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IN THE SUPREME COURT OF PENNSYLVANIA

DR. AHLAM KHALIL,

Appellant/Plaintiff

v.

BETH G. COLE, ESQUIRE, GERALD J. WILLIAMS, ESQUIRE, WILLIAMS CUKER BEREZOFSKY, LLC AND WILLIAMS CEDAR, LLC,

Appellees/Defendants

24 EAP 2021

BRIEF OF APPELLEES BETH G. COLE, ESQUIRE, GERALD J. WILLIAMS, ESQUIRE, WILLIAMS CUKER BEREZOFSKY, LLC

Appeal from January 5, 2021 Order of the Superior Court in *Khalil v. Williams*, 244 A.3d 830 (Pa. Super. 2019), 2549 EDA 2019 *affirming in part and reversing in part*, *Khalil v. Williams*, Phila. C.C.P. May Term 2013, No. 00825

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I. COUNTER-STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The appellate court's scope of review of a trial court's order granting or denying summary judgment is plenary. *O'Donoghue v. Laurel Savings Ass'n*, 728 A.2d 914, 916 (Pa. 1999). The standard of review is clear: "A trial court's order will be reversed only where it is established that the court committed an error of law or abused its discretion." *Cochran v. GAF Corp.*, 666 A.2d 245, 248 (Pa. 1995) (citing *Holmes v. Lankenau Hosp.*, 627 A.2d 763, 765 (1993), *appeal denied*, 649 A.2d 673 (1994).

II. COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Did the Superior Court properly find that the Trial Court committed no error of law or abuse of discretion in granting summary judgment in the Appellee Attorneys' favor on Dr. Khalil's non-fraud claims, based upon its review of the uncontested facts and documents and applying *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (1991), which prohibits actions against attorneys where the client agreed to a settlement ("the Muhammad Doctrine")?

   (The Superior Court agreed that there was no error of law or abuses of discretion by the Trial Court by upholding the Trial Court's ruling that the

Muhammad Doctrine bars Dr. Khalil's non-fraud claims, and Appellees urge affirming this decision.)

2. Should this Honorable Court not overturn the established decision of *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (1991), which bars legal malpractice suits following the settlement of a lawsuit absent an allegation of fraud and has the effect of bringing finality to matters in an already overburdened court system?

   (The Superior Court applied the Muhammad Doctrine and did not specifically address the question, and Appellees urge that the Doctrine remain intact.)

III. COUNTER-STATEMENT OF THE CASE

Appellant/Plaintiff, Dr. Ahlam Khalil (hereinafter referred to as "Dr. Khalil"), appeals from the January 5, 2021 Order of the Superior Court affirming in part and reversing in part the July 11, 2019 Order by the Trial Court, the Philadelphia County Court of Common Pleas, which granted the Motion for Summary Judgment filed by Appellees/Defendants Beth Cole, Esquire, Gerald J. Williams, Esquire and Williams Cuker Berezofsky, LLC (hereinafter collectively referred to as "WCB"). The Trial Court dismissed Counts I through IV of the Complaint as contrary to the Muhammad Doctrine, which bars clients from suing their former counsel over dissatisfaction

with the amount of an agreed upon settlement. Count V of the Complaint was dismissed by the Trial Court on collateral estoppel grounds, but the Superior Court reversed this portion of the Trial Court's decision.

Dr. Khalil, who is trained as a medical doctor, owned and was living in Unit 318 at the Pier 3 Condominium at 31 North Columbus Boulevard in Philadelphia on May 25, 2007 when water entered her unit from her upstairs neighbor's unit.[1] (R. 112a at ¶ 9) The leak has spawned extensive litigation over the last 13 years, yielding settlements and/or verdicts totaling in excess of $135,500 in favor of Dr. Khalil, including reimbursement for the loss of her personal property. *See* "Statement of Prior Determinations" in Brief of the Appellant, p. 6-7. (In fact, well after she entered into the release with Travelers Insurance that is contested in this case, and after continued litigation by her, Dr. Khalil was offered $1.5 million by Travelers to settle all of her claims. The release and its language did preclude this offer. *See Haines & Assocs. v. Khalil*, 2021 Pa. Super. Unpub. LEXIS 2432, at *2 (Pa. Super. Ct., Sept. 10, 2021) ("In 2007, Dr. Khalil's condominium was flooded. Protracted negotiations with her insurance company as to property damage, other

[1] Dr. Khalil notes that "[i]n May 2007, the Philadelphia Fire Department declared the property dangerous and uninhabitable, and Dr. Khalil was forced to leave her home," (Appellant's Br. at p. 8), but provides no citation to the record for such a statement and the record is devoid of any such determination made by the Philadelphia Fire Department.

losses, and allegations of bad faith resulted in her insurer offering to pay her $1.5 million to settle all of her claims.”))

In 2008, Dr. Khalil filed suit against her neighbor, Jason Diegidio; his mother, Anne Diegidio, the condominium’s co-owner; Travelers Property Casualty Company of America (hereinafter “Travelers”), the insurer for Mr. Diegidio and for Pier 3; and, her own first party insurer, State Farm Fire and Casualty Company. (R. 112a at ¶ 7) Dr. Khalil was represented successively by three other law firms before she retained WCB as counsel on April 2, 2010 for the 2008 action; they were retained after that case had been listed for trial and expert reports had been completed and filed by prior counsel. *Ibid.* WCB prevailed against several dispositive and procedural motions, and the case was then called to trial in May 2011. (R. 113a at ¶ 14) Despite the fact that Dr. Khalil did not have satisfactory photographic or documentary evidence, and the earlier-reserved experts had little factual basis for their opinions, WCB successfully negotiated three separate settlements against the three separate sets of defendants in the 2008 action.

WCB presented Dr. Khalil with a release for her signature memorializing the settlement with Travelers Insurance in the amount of $17,500. The two-page release expressly stated that Dr. Khalil could not later pursue the same claims that she had settled for water damage to her unit (as she later tried to do), although left open

certain claims for rights as a unit owner that were not repetitive. Dr. Khalil signed the document after reading it and after WCB explained it to her. (R. 114a at ¶ 21)

Dr. Khalil also settled with the remaining parties during trial: Mr. Diegidio for $50,000 and State Farm for $40,000, the settlements of which, also requiring releases, were placed on the record before the trial judge and explained by WCB to Dr Khalil. Despite having reached settlements with those parties, a few weeks later, Dr. Khalil indicated that she had an argument with Pier 3 management and changed her mind about the adequacy of the settlement amounts; nothing was said about any issue with the release terms. (R. 88a) She refused to sign acceptable releases tendered by Mr. Diegidio and State Farm. The settlements funds, totaling $107,500, were paid into the Court, where they still remain almost a decade later.

At a hearing of January 7, 2013, while granting subsequent counsel's Petition to Withdraw, the Honorable Sandra Mazer Moss also ordered that the *Diegidio* case be marked as settled, discontinued and ended. (R. 391a) Dr. Kahlil appealed that Order to the Superior Court, which affirmed Judge Moss, upheld the validity of the underlying Release and rejected Dr. Kahlil's claims that the document was fraudulent. (R. 497a-506a) The Supreme Court denied Dr. Khalil permission to appeal on October 29, 2014. (R. 399a); *see also Khalil v. Diegidio, et al*., Phila. C.C.P. May Term 2008, No. 03145, *aff'd* 102 A.3d 527 (Pa. Super. 2014).

On June 2, 2011, WCB entered their appearance on behalf of Dr Khalil in a second case, in which Dr. Khalil was being sued by Pier 3 for her refusal to pay overdue monthly condominium fees. WCB had engaged in several email exchanges with Dr. Khalil throughout the settlement negotiations with Travelers during which the Pier 3 case was discussed. Attorney Williams advised Dr. Khalil that execution of the Travelers release would not prejudice her "cognizable defenses and claims in the Pier 3 case." (R. 91a) Attorney Cole told Dr. Khalil that any "legally available rights in the Pier 3 case ARE preserved." (R. 93a). The trial judge in the Pier 3 case, the Honorable George Overton, ultimately found that Dr. Khalil had no cognizable or legally available claims in that matter. Further, he moted the additional binding effect of the release knowingly signed by Dr. Khalil and her personal responsibility, stating in relevant part: "The contract is the contract. Unfortunately, when you sign something, you're bound by it. That's why they say be careful before you sign something." (R. 613a)

As affirmed by the Commonwealth Court in *Pier 3 Condominium Ass'n v. Khalil*, Phila. C.C.P., July Term 2009, No. 01819, *aff'd*, 118 A.3d 495 (Pa. Cmwlth. 2015), the counterclaims and set-off claims asserted by Dr. Khalil against Pier 3 were barred by the Uniform Condominium Act, 68 Pa.C.S. §§ 3101, *et seq*. Furthermore, many of those claims were untimely, having been asserted on January 4, 2010, more than two years after the May 2007 water penetration. (R. 569a)

The Commonwealth Court's opinion of July 9, 2015 can be found at R. 636a and was included with WCB's Motion for Summary Judgment as Exhibit I. This decision was not appealed to the Supreme Court. At footnote 15, the Commonwealth Court indicated it could not permit Dr. Khalil to relitigate the validity of the release and its enforceability because that issue had already been resolved by the Superior Court in the *Diegidio* case. The Court stated:

> …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 September 17, 2014. Because the insurance 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….

(R. 652a at n. 15)

WCB's representation of Dr. Khalil in the Pier 3 case ended on August 25, 2011 with Attorney Cole's Withdrawal of Appearance. (R. 115a at ¶ 28) WCB withdrew from the Pier 3 case after Dr. Khalil refused to conclude the settlement of her case against Travelers, which had been a condition of WCB's representation in the second matter. The emails exchanged between Attorney Cole, Attorney Williams and Dr. Khalil indicate that Dr. Khalil was given ample opportunity to avoid having WCB withdraw from the Pier 3 case by following through on the representations she made in open court and accepting the negotiated settlements with Mr. Diegidio and State Farm Insurance, and also by signing the settlement check from Travelers.

(R. 91a & R. 93a) Dr. Khalil's refusal to abide by the negotiated settlements left WCB no alternative but to withdraw as her counsel at that time.

The instant legal malpractice case was filed in 2013, with Dr. Khalil adding her former counsel to the long succession of parties she has sued. Although largely absent from discussion in Dr. Khalil's Brief, at the core of her litigation efforts has been an effort to prove a "release switch" theory which she has long espoused as the basis for her allegations of fraud against WCB, Travelers, and Travelers' counsel. Pursuant to the "release switch" theory, Dr. Khalil alleges that the release that she signed with Travelers was not the same release the WCB Appellees returned to Travelers. (R. 116a at ¶¶ 31-33). Though Dr. Khalil, a highly educated physician, admits to reading and signing a release document, she asserts that the version she signed had a different first page which included a paragraph marked by an asterisk with an added footnote.[2] The "release switch" theory has until this point been the focal point of Dr. Khalil's fraud allegations against WCB.

[2] It is worth noting that an expert analysis of the original release document by Defendants' forensic document examiner found that the precise imprint of Dr. Khalil's signature from the second page of the release was on the first page that she claimed was not present when she signed the release. This finding, unrebutted by any expert for Dr. Khalil, proves conclusively that the first page was actually under the signature page when signed and was obviously part of the document at that time, contrary to Dr. Khalil's repeated allegations of fraud. (R. 287a – 292a). However, the Superior Court did find that there is a factual issue as to this release-switch fraud theory.

WCB moved for summary judgment and the Trial Court granted judgment on July 11, 2019. (R. 309a) The Trial Court explained its decision in granting that summary judgment and a summary judgment in a related case brought by Dr. Khalil in an Opinion issued on March 2, 2020. (Appellant's Br., Exhibit A) Dr. Khalil appealed to the Superior Court which, in an opinion dated January 5, 2021, affirmed the dismissal by the Trial Court of Counts I through IV of the Complaint, concerning WCB's advice to Dr. Khalil, but reversed and remanded on Count V concerning the "release switch". (Appellant's Br., Ex B)

IV. SUMMARY OF THE ARGUMENT

WCB's Motion for Summary Judgment before the Trial Court provided it with ample evidence 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 *Diegido* case, rather than any problem with counsel's handling of the underlying litigation. Accordingly, dismissal of the non-fraud claims pursuant to *Muhammad* was entirely proper, and there was no error of law or abuse of discretion by the Trial Court or the Superior Court in holding that the claims are barred.

Additionally, there is no basis for this Honorable Court to overturn its prior decision in *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (1991). Indeed, the protracted and unnecessary litigation that has ensued

as a result of Dr. Khalil's failure to adhere to and honor the settlements of which she knowingly and voluntarily entered into is the exact situation this Honorable Court's decision in *Muhammad* was meant to preclude.

V. ARGUMENT FOR THE WCB APPELLEES

A. The Trial Court properly applied the Muhammad Doctrine in dismissing the non-fraud claims asserted by Dr. Khalil, and her dissatisfaction with the settlement amount in the *Diegidio* case does not give rise to a cognizable legal malpractice claim.

The law in Pennsylvania is clear that dissatisfaction with an underlying settlement does not provide grounds for a cause of action for legal malpractice. Yet, this is exactly what the present matter filed by Dr. Khalil is premised upon. Thus, the Trial Court's and the Superior Court's respective dismissal and affirming of the dismissal were entirely appropriate, legally sound, and no error of law or abuse of discretion occurred.

1. The Muhammad Doctrine is well reasoned law that was particularly apt in the present case.

In *Muhammad*, 587 A.2d 1346, the Supreme Court prohibited litigation of negligence or breach of contract claims arising from underlying litigation where there has been negotiation and acceptance of a settlement of the underlying case. Such claims are cognizable only where the settlements were procured by fraud. This

Honorable 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.

This matter arises from an otherwise unremarkable water leak (there was no real "flood") in May 2007. Dr. Khalil's decade-long obsessive attempts to relitigate the validity of the settlements and release through a multiplicity of lawsuits is exactly the type of socially unproductive, burdensome and needless litigation the Supreme Court condemned and expressly foreclosed in *Muhammad*. The Court's language is particularly apt in the current circumstances:

> Protracted litigation is also counterproductive to businesses and to workers. In spending so much time and energy on the lawsuit, litigants neglect the positive and productive aspects of their lives. Those who are involved in lawsuits often do so to the detriment of their lives, their businesses and their families. It is more important for our society to encourage citizens and businesses to retreat from litigation and return to their lives. **It little profits society and its citizens to be overly engaged in the business of litigation. Rather, everyone benefits**

> **from litigants resolving their disagreements, settling their disputes and returning to the business of being productive members of society.**
>
> Mindful of these principles, we 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.

Id. at 1351 (emphasis added).

Dr. Khalil has spent the past decade repetitively litigating her property damage claims and has burdened the Philadelphia Court of Common Pleas, and the Commonwealth's appellate courts, with serial court filings, indiscriminately bringing claims against her neighbors, their insurer, her insurer, former counsel and opposing counsel. Throughout the entirety of this litany of litigation, Dr. Khalil has had the option of using the settlement funds ($107,500) being held in escrow by the Prothonotary (which were in addition to significant amounts already paid by her carrier for rental expenses) to repair the minor water damage to her condominium, yet has chosen litigation instead of mitigation to her own detriment, which has also been to detriment of society through clogging up judicial resources.

Dr. Khalil has had innumerable opportunities to establish that her claims are not redundant, repetitive and/or have not already been settled, and she has failed to do so at every juncture. This Court's holding in *Muhammad*, 587 A.2d 1346, is

unequivocally clear that such behavior is not to be encouraged and is not in the public interest. Moreover, as stated by the Trial Court, "*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." (Appellant's Br., Exhibit A at p. 19)

2. The Trial Court's ruling was based upon a substantial record of evidence followed binding legal precedent in concluding that Plaintiff's legal malpractice claims are an attempt to relitigate the amount of the Diegidio settlement, which is barred by *Muhammad*, and the Superior Court properly affirmed the decision.

Dr. Khalil's argument that the Superior Court misconstrued the averments in the Complaint and erred as a matter of law in upholding the Trial Court's barring of Dr. Khalil's non-fraud clams pursuant to *Muhammad* is misplaced. (Appellant's Br. at p. 34) The Superior Court properly analyzed the allegations of Dr. Khalil's Complaint and concluded that the averments therein were "facts alleging that she was the victim of fraud" because she was alleging "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." (Appellant's Br., Exhibit B at p. 19) The Superior Court correctly observed:

> 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. 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.

(Appellant's Br., Exhibit B at p. 19; *see also* R. 114a at ¶¶ 19-20, 33) In other words, as the Superior Court correctly held, Dr. Khalil was claiming damages as a result of fraud in presentation of the release, not any negligence by WCB in advice about entering into the settlement. (Appellant's Br., Exhibit B at p. 19)

Moreover, WCB's Motion for Summary Judgment provided the Trial Court with ample evidence that Dr. Khalil's true objective in bringing this professional liability claim was to revisit the amount of the settlements she agreed to in the *Diegidio* case, rather than any dissatisfaction with WCB's handling of the underlying litigation. Notably, Dr. Khalil admitted under oath that her claims were really about the settlements, testifying in pertinent part as follows:

> Q. Did you express any dissatisfaction in how witnesses were questioned by Mr. Williams or Ms. Cole?
>
> A. No -- I -- no, I don't remember that.
>
> Q. And there is no claim in your complaint about how they handled the trial?
>
> A. As I said, I didn't want to settle –
>
> Q. It's about the settlements –
>
> A. -- with anybody, but he choose his approach that less people is better and he pushed me to settle to Traveler because he wanted to have less people in the trial.

Q. And your complaint is about the settlements, how they handled the settlements and the releases; is that correct?

A. Very much.

(R. 171a – 172a) (emphasis added)

Based on this testimony, it is clear that Dr. Khalil's complaint is not about the manner in which her case was presented at trial. As she admits later in her deposition, her dissatisfaction is with the settlements which she agreed to in court, yet later refused to honor by signing proper releases:

> Q. Now, later in August you asked for copies of the releases; is that correct? Well, let me back up. There were then releases presented in regard to the settlement with Diegidio and the settlement with State Farm; is that correct?
>
> A. That's correct.
>
> Q. And what was the amount of the settlement with Diegidio?
>
> A. $50,000.
>
> Q. Okay. And what was the amount of the settlement with State Farm?
>
> A. $40,000, plus she would represent me and Pier 3 was no extra charge and she would pay for the storage.
>
> Q. And did you agree to those settlements?
>
> A. With the terms that presented to me at this time, yes.
>
> Q. Okay. And those terms were presented where?
>
> A. In the court by her [Attorney Cole].

Q. Okay.

A. And Williams.

Q. And what was on the record?

A. And also in the conversation at this time, yes –

Q. Okay. We'll get to that in a minute.

A. -- in the court, you know.

(R. 167a – 168a)

Perhaps most telling of the fact that Dr. Khalil's non-fraud claim is about dissatisfaction with the amount of her settlements is an email in which Dr. Khalil sent to Attorney Cole on June 3, 2011, less than one month after the *Diegidio* trial concluded with the various settlements being placed on the record. In the email, Dr. Khalil explicitly renounced her decision to settle with the *Diegidio* defendants because the *amount* of the settlements was inadequate in hindsight and she no longer wanted "to settle for that offer" and "settle almost for nothing." Specifically, the email says, in pertinent part:

> …and there is no reason for me to take all that loss and settle almost for nothing while the main incentive as I was told is to start repairing my apt and get my life together So if I have to continue paying rent let us continue with the court processing with all parties and let the court decide. IT WAS BIG MISTAKE EVEN TO CONSIDER TO SETTLE FOR THAT OFFER AND BE COOPERATIVE WITH THEM, COOPERATION IS SOMTHING THEY DO NOT KNOW.

(R. 88a) (emphasis in the original)

This email unequivocally confirms Dr. Khalil 's change of heart concerning the *amount* of the settlements and brings this matter squarely within the type of litigation barred by *Muhammad.*

Dr. Khalil cites three expert reports proffered by her in support of her professional negligence claims, but they are irrelevant to the determined basis of the dismissal of the non-fraud claims on *Muhammad* grounds, which did not require an examination of the quality of the attorneys' actions. (Dr. Khalil also did not mention that Defendants produced a countervailing expert report from Bernard W. Smalley, Sr., Esquire, in which Mr. Smalley strongly disagreed with Plaintiff's experts and opined that "the work of Attorneys Williams, Cole and their law firm under extremely difficult circumstances was well above the standard of care required." (S.R.R. 001-009, p. 9.)

As discussed below, the allegations of the Complaint, after being properly analyzed by the Superior Court, demonstrate that the case concerns dissatisfaction with the settlement amount, as well as the alleged fraudulent release switch. Accordingly, there was no error of law or abuse of discretion by the Trial Court or Superior Court.

3. Dr. Khalil has produced no evidence of negligent or fraudulent advice.

In an analogous case, *Silvagni v. Shorr*, 113 A.3d 810 (Pa. Super. 2015), the Superior Court held that the grant of summary judgment under the Muhammad Doctrine in favor of a defendant attorney and his law firm was proper because the plaintiff could not prove that the attorney and law firm fraudulently induced the plaintiff into signing a compromise and release agreement. *Silvagni*, 113 A.2d at 816. The *Silvagni* case is notable because Mr. Silvagni claimed that his counsel had given him incorrect legal advice that ultimately led to the execution of the compromise and release. He further claimed, as does Dr. Khalil, that but for the flawed legal advice, he would not have agreed to the terms of the settlement. *Id.* at 812. The Superior Court found those arguments unpersuasive in the absence of evidence of fraudulent inducement.

As discussed in WCB's Motion for Summary Judgment, and also in the Trial Court Opinion, the criteria for application of the fraud exception to the *Muhammad* doctrine are enumerated in *Banks v. Jerome Taylor & Assoc.*, 700 A.2d 1329, 1333 (Pa. Super. 1997). (R. 216a – 218a; Appellant's Br., Exhibit A at p. 21) As held in *Banks*, the type of fraudulent conduct which might 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*, 700 A.2d at 1333 (internal citations omitted).

After consideration of the *Banks* criteria, the Trial Court properly concluded, and the Superior Court properly upheld, that Dr. Khalil did not, and could not, meet the high threshold needed to prove fraudulent inducement regarding any advice given by WCB. The supposed evidence for Dr. Khalil's claims that *Muhammad* does not apply because the terms and conditions of the settlement with Travelers were not properly explained by WCB, or that WCB supposedly gave inappropriate advice in regard to predictions of the future effect of the settlement on any remaining claims that could not have then been known, does not even come close to meeting the criteria.

Moreover, Dr. Khalil's deposition testimony and the underlying trial record confirm not only that Dr. Khalil consented to the settlements, but that she knowingly signed the release. (R 166a-168a, S.R.R. 010-021). The Trial Court, in a proper exercise of its discretion, correctly found that there were no triable issues on the five elements Plaintiff would need to prove the fraud exception to the *Muhammad* doctrine at trial in regard to advice about the settlement. (Appellant's Br., Exhibit A at p. 21)

Dr. Khalil has adduced no evidence of negligent or fraudulent advice or inducement by WCB in her execution of the Travelers release, none was found by the Trial Court, and Dr. Khalil has not demonstrated that this finding was an abuse of discretion. To the contrary, she admits to both reading and signing the release after its provisions had been explained to her. (R. 114a at ¶ 21) However, she also alleges in Count V of her Complaint that she signed an agreement that contained different language that she had demanded be in there when she refused to sign the release originally presented to her. (R. 114a at ¶¶ 19-20). This is the fraud claim for which the Superior Court has found a factual issue and allowed to go to trial.

The record is clear that Dr. Khalil, a licensed medical professional and sophisticated litigant by 2011 (including other litigation prior to the water leak), made an informed decision to sign the release, thereby waiving the right to pursue duplicative claims against Travelers and its insureds. Additionally, *Silvagni* gave the Trial Court binding precedential support for dismissal of the non-fraud claims on *Muhammad* grounds, despite Dr. Khalil's current claims that WCB failed to fully explain the effect that the Travelers release would have on her claims in the Pier 3 matter. Simply, there was no error of law or abuse of discretion.

4. Dr. Khalil's reliance upon *Collas v. Garnick* and *McMahon v. Shea* are misplaced, and the Superior Court properly found them to be distinguishable from the present matter.

Dr. Khalil's argument relies heavily on the assertion that the Trial Court improperly ignored holdings in *Collas v. Garnick*, 624 A.2d 117 (Pa. Super. 1993) and *McMahon v. Shea*, 688 A.2d 1179 (Pa. 1997), *affirming* 657 A.2d 938 (Pa. Super. 1995) (*en banc)*, thereby committing an error of law by applying the Muhammad Doctrine. This argument fails to recognize that while *Muhammad* continues to be controlling law in Pennsylvania, this Court's opinion in *McMahon* was only a plurality decision. A plurality opinion is not binding precedent. *MacPherson v. Magee Memorial Hospital for Convalescence*, 128 A.3d 1209, 1223 (Pa. Super. 2015). As this Court has explained: "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." *In the Interest of O.A.*, 717 A.2d 490, 495-96 n. 4 (Pa. 1998).

Here, neither the Trial Court, nor the Superior Court, was required to follow *McMahon* since the decision, unlike *Muhammad*, was given no precedential weight. Additionally, *Collas* only involved preliminary objections, which are reviewed under a much more lenient standard that accepts the allegations of the complaint as true and resolves all doubts in favor of the plaintiff, *Kemper National P & C.*

Companies v. Smith, 615 A.2d 372, 374 (Pa. Super. 1992), as opposed to a motion for summary judgment where a court has the full benefit of a complete record.

More importantly, both *McMahon* and *Collas* involved claims where the attorneys failed to correctly advise them about well-established principles of law in settling the case, and these misstatements were what placed them outside the bounds of *Muhammad*. The allegations of the Complaint in this matter are clear: they assert factual allegations that Dr. Khalil was the victim of fraud in the "switching" of the release document, as opposed to her injuries stemming for any alleged negligent or fraudulent advice regarding the effect of the release. (R. 114a at ⁋⁋ 19-20, 33) Moreover, the record establishes that the crux of Dr. Khalil 's claims are challenging the value of the settlements, which is barred by *Muhammad*. (R. 88a, 167a-168a, 171a – 172a) (*see also* R. 117a-123a at ⁋⁋ 40, 46, 59, 65: Dr. Khalil "suffered damages, including but not limited to . . . failure to settle and/or prosecute her claims in Khalil v. Diegidio, et al. for its full value.") Accordingly, the Superior Court's declination to follow *McMahon* or *Collas* and, instead, follow the binding precedent of *Muhammad,* was not an error of law or abuse of discretion.

5. Dr. Khalil's arguments concerning the Superior Court's conclusions about the elements of a legal malpractice action and reference to pleading "in a concise and summary form" are misdirected.

Dr. Khalil's argument that the Superior Court "merely concludes – without authority – that the complaint fails to plead claims for legal malpractice, negligence, and breach of contract," (Appellant's Br. at p. 46), as well as the argument that the Superior Court erred in affirming the Trial Court's dismissal of the non-fraud claims because 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" (Appellant's Br. at p. 47), are misdirected and not focused on the actual basis for the Superior Court's upholding of the Trial Court's grant of summary judgment on Counts I through IV of the Complaint. The Superior Court upheld the Trial Court's decision on the basis that the Muhammad Doctrine precludes the negligence and contract claims, after having the benefit of a full and complete record. Pleading standards had nothing to do with the Superior Court's decision.

The ultimate ruling of the Superior Court, after detailed discussion of the allegations contained within the Complaint, was this: "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."[3] (Appellant's Br., Exhibit B at p. 20) This finding was properly grounded and not erroneous.

6. Beyond providing the standard for motions for summary judgment, Dr. Khalil did not argue on appeal before the Superior Court that genuine issues of material fact existed and such arguments are waived on her appeal to this Court.

The law is well-settled that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." *Commonwealth v. Phillips*, 141 A.3d 512 (Pa. Super. 2016) (quoting Pa. R.A.P. 302(a)). Beyond noting the summary judgment standard in her brief to the Superior Court, Dr. Khalil did not argue before the Superior Court that the Trial Court's ruling was improper because genuine issues of material fact existed. Rather, Dr. Khalil's arguments before the Superior Court were that the Trial Court erred by relying upon *Muhammad*, and a single, vague sentence without any explanation that the Trial Court failed to consider the evidence in the light most favorable to Dr. Khalil.

Accordingly, Dr. Khalil cannot now make the argument that there are genuine issues of material fact that should have precluded summary judgment because such

[3] The Superior Court also indicated that it was unclear whether *Collas* or *McMahon* do, in fact, create an exception to *Muhammad*. (Appellant's Br., Exhibit B at p. 18) (emphasis added) (. . . "**if** *Collas* and *McMahon* carve out an exception to *Muhammad,* [Dr. Khalil] did not plead facts in her complaint that fit within that exception.").

an argument has been waived by her failure to include that argument in her appeal before the Superior Court. For all these reasons, the Superior Court correctly upheld dismissal of Counts I through IV, and that decision should be affirmed.

B. The Court should not overturn the Muhammad Doctrine as it serves an important public policy of bringing finality to litigation and ensuring judicial resources are not being wasted.

1. The Muhammad Doctrine is a fair and necessary prohibition of repetitive litigation.

In 1991, this Honorable Court decided *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (1991). The effect of the decision was that it prohibited litigation of negligence or breach of contract claims arising from underlying litigation where there has been negotiation and acceptance of a settlement of the underlying case. Such claims are cognizable only where the settlements were procured by fraudulent misrepresentations that induced the client into settlement. Advice, even if legally incorrect, is not fraud.

As noted above, this Honorable 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. As further noted, this Court foreclosed this type of case as socially unproductive, burdensome and needless litigation:

> Protracted litigation is also counterproductive to businesses and to workers. In spending so much time and energy on the lawsuit, litigants neglect the positive and productive aspects of their lives. Those who are involved in lawsuits often do so to the detriment of their lives, their businesses and their families. It is more important for our society to encourage citizens and businesses to retreat from litigation and return to their lives. **It little profits society and its citizens to be overly engaged in the business of litigation. Rather, everyone benefits from litigants resolving their disagreements, settling their disputes and returning to the business of being productive members of society.**
>
> Mindful of these principles, we 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.

Id. at 1351 (emphasis added).

The Mohammad Doctrine has routinely been upheld by the courts of this Commonwealth. *Greenwalt v. Stanley Law Offices, LLP*, 2020 Pa. Super. Unpub. LEXIS 2004, at *10-12 (Pa. Super. June 22, 2020) (finding *Muhammad* to be

controlling and precluding Plaintiff's claims); *Townsend v. Spear, Greenfield & Richman, P. C.*, 2020 Pa. Super. Unpub. LEXIS 2567 (Pa. Super. August 23, 2020) (upholding dismissal on *Muhammad* grounds); *Piluso v. Cohen*, 764 A.2d 549 (Pa. Super. 2000) *appeal denied* 793 A.2d 909 (Pa. 2002); *Spirer v. Freeland & Kronz*, 643 A.2d 673, 676 (Pa. Super. 1994) (Former client could not maintain legal malpractice action against his lawyer based on dissatisfaction with marital property settlement absent fraud by the lawyer to induce client to accept settlement); *Banks v. Jerome Taylor & Associates*, 700 A.2d 1329, 1332 (Pa. Super. 1997); *Martos v. Concilio*, 629 A.2d 1037 (Pa. Super. 1993) (in the absence of fraud, client who was displeased with results of settlement agreement could not sue his attorney for malpractice).

Moreover, Pennsylvania has a strong public policy of not second-guessing settlements, which is exactly what *Muhammad* is meant to enforce. "The law of this Commonwealth establishes that an agreement to settle legal disputes between parties is favored. There is a strong judicial policy in favor of voluntarily settling lawsuits because it reduces the burden on the courts and expedites the transfer of money into the hand of a complainant." *Mastroni-Mucker v. Allstate Ins. Co.*, 976 A.2d 510, 518 (Pa. 2009); *see also Greentree Cinemas, Inc. v. Hakim*, 432 A.2d 1039, 1041 (Pa. Super. 1981) ("Settlement of matters in dispute are favored by the law and must, in

the absence of fraud and mistake, be sustained. Otherwise any settlement agreement will serve no useful purpose.")

Critically, there is another purpose for the Muhammad Doctrine which Dr. Khalil acknowledged in her Brief (p. 64): "The *Muhammad* rule has had its intended effect: it shields Pennsylvania's trial lawyers from frivolous malpractice claims." Indeed, if this Court were to overturn *Muhammad*, it would invite a surge of litigation from litigants who subsequently think they can "ratchet up" and might get a better deal a second time around. Notably, if *Muhammad* is overturned, settling plaintiffs can keep the original settlement, accepted based on whatever limitations existed in the case, and assume no risk in pursuing a subsequent legal malpractice action against their attorneys, claiming they could have received more and hoping that the limitations in the case will be overlooked in the case-within-a-case trial in the malpractice claim. If the jury finds against them or for a lesser number, the plaintiffs still keep the original settlement that was based on those limitations while the court and the rest of the parties involved were made to suffer the costs and time of litigation.

Moreover, the need to prove attorney negligence would be of little protection to attorneys as any jury would only need to conclude in the case-within-a-case that more money is warranted to also believe that the attorney was somehow negligent for not obtaining a settlement with the greater amount. Further, a settlement of the

original case does not, as Dr. Khalil contends, shield the attorney from his or her negligence. If true negligence had occurred which had caused harm to the client, then the case could not have been settled for an amount satisfactory to the plaintiff.

Repeal of the Muhammad Doctrine would open a raft of merely speculative claims amid the possibly of addressing very few instances of real negligence. A plaintiff might also use malpractice litigation as an attempt to collect a judgment which could not be collected against the original defendant. Repetitive litigation, which often occurs in our courts, should not be allowed where the same case was settled. The Doctrine struck the right balance and should not be discarded.

Additionally, the fact that non-litigation attorneys and other professionals are not protected by *Muhammad* makes perfect sense: none of those professionals settle cases and then are exposed to a negligence claim about the adequacy of the settlement in order to circumvent the prior release in that settlement. Any claim of malpractice against non-litigation attorneys and other professionals has nothing to do with conduct in settling claims. There would be no basis for any public perception that litigation attorneys are receiving an unfair advantage when they are, in fact, only being provided a protection stemming directly from their unique position.

Simply put, judicial economy and society at large are in a better position with *Muhammad* remaining intact, which is a fair and reasonable limit on litigation.

Therefore, WCB respectfully submits to this Honorable Court that it should not disturb it prior ruling in *Muhammad*.

2. Dr. Khalil's argument about a high burden for legal malpractice cases is wholly flawed.

Dr. Khalil's argument about legal malpractice cases already having a high burden and that the same justifies overturning *Muhammad* is absolutely flawed. As discussed above, settling plaintiffs who decide to subsequently sue, alleging they could have received more, can still keep their prior settlements when they proceed with their malpractice case, and obtain a case-within-a-case trial, regardless of the burden they must prove. A jury could easily infer negligence based merely on the perception that more money was deserved and not on any basis for actual negligence. Therefore, the argument that the proofs required for legal malpractice and the need to present a case-within-a-case are significant deterrents to frivolous suits fails to consider jury dynamics in this type of situation, and that there is no risk for such settling plaintiffs to try for more. Accordingly, Dr. Khalil's argument does not support the overturning of *Muhammad*.

3. If the Court is to do anything with Muhammad, it should be to clarify its prior decision and any exceptions thereto, and not ignore *stare decisis* and wholly overturn it.

Dr. Khalil argues that the majority of jurisdictions do not follow *Muhammad* and allow settling litigants to subsequently sue their attorneys for negligence. While there are several cases in other jurisdictions that may reach a different result than *Muhammad,* the same is not grounds for wholly overturning the decision. There are also going to be differing views on any subject or way of handling matters. Pennsylvania does not stand alone in setting a somewhat high bar in allowing attorneys to be sued by their settling clients. *See McCabe v. Dawkins,* 97 N.C. App. 447, 449 (1990) (noting that suits seeking to recover some alleged deficiency in the settlement or judgment of the underlying action are impermissible continuations of the underlying action, and that the damages sought must not have been available in the underlying action for a malpractice claim to continue); *Avolio v. Hogan,* 2009 Mich. App. LEXIS 2331 (Mich. Ct. App., Nov. 10, 2009) (prohibiting legal malpractice suit against attorney where the settlement was clear and unambiguous); and *Schlomer v Perina,* 485 N.W.2d 399, 400 (Wis. 1992) (affirming the appellate court's ruling that public policy precluded the plaintiff from recovering an award for the loss of a larger settlement); .

Further, it is respectfully submitted that this Court should be extremely careful in overturning a prior decision made fairly recently, an action that could greatly

undercut the fundamental doctrine of *stare decisis*, a concept which is much in the public mind currently given concerns about the continued viability of established legal cases. This Court has very recently noted the bedrock need for stability in our judicial system which *stare decisis* upholds:

> Stare decisis is "a principle as old as the common law itself." The phrase "derives from the Latin maxim *'stare decisis et non quieta movere*,' which means to stand by the thing decided and not disturb the calm." "Without stare decisis, there would be no stability in our system of jurisprudence." It is therefore preferable "for the sake of certainty," to follow even questionable decisions because stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."

Commonwealth v. Alexander, 243 A.3d 177, 195-96 (Pa. 2020) (citations omitted).

If there is any consideration to be made to *Muhammad*, and WCB respectfully submit there is no need to overturn or alter the prior ruling, then, respectfully, the proper course of action is to identify better the exceptions to the Muhammad Doctrine, not mandate its wholesale abandonment.

VI. CONCLUSION

Dr. Khalil has not, and cannot, show that the Superior Court committed an error of law or abused its discretion in any respect in affirming the dismissal of the non-fraud claims on *Muhammad* grounds. Dr. Khalil was provided sufficient opportunity to pursue her property damage claims and was properly precluded from pursuing a negligence claims against her attorneys by the Muhammad Doctrine. That doctrine is proper, prudent and fairly recent law, providing a needed limit on certain claims, and should not be overturned.

Accordingly, the Superior Court's ruling should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH PUBLIC ACCESS POLICY

I 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.

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CERTIFICATE OF COMPLIANCE
WITH WORD LIMITS

I certify that this filing complies with the provisions of Pa.R.A.P. 2135(a)(1) and that the foregoing Brief of Appellees does not exceed 14,000 words based on the word count of the word processing system used to prepare the Brief.

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PROOF OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons indicated below by electronic filing, email, and by U.S. Mail, First Class, postage prepaid in compliance with Pa. R.A.P. 121:

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