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Case Number 296,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Sokol Holdings, Inc., Thomas Sinclair, and Brian Savage,	:	No. 296, 2017
Defendants and Counterclaimants Below, Appellants and Cross-Appellees,	:	On Appeal from the Superior Court in and for New Castle County
v.	:	The Honorable John A. Parkins, Jr.
Margolis Edelstein, Marcus & Auerbach LLC, Jerome Marcus, Jonathan Aurebach and Herbert Mondros,	:	Consolidated No. N14C-01-217JAP
Plaintiffs and Counterclaim Defendants Below, Appellees and Cross-Appellants.	:	

APPELLANTS' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This is a complex legal malpractice case previously involving related actions in the Commonwealth of the Bahamas, the State of Colorado, and the United States District Court for the District of Colorado. This Delaware action involves two consolidated actions brought for alleged nonpayment of fees arising from an underlying legal malpractice case. The clients[1] asserted counterclaims for legal malpractice of the underlying legal malpractice action. This action was consolidated in the Superior Court of New Castle County, with the Honorable John A. Parkins, Jr. presiding.

The lawyers filed motions to dismiss the clients' counterclaims for legal malpractice. The trial court denied the motions to dismiss by converting them into motions for summary judgment. Upon conversion, the clients moved for leave to conduct discovery before responding to the motions for summary judgment. The trial court denied discovery.

The trial court then granted the motions for summary judgment and ordered the parties to submit further materials on the initial claims for unpaid fees. Based on the additional information, the trial court entered judgments against the clients

[1] Appellants and Cross-Appellees refer to themselves collectively as "the clients" and refer to Appellees and Cross-Appellants as "the lawyers."

and in favor of the lawyers for a combined total of $882,672.18 plus post-judgment interest. This appeal follows.

SUMMARY OF THE ARGUMENT

1. The trial court erred in entering summary judgment against the clients on their claims for legal malpractice because, in so doing, it employed the wrong legal standard, thereby impermissibly shifting to the clients the burden of persuasion on the lawyers' motion.

2. The simple adage at the heart of this case is that it is better to seek permission than forgiveness. In the case-within-a-case, Dorsey failed to negotiate terms for responding to the subpoena and failed to obtain the Colorado magistrate's permission to incur certain expenses in responding to the subpoena. Dorsey sought forgiveness, not permission.

3. The trial court misconstrued the claim (the trial court's "Allegation 1") that the lawyers negligently failed to assert claims against Dorsey for seeking "reimbursement" of fees in responding to the underlying subpoena, rather than seeking authorization to incur the fees. The clients should have never needed to seek reimbursement. Had Dorsey not been negligent, they would have secured advanced payment for responding to the subpoena – either through negotiation or court order – or at least secured advanced authorization, *i.e.*, permission. Dorsey failed to do so and instead ran up a bill they could not collect from the clients' original adversary. The lawyers were negligent in this legal malpractice action in failing to prosecute Dorsey's malpractice.

4. Likewise, the trial court misconstrued the duty to issue-spot (the trial court's "the Bahamian Trust" issue). The trial court confounded the difference between the *duty* to spot and the *issue* to spot. The duty to spot falls within the scope of every representation. The only question is whether a reasonably careful attorney would spot the same issues under the circumstances. The duty might cover *issues* that are beyond the scope of the representation, such as the need to retain counsel in a different jurisdiction.

5. The trial court erred in concluding that no reasonable jury could find in favor of the clients under the case-within-a-case theory of causation. Likewise, the trial court erred in concluding, albeit implicitly, that no reasonable jury could find in favor of the client under the more-favorable-result theory of causation.

6. Further, the clients are not liable for fees for negligent services. Therefore, reversal of the ruling on the counterclaims requires reversal of the original claims for unpaid fees.

7. In the alternative, once the trial court converted the motions to dismiss into motions for summary judgment, it should have given the clients an opportunity to conduct certain discovery before responding to the motions for summary judgment. The denial of discovery deprived the clients of a fair hearing and was not harmless.

8. Moreover, the trial court lacked subject matter jurisdiction over Marcus & Auerbach, LLC's claims, because the firm's fee agreement had an arbitration clause.

9. The trial court erred in concluding that the clients waived their objections to the trial court's jurisdiction, because objections to subject matter jurisdiction are not waivable. When a trial court lacks subject matter jurisdiction, its actions are void, not merely voidable.

10. Finally, the trial court further erred in addressing language in the arbitration clause creating impossibility about the desired arbitrator. The solution was for the parties or the trial court to select an arbitrator, not for the trial court to declare the arbitration clause inapplicable.

STATEMENT OF FACTS

The clients' nightmare journey through the legal system began when they were mere potential witnesses in a law firm divorce in the Republic of Kazakhstan. (A28.) The clients are a mining company and two of its principals. A Delaware corporation, Appellant Sokol Holdings, Inc., has had direct or indirect interests in mining operations throughout the world.

In January 2007, the clients received in Colorado the equivalent to a subpoena to produce documents in an action in which they were not parties. (A72.) Under the applicable law in Colorado, the clients were not responsible for paying the expenses associated with complying with the subpoena. (A72.) To assist them with responding to the subpoena, the clients retained Dorsey & Whitney LLP ("Dorsey"). (A72.) Given the relative volume of documents and the fact that the clients were not responsible for paying for the production, Dorsey charged the clients an incredible $4,000,000 to respond to the subpoena and, at the same time, Dorsey made several costly errors in responding to the subpoena. (A72.) The clients in fact paid Dorsey $1.2 million for responding to the subpoena before beginning to question Dorsey's work. (Memorandum Opinion at 7 (June 30, 2017) (attached.)

On August 5, 2008, the clients retained Appellee Marcus & Auerbach to address various disputes with Dorsey. (A36.) The Marcus & Auerbach fee agreement included the following arbitration clause:

> Disputes. If a claim arises as a result of an alleged dispute, and the dispute **involves the Attorneys and/or individual members of the firm**, You shall initiate the claim by serving at least one member of the firm, by certified mail, with the notice of the claim. You agree that any claim or dispute involving the Attorneys will be submitted to a **binding arbitration** conducted by the Philadelphia Bar Association, and You agree to be bound by any and all decisions rendered.

(A38 (emphasis **added**).) Thus, the arbitration clause was not limited on the basis of the *nature* of the claim, but on the basis of the *participants* to the claim. All claims belonged in arbitration, so long as the lawyers were involved.

Also on August 5, 2008, the clients retained Appellee Margolis Edelstein to serve as local counsel for litigation in Delaware. (A62.) The Margolis Edelstein fee agreement does not have an arbitration clause. (*See* A60-62.)

In the case against Dorsey, the lawyers made numerous errors. (A73.) Fundamentally, the lawyers asserted malpractice as a defense to Dorsey's fees, but failed to correctly prosecute malpractice as an affirmative claim for damages, when the clients had substantial damages beyond the excessive fees. (A73.)

On February 2, 2015, Marcus & Auerbach commenced an action in New Castle County, apparently in a preemptive effort to avoid jurisdiction in the Commonwealth of Pennsylvania, where they primarily practice and are subject to the arbitration requirements of the Philadelphia Bar Association. (A25.) On the Superior Court Civil Case Information Sheet, Marcus & Auerbach made the representation that this is a "non-arbitration" matter. (A24.)

The clients asserted counterclaims for malpractice and breach of contract. (A76-81.) After consolidation with Margolis Edelstein's similar action, the lawyers filed motions to dismiss. On May 4, 2016, the trial court *sua sponte* converted the motions to dismiss into motions for summary judgment. (A110-111.) In response, the clients moved for leave to conduct certain discovery before having to respond to the motions for summary judgment. (A109.) The trial court denied discovery. (A137.)

On June 30, 2017, the trial court entered summary judgment against the clients on their counterclaims. A copy of the trial court's order and analysis is attached as Exhibit 1 to this brief. The trial court entered judgment in favor of the lawyers on their breach of contract claims.

ARGUMENT

I. The trial court erred in granting summary judgment because a reasonable jury could find in favor of the clients on whether the lawyers were negligent and whether the negligence was a cause of the clients' damages.

A. Question Presented.

Could a reasonable jury find the lawyers liable for legal malpractice causing the clients' damages? The clients preserved the issue at A83-A108.[2]

B. Scope of Review.

This Court reviews the entry of summary judgment *de novo*. *Shrewsbury v. Bank of New York Mellon*, 160 A.3d 471, 474 (Del. 2017).

C. Merits of Argument.

On the question of summary judgment on the clients' legal malpractice claims against the lawyers, the trial court summarized some of the clients' allegations into five numbered theories and a sixth theory dubbed the Bahamian Trust theory of legal malpractice. The clients appeal the trial court's conclusions regarding two of the six rulings, the Allegation 1 and the Bahamian Trust. This Court should conclude that a reasonable jury could find in favor of the clients on Allegation 1 and the Bahamian Trust theories and should reverse and remand for further proceedings.

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[2] Because the trial court converted the motion from Rule 12 to Rule 56, the clients' responses appear couched in terms of dismissal rather than summary judgment, but the arguments are substantially the same for purposes of this appeal.

1) Summary Judgment Standards.

The trial court converted the lawyers' motions to dismiss into motions for summary judgment pursuant to Del. Super. Ct. R. Civ. P. 56(b). In reviewing the trial court's entry of summary judgment, this Court must view the facts in the light most favorable to the clients. *Grabowski v. Mangler*, 928 A.2d 637, 641 (Del. 2007). This Court should not attempt to resolve conflicts in the evidence. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, 871 A.2d 428, 444 (Del. 2005). "Thus, if from the evidence produced there is a reasonable indication that a material fact is in dispute or if it appears desirable to inquire more thoroughly into the facts in order to clarify application of the law, summary judgment is not appropriate." *Id.* (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962), *modified*, 208 A.2d 495 (Del. 1965)).

In granting summary judgment, the trial court suggested that this Court has overruled *Ebersole*, even though this Court cited *Ebersole* with approval in *AeroGlobal*. *See* Exhibit 1 at 15-16. In reaching this conclusion, the trial court overstated this Court's approval of the United States Supreme Court decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The trial court relied on language in an unpublished decision and in this Court's decision in *Burkhardt v. Davies*, 602 A.2d 56 (Del. 1991). In 1991, this Court merely cited *Celotex* with approval and did not overrule *Ebersole*.

More importantly, *Ebersole* is not inconsistent with the *Celotex* line of cases. The clients cited *Ebersole* for the proposition that the lawyers have the burden to prove a basis for dismissal or summary judgment. The *Celotex* line of cases effectively divides the burden further between the burden of production and the burden of persuasion. While a motion might be sufficient to shift the burden of producing certain evidence in response, the movant always has the burden of persuasion. *See generally* Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 Wash. & Lee L. Rev. 81, 120 (2006).

2) Causation Element of Legal Malpractice Claims.

Causation is a question of fact for a jury to resolve. *Duphily v. Delaware Elec. Co-op.*, 662 A.2d 821, 830 (Del. 1995).

> Determining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not. In both litigation and transactional malpractice cases, the crucial causation inquiry is what would have happened if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative.

Viner v. Sweet, 70 P.3d 1046, 1053 (Cal. 2003). Proving the causation element of a legal malpractice claim requires proving the client would have had a more favorable result.

(a) Causation in General.

The principles of causation in a legal malpractice action are the same as the principles of causation in any tort action. *See, e.g.*, *Ward v. Arnold*, 328 P.2d 164, 166 (Wash. 1958) ("We see no sound reason, and none is urged, why the degree of causation which must be proved in an action for damages for malpractice should be any different from that required in an ordinary negligence case."). The elements therefore are breach of standard of care and proximate harm. *Jones v. Crawford*, 1 A.3d 299, 302 (Del. 2010). Proximate cause is a question of fact that is properly decided by a fact finder. *Duphily*, 662 A.2d at 830. Likewise, foreseeability is a question of fact. *Pipher v. Parsell*, 930 A.2d 890, 893-94 (Del. 2007). Further, more than one event may be responsible for causing damages. *Jones*, 1 A.3d at 302.

(b) More Favorable Result Doctrine.

When the negligence occurred during litigation of an underlying dispute, the client must show they probably would have received a more favorable result on the underlying claims. *Villare v. Katz*, 2010 Del. Super. LEXIS 218, at *3 (Super. Ct. May 10, 2010). A client needs to prove only what probably would have happened differently, even if the client could have suffered some damages anyway. *See, e.g.*, *Suder v. Whiteford, Taylor & Preston, LLP*, 992 A.2d 413 (Md. 2010) (whether

underlying adversary "would" have asserted available defense was a question for jury to resolve).

(1) Case-Within-A-Case Theory of Causation.

When the underlying representation ended in an unfavorable judgment, the trial court should recognize the case-within-a-case theory of causation. *See, e.g.*, *Cf. Giron v. Koktavy*, 124 P.3d 821, 824 (Colo. App. 2005); *Suder*, 992 A.2d at 414 ("When the [trial-within-a-trial] doctrine is applicable, the litigants reconstruct the underlying action, absent the supposed breach of duty."). To assist a jury in determining whether the client probably would have received a favorable result, a trial court should instruct the jury on the elements of the underlying claim. *Miller v. Byrne*, 916 P.2d 566, 574 (Colo. App. 1995). The case-within-a-case theory is merely one way to prove that the client would have obtained a more favorable result, not the only way. *Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, 2015 Colo. App. LEXIS 916, at **14-15 (June 18, 2015) (holding that "not every legal malpractice case requires proof of a case within a case").

(2) More-Favorable-Result Theory of Causation.

When the underlying matter involves a transaction ("transactional malpractice"), the plaintiff needs to prove only that the negligence prevented a "better" or "more favorable" result. *See, e.g., Viner*, 70 P.3d at 1052 ("more favorable"); *Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 819 (Minn. 2006) ("more favorable"); *Smith v. Preston Gates Ellis, LLP*, 147 P.3d 600, 602 (Wash. Ct. App. 2006) ("better"); *see also Froom v. Perel*, 872 A.2d 1067, 1076-77 (N.J. Super. Ct. App. Div. 2005) ("loss of a gain or benefit").

In *Viner*, the California Supreme Court held that, in the context of transactional malpractice, the malpractice needs to be only a substantial factor in bringing about the harm, an inquiry that subsumes the "traditional 'but for' test of causation." 70 P.3d at 1051.

> In transactional malpractice cases, as in other cases, the plaintiff may use circumstantial evidence to satisfy his or her burden. An express concession by the other parties to the negotiation that they would have accepted other or additional terms is not necessary. And the plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result."

Id. at 1053 (citing *Ortega v. Kmart Corp.*[, 36 P.3d 11 (Cal. Ct. App. 2001)], quoting *Prosser & Keeton on Torts*, (5th ed. 1984) § 41, p. 269)).

(3) More-Favorable-Settlement Theory of Causation.

"[A]n attorney's representation of a client often combines litigation and transactional work, as when the attorney effects a settlement of pending litigation." *Viner*, 70 P.3d at 1052; *see also Bellino v. McGrath North Mullin & Kratz, PC LLO*, 738 N.W.2d 434, 447 (Neb. 2007) (failure to communicate and investigate legal alternatives raised question for jury to decide); *Jerry's*, 711 N.W.2d at 819 (evidence client would have acted differently raised question for jury on causation). When the underlying representation resulted in a contract to settle litigation, the trial court should instruct the jury on **both** the more-favorable-result theory and the case-within-a-case theory of causation, because a reasonably jury could find that reasonably careful representation would have resulted **either** in a more favorable settlement (requiring the more-favorable-result instruction) **or** in no deal and thus a trial (resulting in the case-within-a-case instruction). *Cf., e.g., Black v. Shultz*, 530 F.3d 702, 709-10 (8th Cir. 2008) (under alternate theories, trial court properly gave separate instructions on causation for transaction malpractice and litigation malpractice).

For example, a reasonable jury may find causation from the existence of settlement negotiations before the lawyer's negligence and the cessation of settlement negotiations after the lawyer's negligence. *Ignotov v. Reiter*, 390

N.W.2d 614 (Mich. 1986). In *Rizzo v. Haines*, 555 A.2d 58 (Pa. 1989), a lawyer failed to communicate a settlement offer made during trial. *Id.* at 62. The Pennsylvania Supreme Court held that the client produced sufficient evidence to support a judgment in favor of the client. *Id.* at 506. The Court noted that the respective offers of settlement were firm and relatively close to each other. *Id.* The Pennsylvania Supreme Court held that, even if the terms of the settlement were not final, the lawyer had a duty to obtain the client's instructions and pursue settlement discussions further. *Id.* at 66-67 (no expert testimony necessary to prove duties to communicate offers and to investigate settlement).

In *Moores v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987), the First Circuit Court of Appeals, applying Maine law, affirmed a verdict against a lawyer who failed to communicate two settlement offers to a client. The client testified that he would have accepted the best offer, had he known about it. *Id.* at 1107. The First Circuit held that the evidence raised a genuine issue of material of fact on causation. *Id.* at 1108.

c) Multiple Causes.

A lawyer may be held liable for negligence causing damages, even if the underlying trial court also erred and contributed to the damages. *See Soderlund v. Alton*, 467 N.W.2d 144, 149 (Wis. Ct. App. 1991). A lawyer may be held liable for negligence causing damages, even if the underlying adversary wrongfully

contributed to the damages. *See Shehade v. Gerson*, 500 N.E.2d 510 (Ill. App. Ct. 1986).

(d) Superseding Cause.

A superseding cause is an unforeseeable intervening cause. *See*, *e.g.*, *Carolina Cas. v. Sharp*, 940 F. Supp. 2d 569 (N.D. Ohio 2013). Whether an intervening cause is a superseding cause is a question of fact for a jury to answer. *See*, *e.g.*, *Huang v. Brenson*, 7 N.E.3d 729 (Ill. App. Ct. 2014).

3) The trial courts misconstrued the basis for its "Allegation 1," causing the trial court to misanalyze whether to enter summary judgment on the claim.

In Allegation 1, the trial court characterized the clients' legal malpractice claim as mere delay. In other words, according to the trial court, the clients were complaining that Dorsey waited too long to seek reimbursement for the fees and costs Dorsey charged the clients for help responding to the Colorado subpoena. The trial court missed the critical point.

Mere delay was not the cause of the clients' damages. Dorsey caused damages by waiting until *after* they incurred and charged the clients for the fees and costs, when Dorsey should have asked the Colorado court for permission to incur the fees and costs. Had Dorsey asked for permission, the clients either would have been reimbursed or would have never incurred the fees and costs. Thus, the failure to ask for permission caused the clients to sustain damages. The clients had

claims against Dorsey for failing to seek permission, and the lawyers in this legal malpractice action missed the claims against Dorsey. The trial court erred in concluding that no reasonable jury could find in favor of the clients on the failure to seek advanced approval of Dorsey's fees and costs. This Court should reverse the trial court's conclusion on Allegation 1.

4) The trial court erroneously entered summary judgment on the Bahamian Trust claim.

Attorneys must give advice to their clients, even if the advice is beyond the scope of the engagement, if a reasonably careful attorney would spot the issue and give such advice under the same or similar circumstances. *See, e.g., Campbell v. Fine Olin & Anderson*, 642 N.Y.S.2d 819 (N.Y. App. 1992); *International Tele-Marine Corp. v. Malone & Assocs.*, 845 F. Supp. 1427 (D. Colo. 1994); *Janik v. Rudy, Exelrod & Zieff*, 14 Cal. Rptr. 3d 751 (Cal. Ct. App. 2004); *Nichols v. Keller*, 19 Cal. Rptr. 2d 601 (Cal. Ct. App. 1993); *McCarty v. Browning*, 797 So. 2d 30 (Fla. 3d Dist. Ct. App. 2001); *Keef v. Widuch*, 747 N.E.2d 992 (Ill. App. Ct. 2001); *Daugherty v. Runner*, 581 S.W.3d 12 (Ky. App. 1978); *Smith v. Becnel*, 396 So. 2d 444 (La. Ct. App. 1981). The circumstances relevant to duties beyond the scope of the engagement include the needs and sophistication of the client. *See, e.g., Conklin v. Hannoch Weisman*, 678 A.2d 1060 (N.J. 1996). An attorney cannot remain silent while knowing that the client does not understand a relevant legal

matter. *See, e.g.*, *Shimer v. Foley, Hoag & Eliot, LLP*, 795 N.E.2d 599 (Mass. App. 2003).

The clients had claims against Dorsey. The lawyers failed to spot the claims and, as a result, the clients lost the claims. Dorsey failed to correctly advise Appellant Sinclair on how to protect assets in the Bahamian Trust. The lawyers had a duty to spot Dorsey's legal malpractice on the Bahamian Trust, even if only to advise Attorney Sinclair to consult with a Bahamian attorney about protecting the assets. The lawyers' breach of the duty to issue-spot was a cause of the clients' damages.

The trial court confounded the difference between the duty to spot and the issue to spot. The duty to spot is always within the scope of all representations, and by definition, the issue to spot is always beyond the scope of the representation. If the issue was within the scope of the representation, the duty would encompass more than merely spotting and advising the clients of the existence of the duty.

The trial court then added to the confusion an erroneous understanding of the difference between a client's duty to mitigate damages and whether, more probably than not, the effort to mitigate will be successful. In England, the clients attempted to mitigate their damages by prosecuting a claim against Dorsey.[3] Here,

[3] The trial court chastised the clients' counsel in the proceeding below for not

the clients argued the lawyers lost the very same claim the clients were pursuing in England. To the extent the positions are inconsistent, the inconsistency is a function of legal malpractice litigation and the client's right to mitigate damages. However, the *attempt* to mitigate (which was unsuccessful because the clients had insufficient funds), is not synonymous with more probably than not being *able* to mitigate. To the extent relevant to this appeal, the England action merely proved that an effort to mitigate the loss of the Bahamian Trust claim, more probably than not, would be unsuccessful and that breach of the duty to spot the Bahamian Trust claim was a proximate cause of the clients' damages.

In this legal malpractice – more probably than not – the clients lost the Bahamian Trust claim, because of the lawyers' malpractice. The lawyers failed to spot and advise the clients of the existence of the issue. A reasonable jury could find in favor of the clients, so the trial court erred in entering summary judgment against the client on the Bahamian Trust theory of malpractice. This Court should reverse and remand for further proceedings.

5) Conclusion.

The trial court erred in granting summary judgment against the clients on their legal malpractice claims against the lawyers. A reasonable jury could

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disclosing the England proceedings. What the trial court did not know was that counsel did not know about the England proceedings until after the trial court learned of them.

conclude that the lawyers were negligent in failing to pursue claims against Dorsey for failing "to ask for permission" before Dorsey incurred its extraordinary fees. In addition, a reasonable jury could conclude the lawyers were negligent in failing to spot and advise the clients of the existence of the Bahamian Trust claim, which the clients lost. Because a reasonable jury could find in favor of the clients, this Court should reverse the trial court and remand for further proceedings.

II. Reversal of the summary judgment on the legal malpractice claims requires reversal of the adverse judgments on the lawyers' breach of contract claims.

A. Question Presented.

Are attorneys entitled to be paid for services they performed negligently? The clients preserved this issue at A65 para. 14 and A66 para. 4. After the trial court entered summary judgment on the clients' legal malpractice claims, any further effort to preserve the issue would have been futile.

B. Scope of Review.

This Court reviews the entry of summary judgment *de novo*. *Shrewsbury v. Bank of New York Mellon*, 160 A.3d 471, 474 (Del. 2017).

C. Merits of Argument.

The failure to provide reasonably careful legal services is a failure of a condition precedent to fees and reimbursement under an attorney-client fee agreement; therefore, the clients are not obligated to pay the lawyers for negligent legal services. *See, e.g., McCafferty v. Musat*, 817 P.2d 1039, 1041 (Colo. App. 1990). The extent of the lawyers' malpractice remains unresolved if this Court reverses the entry of summary judgment on the clients' legal malpractice counterclaim. Thus, if this Court reverses the entry of summary judgment on these counterclaims, this Court should also reverse the entry of summary judgment on the lawyers' claims for breach of contract.

III. The trial court committed reversible error in denying the clients leave to conduct certain discovery after the trial court converted the motions to dismiss into motions for summary judgment.

A. Question Presented.

Did the clients establish a need for relevant discovery before responding to the lawyers' motions to dismiss, when the trial court converted the motions into motions for summary judgment? The clients preserved the issue at A114-A130.

B. Scope of Review.

This Court reviews the regulation of discovery for abuse of discretion. *See Rhudy v. Bottlecaps Inc.*, 830 A.2d 402, 408 n.23 (Del. 2003).

C. Merits of Argument.

When presented with a motion for summary judgment, a trial court may permit further discovery before requiring the nonmovant to respond to the motion. Del. Super. Ct. R. Civ. P. 56(f). The clients submit that discovery is appropriate to permit a claimant an opportunity to use compulsory tools to obtain documents and testimony concerning the elements of the claim. For example, discovery is appropriate to develop the extent of the lawyer's duties, because the extent of a lawyers' duties beyond the scope of the engagement depends on the relevant circumstances. *See, e.g., Conklin v. Hannoch Weisman*, 678 A.2d 1060 (N.J. 1996). The scope of an attorney-client relationship is a question of fact. *See, e.g.,*

Dixon Ticonderoga Co. v. Estate of O'Connor, 248 F.3d 151 (3d Cir. 2001) (circumstances raised questions of fact).

Whether a lawyer-client relationship was formed depends on the totality of the circumstances. *See, e.g.*, *Mansur v. Podhurst Orseck, P.A.*, 994 So. 2d 435 (Fla. 3d Dist. Ct. App. 2008); *Moan v. Hurst*, 822 N.Y.S.2d 564 (N.Y. App. 2006). Factors include the conduct of the lawyer and the client. *Mansur*, 994 So.2d at 437. Other factors include payments, past transactions, written communications, whether the person reasonably believed the lawyer would act for the person's benefit, and whether the attorney took conflicting action for the benefit of a different client. *See Catizone v. Wolff*, 71 F. Supp. 2d 65 (S.D.N.Y. 1999); *Hawaiian Bank v. Russell & Vokening, Inc.*, 861 F. Supp. 233 (S.D.N.Y. 1994); *Neville v. Vingelli*, 826 P.2d 1196 (Ariz. Ct. App. 1991); *Sherwin-Williams Co. v. First Louisiana Const., Inc.*, 915 So. 2d 841 (La. Ct. App. 2005); *DeVaux v. American Home Assur.*, 444 N.E.2d 355 (Mass. 1983); *Francis v. Piper*, 597 N.W.2d 922 (Minn. App. 1999).

No one factor is determinative. *International Tele-Marine*, 845 F. Supp. at 1430. Additionally, the scope of the duty may be implied by the circumstances of the relationship. *Johnson v. Miller*, 596 F. Supp. 768 (D. Colo. 1984); *Fitzpatrick v. Harrison*, 854 F. Supp. 2d 1334 (S.D. Ga. 2010); *Williams v. Ely*, 668 N.E.2d

799 (Mass. 1996); Restatement (Third) of The Law Governing Lawyers § 14(1)(b) ("the lawyer fails to manifest lack of consent to [provide legal services]").

In short, the scope of a lawyer's duties is case-specific and not appropriate for summary judgment, and certainly not without an opportunity to conduct minimal discovery. The trial court engaged in an abuse of discretion by entering summary judgment without first affording the clients an opportunity to conduct discovery.

IV. The trial court lacked subject matter jurisdiction over Marcus & Auerbach's breach of contract claims, because the claims are subject to binding arbitration.

A. Question Presented.

Did the trial court have subject matter jurisdiction over breach of contract claims, when the parties to the contract agreed to binding arbitration? The clients preserved the question at A148 para. 11. Further, an objection to subject matter jurisdiction may be raised at any time. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006).

B. Scope of Review.

This Court reviews the issue of subject matter jurisdiction *de novo*. *Sanders v. Sanders*, 570 A.2d 1189, 1190 (Del. 1990).

C. Merits of Argument.

A judgment rendered without subject matter jurisdiction is void. *York Fed. Sav. & Loan Ass'n v. Heflin*, 1996 WL 30241, at *2 (Del. Super. Ct. Jan. 5, 1996). This Court considered the effect of arbitration on a trial court's subject matter jurisdiction in *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999). The arbitration clause in that case stated in relevant part as follows:

> [A]ny controversy or dispute out of this Agreement, the interpretation of any of the provisions hereof, or the action or inaction of any Member or Manager hereunder shall be submitted to arbitration in San Francisco, California . . . No action . . . based upon any claim arising out of or related to this Agreement shall be instituted in any court by

> any Member except (a) an action to compel arbitration . . . or (b) an action to enforce an award obtained in an arbitration proceeding . . .

Id. at 288-89. This Court held that the arbitration clause barred jurisdiction in the Court of Chancery. *Id.* at 292.

That an arbitration clause bars subject matter jurisdiction is well settled. *SBC Interactive, Inc. v. Corporate Media Partners*, 714 A.2d 758, 761 (Del. 1998); *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 429 (Del. Ch. 2007). Nonetheless, the trial court held that the clients waived their right to arbitration, essentially reinvesting a trial court with subject matter jurisdiction after having contractually promised to submit a dispute to arbitration. The trial court erred.

The trial court held that the clients waived their right to arbitration, thereby re-conferring subject matter jurisdiction in the trial court. The clients do not concede the existence of a waiver, but submit that waiver would not re-confer subject matter jurisdiction. This Court has not yet addressed whether an alleged waiver re-confers subject matter jurisdiction in a trial court. *Cf. Parfi Hldg. AB v. Mirror Image Internet, Inc.*, 842 A.2d 1245, 1260 n.39 (Del. Ch. 2004) (party may waive right to arbitration). Some jurisdictions have held that a valid agreement to arbitrate divests courts of subject matter jurisdiction and that the lack of subject matter jurisdiction cannot be waived. *See, e.g.*, *Guzhagin v. State Farm Mut.*, 566 F. Supp. 2d 962, 967 (D. Minn. 2008) (statutory arbitration). Other courts have

reached the opposite conclusion, but the clients submit that denying subject matter jurisdiction is the better policy. Ultimately, the issue is not whether the right to arbitration can be waived by pursuing litigation, but whether the right to adjudication can be waived by contractually promising to submit to arbitration. This Court should answer the latter question in the affirmative and hold that the trial court lacks subject matter jurisdiction.

In any event, the clients deny waiving their right to arbitration. Public policy favors arbitration, and all doubts about a waiver must be resolved in favor of arbitration. *SBC*, 714 A.2d at 761.

> Both Delaware and federal law recognize a strong public policy in favor or arbitration. As a result, although a party may waive its right to compel arbitration, such waiver will not be lightly inferred, and any doubts should be resolved in favor of arbitration. Mere delay is not enough to sustain a claim of waiver.

Anadarko Petroleum Corp. v. Panhandle Eastern Corp., 1987 Del. Ch. Unpub. LEXIS 464, **23-24 (Del. Ch. 1987) (citations omitted). In this case, the clients have not knowingly and intentionally waived their right to arbitration. *James Julian, Inc. v. Raytheon Serv.*, 424 A.2d 665, 668 (Del. Ch. 1980) (waiver is intentional relinquishment of known right). So far, the clients have asserted compulsory counterclaims, responded to a motion to dismiss, responded to the trial court's requests, and been denied any opportunity to conduct discovery. The circumstances still favor arbitration.

In the alternative, the trial court reasoned that the lawyers' claims for unpaid fees were not arbitrable because the amount in controversy exceeded the scope of the designated arbitrator's authority. This Court should disagree. Any doubt about arbitrability should be resolved in favor of arbitration. *Pettinaro Constr. Co. v. Harry C. Patridge, Jr. & Sons, Inc.*, 408 A.2d 957, 961-63 (Del. Ch. 1979). If the arbitration clause is vague or defective on the identity of the arbitrator, the proper procedure is for the parties to select a substitute arbitrator pursuant to the contractual duty to perform in good faith. *Cf. Viacom Int'l, Inc. v. Winshall*, 2012 Del. Ch. LEXIS 187, *43 (Del. Ch. August 9, 2012) (distinguishing between substantive and procedural arbitrability), *aff'd*, 72 A.2d 78 (Del. 2013); *James Julian*, 424 A.2d at 667 ("The scope of an arbitration agreement is ordinarily determined by the Arbitrator and not by a Court."). If the parties are unable to select a substitute arbitrator, the trial court must select a substitute. Although the present arbitration clause was entered in Pennsylvania, Delaware's Uniform Arbitration Act is informative on the subject matter jurisdiction of a Delaware trial court. The Act provides as follows:

> In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and the arbitrator's successor has not been duly appointed, the Court on complaint or on application in an existing case of a party shall appoint one or more arbitrators.

10 Del. C. § 5704 (2017). Error is for the trial court to substitute a new version of the arbitration clause by holding the claims beyond the scope of the arbitration agreement, merely because of some ambiguity as to the identity of the arbitrator or impossibility of using the chosen arbitrator.

In this case, Marcus & Auerbach insisted upon including an arbitration clause in their fee agreement. The clause does not limit the claims on the basis of the nature of the claims; rather, it applies to all claims involving a member of their firm. Marcus & Auerbach waived their right to a judicial determination of all claims involving a member of their firm. The arbitration clause divested this Court of subject matter jurisdiction. The parties cannot re-confer subject matter jurisdiction back into the trial court. This Court should vacate the judgment in favor of Marcus & Auerbach and remand this case with instructions to the trial court to dismiss all claims involving members of their firm.

CONCLUSION

This Court should vacate the entry of judgment in favor of Marcus & Auerbach, Jerome Marcus, and Jonathan Auerbach and remand to the trial court with instructions to dismiss all claims by and against those parties. This Court should vacate the summary judgment in favor of Margolis Edelstein and Herbert Mondros and remand for further proceedings.

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