

concerning a stock transaction that took place between them on the grounds that the testimony was irrelevant and would confuse the jury.

The Court granted Defendants' Motion for Directed Verdict on the legal malpractice claim in the absence of expert testimony to establish the standard of care. Plaintiff's fraud claim went to the jury. On June 16, 1997, the jury returned a verdict in favor of the Defendants on the fraud claim. On June 19, 1997, the Court entered judgment in favor of Defendants.

In his Motion for New Trial, Plaintiff argues that the Court erred as a matter of law: (1) "by granting Defendants' Motion for Directed Verdict with regard to Plaintiff's claim of legal malpractice where, based upon the simple and uncomplicated nature of Defendant's misfeasance, expert testimony was not required," (Pl.'s Mot. at ¶ 2); (2) "by failing to allow Plaintiff to introduce expert testimony as to Defendants' legal malpractice even though Defendants were advised as to the identity of Plaintiff's expert, were provided with said expert's report and said expert was made available for deposition at least one week in advance of trial," (id. at ¶ 3) and; (3) "by failing to allow testimony of Jonathan Dick and videotaped trial testimony of William Driscoll with regard to transactions between Jonathan Dick and William Driscoll which clearly showed Defendants' motivation with regard to their failure to have the appropriate

escrow agreement executed." (Id. at ¶ 4).

II. LEGAL STANDARD

Defendant has moved for a new trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure.¹ Under the law of this circuit, "[a] new trial is appropriate only when the verdict is contrary to the great weight of the evidence or errors at trial produce a result inconsistent with substantial justice." Sandrow v. United States, 832 F. Supp. 918, 918 (E.D. Pa. 1993)(citing Roebuck v. Drexel Univ., 852 F.2d 715, 735-36 (3d Cir. 1988)). When the basis of the motion for a new trial is an alleged error involving a matter within the sound discretion of the trial court, such as the court's evidentiary rulings or points of charge to the jury, the trial court has wide latitude in ruling on the motion. Griffiths v. CIGNA Corp., 857 F. Supp. 399, 410 (E.D. Pa. 1994) (citing Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 921-22 (3d Cir 1986); Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir. 1960); Lightning Lube, Inc. v. Witco Corp., 802 F. Supp. 1180, 1185 (D.N.J. 1992).

The Court's inquiry in evaluating a motion for a new trial

¹Rule 59(a) reads in relevant part as follows:
A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States

that alleges trial error involves two questions: "[1] the Court must first determine whether an error was made in the course of the trial; [2] then, it must determine 'whether that error was so prejudicial that refusal to grant a new trial would be inconsistent with substantial justice.'" Lampley v. Webb, No. 94-260, 1996 WL 524330, at *5 (E.D. Pa. Sept. 12, 1996)(citing Bhaya v. Westinghouse Elec. Corp., 709 F. Supp. 600, 601 (E.D. Pa. 1989)).

III. DISCUSSION

A. Plaintiff's Legal Malpractice Expert

On December 23, 1996, this Court issued a Pretrial Scheduling Order, pursuant to Rule 16 of the Federal Rules of Civil Procedure. In that Order, the Court set a February 28, 1997 deadline for the parties to exchange expert witness information. Plaintiff failed to comply with the Court's Order in that regard. Several months before the trial commenced, the Court advised all counsel during a pretrial conference that because experts had not been designated by the parties, the Court would not permit expert testimony at trial. A week before trial, Plaintiff identified a legal malpractice expert; a day before trial, Plaintiff served the expert's report. Under these circumstances, the Court precluded Plaintiff from presenting expert testimony at trial.

In moving for a new trial, Plaintiff has failed to identify any extenuating circumstances to justify his failure to comply with the Court's Scheduling Order and his late identification of an expert. The facts here are simple. Plaintiff allowed the deadline to pass without designating an expert. Defendants relied upon the expert witness cutoff deadline and Plaintiff's failure to designate an expert. Defendants would have been prejudiced if the Court had allowed Plaintiff to present expert testimony at trial.²

The Court did not commit error by precluding the testimony of Plaintiff's expert. Rule 37(b)(2)(B) of the Federal Rules of Civil Procedure expressly provides that, as a sanction for a party's failure to comply with a discovery order, a court may issue an order "prohibiting that party from introducing designated matters in evidence." The Court's Order precluding testimony from Plaintiff's expert at trial was proper and well

²Plaintiff suggests that the Court was not even handed in its treatment of the parties because it allowed Defendants to identify William Driscoll as a witness less than a week before trial and permitted the videotaped deposition of Mr. Driscoll the day before trial. Plaintiff's accusations are without merit. Mr. Driscoll was named by Plaintiff as a defendant in this action and was identified by Defendants in their self-executing disclosures. (Defs.'s Resp. at 6 n.1.) Defendants had been unable to locate Mr. Driscoll for several months. When he was located, he was beyond the 100 mile subpoena power of this Court. Therefore, the Court allowed the taking of Mr. Driscoll's trial testimony by videotape in Las Vegas, Nevada. This is a far different situation than that involving the Court's preclusion of Plaintiff's expert's testimony for failure to comply with pretrial discovery deadlines.

within the Court's discretion. Hagans v. Henry Weber Aircraft Distributors, Inc., 852 F.2d 60, 63-65 (3d Cir. 1988).

Accordingly, the Court will deny plaintiff's Motion for New Trial on this ground.

B. Plaintiff's Legal Malpractice Claim

Plaintiff also argues that the Court committed legal error by granting Defendants' Motion for Directed Verdict as to Plaintiff's legal malpractice claim. The Court finds that no such error exists.

Because Plaintiff was not a client of Defendants, his professional negligence claim against Defendants was based on the existence of an implied attorney-client relationship. Atkinson v. Haug, 622 A.2d 983, 986 (Pa.Super.Ct. 1993); Lawall v. Groman, 37 A. 98, 99 (Pa. 1897)(noting in dicta that one who undertakes to perform a service for another, even without reward, is bound to exercise reasonable care and can be held responsible for misfeasance, though not for nonfeasance and that, therefore, a third party could bring suit against an attorney in a negligence action if the attorney knew that the third party "was relying on him in his professional capacity"). In the absence of privity of an attorney-client relationship, "[a]t the very least Lawall would require a specific undertaking on the attorney's part to

perform a specific service for a third party, coupled with the reliance of the third party and the attorney's knowledge of that reliance in order for the third party to bring [a legal malpractice] suit." Guy v. Liederbach, 459 A.2d 744, 749 (Pa. 1983).

Plaintiff's claim against Defendants was based on Defendants' specific undertaking with respect to the Escrow Agreement for the funds Plaintiff invested in the concert. In order to prove this claim, it was necessary for Plaintiff to establish the applicable standard of care and to demonstrate that Defendants breached that standard of care. Storm v. Golden, 538 A.2d 61, 64 (Pa.Super.Ct. 1988). The factual issues relating to these essential elements were not simple and straightforward. Proof of Defendants' alleged breach of care required the review and analysis of an escrow provision in a local town ordinance, the review and analysis of draft escrow agreements put at issue by Plaintiff, and an expert opinion that a competent attorney would have provided the protections that Plaintiff claimed Defendants promised to him.

The Court correctly concluded that, under Pennsylvania law, expert testimony was required. Storm v. Golden, 538 A.2d at 64; Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 480 (3d Cir. 1979)(expert testimony is required to establish standard of

care in a legal practice claim and whether the defendant complied with that standard, except where the matter is so simple or the lack of skill so obvious to be within the range of the ordinary experience and comprehension of non-professional persons). For these reasons, the Court properly directed a verdict in favor of Defendants as to Plaintiff's legal malpractice claim.

Accordingly, the Court will deny Plaintiff's Motion for New Trial on this ground.

C. Testimony of William Driscoll and Jonathan Dick

In his Motion, Plaintiff argues that the Court committed error by not allowing the videotaped trial testimony of William Driscoll. Plaintiff is incorrect. During the trial, Plaintiff's counsel informed the Court that he would not call Mr. Driscoll. (6/12/97 Tr. at 191 and 197.) This was Plaintiff's decision. The Court never made a ruling precluding the testimony of Mr. Driscoll. Therefore, there can be no Court error in this regard.

At trial, Plaintiff's counsel made an offer of proof with respect to the trial testimony of Jonathan Dick. Plaintiff's counsel explained that he intended to use the testimony of Mr. Dick, who was involved in a stock transaction that did not involve Plaintiff, to prove that Defendants were motivated to take actions adverse to investors in the anniversary concert for the sole purpose of ensuring that their legal fees were paid.

(Id. at 191-194.) Defendants objected to the introduction of Mr. Dick's testimony on the grounds that it was not relevant to Plaintiff's claims and, even if the Court determined it was relevant, it was too remotely connected to Plaintiff's claims. (Id. at 195.) The Court ruled that what little relevancy contained in Mr. Dick's testimony was outweighed by its prejudicial value under Rule 403 of the Federal Rules of Evidence because it would be confusing to the jury and would introduce to the jury evidence that was very complicated and somewhat remote and attenuated. (Id. at 196.) The Court did allow, however, testimony by Mr. Dick on a limited issue that the Court found was put at issue by the testimony of Defendants. (Id. at 196-197.)

The Court's evidentiary ruling on the scope of the testimony of Mr. Dick was squarely within the Court's discretionary power. Plaintiff has failed to demonstrate that the Court committed legal error. Therefore, the Court will deny plaintiff's Motion for New Trial on this ground as well.

An appropriate Order follows.