

# Gist-of-the-Action Doctrine and Legal Malpractice

In *dicta* in *Bailey v. Tucker*, 621 A.2d 108, 115 (Pa. 1993), the Supreme Court of Pennsylvania suggested that there is an implied term in every contract where an attorney is retained that his or her services will be performed “in a manner consistent with the profession at large.” The existence of an implied term not to engage in negligent conduct was later recognized by a three-judge panel of the Pennsylvania Superior Court in *Gorski v. Smith*, 812 A.2d 683, 697 (Pa. Super. 2002), finding that “a plaintiff’s successful establishment of a breach of contract claim against an attorney ... does not require proof ... that an attorney failed to follow a specific instruction of the client.” This has been the basis for the proposition that an attorney can be sued for breach of contract for harm caused by negligent conduct as opposed to breach of an express term of the contract, which had previously been the only basis for assertion of a contract claim. Absent the existence of such a term, a legal-malpractice claim sounding in breach of contract could only be asserted upon a showing of breach of an express term.

Again, the Supreme Court’s pronouncement in *Bailey* was *dicta* and *Gorski* was not decided by Pennsylvania’s highest court. As a result, federal courts in diversity cases, not being bound by *Bailey* and *Gorski*, have refused to follow them. They instead limit malpractice as contract claims to those instances where the client can show the breach of an express term of the representation agreement, which is usually the engagement letter.

Implying a term as held by *Gorski* has several potential ramifications. First, it would mean that a contract claim could be asserted where the attorney was negligent and that negligence harmed his or her client. Second, such a claim would be subject to a four-year statute of limitation, in contrast to a malpractice claim sounding in tort, which is subject to a two-year statute of limitation. Finally, it raises the question of whether the assertion of a contract claim based upon negligence would deprive the attorney of defenses that are available in response to a tort claim, notwithstanding that it involves the same actionable conduct. For example, the common-law defense of contributory negligence under Pennsylvania law, and not the statutory defense of comparative negligence, applies to a legal-malpractice claim sounding in tort. But what about contributory negligence as a defense to a contract claim based upon negligence? Would it be a defense there? A

decision by Massachusetts’ highest state court recognized that contributory negligence is a defense to a contract malpractice claim based upon negligence. But there is yet no such reported opinion interpreting Pennsylvania law.

Whether Pennsylvania law would recognize such an implied term previously did not have the same potential dire consequences that it does now. In *Bailey*, the Supreme Court recognized that a client could assert a contract malpractice claim against his or her criminal-defense lawyer, but the damages were limited to disgorgement of fees. Subsequent state and federal trial courts interpreted that holding to apply to all contract malpractice actions, not just those that arise out of criminal-defense representations.

However, in *Coleman v. Duane Morris*, 58 A.3d 833 (Pa. Super. 2012), a three-judge panel of the Superior Court affirmed the decision of a trial judge who rejected this reasoning and held that consequential damages can be recovered in a “negligence type” contract malpractice claim. The court did not address the issue of whether tort defenses were available against a claim for consequential damages arising out of a contract malpractice claim. The Supreme Court granted the defendant law firm’s petition for allowance of appeal, which garnered much attention and prompted the filing of several *amicus* briefs, including one by the PBA. That case, however, settled before oral argument took place, and so it remains until another day to see whether the Supreme Court will ultimately agree with the Superior Court panel on this point. Presumably, since *Coleman*, like *Gorski*, was not decided by Pennsylvania’s highest court, the federal judiciary will not follow that holding either.

But the judicial tide in support of the “implied” term in legal-engagement contracts may be ebbing. In *Bruno v. Erie Insurance Co.*, 106 A.3d 48 (Pa. 2014), the Supreme Court revisited the gist-of-the-action doctrine, stating that if “the facts of the particular claim establish the duty breached is one created by the parties *by the terms of the contract*, i.e., a specific promise to do something that party would not ordinarily have been obligated to do but for the existence of the contract, then the claim would be for breach of contract. ... If, however, the facts establish that the claim involves the defendant’s violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.” (Emphasis added.) The court noted that the label chosen by plaintiff to characterize the claim is “not controlling.”

If the reasoning in *Bruno* were applied to legal-malpractice jurisprudence, it suggests the end of contract malpractice cases based upon negligent conduct. But *Bruno* was not a legal-malpractice case. Instead, it addressed the question of whether a claim by an insured homeowner against an adjuster hired by the carrier, who allegedly negligently told the homeowner that mold observed in the home was not

## Avoiding Liability



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dangerous and that the homeowner could safely proceed with repairs, sounded in negligence or breach of contract. The Supreme Court held that it sounded in tort notwithstanding that the adjuster was performing a contractual duty of the insurance company in conducting the inspection.

But in a nonprecedential decision, a 3rd Circuit panel in *New York Central Mutual Ins. Co. v. Margolis Edelstein*, 2016 U.S. App. LEXIS 1661, 2016 WL 374164, affirmed the district court’s granting of a motion to dismiss a legal-malpractice action based upon negligence where the claim was labeled “contract.” The court reasoned that the gist of the action of the claim alleged by the plaintiffs sounded in tort. The plaintiffs alleged that the defendant lawyer had negligently drafted an opinion letter and not that the lawyer had breached any “specific executory promises.” The court noted language in *Bailey* that supported the existence of contract claims based upon negligence, holding that “given the Pennsylvania Supreme Court’s delineation of contractual and tort claims in *Bruno* — according to which a claim sounding in contract is founded on the breach of ‘specific executory promises’ — we decline to read the court’s *dicta* in *Bailey* as establishing a distinct contractual promise upon which a breach of contract claim may be premised.” Moreover, the court did not follow *Gorski*, since it was the decision of only an intermediate appellate state court.

*Bruno* certainly gives the Supreme Court the impetus to overturn *Gorski* on this point of law. Otherwise the dilemma in state court over the application of tort defenses to negligence contract claims will continue in the face of *Gorski* and *Coleman* as they wreak havoc in the area of contract claims.