VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 26th day of July, 2018.

Present: All the Justices

Gigi L. Sere, Appellant,

against Record No. 170842
Circuit Court No. CL-2016-5845

Joseph T. Trapeni, Jr., et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and argument of the appellant in proper person and counsel for the appellees, the Court is of opinion that there is no reversible error in the judgment of the circuit court.

Gigi L. Sere alleges that she suffered physical injury on January 1, 2006 in a store in the City of Alexandria.[1] She later retained Joseph T. Trapeni, Jr., P.C. ("the Firm") to represent her as she sought compensation.

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[1] The entity which owns and operates the store is a Minnesota corporation originally named Dayton Hudson Corporation ("DHC"). DHC obtained a certificate of authority to transact business within the Commonwealth from the State Corporation Commission ("the Commission") in January 1995. It filed a certificate of assumed name to conduct business as Target Stores in September 1997.

In January 2000, DHC merged as the surviving entity with Target Corporation, taking the latter's name. However, the name Target Corporation was unavailable for use in Virginia under former Code § 13.1-630 because a domestic corporation was already registered with the Commission under the name Target, Inc. The new entity that resulted from the merger of DHC with Target Corporation therefore filed an application for an amended certificate of authority to transact business within the Commonwealth under the name Target Stores, Inc. to satisfy the requirements of former Code § 13.1-762. In May 2000, the Commission issued a certificate stating "that [DHC] . . . was authorized to transact business in Virginia on January 19, 1995

On December 17, 2007, through Joseph T. Trapeni, Jr., Esquire, Sere commenced an action against the Store Owner under the name Target Stores, Inc. by filing a complaint in the circuit court alleging negligence and seeking judgment for $500,000, plus interest and costs. The Store Owner filed an answer in which it asserted that it had been improperly named. It asserted that Target Stores was an unincorporated division of Target Corporation, and that Target Corporation was the only proper defendant. It also removed the action to federal court, again asserting that the complaint had named an improper defendant.[2] On May 6, 2008, Sere terminated the federal court proceeding by filing a stipulation of dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

On October 27, 2008, again through Trapeni, Sere commenced a new action by filing a complaint in the circuit court against the Store Owner under the name Target Corporation seeking judgment for $950,000, plus interest and costs. The Store Owner thereafter filed a motion to dismiss and plea in bar asserting that Sere's first action did not toll the statute of limitations under Code § 8.01-229(E)(3) because it had not named the proper defendant. It also asserted that her second complaint could not relate back to the filing of the original complaint under Code §§ 8.01-6, 8.01-6.1, or 8.01-6.2. Sere responded by denying that Target Stores, Inc. was an improper name and seeking denial of the Store Owner's motion and plea. She also moved to amend the complaint by inserting the Store Owner's true name, whatever it may be, asserting that Target Corporation and Target Stores, Inc. were the same entity and had had actual notice of her claim. At a hearing on the motion and plea, the circuit court ruled that evidence was required to establish the Store Owner's true name and denied them without prejudice.

The Store Owner filed another motion to dismiss and plea in bar after the parties took discovery. It incorporated as exhibits authenticated records and a deposition transcript establishing the facts set forth in footnote one above. Sere thereafter terminated her

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[and] obtained on April 13, 2000 an amended certificate of authority to transact business in Virginia under the name Target Corporation and is transacting business in Virginia under the assumed or fictitious name of Target Stores, Inc."

For the reasons set forth below, the Court takes no position on the proper name of the defendant in the underlying personal injury action and, for ease of reference, refers to that defendant simply as "the Store Owner."

[2] In addition to its answer and its notice of removal, the Store Owner asserted in at least five pleadings in federal court that it had been improperly named.

representation by Trapeni and retained new counsel. Through her new attorney, she filed an opposition to the Store Owner's latest motion and plea, asserting (1) that the Store Owner's true name was unascertainable by searching the records of the Commission; (2) that any error in the Store Owner's name in the original complaint was simply a misnomer curable under Code § 8.01-6 because it had had actual notice of the claim; and (3) that her cause of action was not time-barred because the statute of limitations had been tolled under Code §§ 8.01-6.1 and 8.01-229(E)(3) until the filing of the second complaint.

After a hearing, the circuit court entered an order in September 2010 in which it granted the Store Owner's latest motion, sustained its plea in bar, and dismissed the complaint with prejudice.[3]

In April 2016, Sere, through new counsel, commenced the present action against Trapeni and the Firm (collectively, "the Defendants") alleging that Trapeni was professionally negligent for failing to amend the original complaint in the underlying personal injury action to name the Store Owner as Target Corporation, thereby allowing the statute of limitations to expire and causing her claim to become time-barred. The circuit court entered a scheduling order setting the case for trial and requiring Sere to designate her expert witnesses ninety days in advance. Sere's attorney later withdrew and she proceeded pro se.

The Defendants thereafter filed a motion for summary judgment asserting that Sere had not designated an expert witness to establish a breach of duty ninety days before trial as ordered. Sere filed a cross-motion for summary judgment asserting that she had timely designated Robert T. Hall, Esquire, as her expert witness.[4] She also asserted that no expert testimony was necessary because the issues of the statute of limitations and the Store Owner's proper name had been adjudicated in the underlying personal injury action, culminating in its dismissal. The remaining issues, she continued, were matters within the common knowledge of laymen, such as whether an attorney should know how to sue the correct defendant, how to correct a pleading

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[3] Sere's second counsel filed a timely petition for appeal, *Sere v. Target Corporation* (Record No. 102318), but she did not contest the circuit court's ruling that Target Corporation was the Store Owner's true name. In any event, the petition was dismissed for procedural defects.

[4] Such a designation was timely filed in the circuit court, but the Defendants denied having received service of it.

that names the wrong one, and how to do them without allowing the statute of limitations to elapse.

At a hearing on the cross motions, the Defendants informed the court that they did not receive Sere's expert designation until she attached it as an exhibit to her motion. They also proffered that they had spoken with Hall and that he denied having been retained to testify at trial. Sere alleged that she had paid him a retainer but admitted that she had not confirmed that he would appear as her witness at trial. Under oath, she testified that she had mailed her designation to the Defendants by first-class mail as she had certified on the designation.

The court ruled that the case required expert testimony. It denied the Defendants' motion but directed the parties to determine whether Hall would testify at trial. The Defendants thereafter filed a renewed motion for summary judgment incorporating an affidavit by Hall in which he testified that he had been engaged by Sere's counsel earlier in the proceeding but that he closed the file when that attorney withdrew from the case. He also testified that he had had only one communication with Sere, which concerned her retainer; that she had never arranged for him to testify; and that he would not be appearing as a witness because he had a conflict with the trial date.

The circuit court thereafter entered an order in which it granted the Defendants' motion for summary judgment. Sere appeals.

When a trial court enters summary judgment on undisputed facts, the appellate court reviews its application of the law to those facts de novo. *Johnson v. Hart*, 279 Va. 617, 623, 692 S.E.2d 239, 242 (2010). A plaintiff who asserts a cause of action against an attorney for legal malpractice must plead and prove that a relationship existed between them giving rise to a duty, that the attorney breached the duty, and that the breach was a proximate cause of the plaintiff's damages. *Gregory v. Hawkins*, 251 Va. 471, 475, 468 S.E.2d 891, 893 (1996).

> To establish an attorney's breach of duty, a client must show that the attorney failed to exercise a reasonable degree of care, skill, and dispatch in rendering the services for which the attorney was employed. This generally is a question of fact to be decided by a fact finder, after considering testimony of expert witnesses.

Smith v. McLaughlin, 289 Va. 241, 253, 769 S.E.2d 7, 13 (2015) (internal citations and quotation marks omitted). A rare exception provides that "expert testimony is unnecessary when the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience." *Summers v. Syptak*, 293 Va. 606, 613, 801 S.E.2d at 425 (quoting *Beverly*

Enterprises-Virginia, Inc. v. Nichols, 247 Va. 264, 267, 269, 441 S.E.2d 1, 3, 4 (1994)) (internal quotation marks and alteration omitted).

Sere asserts that the circuit court erred by granting the Defendants' motion for summary judgment because this case falls within the exception. She argues that the court's decision in the underlying personal injury action to grant the Store Owner's motion to dismiss and sustain the plea in bar adjudicated both (1) the issue of the Store Owner's proper name and (2) whether the Defendants' refusal to amend the original complaint led her cause of action to become time-barred. She emphasizes that the Defendants were told at least seven times that the original complaint in the underlying personal injury action named the wrong defendant. She argues that whether this conduct constitutes a breach of an attorney's duty is a matter within the common knowledge of a layperson. She also notes that Code § 54.1-3906 makes negligent attorneys liable to their clients and argues that justice requires that the Defendants be held accountable.

As an initial matter, the circuit court's rulings in the underlying personal injury action have no preclusive effect in this malpractice action. There are two types of preclusion. Claim preclusion bars successive litigation of the same claim. *Lee v. Spoden*, 290 Va. 235, 245, 776 S.E.2d 798, 803 (2015). It is irrelevant here because Sere's claim in the underlying action was for personal injury and her claim here is for professional negligence. Issue preclusion, on the other hand, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim. Direct estoppel and collateral estoppel fall under the category of issue preclusion. *Id.* at 246, 776 S.E.2d at 803-04 (internal quotation marks omitted).

Direct estoppel applies to prevent parties from re-litigating issues already decided within the same cause of action. *Bates v. Devers*, 214 Va. 667, 670 n.3, 202 S.E.2d 917, 920 (1974). This includes the law of the case doctrine, which limits further litigation of an issue after it has become final through the failure to appeal, *Lee*, 290 Va. at 254, 776 S.E.2d at 808, or if an appeal is unsuccessful. *Commonwealth v. Virginia Ass'n of Cntys. Grp. Self Ins. Risk Pool*, 292 Va. 133, 141 n.6, 787 S.E.2d 151, 154 n.6 (2016). It, too, is irrelevant here because Sere's cause of action in this case is different than in the underlying personal injury case.

Finally, for collateral estoppel to apply

> (1) the parties to the two proceedings must be the same, (2) the issue of fact sought to be litigated must have been actually litigated in the prior proceeding, (3)

> the issue of fact must have been essential to the prior judgment, and (4) the prior proceeding must have resulted in a valid, final judgment against the party against whom the doctrine is sought to be applied.

Glasco v. Ballard, 249 Va. 61, 64, 452 S.E.2d 854, 855 (1995). This, too, is irrelevant because the Defendants *represented* Sere in the underlying personal injury action. They were not parties to it.

Consequently, the court's determinations in the underlying personal injury action have no preclusive effect in this case. *See also Streber v. Hunter*, 221 F.3d 701, 723 n.30 (5th Cir. 2000) (holding that a court's rulings in an underlying action are not preclusive against the attorneys who represented a party in it, because (1) the claim is not the same in the two actions and (2) the attorneys are not parties). To hold otherwise "would mean an attorney could never succeed in a malpractice case, since the prior . . . loss would foreclose any defense." *Id.* (internal quotation marks omitted).

An adjudication of Sere's malpractice claim—i.e., that the Defendants breached their duty to her by allowing her underlying personal injury action to become time-barred—therefore required a determination that the action had, in fact, become time-barred. Such a conclusion could not be reached without first resolving at least four questions: (1) whether a voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1)(A) is the same as a nonsuit under Code § 8.01-380 in terms of tolling the statute of limitations under Code § 8.01-229(E)(3); (2) whether the Defendants joined the Store Owner to the underlying personal injury action under its proper name; (3) whether any error in the Store Owner's name was a misjoinder or simply a misnomer; and (4) whether failure to correct the misnomer, if any, under Code § 8.01-6 prevented the tolling of the statute of limitations under Code § 8.01-229(E)(3).

As to the first question, this Court has never considered whether a voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1)(A) is a "voluntary nonsuit as prescribed in [Code] § 8.01-380" for the purpose of the tolling provision in Code § 8.01-229(E)(3). The closest decision is *INOVA Health Care Services v. Kebaish*, 284 Va. 336, 344-46, 732 S.E.2d 703, 707-08 (2012), in which the Court considered only whether a prior voluntary dismissal in federal court exhausted the statutory right to a first nonsuit conferred by Code § 8.01-380(B). Although the Court opined in that case that the tolling provision applied to a proceeding commenced in federal court, *id.* at 345-46, 732 S.E.2d at 708, it did not decide whether (1) a

Federal Rule of Civil Procedure 41(a)(1)(A) voluntary dismissal was interchangeable with a Code § 8.01-380 nonsuit for the purposes of Code § 8.01-229(E)(3), or, in the alternative, (2) Code § 8.01-229(E)(3) applies only if the federal action is remanded to state court and the plaintiff suffers a Code § 8.01-380 nonsuit there.

As to the second question, despite the continuous insistence of the Store Owner to the contrary, its proper name in Virginia may be Target Stores, Inc., as Trapeni asserted. Although the Store Owner relied on the Commission's May 2000 certificate, which stated that the Store Owner "obtained on April 13, 2000 an amended certificate of authority to transact business in Virginia under the name Target Corporation," former Code § 13.1-762(A)(3)(a) expressly prohibited the Commission from issuing the Store Owner a certificate of authority to transact business under that name. The statute provided that "[n]o certificate of authority shall be issued to a foreign corporation unless the corporate name of such corporation . . . shall be distinguishable upon the records of the Commission from . . . [t]he corporate name of a domestic corporation or a foreign corporation authorized to transact business in this Commonwealth." When the Store Owner sought a certificate of authority to transact business under the name Target Corporation, a domestic corporation was already registered under the name Target, Inc. The names Target, Inc. and Target Corporation are indistinguishable under former Code § 13.1-630(A). Former Code § 13.1-762 therefore prohibited the Store Owner from transacting business in Virginia under the name Target Corporation but allowed it to do so under an available "*designated* name." Former Code § 13.1-762(B)(2). (Emphasis added.)

The Commission's May 2000 certificate appears to conflate the term "designated name" used in former Code § 13.1-762(B)(2) with the term "assumed or fictitious name" used in Code § 59.1-69(A). The Court has never ruled that a "designated name" is an "assumed or fictitious name," or that a foreign corporation may not be sued under the "designated name" under which the Commission is required to issue the certificate of authorization to transact business when an actual name is unavailable. *Cf. Leckie v. Seal*, 161 Va. 215, 225-26, 170 S.E.2d 844, 847-48 (1933) (holding that a judgment against a corporation in its *assumed name* instead of its proper name was void).

As to the third and fourth questions, assuming that the Store Owner was sued under an improper name, this Court considered the distinction between a misjoinder and a misnomer in *Richmond v. Volk*, 291 Va. 60, 65, 781 S.E.2d 191, 193 (2016). It concluded that when a

complaint clearly describes the proper party through specific factual allegations, the use of an improper name is simply a misnomer. The Court went further to hold that Code § 8.01-229(E)(3) tolls the statute of limitations when the original action is brought against the proper party, even if that party was improperly named. *Id.* at 67, 781 S.E.2d at 194. Filing a new complaint against the same defendant, using its proper name, after nonsuiting a previous complaint that used an improper name merely corrects the misnomer without changing the identity of the defendant. *Id.*

Thus, the question of whether the Defendants' actions caused Sere's personal injury action to become time-barred required resolution of at least four complex legal questions not within the common knowledge of a layperson, or perhaps, even the average attorney.[5] The need to resolve those complex legal questions supports the circuit court's conclusion that the issue of whether the Defendants breached their professional duty to Sere was not within the common knowledge of a layperson. Consequently, the exception Sere invokes does not apply here. Expert testimony was required regarding the issue of whether Trapeni failed to exercise a reasonable degree of care, skill, and dispatch in rendering the services for which he was employed. The Court therefore affirms the judgment of the circuit court.

The appellant shall pay to the appellees two hundred and fifty dollars damages.

This order shall be certified to the Circuit Court of Fairfax County.

A Copy,

Teste:

Clerk

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[5] All four questions are purely questions of law, dealing with the interpretation of Code §§ 8.01-229(E)(3), 8.01-380, 13.1-630, 13.1-762, and 59.1-69(A). *Reineck v. Lemen*, 292 Va. 710, 721, 792 S.E.2d 269, 275 (2016). When the question of whether an attorney breached his or her duty involves "purely matters of law, they are reserved for determination by a court and cannot be the subject of expert testimony." *Heyward & Lee Constr. Co. v. Sands, Anderson, Marks & Miller*, 249 Va. 54, 57, 453 S.E.2d 270, 272 (1995). However, Sere did not raise this argument below or on appeal.