

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
DOCKET NO. BCD-CV-20-07

KELSEY HERRICK, individually and on behalf)
of her minor children AB and CB,)

PLAINTIFF,)

v.)

MELISSA MONTEJANO, JESSICA DEMERS,)
ESQ. & BOURQUE & CLEGG, LLC,)

DEFENDANTS.)

**ORDER ON MOTION FOR LEAVE
TO AMEND COMPLAINT**

Before the Court is Plaintiff Kelsey Herrick’s motion for leave to amend the complaint.

Specifically, Plaintiffs seek to amend Count II (legal malpractice) of their complaint with information acquired during discovery that, in Plaintiffs’ view, clarifies the timeline of Defendant Bourque & Clegg’s representation, and bolsters Count II of their Complaint.

Defendants object to this request, arguing the motion should be denied because: 1) the requested amendment would be futile, 2) the new claims asserted in the requested amendment are time barred because they are distinct from, and thus do not relate back to, the claims asserted in Plaintiff’s initial complaint, 3) allowing the proposed amended complaint at this time would unfairly prejudice the defendants, and 4) the proposed amendment is not predicated on anything “new” and is thus not properly subject of an amended complaint.

Plaintiffs Kelsey Herrick and her two minor children are represented by Attorney Christopher A. Wright. Defendants are represented by Attorneys George T. Dilworth, and Jeffrey T. Piampiano. The Court has reviewed Plaintiff’s motion and Defendant’s opposition, and for reasons stated, grants Plaintiff’s motion to amend the complaint.

Plaintiffs bring this motion to amend the complaint according to M. R. Civ. P. 15(a), which states:

a party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be given when justice so requires.

The Maine Rule tracks the language of the related federal rule, which courts and commentators have stressed ought to be liberally applied to achieve the most expeditious resolution of litigation on the merits. *Bangor Motor Co. v. Chapman*, 452 A.2d 389, 392 (Me. 1982). It follows that leave to amend a complaint will be given freely, and the Law Court has construed this mandate to mean that “if a moving party is not acting in bad faith or for delay, the motion will be granted in the absence of undue prejudice”. *Chrysler Credit Corp. v. Bert Cote’s L/A Auto Sales, Inc.*, 1998 ME 53, ¶ 14, 707 A.2d 1311, 1315 (quoting *Diversified Foods, Inc. v. First Nat’l Bank of Boston*, 605 A.2d 609, 616 (Me. 1992)). A motion to amend a pleading pursuant to Rule 15 is committed to the sound discretion of the trial court. *Bangor Motor Co.*, 452 A.2d 389, 392.

Defendants’ first argument in opposition to the motion is that amendment of the complaint would be futile, and would fail to survive a motion to dismiss. Defendants make various assertions in support of this argument, the first being that Plaintiff testified that she understood (or should have understood) that her initial engagement agreement with Defendants was limited to obtaining a divorce judgment on her behalf, and that she did not explicitly request attorneys at Bourque & Clegg to monitor life insurance-related obligations. Additionally, Defendants assert that Plaintiff’s deposition testimony confirms her understanding that her engagement with the firm would end upon the completion of her divorce, and that any additional

work undertaken by the firm would be separate from the divorce itself. Finally, Defendants argue that because Plaintiffs initially claimed the sole predicate for claims against the firm were based on its alleged failure to supervise Attorney Demers on a *respondeat superior theory*, the proposed amendments to Count II of Plaintiff's complaint fail to relate back to the same transaction or occurrence.

Despite Defendants' various contentions, and federal precedent imposing a heightened standard to amend pleadings¹, the Law Court has previously held that a finding that an action presents no case or controversy alone is not sufficient to deny a motion to amend. *Bangor Motor Co.*, 452 A.2d 389, 393. However, even were this Court to adopt a heightened standard that required the Amended Complaint to survive a motion to dismiss, the Court finds that the Amended Complaint would likely do so.

To survive a 12(b)(6) motion to dismiss for failure to state a claim, the Court must view the complaint in the light most favorable to the plaintiff to determine whether it sets forth facts that would entitle the plaintiff to relief under some legal theory. M. R. Civ. P. 12(b)(6). Maine law requires a plaintiff to satisfy the following elements to state a claim for legal malpractice: 1) the breach of a duty by defendant to conform to a certain standard of conduct, and 2) the plaintiff's damages were proximately caused by the defendant's breach. *Brewer v. Hagemann* 2001 ME 27, 771 A.2d 1030, 1032. Taken as true, the allegations set forth in the Amended Complaint meet all of the requirements of a legal malpractice claim. The Amended Complaint alleges that the Defendant owed Plaintiffs a duty to supervise the actions of its employees to ensure that competent legal service was being provided. Amended Complaint at ¶ 65. Count II of

¹ Federal precedent has held that a requested amendment should be denied as futile where, if granted, it would be subject to dismissal on either a motion to dismiss or a motion for summary judgment. *See, e.g., Bethany Pharamcal Co., Inc. v. QVC, Inc.*, 241 F.3d 854, 860-61 (7th Cir. 2001); *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 168 (2nd Cir. 2003).

the Amended Complaint also asserts that attorneys employed by the firm breached their duties to provide competent legal counsel to the Plaintiffs. Amended Complaint ¶¶ 61-64, and that the Defendants failed to effectively oversee the actions of its employees. Amended Complaint ¶¶ 66-67. Plaintiffs assert that they did not receive FEGLI policy benefits as ordered by the Plaintiff's divorce judgment, due to Defendants failure. Amended Complaint at ¶¶ 67-68. Because the facts of the Amended Complaint state a claim for legal malpractice, it cannot be considered futile.

Defendants' second argument supporting their opposition is that the new claims asserted in the Amended Complaint are time barred because they are distinct from, and thus do not relate back to, the claims asserted in Plaintiff's initial complaint. "An amendment of a pleading relates back to the date of the original pleading when. . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." M.R. Civ. P. 15(c)(2). In Plaintiffs' view the transaction or occurrence subject to the Count II of their complaint is the firm's representation of Plaintiff Herrick in her divorce proceeding, and the firm's continued representation of her when she sought to enforce the judgment. The conduct asserted in Plaintiffs' initial complaint as the basis for Count II is that Defendants failed to properly supervise the actions of its employed attorneys in the firm's representation. Count II of the Amended Complaint alleges the same, though with more details about said representation. For this reason, the Court finds that the Amended Complaint relates back to the same transaction or occurrence subject to the original complaint.

Third, Defendants assert that allowing the proposed amendment would result in unfair prejudice. Specifically, Defendants argue that the Amended Complaint relies on an entirely new theory, at odds with Plaintiffs' prior deposition testimony. However, despite adding facts to bolster Count II of their complaint, Plaintiffs have not asserted an entirely new theory. Instead, as

