Received 10/26/2021 3:26:36 PM Supreme Court Eastern District

Filed 10/26/2021 3:26:00 PM Supreme Court Eastern District
24 EAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA

DR. AHLAM KHALIL,

Appellant,

v.

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

Appellees.

24 EAP 2021

REPLY BRIEF OF THE 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

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PRELIMINARY STATEMENT

Williams, Cole, and Williams Cuker Berezofsky, LLC ("the Lawyers") make a valiant attempt to argue that the Superior Court correctly held that this case does not fall within the *McMahon* exception to *Muhammad. See McMahon v. Shea,* 657 A.2d 938 (Pa. Super. 1995) (*en banc*), *aff'd*, 688 A.2d 1179 (Pa. 1997); *Muhammad v. Strassburger*, 526 Pa. 541, 587 A.2d 1346 (1991). But the Lawyers' brief distorts the Superior Court's Opinion and misrepresents the facts to draw attention away from the clear attorney malpractice underlying this case.[1]

The factual allegations in Dr. Khalil's complaint, and the evidence provided to the trial court in opposition to summary judgment, compel the conclusion that Dr. Khalil's claims arise out of the Lawyers' actions and their

[1] For example, the Lawyers state in their Counter-Statement of the Case that Dr. Khalil "changed her mind" about the Diegidio settlements. (Brief of Appellees at 6.) To the contrary, Dr. Khalil did not endorse checks or sign releases for Diegidio and State Farm because the Lawyers had included the same broad release language as the Travelers Release which was construed to dismiss her claims in Pier 3. (R. 91a-94a.) The Lawyers also state that Judge Overton, the trial judge in Pier 3, "ultimately found that Dr. Khalil had no cognizable or legally available claims in that matter." (Brief of Appellees at 7.) But Judge Overton did not rule on the merits of Dr. Khalil's claims. Instead, he relied on the Travelers Release that the Lawyers approved as grounds for dismissing Dr. Khalil's claims against Pier 3. (R. 613a, 628a.) Indeed, Judge Overton acknowledged in his opinion that Dr. Khalil might have a claim against the Lawyers. (R. 628a, n.4.) The Lawyers also imply that the Commonwealth Court held that Dr. Khalil's claims against Pier 3 were untimely and were barred by the Uniform Condominium Act. (Brief of Appellees at 7.) Again, they distort the record. The Commonwealth Court did not rule on either issue but instead based its holding on the language of the Travelers Release. (R. 636a-656a.).

negligent and inaccurate advice in connection with the Travelers Release. This case therefore falls squarely within the *McMahon* exception to *Muhammad*.

ARGUMENT

I. The Superior Court erred as a matter of law when it held that Dr. Khalil's legal malpractice claims were barred by *Muhammad v. Strassburger.*

A. The trial court and Superior Court were bound by the exception to the *Muhammad* rule adopted in *McMahon*.

1. *McMahon* has precedential value to the extent that it recognizes an exception to *Muhammad* when a party asserts claims based on a lawyer's legal advice about a settlement.

The Lawyers argue that Dr. Khalil's reliance on *McMahon v. Shea,* 688 A.2d 1179 (Pa. 1997), is misplaced because *McMahon*'s Opinion Announcing the Judgment of the Court (OAJC) is not controlling law. (Brief of Appellees at 22-23.) According to the Lawyers, "neither the Trial Court, nor the Superior Court, was required to follow *McMahon* since the decision, unlike *Muhammad,* was given no precedential weight." (Brief of Appellees at 22.)

The Lawyers misconstrue Dr. Khalil's argument. Dr. Khalil is not arguing that a plurality opinion is binding precedent. Rather, *McMahon* carries precedential weight to the extent that there are legal conclusions or

reasoning joined by both the plurality and concurring opinions. (*See* Brief for Appellant at 43-44.)

Supreme Court plurality opinions do not have precedential value. *See Commonwealth v. Baldwin,* 604 Pa. 34, 42, 985 A.3d 820, 835, (2009); *Kelley v. State Employees' Ret. Bd.,* 593 Pa. 487, 499, 932 A.2d 61, 67-68 (2007). "While the ultimate order of a plurality opinion, *i.e.,* an affirmance or reversal, is binding on the parties in that particular case, legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority." *Interests of O.A.,* 552 Pa. 666, 676 n.4, 717 A.2d 490, 496 n.4 (1998).

But there is a well-recognized exception to the general rule. "In cases where a concurring opinion enumerates the portions of the plurality's opinion in which the author joins or disagrees, those portions of agreement gain precedential value." *Commonwealth v. Brown,* 23 A.3d 544, 556 (Pa. Super. 2011) (citing *Commonwealth v. Perez,* 760 A.2d 873, 877 (Pa. Super. 2000), *aff'd,* 577 Pa. 360, 845 A.2d 779 (2004).) And where "the concurrence does not explicitly state its agreement or disagreement with the plurality, we must look to the substance of the concurrence to determine the extent to which it provides precedential value to points of agreement." *Commonwealth v. Brown,* 23 A.3d at 556.

In *McMahon,* there was agreement among the Justices joining the OAJC and those joining the Concurring Opinion. Although concurring Justices Cappy, Castille, and Newman disagreed that *Muhammad* should be limited to its facts, they agreed that the OAJC Opinion drew "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." 688 A.2d at 1183. As both the plurality and concurring opinions in *McMahon* acknowledged that there should be a "negligent settlement advice" exception to *Muhammad,* that exception has precedential effect. *See Commonwealth v. Brown,* 23 A.3d at 556; *Commonwealth v. Perez,* 760 A.2d at 877.

The Lawyers also argue that the Superior Court equivocated about whether *Collas* and *McMahon* carve out an exception to *Muhammad.* (Brief of Appellees at 25, n.3.) To the contrary, the Superior Court's Opinion states "[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." Opinion at 17 (citing *Collas v. Garnick*, 624 A.2d 117 (Pa. Super. 1993)).

The Superior Court's Opinion also acknowledges that "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." Opinion at 17 (citing *McMahon*, 688 A.2d at 1183).

Finally, the Superior Court noted that in *Kilmer v. Sposito*, 146 A.3d 1275, 1280 (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 interest, recognizing the under the latter scenario, the plaintiff's claims are not barred by *Muhammad.*" Opinion at 17 (citing *Kilmer*, 146 A.3d at 1279-80.)

The Lawyers therefore misconstrue Pennsylvania law and the Superior Court's holding in this case when they argue that *McMahon* does not create an exception to *Muhammad.*

2. The Bar Associations concede that legal malpractice claims arising out of advice about a settlement are not barred by *Muhammad*.

In their Brief for Amici Curiae, the Pennsylvania Bar Association, the Philadelphia Bar Association, and the Allegheny County Bar Association

("the Bar Associations") argue that this Court need not address the continued viability of *Muhammad* because if Dr. Khalil was defrauded, or the Lawyers' erred in providing legal advice about the consequences of the settlement, "[u]nder no circumstances were Appellant's claims barred under the *Muhammad* rule":

> If Appellant pleaded facts sufficient to state a claim for legal malpractice, then such a claim would not be barred under the *Muhammad* doctrine and its accepted exceptions. *If counsel erred in providing legal advice regarding the consequences of the settlement, then the case would fall under one of the established exceptions to the general bar of Muhammad*. If Appellant was induced into settling due to fraud, then the case would fall under one of the established exceptions to the general bar of *Muhammad*. *Under no circumstance were Appellant's claims barred under the Muhammad doctrine.* The present action presents no reason for the Supreme Court to overturn the *Muhammad* doctrine with its established exceptions.

(Brief for Amici Curiae at 18-19 (emphasis added).)

Dr. Khalil agrees. *McMahon* and *Collas* created an exception to the *Muhammad* rule where, as here, a plaintiff alleges that her Lawyers gave her misleading advice about the legal consequences of a release they negotiated, approved, sent to opposing counsel, and submitted to the court.

B. The Superior Court erred in concluding that the complaint's allegations of fraud precluded alternative claims based on theories of negligence and breach of contract.

The Superior Court held that *McMahon* and *Collas* are distinguishable because "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." Opinion at 19. In so holding, "[t]he Superior Court effectively determined Appellant did not state a claim of legal malpractice because the gist of her claim was one of pure fraud." (Brief for Amici Curie at 18.)

But Pennsylvania does not limit a plaintiff to a single "gist of a claim" or theory of a case. And Rule 1020(c) permits pleading in the alternative. Pa.R.C.P. 1020(c). The Superior Court therefore misapplied the Pennsylvania rules of pleading when it held that Dr. Khalil's fraud allegations prevent her from asserting alternative claims based on theories of negligence and breach of contract.

1. Under Pennsylvania rules of pleading, a plaintiff is not limited to a single theory of the case.

Pennsylvania is a fact-pleading state. *Sibley v. Barr & McGogney,* No. 1523 EDA 2018, 2021 Pa. Super. Unpub. LEXIS 1841, at *7 (July 9, 2021);

Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 326, n.8, 319 A.2d 914, 918, n.8 (1974).

Although a complaint must set forth the facts on which a cause of action is based, "it is not necessary that a plaintiff identify the specific legal theory underlying the complaint." *Sibley,* 2021 Pa. Super. Unpub. LEXIS 1841, at *10-12 (July 9, 2021) (*quoting Burnside v. Abbott Laboratories,* 505 A.2d 973, 980 (Pa. Super. 1985)).

"Plaintiffs should not be forced to elect a particular theory in pursuing a claim" to avoid "the attendant possibility that meritorious claims will fail because the wrong legal theory was chosen." *Bucks v. Cty. Servs. v. Phila. Parking Auth.,* 649 Pa. 96, 124, 195 A.3d 218, 236 (2018) (*quoting Schreiber v. Republic Intermodal Corp.,* 473 Pa. 614, 375 A.2d 1285, 1291 (1977).

Instead, a plaintiff may plead alternative legal theories based on the operative facts:

> The notion that a complaint weds a plaintiff to a particular theory of liability is foreign to Pennsylvania pleading. Ours is a system of fact pleading, not "theory" pleading; a plaintiff is free to proceed on any theory of liability which the facts alleged in his complaint will support.

Kuisis, 457 Pa. at 326, n.8, 319 A.2d at 918, n.8. *See Sibley*, 2021 Pa. Super Unpub. LEXIS 1841 at *9 (holding that complaint's factual allegations about the defendant lawyers' mishandling of a real estate action and foreclosure

action alleged breaches of duty under theories of both negligence and breach of contract).

The right to plead alternative legal theories is implicit in Rule 1020(c), which states that "[c]auses of action and defenses may be pleaded in the alternative." Pa.R.C.P. 1020(c).

> A party pleading in the alternative cannot be required to elect upon which theory or which claim or defense he rests his case. To require him to make an election would defeat the purpose of permitting him to plead in the alternative.

Laughlin v. McConnel, 191 A.2d 291 (Pa. Super. 1963). *See also Dansak v. Cameron Coca-Cola Bottling Co.,* 703 A.2d 489, 499 (Pa. Super. 1997) (holding that defendant's pleading did not constitute a waiver because defendant was pleading in the alternative); *Gentile v. Weiss*, 477 A.2d 544, 546 (Pa. Super. 1984) (holding that pleading the requirements necessary to modify a statutory arbitration award did not prevent party from arguing principles of common law arbitration).

In *Baron v. Bernstein,* 106 A.2d 668 (Pa. Super. 1954), the Superior Court held that Rule 1020(c) allows a plaintiff to plead not only inconsistent theories—but also inconsistent facts. In *Baron,* a judgment debtor sought to open a judgment entered by confession on a written note. The debtor's petition to open alleged that (1) the note was collateral security in accordance

with a prior agreement; (2) the debtor had performed his obligation under the agreement; and (3) there was a complete failure of consideration. *Id.* at 669.

But the debtor's petition to open also alleged in the alternative that (1) certain ink-inscribed words on the face of the note when it was executed and delivered had been omitted; (2) the debtor did not sign the instrument entered of record, and (3) his signature on the instrument was a forgery. *Id*.

The trial court found that the debtor's petition to open was "defective and confusing," noting that although the debtor admitted to the making and delivery of the promissory note, he also alleged that he did not sign the note and that it was a forgery. *Id.* The trial court declared the petition to be "untrue and dishonest" and dismissed the debtor's petition to open. *Id.*

The Superior Court reversed: "Though it is apparent the averments in appellant's petition are inconsistent and conflicting there is no basis for holding that the petition is defective. Under Pa.R.C.P. 1020(c) pleading in the alternative is permissible." *Id.* "Therefore, insofar as the dismissal of appellant's petition was based on the inconsistencies in the averments of his petition, we do not concur in the decision of the court below." *Id.* The Superior Court reversed and remanded with instructions that the judgment be opened. *Id. See also Denlinger, Inc. v. Agresta,* 714 A.2d 1048, 1051 (Pa. Super.

1998) (holding that Rule 1020(c) permitted plaintiff to allege in a mechanics lien complaint that it was either a contractor or a subcontractor).

Here, as in *Baron,* Dr. Khalil asserts claims based on different theories of relief. In *Baron*, the Superior Court held that the petitioner's allegations that his signature was forged (a fraud theory) did not preclude him from also asserting arguments under a contract theory. 106 A.2d 668. *Baron* thus compels the conclusion that the Superior Court erred when it held that Dr. Khalils assertion of a fraud theory precluded her from asserting claims based on theories of negligence and breach of contract.

Finally, the Superior Court's overly narrow reading of the complaint goes against Rule 126 which states that "the rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every action." Pa.R.C.P. 126.

In sum, the Superior Court misconstrued the Pennsylvania rules of pleading and erred as a matter of law when it held that because Dr. Khalil asserted facts supporting her claim that defendants were liable under a fraud theory, she could not also assert facts supporting claims based on theories of negligence and breach of contract.

2. The complaint alleges facts that fall within the *McMahon* and *Collas* exception to *Muhammad*.

The Lawyers argue that "[p]leading standards had nothing to do with the Superior Court's decision." (Brief of Appellees at 24.) But the Superior Court found that "if *Collas* and *McMahon* carve out an exception to *Muhammad*, Appellant did not plead facts in her complaint that fit within that exception." Opinion at 18. So, despite the Lawyers' assertion, pleading standards had *everything* to do with the Superior Court's decision.

A review of Dr. Khalil's eighty paragraph complaint reveals that Dr. Khalil alleged facts that fall within the *McMahon* and *Collas* exception to *Muhammad.* (R. 111a-127a.) For example, paragraphs 14 through 16 of the complaint allege that although the Lawyers told Dr. Khalil that the Travelers Release was limited to her claims for damage to the duct work, they "explained that the other damages for her Unit were under a different policy" and they submitted a general release to the Court instead of one that only released Travelers from claims for the duct work damage:

> 14. In May 2011, Khalil v. Diegidio, et al., proceeded to a jury trial before Judge Massiah-Jackson. Prior to trial, Khalil and Travelers Property began settlement discussions for only the repair of ductwork in her condominium, as it was explained that the other damages for her Unit were under a different policy with a clear understanding that Khali will receive additional compensation from the Pier 3 case.

15. Williams and Cole presented Khalil with a settlement agreement that was supposed to release Travelers Property Casualty Company of America from only the duct work damage.

16. Williams and Cole submitted to the Court a general settlement release that released Traveler's insureds from all liability arising out of the May 25, 2007 water damage to Kahlil's Unit which was a professional error and/or omission.

(R. 114a at ¶¶15-16.)

The complaint also alleges that the Lawyers repeatedly assured Dr. Khalil that the settlement agreement would not affect her counterclaims and joinder claims in *Pier 3*:

17. Khalil demanded clear and specific wording in a Release to Williams and Cole that if she entered into the settlement agreement, it would not prevent her from asserting her counterclaims and joinder claim against Pier 3 Condominium Association in Pier 3 Condominium Association v. Khalil, July Term, 2009, No. 1819.

18. Khalil did not want Williams and Cole to prevent her from asserting her counterclaims and joinder claims against Pier 3 Condominium Association in Pier 3 Condominium Association v. Khalil, July Term, 2009, No. 1819.

19. Williams and Cole repeatedly assured Khalil that the settlement agreement would have no effect on her counterclaims and joinder action as asserted in Pier 3 Condominium Association v. Khalil, July Term, 2990, No. 1819 and was only releasing Travelers Property in regard to the ductwork repair for her condominium because it was a different policy.

(R. 114 at ¶¶17-19.)

The complaint further alleges that the Lawyers failed to exercise ordinary skill and knowledge when they allowed her to enter into a settlement agreement that would bar her counterclaims in Pier 3:

> 39. Williams and Cole failed to exercise ordinary skill and knowledge in representing Khalil as attorneys in the above-mentioned actions by allowing her to enter into a settlement agreement that would preclude her counterclaims against Pier 3 Condominium Association in Pier 3 Condominium Association v. Khalil.

(R. 117a at ¶39; *see also* R.119 at ¶ 45.)

Finally, the complaint alleges that the Lawyers told Dr. Khalil that she would receive other compensation for her damages from the *Pier 3* case, a claim that later proved to be false:

> 51. William[s] and Cole represented to Khalil that the settlement with Travelers [was] for the damaged duct work only as it was a different policy.
>
> 52. William[s] and Cole presented to Khalil that she will get other compensations from the Pier 3 case.
>
> 53. William[s] and Cole repeatedly assured Plaintiff that none of the settlement agreement in Khalil v. Diegidio, et al., will prejudice Khalil's recognizable defenses and claims in the Pier 3 case.

(R. 121 at ¶¶51-53.)

As to each of the claims, the complaint alleges that Dr. Khalil relied on the Lawyers' actions and representations and that she was injured when her

claims in Pier 3 were dismissed. (R. 116a at ¶ 34; R. 117a-118a at ¶¶ 40-4; R. 119a at ¶¶ 46-47; R. 121a-122a at ¶¶ 57-60; R. 123a at ¶¶ 65-66; R. 125a at ¶¶ 72-73.)

For these reasons, Dr. Khalil's complaint alleges sufficient facts to fall within the *McMahon* and *Collas* exception to *Muhammad.* The Superior Court erred when it held otherwise.

3. *Silvagni* and *Banks* are distinguishable.

The Lawyers rely on *Silvagni v. Shorr,* 113 A.3d 810 (Pa. Super. 2015) and *Banks v. Jerome Taylor & Assocs.,* 700 A.2d 1329, 1333 (Pa. Super. 1997) to argue that Dr. Khalil's claims are barred by *Muhammad.* Both cases are distinguishable on their facts.

Silvagni was a legal malpractice action that followed the settlement of a worker's compensation claim. Before approving the settlement, the trial court presided over a long colloquy in which Silvagni stated on the record that he understood every provision of the agreement; that he was to receive a lump-sum payment of $48,000; that in return for the payment he would not be entitled to any additional wage, medical, or other benefits under the Workers' Compensation Act; and that he would be responsible for paying for any future medical treatment. *Silvagni,* 113 A.2d at 814.

Silvagni later brought a legal malpractice action alleging that he would not have settled his worker's compensation claim if he had understood that it would terminate his medical coverage and wage benefits. *Id.* The trial court granted summary judgment and Silvagni appealed.

The Superior Court held that Silvagni's claim was contradicted by the record, which revealed that he understood the consequences of the settlement: "The colloquy included questions from opposing counsel as well as Judge Baldys. There is no indication that Silvagni's assent to the Compromise and Release Agreement was involuntary." *Id.* at 815. "Unless Silvagni had specifically pled, and could prove, Defendants fraudulently induced him into signing the Compromise and Release Agreement, or he could prove that Defendants failed to explain the effect of that settlement, or that the settlement was somehow legally deficient, Silvagni is barred from maintaining an action in negligence against the Defendants." *Id.*

In this case, unlike *Silvagni*, not only is there no such colloquy in the record, but the record memorializes the lawyer's false and misleading advice. In multiple emails and in representations to the trial court, the Lawyers repeatedly told Dr. Khalil that her $17,500 settlement with Travelers for the duct work claims would not impair her other claims in Pier 3 because they were separate claims under different insurance policies. (R. 67a, 71a,

75a, 91a, 92a, 95a, 97a, 98a, 114a at ¶19, 121a at ¶51.) *Silvagni* is therefore distinguishable on its facts.

Banks also does not support the Lawyers' arguments. Banks was a legal malpractice action following a settlement in a personal injury lawsuit arising out of a motor vehicle accident. 700 A.2d at 1330. The case was filed in the Eastern District of Pennsylvania and settled following a settlement conference with the judge. *Id.* Banks first rejected an offer of $90,000 but later agreed to accept a settlement offer of $95,000. *Id.* The federal judge marked the case settled and dismissed the action. Banks executed a release against the driver of the vehicle and his insurance company. *Id.*

Two weeks later, Banks wrote a letter to the judge asking him to set aside the settlement because Banks had not yet received the payment. Banks then filed a disciplinary action against his lawyer alleging that he was promised payment within a week but had not received it. Six weeks after Banks executed the settlement agreement, Banks received the settlement check, which he deposited. *Id.*

Banks then brought a malpractice action against his attorney, alleging that his attorney told him he would receive payment within one week and promised him a new position with SEPTA, his former employer, neither of

which occurred. *Id.* The trial court granted summary judgment for the attorney and Banks appealed. *Id.*

The Superior Court affirmed. After discussing *Muhammad*, *McMahon*, *Collas*, and other cases, the court held that "[t]he facts of the present case align closely with those in *Muhammad.* That is, Banks has not complained that his attorneys failed to explain the legal effect of the settlement agreement nor has Banks complained that the agreement neglected to follow well settled legal principles. It is clear, therefore, that Banks is dissatisfied with the amount of his settlement and is utilizing the claim of legal malpractice as a vehicle to vent his frustration." *Id.* at 1332.

Here, the factual allegations of Dr. Khalil's complaint, and the evidence produced in opposition to summary judgment, reveal that Dr. Khalil, unlike Banks, is challenging her lawyers' legal advice. Indeed, the Lawyers' statements in the record reveal that they did not just fail to explain the legal effect of the settlement, they affirmatively misrepresented to both Dr. Khalil and the trial court the legal effect of the Travelers Release on Dr. Khalil's claims in *Pier 3*. Moreover, unlike Banks, Dr. Khalil never endorsed or deposited any settlement checks. (R. 92.)

4. Dr. Khalil's claims do not arise from her alleged dissatisfaction with the dollar amount of the *Diegidio* settlements.

Appellees try to shoehorn this case into the *Muhammad* rule by arguing that "Dr. Khalil's real objective in bringing this professional liability case against WCB was to revisit the amount of the settlements she agreed to in the *Diegidio* case, rather than any problem with counsel's handling of the underlying litigation." (Brief of Appellees at 10.) But the complaint and the evidence does not support that conclusion.

In their Brief of Appellees, the Lawyers rely on Dr. Khalil's deposition testimony where she was asked: "And your complaint is about the settlements, how they handled the settlement and the releases; is that correct?" and Dr. Khalil replied: "Very much." (Brief of Appellees at 15-16.) But the Lawyers conveniently cut off the rest of Dr. Khalil's answer: "How it was presented to me and how they handle it and the effect after that, what a [sic] they did, yes." (R. 171a; N.T. 12/11/2018 at 162.)

Taken in context, Dr. Khalil's statements reveal that her claims arise from the totality of the circumstances surrounding the drafting, execution, and delivery of the Travelers Release as well as the negligent advice the Lawyers gave her about the scope of the Release. Dr. Khalil's deposition testimony therefore *supports* rather than contradicts the conclusion that her

claims arise from the Lawyers' actions and incorrect advice about the scope of the Travelers Release, not the dollar amounts of the settlements. (*See* Brief of Appellees at 15-16.)

The Lawyers argue "it is clear that Dr. Khalil's complaint is not about the manner in which her case was presented at trial." (Brief of Appellees at 15-16.) That is a straw man argument. This case has never been about how the Lawyers presented Dr. Khalil's case at trial. It has always been about the Lawyers' misleading statements and actions in negotiating and advising Dr. Khalil about the Travelers Release.

The Lawyers also argue that Dr. Khalil's email of June 3, 2011 is somehow an admission Dr. Khalil is challenging the dollar amount of the *Diegidio* settlements. (Brief of Appellees at 17.) It is not.

As part of the settlement with Jason Diegidio, Dr. Khalil was willing to release Mr. Diegidio in his individual capacity for his negligence in failing to address the flooding that originated from his unit. But shortly after Dr. Khalil agreed to accept $50,000 to settle her claims against Mr. Diegidio in his individual capacity, Pier 3 claimed that Jason Diegidio was solely responsible for the damage to Dr. Khalil's unit. That change of position is reflected in the June 3 email from Dr. Khalil to Beth Cole when she mentions a letter from "A. Katz" and writes: "according to the letter that you have a copy of it from

the condo association, the owner, in this case jason is responsible for the repair and for all the damages." (R. 88a.)

The email reveals that Dr. Khalil was angry and upset because Pier 3 was trying to make a material change to the settlement. (R. 88a.) If Pier 3 were to prevail on its assertion that any flood damage was solely the responsibility of Jason Diegidio, and not the Pier 3 Condominium Association, Dr. Khalil's settlement with Mr. Diegidio would effectively release all of Dr. Khalil's claims against both Mr. Diegidio and Pier 3. While Dr. Khalil was willing to settle her claims against Mr. Diegidio for $50,000, she never agreed to release all of her claims against Pier 3 for that amount.[2] Dr. Khalil was frustrated with Pier 3's bait-and-switch approach to the settlement negotiations and her email of June 3 expresses that frustration.[3]

In sum, neither Dr. Khalil's deposition testimony nor her June 3 email supports the Lawyers' claim that Dr. Khalil is challenging the dollar amount

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[2] Dr. Khalil's understanding about the scope of the *Diegidio* release was confirmed by Mr. Diegidio's counsel at the hearing before Judge Massiah-Jackson on September 30, 2011 when he stated: "it releases any claims brought against Jason Diegidio in his individual capacity as we agreed before the court. It does not release Dr. Khalil's claims against the condominium association as we agreed before the Court." (Brief of Appellants at 22; R. 452a-453a)

[3] Pier 3's efforts to piggyback on Dr. Khalil's settlement with Mr. Diegidio is strikingly similar to its (unfortunately successful) plan to include language in the Travelers Release that would release all of Dr. Khalil's claims against Pier 3 as well as Travelers.

of the settlements. To the contrary, both her testimony and the email establish that Dr. Khalil's claims arise from the Lawyers' erroneous advice about the scope of the releases, which puts this case with the *McMahon* and *Collas* exception to the *Muhammad* rule.

5. Dr. Khalil did not waive her argument that the trial court erred in granting summary judgment because there are genuine issues of material fact about the Lawyers' negligence.

The Lawyers argue that Dr. Khalil waived her argument that there were genuine issues of material fact that precluded the granting of summary judgment because she did not make a factual argument in the Brief of Appellant she filed with the Superior Court. (Brief of Appellees at 25-26.) They are mistaken.

An Appellant need not address every possible basis for granting summary judgment—only those the lower court relied on. Here, the trial court granted summary judgment for defendants based on the doctrines of res judicata, collateral estoppel, and release.[4] Indeed, the trial court's opinion

[4] The trial court opinion states: "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, [sic] 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." (Brief of Appellant at Ex. A, p. 2)

states that the court granted summary judgment "based solely upon issues of law." (Brief for Appellant, Ex. A at p. 18.)

Accordingly, although Dr. Khalil's Superior Court brief included a thorough summary of the facts supporting her claims, the argument section properly focused on the legal issues identified in the trial court's opinion rather than the factual basis for her claims.

Simply put, there was no waiver.

CONCLUSION

Appellant 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. Appellant further requests that this Court award her attorneys' fees and costs.

Respectfully submitted,

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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 7,000 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 Reply Brief for Appellant by PacFile electronic service on the persons and in the manner indicated below, which meets the requirements of Pa.R.A.P. 121:

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Dated: October 26, 2021