

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GEORGE KUNEY : CIVIL ACTION
v. :
COHEN, SHAPIRO, POLISHER, : NO. 95-2685
SHIEKMAN AND COHEN, :
MORRIS M. SHUSTER, ESQ. :
MORRIS M. SHUSTER, P.C., :
WILLIAM D. MARVIN, ESQ., :
SHUSTER & MARVIN :

Decision Under Fed.R.Civ.P. 52(a)¹

Ludwig, S.J.

September 17, 1997

This legal malpractice action arises from a defense jury verdict, in 1991, in plaintiff George Kuney's personal injury action in state court. Kuney v. Prudential Ins. Co. of N. America and Jackson-Cross Co., No. 135 Oct. Term 1986, C.P. Phila. At trial plaintiff was represented by William D. Marvin, Esquire, of the Philadelphia law firm of Shuster & Marvin. In 1986, plaintiff had engaged Morris M. Shuster, P.C. and the law firm of Cohen, Shapiro, Polisher, Shiekman and Cohen to represent him in his injury claim.² At that time, Shuster, P.C. employed Marvin as an associate and had a joint venture and office-sharing agreement with Cohen, Shapiro. In 1990, Shuster and Marvin left Cohen, Shapiro and formed their own firm - Shuster & Marvin. Marvin, who had handled plaintiff's case from the outset, continued to do so.

1. This action was submitted for trial without a jury as to liability; and that issue was bifurcated. An order was entered on June 30, 1997 deciding the liability issue in favor of defendant Cohen, Shapiro and against plaintiff George Kuney.

2. In 1996, Cohen, Shapiro, a well known Philadelphia law firm, ceased operation.

After the adverse verdict, plaintiff filed the present action against Cohen, Shapiro and Shuster & Marvin and, eventually, settled his claim against Shuster & Marvin for \$300,000. A bench trial was held on July 19, August 28, September 19, and October 31, 1996. Jurisdiction is diversity. 28 U.S.C. § 1332.

I.

Findings of Fact

A. The following undisputed facts were set forth in a pre-trial stipulation:

1. Plaintiff George Kuney and defendant Cohen, Shapiro entered into a written contingent fee agreement that remained in effect throughout the pendency and litigation of the underlying action. See Finding no. 6, infra.

2. In January 1990, Shuster and Marvin terminated their relationship with Cohen, Shapiro. Plaintiff elected to keep Shuster & Marvin as counsel in the underlying lawsuit.

3. A verdict in the underlying case was returned in favor of Jackson-Cross and Prudential Insurance Company.

B. The following facts are based on evidence received at the bench trial:

4. In the underlying action, plaintiff George Kuney sued two defendants, Prudential Insurance Company of North America, the owner of premises One Bala Plaza, Bala Cynwyd, Pa. and Jackson-Cross Company, the building management company. Tr. Nov. 12, 1991 at 24-25. Jackson-Cross employed full-time maintenance supervisors

and workers to maintain the premises. P-33 at 8. The complaint alleged that each defendant had a duty to keep the building's loading dock free of accumulation of ice and snow. Ex. P-15. It also alleged that on February 4, 1985, plaintiff, who worked at the office building as a computer salesman, had slipped on ice and snow on the dock and injured his back while unloading a delivery van. Id.

5. On referral from a friend, plaintiff contacted the law firm of Cohen, Shapiro concerning representation in his personal injury claim. Tr., July 19, 1996 at 85. Cohen, Shapiro was a partnership engaged in the general practice of law employing some 100 attorneys. Id. at 107, 120; ex. D-1. Michael Bloom, Esq., an attorney at Cohen, Shapiro, handled the intake of plaintiff's case and referred plaintiff to Marvin. Tr., July 19, 1996 at 79.

6. Prior to the signing of the contingent fee agreement, Marvin explained that he would be handling the case, but that Shuster, an experienced personal injury attorney, or someone of his caliber, would supervise and eventually conduct the trial of the case. Tr., July 19, 1996 at 82-83. On April 24, 1985, plaintiff and his wife signed the contingent fee agreement, which provided "[w]e hereby constitute and appoint Morris M. Shuster, P.C., and the law firm of Cohen, Shapiro, Polisher, Shiekman & Cohen as our attorneys to prosecute our claim against all responsible parties." Id. at 13; ex. P-2. The agreement set forth that the attorneys were entitled to receive a fee of 40 percent of the sum realized from the claim. Ex. P-2. Marvin gave them the agreement to sign. Tr., July 19, 1996 at 76.

7. In 1985, Shuster had been a trial lawyer specializing in personal injury cases for over 25 years. Tr., July, 19, 1996 at 107, Aug. 28, 1996 at 48. Marvin had been a trial lawyer for about four years. Tr. Aug. 28, 1996 at 7.

8. From September 1984 to April 30, 1990, Shuster, P.C., was engaged in a joint venture with Cohen, Shapiro under an agreement dated June 7, 1984. Tr., July 19, 1996 at 96, 102; ex. D-1, D-2, D-3. Under that agreement, "[the parties] shall, subject to client approval, be designated as co-counsel in all Post Association cases and shall be named as such by the client and all powers of attorney." Tr., July 19, 1996 at 121; ex. D-1, ¶ 5.01(a).

9. Shuster, P.C. was a professional corporation specializing in personal injury cases and consumer and insurance class actions. Tr., July 19, 1996 at 85; ex. D-1. Shuster was the sole director and shareholder of Shuster, P.C. Ex. D-1. It is unclear what the precise legal relationship was between Shuster, P.C. and Cohen, Shapiro. Tr., July 19, 1996 at 92, 101-102, 106, 113. Shuster testified that he "joined Cohen [Shapiro]." Tr. Aug. 28, 1996 at 52. Under the joint venture agreement, Marvin, an employee of Shuster, P.C., was on the Cohen, Shapiro payroll. Tr., July 19, 1996 at 132; ex. D-1, ¶ 3.02. However, on a monthly basis, Shuster, P.C. reimbursed Cohen, Shapiro for Marvin's salary and that of Shuster's secretary. Id. at 110. On an ad hoc basis, Shuster utilized Cohen, Shapiro associates. Tr., July 19, 1996 at 109.

10. During this period, Shuster, P.C. shared office space at Cohen, Shapiro. Tr., Aug. 28, 1996 at 49-50. There was no

physical indication - such as a sign or directory listing - that Shuster, P.C. was a separate entity. Tr. July 19, 1996 at 126. Shuster, P.C. received office space and non-secretarial support services, such as telephone and library, in exchange for Shuster's advising and training associates in his specialty areas. Tr., July 19, 1996 at 107, ex. D-1 ¶ 3. It also used Cohen, Shapiro's accounting and timekeeping system. Id. at 128, 130. Under this arrangement, Shuster, P.C.'s profits were divided 50/50. Id. at 132; ex. D-1 ¶, 5.01(b), D-2 ¶ 1, D-3 ¶ 2. Cohen, Shapiro advanced litigation costs, of which Shuster, P.C. made reimbursement of 50 percent. Ex. D-1 ¶ 3. Shuster, P.C. and Cohen, Shapiro agreed to "consult with respect to each potential Post Association Case" to determine whether to accept the case. Id. at ¶ 8.02. The profit and cost-sharing agreement did not apply to Shuster, P.C. cases that Cohen, Shapiro declined to accept as part of the joint venture. Id.

11. The understanding between Shuster and Cohen, Shapiro was that he might someday retire to teach, and if someone could be trained to take over his practice, the firm would maintain it under the terms of the agreement. Tr., July 19, 1996 at 107.

12. The Cohen, Shapiro firm stationery listed Shuster as "special litigation counsel." Tr., July 19, 1996 at 101, 127, ex. P-9. Marvin was listed with Cohen, Shapiro associates on the left side of the letterhead. Ex. P-9.

13. In filing suit, Marvin entered Cohen, Shapiro's appearance for plaintiff and signed his name for the firm. Tr., July 19, 1996 at 113. Cohen, Shapiro stationery was utilized for

plaintiff's complaint, interrogatories and correspondence. Id. at 8; ex. P-3, P-9.

14. Marvin was directly responsible for handling plaintiff's case, working under Shuster's supervision. Tr., July 19, 1996 at 132; Aug. 28, 1996 at 90. No attorney from Cohen, Shapiro other than Shuster had extensive personal injury trial experience. Tr., July 19, 1996 at 101-02, 107, 120, Aug. 28, 1996 at 57; Ans. ¶ 13. After his initial meeting with Mr. Bloom, plaintiff did not speak with any attorney at Cohen, Shapiro other than Shuster and Marvin. Tr., July 19, 1996 at 79, 83.

15. Shuster did not interview plaintiff. Tr., Aug. 28, 1996 at 81. He met plaintiff on two or three occasions, but spoke to him about the case only once, about a month or two before trial. Id. at 53, 79. In November 1991, Marvin tried the case by himself. Shuster did not attend the trial, but spoke with Marvin every night to discuss issues and to plan for the next day. Id. at 56-57.

16. Plaintiff did not object to Marvin's trying the case. By the time of the trial, in 1991, Marvin had been a trial lawyer for about 10 years and had handled about a half dozen cases that went to verdict and another half dozen that settled after trial began. Tr., Aug. 28, 1997 at 29, 51.

17. Marvin generally prepared monthly status reports on his pending cases and met with Shuster monthly to discuss them, including plaintiff's matter. Tr., Aug. 28, 1996 at 9, Sept. 19, 1996 at 19. Before the trial, Shuster and Marvin discussed discovery strategy and investigation of the facts. Id. at 56.

18. On January 21, 1990, about a year and 10 months before trial, Shuster and Marvin entered into an agreement with Cohen, Shapiro that terminated their association. Tr., July 19, 1996 at 109, ex. D-3. Under this agreement, Shuster and Marvin agreed to vacate the premises by May 7, 1990. Ex. D-3. Cohen, Shapiro had decided not to develop a personal injury practice, and for this reason, Shuster and Marvin decided to start their own partnership - Shuster & Marvin. Tr., July 19, 1996 at 109. Existing cases, including plaintiff's, remained subject to the joint venture agreement. Id. at 72, 124; ex. D-2.

19. By letter dated June 29, 1990, Shuster & Marvin, as a new law firm, advised plaintiff of its separation from Cohen, Shapiro and of its continued willingness to represent him. Tr., Aug. 28, 1996 at 17; Sept. 19, 1996 at 8-9; ex. D-9. Marvin assured plaintiff that the case would still be a "Cohen, Shapiro case" and that Shuster would continue to work on the case with him. Tr., July 19, 1996 at 83. Plaintiff agreed to go ahead with Shuster & Marvin's representation. Tr., July 19, 1996 at 82; Sept. 19 at 8-9.

20. As of May 1990, about 18 months before plaintiff's trial, Shuster and Marvin relocated to new offices. Tr., Aug. 28, 1996 at 17. However, Cohen, Shapiro's offices were used during the trial. Tr., July 19, 1996 at 80.

21. In 1985, before instituting the personal injury action, Marvin, for Shuster, P.C., represented plaintiff in a workers' compensation claim and recovered 100 percent of benefits due. Tr., Aug. 28, 1996 at 12. He also assisted plaintiff in obtaining the

maximum work-loss benefits available under his own automobile insurance. Id. at 13. In addition, he brought a bad faith action against the workers' compensation carrier on plaintiff's behalf and was actively involved in litigating this claim until 1994. Id. at 15-16.

22. In September of 1985, Marvin notified One Bala Associates, the building manager, of plaintiff's injury claim, id. at 57, and, in July of 1986, notified Jackson-Cross of its claim. Tr., July 19, 1996 at 56; ex. P-9. In October 1986, Marvin filed a complaint. Tr., July, 19, 1996 at 55; Aug. 28, 1996 at 19-20.

23. On January 16, 1987, Marvin filed an initial set of interrogatories. Tr., July 28, 1996 at 31; Sept. 19, 1996 at 26; ex. P-32. Thereafter, the case was inactive for over three years. Tr., July 19, 1996 at 18, 31. Motions to compel defendants to answer interrogatories were filed on March 23, 1990 and June 20, 1990. Id. at 18, 27, Sept. 19, 1996 at 25, 29; ex. P-3. During this period no depositions were taken and no investigation was made on plaintiff's behalf. Id.

24. In 1986-1990, there was a five year backlog of personal injury jury trials in the Court of Common Pleas of Philadelphia. Tr., Sept. 19, 1996 at 24.

25. John J. Scott, Jr., a former Judge of the Court of Common Pleas of Philadelphia, was qualified as an expert witness for plaintiff on the prevailing standard of care for Philadelphia attorneys handling plaintiff's personal injury actions, tr., July 19, 1996 at 6; and Thomas B. Rutter, Esq., an active Philadelphia trial attorney, was similarly qualified as an expert witness for

defendant. Tr., Sept. 19, 1996 at 41-43. As testified to by plaintiff's expert, the appropriate standard of professional care applicable to a plaintiff's personal injury action required counsel to make prompt efforts to secure answers to interrogatories, interview witnesses to preserve evidence, take photographs, obtain maintenance records, and determine, through investigation and discovery, what defenses might exist. Tr. July 19, 1996 at 29, 31-32, 62.

26. The three-year period in which plaintiff's case was not processed or prepared resulted in the loss of potentially valuable information. Id. at 67. By the time Marvin filed a motion to compel interrogatory answers, the maintenance company responsible for the removal of ice and snow had destroyed its records in the routine course of business. Tr., July 19, 1996 at 33, 67-68. Also, the management of the building had been changed. Tr. Aug. 28, 1997 at 27.

27. No strategic or other valid reason existed for the delay in filing plaintiff's motion to compel answers to interrogatories or in pursuing investigation and other discovery. Tr., July 19, 1996 at 42; Aug. 28, 1996 at 78.

28. In August 1991, Marvin took depositions of maintenance workers who had been in charge of clearing the snow at One Bala Plaza and who testified as to their habit, custom and practice of regularly doing so. Tr., July 19, 1996 at 37; Aug. 28, 1996 at 68, 71, 86. Both plaintiff's expert and defendant's expert agreed that a plaintiff's personal injury attorney, utilizing an appropriate standard of care, would have investigated other tenants in the

building to rebut the habit, custom and practice defense. Tr., July 19, 1996 at 31-32, 37, 42, Sept. 19, 1996 at 66-67. Marvin was negligent in not conducting such an investigation. Tr., July 19, 1996 at 27-28, 32, 37, Sept. 19, 1996 at 56-61, 64.

29. At the trial, plaintiff was the only witness who described the conditions on the loading dock at the time of the accident in February, 1985. N.T. Nov. 12, 1991 at 65-68.

30. Plaintiff testified that he did not fall down when he slipped, and no one else witnessed his accident. Tr., July 19, 1996 at 65, Aug. 28, 1996 at 10, 21-22, 66. After the accident, plaintiff continued working and did not obtain medical attention or report his injury for 10 days. Tr., Aug. 28, 1996 at 55.

31. To corroborate plaintiff's testimony, Marvin introduced weather records showing a storm occurred the preceding weekend with precipitation of about one inch of mixed snow and ice and that the temperature remained freezing through this period. Tr., Aug. 28, 1997 at 25, N.T. Nov. 12, 1991 at 27-28.

32. As a witness for plaintiff, Barry Greebel, the president of plaintiff's employer and a friend of his, testified to noticing icy conditions on the dock and to having complained about them to the building manager. Tr., Aug. 28, 1996 at 29-32; ex. P-15, N.T. Nov. 19, 1991 at 2.208-09.

33. Another witness called for plaintiff was Dominick Griesi, a security supervisor for Jackson-Cross, who also had snow removal responsibilities at the accident site. P-15, N.T. Nov. 19, 1991 at 2.151, 2.162. On direct examination, Griesi testified that as a matter of habit, custom, and practice, the loading dock was always

kept clear of ice and snow. Tr. Sept. 19, 1997 at 87-88. This testimony undercut plaintiff's theory of negligence.

34. In investigating this malpractice claim, plaintiff's present attorney discovered three liability witnesses who could have been helpful to plaintiff's case, Alan Ellenbogen and Wilbur Pierce, who were both tenants of the building, and Sara Pierce, who regularly visited her husband at the building. See Tr., July 19, 1996 at 12. No attempt had been made by Marvin to obtain testimony from other tenants of the building as to the conditions of the dock. Id. at 27-28. The following testimony of these witnesses, who appeared to be credible, was presented at the bench trial by plaintiff's present attorney, id. at 38-40, 59-60:

a. Alan Ellenbogen, a tenant at One Bala from the 1970's until late 1987, would go to the loading dock or observe it almost every day. During the winter, there was a problem of ice and snow accumulation on the loading dock, and it was not the habit, custom, and practice of the building's maintenance personnel to keep the loading dock clear. Tr., July 19, 1996 at 4, 38-39. He made specific complaints to the building manager about his inability to move his equipment and the danger to his employees resulting from the ice accumulation on the loading dock. Id. at 38-39.

b. Wilbur Pierce, a tenant at One Bala Plaza from 1980 to 1984 in the computer business, used the loading dock frequently to carry computers in and out of the building. On one instance in about 1983, after slipping on the loading dock, he complained to the building manager about the ice on the dock. Ex. P-13, N.T. at 55-59.

c. Sara Pierce, Wilbur's wife, frequently walked on the loading dock to a dumpster and had once fallen on the loading dock. Ex. P-14, N.T. 14-22. She observed dangerous conditions on the loading dock caused by a sheet of ice "even long after the precipitation of snow and ice."

35. The testimony of Alan Ellenbogen, Wilbur Pierce, and Sara Pierce was material to the liability issue in plaintiff's action. Tr., Sept. 19, 1996 at 69, 80; ex. P-13, P-14. As independent

witnesses, they would have corroborated plaintiff's and Greebel's testimony and could well have refuted the defense of habit, custom, and practice as to snow and ice removal. Tr., July 19, 1996 at 38-40; Sept. 19, 1996 at 79.

36. After the trial in the underlying case, plaintiff photographed the loading dock when it was covered with snow, and Alan Ellenbogen testified at the bench trial that the photographs were a fair representation of the condition of the dock after a snowfall. N.T. at 23. This evidence would have supported plaintiff's theory of negligence.

37. At the underlying trial, a surveillance video film taken for defendants, showed plaintiff, after the accident, riding a bicycle and cast doubt on his claim that he was permanently disabled and unable to work because of his injuries. Tr., Aug. 28, 1997 at 34; Oct. 31, 1996 at 32. Cross-examination of plaintiff brought out that he had held a large number of different jobs, which may have weakened his claim for economic loss. Tr., Aug. 28, 1997 at 33.

38. Marvin's failure to prepare plaintiff's case properly was a substantial causal factor in the defense verdict in the underlying trial. Tr., July, 19, 1996 at 42, 46-47. Although Marvin's status reports reflect the need to "push for discovery," he did not do so. Tr., Sept. 19, 1996 at 22-25. Shuster did not effectively supervise the preparation of plaintiff's personal injury case. Tr., July, 19, 1996 at 48.

39. By undertaking the representation of plaintiff, as set forth in the contingent agreement, Shuster, P.C. and Cohen,

Shapiro, as a joint venture, became subject to a duty to provide plaintiff with competent representation and to supervise the legal services performed in the case. Id. at 17, 47-48. The duty to supervise includes timely review by an attorney experienced in plaintiff's personal injury litigation. Id. at 48.

40. As a party in the joint venture, Cohen, Shapiro was not negligent in permitting Shuster, P.C. or Shuster & Marvin, to handle plaintiff's case. See id. at 118. Cohen, Shapiro, as a party in the joint venture or as a separate entity, had no indication of any problem concerning Marvin's work or Shuster's supervision of this or any other case. Id.

41. As a party in the joint venture or as a separate entity, Cohen, Shapiro acted reasonably in relying on Shuster to supervise Marvin's work. Id. Shuster had significantly more experience in personal injury work than anyone else at Cohen, Shapiro. Id. In these circumstances, any supervision by Cohen, Shapiro, or lack of it, was not causally related to the outcome of plaintiff's personal injury action. See id.

42. Prior to the present bench trial, plaintiffs entered into a joint-tortfeasor settlement with Shuster and Marvin, as individuals, Shuster, P.C., and the law firm of Shuster & Marvin. See Tr., July 19, 1996 at 76. The joint tortfeasor release provides:

The right is specifically reserved to the Releasors herein to continue to make claims or to make claims against Cohen, Shapiro, Polisher, Shiekman & Cohen, asserting that said entity was independently negligent and/or independently breached duties owed to and/or agreements made with Releasors. Releasors may continue to claim that Cohen, Shapiro, Sheikman and Cohen is solely responsible for the injuries, damages and losses

sustained by Releasors. Releasors agree and hereby warrant that they will not continue to claim or make a claim that any and/or all of Releasors are together jointly and/or severally liable with Cohen, Shapiro, Polisher, Shiekman & Cohen or any other persons or entities upon any theory of liability, including the theories of vicarious liability and respondeat superior.

Tr., July 19, 1996 at 76.

II.

Discussion

At issue is whether defendant Cohen, Shapiro is liable for the outcome in the underlying case. Having been released by plaintiff from vicarious liability for the malpractice of Shuster & Marvin, Cohen, Shapiro may be held accountable to plaintiff only on some other basis.³

Plaintiff now proceeds on theories of negligence, breach of contract, and breach of fiduciary duty. It is undisputed that Pennsylvania law governs the substantive issues of this case. Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Wassall v. DeCaro, 91 F.3d 443, 445 (3d Cir. 1996).

3. Defendant's motion for summary judgment was granted in part. Order, Feb. 28, 1996. Plaintiff, by releasing Shuster and Marvin, was determined to have extinguished his vicarious liability claim against defendant Cohen, Shapiro. Summary judgment was denied as to "the claim of lack of supervision, a direct claim against Cohen Shapiro." These rulings applied agency principles to the joint venture between Shuster, P.C. - thereafter, Shuster & Marvin - and Cohen, Shapiro. The release of an agent releases the principal where the principal is being sued on the basis of vicarious liability. Mamalis v. Atlas Van Lines, Inc., 522 Pa. 214, 221, 560 A.2d 1380, 1383 (1989). The Pennsylvania Supreme Court has held: "absent any showing of an affirmative act or failure to act when required to do so by the principal, termination of the claim against the agent extinguishes the derivative claim against the principal." Id.

Malpractice

Under Pennsylvania law, there are three elements to attorney malpractice: (1) the employment of the attorney or other basis for the duty; (2) the attorney's failure to exercise ordinary skill and knowledge; and (3) the negligent causation of plaintiff's damages. Tucker v. Mozenter, 533 Pa. 237, 246, 621 A.2d 108, 112 (1993); Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985). Attorneys are negligent if they do not utilize ordinary skill, knowledge, and care that would usually be possessed and exercised by similarly situated members of the legal profession. Composition Roofers Local v. Katz, 398 Pa. Super. 564, 568, 581 A.2d 607, 609 (1990). An informed judgment by counsel, however, even if subsequently proven erroneous, is not negligence. Id.; Gans, 762 F.2d at 341.

Here, the evidence shows that Shuster and Marvin did not adequately prepare for trial. Answers to interrogatories were not pursued for over three years. No attempt was made to locate liability witnesses despite their ready availability and obvious importance at trial. These deficits constituted causal negligence. Had timely efforts been made to obtain necessary discovery and to locate witnesses, a jury may well have found for plaintiff. While the personal injury case backlog in Philadelphia Common Pleas Court may have been Mr. Marvin's explanation for putting the file on the shelf, it is not a non-negligent excuse. In doing so, a plaintiff's personal injury lawyer takes a substantial risk of jeopardizing the case, as this case unfortunately demonstrates.

However, the trial delay does not explain the failure to interview the other occupants of plaintiff's building.

Cohen, Shapiro's Duty to Supervise

The negligence of Shuster and Marvin, however, does not compel the conclusion that Cohen, Shapiro also was causally negligent. Plaintiff contends that, as co-counsel, Cohen, Shapiro had a non-delegable duty to supervise Shuster, P.C.'s and, later, Shuster & Marvin's handling of the case and the preparation of it and presentation at trial. Plaintiff relies on § 214 of the Restatement of Agency 2d (1965)⁴ together with the decisional rule that "a lawyer cannot delegate his fiduciary duties to another in an effort to avoid its [sic] strictures or to avoid responsibility for the manner in which they are undertaken." Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 234 (2d Cir. 1977). Cohen, Shapiro responds that it has not been shown to have been negligent, that its duty to plaintiff was undertaken jointly with Shuster, P.C. - thereafter, Shuster & Marvin - and that the only actionable basis for plaintiff's claim is vicarious liability, from which it has been released.⁵

4. Section 214 states:

A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty.

5. Defendant also asserts that the complaint does not allege a breach of an independent duty by Cohen, Shapiro.

Few courts have considered the issue of when a law firm may be liable for the acts of affiliated or associated firms.⁶ Cohen, Shapiro and Shuster, P.C. were engaged in some form of joint venture, which persisted after Shuster and Marvin left Cohen, Shapiro and organized their own partnership. An attorney may be directly liable for negligent supervision of co-counsel.⁷ Mallen, supra, § 5.9; Tormo v. Yormark, 398 F. Supp. 1159 (N.J. 1975); see Broad v. Conway, 675 F. Supp. 768 (N.D.N.Y. 1987).

Here, the authorization of counsel appointed both Shuster, P.C. and Cohen, Shapiro to represent plaintiff. This dual appointment reflected the joint venture that existed between the two law firms as to personal injury actions.⁸ The evidence as to plaintiff's understanding of the arrangement is entirely consistent

6. See Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 5.7 at 377 (4th ed. 1996), noting that the issue of liability for the conduct of an "affiliate" or an "associate" firm has arisen in the context of ethical opinions and disqualification motions.

7. An attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large. Bailey v. Tucker, 533 Pa. 237, 251-52, 621 A.2d 108, 115 (1993).

8. In Pennsylvania, the essential factors of a joint venture are: (1) each party must make a contribution such as capital, services, or money; (2) profits must be shared; (3) there must be a right of mutual control over the subject matter of the enterprise; (4) usually there is a single business transaction. Wilkins v. Heebner, 331 Pa. Super. 491, 480 A.2d 1141 (1984) (citing McRoberts v. Phelps, 391 Pa. 591, 138 A.2d 439 (1958)).

Courts have generally analogized joint ventures to partnerships. See Kiewit Eastern Co. v. L & R Constr., 44 F.3d 1194, 1201 & n. 17 (3d Cir. 1995) (citing 48A C.J.S. Joint Ventures §5 (1981) ("The relation of the parties to a joint venture is so similar to that in a partnership that their rights, duties, and liabilities are usually tested by partnership rules.")).

with his being jointly - and not separately - represented. Nothing that occurred during the course of the representation suggests otherwise.⁹

So viewed, there is merit to Cohen, Shapiro's position that because plaintiff was represented by the joint venture of both law firms, no independent theory of liability can exist against Cohen, Shapiro on the basis of lack of supervision. From plaintiff's vantage point, every outward physical appearance pointed to his dealing with a single entity, albeit consisting of Shuster, P.C. and Cohen, Shapiro. Moreover, he was given no reason to believe Cohen, Shapiro would oversee the work of Shuster, P.C. and there was no realistic reason to think so. Shuster was the specialist in plaintiff's personal injury litigation and no one at Cohen, Shapiro was experienced in that field. Given these facts, plaintiff's release of Shuster, P.C. and Shuster & Marvin extinguished his claim against the joint venture - and despite the reservation of liability as to Cohen, Shapiro, precluded proceedings against that firm for negligent supervision.

Even if, as plaintiff maintains, an independent duty of supervision on Cohen, Shapiro's part survived the release, plaintiff has not established the factual contours of that duty or how Cohen, Shapiro's conduct amounted to causal negligence. It is not enough to say Cohen, Shapiro should have "monitored the progress" of plaintiff's case or "implemented procedures" to assure proper supervision of it. There is no evidence that would have

9. It has not been argued that plaintiff's acceptance of Shuster & Marvin's representation in 1990 affected the legal relationship of the parties.

alerted any Cohen, Shapiro attorney to believe the case was not being handled properly. While Shuster & Marvin cannot excuse negligent preparation by referring to the Philadelphia jury trial backlog, there was no reason for Cohen, Shapiro to believe the case should have come to trial sooner. Plaintiff has not challenged Shuster's expertise and, in turn, has offered no basis for Cohen, Shapiro not to have relied on Shuster and his supervision of Marvin.

Breach of Contract and Fiduciary Duty

Under the facts of this case, plaintiff's theories as to breach of contract¹⁰ and breach of fiduciary duty are co-extensive with negligent supervision. See Composition Roofers, 398 Pa. Super. at 572, 581 A. 2d at 612.

III.

Conclusions of Law

The following conclusions are entered:

1. This court has jurisdiction over the subject matter of the action and the parties.

2. Morris M. Shuster, Esq. and William D. Marvin, Esq. were negligent in the preparation and trial of plaintiff George Kuney's underlying personal injury claim.

10. Plaintiff asserts that Cohen, Shapiro breached a specific promise that "the case would be tried by an experienced trial attorney of the caliber of Morris Shuster." Compl. ¶ 13. However, plaintiff appears to have consented to Marvin's representation. Marvin entered his appearance for plaintiff on behalf of Cohen, Shapiro, and no evidence suggests that prior to trial plaintiff raised any objection to Marvin's trying the case.

3. The law firms of Shuster, P.C. and, thereafter, Shuster & Marvin, and Cohen, Shapiro had a joint duty to provide effective representation of plaintiff. The joint venture had a duty to supervise the delivery of legal services, which it discharged through Shuster, who was an expert in the field.

4. If Cohen, Shapiro had an independent duty of supervision, plaintiff has not met his burden of proving causal negligence on that firm's part.

5. Cohen, Shapiro is not directly liable on a contract theory inasmuch as no breach of a specific provision of the contract has been shown.

6. No breach of fiduciary duty by Cohen, Shapiro has been shown.

7. Any vicarious liability of Cohen, Shapiro by reason of the acts or omissions of Shuster and Marvin was extinguished by plaintiff's releases of Shuster and Marvin.

8. Cohen, Shapiro is not liable to plaintiff for defendant's verdict in the underlying trial.

Edmund V. Ludwig, J.