

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

ALFONSO J. SEBIA and PAMELA  
SEBIA

v.

MCNEES WALLACE & NURICK,  
LLC and BRUCE R. SPICER

AUGUST TERM, 2010

NO. 02480

COMMERCE PROGRAM

Control No. 13021028

BOOKED

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C. HART  
CIVIL ADMINISTRATION

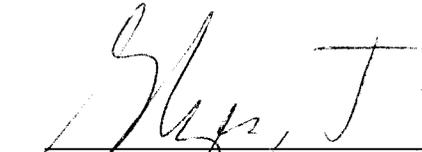
**ORDER**

AND NOW, this 12<sup>th</sup> day of April, 2013, upon consideration of the post-trial motion and supplemental brief of plaintiffs, Alfonso J. Sebia and Pamela Sebia, and the response of defendants, McNeess Wallace & Nurick, LLC and Bruce R. Spicer, it is hereby

**ORDERED**

that the plaintiffs' post-trial motion is **DENIED**.

BY THE COURT:

  
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GLAZER, J.

Sebia Etal Vs Mcnees, W-ORDOP



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**OPINION**

GLAZER, J.

April 12, 2013

The motion for post-trial relief of plaintiffs, Alfonso J. Sebia and Pamela Sebia, requests that this court reverse the non-suit entered in favor of defendants and grant a new trial. The motion is denied.

**BACKGROUND**

Plaintiffs, Alfonso J. Sebia and Pamela Sebia, initiated this action alleging legal malpractice through claims of negligence and breach of contract, committed by defendants, McNeess Wallace & Nurick, LLC and Bruce R. Spicer, in a business transaction relating to the sale of All Staffing, Inc., a company in which Mr. Sebia was a 50% shareholder. See plaintiffs' motion for post-trial relief, p. 1 at ¶ 1. Plaintiffs claim that because of the alleged legal malpractice committed by the defendants, plaintiffs lost their company, their employment, and property totaling \$4,000,000.00. Defendants, however, respond by asserting that they did not represent plaintiffs individually, and instead represented the corporation, All Staffing, Inc.

A five day jury trial took place from Tuesday, January 22, 2013 to Monday, January 28, 2013. At the close of plaintiffs' case in chief, the court granted defendants' motion for non-suit pursuant to Pa. R.C.P. 230.1 on the grounds that plaintiffs offered no evidence to establish that an attorney-client relationship existed between the plaintiffs and the defendants. Plaintiffs now seek relief through a post-trial motion alleging that, among other things, the court erred in granting a non-suit.

## DISCUSSION

### **I. Standard of Review**

The Pennsylvania Rules of Civil Procedure provide, in part, that a motion for post-trial relief must be filed within ten days after a non-suit has been entered in a jury case. Pa. R.C.P. 227.1. The filing of post-trial motions is mandatory to preserve issues for appellate review. In addition, “[m]otions for post-trial relief may be granted or denied at the lawful discretion of the trial court...” Borough of Jefferson v. Bracco, 160 Pa. Commw. 681, 686; 635 A.2d 754, 756 (Pa. Commw. 1993).

Pa. R.C.P. 230.1(a)(1) states that a court “may enter a non-suit on any and all causes of action, if at the close of the plaintiff’s case on liability, the plaintiff has failed to establish a right to relief.” The court may enter a non-suit, “only in cases where it is clear that the plaintiff has not established a cause of action; in making this determination, the plaintiff must be given the benefit of all reasonable inferences arising from the evidence.” Hong v. Pelagatti, 2000 Pa. Super. 373 (Pa. Super. Ct. 2000). The trial court must consider the facts in the light most favorable to the non-moving party. 51 Park Properties v. Messina, 720 A.2d 773, 775 (Pa. Super. 1998). Further, “a non-suit is properly entered if the plaintiff has not introduced sufficient evidence to establish the necessary

elements to maintain a cause of action; it is the duty of the trial court to make this determination prior to the submission of the case to the jury.” Hong v. Pelagatti, 2000 Pa. Super. 373 (Pa. Super. Ct. 2000). Moreover, a judge or jury cannot be permitted to reach a decision on the basis of speculation or conjecture. Biddle v. Johnsonbaugh, 444 Pa. Super. 450, 455, 664 A.2d 159, 161 (1995).

## **II. Plaintiffs Did Not Establish an Attorney-Client Relationship with Defendants and Thus a Non-Suit was Properly Entered**

In their motion for post-trial relief, plaintiffs assert that the court erred in granting a non-suit as to the breach of contract and breach of fiduciary duty<sup>1</sup> claims because sufficient evidence existed for the jury to determine the case. “In Pennsylvania ... a claim against an attorney for either legal malpractice or breach of an attorney-client agreement, must be asserted by the attorney’s actual client.” Kruass v. Claar, 2005 Pa. Super. 255, P28 (Pa. Super. Ct. 2005). Absent an express contract, an implied attorney-client relationship will be found if: “1) the purported client sought advice or assistance from the attorney; 2) the advice sought was within the attorney’s professional competence; 3) the attorney expressly or impliedly agreed to render such assistance; and 4) it is reasonable for the putative client to believe the attorney was representing him.” Atkinson v. Haug, 424 Pa. Super. 406, 622 A.2d 983, 986 (1993).

As a threshold matter, plaintiffs did not establish that there was an express contract for legal representation of them individually by the defendants. The engagement letter from the defendants to All-Staffing, Inc. states:

As a technical matter, our client is the corporation, not any of the individual shareholders. We will endeavor to

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<sup>1</sup> This objection was not raised at trial and is therefore waived. Further, plaintiffs did not plead a count for breach of fiduciary duty in their Amended Complaint.

disclose and discuss issues where the interest of the corporation are different from those of the shareholders or a particular shareholder. However, in situations where we represent an entity rather than the owners, we always recommend that individual owners consider obtaining separate legal counsel. We do so here as well.

See defendants' answer to plaintiffs' post-trial motion, Exhibit H.

Plaintiff Alfonso J. Sebia was a 50% shareholder in All-Staffing, Inc. and was neither a party to nor an intended beneficiary of the contract between defendants and All-Staffing, Inc. As there was not an express contract between plaintiffs and defendants, an implied contract would be necessary to establish an attorney-client relationship. At trial, plaintiffs generally relied on the expert testimony of attorney Alan Frank to establish an attorney-client relationship between plaintiffs and defendants. Mr. Frank testified that it was his belief that the engagement letter was misdirected and that the individual shareholders knew and believed they had counsel. N.T. 1/25/2013 AM, pp. 31 at 22-25, 32 at 1. Further, Mr. Frank testified that it was his belief that there was an attorney-client relationship between Mr. and Mrs. Sebia and the defendants. N.T. 1/25/2013 AM, pp. 69 at 23-25, 70 at 1-2. Mr. Frank relied on the fact that the Sebias' believed, at the time, that defendants were acting in their best interest and that the emails and agreements spoke to the sellers and not to the corporation. N.T. 1/25/2013 AM, pp. 71 at 24-25, 72 at 1-6.

However, "expert testimony from its very nature is not proof of a fact. It is never more than opinion." Avins v. Commonwealth, 379 Pa. 202, 206 (Pa. 1954). The weight of evidence adduced at trial is clearly contrary to Mr. Frank's opinion. It is abundantly clear from the evidence that plaintiffs did not seek advice or assistance from the defendants, that defendants did not expressly or impliedly agree to render such assistance,

and that it was not reasonable for either plaintiff to believe that defendants were representing them. As a result, no attorney-client relationship was proven.

Plaintiff, Alfonso Sebia, admitted at trial that he did not hire the defendants, did not pay the defendants from his personal bank account, did not receive invoices from defendants, and, moreover, did not even contact defendants before signing the agreement, the revised agreement, or the employment contract that resulted in the loss of his company. N.T. 1/24/13 PM, pp. 18 at 23, 19 at 17, 58 at 23-25, 59 at 2-6, 111 at 3-6, 108 at 12-25, 109 at 2-6. Additionally, plaintiff Pamela Sebia, admitted that she never spoke with defendant Bruce Spicer about legal issues or advice. N.T. 1/23/12 PM, pp. 75 at 23-25, 76 at 1-3. Additionally, when the employment contract failed and Mr. Sebia was terminated, he did not contact defendants. Instead, he contacted a different attorney, Joseph Kluger, Esquire to represent his interests. N.T. 1/24/13 PM, p. 113 at 22-24. Further, Mr. Sebia testified that he never exchanged any documents with the defendants, he did not phone the defendants, nor did he invite the defendants to any of the negotiations with the prospective purchaser of All-Staffing, Inc. N.T. 1/24/13 PM, pp. 44 at 17-25, 45 at 1-6, 47 at 17-19, 109 at 14-25. Mr. Sebia and Mrs. Sebia stated that the only contact that they had with defendants that was either through Dan Ziegler, general counsel for All Staffing, Inc., or “when someone else initiated the conversation.” N.T. 1/24/13 PM, pp. 108 at 11, 109 at 17.

Plaintiffs argue in their post-trial memorandum that it was Mr. Sebia’s belief that the defendants would draft legal documents from “his theories.” However, Mr. Sebia stated in his testimony that Smoker Smith, his accountant, was actually the individual that helped him structure the deal during a meeting which defendants never attended. N.T.

1/24/13 PM, pp. 45 at 16-20, 47 at 16-19. Moreover, the plaintiffs' supposedly subjective belief that defendants represented them, which was not based upon any credible evidence whatsoever, does not prove that an attorney-client relationship existed between them. Based on the foregoing, plaintiffs did not produce sufficient evidence to create a jury question and therefore a non-suit was appropriate.

### **III. Plaintiffs' Other Grounds for Post-Trial Relief are Meritless**

#### **A. Evidence of Plaintiff Alfonso Sebia's Illness Was Properly Excluded**

Pursuant to the Pennsylvania Rules of Evidence, evidence is relevant if it has, "any tendency to make the existence of fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Pa. R.E. 401. However, "evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Pa. R.E. 403. "A trial court's rulings on evidentiary questions are controlled by the discretion of the trial court." Commonwealth v. Viera, 442 Pa. Super. 348, 659 A.2d 1024, 1028 (Pa. Super. 1995). "If the basis of the request for a new trial is the trial court's rulings on evidence, then such rulings must be shown to have not only been erroneous but also harmful to the complaining party." Ratti v. Wheeling Pittsburgh Steel Corp, 2000 Pa. Super. 239, 758 A.2d 695, 707 (Pa. Super. 2000). Plaintiffs argue that evidence of Mr. Sebia's medical condition supports an explanation as to why he did not actively seek out defendants.

This court granted defendants' motion in limine precluding references to Mr. Sebia's medical condition and reasoned that the medical condition was not relevant to the

present legal malpractice claim and that it would cause unfair prejudice. This court even reconsidered the motion prior to trial. N.T. 1/22/13 AM, pp. 4 at 17-25, 5 at 1-25, 6 at 1-25, 7 at 1-25, 8 at 1-25, 9 at 1-25, 10 at 1-25, 11 at 1-25, 12 at 1-14. After hearing arguments by both parties, this court again determined that the danger of unfair prejudice, confusion of the issues and misleading the jury far outweighed the probative value of the evidence. This court properly precluded any mention of Mr. Sebia's medical condition.

**B. This Court Properly Granted Defendants' Motion in Limine Preventing Plaintiffs' Expert, Stephan J. Scherf, from Testifying.**

Pursuant to Pennsylvania law, evidence may be excluded if its probative value is outweighed the needless presentation of cumulative evidence. Pa. R.E. 403. Plaintiffs argue that the court erred in granting defendants' motion in limine to preclude plaintiffs' expert testimony regarding the valuation of All Staffing, Inc. Plaintiffs assert that the court erred because they were not permitted to rebut defendants' allegations that All Staffing, Inc. was insolvent. However, this ruling was not erroneous as defendants did not introduce any evidence or expert opinion as to the financial condition of All Staffing, Inc. at trial. Moreover, All Staffing, Inc.'s finances were not at issue. The grim reality is that the problem with the plaintiffs' case was that there was no evidence of an attorney-client relationship between the plaintiffs and the defendants. The valuation of the plaintiffs' business was irrelevant to the issue before the jury. Therefore, this court properly precluded plaintiffs' expert from testifying.

**C. The Court did not Err in Denying Plaintiffs’ Motion in Limine Regarding Contributory Negligence**

In the motion for post-trial relief, plaintiffs argue that the court erred in denying motion in limine regarding contributory negligence because “contributory negligence should not be permitted in legal malpractice cases.” See plaintiffs’ brief on post verdict motions, p. 37. However, the case law cited by plaintiffs is clearly contrary to this argument. Plaintiffs cite to Gorski v. Smith which states, “[a]fter considering the above-referenced great weight of authority on this subject we agree with the rationale of the many states which have recognized that the negligence of a client may be raised as an affirmative defense by an attorney in a legal malpractice action that is based on a theory of negligence.” Gorski v. Smith, 812 A.2d 683, 700 (Pa. Super. 2002).

This language leaves no doubt that a claim for contributory negligence may be raised in a legal malpractice action and therefore, plaintiffs were not prejudiced by this ruling.

**D. This Court Did Not Err in Admitting Limited Evidence of Communications Between Attorney Kluger and Plaintiffs**

The attorney-client privilege is codified as follows: “[i]n a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon trial by the client.” The attorney-client privilege is designed to “foster confidence between a client and his or her attorney that will lead to a ‘trusting and open attorney-client dialogue’.” Joyner v. SEPTA, 736 A.2d 35, 39 (Pa. Commw. Ct. 1999)(citations omitted). The privilege may be waived “when the communication is made in the presence of or communicated to a third party or to the

court, when the client relies on the attorney's advice as an affirmative defense, or when the confidential information is placed at issue." Bonds v. Bonds, 455 Pa. Super. 610, 615, 689 A.2d 275, 277 (1997). Additionally, the work product doctrine protects from disclosure "the mental impressions of a party's attorney, or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories ... [or] his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics." Pa. R.C.P. 4003.3.

Plaintiffs argue that the court erred in admitting evidence of communications between Attorney Kluger and plaintiffs because such evidence was not relevant, was prejudicial, and infringed upon the attorney-client privilege belonging to the Sebias, as well as the work product privilege. This court was careful to limit the testimony and evidence relating to the Sebias' relationship with Attorney Kluger. This court ordered the parties not to disclose the content of communications between Attorney Kluger and the Sebias except in two circumstances. The defendants were permitted to introduce evidence concerning the fact and scope of Attorney Kluger's representation of plaintiffs, including the engagement letter and invoices to plaintiffs. Second, this court permitted defendants to introduce copies of communications between plaintiffs and Attorney Kluger wherein all information other than the sender, recipient, date, subject and Bates range of the communication was redacted.

At issue in this trial was whether or not the Sebias were represented by the defendants. Defendants alleged that they did not represent the Sebias and argued that this was shown by Mr. Sebia hiring Attorney Kluger and thus making the representation a key issue in the underlying case. Moreover, the redacted copies of communications did not

include mental impressions of Attorney Kluger, or any conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. This court ordered all other information besides the sender, recipient, date, subject, and Bates range of the communication to be redacted to protect the attorney-client privilege. Therefore, the admission of this evidence was proper.

**E. The Court Did Not Err in its Manner of Jury Selection**

Pursuant to Pa. R.C.P. 221, each party is entitled to four peremptory challenges. Plaintiffs argue that the court erred in its manner of jury selection because the parties were granted “one additional peremptory challenge when an entire new panel was going to be voir dired to obtain five additional jurors, the effect of which prevented plaintiffs from having a fair and impartial jury.” See plaintiffs’ brief on post verdict motions, pp. 41-42. This argument is both incomprehensible and meritless. Interestingly, plaintiffs did not use all of their peremptory challenges and made no objection to the process during the selection of the jury. Therefore, this motion is denied.

**F. Evidence of Damages**

Plaintiffs argue that the court improperly excluded evidence of Pamela Sebia not getting health insurance because of a preexisting condition, evidence of properties securing the line of credit which were sold at a Sheriff’s sale for lower than value, and evidence of life insurance losses. Plaintiffs further argue that, “[t]hese damages are substantial and there was no reason that as a result of the loss of her job and the concomitant health insurance that it should not be included in damages.” See plaintiffs’ brief on post verdict motions, p. 42. Plaintiffs do not support their arguments with any case law, with any allegation of prejudice, or any assertion that the outcome of the trial

would have been different with the addition of these damages included. As stated above, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence. The court found that the probative value of Mrs. Sebia being denied health insurance, the value of properties securing the line of credit, and loss of life insurance were likely to confuse and mislead the jury. Therefore, plaintiffs' motion is denied. Pa.R.E. 403.

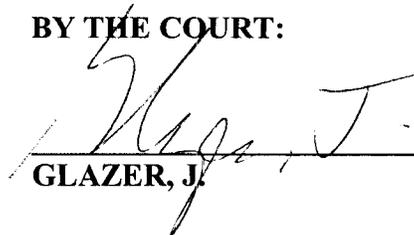
**G. This Court did not Err in Failing to Allow Evidence of Alfonso Sebia's Relationship with Accountants Who Referred Him to Defendants**

This court again finds the defendants motion meritless and to be without any support. Plaintiffs again do not do not support their arguments with any case law, with any allegation of prejudice, or any assertion that the outcome of the trial would have been different with the addition of this line of questioning.

**CONCLUSION**

Plaintiffs failed to introduce any evidence whatsoever to meet the threshold requirement in any legal malpractice claim: the existence of an attorney-client relationship. In fact, the paucity of evidence to support plaintiffs' claims was shocking. As a result, plaintiffs have failed to provide any basis to support the grant of a new trial. Based on the foregoing, plaintiffs' post-trial motion is denied.<sup>2</sup>

**BY THE COURT:**

  
**GLAZER, J.**

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<sup>2</sup> Plaintiffs raised other issues in their post-trial motion. However, this court finds that they are redundant and equally without merit.