APRIL 2017

# The Way Forward in Georgia

## *Duplicative Claims in Malpractice Litigation*

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"I'm so confused." So said one of the jurors in a legal-malpractice case we recently handled where the plaintiff asserted both a professional negligence claim and a breach of fiduciary duty claim. The juror was reacting to the trial court's attempt to explain the fiduciary-breach claim in the verdict form. And that juror's confusion is just one reason why "[c]ourts should resist the appeals of lawyers for [the] plaintiff-client to proliferate theories of recovery that merely overlap each other." Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach As Legal Malpractice*, 34 Hofstra L. Rev. 689, 738 (2006).

Georgia, like other states, does not permit a malpractice plaintiff to recover from the defendant under a breach-of-fiduciary-duty theory when it is duplicative of the professional malpractice claim. *Oehlerich v. Llewellyn*, 285 Ga. App. 738, 741, 647 S.E.2d 399 (2007); *Griffin v. Fowler*, 260 Ga. App. 443, 446, 579 S.E.2d 848 (2003). But the Georgia Court of Appeals has been unable, it seems, to settle on a single, coherent test for addressing this problem. And the Georgia Supreme Court has never addressed the matter. As a result, litigants and trial courts have no clear guidance on when a claim is duplicative of a malpractice claim and when it is not.

In a 2007 decision, the Court of Appeals implied that *intentional* misconduct by an attorney toward the client will support a separate claim in addition to a professional negligence claim. Addressing a breach of contract claim brought in addition to a legal malpractice claim, the Court said the authority the plaintiff relied on as support was distinguishable because in that case the breach of contract claim "alleged intentional wrongdoing, not professional negligence." *Oehlerich*, 258 Ga. App. at 741. But if the Court meant that any claim based on alleged intentional conduct will not be treated as duplicative, it was a step in the wrong direction. An intentional conduct exception would encourage malpractice plaintiffs to simply "masquerade what essentially constitute legal malpractice claims as intentional torts." *Donalson v. Martin*, 2003 WL 22145667, at *2, 2003 Tex. App. LEXIS 8070 (Tex. Ct. App. 2003). A lawyer sued for missing a deadline will be alleged to have "intentionally concealed" that he knew of the deadline and thus breached a fiduciary duty. A lawyer sued for omitting a key term in a contract will be alleged to have "intentionally concealed" that he knew of the term's importance and thus breached a fiduciary duty. And so on.

The better approach is reflected in a 2013 decision by the Court of Appeals. There, the Court affirmed summary judgment for the attorney defendant on a former client's breach-of-fiduciary-duty claim. *Anderson v. Jones*, 323 Ga. App. 311, 745 S.E.2d 787 (2013). The alleged fiduciary breach was representing four plaintiffs despite a conflict of interest concerning distribution of settlement proceeds. *Id.* The Court held that the fiduciary-breach claim duplicated the legal malpractice claim because "the duties arose from the same source (that is, the attorney-client relationship), were allegedly breached by the same conduct, and allegedly caused the same damages." *Id.* at 318. This is the sort of reasoning favored by a leading commentator on legal malpractice law. *See* Mallen & Smith, Legal Malpractice § 14:2 (2007 ed.) ("[A] claim for fiduciary breach, which is based on the same facts and seeks the same relief as the negligence claim, is redundant and should be dismissed.").

Claims based on acts such as allegedly failing to disclose a conflict of interest should not supply a way around the rule set forth in *Anderson*. Where a claim

for failure to disclose a conflict seeks the identical relief as a claim for legal malpractice, the claim is "redundant and should be dismissed." *Flycell, Inc. v. Schlossberg LLC*, 2011 WL 5130159, at *8, 2011 U.S. Dist. LEXIS 126024 (S.D.N.Y. 2011); *see also England v. Feldman*, 2011 WL 1239775, at *5, 2011 U.S. Dist. LEXIS 36382 (S.D.N.Y. 2011); *Nordwind v. Rowland*, 584 F.3d 420, 433-34 (2d Cir. 2009); *Decker v. Nagel Rice LLC*, 2010 WL 2346608, at *4, 2010 U.S. Dist. LEXIS 62042 (S.D.N.Y. May 28, 2010); *Waggoner v. Caruso*, 886 N.Y.S.2d 368, 371 (App. Div. 2009); *Adamson v. Bachner*, 2002 WL 31453096, at *3, 2002 U.S. Dist. LEXIS 21102 (S.D.N.Y. 2002). The reasoning in these New York cases echoes what the Court of Appeals said in *Anderson*—a breach-of-fiduciary-duty claim will not lie against an attorney when the duties arose from the attorney-client relationship and the alleged fiduciary breach caused the same damages as the malpractice. 323 Ga. App. at 318.

The rule announced in *Anderson*—that a claim for breach of fiduciary duty impermissibly duplicates a legal malpractice claim when the duties arise from the attorney-client relationship, are allegedly breached by the same conduct, and allegedly caused the same damages—is both easily implemented and sound public policy. After all, "Nothing is to be gained by fracturing a cause of action arising out of bad legal advice or improper representation into claims for negligence, breach of contract, fraud or some other name. . . ." *Sledge v. Alsup*, 759 S.W.2d 1, 2 (Tex. Ct. App. 1988). Fracturing a legal malpractice claim into different types of claims is contrary to the goal of simplifying the issues presented to the jury. *Id.* And it cannot be gainsaid that simplifying the issues for the jury is an important and salutary goal in professional-negligence cases.

Georgia has followed this rule in many instances. *See, e.g.,*

*Mosera v. Davis*, 306 Ga. App. 226, 701 S.E.2d 864 (2010) (trial court granted summary judgment on legal-malpractice claim relating to attorney's conduct in settlement, and found that plaintiffs' "claim for breach of fiduciary duty was a mere duplication of his legal-malpractice claim," and thus failed on the same grounds as the legal-malpractice claim and Court of Appeals affirmed).

*Oehlerich supra* (where claims for breach of fiduciary duty are mere duplications of legal-malpractice claims, breach-of-fiduciary-duty claims cannot be asserted separately; summary judgment warranted on breach-of-fiduciary-duty claim where summary judgment granted on legal-malpractice claim);

*Griffin, supra* at 446 (where breach-of-fiduciary-duty claim was "mere duplication[] of the legal-malpractice claim which itself is based on the establishment of a fiduciary, attorney-client relationship that is breached," the claim cannot be separately maintained, and where summary judgment is granted on legal-malpractice claim, summary judgment is warranted on duplicative breach-of-fiduciary-duty claim);

*McMann v. Mockler*, 233 Ga. App. 279, 503 S.E.2d 894 (1998) (summary judgment was warranted on claims of breach of contract, breach of implied duty of good faith and fair dealing, and breach of fiduciary duty as

they were merely duplications of malpractice complaint,);

*Hays v. Page Perry, LLC*, 627 Fed. App'x 892, 897 (11th Cir.2015) (district court dismissed plaintiff's breach of fiduciary duty claims as duplicative of complaint about professional malpractice); and

*Waithe v. Arrowhead Clinic, Inc.*, 2012 WL 776916, *11 n. 13, 2012 U.S. Dist. LEXIS 30595 (S.D.Ga.2012) ("The Court also notes that alternative claims which are mere duplications of a plaintiff's professional negligence claim are typically subject to summary judgment in the defendant's favor.");

Furthermore, the rule in *Anderson* is entirely consistent with the simple, easily-applied rules employed elsewhere and under which the many fiduciary breach claims would be deemed duplicative. *See, e.g.,*

*Sayeh v. 66 Madison Ave. Apt. Corp.*, 901 N.Y.S.2d 26, 29 (App. Div. 2010) (holding that claim for intentional tort was properly dismissed as it was based on same facts that gave rise to legal malpractice claim).

*Abramo v. Teal, Becker & Chiaramonte, CPA's, P.C.*, 713 F. Supp. 2d 96, 108 (N.D.N.Y. 2010) (explaining that where a fraud claim is asserted alongside legal malpractice claim, it is sustainable only to the extent the fraud caused additional damages, separate and distinct from those generated by the alleged malpractice).

*Thies v. Bryan Cave LLP*, 2006 WL 2883815, at *4 (N.Y. Sup. Ct. 2006) ("Although plaintiffs allege that Proskauer placed its own financial and other interests before the plaintiffs' interests, these allegations still arise out of Proskauer's alleged legal malpractice. Therefore, the breach of fiduciary duty claim is duplicative.").

*Kimleco Petroleum, Inc. v Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. Ct. App. 2002) ("Regardless of the theory a plaintiff pleads, as long as the crux of the complaint is that the plaintiff's attorney did not provide adequate legal representation, the claim is one for legal malpractice.").

*Majumdar v. Lurie*, 653 N.E.2d 915, 920-21 (Ill. Ct. App. 1995) (explaining that when same operative facts support actions for legal malpractice and breach of fiduciary duty resulting in same injury to client, actions are identical and fiduciary breach claims should be dismissed as duplicative).

*RFT Mgt. Co., LLC v. Tinsley & Adams LLP*, 732 S.E.2d 166, 173-74 (S.C. 2012) (former client's breach of fiduciary duty claim against attorney was duplicative of claim for legal malpractice, where former client did not set forth any specific facts that demonstrated its breach of fiduciary duty claim was distinguishable because it arose out of a duty other than one created by the attorney-client relationship or because it was based on different material facts).

*Aller v. Law Office of Carole C. Schriefer, P.C.,*

140 P.3d 23 (Co. Ct. App. 2005) When a legal malpractice claim and a breach of fiduciary duty claim arise from the same material facts, the breach of fiduciary duty claim should be dismissed as duplicative)

*B & B Contrs. & Developers, Inc. v. Olsavsky Jaminet*, 984 N.E.2d 419 (Ohio Ct. App. 2012) (An action against attorney for damages resulting from the manner of representation is an action for malpractice, regardless of whether it is based upon contract or tort, or indemnification or direct damages; hence, when the gist of a complaint is malpractice, other duplicative claims are subsumed in the malpractice claim, and the court can construe the complaint as only presenting a malpractice claim.)

*McKenzie v. Berggren*, 99 Fed.Appx. 616 (6th Cir. 2004) (in Michigan, breach of contract and fiduciary duty claims were duplicative of legal malpractice claim and only claim that will lie against one's attorney for inadequate legal services is a claim for legal malpractice).

*Kracht v. Perrin, Gartland & Doyle* 219 Cal. App.3d 1019, 268 Cal.Rptr. 637 (1990) (where the injury is suffered because of a lawyer's professional negligence, the gravamen of the claim is legal malpractice, regardless of whether it is pled in tort or contract.)

It is also consistent with how other professionals (e.g., doctors) are treated when both professional malpractice and breach-of-fiduciary-duty claims are made. So long as the operative facts and contended damages are the same, the claims are duplicative and the breach-of-fiduciary-duty claim cannot be sustained.

*Stafford-Fox v. Jenkins*, 282 Ga. App. 667, 639 S.E.2d 610 (2006) (the claim that the doctor breached a fiduciary duty by failing to inform the patient of relevant matters was a medical malpractice claim);

*Neade v. Portes*, 193 Ill. 2d 433 (2000) (no a cause of action for breach of fiduciary duty exists for doctor's failure to disclose personal financial incentives for recommended medical care);

*D.A.B. v. Brown*, 570 N.W.2d 168 (Minn. App. 1997) (alleged kickback scheme was in essence a medical malpractice case and could not be converted into a class action breach-of-fiduciary-duty case);

*Garcia v. Coffman*, 124 N.M. 12, 19, 946 P.2d 216, 223 (App. 1997) (cause of action for breach of fiduciary duty by providers was not distinct from fraudulent misrepresentation, so it provided no independent basis for imposition of liability);

*Awai v. Kotin*, 872 P.2d 1332, 1337 (Colo. App. 1993) (in claim against therapist, factual allegations in support of breach of fiduciary duty were the same as those in support of the claim of negligence and present the same issue for the jury, so summary judgment on breach of fiduciary duty was appropriate);

*Hales v. Pittman*, 118 Ariz. 305, 309, 576 P.2d 493, 497 (1978) (physician's fiduciary duty to

patient does not create cause of action for breach of trust independent from medical malpractice and batter);

In sum, the better rule is that, "Regardless of the theory a plaintiff pleads, as long as the crux of the complaint is that the plaintiff's attorney did not provide adequate legal representation, the claim is one for legal malpractice." *Kimleco Petroleum, Inc. v Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. Ct. App. 2002). That is the rule laid down in *Anderson*, and it is the approach Georgia courts should embrace for all malpractice claims.

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Rob lead's the appellate group at Hawkins Parnell Thackston & Young LLP. He has handled more than 200 appeals in a wide variety of areas, including trust and estates, personal injury, breach of contract, breach of warranty, breach of fiduciary duties, fraud, family law, oil and gas, contempt of court, arbitration, government regulation, defamation, RICO, shareholder oppression, and Lanham Act false advertising claims.

In addition to handling cases in the appellate courts, Rob assists with error preservation, complex motions, and pleadings in the trial courts. He often attends trial to help litigators preserve error, particularly in the jury instructions/court's charge. He has been responsible for preserving error in a variety of complex cases, including numerous jury verdicts exceeding $300,000,000.

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Kate has over 20 years of experience in a wide variety of litigation, including professional liability, products liability, and commercial cases. Kate represents her clients, which include Fortune 500 companies and individuals, in all aspects of litigation from pre-suit negotiation to trial and through appeal. She has appeared in state and federal trial courts, as well as the Georgia Court of Appeals, Supreme Court of Georgia, and Eleventh Circuit Court of Appeals.

Kate has tried over 50 cases, recently winning two jury trials, two bench trials (one including an award of attorney's fees), an arbitration, and an appeal to an administrative law judge. She has handled cases in state and federal court, as well as various administrative and alternative dispute forums.

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