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Do Not Let the Third Circuit's Recent Decision in *Liggon-Redding v. Estate of Robert Sugarman* Scare You: An Alternative Method to Dispose of Meritless Legal Malpractice Actions Remains

By Stephen J. Shapiro and Christopher A. Reese

Pennsylvania Rule of Civil Procedure 1042.3, the Certificate of Merit Rule, requires a plaintiff in a malpractice action to certify that he or she has obtained from an appropriate expert an opinion that the defendant's work likely fell outside the acceptable professional standards and caused the plaintiff's damages. In the alternative, a plaintiff may satisfy the Rule by certifying that such expert testimony is not necessary to prosecute his or her claim. A plaintiff who certifies that expert testimony is not necessary is, under the Rule, barred from later presenting expert testimony, in the absence of exceptional circumstances.

On October 4, 2011, the United States Court of Appeals for the Third Circuit, in *Liggon-Redding v. Estate of Robert Sugarman*, No. 08-4336 (3d Cir. 2011), held that Pennsylvania's Certificate of Merit Rule "is substantive law under the *Erie* Rule and must be applied as such by federal courts." *Slip Opinion* at 14. The Court of Appeals reached this conclusion by determining that Pennsylvania's Certificate of Merit Rule does not directly collide with any Federal Rules of Civil Procedure, including Rules 7, 8, 9, 11, and 41(b). *Id*. at 8–12. The Third Circuit also found that failing to apply Pennsylvania Rule 1042.3 would be outcome determinative and would encourage forum shopping and promote inequitable administration of the laws. *Id*. at 12–14. Thus, the Court of Appeals concluded that the *Erie* Doctrine demanded that federal courts apply Rule 1042.3 in diversity cases. *Id*. at 14.

This conclusion was fairly predictable, based on the Third Circuit's prior decision in *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 1999), where it held that New Jersey's analogous Affidavit of Merit statute is substantive law that must be applied by federal courts sitting in diversity cases. However, in reversing the trial court's grant of the defendant's motion to dismiss in *Liggon-Redding*, the Third Circuit, at least at first blush, appeared to establish an unreasonable rule for defendants in legal malpractice actions. Indeed, the Third Circuit's resolution of the case appeared to give plaintiffs in legal malpractice actions free reign to drag defendants through months or years of discovery even after certifying that they would not obtain the expert testimony necessary to prevail on their claim as a matter of law.

To understand the Third Circuit's holding, a review of the proceedings in the trial court is necessary. In the District Court, the plaintiff in *Liggon-Redding* asserted that expert testimony was not necessary for her to prevail on her legal malpractice action. The defendant moved to dismiss, arguing that the plaintiff had failed to comply with the Certificate of Merit Rule. *Id*. at 14. Citing *Lentino v. Fringe Employee Plans, Inc*., 611 F.2d 474, 480 (3d Cir. 1979), the District Court noted that expert testimony is required in all legal malpractice actions, unless the claimed malpractice is so simple and the lack of skill so obvious that jurors can decide the matter without the assistance of an expert. *Redding v. Estate of Robert Sugarman*, No. 07-4591, *Slip Opinion* at 4 (E.D. Pa. October 22, 2008). The District Court then reasoned that, because expert testimony was required to prove plaintiff's legal malpractice claim, and because plaintiff had conclusively stated her intention not to introduce expert

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testimony, she had not complied with the Certificate of Merit Rule. Therefore, the District Court granted defendant's motion to dismiss.

The Court of Appeals reversed the dismissal, finding that the District Court abused its discretion by deciding at the pleadings stage that plaintiff would be unable to prosecute her claim without expert testimony. *Slip Opinion* at 15–16. At the pleadings stage, all plaintiff needed to do was comply with the Certificate of Merit Rule, which, the Third Circuit held, she had. *Id*. The result of the *Liggon-Redding* case, then, is that a plaintiff who, by her own admission, will not be able to successfully prosecute her legal malpractice claim for lack of expert testimony may now proceed to discovery on her (likely) doomed claim.

This seemingly absurd result, however, probably can be avoided by pursuing a different defense strategy. As noted by the Third Circuit, the problem with the defendant's argument and the District Court's conclusion is that Rule 1042.3(a)(3) explicitly allows plaintiffs to do exactly what the plaintiff in *Liggon-Redding* did: file a Certificate of Merit stating that expert testimony is not necessary to pursue plaintiff's claim. Thus, defendant's decision to seek dismissal of the claims on the ground that plaintiff had not complied with Rule 1042.3 was, in retrospect, not the proper procedure to follow.

A better avenue for seeking early termination of a legal malpractice case where a plaintiff has certified that expert testimony is unnecessary is still available to defendants even after *Liggon-Redding* and well could save defendants from months of pointless discovery. Namely, defendants in such legal malpractice actions should consider filing an early summary judgment motion arguing that, where a plaintiff has committed herself to proceeding without an expert, her claims are barred as a matter of law by the Pennsylvania authority holding that expert testimony is required to prove a legal malpractice claim.

Under Pennsylvania law, a plaintiff's failure to produce expert testimony in response to a motion for summary judgment in cases where expert testimony is required results in a failure to create a dispute of material fact, meaning defendant is entitled to summary judgment as a matter of law. *Schmidt v. Currie*, 470 F. Supp. 2d 477, 483 (E.D. Pa. 2005); *see also Gans v. Mundy*, 762 F.2d 338, 343 (3d Cir. 1985). As noted above, plaintiffs are required to present expert testimony in legal malpractice actions to establish the standard of care and the defendant's deviation from that standard, "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." *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 480 (3d Cir. 1979); *see also Bannar v. Miller*, 702 A.2d 242, 249 (Pa. Super. Ct. 1997). Examples of claims that do not require expert testimony are claims that the defendant attorney breached the duty to investigate and inform his client about settlement offers or claims that the defendant attorney engaged in improper monetary transactions with her client. *Rizzo v. Haines*, 555 A. 2d 58, 66-68 (Pa. 1989).

Thus, in most malpractice actions, the plaintiff is required to present expert testimony to prove her claims and to survive a motion for summary judgment. Although certifying that expert testimony is not necessary to pursue one's claim is sufficient to comply with Pennsylvania Rule 1042.3 and to survive a motion to dismiss on that basis, it is not sufficient to survive a motion for summary judgment, where expert testimony is, in fact, required. Defendants can use a plaintiff's choice to proceed under Rule 1042.3(a)(3) as a concession that he or she is barred from presenting expert testimony because the Official Note to that rule states that "in the absence of exceptional circumstances the attorney [or party] is bound by the certification and, subsequently, the trial court shall preclude the plaintiff from presenting testimony by an expert on the questions of standard of care and causation." The Third Circuit appeared to indicate in *Liggon-Redding* that this rule also will be enforced in federal courts. *See Slip Opinion* at 16 ("Of course, the consequence of such a filing is a prohibition against offering expert testimony later in the litigation, absent 'exceptional circumstances.'").

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In sum, although the Third Circuit's recent decision in *Liggon-Redding* appears at first blush to allow plaintiffs to proceed to discovery in malpractice actions where they have not obtained and cannot obtain an expert, the Court of Appeals' decision ultimately may be nothing more than a reminder for defense counsel not to jump the gun when seeking early termination of legal malpractice actions by filing an improper motion to dismiss. Unless a particular case falls into the exception to the rule requiring expert testimony in malpractice actions, a plaintiff's attempt to comply with Rule 1042.3 by submitting a Certificate of Merit stating that expert testimony is not required does not shield that plaintiff from an early motion for summary judgment. Defendants in future malpractice actions should not let the Third Circuit's decision in *Liggon-Redding* discourage them from pursuing early disposition of such matters. ◆

For more information about our Financial Services Litigation Practice Group or Appellate Practice Group, or to speak with a member of the group at a particular Schnader office location, please contact:

Theresa E. Loscalzo, Co-Chair, Financial Services Litigation Practice Group
215-751-2254
tloscalzo@schnader.com

Stephen J. Shapiro, Co-Chair, Financial Services Litigation Practice Group
215-751-2259
sshapiro@schnader.com

Carl A. Solano, Co-Chair, Appellate Practice Group
215-751-2202
csolano@schnader.com

Hon. Timothy K. Lewis, Co-Chair, Appellate Practice Group
202-419-4216
tlewis@schnader.com

Christopher A. Reese
215-751-2556
creese@schnader.com

www.schnader.com