Reinstating the Two-Year Statute of Limitations for Legal Malpractice Claims

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By Alesia S. Sulock

Recent Pennsylvania jurisprudence has reflected a shift toward more careful consideration of the nature of allegations against defendants in order to more judiciously apply the correct statute of limitations. Raising the gist of the action doctrine as a defense may help professional liability defendants, and in particular attorney defendants, to bar stale claims of malpractice.

Legal malpractice claims may be brought in two forms: negligence and breach of contract. To state a claim for negligence, a plaintiff must allege: employment of the attorney or other basis for a duty; failure of the attorney to exercise ordinary skill and knowledge; and, that such failure was the proximate cause of the harm to the plaintiff. See, *Wachovia Bank v. Ferretti*, 935 A.2d 565, 570-571 (Pa. Super. Ct. 2007) (internal citations omitted). To state a claim for breach of contract, a plaintiff must allege: the existence of a contract, a breach of a duty imposed by the contract, and damages. See, *Kirschner v. K&L Gates*, 436 A.2d 737, 755 (Pa. Super. 2012). Traditionally, a legal malpractice plaintiff could allege the same conduct in support of both claims. This meant that, although a negligence claim must be brought within two years of the alleged breach of duty, nearly all legal malpractice claims could be considered timely breach of contract claims, if filed within four years from the attorney's failure to provide competent representation.

Recently, however, Pennsylvania courts have bolstered an available defense to the prior nearly automatic four-year statute of limitations, in the form of the gist of the action doctrine.

The gist of the action doctrine operates to "maintain the conceptual distinctions between breach of contract claims and tort claims." See, *eToll v. Ellias/Savion Advertising*, 811 A.2d 10, 14 (Pa. Super. 2002). "If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts, and hence, exists regardless of the

contract, then it must be regarded as a tort." See, *Bruno v. Erie Insurance*, 106 A.3d 48, 68-69 (Pa. 2014).

Although the gist of the action doctrine is a long-standing part of Pennsylvania jurisprudence, traditionally it was cited in order to preclude a plaintiff from casting a breach of contract claim as a tort claim. In 2014, *Bruno* applied the gist of the action doctrine to a professional liability claim, opening the door for professional defendants to raise this defense. In particular, professional liability defendants can now use the gist of the action doctrine to defeat breach of contract claims which sound in tort, in order to avoid the application of Pennsylvania's four year statute of limitations to those claims. In *Bruno*, the Pennsylvania Supreme Court found that the mere existence of a contract between parties does not necessarily mean that allegations of negligent conduct give rise to a claim for a breach of that contract. "A negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which comprise the contract. Instead, the contract is regarded merely as the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed."

Recently, courts in this commonwealth have relied on *Bruno* to require professional liability plaintiffs to properly distinguish between tort and contract claims and, in particular, have barred plaintiffs from recasting tort claims as breach of contract claims to take advantage of the longer statute of limitations. For example, the Philadelphia Court of Common Pleas dismissed a plaintiff's professional malpractice claim, finding that because the plaintiff did not allege that the defendant breached "any specific term in the retainer agreement or contract" the gist of the action was in tort, not contract. See, *Seidner v. Finkelman,* No. 201202883 (Phila. Ct. Com. Pls. February 17, 2017) (aff'd, *Seidner v. Finkelman* No. 716 EDA 2017, 808 EDA 2017, unpublished memorandum (Pa. Super. Aug. 31, 2018)). The Pennsylvania Superior Court affirmed in an unpublished decision, agreeing that the plaintiff's legal malpractice claim sounded in tort, not contract, and was barred by the two year statute of limitations. Likewise, the U.S. District Court for the Eastern District of Pennsylvania held that "where the breach of contract claim is based on the same conduct underlying the negligence claim, rather than the defendant's breach of a specific contract provision, it sounds in tort, not contract." See, *Nkansah v. Kleinbard*, Civil Action No. 19-4472 (E.D. Pa. Feb. 26, 2020).

Just last year, in a nonprecedential decision, the Pennsylvania Superior Court affirmed the dismissal of plaintiff's breach of contract legal malpractice claim where the plaintiff did not allege that the attorney failed to follow any client instructions, did not allege that the attorney failed to perform any specific executory promise in the contract, and did not point to any specific provision in the contract which had been breached. See, *Johnson v. Raffaele*, 241 A.3d 479, unpublished memorandum (Pa. Super. 2020). The court further noted that the plaintiff listed similar allegations in both

her negligence and breach of contract claims, all of which focused on the manner in which the attorney performed his duties, the communications with the client, the advice given, and the diligence in representing the plaintiff. As the court stated, "these allegations plainly sound in negligence rather than breach of contract."

As stated by the trial court in *Seidner*, the policy reasons behind these decisions are clear:

> First, allowing breach of contract claims which sound in tort would mean a contract claim could be asserted where the attorney was negligent and that negligence harmed his or her client. Second, such a hybrid contract-negligence claim would be most likely subject to a four year statute of limitations, in contrast to a malpractice claim sounding solely in tort which is subject to a two year statute of limitations. This outcome clashes with the express will of the legislature that crafted two different statutes of limitations for two distinct causes of actions. Such a result would permit plaintiffs to circumvent the statute of limitations for legal malpractice in tort by using contracts as a foundation upon which to sue for negligence that occurred during the contractual relationship and may otherwise be time-barred.

Even as courts in this commonwealth have expanded the availability of the discovery rule for plaintiffs to toll the statute of limitations, they have simultaneously imposed a greater burden on plaintiffs to properly categorize their claims. It seems no longer sufficient for a plaintiff to list a number of negligent actions and then allege his attorney breached the engagement agreement by generally failing to provide services meeting the appropriate standard of care. Rather, a plaintiff must allege a breach of a specific term or a failure to follow the client's instructions, or risk being held to a two-year statute of limitations. Attorney defendants who are faced with allegations that they negligently performed their duties should look closely at the timing of the alleged conduct and raise the gist of the action doctrine to argue for the application of a shorter statute of limitations.

Alesia S. Sulock is an associate in the professional liability department in the Philadelphia office of Marshall Dennehey Warner Coleman & Goggin. She defends legal malpractice matters, including those arising from underlying commercial litigation, criminal matters, professional liability matters, medical malpractice matters, personal injury matters, transactional matters and others. Contact her at assulock@mdwcg.com.