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IN THE SUPREME COURT OF PENNSYLVANIA

DR. AHLAM KHALIL,

Appellant,

v.

GERALD J. WILLIAMS, ESQUIRE; BETH COLE, ESQUIRE; and WILLIAM CUKER BEREZOFSKY, LLC

Appellees.

24 EAP 2021

BRIEF FOR APPELLANT

Appeal from the January 5, 2021 Order of the Superior Court in *Khalil v. Williams,* 244 A.3d 830 (Pa. Super. 2019), *affirming in part and reversing in part,* *Khalil v. Williams,* Phila. C.C.P. May Term 2013 No. 00825

Virginia Hinrichs McMichael (#40031)
APPELLATE LAW GROUP LLC
150 N. Radnor Chester Rd., Suite F-200
Radnor, PA 19087
(610) 977-2096; (610) 230-6201
vmcmichael@appellatelawpa.com
Attorney for the Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Cases **Page**

Statutes **Page**

Rules

Other Authorities **Page**

I. STATEMENT OF JURISDICTION

This appeal is from a final order of the Superior Court of Pennsylvania affirming in part and reversing in part an order of the Philadelphia Court of Common Pleas granting summary judgment for defendants/appellees. (R. 309a; Ex. A.) The Superior Court remanded to the trial court and relinquished jurisdiction. (Ex. B.) Appellant timely petitioned for allowance of appeal, which was granted on August 3, 2021.

The Supreme Court of Pennsylvania has appellate jurisdiction under 42 Pa. Cons. Stat. § 724(a) and Pa.R.A.P. 1112.

II. ORDERS IN QUESTION

A. Trial Court Order

> AND NOW, this 11th day of July, 2019, upon consideration of Defendants' Motion for Summary Judgment and any opposition filed thereto, it is hereby ORDERED and DECREED as follows:
>
> A. The non-fraud claims in Counts I through IV of Plaintiff's Complaint are barred by the Muhammad doctrine.
>
> B. Plaintiff's fraud claims in Count V are estopped, having previously been adjudicated.
>
> It is FURTHER ORDERED that said Motion is GRANTED and that Plaintiff's Complaint is hereby DISMISSED WITH PREJUDICE.

(R. 309a.

B. Superior Court Order

> Accordingly, we affirm the trial court's grant of summary judgment and dismissal with prejudice of counts one through four of Appellant's complaint. We reverse, however, the trial court's dismissal of Appellant claim of fraudulent misrepresentation at count five.
>
> Order affirmed in part and reversed in part. Case remanded. Jurisdiction relinquished.
>
> Judgment entered.

(Ex. B at 28.)

III. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

In reviewing a grant of summary judgment, this Court's standard of review is de novo and the scope of review is plenary. *Bourgeois v. Snow Time, Inc.,* 242 A.3d 637, 649 (Pa. 2020).

"A trial court should grant summary judgment only in cases where the record contains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* at 649-50. "The moving party has the burden to demonstrate the absence of any issue of material fact, and the trial court must evaluate all the facts and make reasonable inferences in a light most favorable to the non-moving party. The trial court is further required to resolve any doubts as to the existence of a genuine issue of material fact against the moving party and may grant summary judgment only where the

right to such judgment is clear and free from doubt." *Id.* at 650 (citations omitted).

The summary judgment standard "clearly includes all expert testimony and reports submitted by the non-moving party or provided during discovery; and, so long as the conclusions contained within those reports are sufficiently supported, the trial judge cannot sua sponte assail them in an order and opinion granting summary judgment." *Id.* (citing *Summers v. Certainteed Corp.,* 606 Pa. 294, 997 A.3d 1152, 1159, 1161 (2010)).

A trial court's order will be reversed where the court committed an error of law or abused its discretion. *Bourgeois,* 242 A.3d at 650.

IV. STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Superior Court misconstrue the averments in Petitioner's complaint and err as a matter of law when it held that Petitioner's legal malpractice claims were barred by *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick,* 526 Pa. 541, 587 A.2d 1346 (1991)?

The Superior Court disagreed.

2. Should the Court overturn *Muhammad v. Strassberger,* which bars legal malpractice suits following the settlement of a lawsuit absent an allegation of fraud?

The Superior Court did not address the question.

V. STATEMENT OF THE CASE

A. Statement of the Form of the Action and Brief Procedural History

This action for legal malpractice, negligence, breach of contract, negligent misrepresentation, and fraud arises from legal advice given to plaintiff/appellant, Dr. Ahlam Khalil, by defendants/appellees Gerald Williams, Beth Cole, and the law firm Williams Cuker Berezofsky, LLC ("the Lawyers"). (R. 111a-127a.)

The gravamen of this dispute is Dr. Khalil's claim that the Lawyers were negligent in negotiating a release in *Khalil v. Diegidio*[1] ("the Travelers Release") and misrepresenting its effect on Dr. Khalil's claims in another action, *Pier 3 v. Khalil.*[2] (R. 114a at ¶¶ 15-21; 117a at ¶ 39, 119a at ¶ 45.)

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[1] *Khalil v. Diegidio,* Phila C.C.P. May Term 2008, No. 03145, 2013 Phila. Ct. Com. Pl. LEXIS 115 (April 24, 2013), *app. dismissed*, 102 A.3d 527 (Pa. Super. April 10, 2014), *app. denied,* 627 Pa. 759, 99 A.3d 926 (Pa. Sept. 17, 2014).

[2] *Pier 3 Condominium Ass'n. v. Khalil,* Phila. C.C.P. July Term 2009, No. 01819, *aff'd,* 15 CD 2013 (Commw. Ct. July 9, 2015).

Dr. Khalil was injured when Travelers Indemnity used the Release to obtain a dismissal of all her claims and counterclaims in *Pier 3.* (R. 119a at ¶ 46; 483a, 544a.)[3]

Dr. Khalil's complaint asserts five counts: Count I – Legal Malpractice (Negligence); Count II – Legal Malpractice (Breach of Contract); Count III – Negligent Misrepresentation; Count IV – Breach of Contract (April 2, 2010 agreement); Count IV – Breach of Contract (May 20, 2011 agreement); and Count V – Fraudulent Misrepresentation. (R. 111a -127a.)

The Lawyers moved for summary judgment, which Dr. Khalil opposed. (R. 186a-308a.) Attached to her briefs in opposition to summary judgment were emails, depositions, and trial testimony showing that the Lawyers negotiated an overly broad general release and erroneously advised Dr. Khalil that the release they negotiated with Travelers Property Casualty Company of America, and recommended she sign as part of the *Diegidio* settlement, would not adversely affect her claims or defenses in *Pier 3.* Dr. Khalil also submitted certificates of merit supporting her malpractice claims against the Lawyers and three expert reports concluding that their actions

[3] Appellant's Reproduced Record is in two volumes with consecutively numbered pages. Volume I includes filings and discovery in this case and ends at page 313. Volume II begins at page 314 and includes relevant portions of the records in *Diegidio* and *Pier 3*.

rose to the level of attorney malpractice. (R. 128a, 129a, 130a, 143a, 148a, 172a, 177a.)

The trial court granted summary judgment in favor of the Lawyers on all of Dr. Khalil's claims. (R. 309a; Ex. A.) Dr. Khalil filed a timely notice of appeal and Rule 1925(b) concise statement of errors. (R. 310a.)

After briefing and oral argument, the Superior Court affirmed in part and reversed in part, remanded to the trial court, and relinquished jurisdiction. (Ex. B.)

Dr. Khalil filed a petition for allowance of appeal, which this Court granted on August 3, 2021.

B. Statement of Prior Determinations

- *Khalil v. Williams,* Phila. C.C.P., May Term 2013, No. 00825 (Mar. 20, 2020), *aff'd in part, rev'd in part,* 244 A.3d 830 (Pa. Super. Jan. 5, 2021), *app. granted,* 2021 Pa. LEXIS 3311 (Pa. Aug. 3, 2021).

The following are related cases:

- *Khalil v. Cole,* Phila. C.C.P. March Term 2019, No. 01911, *aff'd,* 2020 Pa. Super. 242 (Oct. 2, 2020).

- *Khalil v. Diegidio,* 2013 Phila. Ct. Com. Pl. LEXIS 115 (Apr. 24, 2013), *app. dismissed,* 102 A.3d 527 (Pa. Super. April 10, 2014), *app. denied,* 627 Pa. 759, 99 A.3d 926 (Pa. Sept. 17, 2014).

- *Pier 3 Condo. Ass'n. v. Khalil,* Phila. C.C.P., July Term 2009, No. 01819, *aff'd,* 118 A.3d 495 (Pa. Commw. July 9, 2015).
- *Pier 3 Condo. Ass'n. v. Khalil,* Phila. C.C.P. July Term 2016, No. 02048.
- *Pier 3 Condo. Ass'n. v. Khalil,* 208 A.3d 207 (Pa. Commw. April 5, 2019).
- *Khalil v. Traveler's Indem. Co. of Am.,* 2017 Phila. Ct. Com. Pl. LEXIS 202 (June 29, 2017), *rev'd and remanded*, 183 A.3d 1099 (Pa. Super. Jan. 31, 2018), *dismissed,* Phila. C.C.P. April Term, 2014 No. 01925 (Mar. 20, 2020), *app. pending,* 1482 EDA 2019 (Pa. Super.)
- *Khalil v. State Farm Fire and Casualty Co.,* Phila. C.C.P. Aug. Term 2012, No. 02414.

C. Names of the Judges Whose Determinations Are Under Review

The Honorable Angelo Foglietta of the Philadelphia Court of Common Pleas issued the summary judgment order under review. (R. 611a.)

The Superior Court panel consisted of Judges Kunselman, Nichols, and Pellegrini. (Ex. B.) Judge Pellegrini was the author of the Superior Court opinion.

D. Chronological Statement of Facts

1. The 2007 flood

Dr. Khalil is an obstetrician-gynecologist who has owned a condominium in the Pier 3 Condominium building in Philadelphia since 1994. (R. 111a at ¶ 1; 173a.) In May 2007, water entered from above Dr. Khalil's unit and caused extensive damage to her property. (R. 112a at ¶ 9, 406a at ¶ 11.) The water seriously damaged Dr. Khalil's condominium, furnishings, and personal property. (R. 112a at ¶ 9.) Mold grew throughout Dr. Khalil's home and in the walls between her condominium, the common areas, and common elements. (R. 112a at ¶ 9.)

Along with the property damage, Dr. Khalil suffered adverse health effects from the mold. (R. 112a ¶ 9.) In May 2007, the Philadelphia Fire Department declared the property dangerous and uninhabitable, and Dr. Khalil was forced to leave her home. Although Dr. Khalil has been unable to live there for the past fourteen years, she nevertheless remains obligated to pay the mortgage, taxes, condo fees, and insurance. (R. 122a at ¶ 60.)

The condominium directly above Dr. Khalil's unit is owned by Jason and Anne Marie Diegidio ("the Diegidios"). (R. 406a at ¶10.) At the time of the flood, Mr. Diegidio was President of the Pier 3 Condominium Association ("Pier 3"). (R. 598a at ¶ 8.) Wentworth Property Management Co.

("Wentworth"), currently known as First Service Residential, was the property manager for Pier 3. (R. 598 at ¶¶ 12-19.)

Although her home remained uninhabitable, Dr. Khalil continued to pay condominium assessments and fees for many months. In July 2008, after Wentworth refused to repair the water damage, Dr. Khalil advised Wentworth that she would stop paying condo fees until the necessary repairs were made. Nevertheless, no repairs were made.

2. The Travelers and State Farm Insurance Policies

As an original homeowner at Pier 3, Dr. Khalil was insured for damage to her condominium under Pier 3's Master Policy with Travelers Property Casualty Company of America ("Travelers") that covered "the building structure, common areas and building components" within the individual condominium units. (R.60a, 62a, 112a at ¶10; 178a, 407a at ¶15, 704a-705a.) Under the Master Policy, Travelers was responsible for the common areas, and for the repair and/or replacement of structures within Dr. Khalil's condominium. (R. 112a at ¶ 10.)

To supplement her insurance coverage under the Travelers Master Policy, Dr. Khalil had a homeowners' insurance policy issued by State Farm Fire and Casualty Company ("State Farm"). (R. 60a, 406a at ¶14.) The

State Farm policy covered damage to Dr. Khalil's unit in excess of the coverage provided by the Master Policy. (R. 60a; 407a at ¶ 18.)

The State Farm policy also covered damage to Dr. Khalil's personal property, reasonable living expenses, and liability for damage to property to others. (R. 60a, 412a at ¶46.) Dr. Khalil's coverage was confirmed in a letter State Farm sent to Pier 3 stating that the State Farm was an excess policy, and that Travelers was Dr. Khalil's primary insurer for homeowner claims. (R. 60a, 411 at ¶36.)

The Diegidios were insured by Standard Fire Insurance Co. (Standard Fire), a Travelers subsidiary. (Ex. B at 3.)

3. Dr. Khalil commences *Khalil v. Diegidio*

In 2008, after Dr. Khalil's efforts to obtain compensation for the damage to her condominium were unsuccessful, Dr. Khalil filed an action in the Philadelphia Court of Common Pleas captioned *Khalil v. Diegidio*, Phila C.C.P. May Term 2008, No. 3145 ("*Diegidio*"). (R. 322a, 404a.) The complaint asserted breach of contract and bad faith claims against State Farm and Travelers (and its affiliates), and a negligence claim against the Diegidios.[4] (R. 322a, 404a-416a.)

[4] The defendants in Diegidio were the Diegidios, State Farm, Travelers Property Casualty Company, Travelers Property Casualty Company of America, and Travelers Indemnity Company of America.

Attached to the complaint were invoices showing hundreds of thousands of dollars of necessary repairs, including remediation for the mold. The *Diegidio* complaint did not assert any claims against Pier 3 or Wentworth. (R. 404a-416a.)

4. Pier 3 sues Dr. Khalil for unpaid condominium fees and Dr. Khalil files counterclaims and a joinder complaint.

After the flood forced Dr. Khalil to vacate her apartment, she stopped paying condominium fees. In July 2009, while *Diegidio* was pending, Pier 3 sued Dr. Khalil for payment of outstanding condo fees. *Pier 3 Condo. Ass'n. v. Khalil,* Phila. C.C.P., July Term 2009, No. 01819 ("*Pier 3*"). (R. 507a.) Dr. Khalil retained Harper J. Dimmerman, Esquire to represent her in *Pier 3.* (R. 507a).

Dr. Khalil filed an answer and counterclaims against Pier 3 alleging that it failed to maintain and remedy damages to the common elements area. (R. 579a.)[5]

[5] Dr. Khalil asserted counterclaims against Pier 3 for Assumpsit (Count I), Negligence (Count II), Violation of the Uniform Condominium Act (Count III), Violation of Section 364 of the Restatement (Second) of Torts (Count IV), Nuisance (Count V), Violation of Section 328(d) of the Restatement (Second) of Torts (Count VI), Breach of the Implied Covenant of Good Faith and Fair Dealing (Count VII), and Unjust Enrichment/Quantum Meruit (Count VIII.) (R. 579a-595a.)

Dr. Khalil also filed a joinder complaint against Mr. Diegidio alleging that, as President of the Pier 3 Condo Board, he exerted undue influence to ensure that Dr. Khalil's home was not repaired, and that she not receive compensation for her property damage and other injuries. (R.596a; 598a at ¶11.) The complaint further alleged that Wentworth failed to maintain the common elements and repair the damage to her unit. (R. 598a-599a at ¶¶ 12-19.)

Travelers Indemnity Company, the liability insurer of Pier 3 and Wentworth, retained counsel to defend both Pier 3 and Wentworth on the counterclaims and joinder complaint.

5. The Lawyers represent Dr. Khalil in settlement negotiations in *Diegidio.*

In early April 2010, while both *Diegidio* and *Pier 3* were pending in the trial court, Dr. Khalil engaged the Lawyers to represent her in *Diegidio.* (R. 57a; 112a at ¶ 7, 123a at ¶ 63.) Although the Lawyers were not initially retained to represent Dr. Khalil in *Pier 3,* they were familiar with the case and with the counterclaims, joinder claims, and defenses Dr. Khalil had asserted against Pier 3 and Wentworth. (R. 114a ¶ 19.)

In May 2011, *Diegidio* was scheduled for trial in Philadelphia. The parties started settlement negotiations at the end of April. (R. 64a, 65a).

On April 29, Dr. Khalil's attorney, Beth Cole (one of the Lawyers), conveyed to Travelers a "global settlement demand" of $367,000 to settle "any and all claims against all parties now and in the future." (R. 66a.) Travelers rejected the settlement demand.

Discussions followed about the parties entering into a settlement limited to the cost of repairing the ductwork around Dr. Khalil's unit. (R. 65a.) Dr. Khalil wanted to be sure that a partial settlement with Travelers for the ductwork repairs would not adversely affect her claims and counterclaims against Pier 3 and Wentworth in *Pier 3* because the Lawyers had advised her that she would recover the rest of her damages in *Pier 3*. (R. 114a at ¶¶ 17-19.)

On April 29, Dr. Khalil emailed Ms. Cole: "As per our conversation today I would like to clarify THAT DEFINITELY I AM WILLING TO ACCEPT THE 15,000 CHECK FROM TRAVELER BUT I CANNOT ACCEPT THIS 15,000 TO RELEASE TRAVELER FROM ALL THEIR LIABILITIES." (R. 64a.) Defendant Cole wrote Dr. Khalil a letter memorializing her refusal to accept the settlement offer, which she required Dr. Khalil to sign and return. (R. 65.)

Dr. Khalil told the Lawyers that she was concerned that a settlement with Travelers could adversely affect her joinder claims and counterclaims in

Pier 3. (R. 114a at ¶¶ 17-19). Dr. Khalil sought confirmation from the Lawyers that a settlement with Travelers of her claims for the ductwork repairs would not adversely affect her claims and defenses in the other litigation. (R. 67a, 71a, 75a, 91a, 92a, 95a, 97a, 98a, 114a at ¶ 17-19) The Lawyers repeatedly assured her that because her claim for damage to the ductwork was covered by a different insurance policy, any settlement of the ductwork claim would not affect her claims or defenses against Pier 3, Wentworth, the joinder defendants, or Travelers in the other action. (R. 67a, 71a, 75a, 91a, 92a, 95a, 97a, 98a, 114a at ¶19, 121a at ¶ 51.)[6]

In one such communication, Dr. Khalil emailed her Lawyers to confirm her understanding that the proposed settlement with Travelers would not adversely affect her claims in *Pier 3.* (R. 66a.) They told her that it would not because "they are two separate policies, two separate cases" and they were "not dealing with" the *Pier 3* case. (R. 67a, 121 at ¶ 51.)

[6] Dr. Khalil also emailed Harper Dimmerman, her attorney in *Pier 3*, asking whether "the duct settlement" would hurt her claims for bad faith "and all the other damages…such as loss of value and rent…legal fees, and other." (R. 71a.) Dimmerman, who had communicated with Beth Cole, responded "[m]y understanding is that Travelers made an offer in the other case as to ductwork…This settlement will not impact your rights or claims in our case…" (R. 71a.)

6. The Settlement with Travelers Property and Casualty

The parties agreed to a settlement pursuant to which Travelers would pay Dr. Khalil $17,500 to cover the cost of repairing the ductwork. (R. 68a-70a, 113a at ¶ 14.) Dr. Khalil agreed to the settlement after repeated assurances by the Lawyers that the settlement with Travelers was limited to claims relating to ductwork and would not affect her other claims. (R. 67a, 71a, 75a, 91a, 92a, 95a, 97a, 98a, 113a at ¶ 14, 121a at ¶ 51.) Dr. Khalil's claims against the other defendants (State Farm and Jason Diegidio) would go to trial. (R. 69a.)

The next day, Beth Cole confirmed the basic terms of the settlement in an email to Monica O'Neill, counsel for Travelers. (R. 68a.) Ms. O'Neill emailed Marguerite Green, Community Manager for Pier 3, and advised her that Dr. Khalil's claims against Travelers were resolved but that the claims against the other defendants (State Farm and Jason Diegidio) would go to trial. (R. 69a-70a.)

A few days later, Ms. O'Neill explained the settlement in another email to Ms. Green: "This settlement with Travelers involved the "duct" issue that I discussed with you. The Plaintiff had provided an invoice that supported her claim that (when the estimate was prepared) the cost to repair the duct system would be $15,000. This aspect of her claim was resolved for

$17,500. We are currently in the process of working out the wording of the Release. The balance of the case, which involves the plaintiff's claims against State Farm and against Jason Diegidio, is currently on trial." (R.99a.)

7. The Travelers Release

Just before jury selection in *Diegidio*, Monica O'Neill, counsel for Travelers Property, emailed Dr. Khalil's lawyer, Beth Cole, asking about the status of the Release. (R. 73a.) When Ms. Cole responded that she was in court but would do her best to get a release signed, the Travelers' lawyer stressed the importance of getting a quick resolution: "I have been DIRECTED by my client to get the signed release TODAY! They have also proposed that I march into court and demand that your client put on the court record the terms of this settlement agreement." (R. 74a.) There followed a flurry of emails between Dr. Khalil's lawyer, Beth Cole, and Travelers' attorney Monica O'Neill, about the Release language, with multiple drafts exchanged. (R. 73a-81a, 86a.)

Dr. Khalil told the Lawyers that she wanted to be sure that a release of Travelers would not adversely affect her claims and defenses in *Pier 3.* (R. 114a ¶ 17-19.) She therefore insisted that they include language in the Travelers Release clarifying that the parties did not intend for the Travelers Release to release her claims in *Pier 3*. (R. 114a ¶ 17.)

In response to Dr. Khalil's concerns, Ms. Cole emailed Ms. O'Neill and asked that she include language in the Travelers Release to clarify that it was not the parties' intent to release all of Dr. Khalil's claims against Travelers: "Monica – I would like to add a sentence that the release does not cover any claims in connection with the Pier 3 v. Khalil caption – please let me know if that is agreeable." (R. 75a.)

Ms. O'Neill responded: "The client is reluctant to make any reference to the other litigation since they are not involved in it. I have eliminated Pier 3 as a Releasee (since they are not a party in this matter) and have just added an informational sentence about their role as an insured. Let me know if this is acceptable." (R. 77a.)

The next day, the Travelers' lawyer sent Dr. Khalil's lawyer another version of the Release. Titled "General Release," it identified Dr. Khalil as "Releasor." (R. 86a.) It defined the "Releasee" as "TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, incorrectly identified as Travelers Property Casualty Company and Travelers Indemnity Company of America." (R. 86a.) That version of the release included broad general release language and stated at the end of the first paragraph: "It is acknowledged that the Releasee's insured in the applicable policy of insurance is Pier 3 condominium." (R. 86a.)

Dr. Khalil eventually signed a version of the Travelers Release that she believed contained language that carved out Dr. Khalil's claims against Travelers, Wentworth, and Pier 3 in the pending *Pier 3* Case. (R. 84a, 114a at ¶ 21, 31, 32.) She was therefore surprised when Travelers later produced a signed release that not only did not include the language carving out her other claims against Travelers, but also included language stating "the Releasee's insured ….is Pier 3 condominium." (R. 86a-87a, 116a at ¶31, 32.)

8. The Lawyers advise Dr. Khalil that the Travelers Release will not adversely affect her claims in *Pier 3*.

Before trial, Dr. Khalil stipulated to terms to settle her remaining claims with State Farm and the Diegidios. (R. 417a-420a.) As part of the settlement, one of the Lawyers, Gerald Williams, agreed that his firm would reduce its fees to cover up to three months of storage of her personal property and represent her at no cost in *Pier 3*. (R. 115a at ¶ 22, 119a at ¶ 45, 120a at ¶50, 418a.) In reliance on her Lawyers' promises and their assurances that her claims in *Pier 3* were protected, Dr. Khalil agreed to settle her remaining claims in *Diegidio.* (R. 115a at ¶ 23, 121a at ¶ 57.)

On August 17, 2011, Dr. Khalil and the Lawyers attended a settlement conference in *Pier 3*. (R. 115a at ¶ 25.) During the conference, Pier 3's

attorney told the court that Dr. Khalil had settled her claims. (R. 115a at ¶ 26.) Dr. Khalil was shocked to learn of a purported settlement and asked her Lawyers for an explanation. They assured her that her claims in *Pier 3* remained viable. (R. 115a at ¶27.) Dr. Khalil relied on her Lawyer's statements because at the time she did not have a copy of the executed Travelers Release.

After the settlement conference, Dr. Khalil emailed defendant Cole and asked for a copy of the releases. (R. 89a.) Ms. Cole's assistant sent her three *unsigned* releases—the version of the Travelers Release with language highlighted with an asterisk carving out her Pier 3 claims, along with the unsigned Diegidio and State Farm releases. (R. 90a.)

Despite Dr. Khalil's concerns, the Lawyers continued to tell Dr. Khalil not to worry because the Travelers Release she signed would not adversely affect her claims in *Pier 3.* (R. 115 at ¶ 27.) On August 23, 2011, Mr. Williams emailed Dr. Khalil about finalizing the *Diegidio* settlements, again stating that the settlements in *Diegidio* would not impair Dr. Khalil's claims and defenses in *Pier 3*. (R. 91a, 92a.)

The next day, Mr. Williams emailed Dr. Khalil again, telling her that all her rights in *Pier 3* were preserved, and that nothing in the Travelers Release would affect her claims and defenses in *Pier 3*:

> You already know our position very well. *All of your legally available rights in the Pier 3 case ARE preserved,* and nothing in the releases affects them. You've been told this multiple times. It's also clear from the releases themselves, and any lawyer who reviews them will, I'm sure, be able to confirm this. *No sentences need or should be added to the releases.* You have to decide whether to sign, or ultimately, be forced to by the defendants, or receive nothing. These are your alternatives. We are proceeding to withdraw as your counsel, inasmuch as you refuse our advice. If you want to stop the process, please make arrangements to come in and sign the settlement papers.

(R. 93a; emphasis added).

Despite the Lawyers' agreement that they would represent Dr. Khalil in the Pier 3 case pro bono, on August 25, 2011, Beth Cole withdrew her representation of Dr. Khalil in Pier 3. (R. 115a at ¶ 28; 536a.) Dr. Khalil had to expend additional funds to obtain a new attorney to represent her in *Pier 3*. (R. 115a at ¶ 29.)

9. The Lawyers tell the trial court that the Travelers Release will not adversely affect Dr. Khalil's claims in Pier 3.

In September 2011, at a hearing in the trial court to address Dr. Khalil's refusal to endorse the Travelers settlement check, Gerald Williams told the court that he and his client, Dr. Khalil, had a "misunderstanding" about the scope of the Travelers Release:

> MR WILLIAMS: And the third issue is, I think, a misunderstanding. It has to do with the release of Travelers. Travelers issued policies that covered different aspects of the

disputes between Dr. Khalil and various parties including Travelers itself.

****

Travelers issued a couple different policies. One involved the common area of the condominium at Pier 3. And it was a claim in this case that Travelers delayed repairs to those common areas which caused delays in the repair of Dr. Khalil's unit.

THE COURT: Okay.

MR. WILLIAMS: And, therefore, Travelers was originally made a party in this case by original counsel. We settled that claim. A release was issued for $17,500. A release was tendered, signed by the plaintiff, and a check has been issued.

However, Dr. Khalil is concerned that the release of Travelers will have an effect on her counterclaim against Pier 3, in that lawsuit.

THE COURT: Dr. Khalil is but plaintiff's counsel is not; is that what I'm hearing?

MR. WILLIAMS: You are hearing that correctly, Your honor.

THE COURT: So, what law school did Dr. Khalil go to? I missed that part.

MR. WILLIAMS: Your Honor, yes. I don't know. We have – again, in the interest of candor*, we have advised Dr. Khalil that the two claims with Travelers are unrelated and that a release has been signed for Travelers.* This is part of or difficult situation vis-à-vis our client, because we don't want to abandon her or act contrary to her interests. But the fact is, that is what we have advised her.

(R. 429a-432a, emphasis added.)

Later in the hearing, Mr. Williams and Mr. Bracaglia (counsel for the Diegidios) told the court that the release of Mr. Diegidio only released him in his individual capacity; it did not release the claims against him in his capacity as an officer of the Pier 3 Condominium Board:

> THE COURT: But now, let me just ask and I don't know. Sometime people do sign these very overly broad general release that compromises future actions in other cases. So first let me ask Mr. Bracaglia, then I have to ask Mr. Williams, is that what happened here? …….
>
> MR. BRACAGLIA: Judge, it releases any claims brought against Jason Diegidio in his individual capacity as we agreed before the Court. It did not release Dr. Khalil's claims against the condominium association as we agreed before the Court.
>
> THE COURT: Now, Mr. Williams, is that your understanding?
>
> MR. WILLIAMS: Yes. Yes. Your Honor. That is accurate. And what Dr. Khalil said is also accurate.

(R. 452a-453a.)[7]

Dr. Khalil testified that she had consulted with other counsel and was concerned that the proposed releases of State Farm and Diegidio were too broad and would adversely affect her claims in *Pier 3.* (R. 442a-443a.) She

[7] Despite the parties' understanding that the release of Mr. Diegidio was limited to the claims against him in his individual capacity, five days after Attorney Cole entered her appearance as counsel for Dr. Khalil in *Pier 3*, she stipulated to dismiss with prejudice *all* of Dr. Khalil's claims against Mr. Diegidio. (R. 115a at ¶ 28, 534a, 535a.)

told the court that she did not want the settlements to be paid until the parties resolved the issue of the broad release language. (R. 504a.)

The court advised counsel to review the signed Travelers Release and the proposed releases of Diegidio and State Farm to be sure that they did not release Dr. Khalil's claims against Pier 3 so they could be used as a defense in the future. (R. 469a-471.)[8] At Dr. Khalil's insistence, the trial court entered an order directing that the funds be put into an escrow account held by the court. (R. 477a, 94a.) Those funds remain in escrow.

In May 2012, at a hearing in *Pier 3*, Travelers stated that they planned to seek a dismissal of Dr. Khalil's counterclaim based on the language of the Travelers Release. (R. 98a.) Dr. Khalil (who was pro se at the time) wrote a letter to the court asking that the settlement be vacated or set aside. (R. 485a.)

The trial judge responded with a letter to all parties and their counsel in both *Diegidio* and *Pier 3* advising them that she had filed a copy of the Hearing Transcript of the September 30, 2011 hearing on the dockets of both *Diegidio* and *Pier 3*. (R. 487a.)

[8] There is no evidence in the record that the Lawyers ever complied with the trial court's direction that they review and reconsider the release language. But Williams admitted in an email to Dr. Khalil that "the State Farm release should be amended to allow additional claims." (R. 97a.) Williams never amended the State Farm release, an omission that caused Dr. Khalil damages. (R. 117a at ¶36.)

10. Travelers Indemnity's attorneys use the Travelers Release to obtain a dismissal of all of Dr. Khalil's claims and counterclaims in Pier 3.

At pretrial conference in *Pier 3*, the attorneys for Pier 3 and Wentworth that were hired by Travelers Indemnity stated that they intended to seek a dismissal of Dr. Khalil's counterclaim based on the language of the Travelers Release. (R. 98a.)

To defend against Pier 3 and Wentworth's use of the Travelers Release in *Pier 3*, Dr. Khalil asked the Lawyers to help her explain to the court the limited scope of the Travelers Release. (R. 98a, 102a, 104a, 105a.) In response, Beth Cole emailed Mr. Dimmerman, Dr. Khalil's lawyer in *Pier 3,* and confirmed that there were two different policies and that "the settlement with Travelers was for the duct work." (R. 103a, 105a.) Despite several requests, Ms. Cole did not provide Dr. Khalil's trial counsel with copies of the two different insurance policies at issue. (R. 98a, 101a.) Nor did she respond to requests that she sign an affidavit or appear on behalf of Dr. Khalil in *Pier 3.* (R. 104a.)

Just as Dr. Khalil feared, Pier 3 and Wentworth submitted the Travelers Release to the *Pier 3* court to support a summary judgment motion based on the language of the Travelers Release. (R. 116a at ¶ 32, 483a, 544a, 624.) Dr. Khalil's counsel argued that the Travelers Release should not be

construed to release Pier 3 and Wentworth because the two cases involved different insurance policies. (R. 612a.)

The trial court rejected Dr. Khalil's argument, noting that the Travelers Release was a general release that "means what it says" and "you can't use parole evidence to the try to upright or change what a document actually says" (R. 613a.) The trial court relied on the language of the Travelers Release to dismiss all of Dr. Khalil's counterclaims, joinder claims, and affirmative defenses against Pier 3 and Wentworth.[9]

The case proceeded to a jury trial. The jury returned a verdict for Pier 3 and against Dr. Khalil for $109,000. (R. 543a.) The court denied Dr. Khalil's post-trial motions and judgment was entered. (R. 544a.)

Dr. Khalil appealed to the Commonwealth Court. The Commonwealth Court held that under the "four corners doctrine," the release language was unambiguous and affirmed the trial court. (R. 636a.) The opinion did not address any claims or issues about the Lawyers' conduct. (R. 636a-657a.)

[9] The trial court's Rule 1925(b) opinion in *Pier 3* defined the narrow scope of the court's decision: "[N]either the validity of the release nor the circumstances in which the release was signed were issues before this Court. Therefore, the only issue before this Court, with regards to the release, was to determine whether the language of the release released both Pier 3 and Wentworth." (R. 628a.)

While the appeal was pending in the Commonwealth Court, Dr. Khalil moved to vacate the *Diegidio* settlement. (R. 391a.) The trial court denied the motion to vacate on jurisdictional grounds. (R. 492a.) The court's opinion, however, excoriated the Lawyers for their actions during the settlement negotiations:

> The actions of counsel in this litigation caused prejudice to Dr. Khalil when all of her claims and counterclaims were dismissed by the Court in July Term, 2009, No. 1819 …*The settlement agreements which served as a shield for the parties in May Term, 2008 No. 3145 should not have been used as a sword in July Term, 2009, No. 1819.* Further, all parties and their counsel in the July Term, 2009 litigation had the transcripts and were aware of the actual terms and conditions of the 2011 settlement...*It may be that a new and different cause of action is appropriate and/or timely…."*

(R. 483a-484a, emphasis added.)[10]

In a Brief of Appellee that Travelers filed in the Superior Court, Travelers admitted that "the scope of the Travelers' Release was not intended to include claims made by Khalil against Pier 3 Condominium Association or Wentworth Property Management in the Pier 3 Condominium Litigation." (R. 494).

[10] Similarly, in a footnote in the *Pier 3* opinion, the judge notes that he also advised Dr. Khalil that she could bring a new action to challenge the validity of the Travelers Release. (R. 628a. n.4.)

The Superior Court quashed the appeal on the grounds that it was untimely. (R. 497a.)

11. Dr. Khalil commences this action against the Lawyers.

Dr. Khalil commenced this action on May 10, 2013. (R. 4a.) The complaint asserts legal malpractice claims for negligence, negligent misrepresentation, breach of contract, and fraud. (R. 111a-127a.)

After the close of discovery, the Lawyers moved for summary judgment. (R. 186a-221a.) In opposition to summary judgment, Dr. Khalil submitted expert reports supporting her legal malpractice claims. Samuel Stretton was one of the experts who concluded that the defendants committed attorney malpractice. (R. 172a-176a.)

Sanford F. Young, the author of two expert reports, explained that because there were numerous defendants in different lawsuits, defendants were negligent in agreeing to a general release instead of a limited release. (R. 177a-185a; 267a-276a.) In his professional opinion: "There is no question that the Defendants were negligent and that their handling of the settlement and General Release fell far below the standard of care required of them." (R. 178a.)

Dr. Khalil also submitted briefs, expert reports, emails, transcripts, and other documents supporting her malpractice claims.

12. The trial court grants summary judgment on all counts of the complaint.

The trial court granted summary judgment for the Lawyers on all of Dr. Khalil's claims, holding that Counts I through IV were barred by the *Muhammad* doctrine and that Count V was barred by collateral estoppel. (R. 309a.) Dr. Khalil filed a timely Notice of Appeal and a Rule 1925(b) Concise Statement of Errors. (R. 310a.)

A year later, the trial court issued its opinion. (Ex. A.) The opinion, which addresses Dr. Khalil's claims in two separate actions, repeatedly acknowledges that Dr. Khalil's injuries likely stem from her Lawyers' mistakes in negotiating the Travelers Release. (Ex. A at 2, 4-7, 12.)

E. Statement of the Order Under Review.

On appeal to the Superior Court, Dr. Khalil argued that her legal malpractice claims fell within the exception to *Muhammad* recognized in *McMahon v. Shea,* 657 A.2d 938 (Pa. Super. 1995) (en banc), *aff'd by an equally divided court,* 688 A.2d 1179 (Pa. 1997) and *Collas v. Garnick,* 624 A.2d 117 (Pa. Super. Ct. 1993). Both *McMahon* and *Collas* hold that *Muhammad* does not bar legal malpractice actions challenging the attorney's advice rather than the dollar amount of the settlement.

After briefing and oral argument, the Superior Court issued an order and opinion affirming in part and reversing in part the trial court's grant of

summary judgment. (Ex. B.) The Court upheld the trial court's dismissal of the counts for legal malpractice, negligent misrepresentation, and breach of contract. Although the Court acknowledged the exception to the *Muhammad* rule recognized in *McMahon* and *Collas*, it held that Dr. Khalil's complaint did not state claims falling within that exception. (Ex. B. at 17-20.)

The Court, however, reversed the trial court's dismissal of Count V, the fraud claim, holding that it was not barred by collateral estoppel. (Ex. B at 27.) The Superior Court remanded the matter to the trial court and relinquished jurisdiction. (Ex. B at 28.)

Dr. Khalil timely filed a petition for allowance of appeal, which this Court granted.

VI. SUMMARY OF THE ARGUMENT

The Superior Court erred as a matter of law when it relied on *Muhammad v. Strassburger,* 587 A.2d 1346 (Pa.1991), to affirm in part the trial court's grant of summary judgment for the Lawyers in this legal malpractice action.

The complaint alleges that the Lawyers were negligent, breached their contractual obligations, and/or committed fraud when they advised their client, Dr. Khalil, that the release they negotiated on her behalf in one case (*"Diegidio")* would not adversely affect her claims in another pending action (*"Pier 3"*). Dr. Khalil was injured when the Lawyers gave the Release to Travelers, which used it to obtain a dismissal of her claims in *Pier 3*.

Dr. Khalil's legal malpractice claims fall within the exception to *Muhammad* recognized in *Collas v. Garnick,* 624 A.2d 117 (Pa. Super. 1993), and *McMahon v. Shea,* 688 A.2d 1179 (Pa. 1997). The Superior Court misread the complaint, ignored the evidence, and erred as a matter of law when it upheld the trial court's grant of summary judgment on the grounds that Dr. Khalil's non-fraud claims were barred by *Muhammad.*

In the alternative, this Court should overrule *Muhammad*, a thirty-year-old decision that has been sharply criticized in Pennsylvania and disavowed by the highest courts in states throughout the country.

VII. ARGUMENT FOR THE APPELLANT

A. Preliminary Statement

Should Pennsylvania trial lawyers enjoy an immunity from malpractice actions not granted to other lawyers or to doctors, dentists, architects, accountants, and other professionals? Thirty years ago, this Court said "yes."

In *Muhammad v. Strassburger,* the Pennsylvania Supreme Court held that trial lawyers are immune from lawsuits challenging a negotiated settlement unless there is an allegation of fraud in the inducement. *Id.* The Court's rationale was that settlements should be encouraged; allowing "Monday-morning-quarterback suits" challenging settlements would discourage settlements, increase the number of legal malpractice cases, and generally "create chaos in our civil litigation system." 587 A.2d at 1349, 1352, n.13.

In this case, the Superior Court erred as a matter of law when it held that *Muhammad* bars Dr. Khalil's claims. In *Collas v. Garnick,* 624 A.2d 117, the Superior Court held that *Muhammad* does not bar legal malpractice claims based on the lawyer's advice rather than the dollar amount of a settlement. That exception was also recognized by an en banc Superior Court and six Justices of this Court in *McMahon v. Shea*, 657 A.2d 938.

Dr. Khalil is not challenging the dollar amount of the *Diegidio* settlement. Rather, she claims that her attorneys committed legal malpractice when they encouraged her to sign the Travelers Release and advised her that the *Diegidio* settlements would not adversely affect her claims in *Pier 3*. Dr. Khalil suffered damages when all her claims and defenses in *Pier 3* were dismissed. Dr. Khalil's claims thus fall within the well-established exception to the *Muhammad* rule recognized in *Collas* and *McMahon.*

Moreover, all of Dr. Khalil's claims were adequately pleaded in her complaint. Under the Pennsylvania Rules of Civil Procedure, "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa.R.C.P. 1019(a). A plaintiff "may state in the complaint more than one cause of action cognizable in a civil action against the same defendant." Pa.R.C.P. 1020(a). And "causes of action and defenses may be pleaded in the alternative." Pa.R.C.P. 1020(c). The Superior Court ignored those basic tenets of Pennsylvania pleading when it held that Dr. Khalil's complaint failed to state claims for legal malpractice, negligence, and breach of contract.

Muhammad has been sharply criticized. The dissenting opinion called the decision "Christmastime for Pennsylvania lawyers." *Muhammad*, 587

A.2d at 1352-53. Courts in other jurisdictions have uniformly refused to adopt the *Muhammad* rule. *See Parker v. Glasgow,* 2017 Tex. App. LEXIS 5782, at *20 (Tex. App.—Fort Worth June 22, 2017) (collecting cases).

Since 1991, there have been hundreds of opinions and law review articles discussing or citing *Muhammad*.[11] Over time, the *Muhammad* rule has metastasized beyond its original scope to be viewed as "a flat prohibition" of post-settlement legal malpractice actions. *Filbin v. Fitzgerald,* 211 Cal. App. 4th 154, 149 Cal. Rptr. 3d 422, 433 (2012). This case is an opportunity for the Court to address the continued viability of *Muhammad* and provide much-needed guidance to Pennsylvania's trial and appellate court judges.

It is sometimes said that doctors bury their mistakes. But if a doctor makes a mistake and the patient dies, the patient's estate or family can assert a malpractice claim. By comparison, if a trial lawyer makes a mistake and then settles the case, the client has no recourse unless they can prove fraud in the inducement. *Muhammad* effectively creates a zone of protection, forever shielding the lawyer from any malpractice action.

[11] *See, e.g.,* Lynn A. Epstein, *Post-Settlement Malpractice: Undoing the Done Deal,* 46 Cath. U.L. Rev. 453 (1997) (analyzing Muhammad).

Thirty years ago, *Muhammad* slammed shut the courthouse doors to post-settlement legal malpractice claims. This Court should reopen the doors to Pennsylvania's courthouses and allow legal malpractice claims after settlement. Overturning *Muhammad* will not open the floodgates to runaway legal malpractice litigation. It will merely put Pennsylvania trial lawyers on the same footing as other lawyers and professionals—and hold them to the same standards of competence as trial lawyers in the other forty-nine states.

B. The Superior Court misconstrued the averments in the complaint and erred as a matter of law when it held that Appellant's legal malpractice claims were barred by *Muhammad v. Strassburger*.

Dr. Khalil argued to the Superior Court that because Dr. Khalil was challenging her attorneys' legal advice and not the dollar amount of the *Diegidio* settlement, her malpractice claims fell within the exception to *Muhammad* recognized in *Collas*, 624 A.2d 117, and *McMahon,* 688 A.2d 1179.

The Superior Court agreed in part with Appellant's legal argument: "[w]e agree with Appellant that *Collas* and *McMahon* are good law and *Muhammad* did not establish a blanket rule barring any non-fraud claim against a former attorney where the prior matter led to settlement." (Ex. B at 17.) The Court nevertheless concluded: "[t]hat said, if *Collas* and *McMahon*

carve out an exception to *Muhammad*, Appellant did not plead facts in her complaint that fit within that exception." (Ex. B at 18.)

To support its conclusion, the Superior Court cherry-picked paragraphs from the complaint that address Dr. Khalil's fraud claims, specifically, the allegations that the Lawyers switched the release. (Ex. B at 18-19.) The Court relied on those passages to conclude that "Appellant is not alleging that it is her attorneys' negligence that caused her damages; instead, she is alleging that her damages—dismissal of her claims in a separate case—were caused by fraud." (Ex. B at 19.) The Court cited no authority to support its legal conclusion but relied solely on its narrow reading of the complaint to uphold the dismissal of all the complaint's non-fraud claims. (Ex. B at 20.)

The Superior Court's conclusion was an error of law. The complaint alleges, and the record supports, that Dr. Khalil's claims in *Pier 3* would not have been dismissed *but for* the broad general release language. (R. 116a at ¶ 34.) The Lawyers' negligence was the proximate cause of Dr. Khalil's damages.

Moreover, as the trial court recognized, it was the Lawyers' duty to make sure that the Travelers Release reflected the parties' intent. (Ex. A at 2, 4-5, 6, 7, 12.) Allegations that the Lawyers also defrauded Dr. Khalil by

switching the releases do not negate her claim that she was a victim of their negligence.

The Court also misconstrued the record when it concluded that "Appellant had second thoughts about the settlements, refusing to sign releases for the Diegidios and State Farm or accept payment from any of the defendants." (Ex. B at 4.) To the contrary, the record reveals that although Dr. Khalil remained willing to agree to the stipulated settlements with Travelers, the Diegidios, and State Farm, she never agreed to sign broad general releases as part of those settlements. (R. 64a, 114a at ¶ 17-18; R. 468 at lines 19-25, 469 at lines 1-14.) Indeed, both the Lawyers and Travelers have admitted that the *Diegidio* settlements were never intended to release Dr. Khalil's claims in *Pier 3.* (R. 75a, 103a, 470a at ¶¶ 11-15; 494a.) Dr. Khalil did not change her mind about the settlements—she was just insisting that the release language be changed to reflect the settlement agreements, something her Lawyers refused to do.

The Superior Court misread the complaint and erred as a matter of law when it held that the complaint only states a claim for fraud and that Dr. Khalil's non-fraud claims were barred by *Muhammad.* This Court should reverse and remand for trial.

1. The Muhammad rule bars post-settlement legal malpractice actions except where the plaintiff alleges fraud in the inducement.

Muhammad v. Strassburger began as a medical malpractice action arising out of a surgery that caused the death of the plaintiffs' infant son. 587 A.2d at 1347. At a pretrial conference, the parents agreed to accept $26,500 to settle their claims. *Id.* The parents later became dissatisfied with the settlement amount. After a hearing, the trial court upheld the settlement. *Id.* at 1348. The parents retained new counsel and appealed to the Superior Court, which affirmed the settlement order. *Muhammad v. Children's Hosp. of Pitt.,* 487 A.2d 443 (Pa. Super. 1984).

The parents then filed a legal malpractice action against the lawyers who represented them in the medical malpractice case. *Muhammad*, 587 A.2d at 1348. The trial court granted preliminary objections on the grounds of collateral estoppel. *Id.* The Superior Court reversed, holding that collateral estoppel did not bar the legal malpractice action. *Id.*

On appeal, this Court agreed with the Superior Court that the parents' claims were not barred by collateral estoppel. *Muhammad*, 587 A.2d at 1348. The Court nevertheless reversed, relying on its longstanding public policy of encouraging settlements to hold that a dissatisfied plaintiff may not sue his

attorney following a settlement to which he agreed, unless the plaintiff can establish that he was fraudulently induced to settle the original action. *Id.*

The Court stated that its "primary reason" for disallowing negligence or breach of contract malpractice suits after a settlement was because "to allow them will create chaos in our civil litigation system." 587 A.2d at 1349. "Lawyers would be reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that 'could have been done but was not.'" "We refuse to endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases. A long-standing principle of our courts has been to encourage settlements; we will not now act so as to discourage them." *Id*.

But the Court created an exception: "If a lawyer *knowingly* commits malpractice, but does not disclose the error and convinces the client to settle so as to avoid the discovery of such error, then the client's agreement was fraudulently obtained." *Id.* at 1351 (emphasis in original).

In *Muhammad*, the Court held that the complaint did not state a claim for legal malpractice because the parents were simply dissatisfied with the dollar amount of the settlement; they failed to allege with specificity facts supporting a claim for fraudulent inducement. *Id.* at 1352. The Court used a football analogy to illustrate its rationale: "[S]anctioning these 'Monday-

morning quarterback' suits would be to permit lawsuits based on speculative harm; something with which we cannot agree." *Id.* at 1352, n. 13.

Muhammad was controversial from its inception. Justice Larson issued a brief but withering dissent, joined by Justice Zappala, sharply criticizing the fledgling "*Muhammad* rule":

> The majority has just declared a "LAWYER'S HOLIDAY." … It's Christmastime for Pennsylvania lawyers. If a doctor is negligent in saving a human life, the doctor pays. If a priest is negligent in saving the spirit of a human, the priest pays. But if a lawyer is negligent in advising his client to agree to a settlement, the client pays…. Thus, "filthy lucre" has a higher priority than human life and/or spirit. The majority calls this "Public Policy." Maybe….Maybe not?? It sure expedites injustice. Should we change the law so that non-lawyers can be judges?
>
> I dissent.

Id. at 1352-53 (Larson, J., dissenting).

2. *Collas v. Garnick* and *McMahon v. Shea* created an exception to *Muhammad* when the plaintiff is challenging the lawyer's legal advice and not the dollar amount of a settlement.

Two years after *Muhammad,* the Superior Court created an exception to the *Muhammad* rule where a client is challenging her lawyer's advice about the execution of a settlement release rather than the dollar amount of the settlement.

Collas v. Garnick, 624 A.2d 117 (Pa. Super. 1993) was a legal malpractice action arising out of an automobile accident during which Marie

Collas was injured by a vehicle owned by Park's Cleaners. *Id.* at 119. Marie and her husband retained a lawyer, Michael Garnick, to represent them to pursue claims against the responsible parties. *Id.*

Garnick arranged for a writ of summons to be issued against Park's Cleaners, after which he settled the Collas's claims for $245,000. *Id.* Garnick then asked the Collases to execute a general release discharging the other driver, and all other parties, known or unknown, who might be liable. *Id.*

Before signing the release, Marie Collas asked her lawyer if the release would have any impact on her plan to sue the manufacturer of the vehicle or any other tortfeasor. *Id.* Garnick assured her that a viable cause of action against the designer and manufacturer of the car's seat belt system would survive the release of Park's Cleaners. *Id*. In reliance on Garnick's advice, Marie and her husband signed the release. *Id.*

The Collases sued the manufacturer of the vehicle's seat belt restraining system. *Id.* The trial court dismissed the action, holding that their claims were barred by the prior release. *Id.* The Superior Court affirmed, and the Supreme Court denied allocator. *See Collas v. Key Hyundai, Inc.,* 601 A.2d 367 (Pa. Super. 1991), *app. denied,* 530 Pa. 630, 606 A.2d 900 (1992).

The Collases then filed a legal malpractice action against Garnick. *Collas,* 624 A.2d at 119. The trial court relied on *Muhammad* to dismiss the

case. *Id.* But the Superior Court reversed, holding that the allegations in the complaint— that Garnick failed to properly advise his clients about the scope of the release and its effect on future claims—stated claims for attorney malpractice. *Id.* at 121.

On appeal, the Superior Court held that the trial court erred in applying *Muhammad* to dismiss the complaint. *Id.* at 120. The court noted that the Collases were not alleging that the settlement negotiated by their lawyer was inadequate, but rather "that their lawyer negligently gave them bad advice about a written agreement which they had been asked to execute." *Id.* at 121. "The fact that the written agreement was prepared as part of the settlement of their prior action was incidental; it did not relieve counsel of an obligation to exercise care in determining the effect of the agreement which his clients were being asked to sign. This was particularly so where, as here, the clients had specifically asked the lawyer regarding the effect of the release and had told him of their plans to file a second action for the wife-claimant's injuries." *Id.*

In 1997, this Court reached the same conclusion in *McMahon v. Shea,* 657 A.2d 938 (Pa. Super. 1995) (en banc) *aff'd by an equally divided court,* 688 A.2d 1179 (Pa. 1997). *McMahon* was a legal malpractice action based

on alleged attorney negligence in the drafting and execution of a property settlement agreement in a domestic relations matter. 688 A.2d at 1180.

The trial court held that the plaintiff's cause of action was barred by *Miller v. Berschler*, 621 A.2d 595 (Pa. Super. 1993), which had extended this Court's holding in *Muhammad. McMahon,* 657 A.2d at 940. The Superior Court, however, concluded that the rationale underlying *Muhammad* does not apply when the plaintiff is challenging the adequacy of the attorneys' legal advice rather than the dollar amount of the settlement: "[t]he rule announced by the Supreme Court in *Muhammad* is limited to cases involving facts similar to those which caused the Court's ruling." *Id.* "Unless the Supreme Court directs otherwise, we will not interpret *Muhammad* to blindly protect lawyers who carelessly advise clients incorrectly about their substantive rights and the effect of a written agreement which is intended to resolve an existing dispute. Because the decision in *Miller v. Berschler, supra,* reaches a contrary result, it is expressly overruled." *Id.* at 942.

On appeal, this Court affirmed. *McMahon,* 688 A.2d 1179 (Pa. 1997). In an equally divided decision, the three-judge Opinion Announcing the Judgment of Court agreed with the Superior Court that the rationale underlying *Muhammad* does not apply when the client is not "attacking the value that his attorneys placed on his case" but is instead "contending that

his counsel failed to advise him as to the possible consequences of entering into a legal agreement":

> This reasoning has no application to the facts of the instant case. There is no element of speculation as to whether a jury would return a verdict greater than the amount recovered by a settlement. Also, Mr. McMahon is not attempting to gain additional monies by attacking the value that his attorneys placed on his case. Instead, Mr. McMahon is contending that his counsel failed to advise him as to the possible consequences of entering into a legal agreement. The fact that the legal document at issue had the effect of settling a case should not exempt his attorneys from liability.

McMahon, 688 A.2d at 1182.

In affirming the Superior Court, the Opinion Announcing the Judgment of Court adopted a narrow construction of *Muhammad*: "In summary, we find that the analysis of *Muhammad* is limited to the facts of that case. The laudable purpose of reducing litigation and encouraging finality would not be served by precluding the instant action. Mr. McMahon merely seeks redress for his attorneys' alleged negligence in failing to advise him as to the controlling law applicable to a contract. Based on the foregoing, it is clear that Mr. McMahon has set forth a cause of action for legal malpractice." *McMahon,* 688 A.2d at 1182.[12]

[12] The Court also agreed with the Superior Court that the *Berschler* court's extension of *Muhammad* was erroneous and it overruled cases relying on *Berschler. McMahon,* 688 A.2d at 1182.

In a concurring opinion by Justice Cappy joined by Justices Castille and Newman, the three concurring Justices disagreed with the conclusion that *Muhammad* should be limited to its facts. *McMahon,* 688 A.2d at 1183. The concurring Justices, however, nevertheless agreed that there is a "legally relevant" and "reasonable and justifiable" distinction between "a challenge to an attorney's professional judgment regarding an amount to be accepted or paid in settlement of a claim, and a challenge to an attorney's failure to correctly advise his client about well-established principles of law in settling a case":

> Today ….the court properly draws the legally relevant distinction between a challenge to an attorney's professional judgment regarding an amount to be accepted or paid in settlement of a claim, and a challenge to an attorney's failure to correctly advise his client about well-established principles of law in settling a case. This is a reasonable and justifiable distinction.

688 A.2d at 1183 (Justice Cappy, concurring, with Justices Newman & Castille joining in concurring opinion).

Here, as in *Collas* and *McMahon*, the complaint alleges facts to support Dr. Khalil's claims that the Lawyers were negligent and breached their contractual obligations when they negotiated and directed her to sign the Travelers Release and then gave the Release to Travelers and submitted it to the court. (R. 111a-127a.)

The Superior Court therefore erred as a matter of law when it concluded that Dr. Khalil's claims do not fall within the *Collas* and *McMahon* exception to the *Muhammad* rule.

3. The Lawyers had a duty to exercise ordinary skill and knowledge when conducting settlement negotiations on Dr. Khalil's behalf.

A lawyer has a duty to the client to exercise ordinary skill and knowledge. *Rizzo v. Haines,* 520 Pa. 484, 499, 555 A.2d 58, 65 (1989). That duty extends to the lawyer's conduct during settlement negotiations. *Id.* When engaging in settlement negotiations, a lawyer must exercise "at a minimum the requisite exercise of ordinary skill and capacity." *Id.*

The trial court opinion repeatedly recognizes that the Lawyers had a duty to advise Dr. Khalil about the scope and effect of the Travelers Release. Indeed, *six times* in its opinion, the trial court states that the Lawyers' actions likely caused Dr. Khalil's injuries. (Ex. A at 2, 4-6, 12.) One passage sums it up best:

> "The only person who had any duty to make sure that the Release accurately reflected Dr. Khalil's intentions to only resolve certain aspects of the claims and to explain the scope of the Release to Dr. Khalil was Dr. Khalil's counsel at the time. …It would have been her counsel's duty to her to make certain that the release language completely expressed her understanding as to the bar contained therein"

(Ex. A at 6, 7.)

The Superior Court's opinion does not dispute the trial court's conclusion that the Lawyers had a duty to represent Dr. Khalil with ordinary skill and knowledge. It merely concludes—without authority—that the complaint fails to plead claims for legal malpractice, negligence, and breach of contract. (Ex. B at 18-10.) That conclusion was an error of law requiring reversal.

4. The Pennsylvania Rules require that a complaint state material facts "in a concise and summary form."

The Pennsylvania Rules are to be liberally interpreted. *Steiner v. Markel,* 600 Pa. 515, 527, 968 A.2d 1253, 1260 (2009). Rule 126 of the Pennsylvania Rules of Civil Procedure provides that "[t]he rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable." Pa.R.C.P. 126.

The liberal application of the rules extends to pleadings. Rule 1019 states that "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa.R.C.P. 1019(a); *Steiner,* 600 Pa. at 526, 968 A.2d at 1260. Under Rule 1019(a), a complaint need only apprise the defendant of the claim being asserted and summarize the essential facts supporting the claim. *Steiner,* 600 Pa. at 526-27, 968 A.2d at 1260.

"Averments of fraud or mistake shall be averred with particularity. Malice, intent, knowledge, and other conditions of mind may be averred generally." Pa.R.C.P. 1019(b). Moreover, "[a]ny part of a pleading may be incorporated by reference in another part of the same pleading." Pa.R.C.P. 1019(g). Finally, under Rule 1020, a plaintiff "may state in the complaint more than one cause of action cognizable in a civil action against the same defendant" and "causes of action and defenses may be pleaded in the alternative." Pa.R.C.P. 1020(a), (c).

The complaint in this action satisfies the rules of pleading because it includes material facts "in a concise and summary form" to support each of the claims. The Superior Court therefore erred in affirming the trial court's dismissal of the non-fraud claims.

5. The Superior Court erred as a matter of law when it held that the complaint fails to allege sufficient facts to support claims for legal malpractice, negligent misrepresentation, and breach of contract.

Dr. Khalil's five-count complaint asserts claims for legal malpractice on the grounds of negligence (Count I), legal malpractice grounded in a contract (Count II), negligent misrepresentation (Count III), breach of two engagement agreements (Count IV), and fraud (Count V). The seventeen-page, eighty-paragraph complaint describes in detail the factual grounds for each of the claims. (R. 111a.-127a.)

The Superior Court erred as a matter of law when it ignored most of the complaint's factual allegations and focused on a few paragraphs to support its conclusion that all of Dr. Khalil's non-fraud claims were barred by *Muhammad.*

This court should reverse and remand for trial.

a. The complaint alleges facts to support a negligence theory of legal malpractice.

"In order to establish a claim of legal malpractice based on negligence, a plaintiff/aggrieved client must demonstrate three basic elements: (1) employment of the attorney or other basis for a duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of damage to the plaintiff." *Kituskie v. Corbman,* 552 Pa. 275, 714 A.2d 1027, 1030 (1998) (citing *Rizzo v. Haines*, 520 Pa. 484, 499, 555 A.2d 58, 65 (1989)). *See also Schmidt v. Rosin,* 248 A.3d 415, 416 (Pa. 2021) (noting that the elements set forth in *Kituskie* frame a legal malpractice action grounded in tort).

The complaint pleads all three elements of a tort claim for legal malpractice. First, it alleges that Dr. Khalil retained the Lawyers to represent her in *Diegidio,* and later in *Pier 3.* (R. 112 at ¶ 7.)

Second, the complaint alleges alternative grounds for legal malpractice grounded in negligence. Paragraphs 15 and 16 allege that the Lawyers

presented Dr. Khalil with a settlement agreement that was supposed to release Travelers Property for claims for the duct work repairs but instead they submitted to the court a general settlement release releasing Travelers *and its insureds* from *all liability* arising out of the May 2007 flood. (R 114a at ¶¶ 15, 16.) It alleges that the Lawyers' actions constituted legal malpractice. (R. 114a at ¶¶ 15, 16.)

The complaint also alleges that "Khalil demanded clear and specific wording in a Release" that the settlement agreement "would not prevent her from asserting her counterclaims and joinder claim against Pier 3 Condominium Association [in *Pier 3*]." (R. 114a at ¶ 17.) In response, the Lawyers "repeatedly assured Khalil that the settlement agreement would have no effect on her counterclaims and joinder action." (R. 114a at ¶ 19.) Khalil relied on the Lawyers' advice to sign the Travelers Release. (R. 114 at ¶¶ 20-21.)

Moreover, after the settlement conference in *Pier 3*, the Lawyers "told Khalil that there was nothing to worry about regarding the Pier 3 attorney statements at the settlement conference." (R. 115a at ¶ 27.) And when Khalil moved to vacate the *Diegidio* settlement, the Lawyers, who remained counsel of record, "did not take steps to protect Khalil's rights." (R. 116a at ¶

35.) The Lawyers also failed to protect Khalil's rights in connection with the other two releases in *Diegidio.* (R. 117a at ¶ 36.)

Finally, the complaint alleges that because the Lawyers "failed to exercise ordinary skill and knowledge in representing Khalil," Dr. Khalil sustained damages including, among other things, the dismissal of her counterclaims in *Pier 3.* (R. 117a at ¶ 40-41.)

Accordingly, the Superior Court erred when it held that the complaint failed to state a tort claim for legal malpractice.

b. The complaint alleges facts to support a contract-based claim for legal malpractice and claims for breach of two contracts.

To state a claim for legal malpractice claim based on breach of contract, a complaint must include the factual allegation that there was a contract between the parties. Thus, in *Steiner v. Markel,* 600 Pa. 515, 968 A.2d 1253 (Pa. 2009), this Court held that the trial court did not err in dismissing the plaintiff's legal malpractice claims for breach of contract because the complaint did not "even vaguely refer to a breach of contract claim." *Steiner*, 600 Pa. at 523, 968 A.2d at 1258.

Here, unlike *Steiner*, the complaint alleges that Dr. Khalil entered into two engagement agreements with the Lawyers to represent her in *Diegidio* and *Pier 3*. (R. 112 at ¶ 7; 119a at ¶ 44; 123a at ¶ 63; 124a at ¶69.) The

complaint further alleges that the Lawyers breached the contracts "by allowing her to enter into a settlement agreement that would preclude her counterclaims against Pier 3." (R. 119a at ¶ 45.) The Lawyers' breach caused Dr. Khalil's damages. (R. 119a at ¶¶ 46-47.) The complaint makes similar allegations in support of Dr. Khalil's claim for breach of the April 2, 2010 contract. (R. 123a at ¶¶ 63-66.)

On the Count IV claim for breach of the May 20, 2011 agreement, the complaint alleges that the Lawyers represented to Dr. Khalil that if she accepted a reduced amount to settle *Diegidio*, they would represent her at no cost in *Pier 3.* (R. 115a at ¶¶ 22-24; 124a at ¶ 70.) They breached that agreement when Cole withdrew her appearance in *Pier 3* without Dr. Khalil's consent. (R. 115a at ¶¶ 22-24; 124a at ¶¶ 71-73.) Dr. Khalil was injured when she was forced to spend additional funds to hire new counsel to represent her in *Pier 3.* (R. 115a at ¶29; R. 124a-125a at ¶¶ 72-73.) The complaint also alleges that the Lawyers breached their contract when Beth Cole dismissed Dr. Khalil's claims against Mr. Diegidio in his capacity as president of the Pier 3 condo board. (R. 115a at ¶28.)

The Superior Court therefore erred as a matter of law when it concluded that the complaint failed to allege facts sufficient to support claims

for legal malpractice based on a contract (Count II) and for breach of contract (Count IV).

c. The complaint alleges facts to support a claim for negligent misrepresentation.

To state a claim for negligent misrepresentation, a plaintiff must plead: (1) a misrepresentation of material fact; (2) made under circumstances in which the party making a misrepresentation ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. *Bilt-Rite Contractors, Inc. v. The Architectural Studio,* 581 Pa. 454, 866 A.2d 270, 277 (Pa. 2005).

A claim for negligent misrepresentation, like other tort claims, requires the existence of a duty of care to the plaintiff. *Bilt-Rite,* 581 Pa. at 471, 866 A.2d at 280. *See Commonwealth v. RBC Capital Markets Corp.,* 2021 Pa. Commw. Unpub. LEXIS 487 at *72-74, 121 (Commw. Ct. Sept. 9, 2021) (holding that complaint stated elements of a claim for negligent misrepresentation). Here, the Lawyers' contracts with Dr. Khalil gave rise to the requisite duty of care.

In support of the negligent misrepresentation claims (Count III) the complaint alleges that the Lawyers represented to Dr. Khalil that the settlement with Travelers was just for the duct work, that she would be

compensated in *Pier 3,* and that none of the *Diegidio* settlements would adversely prejudice her claims and defenses in *Pier 3.* (R. 121a at ¶¶ 51-53.) The Lawyers also falsely represented that if she settled her claims at a discounted rate in *Diegidio,* they would represent her in *Pier 3* at no cost. (R. 120a at ¶ 50, 121a at ¶ 55.) Finally, the Lawyers told her that the release in *Diegidio* would not preclude her claims in *Pier 3,* knowing that the statements were false and intending that she rely on their advice. (R. 121a at ¶¶ 54-56.)

Dr. Khalil was injured and suffered damages when she relied on her Lawyers' misrepresentations to settle *Diegidio* and sign the Travelers Release. (R. 121a at ¶57-58.)

In sum, Dr. Khalil's complaint states in "concise and summary form" claims for legal malpractice, negligent misrepresentation, breach of contract, and fraud. The Superior Court misread the complaint and erred as a matter of law when it held that the complaint stated a claim for fraud but failed to state claims for legal malpractice, breach of contract, or negligent misrepresentation.

This Court should reverse and remand for trial.

6. The evidence presented in opposition to summary judgment was sufficient to raise genuine issues of material fact as to all of Dr. Khalil's claims.

At the summary judgment stage, a plaintiff need only demonstrate that there is a genuine issue of material fact. Pa.R.C.P. 1035.2(1); *Bourgeois v. Snow Time, Inc.,* 242 A.3d 637, 649 (Pa. 2020); *Summers v. Certainteed Corp.,* 606 Pa. 294, 997 A.3d 1152, 1159 (2010). The court must view the facts, including expert reports provided during discovery, in a light most favorable to the non-moving party. *Summers,* 997 A.2d at 1161.

In opposition to summary judgment, Dr. Khalil raised genuine issues of material fact as to her claims for legal malpractice, negligent misrepresentation, breach of contract, and fraud. As required by the Pennsylvania rules, Dr. Khalil submitted certificates of merit supporting her malpractice claims against each of the defendants. (R. 128a, 129a, 130a, 144a-146a, 148a.) *See* Pa.R.C.P. 1042.3. She also produced expert reports concluding that the Lawyers' breached the standard of care. (R. 172a, 177a, 266a.) Also attached to Dr. Khalil's briefs in opposition to summary judgment were letters, emails, trial transcripts, and other evidence.

There was ample evidence to support Dr. Khalil's claim that the Lawyers breached their duty to her when they negotiated the Traveler's Release, submitted the Release to the court, and told her that the settlement

and release of her claims in *Diegidio* would not adversely affect her claims in *Pier 3.* (R. 114a at ¶19, 21, R. 115a at ¶ 27, R. 117a at ¶ 39, R. 119a at ¶ 45, R. 121 at ¶ 53.)

The Superior Court therefore erred as a matter of law when it upheld the trial court's grant of summary judgment on the non-fraud claims. This Court should reverse and remand for trial.

C. This Court should overturn *Muhammad v. Strassburger*, which bars legal malpractice suits following the settlement of a lawsuit absent an allegation of fraud.

1. This Court's evenly split decision in *McMahon* has caused confusion and uncertainty about the continued viability and proper application of Muhammad.

Superior Court opinions issued post-*McMahon* reveal confusion and uncertainty about the viability and proper application of the *Muhammad* rule. Some courts, noting that *McMahon* was the opinion of an equally divided Supreme Court, have given it no weight:

> Appellant has greatly exaggerated the effect of the *McMahon* decision. While the *McMahon* majority purported to restrict *Muhammad* to its facts, we note that the *McMahon* "majority" was not even a plurality decision. Rather, *McMahon* was the product of an equally divided, six-member supreme court. In point of fact, the three-member "minority" concurred in the result, but specifically objected to limiting *Muhammad* to its facts. Consequently, *McMahon* did not serve to limit *Muhammad* to its facts, and *Muhammad* remains as controlling precedent until a true majority of the supreme court rules otherwise.

Abeln v. Eidelman, 118 A.3d 451, 2015 Pa. Super. Unpub. LEXIS 3372, at

*4-5, (Pa. Super. 2015) (citations omitted).[13]

Other Superior Court panels, however, have concluded that although *McMahon* is not controlling law, it still provides "helpful guidance" on the proper application of *Muhammad*:

> Even without supplying binding precedent, *McMahon* provides helpful guidance on the issue at bar, for the concurrence agreed with the Opinion Announcing the Judgment of Court where it distinguished "between a challenge to an attorney's professional judgment regarding an amount to be accepted or paid in settlement of a claim, and a challenge to an attorney's failure to correctly advise his client about well-established principles of law in settling a case." This is a reasonable and justifiable distinction. As such, all six members of the Court deciding the case drew a distinction between "holding an attorney accountable to inform a client about the ramifications of existing law and allowing the second guessing of an attorney's professional judgment in an attempt to obtain monies, once a settlement agreement has been reached."

Kilmer v. Sposito, 146 A.3d 1275, 1280 (Pa. Super. 2016) (citing *McMahon* 688 A.2d 1179, 1183 (Cappy, J., concurring) (citations omitted)). *See also Rupert v. King,* 193 A.3d 1044, 2018 Pa. Super. Unpub. LEXIS 1951 at *12-17, (Pa. Super. 2018) (following *Kilmer* and reversing trial court's application of *Muhammad* rule).

[13] We cite *Abeln* and other unpublished Superior Court opinions not for their precedential or persuasive value, but simply to illustrate the divergence of views about *McMahon* revealed in both published and unpublished opinions. *See* Pa. Superior Ct. I.O.P.§ 65.37.

Several recent Pennsylvania Common Pleas Court decisions have also adopted *McMahon*'s narrow application of *Muhammad. See, e.g., Index Realty, Inc. v. Gargano,* 2018 Phila. Ct. Com. Pl. LEXIS 93 at *20-21 (June 3, 2018) (holding that *Muhammad* has been narrowly construed and was not a bar because circumstances surrounding plaintiff's claim did not involve dissatisfaction with terms of a settlement); *Jan Rubin Assocs. v. Nixon Peabody, LLP,* 2008 Phila. Ct. Com. Pl. LEXIS 175, at *3-6 (July 31, 2008) (concluding that facts were "more similar to facts in *McMahon* than in *Muhammad*" and holding that claim based on lawyers' failure to advise about application of statute of limitations was not barred by *Muhammad*); *Red Bell Brewing Co. v. Buchanan Ingersoll P.C.,* 2001 Pa. Dist. & Cnty. Dec. LEXIS 283, at *11-13, 51 Pa. D. & C. 4th 129 (March 13, 2001) (recognizing that *McMahon* narrowed the holding in *Muhammad*). *See also Wassall v. DeCaro,* 91 F.3d 443 (3d Cir. 1996) (predicting that Pa. Supreme Court would not extend *Muhammad* holding to bar the plaintiff's claims).

Other post-*McMahon* Superior Court panel opinions, however, have distinguished *McMahon* and held that *Muhammad* barred the plaintiffs' legal malpractice claims. *See, e.g, Townsend v. Spear, Greenfield & Richman, P.C.,* 240 A.3d 157, 2020 Pa. Super. Unpub. LEXIS 2567 (Pa. Super. Aug. 13, 2020); *Greenawalt v. Stanley Law Offices*, 237 A.3d 1071, 2020 Pa.

Super. Unpub. LEXIS 2004, *12-14, (Pa. Super. 2020); *Flanagan v. Hand,* 216 A.3d 358, 2019 Pa. Super. Unpub. LEXIS 1260 (Pa. Super. 2019); *McGuire v. Russo,* 159 A.3d 595 (Pa. Super. 2016), *app. granted*, 641 Pa. 733, 169 A.3d 567 (2017); *Silvagni v. Shorr,* 113 A.3d 810, 813 (Pa. Super.), *app. denied*, 634 Pa. 729, 128 A.3d 1207 (2015); *Moon v. Ignelzi,* 2009 Pa. Super. Unpub. LEXIS 7016, at *16-22, n.8 (Pa. Super. Dec. 11, 2009); *Banks v. Jerome Taylor & Asso.,* 700 A.2d 1329, 1331-33 (Pa. Super. 1997).[14]

This case is an opportunity for the Court to clear up the uncertainty and confusion created by its equally divided opinion in *McMahon.*

2. The *Muhammad* rule is unnecessary because plaintiffs in legal malpractice actions already have a high burden of proof.

"A legal malpractice action is distinctly different from any other type of lawsuit brought in the Commonwealth." *Kituskie v. Corbman,* 552 Pa. 275, 281, 282 714 A.2d 1027, 1030 (1998). In a legal malpractice action, a plaintiff must prove "a case within a case" and first establish that they would have recovered a judgment in the underlying action. *Id.* Moreover, unlike other kinds of lawsuits, the collectability of damages in the underlying action

[14] *See also Phinisee v. Layser*, 2014 U.S. Dist. LEXIS 157274 (E.D.Pa. Nov. 5, 2014), *aff'd*, 627 F. App'x 118 (3d Cir. 2015) (following *Muhammad* and distinguishing *McMahon*); *Palmer v. Kenney*, 2012 Phila. Ct. Com. Pl. LEXIS 294, at *10-12 (Oct. 1, 2012) (same).

is a part of the analysis. *Kituskie,* 552 Pa. at 282, 714 A.2d at 1030 (holding that collectability is an affirmative defense).

If post-settlement legal malpractice actions were to be allowed, plaintiffs would still have to prove their claims. "The settling client should have to prove not just that he would have won the underlying case, but that he also would have recovered more than the amount of the settlement in that trial. The difference between the theoretical recovery in the underlying case and the settlement would constitute the client's damages." Susan Saab Fortney, *Civil Litigation Ethics at a Time of Vanishing Trial: A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims,* 85 Fordham L. Rev. 2033, 2044 (2017). *See also Thomas v. Bethea,* 351 Md. 513, 533-34, 718 A.2d 1187, 1197 (Md. 1998) (applying trial within a trial approach to evaluating reasonableness of settlement).

The high burden of proof required in a legal malpractice action, and the need to present a case within a case, are significant deterrents to frivolous lawsuits. Those hurdles and others will likely remain even if *Muhammad* is overturned.

3. Pennsylvania trial lawyers should be held to the same standards as other professionals and lawyers in other practice areas.

As a high percentage of cases settle, *Muhammad* gives trial lawyers an advantage not enjoyed by business lawyers, tax lawyers, and real estate lawyers—blanket immunity from suit. *See, e.g., Estate of Agnew v. Ross,* 638 Pa. 20, 152 A.3d 247 (2017) (legal malpractice action arising from drafting of a will and trust); *Steiner v. Markel,* 600 Pa. 515, 968 A.2d 1253 (2008) (legal malpractice action involving a real estate matter).

There is no legitimate rationale for conferring special benefits on trial lawyers not given to other lawyers. *See Ziegelheim v. Apollo,* 128 N.J. 250, 263, 607 A.2d 1298, 1304 (1992) ("[W]e insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks.")

Moreover, as Justice Larson noted in his pithy dissent in *Muhammad*, other Pennsylvania professionals are held to standards of reasonable competence:

> If a doctor is negligent in saving a human life, the doctor pays. If a priest is negligent in saving the spirit of a human, the priest pays. But if a lawyer is negligent in advising his client a to a settlement, the client pays….

Muhammad, 587 A.2d at 1352-53.

Indeed, Pennsylvania permits malpractice suits against many different types of professionals. *See, e.g., Leadbitter v. Keystone Anesthesia Consultants, Ltd,* 2021 Pa. LEXIS 3398 (Pa. Aug. 17, 2021) (orthopedic surgeon); *Trigg v. Children's Hosp. of Pittsburgh,* 229 A.3d 260 (Pa. 2020) (hospital); *Bilt-Rite Constrs., Inc. v. Architectural Studio,* 581 Pa. 454, 480, 866 A.2d 270, 286 (2005) (architects); *Arnbruster v. Horowitz,* 572 Pa. 1, 813 A.2d 698 (2002) (dentist); *Koken v. Steinberg,* 825 A.2d 723 (Pa. Commw. 2003) (auditor and actuary); *Raymond Rosen & Co. v. Seidman & Seidman,* 12 Phila. 243, 1985 Phila Cty. Rptr. LEXIS 28 (Phila. C.C.P. 1985) (accountants).

In rejecting *Muhammad,* the Maryland Supreme Court opined that it could see no legitimate reason to treat lawyers differently from other professionals:

> We see no reason to adopt any heightened standard of negligence. Lawyers, like doctors and other professionals, are often called upon to make judgment calls with which their colleagues may disagree. Those calls, if challenged, can be examined in the light of the traditional standard applicable to professional negligence actions. That is the standard applied by courts in other States, and we are aware of no indication that its application has caused any significant problem.

Thomas, 351 Md. at 524-25, 718 A.2d at 1195.

This Court should adopt the reasoning of Justice Larson and the Maryland Supreme Court. There is no legitimate reason why trial lawyers

should enjoy a broad immunity from suit not available to other lawyers and other professionals. *Muhammad* should be overruled.

4. Courts in other jurisdictions have universally rejected *Muhammad*.

Over the past thirty years, the appellate courts of other jurisdictions have overwhelmingly rejected *Muhammad.* The Supreme Court of Maryland was particularly harsh in its criticism:

> The *Muhammad* decision represents a distinct minority view. It is not only inconsistent with most of the cases decided prior to its rendition, none of which are even mentioned in the opinion, but it has been expressly rejected by all of the courts that have had the benefit of considering it.

Thomas, 351 Md. at 524-25, 718 A.2d at 1191-95. *See also Filbin v. Fitzgerald*, 211 Cal. App. 4th 154, 149 Cal. Rptr. 3d 422, 433 (Cal. Ct. App. 2012) (rejecting Pennsylvania's "flat prohibition" of post-settlement legal malpractice actions); *White v. Jungbauer*, 128 P.3d 263, 265 (Colo. App 2005) ("most courts have refused to accept *Muhammad*"); *Ziegelheim v. Apollo,* 128 N.J. 250, 262, 607 A.2d 1298, 1304 (1992) (rejecting "severe rule" of *Muhammad*). *See also McWhirt v. Heavy*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Malfabon v. Garcia*, 111 Nev. 793, 898 P.2d 107 (1995); *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky,* 231 Conn. 168, 174-75, 646 A.2d 195, 199-200 (1994).

The Texas Court of Civil Appeals recently noted that "all other jurisdictions considering the *Muhammad* decision have refused to adopt its reasoning." *Parker v. Glasgow,* 2017 Tex. App. LEXIS 5782 at *20, 2017 WL 2686474 (Tex. App. 2017) (citing decisions from Texas, California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Jersey, Alabama, Florida, Louisiana, Michigan, Minnesota, New York, and South Carolina).

This Court should follow Maryland, New Jersey, Connecticut, and the other states that have rejected *Muhammad.* Plaintiffs who are injured by a trial lawyer's negligence should be allowed their day in court, even when their case is settled.

5. The *Muhammad* rule unfairly bars legitimate post-settlement legal malpractice claims and undermines the public perception of the Court and the legal profession.

The *Muhammad* rule was intended to discourage parties who agree to a negotiated settlement from suing their trial lawyers. The Court sought to encourage settlement and was concerned about clients having buyer's remorse and becoming "Monday-morning quarterbacks" seeking to revisit their decision to accept or pay a settlement. *Muhammad*, 587 A.2d at 1351-53. It was also concerned about the overcrowding of trial and appellate court dockets. *Id.*

To achieve its goals, the Court took the extraordinary step of barring post-settlement legal malpractice actions unless the plaintiff pleads fraud in the inducement. *Id.* To prevail at trial, a plaintiff must prove that "the lawyer *knowingly* commits malpractice, but does not disclose the error and convinces the client to settle to avoid discovery of such error." *Id.* at 1351 (emphasis in original).

The *Muhammad* rule has had its intended effect: it shields Pennsylvania's trial lawyers from frivolous malpractice claims. But in protecting trial lawyers from baseless suits, the rule also bars legitimate legal malpractice claims. A lawyer who is negligent can avoid responsibility for the mistake so long as the case settles. *See, e.g., Reynolds v. Stambaugh,* 2015 Pa. Super. Unpub. LEXIS 171 at * 27 (Pa. Super. 2015) (noting that after client changed her mind about settling case, lawyer threatened to file a petition to force her to sign written agreement "so that he could avoid the legal malpractice suit through operation of *Muhammad*"). To overcome the bar, the plaintiff must plead and prove that the lawyer acted with fraudulent intent—an almost insurmountable burden.

The legal profession has been criticized for protecting its own. One scholar argues that the judges and legislators who regulate lawyer conduct

are "captured"—they overly identify with the lawyers they are supposed to regulate:

> The legal malpractice tort, alone, retains defendant protections that have been denied to others. . .The simple explanation is that the legal malpractice tort has maintained its unique status because the judicial lawmakers who are supposed to regulate the bar have instead been "captured." . . .The legal system is dominated by attorneys. Many legislators and judges are attorneys. When the system devises rules that effect the relationship between attorneys and clients it subjects itself to special scrutiny. It is a fact of the very structure of legal institutions that the individuals who create the rules of law can protect themselves and their colleagues before the bar by slanting the process in favor of the attorneys. This potential for favoritism should not be ignored. The risk is especially troubling when the rules are created by common law courts. . . . Judge-made rules should never appear to unfairly benefit the bar.

Lawrence W. Kessler, *The Unchanging Face of Legal Malpractice: How the "Captured" Regulators of the Bar Protect Attorneys,* 86 Marq. L. Rev. 457, 459 (2002). *See also* Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?* 59 Ala. L. Rev. 453 (2008).

When the Supreme Court decided *Muhammad* and created a special immunity that benefits only trial lawyers, it sent a message to the public that the legal system protects lawyers at the expense of their clients. Rather than hold trial lawyers to the usual standards of professional negligence, the Court conferred on them a special privilege not afforded other professions. That sort of action undermines the public perception of the legal profession.

Allowing *Muhammad* to stand would further fuel the argument that the judiciary is all too willing to "take care of its own."

Reversing *Muhammad* will demonstrate that this Court believes that Pennsylvania's trial lawyers should be held to the same level of professional competence as other lawyers and professionals.

VIII. CONCLUSION

Petitioner requests that this Court reverse the Superior Court's grant of summary judgment and dismissal with prejudice of Counts I through IV of the complaint and remand the case for trial.

Respectfully submitted,

/s/ Virginia Hinrichs McMichael
Virginia Hinrichs McMichael (#40031)
APPELLATE LAW GROUP LLC
Radnor Financial Center
150 N. Radnor Chester Rd., F-200
Radnor, PA 19041
(610) 977-2096; (610) 977-0043 (fax)
vmcmichael@appellatelawpa.com
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

In accordance with Pa.R.A.P. 2135(a)(1), I hereby certify that the foregoing Brief of the Appellant does not exceed 14,000 words based on the word count of the word processing system used to prepare the brief.

/s/ Virginia Hinrichs McMichael

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

In accordance with Pa.R.A.P. 127(a), I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Virginia Hinrichs McMichael

PROOF OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing Petition for Allowance of Appeal by email on the persons and in the manner indicated below, which meets the requirements of Pa.R.A.P. 121. By email on the following:

Tamara Chasan, Esquire
Margolis Edelstein
170 S. Independence Mall West, Suite 400e
Philadelphia, PA 19106-3380
(215) 931-5899
tchasan@margolisedelstein.com

James Robert Kahn, Esquire
Margolis Edelstein
170 S. Independence Mall West, Suite 400e
Philadelphia, PA 19106-3380
(215) 931-5887
jkahn@margolisedelstein.com

Glenn Richard Morris
100 S. Broad Street, Suite 650
Philadelphia, PA 19110-1021
(215) 893-1222
pennsylvanialawyer@hotmail.com

/s/ Virginia Hinrichs McMichael
Virginia Hinrichs McMichael (#40031)
APPELLATE LAW GROUP LLC
150 N. Radnor Chester Rd. Suite F-200
Radnor, PA 19087
Tel: (610) 230-6201;(610) 977-2096
Fax: (610) 977-0043
vmcmichael@appellatelawpa.com

Dated: September 13, 2021

Exhibit A

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

DR. AHLAM KHALIL Plaintiff-Appellant, vs. **TRAVELERS INDEMNITY COMPANY OF AMERICA, et al.** Defendants-Appellees.	)	COURT OF COMMON PLEAS PHILADELPHIA COUNTY APRIL TERM, 2014 NO. 01925 SUPERIOR COURT NO. 1482 EDA 2019

DR. AHLAM KHALIL Plaintiff-Appellant, vs. **GERALD J. WILLIAMS, ESQUIRE, BETH COLE, ESQUIRE, and WILLIAMS CUKER BEREZOFSKY, LLC,** Defendants-Appellees.	)	COURT OF COMMON PLEAS PHILADELPHIA COUNTY MAY TERM, 2013 CASE NO. 1305-00825 SUPERIOR COURT NO. 2549 EDA 2019

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OPINION OF THE TRIAL COURT

These are the appeals of the plaintiff in the underlying cases, Dr. Ahlam Khalil, whose various claims against numerous defendants were dismissed via the granting of the defendants' respective Motions for Summary Judgment.

In regard to her case under Docket Number 1482 EDA 2019, (No.: 1404-01925), in her 1925(b) Statement of Matters Complained of on Appeal, Appellant raises eleven (11) claims of error over seven (7) pages, which this Court addresses below in numerical order.

Despite Appellant's claims, this Court did not err in granting defendants, Glenn M. Campbell, Esq. and William J. Ferren & Associates [the Ferren Defendants]; and Travelers Indemnity Company motion for summary judgment on the basis that these claims are precluded under the doctrines of res judicata and collateral estoppel.

Furthermore, this Court did not err in granting defendants, Monica O'Neill, Esq., and Thomas, Thomas & Hafer LLP,[1] motion for summary judgment on the identical grounds.

Lastly, the trial court did not err in granting defendants, Pier 3 Condominium Association and FirstService Residential motion for summary judgment on these same grounds, as well as the defense of release.

Based upon a review of the entire record, the motions of the various defendants and Appellant's responses thereto, the doctrines of res judicata, collateral estoppel and release apply as a preclusion to all of the Appellant's claim, as said claims have been previously decided by this Court (or could have been raised for determination) or our appellate courts. Further, the Release and Settlement Agreement vitiated all further and future claims, despite the Appellant's contention that the Release was in some way altered and a fraud was committed upon her. As the records show, Appellant is unable to prove fraud in the execution of the Release and any error arising from its execution lies solely with her and her counsel at the time.

[1] These Appellees represented Travelers Property and Casualty Company in the Water Damage Action, CCP., Philadelphia, Case No.: 0805-03145.

Factually, this appeal arises from two prior civil actions filed in the Court of Common Pleas, Philadelphia County, Civil Action 0805-03145, ("Water Damage Action"), and Civil Action 0907-01819, ("Pier 3 Action"), filed in 2008 and 2009, respectively. Both actions were based on Appellant's property loss involving water damage occurring in 2007. Specifically, on May 25, 2007, Appellant's condominium unit in the Pier 3 Condominium complex suffered water damage when her upstairs neighbors (the Diegidios) experienced a flood in their own condominium unit.

At the time of loss, Khalil was insured by State Farm Fire and Casualty Co. (State Farm); whereas Pier 3 Condominium (Pier 3) was insured by Travelers Property Casualty Company of America (Travelers); and her upstairs neighbors were insured by The Standard Fire Insurance Company. Appellant filed the Water Damage Action against Travelers, State Farm, and her upstairs neighbors, seeking money damages for the flooding and resulting damages that occurred in her own unit.

The Ferren Defendants entered the Water Damage Action as counsel for both Pier 3 and Wentworth, the property management company. Dr. Kahlil, while represented by counsel, subsequently entered into a settlement with Pier 3/Travelers prior to trial and thereafter signed a General Release on May 12, 2011.

On May 20, 2011, the Appellant, through the assistance of counsel, settled her remaining claims with her upstairs neighbors and their insurer, State Farm, in the midst of the trial. On September 30, 2011, the trial court held a hearing to enforce settlement, as Appellant had refused to execute a Release memorializing the settlement agreements that she had reached with her upstairs neighbors and State Farm. At that hearing, Appellant did not raise any objections regarding any of the settlement agreement as being fraudulent or misrepresenting her understanding of the terms of the settlements at that time.

On February 6, 2013, Appellant sought to vacate the settlement. The Court denied this motion on March 15, 2013. Plaintiff then filed an appeal of that Order, which was subsequently quashed by the Superior Court[2].

In the interim, Dr. Khalil stopped paying her condominium fees to Pier 3, stating she could not use her unit as result of the extent of the alleged water damage. Pier 3 retained counsel and subsequently filed an action against her to recover the unpaid condominium fees and related expenses. In her response pleading to Pier 3's Complaint, Dr. Khalil asserted Counterclaims and a Joinder Complaint against Pier 3, Wentworth Property Management and her upstairs neighbors, Jason and Anne Marie Diegidio, alleging, inter alia, that Pier 3 improperly failed to repair her unit. On July 19, 2012, a jury returned a verdict in favor of Pier 3 and against Appellant in the amount of $109,000.00.

Appellant's post-trial motions were denied by Judge Overton and an appeal was taken. The Commonwealth Court, Docket No.: 15 CD 2013, affirmed the trial court's findings on July 9, 2015 in a Memorandum Opinion.

Thereafter, Appellant commenced the present lawsuit (1404-01925) against all of the above-captioned defendants by Writ of Summons filed on April 17, 2014. The gist of Appellant's claims assert that the Defendants made knowingly false representations to her and to the Court in order to secure Plaintiff's release of Pier 3, Wentworth, and her upstairs neighbors. At this time, Dr. Khalil also asserted that the Defendants also submitted a fraudulent Release and Settlement Agreement in support of a motion for summary judgment in the Pier 3 suit.

In a nutshell, despite a significant litigation and re-litigation history involving numerous aspects of this claim under various theories of liability, and against various parties, Dr. Khalil has

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[2] ***Khalil v. Diegidio***, 102 A.3d 527 (2014), (Table); Docket No.: 1019 EDA 2013; *alloc. denied*, 627 Pa. 759 (2014).

simply attempted to cover her (and possibly her own attorneys' errors) by claiming that the release she executed on May 12, 2011 was, in fact, forged and/or altered by someone, including, but not limited to, the defendants in the present suit. Dr. Khalil however has failed to provide any evidence to this Court in her response motions that would show such actions by any of the parties to this lawsuit amounted to fraud.

By way of background on the issues related to the Release, on May 17, 2011, Dr. Khalil's counsel at the time, Beth Cole, emailed a copy of an executed general release[3] ("the Release") between Dr. Khalil and Travelers Property and Casualty Company ("Travelers Property") to counsel for Travelers Property, Monica O'Neill, Esquire. The Release is the **only executed** release that exists in the related Water Damage case, and *Dr. Khalil has not produced any other executed releases or any release showing any changes, alterations or modifications.*

Further, since Commonwealth Court has previously determined that the Release was valid, it now bars Dr. Khalil from recovering for any possible claims she might have had against the Releasee's (Travelers Property), insured (Pier 3 Condominium Association), or its management company, Wentworth.[4]

In pertinent part, the only Release presented for this Court to review listed Appellant as the "Releasor," Travelers as the "Releasee," and the Association as the "Releasee's Insured." (R.R. at R4, 1). In exchange for monetary consideration, Appellant agreed to "*forever discharge . . . Releasee of and from any and all claims* . . . of whatsoever kind or nature arising from the incident occurring at [the Unit.]" Appellant further agreed "to terminate all controversy and/or claims for injuries or damages against Releasee, and Releasee's Insured, and any *affiliated or related people*

[3] The release was executed by Appellee on May 12, 2011.

[4] See ***Pier 3 Condominium Association v. Khalil***, Pa. Commonwealth Court, No.: 15 C.D. 2015 (Memorandum Opinion).

or entities, both known and unknown, including future developments thereof, in any way growing out of or connected with said incident." At the conclusion of the Release, Appellant again "specifically agreed that *this [Release] shall be a complete bar to all claims* or suits against Releasee, Releasee's Insured, *and any affiliated or related people or entities, both known and unknown, for injuries or damages of whatsoever nature resulting from or to said incident* [at the Unit.]"

Given the broad and unambiguous language of the Release, the respective parties' attorneys are also released under the same as they are clearly affiliated people or entities. Even without the release governing this situation, although not raised by any party, this Court even questions Appellant's standing to bring a lawsuit against opposing counsel, especially in light of the fact that Appellant was represented by counsel and no opposing attorney had any direct contact or communications with her in regard to the terms, conditions, limitations and finality of her execution of subject release.

Appellant's theories of liability as detailed in her responses to the various defendant's motions for summary judgment contain nothing more than conclusory, unsubstantiated suspicions and allegations that the Appellees engaged in improper and fraudulent conduct intended to deprive her of money to which she was allegedly entitled. There is no evidence whatsoever to support these allegations.

In light of this history, the only person who had any duty to make sure that the Release accurately reflected Dr. Khalil's intentions to only resolve certain aspects of the claims and to explain the scope of the Release to Dr. Khalil was Dr. Khalil's counsel at the time. Without any proof that the Release at issue was altered or modified in any way after it was executed, the determination that the Release is valid by an appellate court effectively eliminates the Appellant's

claims of fraud without her providing any specific instance of fraud or any evidence of fraud by a clear and convincing burden of proof. It also leads one to conclude that any prior negotiations, discussions, or conditions related to the released claims that do not appear in the final, executed version are barred by the parole evidence rule.

If Dr. Khalil executed a Release not understanding the full effect of the language contained therein, or if the final release contained language or exclusions to which she didn't agree or bargain for, then it should not have been executed until a Release expressing all of the intentions of the parties was set forth therein. It would have been her counsel's duty to her to make certain that the release language completely expressed her understanding as to the bar contained therein.

Once Appellant executed the Release upon the advice of her counsel, the Appellees in this case cannot be considered to have perpetrated a fraud upon her and, therefore, her claims cannot stand. Further, there is no allegation by Appellant that any Appellee in any way induced her to execute the Release by misrepresentation, threat or other action against her will, nor is there any proof that she justifiably relied upon any misrepresentation made by any of them. This case seems to be nothing more than "buyer's remorse" by Dr. Khalil.

In regard to the specific issues raised by the Appellant in her 1925(b) Statement of Matters Complained of on Appeal, said appeal involves this Court's Orders, dated March 14, 2019, granting summary judgment in favor of all Appellees via their respective motions for summary judgment. The basis for granting each Appellee's motion is set forth below by each respective parties' motion.

1. **This Court did not err in granting multiple Defendant's Motion for Summary Judgment (via four separate orders entered March 14, 2019) and Dismissing Plaintiff's Claims on the Grounds of Res Judicata and Collateral Estoppel.**

Initially, whether summary judgment is warranted is a question of law, and thus the standard of review is *de novo* and the scope of appellate review is plenary. Summary judgment may be entered only where the record demonstrates that there are no genuine issues of material fact, and it is apparent that the moving party is entitled to judgment as a matter of law. ***Chepkevich v. Hidden Valley Resort, L.P.***, 607 Pa. 1 (2010). "After the relevant pleadings have closed, a party may move for summary judgment, in whole or in part, as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. ***Pa. R.C.P. 1035.2.***

For the reasons explained below, the granting of summary judgment in favor of the various defendants were properly entered and no error committed.

2. This Court did not err in determining that Res Judicata and Collateral Estoppel precludes and acts as a bar to all of the Appellant's claims.

It has been long recognized that the Doctrine of res judicata, or claim preclusion, prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous litigation. ***R/S Financial Corporation v. Kovalchick,*** 552 Pa. 584, 716 A.2d 1228, 1230 (Pa. 1998). The doctrine of res judicata protects parties from the burden of the need for re-litigating a claim with the same parties, or a party in privity with an original litigant, and to protect the judiciary from the corresponding inefficiency

and confusion that re-litigation of a claim would breed. ***Wilkes v. Phoenix Home Life Mut. Ins. Co.***, 587 Pa. 590, 607 (Pa. 2006).

Under the Doctrine of res judicata, the party asserting this defense must show the concurrence of four conditions; (1) identity of the thing sued upon; (2) identity of the cause of action; (3) identity of persons and parties to the action; *and* (4) identity of the quality or capacity of the parties suing or sued. ***Callery v. Municipal Authority of Blythe Township***, 432 Pa. 307, 311-312, 243 A. 2d 385 (1968). (Emphasis added.)

The doctrine of res judicata applies to and is binding, not only on actual parties to the litigation, but also to those who are in privity with them. ***Goldstein v. Ahrens***, 379 Pa. 330, 334 (1954). As here, a final valid judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies on the same cause of action. ***Stevenson v. Silverman***, 417 Pa. 187, 190 (1965).

In support of her position that res judicata does not apply to the alleged fraud claims under ***Wilkes v. Phoenix Home Mutual Ins. Co.***, 902 A.2d 366 (Pa. 2006), Appellant's reliance upon the same is easily distinguishable, as the *Wilkes'* court interpreted and applied New York's law governing res judicata[5] and, additionally, the holding is actually adverse to Plaintiffs position.[6]

Collateral estoppel, on the other hand, is defined broadly when compared to the doctrine of *res judicata*. Collateral estoppel prevents a question of law or an issue of fact which has already been

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[5] Under New York law, the doctrine of res judicata prohibits a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter, including all claims that were litigated or could have been litigated in the prior action. ***Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co.***, 587 Pa. 590, 902 A.2d 366 (2006). Cf. ***In re Hunter***, 4 N.Y.3d 260, 794 N.Y.S.2d 286, 291, 827 N.E.2d 269 (2005)

[6] "Simply put, the claim of external fraud forwarded here cannot make this facially constitutionally adequate notice constitutionally inadequate. We do not doubt that appellees now regret not having investigated the matter further when put on notice; but they cannot colorably claim they were unaware of the effect of their choice to surrender all claims." ***Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co.***, 587 Pa. 590, 622, 902 A.2d 366, 385 (2006).

litigated or adjudicated to finality in a court of competent jurisdiction from being subsequently re-litigated. ***Thompson v. Karastan Rug Mills,*** 228 Pa. Super 260, 265 (1974).

The doctrine of collateral estoppel precludes re-litigation of an issue determined in a previous action if: (1) the issue decided in the prior case is identical to the one presented in the later action; (2) there was a final adjudication on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; ***and*** (5) the determination In the prior proceeding was essential to the judgment. ***Office of Disciplinary Counsel v. Kiesewetter***, 585 Pa. 477 (2005). (Emphasis added.)

3. This Court <u>did not err</u> in granting summary judgment in favor of Appellants and dismissing Appellee's claims because the evidence presented on summary judgment <u>does not</u> permit a reasonable jury to find in Appellee's favor on her claims against all Appellants.

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment pursuant to Pa.R.C.P. No. 1035.2, supra.

In this instance, there is no evidence that any named Defendant forged or altered the Release or any other document involved in this matter or engaged in any conspiracy, fraud, or other wrongful conduct of any kind towards her. Therefore, there are no material issues of fact for a jury to consider, since the release has already been determined to be valid and its language is all encompassing.

Since such is the case, to now complain of fraud, without submitting any evidence of the same with the requisite specificity required when making such an allegation, the issues and claims have been addressed and are binding upon her. Continuing forward would simply be a waste of judicial time and unnecessary expense on the parties.

"Generally final judgments in adverse proceedings cannot be opened or vacated unless there has been fraud or some other extraordinary circumstance so grave or compelling as to constitute extraordinary cause justifying intervention by the court. ***Shelly Enterprises, Inc. v. Guadagnini***, 20 A.3d 494 (Pa.Super. 2011). In such an instance, the trial court has the inherent authority within the exercise of sound judicial discretion to dismiss a judgment or an action. ***Commonwealth v. Orie***, 88 A.3d 983 (Pa.Super. 2014).

It is well-established that fraud must be proven by clear and convincing evidence. ***Weissberger v. Myers***, 90 A.3d 730, 735 (Pa.Super.2014), citing ***Pittsburgh Nat. Bank v. Larson***, 352 Pa.Super. 250, 507 A.2d 867, 869 (1986) ("stating that a party proving fraud must meet the more exacting standard of clear and convincing evidence, which is a higher standard of persuasion than mere preponderance of the evidence").

In this case, fraud has not been shown to exist, as the only evidence for this Court to consider reflects oversight or lack of understanding by the Appellant as to the extent and finality of the executed release[7] at the time it was executed by her.

4. This Court did not abuse its discretion under Pennsylvania law by prohibiting Appellee from seeking discovery from Appellants.

One issue raised on appeal is in respect to an Order involving discovery. Orders regarding discovery matters are subject to the discretion of the trial court. ***Latzanich v. Sears Roebuck and Company***, 2018 WL 3133647, *2 (Pa. Super. 2018). An appellate court will not disturb discovery orders without a "showing of manifest, unreasonableness, partiality, prejudice, bias, ill will, or

[7] It should be noted that the release at issue is the only release for this Court's consideration, as her settlement with the other parties during the trial of the underlying claim are simply "marked as settled, discontinued and ended" on the court docket.

such lack of support in the law or record for the [trial court's action] to be clearly erroneous;" an abuse of discretion. ***Id.***

Here, despite Appellant's protestations of fraud, she fails to recognize her own acts (or possibly the acts of her counsel) in failing to recognize the scope and breadth of the executed release. Simply because the release contained language that terminated all of the litigation does not impute fraud upon the drafting party, it could have been done in error, it could have been an oversight on counsel's part in forwarding to her a 'boilerplate' or standard release, or, even if it was fraudulently sent to her containing more restrictive language than bargained for, this all occurred ***before*** she signed it (and presumptively upon the advice of counsel). It was her and her attorney's duty to make certain the release reflected the intended settlement and the scope of the claims released. Once she voluntarily executed this release, she was forever bound by its terms and conditions.

5. The Honorable Court did not err in granting summary judgment for Appellants Pier 3 and Wentworth Property Management under Motion Control No.: 18122953.

Appellant's claims against Pier 3 and Wentworth Property Management[8] are legally barred by the defenses of release, res judicata, and collateral estoppel.

The Commonwealth Court in its Memorandum Opinion[9] explicitly held that Pier 3 and its property manager were released from ALL related water damage claims arising out of the May, 2007 event. The Commonwealth Court opinion states: "...the trial judge in the insurance action concluded that the release was valid. The Superior Court quashed the appeal, and our Supreme Court denied allowance of appeal on 9/17/14. Because the insurance action has now been litigated to final judgment, the release is deemed valid, and appellant cannot now use this Court, an

[8] Wentworth Property Management d/b/a First Service Residential and FirstService Residential MidAtlantic, LLC.

[9] An unreported opinion of the Commonwealth Court may be cited and relied upon when it is relevant under the doctrine of law of the case, res judicata or collateral estoppel. See 210 Pa. Code § 69.414(a).

appellate court, as the forum to re-contest the validity of the release on the ground of mutual mistake". *See* Memorandum Opinion at page 17.

Appellant should not now be able to attempt to re-litigate issues that she could have raised at the proper time and in the proper place; to hold otherwise would prejudice these Appellants and call into question whether a part may ever close the book in a disputed matter.

The effect of a release is determined by the ordinary meaning of its language. ***Estate of Bodnar***, 472 Pa. 383, 386, 372 A.2d 746, 748 (1977). Our courts have held that a release extending to "any and all persons" releases an individual despite not being named in the release and who paid no consideration for being release. ***Hasselrode v. Gnagey***, 404 Pa. 549, 172 A.2d 764, at 765 (1960).

Further, a misjudgment by the signor of the release as to the precise nature and extent of injury will not permit rescission of a release agreement when the release contains broad language as in the instant case. ***Leyda v. Norelli***, 387 Pa.Super. 411, 413, 564 A.2d 244, 245 (1989), *appeal denied*, 525 Pa. 627, 578 A.2d 414 (1990).

When our supreme court was faced with the interpretation of a similar release in ***Buttermore v. Aliquippa Hospital***, 522 Pa. 325, 561 A.2d 733 (1989), our Supreme Court ruled that absent a showing of fraud or mutual mistake, the release by its terms discharged all claims and parties pertaining to the accident and stated the following in support of its ruling:

> If such a release can be nullified or circumvented, then every written release and every written contract or agreement of any kind no matter how clear and pertinent and all-inclusive, can be set aside whenever one of the parties has a change of mind or whenever there subsequently occurs a change of circumstances which were unforeseen, or there were after-discovered injuries, or the magnitude of a releasor's injuries were unexpectedly increased, or plaintiff made an inadequate settlement. It would make a mockery of the English language and of the law to permit this release to be circumvented or held to be nugatory.

Id. 561 A.2d at 735, (quoting ***Emery v. Mackiewicz***, 429 Pa. 322, 240 A.2d 68 (1968)).

Therefore, since the release agreement discharged Appellees' liability to Appellant, summary judgment was appropriately granted by this Court in dismissing Khalil's claims.

Further, Appellant is barred from re-litigating these claims under collateral estoppel, which may be used as either a sword or a shield by a stranger to the prior action, as long as the party against whom the defense is invoked is the same. ***Thompson v. Karastan Rug Mills***, 228 Pa. Super 260, 265 (1974).

Here, there are fifteen counts in the instant First Amended Complaint to which identical claims are raised against Pier 3 and its then agent, Wentworth. All of the Counts alleged by Plaintiff arise from actions that were already litigated and subsequently settled. Therefore, under both *res judicata* and collateral estoppel the prior, resolved litigation bars the current claims made by Appellant against Appellees, Pier 3 and Wentworth Property Management, and summary judgment on this basis was proper as well.

6. The Honorable Court did not err in granting summary judgment for Appellants Glenn M. Campbell, William J. Ferren and Associates and The Travelers Indemnity Company under Motion Control No.: 19020263.

Here, the evidentiary record contains insufficient evidence of facts to support Appellant's claims or to provide for a *prima facie* cause of action against appellees Glenn M. Campbell, Esquire, his firm, William J. Ferren and Associates, or their client, Travelers. Further, Khalil's claims were properly barred by this Court on the legal basis of *res judicata,* judicial privilege, and the statute of limitations.

First, the validity of Khalil's claims regarding the executed release and the perceived fraud perpetrated upon her by the Ferren Defendants' is barred by *res judicata.* Here, Appellant had filed suit against the parties and their counsel that were involved in the Water Damage Action and/or

the Pier 3 Action. The Ferren Defendants were counsel to Pier 3 and Wentworth, who were counterclaim/additional defendants in the Pier 3 Action, therefore all of the parties are and their privies are brought back into the current civil action. It is clear that all of Plaintiff's arguments made against the Ferren Defendants are barred by *res judicata* under the principles of this doctrine as previously set forth.

Additionally, under Pennsylvania law, an absolute judicial privilege applies to communications which are made in the regular course of judicial proceedings and are material to the relief sought. ***Schanne v. Addis***, 121 A.3d 942, 947 (Pa. 2015). The absolute protection afforded by the privilege applies regardless of the tort(s) alleged in the Complaint. Attorneys are protected within the scope of the privilege. ***Panitz v. Behrend***, 632 A.2d 562, 564 (Pa. Super. 1993). Here, all of the claims made by the Plaintiff fail because the Ferren Defendants' statements and arguments were made in the regular course of proceedings and were material to the relief sought. Under this privilege, the Ferren Defendants were and remain protected under judicial privilege, therefore, summary judgment in their favor was proper and Appellant is not to be afforded any relief on appeal.

Lastly, the statute of limitations for each of Appellant's claims (assuming such claims were made under a recognized legal basis) against the Ferren Defendants is two years. ***Amodeo v. Ryan Homes, Inc.***, 595 A.2d 1232, 1240 (Pa. Super. 1991); ***Toy v. Metro. Life Ins. Co.***, 863 A.2d 1, 9 (Pa. Super. 2004); ***P.J.A. v. H.C.N.***, 156 A.3d 284, 289 (Pa. Super. 2017). Appellant initiated the present action via Writ of Summons on April 17, 2014; beyond the statute of limitations for any of her claims against the Ferren Defendants, since she executed the release on May 12, 2011, nearly 3 years prior, which was when she knew or should have known that the release did not contain the alleged language preserving her remaining claims.

7. **The Honorable Court did not err in granting summary judgment in favor of Appellants Monica O'Neill and Thomas, Thomas and Hafer, LLP, under Motion Control No.: 19020914.**

Khalil's claims against appellants Thomas, Thomas & Hafer, LLP, and Monica E. O'Neill are legally barred because there is no cognizable legal theory or cause of action to support the claims asserted against them. These Appellants represented Travelers Property and Casualty Company in the Water Damage Action. For the same reasons set forth above in regard to the analysis applicable to the Ferren Defendants, these Appellants are entitled to comparable relief, as Appellee is unable to set forth a valid cause of action against them.

There is no evidence whatsoever that any of the Appellants forged/altered the release or any other document or engaged in any conspiracy or other wrongful conduct of any kind. Appellee alleges that the "Original Release" that she signed was altered and that a fraud (upon her or the Court) was committed. There can be no fraud without justifiable reliance and not one of the Appellants have been shown to owe any recognizable duty to her. ***Bro-Tech Corp v. Thermax, Inc.***, 651 F. Supp 2d 378, 418 (E.D.Pa. 2009).

Appellee is doing nothing but attempting to re-litigate the validity of the release via additional theories and parties. The validity of the release has been raised, addressed, and decided repeatedly by this Court, the Superior Court, and the Commonwealth Court. It is time to end this baseless litigation, as the Appellee has done nothing but continue to waste this Court's time and resources by re-hashing decided issues.

In light of the procedural history, the determinations by several judges of this Court of Common Pleas, the Superior Court, the Commonwealth Court and even our Supreme Court, it is respectfully requested that this appeal be deemed frivolous and dismissed accordingly.

8. **The Honorable Court did not err in granting summary judgment for various Travelers defendants under Motion Control No.: 19020620.**

In the current litigation, Appellant asserted twelve (12) causes of action against the Travelers' Defendants, including claims for fraud, negligent misrepresentation, breach of oral contract, breach of the implied covenant of good faith and fair dealing, civil conspiracy, abuse of process, insurance bad faith (both common law and statutory) and violation of the Unfair Trade Practices and Consumer Protection Law. Plaintiff's claims against defendants Travelers Property Casualty Company of America ("Travelers Property"), The Standard Fire Insurance Company ("Standard Fire"), The Travelers Indemnity Company of America ("TICA"), The Travelers Indemnity Company of Connecticut ("TICC"), and Travelers Casualty Insurance Company of America ("TCIC") (collectively, the "Travelers Defendants") are legally also barred by res judicata.

Appellant's claims in this action are based on alleged acts that occurred prior to final judgment in two separate lawsuits that terminated in 2014 and 2015, respectively. Khalil had the opportunity to address the alleged "knowingly false representations" in the Water Damage Suit, but did not do so. Her claims in this action are simply an attempt to re-litigate issues that could have been raised in the Water Damage Suit (and/or the Pier 3 Suit) before the entry of a final judgment in each respective case. Plaintiff's attempt to once again litigate the same issues in this action that could have been raised with the courts in the Water Damage Suit before the entry of final judgment requires that her claims in this action be barred by the doctrine of res judicata.

As for the remaining three issues claimed as error by Appellant, i.e., that discovery was not closed when summary judgment was entered, the timing of the granting of the various motions by this Court, and that her claims create factual issues for a jury to determine are also without basis and no relief should be afforded.

Pa.R.C.P. 1035.2 states in pertinent part that after "the relevant pleadings are closed ... any party may move for summary judgment ... as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report ..."

In this case, it was determined that given the factual underlying history, the fact that discovery may not have been completed is irrelevant, as the determinations as to the entry of summary judgment were based solely upon issues of law as it relates to the actions taken by Appellant in the underlying actions. No new facts were raised in the instant action as the same have been addressed in the Memorandum Opinion issued by the Commonwealth Court.

Further, simply because these motions were decided shortly after being assigned to this Court for determination does not mean that these motions and the responses were not given serious consideration. For the Appellant to presume otherwise is nothing more than a desperate attempt to continue to smear the credibility and ethical duties of anyone whose interest is adverse to hers or decides an issue against her interests. Again, in light of the nature of these claims, the factual history, the procedural history and the failure of the Appellant to recognize the potential effects of executing a release which terminated all claims and controversies simply confirms the frivolousness of this appeal.

In regard to any issue raised by Appellant as a claim of error in this appeal that the jury should decide these issues, the above analysis against each and every Appellee in this action shows that there are no factual issues for a jury to decide, as this claims contain a pure issue of law to be decided by this Court. Therefore, it is respectfully requested that each Order of March 14, 2019 issued by this Court in granting summary judgment to each Appellee be affirmed on appeal.

Lastly, in regard to her appeal under Docket Number 2549 EDA 2019, (CCP, Philadelphia, No.: 1305-00825), This case involves claims against her prior attorneys in regard to their representation in the underlying claims involving the above settlement. Appellant appeals this Court's Order of July 12, 2019, dismissing all of Appellant's claims and granting summary judgment in favor of her prior attorneys, Gerald J. Williams, Esquire, Beth G. Cole, Esq., and Williams, Cuker, Berezofsky, LLC, under Motion Control No.: 19052478.

In her 1925(b) Statement of Matters Complained of on Appeal, Appellant raises three (3) claims of error over eleven (11) pages, which this Court addresses below in numerical order.

1. The Honorable Court erred in granting, in its July 11, 2019 Order, Defendants' Motion for Summary Judgment and Dismissing Plaintiff's Non-Fraud Claims Under Counts I-IV of the Complaint on Ground of the ***Muhammad*** doctrine[10].
2. The Honorable Court erred in granting, in its July 11, 2019 Order, Defendants' Motion for Summary Judgment and Dismissing Plaintiff's Fraudulent Misrepresentation Claim under Count V of the Complaint on Ground of Estoppel.
3. The Honorable Court erred in granting, in its July 11, 2019 Order, summary judgment for defendants and dismissing plaintiff's legal malpractice and fraudulent misrepresentation claims, because the evidence presented on summary judgment permits a reasonable jury to find in plaintiff's favor on her claims.

Plaintiffs assertions that ***Muhammad v. Strasberger***, 587 A.2d 1346 (Pa. 1991) is both criticized and not always followed by other courts, often in other states, are entirely irrelevant to the application of the doctrine to the current factual circumstances. Muhammad remains the law in Pennsylvania, and has been repeatedly applied to bar litigants from taking the proverbial "second bite" at the apple of settlement.

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[10] ***Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick***, 526 Pa. 541, 587 A.2d 1346 (1991), *rearg. denied*, 528 Pa. 345 (1991), *cert. denied*, 502 U.S. 867 (1991).

In ***Muhammad***, the Supreme Court explained that prohibiting suits by dissatisfied clients against their counsel after having agreed to a settlement comported with the Court's longstanding policy of encouraging settlements and avoiding "chaos in our litigation system:"

> The primary reason we decide today to disallow negligence or breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients is that to allow them will create chaos in our civil litigation system. Lawyers would be reluctant to settle a case for fear some enterprising attorney representing a disgruntled client will find a way to sue them for something that "could have been done, but was not." We refuse to endorse a rule that would discourage settlements and increase substantially the number of legal malpractice cases.
> ***Muhammad***, 587 A.2d at 1349.

Clearly, Appellant disagrees with the application of the ***Muhammad*** doctrine, however, it nonetheless remains a proper basis for entry of summary judgment here, as Appellant had consented to a settlement and then later attempted to second guess the amount of the settlement. Despite being criticized in other jurisdictions, ***Muhammad*** remains the law of this Commonwealth and was recently cited in ***Silvagni v. Shorr***, 113 A.3d 810 (Pa. Super. 2015), another decision applying ***Muhammad*** to a situation with facts analogous to the case at bar. Further, this doctrine has been affirmed as good law as recently as 2019.[11]

Despite Appellants assertions that the fraud exception to ***Muhammad*** applies in his instance, in ***Silvagni v. Shorr***, 113 A.3d 810 (Pa. Super. 2015), our Superior Court held that the trial court properly granted summary judgment under the ***Muhammad*** doctrine in favor of a defendant attorney and his law firm dismissing a malpractice action where the plaintiff could not

[11] In an unpublished case of **Flanagan v. Hand**, 2019 Pa. Super. Unpub. LEXIS 1260, the Superior Court also applied the *Muhammad* doctrine in affirming a grant of summary judgment in favor of an attorney defendant where the plaintiff was "clearly attempting to obtain a 'second bite of the apple' through this legal malpractice action against her original attorneys."

prove that the attorney and law firm fraudulently induced the plaintiff into signing a compromise and release agreement. ***Silvagni***, 113 A.2d at 816.

Fraudulent conduct that could establish an exception to the Muhammad doctrine must be misrepresentation fraudulently uttered with the intent to induce the action undertaken in reliance upon it to the damage of the victim. A person asserting fraud, therefore, must establish: (1) a misrepresentation, (2) scienter on behalf of the misrepresenter, (3) an intention by the maker that the recipient will be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damage to the recipient. ***Banks v. Jerome Taylor & Associates***, 700 A.2d 1329, at 1333 (Pa. Super. 1997).

Clearly, Appellant fails to recognize that the holding of ***Muhammad*** and its progeny deal a fatal blow to her claims and it is respectfully requested that this Court's application of the same in granting judgment in favor of the Appellees was proper and be affirmed on appeal.

As for Appellant's second and third arguments that this Court improperly granted summary judgment in Appellees' favor, these claims of error can be discussed together as they are intertwined with one another.

Collateral estoppel does not require an identity of parties as long as the party against whom the defense is invoked is the same. ***Thompson v. Karastan Rug Mills***, 323 A.2d 341, 344 (Pa. Super. 1974).

Appellant claims that her attorneys somehow (and in conjunction with Travelers) fraudulently altered the Release that she signed with Travelers have already been raised, considered and rejected by two trial courts as affirmed by both the Superior and Commonwealth

Courts. Given the fact that these exact issues have been decided against Appellant, Plaintiff is estopped from bringing those same issues being redefined as legal malpractice claims in a new lawsuit. Therefore, the principles of collateral estoppel as explained above clearly apply.

Based upon the decisions rendered by our appellate courts on these exact issues, Appellant cannot now seek redress under a new theory, especially given the time period that has passed to when the action was initiated against counsel. The claims of fraud do not negate the collateral estoppel issues before this Court, as a final judgment challenged on the basis of fraud may be voided only for acts of extrinsic fraud, not for intrinsic fraud. ***McEvoy v. Quaker City Cab Co.***, 267 Pa. 527, 110 A. 366, 368 (Pa. 1920); ***McGary v. Lewis***, 384 Pa. 173, 119 A.2d 497 (Pa. 1956). Extrinsic fraud typically addresses procedural matters "collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." ***McEvoy***, 110 A. at 368.

In this instance, Appellant cannot successfully challenge the Superior Court's and Commonwealth Court's findings that the release with Travelers is enforceable by claiming fraud in the underlying execution of the document. To maintain such an action, Appellant would need to plead and prove extrinsic fraud relating to procedural matters, which her Complaint does not plead. Even when taken in the light most favorable to her, Appellant cannot overcome the prior findings against her simply by now claiming fraud.

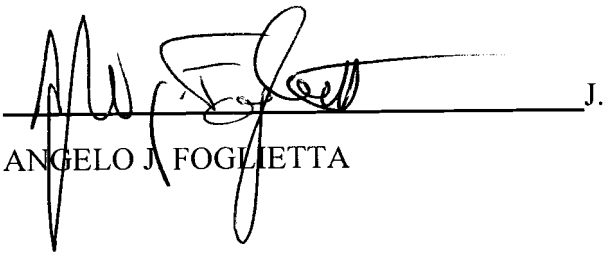
Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. ***Summers v. Certainteed Corp.***, 606 Pa. 294, 997 A.2d 1152, 1159 (2010).

Given the history of this case and the underlying claims, as well as the appellate decisions governing the law of the case for this Court's determination, there are no genuine issues of material fact existing in this instance, as these Appellees are also entitled to judgment in their favor as a

matter of law. Hence, there is no need for the evidence to be submitted to a trier of fact, as Appellant's claims are barred as a matter of law under the various legal principles as discussed herein.

For the foregoing reasons, it is requested this Court's decision in granting all of the Moving Defendants' respective Motions for Summary Judgment be upheld and Appellant's appeals be denied.

BY THE COURT:



J.

ANGELO J. FOGLIETTA

Date: March 2, 2020

Exhibit B

2021 PA Super 3

DR. AHLAM KHALIL, Appellant v. GERALD J. WILLIAMS ESQUIRE; BETH COLE ESQUIRE; WILLIAMS CUKER BEREZOFSKY, LLC	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2549 EDA 2019

Appeal from the Order Entered July 12, 2019
In the Court of Common Pleas of Philadelphia County Civil Division at
No(s): May Term, 2013 No. 0825

BEFORE: KUNSELMAN, J., NICHOLS, J., and PELLEGRINI, J.*

OPINION BY PELLEGRINI, J.: **FILED JANUARY 5, 2021**

Dr. Ahlam Khalil (Appellant) appeals from the July 12, 2019 order of the Court of Common Pleas of Philadelphia County (trial court) granting summary judgment in favor of Gerald J. Williams, Esquire, Beth Cole, Esquire, and Williams Cuker Berezofsky, LLC (collectively, Appellees). We affirm in part and reverse in part.

I.

A.

This appeal involves a legal malpractice action that arose out of two separate but related cases involving Appellant's unit in a Philadelphia condominium building. In May 2007, Appellant's unit suffered water damage

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* Retired Senior Judge assigned to the Superior Court.

caused by a leak in the above unit. The unit was insured under a condominium unitowner's policy issued by State Farm Fire and Casualty Company (State Farm), while her condominium association was insured under a master policy issued by Travelers Property Casualty Company of America (Travelers). Displeased with their responses to her claim, Appellant filed a civil action in July 2008 (the water damage case) in which she asserted claims of breach of contract and bad faith against both State Farm and Travelers, as well as a claim of negligence against the owners of the above unit, Jason and Anne Marie Diegidio (the Diegidios).

Due to the water damage, Appellant moved out of her unit and eventually stopped paying her condominium assessment fees. In July 2009, Pier 3 Condominium Association (Pier 3) sued her for outstanding fees and charges (the Pier 3 case). Appellant responded by filing several counterclaims against Pier 3, alleging that it failed to maintain and remedy damages to the common elements area.[1]

Appellant also filed a joinder complaint against the Diegidios, individually and as members of the Pier 3 Condominium Board, and Wentworth Property Management (Wentworth), the company responsible for

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[1] Appellant asserted counts of assumpsit; negligence; violation of the Uniform Condominium Act, 68 Pa.C.S. §§ 3101-3414; violations of Sections 328(D) and 364 of the Restatement (Second) of Torts; nuisance; breach of implied covenant of good faith and fair dealing; and unjust enrichment/*quantum meruit*.

maintenance of the building. Appellant alleged that the Diegidios created the dangerous condition leading to the discharge of water into her unit, and that Jason Diegidio, as president of the condominium association, exerted undue influence to ensure that she would not be compensated for the damage. As for Wentworth, Appellant asserted it had failed to maintain the common elements areas and remedy the damage to her unit.[2]

In April 2010, with both cases pending, Appellant retained Appellees to represent her in the water damage case. As trial approached in May 2011, Appellant reached an agreement to settle with Travelers for $17,500 and, along with Attorney Cole, signed a general release (the Travelers release). While Appellant disputes the circumstances around her signing, its terms are clear. Appellant is listed as the "Releasor," Travelers as the "Releasee," and Pier 3 is acknowledged as "Releasee's insured." Under the release, Appellant agreed "to terminate all controversy and/or claims for injuries or damages against Releasee, and Releasee's Insured, and any affiliated or related people or entities, both known and unknown, including future developments thereof, in any way growing out of or connected with said incident." Further, Appellant

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[2] Based on her allegations, Appellant asserted counts against the Diegidios and Wentworth for gross negligence and negligence under a theory of *res ispa loquitur*; a count for breach of fiduciary duty against Jason Diegidio in his official capacity; and counts against Wentworth for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §§ 201–1–210–6.

"agreed that this [release] shall be a complete bar to all claims or suits against Releasee, Releasee's Insured, and any affiliated or related people or entities, both known and unknown, for injuries or damages of whatsoever nature resulting from or to said incident [at the Unit.]" Significantly, the release contained no language limiting itself to the water damage case.

With Travelers out of the case, Appellant proceeded to trial on her remaining claims. During trial, she reached an agreement to settle her claims against the Diegidios and State Farm for $50,000 and $40,000, respectively.[3] In an on-record colloquy held in chambers on May 20, 2011, Appellant confirmed her agreement to the terms of the settlements, including Appellees agreeing to represent her for no further fee in the Pier 3 case. Less than a week later, on May 26, 2011, the trial court marked the action as settled, and Attorney Cole entered her appearance in the Pier 3 case on June 1, 2011.

Almost immediately, though, Appellant had second thoughts about the settlements, refusing to sign releases for the Diegidios and State Farm or accept payment from any of the defendants. Because of Appellant's change of mind, Attorney Cole withdrew from the Pier 3 case on August 25, 2011. The trial court then scheduled a hearing to clarify the status of the

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[3] Appellant also agreed to release Jason Diegidio, individually and in his capacity as a condominium board member, from the Pier 3 case. On August 5, 2011, the trial court in the Pier 3 case approved a stipulation that all claims against the Diegidios were withdrawn with prejudice.

settlements. At a September 30, 2011 hearing, Appellant explained her objections to each settlement. Relevant here, Appellant objected to the Travelers settlement because she believed that the release she signed would impair her claims in the Pier 3 case, even though her attorneys had assured her it would not.[4] Despite her complaints, on October 11, 2011, the trial court issued an order finding all the settlements valid and directing each defendant to pay their respective amount into the court. After each defendant complied, the full settlement amount ($107,500) was placed in escrow with the trial court—where it has remained since. Appellant, meanwhile, did not appeal from the trial court's October 11, 2011 order finding the settlements valid.

In April 2012, relying on the Travelers release, Pier 3 and Wentworth moved to dismiss Appellant's counterclaims in the Pier 3 case. Agreeing that the release precluded the claims, the trial court dismissed Appellant's claims against Pier 3 and Wentworth on July 17, 2012. The case proceeded to trial on Pier 3's claim for outstanding assessment fees. On July 19, 2012, a jury found in favor of Pier 3 for $109,000. Following the verdict, Appellant filed a motion for post-trial relief in which she alleged, among other things, that the

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[4] Appellant objected to the State Farm settlement because she learned that a large quantity of her personal property, which had been placed into storage with two separate third-party companies by State Farm, was either missing or destroyed. As for the Diegidios, Appellant contended that she never agreed to release Jason Diegidio, either individually or in his capacity as a board member, from the Pier 3 case.

Travelers release had been entered into by way of "unilateral mistake, mutual mistake, and/or fraud." After the trial court denied the motion, the prothonotary entered judgment for Pier 3 on August 14, 2012, following which Appellant appealed the judgment to the Commonwealth Court.[5]

That appeal, though, was stayed pending disposition of the water damage case, which became active again in November 2012 when Appellees moved to withdraw from the case. On January 7, 2013, the trial court granted the withdrawal and ordered the case "settled, discontinued, and ended." On February 6, 2013, Appellant filed a *pro se* motion for reconsideration of the court's order, as well as a separate "Motion to Vacate and/or Set Aside Stipulation for Settlement and Release(s)." The trial court denied her motion for reconsideration on February 21, 2013, and did the same to her motion to vacate on March 15, 2013, finding it had no jurisdiction to vacate the 2011 settlements. On March 19, 2013, Appellant filed a notice of appeal from the trial court's various orders. This Court quashed the appeal by finding, among other reasons, that Appellant's attempt to litigate the validity of the 2011 settlements was untimely. ***Khalil v. Diegidio***, 2014 WL 10937477 (Pa.

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[5] The Commonwealth Court and not this Court had jurisdiction because the appeal involved an action by a condominium association for collection of fees and costs. ***See*** 42 Pa.C.S. § 762(a)(5) (Commonwealth Court has exclusive jurisdiction over proceedings related to not-for-profit corporations).

Super. filed April 10, 2014) (unpublished memorandum), *appeal denied*, 99 A.3d 926 (Pa. filed September 17, 2014).

After our decision, the Commonwealth Court relisted the appeal in the Pier 3 case for disposition. Appellant argued, among other things, that the trial court erred in barring her claims against Pier 3 and Wentworth because they were not signatories to the release, and that her claims against them were distinct from those she raised in the water damage case. The Commonwealth Court disagreed and found that Appellant released her claims by signing the general release as part of the Travelers settlement. ***Pier 3 Condominium Ass'n v. Khalil***, 2015 WL 5458563 (Pa. Cmwlth. filed July 9, 2015) (unpublished memorandum).

B.

The instant legal malpractice action began on May 10, 2013, when Appellant filed a praecipe initiating the action against the Appellees; she did not file her complaint until March 29, 2017. Appellant raised five counts in her complaint: (1) legal malpractice based in negligence; (2) legal malpractice based in breach of contract; (3) negligent misrepresentation; (4) breach of contract; and (5) fraudulent misrepresentation.

In her complaint, Appellant alleged that before signing the Travelers release, she demanded "clear and specific wording" that signing would not affect her claims in the then-pending Pier 3 case. Even though her attorneys assured her signing would not affect her claims in that case, Appellant refused

to sign the initial Travelers release presented to her. This resulted in Attorney Cole drafting an alternative version containing an asterisk stating that the release "does not include any claims in connection" with the Pier 3 case. Appellant claimed that this was the version of the release that she actually signed. However, to her surprise, when Pier 3 and Wentworth moved to dismiss her claims in the Pier 3 case, they presented a signed release that did not include the asterisk, leading Appellant to allege that Attorneys Williams and Cole or counsel for Pier 3 or Wentworth had switched or altered the Travelers release.[6]

Appellees denied they ever switched the release and, after discovery, moved for summary judgment. Addressing the first four non-fraud counts in Appellant's complaint, Appellees contended that they were barred by ***Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnik***, 587 A.2d 1346 (Pa. 1991), in which our Supreme Court held that "it will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action." ***Id***. at 1348. In Appellees' view, Appellant was seeking to relitigate her dissatisfaction with the water damage settlements through her legal malpractice action. As for the fifth and

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[6] Appellant also alleged that Attorneys Williams and Cole fraudulently induced her to settle with the Diegidios and State Farm by agreeing to represent her at no cost in the Pier 3 case but later withdrawing from the case.

final count alleging fraud, Appellees argued that it was barred by collateral estoppel, asserting that Appellant's claim of fraud had been raised and rejected in both the water damage and Pier 3 cases.

Appellant countered that ***Muhammad*** was inapplicable to her non-fraud claims because she was not alleging dissatisfaction with the settlement amounts. Rather, Appellant insisted, she was alleging that her attorneys had misled her by incorrectly advising her that her claims in the Pier 3 case would be unaffected by signing the release. In support, Appellant produced several emails connected to the signing of the Travelers release. The emails showed that Travelers initially prepared a general release listing Pier 3 as a releasee. In response, Attorney Cole proposed adding language excluding Appellant's claims in the Pier 3 case, with her preparing a second version of the release with the asterisk. Travelers, however, was reluctant to reference the Pier 3 case because it was not a party to the case; instead, Travelers drafted a third version of the release eliminating Pier 3 as a releasee but still acknowledging it as being Travelers' insured. It is this third version that Appellant signed and was later used to dismiss her counterclaims in the Pier 3 case, though Appellant claimed she signed the second version with the asterisk. Finally, Appellant disputed that her fraud claim was estopped, arguing that she never got the chance to litigate her claim that the releases were switched or altered in either of the two prior cases.

Agreeing with Appellees, the trial court issued a July 11, 2019 order holding that Appellant's non-fraud claims were barred by "the ***Muhammad*** doctrine," and that her fraudulent misrepresentation claim was barred by collateral estoppel.[7] As a result, the trial court granted summary judgment for Appellees and dismissed Appellant's action with prejudice. Appellant filed a timely notice of appeal and, after being ordered to do so, a Pa.R.A.P. 1925(b) statement challenging the trial court's findings that ***Muhammad*** and collateral estoppel barred her claims.[8]

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[7] While the summary judgment motion was pending, Appellant filed another legal malpractice action against Appellees on March 22, 2019. Appellees filed preliminary objections based on the doctrine of *lis pendens*, since this legal malpractice action was still pending. After summary judgment was granted in this case, the trial court in the 2019 action sustained Appellees' preliminary objections and dismissed Appellant's complaint with prejudice on grounds of *res judicata*. On appeal, a panel of this Court affirmed in a published opinion. ***See Khalil v. Cole***, --- A.3d ---, 2020 WL 5858628 (Pa. Super. filed October 2, 2020).

[8] Our standard of review for a trial court's decision to grant or deny summary judgment is as follows:

> A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.
>
> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or

II.

In her first issue, Appellant challenges the trial court's reliance on ***Muhammad*** in dismissing her non-fraud claims against her former attorneys and their law firm. ***Muhammad***, she contends, does not bar her claims because she is alleging they gave her incorrect legal advice about the scope of a release connected to a settlement, leading her to sign the Travelers release later used to dismiss her claims in the Pier 3 case. To support this proposition, Appellant relies heavily on two post-***Muhammad*** cases, ***Collas v. Garnick***, 624 A.2d 117 (Pa. Super. 1993), and ***McMahon v. Shea***, 688 A.2d 1179 (Pa. 1997). This being the case, we begin by reviewing ***Muhammad*** and its progeny, including ***Collas*** and ***McMahon***.

A.

This Court has summarized ***Muhammad***:

> In ***Muhammad,*** plaintiffs filed a legal malpractice action against defendant law firm as a result of defendant's representation of plaintiffs in a medical malpractice lawsuit following the death of plaintiffs' child. Defendant law firm negotiated a settlement of the medical malpractice case. Plaintiffs verbally accepted the

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> answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Thompson v. Ginkel, 95 A.3d 900, 904 (Pa. Super. 2014).

settlement offer. Thereafter, plaintiffs changed their minds about the settlement before signing a written accord. Defendant law firm filed a Rule to Show Cause why the settlement agreement should not be enforced. After an evidentiary hearing, the trial court enforced the agreement. The court ordered the defendants in the medical malpractice case to pay the settlement funds and instructed the prothonotary to mark the case settled. Plaintiffs hired new counsel, appealed the order, and this Court affirmed. ***Muhammad v. Childrens Hospital,*** 337 Pa. Super. 635, 487 A.2d 443 (1984) (unpublished memorandum opinion).

Thereafter, plaintiffs filed a legal malpractice case against the law firm that had negotiated the medical-malpractice settlement. The legal malpractice case was dismissed, and our Supreme Court affirmed that dismissal, stating:

> This case must be resolved in light of our longstanding public policy which encourages settlements. Simply stated, ***we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed***, unless that plaintiff can show he was fraudulently induced to settle the original action. An action should not lie against an attorney for malpractice based on negligence and/or contract principles when that client has agreed to a settlement. Rather, only cases of fraud should be actionable.

Muhammad, 587 A.2d at 1348 (emphasis added). The Court further stated:

> [W]e foreclose the ability of dissatisfied litigants to agree to a settlement and then file suit against their attorneys in the hope that they will recover additional monies. To permit otherwise results in unfairness to the attorneys who relied on their client's assent and unfairness to the litigants whose cases have not yet been tried. Additionally, it places an unnecessarily arduous burden on an overly taxed court system. We do believe, however, there must be redress for the plaintiff who has been fraudulently induced into agreeing to settle. It is not enough that the lawyer who negotiated the original settlement may have been negligent; rather, the party seeking to pursue a case against his lawyer after a settlement must plead, with specificity, fraud in the inducement.

Id. at 1351.

Silvagni v. Shorr, 113 A.3d 810, 813 (Pa. Super. 2015).

At first, this Court read ***Muhammad*** as proclaiming "a clear, bright line rule which, absent fraud, shields attorneys from legal malpractice claims sounding in negligence or contract where they involve cases concluded by completed settlement." ***Miller v. Berschler***, 621 A.2d 595, 598 (Pa. Super. 1993). However, in ***Collas***, we declined to read ***Muhammad*** as establishing a complete bar to claims of legal malpractice not involving fraud in settled cases.

In ***Collas***, the plaintiff filed a legal malpractice case against her former lawyer who had advised her to sign a general release as part of a settlement of her motor vehicle-related personal injury action. The "general release [ ], by its terms, released and discharged the other driver and all other parties, known or unknown, who might be liable for the damages sustained." ***Collas***, 624 A.2d. at 119. Based on her lawyer's assurance the release would not preclude an action against the manufacturer of the car's seat belt system, plaintiff signed the release. Plaintiff later sued the manufacturer but her action was barred by the release, following which she filed a legal malpractice action against her former lawyer. Relying on ***Muhammad***, the trial court dismissed the action.

We reversed and held that ***Muhammad*** did not bar plaintiff's malpractice claim. After first recognizing that plaintiff had stated a sufficient

cause of action for malpractice, the panel found ***Muhammad*** to be inapplicable, stating:

> In the instant case, the plaintiffs have not alleged an inadequacy of the settlement negotiated by their lawyer. Instead, they complain that their lawyer negligently gave them bad advice about a written agreement which they had been asked to execute. The fact that the written agreement was prepared as part of the settlement of their prior action was incidental; it did not relieve counsel of an obligation to exercise care in determining the effect of the agreement which his clients were being asked to sign. This was particularly so where, as here, the clients had specifically asked the lawyer regarding the effect of the release and had told him of their plans to file a second action for the wife-claimant's injuries. With respect to his advice regarding the agreement of release, counsel was required to exercise the same degree of care as he or she would have exercised in advising a client about a complex agreement not a part of the settlement of a legal action.

Id. at 121.

A few years after ***Collas***, the Pennsylvania Supreme Court revisited ***Muhammad*** in ***McMahon***. There, as part of their divorce, a husband and wife entered into a written settlement agreement for child support and alimony payments that were to terminate when their youngest child reached age 21, was emancipated, or finished college, whichever happened last. Based on his attorneys' advice, the husband stipulated that the agreement would be incorporated but not merged into the final divorce decree. When his ex-wife remarried, the husband tried to terminate the alimony payments but was unable because the parties' agreement had survived the divorce decree. ***McMahon***, 688 A.2d at 1180. After his petition was denied, the husband filed a legal malpractice action against his attorneys because they failed to merge

his alimony agreement with the final divorce decree, which led to him continuing to pay alimony after his ex-wife remarried. ***Id***. at 1180-81. The trial court dismissed the complaint but this Court reversed and found ***Muhammad*** inapplicable.

In a non-precedential decision, a six-member Pennsylvania Supreme Court affirmed. The Opinion Announcing the Judgment of Court (OAJC) found ***Muhammad*** inapplicable because the plaintiff husband was dissatisfied not with his settlement but with his attorneys failing to provide correct advice about well-established principles of law in settling his case:

> The laudable purpose of reducing litigation and encouraging finality would not be served by precluding the instant action. [Plaintiff] merely seeks redress for his attorneys' alleged negligence in failing to advise him as to the controlling law applicable to a contract.

Id. at 1182 (Zappala, J., joined by Flaherty, C.J., and Nigro, J.).

In a concurring opinion, Justice Cappy disagreed that ***Muhammad*** should be limited to its facts, emphasizing its continued validity in encouraging settlements and reducing litigation. ***Id***. at 1182-83 (Cappy, J., joined by Castille and Newman, JJ.). Justice Cappy, however, agreed with the OAJC where it distinguished "between a challenge to an attorney's professional judgment regarding an amount to be accepted or paid in settlement of a claim, and a challenge to an attorney's failure to correctly advise his client about well established principles of law in settling a case. This is a reasonable and justifiable distinction." ***Id***. at 1183. As a result, all six members of the Court

distinguished between "holding an attorney accountable to inform a client about the ramifications of existing law and allowing the second guessing of an attorney's professional judgment in an attempt to obtain monies, once a settlement agreement has been reached." ***Id***.

Not long after ***McMahon***, we explained the distinction between malpractice claims barred by ***Muhammad*** and those that are not.

> In cases wherein a dissatisfied litigant merely wishes to second guess his or her decision to settle due to speculation that he or she may have been able to secure a larger amount of money, *i.e.*[,] "get a better deal[,]" the ***Muhammad*** rule applies so as to bar that litigant from suing his counsel for negligence. If, however, a settlement agreement is legally deficient or if an attorney fails to explain the effect of a legal document, the client may seek redress from counsel by filing a malpractice action sounding in negligence.

Banks v. Jerome Taylor & Associates, 700 A.2d 1329, 1332 (Pa. Super. 1997).

B.

Appellant argues that ***Muhammad*** is distinguishable because her non-fraud claims do not challenge the reasonableness of the amount of the settlements in the water damage action. Instead, she maintains that her claims alleged that her former attorneys gave her erroneous advice about the effect the Travelers release would have on counterclaims in the Pier 3 case. ***See*** Appellant's Brief at 48. In this sense, she contends, this case is analogous to ***Collas*** where the plaintiff's attorney advised the client that signing a release would not adversely affect her claims in a potential future case. ***Id***. at 55.

She also contends that this case is analogous to ***McMahon***, where our Supreme Court held that the rationale behind ***Muhammad*** was inapplicable to the plaintiff's legal malpractice claims that did not attack the value of his settlement but his attorneys' faulty advice about the possible consequence of entering into a legal agreement. ***Id***. at 58.

We agree with Appellant that ***Collas*** and ***McMahon*** are good law and ***Muhammad*** did not establish a blanket rule barring any non-fraud claim against a former attorney where the prior matter led to settlement. In particular, although our Supreme Court's decision in ***McMahon*** was only a plurality decision, the three concurring justices disputed only that ***Muhammad*** be limited solely to its facts; those justices agreed that ***Muhammad*** does not apply to allegations of attorney negligence in a settled case that goes beyond a contention that the attorney was negligent in advising about a settlement amount. ***See McMahon***, 688 A.2d at 1183. Most recently, in ***Kilmer v. Sposito***, 146 A.3d 1275 (Pa. Super. 2016), we distinguished an attorney's professional judgment in negotiating a settlement from the attorney's failure to advise a client correctly on the law pertaining to the client's interests, recognizing that under the latter scenario, the plaintiff's claims are not barred by ***Muhammad***. ***Id***. at 1279-80 (citing ***McMahon*** in finding that plaintiff/wife was not barred from maintaining legal malpractice action where she followed attorney's advice and elected to take against her

late husband's will when, by operation of law, she would have been entitled to a larger portion of the estate).

That said, if ***Collas*** and ***McMahon*** carve out an exception to ***Muhammad***, Appellant did not plead facts in her complaint that fit within that exception. In her March 29, 2017 complaint, Appellant claimed that Attorneys Williams and Cole assured her the Travelers release would not affect her claims in the Pier 3 case. Appellant's Complaint, 3/29/17, at Paragraph 19. Appellant, though, then alleged the following:

> 20. After [Appellant] refused to sign the release as presented to her by [Attorneys] Williams and Cole, [Attorney] Cole presented [Appellant] with a different settlement release that contained an asterisk which [Attorney] Cole purported that the release in [the water damage case] would not precluded [Appellant] from asserting [her] counterclaims and joinder action in [the Assessment fees case].
>
> 21. Relying on the assurance and [advice] of [Attorneys] Williams and Cole, [Appellant] signed the aforementioned release containing an asterisk.

Id. at Paragraphs 20-21.

Appellant went on to assert that she was surprised when Pier 3 and Wentworth moved for summary judgment based on the Travelers release, since she signed the version with the asterisk.

> 31. To [Appellant's] dismay, the release presented by counsel for [Pier 3 and Wentworth] was not the one presented to [Appellant] by [Attorney] Cole.
>
> 32. The release presented by counsel for [Pier 3 and Wentworth] in the summary judgment motion in the [Assessment fees case] did not contain the aforementioned asterisk and was not the one signed by [Appellant].

> 33. It became evident to [Appellant] that [Attorneys] Cole and Williams and/or counsel for [Pier 3 and Wentworth] **switched the release**. Nevertheless, [Appellant] would not have entertained a release without the assurances from [Attorneys] Williams and Cole that it would not affect her counterclaims and joinder claim in [the Assessment fees case].

Id. at Paragraphs 31-33 (emphasis added).

As these averments show, Appellant pled facts alleging that she was the victim of fraud. More specifically, she alleged that the Travelers release that she signed was intentionally switched with one that she did not sign, thus leading to her claims in a separate case to be dismissed due to the fraud. While claims of fraud are not barred under ***Muhammad***, they also cannot be styled as claims sounding in negligence and breach of contract after a settlement has been accepted by the client.

While she does allege that her attorneys gave her flawed legal advice about the effect of signing the Travelers release, Appellant then alleges that she refused to sign the release unless the language she wanted was added. ***Id***. at Paragraphs 19-20. Then, after she signed a release with the language she demanded, that release was intentionally switched and later used against her in a separate case. ***Id***. at Paragraph 33. Put differently, Appellant is not alleging that it is her attorneys' negligence that caused her damages; instead, she is alleging that her damages—dismissal of her claims in a separate case—were caused by fraud.

In contrast, neither of the plaintiffs in ***Collas*** and ***McMahon*** alleged conduct of the sort that Appellant has alleged. Instead, in both of those cases,

the plaintiffs claimed that their attorneys failed to correctly advise them about well-established principles of the law in settling the case, and that it was these misstatements about the effect of the settlements that placed the plaintiffs' claims outside the scope of the ***Muhammad*** bar against claims of negligence against a former attorney after a settlement has been reached.

Having found ***Collas*** and ***McMahon*** distinguishable, ***Muhammad*** applies to bar her claims sounding in negligence and contract against her former attorneys and their law firm. We, thus, find that the trial court did not err in dismissing the first four counts of her complaint.[9]

III.

Appellant next argues that the trial court erred in dismissing her fifth count for fraudulent misrepresentation on collateral estoppel grounds. "The doctrine of collateral estoppel or issue preclusion prevents a question of law or an issue of fact that has once been litigated and fully adjudicated in a court of competent jurisdiction from being relitigated in a subsequent suit."

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[9] We also note that Appellant argues that the trial court erred in dismissing her non-fraud claims because she alleged that she was fraudulently induced to settle with the Diegidios and State Farm by agreeing to represent her in the Pier 3 case but never intended to do so. ***See*** Appellant's Brief at 51. However, because Appellant's argument is confined to a single paragraph in her brief, we deem her argument waived for lack of meaningful analysis and development. ***See In re M.Z.T.M.W.***, 163 A.3d 462, 465 (Pa. Super. 2017) ("It is well-settled that this Court will not review a claim unless it is developed in the argument section of an appellant's brief, and supported by citations to relevant authority.") (citations omitted).

Mariner Chestnut Partners, L.P. v. Lenfest, 152 A.3d 265, 286 (Pa. Super. 2016) (citation omitted). Collateral estoppel bars relitigation of an issue if these elements are met:

> (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

Weissberger v. Myers, 90 A.3d 730, 733 (Pa. Super. 2014) (citation omitted). Collateral estoppel does not require either "identity of causes of action or parties." ***Chada v. Chada***, 756 A.3d 39, 42 (Pa. Super. 2000) (citation omitted). Rather, "[c]ollateral estoppel may be used as either a sword or shield by a stranger to the prior action if the party against whom the doctrine is invoked was a party or in privity with a party to the prior action." ***Columbia Med. Grp., Inc. v. Herring & Roll, P.C.***, 829 A.2d 1184, 1190 (Pa. Super. 2003) (quotation omitted). Unlike *res judiciata*, which bars later claims that could have been litigated in the prior proceeding but were not, collateral estoppel bars litigation of issues that were actually litigated in the prior action. ***See Wilmington Trust, N.A. v. Unknown Heirs***, 219 A.3d 1173, 1179 (Pa. Super. 2019) (citation omitted).[10]

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[10] Invocation of the doctrine of *res judicata* (claim preclusion) requires that both the former and latter suits possess the following common elements: (1)

In holding that Appellant was estopped from claiming fraud, the trial court found that the claim had been "raised, considered and rejected" in both the water damage and Pier 3 cases, and then affirmed by both this Court and the Commonwealth Court. ***See*** Trial Court Opinion, 3/20/20, at 21-22. Appellant disputes this by first arguing that none of those prior courts considered the issue involved in her fraudulent misrepresentation claim. ***See*** Appellant's Brief at 70-71. On this point, she argues that the trial court misread our decision in the water damage action affirming the denial of her motion to vacate the settlements. She observes that this Court did not rule on the merits of her challenge to the validity of the settlements; instead, this Court quashed the appeal on jurisdictional grounds because she failed to appeal from the trial court's October 11, 2011 order in the water damage case finding all the settlements valid. ***Id***. at 72-73. Appellant likewise argues that

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identity in the thing sued upon; (2) identity in the cause of action; (3) identity of persons and parties to the action; and (4) identity of the capacity of the parties suing or being sued. ***Matternas v. Stehman***, 642 A.2d 1120, 1123, (Pa. Super. 1994). "The fundamental principle upon which [*res judicata*] is based is that a court judgment should be conclusive as between the parties and their privies in respect to every fact which could properly have been considered in reaching the determination and in respect to all points of law relating directly to the cause of action and affecting the subject matter before the court. The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights. When the cause of action in the first and second actions are distinct, or, even though related, are not so closely related that matters essential to recovery in the second action have been determined in the first action, the doctrine of *res judicata* does not apply." ***Hammel v. Hammel***, 636 A.2d 214, 218 (1994) (citations omitted, emphasis supplied).

her fraud claim was not considered by the Commonwealth Court in the Pier 3 case, noting that the main issue on appeal concerned the language of the Travelers release and whether it released Pier 3 and Wentworth from her counterclaims. ***Id***. at 75. Appellees, meanwhile, echo the trial court and assert that Appellant's claim of fraud was raised and rejected in both of Appellant's underlying cases. ***See*** Appellee's Brief at 27.

As noted earlier, Appellant's fifth count in her complaint was for fraudulent misrepresentation, the elements of which are: (1) A representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness on whether it is true or false; (4) intending to mislead another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance. ***Weston v. Northampton Pers. Care. Inc.***, 62 A.3d 947, 960 (Pa. Super. 2013).

In her claim, Appellant alleged that Attorney Cole presented her with a version of the Travelers release containing an asterisk purporting to limit its effect to the water damage case, and that it was this version that she actually signed. ***See*** Appellant's Complaint, 3/29/17, at Paragraph 76. She then asserts that "[t]he [r]elease submitted to the Court was different from the one signed by [Appellant] which had an asterisk" and "[a]s a result of [Appellant's] reliance on the fraudulent representations of [Attorneys Williams and Cole], [Appellant] suffered damages including but not limited to her inability to

prosecute her claims in [the assessment fees case.]" ***Id***. at Paragraphs 77-78.

We begin with the first element of collateral estoppel: whether the issue decided in the prior case is identical to one presented in this case. Beginning with the water damage case, it does not appear that Appellant ever raised her claim that the Travelers release was switched or altered. At the September 30, 2011 hearing to address the status of the water damage settlements, Appellant, who was still represented by Attorneys Williams and Cole, did not allege that the Travelers release had been switched or altered; instead, she expressed concern that the Travelers release, along with the proposed releases for the Diegidios and State Farm, would affect her counterclaims in the Pier 3 case. ***See*** Reproduced Record (RR) at 442a-443a (N.T., 9/30/2011, at 23-24). As a result, when the trial court in the water damage case entered its October 11, 2011 order finding that the settlements were valid, there was no allegation of fraud before it.

Despite her concerns about the settlements, Appellant chose not to appeal from this order, waiting until after her claims in the Pier 3 case were dismissed to file a motion to vacate the settlements on February 6, 2013. Finding that it was without jurisdiction to vacate the 2011 settlements, the trial court denied that motion. On appeal, this Court observed that the February 6, 2013 motion to vacate asserted the same issues that Appellant raised at the September 30, 2011 hearing. ***See Khalil***, 2014 WL 10937477

at *4. Agreeing with the trial court that it was without jurisdiction in the appeal, this Court held that Appellant should have filed an appeal within 30 days of the October 11, 2011 order. ***Id***. By failing to do so, we held, Appellant could not revive her claims attacking the validity of the settlements. ***Id***.

Based on this summary, we cannot conclude that Appellant's claim of fraud was raised and rejected in the water damage action. While Appellant was concerned about the effect of the Travelers release after the settlement, there is no indication that she raised the identical claim that she is trying to raise in her fraudulent misrepresentation claim, and Appellees have not pointed us to anything in the record in the water damage case to the contrary. Moreover, while Appellant could have perhaps raised her claim of fraud once she realized which release she signed, we note that collateral estoppel applies to issues that were *actually* litigated in the prior action, rather than claims which *could have* been raised, which are precluded by *res judicata*. Thus, the fraud claim was not litigated in the prior water damage case.

However, that does not end our inquiry, as we must also determine whether the fraud claim was raised and litigated in the Pier 3 case. As noted above, in that case, Appellant's claims against Pier 3 and Wentworth were dismissed just before trial. Then, following the verdict in favor of Pier 3, Appellant moved for post-trial relief by arguing, among other things, that the Travelers release was "entered into by way of unilateral mistake, mutual mistake, and/or fraud." RR 622a (Appellant's Motion for Post-Trial Relief,

7/30/12, at Paragraph 55). After the trial court denied her motion, Appellant reasserted the issue in her Pa.R.A.P. 1925(b) statement. The trial court, however, declined to the address the merits of the issue in its Pa.R.A.P. 1925(a) opinion, observing, "[n]either the validity of the release nor the circumstances in which the release was signed were issued before this Court." RR 628a (Trial Court Opinion, 11/21/12, at 5). Consequently, the court stated, "the only issue before this Court, with regards to the release, was to determine whether the language of the release released both Pier 3 and Wentworth." ***Id***.

On appeal to the Commonwealth Court, Appellant did not reassert the claim raised in her post-trial motion. Instead, in her lead issue, Appellant contended that "the trial court erred in determining that the [Travelers] Release barred her claims against [Pier 3] and Wentworth because they were not signatories to the Release and were not named in the recital of released parties." ***Pier 3***, 2015 WL 5458563 at *4. After reviewing the terms of the Travelers release, the Commonwealth Court found that Appellant's counterclaims against Pier 3 were barred by the Travelers release. ***See id***. at *6. Additionally, the Commonwealth Court concluded that Appellant's joinder claims against Wentworth were barred because, under both case law and the Uniform Condominium Act, tort and contract suits against agents of condominium associations are prohibited. ***See id***. at *6-8.

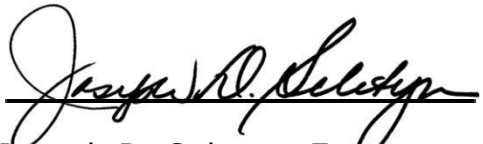
In a footnote, the Commonwealth Court observed that Travelers, in its brief in the appeal of the water damage case, conceded that the Travelers release was not intended to bar Appellant's claims against Pier 3 and Wentworth. ***See id***. at *8 n.15. The Commonwealth Court, however, found this to be of no import, stating that "[b]ecause the [water damage action] has now been litigated to final judgment, the Release is deemed valid, and Appellant cannot now use this Court, an appellate court, as the forum to re-contest the validity of the Release on the ground of mutual mistake." ***Id***.

As we did after reviewing the water damage case, we cannot conclude that the merits of Appellant's claim of fraud were raised and rejected in the water damage action. While Appellant raised the claim somewhat in her post-trial motion in the Pier 3 case, the trial court in that case declined to address any allegations about the circumstances in which the Travelers release was signed, finding that its determination was limited to whether the terms of the release barred Appellant's claims against Pier 3 and Wentworth. Likewise, though not raised on appeal, the Commonwealth Court found that any challenge to the validity of the Travelers release would be improper, since the trial court in the water damage action found it to be valid and this Court found that Appellant's attempt to re-litigate the release were untimely. Thus, we agree with Appellant that the issue raised in this matter—her allegations of fraud against her former attorneys—was not actually litigated in the Pier 3 case and, therefore, is not estopped from being raised in this matter.

Accordingly, we affirm the trial court's grant of summary judgment and dismissal with prejudice of counts one through four of Appellant's complaint. We reverse, however, the trial court's dismissal of Appellant claim of fraudulent misrepresentation at count five.

Order affirmed in part and reversed in part. Case remanded. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/05/2021