

No. 18-399

In The
Supreme Court of the United States

JOHN W. FINK,

Petitioner,

v.

J. PHILIP KIRCHNER and FLASTER/GREENBERG, P.C.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

**RESPONDENTS J. PHILIP KIRCHNER &
FLASTER/GREENBERG, P.C.'S, OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred in affirming the United States District Court’s decisions granting Defendants’-Respondents’, J. Philip Kirchner, Esq., and the law firm, Flaster Greenberg, P.C.’s (collectively, “Respondents”), motions for summary judgment as to all claims alleged by Petitioner John W. Fink (“Petitioner”).

PARTIES TO THE PROCEEDING

Petitioner, John W. Fink, petitioned this Court for a writ of certiorari regarding claims against Defendants-Respondents, J. Philip Kirchner, Esq., and the law firm, Flaster Greenberg, P.C.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, respondent Flaster Greenberg, P.C. hereby states that it: (1) has no parent corporation; (2) no publicly held company holds 10% or more of its stock; and (3) no publicly held corporation has a financial interest in the outcome of this proceeding.

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ORDERS AND OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit denying Petitioner's Appeal of the decisions of the District Court is unreported but is reproduced within Petitioner's Appendix with the companion order. Petitioner's Appendix, at B and C. The opinion of the United States Court of Appeals for the Third Circuit denying Petitioner's Petition for a Writ of Mandamus is unreported but is reproduced within Respondents' Appendix with the companion order. Respondents' Appendix, at A and B. The District Court's opinions granting Respondents' two motions for summary judgment are unreported but are reproduced within Petitioner's Appendix with the companion orders. Petitioner's Appendix, at E-H. The District Court's opinion denying Petitioner's motion for reconsideration is unreported, but is reproduced within Petitioner's Appendix. Petitioner's Appendix, at D.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgment on May 4, 2018. (Petitioner's Appendix, at B and C). The United States Court of Appeals for the Third Circuit denied a Petition for a Writ of Mandamus on June 19, 2018. (Respondents' Appendix, at A and B). The United States Court of Appeals denied a petition for rehearing and rehearing *en banc* on June 25, 2018. (Petitioner's Appendix,

at A). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

S. Ct. R. 10 states that, “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” *Ibid.* In the present matter, Petitioner is solely seeking this Court to review and reverse factual findings and applications of law made by the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit.

On April 5, 2016, the Honorable Noel L. Hillman, U.S.D.J., issued an Order and Opinion in this matter granting summary judgment to Respondents on Petitioner's legal malpractice claim and denying summary judgment on the remainder of Petitioner's claims without prejudice so same could be refiled after the close of the applicable discovery period. Petitioner filed a motion for reconsideration of the April 5, 2016 Order and Opinion. Upon the close of discovery, Respondents filed a motion for summary judgment as to Petitioner's

remaining claims. However, Petitioner subsequently filed a Second Amended Complaint to include new causes of action. Respondents then filed a subsequent motion to dismiss and motion for summary judgment as to Petitioner's Second Amended Complaint.

On December 20, 2016, the District Court resolved Respondents' motion to dismiss and for summary judgment as well as Petitioner's motion for reconsideration of the April 5, 2016 Order. The District Court's Order and Opinion granted Petitioner's motion for reconsideration of the April 5, 2016 decision; however, after reconsideration, the District Court affirmed its April 5, 2016 Order granting summary judgment as to Petitioner's claim for legal malpractice and also granted Respondents' summary judgment as to all remaining Counts of Petitioner's Second Amended Complaint. *See* Petitioner's Appendix, at E-F. The District Court's reasoning in granting summary judgment on behalf of Respondents was as follows:

Fink has the burden of proving his fraud, breach of fiduciary duty, and spoliation claims, in addition to the previously dismissed, but currently reconsidered, malpractice claims. Each of these claims requires sufficient evidence to demonstrate that Fink was harmed by those alleged events. The Court does not discount the serious accusation that a lawyer lied to his client and intentionally submitted an altered document to a tribunal, but the record contains only suspicion, innuendo, hypothesis, and unsupported

suppositions rather than any material issues of disputed fact.

[Petitioner's Appendix F, at 32a.]

Petitioner filed an appeal of the District Court's dismissal of Petitioner's Complaint with prejudice, with the Third Circuit on October 23, 2017. On May 4, 2018, the Third Circuit affirmed the decisions of the District Court, notably finding, “[b]ecause Fink failed to put forth sufficient evidence to allow a jury to reasonably find the requisite causal link between Defendants' alleged conduct and his alleged harm, the District Court did not err in granting summary judgment against him.” Petitioner's Appendix B, at 9a. On May 18, 2018, Petitioner filed a petition for rehearing *en banc* with the Third Circuit, which the court denied on June 25, 2018. *See* Petitioner's Appendix, at A and B.



REASONS FOR DENYING THE PETITION

This case does not involve any decision in conflict with any decision of any other United States Court of Appeals or State Court of last resort. Neither does this matter involve any decision that so far departs from the accepted and usual course of judicial proceedings, or that sanctions such a departure from a lower Court, so as to warrant or call for an exercise of this Court's supervisory power. Further, this matter does not involve any question of federal law that has not been, but should be, settled by this Court.

The instant Petition is devoid of any legal or factual basis to disturb the District Court’s original ruling dismissing Petitioner’s Complaint with prejudice and the Third Circuit’s affirmance of that ruling. Petitioner is simply an “aggrieved plaintiff” who has unsuccessfully prosecuted a series of claims against the Respondents. Petitioner’s frivolous and repetitious claims, which have now clogged various federal courts’ dockets for over eight years, cannot persist. Accordingly, the Court should deny Petitioner’s Petition for Writ of Certiorari and end this meritless and vexatious litigation.

I. Petitioner’s Claims for Legal Malpractice and Breach of Fiduciary Duty were Properly Dismissed

In the Courts below, Petitioner failed to provide requisite proof that Respondents committed legal malpractice or breached any fiduciary duty owed to Petitioner. In New Jersey, a legal malpractice action has three essential elements: “(1) the existence of an attorney-client relationship creating a duty of care by the defendant attorney, (2) the breach of that duty by the defendant, and 3) proximate causation of the damages claimed by the plaintiff.” *McGrogan v. Till*, 167 N.J. 414, 425, 771 A.2d 1187 (2001). Further, under New Jersey law, how a claim is captioned is not controlling; it is the nature of the proof required that controls. *See Triarsi v. BSC Group Services, LLC*, 422 N.J. Super. 104, 27 A.3d 202 (App. Div. 2011). Both negligence claims and breach of fiduciary duty claims

require a showing of a breach of a duty to exercise reasonable skill and care. *McKelvey v. Pierce*, 173 N.J. 26, 45, 800 A.2d 840, 859 (2002) (Breach of fiduciary duty includes a duty of loyalty and a duty to exercise reasonable skill and care). Because claims of professional negligence and breach of fiduciary duty require identical proofs, they are treated as one cause of action.

All competent evidence in this matter definitively shows that Petitioner's claims for legal malpractice and breach of fiduciary duty must fail as a matter of law. The District Court, in its December 20, 2016 Opinion held as follows:

The Court [in its April 5, 2016 Order and Opinion] granted summary judgment in defendants' favor on Fink's legal malpractice claims, finding that no amount of discovery would provide facts to dispute the arbitrator's own words that the altered email had no impact on his decision. The Court also found that ALSI's bankruptcy, as well as Fink's three failed lawsuits to recoup money from ALSI or its purported successors and related parties,¹ all demonstrate that even if Fink received the arbitration decision he desired, he would not have been able to collect on that arbitration award.

[Petitioner's Appendix F, at 22a.]

As correctly noted by the District Court, Petitioner failed to establish any proximate cause between

¹ The Honorable Noel L. Hillman, U.S.D.J., also presided over Petitioner's three failed lawsuits against ALSI.

Respondents' purported deviations from the standard of care and damages allegedly suffered by Petitioner. Proximate cause is an essential element of a claim against an attorney for breach of a duty of care. *See Jerista v. Murray*, 185 N.J. 175, 184, 883 A.2d 350, 359 (2005). Further explaining its rationale, the District Court also stated, "even if the Court were to accept all of Fink's propositions as true, gaping holes exist as to causation for his alleged damages." Petitioner's Appendix F, at 26a.

Additionally, in order to advance claims for legal malpractice and breach of fiduciary duty, a plaintiff must serve a competent expert report. A party asserting malpractice must present expert testimony that establishes the standard of care against which the attorney's actions are to be measured. *See Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo*, 345 N.J. Super. 1, 783 A.2d 246 (App. Div. 2001). Moreover, even in cases where legal malpractice is obvious, expert testimony is still necessary to establish proximate causation as to the damages allegedly caused by the defendant's conduct. *See Vort v. Hollander*, 257 N.J. Super. 56, 60-61, 607 A.2d 1339 (App. Div. 1992). Here, Petitioner did not submit any expert evidence to the District Court and therefore was incapable of presenting evidence of any causal connection to Petitioner's purported damages. The lack of causal connection alone warranted dismissal of Petitioner's claims for legal malpractice and breach of fiduciary duty.

For these reasons, the District Court correctly granted summary judgment in favor of Respondents as to Petitioner's claims for legal malpractice and breach of fiduciary duty. The Third Circuit subsequently affirmed that dismissal with prejudice.

II. Petitioner's Claims for Concealment of Evidence and Tampering with Evidence were Properly Dismissed

Petitioner alleged that the factual basis for making claims for concealment of evidence and tampering with evidence against Respondents is as follows. Petitioner contends that Respondents altered an email exhibit during arbitration proceedings in the underlying matter. *See* Petitioner's Petition, at 15. Petitioner claims that the arbitration decision was not favorable to him² because of a finding of negative credibility by the arbitrator, which purportedly was caused by the alleged altered email. *Id.*

The tort of fraudulent concealment³ may be invoked as a remedy for spoliation where the following elements exist: (1) the defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending

² Petitioner's claim ignores the fact that he actually prevailed in the arbitration on some of his claims.

³ Under New Jersey Law, there is no recognized tort claim for the intentional spoliation of evidence. *See Rosenblit v. Zimmerman*, 166 N.J. 391, 399, 766 A.2d 749, 757 (2001). Accordingly, a party alleging spoliation must proceed via a claim for fraudulent concealment. *See id.* at 760.

litigation; (2) the evidence was material to the litigation; (3) plaintiff could not reasonably have obtained access to the evidence from another source; (4) defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; and (5) plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed. *Rosenblit*, 166 N.J. at 399-400, 766 A.2d at 757-58. Thus, as with the negligence and breach of fiduciary duty claims, Petitioner was required to prove that the alleged fraudulent concealment proximately caused him to suffer actual damage. The District Court, however, correctly found that the Petitioner could not prove, under any set of circumstances, that the alleged fraudulent concealment caused him to suffer damages.

Subsequent to the arbitration decision, Petitioner submitted a motion to reopen the arbitration. Petitioner's Appendix F, at 43a. The arbitrator ultimately rejected the motion to reopen stating that the allegedly altered document was of no significance in the arbitration decision and the arbitrator had made no credibility inference based on it with regard to Petitioner or any other party. *Id.* at 44a. The District Court thoroughly reviewed these allegations in its April 5, 2016 Opinion and determined that no amount of discovery would provide facts to dispute the arbitrator's own words that the altered email had no impact on his decision. Petitioner's Appendix H, at 44a.

As a result, the District Court granted summary judgment in favor of Respondents and dismissed

Petitioner's claims for fraudulent concealment. The Third Circuit subsequently affirmed that dismissal with prejudice.

III. Petitioner's Claim for Fraud was Properly Dismissed

Petitioner asserts that the Honorable Jean McMaster, J.S.C., presiding over the underlying plenary hearing, did not recommend that the parties go to arbitration, and that Plaintiff never would have agreed to arbitration had he known Judge McMaster did not recommend it. *See* Petitioner's Petition, at 25-29. Petitioner claims Respondents fabricated Judge McMaster's recommendation in order to drum up their legal fees. *See id.*

The five elements of common law fraud are: (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 599, 691 A.2d 350, 367 (1997).

Petitioner has failed to offer competent evidence that any of the five necessary prongs for a claim of fraud exists in this matter. The District Court agreed that Petitioner failed to proffer the necessary proofs in this regard and stated:

Fink's proofs in this regard are threadbare. The two attorneys involved in the state court action to enforce Fink's purported settlement

agreement with ALSI – Kirchner and ALSI’s counsel – both testified that the state court judge recommended arbitration instead of continuing the state court action.

[See Petitioner’s Appendix F, at 30a-32a, footnote 7.]

Because Petitioner’s sole evidence in support of his claim for fraud is his own self-serving testimony, which is contradicted by the testimony of adversary counsel in the underlying matter, the District Court properly granted Respondents’ motion for summary judgment to dismiss the Petitioner’s claim of fraud. Once again, the Third Circuit correctly affirmed that dismissal with prejudice.

CONCLUSION

For the foregoing reasons, there is no basis on which to grant Petitioner’s Writ of Certiorari, and, accordingly, this Court should deny same.

Respectfully submitted,

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