

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 1892 WDA 2019

JOE MYERS,

Appellant,

v.

TIMOTHY F. McCUNE, JOSEPH H. CHIVERS, JACK W. MURTAGH, JR.,
GRAYDON BREWER, CARL V. NANNI, JACK LEWIS, JIM GALLAGHER,
HANK LEYLAND, GREG LOVERICK, EDWARD TASSEY, AK STEEL, UAW
(formerly Butler Armco Independent Union) and ANGELO PAPA,

Appellees.

BRIEF OF APPELLEE JOSEPH H. CHIVERS

Appeal from the Order of Court of Common Pleas of Butler County, Pennsylvania
at No. 19-10516 entered November 21, 2019 granting Preliminary Objections of
Defendant-Appellees

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**COUNTERSTATEMENT OF THE SCOPE AND
STANDARD OF REVIEW**

Relief from a judgment of *non pros* for failure to file a certificate of merit is subject to the same standards of review for opening or striking a judgment of *non pros* under Pa.R.C.P. 3051. As to opening a judgment of *non pros*, the standard of review is whether the trial court abused its discretion. See, Hoover v. Davila, 878 A.2d 906, 913 (Pa. Super. 2005). As to striking a judgment of *non pros*, the appellate court determines where there exists any defect in the entry of the judgment. See, Varner v. Classic Cmtys. Corp., 890 A.2d 1068, 1072 (Pa. Super. 2006).

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

- I. Whether Appellant Joe Myers has waived his right to raise on appeal any issue relating to entry of a judgment of *non pros* in favor of Appellee Joseph H. Chivers where he: (A) failed to file a petition to strike or open the judgment of *non pros* in the lower court; (B) has not identified the entry of the judgment of *non pros* as a lower court error to be addressed on appeal; and (C) makes no mention of the judgment of *non pros* in his 71-page appellate Brief.
- II. Whether the entry of the judgment of *non pros* in favor of Appellee Chivers was procedurally and substantively proper.
- III. Whether in the interest of judicial economy, this Court should affirm where all claims against Attorney Chivers are also barred by *res judicata* and the running of the statute of limitations.

COUNTERSTATEMENT OF THE CASE

Appellant Joe Myers (“Myers”) filed this action asserting professional liability claims for “legal malpractice,” “legal negligence” and “breach of contract” against his former legal counsel, Appellee Joseph H. Chivers (“Attorney Chivers”). The claims arise out of an attorney-client relationship formed with Attorney Chivers in 2001 to represent Myers in connection with the termination of Myers’ employment in 2001. (Complaint pp. 4, 8-9, 12-14). In 2004, Myers brought a legal malpractice suit against Attorney Chivers in the Court of Common Pleas of Butler County which culminated in a dismissal of that action with prejudice in February 2008. On May 29, 2019, the instant suit was filed, again asserting professional liability claims against Appellee Chivers. Upon Myers’ failure to file a certificate of merit within thirty days after being given proper notice, a judgment of *non pros* was entered in favor of Attorney Chivers as to all claims. All filings with the lower court on behalf of Attorney Chivers were Rule-compliant and the judgment of *non pros* was properly taken.

SUMMARY OF THE ARGUMENT

Myers has waived his right to raise an appeal on any issues pertaining to the entry of a judgment of *non pros* against him and in favor of Attorney Chivers. Initially, Myers failed to file a petition to open or strike the judgment which is a mandatory requirement to the taking of an appeal. Additionally, his Concise Statement of errors to be addressed on appeal and his 71-page appellate Brief make no mention of any error committed by the trial court in the entry of the judgment. In fact, the entry of the judgment of *non pros* was taken in a Rule-compliant manner and was substantively proper under Pennsylvania law. Finally, although not the basis of dismissal of the claims against Attorney Chivers, Myers' claims are otherwise barred by the running of the statute of limitations and *res judicata* by reason of Myers having asserted the same claims in a 2004 lawsuit against Attorney Chivers which resulted in a dismissal with prejudice. For each of the foregoing reasons, and in, the interest of judicial economy, this Court should affirm.

ARGUMENT

I. Myers has waived any issues as to the judgment of *non pros* entered in favor of Attorney Chivers where Myers: (A) failed to file a petition to strike or open the judgment of *non pros* in the lower court; (B) has not identified the entry of the judgment of *non pros* as a lower court error to be addressed on appeal; and (C) makes no mention of the judgment of *non pros* in his 71-page appellate Brief

A. Failure to File Petition to Open or Strike

Initially, Pa.R.C.P. 3051 provides that “relief from a judgment of *non pros* shall be sought by petition.” Myers did not file any petition to open or strike the judgment of *non pros* entered on August 14, 2019 in favor of Attorney Chivers. Myers has therefore waived the issue for consideration by this Court on appeal.

“It is well-settled under Pennsylvania law that issues not raised before the lower court through post-trial motions are waived on appeal to a higher court.” Smart v. Commonwealth, 2018 Pa. Commw. LEXIS 348, *18-19 (Pa. Commw. 2018) *citing* Sahutsky v. H.H. Knoebel Sons, 782 A.2d 996, 1000 (Pa. 2001). A petition to open serves the same function as a post-trial motion which is to afford the trial court an opportunity to correct any errors before an appeal is pursued. The “failure to file a Rule 3051 petition operates as a waiver of any claims of error concerning the judgment of *non pros* entered by the Court of Common Pleas.” See Sahutsky, 782 A.2d at 1000 (Pa. 2001); *see also*, Koral v. Mixon, 2013 Pa. Super. Unpub. LEXIS 3396, *21 (Pa. Super. 2012) (applying Sahutsky to legal malpractice action).

B. Failure to Identify the Entry of the Judgment of Non Pros as Error in Rule 1925 Statement

A statement of errors under Pa.R.A.P. 1925(b) must identify each claim of error in sufficient detail to allow for judicial review in both the trial and appellate courts. The failure to include an issue in a statement under Rule 1925 is a waiver of that issue on appeal. See, Pa.R.A.P. 1925(b)(4)(vii) (“Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived”); Trial Court’s Rule 1925(a) Order dated January 2, 2020 (“The failure of the Plaintiff to timely include an issue in a Concise Statement means the Plaintiff has not preserved that issue for appellate review”); U.S. Bank, N.A. v. Hua, 193 A.3d 994, 997 (Pa. Super. 2018) (“As discussed *supra*, the failure to comply with Pa.R.A.P. 1925(b) results in the automatic waiver of issues raised on appeal”) (*citing* Commonwealth v. Lord, 719 A.2d 306, 309 (Pa. 1998); Kanter v. Epstein, 866 A.2d 394, 400 (Pa. Super. 2004), *alloc. den.* 880 A.2d 1239 (Pa. 2005); Commonwealth v. McCree, 857 A.2d 188, 192 (Pa. Super. 2004).

Here, waiver is well supported because the Statement of Errors Complained of on Appeal (titled “Concise Statement” and attached to “Appellant’s Brief”) does not mention the entry of the judgment of *non pros* at all; it contains only a lengthy narrative of his original, far-ranging contentions relating to Myers’ termination from his former employment, the involvement of other named defendants and ensuing events. The Concise Statement does not identify any issue that could be

read as a claim of error pertaining to the entry of other judgment of *non pros* so as to be properly presented to this Court for review. Waiver, therefore, is an appropriate finding in this instance. Kanter, 866 A.2d at 401; McCree, 857 A.2d at 192; Jiricko v. Geico Ins. Co., 947 A.2d 206, 210 (Pa. Super. 2008); Wilcox v. Bohmueller, 2011 Pa. Dist. & Cnty. Dec. LEXIS 403, *2–3 (C.P. Chester Cnty. 2011) *aff'd* Wilcox v. Bohmueller, 50 A.3d 234 (Pa. Super. 2012) (*citing* Lineberger v. Wyeth, 894 A.2d 141, 148–149 (Pa. Super. 2006)).

C. *Myers' 71-page Brief Makes no Mention of the Judgment of Non Pros*

“Issues in the statement of questions presented and not developed in argument are also deemed waived. [This Court] will address only those issues properly presented and argued.” Harkins v. Calumet Realty Co., 614 A.2d 699, 703 (Pa. Super. 1992); *See also* In re Estate of Whitley, 50 A.3d 203, 209 (Pa. Super. 2012) (“The argument portion of an appellate brief must include a pertinent discussion of the particular point raised along with discussion and citation of pertinent authorities”) (citations omitted).

Because Myers’ Brief develops no argument whatsoever as to entry of judgment in favor of Attorney Chivers (let alone how the judgment was improper), this Court should affirm the entry of judgment on the basis of waiver on this additional ground. Harkins, 614 A.2d at 703; In re Estate of Whitley, 50 A.3d at 209; Commonwealth v. Walter, 966 A.2d 560, 566 (Pa. 2009)); Purple Orchid, Inc.

v. Pa. State Police, 813 A.2d 801, 804 (Pa. 2002) (holding that an issue is waived for failure to address and develop it in an appellate brief).

II. The entry of the judgment of *non pros* in favor of Attorney Chivers was procedurally and substantively proper

This lawsuit, asserting professional liability claims against Attorney Chivers, was filed on May 29, 2019. Attorney Chivers filed a Notice of Intention to Enter a Judgment of *Non Pros* as to all claims against him on July 3, 2019. Since no certificate of merit was filed within thirty days thereafter, Attorney Chivers filed a Praecipe for Judgment of *Non Pros* on August 14, 2019 and a judgment of *non pros* was entered the same day.

Pursuant to Pa. R.C.P. 1042.3, "in any action based upon an allegation that a licensed professional deviated from an acceptable professional standard," the plaintiff shall file, within sixty days of the filing of the complaint, a certificate of merit as to the licensed professional against whom a claim is asserted. See, Pa.R.C.P. 1042.3(a)(1)-(3). As to *pro se* litigants, the certificate of merit must include a certification signed by plaintiff that either:

- (1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or
- (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other

licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

- (3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

Pa.R.C.P. 1042.3 (a)(1)-(3).

The sixty-day period for filing a certificate of merit runs from the filing of the complaint. Hoover v. Davila, 862 A.2d 591 (Pa. Super. 2004); Ditch v. Waynesboro Hosp., 917 A.2d 317 (Pa. Super. 2007); O'Hara v. Randall, 879 A.2d 240 (Pa. Super. 2005).

Under Pennsylvania procedure, the proper mechanism to obtain dismissal for failing to file a certificate of merit is the filing of a praecipe for judgment of *non pros*, which is entered if: (1) there is no pending motion for either a determination that a certificate of merit is not required or for an extension of time to file a certificate of merit; (2) defendant submitted proof that a notice of intention had been served on plaintiff seeking entry of judgment of *non pros* at least thirty days before the praecipe was filed; and (3) no certificate of merit was filed. If these conditions are met, the Prothonotary is empowered to enter a judgment of *non pros* in favor of the licensed professional.

Initially, the certificate of merit rules apply equally to both *pro se* and represented litigants. See, Mumma v. Boswell, Tintner, Piccola & Wickersham,

937 A.2d 459 (Pa. Super. 2007); Pa.R.C.P. 1042.3(a) (applying to “the plaintiff *if not represented*, shall file ...”).

In order to state a cause of action under Pennsylvania law for legal malpractice, a plaintiff must prove the following elements:

- (a) the employment of the attorney or other basis for duty;
- (b) the failure of the attorney to exercise ordinary skill and knowledge or to comply with a contractual term of representation; and
- (c) that the attorney's negligence or breach of contract was the proximate cause of damage to the plaintiff, i.e., actual loss or harm.

See generally, Myers v. Robert Lewis Seigle, P.C., 751 A.2d 1182, 1194 (Pa. Super. 2000) *citing* Kituskie v. Corbman, 714 A.2d 1027, 1029 (Pa. 1988); Steiner v. Markel, 968 A.2d 1253 (Pa. 2009).

The standard of care in a legal malpractice case is whether the attorney has exercised ordinary skill and knowledge related to common professional practice. Storm v. Golden, 538 A.2d 61, 64 (Pa. Super. 1988). “By its very nature, the specific standard of care attributed to legal practitioners necessitates an expert witness’ explanation where a jury sits as the fact finder.” Id. The determination of legal malpractice, like determinations of malpractice in other professions, requires an evaluation of professional skill and judgment, as well as the standard of care which is related to common professional practice. The expert witness is therefore

required to establish the specific standard of care and to assist the jury in its determination of defendant's conformity to the relevant standard. Expert testimony is required in all legal malpractice cases except where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of the ordinary experience and comprehension of non-professional persons. Storm, 538 A.2d at 65, *citing* Burns v. City of Philadelphia, 504 A.2d 1321, 1325 (Pa. Super. 1986). There can be no dispute in this action that expert testimony was required to prove Myers' claims against Attorney Chivers arising out of an underlying employment dispute.¹

III. The Court should affirm where all claims are otherwise barred by *res judicata* and the running of the statute of limitations

Myers previously filed an action for legal malpractice against Attorney Chivers for representation of Myers' interests in the same 2001 employment termination matter that is the subject of the instant lawsuit. That prior action, filed in 2004, resulted in a final dismissal with prejudice in Attorney Chivers' favor on February 12, 2008. See, Myers v. Chivers, A.D. No. 04-10707 (C.P. Butler Cnty.

¹ Moreover, a plaintiff cannot avoid the filing of a certificate of merit by labeling professional liability claims as something else. See, Perez v. Griffin, 304 Fed. App'x 72 (3d Cir. 2008) (dismissing *fraud*, negligence and breach of contract claims against attorney) *citing* Varner v. Classic Cmtys. Corp., 890 A.2d 1068 (Pa. Super. 2006) ("it is the substance of the complaint rather than its form" that controls whether a claim is for professional liability and whether a certificate of merit is required); Frantz v. Fasullo, 2014 U.S. Dist. LEXIS 159744 (M.D. Pa. 2014) (certificate of merit requirement applies to "*any* action" and "a plaintiff may not avoid the obligation...by cloaking a claim based on a professional duty in the language of ordinary negligence, breach of contract, or fraudulent misrepresentation").

2004).² As such, the claims are barred by *res judicata*. See, *Mintz v. The Carlton House Partners, Ltd.*, 595 A.2d 1240 (Pa. Super. 1991); *Swift v. Radnor Twp.*, 983 A.2d 227 (Pa. Commw. 2009) (res judicata "prohibits parties involved in a prior litigation from asserting claims in a subsequent action that were raised, *or could have been raised*, in the prior action").

Finally, all claims against Attorney Chivers are barred by Pennsylvania's two-year statute of limitations. See, 42 Pa.C.S. §5524(7); *Wachovia Bank, N.A. v. Ferretti*, 935 A.2d 565 (Pa. Super 2007) (legal malpractice claims time-barred); *Krause v. Great Lakes Holdings, Inc.*, 513 A.2d 1189 (Pa. Super. 1989) (fraud claims barred by two-year statute of limitations).

All claims are therefore otherwise barred by both *res judicata* and the running of the statute of limitations.

² This Court is entitled to take judicial notice of public documents. See, *Solomon v. United States Healthcare Systems of PA, Inc.*, 797 A.2d 346 (Pa. Super. 2002); *Bykowski v. Chesed*, 625 A.2d 1256 (Pa. Super. 1993).

CONCLUSION

For all of the foregoing reasons, this Honorable Court should affirm the entry of the judgment of *non pros* in Attorney Chivers' favor.

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CERTIFICATE OF WORD COUNT COMPLIANCE

In accordance with Pa.R.A.P. 2135(d), I hereby certify that the within Brief of Appellee complies with the word count limits set forth in Pa.R.A.P. 2135(a)(1). I relied upon the word count of my word processing system to make this certification.

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CERTIFICATES OF COMPLIANCE AND SERVICE

I, the undersigned, in accordance with Pa.R.A.P. 121, hereby certify that on this 21st day of May, 2020, a true and correct copy of the foregoing **BRIEF OF APPELLEE JOSEPH H. CHIVERS**, which document 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, was served upon the following parties and counsel of record via first-class mail, postage pre-paid:

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