

67641-5

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NO. 676415

COURT OF APPEALS STATE OF WASHINGTON
AT DIVISION I

TAMMY BECK, as personal representative of the Estate of Claud Goll,

Appellant,

v.

DARREN E. GRAFE and JANE DOE GRAFE, and the marital
community composed thereof,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Respondent Darren E. Grafe, an attorney at the law office of David H. Middleton & Associates, represented Claud Goll in a breach-of-contract claim brought after he failed to complete a Real Estate Purchase and Sale Agreement (REPSA) that he entered into with Nancy Chrisp in 2001. Following his breach, Ms. Chrisp sued, seeking either to enforce the sale, or to hold him accountable for the entirety of damages she sustained after her house sat vacant for many months. In his defense, Mr. Grafe argued that Mr. Goll had substantially complied with RCW 64.50.005, the earnest-money-forfeiture statute, limiting her damages to the \$2,000.00 held in escrow. Though available to him, he and his attorney chose not to file a third-party complaint against his realtor Prudential Northwest Realty (Prudential) and its agents because it would have undermined this defense.

After approximately two years representing Mr. Goll, Mr. Grafe filed a notice of withdrawal and substitution of counsel with the owner and sole shareholder of the firm, David Middleton. At that point, Mr. Goll and his daughter Tammy Beck both knew of the defense in place and both knew that Mr. Goll had not brought an available third-party complaint. Ultimately, Mr. Goll settled the case out of court.

As representative of her father's estate, Ms. Beck sued Mr. Grafe for legal malpractice for failing to bring this third-party action. The trial court dismissed her case on summary judgment, properly recognizing that Ms. Beck's legal theory was not supportable.

A *prima facie* legal malpractice claim unambiguously requires that, first and foremost, an attorney-client relationship exist at the time of the alleged wrongdoing. After this threshold showing of proof, the plaintiff must then demonstrate the existence of the remaining elements of the claim. If it is clear as a matter of law that one of those elements is not met, the lawsuit has no basis to go forward to a jury and must be dismissed. Under the facts of this case, the legal representation by Mr. Grafe ended three months prior to trial, and approximately **a year and a half prior** to the statute of limitations running on the party they claim could not be sued due to Mr. Grafe's alleged errors. As a matter of law, no claim of legal malpractice existed against Mr. Grafe.

First, in the absence of controlling legal precedent, Mr. Grafe reasonably argued that the substantial-compliance doctrine applied to RCW 64.50.005. Second, even assuming that Mr. Grafe's representation fell below the standard of care, his errors did not proximately cause injury to Mr. Goll as a matter of law. His representation ended three months before Mr. Goll's trial and approximately **a year and a half** before the

statute of limitations expired on the available third-party complaint against Prudential. In that time, Mr. Goll could have pursued this action with either Mr. Middleton or other counsel. Further, there is no proof that Mr. Grafe's supposedly waiting too long, and too close to trial to add Prudential, precluded Mr. Middleton from doing so. Only the trial judge in that litigation could have made that decision. Whether that trial judge would have granted a motion to amend and add a third-party claim against Prudential is unequivocally one at law, so Ms. Beck's expert's opinion on proximate cause is immaterial.

Therefore, the superior court's decision granting summary judgment on this question was proper and should be affirmed. A legal expert cannot opine to this question and the submission of Mr. Gordon's declaration is immaterial to the questions of proximate cause. Without proximate cause, there is no case for legal malpractice against Mr. Grafe to be submitted to a jury. The superior court's granting of summary judgment based on the above should be affirmed.

II. ASSIGNMENTS OF ERROR

Respondent Mr. Grafe assigns no error to the superior court's decision to dismiss on summary judgment the legal-malpractice action against him.

III. ISSUES PRESENTED FOR REVIEW

Mr. Grafe disagrees with Appellant Tammy Beck's statements of the Issues Pertaining to Assignments of Error. Her appeal presents a single issue of law, that is, whether she can establish the elements of legal malpractice. A properly stated issue is as follows:

Whether the superior court properly dismissed Ms. Beck's legal-malpractice action on summary judgment, where:

1. Mr. Grafe pursued a reasonable defense on Mr. Goll's behalf, arguing that the substantial-compliance doctrine applied to RCW 64.50.005, which was fully disclosed to Mr. Goll, as was the fact that the doctrine had not previously been applied to actions involving that statute; and

2. Ms. Beck has failed to present any genuine issue of material fact to support the element of proximate cause, which the superior court judge properly decided she could not prove as a matter of law.

IV. STATEMENT OF THE CASE

A. Mr. Goll withdrew from a real estate purchase shortly before closing, and the seller sued him for breach of contract.

In August 2001, Mr. Goll and Ms. Chrisp executed a REPSA in which he agreed to purchase her home in King County. CP 56-70. Prudential acted as Mr. Goll's real estate broker in the transaction and held

his \$2,000.00 in earnest money in escrow for the sale. *Id.* Based on his difficulty obtaining financing, Mr. Goll instructed his agent at Prudential days before closing to withdraw from the transaction and demanded a return of his earnest money. CP 90. Ms. Chrisp's home was vacant for some months following Mr. Goll's withdraw. CP 52-55. Shortly after this transaction fell through, in August 2001, Mr. Goll retained Darren Grafe, an attorney at the law offices of David H. Middleton & Associates, P.S. CP 35.

On October 29, 2001, Ms. Chrisp filed suit against Mr. Goll, seeking specific performance of the real estate contract or in the alternative, for damages associated with Mr. Goll's withdraw. *Id.* Ms. Chrisp sued both Mr. Goll and his lender Veterans Mortgage for its role in the transaction. *Id.* Prudential was never named as a party or third-party defendant in the suit. *Id.*

B. Although Mr. Goll's subsequent counsel was successful at trial, this court reversed and remanded to the trial court.

Mr. Grafe pursued the defense that Mr. Goll had substantially complied with the earnest-money-forfeiture statute, RCW 64.50.005. CP 187-91. That version of the statute required both parties to initial a safe-harbor clause, which limited Ms. Chrisp's damages to the earnest money held in escrow. *Id.* At that time, no Washington appellate court had

analyzed whether the substantial-compliance doctrine applied to RCW 64.50.005. *Id.* The crux of Mr. Grafe's defense was that Mr. Goll's substantial compliance in initialing the safe-harbor clause limited any damages to the \$2,000.00 in escrow and precluded the common law remedies that Ms. Chrisp sought. *Id.* Mr. Goll knew this when Mr. Grafe represented him. CP 84-85. Mr. Grafe deposed, and used as witnesses in the underlying suit agents from Prudential to support the position that Mr. Goll substantially complied with the statute and could not be liable for any amount over \$2,000. *Id.*

In May 2003, Mr. Grafe left his former firm and notified his clients of his departure. CP 39. Mr. Middleton took over Mr. Goll's case and took it to trial in August 2003. *Id.* Mr. Middleton did not move to amend Mr. Goll's answer to add a third-party claim against Prudential. At trial, the superior court agreed that the substantial compliance doctrine limited Ms. Chrisp to the \$2,000 earnest money held in escrow. CP 158-60.

Ms. Chrisp appealed this decision. CP 187-91. This court reversed, holding that the substantial-compliance doctrine did not apply to RCW 64.50.005 and that Ms. Chrisp was not limited in her common law remedies. *Id.* This court also denied Mr. Goll's motion for reconsideration, and the Washington Supreme Court denied his petition for review. *Id.* Following remand to the superior court, Mr. Middleton

continued to represent Mr. Goll until Mr. Middleton died on June 13, 2008. CP 72. The parties later settled out of court. CP 87-88.

C. Ms. Beck claims that Mr. Grafe's failure to bring an action against Prudential constituted legal malpractice.

On August 6, 2010, Ms. Beck filed this action on behalf of her father's estate. CP 1-5. She claims that he settled with Ms. Chrisp only because he could no longer sue Prudential or its agents and because the statute of limitations had expired. *Id.* Ms. Beck claims that she was present at many of the meetings between her father and Mr. Grafe and alleges that Mr. Grafe told them several times that he would file a third-party complaint against Prudential based on its agents permitting him to rely on the improperly-initialed safe-harbor clause. CP 79-88.

Ms. Beck's legal malpractice action is premised on the argument that the statute of limitations for any claim against Prudential expired during Mr. Grafe's representation. CP 1-5. This is factually incorrect. Even accepting her calculation regarding the relevant dates, the statute of limitations for claims against Prudential expired in October 2004, approximately **one year and five months after Mr. Grafe formally withdrew from the case** and Mr. Middleton assumed full representation of Mr. Goll. *See* Brief of Appellant at 25; *see also* CP 227. Ms. Beck further disclosed in discovery that she had many conversations with

Mr. Middleton about suing Prudential in the year between Mr. Grafe leaving his firm and the statute of limitations running in 2004. CP 79-88.

D. Summary of Underlying Case Timeline:

- **July 4, 2001:** Mr. Goll and Ms. Chrisp signed the REPSA. CP 56-70.
- **July 19, 2001:** Mr. Goll rescinded this agreement with Ms. Chrisp. CP 90.
- **August 2001:** After Ms. Chrisp notified Mr. Goll that she would file suit, he sought legal counsel from David Middleton & Associates and Mr. Grafe. CP 35.
- **October 29, 2001:** Ms. Chrisp filed the underlying complaint for specific performance of the REPSA or alternately for damages against Mr. Goll. CP 52-55.
- **November 2, 2001:** Mr. Grafe stopped all work on the file based on Mr. Goll's failure to pay his legal fees. CP 37. Mr. Grafe informed Mr. Goll that Prudential was not added as a third-party defendant and that the statute of limitations gave limited time to file a third-party action against that entity. *Id.*
- **May 27, 2003:** Mr. Grafe notified Mr. Goll that he was leaving the office of David Middleton & Associates and informed him that the file would be reassigned to Mr. Middleton. CP 39.

- **June 5, 2003:** Mr. Grafe filed notice of withdrawal and substitution of Mr. Middleton as counsel in King County Superior Court. CP 41-42.
- **August 2003:** Ms. Chrisp's case against Mr. Goll went to trial, where the judge ruled on a motion in limine that the substantial compliance doctrine applied to REPSA and Ms. Chrisp was limited to the \$2,000 earnest money. CP 158-60.
- **August 2004:** Assuming that Ms. Beck's dates are accurate for purposes of argument, the statute of limitations would have expired on any potential lawsuit against Prudential. *See* Brief of Appellant at 25; CP 233.
- **June 13, 2008:** Mr. Middleton died, and his law office withdrew from representing Mr. Goll. CP 72.
- **August 5, 2010:** Mr. Goll's estate filed a complaint against Mr. Grafe for negligence, professional malpractice, and breach of contract for the failure to preserve a claim against Prudential in the underlying action. CP 1-5.

E. The superior court dismissed Ms. Beck's legal-malpractice suit for failure to prove proximate cause or breach of duty.

On February 11, 2011, Mr. Grafe filed a motion for summary judgment seeking dismissal of all claims against him CP 14-31. He

argued that Ms. Beck was unable to prove proximate cause as a matter of law because (1) he no longer represented Mr. Goll when the statute of limitations expired against Prudential; (2) Mr. Grafe did not breach any legal duty owed to Mr. Goll; and (3) Mr. Middleton was responsible for the legal file after Mr. Grafe withdrew as counsel and was an independent intervening cause cutting off any liability as to prior counsel. CP 22.

In response, Ms. Beck sought a CR 56(f) continuance in order to retain an expert on Mr. Grafe's standard of care, as well as the element of proximate cause. CP 91; RP 14-15. Alternatively, she argued that expert testimony was not required to establish a breach of the standard of care for an attorney due to Mr. Grafe's lack of diligence in failing to sue Prudential. *Id.*

In reply, Mr. Grafe argued that no expert declaration in favor of Ms. Beck's claim would be relevant because the issues before the court were purely legal and no potential facts could salvage her claim. CP 200. Most notably, even if Mr. Grafe erred by failing to sue Prudential, he pointed out that Mr. Goll still **had over a year to bring suit before the statute of limitations on his claim expired,** . CP 200. Even if there was factual evidence that the standard of care required him to sue Prudential, his tactical decision, with the knowledge of his clients, to argue that the

substantial-compliance doctrine applied to RCW 64.50.005 was not malpractice. CP 201-02.

On March 11, 2011, Mr. Grafe's summary judgment motion was heard before the Honorable Judge Hollis Hill. RP 1. At the hearing, Ms. Beck's counsel conceded that she was not arguing the statute of limitations on Prudential ran at any time before three years after the REPSA was signed. RP 15. Both parties knew that Prudential had been deposed and was involved in Ms. Chrisp's litigation against Mr. Goll. RP 17. Further, Ms. Beck stated in discovery that she and her father knew Mr. Grafe's trial strategy and that Mr. Middleton chose not to add Prudential as a party to the litigation when he took over representation. CP 87. Nor did Mr. Middleton ever file suit against Prudential. RP 17. Finally, during oral argument, Ms. Beck's counsel conceded that no legal reason precluded her from suing Prudential within the three-year statute of limitations. RP 19-20.

Counsel for Ms. Beck requested a continuance to obtain an expert to opine on Mr. Grafe's standard of care as well as the element of proximate cause. RP 14-15. The superior court granted her motion for continuance, allowing her time to retain and submit an expert declaration before the court re-evaluated Mr. Grafe's summary judgment motion. RP 34-35.

Mr. Grafe filed a motion for reconsideration, arguing that when only legal issues are before the court, any potential expert testimony in favor of her claim is irrelevant. CP 209-10. Mr. Grafe pointed out that the specific issues before the court were (1) whether a court would have allowed Mr. Middleton to bring a third-party complaint against Prudential after Mr. Grafe's withdrawal, and (2) whether a court would have consolidated the case with a separate suit against Prudential. CP 209-18.

Ms. Beck responded by submitting the declaration by an expert, Randolph Gordon. CP 219. In his declaration, Mr. Gordon opined that a multitude of factual questions and alternative courses of action may have given Mr. Goll a "better" result had they been used. CP 238, 241-42.

In reply, Mr. Grafe argued that the court should disregard Mr. Gordon's declaration because the legal questions before the court should properly be answered by the superior court judge and not a jury. CP 313-17. On June 27, 2011, the superior court agreed granting reconsideration and dismissing Ms. Beck's case. CP 318-19. She also filed a motion for reconsideration, which the trial court denied. CP 340-41.

V. SUMMARY OF ARGUMENT

The superior court's June 27, 2011 Order Granting Defendants' Motion for Summary Judgment should be affirmed because: (1)

Mr. Grafe did not breach his duty of care to Mr. Goll by pursuing a legally-substantiated defense in a new area of law; (2) Mr. Grafe's allegedly negligent acts occurred after he withdrew from representing Mr. Goll, precluding Ms. Beck as a matter of law from proving genuine issues of material fact as to proximate causation; (3) whether Mr. Grafe preserved an action against Prudential is a legal question for which Mr. Gordon's expert declaration is irrelevant; and (4) as subsequent counsel, Mr. Middleton was an independent cause cutting off any liability for Mr. Grafe.

VI. ARGUMENT

A. **The standard of review here is de novo, and the record supports the dismissal as a matter of law.**

This court engages in the same inquiry as the superior court when reviewing a summary judgment order. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c). However, “[a] superior court’s decision will be affirmed on appeal if it is sustainable on any theory within the pleadings and the proof.” Tegland, 2A Wash. Prac., Rules Practice RAP 2.5 (6th ed. 2010); *see also Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (2007).

The record on review clearly substantiates the superior court's ruling and corresponding order that, as a matter of law, Ms. Beck did not present sufficient facts to establish a prima facie case of legal malpractice. Specifically, Mr. Grafe did not breach his duty to Mr. Goll when the harm claimed of – losing a cause of action against Prudential – did not occur for over a year and a half after Mr. Grafe's representation. Further, even accepting Ms. Beck's position that there were material facts as to whether Mr. Grafe breached his legal duty, she cannot prove proximate cause, and any expert testimony on a legal question for the court is immaterial.

B. As a matter of law, Ms. Beck cannot show evidence that Mr. Grafe breached a duty to the client that proximately causes damages.

To prove a claim of legal malpractice, a plaintiff must show: (a) the existence of an attorney-client relationship; (b) the existence of a duty of care on the part of the lawyer; (c) breach of that duty; and (d) that the negligence of the lawyer must have been a proximate cause of the damage to the client. *Sherry v. Diercks*, 29 Wn. App. 433, 437, 628 P.2d 1336, *rev. denied*, 96 Wn.2d 1003 (1981). To defeat summary judgment of dismissal, the non-moving party is required to show an issue of material fact as to each element. *See, e.g., Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992); *Craig v. Wash. Trust Bank*, 94 Wn. App. 820, 824, 976 P.2d 126 (1999).

The threshold inquiry in a legal-malpractice action is whether an attorney-client relationship existed at the time of the attorney's allegedly negligent act or omission. *See, e.g., Belli v. Shaw*, 98 Wn.2d 569, 577, 657 P.2d 315 (1983); *Lockhart v. Greive*, 66 Wn. App. 735, 741, 834 P.2d 64 (1992). Here, there is no dispute that Mr. Grafe's representation of Mr. Goll ceased before his alleged negligence in this matter. CP 39. Ms. Beck conceded this fact at oral argument below. RP 19-20.

The only remaining questions are whether Mr. Grafe committed legal malpractice by failing to preserve a suit against Prudential and whether such supposed malpractice proximately caused any legally cognizable injury to Mr. Goll. For the following reasons, Ms. Beck failed to make the requisite showing on those elements as a matter of law.

C. Mr. Grafe did not breach his duty of care to Mr. Goll in arguing that the substantial-compliance doctrine applied to RCW 64.50.005.

Throughout this litigation, Ms. Beck's sole theory of liability against Mr. Grafe has been as follows:

Mr. Grafe breached his standard of care in making that decision (not adding Prudential), in direct conflict with the instructions of his client, and also breached the standard of care in failing to inform Mr. Goll of the need to file a separate lawsuit because of that unilateral, secretive decision.

CP 310.

This argument fails legally and factually. First, Mr. Grafe's defense of Mr. Goll was reasonable in an unsettled area of law, and cannot form the basis of a legal-malpractice suit for the reasons below. Second, Ms. Beck unequivocally stated that both she and her father knew from the outset of representation that no suit had been filed against Prudential. CP 82-87. During Mr. Grafe's representation, they discussed this fact as well as the reasons for not suing Prudential. *Id.* More importantly, there was adequate time following Mr. Grafe's withdrawal for subsequent counsel to take an alternative course of action, or for Mr. Goll to pursue alternate counsel if they so desired or did not agree with the rationale of their attorney; legally, this precluded Ms. Beck from meeting the proximate-cause element of her claim. *See Lockhart*, 66 Wn. App. at 741.

In order to meet the applicable standard of care, an attorney must exercise the degree of care, skill, diligence and knowledge commonly possessed by a reasonable, careful, and prudent lawyer. *See, e.g., Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). The standard of care for an attorney is what is reasonable under the circumstances of the particular case:

The duty of competence, like that for diligence, **does not make the lawyer a guarantor of a successful outcome in the representation.** It does not expose the lawyer to liability to a client for acting only within the scope of the representation or following the client's instructions. It does

not require a lawyer, in a situation involving the exercise of professional judgment, to employ the same means or select the same options as would other competent lawyers in the many situations in which competent lawyers reasonably exercise professional judgment in different ways. The duty also does not require “average” performance, which would imply that the less skillful part of the profession would automatically be committing malpractice. **The duty is one of reasonableness in the circumstances.**

Restatement (Third) of the Law, The Law Governing Lawyers, § 52, comment b. (emphasis added); *see also Hansen*, 14 Wn. App. at 88 (attorney is not negligent when exercising judgment in a matter of doubtful construction).

Washington courts have long held that a party cannot base a legal-malpractice claim solely on an expert’s opinion that he or she would have conducted litigation in an uncertain and unsettled legal area differently. *See Halvorsen v. Ferguson*, 46 Wn. App. 708, 718, 735 P.2d 675 (1986). In *Halverson*, the court specifically resolved this issue, concluding that an expert opining that he would have conducted litigation in an uncertain and unsettled legal area differently **cannot as a matter of law** constitute the basis for a legal-malpractice claim. *Id.* To take this action to trial, Ms. Beck would have to prove, among other missing elements, that her father would have had a better result if Mr. Grafe had sued Prudential during his representation. This determination is one for the court. *Id.*

It is for the superior court judge, and that judge alone, to determine whether a lawyer erred in his or her tactical decision not to bring in a third-party defendant such as Prudential because the judge in the underlying lawsuit would have ruled on that motion had Mr. Middleton attempted to do so after Mr. Grafe's withdrawal. *Id.* Expert witnesses, as a matter of law, cannot opine as to whether an attorney erred under these circumstances. *Id.* at 713.

Similarly, in *Halvorson*, the court stated where an attorney has an informed, legally substantiated defense, there can be no malpractice. *See id.* The court in that case stated that the conduct of an attorney in citing virtually all pertinent decisions on apportionment, as the legal theory presented in that action, in his brief in a dissolution proceeding in an attempt to obtain a community interest in the increase in value of a corporation owned by her client's husband, served to establish an exercise of an informed judgment on the part of attorney. *Id.* But even if it did not, it was not a basis on which to impose liability for a breach of an attorney's standard of care in the absence of evidence of proximate cause between such breach and the client's claimed injuries. *Id.* at 718.

As *Chrisp v. Goll* was the first case of its kind analyzing whether the substantial-compliance doctrine applied to the earnest-money-forfeiture statute, an expert's speculation as to what the proper trial tactic

would be is irrelevant and contradictory to established law. An attorney's strategic choices, even if ultimately unsuccessful for the client, are not malpractice. *See id.* Mr. Grafe chose to argue that his client substantially complied with the statute, which was reasonable under the circumstances. Mr. Grafe repeatedly informed Ms. Beck and her father of the course of the defense and that Prudential would not be added, explaining why he believed it better not to add them. CP 82-87. Specifically, Mr. Grafe was pursuing a defense that there was substantial compliance and that no damages beyond the \$2,000 earnest money were permissible; to also argue Prudential's negligence would have necessarily undermined this defense. CP 187-91. Further, Mr. Grafe advised Mr. Goll in a letter early in the representation what a statute of limitations was, and that it would apply to any claims against Prudential if he were to pursue them in the future. CP 37. Mr. Grafe also explained that Mr. Goll "may have" claims against Prudential. *Id.* Contrary to Ms. Beck's argument, researching potential claims and drafting correspondence, memorandums, and motions on potential legal theories that do not come to fruition are not proper grounds for a legal-malpractice claim.

The decision not to sue Prudential, with the express knowledge of Mr. Goll, was not a breach of the standard of care, irrespective of the fact that Mr. Middleton as successor counsel or Mr. Goll himself, could have

done what he is claiming Mr. Grafe failed to do at any time for over a year and a half after Mr. Grafe withdrew. Allegations of “mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice. This is particularly true when the error involves an uncertain, unsettled or debatable propositions of law.” *Halvorsen*, 46 Wn. App. at 717. Based on what Ms. Beck is claiming Mr. Grafe failed to do, nothing Mr. Gordon opines to can change the law.

Mr. Gordon’s declaration simply restates Ms. Beck’s argument that Mr. Grafe should have done something else in the course of his representation and in preparation for trial. CP 219-47. These speculative assertions as to what might have or could have worked for Mr. Goll in a court of law, especially in light of the unsettled area of law they were dealing with, is legally irrelevant. *Id.* Mr. Grafe’s client and daughter were patently aware of what was going on in his case: “Each and every time that Plaintiff Beck and Goll met or conversed with Grafe, they brought up the topic of suing the real estate brokerage firms.” CP 87. This is not a case where clients were not aware of the strategy of their counsel, or where counsel was taking action without the consent of the client. *Id.* Ms. Beck and Mr. Goll concede that they knew the strategy of their attorney, therefore if they wanted to sue Prudential without the acceptance of this strategy by their attorney, they could have sought new

counsel with the more than year and a half timeframe before the statute of limitations they were also informed of ran. *Id.*

D. Ms. Beck failed to present admissible and material facts supporting the element of proximate cause.

Ms. Beck's sole basis for the legal-malpractice claim in the underlying litigation was Mr. Grafe's supposed failure to preserve a negligence claim against Prudential Realty. *See* Brief of Appellant at 1. If this court agrees, as the superior court did (CP 318-19), that she failed to present sufficient evidence demonstrating that any supposed negligence by Mr. Grafe proximately caused any injury, then the summary judgment dismissal must be affirmed.

To prove causation, a plaintiff must show that but for the alleged malpractice, the plaintiff probably would have obtained a better result. *Daugert v. Pappas*, 104 Wn.2d 254, 263, 704 P.2d 600 (1985). Indeed, a plaintiff cannot maintain a *prima facie* legal-malpractice claim by merely showing that the attorney was negligent; plaintiff must affirmatively demonstrate that such negligence was a proximate cause of an injury. *See Halvorsen*, 46 Wn. App. at 719.

While proximate cause in a legal-malpractice case may present a question of fact to be determined by a jury, *see Lavigne v. Chase*, 112 Wn. App. 677, 683, 50 P.3d 306 (2002), courts dismiss such actions on

summary judgment when the plaintiff does not produce sufficient proof of proximate causation. *See Griswold v. Kilpatrick*, 107 Wn. App. 757, 758, 27 P.3d 246 (2001) (plaintiff produced insufficient proof that, but for the delay in prosecuting the case, the claim would have settled for a larger sum). Further, as with all negligence actions, when reasonable minds could not differ on the issue, proximate cause is properly left as a question of law for the court. *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006).

If a defendant meets his or her initial burden in summary judgment in showing that there was no genuine issue of material fact regarding the issue of proximate cause, the burden then shifts to the non-moving party to demonstrate a genuine issue of material fact. *See Halvorsen*, 46 Wn. App. at 721. The non-moving party may not rely on mere speculation or argumentative assertions that unresolved factual matters remain. *Id.*

Even under Ms. Beck's theory below and on appeal, and assuming that Mr. Grafe was negligent in not suing Prudential while he represented Mr. Goll, which he was not, her theory as to proximate causation fails. The trial strategy to not add Prudential while Mr. Grafe was representing Mr. Goll did not proximately cause damage to Mr. Goll and Ms. Beck because "but for" Mr. Grafe's legal representation Mr. Goll would have not lost the ability to sue Prudential. *See Paradise Orchards Gen. P'ship*

v. Fearing, 122 Wn. App. 507, 514, 94 P.3d 372 (2004) (“cause in fact refers to the ‘but for’ consequences of the act, that is, the immediate connection between an act and an injury”) (citations omitted).

Specifically, Mr. Goll and Ms. Beck had considerable time to bring suit against Prudential following Mr. Grafe’s withdrawal. Mr. Middleton and his clients with alternative counsel could have brought suit against Prudential at any time following the trial court’s decision, before appeal, or any time before October 2004 (accepting the date on which Ms. Beck’s expert, Mr. Gordon, opines that the statute would have run). CP 233. The appellate court would have had the opportunity to consolidate that separate action with the trial court decision in *Chrisp v. Goll*. How a trial judge would have decided a motion to add Prudential as a third-party, or a consolidation effort after the trial if a separate action would have been brought are all questions of law. As recognized at the summary judgment hearing, there are no disputes regarding the facts of this case. RP 35. The parties agree about the timeline of events in this case, and the decision as to whether Mr. Grafe’s representation proximately caused damages was one for the court as a matter of law. Because of this, a continuance for the Ms. Beck to find an expert was improper and unnecessary; ultimately, the superior court properly agreed. CP 318-19.

Mr. Grafe left Mr. Middleton's law firm on May 27, 2003, and Mr. Middleton immediately took over representation of Mr. Goll. CP 39. Mr. Goll and Ms. Beck were specifically aware that Prudential had not been sued when Mr. Middleton was substituted as counsel for their defense, as evidenced by their interrogatory answers in this present matter. CP 75-88. Mr. Goll had over a year and a half to bring suit against Prudential either through the representation of Mr. Middleton or other independent counsel. CP 244. Ms. Beck chose not to add Mr. Middleton's estate as a party to this lawsuit and now seek damages solely against his former associate, Mr. Grafe, for failure to add additional parties when the firm had sufficient time to sue Prudential during the statute-of-limitations period. *Id.*

Goll and his daughter, Ms. Beck knew on August 6, 2001, that Mr. Grafe did not intend on suing Prudential. CP 84. Even assuming the truth of what Ms. Beck asserts now, that both Mr. Goll and she insisted that Mr. Grafe sue Prudential on their behalf, they had multiple courses of action they could have taken to eliminate the harm they now seek to place on Mr. Grafe. They could have filed a separate action against Prudential. They could have gotten new counsel. They could have asked Mr. Middleton to do so after Mr. Grafe left the firm. Each of these alternative courses of action that could have been pursued for over a year

after Mr. Grafe withdrew from Mr. Goll's representation negate any finding of proximate cause.

1. Ms. Beck's expert's opinions provided only inadmissible speculation and improper legal conclusions, and could not raise a genuine issue of material fact as to proximate causation.

What a judge would have done in a particular situation is a legal question for the court. *See Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584, 594, 999 P.2d 42 (2000). Ms. Beck's retention of an expert stating that Mr. Grafe breached the standard of care is irrelevant when her sole issue on appeal is a legal question to be decided by a trial judge. The judge in the superior court properly decided, ruled, and dismissed the action. CP 318-19.

"A court cannot consider inadmissible evidence when ruling on a motion for summary judgment." *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986); *see* CR 56(e). For the reasons set forth more fully below, Mr. Gordon's testimony regarding the standard of care and proximate cause is inadmissible and irrelevant. The superior court properly disregarded Mr. Gordon's declaration when ruling on and granting Mr. Grafe's motion for summary judgment. CP 318-19.

The court addressed similar issues of when it is a judge's role to decide legal questions in fulfilling the element of proximate cause in legal-

malpractice actions in *Brust v. Newton*, 70 Wn. App. 286, 290, 852 P.2d 1092 (1993), *rev. denied*, 123 Wn.2d 1010, 869 P.2d 1085 (1994). When assessing a judge's role, Division II explained, "While questions of negligence and proximate causation are usually questions for the jury, the unique characteristics of a legal-malpractice action may, under some circumstances, make that general rule inapplicable." *Id.* (citations omitted). "[T]he line between questions for the judge and those for the jury in legal malpractice actions has generally been drawn between questions of law and questions of fact." *Id.* at 290-91.

Mr. Gordon's opinions flatly contravene settled Washington law regarding an attorney's duty to his clients. An attorney has a duty to exercise "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." *Cook, Flanagan & Berst v. Clausing*, 73 Wn.2d 393, 395, 438 P.2d 865 (1968); *see also Halvorsen*, 46 Wn. App. at 712. The determination of whether an attorney fell below the standard of care regarding a legal matter is a question of law. *Id.* at 717.

Even a witness who is otherwise qualified to testify as an expert cannot opine on a legal issue because such opinions are the sole province of the trial judge. *See Orion Corp. v. State*, 103 Wn.2d 441, 469-70, 693 P.2d 1396 (1985). Accordingly, it is proper for the trial court to disregard

evidentiary materials that contain conclusions of law. *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1201 (1992); see *Orion*, 103 Wn.2d at 461, 469-70.

Here, Mr. Middleton could have but did not attempt to add Prudential as a third-party defendant. Nor did any party try to bring a separate suit against Prudential or ask the court to determine whether the actions would have been consolidated. Similarly, the *Halvorsen* court, in finding the absence of proximate cause, stated that no one asked the trial judge in the underlying matter whether he would have decided the matter differently as stated by the non-moving party's experts. 46 Wn. App. at 712-13. The court stated that **relying solely on the expert affidavits and the mere conjecture by these experts cannot raise a genuine issue of material fact** and that summary judgment was proper. *Id.* (citations omitted). The initial question as to whether an attorney fell below the standard of care in his or her tactical decisions is solely for the court. For example, as stated in *Halvorsen*, only a judge can determine whether an affidavit required for an appeal was defective or if the appeal would have been successful. *Id.* Since the determination of whether an attorney erred raises a question of law, **the opinions of expert witnesses on the issue are irrelevant.** *Id.* at 713.

Experts cannot offer opinions regarding what a judge would have done in the underlying litigation. *Nielson*, 100 Wn. App. at 594. Ms. Beck ignores this black-letter rule of law and has failed to cite any contrary authority. Mr. Gordon could not opine as to whether the trial judge would have granted a potential request by Mr. Middleton to add Prudential as a third-party defendant before trial. Any other portion of his speculative testimony is improper. This opinion testimony is improper for a standard-of-care expert and instead is properly left to the court to decide as a matter of law.

Mr. Gordon's speculation as to whether the trial court would have allowed Mr. Middleton to add Prudential to the underlying lawsuit before trial had he attempted to do so was not admissible, and therefore Mr. Gordon's opinions on this issue are irrelevant and inadmissible. *See Smith*, 135 Wn. App. at 865. Similarly, what a superior court judge or appellate court would have chosen to do with a motion to consolidate a separate suit brought against Prudential is a legal question. Mr. Gordon's declaration provides the following speculative conclusions: "Failure to do so (add Prudential) gave rise to a procedural hurdle, rendering subsequent remedial measures by later counsel **more difficult**." CP 238 (emphasis added). Mr. Gordon goes on to conclude, erroneously and with no factual or legal support that a claim against Prudential was lost at the time

Mr. Grafe withdrew in May of 2003. CP 239. Yet, in the same declaration stated that the statute of limitations against Prudential ran at the latest on **October 29, 2004**. CP 233. These two assertions are inherently inconsistent, and cannot both be true. Mr. Gordon further opined that Mr. Goll “lost” his potential claim against Prudential. CP 219-247. Again, this speculative legal conclusion places Mr. Gordon in the place of the underlying trial judge who would have properly been the one person authorized to make the decision to join Prudential after Mr. Grafe’s withdrawal and before trial if Mr. Middleton would have requested.

In *Brust*, the court outlined this legal absolute: “[b]ecause the questions of whether an appellate court would have granted review and, if so, whether its ruling would have been favorable to the appellant necessarily involved analysis of the relevant law and the Rules of Appellate Procedure,” the proximate cause issue in this case requires special expertise and is therefore a question of law for the court. 70 Wn. App. at 291-92 (citing *Daugert*, 104 Wn.2d at 258-59).

Mr. Gordon’s declaration, in summary, simply opined that if Mr. Grafe would have added Prudential as third party, a more favorable result might have occurred. CP 219-247. He also made the factually unsupportable statement that Mr. Goll and Ms. Beck did not know Prudential was not a party to her suit. *Id.* Speculation as to whether a

different result would have been obtained is not sufficient for a malpractice claim to survive summary dismissal. *See Smith*, 135 Wn. App. at 865.

2. Mr. Middleton was an independent cause of the alleged damages, cutting off proximate causation on the part of previous counsel, Mr. Grafe.

Assuming for the purposes of argument that Mr. Grafe's failure to sue Prudential fell below the standard of care Ms. Beck nevertheless failed to provide sufficient adequate evidence to avoid summary judgment on proximate cause because successor counsel could have remedied Mr. Grafe's alleged negligence after he withdrew. A withdrawn attorney is absolved of continuing liability where there remains time for successor counsel to remedy his alleged negligence. *See Diamond v. Sokol*, 468 F. Supp. 2d 626, 642 (S.D.N.Y. 2006).¹ Indeed, an intervening cause breaks the chain of causation where the intervening event came into active operation after the alleged negligence of the defendant ceased. *Maltman v. Sauer*, 84 Wn.2d 975, 982, 530 P.2d 254 (1975). As provided in the Restatement:

If a new, independent act breaks the chain of causation, the original negligence is no longer a proximate cause of the injury and the defendant is not liable for the injury. *Riojas* [*v. Grant County Pub. Util. Dist.*, 117 Wn. App. 694, 697, 72 P.3d 1093 (2003), *review denied*, 151 Wn.2d 1006, 87

¹ For the convenience of the court, Respondent Grafe provides as Appendices 1-4 to this brief, the four out of state cases cited and relied upon herein.

P.3d 1184 (2004)]. A superseding cause is an occurrence that intervenes so as to relieve the actor from liability for harm to another for which his antecedent negligence is a substantial cause. Restatement (Second) of Torts § 440.

[I]f in looking back from the harm and tracing the sequence of events by which it was produced, it is found that a superseding cause has operated, there is no need of determining whether the actor's antecedent conduct was or was not a substantial factor in bringing about the harm.

Restatement (Second) of Torts § 440, cmt. b.

A plaintiff's injury cannot be the result of an intervening cause which came into active operation after the alleged negligence of the defendant has ceased. *Maltman*, 84 Wn.2d at 982. If the act is an intervening, sufficient cause, it will break the causal connection between the defendant's original negligence and the plaintiff's injury. *Id.*

When controlling case law is unclear, Washington courts look to persuasive authority from other jurisdictions. *Petcu v. State*, 121 Wn. App. 36, 66, 86 P.3d 1234 (2004). Consistent with Washington's interpretation of the rule, other jurisdictions have held that the negligence of successor counsel is the proximate cause of a client's damage. For example, in *Land v. Greenwood*, 133 Ill. App. 3d 537, 478 N.E.2d 1203 (Ill. App. Ct. 1985), the court held that the conduct of successor counsel was an intervening cause of damage regardless of the possible negligence of the original attorney. The "successor counsel had the duty to preserve

his client's cause of action. It was viable when he received it; it was not when he got through with it.” *Land*, 478 N.E.2d at 1205.

Similarly, in *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 773 N.E.2d 1192, 1193-94 (Ill. App. Ct. 2002), the court found that successor counsel, and not the client’s original counsel, was liable for the damage to the client that occurred under successor counsel’s watch: “There is no question that plaintiff’s cause of action was viable, as a matter of law, well after defendants were discharged and successor counsel was retained. It therefore follows that defendants’ alleged negligence did not cause plaintiff’s damages, the loss of a viable cause of action.” *Mitchell*, 773 N.E.2d at 1195.

In *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169, 806 N.E.2d 1188, 1192 (Ill. App. Ct. 2004), the plaintiff sought to commence a personal injury action against the Chicago Transit Authority (the CTA). The plaintiff’s attorney timely served the CTA with a statutorily required notice of a claim for personal injuries. The notice, however, incorrectly listed the date on which the plaintiff’s injury occurred (it was off by one day). *Cedeno*, 806 N.E.2d at 1193. The plaintiff later discharged the original attorney and retained a successor attorney to prosecute her personal injury action. *Id.* at 1189-90. Ultimately, the circuit court granted summary judgment in the personal injury action in favor of the

CTA because the notice was defective, and the plaintiff failed to appeal the dismissal. *Id.* The plaintiff then sued the original attorney for malpractice. *Id.* Upon review, the court found that, as a matter of law, the plaintiff's personal injury action remained actionable despite the defective initial notice and, therefore, the circuit court erred in granting summary judgment in favor of the CTA. *Id.* at 1193-94. Consequently, the court held that the original attorney's negligence was not the proximate cause of the plaintiff's legal injury. *Id.*

[D]efendants cannot be held accountable for the court's acceptance of a legally unsound basis for granting summary judgment against plaintiff. Where her claim remained actionable after defendants' discharge, and the circuit court's misapplication of the law served as an intervening cause, it cannot be said that plaintiff's damages proximately resulted from defendants' [negligent conduct].

Id. at 1194.

As the reasoning in these cases establishes, Mr. Middleton's representation and failure to bring suit for over a year before the statute of limitations finally expired was an intervening and superseding cause breaking any chain of causation between Mr. Grafe's representation and the alleged damages claimed. As successor counsel, Mr. Middleton had a duty to investigate the merits of and potential strategic benefit of a claim against Prudential upon taking over the case from Mr. Grafe. *Id.*

VII. CONCLUSION

Although Mr. Goll's well-founded defense strategy ultimately failed, he continued to have the ability to sue Prudential long after Mr. Grafe withdrew as his counsel. Legal malpractice claims weigh the interests of both attorney and client to hold the attorney accountable only for the damage their actions or inactions proximately cause. Mr. Grafe represented Mr. Goll for approximately two years, weighed options, pursued courses of action and defenses, before withdrawing as counsel. Ms. Beck's sole assignment of error and accusation of malpractice is Mr. Grafe's failing to preserve a suit against Prudential. This fails for a multitude of reasons.

First, the failure to sue Prudential during Mr. Grafe's tenure as Mr. Goll's attorney did not constitute malpractice when this defense was well reasoned in a new area of law, and with the knowledge of his clients. Second, even if assuming Ms. Beck's calculation of the statute of limitations' expiration date, no suit against Prudential was lost for nearly a year and a half after Mr. Grafe's representation, completely negating a proximate cause. Third, what a court would have done with a motion to amend and add Prudential or a third-party suit after Grafe's withdrawal are all legal questions, rendering Mr. Gordon's declaration irrelevant. Finally, in a legal-malpractice action, Mr. Middleton, as subsequent counsel, cut

off Mr. Grafe's alleged liability because a substantial amount of time remained to cure any of the alleged defects in representation. Accordingly, the superior court's dismissal should be affirmed.

Respectfully submitted this 11th day of January, 2012.

LEE SMART, P.S., INC.

By: Amy F. Miller
Joel E. Wright, WSBA No. 8625
Amy F. Miller, WSBA No. 40620
Attorneys for Respondents Darren Grafe
and "Jane Doe" Grafe

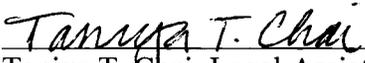
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on January 11, 2012, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

Ms. Jean B. Jorgensen
Singleton & Jorgensen, Inc., P.S.
337 Park Ave. N.
Renton, WA 98057

Dated this 11th day of January, 2012 at Seattle, Washington.



Taniya T. Chai, Legal Assistant

APPENDIX 1

468 F.Supp.2d 626
United States District Court,
S.D. New York.

Rachel DIAMOND, Plaintiff,

v.

David J. SOKOL; Dr. David J. Sokol,
Attorneys at Law; Marc R. Leffler,
and Leffler & Kates, LLP, Defendants.

No. 05 Civ. 4993(GEL). | Dec. 27, 2006.

Synopsis

Background: Client sued two attorneys who successively represented her in state-court dental malpractice action and attorneys' law firms, asserting claims for legal malpractice and breach of contract. Parties cross-moved for summary judgment.

Holdings: The District Court, Lynch, J., held that:

- 1 factual issues precluded summary judgment for attorney who tried state action on negligence element of legal malpractice claim;
- 2 factual issues precluded summary judgment for attorney who tried state action on proximate cause and damages elements of legal malpractice claim;
- 3 client's damages had to be capped at amount of insurance coverage remaining available in state action;
- 4 claim for breach of contract had to be dismissed as duplicative of legal malpractice claim;
- 5 factual issues precluded summary judgment for client's first attorney on proximate cause element of legal malpractice claim; and
- 6 factual issues precluded summary judgment for client on legal malpractice claim.

Ordered accordingly.

West Headnotes (26)

1 Pleading

☞ Nature and office of bill of particulars

Under New York law, a "bill of particulars" is neither a pleading nor a discovery device; rather, it is an amplification of a pleading.

2 Federal Courts

☞ Torts in general; indemnity and contribution
State law governed in legal malpractice case brought under district court's diversity jurisdiction.

3 Attorney and Client

☞ Elements of malpractice or negligence action in general

Under New York law, plaintiff in legal malpractice action must prove each of claim's essential elements: (1) that defendant was negligent, (2) that defendant's negligence was the proximate cause of the claimed injury, and (3) that plaintiff suffered actual and ascertainable damages.

4 Attorney and Client

☞ Skill and care required

To satisfy negligence element of legal malpractice claim under New York law, plaintiff must show that defendant's conduct fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession.

5 Attorney and Client

☞ Acts and omissions of attorney in general

Mere error of judgment or selection of one among several reasonable courses of action does not constitute "legal malpractice" under New York law.

6 Attorney and Client

☞ Conduct of litigation

Generally, under New York law, attorney may only be held liable for legal malpractice for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action.

7 Attorney and Client

— Trial and judgment

Under New York law, reasonableness of attorney's conduct may be determined as a matter of law in legal malpractice action.

8 Federal Civil Procedure

— Tort cases in general

Under New York law, defendant in legal malpractice case is entitled to summary judgment dismissing case when the record reveals no way that a reasonable factfinder could find defendant to have been negligent.

1 Cases that cite this headnote

9 Federal Civil Procedure

— Tort cases in general

Causation element of legal malpractice claim under New York law, often described as “but for” aspect of claim, requires plaintiff opposing summary judgment to show evidence from which a reasonable factfinder could conclude that it is more probable that the complained-of event was caused by defendant than that it was not.

10 Attorney and Client

— Conduct of litigation

Ultimately, under New York law, factfinder in legal malpractice action must, in effect, put herself in the shoes of the reasonable factfinder in the underlying action and determine whether the result there would have been different absent the alleged malpractice, inasmuch as New York law requires that plaintiff be able to meet the “case within the case” requirement, demonstrating that “but for” attorney's conduct, plaintiff would have prevailed in underlying matter.

11 Federal Civil Procedure

— Tort cases in general

Damages element of legal malpractice claim under New York law requires plaintiff, at the summary judgment stage, to show the possibility

of proving that an actual, identifiable loss resulted from defendant's negligence.

12 Attorney and Client

— Elements of malpractice or negligence action in general

Mere speculation of a loss resulting from attorney's alleged omissions is insufficient to sustain a prima facie case sounding in legal malpractice under New York law.

13 Attorney and Client

— Elements of malpractice or negligence action in general

Under New York law, damages claimed in a legal malpractice action must be actual and ascertainable, and not too speculative and incapable of being proven with any reasonable certainty.

14 Attorney and Client

— Trial and judgment

Under New York law, whether legal malpractice has been committed is normally a factual determination to be made by the jury.

15 Attorney and Client

— Conduct of litigation

Under New York law, fact that client, in underlying action, signed bill of particulars which did not list an item of damages did not preclude her attorneys' liability for legal malpractice if attorneys failed to advise client of the significance of the omission, failed to take steps that a reasonable lawyer would have taken to cure the omission at a later point, or unreasonably advised client about which damages to assert.

16 Federal Civil Procedure

— Tort cases in general

Material issues of fact existed as to whether attorney's failure to pursue client's potential

claims for medical expenses and lost earnings in state-court dental malpractice action resulted from reasonable strategy of focusing on claims for pain and suffering and whether claims were forfeited by attorney's failure to take steps to avoid preclusion of evidence or by his neglect to offer relevant evidence, precluding summary judgment for attorney on negligence element of client's legal malpractice claim under New York law.

17 Evidence

↳ Matters directly in issue

Expert may not be used to offer opinion as to the legal standards which expert believes should have governed a party's conduct.

2 Cases that cite this headnote

18 Pleading

↳ Amendment of bill

Under New York law, mere exposure of defendant to greater liability does not constitute prejudice supporting denial of leave to amend bill of particulars after note of issue has been filed.

19 Federal Civil Procedure

↳ Tort cases in general

Material issues of fact existed as to whether attorney's failure to seek lost income damages and medical expenses in client's state-court dental malpractice action was proximate cause of client's failure to obtain greater award in that action, including whether state trial court would have granted motion to amend allowing client to seek such relief, and whether jury in state action would have awarded additional damages, precluding summary judgment for attorney on proximate cause and damages elements of client's legal malpractice claim under New York law.

1 Cases that cite this headnote

20 Attorney and Client

↳ Conduct of litigation

Under New York law, uncertainty as to whether trial court would have granted a motion to amend pleading in an action underlying legal malpractice claim, had such motion been timely made, does not render malpractice plaintiff's damages speculative, in that legal malpractice standard specifically contemplates inquiry into what might have been.

21 Attorney and Client

↳ Damages and costs

Damages that client could recover in her legal malpractice action against attorneys and law firms that had represented her in state-court dental malpractice case, which was based on counsel's alleged negligent failure to seek additional damages in state case, had to be capped at \$740,000, as the amount remaining under dentist's malpractice insurance coverage following state verdict of \$260,000 in client's favor, given that state action was governed by order limiting client's recovery to insurance amount, which permitted case to proceed against deceased dentist's estate, and that client did not allege that her state counsel were negligent in advising her to acquiesce in award limit or in failing to unearth additional sources for recovery.

22 Attorney and Client

↳ Pleading and evidence

Client's claim for breach of contract against attorneys who had represented her in state-court dental malpractice action, and their respective law firms, was duplicative of client's legal malpractice claim and thus had to be dismissed under New York law, given that client did not allege that attorneys promised her particular result, rather than simply undertake to litigate her case.

3 Cases that cite this headnote

23 Federal Civil Procedure

↳ Alternate, Hypothetical and Inconsistent Claims

Under New York law, claim for breach of contract is properly dismissed as redundant of a

malpractice claim when contract claim does not rest upon a promise of a particular or assured result, but rather upon defendant's alleged breach of professional standards.

4 Cases that cite this headnote

24 Federal Civil Procedure

↳ Tort cases in general

Material issues of fact existed as to whether attorney who first represented client in state-court action for dental malpractice was proximate cause of client's failure to receive awards for lost earnings and medical expenses in state action, including whether, in the period between attorney's withdrawal and state trial, there was time for successor counsel to cure harmful effect from attorney's alleged negligent representation and whether attorney's conduct caused client's harm, precluding summary judgment for attorney on proximate cause element of client's legal malpractice claim under New York law.

25 Pleading

↳ Amendment of bill

Pleading

↳ Further or additional bill

Generally, under New York law, as applied to damages, a supplemental bill updates a bill of particulars by adding additional expenses for injuries already disclosed, while an amended bill introduces new injuries.

26 Federal Civil Procedure

↳ Tort cases in general

Material issues of fact existed as to whether client's claims for additional damages for lost earnings would have been rejected by jury in state-court dental malpractice action, and as to whether professed strategy of client's counsel, in state action, of concentrating on client's claim for pain and suffering, without distraction of weaker or smaller items of damages, was reasonable strategy, precluding summary judgment for client on her legal malpractice claim, under New York law, against law firms and attorneys who had

represented in state action, which alleged that client could have recovered additional damages in that case.

Attorneys and Law Firms

*629 Jack A. Gordon and Brett G. Canna, Kent, Beatty & Gordon, LLP, New York, NY, for Plaintiff.

A. Michael Furman and Andrew R. Jones, Kaufman Borgeest & Ryan, LLP, New York, NY, for Defendants David J. Sokol and Dr. David J. Sokol, Attorneys at Law.

William T. McCaffery, L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City, NY, for Defendants Marc R. Leffler and Leffler & Kates, LLP.

Opinion

OPINION AND ORDER

LYNCH, District Judge.

Plaintiff Rachel Diamond sued her dentist in state court for malpractice after a botched tooth extraction and prevailed, winning a verdict for \$260,000 for pain and suffering. In this diversity case, she accuses two successive lawyers who represented her in that matter of legal malpractice and breach of contract, seeking \$3 million for lost earnings and medical expense damages she alleges she would have won but for defendants' negligent failure to seek such damages.

Defendants, attorney David J. Sokol and the firm of Dr. David J. Sokol, Attorneys at Law (collectively, "Sokol"), and attorney Marc R. Leffler and Leffler & Kates, LLP, (collectively, "Leffler"), now move for summary judgment. Plaintiff in effect cross-moves for summary judgment. For the reasons below, the motions of Sokol and Leffler are granted in part, but for the most part denied. Plaintiff's cross-motion is denied.

BACKGROUND

The facts described in this section are undisputed, unless otherwise noted.

This action arises out of defendants' representation of plaintiff in a New York state dental malpractice case against one Ira Gothelf. On or about March 15, 2000, plaintiff retained

the firm with which defendant Leffler was then associated to represent her in that action. A complaint was filed in state court alleging that Gothelf's *630 negligence in treating plaintiff for problems involving one of her teeth had caused her "personal injury, pain, suffering and other attendant damage" and also "humiliation, embarrassment, and an inability to pursue her normal, social activities and interests." (Complaint in *Diamond v. Gothelf*, No. 105914/00, Sup.Ct., County of New York (2000), Sokol Ex. B, at 2212–13.) It further charged that "plaintiff has and will continue to expend diverse sums of money for the care and treatment of said injuries." (*Id.* at 2213.)

1 Counsel for Gothelf's malpractice insurer served a demand for a verified bill of particulars,¹ requesting, among other information, the "total amounts claimed as special damages for ... physician's/dentist's services[,] ... loss of earnings[,] ... [and] any other items of special damage." (Sokol Ex. C, at 1537.) On July 5, 2000, Leffler's firm responded with a verified bill of particulars ("the July 2000 bill"), sworn to and signed by Diamond. The July 2000 bill stated, among other information, that "[n]o claim is made for lost income," and that amounts for special damages would be claimed at a later date. (Sokol Ex. C, at 1580.) In a letter from Leffler's firm seeking plaintiff's verification, Diamond had been advised to review the enclosed draft of the July 2000 bill for accuracy and make "any changes and/or corrections." (Sokol Ex. C, at 1349.)

When deposed by Gothelf's counsel in December 2000, Diamond testified, in part, "It has been very difficult between the surgeries and being ill and all the pain to have a full-time job. I have been freelancing and ... everybody that I work with knows that I have been sick and they are hesitant to want to hire me on a full-time basis because they are afraid I will be sick again." (Sokol Ex. D, at 1129.) An updated verified bill of particulars ("the May 2001 bill"), claiming \$3314 for plaintiff's medical expenses, was served with supporting receipts and authorizations on May 31, 2001.² (Sokol Ex. G.) The May 2001 bill also stated, "In addition to those injuries previously claimed the plaintiff claims the following injuries: TMJ syndrome [and] inability to obtain health insurance." (*Id.* at 2565.) It does not mention loss of income.

At some point Leffler left plaintiff's first retained law firm to form his own firm, Leffler & Kates. Diamond signed a retainer with Leffler & Kates on August 31, 2001, and a notice of substitution of counsel was filed on October 9, 2001. In the interim, on September 26, 2001, Leffler's former firm filed a note of issue and certificate of readiness on plaintiff's behalf,

alerting the court that the case was ready for trial.³ On July 18, 2002, the state court *631 adjourned trial for further discovery and ordered plaintiff to file another note of issue by April 21, 2003. (Sokol Ex. J.)

Another change of counsel took place in late 2002. In a letter dated October 21, 2002, Sokol and Leffler together informed Diamond that "[i]t has become necessary for Dr. Marc Leffler to leave the firm and to take a position elsewhere, where his management of your case will not be feasible. However, Dr. David Sokol is willing and able ... to continue to prosecute your case to its conclusion."⁴ (Sokol Ex. L.) Diamond responded to Sokol in November 2002 that "I have decided that I would like you [to] handle my case going forward." (Sokol Ex. M.)

Sokol arranged for economist Richard Ruth to produce a report on Diamond's economic losses. He asked Diamond to furnish various information for that purpose, and she submitted a five-page account of her employment difficulties and her expectations of future medical needs. In a September 13, 2003, letter to Sokol, Ruth indicated that he had reviewed Diamond's information and suggested consulting a vocational expert, with whose analysis "I can then provide past and future lost earning capacity in gross value and the future gross value of medical needs." (Sokol Ex. Q, at 1217.) Ruth's letter noted that "the Verified Bill of Particulars says that no claim is made for lost income." (*Id.*) In a November 10, 2003, letter to Sokol, Diamond wrote that she "agreed" that it was "not financially appropriate to hire a vocational expert at this time." (Sokol Ex. R.)

In the summer of 2004, the case was finally readied for trial. At some point during the litigation it was discovered that Gothelf had died. On July 8, 2004, the court issued various orders permitting the action to proceed against Gothelf's estate, including an order limiting recovery to \$1 million, the value of Gothelf's liability insurance policy. (Sokol Exs. U, V.) Although Sokol had filed a notice of readiness for trial in January 2003, declaring that all pleadings and bills of particulars had been served and that discovery was complete (Sokol Ex. O), on July 15, 2004, he served the defendant estate with a copy of a report Ruth had produced, dated the same day, estimating Diamond's past and future earnings losses at either \$411,860 using one method or \$1,958,975 using another. The estimates apparently relied on Diamond's own hypotheses about her employment losses, which she had provided to Ruth on Sokol's request. (*See* Sokol Ex. X.)

The four-day dental malpractice trial began on August 3, 2004. On the first day, the judge granted defendant estate's motion in limine to exclude all evidence of loss of income, based on the objection that "the bill of particulars ... states no claims made for such lost income, and we were just served with [Ruth's report] within the last week or ten days and that is when it was first raised." (Sokol Ex. AA, at 2401-02.) The court noted, "Under the circumstances, ... notice [of the expert report] itself does not cure prejudice with respect to defendant's inability to properly conduct discovery on this issue historically." (*Id.* at 2403.)

*632 At the end of the trial, the jury returned a plaintiff's verdict for \$260,000, of which \$100,000 was awarded for past pain and suffering and \$160,00 for future pain and suffering. Both parties appealed the resulting judgment, but the appeals were abandoned a year after the trial for a settlement of \$250,000.

On May 25, 2005, Diamond filed the instant action against Sokol and Leffler. Defendants move for summary judgment; plaintiff opposes and cross-moves for judgment in her favor.

DISCUSSION

I. Legal Standards

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A "genuine issue of material fact" exists if the evidence is such that a reasonable jury could find in favor of the non-moving party. *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 69 (2d Cir.2001). The moving party bears the burden of establishing the absence of any genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding a summary judgment motion, the court must "resolve all ambiguities and draw all reasonable references in the light most favorable to the party opposing the motion." *Cifarelli v. Vill. Of Babylon*, 93 F.3d 47, 51 (2d Cir.1996). The court is not to make any credibility assessments or weigh the evidence at this stage. *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir.1996).

The nonmoving party, however, may not rely on "conclusory allegations or unsubstantiated speculation." *Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir.1998). The nonmoving

party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), and must make a "showing sufficient to establish the existence of [every] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

2 3 The substantive law applied to the case determines which facts are material for purposes of deciding a summary judgment motion. *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. In this diversity action, New York's law of legal malpractice applies.⁵ See, e.g., *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 n. 2 (2d Cir.2006) (deeming New York law applicable to claim of legal malpractice regardless of basis of federal jurisdiction, because the claim has its source in state law) (citation omitted). In New York, the plaintiff must prove each of the claim's essential elements: (1) that defendant was negligent; (2) that defendant's negligence was the proximate cause of the claimed injury; and (3) that plaintiff suffered "actual and ascertainable" damages. *Rubens v. Mason*, 387 F.3d 183, 189 (2d Cir.2004), citing *McCoy v. Feinman*, 99 N.Y.2d 295, 301-02, 755 N.Y.S.2d 693, 785 N.E.2d 714 (2002); see also *Achtman*, 464 F.3d at 337-38 (stating New York malpractice elements).⁶

*633 4 5 6 7 8 To satisfy the first element, a plaintiff must show that defendant's conduct "fell below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession." *Bernstein v. Oppenheim & Co.*, 160 A.D.2d 428, 554 N.Y.S.2d 487, 489 (1st Dep't 1990) (citations omitted). Mere error of judgment or "selection of one among several reasonable courses of action does not constitute malpractice." *Rosner v. Paley*, 65 N.Y.2d 736, 738, 492 N.Y.S.2d 13, 481 N.E.2d 553 (1985); see also *Bernstein*, 554 N.Y.S.2d at 489 ("an attorney ... is not liable ... where the proper course is open to reasonable doubt"). Generally, an attorney may only be held liable for "ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action." *Bernstein*, 554 N.Y.S.2d at 487. Reasonableness of a defendant attorney's conduct may be determined as a matter of law. *Rosner*, 65 N.Y.2d at 738, 492 N.Y.S.2d 13, 481 N.E.2d 553; see also *Bernstein*, 554 N.Y.S.2d at 490 ("some of plaintiff's allegations concerning defendant's conduct of the litigation ... are simply dissatisfaction with strategic choices, and thus ... do not support a malpractice claim as a matter of law"). In other words, defendant is entitled to summary

judgment dismissing the case, where the record reveals no way a reasonable factfinder could find defendant to have been negligent.

9 10 The second element, causation, is often described as the “but for” aspect of the claim, and requires a plaintiff opposing summary judgment to show evidence from which a reasonable factfinder could conclude that “it is more probable that the [complained of] event was caused by the defendant than that it was not.” *Rubens*, 387 F.3d at 189 (citation omitted). Ultimately, the factfinder in a legal malpractice action must, in effect, put herself in the shoes of the reasonable factfinder in the underlying suit and determine if the result there would have been different absent the alleged malpractice. *Id.* at 190 (citation omitted). Specifically, New York law requires that the plaintiff be able to meet the “‘case within the case’ requirement, demonstrating that ‘but for’ the attorney’s conduct the client would have prevailed in the underlying matter.” *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 780 N.Y.S.2d 593, 596 (1st Dep’t 2004). Here, to have “prevailed” means plaintiff would have won a greater verdict but for her counsel’s failure properly to advance certain claims.⁷

11 12 13 The third, or damages, element requires plaintiff at the summary judgment stage to show the possibility of proving that an actual, identifiable loss resulted from defendant’s negligence. “Mere speculation of a loss resulting from an attorney’s alleged omissions is insufficient to sustain a prima facie case sounding *634 in legal malpractice.” *Luniewski v. Zeitlin*, 188 A.D.2d 642, 591 N.Y.S.2d 524 (2d Dep’t 1992). Damages claimed in a legal malpractice action must be “actual and ascertainable,” not “too speculative and incapable of being proven with any reasonable certainty.” *Zarin v. Reid & Priest*, 184 A.D.2d 385, 585 N.Y.S.2d 379, 382 (1st Dep’t 1992).

14 While the standard for proving legal malpractice is a challenging one, plaintiff need not prove her case at this stage. She need only show what is required to survive any summary judgment motion, which is that a reasonable jury *could* find in her favor on the existing record. “[W]hether malpractice has been committed is normally a factual determination to be made by the jury.” *Corley v. Miller*, 133 A.D.2d 732, 520 N.Y.S.2d 21, 23 (2d Dep’t 1987). Once the plaintiff has shown sufficient evidence that a reasonable factfinder, drawing all inferences in her favor, could find the required elements, she is entitled to proceed to trial, no matter how strong or weak her case may seem to the Court.

II. Plaintiff’s Malpractice Claims

The essence of Diamond’s malpractice claim, as presented in response to defendants’ motions, is that defendants fell short of reasonable professional standards by failing properly to present her claims for medical expenses and lost earnings damages.

Various other claims arguably set forth in the complaint have largely been abandoned. The complaint accuses defendants of negligence for their failure to plead “all her damages arising out of the dental malpractice.” (Compl. ¶ 39(a).) Yet plaintiff’s submissions do not colorably support a claim that defendants neglected any claims other than those for lost income and medical expenses; by “all her damages,” the Court takes plaintiff to mean these particular categories of damages.⁸

Similarly, plaintiff’s response to the summary judgment motions does not attempt to support the complaint’s sweeping charges that defendants “failed properly to prepare for trial” and “failed properly to conduct the trial.” (*Id.* ¶¶ 39(f),(g).) Except with respect to the specific claims relating to medical expenses and lost earnings, these allegations are vague and conclusory, and plaintiff makes no effort to explain how such alleged shortcomings in counsel’s performance proximately caused any loss.

Accordingly, construed in the context of plaintiff’s full submissions, Diamond’s claim is that, but for defendants’ negligent failure fully to plead her lost income and medical expense claims and to seek these damages at all, Diamond would have secured ascertainably more than her \$260,000 verdict for pain and suffering. (*See id.* ¶¶ 39(b),(d),(e), 40.)

III. Sokol’s Summary Judgment Motion

A. Negligence

Sokol contends that Diamond is unable to meet any of the elements of the prima facie case against him. To begin with, he argues, as does Leffler, that plaintiff herself bears the full responsibility for the absence of any claims from her state case, as she verified bills of particular that did not include them. Sokol argues that a person is bound by signing a legal document, so long as he or she understands its content. (Sokol Mem. 14.) Yet most of the authorities cited for this proposition enforce the binding nature of signatures *635 on *contractual* agreements, such as settlements, not pleading-type documents. For example, in *Beattie v. Brown & Wood*, 243 A.D.2d 395, 663 N.Y.S.2d 199 (1st Dep’t 1997), the

plaintiff claimed not to have been advised by his attorney that a settlement agreement he signed withdrew his counterclaim. The court affirmed dismissal of the complaint, since the agreement revealed on its face what the client claimed he was not told; his claim was thus “flatly contradicted by documentary evidence.” *Id.* at 199. Even in that context, however, more potent authority has cautioned that a client may not be barred absolutely from maintaining a legal malpractice action, where she claims not to have read the contractual agreement she signed. In *Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300, 727 N.Y.S.2d 688, 751 N.E.2d 936 (2001), New York’s highest court reinstated a legal malpractice claim where plaintiffs claimed to have been misadvised by counsel about the contents of a revised settlement agreement they had signed without reading.

15 In any event, such cases are hardly apposite here. Diamond does not contend, like the plaintiffs in those cases, that she was unaware of the terms of an agreement she signed without reading. She implicitly acknowledges that she read and understood the contents of the bills of particulars, but complains that she learned only too late the prejudicial consequences of failing to amend them. (P. Dep., Sokol Ex. PP, 45:17–19, 169–170.) That legal risk appears nowhere on the face of the documents; nor do defendants profess that they explained the risk to Diamond at the times of her signing or that a reasonably skilled lawyer would not have. The fact that plaintiff signed a bill of particulars that did not list an item of damages does not preclude her attorneys’ liability if they failed to advise her of the significance of the omission, failed to take steps that a reasonable lawyer would have taken to cure the omission at a later point, or unreasonably advised her about which damages to assert.

16 Sokol further denies negligence by insisting that it was reasonable litigation strategy for him to abandon economic damages altogether and focus on pain and suffering. (Sokol Mem. 24–29.) He does not dispute that he never tried to amend the pleadings or bill of particulars to reflect claims for lost earnings or future medical expenses, or that he did not seek at trial those past medical expenses that had previously been disclosed and subjected to discovery. Rather, he essentially argues that it would have been pointless to take these steps, and that he reasonably pursued pain-and-suffering recovery in lieu of—rather than, in addition to—economic losses. The state trial transcript shows Sokol put on a strong case for pain and suffering damages. The jury responded to testimony of a root canal gone painfully wrong with an award of \$260,000. (See Sokol Ex. AA.) Yet the

record presents genuine issues of fact as to whether the failure to seek economic damages was a reasonable decision. Thus, while the record shows the value of the efforts Sokol did expend, it does not support summary judgment for those he did not.

Sokol argues, in effect, that Diamond’s claim for lost earnings was so weak that it could only have detracted from her more persuasive claims for pain and suffering, and that it was therefore not an unreasonable decision to forgo the claim. A reasonable factfinder could agree. Such a factfinder would also be entitled to conclude, however, that Sokol did not make any such decision, but rather that he attempted to develop and present evidence of lost earnings and was precluded from offering such *636 evidence because of his negligent failure to amend the bill of particulars. It is undisputed that, just days before the trial, Sokol served Ruth’s expert report on lost earnings damages on the defendant. The defendant then successfully moved to exclude such evidence.

17 Sokol insists that he served Ruth’s report merely to leverage an increased settlement offer, contending that Diamond’s lost earnings claims actually lacked merit and that he reasonably never intended to argue them at trial.⁹ (Sokol Mem. 26–27.) This argument undermines itself. A report too flimsy to be persuasive at trial could not plausibly be expected to generate a better settlement offer; conversely, if Sokol’s settlement ploy was a reasonable tactic that could have resulted in a more favorable result for Diamond, that gambit was effectively defeated by defendant’s successful motion to exclude the evidence. Either way, a jury could reasonably conclude that the failure to amend the bill of particulars worked to the disadvantage of Diamond.

Sokol’s submissions, including his experts’ opinions, contesting the merits of Diamond’s damages claims consist entirely of analyses performed for the purposes of this action.¹⁰ He offers nothing to establish that, at the time of his decision-making in her state case, he knew that Diamond’s economic claims were bogus and thus strategically avoided them. Regardless of when Sokol became associated with the case, he was required to familiarize himself with the record, and he therefore must have known that Diamond had been complaining since at least her December 2000 deposition about employment difficulties relating to her dental issues. In any event, Sokol has testified that he was aware of her employment difficulties no later than September 2003: “Rachel told me what her employment history was like [that she] had a lot of pain and wasn’t able to work regularly at a job without taking off because

of the pain.” (Sokol Dep., Sokol Ex. SS, 118:19–119:17.) In addition, the information Diamond provided to Ruth at Sokol's request, in about January 2003, recounted extensive concerns about securing an appropriate job and covering future medical costs. Finally, far from bolstering his argument of reasonable strategy, Sokol's own deposition testimony appears to suggest that he mistakenly believed economic and pain-and-suffering damages to be overlapping, *637 rather than distinct, categories of claims. (See Sokol Dep. at 129:8–24.)

18 Moreover, Sokol points to no evidence suggesting that he knew or considered that exclusion was a likely consequence of failing to amend the bill of particulars, knowledge that Diamond implicitly argues any reasonably skilled lawyer would have had. He does not dispute the testimony of Diamond's proffered legal practice expert, who correctly describes at least part of New York's procedural rules relating to the preservation of claims for trial. (See P.Ex. 1, at 5–7.) Plaintiff's expert accurately cites New York case law providing that while serving an amended bill of particulars after a note of issue has been filed requires leave of court, courts freely permit such amendments, and the court's discretionary decision whether to allow amendment will depend on factors including prejudice, undue delay, and unfair surprise. (*Id.*, citing *Abdelnabi v. New York City Transit Authority*, 273 A.D.2d 114, 709 N.Y.S.2d 548 (1st Dep't 2000)); see also *Romanello v. Jason*, 303 A.D.2d 670, 756 N.Y.S.2d 657 (2d Dep't 2003). Mere exposure of the defendant to greater liability does not constitute prejudice. *Abdelnabi*, 709 N.Y.S.2d at 549.

On the other hand, the longer a plaintiff delays in seeking leave to amend, the more likely it is that leave will be denied. See, e.g., *Larkin v. Diaz*, 257 A.D.2d 843, 685 N.Y.S.2d 300, 301 (3d Dep't 1999) (“It is axiomatic that when a party attempts to introduce evidence at trial which does not conform to the bill of particulars, the appropriate remedy is the preclusion of that evidence.”) (citation omitted). Thus, the leading New York practice commentary counsels plaintiffs' lawyers, with specific reference to lost earnings claims, of the importance of promptly moving for leave to amend:

[I]f plaintiffs in their bill of particulars fail to identify lost earnings ... then at trial they may well be required to move to amend their bill ... to include that item of damages.... [T]he motion may well be denied, thus precluding recovery.... Accordingly, parties should keep their bill of particulars in mind throughout the case and

amend it (or move to amend it) whenever some substantial new information responsive to the demand comes to light.

Davies, McKinney's Forms CPLR, References, § 4:346(f) (West, 2006).

Plaintiff's essential claim is that a reasonably skilled lawyer, knowing of the lost earnings information in Ruth's report, would have taken care to develop a proper foundation for admitting the evidence, by timely moving to amend the complaint or bill of particulars.¹¹ Sokol fails to establish that his last-minute service of lost-earnings evidence, without attempting to cure its likely inadmissibility, constituted reasonable strategy as a matter of law. Whether Sokol's explanation should prevail must therefore remain an issue for trial.¹²

***638** Sokol fares no better with respect to his failure to seek damages for plaintiff's medical expenses. Sokol admits that he never substantively considered Diamond's future medical expenses (Sokol Dep., 112:5–23), and thus it is difficult to credit his argument that he believed them to lack merit or otherwise to be insupportable.

As to Diamond's *existing* medical expenses, notwithstanding Sokol's plausible argument of deliberate strategy in not pursuing them (Sokol Mem. 23), summary judgment must also be denied. Existing medical expense claims appear properly to have been disclosed as of the May 2001 bill, but it seems Sokol never supplemented those amounts. Plaintiff implicitly submits that a reasonably competent lawyer would have done so. (See P.Ex. 1.) Diamond avers that she had incurred some \$30,000 of medical costs by the time of the trial. (See P. Aff. ¶ 45.) Diamond's existing medical expenses were easy enough to document, and it seems there would have been little risk that a jury would discredit them or reduce its overall damage award if confronted with a separate demand for actual out-of-pocket expenses. The record does not resolve whether Sokol unsuccessfully attempted to introduce evidence of additional expenses at trial or whether, if he did, such evidence was excluded for reasons—lack of authentication, unfair surprise—that the ordinary lawyer might have been expected to foresee and prevent.¹³ Sokol's insistence that the medical expenses were simply too piddling to present to a jury does not suffice to extinguish the issue of his reasonable performance, especially given plaintiff's contention that the actual amount was significant. His explanation is merely part of the information the reasonable factfinder will have to weigh in assessing his

compliance with the “reasonable skill” standard. *Bernstein*, 554 N.Y.S.2d at 489.

Whether Sokol's failure to pursue Diamond's potential claims for medical expenses and lost earnings was a reasonable strategy, calculated to maximize total recovery by focusing on the strongest and potentially largest claims of pain and suffering, or whether the claims were simply forfeited by Sokol's failure to take appropriate steps to avoid the preclusion of such evidence, or by his neglect to offer relevant evidence, are factual issues to be resolved by the jury at trial. Plaintiff may or may not be able to sustain her burden of persuasion at trial, but on the present record, it cannot be said as a matter of law that Sokol's representation was adequate.

B. Proximate Cause and Actual Damages

19 Sokol also denies that his failure properly to claim lost income damages could be found to be the proximate cause of Diamond's alleged deprivation.¹⁴ He argues, first, that it is “pure speculation” whether the state court would have granted leave to amend her claims. (Sokol *639 Mem. 3.) But he cites no rule absolutely precluding malpractice liability where a court's discretion is involved. Nor has he demonstrated it was sound practice for him to file a notice of readiness for trial several months before such notice was due and without fully disclosing Diamond's economic case, thereby reducing the likelihood that permission to amend would be granted.

20 In any event, the fact that no one can say for certain whether a judge would have granted a motion to amend, had such motion been timely made, does not render damages speculative. The legal malpractice standard specifically contemplates an inquiry into what *might* have been. That is the very nature of the “case within the case” assessment, whereby the reasonable factfinder is to determine whether plaintiff's projected better result—in this case, a bigger award, had her counsel advanced additional claims—would more likely than not have occurred. *Weil Gotshal*, 780 N.Y.S.2d at 596. It remains an issue for trial whether the factors courts typically consider in deciding an application to amend claims in these circumstances would have played out in Diamond's favor.

Even if he had successfully amended the claims, Sokol next argues, it is “speculative” whether the jury would have awarded Diamond any additional damages for lost wages, because she had damaged her credibility by previously verifying bills of particular lacking such a claim, and because the claim itself lacked merit. (Sokol Mem. 3.) These

arguments are for the jury. A reasonable factfinder might well conclude that its counterpart at the underlying trial would have rejected Diamond's lost earnings claims as exaggerated, or found her credibility questionable in light of the omission of those claims from the earlier verified bill of particulars. But it could also reach a different conclusion. Sokol fails to demonstrate that Ruth's \$400,000–to–\$2 million assessment of loss could not have been supported, particularly if he had successfully taken steps to forestall trial and reopen discovery. Just as there is no question that Diamond's credibility would have been an issue for the jury at the underlying trial had her claims been presented, it is equally an issue for the jury in this trial whether her claims would more likely than not have been successful.¹⁵

Finally, Sokol argues that “[i]t is speculative as to whether the addition of loss of income and loss of out-of-pocket medical expenses claims would have increased plaintiff's underlying verdict.” (Sokol Rep. Mem. 6.) In other words, he contends that Diamond has not established ascertainable damages, because, even if the evidence of lost earnings and medical expenses had been admitted and proven persuasive in their own terms, the jury might simply have reduced the pain and suffering award in an amount corresponding to these other proven damages. Once again, however, Sokol appears to confuse the inquiry at trial with the summary judgment standard. Plaintiff is not required to prove any particular amount in damages at this stage of the case; she is merely required to produce a showing upon which real damages resulting from malpractice could be ascertained. *See*, *640 *e.g.*, *Zarin*, 585 N.Y.S.2d at 382. Diamond has submitted ample material estimating the lost earnings and medical expense damages she claims she would have won but for defendants' alleged malpractice, and defendants have submitted counter-estimates. The exchange of papers more than establishes that the claimed damages are not only theoretically ascertainable, but are amenable to cold, hard calculation. The plausibility of Sokol's account of how a jury would likely have decide the case is an issue for trial.

C. Damages Cap

21 Sokol's argument that Diamond's damages must be capped at \$740,000—the remainder of the underlying defendant's \$1 million dental malpractice insurance cap, after subtracting the \$260,000 state verdict—is more persuasive. It is undisputed that the trial was governed by the trial court's July 8, 2004, order limiting recovery to the insurance amount, which permitted the case to proceed as against the deceased defendant's estate. Diamond attempts to dispute that she

authorized Sokol's decision not to oppose the motion resulting in that order. (P. Rule 56.1 Stmt. ¶ 26.) Yet the record contains her May 17, 2004, letter to Sokol, articulating her understanding of the rationale for agreeing to the cap—that the agreement would, *inter alia*, keep the insurance company in the case—and that letter does not remotely indicate any dissatisfaction with the arrangement. (Sokol Ex. T.)

In any event, Diamond's complaint in this legal malpractice action does not allege defendants' negligence in advising acquiescence in the award limit or in failing to unearth additional sources for recovery.¹⁶ Plaintiff points to no evidence suggesting that the strategy embodied in agreeing to the cap was a departure from reasonable professional performance and offers only conclusory and vague intimations that additional sources existed from which recovery could have been made.

Since Diamond could not have recovered more than \$1,000,000 in total damages at trial, and since she has offered no basis for concluding that the limit itself was the product of professional malpractice, as a matter of law any negligent failure on the part of counsel to seek additional damages cannot have cost her more than \$740,000.

D. Breach of Contract

22 23 Plaintiff's breach of contract claim must, as Sokol requests (Sokol Mem. 33), be dismissed as duplicative of her legal malpractice claim. Plaintiff alleges that defendants bore a contractual duty "to represent her in litigating her action for dental malpractice" and that they "breached said contract by failing to exercise the reasonable skill and knowledge commonly possessed by a member of the legal profession." (Compl.¶¶ 43, 44.) Yet a claim for breach of contract is properly dismissed as "redundant ... of a malpractice claim," where it does not "rest upon a promise of a particular or assured result," but rather upon defendant's alleged breach of professional standards. *Senise v. Mackasek, et al.*, 227 A.D.2d 184, 642 N.Y.S.2d 241, 242 (1st Dep't 1996). Diamond does not allege that defendants promised a particular result,¹⁷ rather than simply undertaking to litigate her case. Therefore, the *641 breach of contract claim is dismissed as duplicative of that for legal malpractice.

IV. Leffler's Motion for Summary Judgment

Diamond contends that Leffler was negligent in omitting items of damages from the July 2000 and May 2001 bills of particulars in the first place. Leffler seeks summary

judgment on the ground that plaintiff will not be able to establish proximate cause as against him. He argues that, even assuming he was negligent, he cannot be found liable as a matter of law, because he withdrew from representing plaintiff in about October 2002, and Sokol thereafter had time to cure any effects of Leffler's shortcomings.

Plaintiff characterizes as "disputed" whether Leffler may be deemed to have withdrawn from representing her by his joint letter with Sokol of October 21, 2002. (P. Rule 56.1 Stmt. Opp. Leffler ¶ 19.) Yet plaintiff does not deny receiving that letter, which is clear and unequivocal, and her only factual offering in opposition to a finding of withdrawal is her recollection that *Sokol*, during a meeting subsequent to the date of Leffler's withdrawal letter, led her to believe Leffler would remain available if needed. (See P. Opp. Leffler at 15.) Plaintiff submits nothing to show that *Leffler* ever intimated his continuing availability to her or that Sokol's purported representation caused her actually to rely on Leffler's availability in any material or even superficial way.¹⁸ On the contrary, Diamond in a November 7, 2002, letter addressing only Sokol, several weeks after the date of the joint letter announcing Leffler's withdrawal, expressed her wish to be represented by Sokol going forward. (See Sokol Ex. M.)

Diamond further argues that Leffler's withdrawal letter must be denied effect as a matter of law, because, as is undisputed, he failed to comply with New York rules for withdrawing as attorney of record. (P. Opp. Leffler, 11–15.) Yet the case law plaintiff cites does not establish a rule that withdrawal may only be accomplished in accordance with the rules set forth in N.Y.C.P.L.R. § 321(b).¹⁹ Rather, most of those decisions enforce the provision in order to protect the interests of *other* parties—adversaries or co-litigants—who would be affected adversely by any ambiguity as to a party's authorized representative. See, e.g., *Blondell v. Malone*, 91 A.D.2d 1201, 459 N.Y.S.2d 193, 194 (4th Dep't 1983) ("Until the attorney of record is removed by [CPLR § 321(b) procedure], as to *adverse parties*, his authority as attorney for his client continues") (emphasis added); *Moustakas v. Bouloukos*, 112 A.D.2d 981, 492 N.Y.S.2d 793 (2d Dep't 1985) (mere letter, without use of CPLR procedure, did not render withdrawal of one co-plaintiff's counsel effective as against another plaintiff, for purposes of *642 universal settlement agreement); *Hawkins v. Lenox Hill Hospital*, 138 A.D.2d 572, 526 N.Y.S.2d 153, (2d Dep't 1988) (affirming trial court's denial of client's motion to discharge attorneys and finding those attorneys' service of papers on client's

adversary, in the absence of a § 321(b) discharge, to have been authorized).

Here, there is no allegation that the underlying defendant misunderstood Sokol's takeover of the case or presumed Leffler to have continued his representation in any way, let alone in a way that affected Diamond as relevant to this legal malpractice action. Moreover, to the extent the courts have enforced formal substitution of counsel rules to protect the client's interest, as Diamond submits they have, lack of compliance with the rule has been treated as only one among a number of factors creating an issue as to actual withdrawal. See *Billis v. Leighton, Leighton & Leighton*, 7 A.D.3d 447, 776 N.Y.S.2d 792, 792 (1st Dep't 2004) (affirming denial of summary judgment in legal malpractice case, where issues of actual withdrawal of counsel remained, noting evidence that movant firm had informed client that purported successor counsel "work[ed] for" it and that "[b]oth of our legal firms are now jointly responsible for your representation"). Here, plaintiff has not alleged any actions by Leffler that would diminish the objective effect of his withdrawal letter, nor does she point to any evidence, or even allege, that Leffler's failure to follow § 321(b) procedure induced her to continue relying on him for legal representation.²⁰ Thus, there is no genuine issue of material fact as to Leffler's withdrawal from representing Diamond as of at the latest November 7, 2002, the date of Diamond's letter acknowledging his withdrawal.

24 Leffler correctly cites authority supporting the general principle that a withdrawn attorney is absolved of continuing liability where there remains time for successor counsel to remedy his negligence. (Leffler Mem. 14–16.) See, e.g., *Volpe v. Canfield*, 237 A.D.2d 282, 654 N.Y.S.2d 160 (2d Dep't 1997). This principle is merely another way to state that a lawyer must proximately have caused the client's claimed harm to be liable in malpractice. See *id.* at 161. However, Leffler fails to extinguish any issue of fact as to whether, in the period between his withdrawal and the state trial, there actually was time to cure any harmful effect from his allegedly negligent representation, or whether his conduct indeed caused the harm about which plaintiff complains.²¹

25 There is a genuine issue of fact as to whether Diamond would have been foreclosed at the point of Leffler's departure from being able to pursue lost earnings and future medical expenses by amending her claims. Leffler argues that, as of his withdrawal, plaintiff was still procedurally entitled to one amendment of her bill of *643 particular as of right.²² If this were so, it would negate any possible prejudicial impact

of his failure to assert the omitted items of damages, because Sokol would have had the ability to amend the bill on his own authority, something he clearly had time to do. However, Leffler's argument appears to be wrong and, at the least, leaves an issue of fact for trial. The May 2001 bill, which he submitted on behalf of Diamond, despite its bearing the caption heading, "Supplemental Bill," appears substantively to have amended her previous bill, as it adds a claim for "TMJ syndrome," apparently a new injury. Generally speaking, as applied to damages, a supplemental bill updates the bill of particulars by adding additional expenses for injuries already disclosed, while an amended bill introduces new injuries. As the practice commentaries advise:

[I]n personal injury actions, one must distinguish between an amended bill of particulars and a supplemental bill of particulars.... At any time at least 30 days before trial, a party may serve a supplemental bill as of course with respect to claims of continuing special damages and disabilities.... However, that supplemental bill may not allege a new cause of action or claim a new injury.

Davies, McKinney's Forms CPLR, References, § 4:346(e), (g), citing N.Y. C.P.L.R. § 3043(b). See also, e.g., *Fuentes v. City of New York*, 3 A.D.3d 549, 771 N.Y.S.2d 178 (2nd Dep't 2004) (self-labeled "supplemental" bill of particulars determined to be an amended bill of particulars, as it sought to add new injuries and new category of damages). That Leffler insists that "TMJ syndrome" is but an elaboration on previously claimed injuries, while plaintiff submits otherwise, merely creates an issue of fact for trial.

Further, as discussed above, while there is no doubt that the state court had the discretion to permit amendment of the bill of particulars at any point, it remains a question of fact whether the New York courts would likely have granted such permission in this case. Leffler has not submitted any dispositive authority showing that the factors considered by the courts in assessing such motions to amend, in the circumstances of this case, would certainly have resulted in permission if Sokol had sought it. In short, Leffler can no more assume that leave to amend would have been granted than Sokol can assume that it would have been denied. In any event, had Leffler included lost earnings in the bills of particulars he prepared, Sokol would not have needed to move to amend, and Diamond would not have been exposed to any risk of denial of leave to do so. A jury must determine whether either lawyer was negligent and if so, the proportion of responsibility borne by each.

Accordingly, Leffler's motion for summary judgment is denied to the extent that he may be found liable for his representation of Diamond prior to November 7, 2002.²³

V. Plaintiff's Cross-Motion for Summary Judgment

26 The Court declines plaintiff's invitation to render judgment for her sua *644 sponte (P. Mem.11), as the sole case plaintiff cites in support does not remotely militate such an outcome. The court in *Kenney v. Zimmerman*, 185 A.D.2d 690, 586 N.Y.S.2d 80 (4th Dep't 1992), affirmed summary judgment for the plaintiff in a legal malpractice action, where an initial jury verdict in the underlying personal injury case had been reversed—and a second trial ended in a verdict of no cause of action—specifically because plaintiff had been precluded from offering certain evidence by the failure of her counsel to claim and produce discovery relating to her an injury. In *Kenney*, there was clearly no way a reasonable factfinder could conclude that the defendant attorneys had not caused their client's loss. The verdicts there unequivocally established that the sole cause of plaintiff's deprivation was her attorneys' failures.

There is no such clarity in the instant record. While plaintiff has presented sufficient evidence to survive defendants' motion for summary judgment, abundant issues of fact preclude summary judgment in her favor. A reasonable jury could easily find that Diamond's claims for additional damages for lost earnings would have been rejected, and/or that defendants' professed strategy of concentrating on the largest and most potent claim—the claim for pain and suffering—without the distraction of weaker or smaller items of damages was entirely reasonable.

Accordingly, plaintiff's motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, the motions of Sokol and Leffler for summary judgment are granted as to the dismissal of the cause of action for breach of contract and as to the imposition of a cap of \$740,000 on damages, and in all other respects denied. Plaintiff's motion for summary judgment is denied.

SO ORDERED.

Footnotes

- 1 Under New York law, “[a] bill of particulars is neither a pleading nor a discovery device.... [I]t is an amplification of a pleading.” Mark Davies, *McKinney's Forms Civil Practice Law and Rules, References*, § 4:346(a) (citing N.Y. C.P.L.R. §§ 3011, 3012(a)) (West 2006); *see also Linker v. County of Westchester*, 214 A.D.2d 652, 625 N.Y.S.2d 289 (2d Dep't 1995) (“It is settled that a bill of particulars is intended to amplify the pleadings, limit the proof, and prevent surprise at trial.”). That such a document is verified signifies that “the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and that as to those matters he believes it to be true.” N.Y. C.P.L.R. § 3020(a) (McKinney's 1999).
- 2 Although the May 2001 bill bears the caption heading, “Supplemental Bill of Particulars” (Leffler Ex. Q), the proper characterization of this document remains disputed. The dispute is discussed *infra*, with respect to Leffler's summary judgment motion.
- 3 Diamond does not allege that Leffler had any knowledge of his former firm's plans to act, or that he failed to inform his former firm that he would continue to represent Diamond under the auspices of his new firm. The filing of a note of issue is material, because such filing affects a litigant's ability to amend her bill of particulars as of right under New York procedural law; once a case is noticed for trial, claims may only be amended by leave of the court. N.Y. C.P.L.R. § 3042(b).
- 4 Leffler and Sokol are apparently qualified dentists as well as lawyers, and thus are occasionally referred to in the record with the title “Doctor.”
- 5 Plaintiff's breach of contract claim will be dismissed as duplicative of her legal malpractice claim, for reasons discussed below.
- 6 New York's legal malpractice standard sometimes is worded differently, such that the “prongs” of the test are otherwise numbered; the necessary elements, however, are well established. *See, e.g., Rubens v. Mason*, 417 F.Supp.2d 262 (S.D.N.Y.2006) (granting defendants' motion for summary judgment on remand, because no reasonable jury could conclude that, but for the alleged breaches of duty, plaintiff would have prevailed) (“[A] plaintiff must establish: (1) a duty, (2) a breach of the duty, and (3) proof that actual damages were proximately caused by the breach of the duty.”) (citations and internal quotation marks omitted).
- 7 Diamond's complaint alleges that she “would have succeeded on the merits of the underlying Action ... but for Defendants' negligence.” (Compl.¶ 40.) For the sake of clarity, the Court notes the obvious, that plaintiff did succeed on the merits of the underlying case, having proved it sufficiently to win a verdict; plaintiff's argument is that her recovery would have been larger but for defendants' negligence.
- 8 Plaintiff has expressly withdrawn a claim for loss of hearing damages that the complaint alleged had not been not pursued in the underlying litigation. (*See Sokol Ex. OO.*)

- 9 Sokol offers the opinion of another attorney, John A. McPhilliamy, in support of this alleged strategy. Yet he submits no information sufficient to qualify McPhilliamy as an expert. McPhilliamy does not articulate a reasonable professional standard in his report, merely offering his own legal conclusions about the case. (See Sokol Ex. DD.) As Sokol himself points out with respect to plaintiff's proffered legal expert, "An expert may not be utilized to offer opinion as to the legal standards which *he believes* should have governed a party's conduct." *Russo v. Feder*, 301 A.D.2d 63, 750 N.Y.S.2d 277, 282 (1st Dep't 2002) (emphasis added). In that case, the supposed expert merely attested that he "would have done things differently, therefore the attorney being challenged was incompetent." (*Id.*) While the qualification of plaintiff's expert also remains questionable, her report at least elaborates on procedure and case law that, implicitly, a reasonably skilled lawyer in New York would have been expected to know and follow. (See P.Ex. I.) In any event, the qualifications and opinions of dueling experts are issues for trial; defendant cannot win summary judgment on the strength of a contested expert opinion.
- 10 Diamond also submits a number of recent documents purporting to show that her underlying economic claims were worth millions. This evidence, like Sokol's damages-related evidence, is properly left to be debated at trial. At this summary judgment stage, it is unnecessary to consider any evidence beyond Ruth's July 2004 report.
- 11 Plaintiff's submissions suggest other steps a reasonable lawyer might have been expected to take to be able to introduce this evidence, such as moving to adjourn the trial, reopen discovery, and build a foundation. Indeed, the record shows the state court had previously been amenable to adjournment. (See Sokol Ex. J.)
- 12 That plaintiff's theory survives summary judgment, of course, does not indicate that it is likely to prove persuasive. Diamond's claims that her entire career was derailed by her dental problems over a finite period of time are not self-evidently reasonable, and Diamond presents no expert testimony refuting Sokol's contention that presenting the claims would have detracted from the credibility of her case. Because the credibility of these claims is for the jury to decide, the Court must assume their truth, and on that assumption it could be inferred that it would be unreasonable for any competent lawyer to forgo such valuable claims. A trial jury may well find this theory less than persuasive.
- 13 While there is some allusion in the parties' papers to the state court's exclusion of medical expense evidence, the trial transcript does not clearly show that such exclusion in fact occurred. Diamond has testified to having a conversation with Sokol during the state trial, in which "I was upset that a lot of my medical records were not properly certified so they cannot be introduced.... Also [we] discussed the fact that I could not introduce medical bills which had been introduced to Dr. Sokol well before my trial." (P. Dep.169:5-170:19.)
- 14 His motion as to his prosecution of Diamond's medical-expense claims only argues the negligence element, addressed *supra*. But the following reasoning applies to that issue as well.
- 15 Sokol attempts to blame Diamond for the failure to develop adequate evidence of lost earnings, due to her disinclination to hire a vocational expert, whose testimony would have bolstered Ruth's. He submits a November 10, 2003, letter, in which Diamond states, "I agree it is not financially appropriate to hire a vocational expert at this time." (Sokol Ex. R.) But that evidence is only equivocal, and could be read simply as indicating Diamond's concurrence with Sokol's advice. The significance of this evidence is for a jury to decide.
- 16 The law plaintiff cites on "noncollectibility" is inapposite, as defendants mention nothing about noncollectibility but rather argue that plaintiff is bound by her decision in the underlying case.
- 17 During her deposition, Diamond expressly denied any such promise of a favorable outcome: "Q: Did Dr. Sokol ever tell you might lose the case? A: He said it was a possibility." (P. Dep., Sokol Ex. PP, at 97:18-20.)
- 18 To the extent that an issue remains as to Sokol's representation to Diamond of Leffler's continuing availability, it is not material to this case. Sokol does not rely on Leffler's conduct, or lack thereof, after Leffler's October 2002 withdrawal letter, in order to disclaim his own professional duty.
- 19 That provision reads, in pertinent part, "[A]n attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.... An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct." N.Y. C.P.L.R. § 321(b) (McKinney's 1999.)
- 20 Nor has plaintiff offered any authority whatsoever for her proposition that an attorney remains liable so long as he retains a share in the fee for the underlying case. (P. Opp. to Leffler, 15.) It is not alleged that this interest was intended to compensate Leffler for services he would perform after he sent Diamond his letter of withdrawal. Plaintiff contends that the pegging of Leffler's fee to her "ultimate recovery" evidences his "continuing ... involvement in the Underlying Action" (*id.*), but this payment scheme merely followed the common contingency-fee regime of personal injury actions. (*Id.*)

- 21 Leffler does not attempt to argue that he is entitled to summary judgment on the issue of negligence. While Diamond's presentation against him is sketchy, it is not impossible on the existing record for a reasonable jury to find Leffler liable for provable damages, as a result of a negligent failure to assert her claims.
- 22 "N.Y. C.P.L.R. 3042(b) ... permits parties to amend their bills of particulars once as of course (i.e., without permission of any other party or the court) before ... the case is placed on the trial calendar. [Otherwise,] the party must make a motion for leave to amend the bill." Davies, McKinney's Forms CPLR, References, § 4:346(e).
- 23 Leffler's argument that plaintiff is somehow precluded from bringing this action, because she verified bills of particulars that omitted claims for lost income and complete medical expenses, is rejected, for the same reasons Sokol's similar argument was rejected, *supra*.

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APPENDIX 2

133 Ill.App.3d 537
Appellate Court of Illinois,
Fourth District.

Mark D. LAND, Plaintiff-Appellant,
v.
Craig H. GREENWOOD, Defendant-Appellee.

No. 4-84-0684. | May 30, 1985.

Former client brought legal malpractice action against former attorney following dismissal of client's personal injury suit for failure to obtain summons within a reasonable time. The Circuit Court, Champaign County, John R. DeLaMar, J., dismissed cause with prejudice, and client appealed. The Appellate Court, Webber, J., held that former client was not entitled to recover from former attorney since client had option of taking voluntary nonsuit and refiling within a year.

Affirmed.

West Headnotes (7)

1 Limitation of Actions

↳ Dismissal or Nonsuit in General

Pretrial Procedure

↳ Vacation

Plaintiff may dismiss his suit voluntarily and refile within a year, if done prior to trial or hearing, notwithstanding running of statute of limitations or plaintiff's lack of diligence in obtaining service. S.H.A. ch. 110, ¶¶ 2-1009, 13-217.

7 Cases that cite this headnote

2 Pretrial Procedure

↳ Motion or Request and Proceedings Thereon

Proceedings taken on city's motion to dismiss personal injury suit were not a "trial or hearing" within meaning of section 2-1009 of Code of Civil Procedure permitting voluntary dismissal prior to trial or hearing where motion was filed under section 2-615 of the Code relating to motions with respect to pleadings. S.H.A. ch. 110, ¶¶ 2-615, 2-1009.

3 Attorney and Client

↳ Conduct of Litigation

Former client was not entitled to recover from former attorney for legal malpractice following dismissal of client's personal injury suit for failure to obtain summons within a reasonable time where client had option of taking voluntary nonsuit and refiling personal injury suit within a year. S.H.A. ch. 110, ¶¶ 2-615, 2-1009, 13-217.

6 Cases that cite this headnote

4 Contribution

↳ Joint Wrongdoers

"Contribution" is a doctrine requiring a sharing of damages among or between joint tort-feasors. S.H.A. ch. 70, ¶ 301 et seq.

5 Contribution

↳ Particular Torts or Wrongdoers

Client's former attorney did not have duty to "contribute" his share of damages for former client's loss following dismissal of former client's personal injury suit where client alleged that former attorney's actions were sole cause of the dismissal.

4 Cases that cite this headnote

6 Attorney and Client

↳ In General; Limitations

Action for legal malpractice is one sounding in tort which arises out of a contract, express or implied, for legal services.

12 Cases that cite this headnote

7 Pretrial Procedure

↳ Contracts; Sales

In action by former client against former attorney for negligence and breach of contract, breach of contract count which was restatement of negligence count was properly dismissed.

3 Cases that cite this headnote

Attorneys and Law Firms

****1204 *538 ***596** Robert I. Auler, Auler Law Offices, P.C., Urbana, for plaintiff-appellant.
Keith E. Emmons, Dobbins, Fraker, Tennant, Joy & Perlstein, Champaign, for defendant-appellee.

Opinion

WEBBER, Justice:

This is a case of legal malpractice. The defendant, a licensed attorney, formerly represented the plaintiff in a personal injury suit. The defendant was discharged by the plaintiff and new counsel employed. Thereafter, plaintiff's personal injury suit was dismissed with prejudice for failure to obtain summons within a reasonable time on the defendants there. Plaintiff, through successor counsel, then brought the instant action. Defendant moved to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Ill.Rev.Stat.1983, ch. 110, par. 2-619(a)(9)), and the motion was allowed by the circuit court of Champaign County; the cause was then dismissed with prejudice, and this appeal followed.

The underlying facts are largely undisputed. Plaintiff Land claimed that he was injured when he came into contact with an electric ***539** transmission line of Illinois Power Company. He retained defendant Greenwood to represent him on a contingent fee basis. One day before the statute of limitations expired, June 9, 1982, Greenwood filed a personal injury suit in the circuit court of Champaign County, naming 12 defendants, including Illinois Power Company and the city of Champaign. According to the record in that case (*Land v. Illinois Power Co. et al.*, Champaign County Circuit Court No. 82-L-652) summons was issued by the circuit clerk on June 9, 1982, for three defendants, Illinois Power Company, city of Champaign, and Paul Dauten, Jr. The two former ones were served June 11, 1982; the summons for Dauten was returned "Not Found," it appearing that he had died two years previously. The City filed a motion to dismiss, which was allowed by the circuit court on October 26, 1982.

In either December 1982 or January 1983, the record being in conflict, Land discharged Greenwood as his attorney. He retained successor counsel, Robert Auler, in February 1983. Service of process was had through his efforts on various other defendants during the months of May and June 1983. Motions to dismiss were filed by various defendants based upon a lack of diligence by the plaintiff in obtaining service

on them under Supreme Court Rule 103(b) (87 Ill.2d R. 103(b)). The individual motions were allowed and ultimately, on August 31, 1983, the circuit court dismissed the entire suit with prejudice on the same basis.

In response to the instant suit, defendant filed a double-barreled motion under sections 2-619(a)(9) and 2-615 of the Code of Civil Procedure (****1205 ***597** Ill.Rev.Stat.1983, ch. 110, pars. 2-619(a)(9), 2-615). The trial court's ruling was under section 2-619(a)(9). That section provides for involuntary dismissal based upon certain affirmative defenses which the court can resolve as a matter of law. *John v. Tribune Co.* (1962), 24 Ill.2d 437, 181 N.E.2d 105; *Brewer v. Stovall* (1977), 54 Ill.App.3d 261, 11 Ill.Dec. 911, 369 N.E.2d 365.

The motion was supported by Greenwood's own affidavit and was aimed at the allegation in the complaint that plaintiff's personal injury suit was "absolutely barred." The motion and its supporting affidavit alleged that the suit was not so barred; that plaintiff had the option of taking a voluntary nonsuit under section 2-1009 of the Code of Civil Procedure (Ill.Rev.Stat.1983, ch. 110, par. 2-1009) and refile within a year under section 13-217 of the Code (Ill.Rev.Stat.1983, ch. 110, par. 13-217.) In essence, the trial court by its ruling held as a matter of law that the personal injury suit was not absolutely barred, and therefore plaintiff could plead no set of facts entitling him to relief. We agree.

1 *540 It has been established that a plaintiff may dismiss his suit voluntarily and refile within a year, if done prior to trial or hearing, notwithstanding the running of the statute of limitations or plaintiff's lack of diligence in obtaining service. *LaBarge, Inc. v. Corn Belt Bank* (1981), 101 Ill.App.3d 741, 57 Ill.Dec. 161, 428 N.E.2d 711.

2 Plaintiff here contends that the proceedings taken on the city of Champaign's motion to dismiss were a "trial or hearing" within the meaning of section 2-1009 of the Code. We disagree. The supreme court has held that "trial" has not begun for purposes of section 2-1009 where no prospective jurors have been examined or sworn, no jury selected, and no opening statements made. It further held that "hearing" is the equitable equivalent of trial. (*Kahle v. John Deere Co.* (1984), 104 Ill.2d 302, 84 Ill.Dec. 650, 472 N.E.2d 787.) Other authorities have held that a motion under section 45 of the Civil Practice Act, the predecessor of section 2-615 of the Code of Civil Procedure (Ill.Rev.Stat.1979, ch. 110, par. 45) was not a hearing within the meaning of section 52 of the Civil Practice Act, the predecessor of section 2-1009 of the

Code of Civil Procedure (Ill.Rev.Stat.1979, ch. 110, par. 52).
LaBarge; In re Marriage of Fine (1983), 116 Ill.App.3d 875,
72 Ill.Dec. 438, 452 N.E.2d 691.

The record shows that the city's motion was filed under section 2-615 of the Code. There was no "hearing" within the meaning of the statute.

3 The glaring defect in plaintiff's case is that it is only a matter of speculation as to whether the suit would have been barred at the time defendant was discharged. By its order of August 1983, the circuit court found that service not obtained until May or June 1983 following a filing of suit in June 1982 showed a lack of diligence, but the order did not provide anything regarding December 1982 or January 1983, the dates upon which defendant was dismissed by plaintiff. In any event, it remains clear that plaintiff could have taken a voluntary dismissal at any time up to August 1983, so long as it was done prior to the court's ruling on the motions under Supreme Court Rule 103(b).

Plaintiff has argued that successor counsel had no duty to take corrective measures to "rescue" discharged counsel. As an abstract proposition, it may have some merit, but the fact of the matter is that successor counsel had the duty to preserve his client's cause of action. It was viable when he received it; it was not when he got through with it.

4 5 Plaintiff also argues that prior counsel has the duty to "contribute" *541 his share of damages to plaintiff's loss. Contribution is a doctrine, now embodied in statutory law (Ill.Rev.Stat.1983, ch. 70, par. 301 *et seq.*) requiring a sharing of damages among or between joint tort-feasors. Since there is only one defendant in the instant suit, we have difficulty comprehending how contribution can apply. The entire suit is aimed at Greenwood's actions during the time he had control of the litigation, *i.e.*, **1206 ***598 June 1982 to December 1982 or January 1983. The complaint alleges

that "but for defendant Greenwood's lack of due diligence * * * the Plaintiff would have recovered and collected a substantial award." This appears to us to be an allegation that Greenwood's actions were the sole cause of plaintiff's difficulty. If that be true, there is no basis for contribution.

Defendant's duty to plaintiff ceased upon his discharge. (Compare *York v. Stiefel* (1982), 109 Ill.App.3d 342, 64 Ill.Dec. 888, 440 N.E.2d 440, *aff'd in part & rev'd in part on other grounds* (1983), 99 Ill.2d 312, 76 Ill.Dec. 88, 458 N.E.2d 488.) The cause of action was viable at the time of that discharge. It therefore follows that plaintiff can prove no set of facts which connect defendant's conduct with any damage sustained by plaintiff.

6 7 Plaintiff further argues that even if count I, a negligence count, were properly dismissed, he should still be allowed to proceed under count II, a breach of contract action. The allegations are the same in both counts. Moreover, an action for legal malpractice is one sounding in tort which arises out of a contract, express or implied, for legal services. With no additional allegations, the contract count is simply a restatement of the negligence count. (See *Yates v. Muir* (1985), 130 Ill.App.3d 604, 86 Ill.Dec. 20, 474 N.E.2d 934.) The trial court was correct in dismissing count II for the same reasons as count I.

The order of the circuit court of Champaign County is affirmed.

Affirmed.

McCULLOUGH and MORTHLAND, JJ., concur.

Parallel Citations

133 Ill.App.3d 537, 478 N.E.2d 1203

APPENDIX 3

332 Ill.App.3d 618
Appellate Court of Illinois,
First District, Fourth Division.

William R. MITCHELL, Plaintiff-Appellant,

v.

SCHAIN, FURSEL & BURNEY, LTD., and
James Graney, Defendants-Appellees (Schain,
Fursel & Burney, Ltd., Donnie Rudd, James
Graney, and Steven Sam Koukios, Defendants).

No. 1-01-2108. | July 11, 2002.

Client sued first attorneys and successor attorney for malpractice resulting from dismissal with prejudice of his claim against a neighbor in a property dispute. The Circuit Court, Cook County, Diane J. Larsen, J., entered summary judgment in favor of first attorneys. Client appealed. The Appellate Court, Theis, J., held that first attorneys were not the proximate cause of client's damages.

Affirmed.

West Headnotes (2)

1 Attorney and Client

— Conduct of Litigation

Client's action against neighbor in property dispute was still viable at time client discharged first attorneys, and thus, first attorneys were not the proximate cause of client's damages that resulting from successor attorney's failure to refile complaint after it was dismissed with prejudice, even though dismissal resulted from want of prosecution by first attorneys, where savings provision in statute governing reversal or dismissal allowed successor attorney sufficient time to reinstate client's claim, which he failed to do. S.H.A. 735 ILCS 5/13-217.

15 Cases that cite this headnote

2 Attorney and Client

— Pleading and Evidence

To prevail in an action for legal malpractice, a plaintiff must plead and prove the following elements: (1) an attorney-client relationship that establishes a duty on the part of the attorney, (2)

a negligent act or omission constituting a breach of that duty, (3) proximate cause establishing that "but for" the attorney's malpractice, the plaintiff would have prevailed in the underlying action, and (4) actual damages.

14 Cases that cite this headnote

Attorneys and Law Firms

****1192 *618 ***122** John L. Malevitis, J.L. Malevitis & Associates, Ltd., Chicago, for Appellant Mitchell. Swanson, Martin & Bell (Sheryl A. Pethers, of counsel), for Appellee.

Opinion

Justice THEIS delivered the opinion of the court:

Plaintiff, William R. Mitchell, appeals from an order of the circuit court of Cook County granting summary judgment in his legal malpractice claim in favor of defendants, Schain, Fursel & Burney, Ltd., and James Graney. Plaintiff contends that the circuit court erred in concluding that, as a matter of law, defendants' conduct was not the proximate cause of the loss of his underlying claim, and erred in finding ***619** that the negligence of successor counsel acted as a superseding cause of the loss sufficient to break the chain of causation. For the following reasons, we affirm the judgment of the circuit court.

****1193 ***123** The following facts are adduced from the record. In 1989, plaintiff retained defendants to represent him in a property dispute with a developer and adjacent neighbor of plaintiff's, A. Fanizza. On September 10, 1990, the court granted plaintiff's summary judgment motion as to the liability of Fanizza and set the matter for hearing on September 24, 1990, to prove up damages. On August 14, 1991, the case was dismissed for want of prosecution (DWP). Plaintiff was not aware of the DWP. He alleged that he was told by defendants that his case was pending and there was no settlement offer or disposition in the near future. Thereafter, in January 1992, he discharged defendants and retained attorney Steven Koukios to represent him in his lawsuit against Fanizza.

In late December of 1995, Koukios summoned plaintiff to his office and informed plaintiff that he had not filed any pleadings on his behalf; he had another client by the name of

Mitchell, and had gotten the two files confused. Meanwhile, the DWP had never been vacated, and the right to reinstate plaintiff's action against Fanizza under the savings provision provided by section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 1994)) had expired.

On December 16, 1997, plaintiff filed his claim for legal malpractice against defendants and his successor counsel, Koukios. In turn, defendants filed a third-party complaint for contribution against Koukios. Thereafter, on March 30, 2000, defendants moved for summary judgment, arguing that because plaintiff's cause of action remained viable at the time defendants were discharged, they were not the proximate cause of plaintiff's damages as a matter of law. The circuit court granted defendants' motion for summary judgment. Plaintiff eventually reached a settlement with Koukios in May 2001, and on May 8, 2001, the court dismissed all remaining claims.

Plaintiff contends that the circuit court erred in granting summary judgment because it could not be determined as a matter of law that Koukios was a superseding cause of his damages. He argues that but for defendants' alleged breach of their duties, plaintiff would not have been foreclosed from pursuing his cause of action and obtaining a judgment. Summary judgment should be granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2000); *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill.2d 17, 30-31, 241 Ill.Dec. 627, 719 N.E.2d 756, 764 (1999). Summary judgment can aid in the expeditious disposition of a lawsuit, but it is a drastic measure and should be *620 allowed only "when the right of the moving party is clear and free from doubt." *Purtill v. Hess*, 111 Ill.2d 229, 240, 95 Ill.Dec. 305, 489 N.E.2d 867, 871 (1986). If the plaintiff fails to establish any element of his claim, summary judgment is appropriate. *Pyne v. Witmer*, 129 Ill.2d 351, 358, 135 Ill.Dec. 557, 543 N.E.2d 1304, 1307 (1989). Our standard of review is *de novo* (*Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill.2d 278, 291, 246 Ill.Dec. 654, 730 N.E.2d 1119, 1127 (2000)), and we may affirm on any basis found in the record (*Alliance Syndicate, Inc. v. Parsec, Inc.*, 318 Ill.App.3d 590, 599, 251 Ill.Dec. 861, 741 N.E.2d 1039, 1045 (2000)).

1 2 To prevail in an action for legal malpractice, a plaintiff must plead and prove the following elements: (1) an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that

"but for" the attorney's malpractice, the plaintiff would have prevailed **1194 ***124 in the underlying action; and (4) actual damages. *Owens v. McDermott, Will & Emery*, 316 Ill.App.3d 340, 351, 249 Ill.Dec. 303, 736 N.E.2d 145, 155 (2000). We recognize that, in assessing the damage inflicted by legal malpractice, prime consideration must be given to the situation in which the client was placed at the time of the termination of the legal services. *Schulte v. Burch*, 151 Ill.App.3d 332, 334, 104 Ill.Dec. 359, 502 N.E.2d 856, 858 (1986).

For example, in *Land v. Greenwood*, 133 Ill.App.3d 537, 88 Ill.Dec. 595, 478 N.E.2d 1203 (1985), the plaintiff had two attorneys in the underlying suit. The first failed to serve several defendants with process and then withdrew from the case. A second attorney assumed handling of the case. Four to five months after the second attorney was retained, the defendants were finally served with process. Those defendants filed motions to dismiss for lack of due diligence in the prosecution of the case. The trial court dismissed the case with prejudice. The plaintiff then sued his original attorney for legal malpractice, claiming that the dismissal was caused by the inactions of his first attorney. *Land*, 133 Ill.App.3d at 538-39, 88 Ill.Dec. 595, 478 N.E.2d at 1204-05.

In holding that under this particular set of facts plaintiff could not state a case of legal malpractice against the discharged attorney, the court noted that successor counsel had a duty to preserve his client's cause of action. "It was viable when he received it; it was not when he got through with it." 133 Ill.App.3d at 540, 88 Ill.Dec. 595, 478 N.E.2d at 1205. The court explained that plaintiff's successor attorney had an absolute right to voluntarily dismiss the suit before the trial court's order of dismissal. "The cause of action was viable at the time of [the first attorney's] discharge. It therefore follows that plaintiff can prove no set of facts which connect defendant's conduct with any damage sustained *621 by plaintiff."¹ *Land*, 133 Ill.App.3d at 541, 88 Ill.Dec. 595, 478 N.E.2d at 1206. See *Kozmol v. Law Firm of Allen L. Rothenberg*, 241 A.D.2d 484, 485-86, 660 N.Y.S.2d 63, 64 (1997) (defendants could not be held liable for loss of client's cause of action despite failure to effect valid service on client's adversary, resulting in dismissal, where successor counsel, retained prior to dismissal, could have commenced a new action); see also *McGee v. Danz*, 261 Ill.App.3d 232, 237, 198 Ill.Dec. 772, 633 N.E.2d 234, 237 (1994) (where plaintiff discharged defendant prior to the running of the applicable statute of limitations, as a matter of law, defendant was not liable for legal malpractice for failing to file a claim against

plaintiff was foreclosed from pursuing his underlying cause of action and obtaining a judgment.

HARTMAN and KARNEZIS, JJ., concur.

Accordingly, for the foregoing reasons, the judgment of the circuit court is affirmed.

Parallel Citations

332 Ill.App.3d 618, 773 N.E.2d 1192

Affirmed.

Footnotes

- 1 We recognize that, subsequently, the supreme court, in *O'Connell v. St. Francis Hospital*, 112 Ill.2d 273, 97 Ill.Dec. 449, 492 N.E.2d 1322 (1986), held that when a plaintiff seeks to respond to a Rule 103(b) (134 Ill.2d R. 103(b)) motion by voluntarily dismissing the case and refiling within one year as provided by statute, the Rule 103(b) motion must be heard on its merits prior to a ruling on the plaintiff's motion to voluntarily dismiss.

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APPENDIX 4

347 Ill.App.3d 169
Appellate Court of Illinois,
First District, Fourth Division.

Leticia CEDENO, as Special
Administrator of the Estate of Petra
Cedeno, deceased, Plaintiff–Appellant,

v.

James Ellis GUMBINER, d/b/a The Law Offices
of James Ellis Gumbiner & Associates, and
Bruce D. Goodman, individually, and d/b/a
Steinberg, Polacek and Goodman, The Law Offices
of Steinberg, Polacek & Goodman, and Emilo
Machado, individually, Defendants–Appellees.

No. 1–03–0945. | March 11, 2004.

Synopsis

Background: Former client brought legal malpractice action against attorneys involved in personal injury litigation. The Circuit Court, Cook County, Diane J. Larsen, J., dismissed action. Client appealed.

Holdings: The Appellate Court, Hartman, J., held that:
1 initial notice of client's claim against Chicago Transit Authority was sufficient, and
2 attorneys did not commit legal malpractice due to trial court's acceptance of a legally unsound basis for granting summary judgment.

Affirmed.

West Headnotes (7)

1 Pretrial Procedure

☞ Affirmative Defenses, Raising by Motion to Dismiss

A motion to involuntarily dismiss a pleading based on certain defects or defenses admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters which appear on the face of the complaint or are established by external submissions which act to defeat plaintiff's claim. S.H.A. 735 ILCS 5/2–619.

2 Appeal and Error

☞ Extent of Review Dependent on Nature of Decision Appealed from

If a cause of action is dismissed pursuant to a motion to involuntarily dismiss a pleading the question on appeal is whether a genuine issue of material fact exists and whether defendant is entitled to a judgment as a matter of law. S.H.A. 735 ILCS 5/2–619.

3 Attorney and Client

☞ Duties and Liabilities of Attorney to Client

To prevail in an action for legal malpractice, plaintiff must plead and prove the following elements: (1) an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that “but for” the attorney's malpractice, plaintiff would have prevailed in the underlying action; and (4) actual damages.

12 Cases that cite this headnote

4 Attorney and Client

☞ Conduct of litigation

When an attorney's negligence is alleged to have occurred during the representation of a client in the underlying action, which never reached trial because of that negligence, plaintiff is required to prove counsel's negligence resulted in the loss of the underlying action; if the underlying cause remained actionable upon the discharge of the former attorney, plaintiff can prove no set of facts which connect defendant's conduct with any damage plaintiff sustained.

8 Cases that cite this headnote

5 Municipal Corporations

☞ Waiver and estoppel

Chicago Transit Authority's (CTA) failure to comply with its obligation to distribute information regarding notice requirements for actions against CTA upon receiving notice of potential claim constitutes a waiver of

plaintiff's duty to comply with the formal notice requirements. S.H.A. 70 ILCS 3605/41.

6 Municipal Corporations

— Form and sufficiency

Bus passenger's initial notice to Chicago Transit Authority (CTA) of a claim, which notice was wrong by one day regarding the date of the accident, was sufficient to trigger the CTA's duty to provide passenger with a copy of statute regarding notice of injuries to CTA. S.H.A. 70 ILCS 3605/41.

7 Attorney and Client

— Conduct of litigation

Trial court's acceptance of a legally unsound basis for granting summary judgment in client's personal injury action against Chicago Transit Authority (CTA) served as an intervening cause, and thus, former attorneys, who provided defective notice of injury claim to CTA, but were discharged prior to filing complaint, did not proximately cause former client's injury given that at the time of discharge, client's personal injury case remained actionable despite the defective initial notice. S.H.A. 70 ILCS 3605/41.

8 Cases that cite this headline

Attorneys and Law Firms

****1189 ***601 *170** Kupets & DeCaro, P.C., Chicago (Dennis J. DeCaro, of counsel), for Appellant. Mulherin, Rehfeldt & Varchetto, P.C., Wheaton (Patricia L. Argentati, of counsel), for Appellee Gumbiner. Alholm, Monahan, Keefe & Klauke, LLC, Chicago (Peter A. Monahan and Nizam Arain, of counsel), for Appellee Goodman.

Opinion

Justice HARTMAN delivered the opinion of the court:

Plaintiff appeals from the circuit court's 2–619 dismissal of her legal malpractice action against defendants, her former attorneys; James Ellis Gumbiner, the Law Offices of

James Ellis Gumbiner & Associates (Gumbiner), Bruce D. Goodman, Emilio Machado, and the Law Office of Steinberg, Polacek & Goodman (Goodman).¹ On appeal, plaintiff questions whether the circuit court erred in determining defendants' negligence did not proximately cause plaintiff's defeat in her personal injury lawsuit against the Chicago Transit Authority (CTA). For the reasons that follow, the circuit court's judgment is affirmed.

On April 29, 1999, plaintiff, Petra Cedeno, was injured when she fell while exiting a CTA bus. In an effort to commence a personal injury lawsuit against CTA, she retained as her attorney, Gumbiner.² Shortly thereafter, Gumbiner referred the case to Goodman, who sent to CTA a “Notice of Claim for Personal Injuries” (Notice) on September 8, 1999. The Notice alleged incorrectly that plaintiff's accident occurred on April 30, 1999; instead of the actual date, April 29, 1999. In a letter dated January 13, 2000, plaintiff terminated her relationship with Goodman.

171** Proceeding with her lawsuit against CTA, plaintiff retained Patrick Cummings and the Law Offices of Ciardelli & Cummings (Cummings).³ Through Cummings, plaintiff filed her complaint on April 20, 2000, nine days within the statute of limitations. *1190 ***602** She asserted the accident date was April 29, 1999, which CTA denied in its answer. On September 13, 2000, CTA moved for summary judgment, citing plaintiff's failure to comply strictly with the notice requirements set forth in section 41 of the Metropolitan Transit Authority Act (MTAA). 70 ILCS 3605/41 (West 1998) (section 41). Specifically, CTA argued plaintiff's Notice contained the wrong accident date, and further asserted the date varied from the correct date stated in the complaint, which CTA previously denied in its answer.

In response, plaintiff asserted CTA's failure to provide her with a copy of section 41 as required by that section, precluded it from using the section's formal notice requirements as grounds for dismissal. Plaintiff also claimed the defect was a *de minimus* typographical error, and that compliance with section 41 should be “liberally construed” in her favor, in accordance with the amendment to this section.

On February 7, 2001, the circuit court granted CTA's motion for summary judgment, dismissing the cause with prejudice. Thereafter, on February 15, 2001, Cummings filed a timely notice of appeal from the circuit court's grant of summary judgment and, weeks later, filed an amended notice of appeal. Plaintiff's appeal was dismissed by the appellate court on July 19, 2001, for want of prosecution.

On August 23, 2001, plaintiff commenced the instant legal malpractice action, naming both Gumbiner and Goodman as defendants.⁴ Gumbiner and Goodman filed separate motions to dismiss plaintiff's malpractice action. The circuit court found plaintiff's Notice sufficient to trigger CTA's affirmative duty to furnish plaintiff with a copy of section 41 of the MTAA. Accordingly, the court granted defendants' motions, dismissing plaintiff's cause with prejudice.⁵ Plaintiff timely appeals.

Plaintiff contends defendants were negligent for providing defective written notice of her accident to CTA. It is her position that the *172 Notice provided is tantamount to no notice at all since the inclusion of the correct date is an indispensable element of notice under section 41. Relying on *Frowner v. Chicago Transit Authority*, 25 Ill.App.2d 312, 315, 167 N.E.2d 26 (1960), and *Yokley v. Chicago Transit Authority*, 307 Ill.App.3d 132, 136-37, 240 Ill.Dec. 358, 717 N.E.2d 451 (1999) (*Yokley*), plaintiff argues without the correct accident date, written notice cannot comply strictly with the requirements of section 41.

Plaintiff acknowledges section 41 was amended in 1998, imposing upon CTA a duty to furnish a copy of section 41 to any possible claimants who notify CTA of an accident or cause of action. She urges, however, CTA's duty never arose here since it never actually received notice of an accident occurring on April 29, 1999. She believes the issue of whether CTA had a duty to provide her with a copy of section 41 is irrelevant to the question of whether defendants were negligent for providing defective notice. Plaintiff concludes that "[n]othing in the amended language [of section 41] relieved the individual providing 'Notice' from providing the correct date of accident."

****1191 ***603** Plaintiff cites two cases that have addressed section 41 as amended, *Fields v. Chicago Transit Authority*, 319 Ill.App.3d 683, 253 Ill.Dec. 328, 745 N.E.2d 102 (2001) (*Fields*), and *Puszkarska v. Chicago Transit Authority*, 322 Ill.App.3d 75, 255 Ill.Dec. 51, 748 N.E.2d 755 (2001) (*Puszkarska*).

In *Fields*, plaintiff was injured on a CTA bus and handed the driver a courtesy card containing information regarding her accident. On appeal, she argued the card satisfied the notice requirement, triggering CTA's duty to provide her with a copy of section 41, which it did not do. The court found CTA's failure to comply with its obligation caused it to waive the formal notice requirements, leaving the court to determine

only whether the information on the card was sufficient to trigger CTA's duty. In finding the card adequate, the court noted that "the most significant information provided to CTA was the date and time of the accident." *Fields*, 319 Ill.App.3d at 687-90, 253 Ill.Dec. 328, 745 N.E.2d 102. Plaintiff extrapolates from *Fields* that reasonable notice must include the correct date and hour.

In *Puszkarska*, plaintiff filed with CTA written notice containing only one defect—the hour of the accident was omitted. Plaintiff argued her notice actuated CTA's duty to provide her with a copy of section 41, which it neglected to do. CTA argued plaintiff's notice should be disregarded as an initial communication for failure to conform stringently to the detailed requirements of section 41. Construing the initial communication liberally, the court determined amended section 41 requires only that the initial communication be in writing to trigger CTA's duty, and CTA's nonperformance caused it to waive plaintiff's formal notice obligations. *Puszkarska*, 322 Ill.App.3d at 78-79, 255 Ill.Dec. 51, 748 N.E.2d 755.

***173** Defendants respond that plaintiff misconstrues the paramount issue in this case, suggesting the issue is not whether the initial Notice complied strictly with the formal requirements of section 41; rather, whether the initial Notice was sufficient to trigger CTA's duty to provide a copy of section 41 to plaintiff, thereby precluding CTA from dismissing the action on grounds of defective notice.

Defendants likewise rely on *Fields* and *Puszkarska*, correctly pointing out these cases recognize section 41's amendment modified the overall procedural scheme for filing a claim against CTA. They argue the amendment to section 41, which allows for initial written notice to be "liberally construed," abrogates plaintiff's duty to adhere strictly to the detailed formal notice requirements in situations, as here, where CTA fails to furnish plaintiff with section 41. Once CTA's duty is triggered but goes unsatisfied, CTA may not dismiss a claim based solely on plaintiff's non-compliance. Therefore, they maintain, the adverse impact of their defective initial Notice was negated, and the strength of plaintiff's underlying case against CTA was left intact.

Defendants insist they could not have proximately caused plaintiff's damages since her case remained actionable at the time of their discharge as plaintiff's attorneys. Citing *Land v. Greenwood*, 133 Ill.App.3d 537, 540-41, 88 Ill.Dec. 595, 478 N.E.2d 1203 (1985) (*Land*) and *Mitchell v. Schain, Fursel, & Burney, Ltd.*, 332 Ill.App.3d 618, 620-21, 266 Ill.Dec.

122, 773 N.E.2d 1192 (2002) (*Mitchell*), defendants aver that where the conduct of a successor attorney constitutes the independent and superseding cause of plaintiff's damages, the discharged attorney cannot be found to have committed legal malpractice. Defendants posit the circuit court erroneously dismissed plaintiff's case against CTA and speculate that, if plaintiff's appeal had ****1192 ***604** been pursued, the appellate court would have ruled in her favor, applying the holdings of *Fields* and *Puzkarska*.⁶

Plaintiff replies that Cummings could not have rectified defendants' negligence since the six-month notice period had lapsed.⁷ Although plaintiff filed her complaint against CTA on April 20, 2000, she inconsistently maintains her case was no longer viable (or destined for failure), at the time of defendants' discharge on January 13, 2000.

1 2 The standard of review of a motion to dismiss under section 2-619 is *de novo*. *Pochopien v. Marshall*, 315 Ill.App.3d 329, 335, 247 Ill.Dec. 937, 733 N.E.2d 401 (2000). A section ***174** 2-619 motion admits the legal sufficiency of the complaint and raises defects, defenses or other affirmative matters which appear on the face of the complaint or are established by external submissions which act to defeat plaintiff's claim. *Spirit of Excellence, Ltd. v. Intercargo Insurance Co.*, 334 Ill.App.3d 136, 145, 267 Ill.Dec. 857, 777 N.E.2d 660 (2002); 735 ILCS 5/2-619 (2002). All properly pleaded facts are accepted as true; a reviewing court is concerned only with the question of law presented by the pleadings. *Thornton v. Shah*, 333 Ill.App.3d 1011, 1019, 267 Ill.Dec. 593, 777 N.E.2d 396 (2002). If a cause of action is dismissed pursuant to section 2-619, the question on appeal is whether a genuine issue of material fact exists and whether defendant is entitled to a judgment as a matter of law. *Pochopien*, 315 Ill.App.3d at 335, 247 Ill.Dec. 937, 733 N.E.2d 401.

3 4 To prevail in an action for legal malpractice, plaintiff must plead and prove the following elements: (1) an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorney's malpractice, plaintiff would have prevailed in the underlying action; and (4) actual damages. *Mitchell*, 332 Ill.App.3d at 620, 266 Ill.Dec. 122, 773 N.E.2d 1192. The basis of such a claim is that plaintiff would have been compensated for an injury caused by a third party, absent negligence on the part of plaintiff's attorney. *Eastman v. Messner*, 188 Ill.2d 404, 411, 242 Ill.Dec. 623, 721 N.E.2d 1154 (1999). Where an attorney's negligence is alleged to

have occurred during the representation of a client in the underlying action, which never reached trial because of that negligence, plaintiff is required to prove counsel's negligence resulted in the loss of the underlying action. *Sheppard v. Krol*, 218 Ill.App.3d 254, 257, 161 Ill.Dec. 85, 578 N.E.2d 212 (1991). In other words, plaintiff must prove a "case within a case." *Warren v. Williams*, 313 Ill.App.3d 450, 455, 246 Ill.Dec. 487, 730 N.E.2d 512 (2000). If the underlying cause remained actionable upon the discharge of the former attorney, plaintiff can prove no set of facts which connect defendant's conduct with any damage plaintiff sustained. *Mitchell*, 332 Ill.App.3d at 620, 266 Ill.Dec. 122, 773 N.E.2d 1192; *Land*, 133 Ill.App.3d at 540, 88 Ill.Dec. 595, 478 N.E.2d 1203.

5 Pursuant to amended section 41, potential claimants may submit an initial written communication directly to CTA, ****1193 ***605** and upon receipt of any such communication that can be "reasonably interpreted as notification," CTA must furnish that person with a copy of section 41. *Fields*, 319 Ill.App.3d at 689, 253 Ill.Dec. 328, 745 N.E.2d 102; 70 ILCS 3605/41 (West 1998). CTA's failure to comply with its distribution obligation constitutes a waiver of plaintiff's duty to comply with the formal notice requirements outlined in the first paragraph of section 41. *Fields*, 319 Ill.App.3d at 689, 253 Ill.Dec. 328, 745 N.E.2d 102. Therefore, section 41's formal notice requirements must be ***175** adhered to strictly only when CTA has provided a copy of section 41 to plaintiff.⁸

6 Here, in the underlying action, all aspects of defendants' initial Notice were flawless, except for the incorrect date of the accident, which was wrong by one day. Although *Fields* held a written communication containing the correct date and time "can be reasonably interpreted as notification," it did not hold initial notice lacking the correct date to be insufficient *per se*. Indeed, the legislature's chosen language in amended section 41 indicates a contrary application. Unlike the language in the first paragraph of section 41, the added paragraph requires only an initial written notification that an injury or cause of action may exist. It is silent as to the form of that notice, but postulates that such initial notice shall be "liberally construed" in favor of the claimant. The intent behind the amendment was, in part, to mitigate the onerous burden of section 41's formal notice requirement so legitimate claims would not be unjustly dismissed. *Yokley*, 307 Ill.App.3d at 138-39, 240 Ill.Dec. 358, 717 N.E.2d 451; 90th Gen. Assem. Senate Debates May 21, 1997, at 52. Had the legislature intended strict compliance for initial written communications, it would not have crafted an amendment

affording claimants the relaxed notice obligation it has provided. To hold defendants' initial Notice insufficient under section 41 as amended would disregard legislative intent, an endeavor in which reviewing courts must not engage. *Integrated Research Services, Inc. v. Illinois Secretary of State*, 328 Ill.App.3d 67, 71, 262 Ill.Dec. 304, 765 N.E.2d 130 (2002).

The appellate court acknowledged in *Puszkarska*, that section 41 mandates initial communications are to be "liberally construed," and stated that "CTA may not pick and chose which written communications trigger its duty * * *." The court held that regardless of the form of initial written notice conveying the existence of an injury or cause of action, CTA must provide plaintiff with a copy of section 41. *Puszkarska*, 322 Ill.App.3d at 79, 255 Ill.Dec. 51, 748 N.E.2d 755.

In the case *sub judice*, the circuit court dismissed plaintiff's legal malpractice claim based on finding the Notice, although admittedly defective, could be "reasonably interpreted as notification" so as to trigger CTA's duty to furnish plaintiff with a copy of section 41, which it failed to do. Due to its lapse, CTA should not have been permitted to avail itself of the formal notice requirements as proper grounds for dismissal as a matter of law. *Environmental Control Systems, Inc. v. Long*, 301 Ill.App.3d 612, 234 Ill.Dec. 901, 703 N.E.2d 1001 (1998).⁹ Nonetheless, the circuit court in

the underlying case granted summary judgment in favor of CTA.

7 Notwithstanding this fact, insofar as the present case is concerned, at the time of defendants' discharge, plaintiff's **1194 ***606 personal injury case remained actionable despite the defective initial Notice. Although CTA would not have moved for, and the circuit court not have granted summary judgment in the absence of the defective Notice, defendants cannot be held accountable for the court's acceptance of a legally unsound basis for granting summary judgment against plaintiff. Where her claim remained actionable after defendants' discharge, and the circuit court's misapplication of the law served as an intervening cause, it cannot be said that plaintiff's damages proximately resulted from defendants' Notice. *Mitchell*, 332 Ill.App.3d at 620, 266 Ill.Dec. 122, 773 N.E.2d 1192; *Land*, 133 Ill.App.3d at 540, 88 Ill.Dec. 595, 478 N.E.2d 1203.

Accordingly, for the reasons set forth above, the judgment of the circuit court is affirmed.

Affirmed.

QUINN, P.J., and THEIS, J., concur.

Parallel Citations

347 Ill.App.3d 169, 806 N.E.2d 1188

Footnotes

- 1 Defendants Gumbiner and Goodman filed separate appellate briefs in this matter; however, because their arguments are essentially in lock-step, they are referred to collectively.
- 2 Petra Cedeno, the injured party and original plaintiff, since died and her daughter, Leticia Cedeno, a special administrator of the estate, was substituted as plaintiff on May 7, 2000.
- 3 Cummings became defendants in this matter when plaintiff filed her fourth amended complaint on October 4, 2002, but are not parties to this appeal. Plaintiff's case against Cummings is pending in the circuit court.
- 4 In her legal malpractice suit against Cummings, plaintiff alleged Cummings failed to file either an appellate brief or a timely motion to vacate the appellate court's order dismissing the appeal of her suit against CTA.
- 5 The circuit court, however, simultaneously denied Cummings' motion to dismiss plaintiff's claim. As previously noted, although not parties to the instant appeal, Cummings remain parties to the case before the circuit court.
- 6 *Fields* and *Puszkarska*, were published on February 20, 2001, and May 1, 2002, respectively, only months before plaintiff's appeal was ultimately dismissed for want of prosecution on June 19, 2001.
- 7 The six-month notice requirement expired on September 29, 1999.
- 8 Formal written notice must provide, *inter alia*, the date and approximate hour of the accident. 70 ILCS 3605/41 (West 1998).
- 9 In his response to CTA's motion for summary judgment, Cummings made that very argument before the circuit court.