.S.C. 5301, et seq.), the Real Estate Settlement Procedures Act of 1974, as amended (12 U.S.C. 2601, et seq.) and regulations promulgated by the Consumer Finance Protection Bureau (Regulation X, 12 C.F.R. Part 1024 and Regulation Z, 12 C.F.R. part 1026) have resulted in attorneys having a more limited role in the settlement process in a real estate transaction, particularly preparation of the closing disclosure statement, which is now most commonly performed by the title company.

Thus, in a real estate transaction, an attorney may provide advice on the contract of sale, negotiate necessary repairs on the property, and prepare and review title documents; however, in many transactions, responsibility for such tasks as the collection and disbursement of funds and preparation of the closing disclosure statement has shifted to the title company

and the mortgage provider. In fact, attorneys are not even provided the closing disclosure statement to review prior to closing. Under Dodd-Frank, they must obtain this document from their clients. Accordingly, attorneys should not be held liable for every aspect of a real estate transaction. Their liability should be limited to the scope of their duties in the particular transaction.

Thus, as the Appellate Division has previously held, "while a real estate attorney owes [a duty] to his clients, we are not persuaded that any attorney should be viewed as a 'backstop' and held jointly and severally liable for all damages. . . ." Grubbs v. Knoll, 376 N.J. Super. 420, 439 (App. Div. 2005). While Grubbs addressed a situation where there was fraud by one of the parties involved, the same general principles should apply in contexts such as those here to hold that where the harm is the result of an actor other than the attorney, the attorney should not be the "backstop" or insurer for all harm that might befall a client.

For these reasons, it is respectfully submitted that this court should find that attorneys do not owe a duty to buyers in a real estate transaction to provide advice regarding the procurement of homeowner's insurance absent an express agreement with the clients to provide such services.

III. PUBLIC POLICY REQUIRES THAT THE CONDUCT OF LAWYERS AND OTHER PROFESSIONALS BE GOVERNED BY PROFESSIONAL STANDARDS OF CARE THAT ARE SUPPORTED BY OBJECTIVE CRITERIA

Standard of care is generally defined as the degree of care or competence one is expected to exercise in a particular circumstance. When dealing with professionals, the standard of care is derived from a consensus of the profession. In a malpractice action, when an expert cannot cite to any objective indicia to support such a consensus, that expert's opinion cannot be accepted as anything other than a personal opinion. And a personal opinion is quintessential net opinion, which is not enough to support a claim of malpractice.

In a legal malpractice case, there are many sources that can assist in defining the standard of care:

1. Case law;
2. Rules of Court;
3. Rules of Professional Conduct;
4. Treatises;
5. Form Books;
6. Articles, including law review articles;
7. Seminars;
8. Retainer agreements; and
9. Any other form of accepted authority.

If an expert cannot cite to even one such source, it is incredibly unlikely that the identified "standard" is actually accepted practice by a consensus of the profession.

Under New Jersey law specifically, in representing a client, an attorney "represents that he/she has the degree of knowledge and skill ordinarily possessed and used by others engaged in the general practice of law." See Model Jury Charge (Civil), 5.51A (1979). This professional duty of reasonable care varies depending on the circumstances of the representation. Ziegelheim v. Apollo, 128 N.J. 250, 260 (1992). As has long been recognized under New Jersey law:

> A lawyer, without express agreement, is not an insurer. He is not a guarantor of the soundness of his opinions, or the successful outcome of the litigation which he is employed to conduct … He is not answerable for an error of judgment in the conduct of a case or for every mistake which may occur in practice.

McCullough v. Sullivan, 102 N.J.L. 381, 384 (E.&A. 1926). That standard remains equally applicable today. 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 486 (App. Div. 1994). See also Procanik by Procanik v. Cillo, 226 N.J. Super. 132, 150 (App. Div.), certif. denied, 113 N.J. 357 (1988) ("An attorney is not negligent because he advocates a different view of the law than that ultimately adopted.").

In determining whether an attorney has acted consistently with the standard of care, the attorney's conduct must be

adjudged against objective criteria based on the consensus of the profession. Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999). As noted by a leading legal malpractice commentator:

> As shown by the adversary system itself, there always are lawyers who will disagree on almost any issue. Since law is not an exact science, no level of skill or excellence exists at which all differences of opinion or doubts will be removed from the minds of lawyers and judges. Few lawyers would be willing to provide their clients with truly candid, unqualified opinions if the risk of an error is a malpractice trial in which the attorney's fate will be decided by expert witnesses disputing the quality of his or her research and investigation.

Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice, 5th ed., §18.17 (citing George v. Canton, 600 P.2d 822 (N.M. App.), cert. denied, 598 P.2d 215 (N.M. 1979)).

As legal malpractice claims must typically be supported by expert testimony explaining the standard of care, an expert must rely on objective criteria establishing the duty as one recognized by the consensus of the legal profession. When presented with an expert opinion based on a subjective standard of care, or one that fails to explain the legal or factual basis for the opinion, New Jersey courts have consistently recognized such opinions as inadmissible "net opinion."

The rationale for sustaining this longstanding evidentiary rule is to ensure that the duty identified by an expert is

recognized by some other source beyond that expert's personal view. An opinion based on an expert's years of experience or an observation that such a duty is common practice in a given industry is insufficient to establish a standard of care. Years of experience and observation of common practices are personal opinions and cannot be used to create legally recognizable duties. A plaintiff must be required to point to some other authority or objective criteria to show that the purported duty existed and that the lawyer was on notice of the standards governing his or her conduct. Anything less is fundamentally unfair and inconsistent with traditional notions of justice.

A. Expert Testimony Based on Subjective, Personal Experience is not Admissible to Establish the Professional Standard of Care

"Because the duties a lawyer owes to his client are not known by the average juror, a plaintiff will usually have to present expert testimony defining the duty and explaining the breach." Stoeckel v. Twp. Of Knowlton, 387 N.J. Super. 1, 14 (App. Div.), certif. denied, 188 N.J. 489 (2006). New Jersey Rule of Evidence 702 requires an expert witness to be "[]qualified as an expert by knowledge, skill, experience, training, or education." If qualified, an expert must provide the factual or scientific basis for his or her opinion. See, e.g., Jimenez v. GNOC Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). An expert's bare

conclusions, unsupported by factual evidence, are inadmissible as a mere "net opinion." Buckelew v. Grossbard, 87 N.J. 512 (1981), aff'd, 192 N.J. Super. 188 (App. Div. 1983); Vuocolo v. Diamond Shamrock Chemicals Co., 240 N.J. Super. 289 (App. Div.), certif. denied, 122 N.J. 333 (1990).

There must be some "evidential support offered by the expert," and a "standard which is personal to the expert is equivalent to a net opinion." Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 103 (App. Div. 2001) (citing Taylor v. DeLosso, 319 N.J. Super. 174 (App. Div. 1999)). The net opinion rule requires that the expert "'identify the factual bases for [his or her] conclusions, explain [his or her] methodology, and demonstrate that both the factual bases and the methodology are reliable.'" Townsend v. Pierre, 221 N.J. 36, 55 (2015) (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 414 (1992)). As noted by the Supreme Court in Pomerantz Paper Co. v. New Community Corp., 207 N.J. 344, 373 (2011):

> [A]n expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered […] [T]he expert [must] 'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.' […][A] trial court may not rely on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified.

Id. at 372-373.

An expert's testimony constitutes net opinion when it purports to set out a standard of care, but fails to reference any authority or materials supporting the existence of the standard. See Buckelew, supra, 87 N.J. at 524. The expert may avoid such a pitfall by offering support for his opinion "[]upon which the jury could find that the consensus of the particular profession involved recognized the existence of the standard defined by the expert." Taylor, supra, 319 N.J. Super. at 180.

New Jersey courts have long frowned upon expert testimony that is devoid of any reference to treatises, accepted custom, or supporting authority. See Buckelew, supra, 87 N.J. at 524. In Taylor, an expert testified that the defendant's architect deviated from accepted standards of architectural practice by failing to make a site inspection of plaintiff's property to verify the location of a maple tree before preparing the site plan. Taylor, supra, 319 N.J. Super. at 180. In explaining the proper standard of care, the expert opined that when a plan involves a small site, a "prudent architect would go to the site and make sure that he knows where that tree is, because all his work is going to revolve around that tree." Id.

The Taylor Court recognized the expert's opinion as net opinion and stated that the expert "presented no authority supporting his opinion. No reference was made to any written document, or even unwritten custom or practice indicating the

consensus of the architectural community recognizes a duty to make a site inspection for 'small sites.'" Id. at 182.

Later, in Kaplan, the trial court and Appellate Division rejected plaintiff's argument that their legal malpractice expert's thirty years of experience, during which time he reviewed and handled many divorce cases, and applied his knowledge of the standard of practice after reviewing the file in the matter, was sufficient to establish the standard of care. Kaplan, supra, 339 N.J. Super. at 102-03. The plaintiff asserted on appeal that the trial court erred in classifying the expert's report as net opinion, because it was based on the expert's personal experience, which constituted a sufficient basis to accept the opinion. Id. at 102. In affirming the trial court's ruling, the Appellate Division explained:

> Plaintiff's expert offered no evidential support establishing the existence of a standard of care, other than the standards that were apparently personal to himself. In this regard, [the expert] failed to reference any written document or unwritten custom accepted by the legal community [...]In this stark absence of supporting authority, [the expert] provided only his personal view, which as we have explained, is equivalent to a net opinion.

Id. at 103 (quoting Taylor, supra, 319 N.J. Super. at 180); see also Suanez v. Egeland, 353 N.J. Super. 191, 203 (App. Div. 2002) (concluding that trial court erred because expert

demonstrated no foundation established by scholarly literature or persuasive judicial decisions).

Ultimately, in Pomerantz, the Supreme Court applied the same standards culminated from Taylor and Kaplan and found that an expert's opinion based on his or her experience, absent any suggestion that any scholarly publication or case law would support such opinion, rendered the opinion a net opinion. Pomerantz, supra, 207 N.J. 344.

B. The Trial Court Correctly Barred Expert Testimony in this Case Because it was Based Solely on Subjective Personal Experience and Amounted to Inadmissible Net Opinion

Plaintiff's amended complaint alleged "[]legal malpractice under a negligence theory against his attorney, Andrew G. Freda, Esq. [("Freda")] for failing to advise him to purchase casualty insurance for the home." (Pa71). Plaintiff presented an expert report from Chander P. Singh, Esq. ("Mr. Singh"), a New Jersey licensed attorney. Mr. Singh's report alleges "[]that an attorney has a duty 'to advise and counsel the buyer to obtain appropriate casualty and liability insurance on real property premises being purchased and the potential risks of not obtaining suitable casualty insurance coverage' and that defendant Freda breached that duty." (Pa72).

In support of his opinion as to the standard of care and the duty owed to plaintiff, Mr. Singh referenced his personal

experience in handling residential and commercial real estate transactions, having represented and advised several thousand clients and conducted several thousand title and purchase closings. (Pa143). Based on that personal experience alone, Mr. Singh opined that Mr. Freda had a duty to advise plaintiff to purchase casualty insurance, and Freda's failure to do so caused plaintiff to suffer the alleged damages. (Pa74). The trial court correctly recognized:

> [Singh's opinion] is devoid of any objective standard of care in which to measure [Freda's] conduct to determine whether he deviated from said standard of care. Without such a standard, [Singh's] opinion is a 'mere conclusion' that does not 'give the why and wherefore.' Pomerantz Paper Corp., supra, at 372-373. Therefore, Singh's opinion is a net opinion and Plaintiff cannot rely on it to prove that [Freda] was negligent.

(Pa74).

Mr. Singh's opinion, based exclusively on his own personal experience, fails to reference any authority or supporting materials establishing the duty as one recognized by a consensus of the legal profession. See Buckelew, supra, 87 N.J. at 524; Taylor, supra, 319 N.J. Super. at 180. An expert cannot proffer his subjective view of the standard of care without reliance on an objective standard. Here, as in Taylor and Kaplan, Mr. Singh's opinion was properly recognized as net opinion, because it was based on nothing more than Mr. Singh's personal

experience and fails to offer any other support for his subjective view.

An expert opinion intended to express the "degree of knowledge and skill ordinarily possessed and used by others engaged in the general practice of law" cannot be based exclusively on the personal experience of an attorney. By definition, the parameters of the professional standard of care are shaped by "others engaged in the general practice of law," i.e., the consensus of the profession, not the personal experience of a single attorney. Indeed, if the opinion of the expert were in fact the recognized consensus of the profession, it would be expected that the expert could cite to objective criteria to support that position. This could include references to treatises, seminars, case law, restatements, practice manuals, articles, or innumerable other sources that lawyers rely upon daily to guide their practices.

Here, the failure to reference any objective support for the ultimate conclusion raises numerous issues. For example, how can a lawyer be held to have a duty to provide advice regarding obtaining insurance coverage when, as here, the client admitted that he understood what insurance was and its purpose? Likewise, without the application of objective criteria under the circumstances presented, what are the reasonable limits of the lawyer's alleged obligations? In this transaction, obtaining

insurance was not a legal requirement to close title given that mortgage financing was not involved. Is the lawyer supposed to recommend limits and types of coverage as well? Further, without objective criteria, how is the contention that the lawyer is obligated to advise a client to purchase insurance under this circumstance different from innumerable other circumstances that may arise from a client's post-closing ownership of property, such as legal uses for the property, or that the owner must obey local property maintenance ordinances? The absence of objective criteria opens the door for a client to place responsibility on his or her lawyer for *any* post-closing issues that may arise.

The trial court correctly recognized that legal malpractice expert opinions must be based on objective criteria establishing the duty owed based on the consensus of the legal profession. In doing so, the trial court followed established New Jersey case law holding that a legal malpractice expert's opinion based exclusively on the expert's personal experience renders the opinion a net opinion. Absent reference to any authority or supporting materials establishing the professional standard of care, the expert's opinion is a net opinion and must be recognized as such and barred.

CONCLUSION

For the reasons expressed herein, the NJSBA urges this court to affirm the trial court's determination as a matter of law that a legal malpractice claim cannot be premised on a non-existent duty resting only on an expert's opinion based solely on his subjective personal experience.

Respectfully submitted
New Jersey State Bar Association

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