

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT  
 RULES BEFORE CITING.

Superior Court of New Jersey,  
 Appellate Division.  
 FOX ROTHSCHILD, L.L.P., Plaintiff-Respondent,  
 v.  
 ALANWOOD TRUST, Defendant,  
 and  
 Joseph Kalman, Defendant-Appellant.  
 Fox Rothschild, L.L.P., Plaintiff-Appellant,  
 v.  
 Alanwood Trust, Defendant,  
 and  
 Joseph Kalman, Defendant-Respondent.  
 Submitted Jan. 7, 2009.  
 Decided March 12, 2009.

On appeal from the Superior Court of New Jersey,  
 Law Division, Atlantic County, Docket No. L-1863-  
 04.

Joseph Kalman, appellant, pro se in A-1680-07T2.

Wardell, Craig, Annin & Baxter, L.L.P., attorneys for  
 appellant Fox Rothschild, L.L.P., in A-1705-07T2  
 ([Robert A. Baxter](#), of counsel and on the brief).

Wardell, Craig, Annin & Baxter, L.L.P., attorneys for  
 respondent Fox Rothschild, L.L.P., in A-1680-07T2  
 ([Robert A. Baxter](#), of counsel and on the brief).

Joseph Kalman, respondent, pro se in A-1705-07T2.

Before Judges [AXELRAD](#), PARRILLO and  
[LIHOTZ](#).

PER CURIAM.

\*1 Defendant, Joseph Kalman, acting in his capacities as trustee of the Alanwood Trust (“Trust”) and individually as its sole beneficiary, appeals summary judgment dismissal of the legal malpractice counterclaims against plaintiff, Fox Rothschild, L.L.P. <sup>FN1</sup> (“Fox”), arising out of the law firm’s representation of the Trust in a condemnation action, and various

discovery rulings made during the litigation. Fox appeals separately, consolidated for purposes of this opinion, the sua sponte dismissal of its claim for legal fees against Kalman individually for work performed for the Trust. <sup>FN2</sup> We affirm on Kalman’s appeal and vacate and remand on Fox’s appeal.

<sup>FN1</sup> Fox and its attorneys Herbert Bass and Peter Sarkos are “defendants on the counterclaim” filed by Kalman. They are referred to collectively as “Fox.”

<sup>FN2</sup> Fox’s claim for legal fees against the Trust was resolved by consent order for final judgment in the amount of \$139,185.66 dated October 29, 2007. We note that, while the trial court’s order was designated “final judgment,” it contained the following conditional language:

[I]t is [f]urther agreed and understood by the parties that, in the event the decisions 1) to dismiss the Counterclaims for legal malpractice, or 2) to dismiss Joseph Kalman, individually, from the litigation, previously interlocutory in this litigation, and now rendered final by virtue of this Final Judgment, are appealed from, reversed and remanded, then this Final Judgment will be vitiated, and that this Final Judgment may not, and will not, be asserted as a basis to estop or preclude litigation of the amount of the indebtedness, if any, of the Alanwood Trust, or Joseph Kalman, individually, to Fox-Rothschild.

I.

In 2002, Kalman contacted Herman Bass, an attorney with Fox, to represent the Trust in connection with an eminent domain condemnation by the Casino Reinvestment Development Authority (“CRDA”) of property owned by the Trust in Atlantic City. Fox and the Trust entered into a written agreement for professional services, memorialized in a July 9, 2002 engagement letter signed by Kalman as trustee on July

26, 2002. The CRDA's certified general appraiser, Jerome McHale, established a \$307,000 fair market value for the vacant parcel (\$7.00 per square foot), which Kalman had rejected. On behalf of the Trust, Fox obtained an appraisal by Michael Buchalski, also a certified general appraiser, of \$660,000 (\$15 per square foot). During the multi-day trial in April 2003, McHale testified for the CRDA, opining a highest and best use of the property as being held for future development, and Buchalski testified for the Trust, opining a highest and best use of the property as yielding twenty-four townhouses. In addition, Fox produced rebuttal testimony by real estate expert Kevin Corcoran on behalf of the Trust. The jury rendered a condemnation award of \$307,200. The court denied Fox's motion for a new trial.

On June 16, 2004, Fox filed suit against the Trust for unpaid legal fees in the amount of \$129,655.95 for its representation in the condemnation action. Defendant Kalman, acting pro se on behalf of the Trust, filed an answer and counterclaim asserting legal malpractice. Fox then filed its answer to the counterclaim. Pursuant to court order of May 19, 2005, Fox filed an amended complaint asserting claims against Kalman individually and as trustee.

The Trust, now represented by Steven Hershkowitz, filed an answer to the amended complaint with an amended counterclaim on September 28, 2005, asserting causes of action of legal malpractice, breach of fiduciary duty, and breach of contract based on the following allegations: (1) failure of the Fox attorneys to proffer into evidence an unconsummated 1985 sales contract for the subject parcel for a significantly higher price than the CRDA offered in the condemnation action in exchange for the CRDA not introducing information regarding a tax appeal filed by the Trust seeking to reduce the real estate tax assessment on the property; (2) failure of the Fox attorneys to effectively cross-examine the CRDA's expert at trial; and (3) the Fox attorneys' employing a "team" approach on every issue and excessively billing the file. Kalman also filed a pro se counterclaim in his individual capacity on September 29, 2005, seeking damages allegedly sustained by the Trust based on theories of breach of fiduciary duty in connection with Corcoran's rebuttal report and testimony (count one), negligence in failing to prove that McHale's appraisal was unreliable (count two), misrepresentation in claiming the Trust could not submit a revised

appraisal report without court approval and then not objecting to the CRDA's amended report (count three), overbilling (count four), violation of the Rules of Professional Conduct in not obtaining the trustee's authority to forego introduction of the prior sales contract in return for the CRDA's silence on the tax appeal (count five), duress in threatening to withdraw from representation a month prior to trial (count six), excessive fees (count seven), and fraud relating to count three (count eight). On October 11, 2005, Fox filed an answer to the amended counterclaim.

\*2 On September 21, 2006, Fox moved for partial summary judgment to dismiss the legal malpractice claims against it contained in defendants' counterclaims, except for the claim concerning attorneys' fees. The Trust cross-moved for summary judgment as to its claims of legal malpractice and excessive attorneys' fees set forth in its counterclaim. It relied upon a report of Anthony P. Ambrosio, an attorney, which opined, without reviewing the trial tape or transcript,<sup>FN3</sup> that Fox committed malpractice primarily based on: (1) Bass' purported failure in the underlying condemnation trial to exclude McHale's report and testimony or effectively cross-examine him by showing his faulty methodology and improper use of comparable sales; and (2) Bass' failure to present to the jury evidence of the 1985 unconsummated contract, which the CRDA had approved, based on his stipulation with the CRDA's attorney not to introduce evidence of the position the Trust took in a prior tax appeal. Ambrosio also opined that Fox engaged in grossly excessive billings.

<sup>FN3</sup>. Ambrosio reviewed Fox's bills, the pleadings, and depositions and exhibits marked during the depositions.

In response, Fox submitted the expert report of S. David Brandt, an attorney who, after viewing Ambrosio's report and the entire videotape of the trial,<sup>FN4</sup> concluded: (1) McHale employed a recognized appraisal methodology, which was admissible, and Bass performed extensive cross-examination of McHale's analysis, choice of comparable sales, and adjustments, asking specifically about McHale's adjusting so that larger properties were worth less per square foot; (2) under the case law, testimony regarding the unconsummated 1985 contract for \$581,343.75 likely would not have been admissible, while testimony regarding the Trust's \$480,000 ap-

praisal in the tax appeal could have been quite damaging; therefore, the stipulation was quite favorable for the Trust; and (3) any remaining claims of malpractice asserted by defendants were simply disappointments with the jury verdict and anger over the amount of the bills.

[FN4](#). In addition, Brandt reviewed the pleadings, the 1985 sales contract, and Kalman's deposition.

The court heard oral argument on the motions on November 9, 2006, at which Fox and the Trust were represented by counsel and Kalman appeared pro se. Kalman did not file a separate cross-motion for summary judgment nor proffer an expert report, though he implicitly joined in the Trust's motion, arguing similar to Ambrosio that Bass committed malpractice by ineffectively cross-examining McHale about the inconsistency between his comparables and his contention that smaller properties are valued higher than larger properties.

Pertinent to Fox's appeal, in a colloquy on the record prior to argument, the court sought clarification of the procedural history and inquired as to why Kalman was named as an individual defendant. The following discussion ensued:

FOX'S ATTORNEY: Well, there-there's a theory that was laid out and I'm not prepared to argue that aspect today because Mr. Mazzone represents the Fox Rothschild in the affirmative case ... those issues weren't briefed or brought before the Court, but the theory is that as the trustee, as the sole beneficiary of the trust, he is a responsible person. And there's case law in New Jersey that stands for that proposition.

\*3 ....

THE COURT: Okay. Well, then you're right. It hasn't been briefed before the Court. I looked at the initial complaint. I didn't have before me an amended complaint, so I-so now I understand why he's in the case. I'll probably want briefing on that before trial on that issue to see whether he continues as an appropriate party.

There was no further discussion with regard to this

issue.

The court issued a written decision on June 29, 2007, granting Fox's motion for partial summary judgment, dismissing defendants' malpractice claims, and denying defendants' cross-motions for summary judgment.<sup>[FN5](#)</sup> The court ruled that Ambrosio's expert report was a net opinion and thus inadmissible. The court further concluded that based on the competent evidentiary materials presented, even when viewed in the light most favorable to the Trust, no rational factfinder could find the Fox attorneys' trial strategies to be deviations from the standard of care. Furthermore, the court found no basis for defendants' claims of fraud and misrepresentation as it was undisputed that Fox had an office in Atlantic City and that Bass was a partner in the firm. The court noted that charges involving Bass' pro hac status would be subsumed in the billing dispute.

[FN5](#). As previously stated, although Kalman did not file a formal cross-motion, based on Kalman's participation and the nature of his argument, the court apparently regarded him as implicitly joining in the Trust's summary judgment motion.

Finally, the court sua sponte dismissed defendant Kalman individually as a party to the litigation, stating that his mere signing of the contractual fee agreement with plaintiff in his representative capacity as trustee was not sufficient to hold him individually responsible for the unpaid fees. The court also dismissed Kalman's malpractice counterclaim in its entirety. The court concluded that "[t]he plaintiff does not seek summary judgment on the issue of professional fees charged-the alleged overbilling issues, which are encompassed in the breach of contract and breach of fiduciary duty issues, for which a jury is required." Accompanying memorialized orders provided for the granting of partial summary judgment to Fox dismissing all affirmative claims against it with prejudice except for the overbilling issues raised in the counterclaims, denying summary judgment to defendants on the counterclaims, and providing for a jury trial to be held to determine the overbilling issues raised in the complaint and counterclaims.<sup>[FN6](#)</sup>

[FN6](#). The appendix only includes an Order Denying Summary Judgment prepared by counsel for the Trust referencing its cross-

motion. We do not know if a similar order was prepared by Kalman.

Kalman's motion for reconsideration was denied following argument on September 7, 2007. As aforesaid, the consent final judgment for unpaid legal fees was entered against the Trust on October 29, 2007. Kalman filed a pro se appeal on December 10, 2007, and amended notices of appeal on December 17, 2007 and January 18, 2008. We denied his motion to accelerate the appeal on April 28, 2008. On December 19, 2008, we granted Kalman's unopposed motion to file additional documents omitted from the appendix.

On December 11, 2007, Fox filed an appeal of the court's sua sponte dismissal of its claims for legal fees against Kalman in his individual capacity. On April 22, 2008, we denied Kalman's motion to dismiss Fox's appeal.

## II.

\*4 On appeal, though framed in seven arguments, Kalman's challenges can be combined into four points: the trial court (1) disregarded discovery violations; (2) improperly excluded Ambrosio's report as a net opinion and erred as a matter of law in concluding that an expert report was required to prove legal malpractice; (3) erroneously granted summary judgment where there were genuine issues of material fact on his counterclaim asserting violation of fiduciary duty or Rules of Professional Conduct, duress, or misrepresentation; and (4) erroneously dismissed him as a party and his individual malpractice claims against Fox. We are not persuaded by any of these arguments.

Kalman first challenges another motion judge's December 9, 2005 ruling denying his motion to compel a third deposition of Bass and to compel production by Fox of computerized billing records and CRDA documents regarding the 1985 contract. He argues that Bass and other Fox attorneys did not comply with the Court Rules when providing deposition and interrogatory answers, and further violated the Rules of Professional Conduct by failing to maintain breakdowns of its bulk billings. Kalman urges that the court's denial of his motion prevented him from completing discovery and entering the deposition into evidence, thereby frustrating his efforts to discredit

Bass and other Fox attorneys.

We are satisfied Judge Nugent acted well within his discretion, and affirm his discovery rulings for the reasons set forth in his December 5, 2005 memorandum of decision. See *Isetts v. Borough of Roseland*, 364 N.J.Super. 247, 253 (App.Div.2003) (holding that as a general rule, discovery rulings will not be reversed absent an abuse of discretion). As the court noted, Bass was already deposed for more than nine hours—four hours on July 20, 2005 by counsel for the Trust, after which Kalman declined to question him, and five hours on September 30, 2005 by Kalman, during which the questioning became repetitious—warranting a protective order. As recognized by *Rule 4:10-3*, a court has the authority to limit discovery if necessary “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]” Moreover, Fox complied with the Rules of Professional Conduct and Court Rules by providing all documents within its possession or readily obtainable by it, including detailed billing records in its initial interrogatory answers upon which Bass was deposed. The court appropriately relied upon Bass' representation in his deposition that the firm had no records providing the breakdown of “bulk billing” sought by Kalman and, as a further accommodation to Kalman, had Bass produce a detailed certification.

There is also no merit to Kalman's challenge to the court's ruling on the Ambrosio report. The court correctly held the expert report submitted by the Trust in support of its malpractice claim was an inadmissible net opinion and substantiated its determination in a comprehensive memorandum decision that provided detailed references to the record and cogent legal analysis.

\*5 In his report, Ambrosio acknowledged he did not review the tape of the trial, rather he relied on “[c]ounsel and [the] client [Kalman] [who] have informed [him] that the tape of the trial ... does not reveal anything remotely approximating an effective cross-examination of the CRDA expert by Bass.” Ambrosio further explained the basis for his opinion of legal malpractice by Fox relating to McHale's cross-examination and the stipulation regarding mutual non-production of the sales contract and tax appeal information as follows:

The client points out that, from his vantage point as

a participant in the trial, the performance by the attorney Herb Bass was negligent in that he lacked the skill which he had represented he possessed. He failed to adequately cross-examine the opposing expert on his contention that smaller properties are valued higher than larger properties. Kalman points out that, except for a reference to one sale which should not have been permitted to be part of the analysis, the comparables used by CRDA's expert contradicted his own position, yet Mr. Bass ... failed to expose this essential inconsistency in the opposing expert's testimony, even though this flaw in the opposing expert's methodology was made clear to Bass by his own expert, Michael Buchalski.

....

Here Bass asserted that it was an intentional decision and that he had stipulated with CRDA's attorney that he would not introduce the contract if they agreed not to introduce evidence of the position which the client had taken in a prior tax appeal, i.e., that the parcel had a much lower value for tax purposes. Here too, Bass missed the point.

Even if the Court would have allowed the evidence of the client's position taken in the tax appeal, which is by no means certain, the jury readily would have understood that the client simply did not want to pay higher taxes when he owned the property, even though he wanted a higher price to sell.... Giving away the evidence of the prior contract was not just bad judgment, it was incompetence.

He thus concluded that "the conduct of the attorneys deviated from the required standard of care and to a reasonable degree of legal certainty was a substantial contributing factor to the damages suffered by the [counterclaimant] when he was charged grossly excessive fees and the condemnation proceedings were negligently handled."

In concluding that Ambrosio's opinion that Fox committed malpractice in failing to effectively cross-examine McHale was an inadmissible net opinion in that it was "unsupported by factual evidence," the court focused, in particular, on Ambrosio's failure to review the trial tape, stating:

[T]he expert can't merely repeat the opinion of his client and the client's lawyer. Sometimes it is a close call as to whether an expert is appropriately relying on facts or data of a type reasonably relied on by experts in the field in question in forming opinions of their own even though the facts and data need not be admissible in evidence. [N.J.R.E. 703](#). However, here Mr. Ambrosio says that Mr. Kalman and evidently the Alanwood Trust attorney both gave him their opinions, which he then parroted. The court as gatekeeper must be sure an expert is providing opinions supported by facts and data and not merely by someone else's opinion—especially the opinion of those with such a clear interest in the outcome of the litigation. The facts and data here would be a review of the trial transcript or videotape. The opinion of a client is not the type of information generally relied on by an expert to form an opinion when the tape of the trial exists, as here. This expert opinion of Mr. Ambrosio is a bare conclusion based on hearsay.

\*6 The court noted that Ambrosio challenged McHale's comparable sales but offered no standard governing their use. Moreover, Buchalski testified at the condemnation trial that there are no bright line rules and that an appraiser's choice of sales and adjustments to them is a judgment call. The court determined the proper method of countering McHale's comparables and opinions was through effective and competent cross-examination, which was not disputed by admissible evidence, and by submitting a rebutting appraisal report, which Fox did. Furthermore, considering Bass' experience and the variables in trial strategy and tactics, the court was satisfied his compromise with the CRDA attorney to mutually exclude the 1985 contract and the Trust's tax appeal admission was a "reasonable trial and evidence decision" which, even when viewed in the light most favorable to the counterclaimant, could not be found to be a deviation from the standard of care. Accordingly, there was no sustainable malpractice by Fox.

We agree. In a professional negligence case, "the standard of care must normally be established by expert testimony." [Taylor v. DeLosso](#), 319 [N.J.Super. 174, 179 \(App.Div.1999\)](#). Regardless, the rules governing expert opinion testimony do not allow for carte blanche admission of every expert's opinion, even those qualified experts opining in an area appropriate for expert opinion. While "[Rule 702](#)

permits a qualified expert witness to testify ‘in the form of an opinion or otherwise,’“ [N.J.R.E. 703](#) “addresses the ‘bases of opinion testimony by experts.’ “ [State v. Townsend, 186 N.J. 473, 494 \(2006\)](#).

[Rule 703](#), also known as the “net opinion rule,” renders inadmissible an expert's bare conclusions that are not supported by factual evidence or other data. [Polzo v. County of Essex, 196 N.J. 569, 583 \(2008\)](#); [Buckelew v. Grossbard, 87 N.J. 512, 524 \(1981\)](#). Pursuant to [N.J.R.E. 703](#), courts will admit expert testimony based on (1) personal observations of the expert; (2) evidence admitted at trial; or (3) data of the type commonly relied upon by experts in the field in forming opinions on the same subject, though not necessarily admissible at the trial. [Townsend, supra, 186 N.J. at 494](#). Thus, an expert's opinion must be based on facts, data, or another expert's opinion, either perceived by or made known to the expert, at or before trial. [Froom v. Perel, 377 N.J.Super. 298, 317 \(App.Div.\), certif. denied, 185 N.J. 267 \(2005\)](#). An expert must also explain the causal connection between the act or incident complained of and the resulting injury or damage, and present evidence that the defendant's negligent conduct was a “substantial factor” in bringing about the plaintiff's injury, even though there may be other concurrent causes of the harm. [Id. at 313](#); see also [Conklin v. Hanoach Weisman, 145 N.J. 395, 419-20 \(1996\)](#).

We have consistently instructed experts that their testimony and reports opining legal malpractice will be stricken as net opinions where they have failed to “give the why and wherefore” of his or her opinion, and have just provided a “mere conclusion.” See, e.g., [Froom, supra, 377 N.J.Super. at 317](#) (finding inadmissible net opinion where expert simply assumed the plaintiff was damaged because, in his view, the defendants committed legal malpractice, holding testimony was “patently insufficient” to establish the causal connection between the defendants' malpractice and the plaintiff's damages and “no more than bare conclusions ... unsupported by any factual evidence”); [Kaplan v. Skoloff & Wolfe, P.C., 339 N.J.Super. 97, 103 \(App.Div.2001\)](#) (finding net opinion where expert offered only his personal view of standards to support his opinion of legal malpractice, but offered no evidential support establishing the existence of an appropriate standard of care by which to measure the attorney's conduct, such as a text book, treatise, the Rules of Professional Conduct, or

an unwritten custom accepted by the legal community).

\*7 Here, too, we are left with, at most, the personal opinions and bare conclusions of an expert who cites to no consensus of the legal profession. Worse yet, this expert has virtually no personal knowledge of the underlying case, not having reviewed the trial tape or transcript. Ambrosio based his conclusion that Bass was negligent on Kalman's hearsay account of the trial, thus failing to form his opinion based on personal observations. While the hearsay statements need not be admissible at the trial for the expert testimony to be proper under [Rule 703](#), the fact remains that hearsay is not commonly relied upon by experts in the field. Moreover, it is supposed to be the expertise of Ambrosio, the attorney, not Kalman, the layman, that formed the basis for the opinion of malpractice.

Furthermore, at no point in the report does Ambrosio support his conclusion of malpractice with evidence that the elements of negligence have been met. Other than one cite to the Rules of Professional Conduct regarding billable issues, Ambrosio never identifies a recognized and accepted standard of care an attorney such as Bass owed. Nor does he explain how Bass or any other Fox attorney deviated from that standard. Ambrosio merely offers some personal opinions, most of them Kalman's, phrased in conclusory terms, that Bass' cross-examination was not “effective” and he was incompetent.

Similarly, Ambrosio provides no explanation or evidence causally linking the alleged breach to any injury or damage suffered by Kalman or the Trust. He merely mentions that the performance of the Fox lawyers did not measure up to their representation, resulting in a “disappointing loss,” and asserts the bare conclusion that the conduct was “a substantial contributing factor to the damages suffered by the plaintiff when he was charged grossly excessive fees and the condemnation proceedings were negligently handled.”

We reject Kalman's third argument in short shrift. *R. 2:11-3(e)(1)(E)*. We are satisfied there were no genuine issues of material fact precluding the grant of summary judgment as a matter of law on the issues of negligence, fraud, misrepresentation, and duress in connection with the legal malpractice claim. We note

that Fox did not seek summary judgment on the issue of its professional fees. As the judge recognized in his opinion, alleged overbilling issues, encompassed in the breach of contract and breach of fiduciary duty claims, were preserved for a future jury trial.

Kalman also appears to argue that his counterclaim for malpractice should not have been dismissed because only the Trust proffered an expert report and filed a cross-motion for summary judgment. We reject this argument on both procedural and substantive grounds. It is clear from the record that Kalman implicitly joined in the Trust's motion and participated in oral argument. Moreover, his malpractice claims against Fox were identical to and/or subsumed by the Trust's claims. This is particularly evident by Ambrosio's report, which relied exclusively on Kalman's analysis of the trial and allegations of malpractice.

### III.

\*8 On its appeal, Fox contends it presented a valid claim against Kalman individually as its trustee and sole beneficiary, and that it was deprived of briefing and arguing this claim by the court's sua sponte dismissal after assuring counsel at argument on the summary judgment motions that it would have the opportunity to do so. We take no position as to the merits of Fox's claim but agree that the basic due process requirements of notice and an opportunity to be heard were not met in this instance. See [Doe v. Poritz, 142 N.J. 1, 106 \(1995\)](#). Fox's attorney on the malpractice claim and the attorney for the Trust both agreed the issue required briefing, which they had not done, as Kalman's individual liability for the legal fees was not the issue before the court on the cross-motions for summary judgment. Although the court gave all indications that the matter of Kalman's individual responsibility would be briefed at a later date, the court never requested supplemental briefs in the intervening seven months. Rather, without providing the opportunity for briefs or oral argument, the court included in its decision on the summary judgment motions a sua sponte ruling, without citation to case law, that Fox's amended complaint against Kalman should be dismissed as he had no personal liability. As the court's actions resulted in the circumvention of the basic due process requirements of notice and an opportunity to be heard, we grant relief to Fox on its counterclaim and vacate the court's decision respecting Kalman's individual liability for the legal fees and

remand for further proceedings. Kalman's counterclaim is reinstated only to the extent as it pertains to the issue of legal fees.

Affirmed in part; vacated and remanded for further proceedings in part.

N.J.Super.A.D.,2009.  
Fox Rothschild, L.L.P. v. Alanwood Trust  
Not Reported in A.2d, 2009 WL 614457  
(N.J.Super.A.D.)

END OF DOCUMENT