

# What's the Gist of the Gist of the Action in Pennsylvania?

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In Pennsylvania, legal malpractice claims may be brought in two forms: negligence and breach of contract. To state a claim for negligence, a plaintiff must allege: employment of the attorney or other basis for a duty; failure of the attorney to exercise ordinary skill and knowledge; and, that such failure was the proximate cause of the harm to the plaintiff. See *Wachovia Bank v. Ferretti*, 935 A.2d 565, 570-571 (Pa. Super. Ct. 2007). To state a claim for breach of contract, a plaintiff must allege: the existence of a contract, a breach of a duty imposed by the contract, and damages. See *Kirschner v. K&L Gates*, 436 A.2d 737, 755 (Pa. Super. 2012). The distinction is important for the statute of limitations because, of course, a negligence claim carries with it a two-year statute of limitations while a breach of contract claim may be brought within four years.

While the distinction between legal malpractice claims sounding in negligence and contract historically depended upon whether there was a breach of a specific provision of the contract between the attorney and client, that began to change with *Bailey v. Tucker*, 621 A.2d 108 (Pa. 1993). Thereafter, legal malpractice plaintiffs would allege that the same conduct by their lawyers amounted to both negligence and an implied duty under the

breach of the attorney-client fee agreement, and would thereby take advantage of a four-year statute of limitations.

This changed, however, when the Pennsylvania Supreme Court decided *Bruno v. Erie Insurance*, 106 A.3d 48 (Pa. 2014). In *Bruno*, the Pennsylvania Supreme Court applied the gist of the action doctrine to a professional liability claim, finding that plaintiff's negligence claim was not barred merely because the parties were in a contractual relationship:

"A negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which comprise the contract. Instead, the contract is regarded merely as the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed," see *Bruno*, 106 A.3d at 114.

Pennsylvania courts, and federal courts applying Pennsylvania law, then quickly began to hold that the reverse was true: a legal malpractice plaintiff could not recast a negligence claim as a breach of contract claim. See, e.g., *Seidner v. Finkelman*, 2016

Phila. Ct. Com. Pls. LEXIS 378 (*Seidner v. Finkelman*, 195 A.3d 1048, unpublished memorandum (Pa. Super. 2017)) (where a plaintiff does not allege that the defendant breached “any specific term in the retainer agreement or contract ... the action [could not] be brought under a breach of contract theory because under the gist-of-the-action doctrine the action sounds in tort”); *Johnstone v. Raffaele*, 241 A.3d 479, unpublished memorandum (Pa. Super. 2020) (Pennsylvania Superior Court barred the plaintiff’s breach of contract claim where plaintiff listed similar allegations in support of her negligence and breach of contract claims, all of which focused on the manner in which the attorney performed his duties, the communications with the client, the advice given, and the diligence in representing the plaintiff); *Nkansah v. Kleinbard*, No. 19-4472, 2020 WL 920269 at \*4 (E.D. Pa. Feb. 26, 2020) (“Where the claim is based on the same conduct underlying the negligence claim, rather than the defendant’s breach of a specific contract provision, it sounds in tort, not contract.”); *Corliss v. Ciccarella*, 891 EDA 2021, 2022 WL 40645, unpublished memorandum (Pa. Super. 2022) (barring plaintiff’s breach of contract claim where plaintiff failed to allege any specific violations of contract terms); *Outerlimits Technologies v. O’Connor*, No. 169 EDA 2023, 2023 WL 8524299, at \*8 (Pa. Super. 2023) (“The alleged contract merely served as ‘the vehicle’ to establish the relationship between the parties, during the existence of which the appellee allegedly committed a tort.”).

That is, until last year, when the Pennsylvania Superior Court abruptly change course in two published opinions: *Swatt v. Nottingham Village*, 342 A.3d 23

(Pa. Super. 2025) and *Poteat v. Asteak*, 350 A.3d 198 (Pa. Super. 2025). In *Swatt*, the Pennsylvania Superior Court found that the gist of the action doctrine does not apply to contract claims: “contract claims never were, and are not now, subject to the gist-of-the-action doctrine.” Thus, the *Swatt* court held that the gist of the action doctrine did not bar the plaintiff’s breach of contract claim, and cautioned Pennsylvania courts to “keep in mind that there are instances when a single gist of the action (one unlawful act) breaches both a general duty of care, as well as an expressed or implied contractual duty.” In *Poteat*, following *Swatt*, the Pennsylvania Superior Court held that the gist of the action doctrine could not apply to bar the plaintiff’s breach of contract claim: “the gist of the action doctrine does not apply to this case because the plaintiff has pleaded a breach of contract claim when he alleged that [defendants] breached the retainer agreement by failing to provide competent legal services; not a tort claim.” Judge Victor Stabile, in a lengthy dissent, strongly disagreed with the majority, based on the precedential history in Pennsylvania of recognizing a distinction between breach of contract and tort claims. A petition for allowance of appeal in *Swatt* was denied by the Pennsylvania Supreme Court. The petition for allowance of appeal in *Poteat* is pending.

While the *Poteat* petition for allowance of appeal remains pending, in a recent federal court opinion, U.S. District Court Judge Kai Scott for the Eastern District of Pennsylvania denied a motion for reconsideration asking the court to reconsider its prior dismissal of a breach of contract claim on the basis of the gist of the action doctrine. See *Perirx v. Harras Bloom*

& *Archer*, Civil No. 24-2601 (E.D. Pa. April 30, 2026). The motion sought reconsideration after the Pennsylvania Superior Court decisions in *Swatt* and *Poteat*. Notwithstanding *Swatt* and *Poteat*, Scott found that the Pennsylvania Supreme Court decision in *Bruno* controls the district court's analysis, and under *Bruno* the gist of the action doctrine can apply to bar breach of contract claims and to permit negligence claims in legal malpractice cases. The motion for reconsideration was denied.

As the defense and plaintiffs bars alike reel from the whiplash of these decisions, all await an opinion that will provide clarity on the application of the gist of the action doctrine in Pennsylvania. The question of when and how the gist of the action doctrine applies to professional liability claims in Pennsylvania, and whether a breach of contract claim may be asserted in any legal malpractice action where there is a contract, remains open. Perhaps the Pennsylvania Supreme Court will accept the *Poteat* appeal and settle the issue once and for all.



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