NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4797-09T3

HEDINGER & LAWLESS, LLC,

Plaintiff,

v.

BETAL ENTERPRISES, INC., a/k/a
BETAL ENVIRONMENTAL, CORP.,
a/k/a BETAL ENVIRONMENTAL INC.,
BRANKO ROVCANIN and ALEKSANDRA
OSTOJIN,

Defendants.

BETAL ENTERPRISES, INC.,
BETAL ENVIRONMENTAL, CORP.,
BETAL ENVIRONMENTAL, INC.,
BRANKO ROVCANIN and ALEKSANDRA
OSTOJIN,

Plaintiffs-Appellants/
Cross-Respondents,

v.

HEDINGER & LAWLESS, LLC,

Defendant-Respondent/
Cross-Appellant,

and

TOWNSHIP OF LITTLE FALLS, A&A
CONSTRUCTION AND MANAGEMENT
CONSULTANTS, INC., SIMON, INC.,
NORTHEAST BUILDERS OF AMERICA,

INC., J.I.L. TRANSPORT, LLC,
BLEEKER ARCHITECTURAL GROUP,
LLC, BOROUGH OF EAST
RUTHERFORD, H&B ARCHITECTS AND
ENGINEERS, MASON TECH, LLC,
GMS CONSTRUCTION, INC.,
AMERICAN APPLICATION SYSTEMS,
INC., TOWNSHIP OF INDEPENDENCE,
CAM DESIGN GROUP ARCHITECTS,
STE PAINTING, NORTH HUDSON
COMMUNITY ACTION CORPORATION,
RIVARDO SCHNITZER CAPAZZI,
AIA, MAINO ELECTRIC INC.,
BOROUGH OF BUTLER, DICARA
RUBINO ARCHITECTS, LORENZO
ELECTRICAL CONTRACTORS,
TOWNSHIP OF SANDYSTON,
WESTVIEW CONTRACTING, INC.,
FIRST JERSEY EXTERIOR, UNITED
BROTHERHOOD OF CARPENTERS
LOCAL 124, and ALLEN FROST, II,

Defendants.

Argued: February 3, 2011 - Decided: March 10, 2011

Before Judges Axelrad and J. N. Harris.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket Nos. L-116-06 and L-246-07.

Robert A. Vort argued the cause for appellants/cross-respondents.

Elliott Abrutyn argued the cause for respondent/cross-appellant (Morgan Melhuish Abrutyn, attorneys; Mr. Abrutyn, of counsel and on the brief; Thomas G. Rantas, on the brief).

PER CURIAM

The Betal parties[1] appeal from summary judgment dismissal by the Law Division of their legal malpractice complaint against Hedinger & Lawless, LLC (Hedinger). The Betal parties argue there was, at a minimum, a genuine issue of material fact as to whether an attorney-client relationship existed that would withstand summary judgment. Hedinger cross-appeals, arguing that even if the Betal parties are correct, summary judgment is still appropriate because of the Betal parties' inability to establish a prima facie case of legal malpractice. We affirm the grant of summary judgment based on Hedinger's cross-appeal.

I.

On January 10, 2006, Hedinger filed a complaint against the Betal parties to recover legal fees for services rendered. A default judgment was entered, which was vacated by order of October 27, 2006. On September 26, 2006, the Betal parties filed a complaint against Hedinger for legal malpractice, alleging negligent representation in a surety action. At some point the cases were consolidated.

[1] Betal Enterprises, Inc.; Betal Environmental Corp.; and Betal Environmental, Inc.; as well as their sole shareholders, Branko Rovcanin and Aleksandra Ostojin, husband and wife; are collectively referred to as "the Betal parties" unless individually designated.

Hedinger moved for summary judgment, which was granted on March 19, 2010 following oral argument, and the Betal parties' malpractice claim was dismissed with prejudice. Based on the Betal parties' non-appearance at trial on April 19, 2010, and the submission of an affidavit of amount due, the court entered default judgment against the Betal parties in the fee action on May 7, 2010, in the amount of $45,300.96. The Betal parties appealed and Hedinger filed a protective cross-appeal, claiming, in the event the Betal parties were successful on appeal, summary judgment should have been granted on alternate grounds.

II.

Betal Enterprises was a construction and demolition business that stopped operating sometime in 2004. Betal Environmental is a now defunct corporation that performed asbestos removal, lead abatement, and mold remediation.

The Betal parties first engaged Hedinger, a firm specializing in construction law, in June 2001 regarding a dispute with Little Falls Township over their insurance coverage for a building project. According to the retainer agreement, signed by the Betal parties' representative, Hedinger was retained "in connection with the Rochelle Park project and possible other matters." The Betal parties paid a $2,500 retainer to the law firm and after that was consumed, prompt

payment was expected on monthly invoices. The agreement also provided Hedinger reserved "the right to terminate [the] representation . . . if payment is not received within sixty days" of the invoice date.

Hedinger continued to represent the Betal parties with matters generally handled by Robert Lawless and an associate, James Tarnofsky. By letter of April 6, 2004, Lawless notified the Betal parties of the delinquent outstanding balance and advised that if "an immediate and sizable payment" were not made, the firm would "have no alternative but to discontinue services." On April 14, 2004, Rovcanin requested a meeting with Tarnofsky regarding an action that had just been filed against the Betal parties by Centennial Insurance Company, their surety on performance and payment bonds for various construction projects in Little Falls, including the Rochelle Park project (the Centennial action). Centennial sought reimbursement from the Betal parties as they had indemnified it against any losses resulting from claims against the bonds. The Betal parties had been dismissed from or failed to complete the projects at issue.

On April 20, 2004, Tarnofsky advised Rovcanin by phone that the firm would not work on the file until the outstanding bills were paid, and refused to meet with him. On June 25, 2004, Centennial's counsel sent Tarnofsky a letter noting the Betal

parties had not filed an answer to the complaint but, pursuant to Tarnofsky's request, a thirty-day extension had been granted. A July 2, 2004 letter reflects that Tarnofsky procured another thirty-day extension.

On July 9, 2004, Rovcanin again requested a meeting with Tarnofsky, and on July 23, he sent Tarnofsky a detailed letter outlining the potential claims against subcontractors on the projects at issue in the Centennial action who purportedly contributed to delays and losses. Tarnofsky and Lawless met with Rovcanin on July 27, 2004. Rovcanin presented his strategy to delay filing the answer and then eventually file an answer and bring a third-party action against numerous entities. Rovcanin informed the attorneys at this meeting that he was "judgment proof" so the risks attendant to a default judgment were irrelevant.

According to Lawless' deposition testimony, Rovcanin was advised at the meeting "in no uncertain terms" that any claim against Centennial disputing the amount owed would be "an absolute waste of time," given the nature of the indemnity agreement. Rovcanin was also advised that the third-party action was unlikely to succeed because his business "operated on a shoe string" and he would be unable to win "the battle of credibility" against the third parties. Rovcanin was further

informed that defending the Centennial action and litigating a third-party complaint would cost "hundreds of thousands of dollars."

By letter of July 27, 2004, Tarnofsky confirmed to Rovcanin the content of the meeting and requested additional documentation necessary to prepare a "proper third party complaint." The letter concluded:

> Also, and as discussed, I will only be authorized to file this complex litigation on your behalf should you bring your account with this firm current as you have indicated. Notwithstanding payment of the invoices in full, I will require the foregoing documentation and the supplemental documentation to adequately prosecute these claims.

Sometime thereafter, Tarnofsky drafted a ten-page answer and affirmative defenses, and an eighty-five page third-party complaint naming twenty-two defendants. The pleading was never filed.

On August 9, 2004, Tarnofsky received a letter from Centennial's counsel that the Betal parties had not filed an answer, and if they failed to answer by August 12, Centennial would seek a default. The same day, Tarnofsky forwarded the letter to Rovcanin with a note stating, "it is imperative that you follow through with your commitment to this firm on Wednesday so that we may proceed in a timely manner."

Centennial requested entry of default on August 18, 2004. On August 19, 2004, Tarnofsky forwarded the submissions to Rovcanin and noted that Centennial was willing to consent to vacating; however, it was imperative an answer be filed as soon as possible.

On October 7, 2004, Centennial requested entry of a default judgment. On October 12, Lawless notified Rovcanin of the $6,300 outstanding balance for services rendered through September 30, 2004, asking that Rovcanin, "[p]lease immediately pay this amount so that we can continue services on your behalf." By letter of November 12, Centennial informed Hedinger that default judgment had been entered against the Betal parties in the amount of $2,842,398.66. A few days later, Tarnofsky forwarded the order to Rovcanin advising, "[n]otwithstanding the enclosed, I have been advised by counsel for Centennial, that by consent or unopposed motion, we can have the default vacated when we are prepared to file the comprehensive Third-Party Complaint." On November 30, the Betal parties paid Hedinger $5,811.15 in fees for the Centennial matter.

On February 4, 2005, Tarnofsky again sent Rovcanin a letter enclosing invoices for services rendered through January 31, 2005, totaling $17,478.82, of which $12,400 was delinquent. The letter concluded with the admonition that "absent an immediate

and sizable payment against the past due balances, we will be forced to discontinue all further services."

According to Rovcanin's deposition testimony, he was seeking to obtain approximately $1.8 million in financing from Lakeland Bank around December 2004 to convert a storage facility purchased in 1995 on Vreeland Avenue in Paterson into a residential building. Rovcanin claimed there was a potential for profit of $4 million on the project. Rovcanin asserted in depositions that based on Hedinger's "failure to represent us properly," the financing was denied due to Centennial's judgment.

By letter of February 16, 2005, Tarnofsky informed Rovcanin that he would honor his request and write an explanatory letter to the bank synopsizing "the status of the litigation and the reason for allowing the judgment to have been temporarily entered on the record[,]" and advise that an order of vacation of the judgment would be forwarded upon receipt. The letter concluded, in part,

> [A]bsent an immediate and significant payment from Betal to this firm, I may be prohibited from undertaking further work on your files. This of course will further delay the removal of the Judgment from your credit report. Please give this matter your immediate attention.

Tarnofsky's letter of February 24 again noted Rovcanin had failed to make any payments despite promises to do so, and admonished Rovcanin "not [to] jeopardize our representation of Betal by failing to fulfill your representations."

On February 25, Tarnofsky sent a letter to Lakeland Bank, advising the firm "represent[ed]" the Betal parties, the judgment was not the result of a final adjudication on the merits of the underlying litigation, and an answer had not as yet been filed but he was "currently preparing a comprehensive and voluminous Answer and Third-Party Complaint against approximately 25 defendants." Tarnofsky further explained that because Centennial's attorney was working under time constraints from his client, Hedinger "permitted Centennial to take a default judgment against the individual defendants at this time with the tacit understanding that Centennial would either consent or not oppose the motion by the individual defendants to vacate the default and file the voluminous Answer and Third-Party Complaint." Tarnofsky further asserted, "[w]e believe that the responsibility for the overwhelming majority, if not all, of the claims of Centennial Insurance can be assessed against the third-party defendants that we will seek to join into the action." Tarnofsky concluded:

> With respect to an immediate timetable as to vacating the default judgment, I would

> expect to have the Third-Party Complaint filed in the next 30 days. At that time, there will be [a] motion before the court seeking to vacate the default judgment based upon a meritorious defense, vis-à-vis the filing of the Answer and Third-Party Complaint. As soon as the court issues an Order of Vacation of the Default Judgment, I will forward a copy to you. This can take upwards of 60 days from today. Once we have received such Order I will request that Centennial make the appropriate adjustment to the public records (i.e. credit reports). In any event, an Order of Vacation of Default Judgment should satisfy your purposes.

On March 4, Lawless wrote to Rovcanin advising that no additional services would be performed until a sizable payment was made against the outstanding balance of about $24,000 and the firm would consider moving to be relieved as counsel for the various matters it was handling.

On the same date, Rovcanin was indicted on ten counts, including abandonment of toxic pollutants, unlawful collection of solid waste, unlicensed removal of asbestos, and forgery. The indictment alleged that Rovcanin removed asbestos from job sites, placed thirty-three bags of asbestos materials in a trailer, and then abandoned the trailer in Paterson. Shortly after Rovcanin was arrested, Tarnofsky received a phone call from Centennial's counsel, advising he could no longer honor any tacit agreement to vacate the default judgment and consent to the filing of an answer in light of Rovcanin's arrest. In

February 2006, Rovcanin pled guilty to four of the counts; he received three years probation and was fined $9,000.

On June 6, 2005, in response to information subpoenas, Tarnofsky advised Centennial's counsel that Hedinger no longer represented the Betal parties. In October 2005, Tarnofsky sent Rovcanin a pre-action notice, R. 1:20A-6, and commenced the collection litigation in January 2006.

By letter of December 7, 2006, following the entry of the default judgment in the fee litigation and commencement of the malpractice litigation, Lawless advised the Betal parties' new counsel to move to vacate the Centennial judgment in order to mitigate damages. New counsel promptly did so, submitting Rovcanin's certification informing that Hedinger never filed the answer and third-party complaint and allowed default judgment to be entered, detailing Tarnofsky's representation to the bank of the tacit understanding with Centennial, and representing that there were defenses to the bonding company's action and comprehensive third party claims. The motion to vacate was denied on February 5, 2007, as the court found the Betal parties did not demonstrate excusable neglect.

In the interim, in May 2006, Ostojin filed a Chapter 11 bankruptcy. In August 2006, Centennial filed an adversary proceeding to declare its debt non-dischargeable based on

allegations she and the Betal parties breached their fiduciary obligation under the indemnity agreement by using trust funds for purposes unrelated to the contracts bonded by Centennial. In September 2008, Ostojin and the rest of the Betal parties executed a settlement agreement with Centennial for the joint and several payment of $1 million within 720 days, subject to bankruptcy court approval. The agreement contained an express acknowledgement and admission that $500,000 of the settlement payment constituted reimbursement for losses sustained by Centennial as a result of the non-bankrupt defendants' (the Betal parties other than Ostojin) "failure to comply with their contractual and statutory trust fund obligations."

In the malpractice litigation, the Betal parties submitted the expert report of William H. Michelson, Esq., dated November 26, 2008. Citing <u>Herbert v. Haytaian</u>, 292 <u>N.J. Super.</u> 426, 435-36 (App. Div. 1996), Michelson stated, "where an attorney gets halfway involved with a new case, or fails to clearly disassociate himself from it, he may become bound to an attorney-client representation by implication, or even by promissory estoppel." Michelson was of the opinion the paragraph in the retainer agreement allowing Hedinger to terminate its representation for nonpayment "put a greater burden on the firm than would otherwise exist, to affirmatively

disassociate itself from a subsequent matter such as the Centennial case." He concluded it was "obvious that this did not occur, because it would have had to be done in writing."

He opined that it would have been wiser for Hedinger to have limited the scope of the Centennial representation in writing to provide for negotiation with Centennial's attorney about the default procedure without obligating Hedinger to file responsive pleadings. Michelson agreed with Hedinger that filing voluminous responsive pleadings, such as prepared here, "would be an enormous undertaking that neither the firm nor the client should get themselves into, unless fully prepared to carry through with it." However, he opined that Hedinger should have only filed an answer, and on the eve of expiration of the ninety-day period, file the third-party complaint, R. 4:8-1(a), "to slow Centennial's case down" and to improve the bargaining power with Centennial's attorney. Michelson further opined that Tarnofsky could have restricted the third-party complaint to a handful of defendants who were the most culpable and financially solvent, therefore "greatly reduce[ing] the enormity of the undertaking." The rest of the discussion on liability continued along the same vein, opining as to the strategy Hedinger could have or should have undertaken to limit the Betal parties' liability to Centennial, including discussing with Centennial's

counsel the possibility of assigning some of the third-party claims directly to Centennial and working out a settlement by which Centennial would not take judgment against Ostojin personally.

Michelson's sole assertion of Hedinger's deviation from the accepted standard of care was as follows:

> I also tend to agree with Tarnofsky's belief that asserting liability against the subcontractors would have tended to prove Centennial's right to relief. This, however, should be viewed in tandem with the fact that Centennial was not going to have a lot of luck recovering damages from Betal. In the construction field, even more than in most other areas of law, attorneys are far more concerned with looking for "deep pockets" that are actually likely to produce money, than in litigating what is in their pleadings. I do not believe that Tarnofsky had the level of experience necessary to recognize these principles. Lawless probably did, but I do not believe he addressed himself to this case long enough to think them through. Tarnofsky's belief that there was one full year within which to move to vacate the default, under R. 4:50-1, was probably correct, but he neither calendared the deadline, nor advised the client about it. Therefore, by leaving the clients hanging and allowing entry of a large Default Judgment, H&L deviated from the accepted standard of care for construction lawyers.

In discussing damages, Michelson opined that Ostojin's bankruptcy and ensuing adversary proceeding, which was "an utter economic disaster" for her and Rovcanin, would not have been

necessary had Hedinger worked out a settlement with Centennial, as it "should have" done. He additionally explained that "[f]urther aggravating the damage done by the Centennial Judgment," the bankruptcy court ordered the sale of an apartment house in Yonkers held in Ostojin's name only and their vacation home in Florida, held as tenants by the entirety. Michelson further stated:

> The bankruptcy litigation has been extremely expensive, and continues to be so. Note also that, in legal malpractice litigation, a successful plaintiff is allowed to recover not only actual damages proximately caused by a lawyer's negligence, but reasonable counsel fees and costs, both of fighting the underlying the matter out at a later stage (in this case, the bankruptcy litigation), and of the malpractice litigation.

Michelson deferred the question of calculating the Betal parties damages from the bankruptcy in a "definitive manner" because the settlement with Centennial had not been consummated so its proceeds could not yet be determined, and the case had not concluded.

In a deposition conducted on January 29, 2010, Michelson reiterated his opinion that Hedinger should have filed an answer to the Centennial complaint to avoid the default, but conceded that had it done so, Centennial "eventually" could have filed a successful motion for summary judgment. Nonetheless, Michelson

opined that would have "slow[ed] the process down tremendously, which is exactly what the client wanted and needed." Michelson further acknowledged that Lawless gave Rovcanin "appropriate advice" that there was no basis to implead the towns, there would be considerable immediate expense to join the architects and engineers involved in the projects, and "pursuing the subcontractors was likely to be fruitless, because most of them worked out of the trunk of their car."

Following oral argument on March 19, 2010, the court granted summary judgment to Hedinger, dismissing the Betal parties' malpractice complaint. The court found that while an attorney-client relationship existed in other matters, none existed in the Centennial case. The court further found Michelson's report was a net opinion because he presented a solely personal opinion of strategy. The court noted that Michelson presented no particular standard requiring Hedinger to have filed an answer in the Centennial case, which was not in good faith because there was virtually no meritorious defense but simply to show strength, and then to have settled the matter.

By order of May 7, 2010, judgment was granted in favor of Hedinger in its collection case. This appeal and cross-appeal ensued.

III.

On appeal, the Betal parties challenge the court's finding, as a matter of law, of no attorney-client relationship with Hedinger regarding the Centennial claim. They also urge that if we find an attorney-client relationship, we should determine Hedinger's failure to answer the complaint constitutes malpractice. In its cross-appeal, Hedinger defends the court's finding as to the absence of an attorney-client relationship and alternatively asserts that summary judgment was appropriately granted because of the Betal parties' inability to demonstrate a breach of the standard of care and proximately caused damages.

When reviewing a grant of summary judgment, we employ the same standards used by the motion judge. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party has demonstrated that there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In so doing, we view the evidence in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). We accord no deference to the motion

judge's conclusions on issues of law, Manalapan Realty, L.P., v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), which we review de novo. Dep't of Envtl. Prot. v. Kafil, 395 N.J. Super. 597, 601 (App. Div. 2007). Summary judgment is appropriate when the evidence "'is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 533 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

We agree with the Betal parties that a material issue of fact exists as to whether they had an attorney-client relationship with Hedinger in the Centennial case. Accordingly, summary judgment should not have been granted on that ground.

The requisite elements of a legal malpractice claim require the plaintiff to demonstrate: (1) the existence of an attorney-client relationship, which creates a duty of care upon the attorney; (2) breach of the duty by the attorney; and (3) proximate causation of actual damages. Conklin v. Hannoch Weisman, 145 N.J. 395, 416 (1996); Sommers v. McKinney, 287 N.J. Super. 1, 10 (App. Div. 1996).

An attorney-client relationship may "be inferred from the conduct of the parties" even if the relationship is not "articulated[] in writing or speech." In re Palmieri, 76 N.J. 51, 58-59 (1978). More specifically, the relationship may be

inferred "when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." Haytaian, supra, 292 N.J. Super. at 436 (citation and quotation marks omitted). Essentially, "[a]ll that is necessary is that the parties relate 'to each other generally as attorney and client.'" Petit-Clair v. Nelson, 344 N.J. Super. 538, 543 (App. Div. 2001) (quoting In re Silverman, 113 N.J. 193, 214 (1988)).

In Palmieri, supra, the Court found there was not clear evidence of an attorney-client relationship because nothing showed legal services were rendered and no bills were submitted with respect to the alleged representation. 76 N.J. at 59. However, where there is conflicting evidence of the relationship, summary judgment is improper. See Froom v. Perel, 377 N.J. Super. 298, 311-12 (App. Div.) (holding existence of attorney-client relationship could not be determined as a matter of law due to conflicting evidence as to the nature of the relationship), certif. denied, 185 N.J. 267 (2005).

Here, it is undisputed the parties had a pre-existing attorney-client relationship and the Centennial lawsuit also included the Rochelle Park project, which was the primary

subject of the retainer agreement. Moreover, in contrast with Palmieri, Hedinger opened a file and billed the Betal parties for services rendered in the Centennial case. Additionally, although Hedinger informed Rovcanin on several occasions that the firm would discontinue services if a sizable payment were not made on account of the outstanding fees, Lawless and Tarnofsky's actions in many ways contradicted that stated intent. Subsequent to the letters, the attorneys met with Rovcanin to discuss strategy in the Centennial action, requested information from Rovcanin, drafted a voluminous answer and third-party complaint, and sent a letter to Lakeland Bank expressly stating the firm "represent[ed]" the Betal parties and giving the impression Hedinger was actively working on the Centennial matter. Although we understand Hedinger's reluctance to completely sever a relationship with an established client over a delinquent bill, its letters to Rovcanin do not rise to the level of a clearly drafted consent agreement to limit representation contemplated under Lerner v. Laufer, 359 N.J. Super. 201, 218 (App. Div.), certif. denied, 177 N.J. 223 (2003).

These facts and the favorable inferences afforded the Betal parties render the existence of an attorney-client relationship debatable as implied under Haytaian or by the parties "relating"

to each other as attorney and client under Petit-Clair. While none of these facts are dispositive of an attorney-client relationship, they certainly present conflicting evidence creating an issue of material fact and rendering summary judgment unavailable under Froom.

The Betal parties, however, are not entitled to the relief sought on appeal, i.e., that we conclude Hedinger's failure to answer the complaint constituted malpractice and enter a judgment on liability in the Betal parties' favor. The Betal parties simply opposed Hedinger's summary judgment motion; they did not file a cross-motion asking the court to affirmatively find that the failure to file an answer is by its very nature evidence of Hedinger's malpractice. We "decline to consider issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960)).

Moreover, where the issue is not briefed beyond the "conclusionary statement of the brief writer," it will not be considered. Miller v. Reis, 189 N.J. Super. 437, 441 (App. Div.

1983). The Betal parties' conclusory argument on this point is three sentences long and cites no supporting law or facts aside from the trial judge's musing that he thought the failure to file an answer "probably would be a deviation" from the standard of care.

It is well established that an appellate court will affirm an order of the trial court that is valid, even if the decision was based on incorrect grounds. Isko v. Planning Bd. of Livingston, 51 N.J. 162, 175 (1968). Based on our review of the record, we are convinced summary judgment dismissing the Betal parties' complaint was appropriately granted as they are unable to sufficiently satisfy the second and third elements of a malpractice claim.

A plaintiff in a legal malpractice case has an affirmative duty to present expert testimony, when required, on the issue of breach. Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 14 (App. Div.), certif. denied, 188 N.J. 489 (2006). "Expert testimony is required in cases of professional malpractice where the matter to be addressed is so esoteric that the average juror could not form a valid judgment as to whether the conduct of the professional was reasonable." Sommers, supra, 287 N.J. Super. at 10. Where "the adequacy of an investigation or the soundness of an opinion is the issue, a jury will usually require the

assistance of an expert opinion." Id. at 11. However, expert testimony is not required "where the questioned conduct presents such an obvious breach of an equally obvious professional norm that the fact-finder could resolve the dispute based on its own ordinary knowledge and experience and without resort to technical or esoteric information." Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, P.C. v. Ezekwo, 345 N.J. Super. 1, 12 (App. Div. 2001). Strategic decisions tend to be an area where expert testimony is required. See Prince v. Garruto, Galex & Cantor, 346 N.J. Super. 180, 190 (App. Div. 2001) (using expert testimony to determine whether strategic decision not to join additional defendant was professionally negligent). What distinguishes the cases where expert testimony is required from those where it is not "is none of them required the trier of fact to evaluate an attorney's legal judgment concerning a complex legal issue." Brach, supra, 345 N.J. Super. at 13.

While the failure to file a well-substantiated answer might be "an obvious breach" under Brach, the evidence shows the Betal parties had no meritorious defense to the Centennial action and even Michelson conceded the filing of an answer would not withstand summary judgment. Moreover, Rule 1:4-8(a)(1), frivolous litigation, expressly precludes attorneys from

submitting pleadings, motions or related papers for the "improper purpose" of "harass[ment]," "caus[ing] unnecessary delay or needless[ly] increasing [] the cost of litigation." Therefore, under Sommers, the reasonableness of Hedinger's strategy to allow a default to be entered in order to buy the Betal parties more time would require expert testimony.

The motion judge properly concluded that Michelson's report constituted an inadmissible net opinion. To establish a prima facie case of legal malpractice, the client must show the attorney failed to exercise that degree of skill, care and diligence commonly exercised by an ordinary member of the legal community, and the client incurred damages as a direct result of the attorney's actions. Olds v. Donnelly, 150 N.J. 424, 437 (1997); Estate of Fitzgerald v. Linnus, 336 N.J. Super. 458, 467 (App. Div. 2001). The burden of proving the causal relationship rests with the client and cannot be satisfied by "mere conjecture, surmise or suspicion." Sommers, supra, 287 N.J. Super. at 10 (citing Lieberman v. Employers Ins. of Wassau, 84 N.J. 325, 342 (1980) and 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 488 (App. Div. 1994)); see also 2175 Lemoine, supra, 272 N.J. Super. at 490 (in a legal malpractice case involving a complex commercial transaction, requiring evidence to demonstrate other parties to the transaction would

have been willing to complete the transaction if structured legally).

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." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (citations omitted); N.J.R.E. 703. "Under the 'net opinion' rule, an opinion lacking in such foundation and consisting of bare conclusions unsupported by factual evidence is inadmissible." Rosenberg, supra, 352 N.J. Super. at 401 (citing Johnson v. Salem Corp., 97 N.J. 78, 91 (1984); Buckelew v. Grossbard, 87 N.J. 512, 524 (1981)). An expert is required by this rule "'to give the why and wherefore'" of his or her opinion, rather than a mere conclusion." Rosenberg, supra, 352 N.J. Super. at 401 (quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996)).

In a legal malpractice case, "an expert must base his or her opinion on standards accepted by the legal community and not merely on the expert's personally held views." Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 79 (App. Div. 2007) (citations omitted). However, the opinion of a client's expert is not an inadmissible net opinion where the report specifically relies upon facts in the record, references extensive case law,

the rules of professional conduct, and treatises to support his or her conclusion, and identifies with particularity deficiencies in the attorney defendant's conduct with reference to the facts and law. Ibid.; Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 102-03 (App. Div. 2001); Stoeckel, supra, 387 N.J. Super. at 15-16.

The court found Michelson's opinion that Hedinger should have filed an answer, which he acknowledged was not meritorious, and later file a third-party complaint, which would buy time for the Betal parties to obtain funds for a potential settlement, to be "net opinion" because it was not based on a deviation from any particular standard of care and was merely a "matter of strategy" about which attorneys can routinely differ. We agree. Not only was Michelson's opinion not based on standards accepted by the legal community, but his strategy of "delay for the sake of delay" is diametrically opposed to the duties of an attorney set forth in Rule 1:4-8 and thus cannot support a claim of breach. Moreover, Michelson simply offered general ways the case could have been handled differently, such as assigning Centennial some of the third-party claims, without explanation or analysis of the "whys and wherefores." Additionally, Michelson's report is essentially comprised merely of his

"personally held views," which are insufficient to withstand a net opinion challenge.

In determining whether summary judgment on proximate cause is appropriate, the appellate court must consider the facts presented in the light most favorable to the client and determine whether a reasonable fact-finder could conclude the purported malpractice was a proximate cause of the client's loss. Johnson v. Schragger, Lavine, Nagy & Krasny, 340 N.J. Super. 84, 92-93 (App. Div. 2001). We consider whether "the negligence was a substantial factor in bringing about the ultimate harm." Conklin, supra, 145 N.J. at 422.

Expert testimony is typically required to show proximate cause except where the "causal relationship between the attorney's legal malpractice and the client's loss is so obvious that the trier of fact can resolve the issue as a matter of common knowledge." Sommers, supra, 287 N.J. at 11. However, an expert's "bare conclusions" on proximate cause will be stricken as "net opinion" if without factual support in the record. Froom, supra, 377 N.J. Super. at 317.

Even if Hedinger had a duty to file an answer in the Centennial action, there was no credible evidence in the record that such omission was a "substantial factor" in causing injury to the Betal parties. Michelson's bare conclusions as to

causation and damages are without factual support in the record, thus constituting an inadmissible net opinion under Froom. His opinion that had Hedinger filed an answer in the Centennial action, Ostojin's bankruptcy proceeding would not have been necessary, is simply "conjecture," which under Sommers is insufficient to demonstrate proximate cause. Even viewing the evidence in the light most favorable to the Betal parties, the record contains unrefuted evidence of their dire financial straits notwithstanding the Centennial judgment, including an asset and liability report obtained by Centennial showing a multitude of judgments and liens, some for hundreds of thousands of dollars. Moreover, similar to 2175 Lemoine, there is no evidence in the record that Centennial would have settled with the Betal parties for less than $1 million or that had Hedinger filed the answer and third-party complaint, the outcome of that complex litigation would have been financially favorable to the Betal parties.

Even assuming expert testimony is not needed, Rovcanin's self-serving statements about definite financing of $1.8 million from Lakeland Bank and an ensuing potential $4 million in lost profits on the Vreeland Avenue venture are far more wishful thinking than competent, credible proof. These bald assertions are insufficient to show proximate causation to defeat summary

judgment. See Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted) (holding "conclusory and self-serving assertions . . . are insufficient to overcome" summary judgment); U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961).

The same is true on the issue of damages, as a plaintiff in a legal malpractice case must show actual damages. See Olds, supra, 150 N.J. at 437. "Actual damages are those that are real and substantial as opposed to speculative." Grunwald v. Bronkesh, 131 N.J. 483, 495 (1993) (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 57 S. Ct. 461, 464 81 L. Ed. 2d 617, 621 (1937)). A plaintiff in a legal malpractice case must have supporting data or facts to state a cognizable damages claim. Brach, supra, 345 N.J. Super. at 11.

As we have noted, Rovcanin's bald assertions of $4 million in lost profits are unsupported by any competent or credible evidence in the record. He presents no commitment letter or other documentary evidence that he would have secured financing save for the Centennial judgment, nor does he provide any specifics to support his claim that the Vreeland Avenue project would have been successful. Thus, the Betal parties provide no basis upon which to calculate damages. Moreover, regardless of whether there was a judgment or not, Rovcanin likely would have

been obligated to disclose his failed projects and the pending surety action to the bank. Under these circumstances it is improbable the bank would have taken the risk and given Rovcanin the requested financing.

Additionally, the record discloses significant actions by Rovcanin himself that would have adversely impacted on his financial situation at the time. He admitted in the Centennial settlement agreement that he breached his fiduciary and statutory obligations to use public funds paid by the towns for the construction projects on which he was acting as general contractor. He was also indicted on serious criminal charges around the same time he was trying to obtain financing for the project, resulting in a guilty plea and imposition of three years probation and a fine. Accordingly, the Betal parties have failed to set forth a prima facie case of malpractice.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION