Rhode Island

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It is well settled in Rhode Island that "the gravamen of an action for attorney malpractice is the 'negligent breach of [a] contractual duty.'...."[1] As such, an action for legal malpractice in Rhode Island requires proof of the following elements: (1) that an attorney-client relationship existed; (2) that there was an act of negligence; (3) that the negligence caused the plaintiff's damages; and (4) that but for the negligence of the attorney, the plaintiff would have been successful in the underlying action.[2]

Attorney-Client Relationship Required

In Rhode Island, whether an attorney-client relationship has formed is a question of fact governed by the principles of agency.[3] An agency relationship exists when: (1) the principal manifests that the agent will act for him, (2) the agent accepts the undertaking, and (3) the parties agree that the principal will be in control of the undertaking.[4] "Generally, the relationship of attorney and client arises by reason of agreement between the parties. The relationship is essentially one of principal and agent."[5] The existence of such a relationship, however, need not be proven by express agreement; rather, the conduct of the parties also may establish an attorney-client relationship by implication.[6] And where the advice and assistance of the attorney are sought and received in matters pertinent to the attorney's profession as a lawyer, such a relationship can still arise even in the absence of an express agreement.[7]

Breach of Duty of Care Typically Requires Expert Testimony

It is well settled in Rhode Island that a plaintiff alleging legal malpractice must prove the "want of ordinary care and skill" exercised by the defendant attorney.[8] The Rhode Island Supreme Court has stated that to prevail on a negligence legal malpractice claim, "a plaintiff must prove by a fair preponderance of the evidence not only a defendant's duty of care, but also a breach thereof and the damages actually or proximately resulting therefrom to the plaintiff."[9] "Failure to prove all three of those required elements, acts as a matter of law, to bar relief or recovery."[10]

Moreover, 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 and the alleged

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deviation therefrom that caused damages.[11] An exception to this general rule applies when the malpractice "is so obvious that the trier of fact can resolve the issue as a matter of common knowledge."[12] "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."[13] Such an instance might occur when an attorney accepts a fee to do certain work for a client and then fails to do any work.[14] In addition, "[w]hatever form a legal malpractice action takes, the plaintiff has the burden of introducing evidence to justify an award of consequential damages."[15]

The "But For" Requirement and Damages

Courts in Rhode Island have consistently recognized that an integral part of negligent legal malpractice claims and breach of fiduciary duty legal malpractice claims requires plaintiffs to prove actual damages resulting from an attorney's breach of duty arising out of the attorney-client relationship.[16]

In *Evora*, the Rhode Island Supreme Court specifically adopted the views held in other jurisdictions such as California, Connecticut, D.C., Maryland, New Jersey and Vermont that a plaintiff in a legal-malpractice case must prove that the attorney's negligence was the proximate cause of his or her damages.[17] This position was later reaffirmed in *Scunio Motors, Inc. v. Teverow*.[18]

Assignment of Legal Malpractice Claims

In a case of first impression, the Rhode Island Supreme Court in *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I.1999) specifically allowed the assignment of a legal malpractice claim, even though the action sounded in tort and its assignment was prohibited by a majority of jurisdictions.[19] *Cerberus Partners* involved a suit by a purchaser of a secured commercial loan against a law firm that, while representing the original lender, failed to properly perfect the security interest. There, despite the absence of a duty running from the attorney defendants to the assignee plaintiffs, the Court concluded that the "legal malpractice claims, *transferred along with other assets and obligations to an assignee in a commercial transaction*, are assignable."[20] Refusing to "blindly" adhere to a general rule of prohibition in all cases of assignment, the Court acknowledged a distinction between market assignments involving purely economic transactions and freestanding malpractice personal injury claim assignments, only approving assignments in situations involving the former.[21]

Statute of Limitations

Pursuant to the General Laws 1956, §9-1-14.3, Rhode Island maintains a three-year statute of limitations on actions for legal malpractice based upon the occurrence of the incident which gave rise to the action. However, an individual who is under a disability by reason of age, mental incompetence may be permitted to commence an action within three (3) years of the removal of the disability. The Rhode Island statute also provides that those 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", 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."[22] This subsection [subsection b] provides an exception to the general three-year requirement and has come to be known as the discovery rule.[23]

In the *Zanni* matter, the plaintiff urged the Court to apply the statute of limitations discovery rule claiming that determining when he had knowledge of the alleged malpractice is inappropriate for disposition by summary judgment and should be left to be resolved for the trier of fact.[24] The *Zanni* court rejected the plaintiff's argument in determining that "the statutory period begins to run not when the plaintiff has actual knowledge of alleged acts of malpractice, but rather when he becomes aware of facts or by exercising reasonable diligence could discover facts that would place a reasonable person on notice that a potential claim exists."[25] In so holding, the *Zanni* court noted that there were several undisputed facts and/or "red flags" that clearly demonstrated that the plaintiff knew of the alleged acts of malpractice, or that he was aware of facts that placed him on notice of a potential claim for malpractice (i.e. the dismissal the plaintiff's complaint by the Pennsylvania court due to the attorney's failure to sue the correct party).[26] This is true because dismissal of a claim for failure to sue the correct party is a "red flag" to a client that malpractice might have occurred.[27]

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1 *Church v. McBurney*, 513 A.2d 22, 24 (R.I.1986) (*quoting Flaherty v. Weinberg*, 303 Md. 116, 492 A.2d 618, 627 (1985).
2 *See Macera Bros. of Cranston, Inc. v. Gelfuso & Lachut, Inc.*, 740 A.2d 1262, 1264 (R.I. 1999). *See also Evora v. Henry*, 559 A.2d 1038 (R.I.1989).
3 *Rosati v. Kuzman*, 660 A.2d 263, 265 (R.I. 1995). *See also State v. Austin*, 462 A.2d 359, 362 (R.I. 1983).
4 *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 867 (R.I. 1987); *see also Rosati*, 660 A.2d at 265 ("The essence of an agency relationship is the principal's right to control the work of the agent, whose actions must primarily benefit the principal.").
5 *State v. Cline*, 122 R.I. 297, 309, 405 A.2d 1192, 1199 (1979).
6 *See id.*
7 *See id.*
8 *Clauson v. Kirshenbaum*, No. 92-3410, 1997 WL 1051019, at *2 (R.I. Super. July 2, 1997) (*quoting Holmes v. Peck*, 1 R.I. 242, 245 (1849). *See also Vallinoto v. DiSandro*, 688 A.2d 830, 834 (R.I. 1997) ("[t]hat duty includes in essential part providing competent representation to the client, including the utilization of competent legal knowledge, skill, thoroughness and case preparation reasonably necessary both to protect and to advance the client's interests."(*citing* Art. V, Rule 1.1 of the Supreme Court Rules of Professional Conduct).
9 *Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc.*, 740 A.2d 1262, 1264 (R.I.1999) (per curiam).
10 *Id.* (*quoting Vallinoto v. DiSandro*, 688 A.2d 830, 836 (R.I.1997)).
11 *Ahmed v. Pannone*, 779 A.2d 630, 632 (R.I. 2001) (citing .
12 *Focus Investment Associates, Inc. v. American Title Insurance Co.*, 992 F.2d 1231, 1239 (1st Cir.1993) (expert testimony required at trial of legal malpractice case to establish standard of care).
13 *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*, 61 Haw. 26, 595 P.2d 275, 276, 282 (1979) (expert testimony not required where attorney failed to file suit *174 within the appropriate statute of limitations period); *Sommers v. McKinney*, 287 N.J.Super. 1, 670 A.2d 99, 105 (App.Div.1996) (no expert testimony needed to evaluate attorney's failure to inform client of settlement offer).
14 *Id.*
15 *Flanders & Medeiros, Inc.*, 65 F.3d 198 (1st Cir. 1995) (holding that summary judgment was appropriate on all the nonmoving party's claims that required the analysis of legal expertise where there was no expert testimony to support those claims).
16 *Vallinoto v. DiSandro*, 688 A.2d 830, 834 (R.I. 1997)
17 *Evora v. Henry*, 559 A.2d 1038, 1039 (R.I. 1989) (describing nature of breach for legal malpractice claim and holding that "the client must still prove, in order to prevail in a legal malpractice action, that the negligence was the proximate cause of his or her damages or loss."); *Somma v. Gracey*, 15 Conn. App. 371, 374-75, 544 A.2d 668, 670 (1988) (setting out plaintiff's burden to show legal malpractice).
18 *Scuncio Motors, Inc. v. Teverow*, 635 A.2d 268, 269 (R.I. 1993) (stating attorney's negligence must proximately cause client's damages).
19 *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I.1999).
20 *Id.* at 1062 (emphasis added).
21 *Id.*
22 *See* R.I. Gen. Laws Ann. § 9-1-14.3 (West).
23 *See Penn-Dutch Kitchens, Inc. v. Grady*, 651 A.2d 731, 733 (R.I. 1994).
24 *Zanni v. Voccola*, 13 A.3d 1068, 1071 (R.I. 2011).
25 *Id. citing Canavan v. Lovett, Schefrin and Harnett*, 862 A.2d 778, 783–84 (R.I. 2004).
26 Id.; *See Harvey v. Snow*, 281 F.Supp.2d 376, 382 (D.R.I.2003).
27 *See Canavan*, 862 A.2d at 783; *see also Rocchio v. Moretti*, 694 A.2d 704, 706 (R.I. 1997) (describing the undisputed facts and concluding that, based on those facts, the statute of limitations expired before plaintiffs brought suit).; *Guay v. Dolan*, 685 A.2d 269, 271 (R.I. 1996).