Circuit Court for Baltimore County
Case No. 03-C-17-004443

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

ON MOTION FOR RECONSIDERATION

No. 3074

September Term, 2018

BERTRAM MILLER

v.

KEVIN JOYCE

Nazarian,
Wells,
James A. Kenney, III,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: June 12, 2020

Dr. Bertram Miller, acting *pro se*, filed a complaint in the Circuit Court for Baltimore County against Kevin Joyce, an attorney who had represented him during the early pre-trial stages of (ultimately unsuccessful) litigation against Dr. Miller's former employer. After discovery, Mr. Joyce moved for summary judgment on the grounds that Dr. Miller's malpractice claim was not filed within the statute of limitations, that he failed to proffer expert testimony to attest to the standard of care, and that he failed to provide factual support for a conclusion that Mr. Joyce's conduct caused Dr. Miller to suffer damages. The circuit court agreed and entered judgment in favor of Mr. Joyce. Dr. Miller appeals and we affirm.

I. BACKGROUND

On January 10, 2010, Dr. Miller retained Mr. Joyce to represent him in connection with an employment-related dispute with the Board of Education of Baltimore County (the "Board"). Until his retirement that year, Dr. Miller was a high school mathematics teacher. On January 11, 2010, on behalf of Dr. Miller, Mr. Joyce filed a complaint in the circuit court against the Board and several other defendants. On May 12, 2010, Mr. Joyce filed a motion for a temporary restraining order ("TRO"), asking the court to enjoin the Board from proceeding with its termination process against Dr. Miller until it provided him with an internal appeal process. The court denied the request for a TRO on June 29, 2010. Dr. Miller retired that day, and claims he did so because he didn't want to risk losing all his retirement benefits.

On September 30, 2010, Mr. Joyce filed a second, ten-count complaint against the Board on behalf of Dr. Miller. On January 20, 2012, the court granted summary judgment on the first nine counts, among them a count alleging discrimination, but ruled that Count 10, Breach of Contract, would proceed to trial. Mr. Joyce withdrew from the representation before trial, and Dr. Miller represented himself at trial. On May 14, 2014, the jury found that although the Board breached the terms of its contract with Dr. Miller, he was not entitled to damages because he had retired voluntarily before the appeals process concluded, and therefore had not been constructively terminated from his position. Dr. Miller appealed that verdict to this Court, and we affirmed. *Miller v. Board of Education of Baltimore County*, No. 1853, Sept. Term 2014 (Md. App. Sept. 2, 2016).

On May 5, 2017, Dr. Miller filed a complaint for legal malpractice against Mr. Joyce, also in the Circuit Court for Baltimore County. His complaint is difficult to follow, but he seems to assert three instances in which, he claims, Mr. Joyce committed malpractice. *First*, he contends that Mr. Joyce should have informed him that retiring would deprive him of standing in a breach of contract action against the Board. *Second*, he claims that Mr. Joyce "fail[ed] to appropriately support the discrimination count-did not provide the court with that appropriate support during the ensuing 13 months before the November 10, 2011 hearing, did not present appropriate support at the hearing, and did not provide the court with appropriate support either after the hearing or even in a motion for reconsideration." Dr. Miller says that Mr. Joyce should have obtained affidavit support for alleged acts of discrimination by his supervisor:

> 18. Ms. Dowling testified that Miller's math department chairman, Ms Theresa Vaccaro, had regularly referred to Miller as a) "Dirty Jew", b) "Smelly Jew", and c) "F***ing Jew" . . . .
>
> 19. In Ms. Dowling's presence, Ms. Vaccaro said, "Miller hates women because we bleed 'cause he's a Jew."
>
> 20. In Ms. Dowling's presence, Ms. Vaccaro bribed players on her girl's volleyball team with more playing time and starting positions if they would have their parents complain to the principal against Dr. Miller.
>
> 21. In Ms. Dowling's presence, Ms. Vaccaro surreptitiously entered Miller's classroom and placed a lemon with pins stuck into it (a voodoo-like intimidation symbol) on Miller's desk.

And *finally*, Dr. Miller alleged that Mr. Joyce should have included, in an amended complaint, a count alleging that the Board violated his due process rights when it failed to provide him with an administrative appeal process.

On March 1, 2018, Mr. Joyce moved for summary judgment on three grounds: (1) expert testimony was required to establish whether the standard of care was breached and whether the breach caused damages regarding the discrimination claim, and Dr. Miller never retained an expert; (2) Dr. Miller's complaint was not timely; and (3) Dr. Miller failed to plead facts that could connect Mr. Joyce's alleged negligence to Dr. Miller's damages. The circuit court convened a hearing on August 21, 2018.[1]

[1] As the circuit court explains, there was a minor hiccup in getting to the hearing, but it was resolved:

> Considered as the Motion for Summary Judgment and Response are the following: (1) the motion for summary judgment filed 3/1/2018; (2) a Response filed 3/14/2018; (3) A Motion to Alter or Amend a Judgment under Rule 2-534 filed 3/18/2018 and a Motion for New Trial filed 3/18/2018; (4) a Response to the Motion to Alter or Amend; (5) A Supplement

On October 19, 2018, the circuit court granted summary judgment in favor of Mr. Joyce. With regard to the discrimination claim, the court held that Dr. Miller could not, as a matter of law, establish the relevant standard of care and a breach without expert testimony. The court also found that the date of alleged injury was January 20, 2012, when summary judgment in the action for discrimination was docketed, and that Dr. Miller's legal malpractice claim, filed on May 5, 2017, was untimely. And the court concluded as well that there was no evidence to support a finding that Mr. Joyce proximately caused any damage to Dr. Miller by failing to advise him of the consequences of retiring. Dr. Miller noted this timely appeal.

II. DISCUSSION

On appeal, Dr. Miller argues that the circuit court erred in granting summary judgment in favor of Mr. Joyce, and raises three issues for our review that we rephrase.[2]

> to the Plaintiff's Motion to Alter or Amend filed 5/8/2018; and (6) a Response to the Supp to the Motion to Alter filed 5/7/2018[].
>
> The undersigned judge erroneously ruled on the motion for summary judgment and the response without granting [Dr. Miller] a hearing, which hearing he requested and to which he was entitled. Thus, the positions in all the papers filed by [Dr. Miller]. As stated above, are considered as his response and the positions in all the papers filed by [Mr. Joyce] are considered as his motion for summary judgment.

[2] Dr. Miller phrased the Questions Presented in his brief as follows:

> 1. In granting summary judgment, did the judge err by considering the limitations defense only with respect to Joyce's failure to support the discrimination account and not consider Joyce's other acts of malpractice which were not barred by limitations?

First, Dr. Miller asserts that his legal malpractice claim was timely. *Second*, Dr. Miller argues that an expert witness was not a prerequisite to his legal malpractice claim. *Third*, Dr. Miller argues that we should craft a new rule requiring a court, in legal malpractice claims where it finds an expert is needed, to grant a *pro se* plaintiff a 30-day or 45-day continuance to obtain an expert witness before granting summary judgment in favor of the opposing party.

Summary judgment is appropriate when "there is no genuine dispute of material fact" and the moving party "is entitled to judgment as a matter of law." Md. Rule 2-501(f). We review *de novo* the circuit court's decision to grant summary judgment. *Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 598 (2013). We "consider the record in the light most favorable to the non-moving party and consider any reasonable inferences that may be drawn from the undisputed facts against the moving party." *Id.* We hold that the circuit court granted summary judgment properly in favor of Mr. Joyce, and affirm. Although we conclude that Dr. Miller did not file his claim within the statute of limitations, which would

2. In granting summary judgment, did the judge err in ruling that the Plaintiff's malpractice claim required expert testimony to a) establish the defendant's negligence, b) establish that the defendant's negligent act(s) were the proximate cause of the Plaintiff's damage, and c) predict the likelihood of success of the Plaintiff's case?
3. Did the judge err when, after ruling that the facts of the case required the provision of testimony from an expert witness, he granted summary judgment without offering a continuance to Miller so that he could obtain an expert witness or have the case dismissed?

ordinarily end our inquiry, we address each of his arguments in turn.

A. Dr. Miller Failed To File His Claim On Time.

In support of his position that his complaint for legal malpractice was filed within the limitations period, Dr. Miller argues that the circuit court erred in only considering Mr. Joyce's failure to provide evidence supporting the discrimination count, rather than considering other acts of alleged malpractice that, he says, occurred later. In his brief, Dr. Miller lists instances of malpractice and the dates on which he asserts he became aware of them:

> 1. Miller became aware in January 2012 that Joyce had failed to support the discrimination count with required evidence.
> 2. Miller became aware on May 15, 2014 that his June 2010 retirement had evaporated his standing to sue for breach of contract.
> 3. Miller became aware in March 2018 that Joyce had known as of June 3, 2010 that Department Chairperson Vaccaro had perpetrated the voodoo hate crime and had bribed students to defame him.
> 4. Miller became aware on May 9, 2014 that the trial judge had denied his timely-filed pre-trial motion to add a count for [the Board's] violation of his [] 14th Amendment due process rights.
> 5. Miller became aware in April 2014 that Joyce had not filed a count for [the Board's] Accardi Rule violation.
> 6. Miller became aware on May 9, 2014 that Joyce had not discovered that [the Board] had never investigated the voodoo attack perpetrated by Miller's superior.

Looking at the three instances of malpractice alleged in his complaint, though, we agree with the circuit court that the complaint was untimely.

The purpose behind statutes of limitations is "to provide adequate time for a diligent

plaintiff to bring suit as well as to ensure fairness to defendants by encouraging prompt filing of claims." *Hecht v. Resolution Trust Corp.*, 333 Md. 324, 338 (1994). They balance the interests between a plaintiff who pursues his claim diligently while allowing repose to a potential defendant. *Doe v. Maskell*, 342 Md. 684, 679 (1996); *Pennwalt Corp. v. Nasios*, 314 Md. 433, 437–38 (1988). They "ensure fairness by preventing 'stale' claims." *Edmonds v. Cytology Servs. of Md., Inc.*, 111 Md. App. 233, 244 (1996). "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients rather than principles." *Maskell*, 342 Md. at 689 (citations omitted).

In legal malpractice cases, the Court of Appeals has "established the discovery rule–the rule that the cause of action accrues when the claimant discovers or reasonably should have discovered that he has been wronged." *Watson v. Dorsey*, 265 Md. 509, 512 (1972). Ordinarily, the dispositive issue is "when [] the [claimant was] put on notice that she may have been injured." *Russo v. Ascher*, 76 Md. App. 465, 470 (1988). "[B]eing on notice means having knowledge of circumstances which would cause a reasonable person in the position of the plaintiff to undertake an investigation which, if pursued with reasonable diligence, would have led to knowledge of the alleged [wrong]." *Id.* (internal citation and quotations omitted).

When determining whether a statute of limitations accrues in a particular instance, we do so "with awareness of the policy considerations unique to each situation." *Hecht*, 333 Md. at 338. Accrual can be a question of law, fact, or both:

> When a cause of action accrues is usually a legal question for the court. When the question hinges on the resolution of

> disputed facts, however, it is for the fact-finder to decide. Depending on the nature of the assertions being made with respect to the limitations plea, the determination [of whether the action is barred] may be solely one of law, solely one of fact, or one of law and fact.

Moreland v. Aetna U.S. Healthcare, Inc., 152 Md. App. 288, 296 (2003) (citations omitted).

Dr. Miller asserts that he only realized the harm stemming from the failure to advise him that retirement deprived him of standing to sue for breach of contract when the jury returned a verdict against him on May 15, 2014.[3] We disagree. Dr. Miller knew or should have known of this alleged harm when he opposed the Board's summary judgment motion in his case against the Board. His memorandum in opposition, filed on October 17, 2012, stated that "Dr. Miller could ask for an administrative hearing–from an entity that had already effectively denied Dr. Miller several such hearing [*sic*]–and in doing so insure [*sic*] he was terminated, or retire under protest and at least preserve his retirement benefits." Dr. Miller knew no later than this filing that his decision to retire affected his breach of contract claim against the Board. He needed to file his claim regarding this issue by October 17, 2015, and he didn't.

With regard to the discrimination claim, Dr. Miller asserts that the continuous representation rule (or "continuation of events" theory) applies to this case because Mr. Joyce was working on contingency, and the statute of limitations did not begin running

[3] Dr. Miller and Mr. Joyce had an attorney/client relationship that began sometime in January 20, 2010 and ended once and for all on May 7, 2014.

until this Court rendered a decision, on June 27, 2016, in Dr. Miller's case against the Board. We disagree. Dr. Miller cites no authority, and we can find none, to support the proposition that because Mr. Joyce was working on contingency, the continuation of events theory defeats the discovery rule. The inquiry under the discovery rule is when Dr. Miller knew or should have known that he was harmed from Mr. Joyce's failure to bring the discrimination claim. And he knew or should have known that when summary judgment was granted in favor of the Board on that claim on January 20, 2012. He needed to file his claim for malpractice on this issue by January 20, 2015, and he didn't.

With regard to the alleged due process violation, Dr. Miller asserts that limitations began to run on May 9, 2014, when the trial court denied his pretrial motion to add a count for violation of due process against the Board. We disagree. It's undisputed that on May 12, 2010, Mr. Joyce filed a motion asking the circuit court to enter a temporary restraining order to delay termination proceedings to give Dr. Miller an opportunity to complete the administrative appeal process. The court denied the motion, and it's undisputed that on September 30, 2010, Mr. Joyce filed a second revised complaint that alleged ten counts against the Board but didn't include a claim for violation of due process. At that point, when Mr. Joyce filed the second revised complaint without the due process claim, Dr. Miller was on notice of this alleged form of malpractice. He had until September 30, 2013 to file a claim to that effect, and he didn't.

B. Dr. Miller Needed An Expert To Support His Legal Malpractice Claim.

"To prevail on a claim for legal malpractice, a former client must prove '(1) the

attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) loss to the client proximately caused by that neglect of duty.'" *Suder v. Whiteford, Taylor & Preston, LLP*, 413 Md. 230, 239 (2010) (*quoting Thomas v. Bethea*, 351 Md. 513, 528–29 (1998)). Just like any other negligence claim, a legal malpractice plaintiff must prove duty, breach, proximate cause, and damages. *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 717 (2003). In other words, "the plaintiff bears the burden of overcoming the presumption that due skill and care were used." *Crockett v. Crothers*, 264 Md. 222, 224 (1972). But where a plaintiff is unable to point to facts that support each element of the claim, a defendant may prevail on a summary judgment motion. *Supik*, 152 Md. App. at 717 ("The absence of any one of those elements will defeat a cause of action in tort.").

Generally speaking, the elements of a legal malpractice claim cannot be proven without expert testimony, subject to a few narrow exceptions. *See Franch v. Ankney*, 341 Md. 350, 357 n.4 (1996). "[A]llegations of professional malpractice require expert testimony[] because the intricacies of professional disciplines generally are beyond the ken of the average layman." *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 720 (2013). But there is a difference between those cases where expert testimony is required to prove professional malpractice and cases where "the alleged negligence, if proven, would be so obviously shown that the trier of fact could recognize it without expert testimony." *Schultz v. Bank of America, N.A.*, 413 Md. 15, 29 (2010). For example, malpractice is so obvious, and an expert witness is not needed, in rare exceptions "where a dentist extracts the wrong tooth, a doctor amputates the wrong arm or leaves a sponge in a patient's body, or an attorney

fails to inform his client that he has terminated his representation of the client." *Id.*

Dr. Miller never offered expert testimony to support his malpractice claims in this case, but he argues that "each of the violations of the standard of care committed by Joyce must be classified as an example of the common knowledge exception, in which a plaintiff is not required to provide the court with expert witness testimony to prove negligence." He contends that all of the following are violations of the standard of care subject to the common law exception: (1) Mr. Joyce's failure to file an affidavit by an eyewitness to the discrimination against him; (2) Mr. Joyce's failure to present, through affidavit testimony of Ms. Dowling about the lemon placed on Dr. Miller's desk, an argument to the TRO court alleging corruption in the administrative appeal process; and (3) Mr. Joyce's failure to advise Dr. Miller that his retirement would deprive him of standing to sue the Board.

We disagree. These instances of alleged malpractice all raise issues of substantive, legal matters and professional conduct that would exceed the knowledge of the average lay juror. *See, e.g.*, *Taylor v. Feissner*, 103 Md. App. 356, 377 (1995) (expert testimony is "necessary to establish whether [the defendant attorney] exercised reasonable care in assessing the merits" of a legal theory and whether the attorney properly advised the client). In each of these instances, the context and the state of the record are important. It is not enough simply to say, for example, that there was a eyewitness who could have submitted an affidavit—Dr. Miller needed at summary judgment to create a dispute of material fact that the witness was real and credible, that Mr. Joyce knew she was real and credible, and, most importantly, that Mr. Joyce lacked a professionally reasonable reason not to proceed

as Dr. Miller now claims he should have. It is not enough for him to say that Mr. Joyce should have done something different than he did—as a malpractice plaintiff, Dr. Miller carried the burden of establishing the standard of care with expert testimony, and in not providing an expert, he failed to meet that burden. The circuit court concluded correctly that there was no evidence it was "more likely than not that [Dr. Miller] would have prevailed on the issue at trial," and granted summary judgment properly in favor of Mr. Joyce.

C. The Circuit Court Was Not Required To Grant Dr. Miller A Continuance.

Dr. Miller asserts that the circuit court should have granted him a 30 or 45 day continuance so he could obtain an expert. He recognizes that he never asked for such a continuance, but he urges us to adopt a rule that a *pro se* plaintiff shall be given an additional 30-day or 45-day continuance to find an expert should the court find that he needs one. He says that the requirement that a plaintiff "in a malpractice case must provide the testimony of an expert witness to counter a motion for summary judgment . . . is unfair, discriminatory and probably unconstitutional." And he argues that a plaintiff such as himself "should not have to pay likely upwards of $1000 (effectively 'a discriminatory filing fee') before he will be allowed to proceed with a malpractice claim."

We disagree, for several reasons. *First*, Dr. Miller didn't preserve this issue, because he never requested a continuance under Maryland Rule 2-508 in the circuit court. *Second*, even if he had asked for such a continuance, Rule 2-508 provides that "the trial shall not be continued or postponed on the ground that discovery has not yet been completed, except

for good cause shown." On this record, it appears that Dr. Miller just didn't want to find (or pay for) an expert unless the court made a preliminary conclusion that he needed one, an approach that would allow him two opportunities—one without an expert, and then if necessary, a second with one—to prove his case. Ordinarily, failing to secure a witness when a witness could have been secured prior to trial is not grounds for a continuance, *Hughes v. Averza*, 223 Md. 12, 18–19 (1960), and Dr. Miller hasn't argued that he couldn't find or afford an expert in any event. *Third*, "the procedural, evidentiary, and appellate rules apply alike to parties and their attorneys. No different standards apply when parties appear *pro se*." *Tretick v. Layman*, 95 Md. App. 62, 86 (1993). And *finally*, Dr. Miller fails to cite any authority in his brief to support such a rule, and we see no basis to create one from scratch in this case.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. APPELLANT TO PAY COSTS.