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No. 68339-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STACEY DEFOOR,

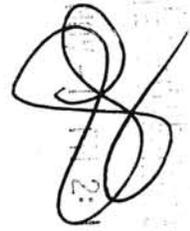
Appellant,

v.

RAFEL LAW GROUP PLLC

Respondent.

2012 SEP 11 AM 12:16
CLERK OF COURT
STATE OF WASHINGTON



Appeal From The Superior Court For King County
Hon. Mary Yu

REPLY BRIEF OF APPELLANT STACEY DEFOOR

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I. INTRODUCTION

The Rules of Professional Conduct protect clients and the public from overreaching attorneys. In this case, the Settlement & Re-Engagement Agreement between Stacey Defoor and Rafel Law Group did not merely create an “ordinary fee arrangement[] between client and lawyer” that would be governed by Rule 1.5, but instead included both a “business transaction” and a “security” interest. RPC 1.8 & cmt 1. Rafel therefore had a duty to make the disclosures required by RPC 1.8(a) at the outset of the representation. He did not. As a result of Rafel’s violation of RPC 1.8, the Agreement is void as a matter of law. This Court should reverse the trial court’s orders granting RLG’s motion for summary judgment of validity and denying Defoor’s cross-motion, and should remand for entry of a judgment invalidating the Agreement and awarding attorney’s fees to Defoor.

Because the Agreement is void, it is unnecessary to reach the trial court’s ruling that RLG is entitled to a total of \$2,027,316 for services, costs, fees, and interest. In any event, disputed factual issues preclude summary adjudication of both the fairness and reasonableness of this amount. Disputed issues of fact also bar summary judgment on Defoor’s two counterclaims. This Court should reverse and remand for trial of Defoor’s counterclaims, together with RLG’s claim for the *quantum meruit* value of RLG’s services in each matter calculated in light of Rafel’s misconduct.

II. ARGUMENT

A. Because Rafel Violated RPC 1.8, The Settlement & Re-Engagement Agreement Is Void As A Matter of Law.

1. The Settlement and Note Provisions Regarding RLG's Matter 1 Fee Demand Violated RPC 1.8(a).

a. Converting a doubtful *quantum meruit* claim into a \$775,000 promissory note in return for providing future legal services is a “business transaction” covered by RPC 1.8(a).

RLG begrudgingly acknowledges that *before* Defoor signed the Settlement & Re-Engagement Agreement on Feb. 14, 2008, its claim for compensation in Matter 1 was limited to the unliquidated *quantum meruit* value of the contribution provided by its legal services. Resp.Br. 25.¹ RLG offered to represent Defoor at trial in exchange for her acknowledging an “obligation” that did not previously exist, and for agreeing to convert RLG’s existing *quantum meruit* Matter 1 claim into a secured, interest-bearing \$775,000 note, including \$505,000 for fees, due in full even before the Defoor Litigation concluded. The parties agree that RPC 1.8 would obviously apply to such nonmonetary terms if the attorney had already been engaged. *See, e.g.*, Resp.Br. 21 (citing *Valley/50th Ave., LLC v.*

¹ Nevertheless, RLG’s brief neglects to address the controlling authority of *Ausler v. Ramsey*, 73 Wn. App. 231, 868 P.2d 877 (1994) and *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982)—which Rafel likewise ignored in his dealings with Defoor when he contended he was *contractually* entitled to the *full amount* of his claimed fees. *See, e.g.*, CP 1688, 1723, 1795. As late as RLG’s 30(b)(6) deposition in July 2011, Rafel took the position that the *Ausler / Ross* rule did not apply to him. CP 1692-98.

Stewart, 159 Wn.2d 736, 745, 153 P.2d 186 (2007)).

Like the trial court, CP 2851, RLG assumes that RPC 1.8(a) does not apply to Rafel's conduct because Defoor was representing herself when she signed the Agreement. Resp.Br. 19. According to RLG, there is "no applicable case law or other authority applying RPC 1.8(a) to prospective representations in Washington." *Id.* at 2. RLG is wrong.

First, RLG mischaracterizes *Holmes v. Loveless*, 122 Wn. App. 470, 94 P.3d 338 (2004), as a case that "involved an attorney who was already representing the client at the time the alleged business transaction occurred." Resp.Br. 21. To the contrary, the client in *Holmes* was a joint venture called "Loveless/Tollefson Properties." 122 Wn. App. at 473.² The attorney had previously provided legal services to C.E. Loveless, *id.*, but there is no suggestion that he represented either the joint venture itself, co-venturer Tollefson, or any other joint venture between them. The engagement agreement with Loveless/Tollefson Properties provided for some of the lawyers' compensation to come from a percentage of the profits of the client's development venture. *Id.* The Court held that such an agreement "falls within the scope of the business transaction rule." *Id.* at 475.

Second, although this Court's decision in *Cotton v. Kronenberg*,

² In evaluating an attorney's compliance with RPC 1.8, courts must consider the identity of the actual client, not affiliates. *Valley/50th Ave.*, 159 Wn.2d at 747.

111 Wn. App. 258, 44 P.3d 878 (2002), did not focus on the precise timing among documents executed at the outset of the engagement, the Court explicitly cited the leading treatise for the proposition that Rule 1.8(a) applies to nonmonetary business transaction terms that are agreed to concurrently with the engagement agreement. *Id.* at 271 n.33 (quoting Geoffrey C. Hazard, Jr., *et al.*, THE LAW OF LAWYERING § 12.5).

Third, other treatises and commentators likewise recognize that RPC 1.8(a) applies when there is an “[o]verlap between fee agreements and business transactions.” Andrews *et al.*, LAW OF LAWYERING IN WASHINGTON (WSBA 2012) at 7-43; *see also* WSBA Ethics Adv. Op. 2178 (2008) (attorney may not acquire a “promissory note for a sum certain from a prospective client prior to work being performed or fees being earned”); CP 2021 (Mark Fucile testified that Rule 1.8 applies to promissory note obtained “at the formation stage” of engagement).

Finally, multiple provisions of RPC 1.8 itself demonstrate that the reference in its heading to “Current Clients” includes the terms of an initial engagement agreement. *See, e.g.*, RPC 1.8(f) (third-party payment); RPC 1.8(i) (interest in litigation). As the first comment to Rule 1.8 states, the requirements of RPC 1.8(a) “must be met when the lawyer accepts an interest in the client’s business or other nonmonetary property as payment of all or part of a fee.” The trial court erred in holding otherwise.

b. Rafel did not comply with RPC 1.8(a).

Defoor sought summary judgment of invalidity based on the provision of RPC 1.8(a)(1) requiring full disclosure, in writing, separate from the terms of the contract itself, identifying the specific disadvantages of the business transaction.³ As a matter of law, RLG failed to make the required conflicts disclosures regarding the Settlement and Note.

RLG first argues that the “terms of the agreement were clearly transmitted to Defoor.” Resp.Br. 23; *see also id.* at 26 (Rafel informed Defoor that “she was ‘completely free’ to decline his proposed terms” regarding interest). But RPC 1.8(a) requires more than drafting and sending a written contract. *See, e.g., In re Disciplinary Proceeding Against Haley*, 157 Wn.2d 398, 407, 138 P.3d 1044 (2006).

Second, RLG contends that Rafel may rely in hindsight on a letter sent to Defoor by her former counsel, Ginger Edwards, on February 16, 2008—two days *after* Defoor had already signed the Settlement & Re-Engagement Agreement. Resp.Br. 24 (citing CP 4278-83); CP 1848 (2/14/08 signature). According to RLG, Rafel’s discovery of another attorney’s subsequent letter excuses his own repeated mischaracterization

³ A lawyer must satisfy *each* of the requirements set forth in RPC 1.8(a). *Cotton*, 111 Wn. App. at 272 (voiding contract because agreement was not fair and reasonable under RPC 1.8(a)(1)). As discussed below in Section D, the fairness and reasonableness of RLG’s fee demand for Matter 1 present disputed factual issues, which independently require reversal of the trial court’s grant of summary judgment in favor of RLG.

to Defoor, *see* n.1, *supra*, of her post-withdrawal rights and obligations. But RPC 1.8(a) requires a complete *written conflicts disclosure*. It is true that when “the client is independently *represented in the transaction*” between attorney and client, the prior written disclosure may come *either* from the attorney *or* from “the client’s independent counsel.” RPC 1.8 cmt 4 (emphasis added). In this case, however, Defoor was *not* represented in her transaction with RLG. CP 652. Even if she had been, RLG is unwilling to represent to this Court that Edwards’ belated letter—which raises serious questions regarding the fairness and reasonableness of the transaction—actually constituted the operative written disclosure to Defoor. Resp.Br. 25 n.5. Instead, RLG relies on the letter solely to “show that Defoor was advised by independent counsel,” *id.*, thus satisfying RPC 1.8(a)(2)—which is separate from the additional requirements under RPC 1.8(a)(1) that the transaction terms be *fair and reasonable*, and that all conflicts be *fully disclosed* in writing. *Cotton*, 111 Wn. App. at 272.

Finally, RLG contends that before transmuted its existing *quantum meruit* claim for services in Matter 1 into a secured note obligating Defoor to pay \$505,000 plus costs as “a condition for Rafel agreeing to represent” her, Rafel had no duty to disclose anything about its Matter 1 rates and services beyond the astonishing total amount claimed because “there is no evidence that Defoor ever asked for such records.” Resp.Br. 26-27. RLG

has it backwards. It was Rafel's obligation to make *full disclosure* and obtain *informed* consent prior to the transaction with Defoor. Defoor could not consent to a Note obligating her to pay \$505,000 in attorneys' fees for Matter 1 if she had no clue about the premium "contingent" rates Rafel proposed to charge, and no opportunity to review any description whatsoever of the services purportedly provided. See *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 871, 64 P.3d 1226 (2003) (disclosure must be sufficient to allow independent evaluation).

Rafel's attempt to distinguish the facts in *Simburg, et al., v. Olshan*, 97 Wn. App. 901, 988 P. 2d 467 (1999), merely underscores his own utter lack of candor. In *Simburg*, the attorneys failed to satisfy the "full disclosure" element of accord and satisfaction because despite providing billing records, the firm had neglected to disclose one lawyer's change in billing rate. In contrast with that partial omission, Rafel repeatedly insisted to Defoor—falsely—that she had a *contractual* duty to pay \$505,000 for fees without providing *any information whatsoever* about his calculation—including the fact that it was based on premium "contingent fee rates" that Rafel has never charged any other client, and included numerous charges that he now acknowledges were improper. CP 1000. Even drawing all reasonable inferences in favor of RLG, Rafel failed as a matter of law to make the required RPC 1.8 disclosures.

2. RLG Does Not Dispute That Rafel Violated RPC 1.8(a) By Acquiring A Security Interest In “Any Assets Of Defoor.”

As RLG observes, Defoor challenged a second aspect of the Settlement & Re-Engagement Agreement: Rafel’s knowing acquisition of a “lien against any non-litigation assets held by Defoor.” Resp.Br. 30. Unlike the business transaction converting its Matter 1 *quantum meruit* claim into a \$775,000 note, RLG does not argue that this security interest is beyond the scope of RPC 1.8(a), or that Rafel made the required disclosures, or that Defoor was advised by other attorneys regarding the provision. *See id.* at 20-28. Instead, RLG merely contends that the lien it demanded from Defoor “has never been asserted” against any of Defoor’s assets other than “property awarded to her in the litigation.” Resp.Br. 31 (emphasis in original).⁴

However, the plain language of RPC 1.8(a) bars the *acquisition* of security interests adverse to client, not just the enforcement of such interests. A security interest is a valuable property right, with great “potential for economic coercion by attorneys.” *Ross*, 97 Wn.2d at 606.

⁴ In fact, RLG has *not* limited its claims to property recovered from Terry. *See, e.g.*, CP 2238 (Rafel recognized that Defoor’s jewelry was separate property and not subject to division in litigation). RPC 1.8(i) separately governs the creation of liens in property that is “recovered through the lawyer’s efforts in the litigation.” RPC 1.8 cmt 16. Other substantive law, not at issue in this appeal, governs the priority and potential effect of contractual lien provisions on particular real or personal property. *See, e.g.*, RCW 64.04.010 (encumbrances on real estate effective by deed); *Home Realty Lynwood, Inc. v. Walsh*, 146 Wn. App. 231, 237, 189 P.3d 253 (2008) (requiring property description).

See also LK Operating, LLC v. Collection Grp, LLC, 168 Wn. App. 862, 880, 279 P.3d 448 (2012) (RPC 1.8 does not require “that an actual benefit be conferred” on lawyer); WASHINGTON LAW OF LAWYERING at 7-44 (agreement “interjecting a creditor-debtor relationship between the lawyer and client before the lawyer-client relationship has even commenced” is “not fair and reasonable to the client”) (citing WSBA Ethics Op. 2178).

3. Because Rafel Violated RPC 1.8, RLG May Not Enforce The Agreement Against Defoor.

As Division III of this Court recently reaffirmed, as a matter of fundamental public policy, courts will refuse an attorney’s efforts to enforce client agreements when the lawyer has violated RPC 1.8. *LK Operating*, 168 Wn. App. at 874-75 (collecting cases). RLG offers no contrary authority regarding the consequence of violating RPC 1.8.

Instead, RLG argues that the Court may sever the offending Matter 1 fee transaction and overbroad contractual lien provision “and enforce the rest” of the Settlement & Re-Engagement Agreement. Resp.Br. 30. Even under general contract principles, RLG’s argument fails because the terms of the Note and the Settlement & Re-Engagement Agreement are interdependent and cannot be severed from one another. A “contract is ‘entire,’ rather than severable, when ‘the parties assented to all the promises as a single whole, so that there would have been no bargain

whatever, if any promise or set of promises were struck out.” *In re Marriage of McCausland*, 129 Wn. App. 390, 403, 118 P.3d 944 (2005). As Rafel testified as RLG’s CR 30(b)(6) designee, the contract with Defoor was “an entire agreement” and “it’s all part of a whole.” CP 1714.

In any event, the Settlement & Re-Engagement Agreement is no ordinary contract, but rather an agreement between attorney and client, which must satisfy the strict requirements of RPC 1.8. *LK Operating*, 168 Wn. App. at 876. Rafel’s conduct renders the Agreement “void as against public policy.” *Id.* at 881.

4. RLG’s Unfounded Fraud Accusations Do Not Excuse Rafel’s Professional Misconduct.

After Defoor asserted malpractice counterclaims, RLG amended its original collection claims to add multiple new legal theories, including accusations of fraud. CP 276-78. Defoor vigorously disputes RLG’s accusations. RLG later abandoned its fraud contentions, which were never adjudicated. CP 4391, 4402. Nevertheless, RLG now argues that this Court should revive the Agreement on the grounds that Defoor “fraudulently induced Rafel to enter” it. Resp.Br. 29.

Rafel’s excessive lien claim for Matter 1 left Defoor with no alternative to signing the Agreement (other than wiping out Rafel’s improper lien with the drastic step of declaring bankruptcy, her former attorneys’

actual counsel to her). CP 1656. RLG twists Defoor's words at her deposition to transform her well-founded objection to the *amounts* of Rafel's Matter 1 fees and cost demands, CP 1647, into a novel fraud defense. Rafel required her to sign the false statement that she had an "obligation" to pay \$505,000 for Matter 1 fees. CP 1847. RLG's circular logic—that any victim of duress who swears under oath that her signature was obtained without coercion has no recourse against the perpetrator—is sheer chutzpah.

In any event, Rafel's proffered defense cannot resuscitate a void attorney engagement agreement. *See, e.g., Corp. Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet*, 132 Wn. App. 903, 913, 134 P.3d 1188 (2006) (attorney's engagement agreement was "void as a matter of public policy" where attorney "behaved unethically" under RPC 1.8); *Cooper v. Baer*, 59 Wn.2d 763, 380 P.2d 871 (1962) (estoppel unavailable when contract against public policy).

B. Disputed Factual Issues Preclude Summary Judgment On Defoor's Malpractice Claim.

For Rafel's summary judgment on Defoor's malpractice claim to be upheld, when the facts are viewed in the light most favorable to Defoor, there must be no genuine issue of fact regarding whether Rafel breached his duty of care to Defoor and whether his breach was the proximate cause of Defoor's damage. Opening Br. 25. Genuine issues exist regarding both.

1. Rafel Breached His Duty of Care by Failing to Track the Proceeds From Community Transactions.

The duty of care imposed on an attorney in a dissolution includes a duty to track the disposition of community assets. *First*, malpractice actions arising from dissolutions have routinely recognized that attorneys breach the duty of care if they fail to discover, value, or track assets when resolving divisions of property. These cases also recognize that the question whether an attorney breached the duty by not taking adequate steps to discover, value, or track assets is for the jury; it is not an appropriate subject for summary judgment or a directed verdict.⁵ Whether to track assets is not a judgment call or an optional strategy; it is a basic component of the duty of care.

⁵ See, e.g., *Martin v. Northwest Wa. Legal Servs.*, 43 Wn. App. 405, 409, 717 P.2d 779 (1986); *Aloy v. Mash*, 696 P.2d 656, 660 (Cal. 1985); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 527 (1966); *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 646 A.2d 195, 202-03 & n.9 (Conn. 1994); *Tarleton v. Arnstein & Lehr*, 719 So.2d 325, 327 (Fla. App. 1998); *Stephen v. Sallaz & Gatewood*, 248 P.3d 1256, 1260-62 (Idaho 2011); *McDonald v. Paine*, 810 P.2d 259, 262 (Idaho 1991); *Landau v. Bailey*, 629 N.E.2d 264, 266-67 (Ind. App. 1994); *Schneider v. Richardson*, 411 A.2d 656, 658 (Me. 1979); *Pickett, Houlon & Berman v. Haislip*, 533 A.2d 287, 290-95 (Md. App. 1987); *Guenard v. Burke*, 443 N.E.2d 892, 897 (Mass. 1982); *Teodorescu v. Bushnell, Gage, Reizen & Byington*, 506 N.W.2d 275, 276-78 (Mich. App. 1993); *Oakes & Kanatz v. Schmidt*, 391 N.W.2d 51, 54 (Minn. App. 1986); *London v. Weitzman*, 884 S.W.2d 674, 676 (Mo. App. 1994); *Wood v. McGrath, North, Mullin & Kratz*, 589 N.W.2d 103, 108 (Neb. 1999); *McWhirt v. Heavey*, 550 N.W.2d 327, 335-36 (Neb. 1996); *Ziegelheim v. Apollo*, 607 A.2d 1298, 1305-06 (N.J. 1992); *Feng v. Kelley & Ferraro*, 2009 WL 790345 at *3-4 (Ohio App. Mar. 26, 2009); *Ballesteros v. Jones*, 985 S.W.2d 485, 495 (Tex. App. 1999); *McClung v. Smith*, 870 F.Supp. 1384, 1405 (E.D. Va. 1994), *aff'd in relevant part*, 89 F.3d 829 (4th Cir. 1996); *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W.2d 118, 128-31 (Wis. 1985); *Rino v. Mead*, 55 P.3d 13, 20 (Wyo. 2002); *cf. Park v. Park*, 612 P.2d 882, 889 (Cal. 1980) (vacating dissolution when “the division of the community property was made without the aid of an up-to-date financial declaration.”); *Nembach v. Giaimo & Vreeburg*, 618 N.Y.S.2d 307 (A.D. 1994) (failure to replace husband as beneficiary on insurance policy).

Second, Defoor’s expert Ted Billbe testified that Rafel “did not do a proper job of tracking the assets,” which “resulted in him not being able to put on a proper case.” CP 2065. Mr. Billbe opined that “a reasonably competent attorney would have tracked all of the quasi-community assets” and that “Mr. Rafel failed to meet a standard of care that a reasonably competent attorney would have met.” CP 2066-67.

Third, Rafel’s own words confirm the duty to track assets. Shortly after he was retained, he sought an extension because his predecessor had not hired “accountants to analyze the complex transactions” of the Defoors “and Mr. Defoor’s disposition of millions of dollars in community assets following the parties’ separation.” Rafel opined that “Such experts are *absolutely essential*, to assure that Ms. Defoor’s interests are properly protected.” CP 1928 (emphasis added). *See also* CP 1928-29 (¶¶ 4(a), (b)); CP 1923-24. Rafel’s own recognition of the need to track assets is, by itself, sufficient to raise a question of fact regarding his breach. *See Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1092-95 (1995).

Rafel does not dispute that, with limited exceptions, he did not seek to track what happened to the proceeds from the disposition of the community assets. He contends, instead, that he did not breach his duty because he “brought to the court’s attention” the assets *as they existed at the time of separation or subsequent acquisition*. This argument ignores

the extent of Rafel's duty. It is not sufficient to tell the court where the community assets have been. It is also "absolutely essential," CP 1928, to track where the proceeds from the disposition of those assets went.

Proceedings in the Defoor Litigation demonstrate this fact. When the proceeds from community assets were tracked, Judge Inveen awarded Defoor half of those proceeds. *See, e.g.*, CP 1917, 1920. But when Rafel was unable to track the proceeds, the court did not allocate any portion to Defoor. *See, e.g.*, CP 1916-19, 2303-04. Following are five examples where Judge Inveen identified assets as community assets, but did not assign half the proceeds to Defoor because Rafel did not track the proceeds.

1. *Sale of Tobin Property and Purchase of Kirkland Home.*

In January 2007, Terry sold the Tobin property, community property in Renton, to the Washington Department of Transportation for approximately \$2.4 million. CP 1641, 1909 (¶ 53), 2295, 2303, 2647. Immediately thereafter, he purchased a home in Kirkland for approximately the same amount, using \$699,732 of the cash from the Tobin sale and borrowing the rest. CP 1990-01 (¶ 31), 1909 (¶ 53), 1988.

The court found that Terry had used community assets to purchase the Kirkland home. CP 1900-01 (¶ 31), 1909 (¶ 53). Because \$699,732 of the Tobin proceeds could be traced to the Kirkland residence, Judge Inveen included it in the distribution of community assets. CP 1920. But because

Rafel had not sought to track what happened to the remaining \$1.7 million, Judge Inveen gave no credit to Defoor for that amount, notwithstanding that it came from a community asset. CP 2303-04.

2. October 2007 Camwest Federal Way Payment. In October 2007, GWC received a payment of \$1,050,000 from its development partner Camwest with respect to a community asset in Federal Way. CP 1640-41 (¶ 6), 1652-53 (¶ 30), 1904, 2082, 3708-09 (¶ 7), 3755-67. The court found the payment was a community asset. CP 1903-05 (¶ 42). The next day, Terry transferred most of this payment (\$950,000) to UBS Account BK-02483-35. CP 1652-53 (¶ 30), 2090, 2100, 2118.

Rafel represented to the court below that Terry did not produce bank statements for Account 2483 or reflecting the \$950,000 deposit. CP 3709 (¶ 9). In fact, documents produced by Rafel in this action show that Terry *did* produce the bank statement reflecting the deposit and that Rafel provided the statement to his expert Mr. Sutphen. CP 2110-19.

Also contrary to Rafel's representation, the evidence is that Rafel did not "bring to the court's attention" the fact that the \$950,000 was sitting in Account 2483. Rafel argued that Defoor should receive half of the Camwest payment, since it was derived from a community asset. CP 2286, 2637-38, 2645, 2651, 3710 (¶ 12), 3857. But because Rafel did not track the funds and did not tell Judge Inveen that those funds were in

Account 2483, Judge Inveen did not give Defoor any credit for the \$950,000. CP 1916-19, 2304. Defoor's expert Mr. Billbe specifically described the failure by Rafel to track the \$950,000 as an example of Rafel's breach of his duty of care. CP 2066, 4095.

3. ***US Bank Account.*** As of Defoor and Terry's September 2006 separation, their joint US Bank account, in the name of GWC, had over \$3,000,000. CP 2003. Judge Inveen found that Terry transferred this money to an account at UBS (Account BK-02642-35). CP 1911 (¶ 61). As of October 2007, the balance in that account had declined to \$2 million, not counting \$700,000 attributable to the sale of the Costa Rica condominium.

Judge Inveen found that the funds in the account "were those of GWC or the parties jointly," CP 1911 (¶ 61) and awarded Defoor half of the remaining \$2 million. CP 1917. Rafel had argued that Defoor should receive \$4.3 million, which would have taken into account the \$1.2 million difference between the original \$3.2 million and the remaining \$2 million, as well as other community funds that he had not tracked. CP 2286-97, 2637-38, 2641, 2645, 2651, 3710 (¶ 12), 3857-58. Judge Inveen rejected this argument. She found that, though it appeared Terry had taken cash that had belonged to the community, "the evidence just isn't sufficient" to track what had happened to the money or to be sure that it wasn't already accounted for in other assets being divided. CP 2303-04. As a result,

Defoor received no credit for \$1.2 million from the couple's community account because Rafel did not track where the money went.

4. **March 2007 Camwest Fairwood Payment.** In March 2007 Camwest made a payment of \$225,000 to GWC with respect to a project known as Fairwood. CP 2286, 3709 (¶ 8), 3769, 3773. Judge Inveen found that the payment was a community asset. CP 1905 (¶ 43). Rafel argued that Defoor should receive a payment that reflected half of this amount. CP 2286. But because Rafel had not done anything to track where the \$225,000 went, Judge Inveen denied this request. CP 2303-04.

5. **High Hook Boat.** Judge Inveen found that Terry had sold a community luxury fishing yacht and retained control of the \$157,257 proceeds himself. CP 1910 (¶ 58). Once again, Rafel argued that Defoor should receive a payment that reflected half of this amount. CP 2286. And, once again, because Rafel had not done anything to track where the \$157,257 went, Judge Inveen denied this request. CP 2303-04.

2. **Rafel's Breach of Duty Was the Proximate Cause of Damage to Defoor.**

"In the legal malpractice context, proximate cause boils down to whether the client would have fared better but for the attorney's negligence." *Lavigne v. Chase, Haskell, Hayes & Kalamon*, 112 Wn. App. 677, 683, 50 P.3d 306 (2002). "Unless the question involves a pure matter

of law, such as whether the client would have prevailed on a statute of limitations issue, the trier of fact determines the existence of proximate cause.” *Id.*; *accord Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 328-29, 111 P.3d 866 (2005); *Daugert v. Pappas*, 104 Wn.2d 254, 257-58, 704 P.2d 600 (1985). Whether an attorney’s failure to discover, value, or track community assets was the proximate cause of loss is a matter for resolution at trial, not by summary judgment or directed verdict.⁶

Rafel suggests that even if he was negligent, Defoor should not recover because she “has not provided any expert testimony to prove causation, damages or collectability.” Resp.Br. 41. There are multiple flaws with this argument.

First, Defoor’s expert Mr. Billbe did testify as to causation. He explained that various community assets did not make it into the judgment because the court had not been provided with information about what happened to the cash proceeds from the assets, which left the court confused and caused it to “thr[o]w its hands up.” CP 4096-97.

Second, as Rafel acknowledges, expert testimony is not required as

⁶ See, e.g., *Martin*, 43 Wn. App. at 407, 409-11; *Tennen v. Lane*, 716 P.2d 1031, 1034 (Ariz. App. 1986); *Callahan v. Clark*, 901 S.W.2d 842, 847-48 (Ark. 1995); *Aloy*, 696 P.2d at 660; *Stanley*, 35 Cal. App. 4th at 1092-97; *Lewis v. Superior Court*, 77 Cal. App. 3d 844, 852-53 (1978); *Ishmael*, 241 Cal. App. 2d at 529-30; *Grayson*, 646 A.2d at 203; *Tarleton*, 719 So.2d at 327-330; *Millsaps v. Kaufold*, 653 S.E.2d 344, 345-47 (Ga. App. 2007); *Meyer v. Wagner*, 784 N.E.2d 34, 39 (Mass. App. 2003); *Guenard*, 443 N.E.2d at 898; *Teodorescu*, 506 N.W.2d at 278; *London*, 884 S.W.2d at 677-78; *McWhirt*, 550 N.W.2d at 336-38; *Nembach*, 618 N.Y.S.2d at 307; *Feng*, 2009 WL 790345 at *3-4; *Helmbrecht*, 362 N.W.2d at 131-32.

to matters within the common knowledge of lay persons. Resp.Br. 40.⁷ Here, it is evident that Rafel's negligence was the proximate cause of Defoor's harm. Whenever Judge Inveen could track what had happened to the proceeds from community assets, she awarded half to Defoor, as in the case of the \$699,732 from the Tobin sale that were tracked to the Kirkland home and the \$2 million from the US Bank account that were traceable to UBS Account 2642. CP 1917, 1920. When, however, Rafel failed to track what had happened to the community funds, Judge Inveen found that "the evidence just isn't sufficient" to determine what had happened to the funds and did not award anything to Defoor. CP 2304. A jury does not require an expert to point out this fact.

Third, none of the cases cited by Rafel held that expert testimony was required as to collectability. And several of them (*Lavigne, Matson, Tilly*) held the plaintiff showed collectability, or created a genuine issue of fact, notwithstanding that the evidence did not include expert testimony.

Finally, Rafel's argument regarding collectability ignores the fact that Rafel was responsible for the inability to collect. Had he tracked what happened to the community assets, he could have taken additional steps to protect Defoor, e.g., through freezing the funds in UBS Account 2642 and

⁷ *Accord Tarleton*, 719 So.2d at 330; *Morris v. Morris*, 2003 WL 21509023 at *5-6 (Ohio App. July 2, 2003).

other accounts, lis pendens, temporary restraining orders, etc. Indeed, the day after Rafel was hired, his “things to do” memo discussed the need to take steps to protect Defoor through security. CP 1922-24. Accordingly, he began researching the filing of lis pendens and began preparing a motion “to protect and control assets.” CP 2916, 2918, 2920. But he did not file any lis pendens or motion until almost three months later. CP 1642. Nor did he ever take steps to freeze the bank accounts. The failure to provide adequate security is, itself, malpractice, and the question whether an attorney’s work was deficient in this regard is for the jury.⁸ “If a plaintiff has produced the best evidence available, and if the evidence affords a reasonable basis for estimating a loss, courts will not permit a wrongdoer to benefit from the difficulty of determining the dollar amount of loss,” *Lundgren v. Whitney’s Inc.*, 94 Wn.2d 91, 98, 614 P.2d 1272 (1980), particularly when the wrongdoer’s acts have created the difficulty in determining damages with precision. “[T]he wrongdoer shall bear the risk of the uncertainty which his own wrong has created.” *Jacqeline’s Washington, Inc. v. Merchantile Stores Co.*, 80 Wn.2d 784, 789-90, 498

⁸ See, e.g., *Reed v. Mitchell & Timbanard*, 903 P.2d 621, 625-26 (Ariz. App. 1995); *Rhine v. Haley*, 378 S.W.2d 655, 656-58 (Ark. 1964); *Margolin v. Kleban & Samor, P.C.*, 882 A.2d 653, 663-65 (Conn. 2005); *Behr v. Foreman*, 824 So.2d 222, 223-24 (Fla. App. 2002); *Millsaps*, 653 S.E.2d at 345-47; *Sobilo v. Manassa, Riffner, Barber, Rowden & Scott*, 479 F. Supp. 2d 805, 812-22 (N.D. Ill. 2007); *Meyer*, 784 N.E.2d at 35-36; *Peterson v. Simasko, Simasko & Simasko*, 579 N.W.2d 469, 470 (Mich. App. 1998); *Ehlinger v. Ruberti, Girvin & Ferlazzo*, 758 N.Y.S.2d 195 (A.D. 2003); *Hart v. Carro, Spanbock, Kaster & Cuiffo*, 620 N.Y.S.2d 847, 849 (A.D. 1995).

P.2d 870 (1972).

C. Disputed Factual Issues Preclude Summary Judgment On Defoor's Breach Of Fiduciary Duty Claim.

Rafel's denial that his filing of liens was improper and excessive, *see* Resp.Br. 42-45, merely demonstrates the existence of genuine issues of fact. *See* Opening Br. at 42-43; *see also* CP 1858, 2170 (after re-engagement RLG filed liens that included additional back-dated Matter 1 charges). As to Rafel's contention that there is no evidence "that Defoor sought to retain other counsel other than possibly James Clark," Resp.Br. 43, the evidence is that Defoor *did* attempt to rehire Mr. Clark and was unsuccessful because of the liens. CP 1630, 1647. As to Rafel's argument that there is no evidence another lawyer would have achieved a better result, competent counsel would have tracked community assets and obtained adequate security. *See* discussion *supra* at 12-13.

Rafel also contends that to recover for emotional distress, Defoor must show the distress is susceptible to medical diagnosis or accompanied by objective symptoms. Resp.Br. 45-46. These requirements would apply if Defoor were seeking emotional distress damages on her negligence claim; they do not apply to intentional torts such as breach of fiduciary duty. *Kloepfel v. Bokor*, 149 Wn.2d 192, 201, 66 P.3d 630 (2003); *Berger v. Sonneland*, 144 Wn.2d 91, 112-13 & n.113, 26 P.3d 257 (2001).

D. Disputed Factual Issues Preclude Summary Judgment As To The Fairness And Reasonableness Of RLG's \$1,747,567 Fee Claim.

The reasonableness and fairness of an attorney's fee is a question of fact, to be resolved by the jury and not on summary judgment. *Jacob's Meadow Owners Ass'n v. Plateau, 44 II, LLC*, 139 Wn. App. 743, 760-61, 162 P.3d 1153 (2007); *Wolfe v. Morgan*, 11 Wn. App. 738, 744, 524 P.2d 927 (1974). Reasonableness is generally based on a lodestar approach, "arrived at by multiplying a *reasonable* hourly rate by the number of hours *reasonably* expended on the matter." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150-51, 859 P.2d 1210 (1993) (emphasis in original). "Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims." *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998).

Defoor has raised genuine factual issues concerning the reasonableness of Rafel's fees. Opening Br. 44-48. Rafel's primary response is to claim that the defects which Defoor has pointed to should be ignored absent supporting expert testimony. Resp.Br. 47. While expert testimony regarding the reasonable value of an attorney's services is permitted, it "is neither central nor conclusive, and the court or jury may be disregard it entirely." *MacNaughton v. NBF Cable Sys., Inc.*, 1996

WL 33703873 (D. N.J. June 18, 1996).⁹ A jury may determine that an attorney's request for fees is or is not reasonable based on factors such as (1) the requesting attorney's own testimony and records, *see, e.g., O'Conner v. Blodnick, Abramowitz & Blodnick*, 744 N.Y.S.2d 205, 206 (A.D. 2002), (2) the testimony of opposing counsel, *see, e.g., Guity v. C.C.I. Enter.*, 54 S.W.3d 526,527-28 (Tex. App. 2001), and (3) the jury's own assessment of the circumstances. *See, e.g., Head*, 105 U.S. at 49-50. Genuine issues exist as to each of the following factors.

1. Hourly Rate. Discovery from Rafel indicates that his regular hourly rate on non-contingent matters was \$350 per hour and that in only one case—Defoor's—has he charged a non-contingent-fee client his hypothetical contingent fee rate of \$450. CP 1646 (¶ 13), 2985 (40: 8-16), 2991, 2996, 3000-01. This discrepancy creates a genuine issue concerning what the reasonable hourly rate should be.¹⁰

⁹ *Accord Brown v. State Farm Fire & Cas. Co.*, 66 Wn. App. 273, 283, 831 P.2d 1122 (1992) ("We agree with S. Speiser, Attorney's Fees §18.14, at 478 1973: 'Generally the testimony of expert witnesses [on the issue of the value of services of an attorney] is not essential.'") (brackets in *Brown*); *Head v. Hargrave*, 105 U.S. 45, 49-50 (1881); *Verve, LLC v. Hypercom Corp.*, 2006 WL 3385797 (D. Ariz. Oct. 19, 2006); *Ball v. Posey*, 176 Cal. App. 3d, 1209, 1215 (1986). *Geer v. Tonnon*, 137 Wn. App. 838, 850, 155 P.3d 163 (2007), cited by Rafel, held that expert testimony may be required as to breach of the duty of care, but did not so hold as to the reasonableness of the attorney's fee. *See id.* at 850-51.

¹⁰ *See, e.g., City of Birmingham v. Horn*, 810 So.2d 667, 683-84 (Ala. 2001) (attempt to charge higher rate than rate attorney typically charged); *O'Conner*, 744 N.Y.S.2d at 206 (attorney's testimony that rate exceeded his usual rate established prima facie case that fees were excessive); *cf. Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) ("Where the attorneys in question have an established rate for billing clients, that rate will likely be a reasonable rate."); *Baca v. Chiropractic v. Cobb*, 317 S.W.3d 674, 679-80 (Mo. App. 2010) (contradiction between rates charged and promised).

2. **Number of Hours.** The determination of whether the requested hours are reasonable includes consideration of whether those hours are wasteful or duplicative. *Mahler*, 135 Wn.2d at 434. Here, counsel for Defoor has reviewed Rafel's entries and identified 65 entries, representing 220.5 hours and \$63,191, that appear to be improper. CP 2907-08 (¶¶ 3, 8), 2913-2979, 3002-71. Such a declaration is sufficient to demonstrate the existence of a genuine issue of fact.¹¹

3. **Quality of Work.** The determination of a reasonable fee must take into account the quality of the work performed.¹² An attorney whose work has been negligent or who has violated RPC 1.8 should not recover fees for performing that work.¹³

4. **Costs.** When Defoor hired Rafel, he told her "the maximum total costs for experts" would be \$100,000. CP 1640 (¶ 5). Instead, he has sought costs of \$383,184.29. CP 2860. This discrepancy, by itself, raises a

¹¹ See, e.g., *Brygider v. Atkinson*, 385 S.E.2d 95, 96-97 (1989); *Hinkle, et al. v. Cadle Co.*, 848 P.2d 1079, 1083-84 (N.M. 1993); *Guity*, 54 S.W.3d at 527-28.

¹² See, e.g., *Mahler*, 135 Wn.2d at 434 ("unsuccessful theories or claims"); *Bowers*, 100 Wn.2d at 594, 597 ("quality of legal representation"; "unsuccessful claims"); RPC 1.5(a)(4) ("results obtained").

¹³ See, e.g., *Shoemake v. Ferrer*, 143 Wn. App. 819, 825-829, 182 P.3d 992 (2008) (negligent attorney may not offset fee against malpractice award); *Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992) ("The general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized."); *Bowers*, 100 Wn.2d at 594-597; *Dailey v. Testone*, 72 Wn.2d 662, 664, 435 P.2d 24 (1967); *Saffer v. Willoughby*, 670 A.2d 527, 534 (1996) ("Ordinarily, an attorney may not collect attorney fees for services negligently performed."); *Kluczka v. Lecci*, 880 N.Y.S.2d 698, 700 (A.D. 2009) ("An attorney may not recover fees for legal services performed in a negligent manner even where that negligence is not a proximate cause of the client's injury.").

genuine issue as to reasonableness of costs. *Baca*, 317 S.W.3d at 679-80. Rafel's communication with his expert appraiser also confirms the existence of a genuine issue regarding the reasonableness of the costs. Rafel complained to the appraiser that his hourly rate exceeded the agreed-to rate by \$100 per hour and that the appraiser's work had been "dangerously" deficient. CP 3075. Similarly, much of the costs paid represent the work of Rafel's accountant expert Mr. Sutphen. *See* CP 100, 1814. As demonstrated above, this work was deficient as well.

5. **Result.** RLG erroneously insists that it is entitled to the full amount of its \$1,747,567 fee claim, despite subsequent events that have deprived Defoor herself of much of the value of her judgment against Terry. *See, e.g.*, RESTATEMENT OF LAWYERING § 34 cmt. c & reporter's note ("events not known or contemplated when the contract was made can render the contract unreasonably favorable to the lawyer").

III. CONCLUSION

Even experienced attorneys make mistakes. The real test of a person and a lawyer is what you do afterwards. Unfortunately, rather than take responsibility for his failures, Rafel's strategy was to cover things up and to attack his former client with an overreaching zeal that he never approached when he represented her. This Court should reverse the judgment below, and grant the relief set forth above at p. 1.

Respectfully submitted this 1st day of November, 2012.

DAVIS WRIGHT TREMAINE LLP

A handwritten signature in black ink, appearing to read "R. Leishman", written over a horizontal line.

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Zak Tomlinson, WSBA No. 35940

Attorneys for Appellant Stacey Defoor

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On November 1, 2012 I caused to be served by messenger a copy of the foregoing document on the following:

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DATED this 1st day of November, 2012.


Suzette Barber

No. 68339-0-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

STACEY DEFOOR,

Appellant

v.

RAFEL LAW GROUP PLLC

Respondent

Appeal From The Superior Court For King County
Hon. Mary Yu

**APPENDIX OF NON-WASHINGTON AUTHORITIES
SUPPORTING REPLY BRIEF OF APPELLANT
STACEY DEFOOR**

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Attorneys for Appellant Stacey Defoor

Appellant Stacey Defoor hereby submits copies of the following non-Washington State Cases in support of its Reply Brief:

1. *Aloy v. Mash*, 696 P.2d 656 (Cal. 1985);
2. *Baca v. Cobb*, 317 S.W.3d at 679-80;
3. *Ball v. Posey*, 176 Cal. App. 3d (1986);
4. *Ballesteros v. Jones*, 985 S.W.2d 485 (Tex. App. 1999);
5. *Behr v. Foreman*, 824 So. 2d 222 (Fla. App. 2002);
6. *Brygider v. Atkinson*, 385 S.E.2d at 96-97;
7. *Callahan v. Clark*, 901 S.W.2d 842 (Ark. 1995);
8. *City of Birmingham v. Horn*, 810 So.2d 667 (Ala. 2001);
9. *Ehlinger v. Ruberti, Girvin & Ferlazzo*, 758 N.Y.S.2d 195 (A.D. 2003);
10. *Feng v. Kelley & Ferraro*, 2009 WL 790345 (Ohio App. 2009);
11. *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 646 A.2d 195 (Conn. 1994);
12. *Guenard v. Burke*, 443 N.E.2d 892 (Mass. 1982);
13. *Guity v. C.C.I. Enterprise*, 54 S.W.3d at 527-28;
14. *Hart v. Carro, Spambock, Kaster & Cuiffo*, 620 N.Y.S.2d 847 (A.D. 1995);
15. *Head v. Hargrave*, 105 U.S. 45 (1881);
16. *Helmbrecht v. St. Paul Ins. Co.*, 362 N.W.2d 118 (Wis. 1985);
17. *Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co.*, 848 P.2d 1079 (N.M. 1993);

18. *Ishmael v. Millington*, 241 Cal. App. 2d 520 (1966);
19. *Kluczka v. Lecci*, 880 N.Y.S.2d 698 (A.D. 2009);
20. *Landau v. Bailey*, 629 N.E.2d 264 (Ind. App. 1994);
21. *Lewis v. Superior Court*, 77 Cal. App. 3d 844 (1978);
22. *London v. Weitzman*, 884 S.W.2d 674 (Mo. App. 1994);
23. *MacNaughton v. NBF Cable Systems, Inc.*, 1996 WL 33703873 (D. N.J. 1996);
24. *Margolin v. Kleban & Samor, P.C.*, 882 A.2d 653 (Conn. 2005);
25. *McClung v. Smith*, 870 F. Supp. 1384 (E.D. Va. 1994), *aff'd in relevant part*, 89 F.3d 829 (4th Cir. 1996);
26. *McDonald v. Paine*, 810 P.2d 259 (Idaho 1991);
27. *McWhirt v. Heavey*, 550 N.W.2d 327 (Neb. 1996);
28. *Meyer v. Wagner*, 784 N.E.2d 34 (Mass. App. 2003);
29. *Millsaps v. Kaufold*, 653 S.E.2d 344 (Ga. App. 2007);
30. *Morris v. Morris*, 2003 WL 21509023 (Ohio App. 2003);
31. *Nembach v. Giaimo & Vreeburg*, 618 N.Y.S.2d 307 (A.D. 1994);
32. *O'Conner v. Blodnick, Abramowitz & Blodnick*, 744 N.Y.S.2d 205 (A.D. 2002);
33. *Oakes & Kanatz v. Schmidt*, 391 N.W.2d 51 (Minn. App. 1986);
34. *Park v. Park*, 612 P.2d 882 (Cal. 1980);
35. *Peterson v. Simasko, Simasko & Simasko*, 579 N.W.2d 469 (Mich. App. 1998);
36. *Pickett, Houlon & Berman v. Haislip*, 533 A.2d 287 (Md. App. 1987);
37. *Reed v. Mitchell & Timbanard*, 903 P.2d 621 (Ariz. App. 1995);

38. *Rhine v. Haley*, 378 S.W.2d 655 (Ark. 1964);
39. *Rino v. Mead*, 55 P.3d 13 (Wyo. 2002);
40. *Saffer v. Willoughby*, 670 A.2d 527;
41. *Schneider v. Richardson*, 411 A.2d 656 (Me. 1979);
42. *Sobilo v. Manassa, Riffner, Barber, Rowden & Scott*, 479 F. Supp. 2d 805 (N.D. Ill. 2007);
43. *Stanley v. Richmond*, 35 Cal. App. 4th 1070 (1995);
44. *Stephen v. Sallaz & Gatewood*, 248 P.3d 1256 (Idaho 2011);
45. *Tarleton v. Arnstein & Lehr*, 719 So.2d 325 (Fla. App. 1998);
46. *Tennen v. Lane*, 716 P.2d 1031 (Ariz. App. 1986);
47. *Teodorescu v. Bushnell, Gage, Reizen & Byington*, 506 N.W.2d 275 (Mich. App. 1993);
48. *Verve, LLC v. Hypercom Corp.*, 2006 WL 3385797 (D. Ariz. 2006);
49. *Wood v. McGrath, North, Mullin & Kratz*, 589 N.W.2d 103 (Neb. 1999);
50. *Ziegelheim v. Apollo*, 607 A.2d 1298 (N.J. 1992).

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On November 1, 2012 I caused to be served by messenger a copy of the foregoing document on the following:

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DATED this 1st day of November, 2012.


Suzette Barber



**MARCELLA G. ALOY, Plaintiff and Appellant, v. EUGENE A. MASH, Defendant
and Respondent**

S.F. No. 24639

Supreme Court of California

*38 Cal. 3d 413; 696 P.2d 656; 212 Cal. Rptr. 162; 1985 Cal. LEXIS 268; 6 Employee
Benefits Cas. (BNA) 1436*

March 28, 1985

PRIOR HISTORY: Superior Court of Merced County, No. 64654, Donald R. Fretz, Judge.

DISPOSITION: The judgment is reversed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In a malpractice action against an attorney who represented plaintiff in dissolution of marriage proceedings in 1971, for failure to assert a community property interest in the vested military pension of her husband, who was then on active duty although eligible to retire, defendant moved for summary judgment on the ground that in 1971 the law regarding the character of federal military retirement pensions was unsettled, and that he had exercised informed judgment and was therefore immune from a claim of professional negligence. The trial court granted the motion and entered summary judgment for defendant. (Superior Court of Merced County, No. 64654, Donald R. Fretz, Judge.)

The Supreme Court reversed, holding a triable issue of negligence was presented, in view of the showing that defendant had failed to claim the pension was community property based on an incomplete reading of a single case, without appreciating the vital difference between a member of the armed forces who has not yet served long enough to be eligible to retire and one who has, but chooses to stay in the service. The court rejected defendant's contention that a 1981 United States Supreme Court decision that the application of community property principles impermissibly conflicted with the federal military retirement scheme immunized him from liability.

It held all the evidence is negative that in the early 1970's the United States Supreme Court would have granted certiorari on the issue whether states could hold military pensions to be community property. Moreover, noting the extremely limited retroactive effect given to that decision, it held that it would be ironic if its chief legacy were immunization of legal malpractice by an attorney who never even pondered the issues which fathered the decision's brief life. (Opinion by Kaus, J., with Mosk, Grodin, JJ., and Ramsey, J., * concurring. Separate dissenting opinion by Reynoso, J., with Bird, C. J., and Taber, J., * concurring.)

* Assigned by the Chairperson of the Judicial Council.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Attorneys at Law § 22--Attorney-client Relationship--Liability of Attorneys--Acts Constituting Malpractice--Dissolution Action--Failure to Assert Military Pension Claim--Insufficient Research. --In a malpractice action against an attorney who represented plaintiff in her dissolution of marriage proceedings in 1971, for failure to assert a community property interest in the vested military pension of her husband, who remained on active duty although eligible to retire, a triable issue of negligence existed precluding summary judgment for defendant, where it appeared defendant failed to claim pension rights based on an incomplete reading of a

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single case, without appreciating the vital difference between a member of the armed forces who has not yet served long enough to be eligible to retire and one who has, but chooses to stay in the service, and who did not even consider the issue of federal preemption of community property interests in military pensions.

(2) Attorneys at Law § 24--Attorney-client Relationship--Liability of Attorneys--Defenses to Malpractice Actions--Lack of Damage. --In a malpractice action against an attorney who represented plaintiff in dissolution of marriage proceedings in 1971, it was not a defense to defendant's negligence in failing to assert a claim to the husband's vested military pension, then an unsettled issue, that the United States Supreme Court decided in 1981 that application of state community property principles to military pensions impermissibly conflicted with the federal military retirement scheme. All the available evidence is negative that in the early 1970's the United States Supreme Court would have granted certiorari on the issue whether states could hold military pensions to be community property. Moreover, the United States Supreme Court decision was given extremely limited retroactive (or prospective) effect, so that it would be ironic if its chief legacy were the immunization of legal malpractice by an attorney who never even pondered the issues which fathered the decision's brief life.

COUNSEL: Miles, Sears & Eanni, Richard C. Watters and William J. Seiler for Plaintiff and Appellant.

James L. Stevens, Jr., as Amicus Curiae on behalf of Plaintiff and Appellant.

R. Gaylord Smith, Conrad R. Aragon, M. Patricia Marison and Lewis, D'Amato, Brisbois & Bisgaard for Defendant and Respondent.

Ronald E. Mallen and Long & Levit as Amici Curiae on behalf of Defendant and Respondent.

JUDGES: Opinion by Kaus, J., with Mosk, Grodin, JJ., and Ramsey, J., * concurring. Separate dissenting opinion by Reynoso, J., with Bird, C. J., and Taber, J., * concurring.

* Assigned by the Chairperson of the Judicial Council.

OPINION BY: KAUS

OPINION

[*415] [**657] [***162] I

Marcella G. Aloy, plaintiff in a legal malpractice action, appeals from a summary judgment for defendant Eugene A. Mash, her former attorney in a 1971 dissolution action against her husband Richard. Marcella's claim of legal malpractice is based on defendant's failure to assert a community [***163] property interest in Richard's vested military retirement pension.¹

1 The pension was vested because Richard had been in the service for over 20 years and thus had an unconditional right to it upon retirement.

It is unclear whether the pension could also be termed "matured." There is some inconsistency in the definition of a "matured" pension. Most cases define it as one in which all conditions precedent to the payment of the benefits have taken place or are within the control of the employee. (*In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 422, fn. 2 [174 Cal.Rptr. 493, 629 P.2d 1]; *In re Marriage of Fithian* (1974) 10 Cal.3d 592, 596, fn. 2 [111 Cal.Rptr. 369, 517 P.2d 449]; *Smith v. Lewis* (1975) 13 Cal.3d 349, 355, fn. 4 [118 Cal.Rptr. 621, 530 P.2d 589, 78 A.L.R.3d 231].) Under this definition the pension was also matured. *In re Marriage of Brown* (1976) 15 Cal.3d 838, 842 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164], however, defined a "matured" benefit as one where there is an "unconditional right to immediate payment" -- i.e., where the employee "reaches retirement age and elects to retire." Under the latter definition, Richard's pension had not matured since he was still on active duty.

Marcella employed defendant Mash in January 1971 to represent her in the dissolution action. Richard was then on active military service and was therefore not receiving a pension although he had been in the service for over 20 years and was eligible to retire. (10 U.S.C. § 8911.) Defendant failed to claim any community property interest in Richard's pension and it was not put in issue in the dissolution action. The final decree of dissolution was entered in December 1971. Richard retired sometime between 1971 and 1980.

[*416] In 1971, the California view regarding the characterization of vested federal military retirement pensions as community or separate property was unsettled. In 1974, however, we held that federal preemption did not bar treating such federal military pensions as community property. (*In re Marriage of Fithian*, *supra*, 10 Cal.3d 592.)

In 1980, Marcella filed a complaint against defendant alleging that he negligently failed to assert her community property interest in Richard's military retirement

pension, which failure prevented her from receiving any share of his gross military retirement pension benefits "from either the date of separation and/or the date of [his] retirement."

Defendant moved for summary judgment on the ground that in 1971 the law regarding the character of federal military retirement pensions was unsettled, and that he had exercised informed judgment and was therefore immune from a claim of professional negligence. He submitted a declaration stating, among other things: "2. In 1971, it was my practice to read advance sheets, particularly in the dissolution area, an area in which I have regularly practiced. I would therefore have had knowledge of specific decisions at the time they were rendered or shortly thereafter. [para.] 3. In 1971, I relied on the case of *French v. French*, 17 Cal.2d 775 (1941) as authority that a nonmatured military pension, that is, one owned by a person on active military duty, was not subject to division upon dissolution. I was also aware that in 1971 this case had not yet been overruled. I read the decision *In re Marriage* [**658] of *Fithian*, 10 Cal.3d 592 (1974) shortly after it was issued in 1974. [para.] 4. I drafted the terms of the interlocutory decree based on my research, knowledge, and understanding of the law in 1971."

Marcella opposed the motion, asserting that it was a triable issue whether defendant had made an informed decision. She submitted excerpts from her deposition testimony in which she stated that the one time she asked defendant whether she was entitled to a portion of Richard's military retirement pension, he told her she had no such right because Richard was still on active duty. Marcella also submitted excerpts from defendant's deposition testimony where he discussed his knowledge and research as follows: "Mr. Watters: Q. Are you a regular reader of the advance sheets, say from 1971 up until now? [para.] A. I read them. I get them in the office but I can't recall when I started getting them, frankly. Whether I got them in 1971, I don't know. I used to read the advance [***164] sheets all the time but I don't know when I got them. I still skim them, review them, when I can. [para.] Q. You review the cases in your particular area of practice? [para.] A. Yes, I do. [para.] Q. That would include the domestic area, up until you stopped doing domestic work, or slowed down? [para.] A. Right. [para.] Q. As of 1971, what was your case authority for your position that when someone in the [*417] military service was on active duty that their pension was not community property, what was your authority? [para.] A. I don't know what I checked with at that time. Probably the French case would be the authority. [para.] Q. A 1941 case? [para.] A. Whatever the date is. [para.] Q. Sir, any other authority that you can cite me other than the French case for that belief

that you had? [para.] . . . [para.] A. I can't recall what else, what I might have looked up at that point. Might have been something else but I don't . . . [para.] A. Well, this is again going back to my thinking, what I might have thought back then, and I'd have to say probably the same thing, that if a person has been in the military, active military duty, was not drawing his pension, that it was not an item to be divided at that time. [para.] Q. This would be true when the person was in the service over twenty years, over twenty or under twenty years? [para.] Mrs. Marrison: Q. Do you understand the question? [para.] A. I presume he is asking what was in my mind at that time and I'm not sure in this case at that time what was in my mind. I'm not sure what I would have stated at that time. If you ask me the question in 1971, is that what you're asking?"

Marcella further submitted a declaration by James J. Simonelli, which stated that he was an attorney with an extensive practice in family law since 1970, and that in 1971 attorneys in the family law field in the San Joaquin Valley uniformly claimed a community property interest in vested military retirement pensions. Simonelli further stated that had he been representing Marcella in November 1971, he would have advised her that she had some community property interest in Richard's vested military retirement pension and that the only issue as to that interest was whether federal law preempted state enforcement of such an interest.

II

The criteria on appeals from summary judgments are too familiar to need restatement. In brief, if the record discloses triable issues with respect to negligence, causation and damages, the judgment must be reversed.

In *Smith v. Lewis* (1975) 13 Cal.3d 349 [118 Cal.Rptr. 621, 530 P.2d 589, 78 A.L.R.3d 231] -- a legal malpractice case based on an attorney's 1967 failure to claim a community property interest in the husband's vested retirement benefits -- we affirmed a judgment for plaintiff and rejected the defendant attorney's contention that he should not be liable for mistaken advice when well-informed lawyers in the community had entertained reasonable doubt at the time as to the proper resolution of the legal issue. We found the situation in no way analogous to that in *Lucas v. Hamm* (1961) 56 Cal.2d 583 [**659] [15 Cal.Rptr. 821, 364 P.2d 685], involving the esoteric subject of the rule against perpetuities. We conceded that in 1967 the law [*418] regarding the community character of the husband's federal pension was unsettled. We said, however: "If the law on a particular subject is doubtful or debatable, an attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved. [Citation.] But even with respect to an unsettled area of the

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law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem." (*Id.* at pp. 358-359.)

Smith v. Lewis, *supra*, 13 Cal.3d 349, is obviously of little help to defendant. His motion for summary judgment was, in fact, primarily based on *Davis v. Damrell* (1981) 119 Cal.App.3d 883 [174 Cal.Rptr. 257] -- a similar [***165] case in which Damrell, the wife's attorney, in 1970 failed to assert a community property interest in the husband's vested federal military retirement pension. The husband retired in 1973, and the wife filed suit against Damrell sometime thereafter. The Court of Appeal affirmed the summary judgment for Damrell on the ground that he had demonstrated compliance with the *Smith v. Lewis* standards by showing a thorough, contemporaneous research effort on an issue of unsettled law. He had submitted a declaration describing his detailed knowledge of legal developments and debate in the field. He traced his familiarity with the line of cases following the earlier *French* rule (*French v. French* (1941) 17 Cal.2d 775 [112 P.2d 235, 134 A.L.R. 366] [nonvested military pension was mere expectancy not subject to division as community property]), overruled in *In re Marriage of Brown* (1976) 15 Cal.3d 838 [126 Cal.Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164], and recounted his special interest in the *Wissner* case (*Wissner v. Wissner* (1950) 338 U.S. 655 [94 L.Ed. 424, 70 S.Ct. 398] [establishing the supremacy of a federal statute governing disposition of the proceeds of a military service life insurance policy]), which had motivated him to follow its progress from its inception.

Defendant's reliance on *Davis v. Damrell*, *supra*, 119 Cal.App.3d 883, is ill-advised, since the differences between his professional conduct and that of the defendant in that case inexorably point to potential liability on defendant's part. In brief, in *Davis* the defendant attorney was thoroughly familiar with all the pertinent authorities, state and federal, and had reached the conclusion, based primarily on *Wissner v. Wissner*, *supra*, 338 U.S. 655, that vested military pension benefits were not subject to California community property rules. His decision not to claim a community property interest in the husband's military pension was not actionable, as it represented "a reasoned exercise of an informed judgment grounded on a professional evaluation of applicable legal principles." (*Id.*, [**660] 119 Cal.App.3d at [*419] p. 888.)² Defendant, by contrast, relied on a single case -- *French v. French* (1941) 17 Cal.2d 775 [112 P.2d 235, 134 A.L.R. 366] for the proposition that a nonmatured military pension was not subject to division on dissolution. At his deposition he never did answer the

question whether he was aware that a military pension vests after 20 years of service, whether the serviceman retires or not. This would have been a vital point in his research, for in *French v. French* itself a dictum indicates that after retirement pay vests it becomes community property. (*Id.* at p. 778.)³ He thus never even gave himself a chance to consider whether his client was entitled to a community share in monthly payments which, but for the husband's election not to retire, would have been vested pension payments. (See *In re Marriage of Gillmore*, *supra*, 29 Cal.3d 418, 423; *Waite v. Waite* (1972) 6 Cal.3d 461, 472 [99 Cal.Rptr. 325, 492 P.2d 13].)

2 Amicus, appearing on behalf of defendant, argues that, were the rule otherwise, "[self-defensive] instincts would encourage lawyers to provide their clients with the most popular perception of the law rather than their own views. Candor and creativity would be replaced by consensus. Such a rule would be neither in the interest of clients nor lawyers." Brave words, but one suspects that a client whose interests coincide with the popular conception of the law would expect his attorney to advance them, particularly if the consensus is shared by the judiciary.

3 Presumably the same dictum was belatedly discovered by the defendant in *Smith v. Lewis*. (See *Smith v. Lewis*, *supra*, 13 Cal.3d at p. 358, fn. 7.)

(1) In sum, this is not a case where the defendant attorney, basing his judgment on all available data, made a rational professional judgment not to claim an interest in the husband's pension. Rather, he acted -- more precisely, failed to act -- on an incomplete reading of a single case, without appreciating the vital difference between a member of the armed forces who has not yet served long enough to be eligible to retire and one who has but chooses to stay in the service. As far as the issue of federal preemption is concerned, the record does not show that he ever considered it.

[***166] In sum, the record on which the motion for summary judgment was argued presented a triable issue of negligence.

III

The question whether the defendant's negligence caused damage in some amount need not detain us long. Footnote 9 to *Smith v. Lewis*, *supra*, 13 Cal.3d at pages 360-361, makes this an a fortiori case. (See also *Martin v. Hall* (1971) 20 Cal.App.3d 414, at pp. 423-424 [97 Cal.Rptr. 730, 53 A.L.R.3d 719].) Nor -- the arguments based on *McCarty v. McCarty* (1981) 453 U.S. 210 [69

L.Ed.2d 589, 101 S.Ct. 2728], aside -- do we understand defendant to claim otherwise.

[*420] IV

McCarty v. McCarty, *supra*, decided on June 26, 1981, held that the application of community property principles impermissibly conflicts with the federal military retirement scheme. This, of course, happened a decade after defendant had represented plaintiff. Nor, unlike the defendant attorney in *Davis v. Damrell*, *supra*, 119 Cal.App.3d 883, had defendant anticipated this development. (2) Nevertheless he seeks to take advantage of *McCarty* in two ways: first, he argues that had he asserted a community property interest in Richard's pension, the United States Supreme Court case which invalidated any favorable ruling by a California court might have been *Aloy v. Aloy*, rather than *McCarty v. McCarty*; second, he argues that it simply cannot be actionably malpractice not to assert a claim which is eventually found to be invalid.

A

Defendant's first argument assumes, of course, that *McCarty v. McCarty* once and for all settled the question of Colonel McCarty's pension in his favor. Solely because we happen to know judicially that the *McCarty* controversy is far from over and do not wish to make any unnecessary statement which might affect its outcome, we shall assume defendant's hypothesis to be true. ⁴

4 We know nothing about the details of the continuing *McCarty* litigation. It seems a fair guess, however, that it is somehow affected by the passage of the Federal Uniformed Services Former Spouses' Protection Act of 1982. (Pub.L. No. 97-252, tit. X.) It is, of course, 100 percent speculation whether the mythical *Aloy v. Aloy* (197) U.S. , would have triggered similar federal legislation.

Assuming further that it is a legitimate subject of inquiry whether, at the critical time, the early '70's, the United States Supreme Court would have granted certiorari on the issue whether states could hold military pensions to be community property, all the available evidence is negative. After we first decided in favor of the nonmember spouse in *Fithian*, certiorari was denied (*Fithian v. Fithian* (1974) 419 U.S. 825 [42 [*661] *L.Ed.2d 48, 95 S.Ct. 41*]), as was a petition for rehearing. (*Fithian v. Fithian*, *supra*, at p. 1060 [42 L.Ed.2d 657, 95 S.Ct. 644].) Shortly thereafter we reaffirmed *Fithian* in *In re Marriage of Milhan* (1974) 13 Cal.3d 129 [117 Cal.Rptr. 809, 528 P.2d 1145]. Again certiorari was denied. (*Milhan v. Milhan* (1975) 421 U.S. 976.) Nothing in the *Aloy v. Aloy* litigation suggests to us that it was [*421] more likely than *Fithian* or *Milhan* to persuade

the high court that the military pension issue was one whose time had come. ⁵

5 It is the repeated denial of certiorari which distinguishes this case from *Martin v. Hall*, *supra*, 20 Cal.App.3d 414, 423-424. There an attorney retained to represent a client accused of crime, failed to assert the, under the circumstances, plausible bar of the multiple prosecution aspect of *Penal Code section 654*. His omission took place after we had hinted in *Neal v. State of California* (1960) 55 Cal.2d 11, 21 [9 Cal.Rptr. 607, 357 P.2d 839], that *section 654* might preclude multiple prosecutions even in situations in which multiple punishment would be permissible. *Kellett v. Superior Court* (1966) 63 Cal.2d 822 [48 Cal.Rptr. 366, 409 P.2d 206], however, which eventually so held, was still some years down the road. On the issue of causation, the Court of Appeal held that it had "no reason to suppose that the result in a hypothetical *Martin v. Superior Court* would have been different." Here there is every reason to suppose that *Aloy v. Aloy* would not have escaped the confines of California.

[***167] B

Finally we turn to the argument that the summary judgment was correct because the claim which defendant negligently failed to assert in 1971 luckily turned out to be worthless in 1981 -- the serendipity defense. This argument is not based on any theory that in point of fact Marcella would not have benefited financially had a community property claim to Richard's pension rights been asserted in 1971. (See pt. III, *ante*.) Rather, defendant simply asserts that he was under no "duty to secure for plaintiff benefits to which she was not legally entitled." ⁶

6 Amicus for defendant makes the same point more subtly by distinguishing between "fault" -- conceded -- and "error" -- disputed.

It is evident from the way defendant makes his point -- "benefits to which she was not legally entitled" -- that he assumes as a premise of his argument that *McCarty* has been retroactively applied and that, therefore, in a real sense *McCarty* "was" the law 10 years before it was decided, when defendant acted for Marcella.

Whatever may be said in favor of defendant's theory were this premise correct, the fact is that no case within our memory has received less retroactive application than *McCarty*. Starting with the last paragraph of the *McCarty* opinion itself, the judicial and legislative branches, state and federal, cooperated in a massive and

largely successful drive to make *McCarty* disappear -- prospectively, presently and retroactively. Some highlights of that effort are noted below.⁷ The result is that, for most [*662] [***168] purposes, *McCarty* [*422] not only is not the law but never really was. As one Court of Appeal put it: "[There] is no longer any *McCarty* rule to be retroactively applied." (*In re Marriage of Frederick* (1983) 141 Cal.App.3d 876, 880 [190 Cal.Rptr. 588].) It would be ironic if the chief legacy of *McCarty* were the immunization of legal malpractice by an attorney who never even pondered the issues which fathered *McCarty's* brief life.

7 1. The United States Supreme Court itself did not think too highly of the result it felt compelled to reach: "We recognize that the plight of an ex-spouse of a retired service member is often a serious one That plight may be mitigated to some extent by the ex-spouse's right to claim Social Security benefits, cf. *Hisquierdo*, 439 U.S., at 590, and to garnish military retired pay for the purposes of support. Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone." (*McCarty v. McCarty*, *supra*, 453 U.S. at pp. 235-236 [69 L.Ed.2d at p. 608].)

2. Congress, as part of the fiscal 1983 defense bill passed title X of Public Law No. 97-252, the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) which, in effect, nullified *McCarty* prospectively and, in part, retroactively. (See 10 U.S.C. § 1408 *et seq.*; § 1006 of the act allows enforcement of pre-*McCarty* judgments.)

3. Even without the benefit of or reliance on FUSFSPA, our cases uniformly held that pre-*McCarty* judgments treating military pensions as community property were not affected by *McCarty*. (*In re Marriage of Camp* (1983) 142 Cal.App.3d 217, 219-221 [191 Cal.Rptr. 45]; *In re Marriage of Parks* (1982) 138 Cal.App.3d 346, 348-349 [188 Cal.Rptr. 26]; *In re Marriage of McGhee* (1982) 131 Cal.App.3d 408, 411 [182 Cal.Rptr. 456]; *In re Marriage of Fellers* (1981) 125 Cal.App.3d 254, 256-258 [178 Cal.Rptr. 35]; *In re Marriage of Sheldon* (1981) 124 Cal.App.3d 371, 377-380 [177 Cal.Rptr. 380].) This was declared to be the law even if the case was still pending on appeal at the time of the *McCarty* decision (*In re Marriage of Sheldon*, *supra*, 124 Cal.App.3d at pp. 380-384), unless the member had preserved the preemption issue. (*In re*

Marriage of Jacanin (1981) 124 Cal.App.3d 67, 70-71 [177 Cal.Rptr. 86].) Federal courts agreed. (*Wilson v. Wilson* (5th Cir. 1982) 667 F.2d 497 [cert. den. 458 U.S. 1107 (73 L.Ed.2d 1368, 102 S.Ct. 3485)]; *Ersparn v. Badgett* (5th Cir. 1981) 659 F.2d 26, 28 [cert. den. 455 U.S. 945 (71 L.Ed.2d 658, 102 S.Ct. 1443)]; *Marriage of Smith* (W.D.Tex. 1982) 549 F.Supp. 761, 767.)

4. Courts of Appeal with rare unanimity, seized on FUSFSPA to obliterate all traces of *McCarty*. (*In re Marriage of Sarles* (1983) 143 Cal.App.3d 24, 26-30 [191 Cal.Rptr. 514]; *In re Marriage of Ankenman* (1983) 142 Cal.App.3d 833, 836-838 [191 Cal.Rptr. 292]; *In re Marriage of Fransen* (1983) 142 Cal.App.3d 419, 427 [190 Cal.Rptr. 885]; *In re Marriage of Hopkins* (1983) 142 Cal.App.3d 350, 353-361 [191 Cal.Rptr. 70]; *In re Marriage of Frederick* (1983) 141 Cal.App.3d 876, 879-880 [190 Cal.Rptr. 588]; *In re Marriage of Buikema* (1983) 139 Cal.App.3d 689, 691 [188 Cal.Rptr. 856].)

5. This pretty much reduced the impact of *McCarty* to judgments which became final between June 25, 1981, the date of that decision, and February 1, 1983, the effective date of FUSFSPA. The few unfortunate nonmember spouses whose judgments did become final between those dates, were given special permission by the California Legislature to ask that the judgments be modified "to include a division of military retirement benefits payable on or after February 1, 1983, . . ." (*Civ. Code*, § 5124, added by Stats. 1983, ch. 775, § 1, p. 2853.)

It is noted that this court has yet to speak on the matters covered in this footnote. Our purpose in referring to the various authorities is not to present them as immutably correct, but as indicative of general dissatisfaction with *McCarty*.

The judgment is reversed.

DISSENT BY: REYNOSO

DISSENT

REYNOSO, J. I respectfully dissent. With the exception of the majority opinion, I know of no case which suggests that an attorney whose advice is correct may be held liable for malpractice.

[*423] Relying on the standard developed in *Smith v. Lewis* (1975) 13 Cal.3d 349 [118 Cal.Rptr. 621, 530 P.2d 589, 78 A.L.R.3d 231] and its progeny,¹ the majority concludes that an attorney may face malpractice liability despite the fact that the law is ultimately re-

38 Cal. 3d 413, *; 696 P.2d 656, **;
212 Cal. Rptr. 162, ***; 1985 Cal. LEXIS 268

solved in accordance with the advice given. Although this application of the *Smith* standard follows logically from its emphasis on the duty of care owed a client, it nonetheless raises a troubling anomaly: where the law is unsettled, the attorney who gives advice later determined to be correct may well have committed malpractice, while the attorney whose advice turns out to be erroneous may avoid liability entirely.

1 Prior to *Smith* attorneys in California were not liable "for lack of knowledge as to the true state of the law where a doubtful or debatable point [was] involved." (*Sprague v. Morgan* (1960) 185 Cal.App.2d 519, 523 [8 Cal.Rptr. 347].) *Smith* modified that rule so that even with regard to an unsettled area of the law an attorney is obligated to "undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision . . ." (*Smith, supra*, 13 Cal.3d at p. 359.)

The law cannot tolerate such incongruous results. As Justice Holmes so aptly observed long ago, "[the] life of the law has not been logic: it has been experience." (Holmes, *Common Law* (1881) p. 1.) Experience now tells us that the *Smith* standard, however rational and well-suited to its original purpose, no longer makes sense. We must therefore formulate a new standard that draws a fair and reasonable distinction between culpable and nonculpable practitioners.

The defect inherent in the *Smith* standard, made ever clearer by today's majority opinion, is that the concept of legal error is confused with that of fault, converting a [**663] question of law into one of fact. Malpractice consists of four elements: duty arising out of the attorney-client relationship, breach of that duty, causation and damages. The second element breaks down further into two components: legal error and failure to use "such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 591 [15 Cal.Rptr. 821, 364 P.2d 685].) The first is a question of law, the second a question of fact.

The question of whether an attorney erred necessarily must be resolved before any issue of negligence arises. An attorney who renders erroneous advice may not be negligent in doing so. (See *Davis v. Damrell* (1981) 119 Cal.App.3d 883 [174 Cal.Rptr. 257].) A second attorney may fail to perform adequate research but somehow give his client accurate advice. Neither of these

attorneys has committed malpractice. (See *Mallen & Levit, Legal Malpractice* (2d ed. 1981) § 250, p. 317.)

[*424] Where the law is settled, it is relatively easy to determine whether the attorney's advice was erroneous. Problems arise only with respect to issues of law that are unresolved or in a state of flux at the time the advice is given. In either instance, however, the question of whether the advice was wrong is a question of law.

[***169] Ironically, *Smith* itself reflects this basic approach. At the outset of the analysis the court stressed: "the crucial inquiry is whether his advice was *so legally deficient* when it was given that he may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' [Citation.] We must, therefore, examine the indicia of the law which were readily available to defendant at the time he performed the legal services in question." (*Id.*, at p. 356.) (Italics added.)

Thus, *Smith* initially proposed a two-step test for determining whether an attorney has been negligent. As noted, the threshold inquiry is a legal one, whether adequate legal authority existed at the time to support the advice given. Only when this question is answered in the negative is it necessary to move to the second part of the test, the factual inquiry as to whether the attorney breached the standard of care in rendering the erroneous advice.

Applying this test to the case at bar reveals that Attorney Mash did not err in advising his client in 1971 that her husband's federal military pension was not community property. As the majority notes, "[in] 1971, the California view regarding the characterization of vested federal military retirement pensions as community or separate property was unsettled." (*Ante*, p. 416.) In fact, Mash relied on an opinion of this court, *French v. French* (1941) 17 Cal.2d 775 [112 P.2d 235, 134 A.L.R. 366], in concluding that the pension was not divisible. As *French* remained good law, this reliance was neither unreasonable nor erroneous. Because Mash committed no error, the malpractice claim must fail.

It is imperative that a lawyer remain free to choose one of a number of reasonable and legally supportable solutions to an otherwise unsettled legal question and advise the client accordingly without facing a malpractice suit.

317 S.W.3d 674

(Cite as: 317 S.W.3d 674)

C

Missouri Court of Appeals,
Southern District,
Division Two.
BACA CHIROPRACTIC, P.C.,
Plaintiff-Respondent,
v.
Jerry COBB and Christie Cobb, Defend-
ants-Appellants.

No. SD 30271.
Aug. 16, 2010.

Background: Chiropractor brought collection action against husband and wife patients. The Circuit Court, Christian County, John S. Waters, J., granted summary judgment in favor of chiropractor in the amount of \$6,533.17, and patients appealed.

Holdings: The Court of Appeals, Gary W. Lynch, P.J., held that:

- (1) patients' counteraffidavits were properly before the Circuit Court, as required to challenge allegations fees were reasonable;
- (2) patients were qualified to assert chiropractor's fees were unreasonable; and
- (3) genuine issue of material fact as to reasonableness of chiropractor's fees precluded summary judgment.

Reversed and remanded.

West Headnotes

[1] **Account, Action On 10** ⇌ 2

10 Account, Action On

10k1 Open Accounts in General

10k2 k. Nature and grounds of action. Most Cited Cases

An action on account is an action based in contract.

[2] **Account, Action On 10** ⇌ 3

10 Account, Action On

10k1 Open Accounts in General

10k3 k. Requisites of account. Most Cited Cases

There are three elements that must be proven in a suit on open account: (1) the defendant requested the plaintiff to furnish goods or services, (2) the plaintiff accepted the defendant's offer by furnishing the goods or services, and (3) the charges were reasonable.

[3] **Judgment 228** ⇌ 185.1(1)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.1 Affidavits, Form, Requisites and Execution of

228k185.1(1) k. In general. Most Cited Cases

Trial court considered patients' summary judgment counteraffidavits as having been timely filed, and thus, counteraffidavits were properly before the trial court, by leave of court, as required to challenge chiropractor's allegations that the amount charged for his chiropractic treatments was reasonable or that the treatments were necessary, where the court articulated in its judgment that it had considered the patients' response, and the documents attached, which included patients' counteraffidavits. V.A.M.S. § 490.525(5)(2).

[4] **Judgment 228** ⇌ 185.1(2)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.1 Affidavits, Form, Requisites and Execution of

228k185.1(2) k. Persons who may make affidavit. Most Cited Cases

Judgment 228 ⇌ 185.3(3)

228 Judgment

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228V On Motion or Summary Proceeding
 228k182 Motion or Other Application
 228k185.3 Evidence and Affidavits in
 Particular Cases

228k185.3(3) k. Accounting and ac-
 counts. Most Cited Cases

Patients were qualified to assert in their sum-
 mary judgment affidavits that chiropractor's
 charges for his services to patients was unreason-
 able, by reason of patients' personal knowledge of
 and personal experience with chiropractor's prior
 rates, and his promise to adhere to those prior rates
 during patients' post-accident treatment. V.A.M.S.
 § 490.525(6).

[5] Judgment 228 ⇌ 181(15.1)

228 Judgment

228V On Motion or Summary Proceeding
 228k181 Grounds for Summary Judgment
 228k181(15) Particular Cases
 228k181(15.1) k. In general. Most

Cited Cases

Genuine issue of material fact as to the reason-
 ableness of fees charged by chiropractor precluded
 summary judgment in chiropractor's collection ac-
 tion.

*675 James E. Corbett, David T. Tunnell, Matthew
 W. Corbett, and Daniel P. Molloy, Corbett Law
 Firm, Springfield, MO, for Appellant.

Raymond Lampert, Springfield, MO, for Respond-
 ent.

GARY W. LYNCH, Presiding Judge.

Jerry Cobb and Christie Cobb (individually,
 "Jerry" and "Christie," and collectively, "the
 Cobbs") appeal the trial court's judgment granting
 Baca Chiropractic, P.C.'s motion for summary judg-
 ment and awarding it \$6,533.17 in unpaid fees. The
 Cobbs argue that the trial court erred in granting
 summary judgment because there was a genuine
 dispute as to whether the fees charged by Baca
 Chiropractic were reasonable, and therefore it was

not entitled to judgment as a matter of law. We
 agree, reverse the trial court's judgment, and re-
 mand for further proceedings.

Factual and Procedural Background

The Cobbs were in an automobile accident on
 May 29, 2004. Before that accident, from May 4,
 2001, to December 20, 2002, both had received
 chiropractic treatment from Steven Baca, a chiro-
 practor and the owner of Baca Chiropractic. Fol-
 lowing the accident, the Cobbs again received treat-
 ment from Dr. Baca, this time from August 3, 2004,
 to March 3, 2005.

Dr. Baca sent the Cobbs a letter requesting
 payment on their outstanding account balances for
 treatment following the accident, which amounted
 to \$3,485.00 on Christie's account, and \$1,415.00
 on Jerry's account, for a total of \$4,900.00. In that
 letter, Dr. Baca gave the Cobbs until January 2,
 2008, to contact his office regarding payment of the
 accounts or he would turn the accounts over to his
 collections attorney. On January 10, 2008, Credit-
 ors Financial Services, L.L.C., sent the Cobbs a let-
 ter demanding payment in the amount of \$6,533.17;
 that letter did not contain an itemization of the
 charges.

*676 The following month, Baca Chiropractic
 filed a two-count petition against the Cobbs. Count
 I alleged that the Cobbs owed Baca Chiropractic
 \$6,533.17, which included "reasonable collection
 fees," and that both individuals should be held li-
 able for the entire amount. Count II alleged that the
 Cobbs were unjustly enriched by accepting Dr.
 Baca's treatment without submitting payment. At-
 tached to the petition was the sworn affidavit of Dr.
 Baca averring that he had provided the requested
 services, that his fees were reasonable, and that the
 Cobbs refused to pay; an "itemized and true copy of
 the account[s]"; a "Doctor's Lien" relating to
 Christie and a "Clinic Lien" relating to Jerry; health
 history questionnaires for both Cobbs; a request for
 Jerry's medical records; and the two collection let-
 ters described *supra*.

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In their answer, the Cobbs contended that the fees sought were unreasonable as the fees were the product of "price gouging," that they were charged different rates before and after their accident, that Baca Chiropractic charged the higher rate after the accident because it "thought it could engage in price gouging," that they were not made aware of the price difference until after their treatment, and that they would not have continued with treatment from Dr. Baca had they known about the increased prices.

Baca Chiropractic then filed a motion for summary judgment, arguing that

[t]he [Cobbs] have admitted in their pleadings and in discovery that Baca offered and they accepted the services and they promised to pay the bill. They have not contradicted the reasonable charges affidavit. There is therefore no genuine issue of material fact and the Court should enter judgment in favor of [Baca Chiropractic] for the full amount due plus attorney fees.

Baca Chiropractic went on to argue that, even though "[i]n their answer, the [Cobbs] denied that [the] charges are reasonable[, n]evertheless they have not provided the affidavit required under § 490.525.2 to rebut the established presumption of reasonableness.^{FN1} Because [Baca Chiropractic] has filed the required affidavit there is sufficient evidence to support that the charges were reasonable." Accompanying Baca Chiropractic's motion for summary judgment was "Plaintiff's Statement of Facts," which alleged three facts: "1. [The Cobbs] requested that [Baca Chiropractic] provide them chiropractic services, and [Baca Chiropractic] provided said services to [the Cobbs]"; "2. [Baca Chiropractic's] charges for said services were reasonable[;]" and "3. Said charges were not paid." These facts were supported by citation to the pleadings, Dr. Baca's affidavit, and deposition testimony of both Jerry and Christie, portions of which were also attached to the motion for summary judgment.

FN1. All statutory references are to RSMo

Cum.Supp.2004, unless otherwise indicated.

The Cobbs filed their response to the motion for summary judgment again asserting the unreasonableness of Dr. Baca's charges. Attached to this motion were Jerry's affidavit, Christie's affidavit, and itemized billing statements from Baca Chiropractic from both before and after the automobile accident.

Along with their response to the motion for summary judgment, the Cobbs also filed a "Motion for Leave of Court to File Counteraffidavits Pursuant to RSMo. § 490.525.5 Out of Time." The counteraffidavits referred to in and attached to this motion were the same affidavits of Jerry and Christie that were referenced in and *677 attached to their response to the motion for summary judgment.

Jerry's and Christie's affidavits aver that Dr. Baca charged them different rates after the accident than he had charged before the accident, that Dr. Baca had represented to the Cobbs that he would charge them the same rates as he had charged before the accident, that the ultimate fees sought were unreasonable, that neither Christie nor Jerry would have treated with Dr. Baca had they known what the charges would be, and that they believed Dr. Baca charged higher rates because he knew an insurance company would be paying the bill.

The trial court granted Baca Chiropractic's motion for summary judgment and entered judgment accordingly on December 3, 2009. In its judgment, the trial court awarded Baca Chiropractic \$6,533.17, the amount requested in its petition, against the Cobbs. This appeal timely followed.

Standard of Review

In reviewing a trial court's grant of a motion for summary judgment, "we employ a *de novo* standard of review." *Neisler v. Keirsbilck*, 307 S.W.3d 193, 194 (Mo.App.2010) (citing *City of Springfield v. Gee*, 149 S.W.3d 609, 612 (Mo.App.2004)). As such, we will not defer to the trial court's decision,

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Murphy v. Jackson Nat'l Life Ins., Co., 83 S.W.3d 663, 665 (Mo.App.2002), but rather, we will use the same standards the trial court should have used in reaching its decision to grant the motion for summary judgment. *Stormer v. Richfield Hospitality Servs., Inc.*, 60 S.W.3d 10, 12 (Mo.App.2001). "We view the record in the light most favorable to the party against whom judgment was entered, and we accord that party the benefit of all inferences which may reasonably be drawn from the record." *Neisler*, 307 S.W.3d at 194-95 (citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)). "The propriety of summary judgment is purely an issue of law." *ITT Commercial Fin. Corp.*, 854 S.W.2d at 376.

Discussion

In their sole point relied on, the Cobbs contend that the trial court erred in granting Baca Chiropractic's motion for summary judgment because there was a genuine issue of material fact as to whether its charges were reasonable. We agree.

To be entitled to summary judgment under Rule 74.04 as a claimant, the movant must establish that (1) it is entitled to judgment as a matter of law and (2) there is no genuine dispute as to the material facts upon which it would have the burden of persuasion at trial.... Once the movant has made this prima facie showing as required by Rule 74.04, the non-movant must demonstrate that one or more of the material facts asserted by the movant as not in dispute is, in fact, genuinely disputed.... The non-moving party may not rely on mere allegations and denials of the pleadings, but must use affidavits, depositions, answers to interrogatories, or admissions on file to demonstrate the existence of a genuine issue for trial.

Midwestern Health Mgmt., Inc. v. Walker, 208 S.W.3d 295, 297 (Mo.App.2006) (internal citations omitted).

Here, in order to make a prima facie case for summary judgment on its open account action, Baca Chiropractic was required to plead in its sum-

mary judgment motion all of the facts necessary to establish each and every element of its claim, referencing any pertinent pleadings, discovery, or affidavits. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 380.

*678 [1][2] "An action on account is an action based in contract." *Midwestern Health Mgmt., Inc.*, 208 S.W.3d at 297 (citing *Heritage Roofing, L.L.C. v. Fischer*, 164 S.W.3d 128, 133 (Mo.App.2005); *St. Luke's Episcopal-Presbyterian Hosp. v. Underwood*, 957 S.W.2d 496, 498 (Mo.App.1997)). There are three elements that must be proven in a suit on open account: "(1) the defendant requested the plaintiff to furnish goods or services, (2) the plaintiff accepted the defendant's offer by furnishing the goods or services, and (3) the charges were reasonable." *Id.*

In its motion for summary judgment, Baca Chiropractic alleged all three of these elements with references to the applicable documents, including Dr. Baca's affidavit, which stated that the fees Baca Chiropractic charged the Cobbs for chiropractic services "were reasonable[.]" Dr. Baca's affidavit was the only evidence offered by Baca Chiropractic in support of its contention that the fees it charged the Cobbs were reasonable. In their response, the Cobbs admitted both that they had requested treatment from Dr. Baca and that treatment was provided; the only element of Baca Chiropractic's claim that they disputed was that the charges were reasonable.

Section 490.525 provides that,

[u]nless a controverting affidavit is filed as provided by this section, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

Section 490.525.2. Thus, as expressly provided

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in this statute, absent a "controverting affidavit," Baca Chiropractic's use of Dr. Baca's affidavit as to the reasonableness of the charges provided sufficient evidence to support its motion for summary judgment. The Cobbs, however, filed a controverting affidavit.

Section 490.525 states:

5. A party intending to controvert a claim reflected by the affidavit shall file a counteraffidavit with the clerk of the court and serve a copy of the counteraffidavit on each other party or the party's attorney of record:

(1) Not later than:

(a) Thirty days after the day he receives a copy of the affidavit; and

(b) At least fourteen days before the day on which evidence is first presented at the trial of the case; or

(2) With leave of the court, at any time before the commencement of evidence at trial.

Section 490.525.5.

[3] Baca Chiropractic first argues that the Cobbs filed their counteraffidavits out of time. The Cobbs admit that they did not file their counteraffidavits within the time required by section 490.525.5(1). The Cobbs contend, however, and we agree, that the trial court treated their counteraffidavits as having been timely filed, and thus the counteraffidavits were properly before the trial court by leave of court, in accordance with section 490.525.5(2). While there was no express ruling by the trial court on the Cobbs' motion for leave to file the counteraffidavits out of time, the trial court articulated in the judgment that it had "considered said Motion [for summary judgment] and [the Cobbs'] Response, *the documents attached thereto*, and the arguments of counsel." (Emphasis added). Because the documents attached to the Cobbs' response included the counteraffidavits, the trial

court's consideration of them implicitly granted the Cobbs' motion for leave to file them out of time in *679 accordance with section 490.525.5(2). Cf. *Premier Golf Missouri, LLC v. Staley Land Co., L.L.C.*, 282 S.W.3d 866, 871 (Mo.App.2009) (grant of motion for summary judgment on petition implicitly denied motions for summary judgment on counterclaims involving the same issues and evidence); *State v. Tidwell*, 888 S.W.2d 736, 743 (Mo.App.1994) (grant of motion for continuance for the purpose of obtaining defendant's blood sample implicitly granted pending motion for order requiring defendant to submit blood sample); *Midwest Materials Co. v. Vill. Dev. Co.*, 806 S.W.2d 477, 501 (Mo.App.1991) (finding of lack of bias and prejudice was implicit in the trial court's overruling of the motion for new trial).

[4] Baca Chiropractic next argues that, even if the affidavits were considered timely, the Cobbs were not qualified to make such affidavits as they are not "experts" within the meaning of the statute. The statute, in pertinent part, provides:

6. The counteraffidavit shall give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit shall be made by a person who is qualified, by knowledge, skill, experience, training, education or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.

Section 490.525.6.

Baca Chiropractic contends that "a non-expert is not competent to testify that a professional's charge for his services is unreasonable." The statute, however, is void of any reference to an "expert"; rather, the statute requires that a counteraffidavit "be made by a person who is qualified, by knowledge, skill, experience, training, education or other expertise, to testify in contravention of all or part of any of the matters contained in the initial af-

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fidavit." Section 490.525.6. Under the unique facts in this case, we find that the Cobbs were qualified to make such an affidavit by reason of their personal knowledge of and personal experience with Baca Chiropractic's prior rates and Dr. Baca's promise to adhere to those prior rates during the Cobbs' post-accident treatment. The facts in the counteraffidavits support that Jerry and Christie were treated by Dr. Baca for a lengthy period of time before their accident, during which they were charged a certain amount for particular services; after their accident, Dr. Baca told the Cobbs that he would charge the same amount for the same services; and Dr. Baca instead charged the Cobbs a higher amount than he had previously charged them for the same services. Under this set of facts, the Cobbs were uniquely qualified to specifically contest the reasonableness of Baca Chiropractic's fees based upon their knowledge and experience.

[5] As the counteraffidavits were properly before the trial court, all that remains to be determined is whether the contents of the Cobbs' counteraffidavits raise a genuine issue of material fact as to the reasonableness of Baca Chiropractic's fees. "A 'genuine issue' exists where the record contains competent evidence of 'two plausible, but contradictory, accounts of the essential facts.'" *Robinson v. Mo. State Highway & Transp. Comm'n*, 24 S.W.3d 67, 75-76 (Mo.App.2000) (quoting *ITT Commercial Fin. Corp.*, 854 S.W.2d at 382). "A 'genuine issue' is a dispute that is real, not merely argumentative, imaginary or frivolous." *Id.*

Here, both Jerry and Christie aver that Dr. Baca told them "he would charge the same rates post-accident as he did pre-~~680~~ accident[,]" but that Dr. Baca "charged higher rates for the treatment provided after the automobile accident compared with the rates he charged prior to the automobile accident." Belief of these facts would support an inference that Baca Chiropractic's fees in excess of those agreed to be charged are unreasonable. Therefore, these facts contradict the conclusory inference in Dr. Baca's affidavit that the fees were

"reasonable." This contradiction raises a genuine issue of material fact as to the reasonableness of the fees and, accordingly, summary judgment was inappropriate. The Cobbs' point is granted.

Decision

The trial court's judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

SCOTT, C.J., and RAHMEYER, J., concur.

Mo.App. S.D.,2010.
 Baca Chiropractic, P.C. v. Cobb
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DONNA BALL, as Administratrix With the Will Annexed, etc., Plaintiff and Respondent, v. DAN T. POSEY, Defendant and Appellant

No. A026068

Court of Appeal of California, First Appellate District, Division Four

176 Cal. App. 3d 1209; 222 Cal. Rptr. 746; 1986 Cal. App. LEXIS 2516

January 29, 1986

PRIOR HISTORY: [***1] Superior Court of the City and County of San Francisco, No. 780206, Morton R. Colvin, Judge.

DISPOSITION: The judgments are affirmed.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

An award of compensatory and punitive damages was entered against an attorney on causes of action for conversion, breach of fiduciary duty, and fraudulent disposition of a client's property. (Superior Court of the City and County of San Francisco, No. 780206, Morton R. Colvin, Judge.)

The Court of Appeal affirmed, holding that, because defendant was a fiduciary as to his client, the jury was properly instructed that a presumption of undue influence arose from that relationship. The court also held that the jury was qualified to determine the value of legal services defendant had rendered the client, that the evidence that defendant had misappropriated an inheritance check was sufficient, and that the award of punitive damages bore a reasonable relationship to the compensatory damages in light of defendant's behavior. (Opinion by Channell, J., with Anderson, P. J., and Sabraw, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Appellate Review § 133 -- Review -- Standing to Allege Errors -- Estoppel and Waiver. --In an action against an attorney for conversion, breach of fiduciary duty and fraudulent disposition of a client's property, in which action the trial court entered a judgment based on the jury's verdict and subsequently entered a second judgment awarding prejudgment interest, defendant waived the interest award issue on appeal pursuant to *Code Civ. Proc.*, § 906 (specifying what matters are reviewable), notwithstanding that he purported to appeal from both judgments, where he did not raise the interest award issue.

(2a) (2b) (2c) Attorneys at Law § 12 -- Attorney-client Relationship -- Dealings With Clients -- Presumption of Undue Influence. --In an action against an attorney for conversion, breach of fiduciary duty and fraudulent disposition of a client's property, the jury was properly instructed that a presumption of undue influence applies to all dealings between an attorney and a client for the attorney's benefit, where defendant was hired to settle the estate of an elderly woman's deceased husband, where in all transactions forming the basis of the action defendant had himself appointed the woman's agent by reason of a signed power of attorney, and where at trial defendant admitted he never advised the client to obtain separate counsel when his name appeared as joint tenant on her bank accounts shortly before her death.

[Undue influence in gift to testator's attorney, note, *19 A.L.R.3d 575.*]

(3) Attorneys at Law § 10 -- Attorney-client Relationship -- Fiduciary Nature. --The attorney-client relationship is a fiduciary relationship of the highest character.

(4) Trusts § 9 -- Transactions Between Persons in Trust Relationship -- Presumption of Undue Influence. --When a fiduciary gains an advantage, a presumption of undue influence arises.

(5) Trusts § 9 -- Transactions Between Persons in Trust Relationship -- Presumption of Undue Influence. --To declare that an advantage obtained by a fiduciary must be shown to be unfair, unjust, or inequitable before the presumptions of *Civ. Code*, § 2235 (providing that transactions in which a trustee obtains an advantage over his beneficiary are presumed to be entered into without sufficient consideration and under undue influence), arise would result in the imposition of a condition that is not required by § 2235.

(6) Trusts § 9 -- Transactions Between Persons in Trust Relationship -- Disclosure. --The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts that materially affect his rights and interests.

(7) Attorneys at Law § 12 -- Attorney-client Relationship -- Dealings With Client -- Duty to Inform. --An attorney must demonstrate that his client was fully informed in all matters related to any transactions between them.

(8a) (8b) Attorneys at Law § 32 -- Attorney-client Relationship -- Compensation of Attorneys -- Determination of Amount of Reasonable Fee -- Expert Testimony. --Expert testimony as to the reasonable value of an attorney's legal services is unnecessary, and the trial court's findings of fact on this matter cannot be disturbed absent a clear abuse of discretion. Thus, in an action against an attorney for conversion, breach of fiduciary duty and fraudulent disposition of a client's property, an award to plaintiff based on the unjustified size of fees defendant collected from his elderly client to settle an estate, was not an abuse of discretion, notwithstanding that no expert testimony on this question was presented, where defendant claimed he gave his since-deceased client a bill in a specified amount but produced no evidence of this at trial, and where he never explained why the client paid substantially more than the bill.

(9) Evidence § 81 -- Opinion Evidence -- Expert Witnesses -- Where Question Is Resolvable by Common Knowledge. --Expert testimony is not required where a question is resolvable by common knowledge.

(10) Conversion § 6 -- Pleading and Proof -- Sufficiency of Evidence -- Misappropriation of Client's Money by Attorney. --In an action against an attorney for conversion, breach of fiduciary duty and fraudulent

disposition of a client's property, there was sufficient evidence to support the jury's award based on defendant's misappropriation of an inheritance check, where defendant never deposited the proceeds of the check to the bank accounts of his client, an elderly woman in a convalescent hospital, and failed to produce evidence to prove his claim that he delivered the proceeds to her in cash.

(11) Conversion § 7 -- Damages -- Allowing Defendant Credit for Tax Paid. --In an action against an attorney for conversion, breach of fiduciary duty and fraudulent disposition of a client's property, in which action plaintiff was awarded compensatory and punitive damages, it was not error to have refused to allow defendant credit for taxes paid on the money of his client which he held in joint tenancy with her, where he presented no evidence beyond his own testimony that he made any tax payment.

(12) Damages § 24 -- Exemplary or Punitive Damages -- Relation to and Requirement of Actual Damages. --In an action against an attorney for conversion, breach of fiduciary duty and fraudulent disposition of a client's property, the award of \$ 40,000 in punitive damages bore a reasonable relationship to the compensatory damages award of \$ 43,746.73, in light of defendant's behavior, which consisted of overbilling and misappropriating the money of an elderly client.

COUNSEL: Dan T. Posey, in pro. per., and Robert N. Beechinor for Defendant and Appellant.

Bernadine Bushman Guidotti for Plaintiff and Respondent.

JUDGES: Opinion by Channell, J., with Anderson, P. J., and Sabraw, J., concurring.

OPINION BY: CHANNELL

OPINION

[*1212] [**747] (1) (See fn. 1.) Dan T. Posey, a California attorney, appeals from judgments¹ against him for conversion, breach of fiduciary duty and fraudulent disposition of a client's property. He contends that: (1) the jury was improperly instructed on the presumption of undue influence; and (2) the plaintiff [**748] failed to sustain her burden of proof as to damages. Neither claim is meritorious, and consequently we affirm the judgments.

¹ The trial court entered a judgment based on the jury's verdict, and subsequently entered a second judgment awarding prejudgment interest. Though appellant purports to appeal from both

judgments, he does not raise the interest award issue, and he therefore waives it. (*Code Civ. Proc.*, § 906.)

[***2] I. Facts

Respondent, Donna Ball, ² is the administratrix with the will annexed of the estate of Jeannette Watkins Ball (hereafter Mrs. Ball).

2 Donna Ball is the daughter-in-law of decedent, Mrs. Ball. She is also the widow of Donald Ball, who was the son of Mrs. Ball and her husband, Arthur Cameron Ball.

Mrs. Ball was an elderly woman in poor health. She suffered from a number of ailments for which she had been hospitalized at least 11 times in the last five years of her life. She took pain medication several times daily, occasionally combining it with alcohol.

In 1975 and again in 1978, Arthur and Jeannette Ball had Posey prepare their reciprocal wills. Shortly after Arthur died in 1979, Mrs. Ball hired Posey to settle Arthur's estate. That estate consisted solely of community property, principally cash and securities, all held in joint tenancy with Mrs. Ball. Posey performed a number of routine tasks to terminate the joint tenancies. ³ Mrs. Ball paid \$ 6,620 for these services, though Posey claims [***3] he gave her a bill for only \$ 2,500. A jury found these services worth no more [*1213] than \$ 1,135. (See fn. 4, *post.*) This was but one in a series of transactions, the most egregious of which are described below, that amounted to undue influence on Mr. Posey's part.

3 Posey also prepared a United States Estate Tax Return (Form 706) for Mrs. Ball's signature. However, this was unnecessary because Arthur's total gross estate was below the minimum to require such a return.

1. In January 1980, Mrs. Ball signed a power of attorney, prepared by Posey, appointing him as her attorney in fact.

2. On March 4, 1980, Posey had Mrs. Ball send a letter, addressed to the manager of the apartment building, advising that he, Posey, should have access to her apartment in the event of her incapacity. She countersigned the letter. (Six months later Posey was careful to draw up, and have Mrs. Ball sign, a similar letter to the manager of the hotel that was then her residence.)

3. On the same day Posey presented [***4] her with the first letter to her landlord, he provided Mrs. Ball with a new will that named himself as executor. This, too, she signed.

4. Still the same day, March 4, 1980, documents were deposited with Mrs. Ball's bank naming Posey as the joint tenant on both her checking and savings accounts. They were signed by both Posey and Mrs. Ball.

5. In November, Mrs. Ball inherited \$ 1,125. She endorsed the check she received and gave it to Mr. Posey to cash for her. Instead of giving her the proceeds, Posey bought a cashier's check payable to a third party.

6. On December 26, 1980, the day Mrs. Ball died, Posey improperly obtained from the county treasurer's office in San Francisco a consent to transfer all the money in Mrs. Ball's accounts to himself. On January 5, 1981, Posey withdrew all the money, over \$ 37,000, from those accounts.

Between the day Mrs. Ball died and the day Posey emptied all her accounts Posey had the apartment sealed, and refused access to Donna Ball and her children. This was despite Donna Ball's warning that maintaining the apartment would result in another month's rent being charged.

At trial, the jury awarded \$ 43,746.73 ⁴ compensatory damages on three [***5] causes of action: (1) for recovery of the \$ 37,136.73 in Mrs. Ball's bank accounts; (2) for the proceeds of the \$ 1,125 inheritance check; and (3) for the return of excessive fees charged [**749] in the amount of \$ 5,620. The jury also awarded \$ 40,000 punitive damages.

4 Full recovery on these three causes of action would have been \$ 135 more than the verdict. It may be that out of the \$ 6,620 paid for fees, the jury was requiring Posey to return slightly less than the \$ 5,620 sought in the complaint. The record on this matter is not clear.

[*1214] II. Presumptions of Undue Influence

(2a) Posey contends that the jury was improperly instructed that there was a presumption of undue influence. He argues that since he never entered into a contract, joint venture, or agreement with Mrs. Ball, any such presumption was incorrectly applied to his relationship with her. The cases, including those Posey cites, do not support this view.

(3) First of all, Posey was Mrs. Ball's attorney. [***6] This alone creates a fiduciary relationship that should be of the highest character. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-189 [98 Cal.Rptr. 837, 491 P.2d 421].) (2b) Further, at the time of all the transactions that form the basis of this case, Posey was Mrs. Ball's agent by reason of the signed power of attorney, as well as the fact that he was the named executor of her will.

(4) When a fiduciary gains an advantage, a *presumption* of undue influence arises. (*Bradner v. Vasquez* (1954) 43 Cal.2d 147, 151 [272 P.2d 11].) (5) "To declare that the advantage obtained must be shown to be unfair, unjust, or inequitable before the presumptions arise would result in the imposition of a condition which is not required by [Civil Code] section 2235." ⁵ (*Id.*, at p. 152.)

⁵ Civil Code section 2235 reads in pertinent part: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

[**7] (2c) Posey cites *Gold v. Greenwald* (1966) 247 Cal.App.2d 296 [55 Cal.Rptr. 660], in support of his argument. However, that case stands for the proposition that a presumption of undue influence applies to all dealings between an attorney and a client for the attorney's benefit.

At trial, Posey admitted that he had never advised Mrs. Ball to obtain separate counsel when his name appeared as the joint tenant on her bank accounts. (6) However, "[the] duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra*, 6 Cal.3d at pp. 188-189.) Even the lack of full disclosure will amount to fraud, because the fiduciary's obligation is affirmative. (7) The attorney must demonstrate that the client was fully informed on all matters related to any transactions between them. (*Id.*, at p. 189; see also *Gold v. Greenwald, supra*, 247 Cal.App.2d at p. 306.) Posey has failed to do this.

[*1215] III. Compensatory Damages

(8a) Posey next [**8] contends that the jurors were not qualified to determine the value of the legal services he performed for Mrs. Ball.

Posey claimed that he gave Mrs. Ball a bill for \$ 2,500, but he produced no evidence of this at trial. Posey never explained why Mrs. Ball paid \$ 4,120 more than the amount of his bill. Furthermore, Posey's calculation of his fee was based on the entire estate, not just that of Mrs. Ball's deceased husband. Posey even prepared and had Mrs. Ball sign unnecessary documents. (See fn. 3, *ante*.)

Expert testimony was not needed to determine the value of the few proper services Mr. Posey performed. All the facts were before the jury, and it generously al-

lowed him to keep over \$ 1,000. (See fn. 4, *ante*.) "The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know which way the wind blows.'" ⁶ (9) The California courts, although in harmony, express the rule somewhat [**750] less colorfully and hold expert testimony is not required where a question is 'resolvable by common knowledge'. [Citations omitted.] (*Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, 163 [177 Cal.Rptr. 882].) [**9]

⁶ In a footnote at this point, the court cites: "Bob Dylan, 'Subterranean Homesick Blues' from *Bringing it All Back Home*."

More specifically, in *Bunn v. Lucas, Pino & Lucas* (1959) 172 Cal.App.2d 450 [342 P.2d 508], the court held that "[expert] testimony as to the reasonable value of attorney's legal services is unnecessary. [Citations.]" (*Id.*, at p. 468.) The trial court's findings of fact on this matter cannot be disturbed absent a clear abuse of discretion. (8b) This award constituted no such abuse of discretion.

(10) Posey also contends that the jury had insufficient evidence that he misappropriated the inheritance check. We are not convinced. The proceeds of the check were never deposited in either of Mrs. Ball's bank accounts. Posey failed to produce evidence, such as a receipt, to prove his claim that he returned the proceeds to Mrs. Ball in cash. Like the jury, we fail to see why he would have delivered over \$ 1,000 in cash to an [**10] elderly client who was then in a convalescent hospital, with or without a receipt. In fact, on the same day Posey cashed the check, he purchased another one, of a slightly higher denomination, payable to an unrelated third party. We think there was more than sufficient evidence to support the jury's award.

[*1216] (11) Posey even argues that he should have been allowed credit for taxes paid on the money held in "joint tenancy." Other than his testimony, he had no evidence he made any tax payment, he cites no authority for this claim, and we find it wholly without merit.

IV. Punitive Damages

(12) Finally, Posey contends that the \$ 40,000 award of punitive damages is excessive. He cites *Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740 [168 Cal.Rptr. 237], for the principle that an award of punitive damages must bear some reasonable relationship to actual damages. In *Rosener*, the jury awarded \$ 158,000 compensatory damages and \$ 10 million in punitive damages. The court held that this amount reflected passion and prejudice and that \$ 2.5 million

176 Cal. App. 3d 1209, *; 222 Cal. Rptr. 746, **;
1986 Cal. App. LEXIS 2516, ***

was more appropriate. (*Id.*, at pp. 746, 749-750.) We think [***11] that, in light of Posey's behavior, the award both bore a reasonable relationship to the compensatory damages award, and reflected the jury's conservatism and restraint.

V.

This court is outraged by the conduct of a member of the California State Bar, and astonished that he should have the temerity to appeal the judgments in this case. We have determined that the State Bar is appropriately investigating Posey for his conduct that necessitated this litigation. If this were not the case we would make such a recommendation.

The judgments are affirmed.

985 S.W.2d 485

(Cite as: 985 S.W.2d 485)

H

Court of Appeals of Texas,
San Antonio.
Sandra BALLESTEROS, Appellant,
v.
James K. JONES and The Law Offices of Mann &
Jones, Appellees.

No. 04-91-00568-CV.

Nov. 18, 1998.

Rehearing Overruled Jan. 26, 1999.

Client filed action against attorney asserting legal malpractice and liability under Deceptive Trade Practices-Consumer Protection Act (DTPA) concerning his representation in her prior action for common law marriage and divorce. After jury returned verdict in favor of client, the 111th Judicial District Court, Webb County, Joe Kelly, J., granted attorney's motion for judgment notwithstanding the verdict (JNOV). Client appealed. On motion for rehearing en banc, the Court of Appeals, Angelini, J., held that: (1) evidence supported finding on existence of common law marriage; (2) evidence supported finding that attorney was negligent in his representation of client; (3) contingent attorney fee contract in underlying action was valid and enforceable; (4) no evidence indicated that conduct of attorney amounted to anything more than negligence, which thus precluded finding of unconscionability on part of attorney for purposes of DTPA claim; and (5) amount of damages sustained by client presented fact issue for jury.

Affirmed in part and reversed and remanded in part.

West Headnotes

[1] Appeal and Error 30 ⇌ 863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in

General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In general. Most Cited

Cases

To sustain the trial court's action in entering a judgment notwithstanding the verdict (JNOV), the reviewing court must determine that there is no evidence to support the jury's findings.

[2] Appeal and Error 30 ⇌ 934(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k934 Judgment

30k934(1) k. In general. Most Cited

Cases

In reviewing a judgment notwithstanding the verdict (JNOV), the reviewing court views the evidence in the light most favorable to the jury's findings, considering only the evidence and inferences which support them, and rejecting the evidence and inferences contrary to those findings.

[3] Judgment 228 ⇌ 199(3.7)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in

General

228k199 Notwithstanding Verdict

228k199(3.7) k. Where there is some substantial evidence to support verdict. Most Cited Cases

It is error to grant a judgment notwithstanding the verdict (JNOV) when there is more than a scintilla of evidence to support the jury's finding.

[4] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

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In order to prevail on a legal malpractice claim which arises from prior litigation, the plaintiff has the burden to satisfy "suit within a suit" requirement by showing that but for the attorney's negligence, he or she would be entitled to judgment, and show what amount would have been collectible had he or she recovered the judgment.

[5] Antitrust and Trade Regulation 29T ⇌ 256

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(D) Particular Relationships

29Tk254 Professionals

29Tk256 k. Legal professionals; attorney and client. Most Cited Cases

(Formerly 92Hk6 Consumer Protection)

Plaintiffs need not prove the "suit within a suit" element of legal malpractice claim when suing an attorney under the Deceptive Trade Practices-Consumer Protection Act (DTPA). V.T.C.A., Bus. & C. § 17.41 et seq.

[6] Marriage 253 ⇌ 50(4)

253 Marriage

253k50 Weight and Sufficiency of Evidence

253k50(4) k. Admissions and declarations.

Most Cited Cases

Evidence was legally sufficient to support jury's finding of agreement to be married which thus supported jury's finding on existence of common law marriage; although relationship began while both were married to others, couple lived together as husband and wife and represented themselves to others as being married after purported wife obtained divorce and after purported husband's wife died, and purported wife testified that they entered into agreement to be married after his first wife died. V.T.C.A., Family Code § 1.91(a)(2) (Repealed).

[7] Marriage 253 ⇌ 22

253 Marriage

253k22 k. Marriage by cohabitation and reputation. Most Cited Cases

Valid common law marriage consists of three elements which must exist at the same time: (1) an agreement presently to be husband and wife; (2) living together in Texas as husband and wife; and (3) representing to others in Texas that they are married. V.T.C.A., Family Code § 1.91(a)(2) (Repealed).

[8] Marriage 253 ⇌ 11

253 Marriage

253k4 Persons Who May Marry

253k11 k. Prior existing marriage. Most Cited Cases

If an impediment to the creation of a lawful marriage between the parties exists, as when one party is married to someone else, there can be no common law marriage, even if all three statutory elements are proven, but an ongoing agreement to be married may be shown by the circumstantial evidence of the parties continuing to live together as husband and wife and holding themselves out to others as being married after the removal of the impediment. V.T.C.A., Family Code § 2.22 (Repealed).

[9] Marriage 253 ⇌ 50(5)

253 Marriage

253k50 Weight and Sufficiency of Evidence

253k50(5) k. Cohabitation and reputation.

Most Cited Cases

Evidence was factually sufficient to support jury's findings that parties held themselves out as married in state, that parties cohabited, and that parties' had agreement to be married, which thus supported jury's finding on existence of common law marriage; purported husband signed parties in at hotels in state as husband and wife, gave purported wife wedding ring which she wore, introduced her as his wife to customers, co-signed promissory note with her, and stayed at her house frequently, and purported wife testified that they entered agreement to be married after his first wife died.

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V.T.C.A., Family Code § 1.91(a)(2) (Repealed).

[10] Marriage 253 ⇌ 22

253 Marriage

253k22 k. Marriage by cohabitation and reputation. Most Cited Cases

Common law marriage requirement of holding out as married in state can be established by word or conduct. V.T.C.A., Family Code § 1.91(a)(2) (Repealed).

[11] Appeal and Error 30 ⇌ 971(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k971 Examination of Witnesses

30k971(2) k. Competency of witness.

Most Cited Cases

Evidence 157 ⇌ 546

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k546 k. Determination of question of competency. Most Cited Cases

Whether a witness qualifies as an expert is left to the discretion of the trial court, and its decision will not be overturned absent a clear abuse of discretion.

[12] Evidence 157 ⇌ 538

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k538 k. Due care and proper conduct in general. Most Cited Cases

Lawyers who practiced in another city in state were qualified to give expert opinions in legal malpractice case on standard of care applicable to attorneys in county in which client's underlying action was tried, based on their testimony to having experience that allowed them to become familiar with standard of care by which a practitioner in county

should be judged.

[13] Attorney and Client 45 ⇌ 107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k107 k. Skill and care required. Most Cited Cases

Attorney in a legal malpractice action is held to the standard of care that would be exercised by a reasonably prudent attorney.

[14] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and judgment. Most Cited Cases

Negligence instruction given in legal malpractice standard sufficiently defined "negligence" and "ordinary care" in terms of degree of care and actions that attorney of ordinary prudence would have taken under similar circumstances in county.

[15] Evidence 157 ⇌ 571(3)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(3) k. Due care and proper conduct. Most Cited Cases

Evidence was legally and factually sufficient to support finding that attorney was negligent in his representation of client in her action for common law marriage and divorce concerning his advice that client accept proposed settlement; expert testimony indicated that attorney was negligent in advising client to accept settlement offer without investigating full extent of assets owned by couple, in failing to require purported husband to file sworn inventory, and in failing to get equitable portion of marital estate for client.

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[16] Antitrust and Trade Regulation 29T ⇌ 256

29T Antitrust and Trade Regulation
 29TIII Statutory Unfair Trade Practices and Consumer Protection
 29TIII(D) Particular Relationships
 29Tk254 Professionals
 29Tk256 k. Legal professionals; attorney and client. Most Cited Cases
 (Formerly 92Hk6 Consumer Protection)
 Lawyer's unconscionable conduct is actionable under the Deceptive Trade Practices-Consumer Protection Act (DTPA). V.T.C.A., Bus. & C. § 17.45(5) (1994).

[17] Antitrust and Trade Regulation 29T ⇌ 136

29T Antitrust and Trade Regulation
 29TIII Statutory Unfair Trade Practices and Consumer Protection
 29TIII(A) In General
 29Tk133 Nature and Elements
 29Tk136 k. Fraud; deceit; knowledge and intent. Most Cited Cases
 (Formerly 92Hk34 Consumer Protection)
 Showing under the Deceptive Trade Practices-Consumer Protection Act (DTPA), that the defendant took advantage of a consumer's lack of knowledge to a grossly unfair degree, does not depend on the defendant's intent but rather requires a showing that the resulting unfairness was glaringly noticeable, flagrant, complete, and unmitigated. V.T.C.A., Bus. & C. § 17.45(5) (1994).

[18] Attorney and Client 45 ⇌ 147

45 Attorney and Client
 45IV Compensation
 45k146 Contingent Fees
 45k147 k. Requisites and validity of contract. Most Cited Cases
 Contingent attorney fee contract in action for establishment of common law marriage and divorce was valid and enforceable.

[19] Attorney and Client 45 ⇌ 147

45 Attorney and Client
 45IV Compensation
 45k146 Contingent Fees
 45k147 k. Requisites and validity of contract. Most Cited Cases
 Contingent attorney fees contract for one-third of recovery is not excessive.

[20] Antitrust and Trade Regulation 29T ⇌ 256

29T Antitrust and Trade Regulation
 29TIII Statutory Unfair Trade Practices and Consumer Protection
 29TIII(D) Particular Relationships
 29Tk254 Professionals
 29Tk256 k. Legal professionals; attorney and client. Most Cited Cases
 (Formerly 92Hk6 Consumer Protection)
 Payment of \$90,000 under contingent attorney fee contract for one-third of recovery in action for establishment of common law marriage and divorce did not result in glaring and flagrant disparity between fee paid by client and the value of services received and did not support liability under Deceptive Trade Practices-Consumer Protection Act (DTPA) on unconscionable fee theory. V.T.C.A., Bus. & C. § 17.45(5)(B) (1994).

[21] Antitrust and Trade Regulation 29T ⇌ 365

29T Antitrust and Trade Regulation
 29TIII Statutory Unfair Trade Practices and Consumer Protection
 29TIII(E) Enforcement and Remedies
 29TIII(E)5 Actions
 29Tk365 k. Verdict, findings, and judgment. Most Cited Cases
 (Formerly 92Hk39 Consumer Protection)
 No evidence indicated that conduct of attorney amounted to anything more than negligence, which thus precluded jury's finding of unconscionability on part of attorney and warranted grant of judgment

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notwithstanding the verdict (JNOV) on client's claim under Deceptive Trade Practices-Consumer Protection Act (DTPA). V.T.C.A., Bus. & C. § 17.45(5)(A) (1994).

[22] Appeal and Error 30 ⇌ 901

30 Appeal and Error
 30XVI Review
 30XVI(G) Presumptions
 30k901 k. Burden of showing error. Most Cited Cases

Appeal and Error 30 ⇌ 1079

30 Appeal and Error
 30XVI Review
 30XVI(K) Error Waived in Appellate Court
 30k1079 k. Insufficient discussion of objections. Most Cited Cases

Trial court's judgment granting motion for judgment notwithstanding the verdict (JNOV) did not specify on which of several asserted grounds it was granted, which thus obligated appellant to establish on appeal that judgment could not be supported on any of the grounds set out in motion or waive any ground not challenged.

[23] Judgment 228 ⇌ 199(5)

228 Judgment
 228VI On Trial of Issues
 228VI(A) Rendition, Form, and Requisites in General
 228k199 Notwithstanding Verdict
 228k199(5) k. Motion for judgment in general. Most Cited Cases

Objection to a jury charge based on legal insufficiency of the evidence is not a prerequisite for a postverdict motion for judgment notwithstanding the verdict (JNOV). Vernon's Ann.Texas Rules Civ.Proc., Rule 279.

[24] Judgment 228 ⇌ 199(5)

228 Judgment
 228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in General

228k199 Notwithstanding Verdict

228k199(5) k. Motion for judgment in general. Most Cited Cases

Fact that attorney did not object to jury charge in legal malpractice action on ground that it called for immaterial jury finding on question of law did not result in waiver of his right to assert motion for judgment notwithstanding the verdict (JNOV) on that ground.

[25] Antitrust and Trade Regulation 29T ⇌ 363

29T Antitrust and Trade Regulation
 29TIII Statutory Unfair Trade Practices and Consumer Protection
 29TIII(E) Enforcement and Remedies
 29TIII(E)5 Actions
 29Tk361 Proceedings; Trial
 29Tk363 k. Questions of law or fact. Most Cited Cases
 (Formerly 92Hk40 Consumer Protection)

Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client
 45III Duties and Liabilities of Attorney to Client
 45k129 Actions for Negligence or Wrongful Acts
 45k129(3) k. Trial and judgment. Most Cited Cases

Amount of damages sustained by client presented fact issue for jury in legal malpractice and Deceptive Trade Practices-Consumer Protection Act (DTPA) action against attorney. V.T.C.A., Bus. & C. § 17.41 et seq.

[26] Appeal and Error 30 ⇌ 215(1)

30 Appeal and Error
 30V Presentation and Reservation in Lower Court of Grounds of Review
 30V(B) Objections and Motions, and Rulings Thereon

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30k214 Instructions

30k215 Objections in General

30k215(1) k. Necessity of objection in general. Most Cited Cases

Intermingling of matters for the jury with matters for the court alone in a jury charge is an error that is waived by failure to object to the charge. Vernon's Ann. Texas Rules Civ. Proc., Rule 274.

[27] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited Cases

Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and judgment. Most Cited Cases

In a legal malpractice suit based on negligence, the plaintiff is required to establish that any judgment that would have been obtained in the underlying action, but for the attorney's breach of duty, would have been collectible, and thus question of collectibility must either be included in damages question itself or it must be included in a separate jury instruction.

[28] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and judgment. Most Cited Cases

Client had burden of requesting jury question on the proper measure of damages in legal malpractice action.

[29] Appeal and Error 30 ⇌ 1177(5)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1177 Necessity of New Trial

30k1177(5) k. Errors in rulings and instructions at trial. Most Cited Cases

Damages 115 ⇌ 221(5.1)

115 Damages

115X Proceedings for Assessment

115k219 Verdict and Findings

115k221 Special Interrogatories and Findings by Jury

115k221(5) Preparation and Form of Interrogatories or Findings

115k221(5.1) k. In general. Most Cited Cases

Question that fails to guide the jury on any proper legal measure of damages is fatally defective and requires remand for a new trial.

[30] Appeal and Error 30 ⇌ 1064.1(7)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1064 Prejudicial Effect

30k1064.1 In General

30k1064.1(2) Particular Cases

30k1064.1(7) k. Damages and amount of recovery. Most Cited Cases

Submission of erroneous jury question on damages in legal malpractice action, which failed to limit jury's consideration to amount client could have collected in settlement of underlying action, required remand for new trial on negligence claim under circumstances that damages were unliquidated and liability issues were contested. Rules App. Proc., Rule 44.1(b).

*488 Marvin B. Zimmerman, Zimmerman & Zimmerman, P.C., San Antonio, Oscar C. Gonzales, Oscar C. Gonzales, Inc., San Antonio, John M. Pinckney, III, Wells, Pinckney & McHugh, P.C.,

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San Antonio, Judith R. Blakeway, Strasburber & Price, L.L.P., San Antonio, for Appellant.

Timothy Patton, Pozza & Patton, San Antonio, Harlin C. Womble, Jr., Jordan & Shaw, P.C., Corpus Christi, for Appellees.

Before PHIL HARDBERGER, Chief Justice, TOM RICKHOFF, Justice, ALMA L. LÓPEZ, Justice, CATHERINE STONE, Justice, PAUL W. GREEN, Justice, SARAH B. DUNCAN, Justice, KAREN ANGELINI, Justice, en banc.

OPINION ON APPELLEE'S MOTION FOR REHEARING EN BANC

KAREN ANGELINI, Justice.

Appellee's motion for rehearing en banc is granted and the motion to resubmit is denied. Our opinion of September 29, 1993 and judgment of July 28, 1993 are withdrawn, and the following opinion and judgment are substituted.

Nature of the case

This is an appeal of a judgment notwithstanding the verdict in a legal malpractice and deceptive trade practices suit. Appellant, *489 Sandra Ballesteros, filed suit against appellees, James K. Jones and the Law Offices of Mann and Jones (collectively referred to as "Jones"), asserting that the settlement Jones had obtained on her behalf in a suit to establish a common law marriage and for divorce against Andres Monetou was inadequate and that Jones had charged her an excessive fee. The jury found that a common law marriage had existed between Ballesteros and Monetou, and found that Jones was negligent and had acted unconscionably. The trial court granted Jones's motion for judgment notwithstanding the verdict. Ballesteros filed this appeal.

[1][2][3] To sustain the trial court's action in entering a judgment notwithstanding the verdict, the reviewing court must determine that there is no evidence to support the jury's findings. *Best v. Ryan Auto Group, Inc.*, 786 S.W.2d 670, 671 (Tex.1990);

Navarette v. Temple Indep. Sch. Dist., 706 S.W.2d 308, 309 (Tex.1986). "In making this determination, we view the evidence in the light most favorable to the jury's findings, considering only the evidence and inferences which support them, and rejecting the evidence and inferences contrary to those findings." *Navarette*, 706 S.W.2d at 309. It is error to grant a judgment notwithstanding the verdict when there is more than a scintilla of evidence to support the jury's finding. *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 228 (Tex.1990).

[4] In order to prevail on a legal malpractice claim which arises from prior litigation, the plaintiff has the burden to show that "but for" the attorney's negligence, he or she would be entitled to judgment, and show what amount would have been collectible had he or she recovered the judgment. *Cosgrove v. Grimes*, 774 S.W.2d 662, 666 (Tex.1989); *Hall v. Rutherford*, 911 S.W.2d 422, 424 (Tex.App.-San Antonio 1995, writ denied); *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948, 949 (Tex.Civ.App.-Houston [1st Dist.] 1974, writ ref'd n.r.e.). This is commonly referred to as the "suit within a suit" requirement.

[5] Because the plaintiff must establish that the underlying suit would have been won "but for" the attorney's breach of duty, this "suit within a suit" requirement is necessarily a component of the plaintiff's burden on cause in fact. However, the plaintiff only has the burden to prove a "suit within a suit" in a negligence claim. Plaintiffs need not prove the "suit within a suit" element when suing an attorney under the DTPA. *Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex.1998).

Because Ballesteros alleged that Jones was negligent, the trial court correctly applied the "suit within a suit" concept when the first jury question asked if a common law marriage existed between Ballesteros and Monetou.

Common Law Marriage

[6] In her first point of error, Ballesteros argues that the trial court erred in granting Jones's motion

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for judgment notwithstanding the verdict because the evidence was legally sufficient to support the jury's finding of a common law marriage. We agree.

[7] A valid common law marriage consists of three elements: (1) an agreement presently to be husband and wife; (2) living together in Texas as husband and wife; and (3) representing to others in Texas that they are married. *Russell v. Russell*, 865 S.W.2d 929, 932 (Tex.1993); TEX. FAM.CODE ANN. § 1.91(a)(2) (Vernon 1993).^{FN1} All three elements must exist at the same time. *Bolash v. Heid*, 733 S.W.2d 698, 699 (Tex.App.-San Antonio 1987, no writ).

FN1. Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 1.91, 1969 Tex. Gen. Laws 2707, 2717 (repealed 1997) (current version at TEX. FAM.CODE ANN. § 2.401(a)(2) (Vernon Pamph.1998)). Section 1.19 was repealed and reenacted as section 2.401(a)(2) without substantive change.

Viewing the evidence as we are required to do under the applicable standard of review, the facts pertaining to the alleged common law marriage are as follows. Monetou and Ballesteros began living together in 1970. Both were married to other persons at the time. Their relationship lasted 17 years. Shortly after the relationship began, Ballesteros and her husband divorced. In 1975, Ballesteros gave birth to a son fathered by Monetou. They named their son Andres, Jr. *490 Monetou's wife died in 1980. In 1983, Monetou legitimized his son by a decree of paternity. The decree recited that Monetou and Ballesteros were living together at the same address in Laredo. During their relationship, Ballesteros and Monetou traveled together and would sign hotel and airline documents "Mr. and Mrs. Monetou." Monetou supported Ballesteros, Andres, Jr., and Ballesteros's two other sons financially. Ballesteros testified that her older son considered Monetou a hero and that her second son called him "daddy."

According to Ballesteros, she and Monetou cohabited three or four times a week in Laredo, although Monetou also spent some time at his Nuevo Laredo residence with his other children. Monetou kept clothes at the house in Laredo; he would bathe, shave, and eat there; and he invited his other children over for visits and meals. Monetou paid for improvements to the house in Laredo. At times, Monetou and Ballesteros traveled together, accompanied by Monetou's other children. Monetou gave Ballesteros a diamond ring and a wedding band which she continued to wear after Monetou's wife died. Monetou introduced Ballesteros to others as his wife. They held themselves out as husband and wife in Laredo and while traveling. Monetou co-signed promissory notes for Ballesteros, including one that allowed her to pay off the mortgage on the house in Laredo that she and Andres, Jr. had shared with Monetou.

Ballesteros testified that after Monetou's wife died, she and Monetou began spending more time together and that he moved his clothes into the house in Laredo and would stay there. During this time, according to Ballesteros, they also held themselves out to others as being married to one another. She testified that at this time they entered into an agreement to be married. We consider this as some evidence of the existence of an agreement to be married. *Collora v. Navarro*, 574 S.W.2d 65, 70 (Tex.1978); *Winfield v. Renfro*, 821 S.W.2d 640, 645 (Tex.App.-Houston [1st Dist.] 1991, writ denied); *Bolash*, 733 S.W.2d at 699. Furthermore, the agreement to be married may be shown by circumstantial evidence or conduct of the parties. *Russell*, 865 S.W.2d at 933. Proof of cohabitation and representing to others that they were married may constitute circumstantial evidence from which a jury could find an agreement to be married. *See id.*

[8] Jones argues that Monetou and Ballesteros could not be engaged in a common law marriage because the relationship was illicit in its origin. If an impediment to the creation of a lawful marriage between the parties exists, as when one is married

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to another, there can be no common law marriage, even if all three elements are proven. *Howard v. Howard*, 459 S.W.2d 901, 904 (Tex.Civ.App.-Houston [1st Dist.] 1970, no writ). However, an ongoing agreement to be married may be shown by the circumstantial evidence of the parties continuing to live together as husband and wife and holding themselves out to others as being married after the removal of the impediment. TEX. FAM.CODE ANN. § 2.22 (Vernon 1993)^{FN2}; *Garduno v. Garduno*, 760 S.W.2d 735, 741 (Tex.App.-Corpus Christi 1988, no writ). There is evidence that the parties lived together as husband and wife and represented themselves to others as being married after Monetou's wife died. As we have indicated, Ballesteros testified that at the time of the death of Monetou's wife they entered into an agreement to be married. This is some evidence of the required agreement.

FN2. Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 2.22, 1969 Tex. Gen. Laws 2707, 2719 (repealed 1997) (current version at TEX. FAM.CODE ANN. § 6.202 (Vernon Pamph.1998)). Section 2.22 was repealed and reenacted as section 6.202 without substantive change.

Looking at the evidence in the light most favorable to the jury's findings, we find some evidence to support the jury's finding that Ballesteros and Monetou were engaged in a common law marriage. Thus, the evidence is legally sufficient and the motion for judgment notwithstanding the verdict was improper on this issue. We sustain the first point of error.

Jones argues in his first two cross-points that the evidence is factually insufficient to support the jury's common law marriage finding. In considering a factual insufficiency challenge, we must consider and weigh all the evidence and reverse for a new trial only *491 if the challenged finding is so against the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex.1986). We may not substi-

tute our opinion for that of the jury merely because we would have reached a different result. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex.1986).

[9][10] Jones first contends that the evidence is factually insufficient on the requirement of holding out. The common law marriage requirement of holding out can be established by word or conduct. *Estate of Giessel*, 734 S.W.2d 27, 31 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.). Proof of holding out requires that it be done in Texas. TEX. FAM.CODE ANN. § 1.91(a)(2) (Vernon 1993).^{FN3} Jones argues that the vast majority of the trips where Monetou and Ballesteros registered at hotels and with airlines as a married couple were in other states and in Mexico. Monetou denied that he represented to anyone else that he and Ballesteros were husband and wife. He testified that most of the reservations were in the name of "Mr. and Mrs. Monetou" because Ballesteros made them. The promissory notes that Monetou co-signed were signed after the relationship ended and were in Ballesteros's name. The couple never filed income tax returns as husband and wife.

FN3. Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 1.91, 1969 Tex. Gen. Laws 2707, 2717 (repealed 1997) (current version at TEX. FAM.CODE ANN. § 2.401(a)(2) (Vernon Pamph.1998)). Section 1.19 was repealed and reenacted as section 2.401(a)(2) without substantive change.

Monetou did acknowledge, however, that numerous trips he and Ballesteros took were within the State of Texas and many of these trips occurred after the death of his wife. Monetou testified he had signed in at hotels as "Mr. and Mrs. Monetou." He also admitted giving Ballesteros a diamond ring and a wedding band, which she wore after his wife's death. Bruce Adams, a business associate of Monetou, testified that after Monetou's wife died, Monetou introduced Ballesteros as his wife not only to him but also to customers in Adams's warehouse in Laredo. Adams testified that on business trips he took with Monetou and Ballesteros, Monetou would

introduce Ballesteros as his wife. Monetou testified that he co-signed one of the promissory notes to allow Ballesteros to pay off the mortgage on her house in Laredo so she and his son could keep the house.

Jones next contends that the proof of cohabitation is factually insufficient. The evidence showed that Monetou is a Mexican national whose permanent residence is in Nuevo Laredo. Although he visited Ballesteros frequently at her Laredo home and spent as much as a week at a time with her there, he testified that he never intended to live with Ballesteros permanently in Laredo. He also testified that he saw other women during the time of his relationship with Ballesteros and thought she knew about this.

We find the evidence of Monetou's and Ballesteros's living and family arrangements in Laredo sufficient to establish the cohabitation element of a common law marriage. Monetou's business associate, Adams, testified that he went to their house in Laredo on numerous occasions in the evenings and saw Monetou there. He further testified that Monetou gave him the phone number of the Laredo house so that he could call Monetou there at night. In fact, Adams reached Monetou there by phone in the evenings. The evidence shows that Monetou stayed at the house in Laredo on a regular basis. Although he did frequently return to his house in Nuevo Laredo where the children of his first marriage lived, this in itself is not sufficient to destroy the pattern of living together. See *Bolash*, 733 S.W.2d at 699 (finding evidence that the man, employed in Nigeria, stayed at the woman's residence during his periodic visits to Texas was sufficient to support the finding that they lived together as husband and wife "to the extent possible under the circumstances"). The decree legitimizing Andres, Jr. lists both parties as living at the same address in Laredo. Considering all the evidence as a whole, there is evidence of more than merely isolated instances of living together. Thus, we view the evidence as sufficient to establish holding out and co-

habitation.

Finally, Jones challenges the sufficiency of the evidence to support the agreement element*492 of a common law marriage. He refers to testimony by Monetou that he never intended to marry Ballesteros, that he told her he would not marry her, and that he made a conscious decision not to marry her when he acknowledged paternity of his child. Jones also points out that Monetou was to be ceremonially married to another woman on the day that he was served with Ballesteros's suit. Jones contends that this evidence indicated that Monetou never considered himself to be married to Ballesteros. Finally, there was testimony that Monetou hired prostitutes, sometimes flying them in from as far away as Mexico City, to engage in lesbian sex with Ballesteros while he watched. Although Ballesteros testified that she was not a willing participant in these activities, she also testified that the relationship ended when she would no longer satisfy Monetou's desires. Jones argues that this conduct is inconsistent with a man intending to transform an "illicit affair" into a marriage.

We have already detailed Ballesteros's evidence regarding the agreement element of a common law marriage. The jury believed Ballesteros. The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 28 (Tex.1993). It may resolve conflicts or inconsistencies in the testimony. *Barrajas v. VIA Metro. Transit Auth.*, 945 S.W.2d 207, 209 (Tex.App.-San Antonio 1997, no writ). We cannot say the jury's finding of a common law marriage is so against the overwhelming weight of the evidence as to be clearly wrong and unjust. We find that the evidence was factually sufficient. Therefore, we overrule Jones's first and second cross-points.

Legal Malpractice and DTPA

In the remainder of her points, Ballesteros argues that the evidence was legally sufficient to support the jury verdict in her favor on legal malpractice, violation of the DTPA, and damages. Jones

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brings a number of cross-points, contending that if we reverse the judgment notwithstanding the verdict, we should remand for a new trial because the charge was defective and because the evidence was factually insufficient to support the jury's legal malpractice and DTPA findings.

A review of the evidence in the light most favorable to the jury's findings shows that in the summer of 1988, Ballesteros consulted with attorney Shirley Hale because she wanted to file for divorce. Ms. Hale advised Ballesteros to request a monthly allowance until divorce papers were filed. At that point, Monetou and Ballesteros agreed she would not file for divorce and he would provide her with \$1500 a month allowance. Shortly thereafter, Ballesteros became aware that Monetou was getting married. She then contacted Jones about getting a divorce. She had, on a previous occasion, talked to Jones about her common law marriage, and he told her if she ever decided to leave Monetou, she could get a divorce. Jones requested a \$10,000 retainer, but Ballesteros told him she did not have the money. Instead, Ballesteros gave Jones \$3,000 and she signed an agreement with Jones that stated: "for and in consideration of the services which the firm shall provide, it shall receive one-third (1/3) of any money or property awarded to me."

Ballesteros spoke with Jones for about six hours about the case on January 12, 1989. Before the hearing, Ballesteros told Jones about having sex with other women in order to please Monetou. According to Ballesteros, Jones said that they could use the information about Monetou's sexual appetites to "hang him." He told Ballesteros he had handled another divorce case in Laredo that was probably worse than hers. After discussions in the judge's chambers before the hearing, Jones related to Ballesteros that Monetou had offered to settle for \$100,000. Jones said that the offer was not good enough and recommended that she settle for \$300,000. At that time, Ballesteros had no idea of Monetou's net worth.

Within a few days the parties reached a settle-

ment. According to Ballesteros, Jones told her it was a wonderful agreement and that she was rich woman. He told her it would be better for her to settle because a jury would find against a common law marriage based on the sexual encounters with other women. Jones testified that he believed*493 a jury would not believe that a man would treat his wife that way. Based on these representations by Jones, Ballesteros approved the settlement agreement, relinquishing her claims to a marriage with Monetou and, therefore, her claims to any community property.

The settlement agreement, dated March 8, 1989, provided that Ballesteros would receive \$90,000 in cash; Monetou would pay three promissory notes dated June and August 1988 in the principal amounts of \$10,000, \$65,000, and \$69,573.55. The three notes represented debts on Ballesteros's house and business. Additionally, he would relinquish all interest in International Van Storage, the business operated by Ballesteros, and two lots in Laredo. Monetou would pay Ballesteros \$1400 per month for life, secured by a lien on a warehouse in Laredo. In return, Ballesteros agreed to dismiss the divorce suit with prejudice. A certified public accountant valued the settlement at \$384,839.

When Ballesteros originally told Jones about the sexual encounters, she was willing and unafraid to go to court. According to Ballesteros, she would not have signed the settlement agreement had she known the extent of Monetou's assets. At the time the parties signed the settlement agreement, there was no discussion about Jones's fee. Later, when the checks came in, Jones told her he would take his fee out of the cash, which she understood would be one-third of the \$90,000. Jones gave her a check for the first \$1400 monthly payment and asked her to endorse the \$90,000 check over to him. Jones said he would give her the balance as soon as expenses were cleared. When she left Jones's office, Ballesteros was under the belief she would receive \$60,000 from Jones.

Approximately one week later, Jones's recep-

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tionist contacted Ballesteros and told her they had a check for her. When Ballesteros went to Jones's office, she was given a check for \$88.45 and an invoice. The invoice reflected that the amount was the balance from the \$3,000 deposit she had given Jones. Ballesteros stated she was in shock after realizing she received \$88.45 out of a \$90,000 cash settlement. She wrote Jones asking him to reconsider his fee because of her desperate financial situation and indicated that time was of the essence. Ballesteros was then arrested for writing hot checks. After Ballesteros was released, she went to see Jones and he told her that the \$90,000 was actually a reduced fee. He explained that under the contract, he was entitled to take one-third of the money and property she had received, which would be much more than \$90,000. He told her they could go back to the original agreement but it would end up costing her more.

At the time she signed the settlement agreement, Ballesteros was unaware of what property she might be entitled to. Although the temporary injunction provided for an inventory, Jones never obtained one. Jones also never took Monetou's deposition nor did he hire an investigator to do an asset search. Jones also never made a settlement demand. Jones did check the county tax assessor's office and determined that Monetou had no property in his name in Webb County. Jones said he did not think the first offer of settlement was worth taking, not because of any knowledge of Monetou's assets, but because he generally does not feel the first offer is worth taking in any litigation. In fact, Monetou did have extensive real property and business holdings in Texas and Mexico. At the time of the settlement, he had a \$900,000 certificate of deposit and \$15,000 to \$20,000 in his checking account in a Laredo bank. Monetou estimated his net worth at that time was approximately \$2,000,000.

Ballesteros sued Jones under the DTPA alleging that his conduct in coercing her to settle her cause of action without determining the size of the estate acquired by the parties during their common

law marriage resulted in a gross disparity between the value received and what she should have received. She sued him for negligence and gross negligence in failing to investigate properly and determine the full extent of the assets owned by the community; failing to require Monetou to file an inventory; failing to perform routine discovery; failing to discover marital assets prior to settlement; failing to obtain a settlement which would award her an equitable portion of the community property; failing to protect her rights by *494 dismissing her case and by agreeing to entry of an order that declared no marriage existed; and charging her an unconscionable attorney's fee.

In addition to finding that a common law marriage existed, the jury found that Jones knowingly engaged in unconscionable conduct that was a producing cause of Ballesteros's damages, that he was negligent and that his negligence was a proximate cause of her damages, and that he was grossly negligent. The jury awarded Ballesteros \$560,000 in actual damages. She was awarded \$60,000 for mental anguish, \$100,000 in additional damages under the DTPA, and \$200,000 as exemplary damages. She was also awarded attorney's fees of \$100,000 through trial, \$15,000 for appeals, \$10,000 for making or responding to a writ of error to the supreme court, and \$5,000 if the writ were granted.

Negligence

In her fourth point of error, Ballesteros alleges that the court erred in granting a judgment notwithstanding the verdict because the evidence was legally sufficient to support the jury's finding of legal malpractice. In Jones's fourth cross-point, he contends that the evidence was factually insufficient to support the jury's findings of liability.

A legal malpractice action is based on negligence. *Cosgrove*, 774 S.W.2d at 664. To prove that Jones breached the standard of care and thus was negligent, Ballesteros called two family law practitioners, Christine Tharp and Frank Pennypacker, as expert witnesses. Because both Tharp and Pennypacker are San Antonio lawyers, Jones in his

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fourth reply point, objects to their qualifications to express opinions concerning the standard of care applicable to an attorney practicing in Webb County. In *Cook v. Irion*, 409 S.W.2d 475, 478 (Tex.Civ.App.-San Antonio 1966, no writ), this court noted that an attorney practicing in a vastly different locality would not be qualified to second guess the judgment of an experienced attorney as to who should be joined as additional party defendants. In that malpractice action against an El Paso attorney, an attorney from Alpine was called as an expert witness. The opinion noted that Alpine was 220 miles from El Paso and that the population of Brewster County was 6,434, as compared to 314,070 in El Paso County. *Id.* The Alpine attorney had never tried a case in El Paso County. *Id.* at 477. Therefore, rather than testifying as to the care, skill, and diligence customarily exercised by El Paso County attorneys, he testified, over objection, concerning the requisite standard of care of the average general practitioner in Texas. *Id.* Jones points out that neither Tharp nor Pennypacker had ever tried a case, picked a jury, appeared before a judge, or participated in a contested evidentiary matter in Webb County. The attorneys testified that they were familiar with the standard of care required of a Webb County practitioner because they had worked on cases out of Webb County, they had consulted with Webb County attorneys and San Antonio attorneys who practice extensively in Webb County, they had consulted Webb County court personnel about local customs, and they had practiced before judges who try cases in Webb County. Tharp testified that she had tried cases before the trial judge in this case.

[11] A party offering expert testimony has the burden to show that the witness is qualified, that is, that the witness possesses a higher degree of knowledge or skill than an ordinary person and that the knowledge or skill will assist the trier of fact. TEX.R. CIV. EVID. 702. Whether a witness qualifies as an expert is left to the discretion of the trial court, and its decision will not be overturned absent a clear abuse of discretion. *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex.1996).

[12] The charge in this case limited its definitions of negligence, ordinary care, and proximate cause to Webb County. Thus, the question is whether Ballesteros's experts were competent to address the standard of care existing in the Webb County legal community. Despite the fact that neither Tharp nor Pennypacker were Webb County practitioners, the trial court acted well within its discretion in allowing these two attorneys to testify as experts. They testified to having experience that allowed them to become familiar with the standard of care by which a Webb County practitioner should be judged. *495 Thus, Ballesteros met the threshold burden of showing that her experts possessed greater knowledge, skill, experience, and training than the jury, and that they were familiar with the standard of care that should exist in the Webb County legal community. At that point, the weight and credibility of the testimony was for the jury to determine. *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 250 (Tex.App.-Dallas 1990, no writ).

[13][14] An attorney in Texas is held to the standard of care that would be exercised by a reasonably prudent attorney. *Cosgrove*, 774 S.W.2d at 664. The standard is an objective exercise of professional judgment. *Id.* at 665. Jones complains in his third cross-point that the negligence instruction was fundamentally defective because it failed to set out the *Cosgrove* standard of liability. He requested the following instruction:

If an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstances, it is not an act of negligence even if the result is undesirable. An attorney who makes a reasonable decision in the handling of a case is not negligent simply because the decision later proves to be imperfect.

This language tracks language from *Cosgrove*. See *id.* The terms "negligence" and "ordinary care" were defined in the charge as follows:

"Negligence," when used with respect to the conduct of James K. Jones, Jr., d/b/a/ Law Offices of Mann & Jones, means failure to use ordinary

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care, that is, failing to do that which an attorney of ordinary prudence would have done under the same or similar circumstances in Webb County, or doing that which an attorney of ordinary prudence would not have done under the same or similar circumstances in Webb County.

"Ordinary care," when used with respect to the conduct of James K. Jones, Jr., d/b/a Law Offices of Mann & Jones, means the degree of care that an attorney of ordinary prudence could use under the same or similar circumstances in Webb County.

In *Cosgrove*, the Supreme Court said that the instruction "should clearly set out the standard for negligence in terms which encompass the attorney's reasonableness in choosing one course of action over another." *Id.* The instructions in this case set out the proper standard of liability. In fact, the instruction sets out the standard in greater detail than the instruction reviewed in *Cosgrove*. *See id.* Cross-point three is overruled.

[15] In addressing Ballesteros's fourth point of error and Jones's fourth cross-point, we find that there was expert testimony that Jones was negligent in failing to investigate properly the full extent of the assets owned by Monetou and Ballesteros at the time of the settlement, in failing to require Monetou to file a sworn inventory, and in failing to get an equitable portion of the marital estate for Ballesteros. Jones argues that he had no duty to conduct discovery because he counseled Ballesteros concerning whether to forego legally available objectives or methods. Ballesteros testified, however, that Jones never told her about an inventory or any other discovery device. According to Ballesteros's experts, Jones could not have competently advised her to forego what she was foregoing since he had no idea of the extent of Monetou's assets. Ballesteros's experts testified it would have been a simple matter under Texas discovery rules to obtain information; he could have obtained an inventory, he could have taken depositions, he could have hired an investigator. A reasonably prudent attorney could not have

advised his client to accept a settlement under these circumstances. Having reviewed the evidence in the light most favorable to the jury finding, we find some evidence from which a jury could conclude that Jones was negligent in his representation of Ballesteros. Thus, we find the evidence legally sufficient and sustain Ballesteros's fourth point of error. Looking at all the evidence, we also find that the jury's finding of negligence is not so against the overwhelming weight of the evidence as to be clearly wrong and unjust. Thus, the evidence is factually sufficient to support the jury's finding of negligence.

Unconscionability

In her second point of error, Ballesteros argues that the court erred in granting a *496 judgment notwithstanding the verdict because there was legally sufficient evidence to support the jury's finding that Jones acted unconscionably, and did so knowingly. In Jones's fourth cross-point, he contends that the evidence was factually insufficient to support the jury's findings of liability.

[16][17] The jury found that Jones engaged in an unconscionable action or course of action that was a producing cause of damages to Ballesteros. Unconscionable action or course of action means an act or practice which, to a person's detriment:

(A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or

(B) results in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration.

TEX. BUS. & COM.CODE ANN. § 17.45(5) (Vernon 1987).^{FN4} A lawyer's unconscionable conduct is actionable under the DTPA. *See Latham*, 972 S.W.2d at 68, *DeBakey v. Staggs*, 612 S.W.2d 924, 925 (Tex.1981). A showing under subparagraph A of section 17.45(5), that the defendant took advantage of a consumer's lack of knowledge to a grossly unfair degree, does not depend on the de-

fendant's intent. It requires a showing that the resulting unfairness was "glaringly noticeable, flagrant, complete, and unmitigated." *Chastain v. Koonce*, 700 S.W.2d 579, 584 (Tex.1985).

FN4. See Act of May 10, 1977, 65th Leg., R.S., ch. 216, § 1, 1977 Tex. Gen. Laws 600 (amended 1995) (current version at TEX. BUS. & COM.CODE ANN. § 17.45 (5) (Vernon Supp.1998)).

In the recent case of *Latham v. Castillo*, the Texas Supreme Court discussed unconscionable conduct under the DTPA in a legal malpractice case. In *Latham*, the plaintiffs retained an attorney to file a medical malpractice claim against a hospital for causing the death of their young daughter. *Latham*, 972 S.W.2d at 67. The plaintiffs sued the attorney for negligence because he failed to file the lawsuit within the statute of limitations. *Id.* The plaintiffs also alleged unconscionable action under the DTPA because the attorney affirmatively represented to them that he had filed the lawsuit. Additionally, the plaintiffs alleged fraudulent misrepresentation and breach of contract. After the plaintiffs presented their case, the judge granted a directed verdict that the plaintiffs take nothing from the attorney. *Id.* Presumably, the judge granted the directed verdict because the plaintiffs offered no evidence that "but for" the attorney's negligence the medical malpractice suit would have been successful and damages would have been recoverable and collectible. The court of appeals affirmed the directed verdict on negligence and the plaintiffs did not appeal that issue. The court of appeals remanded the remaining issues. The supreme court found that the plaintiffs had offered some evidence on all elements of their DTPA cause of action. *Id.* at 70.

As in our case, the plaintiffs in *Latham* argued that the lawyer's conduct was an "unconscionable action or course of action." The supreme court stated that the legislature enacted the DTPA to protect consumers against false, misleading, and deceptive business practices and unconscionable actions. "Attorneys can be found to have engaged in

unconscionable conduct by the way they represent their clients." *Id.* at 68. In *Latham*, the plaintiffs depended on the attorney to file their suit and the record reveals that the attorney told the plaintiffs he had filed the claim when actually he had not. The court stated that the attorney took advantage of the trust his clients placed in him as an attorney and found some evidence that the clients were taken advantage of to a grossly unfair degree. *Id.* at 69. The attorney argued that the plaintiffs' DTPA claim was essentially a dressed-up legal malpractice claim and the plaintiffs should have proven that they would have won the medical malpractice case in order to recover. *Id.* The court disagreed and stated that recasting the plaintiffs' claims as merely a legal malpractice claim would subvert the legislature's clear purpose of deterring deceptive practices. *Id.* The court stated that if the plaintiffs had only alleged that the attorney negligently failed to file their claim, the claim would only be one for legal malpractice. "It is the difference between negligent conduct and deceptive conduct. To recast this claim as one for legal malpractice is to ignore this *497 distinction." *Id.* The court concluded that the DTPA does not require the "suit within a suit" element when suing an attorney under the DTPA. *Id.*

Both of Ballesteros's experts testified that \$90,000 for the amount of work performed on the case was clearly excessive and unconscionable. Tharp testified that in her opinion Jones had done only about \$3,500 worth of work. Jones's own records show he spent 52 hours on the case, in addition to 65 hours of associate's time. This averages out to a fee of \$769.23 per hour. Tharp, a board certified family law specialist, testified that her hourly rate is \$125. Both experts testified that contingent fee contracts in divorce actions, while not illegal, are not recommended and lead to an automatic conflict of interest between the attorney and client.

[18][19][20] We cannot approve of contingent fee contracts in traditional divorce actions for the reasons mentioned by Ballesteros's experts. Further, while not in effect when the present agreement was

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signed, our code of Professional Conduct is also instructive regarding the policy reasons that disfavor such fee arrangements in certain kinds of family law litigation.

Contingent and percentage fees in family law matters may tend to promote divorce and may be inconsistent with a lawyer's obligation to encourage reconciliation. Such fee arrangements also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained for client. See also Rule 1.08(h). In certain family law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04 cmt. 9, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp.1998) (TEX. STATE BAR R. art. X, § 9). This case, however, was not a traditional divorce action since a recovery by the plaintiff depended on the establishment first of a common law marriage. While rarely justified in divorce actions, contingent fee contracts may be appropriate in a situation such as this. If the marriage is not established, the plaintiff may recover nothing, a situation differing sharply from a divorce suit involving a ceremonial marriage in which each party will obtain a recovery of some sort. The contingency fee contract between Jones and Ballesteros is valid and enforceable. Further, a one-third contingent fee contract is not excessive. See *Kuhn, Collins & Rash v. Reynolds*, 614 S.W.2d 854, 857 (Tex.Civ.App.-Texarkana 1981, writ ref'd n.r.e.). We therefore cannot say that there is a glaring and flagrant disparity between the fee paid by Ballesteros and the value of the services received.

[21] We hold that the evidence is legally and factually insufficient to support a finding for Ballesteros under section 17.45(5)(B). Because we find that the fee was not unconscionable, we must

find evidence, other than the fee agreement, to support the jury's finding under 17.45(5)(A). Therefore, we must find evidence that Jones took advantage of the lack of knowledge, ability, experience, or capacity of Ballesteros to a grossly unfair degree.

In her amended petition, Ballesteros alleges that the unconscionable conduct was the excessive fee Jones received in relation to the work he performed and the results he obtained. Ballesteros's experts testified that the fee was excessive and unconscionable. The record shows that the focus of Ballesteros's unconscionability claim was the fee agreement. In her brief, Ballesteros's unconscionability argument concerns the excessive attorney's fee issue. There was testimony from Ballesteros's experts, however, that Jones (1) failed to obtain a divorce for Ballesteros; (2) failed to obtain an inventory; and (3) urged a settlement without discovery of assets. They opined that this conduct constituted negligence and gross negligence. Thus, apart from the fee issue, evidence of Jones's negligence would also have to support the jury finding on unconscionability.

The Supreme Court in *Latham* drew a clear distinction between negligent conduct, which gives rise to recovery for the "suit within a suit" type of legal malpractice, and deceptive conduct which gives rise to recovery*498 under the DTPA for unconscionability and does not require the "suit within a suit" element. As the court stated in *Latham*, if the plaintiffs had only alleged that Latham negligently failed to timely file their claim, their claim would properly be one for legal malpractice. In this case Ballesteros alleged and offered proof that Jones was negligent in his representation of her and charged an unconscionable fee. There is no evidence that any of Jones's conduct amounts to anything more than negligence, which the supreme court in *Latham* said would require the "suit within a suit" proof. There is no evidence that this negligent conduct was deceptive conduct as contemplated by the supreme court in *Latham*. To find unconscionable conduct in this case would require re-

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casting the negligence claim as a DTPA claim.^{FN5}

FN5. Although not applicable to this case, the DTPA was amended as of September 1, 1995. The DTPA no longer applies to a "claim for damages based on the rendering of professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill." TEX. BUS. & COM.CODE ANN. § 17.49(c) (Vernon Supp.1998). However, an attorney may still be liable for an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion. *Id.* § 17.49(c)(3). The amendment supports the idea that unconscionable action is more than negligent conduct.

Thus, we find the evidence legally and factually insufficient to support a finding for Ballesteros under section 17.45(5)(A). We find that the judgment notwithstanding the verdict was proper because there is no evidence to support the jury's finding on unconscionability. We overrule Ballesteros's second point of error and sustain Jones's fourth cross-point with regards to the jury's finding on unconscionability.

Having found insufficient evidence of unconscionability, we need not address Ballesteros's remaining points of error concerning the sufficiency of the evidence to support a "knowing" violation of the DTPA, the award of mental anguish damages, and additional damages because they are dependent upon a finding of unconscionability. We affirm the judgment notwithstanding the verdict, that Ballesteros take nothing by way of her DTPA claim.

Damages

In her sixth point of error, Ballesteros alleges that the evidence was legally sufficient to support the jury's award of actual damages. Jones argues in his fifth reply point that Ballesteros has waived her right to challenge the judgment notwithstanding the verdict as it relates to the damages question.

In its answer to question six, the jury awarded Ballesteros \$560,000 in actual damages, representing (1) the difference in the value of the settlement she received and the value of the settlement she should have received if her suit had been properly prosecuted, and (2) the difference between the value of services rendered by her attorney and the amount of attorney's fees she paid.^{FN6}

FN6. Question 6 reads:

What sum of money, if any, if paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Sandra Ballesteros for her damages, if any resulting from the conduct of James K. Jones, Jr., d/b/a Law Office of Mann & Jones?

Consider the following elements of damages and none other. Do not include interest on any amount of damages you find.

a. The difference in value of the settlement received by Sandra Ballesteros in her cause of action against Andres Monetou because of the conduct of James K. Jones, Jr., d/b/a Law Offices of Mann & Jones and the value of the settlement that she should have received had her suit been properly prosecuted. The difference in value, if any, shall be determined at the time and place the settlement was made.

b. The difference, if any between the attorney's fees charged Sandra Ballesteros by James K. Jones, Jr., for services performed in connection with the settlement of Sandra Ballesteros' claims against Andres Monetou and the value of those services. The difference in value, if any, shall be determined at the time and place the settlement was made.

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Answer in dollars and cents for damages, if any.

Answer: \$560,000.00

[22] Jones's motion for judgment notwithstanding the verdict rested on several independent grounds. Because the trial court's judgment did not specify which grounds it was granted on, Ballesteros had the burden to establish that the judgment could not be supported on any of the grounds *499 set out in Jones's motion. *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex.1991); *Monk v. Dallas Brake & Clutch Serv. Co., Inc.*, 697 S.W.2d 780, 783-84 (Tex.App.-Dallas 1985, writ ref'd n.r.e.). Otherwise, Ballesteros has waived her right to question any ground not challenged. *Monk*, 697 S.W.2d at 784. Jones contends that Ballesteros has failed to challenge the grounds asserted in paragraph three of his motion.

[23] Ballesteros, on the other hand, argues that Jones has waived his complaint because he failed to object to the charge on the ground urged in his motion for judgment notwithstanding the verdict. An objection to the charge based on legal insufficiency of the evidence is not a prerequisite for a post-verdict motion for judgment notwithstanding the verdict. *City of San Antonio v. Theis*, 554 S.W.2d 278, 281 (Tex.Civ.App.-Tyler 1977, writ ref'd n.r.e.), cert. denied, 439 U.S. 807, 99 S.Ct. 64, 58 L.Ed.2d 100 (1978); TEX.R. CIV. P. 279.

[24] Jones's complaints, however, are not related to the sufficiency of the evidence. He raises two complaints in paragraph three of his motion. Jones's initial complaint is that the answer to question 6(a) is immaterial because it asks the jury to decide a question of law—the value of the settlement Ballesteros would have received in a successful divorce action. Jones was not required to object to the charge to complain subsequently that a finding is immaterial. See *Carey v. American Gen. Fire & Cas. Co.*, 827 S.W.2d 631, 632 (Tex.App.-Beaumont 1992, writ denied). A ques-

tion erroneously calling on the jury to answer a question of law is classified as immaterial. See *Cor-timeglia v. Davis*, 116 Tex. 412, 292 S.W. 875, 876 (1927); *Portwood v. Buckalew*, 521 S.W.2d 904, 912 (Tex.Civ.App.-Tyler 1975, writ ref'd n.r.e.). Jones has not waived this argument.

[25] But we also hold that Ballesteros has not waived hers. She argued in her brief that the evidence is legally sufficient to support the jury's finding of damages and that the judgment should be entered on the jury's verdict. This must necessarily be viewed as an argument that it is the jury's function to determine the amount of those damages, and not a question of law for the court. Such an argument, of course, correctly states the law. See *Westinghouse Elec. Corp. v. Pierce*, 153 Tex. 527, 271 S.W.2d 422, 425 (1954) (amount of damages in a negligence case is a jury question); *Country Roads, Inc. v. Witt*, 737 S.W.2d 362, 365 (Tex.App.-Houston [14th Dist.] 1987, no writ) (amount of unliquidated damages rests primarily within the discretion of the jury). The case before us is not a divorce case in which a trial court must divide the marital estate. See TEX. FAM.CODE ANN. § 3.63 (Vernon 1993).^{FN7} Rather, this is a legal malpractice and DTPA case in which the amount of damages sustained by the plaintiff is a fact issue. See *Cosgrove*, 774 S.W.2d at 666 (judgment rendered that plaintiff recover actual damages in accordance with jury verdict); *Schlosser v. Tropoli*, 609 S.W.2d 255, 259 (Tex.Civ.App.-Houston [14th Dist.] 1980, writ ref'd n.r.e.) (jury question properly submitted actual damages issue in legal malpractice case).

FN7. Act of June 2, 1969, 61st Leg., R.S., ch. 888, § 3.63, 1969 Tex. Gen. Laws 2707, 2725 (repealed 1997) (current version at TEX. FAM.CODE ANN. § 7.001 (Vernon Pamph.1998)). Section 3.63 was repealed and reenacted as section 7.001 without substantive change.

[26] Jones's second complaint in paragraph three of his motion is that disparate elements of the

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damages issue are improperly intermingled in a single answer. He argues that matters properly for the jury's determination (the difference between the attorney's fees charged and the value of the attorney services provided) are improperly intermingled with matters only the court could decide (the amount Ballesteros should have recovered in her divorce action). Intermingling is an error that is waived by failure to object to the charge. See *Matthews v. Candlewood Builders, Inc.*, 685 S.W.2d 649, 650 (Tex.1985); *Ked-Wick Corp. v. Levinton*, 681 S.W.2d 851, 855 (Tex.App.-Houston [14th Dist.] 1984, no writ); TEX.R. CIV. P. 274. It is not necessary to challenge an argument waived by one's opponent. Even if this argument were not waived, Ballesteros's legal sufficiency argument must again be viewed as a challenge to Jones's assertion *500 that the actual damages are for the court alone to decide. Reply point five is overruled.

[27] In his fifth cross-point, Jones argues that question six improperly submitted the damage element because it failed to set forth the element of "collectibility." In a legal malpractice suit based on negligence, the plaintiff is required to establish that any judgment that would have been obtained in the underlying action, but for the attorney's breach of duty, would have been collectible. See *Cosgrove*, 774 S.W.2d at 666. Jones objected to the omission of the collectibility element. Although, a separate question on collectibility is not required, that element must either be included in the damages question itself or it must be included in an instruction. See *Scholsser*, 609 S.W.2d at 258-59. The measure of damages submitted by the trial court was clearly erroneous because it failed to limit the jury's consideration to the amount Ballesteros could have collected from Monetou in a settlement.

[28][29] Ballesteros had the burden of requesting a jury question on the proper measure of damages. *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex.1988). A question that fails to guide the jury on any proper legal measure of damages is fatally defective. *Jackson v. Fontaine's*

Clinics, Inc., 499 S.W.2d 87, 90 (Tex.1973). Remand for a new trial is required. See *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 166 (Tex.1982); *Id.*

[30] A separate trial on unliquidated damages alone, however, may not be ordered if liability is contested. TEX.R.APP. P. 44.1(b); *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 662 (Tex.App.-El Paso 1989, writ denied). Because in this case the damages are unliquidated and the liability issues are contested, remand of the negligence claim is required. *Id.* We sustain Jones's fifth cross-point.

We need not address Ballesteros's remaining points concerning the sufficiency of the evidence to support the finding of gross negligence and the exemplary damages award because they are conditioned upon a finding of negligence.

We affirm the judgment in part, that Ballesteros take nothing from Jones on her claim of unconscionability under the DTPA. We reverse and remand the judgment in part for a new trial on negligence.

Tex.App.-San Antonio, 1998.
Ballesteros v. Jones
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824 So.2d 222, 27 Fla. L. Weekly D1638
(Cite as: 824 So.2d 222)

H

District Court of Appeal of Florida,
Second District.

Toni T. BEHR, Appellant,

v.

Edward D. FOREMAN, individually, and Edward
D. Foreman, P.A., a professional association, Ap-
pellees.

No. 2D01-1897.

July 19, 2002.

Rehearing Denied Aug. 21, 2002.

Former divorce client filed action against her former attorney for legal malpractice and breach of fiduciary duty for his alleged failure to protect a marital asset worth \$4,000,000. The Circuit Court, Pinellas County, Frank Quesada, J., entered summary judgment in favor of the attorney. Client appealed. The District Court of Appeal, Whatley, J., held that genuine issue of material fact existed as to whether a broker's actions in losing entirety of money in an investment account was reasonably foreseeable by the attorney.

Reversed and remanded.

West Headnotes

[1] Judgment 228 ⇐ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, Cases In-
volving. Most Cited Cases

Genuine issue of material fact existed as to whether broker's actions in losing entirety of money in investment account, a marital asset valued in excess of \$4,000,000, was reasonably foreseeable by former client's attorney, while representing the client in connection with possible dissolution of marriage, thus precluding summary judgment in action

for legal malpractice and breach of fiduciary duty.

[2] Judgment 228 ⇐ 181(15.1)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(15.1) k. In General. Most

Cited Cases

The issues of proximate cause, and foreseeability as it relates to proximate cause, are generally not appropriate for determination by summary judgment, but are factual issues which must be resolved by the trier of fact.

[3] Appeal and Error 30 ⇐ 854(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k851 Theory and Grounds of Decision
of Lower Court

30k854 Reasons for Decision

30k854(1) k. In General. Most

Cited Cases

Trial courts may be right in entering summary judgment for the wrong reasons.

*223 Michael C. Addison of Addison & Delano,
P.A., Tampa, for Appellant.

Jack Helinger of Louderback and Helinger, St.
Petersburg, for Appellees.

WHATLEY, Judge.

Toni T. Behr appeals the final summary judgment entered in her action against Edward D. Foreman, individually, and Edward D. Foreman, P.A., for legal malpractice and breach of fiduciary duty. We agree with Behr that genuine issues of material fact remain and precluded the finding that Foreman's actions were not the proximate cause of

Behr's loss.

Behr engaged the services of attorney Foreman in connection with the possible dissolution of her marriage to Charles Behr. At the time Foreman was retained, the Behrs' principal marital asset was an investment account at a brokerage house valued in excess of \$4,000,000. Even though this account was a marital asset, Charles Behr maintained exclusive control over it by establishing it in the form of a trust with him as the sole trustee.

[1] In her complaint, Behr contended, inter alia, that during the more than fifteen months after he was retained to represent her, Foreman breached the standard of care for attorneys by not protecting her interest in this marital asset. As a result, Behr alleged, she lost her interest in the asset when Charles Behr lost the entirety of the money in the brokerage account, in addition to a margin debt of over \$2,000,000.

In entering final summary judgment, the trial court ruled that Behr herself had asserted in a complaint she filed against Foreman with The Florida Bar that the losses were due to the actions of a rogue broker. Because this broker had prudently managed the account in the past, the court stated, his actions were not reasonably foreseeable but were a superseding, intervening cause of the losses in the account. Consequently, the court concluded, Foreman's actions or inactions did not as a matter of law proximately cause the losses suffered by Behr.

*224 In this appeal, Behr asserts that her statement in the Bar complaint was merely a relaying of information that her husband had provided in explaining the losses to the account; it was not an assertion that she herself believed a rogue broker's actions caused the losses she suffered. Thus, this is a genuine issue of material fact that must be determined by the trier of fact.

[2] "The issues of proximate cause, and foreseeability as it relates to proximate cause, are gen-

erally not appropriate for determination by summary judgment. These are factual issues which must be resolved by the trier of fact." *CSX Transp., Inc. v. Pasco County*, 660 So.2d 757, 759 (Fla. 2d DCA 1995). This is particularly true under the circumstances of this case because Foreman filed his motion for summary judgment before he filed an answer. Although this procedure is acceptable, Fla. R. Civ. P. 1.510, it makes the movant's burden "an especially heavy one" because the pleadings are not closed. *Lakes of the Meadow Vill. Homes Condo. Nos. One, Two, Three, Four, Five, Six, Seven, Eight, & Nine Maint. Ass'ns, Inc. v. Arvida/JMB Partners, L.P.*, 714 So.2d 1120, 1122 (Fla. 3d DCA 1998).

[3] We note that Foreman raised as another ground of his motion for summary judgment that Behr's action is barred by the statute of limitations. The trial court made no ruling or comment on this ground in the final summary judgment. Trial courts may be right for the wrong reasons. *See Combs v. State*, 436 So.2d 93, 96 (Fla.1983). The resolution of the issue of whether the statute of limitations has run in this case turns, however, on a determination of whether this case involves an allegation of litigation-related or transactional malpractice. *See Silvestrone v. Edell*, 721 So.2d 1173 (Fla.1998); *Peat, Marwick, Mitchell & Co. v. Lane*, 565 So.2d 1323 (Fla.1990).

Accordingly, we reverse the final summary judgment and remand for proceedings consistent with this opinion.

PARKER and DAVIS, JJ., concur.

Fla.App. 2 Dist.,2002.

Behr v. Foreman

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H

Court of Appeals of Georgia.

BRYGIDER

v.

ATKINSON.

No. A89A0047.

July 3, 1989.

Rehearing Denied July 25, 1989.

Certiorari Denied Sept. 7, 1989.

Attorney brought an action to recover unpaid attorney fees against a former client. The Fulton State Court, Baxter, J., granted attorney's motion for summary judgment on claim of breach of an oral contract. Client appealed. The Court of Appeals, Beasley, J., held that material issues of fact as to terms of agreement and reasonableness of fee charged precluded grant of summary judgment in favor of attorney.

Reversed.

Carley, C.J., concurred specially and issued an opinion.

West Headnotes

[1] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Material issue of fact as to terms of oral employment agreement between attorney and client and reasonableness of fee charged by attorney precluded grant of summary judgment in favor of attorney in suit for attorney fees.

[2] Judgment 228 ⇌ 185.3(4)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in

Particular Cases

228k185.3(4) k. Attorneys. Most Cited

Cases

In a suit brought by attorney to collect alleged unpaid fees against client, client's affidavit in opposition to motion for summary judgment, which stated that based on his experiences as a businessman and his previous dealings with attorneys, he was of the opinion that the hours and charges attorney was claiming were unpaid were excessive, was sufficient to raise a material issue of fact as to reasonableness of fee.

****95 *427** King, Morriss, Talansky & Witcher, Joseph H. King, Jr., Atlanta, for appellant.

Tyrus B. Atkinson, Jr., pro se.

***424** BEASLEY, Judge.

Brygider, a former client of attorney Atkinson, appeals the grant of summary judgment to Atkinson in this suit over unpaid attorney fees.

Recovery was sought under three theories, but the motion for summary judgment is based only on Count One, breach of an oral contract.

The controversy for which Atkinson was hired involved a product, a "guardfather" produced by Bingham, Ltd., of which Brygider****96** was president. The Federal Bureau of Investigation contended that the device was an illegal switchblade knife. It looked like a ballpoint pen but had a button which, when pushed, caused an icpick-like shaft to emerge and lock into place. Brygider does not dispute that there was a contract of employment, but rather that Atkinson was retained by him as an individual as opposed to a corporate officer. He also disputes the reasonableness of the fees.

*425 The government was granted summary judgment in the federal suit on the ground there was no justiciable case or controversy. This was reversed on appeal to the Eleventh Circuit in 1985. A second motion for summary judgment was made and granted to the government on the merits, resulting in a second appeal.

Brygider paid the bill resulting from the first appeal through May 1986, but when he was billed after the second brief was filed, he took exception to the \$5,000 charge for the second appeal and contended that the first brief was merely "reworked" for the second. Also, approximately \$3,000 in past due billings from the first appeal appeared on that bill. The briefs themselves are in the record and do reflect some overlap. Brygider contends that, while he did authorize the filing of the second appeal, there was a \$2,000 fee cap for it.

[1] Atkinson moved for summary judgment. His supporting affidavit included: "I state that the sum of \$5,000.00 to brief an appeal in the United States Court of Appeals is a reasonable attorney fee for a case of the nature of the one performed by me for the benefit of Mr. Brygider. In my opinion a fee of \$10,000 for such an appeal would not be unreasonable.... All services rendered by me were reasonable and necessary to adequately represent Mr. Brygider." Also included was a statement of Atkinson's experience as an attorney, as a basis for his opinions as to the fee's reasonableness.

In his opposing affidavit, Brygider stated he had substantial expertise, as president of Bingham, Ltd., in the reasonableness of attorney fees. "This expertise has been acquired in the course of 15 years of business practice. I have supervised and reviewed the billing of numerous attorneys, including [Atkinson], and have become familiar with the practices in Georgia regarding such fees, and the standards of reasonableness applied in determining such fees. I have reviewed the fees ... in this case, and I have the opinion that they are unreasonable." Six bases were set out for the conclusion, including the overlap in the two briefs, charges made for such

items as "familiarization with rules which should already have been familiar," and that the time spent and fee charged were beyond his specific authorization.

Although Atkinson states in his brief that he objected to Brygider's affidavit, no hearing transcript or other evidence of such objection is in the record. "A brief cannot be used in lieu of the record or transcript for adding evidence to the record. [Cits.] We must take our evidence from the record and not from the brief of either party." *Blue v. R.L. Glosson Contracting*, 173 Ga.App. 622, 623(1), 327 S.E.2d 582 (1985); *In re Holly*, 188 Ga.App. 202, 203, 372 S.E.2d 479 (1988); see *Chapman v. McClelland*, 248 Ga. 725, 726(2), 286 S.E.2d 290 (1982). Nevertheless, whether he objected or not, the legal efficacy of the affidavit would still have to be determined on appeal on addressing the summary judgment issue.

*426 The trial court was bound to construe the evidence in favor of Brygider, the party opposing the motion. *Eiberger v. West*, 247 Ga. 767, 769(1), 281 S.E.2d 148 (1981); *Mitchell v. Rainey*, 187 Ga.App. 510, 512, 370 S.E.2d 673 (1988). Summary judgment was appropriate only if there was no genuine issue as to any material fact and the law demanded judgment for Atkinson. OCGA § 9-11-56(c).

It would have been demanded only if there was no dispute that Atkinson and Brygider had agreed that Atkinson was to spend as much time as reasonable to produce the second brief; that there was no cap on the fee; and that \$5,000 was reasonable. There is clearly a dispute as to the first two items, with Brygider stating he **97 did place a cap and Atkinson stating he did not. This matter of credibility is peculiarly for the jury. OCGA § 24-9-80. Also, the fact that two opinions have been given as to the reasonableness of the fee itself, defeats summary judgment.

"[W]hen the evidence on a dispositive issue consists of opinion evidence, such evidence alone

can never sustain an award of summary judgment. [Cits.] Introduction of opinion evidence by the non-moving party, however, ... can be sufficient to *preclude* an award of summary judgment. [Cits.]" *Scott v. Owens-Illinois*, 173 Ga.App. 19, 22(2), 325 S.E.2d 402 (1984); *Bryan v. Bryan*, 248 Ga. 312, 282 S.E.2d 892 (1981); *Dickson v. Dickson*, 238 Ga. 672, 674(2), 235 S.E.2d 479 (1977); *Hepner v. Southern R. Co.*, 182 Ga.App. 346, 349(1), 356 S.E.2d 30 (1987).

[2] This case is similar to *Spears v. Allied Engineering Assoc.*, 186 Ga.App. 878, 368 S.E.2d 818 (1988). *Spears*, a developer and builder, hired Allied to perform engineering services. Although the hourly rate for the services had been agreed upon, there was a "factual dispute over the number of hours it actually took or should have taken for the work to be performed. Therefore, summary judgment was inappropriate as to the amount *Spears* owed Allied. [Cit.]" *Spears'* affidavit based on his experience as a builder and developer, expressed his opinion that the hours expended and the charges made for engineering services were excessive. *Brygider*, based on his experience as a businessman and his previous dealings with attorneys, expressed his opinion that the hours and charges were excessive. This sufficed to defeat summary judgment.

Judgment reversed.

McMURRAY, P.J., concurs.

CARLEY, C.J., concurs specially.

CARLEY, Chief Judge, concurring specially.

I agree with the majority that summary judgment was improper because there were genuine issues of material fact as to the terms and conditions of the contract between the client and the attorney. I do not agree with the majority that *Spears v. Allied Engineering Assoc.*, 186 Ga.App. 878, 368 S.E.2d 818 (1988) is applicable to this case in such a manner as to require a finding that the affidavit of the client is sufficient to raise an issue as to the "reasonableness" of the fee. However, there being a genuine issue as to the terms of the contract between the parties, summary judgment was im-

proper.

Ga.App.,1989.

Brygider v. Atkinson

192 Ga.App. 424, 385 S.E.2d 95

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Supreme Court of Arkansas.
George M. CALLAHAN et al., Appellants,
v.
Mary Ellen CLARK, Appellee.

No. 94-1361.

July 17, 1995.

Client sued her attorney for legal malpractice, alleging that attorney negligently advised client to sign property settlement agreement in underlying divorce action, resulting in substantial loss to client when she was unable to renew note on her and former husband's business premises. The Circuit Court, Garland County, Walter G. Wright, J., entered judgment on jury verdict for client. Attorney appealed. The Supreme Court, Holt, C.J., held that: (1) jury's award was based on substantial evidence, and (2) attorney was not entitled to introduce evidence that client eventually lost custody of her children.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇌ 930(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k930 Verdict

30k930(1) k. In general. Most Cited

Cases

Appeal and Error 30 ⇌ 1001(1)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)2 Verdicts

30k1001 Sufficiency of Evidence in

Support

30k1001(1) k. In general. Most

Cited Cases

Supreme Court's standard in reviewing sufficiency of evidence is as follows: (1) evidence is viewed in light most favorable to nonmoving party; (2) jury's finding will be upheld if there is any substantial evidence to support it; and (3) substantial evidence is that of sufficient force and character to induce mind of factfinder past speculation and conjecture.

[2] Negligence 272 ⇌ 372

272 Negligence

272XIII Proximate Cause

272k372 k. Necessity of legal or proximate causation. Most Cited Cases

(Formerly 272k56(1.3)).

To prove negligence in Arkansas, plaintiff must show that he or she suffered damages proximately caused by defendant's negligence.

[3] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited Cases

To show damages and proximate cause in legal malpractice action, plaintiff must show that but for alleged negligence, result would have been different in underlying action.

[4] Attorney and Client 45 ⇌ 107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k107 k. Skill and care required. Most Cited Cases

In Arkansas, attorney is negligent if he fails to exercise reasonable diligence and skill on behalf of his client.

[5] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and evidence. Most
Cited Cases

Evidence in legal malpractice action was sufficient to support jury's finding that attorney was negligent in advising client in underlying divorce action to sign property settlement agreement, and that client sustained damages in amount of \$248,000; evidence indicated that client's inability to renew note on business premises resulted in loss of \$150,000 in lease payments and \$98,000 in equity she had in marital home, that default provision in parties' agreement permitted such result, that attorney should have included provision in agreement that husband either personally guarantee lease agreement or that he agree in writing to help client renew note, and that attorney should have been aware that client was not going to be able to renew note.

[6] Appeal and Error 30 ⇌ 230

30 Appeal and Error

30V Presentation and Reservation in Lower
Court of Grounds of Review

30V(B) Objections and Motions, and Rulings
Thereon

30k230 k. Necessity of timely objection.
Most Cited Cases

Contemporaneous objection is necessary in order to preserve issue for appellate review.

[7] Appeal and Error 30 ⇌ 1051.1(1)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)10 Admission of Evidence

30k1051.1 Same or Similar Evidence
Otherwise Admitted

30k1051.1(1) k. In general. Most
Cited Cases

There is no prejudicial error where evidence er-

roneously admitted was merely cumulative.

[8] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and evidence. Most
Cited Cases

Evidence that wife eventually lost custody of her children to husband, threat of which strongly bore on her inclination to sign property settlement agreement in underlying divorce action, was irrelevant in her legal malpractice action alleging that her attorney negligently advised her to sign that agreement, resulting in substantial loss when she was unable to renew note on parties' business premises; husband obtained custody after alleged acts of malpractice took place.

[9] Appeal and Error 30 ⇌ 970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on admissibility
of evidence in general. Most Cited Cases

Trial 388 ⇌ 43

388 Trial

388IV Reception of Evidence

388IV(A) Introduction, Offer, and Admission
of Evidence in General

388k43 k. Admission of evidence in general. Most Cited Cases

It is within trial court's discretion whether to admit testimony, and its decision will not be reversed absent manifest abuse of discretion.

****843 *378** James M. Moody, Troy A. Price, Little Rock, for appellant.

Kent J. Rubens, Timothy O. Dudley, West Memphis, for appellee.

HOLT, Chief Justice.

This is a legal malpractice case arising out of appellant George Callahan's representation of appellee Mary Ellen Clark in a divorce action. The case was submitted on interrogatories, whereby the jury concluded that Mr. Callahan was negligent in failing to determine the value of the marital business, setting damages at \$120,000.00, and in advising Ms. Clark to sign the property settlement agreement awarding damages of \$248,000.00 in this regard. The trial court entered judgment against Mr. Callahan and his law firm accordingly.

Mr. Callahan and his law firm appeal, asserting four specific points of error: (1) that the jury's award of \$248,000 for negligence was based on conjecture and speculation, rather than on the required substantial evidence of damages flowing from specific breaches; (2) that the jury's award of \$120,000 for negligent failure to value marital assets could only have been based on conjecture and speculation since the jury did not and could *379 not have found that the court would have awarded such an amount; (3) that the trial court erred in allowing Ms. Clark's trial counsel to taint the proceedings below with unfairly prejudicial evidence of a supposed ethical violation by Mr. Callahan; and (4) that the trial court erred in refusing to allow Mr. Callahan to introduce evidence that Ms. Clark eventually lost custody of her children, the threat of which strongly bore on her inclination to sign the property settlement agreement. None of these arguments has merit. We affirm.

Facts

In March of 1989, appellee Mary Ellen Clark hired appellant George Callahan, an attorney with the firm of Callahan, Crow, Bachelor, and Newell of Hot Springs, to obtain what she thought would be an uncontested divorce from her husband, Harvey Clark, to whom she had been married for over eight years. When Ms. Clark first met with Mr. Callahan, she outlined her objectives in the divorce as follows: (1) that she receive custody of the couple's four children; (2) that she retain some role in opera-

tion of their business, Clark Industries, Inc., which produced replacement parts for classic cars, and which was operated out of a "shop" building on a small piece of land adjacent to the marital residence; and (3) that she obtain a steady income for herself and her children.

Shortly after Ms. Clark's initial meeting with Mr. Callahan, the divorce proceedings became bitterly contested. Mr. Clark sought custody of the children, and the business became the subject of much disagreement. Particularly, the Clarks accused each other of draining business assets and improperly using business funds, and the Internal Revenue Service ultimately imposed a tax lien on the business, with the Clarks facing personal liability for failure to withhold payroll taxes. Thereafter, the chancellor appointed Robert Ridgeway, an attorney who had previously represented the Clarks, as a special master to oversee Clark Industries.

Following the exchange of several drafts, the Clarks executed a settlement agreement in January of 1990 relating to both custody and division of their marital property. Ms. Clark was awarded custody of the children, and Mr. Clark agreed to pay \$1200 per month in child support. Although Ms. Clark was no *380 longer living there, she became the owner of the marital residence and the land on which the shop was located. Mr. Clark was permitted to continue to operate the business, but was required to pay Ms. Clark \$3000 per month in rent for a period of five years for use of the property. In turn, Ms. Clark agreed to transfer all of her stock in the business to Mr. Clark, who, upon execution of the agreement, paid Ms. Clark \$10,000 cash, \$3000 in vacation pay, and \$2766.33 in reimbursement for sums Ms. Clark had advanced to the business. Additionally, Mr. Clark paid \$10,000 toward Mr. Callahan's attorney's fees, and agreed to assume full responsibility for the outstanding taxes reflected in the tax lien.

The property settlement agreement contained provisions that imposed responsibilities **844 and risks on both parties, which included the condition

that if Ms. Clark defaulted on the mortgage payments for either the marital residence or the shop, Mr. Clark could reclaim and obtain ownership of both pieces of property by paying the overdue payments and attorneys fees or costs. Conversely, if Mr. Clark defaulted on any of his required payments, Ms. Clark was given the right to reenter the premises of the business and to attach and sell all corporate assets.

In May of 1990, some four months after executing the settlement agreement, the bank note on the shop property became due and Mr. Clark refused to sign an extension of the note; thus, Ms. Clark was unable to refinance her loan. The bank initiated foreclosure proceedings, and Mr. Clark exercised his right under the agreement to reclaim the house and shop, and terminated the \$3000 per month lease payments to Ms. Clark. Thereafter, Ms. Clark filed an action for malpractice against Mr. Callahan and his law firm, alleging, among other things, that he was negligent both in failing to have Clark Industries valued, and in advising her to sign the property settlement agreement. She amended her complaint to include Robert Ridgeway, the special master, as a separate defendant, but the trial court later dismissed Mr. Ridgeway upon Ms. Clark's motion.

The case proceeded to trial. Ms. Clark's first witness was the appellant, Mr. Callahan, who stated that he had been practicing law for 26 years. In order to value Clark Industries, he examined four to five years of tax returns, financials that Ms. Clark and Elaine Simpson, Ms. Clark's sister and part-time bookkeeper *381 for Clark Industries, had provided to him, and the master's full reports containing accounts receivable and accounts payable information. In addition to reviewing these documents, Mr. Callahan walked through the business and looked at the equipment, and telephoned Ron Reagan, the owner of Chemfab, a similar business which manufactured aircraft parts, who advised him that liquidation of Clark Industries would not be in Ms. Clark's best interests.

As it was his understanding that custody was Ms. Clark's top priority, Mr. Callahan stated that he knew she would have to make some concessions with regard to the business, recognizing that the Clarks could not jointly operate the business, and that its real value was the genius of Mr. Clark, who had the contacts and identified the market. According to Mr. Callahan, he was able to give Mr. Clark much of the marital debt in the agreement, and obtained for Ms. Clark substantial hard assets—the real estate, home, building, and other personal property. Mr. Callahan testified that he explained to Ms. Clark that pursuant to the agreement, both parties ran substantial risks; however, he stated that he did not know that the bank would not let the \$24,000 note on the shop be refinanced unless both parties signed it, and that he did not check with the bank as to whether Mr. Clark's signature would be required. He explained that there was never any presumption that Mr. Clark would be responsible for the note, as Ms. Clark had told him that she would not go back to One Bank, who had the note, as she did not like their rate of interest. According to Mr. Callahan, Ms. Clark "constantly reassured" him that she would be able to refinance the note and deal with the risk.

Patty Ann Lueken, a licensed attorney since 1989, testified as an expert witness on behalf of Ms. Clark, stating that 50 percent of her practice was devoted to domestic relations cases. She reviewed the files in the case, and offered her opinion that, a deposition or set of interrogatories would have been very helpful in order to value Clark Industries. Particularly, she stated that she would have taken Mr. Clark's deposition in order to determine what he thought the value of the company was, and would have used his deposition as a negotiating tool. It was Ms. Lueken's opinion that it was necessary to get an expert as to the value of the business in the case, and that Mr. Callahan failed to meet the applicable standard of care in his representation of Ms. Clark.

*382 According to Ms. Lueken, paragraph 19,

the default provision of the property settlement agreement, put Ms. Clark in a terrible position in that if she could not renew the note on the shop in May of 1990, she ended up with nothing, with the exception of a **845 party barge, a Bronco, and some other personal items. This provision reads as follows:

In the event that the Wife defaults on the mortgage payment for either the home or the shop building note or notes, the Husband has the right to buy back the home, the land the home is situated on, the shop building and the land that the shop building is situated on by paying only the back payments owed at that time plus attorney's fees or other costs in order to bring the note or notes current. The default by the Wife on these payments is agreed by the parties to be defined as late payments sufficient to necessitate legal action by the filing of a Complaint for Foreclosure in order to collect these past due amounts by an attorney.

It was Ms. Lueken's opinion that Mr. Callahan, in advising Ms. Clark to sign this agreement containing this provision, should have been aware of what liabilities Ms. Clark had, as his file clearly showed that she was not going to be able to renew the note, as it reflected that some of her credit cards had been cut off, the Bronco payment was behind, and that there were IRS liens for which she was partially responsible. According to Ms. Lueken, this provision provided that, in the event that Ms. Clark defaulted, Mr. Clark would get whatever was left over after foreclosure, without having to pay any of the equity in the shop or the remaining portion of the \$180,000 lease payment to Ms. Clark. Moreover, the lease payment, Ms. Lueken stated, would actually be paid by Clark Industries, which was owned by Mr. Clark. After costs, Ms. Lueken estimated that Mr. Clark would receive an additional \$70,000 to \$80,000 as a result of this provision.

Philip Dixon, a licensed attorney since 1960 with 60 to 70 percent of his practice devoted to domestic relations, testified out of turn as an expert

witness on behalf of Mr. Callahan. It was his opinion, after reviewing the files in the case, that Mr. Callahan met the applicable standard of care and performed the due diligence that was required of him in the representation of Ms. *383 Clark. It was Mr. Dixon's opinion that Mr. Callahan had more discovery and more information available to him overall than many attorneys get throughout a lawsuit, specifically referring to the reports of the master. He testified that he had reviewed the deposition of Dr. Ralph Scott, Ms. Clark's economist, and that he disagreed with his assumptions made in arriving at his figures. Particularly, he stated that Dr. Scott assumed that both parties could walk away from the business and still continue to have an income stream of \$100,000.

Regarding paragraph 19 of the agreement, Mr. Dixon stated that he was aware that Ms. Lueken had criticized Mr. Callahan for not having Mr. Clark personally guarantee the lease agreement, or in not having him agree in writing to help Ms. Clark renew the note. It was Mr. Dixon's opinion that, as Mr. Callahan had stated that he had counseled Ms. Clark regarding her debts and that she assured him that she had the means to take care of the situation, Mr. Callahan's conduct in advising Ms. Clark to sign the property settlement agreement, which included the provision in paragraph 19, was reasonable under the circumstances. On cross-examination, however, Mr. Dixon stated that he had never seen a default provision like the one in paragraph 19 of the agreement.

Elaine Simpson testified on her sister's behalf, as she had done some bookkeeping at Clark Industries. She stated that she was present at a few meetings between Ms. Clark and Mr. Callahan, and that she had given Mr. Callahan a note reading, "If we do not have someone do a current inventory of assets currently at this plant, Mary will lose thousands of dollars as this list doesn't include the hundreds of dies nor a large portion of tools in the tool and die shop. These are high dollar values." Ms. Simpson further stated that she did not receive a re-

sponse to her note; rather, Mr. Callahan repeatedly requested her sister to make lists. At one meeting for settlement negotiations, Ms. Simpson claimed that there was a discussion as to whether Mr. Clark would be required to sign the renewal note for the shop when it came up at One Bank in May of 1990. According to Ms. Simpson, Mr. Clark, who was present at the meeting with his attorney, agreed to keep his name on the note for five years.

****846** Mary Clark testified as to her involvement in Clark Industries, stating that she talked to Mr. Callahan numerous times ***384** about obtaining an inventory of the business. It was her testimony that she did not want to sign the agreement with the default provisions in paragraph 19, but that Mr. Callahan insisted that it had to be there without explaining why. She further testified that Mr. Callahan knew that Mr. Clark's name had to remain on the note for the shop, and that Mr. Callahan assured her that paragraph 30 of the agreement obligated Mr. Clark to sign the extension in May of 1990. Paragraph 30 states as follows:

That each of the parties agree to cooperate with the other in executing such instruments as shall be necessary to perform the agreements herein contained, and each of the parties do hereby bind themselves and their respective personal representatives, heirs and assigns to perform and keep the agreements herein contained.

In May of 1990, when Mr. Clark refused to sign the extension agreement, Ms. Clark stated that she tried to extend it on her own with another bank, but her credit was too bad.

Over Mr. Callahan's objection, Dr. Ralph Scott, an economist, testified that he valued the business based on the year 1988, stating that it grew steadily up until that time. He calculated owner compensation at \$113,000 and subtracted corporate loss of \$20,735 for a total of \$92,266 as a measure of the Clark's compensation. From that figure, Dr. Scott subtracted \$30,000, based on a Department of Labor publication, for what it would have cost the

Clarks to hire a bookkeeper, thus leaving \$62,266. He used this figure to make a projection for the next 15 years, or Ms. Clark's work life expectancy, arriving at a figure of \$692,297, one-half of which is \$346,148. From listening to the testimony, Dr. Scott opined that one-half of the outstanding tax liability should be subtracted from this amount. He further stated that he would have arrived at a much higher figure had he factored in growth of the company and fringe benefits. He compared the business to a physician's practice, stating that it should be viewed as an asset that is going to generate income like a stock or bond.

At the close of Ms. Clark's case, Mr. Callahan made specific motions for directed verdict based on lack of competent evidence that any act or omission on his part proximately caused damages, and on lack of competent evidence from which the jury ***385** could reach a verdict without speculation as to how a chancellor could effect a remedy which would have entitled Ms. Clark to one half of the business. The trial court denied both motions, and Mr. Callahan presented the testimony of Stephany Slagle, the attorney for Mr. Clark during the divorce proceeding, who testified as to the complexity of the case. She stated that if no agreement had been reached and the company had to be liquidated according to the usual practice in Garland County, it would have destroyed both Mr. Clark and Ms. Clark financially. She stated that there was never a meeting at which she, Ms. Simpson, Mr. Clark, and Ms. Clark were present where Mr. Clark made a promise that he would renew the note in May of 1990. She stated that she would have remembered such a promise had one been made, as she would not have believed it. Ms. Slagle further opined that in August 1989, the business could not be valued without knowing what Ms. Clark had done, as she was paying for her race horses, personal vehicle, babysitters, and other things which were completely out of Mr. Clark's control. In December of 1989, according to Ms. Slagle, the business was "worth very little, if not in the hole." Like Mr. Callahan, Ms. Slagle did not hire an appraiser or anyone to

make a valuation of the business.

Harvey Clark testified that by the fall of 1989, he did not think the business would break even with the debt he and Ms. Clark had. He stated that he told his wife that he would sign the note until the time the divorce was final. According to Mr. Clark, when she raised the question about his signing the note during one of the final negotiation sessions, she retracted her question, stating that she was going to refinance the note, and that she thought she might sell it. Mr. Clark testified that, had his signature on the note been proposed as a condition to the agreement, he ****847** did not think that he would sign it, stating that he would not want to secure something for his landlord.

Mr. Callahan renewed all motions and objections at the conclusion of all of the evidence, which the trial court denied. The trial court submitted separate interrogatories to the jury, from which the jury found Mr. Callahan negligent in advising Ms. Clark to sign the settlement agreement, and that she sustained damages in the amount of \$248,000. Mr. Callahan appeals.

***386 I. Jury award for negligence**

For his first allegation of error, Mr. Callahan asserts that the jury's award of \$248,000 for negligence in advising Ms. Clark to sign the property settlement agreement was based on conjecture and speculation, rather than on the required substantial evidence of damages flowing from specified breaches. This amount was obviously predicated on the \$3000 per month lease payments Ms. Clark lost, calculated as 60 required payments or \$180,000, less ten payments made or \$30,000, for a subtotal of \$150,000, together with \$98,000 in equity she had in the marital home, for a total of \$248,000-the exact amount of the verdict.

[1][2][3][4] As Mr. Callahan appeals from the trial court's denial of his motion for directed verdict as to proof of negligence and resulting damages, he is challenging the sufficiency of the evidence. Our standard in reviewing the sufficiency of the evi-

ence is well settled: (1) The evidence is viewed in a light most favorable to the non-moving party; (2) the jury's finding will be upheld if there is any substantial evidence to support it; and (3) substantial evidence is that of sufficient force and character to induce the mind of the factfinder past speculation and conjecture. *Quinney v. Pittman*, 320 Ark. 177, 895 S.W.2d 538 (1995). Moreover, to prove negligence in Arkansas, the plaintiff must show that he or she suffered damages proximately caused by the defendant's negligence. *Vanderford v. Penix*, 39 F.3d 209 (8th Cir.1994), citing *Arkansas Kraft v. Cottrell*, 313 Ark. 465, 855 S.W.2d 333 (1993). To show damages and proximate cause in a legal malpractice action, the plaintiff must show that but for the alleged negligence, the result would have been different in the underlying action. *Vanderford v. Penix, supra*. In Arkansas, an attorney is negligent if he fails to exercise reasonable diligence and skill on behalf of his client. *Id.*, citing *Arkansas Kraft v. Cottrell, supra, Welder v. Mercer*, 247 Ark. 999, 448 S.W.2d 952 (1970).

[5] In support of his argument that Ms. Clark failed to prove that Mr. Clark would have agreed to a more favorable settlement, or that litigation to judgment would have yielded a better result, Mr. Callahan relies in part on the following passage from Roger E. Mallen's and Jeffrey M. Smith's recent treatise on attorney malpractice, in which they state as follows:

Assuming a cause of action [for negligent settlement] ***387** can be stated, the client must not only establish that concluding such a settlement fell outside the standard of care, but also what would have been a reasonable settlement and that such sum would have been agreed to and collectible.

In evaluating and recommending a settlement, the attorney has broad discretion and is not liable for a mere error in judgment.

Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 24.36 at 521 (1989). However, Mal-

len and Smith also speak on speculative damages as follows:

The general rule is that an attorney is not liable for any damages which are remote or speculative. The test of whether damages are remote or speculative has nothing to do with the difficulty in calculating the amount, but rather the more basic question of *whether there are identifiable damages ... No one can precisely say what the plaintiff lost or should have lost in such situations, but difficulty or imprecision in calculating damages does not exculpate the attorney. Even though damages cannot be calculated precisely, they can be estimated. Otherwise, attorneys could avoid liability merely because damages are difficult to measure.*

Mallen & Smith, § 16.3 at 894-895 (1989). (Emphasis added.)

****848** In reviewing the evidence before us, we ascertain that sufficient facts existed by which the jury could find evidence of negligence, and from which the jury could identify and assess damages which were not remote or speculative. As such, a final resolve of this case hinged on which witnesses the jury chose to believe.

We have long stated that it is the province of the jury to weigh the credibility of the witnesses. *Quinney v. Pittman, supra*. As such, the jury was free to believe the testimony of Ms. Clark and her sister, Ms. Simpson, over that of the other witnesses, that Mr. Callahan assured Ms. Clark that the agreement required Mr. Clark to extend the note in May of 1990 and beyond, and that Mr. Clark had verbally agreed to sign the extension. In light of Ms. Lueken's testimony that Mr. Callahan should have included a provision in paragraph 19 that Mr. Clark either personally guarantee the lease agreement, or that he agree in writing ***388** to help Ms. Clark renew the note, the jury could have reasonably concluded that either a guarantee or an agreement to help renew the note should have been made a part of the contract. There was also testimony from Ms. Lueken that Mr. Callahan should have

been aware of what liabilities Ms. Clark had, as his file clearly showed that, due to her numerous expenses, she was not going to be able to renew the note. Even Mr. Dixon, Mr. Callahan's own expert, testified that in his 35 years of practice, he had never seen a default provision like the one in paragraph 19 of the settlement agreement, which operated in Mr. Clark's favor when Ms. Clark defaulted on the shop note.

As Ms. Clark correctly states in her brief, her damages were indeed identifiable, for her default was a result of Mr. Clark not being required to sign the renewal on the shop note. As mentioned previously, Ms. Clark lost \$150,000 in lease payments and \$98,000 in equity she had in the marital home totally \$248,000, the amount of the jury verdict. Under these circumstances, we cannot say that the trial court erred in failing to direct a verdict in Mr. Callahan's favor, as there was substantial evidence to support both the jury's finding on interrogatories that Mr. Callahan was negligent in advising Ms. Clark to sign the property settlement agreement, and that Ms. Clark sustained damages in the amount of \$248,000.

II. Failure to value business

For his second argument on appeal, Mr. Callahan asserts that the jury's award for \$120,000 for negligent failure to value marital assets could have only been based on conjecture and speculation, since the jury did not and could not state that the court would have awarded that amount. In his reply brief, Mr. Callahan concedes that this issue is only relevant if we hold in his favor on the first issue. As stated above, we find no merit to Mr. Callahan's first point on appeal; thus, we need not address his second argument.

III. Ethical inquiry

[6][7] Mr. Callahan further argues that the trial court erred in allowing Ms. Clark's counsel to taint the proceedings below with unfairly prejudicial evidence of a supposed ethical violation. Ms. Clark called Mr. Callahan as her first witness, and he ***389** was questioned about a letter that he had writ-

ten to her in April of 1989, in which he set a minimum fee of \$2500, and stated that her divorce would not be finalized until her account with his firm was paid in full. When counsel for Ms. Clark inquired as to whether this was a proper fee arrangement, Mr. Callahan replied that "There's some disagreement about that," stating that, "There is an ethical opinion that says that if your client cannot pay you, that you must continue to represent her and to see that her rights are protected regardless of whether you are paid or not." After Mr. Callahan offered further testimony regarding his fees, counsel for Mr. Callahan made a relevancy objection, which the trial court overruled. Thereafter, the trial court admitted into evidence, over Mr. Callahan's relevancy objection, legal bills that Mr. Callahan had sent Ms. Clark, finding that the bills could be used to attack Mr. Callahan's credibility. During cross-examination of Mr. Callahan's expert, Phillip Dixon, Ms. Clark was allowed to question him, over Mr. Callahan's objection, regarding his opinion as to whether Mr. Callahan's fee **849 arrangement was ethical. Finally, during closing argument, counsel for Ms. Clark stated as follows:

Mr. Dixon ... told you that the first thing [Mr. Callahan] did was unethical. He wrote a fee agreement that said, "We are not going to enter a divorce decree until you have paid all of our fee."

Under our rules of ethics, as Mr. Dixon told you that is an unethical thing for a lawyer to do. The very first thing he did in this case, writing the fee agreement, was unethical and had to do with money.

We need not explore this issue further, as Mr. Callahan did not make a contemporaneous objection to the admission of this testimony; instead, he allowed counsel for Ms. Clark to ask some 17 additional questions before registering an objection with the trial court. A contemporaneous objection is necessary in order to preserve an issue for appellate review. *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992). As Mr. Callahan had offered similar testimony, Mr. Dixon's testimony on this issue was

merely cumulative. We will not find prejudicial error where the evidence erroneously admitted was merely cumulative. *Williams v. Southwestern Bell*, 319 Ark. 626, 893 S.W.2d 770 (1995). Thus, the *390 admission of Mr. Dixon's testimony was harmless error. As to comments made by Ms. Clark's counsel during closing argument, we find no objection made by Mr. Callahan in the abstract or in the record. Under these circumstances, Mr. Callahan's argument is without merit.

IV. Evidence regarding custody

[8] Finally, Mr. Callahan asserts that the trial court erred in refusing to allow him to introduce evidence that Ms. Clark eventually lost custody of her children, the threat of which strongly bore on her inclination to sign the property settlement agreement. He contends that if the jury had been made aware of Mr. Clark's strong desire to obtain custody, "it might well have evaluated Callahan's advice in a different light."

[9] The trial court sustained Ms. Clark's relevancy objection to this evidence, stating that it was "after the fact" evidence, and that it might lead to more rebuttal testimony. We have often stated that the trial court determines the relevancy, competency, and probative value of testimony; it is within the trial court's discretion whether to admit testimony, and its decision will not be reversed absent a manifest abuse of discretion. *Orsini v. Larry Moyer Trucking, Inc.*, 310 Ark. 179, 833 S.W.2d 366 (1992). As Mr. Clark obtained custody after the alleged acts of malpractice took place, we cannot conclude that the trial court abused its discretion in refusing to allow this testimony on relevancy grounds. Thus, Mr. Callahan's argument is without merit.

Affirmed.

Ark., 1995.
Callahan v. Clark
321 Ark. 376, 901 S.W.2d 842

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810 So.2d 667

(Cite as: 810 So.2d 667)

▷

Supreme Court of Alabama.

CITY OF BIRMINGHAM

v.

William Fred HORN et al.

William Fred Horn et al.

v.

City of Birmingham et al.

1991455 and 1991558.

Aug. 17, 2001.

City residents sought attorney fees in connection with their action against city, which resulted in new ordinance regulating solid-waste facilities. The Court of Civil Appeals, 648 So.2d 607, remanded and later, 718 So.2d 691, affirmed denial of fees. On grant of writ of certiorari, the Supreme Court, 718 So.2d 694, reversed and remanded. Following denial of mandamus relief respecting award of interim attorney fees, 757 So.2d 389, the Circuit Court, Jefferson County, No. CV-93-5013, William A. Jackson, J., awarded residents attorney fees totaling \$1,785,939. City appealed, and residents cross-appealed. The Supreme Court, Brown, J., held that: (1) law-of-the-case doctrine did not preclude trial court on remand from utilizing lodestar method, rather than common fund method, for its calculation of attorney fees; (2) hours that one attorney spent trying to convince another to assist him with representation of residents would be deducted from lodestar calculation; (3) hourly rate of award would be reduced from \$175 to \$150; (4) lodestar multiplier of 2 was improper; and (5) statutes limiting city's liability for torts to no more than \$300,000 did not apply to attorney fee award.

1991455-Reversed and judgment rendered.

1991558-Affirmed.

See, J., issued specially concurring opinion.

Johnstone, J., issued opinion concurring in

part, concurring in result in part, and dissenting in part.

Houston, J., issued opinion concurring in part and dissenting in part.

West Headnotes

[1] Appeal and Error 30 ⇌ 1195(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in

Lower Court

30k1193 Effect in Lower Court of Decision of Appellate Court

30k1195 As Law of the Case

30k1195(1) k. In General. Most

Cited Cases

Law-of-the-case doctrine did not, on remand from Supreme Court, preclude trial court from utilizing lodestar method, rather than common fund method, for its calculation of attorney fees awarded to city residents whose action against city resulted in new ordinance regulating solid-waste facilities; although Supreme Court held on prior appeal that residents were entitled to award of attorney fees under special-equity exception to American rule, Court was silent on question of method by which fees were to be calculated, and common-fund approach would be difficult to apply because case was undertaken solely to effect societal change.

[2] Appeal and Error 30 ⇌ 1195(1)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in

Lower Court

30k1193 Effect in Lower Court of Decision of Appellate Court

30k1195 As Law of the Case

30k1195(1) k. In General. Most

Cited Cases

On remand, the issues decided by an appellate

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court become the "law of the case," and the trial court's duty is to comply with the appellate court's mandate according to its true intent and meaning, as determined by the directions given by the reviewing court.

[3] Costs 102 ⇌ 194.16

102 Costs

102VIII Attorney Fees

102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases

Under the American rule, parties to a lawsuit generally bear the responsibility of paying their own attorney fees, subject to certain exceptions created by statute, contract, or "special equity."

[4] Costs 102 ⇌ 194.16

102 Costs

102VIII Attorney Fees

102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases

The special-equity exception to the American rule invokes principles common to an action seeking a recovery under the theory of quantum meruit, in that it involves one party's seeking attorney fees for engaging in efforts that benefited another party.

[5] Attorney and Client 45 ⇌ 155

45 Attorney and Client

45IV Compensation

45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases

Costs 102 ⇌ 194.42

102 Costs

102VIII Attorney Fees

102k194.42 k. Public Interest and Substantial Benefit Doctrine; Private Attorney General. Most Cited Cases

Attorney fees may be awarded where the plaintiff's efforts are successful in creating a fund

out of which the fees may be paid, or when the efforts of the plaintiff's attorneys render a public service or result in a benefit to the general public in addition to serving the interests of the plaintiff.

[6] Attorney and Client 45 ⇌ 155

45 Attorney and Client

45IV Compensation

45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases

Costs 102 ⇌ 194.26

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.26 k. Class Actions. Most Cited Cases

There are currently two methods available for the determination of fee awards for attorneys who have litigated successfully on behalf of a class: (1) the common-fund approach and (2) the lodestar approach.

[7] Costs 102 ⇌ 194.26

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.26 k. Class Actions. Most Cited Cases

Under the lodestar approach for determining attorney fee awards for attorneys who have litigated successfully on behalf of a class, the trial court must determine the number of hours reasonably expended by counsel on the matter, and then multiply those hours by an hourly rate of compensation set by the court; the court may then adjust that figure by using a multiplier determined by considering a variety of factors, including the complexity of the case and counsel's experience.

[8] Attorney and Client 45 ⇌ 155

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45 Attorney and Client

45IV Compensation

45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases

Under the common-fund approach for determining attorney fee awards in favor of attorneys who have litigated successfully on behalf of a class, the trial court decides upon a percentage and then applies that figure to the fund obtained as a recovery.

[9] Attorney and Client 45 ⇌ 155

45 Attorney and Client

45IV Compensation

45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases

Although the existence of a separate fund is unnecessary to application of the common-fund approach when determining attorney fee awards for attorneys who have litigated successfully on behalf of a class, the common-fund approach has been employed only when there has been a defined monetary recovery.

[10] Costs 102 ⇌ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases

The method used to calculate an attorney-fee award in a particular case is not necessarily determined by which of the exceptions to the American rule (i.e., statutory, contractual, or special equity) justified that award.

[11] Costs 102 ⇌ 194.42

102 Costs

102VIII Attorney Fees

102k194.42 k. Public Interest and Substantial Benefit Doctrine; Private Attorney General. Most Cited Cases

Attorney fees awarded pursuant to the "special-equity" common-benefit doctrine may, at times, be computed using the lodestar method

where circumstances warrant.

[12] Appeal and Error 30 ⇌ 1195(3)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(F) Mandate and Proceedings in Lower Court

30k1193 Effect in Lower Court of Decision of Appellate Court

30k1195 As Law of the Case

30k1195(3) k. To What Extent Applicable in General. Most Cited Cases

Supreme Court's statement in another case, describing its holding on prior appeal in instant case as calling for attorney fee award under common fund exception to American rule, did not, under law-of-case doctrine, preclude trial court upon remand from utilizing lodestar method, rather than common fund method, for its calculation of attorney fees; statement in question was not holding, but mere description of holding in another case, and, thus, it was not binding.

[13] Appeal and Error 30 ⇌ 984(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k984 Costs and Allowances

30k984(5) k. Attorney Fees. Most Cited Cases

Costs 102 ⇌ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases

The determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion.

[14] Appeal and Error 30 ⇌ 984(5)

30 Appeal and Error

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30XVI Review

30XVI(H) Discretion of Lower Court

30k984 Costs and Allowances

30k984(5) k. Attorney Fees. Most

Cited Cases

Supreme Court's deference to the trial court in attorney-fee cases is based upon the Court's recognition that the trial court, which has presided over the entire litigation, has a superior understanding of the factual questions that must be resolved in fee determinations.

[15] Costs 102 ⇌ 208

102 Costs

102IX Taxation

102k208 k. Duties and Proceedings of Taxing Officer. Most Cited Cases

The trial court's order regarding an attorney fee must allow for meaningful review by articulating the decisions made, the reasons supporting those decisions, and the performance of the attorney-fee calculation.

[16] Costs 102 ⇌ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases

The attorney-fee calculation under the lodestar method involves several steps: first, the trial court must determine the number of hours reasonably expended by counsel and a reasonable hourly rate of compensation for counsel's representation; the number of reasonable hours is then multiplied by that reasonable rate, yielding an initial estimate called the "lodestar amount"; the lodestar amount is then adjusted upward or downward depending on certain factors attendant to, among other things, the nature and difficulty of counsel's representation.

[17] Costs 102 ⇌ 207

102 Costs

102IX Taxation

102k207 k. Evidence as to Items. Most Cited Cases

Applicants for an attorney fee bear the burden of proving their entitlement to an award and documenting their appropriately expended hours.

[18] Costs 102 ⇌ 207

102 Costs

102IX Taxation

102k207 k. Evidence as to Items. Most Cited Cases

Applicants for an attorney fee should exercise "billing judgment" with respect to hours worked, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.

[19] Appeal and Error 30 ⇌ 1024.1

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)6 Questions of Fact on Motions or Other Interlocutory or Special Proceedings

30k1024.1 k. In General. Most Cited Cases

Costs 102 ⇌ 208

102 Costs

102IX Taxation

102k208 k. Duties and Proceedings of Taxing Officer. Most Cited Cases

With respect to an attorney fee award under the lodestar approach, a trial court's general statement that the number of hours spent was reasonable or unreasonable is not very helpful and, accordingly, should not be given much weight on appeal.

[20] Municipal Corporations 268 ⇌ 1040

268 Municipal Corporations

268XVI Actions

268k1040 k. Costs. Most Cited Cases

Evidence on appeal from attorney fee award to

citizens' group in environmental litigation against city supported finding that there was no redundant billing with respect to work jointly performed by plaintiffs' counsel in preparing briefs, court memoranda, and various responses to city's submissions; while record disclosed billing statements that nebulously described general tasks but did not provide sufficient detail, testimony presented during evidentiary hearing provided adequate elucidation supporting trial court's conclusion of reasonableness.

[21] Costs 102 ⇌ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases

Attorney fees for hours expended for fee litigation are compensable.

[22] Municipal Corporations 268 ⇌ 1040

268 Municipal Corporations

268XVI Actions

268k1040 k. Costs. Most Cited Cases

Twenty-seven hours that first attorney spent trying to convince second attorney to assist him with representation of city residents in environmental litigation against city, which resulted in new city ordinance regulating solid-waste facilities, were not essential to that representation, and, thus, those hours would be deducted from lodestar calculation when determining reasonableness of attorney fee award to city residents.

[23] Municipal Corporations 268 ⇌ 1040

268 Municipal Corporations

268XVI Actions

268k1040 k. Costs. Most Cited Cases

Evidence did not support attorney fee award to city residents at hourly rate of \$175 in class action that resulted in new city ordinance regulating solid-waste facilities, and, thus, award would be reduced to \$150 per hour; while trial court stated that it was "familiar with the hourly market rate in the area,"

there was no evidence in record regarding area's market rate, counsel typically charged clients somewhere between \$80 and \$150 per hour, and even though complexity of case generally supported higher rate, record was replete with testimony indicating that counsel were unfamiliar with applicable law.

[24] Municipal Corporations 268 ⇌ 1040

268 Municipal Corporations

268XVI Actions

268k1040 k. Costs. Most Cited Cases

Lodestar multiplier of 2 was improper when calculating attorney fees awarded to city residents whose action against city resulted in new ordinance regulating solid-waste facilities, and, thus, attorney fee award of \$1,785,939 was excessive; because substantial portion of counsel's hours were expended pursuing fee litigation rather than litigation that provided substantive benefits of original case, multiplier of 1.5 would be applied to those hours expended by plaintiffs' counsel in winning enactment of ordinance, and no multiplier would be applied to work on matters not essential to that purpose, resulting in fee award of \$1,020,290.50.

[25] Municipal Corporations 268 ⇌ 1040

268 Municipal Corporations

268XVI Actions

268k1040 k. Costs. Most Cited Cases

Statutes limiting city's liability for torts to no more than \$300,000 did not apply to attorney fee award exceeding that amount. Code 1975, §§ 11-47-190, 11-93-2.

*670 Joe R. Whatley, Jr., and Peter H. Burke of Whatley Drake, L.L.C., Birmingham; Kenneth L. Thomas and Valerie L. Acoff of Thomas, Means & Gillis, Birmingham; and Tamara Harris Johnson and Michael Melton, city attys., for appellant/cross appellee City of Birmingham.

W.L. Williams, Jr., Birmingham; and David A. Sullivan, Birmingham, for appellees/cross appellants

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William Fred Horn et al.

Kenneth Smith, director of legal services, and Erin Smith, assoc. gen. counsel, Alabama League of Municipalities for amicus curiae Alabama League of Municipalities.

BROWN, Justice.

The question presented in these appeals, collectively stated, is whether the Jefferson Circuit Court erred by holding that a group of citizens (sometimes referred to herein as "the plaintiffs") who sued the City of Birmingham ("the City") are entitled to an award of attorney fees totaling \$1,785,939, an amount computed by the so-called "lodestar method." The court awarded these fees to the plaintiffs for their role in litigation involving the placement of a waste transfer station and recycling center in a Birmingham neighborhood by Browning Ferris Industries of Alabama, Inc. ("BFI"). See generally *Horn v. City of Birmingham*, 648 So.2d 607 (Ala.Civ.App.1994) ("Horn I"); *Horn v. City of Birmingham*, 718 So.2d 691 (Ala.Civ.App.1997) ("Horn II"); and *Battle v. City of Birmingham*, 656 So.2d 344 (Ala.1995). The City appeals, contending that the trial court, in awarding attorney *671 fees, incorrectly applied the method it used to compute the fees; the plaintiffs cross-appeal from the order awarding attorney fees, contending that the trial court used an inappropriate method to compute the fees. As to the City's appeal, we reverse the judgment of the trial court and render a judgment; as to the plaintiffs' cross-appeal, we affirm.

I. Facts and Procedural History

To facilitate an understanding of this complex case and the stakes involved, we set out its factual background, in pertinent part, as it was previously presented by this Court in *Ex parte Horn*, 718 So.2d 694 (Ala.1998):

"Browning Ferris Industries of Alabama, Inc. ('BFI'), operates landfills for sanitary waste (hereinafter sometimes referred to as 'garbage')

in Blount and Walker Counties that are permitted to accept such waste from certain other Alabama counties, including Jefferson County. In 1991, BFI sought to construct a sanitary waste transfer station and recycling center in the City of Birmingham ('the City'). The sanitary waste transfer station was to be a facility where the many BFI trucks collecting garbage from areas of the City would come and dump their loads of garbage inside a large building; the garbage would then be processed by separating recyclable waste from nonrecyclable waste. The nonrecyclable waste would later be transferred to much larger trucks for transport to distant landfills, and the recyclable waste would be stored on-site for eventual sale.

"In January 1991, an attorney representing BFI wrote a letter to Tom Magee, chief planner in the City's Department of Urban Planning, inquiring whether BFI's proposed sanitary waste transfer station and recycling center would require a 'special use' zoning permit. The BFI letter stated, in relevant part:

" 'It is BFI's intention to purchase property near the University of Alabama [at] Birmingham. The facility that they wish to locate there is called a Transfer and Recycling Facility. The purpose of the operation is this:

" 'BFI trucks will deliver garbage and recyclable materials to the facility. A machine will then separate the garbage from the recyclable materials. All the recyclable materials will be placed in the facility and sold to the market as BFI chooses, and all the garbage will be compressed by a machine and then placed on 70 ton trucks. After this process is completed the 70 ton trucks will deliver the compressed garbage to landfill sites in Blount and Walker Counties.

" 'As you know, the zoning ordinance under the special exception criteria, authorize[s] a landfill in an M2 ["heavy industrial"] district with a special use permit. My question to you

is whether a facility, such as the one described above, is deemed to be a landfill by the City of Birmingham.'

"The City's use regulations for a district zoned M-2, heavy industrial, state:

" 'A building or premises shall be used only for the following purposes:

" '1. Any use permitted in the M-1 Light Industrial District; except, that no dwelling other than that for a resident watchman, custodian or caretaker employed on the premises shall be permitted.

" '2. Any other use not in conflict with the ordinances of the City of Birmingham regulating nuisances; provided further that no building or occupancy permit shall be issued for any of the following uses until and unless the location of such use shall *672 have been approved by the City Council after report by the Planning Commission in accordance with the procedure set forth in Article V, Section 3:

" 'a. Abattoir.

" 'b. Acid manufacture.

" 'c. Atomic power plant or reactor.

" 'd. Explosives manufacture or storage.

" 'e. Fat, grease, lard or tallow rendering or refining.

" 'f. Glue or size manufacture.

" 'g. Garbage, offal or dead animal reduction or dumping.

" 'h. Petroleum refining.

" 'i. Stockyard or slaughter of animals.

" 'j. Junkyards, salvage yards.

" 'k. Hazardous waste or toxic disposal.

" 'l. Medical and infectious materials disposed.'

"[Emphasis added in *Ex parte Horn* omitted here.] The City's M-1 use regulation allows, among other things, 'Manufacturing, fabricating, processing, or assembling uses which do *not* create an objectionable noise, vibration, smoke, dust, odor, heat or glare.' (Emphasis added [in *Ex parte Horn*].)

"Later that same month, Magee wrote a response to BFI, stating that it was his opinion that BFI did not need to obtain a special use permit to construct a sanitary waste transfer and recycling facility in an M-2 district:

" 'This letter is in response to your recent correspondence regarding Browning Ferris Industries' (BFI) intent to purchase property on the Southside of Birmingham for the purpose of constructing a Transfer and Recycling Facility. As per your letter, BFI trucks will deliver garbage and recyclable materials to this proposed facility, where the garbage and recyclable materials will be separated. All garbage will then be compressed and placed in 22[sic] ton trucks which will haul the garbage to landfills in Blount and Walker Counties. It is my understanding that the garbage will be processed daily and will not remain on the premises overnight. Your letter also indicated that the recyclable materials will be stored in a separate area and will be sold to the market as needed. It is also my understanding that this entire process of transferring, processing, and recycling of garbage will be completely enclosed within a building, and no hazardous wastes or toxic materials will be processed or stored on the premises. Based on this understanding, this use would not be interpreted to be a sanitary landfill. In addition, the property you have indicated as being utilized for this proposed facility is located north of 6th Aven-

ue, South near the Golden Flake Company and is zoned M-2 (Heavy Industrial District). This Zoning district would allow this facility as a permitted use. Please be advised, however, that no noxious odors, fumes, or noise can be associated with this facility.'

"[Emphasis added in *Ex parte Horn* omitted here.] At the time Magee wrote this letter, the only knowledge or information he had regarding sanitary waste transfer stations was that presented in BFI's letter to him and in a videotape he had also received from BFI. Magee failed to conduct any further inquiry before providing BFI with his response approving construction of the facility in that M-2 district.

*673 "Thereafter, BFI obtained an option from the Golden Flake Company to purchase 10 acres of a 30-acre tract owned by Golden Flake, and BFI submitted for Golden Flake an application with the City to subdivide the property. In March 1992, BFI gave property owners immediately adjacent to the Golden Flake property notice of the intended subdivision of the property for development by BFI as a sanitary waste transfer and recycling station and the City approved subdivision of the property. BFI purchased the subdivided property from Golden Flake in March 1993 and in April BFI announced in a press release that it had obtained all the permits and approvals required by the City for it to construct a garbage transfer station in the Titusville area of Birmingham.

"The residents of the primarily African-American Titusville neighborhood first learned of the BFI sanitary waste transfer station through the press release. They objected to the facility's being built adjacent to their neighborhood, and several residents obtained the assistance of attorneys W.L. Williams, Jr., and David A. Sullivan [plaintiffs' counsel in the present appeal]. These Titusville residents and their legal counsel attended the May 11, 1993, meeting of the Birmingham City Council and voiced to the council mem-

bers their objections to the proposed BFI facility. Council members responded by saying that they had not previously been aware of the pending BFI facility and that they did not believe they could do anything to prevent the completion of its construction. A larger group of Titusville residents, along with residents of Walker County, attended the May 25, 1993, meeting of the city council. During that meeting, the Titusville residents and their counsel voiced continued opposition to the BFI sanitary waste transfer station. Attorney Williams stated that he believed that under the City's M-2 zoning classification a facility such as the one BFI planned to construct required approval by the city council, and he requested that the Department of Urban Planning review the zoning ordinance again. Michael Dobbins, who was director of the Department of Urban Planning and was Magee's supervisor, stated that he believed council approval was not necessary, because he believed the BFI sanitary waste transfer station conformed with the M-2 heavy industrial zoning classification. Dobbins admitted that he had not visited a BFI sanitary waste transfer facility, but stated that if the proposed BFI facility involved the creation of noxious odors, fumes, and/or noise then it would violate the City's nuisance ordinances. Mayor Richard Arrington made a report to the council and informed it that he believed he had no legal basis to deny any further permits to BFI. However, the city council passed a resolution asking the mayor to have the City do whatever was legally possible to prevent BFI from operating a sanitary waste transfer station at the site in question. The following day the City's attorney issued a memorandum to the city council stating that he believed the City could face a multi-million dollar lawsuit if it prevented BFI from completing construction of the sanitary waste transfer station.

"Thereafter, Dobbins wrote a letter to Williams, one of the attorneys for the Titusville residents. Dobbins stated that it was his position that BFI's proposed facility was not a garbage dump

and that BFI was not required to receive any further zoning approvals before construction of the facility. It is apparent from Dobbins's letter that he was taking as fact BFI's contention that *674 the garbage transfer station would not create any noise, noxious odors, or fumes that would prevent it from conforming with the M-2 use regulations and thus would not require city council approval. Dobbins stated in his letter to Williams that garbage transfer stations were a new method for handling household wastes and that the nearest one was being operated by BFI in Marietta, Georgia, where it was adjacent to a residential neighborhood. However, there is no indication in the record that Dobbins or any of his staff had visited the Marietta garbage transfer station, or any other operated by BFI, in order to ascertain whether such facilities created noise, noxious odors, or fumes, or in any other way would constitute a nuisance. Also in May 1993, Mayor Arrington wrote to the city council, stating that after consulting with the City's Law Department and the Department of Urban Planning, he was of the opinion that construction permits could not be legally withheld from BFI.

"In early June 1993, the Titusville residents appealed Dobbins's decision-that the proposed BFI garbage transfer station *did not* require approval by the city council in order to be constructed in an area zoned M-2-to the City's Board of Zoning Adjustment ('the Board'). The construction of the BFI facility adjacent to a residential neighborhood, and the protest of the Titusville residents, had begun to attract substantial attention from the local news media, and at the June 8, 1993, meeting of the city council, one of the council members responded by sponsoring a proposed ordinance that would regulate sanitary waste transfer facilities and would require public notice and public hearings, as well as city council approval, before construction. The ordinance was adopted by the council at the same meeting and was approved by the mayor the following day; however, public notice requirements for approval of the or-

dinance had not been met and it had to be passed again at a later date, as mentioned below.

"The Titusville residents and their counsel, along with numerous supporters, appeared before the Board of Zoning Adjustment on June 10, 1993, to support their appeal; however, the Board upheld Dobbins's decision. Thereafter, on June 24, William Fred Horn and other citizens filed in the Jefferson Circuit Court a 'Notice of Appeal of the Decision of the Zoning Board of Adjustment of the City of Birmingham and Complaint for Declaratory Judgment, Petition for Writ of Mandamus and Permanent Injunctive Relief' against the Board, the City, and the mayor ('the *Horn* lawsuit'). The *Horn* filing alleged that Dobbins, as the director of the Department of Urban Planning, was the only person lawfully authorized to administer the City's zoning ordinances and, therefore, that a lesser employee such as Magee was without lawful authority to render an interpretation of the M-2 zoning ordinance when he did so in his January 1991 letter to BFI. The filing further alleged that the construction permits the City had issued to BFI, based on Magee's decision and without city council approval, were unlawful. It requested that the court order the City not to issue any further permits to BFI regarding the facility under construction until its use was approved by the city council. In July 1993, 63 persons from different cities and counties in Alabama moved to intervene as plaintiffs in the *Horn* lawsuit. BFI also moved to intervene in the action as a defendant.

"In response to extensive and continuing public pressure and media coverage *675 brought by the plaintiffs' litigation against the City, the city council, on August 3, 1993, passed a resolution authorizing the mayor to enter into negotiations with BFI to either purchase the subject property from BFI or to exchange it for other property owned by the City. The mayor and a council member met with representatives of BFI to discuss a purchase of the property by the City, but

no agreement was reached and BFI continued construction of the facility.

"On August 27, the plaintiffs filed a motion seeking to compel the City and the mayor to be realigned from defendants to plaintiffs. Negotiations between the City and BFI continued, but failed when the City could not meet BFI's requested price for the facility, \$17 million. On September 3, the mayor filed a motion with the circuit court requesting that he be realigned from a party defendant to a party plaintiff, which was granted by the circuit court. That motion stated:

" 'Now comes Mayor Richard Arrington, Jr. in his official capacity as Mayor of the City of Birmingham, Alabama, and moves this Honorable Court to realign this defendant as a plaintiff as further described herein. This defendant asserts that new information has been developed during the course of this action. This new information is as follows:

" '1. Contrary to earlier representations, a portion of the garbage collected by Browning-Ferris Industries of Alabama, Inc., will remain on the site more than a few hours. This consists of items salvaged for recycling and of liquid and semi-solid contaminants leaking from the garbage.

" '2. Contrary to earlier representations, this facility, if operated as other similar facilities, cannot be sanitized. Reports from Marietta, Georgia suggested that, with 24 hour operation, full, daily cleaning is either not possible or not effective in eliminating odor.

" '3. It has been reported to me that it is not possible to eliminate possible contaminated liquid drainage on streets and into storm sewers, leading to the facility. This is a special concern since the primary path to the BFI facility is adjacent to a city park and swimming pool.

" '4. Together with the additional information now available, as described herein, in my opinion, this garbage transfer facility does constitute a necessary incident to a garbage dump thereby incurring the requirement that the location of such use be approved by the City Council.

" '5. As a further necessary precondition to the operation of this facility, it is my opinion that the Alabama Department of Environmental Management must review and approve this facility as a necessary incident to a garbage dump. Any such review or approval is unknown to me.

" 'Based upon these facts, I as Mayor, request to be realigned as a plaintiff for the limited purpose of asserting that, based on new information not previously furnished to, or incorrectly furnished to, Mr. Thomas Magee, Mr. Mike Dobbins, and the Zoning Board of Adjustment, this matter must, in accordance with Article III, Section 3.2 of the Zoning Code of the City of Birmingham, be referred to the Birmingham*676 Planning Commission and City Council, and further, that this proposed use, for reasons cited above, will, in my opinion, necessarily constitute a nuisance in violation of Section 11-8-1 of the General Code of the City of Birmingham, 1980, in that this use is likely to be prejudicial to the comfort of and offensive to the senses of the ordinary citizens of the City of Birmingham.'

"[Emphasis added in *Ex parte Horn* omitted here.]

"On September 7, the city council adopted a resolution authorizing the mayor to obtain an appraisal of the BFI property for the purpose of condemning the property. The council also authorized the creation of a committee to investigate the BFI project. BFI responded by suing the City, Mayor Arrington, the city council, and its

members, for declaratory and injunctive relief, and for \$17 million in damages (the *BFI* lawsuit'). In its complaint, BFI alleged that City officials, unfairly exercising political expediency, had illegally conspired to formulate a plan to 'kill' its previously approved project.

"On September 10, the City made an offer of judgment, per Rule 68, Ala. R. Civ. P., consenting to the entry of a judgment against it and in favor of the plaintiffs in the *Horn* lawsuit that would require that the matter of BFI's construction permits be returned to the city council for further consideration, requiring council approval before the facility could begin operating. The plaintiffs accepted the offer of judgment. On September 13, 1993, Judge William A. Jackson, of the Jefferson Circuit Court, entered a final order in the *Horn* lawsuit, pursuant to the offer of judgment, requiring that the City refuse to issue construction permits to BFI until the sanitary waste transfer facility obtained the approval of the city council, after public notice and a public hearing. The court ordered that each party bear its own costs. Two days later, the plaintiffs filed a Rule 59, Ala. R. Civ. P., motion with the circuit court, asking the court to alter or amend the judgment so as to award them an attorney fee from the City. The trial court denied the motion and the plaintiffs appealed to the Court of Civil Appeals; that court eventually affirmed the trial court's ruling....

"On September 14, the city council adopted an amended version of the solid waste facilities ordinance it had previously adopted in June. That extensive ordinance, governing the permitting and licensing of all commercial solid waste facilities in the City, now appears as § 4-3-31 et seq., General Code of the City of Birmingham....

"On September 17, the City's attorney wrote BFI a letter in which he invited BFI to petition the City for a special use zoning permit from the Board of Zoning Adjustment, as required by the trial court's judgment in the *Horn* lawsuit.

However, BFI never did so. Instead, BFI attempted to use its own lawsuit against the City to gain approval to operate its garbage transfer station. The City responded to BFI's complaint against it by asserting the *Horn* lawsuit consent judgment in support of a collateral estoppel and *res judicata* defense.

"On January 13, 1994, Whitlynn Battle, one of the Titusville plaintiffs, moved to intervene in the *BFI* lawsuit against the City, as a party defendant. Battle sought to protect the judgment she and the other plaintiffs had obtained in the *Horn* lawsuit. The City, BFI, and Battle entered into mediation, and the *BFI* lawsuit was eventually settled, with a consent judgment entered in February *677 1994; by that settlement BFI was to sell, and the City was to purchase, BFI's property for \$6,750,000. Battle, seeking to prevent the City from having to purchase the property from BFI, challenged the judgment by way of a Rule 59, Ala. R. Civ. P., motion and also sought an award of attorney fees in relation to the *BFI* lawsuit. The trial court denied the motions, and its ruling was eventually upheld on appeal. *Battle*, supra.

"The success of the *Horn* plaintiffs in preventing the operation of BFI's sanitary waste transfer station, and the City's purchase of the BFI property, [were] brought to statewide and even international attention. According to the plaintiffs, a Birmingham daily newspaper, the *Birmingham News*, published more than 90 articles concerning the plaintiffs' fight against the proposed BFI garbage transfer facility, and one Birmingham television station aired approximately 100 stories on that topic. The case was the focus of discussion on the Alabama Public Television Network's news program 'For the Record' on November 28, 1995, and the international organization Greenpeace produced a video on the struggle of the *Horn* plaintiffs entitled, 'Not in Anyone's Backyard-the Grassroots Victory over Browning-Ferris Industries.' On the episode of 'For the [Record],' Rick Losa, a BFI representative, stated

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that because of the *Horn* litigation involving its attempt to operate a garbage transfer station in Titusville, BFI had changed its procedures for locating and constructing such a facility so that in the future public concerns about a proposed location would be considered from the start. The *Horn* lawsuit was also the topic of one of the 11 chapters in the 1995 academic text 'Faces of Environmental Racism' by Dr. Laura Westra and Dr. Peter Wenz, in which those authors concluded that BFI's attempt to locate its garbage transfer facility in the primarily African-American Titusville neighborhood was a clear case of environmental racism."

Ex parte Horn, 718 So.2d at 695-701 (footnotes omitted).

The *Horn* plaintiffs appealed the trial court's order denying their motion for an award of attorney fees to the Court of Civil Appeals. That court, in *Horn v. City of Birmingham*, 648 So.2d 607 (Ala.Civ.App.1994), stated that it appeared the trial court's ruling had been based on "an apparent belief that a common fund had to exist in order for it to award attorney fees." *Horn I*, 648 So.2d at 609. The court then held that "the mere fact that the plaintiffs' action did not create a fund from which a fee could be paid should not bar the trial court from awarding attorney fees," and it remanded the case for the trial court to determine "whether the efforts of the plaintiffs' attorneys produced a common benefit [to the general public] and to consider the award of attorney fees." *Id.* at 610.

The trial court, on remand, determined that there was no common benefit to the general public and again denied the plaintiffs' motion for attorney fees. On return from remand, the Court of Civil Appeals affirmed. *Horn v. City of Birmingham*, 718 So.2d 691, 694 (Ala.Civ.App.1997). This Court then granted certiorari review to consider "whether the Court of Civil Appeals erred in affirming the trial court's ruling that the plaintiffs are not due an award of attorney fees under the 'common benefit' exception to the 'American Rule.'" *Ex parte Horn*,

718 So.2d 694, 695 (Ala.1998) (sometimes referred to herein as "*Horn III*"). We reversed the judgment of the Court of Civil Appeals, holding that the plaintiffs were entitled to attorney fees *678 because they had conferred a substantial benefit upon the residents of Birmingham, including those residents living outside the plaintiffs' own neighborhood. *Horn III*, 718 So.2d at 706. In so holding, we reasoned that the benefit conferred included "a new [city] ordinance specifically regulating and licensing solid waste facilities, such as the garbage transfer station at issue ... [and] an increased level of due process protection to all residents of Birmingham." *Id.* Consequently, the case eventually returned to the Jefferson Circuit Court for further proceedings.

In those proceedings, both parties initiated discovery relating to the question of attorney fees. While discovery continued, the plaintiffs filed a motion with the trial court seeking, among other things, interim attorney fees. The trial court granted the motion and eventually awarded the plaintiffs a \$250,000 interim fee, prompting the City to petition this Court for a writ of mandamus. *See Ex parte City of Birmingham*, 757 So.2d 389 (Ala.1999). In that petition, the City requested that this Court (1) direct the trial court to vacate its order awarding the plaintiffs the \$250,000 interim attorney fee and (2) overrule *Horn III*, supra. We denied the petition and held that the trial court did not abuse its discretion in awarding the interim attorney fee. *Ex parte City of Birmingham*, 757 So.2d at 392. We also refused to overrule our prior decision holding that attorney fees should be awarded in the case; we stated:

"The City requests further that we overturn our decision in *Ex parte Horn*, ... in which we held that the residents are entitled to an attorney fee under the 'common-fund' exception. However, we decline to do so."

Id.

In December 1998, the trial court conducted a bench trial on the issue of determining an award of

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attorney fees. The court heard from numerous witnesses, including the support staff for the plaintiffs' counsel; expert witnesses; the Honorable Richard Arrington, Jr. (who was mayor of Birmingham during the time in question); and plaintiff and defense counsel. The court received into evidence billing records; time sheets; invoices; expense reports; examples of work product; newspaper articles concerning the case; correspondence; and documents concerning the qualifications and professional achievements of plaintiffs' counsel.

After considering this evidence, the trial court issued an order on March 2, 2000, stating its findings and conclusions. In that order, the court deducted 84 hours from plaintiffs' counsel's billable-hour submission, finding those hours redundant or unnecessary; this yielded a total of 5,326 compensable hours. The court then considered and added hours claimed in the plaintiffs' counsel's supplemental submission, which raised the total compensable hours to 5,816.95. The court also determined a market rate of \$175 per hour of work done, a figure it based on its considering evidence of rates charged in the area for similar work by attorneys with similar experience. Further, the court determined that the plaintiffs were entitled to a multiplier of 2, which, the court said, reflected the difficulty of the case and the fact that the plaintiffs had prevailed under arduous circumstances. The final attorney-fee award was \$1,785,939, which reflected a deduction of \$250,000 for the previously awarded interim attorney fees.

Neither side was content with this award. The plaintiffs moved the trial court to alter, amend, or vacate its judgment, contending that the court had erred by using the lodestar method in calculating *679 the fees. After the trial court denied the plaintiffs' motion, both sides appealed.

Resolution of the general issue in this case, as we stated it above, requires us to answer three questions: (1) Was the trial court correct in using the lodestar method for its calculation of attorney fees? (2) Did the trial court correctly determine that the

plaintiffs were entitled to attorney fees totaling \$1,785,939 and that those fees were necessary and reasonable? and (3) Does § 11-93-2, Ala.Code 1975, limit the City's obligation to pay attorney fees exceeding \$300,000?

II.

[1] The first question we consider is whether the trial court used the correct method for its calculation of attorney fees. The plaintiffs contend that under the law-of-the-case doctrine, the trial court should have used the "percentage method," which, the plaintiffs argue, would have been in accordance with our holding in *Horn III*.

[2] In *Gray v. Reynolds*, 553 So.2d 79 (Ala.1989), we summarized the law-of-the-case doctrine:

"It is well established that on remand the issues decided by an appellate court become the 'law of the case,' and that the trial court must comply with the appellate court's mandate. *Walker v. Carolina Mills Lumber Co.*, 441 So.2d 980 (Ala.Civ.App.1983). *See also Erbe v. Eady*, 447 So.2d 778 (Ala.Civ.App.1984). The trial court's duty is to comply with the mandate 'according to its true intent and meaning,' as determined by the directions given by the reviewing court. *Ex parte Alabama Power Co.*, 431 So.2d 151 (Ala.1983)."

553 So.2d at 81. The application of this doctrine here rests upon a construction of our holding in *Horn III*, for only those statements of law directly pertaining to the issues decided in *Horn III* can bind subsequent proceedings in this case. *See Gray*, 553 So.2d at 81.

[3] The plaintiffs contend that *Horn III* is dispositive of the question regarding the appropriate method to be employed in calculating the award of attorney fees in this case. In *Horn III*, the issue before us was whether the plaintiffs were entitled to attorney fees. 718 So.2d at 695. We observed that, under the American rule, parties to a lawsuit generally bear the responsibility of paying their own at-

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torney fees, subject to certain exceptions created by statute, contract, or "special equity." *Id.* at 702. We then held that the special-equity exception applied to this case. *Id.*

[4][5] The special-equity exception invokes principles common to an action seeking a recovery under the theory of quantum meruit, in that it involves one party's seeking compensation for engaging in efforts that benefited another party. *Silberman v. Bogle*, 683 F.2d 62, 64 (3d Cir.1982) (quoting *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 165 (3d Cir.1973)). We acknowledged those principles in *Horn III*, where we stated:

"[A]ttorney fees may be awarded where the plaintiff's efforts are successful in creating a fund out of which the fees may be paid, or when the efforts of the plaintiff's attorneys render a public service or result in a benefit to the general public in addition to serving the interests of the plaintiff."

718 So.2d at 702; see also *City of Ozark v. Trawick*, 604 So.2d 360, 364 (Ala.1992); *Brown v. State*, 565 So.2d 585, 591 (Ala.1990); and *Bell v. Birmingham News Co.*, 576 So.2d 669, 670 (Ala.Civ.App.1991). In *Horn III*, we found that the plaintiffs' efforts had principally resulted in a new City ordinance regulating solid-waste facilities; this fact, we said, resulted in an *680 increase in due-process protection for all residents of Birmingham. *Horn III*, 718 So.2d at 706. We then held that the plaintiffs were entitled to an award of attorney fees under the special-equity exception. *Id.* The plaintiffs, noting that this exception is premised upon the common-benefit doctrine, argue in their brief that our holding in *Horn III* issued an implied mandate to the trial court to employ the so-called "common-fund" approach in calculating the award of attorney fees in this case. We disagree.

[6][7][8][9] Under Alabama law, there are currently two methods available for the determination of fee awards for attorneys who have litigated suc-

cessfully on behalf of a class: (1) the common-fund approach and (2) the lodestar approach. See *Union Fid. Life Ins. Co. v. McCurdy*, 781 So.2d 186, 189-90 (Ala.2000) (discussing the discretion of the trial court in determining which approach is appropriate in any given case). Under the lodestar approach, the trial court must determine the number of hours reasonably expended by counsel on the matter, and then multiply those hours by an hourly rate of compensation set by the court. *Union Fid.*, 781 So.2d at 191-92. The court may then adjust that figure by using a multiplier determined by considering a variety of factors, including the complexity of the case and counsel's experience. *Id.* Under the common-fund approach, the trial court decides upon a percentage and then applies that figure to the fund obtained as a recovery. Although we have held that the existence of a separate fund is unnecessary, *Union Fid.*, 781 So.2d at 190, we have employed the common-fund approach only when there has been a defined monetary recovery. See *Edelman & Combs v. Law*, 663 So.2d 957, 961 (Ala.1995); *Ex parte Brown*, 562 So.2d 485, 496 (Ala.1990); *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So.2d 1238, 1245 (Ala.1985); and *Eagerton v. Williams*, 433 So.2d 436, 450-51 (Ala.1983); cf. *Union Fid.*, 781 So.2d at 189-90 (stating that recovery under the common-fund approach is possible when the defendant has admitted to being liable for a sum certain in damages even though no separate fund, such as an escrow account, has been created).

The common-fund approach becomes unworkable when the recovery does not involve a quantifiable monetary settlement or damages award. This is often the case where, as here, the litigation has been undertaken solely to effect a societal change. Generally, such a case involves the declaration or enforcement of rights where a statute authorizing the lawsuit has likewise authorized the award of attorney fees. See *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237, 255 (1985). Because of the intangible nature of the relief granted, courts have steadfastly employed the

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lodestar method to calculate attorney fees in such cases. The United States Court of Appeals for the Third Circuit, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir.1995), explained the judicial loyalty to the lodestar method in this kind of case:

"The lodestar and the percentage of recovery methods each have distinct attributes suiting them to particular types of cases. Ordinarily, a court making or approving a fee award should determine what sort of action the court is adjudicating and then primarily rely on the corresponding method of awarding fees (though there is, as we have noted, an advantage to using the alternative method to double check the fee).

"Courts generally regard the lodestar method, which uses the number of hours reasonably expended as its starting point, as the appropriate method in statutory fee shifting cases. Because the lodestar award is de-coupled from the class recovery, the lodestar assures counsel undertaking socially beneficial litigation (as legislatively identified by the statutory fee shifting provision) an adequate fee irrespective of the monetary value of the final relief achieved for the class.

"This de-coupling has the added benefit of avoiding subjective evaluations of the monetary worth of the intangible rights often litigated in civil rights actions. Outside the pure statutory fee case, the lodestar rationale has appeal where as here, the nature of the settlement evades the precise evaluation needed for the percentage of recovery method."

55 F.3d at 821 (citation omitted). With regard to cases (like the present one) where the right to an attorney fee is nonstatutory and the relief involves intangible remedies, the Court of Appeals in *General Motors* opined:

"Certainly, the court may select the lodestar method in some non-statutory fee cases where it can calculate the relevant parameters (hours ex-

pendent and hourly rate) more easily than it can determine a suitable percentage to award."

Id.

[10][11][12] The Third Circuit's reasoning in *General Motors* illustrates the principle that the method used to calculate an attorney-fee award in a particular case is not necessarily determined by which of the exceptions (i.e., statutory, contractual, or special equity) justified that award. Consequently, attorney fees awarded pursuant to the "special-equity" common-benefit doctrine may, at times, be computed using the lodestar method where circumstances warrant. See *Charles v. Goodyear Tire & Rubber Co.*, 976 F.Supp. 321, 325 (D.N.J.1997) (applying the lodestar method after noting the difficulty in valuing a settlement that included equitable relief); and *Cooperstock v. Pennwalt Corp.*, 820 F.Supp. 921, 926 (E.D.Pa.1993) (applying the lodestar method after finding that the benefit conferred upon the class plaintiffs was "unquantifiable"). In *Horn III*, this Court determined that the plaintiffs were entitled to attorney fees, but, by its silence on the question of method, left open the method by which those fees were to be calculated. Therefore, we hold that the trial court did not violate the law of the case established in *Horn III* by employing the lodestar method.^{FN1}

FN1. In *Ex parte City of Birmingham*, supra, where the City petitioned for a writ of mandamus, we characterized the City's argument in the following manner:

"The City requests further that we overturn our decision in *Ex parte Horn*, supra, in which we held that the residents are entitled to an attorney fee under the 'common-fund' exception."

Ex parte City of Birmingham, 757 So.2d at 392 (emphasis added). The plaintiffs contend in addition to their arguments stated above that this restatement of our holding in *Horn III* was, itself, a hold-

ing. That restatement, however, merely described a holding in *Horn III*, which was another case, and did not directly pertain to our resolution of the issues presented in *City of Birmingham*. Therefore, we are not bound by that statement in the present case, under the law-of-the-case doctrine. See *Gray v. Reynolds*, 553 So.2d 79, 81 (Ala.1989) (stating that the Court was not bound by dicta appearing in an opinion in a prior appeal).

III.

[13][14][15] We now turn to the question regarding the amount of attorney fees awarded. "The determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion." *Ex parte Edwards*, 601 So.2d 82, 85 (Ala.1992). Our *682 deference to the trial court in attorney-fee cases is based upon our recognition that the trial court, which has presided over the entire litigation, has a superior understanding of the factual questions that must be resolved in fee determinations. See *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Nevertheless, the trial court's order regarding an attorney fee must allow for meaningful review by articulating the decisions made, the reasons supporting those decisions, and the performance of the attorney-fee calculation. *American Civil Liberties Union of Ga. v. Barnes*, 168 F.3d 423, 427 (11th Cir.1999); see also *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933.

[16] The attorney-fee calculation under the lodestar method involves several steps. First, the trial court must determine the number of hours reasonably expended by counsel and a reasonable hourly rate of compensation for counsel's representation. The number of reasonable hours is then multiplied by that reasonable rate, yielding an initial estimate called the "lodestar amount." *Edwards*, 601 So.2d at 85. The lodestar amount is then adjusted

upward or downward depending on certain factors attendant to, among other things, the nature and difficulty of counsel's representation. See *id.* (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)); see also *Brown v. State*, 565 So.2d 585, 592 (Ala.1990) (listing 13 factors for the trial court to consider when determining a reasonable attorney fee).

The City has challenged the trial court's decision as to each facet of this calculation, contending (1) that many of the hours claimed by plaintiffs' counsel were excessive or redundant; (2) that the hourly rate determined by the court did not reflect the true value of services rendered, as judged by local standards; and (3) that the trial court's application of a multiplier of 2 was unreasonable.

A. Hours Reasonably Expended

[17][18] Applicants for an attorney fee bear the burden of proving their entitlement to an award and documenting their appropriately expended hours. *Edwards*, 601 So.2d at 85; see also *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933 (citing the importance of documenting in fee applications the hours expended). "The applicant should exercise 'billing judgment' with respect to hours worked, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933 (citation omitted). As the United States Court of Appeals for the Eleventh Circuit stated in *American Civil Liberties Union of Ga. v. Barnes*, *supra*:

"If fee applicants do not exercise billing judgment, courts are obligated to do it for them, to cut the amount of hours for which payment is sought, pruning out those that are 'excessive, redundant, or otherwise unnecessary.' Courts are not authorized to be generous with the money of others, and it is as much the duty of courts to see that excessive fees and expenses are not awarded as it is to see that an adequate amount is awarded."

168 F.3d at 428.

[19] In opposition to the hours claimed by plaintiffs' counsel, the City enumerated several instances where it contended that the hours claimed by opposing counsel were duplicative. Our review of the record indicates that the trial court made no detailed findings with respect to these claims. In fact, it appears that the trial court reviewed the time sheet submitted by plaintiffs' counsel only for multiple entries for the same work rather than for instances where attorneys Sullivan and *683 Williams might have duplicated one another's work. As to the latter question, the trial court simply added to its order a general statement declaring those hours to be reasonable and necessary. Therefore, our deference with respect to the trial court's order as to these questions is limited. As we said in *Ex parte Edwards*, supra, "[a] general statement that the number of hours spent was reasonable or unreasonable is not very helpful and, accordingly, should not be given much weight." 601 So.2d at 86.

[20] The City contends that the trial court overlooked what the City calls redundant billing by plaintiffs' counsel with respect to work preparing briefs, court memoranda, and various responses to the City's submissions. Because of the trial court's silence with respect to these contentions, we are left to examine the record in order to fulfill our duty of meaningful review. Our review of the record discloses billing statements that nebulously describe general tasks but, unfortunately, do not provide sufficient detail. While this situation, by itself, is problematic, see *American Civil Liberties Union of Ga.*, 168 F.3d at 429, testimony presented during the evidentiary hearing provides adequate elucidation supporting the trial court's conclusion of reasonableness.^{FN2} Therefore, we conclude that the trial court did not abuse its discretion by finding that there was no redundant billing with respect to work jointly performed.

FN2. Williams testified that he and Sullivan worked together on briefs by performing different tasks. He explained that, at times, he researched a particular area of

the law while Sullivan wrote, using research already done. He also testified that they often discussed arguments and strategy as to the preparation of court documents and matters raised by the City.

[21] We now turn to the City's allegations that some of the hours expended by plaintiffs' counsel were unreasonable.^{FN3} Our review of the record indicates that there was conflicting and credible testimony by both sides as to nearly all of the specific claims of unreasonableness.^{FN4} Because this testimony was oral, we defer to the trial court's resolution of the pertinent factual disputes in favor of the plaintiffs. After considering the trial court's observation, made in its order, regarding the complexity of this case, we conclude that the court did not abuse its discretion with respect to its findings on these matters.

FN3. The City's argument includes an assertion that the plaintiffs should not be allowed to recover attorney fees for hours expended for fee litigation. It is hornbook law, however, that such time is compensable. See *Alba Conte, Attorney Fee Awards* § 4.21 (2d ed.1993), and the footnotes contained therein.

FN4. At the evidentiary hearing, Williams testified that he and Sullivan often collaborated on their filing of, or responses to, briefs and court memoranda. They also testified as to the complexity of the case. The City countered with expert testimony by John Falkenberry, an attorney, who concluded that the hours expended by Williams and Sullivan were excessive.

[22] One matter, however, concerns us. The record reveals that plaintiffs' counsel included in their fee application 27 hours spent by Sullivan trying to convince Williams to assist him with the case. We believe that these hours were not essential to the plaintiffs' representation; therefore, we reduce by 27 the number of hours the trial court accepted as

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reasonable—this reduction yields a total of 5,789.95 hours reasonably expended.

B. The Trial Court's Determination of the Hourly Rate

[23] The City contends that the trial court also abused its discretion with respect*684 to the adjudged hourly rate of compensation. We agree.

The trial court's order is silent as to any justifications for the determined rate of \$175 per hour, except for a general statement declaring that the trial court had conducted "numerous fee-award cases over the years" and, therefore, was "familiar with the hourly market rate in the area." We acknowledge that the trial court may indeed have its finger on the pulse of the Birmingham legal community, but, without evidence in the record regarding the area's market rate, we are unable to defer to its conclusions.

The record reflects that Sullivan typically charged clients somewhere between \$80 and \$150 per hour for his representation. The record contains no other evidence as to rates of compensation. While the complexity of this case generally supports a higher rate, we note that the record is replete with testimony indicating that Sullivan and Williams were unfamiliar with the law applicable in this case and, therefore, had to expend numerous hours acquainting themselves with that law. This degree of unfamiliarity often reflects a lack of experience, which leads us to conclude that Sullivan and Williams had little experience in the area of law involved in this case. Therefore, based on the typical rate usually charged by plaintiffs' counsel, their level of experience in this area of the law, and the complexity of this case, we conclude that \$150 per hour is a reasonable rate of compensation.

C. The Trial Court's Determination of the Multiplier

[24] The City argues next that the multiplier established by the trial court was excessive. Such a determination is, once again, a matter we generally leave to the trial court's discretion, *see, e.g., Ex*

parte Edwards, 601 So.2d 82, 85 (Ala.1992), especially where, as here, the trial court has fully explained its reasoning in its order.

In our review of the trial court's order, we are mindful of the 12 factors set forth in previous cases in which we have been confronted with the question of attorney fees. *See Union Fid.*, 781 So.2d at 192 (quoting *Edelman & Combs*, 663 So.2d at 960 (summarizing 12 factors first enunciated by this Court in *Peebles v. Miley*, 439 So.2d 137, 140-41 (Ala.1983))). The factor that concerns us most is the benefit to the client received from the hours expended.

The City contends that the multiplier of 2 should be reduced because, it says, a substantial portion of counsel's hours were expended pursuing fee litigation rather than the litigation that provided the substantive benefits of the original case. The history of this case indicates that the attorney-fee litigation began immediately after the Jefferson Circuit Court approved a settlement between the parties regarding the placement of the solid-waste facility. While the law clearly allows for a fee award with respect to those hours, *see* note 3, *supra*, we do not consider this time to be vital to the true purpose of the litigation, which was to enhance the due-process rights of Birmingham residents and to prevent the placement of a solid-waste transportation facility in a particular location. Many of the factors set forth in previous decisions by this Court with respect to attorney-fee awards are intended primarily to be applied to the circumstances attendant to the nature of the representation, not attorney-fee litigation. We recognize, however, that some of the factors, such as those pertaining to questions of local compensatory customs, are proper for a court to consider in fee-litigation cases. Nevertheless, the number of hours in this case expended only on fee litigation is so great that we believe the *685 trial court abused its discretion by determining a multiplier of 2. Considering the benefits conferred on the plaintiffs, the time expended on the entire litigation (including the attorney-fee litigation), and the trial

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court's finding regarding the complexity of this case and counsel's performance, we conclude that a multiplier of 1.5 is warranted. We apply this figure, however, only to those hours expended by plaintiffs' counsel in succeeding in the primary purpose of the litigation, which was to win the enactment of a new city ordinance and to increase due-process protection for Birmingham residents. As best we can discern, the hours expended in those efforts total 2,024. In calculating this portion of counsel's fee, using a 1.5 multiplier, we conclude that plaintiffs' counsel are entitled to a fee of \$455,400 for this part of their services.^{FN5} As for their work on matters not essential to the result obtained as a part of their representation, we find that plaintiffs' counsel expended 3,765.95 hours. Because these hours did not directly pertain to the benefit obtained in the *Horn* litigation, we believe that as to those hours the application of a multiplier is unwarranted. Therefore, in calculating the fee as to these hours, we conclude that, for this portion of their work, plaintiffs' counsel are entitled to a fee of \$564,892—this figure is arrived at by multiplying the number of hours devoted to this aspect of the case (3,765.95) by the \$150 hourly rate. Thus, the total unadjusted fee to which plaintiffs' counsel are entitled equals \$1,020,290.50, the sum of the two separately determined fee awards. When we subtract the \$250,000 interim attorney fee awarded in this case, we determine that plaintiffs' counsel are fairly and reasonably entitled to a fee award of \$770,292.50.

FN5. We arrive at this amount by multiplying 2024 (the number of hours reasonably expended on litigation essential to the result obtained) by the hourly compensation rate of \$150 and then multiplying that amount by a 1.5 multiplier.

IV.

[25] The final issue presented is whether §§ 11-93-2 and 11-47-190, Ala.Code 1975, limit the City's obligation to pay an attorney fee exceeding \$300,000. After carefully reviewing these statutes,

we conclude that they do not.

We are unable to read either statute as pertaining to attorney-fee awards. The legislative history of § 11-93-2 soundly suggests that this statute and related enactments apply only to tort liability. The title to Act No. 673, Ala. Acts 1977, part of which is codified at § 11-93-2, Ala.Code 1975, reads:

"AN ACT

"To prescribe and establish monetary limits payable on claims and judgments based on tort liability and filed or obtained against governmental entities...."

See St. Paul Fire & Marine Ins. Co. v. Nowlin, 542 So.2d 1190, 1192-93 (Ala.1988). Section 11-47-190 also applies only to torts, *see Rich v. City of Mobile*, 410 So.2d 385, 387 (Ala.1982), albeit torts founded upon negligence. *Compare* § 11-47-190 with § 11-93-2, Ala.Code 1975.

An award of attorney fees is merely an award of costs; thus, we conclude that § 11-93-2 and § 11-47-190 do not apply to attorney-fee awards.

1991455-REVERSED AND JUDGMENT RENDERED.

1991558-AFFIRMED.

MOORE, C.J., and LYONS, HARWOOD, WOODALL, and STUART, JJ., concur.
 SEE, J., concurs specially.

*686 JOHNSTONE, J., concurs in part, concurs in the result in part, and dissents in part.

HOUSTON, J., concurs in part and dissents in part.
 SEE, Justice (concurring specially).

In Alabama, a party may recover attorney fees only when an award is authorized by statute, is provided for by contract, or is justified by a "special equity." *Horn v. City of Birmingham*, 718 So.2d 691, 692 (Ala.Civ.App.1997), rev'd, *Ex parte Horn*, 718 So.2d 694 (Ala.1998); see also *Blankenship v. City of Hoover*, 590 So.2d 245 (Ala.1991). A court may award an attorney fee on the basis that it is justified by a special equity "where the

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plaintiff's efforts are successful in creating a fund out of which the fees may be paid, or when the efforts of the plaintiff's attorneys render a public service or result in a benefit to the general public in addition to serving the interest of the plaintiff." *Ex parte Horn*, 718 So.2d 694, 702 (Ala.1998). These circumstances have been termed the "common-fund" and "common-benefit" exceptions. *Id.*

This Court discussed the common-fund and common-benefit exceptions in *Brown v. State*, 565 So.2d 585, 592 (Ala.1990), where a class of plaintiffs, each of whom had been convicted of a traffic offense based upon an improperly verified Uniform Traffic Ticket and Complaint ("UTTC"), FN6 sued the State of Alabama, the City of Montgomery, and others, seeking to have all convictions based upon improperly verified UTTCs expunged from their records and to have all fines and costs paid as a result of the convictions refunded. 565 So.2d at 586. Although this Court affirmed the judgment of the trial court, which denied the relief sought by the plaintiffs, this Court nevertheless held that the plaintiffs were entitled to an award of attorney fees:

FN6. This Court wrote in *Brown*:

"The defect in the procedure that we are dealing with in this case is not the stamping of the clerk's name by one authorized to do so. The defect is in putting a citizen to trial on a criminal charge, albeit a misdemeanor, when no one has sworn on oath ... that the citizen has committed an offense."

565 So.2d at 589.

"The plaintiffs have, however, made a significant contribution to the integrity of our system of jurisprudence in calling attention to a serious flaw in its administration. They have done more in that regard to advance the cause of justice than vacating the judgments of the class members would

achieve. We are informed by counsel on both sides of this case that because of this and similar litigation, the practice has been discontinued and ... now the officers issuing the UTTC's appear before a judge or magistrate and swear on oath to the charges made therein....

"....

"This litigation clearly resulted in a benefit to the general public. It is unquestionable that plaintiffs' attorneys rendered a public service by bringing an end to an improper practice. The public nature of the services rendered by these lawyers justifies an award of attorney fees."

565 So.2d at 591-92 (citation omitted).

Similarly, in *Bell v. Birmingham News Co.*, 576 So.2d 669 (Ala.Civ.App.1991), the Birmingham News Company sought to enjoin the Birmingham City Council from conducting closed sessions to elect the council's president and president pro tempore. The circuit court issued the injunction and awarded attorney fees, reasoning that the citizens of Birmingham "derive a common benefit 'by an action which enforces*687 the requirements of the statute that the business of the City Council be conducted in open and public meetings and, specifically, that the election of Council officers be conducted openly and not in secret.'" 576 So.2d at 670. The Court of Civil Appeals, relying on our decision in *Brown*, supra, determined that the record contained ample evidence supporting the circuit court's conclusion that the plaintiffs' actions "resulted in a benefit to the general public." *Id.* Therefore, it held, the circuit court's award of fees pursuant to the common-benefit exception was proper.

In this case, the plaintiffs' efforts to prevent the construction of a waste facility in their neighborhood did not produce "a benefit to the general public" like that produced in *Brown* and *Bell*. The plaintiffs in *Brown* and *Bell* conferred benefits that were state-wide and city-wide, respectively; the

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plaintiffs' efforts here to have the waste station located in another area have not conferred a similar benefit. Instead, it appears that the plaintiffs' efforts benefited only those in the plaintiffs' immediate neighborhood, to the apparent detriment of those who would use the facility and those who are close to its ultimate location.

This is the third time these parties have come before this Court. In *Ex parte Horn*, 718 So.2d 694 (Ala.1998), a majority of this Court determined that the common-benefit exception to the American rule applied in this case and that the plaintiffs were therefore entitled to an award of attorney fees paid by the City of Birmingham. I dissented, because I read *Brown* and *Bell* to require a benefit to society broader than that provided to a particular neighborhood or group.

The parties came before this Court again in *Ex parte City of Birmingham*, 757 So.2d 389 (Ala.1999). Following this Court's decision in *Ex parte Horn*, the trial court had ordered the City to pay an interim attorney-fee award of \$250,000, and the City sought mandamus relief in the form of a writ from this Court directing the trial court to vacate its order awarding an interim attorney fee. The City asked this Court to revisit its decision in *Ex parte Horn* holding the common-benefit exception applicable. This Court denied the City's petition for mandamus relief, and, in doing so, declined to reconsider its holding that the common-benefit exception applied, noting that its prior decision in *Ex parte Horn* established the law of the case. "Under the 'law of the case' doctrine, the 'findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal.' " *Heathcoat v. Potts*, 905 F.2d 367, 370 (11th Cir.1990) (quoting *Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir.1984)). Thus, the Court's conclusion that the common-benefit exception applies in this case was binding in the mandamus proceeding.

I dissented in *Ex parte Horn* because I did not

believe our prior decisions supported the conclusion that the common-benefit exception applies in this case. While I adhere to that view, the majority's decision in *Ex parte Horn* established the law of the case. For that reason alone, I concurred in *City of Birmingham*, and for that reason alone I concur today.

JOHNSTONE, Justice (concurring in part, concurring in the result in part, and dissenting in part).

I concur in Part I (the facts and the procedural history), in Part II (the rationale and holding approving the lodestar method for calculating the attorney's fees in this case), and the introductory explanation preceding Part I. I concur in the result of the introductory portion of Part III about the method of calculating an *688 attorney's fee under the lodestar method. While the explanation of the method itself is clear and helpful, I question the threat to the ore tenus rule posed by the statement in the main opinion that, "[n]evertheless, the trial court's order regarding an attorney fee must allow for meaningful review by articulating the decisions made, the reasons supporting those decisions, and the performance of the attorney-fee calculation." 810 So.2d at 682. I respectfully dissent from Part III.A. insofar as it infringes the ore tenus rule and tweaks the computation of the compensable hours.

The main opinion says, "Because of the trial court's silence with respect to these contentions, we are left to examine the record in order to fulfill our duty of meaningful review." 810 So.2d at 683. This statement, too, seems to be an incursion on the ore tenus rule. Our general rule of appellate review is that a trial court is deemed to have found all of the facts necessary to its decision, unless such fact findings would be clearly erroneous. *Ex parte Bryowsky*, 676 So.2d 1322, 1324 (Ala.1996) ("It is also well established that in the absence of specific findings of fact, appellate courts will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous"); *Lemon v. Golf Terrace Owners Ass'n*, 611 So.2d 263, 265 (Ala.1992) ("[W]here a trial

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court does not make specific findings of fact concerning an issue, this Court will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous").

I respectfully dissent from Part III.B. insofar as it tweaks the finding of the trial court on the reasonable hourly rate. The trial judge is entitled to apply common knowledge in the legal community where he presides.

I respectfully dissent from Part III.C. insofar as it reduces the multiplier from 2 to 1.5. The main opinion bases the reduction on a negative analysis of one of the 13 factors. We do not know that the trial judge has not already considered this same negative analysis as to this particular factor but has found the multiplier of 2 appropriate on the basis of one or more of the other 12 factors. The plaintiffs sought a multiplier of 4.5. *Mashburn v. National Healthcare, Inc.*, 684 F.Supp. 679 (M.D.Ala.1988), applied a multiplier greater than 3.

The trial judge's order explains his decision to apply the multiplier of 2:

"This Court believes that an enhancement multiplier is appropriate in this case because this case was extremely difficult, protracted, complex, novel, and because the Plaintiffs' attorneys during various periods of time had to devote essentially all of their time to this case. They suffered financial hardship due to their involvement in the case and used their personal and financial resources for the benefit of the citizens of Birmingham.

"Moreover, an enhancement multiplier is justified because Plaintiffs' only hope of obtaining fees in this case was premised on a special equity exception to the American Rule. In this case Plaintiffs' attorneys did not have a contract and they did not have the benefit of some fee shifting statute which would have guaranteed them a fee in the event that they were prevailing parties. Plaintiffs not only had to prevail, but they had to

prove that they provided a common benefit to all of the citizens of Birmingham. They succeeded only when the highest court in the state, the Alabama Supreme Court, made the finding that Plaintiffs' attorneys were entitled to an award under the common benefit or common fund *689 doctrine. The Plaintiffs' chances of prevailing in this case were slim indeed. In fact, this Court publicly opined in the past that Plaintiffs had about as much chance of succeeding in this litigation as a hunchbacked grandmother had of straightening up. The risk that Plaintiffs took and the tremendous efforts Plaintiffs exerted deserve a multiplier as was in *Mashburn*, 684 F.Supp. 679 (M.D.Ala.1988). In *Mashburn, supra*, the Plaintiffs were credited with a multiplier of 3.122. The Plaintiffs allege this case was much more complex and difficult than the *Mashburn* case and seek an enhancement multiplier of 4.5 which would result in claimed fees in excess of 6 1/2 millions."

Our tweaking this multiplier is another violation of the ore tenus rule.

I concur in Part IV of the main opinion. I agree with the rationale and holding "that § 11-93-2 and § 11-47-190[, Ala.Code 1975,] do not apply to attorney-fee awards." 810 So.2d at 685.

In summary, I would affirm the judgment of the trial court in case number 1991455, *City of Birmingham v. William Fred Horn*. I do concur in the main opinion insofar as it affirms the judgment of the trial court in case number 1991558, *William Fred Horn et al. v. City of Birmingham et al.* HOUSTON, Justice (concurring in part and dissenting in part).

I concur to reverse and render a judgment in case number 1991455; however, I dissent as to the amount of the attorney fees awarded.

I concur to affirm in case number 1991558.

Reviewing the briefs and the record, and purposefully not being specific, I am convinced that a

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lack of billing judgment permeates the attorneys' fee petition. I cannot sanction an award of \$150 per hour for most of the hours billed, and I cannot sanction applying a multiplier of 1.5 to an already excessive lodestar award. I am the only Justice remaining on the Court who voted with the majority in *Ex parte Horn*, 718 So.2d 694 (Ala.1998), to require the City to pay a legal fee to Horn's attorneys. In my opinion, it is an abuse of discretion to award a fee in excess of \$581,695 (which includes the \$250,000 previously paid) to Horn's attorneys.

Ala.,2001.
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C

Supreme Court, Appellate Division, Third Department, New York.

Robert C. EHLINGER, Appellant,

v.

RUBERTI, GIRVIN & FERLAZZO, P.C., et al.,
Respondents.

April 10, 2003.

Client brought legal malpractice action against law firm and attorney that represented him in divorce action against his wife, alleging that defendants' negligence caused him to lose distributive award in divorce action. The Supreme Court, Albany County, Teresi, J., granted summary judgment in favor of defendants, and plaintiff appealed. The Supreme Court, Appellate Division, Rose, J., held that: (1) attorney's decision not to pursue pendente lite relief to preserve client's distributive award in divorce action did not depart from applicable standard of care, but (2) genuine issue of material facts existed with regard to attorney's failure to file notice of pendency before client's wife encumbered property from which he was supposed to obtain distributive award, precluding summary judgment.

Affirmed as modified.

West Headnotes

[1] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

(Formerly 45k105)

To recover damages for legal malpractice, a plaintiff must demonstrate that the attorney was negligent, that the negligence was a proximate cause of the loss sustained, and that plaintiff suffered actual and ascertainable damages.

[2] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited Cases

Attorney's decision not to pursue pendente lite relief to preserve client's distributive award in divorce action did not depart from applicable standard of care, as would support client's legal malpractice claim, where attorney's affidavit set forth reasonable legal strategy and accurately opined that a pendente lite restraint could not have been obtained in absence of a threat by client's former wife to dissipate or encumber property at issue.

[3] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, cases involving. Most Cited Cases

Genuine issue of material fact existed as to whether notice of pendency was unavailable to protect client's interest in wife's property, whether attorney's failure to file such a notice was a departure from applicable standard of care, and whether such failure proximately caused client's damages, precluding summary judgment on legal malpractice claim against law firm and attorney who represented client in divorce action. McKinney's CPLR 6501.

****195** Kriss, Kriss, Brignola & Persing, Albany (Daniel P. O'Leary of counsel), for appellant.

Smith, Sovik, Kendrick & Sugnet, Syracuse (Kevin E. Hulslander of counsel), for respondents.

Before: MERCURE, J.P., CREW III, PETERS, ROSE and LAHTINEN, JJ.

*925 ROSE, J.

Appeal from an order of the Supreme Court (Teresi, J.), entered September 11, 2001 in Albany County, which granted defendants' motion for summary judgment dismissing the complaint.

In October 1994, plaintiff retained defendants to represent him in a divorce action against his wife. One of the disputed issues in the action was ownership of certain real property titled solely in the name of plaintiff's wife and known as the Ridgefield **196 Drive property. Plaintiff claimed an equitable interest in this property based upon his having paid off its mortgage in reliance on his wife's promise to name him a co-owner on the deed. Well after commencement of the divorce action, and unknown to plaintiff, his wife remortgaged the Ridgefield Drive property. In September 1997, Supreme Court (Maney, J.) granted plaintiff a divorce and distributed the parties' property (*Ehlinger v. Ehlinger*, 174 Misc.2d 344, 664 N.Y.S.2d 401). Based on its finding that plaintiff was entitled to a constructive trust upon the Ridgefield Drive property, the court ordered his wife to either repay him \$161,595.06, the net amount he invested in the property, or convey her interest in the property to him. However, his wife's actions in mortgaging the property before the divorce, filing for bankruptcy immediately afterward and precipitating a foreclosure precluded plaintiff from recovering the distributive award.

In September 1999, plaintiff commenced this legal malpractice action alleging that the failure of his counsel, defendant Elaine M. Pers, to seek pendente lite relief in the divorce action or file a notice of pendency as to the Ridgefield Drive property constituted negligence and caused him to lose the 1997 distributive award. Defendants then moved for summary judgment dismissing the complaint based on the affidavits of their counsel and Pers describing her representation of plaintiff as competent and opining that neither pendente lite relief nor a notice of pendency based upon a claim of a constructive trust would have been a legally viable

remedy before the divorce judgment was issued. Finding that the lack of a demonstrable threat to encumber the property would have precluded a pendente lite restraint against plaintiff's wife and that it was "unlikely" that plaintiff would have been entitled to the imposition of a constructive trust, Supreme Court granted defendants' motion and dismissed the complaint, prompting this appeal by plaintiff.

[1] *926 "To recover damages for legal malpractice, a plaintiff must demonstrate that the attorney was negligent, that the negligence was a proximate cause of the loss sustained and that plaintiff suffered actual and ascertainable damages" (*Busino v. Meachem*, 270 A.D.2d 606, 609, 704 N.Y.S.2d 690 [citations omitted]; see *Arnav Indus. Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner*, 96 N.Y.2d 300, 303-304, 727 N.Y.S.2d 688, 751 N.E.2d 936). For defendants to succeed on their motion for summary judgment here, they were required to present evidence in admissible form establishing that plaintiff is unable to prove at least one of these elements (see *Suydam v. O'Neill*, 276 A.D.2d 549, 714 N.Y.S.2d 686; *Shopsin v. Siben & Siben*, 268 A.D.2d 578, 702 N.Y.S.2d 610).

[2] Upon our review of the record, we agree that defendants' submissions were sufficient to show that Pers's decision not to pursue pendente lite relief did not depart from the applicable standard of care (see *Beltrone v. General Schuyler & Co.*, 223 A.D.2d 938, 939, 636 N.Y.S.2d 917). In this regard, Pers's affidavit is not conclusory (*cf. Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 259 A.D.2d 282, 284, 686 N.Y.S.2d 404), but rather sets forth a reasonable legal strategy and accurately opines that a pendente lite restraint could not have been obtained in the absence of a threat by plaintiff's wife to dissipate or encumber the property (see *Strong v. Strong*, 142 A.D.2d 810, 812, 530 N.Y.S.2d 693; *cf. Maillard v. Maillard*, 211 A.D.2d 963, 964, 621 N.Y.S.2d 715). Plaintiff's responding papers fail to raise a question of fact as to

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pendente lite relief because he submits no expert affidavit describing the applicable standard of care or **197 opining that a pendente lite restraint could have been obtained (*see e.g. Zeller v. Capps*, 294 A.D.2d 683, 684, 741 N.Y.S.2d 343).

[3] We reach a different conclusion, however, with regard to Pers's failure to file a notice of pendency before plaintiff's wife encumbered the Ridgefield Drive property. Defendants' moving papers are insufficient to show that this failure was not malpractice or the proximate cause of plaintiff's damages. Pers's affidavit simply does not address the absence of a notice of pendency. While defendants' counsel avers that "[i]t is * * * well settled that plaintiff had no right to obtain a lis pendens when he clearly had no legal interest in the property," this opinion is conclusory and patently inaccurate because there is no dispute that plaintiff claimed an equitable interest in the Ridgefield Drive property and sought the imposition of a constructive trust. Since actions seeking to impose a constructive trust on real property "obviously affect[] title to real property" (*Grossfeld v. Beck*, 42 A.D.2d 844, 844, 346 N.Y.S.2d 650; *see Peterson v. Kelly*, 173 A.D.2d 688, 689, 570 N.Y.S.2d 592), the filing of a notice of *927 pendency would have been an available and appropriate prejudgment safeguard in the divorce action (*see CPLR 6501; 5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 318, 486 N.Y.S.2d 877, 476 N.E.2d 276; *Letizia v. Flaherty*, 207 A.D.2d 567, 569, 615 N.Y.S.2d 487, *appeal dismissed* 84 N.Y.2d 922, 621 N.Y.S.2d 520, 645 N.E.2d 1220). Moreover, since the court in the divorce action found that the guideline factors for a constructive trust had been established (*Ehlinger v. Ehlinger, supra* at 349, 664 N.Y.S.2d 401; *see e.g. Gaglio v. Molnar-Gaglio*, 300 A.D.2d 934, 938, 753 N.Y.S.2d 185), Supreme Court's view that such a finding was "unlikely" is plainly contradicted by the record and controlling precedent (*see Lester v. Zimmer*, 147 A.D.2d 340, 342, 542 N.Y.S.2d 855 [constructive trust is not confined to reconveyance situations]). Thus, defendants' moving papers are inadequate to establish that a notice of pendency

was unavailable to protect plaintiff's interest, that the failure to file such a notice did not constitute a departure from the applicable standard of care or that such failure did not proximately cause plaintiff's damages. As a result, the burden to prove that this failure departed from the standard of care or proximately caused plaintiff's damages was not shifted to plaintiff.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as granted defendants' motion for summary judgment dismissing the claim based on defendants' failure to file a notice of pendency; motion denied to that extent; and, as so modified, affirmed.

MERCURE, J.P., CREW III, PETERS and LAHTINEN, JJ., concur.

N.Y.A.D. 3 Dept., 2003.

Ehlinger v. Ruberti, Girvin & Ferlazzo, P.C.
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Slip Copy, 2009 WL 790345 (Ohio App. 8 Dist.), 2009 -Ohio- 1368
 (Cite as: 2009 WL 790345 (Ohio App. 8 Dist.))

H

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Eighth District, Cuyahoga County.
 Lu-Jean FENG, Plaintiff-Appellee

v.

KELLEY & FERRARO, et al., Defendants-Appel-
 lants.

No. 91738.

Decided March 26, 2009.

Background: Former client brought legal malprac-
 tice action against attorneys who had represented
 her in underlying divorce action. After a jury trial,
 the Court of Common Pleas, Cuyahoga County, No.
 CV-580568, denied attorneys' motion for a directed
 verdict and entered judgment in favor of client. At-
 torneys appealed.

Holding: The Court of Appeals, Mary Eileen Kil-
 bane, P.J., held that attorneys' negligence was the
 proximate cause of client's settling divorce action
 on unfavorable terms.

Affirmed.

West Headnotes

[1] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of Litigation. Most Cited
 Cases

Attorneys' negligent representation, pressuring
 client to settle her divorce case by representing to
 client that opposing counsel had threatened to use
 an allegedly misleading loan document that client
 had signed to obtain a criminal indictment against

client, but without informing client that such threats
 were illegal, was the proximate cause, as an ele-
 ment of client's legal malpractice claim against at-
 torneys, of client's settling divorce action on unfa-
 vorable terms; if client had not settled, she would
 have been virtually guaranteed a more favorable
 outcome under "equal unless equal is not equitable"
 standard governing property distributions in di-
 vorces. R.C. § 3105.171.

[2] Estoppel 156 ⇌ 91(3)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k89 Acquiescence

156k91 Assent to or Participation in
 Judicial Proceedings

156k91(3) k. Compromises. Most

Cited Cases

Client could not be equitably estopped from
 bringing claim of legal malpractice against attor-
 neys who had negligently pressured her into settling
 her divorce action, on the basis of client's affirma-
 tions under oath that she had agreed to her divorce
 settlement, since client was acting on attorneys' ad-
 vice in agreeing to settlement; client's affirmations
 did not show that attorneys' advice met the standard
 of care.

[3] Evidence 157 ⇌ 34

157 Evidence

157I Judicial Notice

157k34 k. Laws of United States. Most Cited
 Cases

Trial court could take judicial notice of the ex-
 istence of a mens rea requirement found in federal
 fraud statute, in legal malpractice action in which
 an issue was client's knowledge of alleged misstate-
 ments made in loan documents; accuracy of the
 mens rea requirement was readily discernable from
 the text of the statute itself. 18 U.S.C.A. § 1001;
 Rules of Evid., Rule 201(B).

Slip Copy, 2009 WL 790345 (Ohio App. 8 Dist.), 2009 -Ohio- 1368
 (Cite as: 2009 WL 790345 (Ohio App. 8 Dist.))

Civil Appeal from the Cuyahoga County Court of Common Pleas, Case No. CV-580568. James O'Connor, Christopher R. Kakish, Nicholas D. Satullo, Reminger & Reminger, Cleveland, OH, for appellants.

Michael J. Maillis, Paul G. Perantinides, Perantinides & Nolan Co., L.P.A., Akron, OH, for appellee.

Before: KILBANE, P.J., McMONAGLE, J., and JONES, J.

MARY EILEEN KILBANE, P.J.

*1 N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

{¶ 1} Kelley & Ferraro (K & F) appeals from a jury verdict in favor of appellee, Lu-Jean Feng, M.D. (Feng), who sued the firm for legal malpractice. For the following reasons, we affirm.

{¶ 2} On December 29, 2005, Feng sued K & F in common pleas court alleging that it breached the standard of care by failing to properly handle her divorce case. She alleged that K & F did not prepare adequately for the trial. She further alleged that K & F's attorneys exerted undue influence over her to settle the divorce when they advised her that she was subject to criminal and medical licensure penalties related to signing her name on a loan application that allegedly overvalued her clinic. Feng claimed that if K & F had not coerced her into a settlement based upon specious threats of criminal indictments and licensure problems, she would

have achieved a better resolution of her divorce at trial.

{¶ 3} On May 28, 2008, the malpractice case proceeded to trial. At the close of plaintiff's case, K & F moved for directed verdict, which was denied. Prior to the conclusion of trial, K & F sought a jury instruction on equitable estoppel based upon Feng's prior testimony that she understood and agreed to the terms of the divorce settlement. Because of this testimony, K & F argued that Feng was estopped from claiming that K & F committed malpractice against her. The trial court refused to instruct the jury on this issue.

{¶ 4} On June 3, 2008, the jury returned a verdict in favor of Feng, awarding \$832,929.50 in damages.

{¶ 5} On June 17, 2008, K & F filed a motion for new trial and a motion for judgment notwithstanding the verdict, both of which were denied. This appeal followed.

{¶ 6} ASSIGNMENT OF ERROR ONE

"The Trial Court erred in denying Defendant-Appellant's motions for directed verdict and for judgment notwithstanding the verdict because Plaintiff-Appellee failed to present evidence that the alleged legal malpractice proximately caused her damages."

{¶ 7} Motions for directed verdict and motions for judgment notwithstanding the verdict (JNOV) are subject to de novo review. *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 522 N.E.2d 511. In reviewing such motions, we are required to test whether the evidence, when construed most strongly in favor of appellees, is legally sufficient to sustain the verdict. *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 893 N.E.2d 173, 2008-Ohio-3833. Where, as here, a plaintiff claims that she would have been better off if the underlying matter had been tried rather than settled, the standard for prov-

ing causation requires more than just some evidence of the merits of the underlying lawsuit. *Id.* at 213, 893 N.E.2d 173. Thus, in the case sub judice, Feng had the burden of proving that but for K & F's conduct, she would have received a more favorable outcome in the underlying matter. *Id.*

*2 [1] {¶ 8} In both the directed verdict and JNOV motions, and indeed in its brief, appellant argues that Feng has failed to submit sufficient evidence of proximate cause to either allow the jury to decide the case and/or to support its verdict. When viewing the evidence most strongly in favor of Feng, as the law requires, we disagree.

{¶ 9} The crux of Feng's malpractice claim stemmed from advice she received from K & F on the second day of her divorce trial that an allegedly false loan document that she signed subjected her to federal prosecution and/or forfeiture of her medical license. Specifically, Feng claimed that K & F's attorneys pressured her into settling the case on the second day of trial, rather than testify about the specifics of the loan document. As a result of K & F's malpractice, Feng claimed she received an inequitable distribution of assets. A jury agreed with her claims.

{¶ 10} While there is considerable debate about the level of Feng's knowledge surrounding the loan document, what is undisputed is that K & F, through its attorneys,^{FN1} represented to Feng that her opposing counsel threatened to use the loan document to get her indicted. No one from K & F told Feng that such threats are illegal and unethical—that is, that no attorney may use the threat of criminal prosecution to effect a result in a civil case.^{FN2} See *Cuyahoga Cty. Bar Assn. v. Wise*, 108 Ohio St.3d 164, 842 N.E.2d 35, 2006-Ohio-550. This specious threat was the fulcrum that K & F used to settle Feng's divorce case.

FN1. One of whom represented to Feng that he was a white-collar criminal defense lawyer.

FN2. Ohio Professional Conduct Rule 1.2(e).

{¶ 11} The quantum of evidence necessary to prove causation in a legal malpractice case is relatively straightforward. Feng was required to prove what amounts to the "case within a case," whereby all issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens the plaintiff would have borne in the original trial. *Environmental Network*, supra. Taking on these roles, Feng's burden at trial was to prove that the outcome of her divorce would have been different if she had tried the case. *Id.* In order to prove causation and damages, Feng was required to prove that the K & F's actions resulted in settling the case for less than she would have received at trial. *Id.* at syllabus.

{¶ 12} K & F argues that this case is factually similar to *Environmental Network* and should be decided identically. However, this case is factually distinguishable from *Environmental Network* for two reasons. First, the settlement in this case was decidedly unfavorable to Feng, whereas the settlement in *Environmental Network* was favorable. *Id.* at 214-216, 893 N.E.2d 173. Second, the appellees in *Environmental Network*, in adhering to the standard set forth in *Vahila v. Hall*, 77 Ohio St.3d 421, 674 N.E.2d 1164, 1997-Ohio259, failed to show on appeal that the outcome would have been different if they had tried the case. Such is not the case here.

*3 {¶ 13} At trial, Feng's counsel elicited evidence that K & F failed to meet the standard in several ways. These include firing the court-appointed asset appraiser and failing to hire a new appraiser to value the business assets of Feng's husband. This firing resulted not only in the failure to properly evaluate the marital assets, but also in the former appraiser obtaining a judgment against Feng.

{¶ 14} According to Feng, one of K & F's attorneys said they would "take care of" representing her in that matter. The record does not reflect that

they ever did so.

{¶ 15} According to the record, K & F's failure to hire an expert to value the business of Feng's husband resulted in its considerable worth being left out of the evaluation of marital assets. What is more, the marital assets that were valued by K & F in the case were valued as of 2001, not 2004, because there were three years' worth of valuations missing from the assets in K & F's files. Also, the final settlement was inconsistent with R.C. 3105.171-Ohio's "equal unless equal is not equitable" standard.^{FN3}

FN3. R.C. 3105.171(C)(1) states: "Except as provided in this division or division (E) of this section, the division of marital property shall be equal. If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable."

{¶ 16} At trial, Feng's counsel proved that there was a discrepancy of approximately \$815,000 between what Feng received through settlement and what she would have received at trial, based upon the total accounting of all marital assets and R.C. 3105.171. The evidence in the record, relied upon by the jury in reaching its verdict, is that Feng would have received a better outcome had she tried her divorce case. The jury awarded her \$832,929.50.

{¶ 17} In its appeal, K & F argues that because she failed to disclose the existence of the loan document to them, Feng is unable to prove that "but for" K & F's negligent conduct, she would have received a better result in her divorce. They argue that she never disclosed the documents, even when they asked her to. They further argue that they were surprised on the second day of the divorce trial when opposing counsel produced the loan application with Feng's signature from Charter One Bank.

{¶ 18} But K & F's argument assumes that it should not have known of the documents before trial, and that the advice it dispensed to Feng with respect to the loan document, as well as the nature in which they dispensed that advice, met the standard of care. We hold it did not. K & F received notice that Feng's Charter One accounts were being subpoenaed one month before trial. Feng's attorneys elicited expert testimony that the failure to investigate the Charter One subpoena breached the standard of care. K & F did not rebut this at trial.

{¶ 19} Although K & F argues that Feng was unwilling to try the case because of this document, it fails to acknowledge that the source of Feng's unwillingness emanated from their own advice. In addition to ignoring its other failures in trial preparation and its failure to accurately value the marital estate, K & F's argument also ignores its failure to (a) discern the loan document's existence until day two of the trial, when, in fact, K & F had over one month to find this document, and (b) advise Feng candidly about the actual consequences she faced in light of the document, which were much more minimal than K & F led her to believe.^{FN4}

FN4. In fact, Feng's loan (the repayment of which was never an issue in either the divorce or malpractice case) is a matter between her and the bank. She has never been subjected to any negative civil or criminal penalties for negotiating it; much less prosecution and/or loss of her medical license because of it.

*4 {¶ 20} Feng testified that she told her lawyers she never knowingly attempted to defraud the bank by signing the loan papers. Their response, according to Feng, was to state that all opposing counsel (or anyone) had to do was "walk across the street" and get her indicted. Further, K & F represented that opposing counsel in her divorce action possessed just the type of unsavory character to do so.

{¶ 21} True or not, this ignores the fact that

such a threat is illegal in the first instance, and cannot be used to gain advantage in a civil case, much less settle it.^{FN5} Giving legal advice based upon such specious threats and using them to cajole a client into settling a divorce case upon harshly inequitable terms violates the standard of care for a reasonably prudent and competent attorney in the same or similar circumstances.

FN5. Ohio Prof. Cond. Rule 1.2(e).

{¶ 22} K & F's failure to prepare for trial and consequent use of a document it should have known about before the second day of trial so as to pressure Feng into settling the case constituted malpractice. But for K & F's advising Feng to settle the divorce case on the basis of the loan document, she would have received a more favorable outcome. Ohio's "equal unless not equitable" law virtually guarantees she would have received a better outcome if she had tried the case.

{¶ 23} Based upon the above evidence elicited at trial, the trial court did not err in denying K & F's motions for directed verdict and judgment notwithstanding the verdict. When viewed in a light most favorable to Feng, these facts prove that a jury could reasonably have found that K & F committed malpractice in representing Feng in her divorce.

{¶ 24} Appellant's first assignment of error is overruled.

{¶ 25} ASSIGNMENT OF ERROR TWO

"The Trial Court committed prejudicial and reversible error when it failed to instruct the jury on equitable estoppel and later, when it denied Kelley & Ferraro's Motion for New Trial."

{¶ 26} It is well established that trial courts will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 348 N.E.2d 135. Further, "[i]n reviewing a record to ascertain the presence of sufficient evidence to support the giving of an instruc-

tion, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 57, 275 N.E.2d 340.

{¶ 27} The record before this court is devoid of evidence upon which reasonable minds might reach the conclusion sought by appellant's equitable estoppel instruction request.

[2] {¶ 28} In its second assignment of error, K & F argues in essence that Feng's subsequent sworn representations that she assented to the settlement somehow show that the trial judge erred in failing to instruct the jury on equitable estoppel and denying its motion for new trial. K & F argues that because Feng was unwilling to accept any degree of risk of criminal and licensure penalties as a result of the loan document she is estopped from claiming that K & F committed malpractice. K & F cites to examples in the record below where Feng affirmed that she agreed to her divorce settlement under oath.

*5 {¶ 29} As stated above, this argument assumes that Feng acted in a vacuum; it ignores the provenance of the advice K & F gave to her in the first place. Feng's assent to the terms of her divorce decree only underscores the fact that she followed her attorneys' advice. It does not mean that advice met the standard of care.

{¶ 30} Based upon the foregoing facts, the trial court committed no error in refusing to instruct the jury on equitable estoppel.

{¶ 31} With respect to the denial of K & F's motion for new trial, aside from its mention in the assignment of error, K & F fails to argue this point anywhere in its brief. We therefore decline to address it. See App.R. 12(A)(2). "The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the

brief, as required under App.R. 16(A)." *Id.*

ASSIGNMENT OF ERROR THREE

"The trial court committed prejudicial and reversible error when it took judicial notice of the mens rea required under 18 USCA § 1001, et seq."

{¶ 32} A court may take judicial notice of a fact not subject to reasonable dispute that is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid.R. 201(B). The court may do so at any time during the proceeding. Evid.R. 201(F). Pursuant to Evid.R. 201(C), it is clearly within the trial court's discretion to take judicial notice. *Moreland Hills v. Gazdak* (1988), 49 Ohio App.3d 22, 550 N.E.2d 203.

{¶ 33} In this case, the trial court, during the cross-examination of one of K & F's witnesses, took judicial notice that there is a mens rea aspect to any crime. According to K & F, the trial court's taking judicial notice of this fact wrongly implied to the jury that Feng was required to act with specific intent to defraud her bank in order to be subject to criminal penalties when she signed her loan documents. Such an argument is without merit.

{¶ 34} K & F argues that it was prejudiced by the court's judicial notice that mens rea is an aspect of any crime, because the court denied their motion for directed verdict. K & F argues that in denying its motion, the court specifically relied on the mens rea requirement found in 18 USCA § 1001, et seq. Nowhere is this found in the record.

{¶ 35} The trial court, outside of the presence of the jury, denied the motion for directed verdict, and in doing so indicated during its colloquy with counsel that one of K & F's witnesses, Mr. Wilson, testified there was a negligence aspect to the statute. The court merely stated that it disagreed with that reading. Since no jurors were present at this time, the court could not have implied anything about the intent aspect of the statute to the jury.

What is more, the judicial notice K & F complains of took place during the cross-examination of Mr. Frost, where the court simply stated "[t]hat there is a requirement * * * called mens rea, and there's an intent aspect to any crime in the State of Ohio, and that's applicable to both statewide and federal." Nothing in this statement implies any requirement at all-other than its existence-to the jury.

*6 {¶ 36} Further, the court cured any potential prejudice by properly instructing the jury that it was not to infer anything from the court's conduct of the trial, or its rulings, stating: "[i]f I said or did anything during the course of this trial that gives you any indication of my thought process, please disregard it. Don't let that factor into your decision of this case."

{¶ 37} Because the mens rea requirement of any crime is a fact that is readily discernable by resort to sources whose accuracy cannot reasonably be questioned (in this case the U.S.Code), the court did not abuse its discretion in taking judicial notice of the mens rea requirement of 18 USCA § 1001, et seq. The accuracy of the mens rea requirement is readily discernable from the text of the statute itself, and taking such notice is strictly in accord with Evid.R. 201(B). Because of this, the trial court did not abuse its discretion in taking such notice.

{¶ 38} Appellant's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Slip Copy, 2009 WL 790345 (Ohio App. 8 Dist.), 2009 -Ohio- 1368
(Cite as: 2009 WL 790345 (Ohio App. 8 Dist.))

CHRISTINE T. McMONAGLE and LARRY A.
JONES, JJ., concur.

Ohio App. 8 Dist.,2009.
Feng v. Kelley & Ferraro
Slip Copy, 2009 WL 790345 (Ohio App. 8 Dist.),
2009 -Ohio- 1368

END OF DOCUMENT

P

Supreme Court of Connecticut.

Elyn K. GRAYSON

v.

WOFSEY, ROSEN, KWESKIN AND KURI-
ANSKY et al.

No. 14889.

Argued May 5, 1994.

Decided Aug. 23, 1994.

Client filed malpractice action against attorneys that represented her in marriage dissolution proceeding for alleged negligence of attorneys in advising settlement based on inadequate financial information regarding husband's estate. The Superior Court, Judicial District of Fairfield, Ballen, J., entered award of \$1,500,000 in favor of client. Attorneys appealed. The Supreme Court, Palmer, J., held that: (1) client who agreed to settlement dissolution action in reasonable reliance on advice of her attorneys was entitled to bring malpractice claim against attorneys; (2) finding that attorneys were negligent in representation of client was supported by sufficient evidence; (3) finding that attorneys' negligence was proximate cause of client's economic damage was supported by sufficient evidence; (4) verdict of \$1,500,000 was not excessive; (5) testimony of client that attorneys failed to seek order of alimony pendente lite despite client's request that they do so was relevant to claim of negligence; (6) trial court properly required attorney to testify on cross-examination as to whether he believed that judge presiding over marital dissolution proceeding held view that proper role of a client was in home; (7) testimony of expert as to attorneys' failure to bring to attention of marital dissolution court certain financial information concerning husband's business interests prior to settlement was relevant; and (8) trial court's admission of prior judicial opinions in marital dissolution proceeding was not abuse of discretion.

Affirmed.

West Headnotes

[1] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited

Cases

Client, who agreed to settlement of marriage dissolution action in reasonable reliance on advice of her attorneys, was entitled to bring malpractice claim against attorneys for negligence; fact that settlement had been approved by trial court did not insulate attorneys from malpractice action.

[2] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited

Cases

When it has been established that attorney, in advising client concerning settlement of action, has failed to exercise degree of skill and learning commonly applied under all circumstances in community by average, prudent, reputable member of legal profession and that conduct has resulted in injury, loss, or damage to client, client is entitled to recovery against attorney.

[3] Appeal and Error 30 ⇌ 863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General30k862 Extent of Review Dependent on
Nature of Decision Appealed from30k863 k. In General. Most Cited
Cases

Supreme Court undertakes only limited appellate review of trial court's denial of motion for judgment notwithstanding the verdict; greatest de-

ference is accorded trial court's superior opportunity to view trial in its entirety.

[4] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

Finding that attorneys were negligent in representation of client during dissolution proceedings was supported by evidence that attorneys failed to discover value of husband's business interests and related assets, which resulted in attorneys' advice that client accept inadequate settlement offer.

[5] Evidence 157 ⇌ 571(9)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(9) k. Cause and Effect.

Most Cited Cases

Finding that attorneys' negligent representation of client during dissolution proceedings was proximate cause of client's economic damage was supported by expert testimony that competent counsel would not have advised client to enter into settlement agreement and that client would have received significantly greater distribution of marital estate had she been properly represented.

[6] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(4) k. Damages and Costs. Most

Cited Cases

Verdict of \$1,500,000 awarded to client in malpractice action brought against attorneys who rep-

resented client in marital dissolution proceeding was not excessive; value of marital estate was approximately \$2,400,000, while settlement entered into upon advice of attorneys was approximately \$450,000.

[7] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

In attorney malpractice action, testimony of client that attorneys failed to seek order of alimony pendente lite in dissolution proceeding despite client's request that they do so was relevant to claim of negligence in failing to discover value of marital assets; testimony bore relevance to relationship between client and attorneys, in particular to manner in which attorneys had responded to client's requests.

[8] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

In attorney malpractice action, trial court properly required attorney to testify on cross-examination as to whether he believed that judge presiding over marital dissolution proceeding in which attorney represented client held view that proper role of a client was in home; attorney's beliefs concerning judge's views toward women were relevant to issue of how attorneys intended to address any perceived bias of judge.

[9] Evidence 157 ⇌ 512

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k512 k. Due Care and Proper Conduct in General. Most Cited Cases

In attorney malpractice action, testimony of expert as to wife's attorneys' failure to bring to attention of marital dissolution court certain financial information concerning husband's business interests prior to settlement was relevant to issue of alleged negligence of attorneys in advising settlement based on insufficient information regarding value of marital estate.

[10] Evidence 157 ⇌ 571(3)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(3) k. Due Care and Proper Conduct. Most Cited Cases

In malpractice cases, expert's testimony must be evaluated in terms of its helpfulness to trier of fact on specific issues of standard of care and alleged breach of that standard; once threshold question of usefulness to jury has been satisfied, any other questions regarding expert's qualifications properly go to weight, and not to admissibility, of testimony.

[11] Evidence 157 ⇌ 332(1)

157 Evidence

157X Documentary Evidence

157X(A) Public or Official Acts, Proceedings, Records, and Certificates

157k332 Judicial Acts and Records

157k332(1) k. In General. Most Cited Cases

In attorney malpractice action brought by client for alleged negligence of attorneys in advising settlement of marital dissolution proceeding, trial court's admission of prior judicial opinions from marital dissolution proceeding was not abuse of discretion, where attorney's counsel referred to opinions in opening statement, using opinions to

strongly suggest that each decision constituted ratification of settlement agreement.

[12] Evidence 157 ⇌ 146

157 Evidence

157IV Admissibility in General

157IV(D) Materiality

157k146 k. Tendency to Mislead or Confuse. Most Cited Cases

Although relevant, evidence may be excluded by trial court if court determines that prejudicial effect of evidence outweighs its probative value.

[13] Appeal and Error 30 ⇌ 216(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k214 Instructions

30k216 Requests and Failure to Give Instructions

30k216(1) k. In General. Most Cited Cases

Appeal and Error 30 ⇌ 263(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(C) Exceptions

30k258 Review of Proceedings at Trial

30k263 Instructions, and Failure or Refusal to Give Instructions

30k263(1) k. In General. Most Cited Cases

Supreme Court would not consider challenge to trial court's instructions to jury, absent request that trial court refer to any specific facts in jury charge and failure to except to trial court's instruction on that ground. Practice Book 1978, § 315.

[14] Appeal and Error 30 ⇌ 215(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k214 Instructions

30k215 Objections in General

30k215(1) k. Necessity of Objection in General. Most Cited Cases

Supreme Court would decline to review unpreserved jury instruction claim for plain error; review under plain error doctrine was reserved for truly extraordinary situations. Practice Book 1978, § 4185.

****197 *169** William F. Gallagher, with whom, on the brief, were Elizabeth A. Gallagher, New Haven, and Robert W. Lotty, Fairfield, for appellants (defendants).

Sue L. Wise, New Haven, with whom was Edward N. Lerner, Fairfield, for appellee (plaintiff).

Before ***168** PETERS, C.J., and CALLAHAN, BORDEN, PALMER and O'CONNELL, JJ.

PALMER, Associate Justice.

The principal issue raised by this appeal is whether a client who has agreed to the settlement of a marital dissolution action on the advice of his or her attorney may then recover against the attorney for the negligent handling of her case. The plaintiff, Elyn K. Grayson, brought this action against the defendants, Edward M. Kweskin, Emanuel Margolis, and their law firm, Wofsey, Rosen, Kweskin and Kuriansky, alleging that they had committed legal malpractice in the preparation and settlement of her dissolution action.^{FN1}

***170** After trial, a jury returned a verdict in the amount of \$1,500,000 against the defendants. The trial court, *Ballen, J.*, rendered judgment for the plaintiff in accordance with the jury verdict, and this appeal followed.^{FN2}

The defendants claim that: (1) the plaintiff failed to establish, as a matter of law, that she was entitled to a recovery against them; (2) the evidence was insufficient to support the jury's verdict; (3) the trial

court's rulings on certain evidentiary issues constituted an abuse of discretion; and (4) the trial court's instructions to the jury were improper. We affirm the judgment of the trial court.

FN1. The plaintiff also brought suit against Robert Gervasoni, an accountant who assisted the defendants in the preparation of the marital dissolution action, and Gervasoni's accounting firm, Edward Isaacs Co. (Isaacs). The jury returned a verdict in favor of Gervasoni and Isaacs. Because the plaintiff has not appealed from the judgment rendered for Gervasoni and Isaacs, they are not parties to this appeal.

FN2. The defendants appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 4023 and General Statutes § 51-199(c).

The relevant facts and procedural history are as follows. In 1981, Arthur I. Grayson (husband) brought an action against the plaintiff for the dissolution of their marriage. On May 28, 1981, the third day of the dissolution trial before *Hon. William L. Tierney, Jr.*, state trial referee, the plaintiff, on the advice of the defendants, agreed to a settlement of the case that had been negotiated by the defendants and counsel for her husband. The agreement provided, inter alia, that the plaintiff would receive lump sum alimony of \$150,000 and periodic alimony of \$12,000 per year. Judge Tierney found that the agreement was fair and reasonable and, accordingly, rendered a judgment of dissolution incorporating the agreement.^{FN3}

FN3. "The stipulated judgment ordered the [husband] to pay to the [plaintiff] lump sum alimony of \$150,000, payable in installments of \$50,000 by June 28, 1981, \$50,000 by August 28, 1981 ... and \$50,000 by February 28, 1982 ... together with nonmodifiable periodic alimony of \$12,000 per year. The [husband] was also

ordered to pay \$15,000 as part of the [plaintiff's] attorney's fees and to maintain a \$50,000 life insurance policy on his life owned by the [plaintiff] and payable to her. The [plaintiff] was ordered to transfer her one half interest in a business building at 636 Kings Highway, Fairfield, to the [husband], the equity in which he claimed was \$50,000. The [plaintiff] was required to relinquish her claim in the amount of \$27,000 to a certificate of deposit managed by the [husband]. The [plaintiff] was awarded full ownership of Daniel Oil [Company], which the [husband's] affidavit claimed produced an income of \$18,000 per year. Works of art valued by the [husband] at \$64,700 were ordered divided between the parties. Otherwise, each was to retain substantial other assets shown on their affidavits. The principal asset shown by the [husband's] affidavit [was] the valuation, after taxes due on liquidation, of his pension plan in Grayson Associates, Inc., at \$340,152 and the principal asset shown by the [plaintiff's] affidavit [was] the former family residence at 15 Berkeley Road, Westport, in which the claimed equity was \$167,000." *Grayson v. Grayson*, 4 Conn.App. 275, 277-78, 494 A.2d 576 (1985).

****198 *171** On September 23, 1981, the plaintiff moved to open the judgment on the ground that the settlement agreement had been based on a fraudulent affidavit submitted to the court and to the plaintiff by her husband.^{FN4} The trial court, *Jacobson, J.*,^{FN5} denied the plaintiff's motion to open the judgment and the plaintiff appealed to the Appellate Court, which affirmed the judgment. *Grayson v. Grayson*, 4 Conn.App. 275, 494 A.2d 576 (1985), appeal dismissed, 202 Conn. 221, 520 A.2d 225 (1987).

FN4. The pertinent portions of that affidavit, and other facts relevant to the marital

dissolution action, are set forth in *Grayson v. Grayson*, supra, 4 Conn.App. 275, 494 A.2d 576.

FN5. The plaintiff's motion to open the marital dissolution judgment was heard and decided by Judge Jacobson. Unless otherwise indicated, references in this opinion to the trial court are to Judge Ballen.

The plaintiff also brought this legal malpractice action against the defendants. Her complaint alleged that she had agreed to the settlement of the dissolution action on the advice of the defendants who, she claimed, had failed properly to prepare her case. The plaintiff further alleged that as a result of the defendants' negligence, she had agreed to a settlement that "was not reflective of her legal entitlement" and that she had "thereby sustained an actual economic loss."

At trial, the plaintiff introduced evidence concerning her thirty year marriage, its breakdown due to her husband's affair with another woman, and the couple's ***172** financial circumstances. After a detailed recounting of the history of the divorce litigation, the plaintiff presented the testimony of two expert witnesses, Thomas Hupp, a certified public accountant, and Donald Cantor, an attorney who specialized in the practice of family law.

Hupp testified that the defendants had failed properly to value the marital estate and, in particular, the husband's various business interests. Cantor gave his opinion that the defendants' representation of the plaintiff fell below the standard of care required of attorneys in marital dissolution cases. Specifically, Cantor testified that: (1) the defendants had not conducted an adequate investigation and evaluation of the husband's business interests and assets; (2) they had not properly prepared for trial; (3) as a result of the defendants' negligence, the plaintiff had agreed to a distribution of the marital estate and an alimony award that were not fair and equitable under the law; see General Statutes

§§ 46b-81(c)^{FN6} and 46b-82;^{FN7} and (4) the **199 plaintiff *173 would have received a greater distribution of the marital estate and additional alimony had she been competently represented. The trial court, *Ballen, J.*, denied the defendants' motion for a directed verdict at the close of the plaintiff's case.

FN6. General Statutes § 46b-81(c) provides in relevant part: "In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party ... shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

FN7. General Statutes § 46b-82 provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall hear the witnesses, if any, of each party ... shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment."

In their case in defense, the defendants testified concerning their handling of the plaintiff's case, and

they also presented the expert testimony of two attorneys, James Stapleton and James Greenfield. These experts expressed the opinion that the defendants' representation of the plaintiff comported with the standard of care required of attorneys conducting dissolution litigation.

The jury returned a verdict for the plaintiff in the amount of \$1,500,000. The defendants thereafter filed motions to set aside the verdict and for judgment notwithstanding the verdict. The trial court denied those motions and rendered judgment in accordance with the verdict. Additional facts are set forth as relevant.

I

[1] The defendants first claim that the trial court improperly denied their motions for a directed verdict and for judgment notwithstanding the verdict on the ground that the plaintiff was barred from recovering against them, as a matter of law, due to her agreement to settle the marital dissolution action. We conclude that the plaintiff was not so barred.

The defendants urge us to adopt a common law rule whereby an attorney may not be held liable for negligently advising a client to enter into a settlement agreement. See *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 526 Pa. 541, 587 A.2d 1346 (1991). They argue that, as a matter of public policy, an attorney should not be held accountable for improperly advising a client to settle a case unless that advice *174 is the product of fraudulent or egregious misconduct by the attorney. See *id.* The defendants contend that the adoption of such a rule is necessary in order to promote settlements, to protect the integrity of stipulated judgments, and to avoid the inevitable flood of litigation that they claim will otherwise result. They claim that such a rule is particularly appropriate if, as here, the court has reviewed and approved the settlement agreement.

We have long recognized that the pretrial settlement of claims is to be encouraged because, in

the vast number of cases, an amicable resolution of the dispute is in the best interests of all concerned. "The efficient administration of the courts is subserved by the ending of disputes without the delay and expense of a trial, and the philosophy or ideal of justice is served in the amicable solution of controversies." *Krattenstein v. G. Fox & Co.*, 155 Conn. 609, 614, 236 A.2d 466 (1967). We have also acknowledged that, with appropriate judicial supervision, the "private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine." *Hayes v. Beresford*, 184 Conn. 558, 568, 440 A.2d 224 (1981); *Baker v. Baker*, 187 Conn. 315, 321-22, 445 A.2d 912 (1982). At a time when our courts confront an unprecedented volume of litigation, we reaffirm our strong support for the implementation of policies and procedures that encourage fair and amicable pretrial settlements.

[2] We reject the invitation of the defendants, however, to adopt a rule that promotes the finality of settlements and judgments at the expense of a client who, in reasonable reliance on the advice of his or her attorney, agrees to a settlement only to discover that the attorney had failed to exercise the degree of skill and learning required of attorneys in the circumstances. "Although we encourage settlements, we recognize that litigants *175 rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks." *Ziegelheim v. Apollo*, 128 N.J. 250, 263, 607 A.2d 1298 (1992). Therefore, when it has been established that an attorney, in advising a client concerning the settlement of an action, has failed to "exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average**200 prudent reputable member of the [legal] profession ... [and that conduct has] result[ed in] injury, loss, or damage to the [client]"; (internal quotation marks omitted) *Davis v. Margolis*, 215 Conn. 408,

415, 576 A.2d 489 (1990); the client is entitled to a recovery against the attorney. Accordingly, like the majority of courts that have addressed this issue, we decline to adopt a rule that insulates attorneys from exposure to malpractice claims arising from their negligence in settled cases if the attorney's conduct has damaged the client. See *Edmondson v. Dressman*, 469 So.2d 571 (Ala.1985); *Bill Branch Chevrolet, Inc. v. Burnett*, 555 So.2d 455 (Fla.App.1990); *McCarthy v. Pedersen & Houpt*, 250 Ill.App.3d 166, 190 Ill.Dec. 228, 621 N.E.2d 97 (1993); *Braud v. New England Ins. Co.*, 534 So.2d 13 (La.App.1988); *Fishman v. Brooks*, 396 Mass. 643, 487 N.E.2d 1377 (1986); *Lowman v. Karp*, 190 Mich.App. 448, 476 N.W.2d 428 (1991); *Ziegelheim v. Apollo*, supra, 128 N.J. 250, 607 A.2d 1298; *Cohen v. Lipsig*, 92 A.D.2d 536, 459 N.Y.S.2d 98 (1983); but see *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, supra, 526 Pa. 541, 587 A.2d 1346.

Furthermore, we do not believe that a different result is required because a judge had approved the settlement of the plaintiff's marital dissolution action. Although in dissolution cases "[t]he presiding judge has *176 the obligation to conduct a searching inquiry to make sure that the settlement agreement is substantively fair and has been knowingly negotiated"; *Hayes v. Beresford*, supra, 184 Conn. at 568, 440 A.2d 224; *Baker v. Baker*, supra, 187 Conn. at 321, 445 A.2d 912; see General Statutes § 46b-66; the court's inquiry does not serve as a substitute for the diligent investigation and preparation for which counsel is responsible. See *Monroe v. Monroe*, 177 Conn. 173, 183, 413 A.2d 819, appeal dismissed, 444 U.S. 801, 100 S.Ct. 20, 62 L.Ed.2d 14 (1979) ("lawyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all of the facts that materially affect the client's rights and interests"). Indeed, the dissolution court may be unable to elicit the information necessary to make a fully informed evaluation of the settlement agreement if counsel for either of the parties has failed properly to discover and analyze

the facts that are relevant to a fair and equitable settlement.

Finally, we do not share the concern expressed by the defendants about the impact that our resolution of this issue will have on settlements, stipulated judgments, and the volume of litigation. Indeed, the defendants do not suggest that attorneys have heretofore been unwilling to recommend settlements out of concern over possible malpractice suits, for attorneys in this state have never been insulated from negligence claims by the protectional rule urged by the defendants. Because settlements will often be in their clients' best interests, we harbor no doubt that attorneys will continue to give advice concerning the resolution of cases in a manner consistent with their professional and ethical responsibilities.

We similarly reject the defendants' prediction of a dramatic increase in legal malpractice claims by parties to marital dissolution actions who, after judgment, have become disenchanted with the settlement agreements negotiated *177 by their attorneys. Again, we have no reason to believe that our resolution of the defendants' claim will prompt an increase in malpractice suits against attorneys because, in declining to narrow the existing common law remedy for attorney malpractice, we create no new claim or theory of recovery. Moreover, as the New Jersey Supreme Court has recently stated in response to the same concern expressed by the defendants here, "plaintiffs must allege particular facts in support of their claims of attorney incompetence and may not litigate complaints containing mere generalized assertions of malpractice. We are mindful that attorneys cannot be held liable simply because they are not successful in persuading an opposing party to accept certain terms. Similarly, we acknowledge that attorneys who pursue reasonable strategies in handling their cases and who render reasonable advice to their clients cannot be held liable for the failure of their strategies or for any unprofitable outcomes that result because their clients took their advice. The **201 law demands

that attorneys handle their cases with knowledge, skill, and diligence, but it does not demand that they be perfect or infallible, and it does not demand that they always secure optimum outcomes for their clients." *Ziegelheim v. Apollo*, supra, 128 N.J. at 267, 607 A.2d 1298.

We believe, therefore, that the rule proposed by the defendants is neither necessary nor advisable. Accordingly, we conclude that a client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence.

II

The defendants next claim that the evidence was insufficient to support the jury's verdict with respect to both liability and damages and, therefore, that the *178 trial court improperly denied their motions to set aside the verdict and for judgment notwithstanding the verdict. We disagree.

[3] It is well established that "[w]e undertake only limited appellate review of a trial court's denial of a motion for judgment notwithstanding the verdict and of a motion to set aside the verdict. In each case, we accord great deference to the trial court's superior opportunity to view the trial in its entirety. In reviewing the decision of the trial court, we consider the evidence in the light most favorable to the sustaining of the verdict.... Our function is to determine whether the trial court abused its discretion in denying [either] motion.... The trial court's [denial of each motion] is entitled to great weight and every reasonable presumption should be indulged in favor of its correctness...." (Citations omitted; internal quotation marks omitted.) *Blanchette v. Barrett*, 229 Conn. 256, 264, 640 A.2d 74 (1994). With these principles in mind, we address the defendants' claims of evidentiary insufficiency.

A

[4] The defendants contend that the evidence

does not support a determination that they were deficient in their representation of the plaintiff. They also claim that the plaintiff's evidence was so speculative that a jury reasonably could not have concluded that the defendants' conduct was the proximate cause of any economic harm to the plaintiff. We disagree.

The following evidence, which the jury could have credited, is relevant to these claims. At the time of the trial of the marital dissolution action, the plaintiff and her husband had been married for thirty years. The plaintiff, fifty-three years old, was a graduate of Simmons College, and for eight years had owned and operated her own real estate business. Prior to opening her *179 real estate office, the plaintiff had remained at home to raise the couple's three daughters. Her husband, a fifty-six year old graduate of the Wharton School of Finance and Columbia Law School, was a successful entrepreneur.

Among her husband's business interests were several bowling alleys. He held a 20 percent general partnership interest in Nutmeg Bowl, Colonial Lanes and Laurel Lanes, and was in charge of their management. In addition, he owned 100 percent of the stock in three lounges that served food and beverages to patrons of the bowling alleys. The husband also had a beneficial interest in the Grayson Associates Pension and Profit Sharing Plan, which in turn was a limited partner in the three bowling alleys.

Grayson Associates, Inc., a management company in which the husband was the sole shareholder, received management fees from the three bowling alleys. Although Grayson Associates had a fair market value of \$487,000, the husband's financial affidavit listed only its book value of \$14,951. The husband's financial affidavit also listed a \$46,080 limited partnership interest in Georgetown at Enfield Associates (Georgetown partnership), and a future general partnership interest in that partnership of \$959.76. The husband's affidavit failed to disclose, however, that he intended to take a

\$185,000 partnership distribution from the Georgetown partnership and that he was entitled to \$45,000 in management**202 fees from that partnership.^{FN8} To the contrary, the affidavit affirmatively represented that the husband would receive no future income from the Georgetown partnership. Finally, the husband's affidavit indicated an annual income of approximately \$62,000.

FN8. The husband's partner in the Georgetown partnership, Leslie Barth, testified that, at the time of the dissolution trial, the husband planned to take a partnership distribution of \$185,000 from the Georgetown partnership, and that the partnership also owed the husband \$45,000 in management fees.

*180 The plaintiff's financial affidavit, which was prepared by the defendants in consultation with the plaintiff, indicated that she had no income. The plaintiff had testified at her deposition prior to the dissolution trial, however, that she earned approximately \$25,000 annually from her real estate business, and that she expected to receive commissions in excess of \$34,000 in 1981.

The plaintiff's expert witness Cantor expressed his opinion that the defendants had been negligent in failing properly to discover and evaluate certain assets of the marital estate.^{FN9} Specifically, Cantor testified that the defendants had improperly failed to: (1) ascertain the full value of the Georgetown partnership; (2) discover the \$165,000 anticipated distribution to the husband by that partnership; and (3) discover the \$45,000 management fee owed to the husband by the partnership. Cantor also testified that because the defendants had failed to obtain appraisals for several of the assets, including 636 Kings Highway and Grayson Associates, Inc., the defendants were unable to challenge various inconsistencies in the husband's financial affidavit. Cantor further testified that the defendants had failed properly to establish the husband's "residual interest in the bowling alleys ... as a general partner," an asset not expressly valued in the husband's affi-

davit.

FN9. Cantor testified that "[t]he value of the assets is the prime information that ... [a lawyer] need[s] to have in order to sit down and intelligently discuss how the assets will be divided. If you don't have that information, you are crippled when you sit down to attempt to negotiate."

Cantor also explained that, in his opinion, the defendants had failed to exercise due care in the preparation of the plaintiff's financial affidavit. In Cantor's judgment, the plaintiff's credibility had been seriously and unnecessarily compromised because her financial affidavit did not include the income from her real estate business. Cantor also noted that the plaintiff's credibility may have been further undermined by virtue of *181 the defendants' submission of three separate documents containing three different valuations of another marital asset, the Daniel Oil Company.

Cantor expressed his opinion that at the end of the two days of trial, there was not enough financial information available to the lawyers to permit them to responsibly recommend settlement to the plaintiff. He further concluded that the defendants' failure to satisfy the standard of skill and care required of attorneys in such cases was the cause of economic damage to the plaintiff because, in his view, she would have received a larger distribution of the marital estate had the defendants represented her competently.

Finally, Cantor testified to his opinion that the plaintiff reasonably could have anticipated receiving 40 to 60 percent of the total marital estate, FN10 which, according to the plaintiff's witnesses, had a value of approximately \$2,400,000. Cantor also opined that the plaintiff reasonably could have anticipated receiving periodic modifiable alimony of approximately 35 to 50 percent of the parties' combined incomes. FN11

FN10. In support of his opinion, Cantor

noted that: (1) the plaintiff and her husband had been married for thirty years; (2) the plaintiff was fifty-three years old; (3) the evidence indicated that the husband had committed adultery; and (4) the plaintiff had contributed significantly to the marital estate. In Cantor's view, these were all significant factors to be considered by a court in determining how the assets of the parties should be divided and whether alimony should be awarded.

FN11. Cantor testified that if the plaintiff had received a distribution of the marital estate that was at the high end of the 40 to 60 percent range, then she could have expected to receive an alimony award that was at the low end of the 35 to 50 percent range.

**203 We conclude that the evidence adduced at trial was sufficient to support the jury's determination that the defendants were negligent in their representation of the plaintiff. The jury reasonably could have determined, on the basis of the testimony of the plaintiff's expert, that the defendants had negligently failed to *182 discover and value the husband's business interests and related assets, and that the terms of the settlement agreement did not represent a fair and equitable distribution of the true marital estate. Moreover, the jury was entitled to credit Cantor's testimony that the defendants' advice to accept the settlement agreement was the product of their inadequate investigation and preparation.

[5] We further conclude that the evidence supported the jury's determination that the defendants' negligence was the proximate cause of economic damage to the plaintiff. "[T]he test of proximate cause is whether the defendant's conduct is a substantial factor in bringing about the plaintiff's injuries.... The existence of the proximate cause of an injury is determined by looking from the injury to the negligent act complained of for the necessary causal connection." (Citations omitted; internal

quotation marks omitted.) *Wu v. Fairfield*, 204 Conn. 435, 438, 528 A.2d 364 (1987). Cantor testified that competent counsel would not have advised the plaintiff to enter into the settlement agreement, and that she would have received a significantly greater distribution of the marital estate had she been properly represented. Although the defendants vigorously contested this testimony, the jury was entitled to credit it. In view of that testimony, we cannot say that the jury necessarily resorted to conjecture, surmise or speculation in reaching its verdict. *Id.*; *Pisel v. Stamford Hospital*, 180 Conn. 314, 340, 430 A.2d 1 (1980); *Slepski v. Williams Ford, Inc.*, 170 Conn. 18, 22, 364 A.2d 175 (1975). The jury reasonably could have concluded, therefore, that the defendants' negligence was the proximate cause of economic harm to the plaintiff.

B

[6] The defendants further claim that the jury's verdict was excessive as a matter of law. We do not agree.

*183 The jury could have credited the testimony of the plaintiff's witnesses that the value of the marital estate, at the time of the divorce, was approximately \$2,400,000, and that the value of the plaintiff's distribution, under the terms of the stipulated judgment, was approximately \$450,000. Because the jury could have concluded, as Cantor testified, that the plaintiff reasonably could have expected to receive up to 60 percent of the value of the marital estate, namely, \$1,400,000, the jury also could have determined that the plaintiff, had she been competently represented, would have received approximately \$1,000,000 more of the estate's assets than she had been awarded pursuant to the stipulated judgment. In addition, on the basis of Cantor's testimony that the plaintiff could have expected to receive alimony of between 35 and 50 percent of the parties' combined annual income, the jury reasonably could have concluded that the plaintiff would have received alimony of up to \$35,000 more per year than she had agreed to in settlement of the marital dissolution action.^{FN12}

Furthermore, the jury was free to have calculated the economic damage to the plaintiff in lost alimony from the date of the marital dissolution action in 1981 indefinitely in to the plaintiff's future. Viewed in the light most favorable to the plaintiff, therefore, the evidence supported the jury's verdict of \$1,500,000.

FN12. Although the husband's financial affidavit listed annual income of approximately \$62,000, the jury could have concluded, based on the testimony of the plaintiff's witnesses, that the husband's annual income was as much as twice that amount.

"Litigants have a constitutional right to have factual issues resolved by the jury.... This right embraces the determination of damages when there is room for a reasonable difference of opinion among fair-minded persons as to the amount that should be awarded.... The amount of a damage award is a matter peculiarly within the province of the trier of fact, in this case, the *184 jury.... The size of the verdict alone does not determine whether it is excessive. The only practical test to apply to this verdict is whether **204 the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." (Citations omitted; internal quotation marks omitted.) *Mather v. Griffin Hospital*, 207 Conn. 125, 138-39, 540 A.2d 666 (1988); see also *Bartholomew v. Schweizer*, 217 Conn. 671, 687, 587 A.2d 1014 (1991).

Because the jury reasonably could have concluded that the defendants' negligence caused economic damage to the plaintiff in the amount of \$1,500,000, the verdict was not excessive as a matter of law. Therefore, the defendants' claim that the trial court improperly denied their motions to set aside the verdict and for judgment notwithstanding the verdict must fail.

III

The defendants also claim that the trial court's

rulings on several evidentiary issues require reversal of the judgment against them. Specifically, the defendants contend that the trial court improperly permitted the plaintiff to introduce: (1) testimony concerning the defendants' failure to seek an order of alimony pendente lite; (2) testimony concerning the attitude toward women held by the dissolution court; (3) expert testimony concerning the defendants' failure to discover certain of the husband's undisclosed assets; and (4) certain decisions issued by the trial court, *Jacobson, J.*, the Appellate Court and this court.^{FN13}

FN13. The defendants also claim that the trial court improperly permitted the plaintiff's expert to testify that the defendants had negligently failed to bring to the attention of the dissolution court evidence of the husband's adultery. We do not address this claim because the defendants failed to object to the testimony in the trial court. See Practice Book § 4185.

Our role in reviewing evidentiary rulings of the trial court is settled. "This court has consistently held that *185 trial courts are vested with broad discretion in rulings on relevancy and every reasonable presumption must be given in favor of the court's ruling.... Evidence is relevant if it tends to establish a fact in issue or corroborates other direct evidence.... Rulings on such matters will be disturbed on appeal only upon a showing of a clear abuse of discretion." (Citations omitted; internal quotation marks omitted.) *Holy Trinity Church of God in Christ v. Aetna Casualty & Surety Co.*, 214 Conn. 216, 222, 571 A.2d 107 (1990). We conclude that the trial court acted within its discretion in permitting the introduction of the challenged evidence.

A

[7] The defendants first claim that the trial court improperly permitted the plaintiff to testify that the defendants had failed to seek an order of alimony pendente lite notwithstanding her request that they do so. The defendants contend that the testimony was not relevant to any of the plaintiff's

claims because Cantor did not testify that the defendants' failure to seek temporary alimony constituted a breach of their duty of care to the plaintiff. We do not agree.

The trial court could reasonably have concluded that the plaintiff's testimony bore sufficient relevance to the relationship between the plaintiff and the defendants, and, in particular, the manner in which the defendants had responded to her requests, to allow its admission. In that regard, we have noted that "the fiduciary responsibility of a lawyer to his client, *particularly in matrimonial settlements*, requires reasonable inquiry into the wishes as well as the objective best interests of the client." (Emphasis added.) *Monroe v. Monroe*, supra, 177 Conn. at 183, 413 A.2d 819. In addition, a motion for temporary alimony that had been filed, but not pressed, by the defendants, was admitted into evidence without objection. Finally, the defendants have failed to *186 demonstrate that the plaintiff's testimony was likely to have been unduly prejudicial, particularly in view of the fact that plaintiff's counsel did not seek to exploit it.^{FN14} Therefore, we conclude that the trial court did not abuse its discretion in allowing the plaintiff's testimony concerning the defendants' failure to pursue her request for alimony pendente lite.

FN14. For example, plaintiff's counsel made no mention of the testimony in her closing argument to the jury.

****205 B**

[8] The defendants also claim that the trial court should not have required the defendant Kwe-skin to testify on cross-examination as to whether he believed that Judge Tierney held the view that the proper role of a wife was in the home. In view of other related defense testimony, we disagree.

The defendants' expert Greenfield testified that in his opinion, Judge Tierney believed that women should be "modestly taken care of." Greenfield further testified that he considered it to be the responsibility of a matrimonial lawyer to be aware of any

bias, to the extent possible, of the dissolution court that might have a bearing on the court's handling of the marital dissolution action. Moreover, the defendant Margolis had testified that he believed that Judge Tierney was more likely to believe the husband's testimony than the plaintiffs. In light of this testimony, Kweskin's beliefs concerning Judge Tierney's views toward women generally, and working women in particular, were relevant to the issue of how the defendants intended to address any perceived bias he may have held toward women.

^{FN15} Under the circumstances presented, therefore, we conclude*187 that the trial court did not abuse its discretion in overruling the defendants' objection to the plaintiff's inquiry.

FN15. After the trial court overruled the defendants' objection to the plaintiff's question, Kweskin responded that he did not know whether Judge Tierney held any bias toward women, but that if the judge did have such a bias, he would not have allowed it to affect the exercise of his judgment in the case.

C

[9] The defendants next claim that the trial court improperly allowed the plaintiff's expert to testify concerning the defendants' failure to bring to the attention of the dissolution court certain financial information concerning the Georgetown partnership. The defendants argue that the expert testimony should have been excluded in view of the fact that (1) testimony about those assets might have been elicited by the defendants had the marital dissolution trial proceeded to conclusion, but that, in any event, (2) the defendants' failure to bring the husband's expectancy interest in the Georgetown partnership to the attention of the dissolution court did not, as a matter of law, constitute a breach of the standard of care owed by the defendants to the plaintiff. We disagree.

We briefly reiterate the facts relevant to this claim. On the first day of the marital dissolution trial, the husband filed an affidavit with the court pur-

porting to identify his assets. The affidavit stated that the plaintiff expected no future income from the Georgetown partnership. In fact, at the time of the trial, the husband planned to take a distribution of approximately \$185,000 from the Georgetown partnership, and the partnership owed him \$45,000 in management fees. The husband's affidavit did not contain this information.

The plaintiff's expert, Cantor, testified that the defendants would have uncovered these interests had they engaged in proper discovery and conducted a reasonably diligent pretrial investigation. Cantor further testified that the revelation of the husband's interest in these payments was critically important to the dissolution*188 court's evaluation of the husband's credibility and to the court's determination of the fair and equitable distribution of the marital estate. The defendants claim that these payments, as mere "expectancies," were irrelevant as a matter of law to any issue in the marital dissolution action. On the basis of this premise, the defendants argue that the dissolution court could not have considered these anticipated payments for any reason and, therefore, that the testimony of the plaintiff's expert on the subject was improper.

First, we do not agree with the defendants that the expert testimony was improperly admitted because there might have been testimony about the payments if the trial of the marital dissolution action had continued. The trial did not proceed, and Judge Tierney was not otherwise made aware of the expected payments when he approved the parties' settlement agreement. The jury in this case reasonably could have concluded that the dissolution court would not have approved the agreement had it been fully and properly**206 apprised of the husband's true financial circumstances.

Furthermore, we do not believe that the dissolution court was necessarily precluded from consideration of the Georgetown partnership distribution and management fees. In view of the clear and unequivocal testimony that the husband *would receive* the partnership distribution and management fees,

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we cannot conclude that his receipt of the payments was so speculative or contingent that the trial judge could not have considered them. See *Eslami v. Eslami*, 218 Conn. 801, 806-808, 591 A.2d 411 (1991). Moreover, the issue of the relevance and significance of those anticipated payments was properly the subject of expert testimony, and the jury was free to credit the testimony of Cantor on the issue.

"The requirement of expert testimony in malpractice cases serves to assist lay people, such as members *189 of the jury and the presiding judge, to understand the applicable standard of care and to evaluate the defendant's actions in light of that standard. *Fitzmaurice v. Flynn*, 167 Conn. 609, 617, 356 A.2d 887 (1975); *Decho v. Shutkin*, 144 Conn. 102, 106, 127 A.2d 618 (1956); *Bent v. Green*, [39 Conn.Supp. 416, 420, 466 A.2d 322 (1983)]." *Davis v. Margolis*, supra, 215 Conn. at 416, 576 A.2d 489.

[10] "The general standard for admissibility of expert testimony in Connecticut is simply that the expert must demonstrate a 'special skill or knowledge, beyond the ken of the average juror, that, as properly applied, would be helpful to the determination of an ultimate issue.' *Siladi v. McNamara*, 164 Conn. 510, 513, 325 A.2d 277 (1973); see *State v. George*, 194 Conn. 361, 373, 481 A.2d 1068 (1984), cert. denied, 469 U.S. 1191, 105 S.Ct. 963, 83 L.Ed.2d 968 (1985). In malpractice cases, the expert's testimony must be evaluated in terms of its helpfulness to the trier of fact on the specific issues of the standard of care and the alleged breach of that standard. *Fitzmaurice v. Flynn*, supra at 616-18, 356 A.2d 887.... Once the threshold question of usefulness to the jury has been satisfied, any other questions regarding the expert's qualifications properly go to the weight, and not to the admissibility, of his testimony. *Sanderson v. Bob's Coaster Corporation*, 133 Conn. 677, 682, 54 A.2d 270 (1947)." (Citations omitted.) *Davis v. Margolis*, supra, 215 Conn. at 416, 576 A.2d 489. Because the trial court reasonably concluded that the expert

testimony would assist the jury to understand the nature of the defendants' duty to the plaintiff in the circumstances, the defendants' contention that the trial court improperly permitted the challenged testimony is without merit.^{FN16}

FN16. The defendants make the same claim in arguing that the trial court improperly failed to direct the jury, in its instructions at the conclusion of the evidence, to disregard Cantor's testimony about the Georgetown partnership distribution and management fees. We reject that claim for the reasons stated above.

*190 D

[11] The defendants further claim that the trial court improperly allowed the plaintiff to introduce certain written opinions of the trial court, *Jacobson, J.*, the Appellate Court and this court concerning the plaintiff's motion to open the marital dissolution judgment. Under the circumstances of their introduction, we are not persuaded that the admission of these opinions constituted an abuse of discretion.

The judicial opinions introduced by the plaintiff consisted of the memorandum of decision of the trial court, *Jacobson, J.*, dated September 19, 1983, denying the plaintiff's motion to open the marital dissolution decree; the opinion of the Appellate Court affirming the judgment of the trial court;^{FN17} and the opinion of this court dismissing, as improvidently granted, the plaintiff's petition for certification to appeal from the judgment of the Appellate Court.^{FN18} The plaintiff sought the admission of these opinions in response to the opening statement to the jury of counsel for Gervasoni,^{FN19} the accountant**207 who had assisted the defendants in preparing the marital dissolution case. In his opening statement,^{FN20} Gervasoni's counsel attacked the plaintiff for *191 seeking to open **208 the marital dissolution decree and for appealing the denial of her motion to the Appellate *192 Court and to this court. The statement, which included counsel's characterization of the reasons why the courts had rejected the plaintiff's claim,

strongly suggested that each of the decisions constituted a ratification of the settlement agreement and a rejection of the plaintiff's claim that she had been ill-advised to enter into it. The trial court did not abuse its discretion in concluding that the judicial opinions in question were admissible as a relevant response to Gervasoni's opening statement to the jury.^{FN21}

FN17. *Grayson v. Grayson*, supra, 4 Conn.App. 275, 494 A.2d 576.

FN18. *Grayson v. Grayson*, supra, 202 Conn. 221, 520 A.2d 225.

FN19. See footnote 1.

FN20. The relevant portions of the opening statement of counsel for Gervasoni are as follows:

"[After reaching a settlement, the parties] said this is what we have decided, they read [the agreement] into the record and [the trial judge,] Judge Tierney, said, I approve it, because he too knew that it was a favorable settlement for Mrs. Grayson.

"And the evidence will show that the court put its stamp of approval on it, and the evidence will show that that dissolution action then became a matter of record. And the settlement became final.

"Now, that didn't satisfy Mrs. Grayson. She wasn't really even at this point satisfied with what she had managed to get in the settlement. She decided at this point that she didn't get enough, that she should have had more, and the evidence will show that she then went back into this court, not now yet against her attorneys or her accountants, but she went back into the court seeking to overthrow the settlement, seeking to set it aside, and the evidence will show that that's a

very rare occurrence, and that's where Judge Burton Jacobson comes in....

"Judge Jacobson, again, a respected judge ... had this case brought before him when he was sitting in this very courthouse as a judge, and the claim there by Mrs. Grayson was that this case should be, that this settlement should be overturned because she didn't know, she didn't get enough, she was unhappy with it, her husband was too wealthy, he got too good a deal, it should be started all over again.

"Judge Jacobson heard the case, as he was obligated to do. Whether he thought it was a bad case or a good case, everybody has a right to bring a suit in court and have it decided, and another trial took place, this time without a jury before Judge Jacobson, in this very building. The evidence will show that he listened to that trial and refused to reopen the case or do anything about it. Because he felt that, as he decided finally, that the settlement was a fair settlement and that there was no reason to disturb this settlement, throw it out, start all over, do anything about it.

"So, again, this hearing again from the Superior Court at Stamford, again before Judge-Superior Court Judge Jacobson who says, no, it stands. And the evidence will then show that now we have two judges, Judge Tierney, Judge Jacobson putting their stamp of approval on the settlement. But Mrs. Grayson still wasn't happy. It went on yet. She appealed Judge Jacobson's decision. Didn't like it. And the appeal then went up to Hartford to the court known as the Appellate Court, which the evidence will show is the immediate appeal court over the Superior Court—we are now in the Superior

Court—the court known as the Appellate Court, and the Appellate Court is the next level.

"So she doesn't like what Judge Jacobson does, up she goes to the Appellate Court. The Appellate Court held another hearing, the attorneys had to go up, the attorneys had to write briefs and file briefs, then they had to go up to the Appellate Court, and the evidence will show that that's exactly what happened, they wrote the briefs on both sides, they rehashed what happened before Judge Tierney, they rehashed what happened before Judge Jacobson, they made their claims back and forth again and they went up to the [Appellate] Court, which consists of three judges who sit on the bench in a trio really to decide the case, and these are judges who have appellate experience, who are selected really to exercise appeal jurisdiction over the Superior Court. And these three judges, three of them, looked at the case and heard it, heard the arguments, and the court ruled, there is only one decision, and one majority decision there, and the court ruled in that majority decision that, again, there was no fraud, there was no hiding, there was nothing unfair, there was no overreaching. So, in effect the Appellate Court sanctioned and affirmed and approved of what Judge Tierney had done and what Judge Jacobson had done.

"Still Mrs. Grayson wasn't satisfied. Mrs. Grayson then asked for permission to appeal the Appellate Court ruling, to go further to the Connecticut Supreme Court. In this type of case the Connecticut Supreme Court has to grant permission to argue, to take an appeal. The appeal is not automatic as it is for the Appellate Court. She wasn't going to let it

go then. She wanted it to go to the Supreme Court of the State of Connecticut.

"The Supreme Court of the State of Connecticut, the evidence will show, after the filing of some papers and the request to hear it and the asking for arguments, refused to hear it on a factual basis. They, in effect, said we are not going to hear it; the Appellate Court decision stands. All right.

"So now we have the trial before Judge Tierney, the trial before Judge Jacobson, the Appellate Court, the Supreme Court, nobody will touch this divorce agreement. Mrs. Grayson still isn't happy, she is still looking for more money. So then she turns on her attorneys and her accountants—not going to get anymore money through the divorce action, not going to get anything more from her husband, the court systems says, okay, okay, okay.

"So her next bet, the next level is, now I think I'll sue the attorneys and I think I'll sue the accountants, I may get some money that way. And that's what this case is about, and that's why we are here in court and I think that when you listen to the case, bear in mind the evidence that is going to be coming out of the case. The evidence will demonstrate that her case about being misled or not told or somehow defrauded is as weak and insignificant now as it was before Judge Tierney and Judge Jacobson and the Appellate Court. The fact of the matter is that the attorneys and the accountants acted well, they acted faithfully, they acted loyally and they went the last mile for her. They do not deserve this fate, ladies and gentlemen, and I would urge that you listen to the evidence carefully, keep an open mind until both sides are heard

and I think that you will see this case and you'll find favorably in favor of the defendants."

FN21. We note that the defendants made no objection to the opening statement of counsel for Gervasoni.

*193 [12] Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. *Berry v. Loiseau*, 223 Conn. 786, 804, 614 A.2d 414 (1992); *Russell v. Dean Witter Reynolds Inc.*, 200 Conn. 172, 191-92, 510 A.2d 972 (1986). We have identified at least four circumstances where the prejudicial effect of otherwise admissible evidence may outweigh its probative value: "(1) where the facts offered may unduly arouse the jury's emotions, hostility or sympathy, (2) where the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) where the evidence offered and the counterproof will consume an undue amount of time, and (4) where the [party against whom the evidence has been offered], having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." *State v. DeMatteo*, 186 Conn. 696, 702-703, 443 A.2d 915 (1982); *State v. Greene*, 209 Conn. 458, 478-79, 551 A.2d 1231 (1988). The defendants claim that the judicial opinions should have been excluded because they tended to create a side issue that was likely to have distracted the jury. They have articulated no reason, however, why the admission of the opinions was likely to have caused such a distraction. Moreover, the defendants have provided no explanation of which specific statements or references in the opinions were likely to have caused them prejudice, or why. We will not speculate concerning the prejudicial effect of otherwise relevant evidence when the party challenging the admission of the evidence on the ground of undue prejudice has failed to identify, with reasonable particularity, the source of the alleged prejudice and the reason why the evidence was likely to have

been prejudicial. See *Pet v. Dept. of Health Services*, 228 Conn. 651, 675-76, 638 A.2d 6 (1994). Accordingly, the defendants' claim must fail.

*194 IV

[13] The defendants also challenge the trial court's instructions to the jury, claiming that they were fundamentally inadequate because the court improperly failed to relate the facts of the case to the applicable law. The defendants, however, did not request that the trial court refer to any specific facts in its jury charge,^{FN22} and they similarly failed to except to the court's instruction on that ground. We therefore do not reach the merits of the defendants' claim. See Practice Book § 315.^{FN23}

FN22. The defendants initially excepted to the trial court's failure to instruct the jury on the Georgetown partnership with greater factual specificity. During the colloquy following the court's instructions, however, the defendants expressly withdrew their exception.

FN23. Practice Book § 315 provides in relevant part: "The supreme court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection...."

[14] We also decline the defendants' invitation to afford plain error review to this claim. "Review under the plain error doctrine ... is reserved for truly extraordinary situations where the existence of the error is **209 so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Citations omitted; internal quotation marks omitted.) *State v. Hinckley*, 198 Conn. 77, 87-88, 502 A.2d 388 (1985); *Williamson v. Commissioner of Transportation*, 209 Conn. 310, 317, 551 A.2d 704 (1988); see Practice Book §

4185. On the basis of our careful review of the trial court's thorough jury instructions,^{FN24} we conclude that *195 the defendants' claim of error does not merit consideration under the plain error doctrine.

FN24. Although we do not reach the merits of the defendants' unpreserved jury instruction claim, we note that the trial court, in its jury charge, thoroughly reviewed the allegations of the plaintiff's complaint, identified facts that were not in dispute, explained the roles of the parties' expert witnesses with reference to their testimony, and otherwise adapted its instructions on the applicable law to the facts and issues of the case.

The judgment is affirmed.

In this opinion the other Justices concurred.

Conn., 1994.

Grayson v. Wofsey, Rosen, Kweskin and Kuriansky
231 Conn. 168, 646 A.2d 195, 63 USLW 2198

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Supreme Judicial Court of Massachusetts,
Bristol.

Eleanor L. GUENARD

v.

George G. BURKE.

Argued Sept. 16, 1982.

Decided Dec. 30, 1982.

Action was brought in the Superior Court, Bristol County, concerning attorney fee dispute and alleging legal malpractice. Attorney's motion to strike former client's claim for jury trial as to two counts of complaint was heard by Silva, J., and counts one and two were tried before Taveira, J., and motion for summary judgment on count three was heard by Ponte, J. The Supreme Judicial Court granted request for direct appellate review and Wilkins, J., held that: (1) attorney was entitled to receive fair and reasonable value of his services, even though he purported to enter into unlawful contingent fee agreement with his former client; (2) determination of amount of fee was jury question; and (3) genuine issue of material fact existed with respect to attorney's negligence in his representation of former client, precluding summary judgment.

Reversed and remanded.

West Headnotes

[1] Attorney and Client 45 ⇌ 148(1)

45 Attorney and Client

45IV Compensation

45k146 Contingent Fees

45k148 Construction and Operation of Contract

45k148(1) k. In General. Most Cited Cases

Attorney was entitled to receive fair and reasonable value of his services, even though he pur-

ported to enter into unlawful contingent fee agreement with his client in connection with modification of separation agreement which she had entered into with her husband, since purpose of rule forbidding contingent fee agreement in respect of procuring of divorce to eliminate any inducement to counsel to proceed with divorce rather than to seek reconciliation was not thwarted as decree nisi had already been entered when client retained attorney. S.J.C.Rules 3:14, 3:14(3, 4) (1980).

[2] Attorney and Client 45 ⇌ 147

45 Attorney and Client

45IV Compensation

45k146 Contingent Fees

45k147 k. Requisites and Validity of Contract. Most Cited Cases

Contingent fee agreement entered into prior to entry of divorce decree, or judgment, absolute is an agreement in respect of procuring a divorce and is forbidden. S.J.C.Rules 3:14, 3:14(3, 4) (1980).

[3] Attorney and Client 45 ⇌ 167(2)

45 Attorney and Client

45IV Compensation

45k157 Actions for Compensation

45k167 Trial

45k167(2) k. Questions for Jury. Most Cited Cases

Amount of fee attorney was entitled to receive for reasonable value of his services was a jury question in dispute between attorney and former client.

[4] Trial 388 ⇌ 136(1)

388 Trial

388VI Taking Case or Question from Jury

388VI(A) Questions of Law or of Fact in General

388k136 Questions of Law or Fact in General

388k136(1) k. In General. Most Cited

Cases

When jury claim is seasonably made factual issue should be submitted to jury.

[5] Attorney and Client 45 ⇌ 148(1)

45 Attorney and Client

45IV Compensation

45k146 Contingent Fees

45k148 Construction and Operation of

Contract

45k148(1) k. In General. Most Cited

Cases

(Formerly 45k32)

Attorney and Client 45 ⇌ 148(3)

45 Attorney and Client

45IV Compensation

45k146 Contingent Fees

45k148 Construction and Operation of

Contract

45k148(3) k. Amount of Fee. Most

Cited Cases

Because purported contingent fee agreement entered into in connection with modification of separation agreement, which former client had entered into with her husband, was unenforceable due to fact that attorney did not sign agreement, his reliance on that agreement to justify amount of his fee was improper and his reliance on agreement made in violation of court rules was an unfair or deceptive act or practice; however, matter of relief had to await since the Supreme Judicial Court could not tell whether former client sustained loss of money or property as a result of attorney's reliance on contingent fee agreement. M.G.L.A. c. 93A, §§ 2, 2(a), 9(1); S.J.C.Rule 3:14 (1980).

[6] Interest 219 ⇌ 19(3)

219 Interest

219I Rights and Liabilities in General

219k19 Demands Not Liquidated

219k19(3) k. Principal in Dispute. Most

Cited Cases

Attorney who acted in good faith where there was honest controversy between parties as to attorney fees would not be liable for interest penalty. M.G.L.A. c. 221, § 51.

[7] Attorney and Client 45 ⇌ 167(2)

45 Attorney and Client

45IV Compensation

45k157 Actions for Compensation

45k167 Trial

45k167(2) k. Questions for Jury. Most

Cited Cases

Interest 219 ⇌ 68

219 Interest

219IV Recovery

219k68 k. Questions for Jury. Most Cited

Cases

In dispute over attorney fees, claim of former client's right to interest and multiple damages for loss of use of her money due to alleged unlawful contingent fee agreement was jury question. M.G.L.A. c. 93A, § 9(3, 4); c. 221, § 51; S.J.C.Rule 3:14 (1980).

[8] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

In legal malpractice action, genuine issue of material fact existed concerning attorney's alleged negligence in his representation of former client, precluding summary judgment.

[9] Judgment 228 ⇌ 186

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k186 k. Hearing and Determination.

Most Cited Cases

Deposition and contrary affidavit must both be considered in passing on motion for summary judgment.

[10] Judgment 228 ⇐ 185.3(4)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in

Particular Cases

228k185.3(4) k. Attorneys. Most Cited

Cases

Admission in former client's deposition taken in connection with legal malpractice action was not binding on her in light of contrary affidavit filed with court.

****893 *803** Edward T. Troy, Mansfield, for plaintiff.

John P. Ryan, Plymouth, and Jeffrey C. LaPointe, Quincy, for defendant.

Before ***802** WILKINS, ABRAMS, NOLAN, LYNCH and O'CONNOR, JJ.

WILKINS, Justice.

We are presented with a contest between an attorney and his former client. One aspect of the dispute concerns whether the attorney is entitled to any fee as a result of his representation of his client in connection with the modification of a separation agreement which she had entered into with her husband. We conclude that, in the circumstances, the attorney is entitled to receive the fair and reasonable value of his services, even though he purported to enter into an unlawful contingent fee agreement with his client, and that the determination of the amount of his fee is a question that should have been submitted to a jury. Only after a determination of the amount of the attorney's reasonable fee will it be possible to determine whether the former client is entitled to multiple damages for the attorney's failure to pay over funds he received from his cli-

ent's former husband. A further aspect of the dispute involves the former client's claim of malpractice against the attorney in which she asserts that the attorney was negligent in his representation of her in connection with the modification of the separation agreement. This issue was decided against the client on the attorney's motion for summary judgment. We reverse the judgments.

The issues for our decision arise in the following circumstances. On June 24, 1974, a decree nisi (now called a judgment nisi) was entered in favor of Raymond O. Guenard in his divorce action against the plaintiff. The plaintiff was then represented by counsel other than the defendant. On the same day, the parties executed a separation agreement, ***804** which was not incorporated in the decree. The husband agreed to pay the plaintiff \$195 a week until her death, her remarriage, or his death. The husband also agreed to pay the plaintiff the greater of \$30,000 or one half of the net equity on the sale of certain real estate.

In October or November, 1974, the plaintiff, dissatisfied with the settlement, consulted the defendant attorney. On December 6, 1974, shortly before the decree of divorce would have become absolute, the defendant filed a petition on the wife's behalf in the Probate Court for the county of Norfolk challenging the decree nisi on the ground that it was obtained by fraud, unilateral mistake, and coercion. Counsel for her husband took the plaintiff's deposition in which she stated that she had signed the original agreement voluntarily and that she had not been coerced or threatened into accepting the settlement. In May, 1975, the plaintiff paid a retainer of \$1,075 to the defendant. On June 12, 1975, the plaintiff executed a purported contingent fee agreement in which she agreed to pay the defendant "one-third of any recovery received on my behalf relative to the divorce action commenced" against her or received by her relative to her objections to the divorce. The defendant did not sign the purported agreement.

After negotiations, in August, 1975, the hus-

band and wife executed an amendment to the separation agreement. It provided for the immediate payment of an additional \$30,000 to the plaintiff and for the continuance of the husband's weekly alimony obligations**894 after his death. The plaintiff withdrew her objections and a decree absolute of divorce was entered. In September, 1975, the defendant sent the plaintiff a check in the amount of \$20,000, "representing the net amount due you after the deduction of my one-third legal fee." The defendant did not attempt to base his fee also on the value to the plaintiff of her right to receive alimony if she should survive her husband and remain unmarried.

The plaintiff, once again dissatisfied, consulted her present counsel concerning her rights. In April, 1978, the plaintiff*805 made a demand under G.L. c. 93A for the payment of the \$10,000 received by the defendant and for an "[i]temization of fee charged" against the retainer. In the present action, commenced in June, 1978, the plaintiff challenges the defendant's right to receive any fee for his services on the ground that the contingent fee agreement violated that portion of S.J.C. Rule 3:14(3), 351 Mass. 795 (1967), which prohibited a contingent fee agreement "in respect of the procuring of a divorce."^{FN1} The plaintiff also alleged that the contingent fee agreement was unlawful under G.L. c. 93A, § 2, and that she was entitled to relief under G.L. c. 93A, § 9. The plaintiff asserted, under counts one and two, a claim for multiple interest on the withheld funds, relying on G.L. c. 221, § 51. The defendant counterclaimed for an additional \$4,000 in legal fees. Subsequently, the plaintiff amended her complaint to add a third count alleging that the defendant negligently represented her in connection with the modification of the separation agreement.

FN1. This rule now appears as S.J.C. Rule 3:05, as amended, Mass. (1981).

The defendant moved to strike the plaintiff's claim of a jury trial on the first and second counts of her complaint. A judge allowed that motion.

These two counts went to trial before a different judge without a jury and resulted in a judgment for the defendant on both counts.^{FN2} The judge concluded that the purported contingent fee agreement violated S.J.C. Rule 3:14, that the defendant was entitled to a fee based on the fair value of his services even if he had violated S.J.C. Rule 3:14, and that the amount (\$11,075) the defendant had already received was reasonable to compensate him for his services and expenses. He concluded that the plaintiff was not entitled to recover under G.L. c. 93A. The plaintiff appeals from the judgment for the defendant on counts one and two of the complaint.^{FN3} We *806 granted the plaintiff's application for direct appellate review.

FN2. The defendant stipulated that he would not press his counterclaim if he were successful on the first two counts of the complaint.

FN3. We leave to later a presentation of the circumstances relating to the propriety of the entry of summary judgment for the defendant on count three, the malpractice claim.

[1] 1. The trial judge correctly concluded that the defendant's violation of S.J.C. Rule 3:14 did not bar him from receiving any fee for his services.^{FN4} He was also correct in concluding that the defendant was entitled to a fee based on the fair value of his services.

FN4. This rule (see now S.J.C. Rule 3:05, as amended, Mass. [1981]), authorized written contingent fee agreements as to the attorney's fees in certain instances. Each copy of the agreement "shall be signed both by the attorney and by each client." S.J.C. Rule 3:14(4), 351 Mass. 795 (1967). "No contingent fee agreement shall be made ... (b) in respect of the procuring of a divorce, annulment of marriage or legal separation." S.J.C. Rule 3:14(3).

The defendant does not now rely on the contingent fee agreement to support his claim for a fee but rather argues that he was entitled to a fair and reasonable fee. We have held that an attorney is not barred from recovering the fair value of his services simply because a client failed to sign a purported contingent fee agreement. *Young v. Southgate Dev. Corp.*, 379 Mass. 523, 525-526, 399 N.E.2d 27 (1980). Where the client has signed such an agreement, but the attorney has not, there is even less reason to deny the attorney the right to receive a reasonable fee. Rule 3:14 was adopted to protect the interests of clients and the public, not as a trap to deny an ****895** attorney a reasonable fee whenever a purported contingent fee agreement is unenforceable.

A more substantial question arises from the plaintiff's claim that the contingent fee agreement violated the prohibition against contingent fee agreements "in respect of the procuring of a divorce." Such a prohibition is the majority rule in this country. See *McInerney v. Massasoit Greyhound Ass'n*, 359 Mass. 339, 350, 269 N.E.2d 211 (1971); Annot., 93 A.L.R.3d 523, 526 (1979). The prohibition is designed primarily to encourage reconciliation by removing any incentive to the attorney to press forward with the divorce and, secondarily, to assure that the court will be able to make a fully informed equitable property settlement. *McInerney v. Massasoit Greyhound Ass'n*, *supra* at 350-351, 269 N.E.2d 211.

***807** [2] We agree with the trial judge that a contingent fee agreement entered into prior to the entry of a decree, or judgment, absolute is an agreement "in respect of the procuring of a divorce" and is forbidden by S.J.C. Rule 3:14(3) (now S.J.C. Rule 3:05[3]). The rule applies to both parties to a divorce action, not only to the party seeking the divorce. The rule does not depend on the client's financial ability to obtain representation without such an agreement. The better course is to apply the rule literally and not to open up consideration of the facts of a particular case to see whether the pur-

poses of the rule have or have not been thwarted by a literal violation of the rule. If the rule sweeps too broadly in its application, the appropriate solution is to amend the rule, not to modify it by judicial interpretation. Because the defendant did not sign a copy of the purported contingent fee agreement, it was not, in any event, a valid agreement, even if the agreement had not been "in respect of the procuring of a divorce."

When, however, we come to the issue whether the defendant is entitled to a fair and reasonable fee despite the violation of rule 3:14(3), the nature of the violation and its degree of seriousness are relevant. Here, a decree nisi had already been entered when the plaintiff retained the defendant. The dispute was over a property settlement, not the divorce as such. There is nothing in the record to show that either party to the divorce action had the slightest interest in reconciliation. Thus, on the facts, the purpose of rule 3:14 to eliminate any inducement to counsel to proceed with the divorce rather than to seek reconciliation was not thwarted. On the other hand, the further purpose of the rule to have an informed judicial approval of any property settlement may have been thwarted. The record does not show whether the Probate Court judge who approved the amended agreement knew of the fee arrangement between the plaintiff and the defendant.

We see no reasonable basis for denying the defendant a fair and reasonable fee in these circumstances. We are not dealing here with a violation of a prohibition against representation ***808** of a client. See *Misci v. Revere Hous. Auth.*, 359 Mass. 743, 744, 269 N.E.2d 210 (1971); *Collins v. Godfrey*, 324 Mass. 574, 581, 87 N.E.2d 838 (1949). The recovery of the fair value of the defendant's services is warranted under the principles announced in *Town Planning & Eng'g Assocs. v. Amesbury Specialty Co.*, 369 Mass. 737, 745, 342 N.E.2d 706 (1976). For opinions generally allowing, but some denying, recovery in quantum meruit in similar situations, see Annot., 100 A.L.R.2d 1378, 1390-1391 (1965). To allow recovery of the fair

value of the defendant's legal services would not defeat the purposes of the prohibition in rule 3:14. Denying enforcement of the contingent fee agreement achieves that object. Representation of the client was not illegal; only the contingent fee agreement was. The loss to the defendant of a reasonable fee and the windfall to the plaintiff in being relieved of the obligation to pay any attorney's fee for the defendant's proper services indicate that denial of a fair fee would be unreasonable in the circumstances. *Town Planning & Eng'g Assocs. v. Amesbury Specialty Co.*, *supra* at 746, 342 N.E.2d 706.

[3][4] 2. Although we reject the plaintiff's argument that, because of the violation**896 of rule 3:14, she was entitled to recover amounts the defendant received for representing her, we do agree with the plaintiff that the amount of the defendant's fee was a jury question. The motion judge erred in allowing the defendant's motion to strike the plaintiff's claim for a jury trial as to count one. The question of what was fair and reasonable compensation for the services rendered is a question of fact (see *Cummings v. National Shawmut Bank*, 284 Mass. 563, 568, 188 N.E. 489 [1933]), and, when a jury claim is seasonably made, as it was here, the factual issue should be submitted to a jury. In support of the denial of a jury trial on the issue of the reasonable fee to which he was entitled, the defendant relies on that portion of S.J.C. Rule 3:14(6), 351 Mass. 795 (1967), which stated that "[t]he reasonableness of a contingent fee agreement shall be subject to review by a court of competent jurisdiction." The word "court," however, includes a court consisting of a judge and jury, where appropriate. *809 *Cameron v. Sullivan*, 372 Mass. 128, 132 n. 3, 260 N.E.2d 890 (1977). Rule 3:14 did not purport to deny the plaintiff a jury trial, and rightly so, because a court rule cannot deny a person his or her right to a jury trial.^{FN5}

FN5. The defendant is not aided by the fact that rule 3:14(6) stated that "[t]he reasonableness of a contingent fee agreement shall be subject to review by a court of

competent jurisdiction *prior to the expiration of one year following the making of the agreement or one year following the date of last rendition of services*" (emphasis supplied). Here, the agreement is invalid and a nullity. Its reasonableness is not in dispute. Rule 3:14 says nothing about actions seeking a fair and reasonable fee. We need not decide whether, if a contingent fee agreement is properly executed in circumstances authorized by the rule, a client may challenge the reasonableness of the fee after the time limits of the rule have expired.

3. We come then to the plaintiff's claim under G.L. c. 93A. She argues that the use of a purported contingent fee agreement was an unlawful act or practice because, in the words of G.L. c. 93A, § 2(a), inserted by St.1967, c. 813, § 1, the defendant engaged in "unfair or deceptive acts or practices in the conduct of any trade or commerce." Even if we assume that the defendant's conduct in attempting to obtain a contingent fee agreement was "unfair or deceptive," the plaintiff sustained no "loss of money or property" as a result of the agreement itself. See G.L. c. 93A, § 9(1), as amended through St.1971, c. 241.^{FN6} The agreement is unenforceable, and the plaintiff sustained no injury solely from its existence.

FN6. See now G.L. c. 93A, § 9(1), as appearing in St.1979, c. 406, § 1 (eliminating the reference to damages on the basis of a loss of "money or property" and substituting the words "who has been injured").

[5] The plaintiff argues further that the defendant's reliance on the unenforceable agreement to retain one third of the \$30,000 additional payment that he negotiated is itself unlawful under G.L. c. 93A, § 2. We conclude that because the purported contingent fee agreement was unenforceable, his reliance on that agreement to justify the amount of his fee was improper. The defendant's reliance on an agreement made in violation of S.J.C. Rule 3:14

in these circumstances was, as a matter of law, an unfair or deceptive act or practice.

810** We cannot tell at this time, however, whether the plaintiff sustained a loss of money or property as a result of the defendant's reliance on the contingent fee agreement. If the jury should find the defendant's reasonable fee (and expenses) equalled or exceeded the \$11,075 that he has retained, the plaintiff will have sustained no loss of money or property because of the G.L. c. 93A violation. If, on the other hand, the reasonable fee awarded to the defendant is less than \$11,075, the plaintiff will have been denied the use of the difference between \$11,075 and the fee awarded to the defendant. Although, in such a situation, the plaintiff would be entitled, quite apart from G.L. c. 93A, to interest on the amount of any excess retained by the defendant, there will be a question for the court to decide concerning a doubling or trebling of the damages (G.L. c. 93A, § 9[3]) and the award of reasonable attorney's fees and *897** costs (G.L. c. 93A, § 9[4]).^{FN7} Thus the matter of relief under G.L. c. 93A must await the verdict under count one.

FN7. We construe the plaintiff's written demand for relief (G.L. c. 93A, § 9[3]) as sufficient to challenge the defendant's retention of the fee in reliance on S.J.C. Rule 3:14. The defendant made no written tender of settlement. Thus, under G.L. c. 93A, § 9(3), the plaintiff would be entitled to between double and triple damages if the court should find that the unlawful act "was a willful or knowing violation [of § 2] ... or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated [§ 2]."

[6][7] 4. The matter of the plaintiff's right to interest (and to multiple damages under G.L. c. 93A for the loss of use of her money) is complicated by her claim, under both counts one and two, for interest pursuant to G.L. c. 221, § 51. Section 51

provides that an attorney "who unreasonably neglects to pay over money collected by him for and in behalf of a client, when demanded by the client, shall forfeit to such client five times the lawful interest of the money from the time of the demand." This claim is one for a jury and not for a judge alone, assuming that there is evidence ***811** that the attorney acted unreasonably.^{FN8} An attorney who acted in good faith where there was an honest controversy between the parties would not be liable for an interest penalty under § 51. *Zuckernik v. Jordan Marsh Co.*, 290 Mass. 151, 156, 194 N.E. 892 (1935).

FN8. The motion judge's allowance of the defendant's motion to strike the plaintiff's jury claim was wrong as applied to the plaintiff's claim under G.L. c. 221, § 51. The plaintiff makes no cognizable argument in her brief that she was entitled to a jury trial on her G.L. c. 93A claim.

If the jury determines that the defendant's reasonable fee was less than the \$11,075 he retained, the jury must then determine whether the attorney unreasonably neglected to pay the plaintiff the amount in excess of his reasonable fee. This factual question can be submitted to the jury in the form of a special question. *Mass.R.Civ.P. 49(a)*, 365 Mass. 812 (1974). If the jury should decide that the defendant did act unreasonably, he will be liable under § 51 for interest at five times the lawful rate. This amount will exceed any damages possibly recoverable under G.L. c. 93A, § 9, for the same period of time, except, of course, for an allowance of reasonable attorney's fees and costs. If any violation of G.L. c. 93A and G.L. c. 221, § 51, is for the same wrong (the wrongful withholding), cumulative damages should not be awarded. If there is an overlapping of damages, the damages allowed should reflect the greater statutory award provided in § 51. See *McGrath v. Mishara*, 386 Mass. 74, 85, 434 N.E.2d 1215 (1982).^{FN9}

FN9. Damages, assuming there are any, will not be overlapping in all respects. In

retaining \$10,000 of the \$30,000 additionally paid by the plaintiff's former husband, the defendant initially relied on the unenforceable contingent fee agreement. As we have said, that reliance was unlawful under G.L. c. 93A, § 2, as a matter of law. Thus, any damages under G.L. c. 93A run from the date the defendant retained the \$10,000. As of the date of the plaintiff's demand for the return of the \$10,000, assuming there is a G.L. c. 221, § 51, violation, damages payable under § 51 and G.L. c. 93A would be cumulative and § 51 damages would supersede any G.L. c. 93A damages.

5. We come finally to the plaintiff's appeal from the allowance of summary judgment for the defendant on count three, the malpractice claim. The summary judgment *812 judge, appropriately at the time, relied on findings made by the trial judge in the earlier trial of counts one and two. Those findings, however, have no continuing validity because, as we have just held, the plaintiff was entitled to a jury trial on count one and on her claim for multiple interest on any funds allegedly withheld unreasonably.

[8] We must assess the propriety of summary judgment for the defendant on the basis of other material appropriately before the summary judgment judge. Based on affidavits of the parties and portions of a deposition of the plaintiff that were submitted to the judge, there is a genuine issue of material fact concerning the defendant's alleged negligence in his representation of the plaintiff.

**898 [9][10] The defendant, however, argues that there is no genuine issue of material fact with regard to the plaintiff's chances of overturning the original separation agreement on the basis of fraud or coercion. In other words, without conceding his negligence, the defendant argues that the plaintiff sustained no loss because there was no basis for achieving a favorable result in the attempt to set aside the separation agreement. He points to testi-

mony of the plaintiff on deposition in which she admitted that there was no duress or coercion by her husband. However, by affidavit, the plaintiff denies that she admitted at any time that there was no fraud or duress in the execution of the original separation agreement. A deposition and a contrary affidavit must both be considered in passing on a motion for summary judgment. See *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 893-894 (5th Cir.1980); *Camerlin v. New York Cent. R. Co.*, 199 F.2d 698, 701 (1st Cir.1952); 6 Moore's Federal Practice par. 56.22[1], at 1325-1326 (2d ed. 1982); 10 C.A. Wright & A.R. Miller, Federal Practice and Procedure § 2738 at 686 (1973). The admission in the plaintiff's deposition is, therefore, not binding on her. See *McMahon v. M & D Builders, Inc.*, 360 Mass. 54, 61, 271 N.E.2d 649 (1971); *Junkins v. Slender Woman, Inc.*, 7 Mass.App. 878, 386 N.E.2d 789 (1979).

Although we recognize that there may be instances in which an affidavit denying deposition testimony may not *813 fairly raise a genuine issue of material fact (see *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 [2d Cir.1969]), we are reluctant to hold the plaintiff to conclusions of law stated in her deposition. We know that, despite the defendant's claim that the plaintiff's cause was hopeless, the plaintiff did receive additional financial benefits from the renegotiation of the separation agreement. Assuming, without deciding, that the defendant was negligent in his investigation of the husband's assets, we cannot say, on the facts presented on the motion for summary judgment, that his negligence did not result in a less satisfactory result for the plaintiff than she would have obtained if there had been no negligence. Although, from what has been shown to us, we are skeptical of the merits of the plaintiff's claim, particularly in light of the admissions in her deposition and the now nugatory findings made by the trial judge, there was a genuine issue of material fact to be tried under count three.

6. The judgments for the defendant are re-

versed. The order denying the plaintiff a jury trial on count one and on her claim for multiple interest on funds allegedly withheld unreasonably is vacated to that extent. The action is remanded for a jury trial on those issues and on count three. The plaintiff's rights under G.L. c. 93A depend on the results of the jury trial.

So ordered.

Mass.,1982.

Guenard v. Burke

387 Mass. 802, 443 N.E.2d 892

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(Cite as: 54 S.W.3d 526)

C

Court of Appeals of Texas,
Houston (1st Dist.).
Angel GUILTY, Appellant,

v.

C.C.I. ENTERPRISE, COMPANY, Appellee.

No. 01-00-01038-CV.
Aug. 23, 2001.

Employee brought action against employer to recover unpaid overtime wages under the Fair Labor Standards Act (FLSA). The 165th Judicial District Court, Harris County, Elizabeth Ray, J., granted summary judgment for employee but did not award requested amount of attorney fees. Employee appealed. The Court of Appeals, Nuchia, J., held that genuine issue of material fact on reasonableness of attorney fees precluded summary judgment on that issue.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Judgment 228 ⇌ 181(21)

228 Judgment

228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(21) k. Employees, Cases Involving. Most Cited Cases

Genuine issue of material fact as to the reasonableness of attorney fees claimed by employee precluded summary judgment on this issue, in employee's action against employer for unpaid overtime wages, brought under the Fair Labor Standards Act (FLSA). Fair Labor Standards Act of 1938, §§ 2(a), 9(b), 29 U.S.C.A. §§ 207(a), 216(b).

[2] Judgment 228 ⇌ 185.3(1)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(1) k. In General. Most Cited Cases

The award of attorney fees in a summary judgment is improper unless the evidence of the reasonableness of those fees is uncontroverted.

[3] Judgment 228 ⇌ 186

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and Determination.

Most Cited Cases

When the amount of attorney fees is not conclusively established, the attorney fees question may be severed on summary judgment and remanded for trial.

[4] Costs 102 ⇌ 194.18

102 Costs

102VIII Attorney Fees
102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases

In determining the reasonableness of attorney's fees, the fact finder must be guided by a specific standard; this standard is substantially similar under both federal law and state law. State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App., Art. 10, § 9, Rules of Prof.Conduct, Rule 1.04.

[5] Labor and Employment 231H ⇌ 2405

231H Labor and Employment

231HXIII Wages and Hours
231HXIII(B) Minimum Wages and Overtime Pay
231HXIII(B)6 Actions

231Hk2401 Costs and Attorney Fees

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231Hk2405 k. Amount. Most Cited

Cases

(Formerly 232Ak1571 Labor Relations)

Because federal law provides a very specific framework for analyzing the reasonableness of attorney fees under statutes like the Fair Labor Standards Act (FLSA), the federal framework must be followed in determining and reviewing the reasonableness of attorney fees under the FLSA. Fair Labor Standards Act of 1938, § 9(b), 29 U.S.C.A. § 216(b).

[6] Costs 102 ⇌ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases

To calculate reasonable attorney fees, a fact finder should multiply the number of hours worked by the attorney's hourly rate; both the number of hours and the hourly rate must be reasonable.

[7] Costs 102 ⇌ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases

The amount resulting from multiplying the hours an attorney worked by the attorney's hourly fee is commonly referred to as the "lodestar figure" for attorney fees.

[8] Costs 102 ⇌ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases

The factors to be considered in adjusting attorney fees up or down from the "lodestar" amount include: (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the level of skill required, (4) the effect on other employment by the attorney, (5) the customary fee, (6) whether

the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorney, (10) the "undesirability" of the case, (11) the nature and length of the attorney's relationship with the client, and (12) awards in similar cases; if some of these factors are accounted for in the "lodestar" amount, they should not be considered when making adjustments.

*527 Peter Costea, Houston, for Appellant.

Charles L. Henke, Jr., Scott Christopher Gillett, Henke & Associates, Houston, for Appellee.

Panel consists of Justices HEDGES, NUCHIA, and BRISTER.^{FN*}

FN* The Honorable Scott Brister, who became Chief Justice of the Fourteenth Court of Appeals on July 16, 2001, continues to participate by assignment for the disposition of this case, which was submitted on May 14, 2001.

OPINION

NUCHIA, Justice.

Appellant-plaintiff Angel Guity appeals from a summary judgment granted in his favor in a suit against appellee-defendant C.C.I. Enterprises, Company ("C.C.I."), for unpaid overtime wages under the Fair Labor Standards Act ("FLSA").^{FN1} See 29 U.S.C. A. § 207(a) (West 1998). In a single point of error, Guity contends the trial court erred in denying his full recovery of attorney's fees. We affirm in part and reverse in part.

FN1. Section 216(b) of the Fair Labor Standards Act gives state courts jurisdiction to hear cases involving suits for overtime pay. 29 U.S.C.A. § 216(b) (West 1998) ("An action to recover ... may be maintained against any employer

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(including a public agency) in any Federal or State court of competent jurisdiction....").

BACKGROUND

On appeal neither party complains about the trial court's granting of summary judgment on the underlying claim. The only issue before us is the trial court's award of attorney's fees.

Attached to Guity's summary judgment motion was the affidavit of Peter Costea, Guity's attorney. In it, Costea claims \$8,325.00 in attorney's fees for prosecuting the suit, and he also sets out why that amount is reasonable. C.C.I.'s response motion to Guity's motion for summary judgment included the affidavit of its attorney, *528 Charles L. Henke, Jr. After also setting out his qualifications and professional experience, Henke's affidavit lists a set of factors courts follow in determining the reasonableness of attorney's fees. The affidavit concludes by stating that a "reasonable fee for the necessary services performed to date in connection with the prosecution of this case is \$500.00." In its final order, the trial court awarded Guity \$500.00 in attorney's fees. Guity appeals that amount.

DISCUSSION

The relevant portion of the FLSA states, "The court in such action, shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C.A. § 216(b) (West 1998). The language of the statute is mandatory; that is, a prevailing plaintiff must be awarded reasonable attorney's fees and costs in actions brought under the FLSA. See *Purcell v. Seguin State Bank and Trust Co.*, 999 F.2d 950, 961 (5th Cir.1993).

[1][2][3] In this case, the award of attorney's fees was made as a matter of summary judgment. The award of attorney's fees in a summary judgment is improper unless the evidence of the reasonableness of those fees is uncontroverted. That is not the case here, given that conflicting affidavits from

opposing attorneys were presented.^{FN2} *General Elec. Supply Co. v. Gulf Electroquip, Inc.*, 857 S.W.2d 591, 601 (Tex.App.-Houston [1st Dist.] 1993, writ denied). When the amount of attorney's fees is not conclusively established, the attorney's fees question may be severed and remanded for trial. *Id.* at 602.

FN2. In addition to the affidavit disputing the reasonableness of attorney's fees sought by Guity, C.C.I.'s motion opposing Guity's motion for summary judgment asserted that "there is a genuine issue of material fact whether these [attorney's] fees are reasonable...."

[4] In determining the reasonableness of attorney's fees, the fact finder must be guided by a specific standard. This standard is substantially similar under both federal law and state law. See *Purcell*, 999 F.2d at 961 (setting out the federal standard); *Arthur Andersen v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex.1997) (setting out the state standard and citing to TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R., art. X, § 9)); *Gorges Foodservice, Inc. v. Huerta*, 964 S.W.2d 656, 673 (Tex.App.-Corpus Christi 1997, no pet.).

[5] However, because federal law provides a very specific framework for analyzing the reasonableness of attorney's fees under statutes like the FLSA, the federal framework must be followed in determining and reviewing the reasonableness of attorneys's fees under section 216. See *Hensley v. Eckerhart*, 461 U.S. 424, 430-33, 103 S.Ct. 1933, 1937-39, 76 L.Ed.2d 40 (1983). In *Hensley*, the Court noted that the standards set forth in that opinion "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Id.* 461 U.S. at 433, 103 S.Ct. at 1939 n. 7. Congress has mandated the award of attorney's fees to a prevailing party in FLSA claims. See 29 U.S.C.A. § 216(b) (West 1998).

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[6][7][8] To calculate reasonable attorney's fees, the fact finder should multiply the number of hours worked by the attorney's hourly rate. *Purcell*, 999 F.2d at 961. Both the number of hours and the hourly rate must be reasonable. *Id.* The resulting amount is commonly referred to as the "lodestar" figure. After calculating *529 the lodestar amount, "the district court can adjust the amount upward or downward to account for the well-established *Johnson* factors." *Id.* (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974)). The *Johnson* factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required; (4) the effect on other employment by the attorney; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the attorney's relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19. If some of these factors are accounted for in the lodestar amount, they should not be considered when making adjustments. *Shipes v. Trinity Indus.*, 987 F.2d 311, 320 (5th Cir.1993).

The cause, therefore, is remanded for a determination and award of reasonable attorney's fees. Appellant's point of error is sustained.

We affirm the portion of the judgment awarding overtime wages and liquidated damages, and reverse the portion of the judgment awarding attorney's fees, and remand the cause for further proceedings.

Tex.App.-Houston [1 Dist.],2001.
Guity v. C.C.I. Enterprise, Co.
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H

Supreme Court, Appellate Division, Second Department, New York.
Ronald HART, et al., etc., Plaintiffs-Respondents,
v.
CARRO, SPANBOCK, KASTER & CUIFFO, etc.,
Defendant Third-Party Plaintiff-Appellant, et al.,
Defendant,
Hayt, Hayt & Landau, Third-Party Defendant-Respondent.

Jan. 9, 1995.

Former client brought legal malpractice action against law firm based on firm's representation of client in stock purchase transaction in which interest of client in collateral located in foreign country was not secured, and law firm brought third-party claim against second law firm which had assumed representation of client. Client moved for partial summary judgment and second law firm moved to dismiss complaint, and the Supreme Court, Nassau County, Levitt, J., granted motions. Law firm appealed, and the Supreme Court, Appellate Division, held that: (1) conduct of law firm in failing to properly structure stock transaction and investigate and evaluate enforceability of pledge of foreign collateral constituted legal malpractice, and (2) law firm was not entitled to contribution from second law firm which did not assume representation until after injury-causing acts had taken place.

Affirmed.

West Headnotes

[1] Attorney and Client 45 ⇌ 109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and Omissions of Attorney in General. Most Cited Cases

Attorney and Client 45 ⇌ 112.50

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112.50 k. Research and Knowledge of Law. Most Cited Cases

Attorney was negligent in failing to properly structure stock purchase agreement and to properly investigate, evaluate, and advise client as to enforceability of pledge agreement used to secure collateral located in foreign country in connection with stock purchase agreement where failure to secure foreign collateral caused client to be without assets against which to satisfy judgment obtained in action arising out of stock purchase, even though attorney repeatedly suggested that client obtain foreign counsel.

[2] Attorney and Client 45 ⇌ 109

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and Omissions of Attorney in General. Most Cited Cases

Attorney and Client 45 ⇌ 112.50

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k112.50 k. Research and Knowledge of Law. Most Cited Cases

When counsel is retained in matter involving foreign law, it is counsel's responsibility to conduct matter properly and know, or learn, law of foreign jurisdiction; counsel may not shift to client legal responsibility it was specifically hired to undertake because of its superior knowledge.

[3] Contribution 96 ⇌ 5(6.1)

96 Contribution
96k2 Common Interest or Liability
96k5 Joint Wrongdoers
96k5(6) Particular Torts or Wrongdoers
96k5(6.1) k. In General. Most Cited

Cases

Law firm against which legal malpractice ac-

tion was brought by client as result of firm's handling of stock purchase agreement was not entitled to seek contribution from second law firm which had assumed representation of client where injury-producing conduct of improperly structuring transaction and advising client, which resulted in failing to obtain interest in collateral, occurred before second law firm assumed any responsibility in matter.

[4] Attorney and Client 45 ↩ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited

Cases

Law firm's decision to pursue legal malpractice claim against client's prior law firm in connection with prior firm's handling of stock purchase agreement in attempt to mitigate client's damages, rather than pursue any evanescent interest client retained in collateral which was part of stock purchase agreement, was reasonable course of action and did not constitute legal malpractice.

****847** Wilson, Elser, Moskowitz, Edelman & Dick-er, New York City (Thomas W. Hyland, Mark W. Anesh, and Edward A. Magro, of counsel), for defendant third-party plaintiff-appellant.

Hayt, Hayt & Landau, Great Neck (Clifford J. Chu and Ralph Pernick, of counsel), for plaintiffs-respondents.

Sedgwick, Detert, Moran & Arnold, New York City (James Clair and Douglas Poetzsch, of counsel), for third-party defendant-respondent.

Before ROSENBLATT, J.P., and LAWRENCE, JOY and KRAUSMAN, JJ.

****848 *617 MEMORANDUM BY THE COURT.**

In an action to recover damages, *inter alia*, for legal malpractice, the defendant third-party plaintiff appeals from an order of Supreme Court, Nassau

County (Levitt, J.), dated January 31, 1992, which (1) denied its motion to disqualify Hayt, Hayt & Landau as counsel of record for the plaintiffs, and (2) granted those branches of the joint cross motion of the plaintiffs and Hayt, Hayt & Landau which were (a) to grant partial summary judgment to the plaintiffs on their cause of action for legal malpractice in connection with the sale of certain real estate located in the Bahamas, and (b) to dismiss the third-party complaint insofar as asserted against Hayt, Hayt & Landau.

ORDERED that the order is affirmed, with one bill of costs payable to the respondents appearing separately and filing separate briefs.

This action for legal malpractice arises out of the plaintiffs' sale of stock in American Plan Corporation (hereinafter APC), to APN Holdings Corp. (hereinafter APN), an entity controlled by Abe J. Lieber (hereinafter Lieber). The APC stock was the major asset of a testamentary trust established under the will of Mark M. Hart. In essence, the plaintiffs claim that their financial losses were caused by the improper structuring of a Stock Purchase Agreement by the law firm of Carro, Spanbock,*618 Kaster & Cuiffo (hereinafter Carro), and Carro's deficient legal advice rendered in conjunction with the stock sale.

As a result of the problems which arose in connection with the stock sale Carro was discharged and ultimately replaced by Hayt, Hayt & Landau (hereinafter Hayt). The plaintiffs, then represented by Hayt, commenced this action against Carro, *inter alia*, for legal malpractice. Thereafter, Carro commenced the third-party action against Hayt, alleging that if Carro was negligent and caused the plaintiffs' losses, Hayt was similarly negligent and therefore liable for its proportionate share of any judgment against Carro. Carro then moved to disqualify Hayt as plaintiffs' counsel, on the grounds of conflict of interest and violation of the attorney-witness rule, as Carro intended to call Hayt as a witness in its third-party action.

APC and the Hart family were long-standing clients of the Carro firm. In 1976 Carro drafted the will providing for the testamentary trust, and in 1982 Carro drafted the Stock Purchase Agreement for the sale of the APC stock to APN. The Stock Purchase Agreement was executed by the contracting parties on June 25, 1982. It provided for a total purchase price of \$5,206,910 for the stock, \$1,750,000 of which was to be paid in two installments (\$520,000 and \$1,230,000) on or prior to the closing, with the deferred balance of \$3,456,910 to be paid after closing pursuant to a promissory note. The Stock Purchase Agreement was structured so that the collateral used to secure the deferred balance had three components: (1) a second mortgage on commercial real property in Plano, Texas (hereinafter the Texas collateral); (2) a personal guaranty signed by Lieber, his wife, and five Lieber-controlled Bahamian corporations; and (3) the Bahamian collateral, which consisted of a pledge agreement whereby APN pledged shares of stock it owned in three Lieber-controlled corporations, which in turn owned separate parcels of real estate in the Bahamas, to wit, the Whitfield Parcel, owned by Whitfield Corp., the Sunward Villas Parcel, owned by Sunward Villas, Ltd., and the ABT Parcel, owned by ABT Investments, Ltd. (Only the ABT Parcel, which was sold on October 19, 1982, two weeks after the closing on the SPA, is at issue here.) The closing took place on October 5, 1982. The buyers also executed the personal guaranty and the pledge agreement at that time. After the closing, Lieber/APN failed to transfer the stock certificates relating to the Bahamian collateral and also refused to make payment on the promissory note.

To avoid its obligations on the promissory note, in June *619 1983 APN commenced an action against the plaintiffs (hereinafter the APN action) in Federal District Court, contending that it was fraudulently induced to purchase the APC stock at an inflated price. (Carro represented the plaintiffs in the APN action until January 1984, when the plaintiffs engaged Hayt to replace Carro as the plaintiffs' **849 counsel of record). In September

1985, the Federal District Court rendered a \$4.5 million judgment in favor of the plaintiffs and against APN and the guarantors on the note (*see, A.P.N. Holdings Corp. v. Hart*, 615 F.Supp. 1465). In October 1985, Lieber and the other guarantors filed for bankruptcy, or were otherwise determined to be judgment-proof. In addition, the Texas collateral had previously proved to be worthless.

This state of affairs left the Bahamian collateral as the only possible asset remaining to satisfy the APN judgment. Therefore, in December 1985 the plaintiffs, then represented by Hayt, contacted an attorney in the Bahamas who advised them that, under Bahamian law, the pledged stock did not secure any interest in the Bahamian corporations or in the Bahamian real estate. Moreover, since further investigation revealed that APN and Lieber had no other assets in the Bahamas, Bahamian counsel concluded that nothing further could be done to satisfy the judgment.

[1][2] In these circumstances, the court properly granted the plaintiffs' cross motion for partial summary judgment as to the ABT Parcel. The record establishes that in improperly structuring the Stock Purchase Agreement and in failing to properly investigate, evaluate, and advise the plaintiffs as to the enforceability of the pledge agreement used to secure the Bahamian collateral, Carro did not exercise that degree of skill commonly exercised by an ordinary member of the legal community (*see, Marshall v. Nacht*, 172 A.D.2d 727, 727-728, 569 N.Y.S.2d 113). Carro thus breached its duty to the plaintiffs and proximately caused their damages (*see, Marshall v. Nacht, supra; Murphy v. Stein*, 156 A.D.2d 546, 548, 549 N.Y.S.2d 53). Carro's attempt to avoid liability by emphasizing that it repeatedly urged plaintiff Ronald Hart to employ Bahamian counsel is to no avail. When, as here, counsel is retained in a matter involving foreign law, it is counsel's responsibility to conduct the matter properly and to know, or learn, the law of the foreign jurisdiction (*see, Matter of New York County Lawyers Assn. [Roel]*, 3 N.Y.2d

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224, 232, 165 N.Y.S.2d 31, 144 N.E.2d 24; *Degen v. Steinbrink*, 202 App.Div. 477, 481, 195 N.Y.S. 810). Counsel may not shift to the client the legal responsibility it was specifically hired to undertake because of its superior knowledge (*see, Cicorelli v. Capobianco*, 90 A.D.2d 524, 525, 453 N.Y.S.2d 21). In any event, we *620 note that Ronald Hart, as only one of the trustees, was not authorized to bind the trust. Accordingly, Carro was not in a position to properly rely on Ronald Hart's alleged decision not to retain counsel in the Bahamas.

[3][4] The Supreme Court also properly dismissed the third-party complaint for contribution insofar as it is asserted against Hayt. Hayt did not begin representing the plaintiffs in the matter until January 1984. The injury-producing conduct, the improper structuring of the Stock Purchase Agreement and the related advice Carro provided to the plaintiffs, which led to the sale of the ABT Parcel on October 19, 1982, and the plaintiffs' subsequent financial loss, occurred before Hayt assumed any responsibility in the matter. Moreover, Hayt's choice to pursue a legal malpractice claim to mitigate the plaintiffs' damages, rather than pursue any evanescent interest the plaintiffs may have retained in the Bahamian collateral, was a reasonable course of action and did not constitute legal malpractice (*see, Rosner v. Paley*, 65 N.Y.2d 736, 738, 492 N.Y.S.2d 13, 481 N.E.2d 553; *Johnson v. Berger*, 193 A.D.2d 784, 786, 598 N.Y.S.2d 270; *Ferlisi v. Jackrel, Kopelman & Raskin*, 167 A.D.2d 502, 503, 562 N.Y.S.2d 173).

Finally, with the dismissal of the third-party action insofar as it is asserted against Hayt, Carro's motion for disqualification of Hayt is academic.

N.Y.A.D. 2 Dept., 1995.
Hart v. Carro, Spanbock, Kaster & Cuiffo
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105 U.S. 45, 15 Otto 45, 1881 WL 19787 (U.S.Ariz.), 26 L.Ed. 1028
(Cite as: 105 U.S. 45, 1881 WL 19787 (U.S.Ariz.))

▷

Supreme Court of the United States

HEAD

v.

HARGRAVE.

October Term, 1881

West Headnotes

Appeal and Error 30 ⇌ 553(1)

30 Appeal and Error

30X Record

30X(C) Necessity of Bill of Exceptions,
Case, or Statement of Facts

30k553 Substitutes

30k553(1) k. In General. Most Cited

Cases

A statement of facts, setting forth alleged errors of law, is available on appeal in place of a bill of exceptions, if embodied in the record for that purpose, though it may have been used on a motion for a new trial.

Attorney and Client 45 ⇌ 140

45 Attorney and Client

45IV Compensation

45k139 Value of Services

45k140 k. In General. Most Cited Cases

In an action for legal services, the opinions of attorneys as to their value are not to preclude the jury from exercising their judgment; and it is in their province to weigh the opinions by reference to the nature of the services rendered, the time occupied in their performance, and other attendant circumstances.

Evidence 157 ⇌ 571(7)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(7) k. Value. Most Cited

Cases

Opinion evidence as to the value of professional services is not, as a matter of law, conclusive on the jury.

Evidence 157 ⇌ 571(7)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(7) k. Value. Most Cited

Cases

Great weight should be given to the opinions of professional men with respect to the value of professional services but the opinions are not to be blindly received and are to be intelligently examined by the jury in the light of their own general knowledge.

****1 ERROR** to the Supreme Court of the Territory of Arizona.

This was an action brought in a district court of Arizona to recover the sum of \$2,000 alleged to be owing by the defendants to the plaintiffs for professional services as attorneys and counsellors-at-law in that Territory in 1877 and 1878. The complaint alleges that the services were performed in several suits and proceedings, upon a retainer by the defendants; and that they were reasonably worth that sum. The answer is a general denial.

On the trial, one of the plaintiffs testified to the rendition of the services by them in several suits, stating generally the nature of each suit, the service performed, and its value. Five attorneys-at-law also testified to the value of the services; three of whom were called by the plaintiffs and two by the defendants. They differed widely in their opinions, the

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highest estimate placing the value of the services at \$5,440, the lowest at \$1,000.

The court instructed the jury, that, in determining the value of the plaintiffs' services, they might consider their nature, the length of time they necessarily occupied, and the benefit derived from them by the defendants; that the plaintiffs were entitled to reasonable compensation for the services rendered; and that the reasonableness of the compensation was a fact to be determined from the evidence as any other controverted fact in the case; and then proceeded as follows:--

'The services rendered were skilled and professional, and for the purpose of proving to you the value of that class of services rendered, professional gentlemen, attorneys-at-law, claiming to be familiar with the value of such services, have testified before you. If you accredit *these witnesses* with truthfulness, their testimony should have weight with you; and the fact as to what is a reasonable compensation should be determined from the evidence offered, and not from your own knowledge or ideas of the value of that class of services. In other words, you must determine the value of the services rendered from the evidence which has been offered before you, and not from your own knowledge or ideas of the value of such services.'

The defendants thereupon asked the court to instruct the jury as follows:--

'In determining the value of the plaintiffs' services the jury are not bound by the testimony of the expert witnesses; that testimony may be considered by the jury; but if, in their judgment, the value fixed by those witnesses is not reasonable, they may disregard it, and find the amount which, in their judgment, would be reasonable.

'In determining the value of the plaintiffs' services the jury are not bound by the opinions of the witnesses, unless the jury shall find from all the evidence taken together, including the nature of the services, the time occupied in the performance of

them, and the result of them, and the benefit derived by the defendants from the rendition of said services, that said opinions are correct.'

**2 The court refused to give these instructions, and an exception was taken. The jury thereupon gave a verdict for the plaintiffs for \$1,800; upon which judgment was entered. A statement of the proceedings at the trial was then prepared, which, among other things, set forth the alleged errors of law excepted to by the defendants. This statement was used on a motion for a new trial, which was denied; and by stipulation it was embodied in the papers for the appeal to the Supreme Court of the Territory from the judgment, as well as from the order denying the new trial. The order and judgment were both affirmed; and, to review the judgment, the case is brought to this court.

Mr. Thomas Fitch and *Mr. C. J. Hillyer* for the plaintiffs in error.

Mr. Philip Phillips and *Mr. W. Hallett Phillips* for the defendants in error.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The defendants in error object to the use of the statement, which sets forth the exceptions taken, as not constituting a part of the record before us. The ground of the objection is, that the statement was prepared for and used on the motion for a new trial, with the disposition of which this court cannot interfere. The objection would be tenable but for the stipulation of the parties that the statement might be used on appeal from the judgment. A statement of the case, according to the law regulating civil proceedings in the Territory, takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken. It is not the less available on appeal from the judgment when, by stipulation, it is embodied in the record for that purpose, though used on the motion for a new trial. We have had occasion to refer to this subject in *Kerr v. Clappitt*,

105 U.S. 45, 15 Otto 45, 1881 WL 19787 (U.S.Ariz.), 26 L.Ed. 1028
(Cite as: 105 U.S. 45, 1881 WL 19787 (U.S.Ariz.))

which arose in Utah, where a similar system of procedure in civil cases obtains; and it is unnecessary to repeat what is there said. 95 U.S. 188.

The only question presented for our consideration is whether the opinions of the attorneys, as to the value of the professional services rendered, were to control the judgment of the jury so *48 as to preclude them from exercising their 'own knowledge or ideas' upon the value of such services. That the court intended to instruct the jury to that effect is, we think, clear. After informing them that, in determining the value of the services, they might consider their nature, the time they occupied, and the benefit derived from them; also, that the plaintiffs were entitled to reasonable compensation for the services, and that the reasonableness of the compensation was a fact to be determined from the evidence,-it proceeded to call special attention to the testimony of the attorneys, and told the jury that if they accredited *these* witnesses with truthfulness their testimony should have weight, and the fact as to what is reasonable compensation should be 'determined from the evidence offered,' and not from their own knowledge or ideas of the value of that class of services, and emphasized the instruction by repetition, as follows: 'You must determine the value of the services rendered from the evidence that has been offered before you, and not from your own knowledge or ideas as to the value of such services.' This language qualifies the meaning of the previous part of the instruction. It is apparent from the context that by the words 'evidence offered' and 'evidence that has been offered before you' reference was made to the expert testimony, and to that alone. Taken together, the charge amounts to this: that while the jury might consider the nature of the services and the time expended in their performance, their value-that is, what was reasonable compensation for them-was to be determined exclusively from the testimony of the professional witnesses. They were to be at liberty to compare and balance the conflicting estimates of the attorneys on that point, but not to exercise any judgment thereon by application of their own

knowledge and experience to the proof made as to the character and extent of the services; that the opinions of the attorneys as to what was reasonable compensation was alone to be considered. That the defendants so understood the charge is evident from the qualifications of it which they desired to obtain; and the jury may, in like manner, have so understood it. And as we so construe it, we think the court erred, and that it should have been qualified by the instructions requested. Those instructions correctly presented the law of *49 the case. It is true that no exception was taken to the charge; but its modification was immediately sought by the instructions requested, and to the refusal to give them an exception was taken. Objection to the charge was thus expressed as affirmatively and pointedly as if it had been directed in terms to the language used by the court.

*3 It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys, and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they cannot act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to act intelligently they must, judge of the weight and force of

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that evidence by their own general knowledge of the subject of inquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and, while great weight should always be given to the opinions of those familiar with the subject, they are not to *50 be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable.

As justly remarked by counsel, the present case is an excellent illustration of the error of confining the jury to a consideration merely of the opinions of the experts. Of the five attorneys who were witnesses, no two agreed; and their estimates varied between the extremes of \$1,000 and \$5,440. Directing the jurors to determine the value of the professional services solely upon these varying opinions was to place them in a state of perplexing uncertainty. They should not have been instructed to accept the conclusions of the professional witnesses, in place of their own, however much that testimony may have been entitled to consideration. The judgment of witnesses, as a matter of law, is in no case to be substituted for that of the jurors. The instructions tended to mislead as to the weight to be given to the opinions of the attorneys, especially after qualifications of them designed to correct any misconception on this head were refused.

**4 In *Anthony v. Stinson*, a question similar to the one here presented came before the Supreme Court of Kansas, and a like decision was reached. The instruction given at the trial that the testimony of certain lawyers as to the value of professional services should be the guide of the jury, and that

they should be governed by it in finding the value of the services rendered, was held to be erroneous; the court observing that the jury were not to be instructed as to what part of the testimony before them should control their verdict; that, in order to control it, the testimony of experts should be of such a character as to outweigh by its intrinsic force and probability all conflicting testimony; and that they could not be required to accept, as a matter of law, the conclusions of the witnesses instead of their own. 4 Kan. 211.

In *Patterson v. Boston*, which arose in Massachusetts, the question was as to the damages to be awarded to the plaintiff for his property, taken to widen a street in Boston. The trial court instructed the jury that, in estimating the amount of the damages, if any of them knew, of his own knowledge, any material fact which bore upon the issue, he ought to disclose it *51 and be sworn, and communicate it to his fellows in open court in the presence of the parties; but that, in making up their verdict, they might rightfully be influenced by their general knowledge on such subjects, as well as by the testimony and opinions of witnesses. The case being taken to the Supreme Court of the State, it was held that these directions were not open to exception. Said Chief Justice Shaw, speaking for the court: 'Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisalment, which depends on knowledge and experience, if they might not avail themselves of those powers of their minds when they are most necessary to the performance of their duties.' 20 Pick. (Mass.) 159, 166.

In *Murdock v. Sumner*, the same court, speaking through the same distinguished judge, said that 'the jury very properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry.' In that case a witness had testified as to the quality, condition, and cost of certain goods, and given *his opinion* as to their worth, and the court said that 'the jury were not bound by the opinion of the witness;

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they might have taken the facts testified by him as to the cost, quality, and condition of the goods, and come to a different opinion as to their value.' 22 id. 156.

In like manner, in this case, the jurors might have taken the facts testified to by the attorneys as to the character, extent, and value of the professional services rendered, and then come to a different conclusion. The instructions given, whilst stating that the nature of the services rendered, the time occupied in their performance, and the benefit derived from them might be considered by the jury, directed them that they should be governed by the opinions of the experts as to the value of the services, and, in effect, forbade them to exercise their own knowledge and ideas on that kind of services. This error would have been avoided if the instructions requested by the defendants had been given.

***5 Judgment reversed and a new trial ordered*

U.S.,1881

Head v. Hargrave

105 U.S. 45, 15 Otto 45, 1881 WL 19787
(U.S.Ariz.), 26 L.Ed. 1028

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Supreme Court of Wisconsin.
Jeanette HELMBRECHT, Plaintiff-Appel-
lant-Cross-Petitioner,

v.

ST. PAUL INSURANCE COMPANY and Ray-
mond Colwin, Defendants-Respondents-Petitioners.

No. 82-1894.

Argued Oct. 29, 1984.

Decided Jan. 31, 1985.

Malpractice action was filed by client against her former attorney who represented her in divorce action. The Circuit Court, Fond du Lac County, William E. Crane, J., dismissed after rejecting jury's verdict in favor of client. Client appealed. The Court of Appeals, 117 Wis.2d 74, 343 N.W.2d 132, reversed and remanded, and attorney and his insurance company petitioned for review. The Supreme Court, Ceci, J., held that: (1) damages to client should have been calculated by comparing what she actually received from stipulation with what reasonable judge would have awarded her in divorce action had she been properly represented; (2) substantiated credible evidence supported jury's finding of malpractice; (3) evidence was sufficient to support damage award to client of \$250,000; (4) client was not contributorily negligent as a matter of law; (5) erroneous instruction that jury calculate damages based on what divorce judge would have awarded in divorce action, rather than what reasonable judge would have awarded, was not prejudicial error, and thus, did not warrant new trial; and (6) trial court's failure to instruct jury on legal elements in divorce action was not prejudicial error, and thus, new trial was not warranted.

Decision of Court of Appeals affirmed in part and reversed in part.

West Headnotes

[1] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

In order for client to prove causation and damages in malpractice action against former attorney who represented her in divorce action, client was required to prove what she should have received in divorce action if her case had been properly presented, since client did not allege total loss of claim, but, rather, that she did not receive full award to which she was entitled, or what she would have received had she been competently represented.

[2] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

In malpractice action by client against former attorney who represented her in her divorce action, trial court incorrectly concluded that client was not damaged because divorce judge testified that, even in light of additional evidence, he would not have awarded client anything more.

[3] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and Judgment. Most

Cited Cases

In malpractice action by client against former attorney who represented her in her divorce action, jury did not have to decide what divorce judge would have done in light of additional evidence; it had to decide what reasonable judge would have

done had attorney made proper presentation of client's case.

[4] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases
(Formerly 45k105)

Legal malpractice is negligence, and negligence is determined objectively.

[5] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence.
Most Cited Cases

In malpractice action by client against former attorney who represented her in her divorce action, trial court erred in allowing divorce judge to testify as to what he would have awarded had divorce action been tried before him and in excluding relevant evidence as to what reasonable judge who was apprised of all facts would have awarded, since standard was objective rather than subjective.

[6] Trial 388 ⇌ 165

388 Trial

388VI Taking Case or Question from Jury
388VI(C) Dismissal or Nonsuit
388k165 k. Hearing and Determination of Motion. Most Cited Cases

In determining whether trial court should grant postverdict motion for dismissal because of insufficiency of evidence, great deal of credence is given to jury's determinations. W.S.A. 805.14(1).

[7] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Neg-

ligence Action in General. Most Cited Cases
(Formerly 45k105)

Although code of professional responsibility is beneficial in providing answers with respect to attorneys' ethical conduct, it does not exhaustively define obligations attorney owes his client, nor does it undertake to define standards for civil liability of lawyers for professional conduct. SCR 20.002.

[8] Attorney and Client 45 ⇌ 107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k107 k. Skill and Care Required. Most Cited Cases

Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and Judgment. Most Cited Cases

Attorney's alleged liability for malpractice in representing client in divorce action turns on reasonableness of his skills, knowledge and actions, given particular circumstances of divorce; such determination is a mixed question of fact and law, because trier of fact is confronted with a dual problem: what, in fact, did attorney do or fail to do in particular situation, and what would reasonable or prudent attorney have done in same circumstance.

[9] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence.
Most Cited Cases

Expert testimony is generally necessary in legal malpractice cases to establish parameters of acceptable professional conduct, given underlying fact situation, but is not required in cases where breach

is so obvious that it may be determined by court as a matter of law or where standard of care is within ordinary knowledge or experience of jurors.

[10] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

Evidence 157 ⇌ 512

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k512 k. Due Care and Proper Conduct
in General. Most Cited Cases

In malpractice action by client against former attorney who represented her in her divorce action, expert testimony by three experienced divorce attorneys regarding conduct by attorney in question was appropriate and necessary to establish standard of care in case, because issue of what reasonably prudent attorney would have done in divorce action with respect to property division and maintenance was not within realm of ordinary experience or common knowledge.

[11] Appeal and Error 30 ⇌ 1108

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(A) Decision in General

30k1108 k. Effect of Change in State of
Facts. Most Cited Cases

In reviewing testimony of expert witnesses in malpractice action, Supreme Court would be required to consider facts of particular case viewed as of time of attorney's alleged negligent conduct.

[12] Attorney and Client 45 ⇌ 107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k107 k. Skill and Care Required. Most
Cited Cases

Generally, attorney is not required to exercise perfect judgment in every instance; he is not guarantor of results and will not be held accountable for error in judgment if he acts in good faith and his acts are well-founded and in best interests of client.

[13] Attorney and Client 45 ⇌ 110

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k110 k. Collection of Demands. Most
Cited Cases

Although attorney representing client in divorce action was not obligated to negotiate a settlement for his client, in doing so, he had duty to negotiate with reasonable diligence, which would be difficult, if not impossible, where all of relevant and pertinent facts were not known when attorney entered into negotiations.

[14] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful
Acts

45k129(2) k. Pleading and Evidence.
Most Cited Cases

In malpractice action by client against former attorney who represented her in divorce action, jury's determination that attorney was negligent in recommending that client accept settlement of \$25,000 property award, \$1,000 per month limited maintenance for three and one-half years and \$400 per month child support for two children was supported by substantiated credible evidence, including evidence that attorney was not prepared at trial to prove value of marital assets or amount necessary for maintenance and duration thereof, that parties had been married for nearly 24 years, that marital assets could have been worth as much as \$263,000, and that husband's income was \$62,000 per year.

[15] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

In malpractice action by client against former attorney who represented her in divorce action, client was required to establish that divorce award she actually received was less than what reasonable judge who was aware of all of facts would have awarded in divorce action in order to satisfy her burden of proving causation and damages.

[16] Appeal and Error 30 ⇌ 837(2)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k837 Matters or Evidence Considered
in Determining Question

30k837(2) k. Consideration of Other
Cases and Matters Therein. Most Cited Cases

In order to evaluate jury's determination as to damages in malpractice action by client against former attorney who represented her in divorce action, Supreme Court would be required to review evidence pertaining to valuation of marital estate, maintenance award, and client's attempt to revise divorce judgment.

[17] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

In malpractice action by client against former attorney who represented her in divorce action, evidence that attorney's valuation of marital estate prior to settlement excluded dental practice, two trusts, and employer's contribution in retirement plan, that maintenance award was too low in

amount and too short in duration, and that client incurred more than \$7,500 in attorney fees in an attempt to modify divorce judgment, demonstrated that approximate damage to client, exclusive of what she actually received in divorce settlement, was at a minimum between \$244,166 and \$288,000, and thus, supported damage award of \$250,000.

[18] Attorney and Client 45 ⇌ 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(1) k. In General; Limitations.

Most Cited Cases

Contributory negligence of client can be a defense in a legal malpractice action.

[19] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

In malpractice action, attorney, who failed to allege in his answer that client was contributorily negligent with respect to handling of divorce action, waived defense of contributory negligence. W.S.A. 802.02(3).

[20] Negligence 272 ⇌ 1571

272 Negligence

272XVIII Actions

272XVIII(C) Evidence

272XVIII(C)1 Burden of Proof

272k1569 Defenses and Mitigating
Circumstances

272k1571 k. Fault of Plaintiff or
Third Persons. Most Cited Cases
(Formerly 272k122(1))

Burden of proof to establish contributory negligence is upon defendant.

[21] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

In malpractice action by client against former attorney who represented her in divorce action, attorney failed to meet his burden of establishing that client was contributorily negligent, in light of evidence in record that client fully cooperated with attorney, that she advised him of new developments by letters, and that she agreed to divorce stipulation upon counsel's advice.

[22] Attorney and Client 45 ⇌ 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(1) k. In General; Limitations.

Most Cited Cases

Even if client failed to advise former attorney who represented her in divorce action of safety deposit box, gun collection and coin collection, such alleged omission would not be a factor in determining contributory negligence on part of client in malpractice action brought against attorney, since jury was specifically advised by counsel to disregard such items in their deliberations regarding damages and no evidence as to value of such items were ever presented to jury.

[23] Attorney and Client 45 ⇌ 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(1) k. In General; Limitations.

Most Cited Cases

Client's recovery in malpractice action will not be limited merely because client trusted attorney to

properly perform services for which he was employed.

[24] Appeal and Error 30 ⇌ 1177(5)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1177 Necessity of New Trial

30k1177(5) k. Errors in Rulings and

Instructions at Trial. Most Cited Cases

New trial is not warranted in cases where trial court erroneously gave an instruction unless error is determined to be prejudicial.

[25] Appeal and Error 30 ⇌ 1068(4)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1068 Error Cured by Verdict or Judgment

30k1068(4) k. Amount of Recovery or Damages. Most Cited Cases

Appeal and Error 30 ⇌ 1177(5)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1177 Necessity of New Trial

30k1177(5) k. Errors in Rulings and

Instructions at Trial. Most Cited Cases

In malpractice action by client against former attorney who represented her in her divorce action, erroneous instruction that jury should calculate damages based on what divorce judge would have awarded client in divorce action if she had been properly represented did not prejudice client, since jury returned verdict in favor of client despite divorce judge's testimony, obviously ignoring erroneous instruction and using proper objective standard in determining damages, and since verdict answers regarding negligence of attorney and damages sustained by client were supported by credible

evidence; therefore, new trial was not warranted.

[26] Jury 230 ⇌ 16(9)

230 Jury

230II Right to Trial by Jury

230k16 Particular Proceedings in Civil Actions

230k16(9) k. Attorney Fee Determinations. Most Cited Cases

(Formerly 230k16(1))

Fact that divorce suit underlying malpractice action by client against attorney who represented her in divorce action would have been tried before trial judge and not jury did not preclude jury's determination in malpractice action of what a reasonable judge would have awarded in divorce action, absent alleged negligence, since action was not a divorce action, but a suit alleging negligence of attorney, as to which State Constitution guaranteed jury trial if parties desired one. W.S.A. Const. Art. 1, § 5.

[27] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and Judgment. Most Cited Cases

Although causation and damages are generally issues of fact for trier of fact, such may not necessarily be true in legal malpractice case where determination of causation and damages is dependent on what outcome would have been in original action absent negligence of attorney.

[28] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and Judgment. Most Cited Cases

Although jury in malpractice action should substitute its judgment for fact finder of initial action, jury cannot reach its own judgment on proper outcome of earlier case that hinged on issue of law.

[29] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and Judgment. Most Cited Cases

In malpractice action by client against former attorney who represented her in divorce action, trial court erred in not instructing jury on legal elements in divorce action; at a minimum, instructions should have addressed what factors divorce court would have applied in its finding of fact and in its determinations as to property division and maintenance, which would have enabled jury to reasonably apply law to particular facts involved and resolve issue of what reasonable judge would have awarded in initial divorce action. W.S.A. 767.255, 767.26.

[30] Appeal and Error 30 ⇌ 1067

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1067 k. Failure or Refusal to Charge. Most Cited Cases

Appeal and Error 30 ⇌ 1068(5)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)18 Instructions

30k1068 Error Cured by Verdict or Judgment

30k1068(5) k. Failure or Refusal to Instruct. Most Cited Cases

In malpractice action by client against former attorney who represented her in divorce action, trial

court's failure to instruct jury on legal elements in underlying divorce action did not prejudice client, since jury heard considerable testimony concerning factors each expert witness considered in arriving at opinions with respect to proper property division and maintenance award, since instruction given was not misleading, but was incomplete, and since damage awarded was supported by sufficient credible evidence and would not have been different with thorough instruction; therefore, new trial was not warranted.

****121 *97** John R. Teetaert (argued), Appleton, for defendants-respondents-petitioners; Menn, Nelson, Sharratt, Teetaert & Beisenstein, Ltd., Appleton, on brief.

John H. Correll (argued), Milwaukee, for plaintiff-appellant-cross-petitioner; and Correll Law Office, Ltd., Milwaukee, on brief.

CECI, Justice.

This is a review of a decision of the court of appeals ^{FN1} reversing the judgment of the circuit court for Fond du Lac county, William E. Crane, presiding judge, and remanding the case for a new trial. ***98** We affirm the court of appeals' holding that the trial court erred in granting the petitioners' motion to dismiss the action and direct a verdict in their favor. We reverse that portion of the court of appeals decision remanding the matter for a new trial on all issues.

FN1. *Helmbrecht v. St. Paul Ins. Co.*, 117 Wis.2d 74, 343 N.W.2d 132 (Ct.App.1983)

This is a legal malpractice action which arose out of Attorney Colwin's representation of Jeanette Helmbrecht in a 1977 divorce action. At the time of the divorce, Jeanette Helmbrecht had been married to Thomas Helmbrecht for nearly twenty-four years, and they had six living children. Mrs. Helmbrecht, forty-nine years old at that time, was a registered nurse but, except for a few months in

1971, had not worked since their marriage in 1953. Thomas Helmbrecht, fifty years of age at that time, was a dentist by profession and was in partnership with his brother in Mayville, Wisconsin. By means of his dental practice, Dr. Helmbrecht grossed approximately \$112,000 per year, netting him over \$62,000 per year before taxes.

A summons was filed by Mrs. Helmbrecht in September, 1976, but was not followed by a complaint. It is clear that she wanted a legal separation but was opposed ****122** to a divorce. Subsequently, in March, 1977, Attorney Colwin was retained by Mrs. Helmbrecht, and Dr. Helmbrecht filed a counterclaim, asking for a divorce.

Prior to the scheduled divorce trial date, Colwin met with Jeanette Helmbrecht to discuss what items were to be included in the marital estate and the possibility of a maintenance award for Mrs. Helmbrecht. Jeanette testified that she met with Colwin on four occasions, and Colwin testified that they met on thirteen occasions. Prior to trial, Jeanette expressed a desire to enroll in a refresher course so that she could return to work as a registered nurse.

Mr. Storck, the attorney for Dr. Helmbrecht, submitted to Colwin a proposed stipulation agreement, which included ***99** the following assets: 1976 Buick automobile, 1976 International Scout, the marital residence, furniture, Airstream trailer, four life insurance policies, retirement fund, Clifford trust, and a remainder interest in the Helmbrecht trust. In an attempt to further ascertain the extent and valuation of the marital estate, Colwin deposed Dr. Helmbrecht, visited Dr. Helmbrecht's dental office, examined probate records with respect to a remainder interest in the Helmbrecht trust, and obtained Dr. Helmbrecht's tax forms.

The divorce trial was scheduled for August 23, 1977, the major issues being property division and maintenance to be awarded Mrs. Helmbrecht. Colwin appeared with his client, Jeanette Helmbrecht, but had no other witnesses scheduled to testify re-

garding the value of the marital assets or Mrs. Helmbrecht's need for maintenance. After Dr. Helmbrecht's attorney stated that he was ready to proceed with the trial, Colwin requested a recess. The two attorneys then negotiated a stipulation whereunder Mrs. Helmbrecht was to receive a \$25,000 cash award as property division to be paid following the sale of their home, limited alimony payments of \$1,000 per month for forty-two months, custody of their two minor children, \$200 per month per child in child support, the 1976 Buick, some items of furniture, and an insurance policy on her life. The balance of the marital estate, including the remaining proceeds from the sale of the house, the 1976 Scout, furniture, three life insurance policies on the life of Dr. Helmbrecht, Airstream trailer, retirement fund, Clifford trust, and remainder interest in the Helmbrecht trust were all awarded to Dr. Helmbrecht. No mention was made of Dr. Helmbrecht's interest in his dental practice.

The stipulation was read into the record and approved by Joseph E. Schultz, county judge for Dodge county. When asked if she agreed with the stipulation, Mrs. *100 Helmbrecht answered, "Basically it's the same as what we discussed before, right. Yes, I do, your honor." Jeanette Helmbrecht, in the instant action, testified that Colwin told her that Judge Schultz had insisted on a fifty percent split of the marital estate and that the stipulation was a fifty percent split. The divorce was subsequently granted by Judge Schultz.

Following the divorce, Mrs. Helmbrecht moved to Bedford, New Hampshire, to live with her brother. The two minor children had previously moved there and were already attending school. Jeanette did take a course to refresh her skills as a registered nurse but, because of a back injury and her outdated skills, job opportunities as a registered nurse did not materialize. At the time of the malpractice trial, she was working nights at Cedar Lake Home Campus in West Bend, Wisconsin.

Within a year of the divorce, Mrs. Helmbrecht realized that she and her children could not live on

the maintenance award and child support she was receiving. She contacted Colwin concerning the possibility of an increase in child support, but was told by Colwin's associate that an increase was unreasonable. After her maintenance payments expired in 1981, Mrs. Helmbrecht returned to Wisconsin and attempted to get an adjustment on the divorce judgment. When all attempts failed, she commenced this legal malpractice action against Attorney Colwin and his insurer, seeking to recover as damages the difference between what she actually received in the divorce **123 proceedings and what she would have received if her case had been competently and reasonably prepared and presented.

A trial to a jury of twelve was held on July 27-30, 1982, Judge William E. Crane, presiding. Mrs. Helmbrecht, the plaintiff therein, relied primarily on the testimony of a certified public accountant and three attorneys admitted to practice law in Wisconsin. They testified*101 largely with respect to specific acts of negligence on the part of Colwin and the valuation of the marital estate in 1977. At the close of the plaintiff's case, the defendants made a motion to dismiss the case, asserting that there was no evidence regarding the issue of damages that could go to the jury. The defendants argued that Judge Schultz approved the stipulation and that there was no evidence to indicate that he would have ruled differently if the case had gone to trial. Judge Crane took the motion under advisement.

The defendants relied primarily on the testimony of Judge Schultz, the trial judge in the original divorce action, and one attorney admitted to practice law in Wisconsin. Judge Schultz testified as to what he would have done had the divorce case gone to trial. He concluded that Colwin had negotiated a fair settlement for his client and one which had been "hammered out" by "two fine craftsmen."

At the close of the parties' cases, the trial judge submitted both the negligence and damage questions to the jury. As to damages, the trial judge in-

structed the jury,

"In this case the pecuniary loss, if any, would be the difference between the value of the pecuniary benefits as awarded by the trial court based upon the stipulated agreement of the parties to the divorce action and the amount of pecuniary benefits that would have been awarded by the trial court except for the defendant's negligence.

"I caution you jurors that you are not to decide the divorce case. That is not the matter that is presented to you. You are not to decide the other issues as to the property division or the temporary alimony as your own decision. Your decision must be as to what the judge did based on the stipulation and what the judge would have done based on the information before him on August 23, 1977, at the time that the judgment in this case was entered based upon ... the agreed stipulation of the parties."

***102** The jury returned a verdict finding Colwin seventy-five percent causally negligent and Jeanette Helmbrecht twenty-five percent contributorily negligent. With one dissent, the jury set damages at \$250,000.

Following motions after verdict, the trial judge, Judge Crane, granted the defendants' motion to dismiss and directed the verdict in favor of the defendants. He claimed that the jury's verdict shocked the conscience of the trial court in that it was not supported by sufficient evidence. The trial court reasoned that the verdict,

".... totally disregarded the Court's instructions, totally disregarded the jury's duty, and the damage award as found by them is perverse and extremely prejudicial...."

The court's finding was based largely on the fact that the jury's decision conflicted with the testimony of a single witness, the trial judge in the divorce action. The jury had been instructed to determine what the particular judge in the original di-

vorce action would have awarded the plaintiff had her case been properly presented at trial. However, damages were set by the jury at \$250,000, even though at the legal malpractice trial Judge Schultz gave little or no indication that he would have awarded anything more than the plaintiff received from the stipulation.

The issues presented on appeal are:

1. Whether the standard used in determining damages in a legal malpractice case is subjective (what a particular judge would have awarded) or objective (what a reasonable judge would have awarded).

****124** 2. Whether the trial judge erred in dismissing the action and directing the verdict in favor of the defendants.

3. Whether the court of appeals erred in remanding the case for a new trial on all issues.

4. Whether the trial court erred in allowing the jury to decide the issue of causation and damages.

***103 I.**

The elements of a legal malpractice case in Wisconsin were set out in *Lewandowski v. Continental Casualty Co.*, 88 Wis.2d 271, 277, 276 N.W.2d 284 (1979), as follows:

" 'In an action against an attorney for negligence or violation of duty, the client has the burden of proving the existence of the relation of attorney and client, the acts constituting the alleged negligence, that the negligence was the proximate cause of the injury, and the fact and extent of the injury alleged. The last element mentioned often involves the burden of showing that, but for the negligence of the attorney, the client would have been successful in the prosecution or defense of an action.' " 7 Am.Jur.2d, *Attorneys at Law*, sec. 188, at 156 (1963).

The plaintiff in *Lewandowski* was injured as a result of an automobile accident involving a police

officer of the city of Ashland. The plaintiff's attorney failed to file a summons and complaint within the statute of limitations period, thus barring any legal action against the city. In the plaintiff's legal malpractice action against his attorney, the sole issues were those of causation and damages. In order to resolve these issues, the trial court proceeded with a trial of the negligence action as between the drivers of the two vehicles. The trial court determined that the measure of damages in the legal malpractice action would be the damages that would have been awarded to the plaintiff in an action against the police officer. This process has been described as a "suit within a suit."

[1] On appeal, the trial court's procedure in *Lewandowski* was upheld by this court. As a general rule, we stated,

"In a malpractice action charging that an attorney's negligence in prosecuting a suit resulted in the loss of the client's claim, it has been recognized that the value of the lost claim, that is, the amount that would have been recovered by the client except for the attorney's *104 negligence, is a proper element of damages." *Lewandowski*, 88 Wis.2d at 277-78, 276 N.W.2d 284, quoting 7 Am.Jur.2d, *Attorneys at Law*, section 190 at 157 (1963). (Footnote omitted.)

We held,

"Regardless of the approach used to resolve the issue of liability and damages in a legal malpractice case the ultimate goal should be to determine what the outcome *should* have been if the issue had been properly presented in the first instance." *Lewandowski*, 88 Wis.2d at 281, 276 N.W.2d 284. (Emphasis in original.)

In order for Mrs. Helmbrecht to prove causation and damages, she must prove what she should have received in the 1977 divorce action if her case had been properly presented. It is clear from the record that all of the pertinent facts were not available for Judge Schultz. Unlike the plaintiff in *Lewandowski*, Mrs. Helmbrecht does not allege total

loss of her claim, but, rather, that she did not receive the full monetary award to which she was entitled, or what she would have received had she been competently represented in the divorce case.

Of primary importance in determining whether Colwin caused any injury to Jeanette Helmbrecht is the issue of whether a subjective or objective standard should be used in calculating damages. Specifically, the issue is whether the monetary award actually received by Mrs. Helmbrecht should be compared with what Judge Schultz, the particular judge in the original divorce action, would have awarded had all of the facts been properly presented to him, or with what a "reasonable judge," knowing all the facts, would have awarded **125 in 1977.^{FN2} *105 This issue is of major significance in this case because not only did Judge Schultz testify at trial concerning what he would have awarded, but also the jury was specifically instructed to use a subjective standard and, when it became apparent that the jury disregarded the instruction, the trial judge dismissed the action.

FN2. The powers and obligations of a trial judge in a divorce action are set forth in ch. 767, Stats. Cf., *Miner v. Miner*, 10 Wis.2d 438, 103 N.W.2d 4 (1960), involving a divorce stipulation, where we held, "The court has the same serious duty to examine carefully such agreements or stipulations against the background of *full information of the economic status and resources of the parties* as it has in making a determination without the aid of such an agreement." *Id.*, 10 Wis.2d at 443, 103 N.W.2d 4. (Emphasis added.) See also, *Leighton v. Leighton*, 81 Wis.2d 620, 261 N.W.2d 457 (1978).

[2][3][4] We agree with the court of appeals' holding, which states,

"The trial court incorrectly concluded that Jeanette was not damaged because the divorce judge testified that even in light of the additional

evidence, he would not have awarded Jeanette anything more. The jury did not have to decide what the divorce judge in this case would have done; it had to decide what a reasonable judge would have done had Colwin made a proper presentation of Jeanette's case. *See, Chocktoot v. Smith* [210 Or. 567] 571 P.2d 1255, 1257 (Or.1977). Malpractice is negligence, and negligence is determined objectively." *Helmbrecht*, 117 Wis.2d at 77, 343 N.W.2d 132.

In addition to the argument that negligence law concerns itself with that which can be objectively proven, there are also practical concerns which help to explain why the better rule regarding the measurement of damages is the use of the objective standard. We are deeply concerned about the role of the original judge in subsequent legal malpractice actions, and we will not adopt a rule which compels a trial judge to testify as a witness for one of the parties. That would necessarily place the judge in a peculiar situation where his position of neutrality would be unavoidably compromised, and he would be forced to defend his own actions in the original *106 suit. Also, the risk of prejudice is great. The court of appeals stated,

"Additionally, although the jury obviously disregarded the testimony of the divorce judge in this case, there was the danger that the jury would give his testimony undue weight. Section 904.03, Stats., may therefore require that he not be allowed to testify." *Helmbrecht*, 117 Wis.2d at 77, 343 N.W.2d 132.

If we would require a subjective standard to be used in legal malpractice actions, serious problems would arise for the plaintiff if the original fact finder is unavailable or if his testimony is excluded in the malpractice action because it is found to be prejudicial.

The same concern was expressed by the California Court of Appeals. After stating that a judge should avoid not only impropriety, but also the appearance of impropriety, the court declared,

"We think it prejudicial to one party for a judge to testify as an expert witness on behalf of the other party with respect to matters that took place before him in his judicial capacity. In such instance the judge appears to be throwing the weight of his position and authority behind one of two opposing litigants. The Evidence Code absolutely prohibits the judge presiding at the trial of an action to testify as a witness over the objection of a party. (Evid.Code, § 703; *People v. Connors*, 77 Cal.App. 438, 453, [246 P. 1072].) We think it only slightly less prejudicial when a judge expresses his opinion as a witness about events that occurred in an earlier trial over which he had presided." *Merritt v. Reserve Ins. Co.*, 34 Cal.App.3d 858, 883, 110 Cal.Rptr. 511 (1973).
FN3

FN3. *See also, Aetna v. Price*, 206 Va. 749, 760, 146 S.E.2d 220 (1966).

Second, if evidence of what a particular trial judge would have awarded in the initial**126 action is required to prove damages when the original action was before a trial judge, then evidence of what a particular jury *107 would have awarded in the initial action would also be required to prove damages when the original action was before a jury. This would place an unreasonable and impossible burden on a plaintiff to bring forth twelve jurors to testify as to how they would have found the facts and awarded damages.

The role of the jury in a malpractice action was discussed by the Supreme Court of Oregon. The court decided that in a legal malpractice action, the trial judge should decide disputed issues of law, and the jury should decide disputed issues of fact.

"As already mentioned, even when the alleged negligence concerns the conduct of a jury trial, the 'causation' issue does not call for reconstructing the probable behavior of the actual jury in that trial. It does not call for bringing the jurors into court and subjecting them to examination

and cross-examination to determine what they would have done if the case had been tried differently, nor does it call for expert testimony about the characteristics or the apparent attitudes of those jurors. Although the issue is stated to be the probable outcome of the first case, the second jury is permitted to decide this by substituting its own judgment for that of the factfinder in the earlier case. Once it is accepted that this is what the malpractice jury does, there is no reason why the jury (or a court when sitting without a jury) should not do the same even when the earlier factfinder was a judge, an administrative hearings officer, an arbitrator, a court-martial, or any tribunal deciding on factual grounds. However, no jury can reach its own judgment on the proper outcome of an earlier case that hinged on an issue of law. Unlike its decision of a disputed issue of the professional standard of care, the jury cannot decide a disputed issue of law on the testimony of lawyers." *Chocktoot v. Smith*, 280 Or. 567, 572-73, 571 P.2d 1255 (1977).

Finally, use of an objective standard in determining damages will further ensure uniformity in this state and avoid the troublesome prospect of a standard for damages*108 that will shift with the vagaries of human ability and conduct.

[5] For the above-stated reasons, we hold that the pecuniary damage to Jeanette Helmbrecht should have been calculated by comparing what she actually received from the stipulation with what a reasonable judge in 1977 would have awarded her had she been properly represented. The trial court erred in allowing Judge Schultz to testify as to what he would have awarded had the divorce action been tried before him and in excluding relevant evidence as to what a reasonable judge who was apprised of all of the facts would have awarded in 1977.

II.

The issue we now address is whether the trial court erred in dismissing the action and directing the verdict in favor of the defendants. The defendants moved for a directed verdict at the close of the

plaintiff's case and then renewed their motion following the return of the jury's verdict.^{FN4} **127

The motion was granted because the *109 trial court believed that the evidence was not sufficient to support the verdict. The trial court was quite disturbed by the fact that the jury obviously ignored the court's instruction to establish damages based upon what Judge Schultz would have awarded.^{FN5}

The trial court was convinced that, given Judge Schultz's testimony, there was no credible evidence to establish pecuniary loss, and, therefore, proximate cause was also not established. Finally, the trial court was satisfied that the jury's determination of defendant's negligence was in error.

FN4. Section 805.14, Stats., provides in part as follows:

"(1) TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.

"...

"(3) MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. At the close of plaintiff's evidence in trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff.

"...

"(5) MOTIONS AFTER VERDICT....

"(d) MOTION FOR DIRECTED VERDICT. A party who has made a motion for directed verdict or dismissal on which the court has not ruled pending return of the verdict may renew the motion after verdict. In the event the motion is granted, the court may enter judgment in accordance with the motion."

FN5. The effect of the jury's failure to follow the trial court's erroneous damage instruction is discussed in section III of this opinion.

The standard to be used by a trial court in determining whether to grant a post-verdict motion for dismissal of the action because of insufficiency of evidence is well established. The statutorily established test that a trial court must use in reviewing the sufficiency of the evidence is set out in section 805.14(1), Stats., as follows:

" **805.14 Motions challenging sufficiency of evidence; motions after verdict.** (1) TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party."

"This standard applies to both the trial court on a motion after verdict and to this court on appeal. *110 *Page v. American Family Mut. Ins. Co.*, 42 Wis.2d 671, 681, 168 N.W.2d 65 (1969)." *Chart v. General Motors Corp.*, 80 Wis.2d 91, 110, 258 N.W.2d 680 (1977).

[6] A great deal of credence is given to the jury's determinations. We have maintained,

"Even if the evidence adduced is undisputed, if that evidence permits different or conflicting inferences, a verdict should not be directed; and upon review after verdict, a court is obliged to accept the one adopted by the jury.... Thus, it is only in the most unusual case that a jury's verdict will be upset." *Millonig v. Bakken*, 112 Wis.2d 445, 451, 334 N.W.2d 80 (1983). (Citations omitted.)

However, we have also declared that this court, "will not reverse a trial court's ruling on a motion for dismissal (nonsuit) unless such ruling is clearly wrong." *Olfe v. Gordon*, 93 Wis.2d 173, 186, 286 N.W.2d 573 (1980). In *Olfe*, we quoted the following with approval from *Trogun v. Fruchtman*, 58 Wis.2d 569, 207 N.W.2d 297 (1973):

" ' "... It is considered that these cases and perhaps others containing like language were all intended to express and do in fact express the same general idea, namely, that when the trial judge rules, either on motion for nonsuit, motion for a directed verdict, or motion to set aside the verdict, that there is or is not sufficient evidence upon a given question to take the case to the jury, the trial court has such superior advantages for judging of the weight of the testimony and its relevancy and effect that this court should not disturb the decision merely because, on a doubtful balancing of probabilities, the mind inclines slightly against the decision, but only when the mind is clearly convinced that the conclusion of the trial judge is wrong." ' " *Trogun v. Fruchtman*, 58 Wis.2d 569, 585, 207 N.W.2d 297 (1973), quoting, *Slam v. Lake Superior T. & T. Ry.*, 152 Wis. 426, 432, 140 N.W. 30 (1913). *Olfe*, 93 Wis.2d at 186, 286 N.W.2d 573.

***111 A. Liability**

[7] In 1969, this court adopted our Code of Professional Responsibility,

****128** "... as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the

disciplinary rules." SCR 20.002.

Although this code is beneficial in providing answers with respect to attorneys' ethical conduct, it does not exhaustively define the obligations an attorney owes his client, nor does it "undertake to define standards for civil liability of lawyers for professional conduct." *Id.*

This court first set forth the standard of care to be used by an attorney in *Malone v. Gerth*, 100 Wis. 166, 75 N.W. 972 (1898).

" '[A]n attorney must be held to undertake to use a reasonable degree of care and skill, and to possess to a reasonable extent the knowledge requisite to a proper performance of the duties of his profession, and, if injury results to the client as a proximate consequence of the lack of such knowledge or skill, or from the failure to exercise it, the client may recover damages to the extent of the injury sustained....' " *Gerth*, 100 Wis. at 173, 75 N.W. 972, cited with approval in *Gustavson v. O'Brien*, 87 Wis.2d 193, 199, 274 N.W.2d 627 (1979), and *Olfe*, 93 Wis.2d at 180, 286 N.W.2d 573.

We have also held that an attorney is bound to exercise his best judgment in light of his education and experience, but is not held to a standard of perfection or infallibility of judgment. *Denzer v. Rouse*, 48 Wis.2d 528, 534, 180 N.W.2d 521 (1970)

[8][9] Attorney Colwin's liability for malpractice turns on the reasonableness of his skills, knowledge, and actions, *112 given the particular circumstances of the 1977 divorce action. This determination is a mixed question of fact and law, because the trier of fact is confronted with a dual problem-what, in fact, did Colwin do or fail to do in the particular situation, and what would a reasonable or prudent attorney have done in the same circumstance.^{FN6} Expert testimony is generally necessary in legal malpractice cases to establish the parameters of acceptable professional conduct, giv-

en the underlying fact situation. Expert testimony is not required in cases where the breach is so obvious that it may be determined by the court as a matter of law or where the standard of care is within the ordinary knowledge and experience of the jurors.^{FN7}

FN6. See, *Millonig*, 112 Wis.2d at 450, 334 N.W.2d 80, and *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis.2d 723, 732, 275 N.W.2d 660 (1979).

FN7. See generally, *Olfe*, 93 Wis.2d 173, 286 N.W.2d 573, where we held that expert testimony was not required to establish the standard of care and departure from that standard in cases where the negligence of the attorney involved the attorney's failure to follow his client's instructions.

[10] At the legal malpractice trial, the plaintiff produced three experienced divorce attorneys to give expert opinions concerning Colwin's conduct. This testimony was appropriate and necessary to establish the standard of care in this case, because the issue of what a reasonably prudent attorney would have done in this divorce action in 1977, with respect to property division and maintenance, is not within the realm of ordinary experience or common knowledge.

Jeanette contends that Colwin failed to use due care in the prosecution of the divorce case in that, among other things, he failed to properly inform and advise her of her legal rights and the tax consequences of the divorce settlement, and to use due care in the investigation of the marital assets and preparation for trial. Attorneys have been held liable for malpractice by other *113 courts for giving improper advice and for failing to give advice to their clients in divorce cases.^{FN8} For instance, in *Smith v. Lewis*, 13 Cal.3d 349, 530 P.2d 589, 118 Cal.Rptr. 621 (1975), the Supreme Court of California affirmed a judgment against an attorney for malpractice in failing to assert his client's com-

munity interest in her husband's federal and state retirement benefits in divorce proceedings. The attorney had advised his client that her husband's **129 retirement benefits were not community property. The attorney rested his defense to liability primarily on the proposition that the law with respect to the characterization of retirement benefits was very unclear at the time of the divorce proceeding. The court held,

FN8. See generally, Annot., 78 A.L.R.3d 255 (1977).

"As the jury was correctly instructed, an attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.... If the law on a particular subject is doubtful or debatable, an attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved.... But even with respect to an unsettled area of the law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem. In the instant case, ample evidence was introduced to support a jury finding that defendant failed to perform such adequate research into the question of the community character of retirement benefits and thus was unable to exercise the informed judgment to which his client was entitled." *Id.*, 13 Cal.3d at 358-59, 118 Cal.Rptr. 621, 530 P.2d 589. (Citations omitted.)

*114 Similarly, in *Rhine v. Haley*, 238 Ark. 72, 378 S.W.2d 655 (1964), the Arkansas Supreme Court affirmed a judgment against an attorney for malpractice in securing a property settlement for

his client in a divorce case. The testimony of attorneys was held to be properly admitted to establish what ordinarily careful and prudent attorneys would have done to protect the client's ability to recover under a property settlement negotiated by the attorney. The court pointed out that the attorney did not incorporate a lien into the property settlement to secure his client in the collection of the amounts due to her, nor did he advise his client of the legal effect of her execution of the instrument.

Finally, in *Ishmael v. Millington*, 241 Cal.App.2d 520, 50 Cal.Rptr. 592 (1966), the California Court of Appeals reversed a summary judgment in favor of the attorney in a malpractice action against him. The attorney had represented both parties in an uncontested divorce. The wife subsequently sued, alleging damages due to the attorney's negligent failure to properly investigate, advise, and disclose the true value of the community property before she entered into the property settlement. The court held,

"Representing the wife in an arm's length divorce, an attorney of ordinary professional skill would demand some verification of the husband's financial statement; or, at the minimum, inform the wife that the husband's statement was unconfirmed, that wives may be cheated, that prudence called for investigation and verification. Deprived of such disclosure, the wife cannot make a free and intelligent choice." 241 Cal.App.2d at 527, 50 Cal.Rptr. 592.

In this case, the three attorneys testifying for the plaintiff were all of the opinion that Colwin did not exercise the degree of skill, care, and judgment usually exercised by attorneys under like or similar circumstances. These witnesses found Colwin to be negligent in *115 the representation of Jeanette Helmbrecht in three major areas.

First, the attorneys testified that Colwin negligently failed to discover the extent and value of the marital assets. The formal discovery conducted by Colwin consisted solely of the taking of Dr.

Helmbrecht's deposition. The manner in which this deposition was taken was criticized because Colwin failed to question the validity of Dr. Helmbrecht's information and to thoroughly depose Dr. Helmbrecht. This is evidenced by the fact that Dr. Helmbrecht's ****130** deposition was only ten pages in length. Also, it was asserted that Colwin neglected to trace Dr. Helmbrecht's income by requesting a copy of his bank statements and checks. This could have aided Colwin in discovering additional assets and in determining Dr. Helmbrecht's ability to pay alimony. Colwin never ascertained whether a financial statement had ever been filed with a lending institution and also failed to discern the contents of a safety deposit box, the existence of which was documented on Dr. Helmbrecht's tax return. Finally, Colwin was most severely criticized by the expert witnesses for not obtaining independent appraisals for the home, the dental practice, and the three trusts. Colwin merely accepted the values provided to him by Dr. Helmbrecht's attorney.

Second, the plaintiff's witnesses found Colwin to be negligent in not being prepared for trial. He did not educate his client as to what she could expect during the trial. There was no trial brief filed regarding the applicable law on the issues of property division and maintenance. Colwin did not prepare for the court Mrs. Helmbrecht's budget, which is essential in proving her needs for maintenance. Additionally, Colwin had no witnesses available to testify with respect to the value of the marital estate or the ability of Mrs. Helmbrecht to return to the work force and her earning capacity if she ***116** did. It was argued that all of this preparation should have been undertaken to properly represent Mrs. Helmbrecht in her divorce action.

Finally, the attorneys testified that Colwin was negligent in failing to secure an adequate property settlement and maintenance award for Jeanette. Jeanette testified that Colwin assured her that the \$25,000 she received as property settlement was close to fifty percent of the marital estate. The attorneys at trial maintained that Colwin had no

knowledge of the full extent and value of the marital assets and, consequently, failed to secure for his client an adequate settlement of one-third to one-half of the marital estate. Additionally, the attorneys criticized the maintenance award for being only temporary in duration and inadequate in amount. Their opinions were based on Dr. Helmbrecht's income and earning capacity, the length of the marriage, and Mrs. Helmbrecht's ability or inability to return to the work force. It was also believed that if the tax consequences of the monthly payments would have been considered, i.e., the fact that the payments were deductible to Dr. Helmbrecht and taxable to Mrs. Helmbrecht, the amount of maintenance actually received by Jeanette was significantly less than \$42,000.

[11] In reviewing the testimony, we must consider the facts of this particular case viewed as of the time of Colwin's alleged negligent conduct. Our United States Supreme Court has suggested that in determining the reasonableness of an attorney's conduct,

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

***117** In doing so, we hold that there was substantial evidence of malpractice before the jury. The court of appeals was correct in holding that

"Given the length of the marriage, the ages of the parties, marital assets of up to \$263,000, and a single income of \$62,000, we have no reservation in upholding the jury's determination that Colwin was negligent in recommending a \$25,000 property award, \$1,000 per month limited maintenance for three and one-half years, and \$400 per month child support for two children." *Helmbrecht*, 117 Wis.2d at 76-77, 343 N.W.2d 132.

[12] Generally, an attorney is not required to exercise perfect judgment in every instance. He is not a guarantor of the results and will not be held accountable for an error in judgment if he acts in good faith and his acts are well-founded and in ****131** the best interest of his client. This case, however, does not involve an honest mistake in judgment.

"Judgment involves a reasoned process which presumes the accumulation of all available pertinent facts to arrive at the reasoned judgment." *Glenna v. Sullivan*, 310 Minn. 162, 170, 245 N.W.2d 869 (1976) (Todd, J., concurring).

Attorney Colwin did little or nothing to accumulate all the pertinent facts necessary to make an intelligent and professional evaluation of Mrs. Helmbrecht's claim.

[13][14] Colwin failed to conduct adequate discovery of the marital estate and was not prepared at trial to prove the value of the marital assets or the amount necessary for maintenance and the duration thereof. Consequently, Colwin erroneously believed that he had secured for his client a favorable settlement. Colwin was not obligated to negotiate a settlement for his client, but, in doing so, he had a duty to negotiate with reasonable diligence. ***118** This is difficult, if not impossible, when all of the relevant and pertinent facts are not known when an attorney enters into negotiations.

We hold that there was substantiated credible evidence to support the jury's finding of malpractice. The trial court was clearly wrong in granting the defendants' motion to dismiss after the verdict was returned.

B. Causation and Damages

[15][16] The issues of causation and damages in this case are dependent upon the merits of the 1977 divorce action. The plaintiff satisfies her burden of proving causation and damages by establishing that the divorce award she actually received is less than what a reasonable judge who was aware of

all of the facts would have awarded in the 1977 divorce action. The jury returned an affirmative answer to the causation question for the defendant and a damage award of \$250,000, with one juror dissenting as to the amount because she believed it was too high. In order to evaluate the jury's determination as to damages, we must review the evidence pertaining to the valuation of the marital estate, the maintenance award, and the plaintiff's attempt to revise the divorce judgment.

The two automobiles and the furniture were approximately evenly divided between Dr. and Mrs. Helmbrecht, leaving a marital estate which consisted primarily of the marital residence, Airstream trailer, four life insurance policies, retirement fund, Clifford trust, a remainder interest in the Helmbrecht trust, and Dr. Helmbrecht's interest in his dental practice. There was some testimony at trial that the marital estate also included a safety deposit box, a coin collection, and a gun collection. The jury was advised by both counsel not to include these items in their damage award because their value ***119** had not been proven. Colwin testified that the value of the marital estate, excluding the automobiles and furniture, was approximately \$107,000. Colwin admitted at trial that this valuation also excluded the dental practice, the two trusts, and the employer's contribution in the retirement plan. The plaintiff argues in her brief that the approximate value of the marital assets was \$263,000. This is based in part on testimony that the dental practice was worth \$58,000, that the Clifford trust had a corpus of \$10,000, that the remainder interest in the Helmbrecht trust was worth \$25,263, and that the retirement plan, including both the contributions of the employer and employee, was worth \$34,000. There was some dispute at trial as to whether the value given to the dental practice erroneously included a value for goodwill, ^{FN9} but the jury was specifically instructed that if it was necessary to consider the valuation of the dental practice in determining damages, they were not to include ****132** the value of goodwill and the accounts receivable in their consideration.

FN9. See generally, Comment, *The Recognition and Valuation of Professional Goodwill in the Marital Estate*, 66 Marq.L.Rev. 697 (1983); *Holbrook v. Holbrook*, 103 Wis.2d 327, 309 N.W.2d 343 (Ct.App.1981); and *In re Marriage of Lewis v. Lewis*, 113 Wis.2d 172, 336 N.W.2d 171 (Ct.App.1983).

The parties were in agreement that Jeanette should have received between one-third and one-half of the marital estate, probably closer to one-half. In fact, Jeanette testified that Colwin assured her at the divorce trial that she did receive one-half of the estate, and Judge Schultz testified at the malpractice trial that it was his understanding that she received one-half of the estate. The plaintiff argues that if Mrs. Helmbrecht would have received between one-third and one-half of the marital estate valued at \$263,000, she would have received between*120 \$87,666 as a minimum and \$131,500 as a maximum.

Second, we must consider damages with respect to the maintenance award. Jeanette received \$1,000 a month for forty-two months, totalling \$42,000. This maintenance award was criticized because it was too low in amount and too short in duration. The attorney testifying for the defendants even admitted that Jeanette was a proper candidate for indefinite support. The plaintiff's witnesses testified that Jeanette was a candidate for alimony in the range of \$1,500 to \$3,000 per month for an indefinite period of time, but for at least twelve years. The plaintiff argues that at a minimum, she was entitled to \$1,500 a month for twelve years, totaling \$216,000. This figure does not take into account the tax consequences of such an award.

Finally, there was testimony that Jeanette incurred more than \$7,500 in attorney's fees in an attempt to modify the divorce judgment, for which she should also be compensated.

[17] In viewing the evidence in the light most favorable to the plaintiff, we hold that there is suffi-

cient evidence to sustain the damage award of \$250,000. The evidence demonstrates that the approximate damage to Mrs. Helmbrecht, exclusive of what she actually received in the divorce settlement, was at a minimum between \$244,166 and \$288,000. It is apparent to this court that the jury weighed the evidence and resolved the conflicts in the testimony with respect to the values of the marital assets. This award is not based on speculation, as the trial court suggests.

C. Contributory Negligence

The jury apportioned damages at seventy-five percent to the defendant and twenty-five percent to the plaintiff. *121 We disagree with this finding and hold, as a matter of law, that the plaintiff was not contributorily negligent.

[18][19] First, we recognize that contributory negligence of a client can be a defense in a legal malpractice action. *Gustavson*, 87 Wis.2d at 204, 274 N.W.2d 627, citing Annot., 45 A.L.R.2d 5, 17, 18 (1956). "However, contributory negligence is an affirmative defense which is waived if it is not pleaded." *Id.*^{FN10} Colwin failed to allege in his answer that Jeanette was contributorily negligent with respect to the handling of the 1977 divorce action and, thus, has waived this defense.

FN10. Section 802.02(3), Stats., which provides as follows:

"(3) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to the following: ... contributory negligence...." (Emphasis added.)

[20][21][22][23] Second, the burden of proof to establish contributory negligence is upon the defendant. *Grimm v. Milwaukee E.R. & L. Co.*, 138 Wis. 44, 119 N.W. 833 (1909). We find no credible evidence to support the proposition that Jeanette failed to exercise ordinary care for her own well-

being, and, therefore, we hold that the defendant failed to meet his burden of proof. There is evidence in the record which demonstrates that Jeanette fully cooperated with Colwin. She met with him on occasion to discuss the divorce action; she advised him of new developments by letters; and she agreed to the divorce stipulation upon her counsel's advice. Colwin's sole argument to the jury concerning Jeanette's contributory negligence was that she failed to advise him of Mr. Helmbrecht's safety deposit box, gun **133 collection, and coin collection. However, this omission on the part of Jeanette, even if it is true, should not be a factor in determining *122 contributory negligence because the jury was specifically advised by counsel to disregard these items in their deliberations regarding damages. No evidence as to the value of these items was ever presented to the jury. If Jeanette was careless, it was in her misplaced reliance upon Colwin's negligent representation of her. We will not limit recovery in this case merely because Jeanette trusted Colwin to properly perform the services for which he was employed.

A similar situation arose in *Olfe*, 93 Wis.2d 173, 286 N.W.2d 573, where we cited the following from one commentator:

" [C]ontributory negligence should have no place as a defense against an obedient client who originally hired the attorney to help him avoid the very acts which are now labelled negligent.

" '...

" 'The layman should be penalized for ignorance of legal matters only when he refuses proper help, and not when the attorney he hires fails in his duties.' Leavitt, *The Attorney as Defendant*, 13 *Hast.L.J.* 1, 32 (1961)." *Id.* at 188, 286 N.W.2d 573.

For the above-stated reasons, we hold that the jury erred in finding that Jeanette was contributorily negligent.

III.

Judge Schultz, who presided over the divorce proceedings, testified in effect that he would have awarded substantially the same property division and maintenance even if the divorce stipulation had never been negotiated. The jury was erroneously instructed to calculate damages based on what Judge Schultz would have awarded in 1977. If this instruction would have been followed, the jury would have awarded little or no damages to Jeanette. The court of appeals ordered a new trial, holding,

*123 "Although this and other instructions were incorrect and favored Colwin, the jury had no right to ignore them, which they did. We cannot uphold a damage award made in complete disregard of the court's instruction even though the award may be reasonable." *Helmbrecht*, 117 Wis.2d at 78, 343 N.W.2d 132.

We disagree and find no justification for a new trial in this case.

The court of appeals' use of *Johnson v. Ray*, 99 Wis.2d 777, 299 N.W.2d 849 (1981), is misplaced. *Johnson* involved an action for assault and battery against a police officer for excessive use of force in making an arrest. We held that the trial court erred in not instructing the jury that damages were to be allowed only for injuries caused by the use of excessive force as opposed to those injuries caused by the permissible exercise of reasonable force. Unlike the instruction error in *Johnson*, the erroneous instruction in this case goes to the *manner* in which the jury should calculate damages. There is no question here, as there was in *Johnson*, of whether the damage award wrongly compensated for injuries caused by means other than the defendant's actions.

[24][25] A new trial is not warranted in cases where the trial court erroneously gave an instruction unless the error is determined to be prejudicial. *Lutz v. Shelby Mut. Ins. Co.*, 70 Wis.2d 743, 750-51, 235 N.W.2d 426 (1975). The instruction given in this case was clearly detrimental to the

plaintiff, but the plaintiff is not the one urging this court to grant a new trial. We conclude that the trial court's error was not prejudicial error, because a different result would not have occurred if the jury had been properly instructed. The jury returned a verdict in favor of the plaintiff, obviously ignoring the erroneous instruction and opting to use the proper standard concerning damages. Second, we have held in the previous *124 sections of this opinion that the verdict answers regarding the negligence of Colwin and the damages sustained by Mrs. Helmbrecht are supported by credible evidence. A new trial on these issues would be meaningless.

****134 IV.**

[26] Had the divorce stipulation between Dr. and Mrs. Helmbrecht never been entered into, the divorce suit would have been tried before a trial judge and not a jury.^{FN11} For this reason, the defendants argue that the jury in the legal malpractice action should not have been allowed to decide, in making its determination of damages, what a reasonable judge would have awarded in 1977. The defendants stress that the jury was called upon to make a determination normally made exclusively by a judge.

FN11. See, section 247.12(1), Stats.1977 (now section 767.12(1)), which provides as follows: "**Trial procedure.** (1) PROCEEDINGS. In actions affecting marriage, all hearings and trials to determine whether judgment shall be granted shall be before the court. The testimony shall be taken by the reporter and shall be written out and filed with the record if so ordered by the court. Custody proceedings shall receive priority in being set for hearing."

We reject the defendants' argument. Even though our legislature has given exclusive jurisdiction over matters affecting the family to the court, the instant action is not a divorce action. This is a suit alleging negligence of an attorney, and the Wisconsin Constitution guarantees a jury trial if the

parties desire one.^{FN12}

FN12. Wis. Const. art. 1, section 5, which provides as follows: "**Trial by jury; verdict in civil cases....** The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof."

*125 [27] Second, the focus is not on whether the original action is tried before a jury, but, rather, whether the issue remaining in the malpractice action is one of law or one of fact. Generally, causation and damages are issues of fact for the trier of fact,^{FN13} but this may not necessarily be true in a legal malpractice case where the determination of causation and damages is dependent on what the outcome would have been in the original action absent the negligence of the attorney.

FN13. See, *Merco Distg. Corp. v. Com'l. Police Alarm Co.*, 84 Wis.2d 455, 458-59, 267 N.W.2d 652 (1978), where we held, "The test of cause in Wisconsin is whether the defendant's negligence was a substantial factor in contributing to the result.... The phrase 'substantial factor' denotes that the defendant's conduct has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.... There may be more than one substantial causative factor in any given case.... Causation is a fact; the existence of causation frequently is an inference to be drawn from the circumstances by the trier of fact." (Citations omitted). See also, *Toulon v. Nagle*, 67 Wis.2d 233, 245, 226 N.W.2d 480 (1975) (contract action), and

Keithley v. Keithley, 95 Wis.2d 136, 138, 289 N.W.2d 368 (Ct.App.1980), citing *Mertens v. Lundquist*, 15 Wis.2d 540, 113 N.W.2d 149 (1962) (wrongful death cases), holding that determination of damages normally involves a question of fact, properly within the province of the jury.

The distinction between issues of fact and law in the earlier litigation carries over into the malpractice action. This is explained in *Chocktoot v. Smith*, 280 Or. 567, 571 P.2d 1255. *Chocktoot* involved a legal malpractice case brought by the personal representative of a decedent against two attorneys who had represented the decedent in an earlier proceeding. The attorneys had represented the decedent in a declaratory judgment proceeding before a trial judge without a jury. The issue before the trial judge was whether the decedent was the son of a James Brown and, *126 thus, entitled to share in the estate of Rowley Lalo, Jr. The judge ruled against the decedent and, following his death, the decedent's representative commenced the malpractice action, alleging that the attorneys negligently failed to discover and present material evidence and to appeal the adverse decision of the trial judge. The issues were phrased by the court as follows:

"Who, judge or jury, must decide whether an attorney's negligence harmed his client, and upon what evidence, when the negligence concerned an issue decided by a court rather than a jury?" *Chocktoot*, 280 Or. at 569, 571 P.2d 1255.

**135 [28] As mentioned earlier, the *Chocktoot* court held that in a legal malpractice action, the trial judge should decide disputed issues of law, and the jury should decide disputed issues of fact. The jury should substitute its judgment for the fact finder of the initial action, be it a jury, judge, administrative hearings arbitrator, court-martial, etc.

"However, no jury can reach its own judgment on the proper outcome of an earlier case that hinged on an issue of law." *Id.* at 572-73, 571 P.2d 1255

In order for the personal representative in *Chocktoot* to prove causation and damages, he had to show that, but for the negligence of the attorneys, the outcome of the declaratory judgment would have been favorable to the decedent. The court held,

"We conclude in short, that in determining the probable consequences of an attorney's earlier negligence in a later action for malpractice, the line dividing the responsibility of judge and jury runs between questions of law and questions of fact. This is not quite the same division as that made by the trial court when faced with the necessity to decide this issue. It drew the line between those questions which would have been for a jury and those for the court in the original proceeding. But that rule would withdraw from the jury in the malpractice *127 trial the evaluation of the probable outcome of purely factual disputes in all nonjury cases, including all equity, probate, or administrative proceedings. As we have stated, there is no reason why the jury cannot replicate the judgment of another factfinding tribunal, whatever its composition.

"Dividing the function of judge and jury in determining the consequences of legal malpractice between questions of law and questions of fact leads to these principles for the trial of such cases:

"The question what decision should have followed in the earlier case if the defendant attorneys had taken proper legal steps is a question of law for the court.^{FN14} Consequently such legal rulings are also open for briefing and review on appeal.

FN14. The court is referring to the attorney's failure to appeal the adverse decision to the appellate court. This is a question of law because the trial court in the malpractice suit would have to decide the success of such an appeal. *See, General Acc. F. &*

L. Assur. Corp. v. Cosgrove, 257 Wis. 25, 42 N.W.2d 155 (1950), involving the lawyer's failure to settle the bill of exceptions which resulted in the client's losing his right to appeal.

"The question what outcome should have followed if defendants had conducted a proper investigation, presentation (or exclusion) of evidence, or other steps bearing on a decision based on facts remains a question of fact for the jury (or for a judge when the malpractice case is tried without a jury). Similarly, it will be reviewable on appeal only to the same extent as other factual determinations." *Id.* at 574-75, 571 P.2d 1255. FN15

FN15. *Accord, Sola v. Clostermann*, 67 Or.App. 468, 679 P.2d 317 (1984) (involving an attorney's failure to appeal), and *Martin v. Hall*, 20 Cal.App.3d 414, 97 Cal.Rptr. 730 (1971) (involving an attorney's failure to raise defenses).

We recognize that the instant case differs slightly from *Chocktoot* because in *Chocktoot* the issue in the initial action was strictly one of fact, whereas in this case, the issues before Judge Schultz were mixed questions of law and fact. In a divorce action, the trial judge will make conclusions of law based upon his findings of fact. For *128 example, a maintenance award to one spouse is based upon a factual finding of that spouse's need and the other spouse's ability to pay. *See*, section 767.26, Stats. In determining what a reasonable judge would have awarded Jeanette Helmbrecht in 1977, the jury is presented with the same questions of law and fact. The court in *Chocktoot* suggests that when the initial action involves both legal and factual elements, the trial court in a malpractice action should separate these issues and instruct the jury on the legal aspects of the case. *Id.* at 575, 571 P.2d 1255.

**136 [29] The damage instruction given to the jury in this case read as follows:

"The measure of damages in a malpractice action charging an attorney with negligence in prosecuting a divorce action is the value of the pecuniary or money loss, that is, the amount that would have been recovered by the plaintiff except for the attorney's negligence.

"Expenses incurred by the client, as a result of negligence of an attorney, are proper elements of damages.

"In this case the pecuniary loss, if any, would be the difference between the value of the pecuniary benefits as awarded by the trial court based upon the stipulated agreement of the parties to the divorce action and the amount of pecuniary benefits that would have been awarded by the trial Court except for the defendant's negligence."

The trial court erred in not instructing the jury on the legal elements in the case. At a minimum, the jury instructions should have addressed what factors a court applies to its findings of fact in making its determination as to property division and maintenance. Our legislature has conveniently codified the various factors to be weighed and balanced by a judge in that regard. FN16 If a *129 jury would be properly instructed**137 on the law in this matter, we are confident that it could reasonably apply the law to the particular facts involved and resolve the issue *130 of what a reasonable judge would have awarded in the initial divorce action. The question of what a reasonable judge would have awarded as property division and maintenance is no more complicated than other issues decided by juries every day all across this nation.

FN16. *See*, section 767.255, Stats., which provides in pertinent part as follows:

"767.255 Property division. Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02(1)(h), the court shall divide the property of the parties and divest and transfer the title of any

such property accordingly.... The court shall presume that all other property is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering:

"(1) The length of the marriage.

"(2) The property brought to the marriage by each party.

"(2r) Whether one of the parties has substantial assets not subject to division by the court.

"(3) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

"(4) The age and physical and emotional health of the parties.

"(5) The contribution by one party to the education, training or increased earning power of the other.

"(6) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

"(7) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having custody of any children.

"(8) The amount and duration of an order under s. 767.26 granting mainten-

ance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.

"(9) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

"(10) The tax consequences to each party.

"(11) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.

"(12) Such other factors as the court may in each individual case determine to be relevant."; and,

Section 767.26, Stats., which provides as follows:

" 767.26 Maintenance payments. Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

"(1) The length of the marriage.

"(2) The age and emotional health of the parties.

"(3) The division of property made under s. 767.255.

"(4) The educational level of each party at the time of marriage and at the time the action is commenced.

"(5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.

"(6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

"(7) The tax consequences to each party.

"(8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

"(9) The contribution by one party to the education, training or increased earning power of the other.

"(10) Such other factors as the court may in each individual case determine to be relevant."

*131 [30] In considering whether a new trial is warranted in this case, we must decide whether the resultant verdict would have been different had the error not occurred. *Lutz*, 70 Wis.2d at 751, 235

N.W.2d 426. The damage instruction given to the jury is not misleading; it is incomplete in that it lacks necessary information for the jury's determination of damages. The jury did hear considerable testimony concerning the factors that each expert witness considered in arriving at their opinions with respect to a proper property division and maintenance award. The jury was given little guidance on the importance of these factors. Although this court holds that the trial court did not properly instruct the jury, we will not grant a new trial in this case, because such error is not prejudicial error. The damage award is supported by sufficient credible evidence and would not have been different if the jury had been thoroughly instructed.

The decision of the court of appeals is affirmed in part and reversed in part.

Wis., 1985.
Helmbrecht v. St. Paul Ins. Co.
122 Wis.2d 94, 362 N.W.2d 118

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P

Supreme Court of New Mexico.
 HINKLE, COX, EATON, COFFIELD & HENSE-
 LEY, a partnership, Plaintiff-Appellee, and
 Cross-Appellant,
 v.
 CADLE COMPANY OF OHIO, INC., Defend-
 ant-Appellant, and Cross-Appellee.

No. 20332.
 Feb. 23, 1993.

Law firm brought action against client to recover fees, and client filed counterclaim to recover alleged excess fees. The District Court, Chaves County, William J. Schnedar, D.J., entered judgment in favor of law firm, but denied attorney fees, and both parties appealed. The Supreme Court, Montgomery, J., held that: (1) law firm made prima facie showing of reasonableness of fees; (2) client sufficiently rebutted that showing to raise issue of facts; (3) law firm established account stated with respect to fees already paid; (4) law firm was not entitled to attorney fees for counterclaim; and (5) attorneys who represent themselves may be awarded attorney fees.

Affirmed in part, vacated in part, and remanded.

West Headnotes

[1] **Attorney and Client 45** ⇌ **166(3)**

45 Attorney and Client
 45IV Compensation
 45k157 Actions for Compensation
 45k166 Evidence
 45k166(3) k. Value of services or amount of compensation. Most Cited Cases

Attorney and Client 45 ⇌ **166(4)**

45 Attorney and Client

45IV Compensation

45k157 Actions for Compensation

45k166 Evidence

45k166(4) k. Performance. Most Cited

Cases

Where attorney and client agreed to hourly rate but did not agree to the number of hours expended, attorney had burden of establishing reasonableness of terms not expressly agreed to and of showing that time expended was reasonable and was fairly and properly used.

[2] **Attorney and Client 45** ⇌ **166(3)**

45 Attorney and Client

45IV Compensation

45k157 Actions for Compensation

45k166 Evidence

45k166(3) k. Value of services or amount of compensation. Most Cited Cases

Attorney and Client 45 ⇌ **166(4)**

45 Attorney and Client

45IV Compensation

45k157 Actions for Compensation

45k166 Evidence

45k166(4) k. Performance. Most Cited Cases

Affidavit stating that attorneys charges were reasonable in amount and necessarily incurred, and monthly invoices itemizing tasks performed by law firm and the attorney who performed each task, the amount of time expended, and the amount billed for each task established that law firm had performed the claimed legal services and that those services were reasonable in amount.

[3] **Judgment 228** ⇌ **185.3(4)**

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(4) k. Attorneys. Most Cited Cases

Expert testimony is not necessary to create genuine issue of fact concerning reasonableness of attorney fees.

[4] Attorney and Client 45 ⇌ 166(3)

45 Attorney and Client

45IV Compensation

45k157 Actions for Compensation

45k166 Evidence

45k166(3) k. Value of services or amount of compensation. Most Cited Cases

Affidavit of corporate counsel for client stating that he had reviewed cases handled by outside counsel, including law firm seeking to recover fees, and that law firm's fees were unreasonable was sufficient to rebut prima facie case of reasonableness of fees made by law firm.

[5] Evidence 157 ⇌ 474(17)

157 Evidence

157XII Opinion Evidence

157XII(A) Conclusions and Opinions of Witnesses in General

157k474 Special Knowledge as to Subject-Matter

157k474(17) k. Value of services.

Most Cited Cases

Corporate counsel for client from which law firm sought to recover fees who stated that he was familiar with the law firm's representation of the client and had reviewed its invoices was qualified to testify as to the unreasonableness of the fees and could do so, even though court found him not competent to offer expert testimony.

[6] Account Stated 11 ⇌ 8

11 Account Stated

11k8 k. Conclusiveness. Most Cited Cases

Once account stated is established, it operates as admission by each party that certain sum of money is due.

[7] Account Stated 11 ⇌ 6(1)

11 Account Stated

11k6 Implied Assent of Party to Be Charged

11k6(1) k. In general. Most Cited Cases

Payments made by client after client reviewed law firm's invoices and discussed some of them with law firm demonstrated client's assent to those amounts and that assent constituted an "account stated," and, absent recognized ground for avoidance, such as fraud or mutual mistake, client could not thereafter argue that amounts which it had already paid were unreasonable.

[8] Costs 102 ⇌ 194.38

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.38 k. Accounts. Most Cited Cases

Statute authorizing award of attorney fees to law firm if it prevailed on its action on open account did not authorize attorney fees for defending against client's counterclaims which were resolved on basis of account stated. NMSA 1978, § 39-2-2.1 .

[9] Costs 102 ⇌ 194.46

102 Costs

102VIII Attorney Fees

102k194.46 k. Persons entitled or liable. Most Cited Cases

Attorneys who represent themselves may be awarded attorney fees for that representation.

****1080 *153** Cynthia A. Fry, Albuquerque, for appellant.

Hinkle, Cox, Eaton, Coffield & Hensley, Stuart D. Shanor and Gregory S. Wheeler, Roswell, for appellee.

OPINION

MONTGOMERY, Justice.

This is an appeal and a cross-appeal from a judgment in favor of the plaintiff, a law firm, awarding it the amount sought in its complaint as fees allegedly earned in representing the defendant over a period of time (plus prejudgment interest, costs, and attorney's fees), and dismissing the defendant's counterclaims. Defendant, Cadle Company of Ohio, Inc. ("Cadle"),^{FN1} challenges the trial court's orders granting summary judgment to the plaintiff, Hinkle, Cox, Eaton, Coffield & Hensley ("Hinkle"), on Hinkle's complaint and on Cadle's counterclaims to recover amounts previously paid during the course of Hinkle's previous representation. By its cross-appeal, Hinkle attacks the trial court's refusal to award, as part of Hinkle's claim for attorney's fees as the prevailing party in the present litigation, amounts representing the value of services performed by a Hinkle associate. The case presents issues on allocation of the burden of establishing reasonableness in connection with a claim for attorney's fees allegedly earned in the past by a lawyer or a law firm, the requirements for the defense of "account stated" in resisting a claim by a former client for refund of fees previously paid, recovery of attorney's fees to a prevailing party for work related to the defense of counterclaims, and the requirements for asserting a claim for "in-house" attorney's fees in connection with a claim for attorney's fees recoverable in an action. We affirm in part, reverse in part, and remand for further proceedings.

FN1. The correct name of the defendant is "The Cadle Company," not "Cadle Company of Ohio, Inc.". In this opinion we shall refer to the defendant simply as "Cadle."

I. FACTS

Cadle is an Ohio corporation engaged in the business of purchasing commercial paper at a discount from the Federal Deposit Insurance Corporation and the Resolution Trust Corporation. Cadle often employs outside legal counsel to assist it in

collecting such commercial paper and in liquidating any collateral securing it. In 1988 Cadle employed Hinkle to represent it in the collection of amounts due under certain promissory notes.

Cadle and Hinkle did not enter into a written fee agreement to govern Hinkle's fees for its services. Rather, according to Cadle's President, Daniel Cadle, the parties orally agreed that Hinkle would bill Cadle on an hourly basis, based on Hinkle's customary and reasonable hourly rate. Daniel Cadle testified by deposition that Stuart Shanor, a managing and senior partner of Hinkle, told him that the hourly rate would vary, depending on who performed the legal work.

Hinkle began the collection work and sent Cadle monthly invoices for the work performed. From approximately July 1988 to May 1989, Cadle paid Hinkle a total amount of between \$26,572.13 and \$27,364.54 (the exact amount was disputed). Thereafter, Hinkle continued to send Cadle monthly invoices, but Cadle refused to pay them.

In May 1990 Hinkle sued Cadle, seeking to recover \$14,968.64 for unpaid legal services that it allegedly had rendered in collecting or attempting to collect on the promissory notes. Hinkle sought recovery based on theories of open account, account stated, and breach of contract. Cadle answered the complaint, denying that it owed any amounts to Hinkle. Cadle also asserted two counterclaims, seeking recovery of amounts it had already paid for previously rendered legal services. Its counterclaims alleged breach of contract and unfair trade practices.

Subsequently, during discovery, Cadle indicated that it was going to rely on the ****1081 *154** testimony of an expert witness, Louis Puccini, to establish that Hinkle's fees were unreasonable. Hinkle therefore sought to depose Puccini before trial. Hinkle attempted to schedule Puccini's deposition, but Cadle repeatedly delayed the deposition because it had not provided Puccini with the necessary documentation to enable him to express an ex-

pert opinion. Because of Cadle's delays, the trial court entered an order on August 22, 1991, compelling Puccini's deposition by August 30. Hinkle then deposed Puccini by telephone on August 30; however, Puccini could not express an opinion as to the reasonableness of Hinkle's fees because Puccini still had not received sufficient documentation on which to base an opinion.

Hinkle then moved to dismiss Cadle's counterclaims as a discovery sanction against Cadle. Hinkle alleged that Cadle's failure to provide Puccini with the necessary documentation was willful and deliberate. The trial court denied Hinkle's motion, but did impose an alternative sanction: It struck Puccini as a witness and prohibited Cadle from offering any other expert testimony in the case.

Hinkle next filed two motions for summary judgment, seeking judgment on its complaint and on Cadle's counterclaims. In support of the motion on its complaint, Hinkle submitted monthly invoices it had sent to Cadle and which remained unpaid. The invoices itemized the tasks performed by Hinkle, the attorney who performed each task, the amount of time spent on each task, and the amount billed for each task. The invoices also listed Hinkle's expenses incurred in representing Cadle. Along with the invoices, Hinkle submitted the affidavit of Stuart Shanor, who stated that the invoices represented actual work performed and expenses incurred and that the legal work and expenses were reasonable in amount and necessarily incurred.

Hinkle's other motion for summary judgment, addressed to Cadle's counterclaims, was based on the theory of an account stated. Hinkle asserted that Cadle could not recover amounts it had already paid Hinkle because Cadle had assented to those amounts by paying them without objection.

Cadle responded to Hinkle's motions by submitting affidavits signed by Timothy Taber, Vice President and General Counsel of Cadle. In his affidavit in response to Hinkle's motion on the com-

plaint, Taber stated that since May 1989 he had been primarily responsible for hiring outside counsel for Cadle and that he had reviewed invoices from approximately 100 outside counsel, including four New Mexico firms. He then stated that he was familiar with Hinkle's representation, that he had reviewed Hinkle's invoices, and that Hinkle's legal fees were unreasonable. Taber's affidavit incorporated by reference two of Cadle's answers to Hinkle's discovery interrogatories. In the answers, Cadle listed the items from Hinkle's invoices that Cadle found objectionable and generally objected to "paying for [Hinkle's] legal education" and to being charged for intraoffice conferences and memos, unnecessary research projects, and excessive time allegedly spent on certain procedures.

In his affidavit in response to Hinkle's motion on the counterclaims, Taber again said that Hinkle's legal fees were unreasonable. This affidavit incorporated by reference a portion of Daniel Cadle's deposition, in which he referred to his previous discussions with attorneys at Hinkle, in which he had objected to the amount of Hinkle's bills.

The trial court considered Hinkle's motions at a hearing in October 1991. Initially, the court struck the affidavits of Timothy Taber insofar as they "purport[ed] to assert any expert opinion." The court reasoned that Cadle could not rely on Taber's affidavits because of the court's earlier discovery sanction prohibiting Cadle from relying on any expert opinion and that Taber was in any event incompetent to offer any expert opinions in the case.

The court then granted Hinkle's motions for summary judgment on the complaint and on the issue of account stated. In connection with the summary judgment on the issue of account stated, the court found that Cadle had assented to the charges it had already paid. It stated that "[t]here is uncontradicted testimony of record of the ****1082 *155** manifestation of assent by [Cadle] to [Hinkle's] charges which have been paid by [Cadle]." Granting of summary judgment on that issue compelled, and the court accordingly ordered, dismissal of the

counterclaims.

In granting Hinkle summary judgment on its complaint, the court found it undisputed that Hinkle had performed legal services for Cadle as set forth in Hinkle's invoices and that the charges remained unpaid. It then stated that "[u]nrebutted expert legal opinion has confirmed that the legal work and expenses as set forth in the various invoices ... were necessarily incurred ... and that said sums are reasonable in amount." Accordingly, the court entered an order granting Hinkle summary judgment on its claim for \$14,968.64.

Following entry of this order, Hinkle, as the prevailing party in this action to recover on an open account, requested attorney's fees pursuant to NMSA 1978, Section 39-2-2.1 (Repl.Pamp.1991).^{FN2} Hinkle requested a total amount of \$17,093.56, consisting of \$4,426.56 for in-house counsel fees and \$12,667.00 for fees incurred by its retained counsel. At a hearing in November 1991, the court awarded Hinkle attorney's fees of \$12,667.00. The court denied all of Hinkle's in-house fees, stating that it was the court's practice never to allow attorney's fees "when the attorney is doing their own work."

FN2. Section 39-2-2.1 provides for allowance to the prevailing party of a reasonable attorney's fee, to be set by the court and taxed and collected as costs, in any action to recover on an open account.

On appeal, Cadle argues that the trial court erred in granting summary judgment on both the complaint and the counterclaims. On its cross-appeal, Hinkle argues that the trial court erred in denying its in-house attorney's fees.

II. ANALYSIS

A. Summary Judgment on Hinkle's Complaint

Cadle makes two arguments in support of its position that the trial court erred in granting summary judgment on Hinkle's complaint: First, that Hinkle failed to present a prima facie case because

it did not establish the reasonableness of its fees; second, that even if Hinkle did present a prima facie case, Cadle rebutted that prima facie case and raised a genuine issue of fact as to the reasonableness of the fees. We consider each of Cadle's arguments separately.

1. Requirements of a Prima Facie Case

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party demonstrates that it is entitled to judgment as a matter of law. *Peck v. Title USA Ins. Corp.*, 108 N.M. 30, 32, 766 P.2d 290, 292 (1988). The moving party must first make a prima facie showing of entitlement to summary judgment. *Id.* If a prima facie case is made, the burden shifts to the party opposing summary judgment to demonstrate a genuine issue of material fact. *See id.* Accordingly, when Hinkle moved for summary judgment on its complaint, it had the initial burden of showing that no genuine issues of material fact existed and that it was entitled to judgment as a matter of law.

The first issue debated by the parties is whether Hinkle's burden of showing that it was entitled to judgment as a matter of law required it to demonstrate the reasonableness of its fees. Cadle, citing *Calderon v. Navarette*, 111 N.M. 1, 800 P.2d 1058 (1990), asserts that an attorney seeking to recover on a contract with a client has the burden of proving that its fees are reasonable. *See id.* at 3, 800 P.2d at 1060 ("It is fundamental that the attorney bears the burden of proving the value of the legal services rendered."). Hinkle responds by distinguishing *Calderon*, in which an attorney sought recovery based on quantum meruit, from the present situation, in which Hinkle seeks recovery based on contract. It argues that the attorney in *Calderon*, by suing in quantum meruit, placed the value of his services in issue. In contrast, Hinkle argues that because it is suing in contract, it has not placed the value of its services in issue and therefore should not bear the burden of proof of reasonableness.

****1083 *156** [1] We think that Hinkle bore the burden of establishing the reasonableness of at least

part of its fee. As stated above, the fee agreement was not for an agreed amount. While the parties apparently agreed to an hourly rate, they did not agree to the number of hours to be expended. Hinkle had the burden of establishing the reasonableness of the terms not expressly agreed to by the parties, *i.e.*, the burden of showing that the amount of time expended was reasonable and that the time was "fairly and properly used." See *Jacobs v. Holston*, 70 Ohio App.2d 55, 434 N.E.2d 738, 742 (1980) (when attorney and client had agreed to a fee based on a stated hourly rate, attorney seeking to enforce the agreement had burden of proving reasonableness of time expended).

We further believe that Hinkle met its burden of showing reasonableness. Cadle argues that the affidavit of Stuart Shanor, who stated that Hinkle's charges "were reasonable in amount and necessarily incurred," was conclusory and insufficient to establish reasonableness. Cadle asserts that "the attorney must present evidence substantively supporting the reasonableness of the fee."

[2] We agree that Shanor's affidavit alone was insufficient to prove reasonableness. However, Cadle virtually ignores the additional "substantive" evidence that Hinkle submitted in support of its motion: the monthly invoices that itemized the tasks performed by Hinkle, the attorney who performed each task, the amount of time expended on each task, and the amount billed for each task. Those invoices, along with Shanor's affidavit, established that Hinkle had performed its claimed legal services and that those services were reasonable in amount. It would be impractical to require Hinkle to present more detailed evidence, as suggested by Cadle, of the skill involved in the various tasks Hinkle performed and the results it obtained. Accordingly, we find that Hinkle presented a *prima facie* case of the reasonableness of its fees, and that the burden then shifted to Cadle to show the existence of a genuine issue of material fact on this issue.

2. Rebutting the *Prima Facie* Case

As previously noted, Cadle submitted an affidavit by Timothy Taber in response to Hinkle's motion, incorporating by reference two of Cadle's answers to Hinkle's interrogatories. The trial court struck Taber's affidavit insofar as it offered expert opinion and then concluded that "[u]nrebutted expert legal opinion" established that Hinkle's fees were reasonable. The trial court apparently believed that expert testimony was necessary to raise an issue of fact as to the reasonableness or unreasonableness of an attorney's fee. Consequently, not only did it refuse to consider Taber's affidavit insofar as it purported to express expert opinion, but it also refused to consider the affidavit and the answers to interrogatories attached to it as nonexpert testimonial and documentary evidence.

[3] The trial court erred to the extent it believed expert testimony is always necessary to create a genuine issue of fact concerning the reasonableness of attorney's fees. As a general rule, "*any one sufficiently familiar* with the commercial value" of services may testify to the value of those services. 3 John H. Wigmore, *Evidence in Trials at Common Law* § 715, at 52 (rev. ed. 1970); see also 2 Stuart M. Speiser, *Attorneys' Fees* § 18:14 (1973) (testimony of expert witness is generally not essential on question of value of legal services). When the issue concerns the value of professional services, such as legal services, some courts hold that only a member of the particular profession is sufficiently familiar; other courts disagree. Wigmore, *supra*, § 715, at 52.

[4][5] Taber was sufficiently familiar with the commercial value of Hinkle's legal services to testify on the alleged unreasonableness of Hinkle's charges. As noted, Taber is the Vice President and General Counsel of Cadle. Taber testified in his affidavit that since 1989 he had reviewed invoices from approximately 100 outside counsel for Cadle, including four New Mexico firms (excluding Hinkle). He also stated that he was familiar with Hinkle's representation of Cadle and had reviewed Hinkle's invoices. This knowledge made Taber

****1084 *157** qualified to testify as to the unreasonableness of the fees, notwithstanding the trial court's finding that Taber was not competent to offer *expert* testimony.

We further hold that Taber's affidavit, when considered with the answers to interrogatories, rebutted Hinkle's *prima facie* case and raised a genuine issue of fact on the reasonableness of the fees. The answers to interrogatories identified the specific charges that Cadle found objectionable and gave various reasons why Cadle objected to those charges. These objections were sufficiently detailed to raise a question of fact concerning the reasonableness of Hinkle's fees. Accordingly, the trial court erred in granting summary judgment to Hinkle on its complaint.

B. Summary Judgment on Cadle's Counterclaims

[6] The court dismissed Cadle's counterclaims after granting summary judgment to Hinkle on the issue of account stated. The *Restatement of Contracts* defines an account stated as "a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." *Restatement (Second) of Contracts* § 282(1) (1979). New Mexico case law similarly defines an account stated as " 'an account balanced, and rendered, with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance.' " *Leonard v. Greenleaf*, 21 N.M. 180, 184, 153 P. 807, 808 (1915) (quoting *Comer v. Way*, 107 Ala. 300, 19 So. 966, 967 (1895)). Once an account stated is established, it operates as an admission by each party that a certain sum of money is due. *See Restatement (Second) of Contracts* § 282(2). Neither party, in the absence of fraud or mistake, can question the correctness of the stated sum. *Leonard*, 21 N.M. at 187, 153 P. at 809 (quoting *Brown & Manzanares Co. v. Gise*, 14 N.M. 282, 287, 91 P. 716, 717 (1907)).

The trial court concluded that Cadle had impliedly assented to the amounts it had previously paid Hinkle by paying those amounts without ob-

jection. The court found "uncontradicted testimony of record of the manifestation of assent by [Cadle] to [Hinkle's] charges which have been paid by [Cadle]." It further found no evidence of fraud or mutual mistake.

Cadle argues that the trial court erred in granting summary judgment because Cadle presented evidence showing that it had not assented to the amounts it had previously paid. Cadle points out that Daniel Cadle met with attorneys at Hinkle to discuss objections to Hinkle's bills. It also relies on Daniel Cadle's testimony that payment of Hinkle's invoices did not necessarily indicate that Cadle had no objections to the bills.

[7] Cadle's argument is not persuasive. While Daniel Cadle did testify that he met with attorneys at Hinkle in early 1989 to discuss Cadle's concern that Hinkle's bills were too high, Cadle also admitted that after these discussions he paid Hinkle's bills without protest or any noted reservation of right. Such payments, occurring after Daniel Cadle reviewed the invoices and even discussed some of them with Hinkle, demonstrated Cadle's assent to those amounts. This assent constituted an account stated. Absent a recognized ground for avoidance, such as fraud or mutual mistake, which the trial court found to be absent, Cadle cannot now argue that the amounts it has already paid were unreasonable. *See Tabet Lumber Co. v. Chalamidas*, 83 N.M. 172, 174, 489 P.2d 885, 887 (Ct.App.1971) (assuming that reasonableness of amount involved is a defense to account stated, defendant's agreement to the amount is evidence of its reasonableness). Accordingly, we affirm the trial court's summary judgment in favor of Hinkle on the counterclaims.

C. Award of Attorney's Fees

We now consider the trial court's award of attorney's fees, which the court granted to Hinkle as the prevailing party in its suit on an open account (*see supra* note 2). The court awarded attorney's fees for work related both to the prosecution of Hinkle's complaint and to its defense to Cadle's counter-

claims.

****1085 *158 1. Work Related to Counterclaims**

[8] Clearly, our reversal of the summary judgment on Hinkle's complaint requires reversal of the award of attorney's fees insofar as it allows fees for work related to prosecution of the complaint. Arguably, our affirmance of the summary judgment on the counterclaims might permit affirmance of the award of attorney's fees related to defense of the counterclaims. However, we do not believe there was any authority to award attorney's fees for defense of the counterclaims. While Section 39-2-2.1 clearly authorizes attorney's fees to Hinkle if it prevails in its action on an open account, the statute does not authorize attorney's fees for defending against Cadle's counterclaims, because those claims were resolved on the basis of an account stated. *See Tabet Lumber Co.*, 83 N.M. at 174, 489 P.2d at 887 (reversing award of attorney's fees under predecessor to § 39-2-2.1 when facts supported finding of account stated rather than open account); *see also Hiatt v. Keil*, 106 N.M. 3, 4-5, 738 P.2d 121, 122-23 (1987) (stating that fees generally should be allowed only for work on principal cause of action for which there is statutory or contractual authority for award of fees, although refusing to foreclose possibility that fees can never be awarded for defending a counterclaim); *cf. Thompson Drilling, Inc. v. Romig*, 105 N.M. 701, 706, 736 P.2d 979, 984 (1987) (In a claim for attorney's fees based on contract, "it is appropriate to distinguish between the amount of the attorney's fees incurred for prosecution of the complaint and counsel's fees for defense of a counterclaim."). Some of the work may be inextricably intertwined, making it difficult or impossible to segregate some of the time worked on the complaint from work related to the counterclaims. Nevertheless, the trial court should attempt to distinguish between the two types of work to the extent possible. Accordingly, we vacate the entire award of attorney's fees. If, on remand, Hinkle prevails on its complaint and the trial court awards a reasonable attorney's fee, the award should be limited, to the extent feasible, to work related to pro-

secution of the complaint.

2. Work Performed by In-House Attorneys

Our vacation of the attorney's fee award makes it unnecessary to consider Hinkle's argument on its cross-appeal that the trial court erred in denying the firm's in-house attorney's fees. Nevertheless, because the issue may arise again should Hinkle prevail on its complaint at trial, we address the issue to provide guidance to the trial court on remand. *See Brown v. General Ins. Co. of Am.*, 70 N.M. 46, 52, 369 P.2d 968, 972 (1962) (following reversal on one ground, court considered remaining issues so that issues would not arise again as result of second trial).

[9] The trial court erred to the extent it ruled, as a matter of law, that attorneys who represent themselves cannot be awarded attorney's fees for such representation. While there may be dangers in some cases in allowing recovery of such fees, *see Weaver v. Laub*, 574 P.2d 609, 612 (Okla.1977) (discussing reasons why courts have denied attorney's fees for self-representation), there are compelling reasons for awarding them in many cases. *See id.* at 612-13 (discussing reasons why courts have allowed attorney's fees for self-representation). It would be unjust to deny fees to an attorney or law firm for self-representation when the attorney or firm, in rendering services for itself, has potentially incurred as much pecuniary loss as if it had employed outside counsel. *See id.* at 613. Additionally, it should be of no significance to the party bound to pay attorney's fees whether the award of fees is to an attorney or firm representing itself or is to retained counsel. *Id.* Therefore, if Hinkle prevails on its complaint on remand, the trial court should permit recovery of Hinkle's in-house fees to the extent that they are reasonable in amount, necessarily incurred, and not duplicative of services rendered by Hinkle's retained counsel. *Cf. id.* at 613-14 (setting forth requirements for recovery of attorney's fees by attorneys who represent themselves).

For the foregoing reasons, we reverse the summary judgment in favor of Hinkle on its complaint,

affirm the summary judgment**1086 *159 in favor of Hinkle on Cadle's counterclaims, vacate the award of attorney's fees, and remand this case to the trial court for further proceedings consistent with this opinion. In light of Cadle's concession in this Court that it was incorrectly named in the complaint and that it was the client for whom Hinkle did the legal work involved in the lawsuit, the trial court on remand should enter an appropriate order correcting the name of the defendant.

IT IS SO ORDERED.

RANSOM, C.J., and FROST, J., concur.

N.M.,1993.

Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co. of Ohio, Inc.

115 N.M. 152, 848 P.2d 1079

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**ROBERTA M. ISHMAEL, Plaintiff and Appellant, v. ROBERT MILLINGTON,
Defendant and Respondent**

Civ. No. 11079

Court of Appeal of California, Third Appellate District

241 Cal. App. 2d 520; 50 Cal. Rptr. 592; 1966 Cal. App. LEXIS 1268

April 15, 1966

PRIOR HISTORY: [***1] APPEAL from a judgment of the Superior Court of Butte County. J. F. Good, Judge.

Action for legal malpractice.

DISPOSITION: Reversed. Summary judgment for defendant reversed.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Attorneys--Liability--Negligence. --Actionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence; duty, breach of duty, proximate cause, damage.

(2) Id.--Relation to Client--Duties of Attorneys. --Generally, an attorney by accepting employment to give legal advice or to render other legal services impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks that they undertake.

(3a) (3b) Id.--Liability--Negligence--Actions. --In a legal malpractice action against an attorney who represented both parties in an uncontested divorce, though there was no conflict in the evidence that the husband requested his attorney to file the divorce action for the wife, that the wife knew she was entitled to one-half the marital property, that she relied on her husband's misrepresentations as to his assets, and that the attorney did not advise the wife, issues as to the attorney's negligence

in failing to advise the wife to investigate the husband's statement of assets and the wife's contributory negligence could not be resolved as a matter of law, and a motion for summary judgment should have been denied.

(4) Judgments--Summary Judgments--Issues Precluding Judgment. --Summary judgment proceedings are not available where there are issues of fact to be tried. The question posed to the trial court and to the reviewing court on appeal from a summary judgment is whether the pleading and affidavits disclosed triable issues of fact.

(5) Negligence--Elements of Negligence: Questions of Law and Fact. --In any negligence action, the existence of a duty of care owed by defendant to plaintiff is a question of law for the court. Where a duty exists, the complementary degree of care exacted by defendant, usually that of a reasonable man of ordinary prudence in a like situation, is also declared by law.

(6) Id.--Questions of Law and Fact--Negligence of Defendant. --In a negligence action, breach of duty by defendant is usually a fact issue for the jury; where the circumstances permit a reasonable doubt whether defendant's conduct violates the boundaries of ordinary care, the doubt must be resolved as an issue of fact by the jury rather than of law by the court.

(7) Id.--Questions of Law and Fact--Proximate Cause. --Given a breach of duty by defendant in a negligence action, the decision whether that breach caused plaintiff's damage (that is, causation in fact) is within the jury's domain; but where reasonable men will not dispute the absence of causality, the court may take the decision from the jury and treat the question as one of law.

(8) Attorneys--Relation to Client--Duties of Attorney.

--By undertaking to represent a wife in an uncontested divorce suit, an attorney assumed a duty of care toward her, the degree of which was that exacted from a figurative lawyer of ordinary skill and capacity in performing like tasks.

(9) Id.--Relation to Client--Duties of Attorney--Assumption of Adverse Position.

--A lawyer owes undivided loyalty to his client, and though minimum standards of professional ethics usually permit him to represent dual interests where full consent and full disclosure occur, the loyalty he owes one client cannot consume that owed to the other.

(10) Id.--Relation to Client--Duties of Attorney--Assumption of Adverse Position.

--Representing the wife in an arm's-length divorce, an attorney of ordinary skill would demand some verification of the husband's financial statement or, at the minimum, inform the wife that prudence called for investigation and verification. Representing both spouses in an uncontested divorce (whatever the ethical implications), the attorney's professional obligations demand no less.

(11) Id.--Relation to Client--Duties of Attorney--Assumption of Adverse Position.

--An attorney representing parties with divergent interests must disclose all facts and circumstances that, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable the client to make free and intelligent decisions regarding the subject matter of the representation.

(12) Id.--Liability--Negligence--Actions: Judgments--Summary Judgments--Issues Precluding Summary Judgment.

--In a malpractice action against an attorney who had represented both parties in an uncontested divorce, the question of the attorney's breach of duty in failing to disclose to plaintiff wife the limited representation she was receiving and in failing to point to the possibility of independent legal advice was a triable issue that could not be resolved on a summary judgment motion.

(13) Id.--Liability--Negligence. --Reliance by a client on an attorney's advice cannot be regarded as a fixed condition of recovery by the client for the attorney's negligence or for a finding that the attorney's negligence was not a cause of the client's injury as a matter of law.

(14) Id.--Liability--Negligence--What Constitutes.

--Legal malpractice may consist of a negligent failure to act, and an attorney's negligence, whether consisting of

active conduct or of failure to act, need not be the sole cause of a client's loss.

(15) Id.--Liability--Negligence--Actions. --Where an attorney who had represented both parties in an uncontested divorce was charged by the wife with failure to advise, investigate and disclose the husband's financial assets, a jury might find that the husband's misrepresentations of the extent of his assets were a realizable likelihood that made the attorney's inaction negligent, forming a concurrent (not a superseding) cause of harm, and the cause of the wife's injury was a jury question that could not be resolved as a matter of law.

(16) Id.--Liability--Negligence--Defenses. --In a legal malpractice action, contributory negligence by plaintiff specially pleaded and established bars recovery.

(17) Id.--Liability--Negligence--Actions--Evidence.

--In a legal malpractice action against an attorney who had represented both parties in an uncontested divorce, though plaintiff wife testified that she had relied on her husband's list of assets and apparently did not investigate or inquire whether she was getting her share of property and accepted his attorney for the limited purpose of piloting her through the divorce formalities, it could not be said that reasonable jurors would inevitably characterize her conduct as contributory negligence, which was an issue for the trier of fact.

COUNSEL: James E. Green for Plaintiff and Appellant.

Rich, Fuidge, Dawson, Marsh, Tweedy & Morris and Richard H. Fuidge for Defendant and Respondent.

JUDGES: Friedman, J. Pierce, P. J., and Regan, J., concurred.

OPINION BY: FRIEDMAN

OPINION

[*523] [**593] This is a legal malpractice action in which the plaintiff-client appeals from a summary judgment granted the defendant-attorney. The factual narrative will possess heightened significance against a backdrop of general doctrine:

(1) Actionable legal malpractice is compounded of the same basic elements as other kinds of actionable negligence: duty, breach of duty, proximate cause, damage. (*Hege v. Worthington, Park & Worthington*, 209 Cal.App.2d 670, 677 [26 Cal.Rptr. 132]; see *Modica v. Crist*, 129 Cal.App.2d 144, 146-148 [276 P.2d 614]; 1 Witkin, Cal. Procedure (1954) 73-74.) (2) Touching the first element, duty, the general rule is that "the attorney,

by accepting employment to give legal advice or to render other legal services, impliedly agrees to [***2] use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. (*Estate of Kruger*, 130 Cal. 621, 626 [63 P. 31]; *Moser v. Western Harness Racing Assn.*, 89 Cal.App.2d 1, 7 [200 P.2d 7]; *Armstrong v. Adams*, 102 Cal.App. 677, 684 [283 P. 871]; see Wade, *The Attorney's Liability for Negligence* (1959) 12 Vanderbilt L.Rev. 755, 762-765; 5 Am. Jur. 336.) (*Lucas v. Hamm*, 56 Cal.2d 583, 591 [15 ***594] Cal.Rptr. 821, 364 P.2d 685]; see also Leavitt, *The Attorney as Defendant*, 13 Hastings L.J. 1, 23; Note, 45 A.L.R.2d 5-58.)

Quite without reference to the four basic elements of the traditional negligence analysis, a 1931 California appellate decision announced the following statement of essentials in the pleading and proof of legal malpractice: "First, that there existed the relationship of attorney and client; second, that in connection with such relationship advice was given; third, that he [the client] relied upon such advice and as a result thereof did things that he would not otherwise have done; fourth, that as a direct and proximate [***3] result of such advice and the doing of such acts, he suffered loss and was damaged thereby." (*McGregor v. Wright*, 117 Cal.App. 186, 193 [3 P.2d 624].) No specific ancestry was cited for the quoted statement. It seems to have been coined in the *McGregor* case. Relative to the element of reliance, the statement was dictum. A later dictum in *Modica v. Crist*, *supra*, 129 Cal.App.2d at page 146, quoted the *McGregor* dictum with approval. Although embracing the *McGregor* formulation of specific malpractice essentials, the *Modica* case held that in legal malpractice suits negligence may be pleaded in general terms.

[*524] In this case the defense is that the client sought no advice from the attorney and was given none; by the client's express admission, she did not rely on the attorney, thus, that her alleged damage was not proximately caused by the attorney's cause of action.

The facts are presented by summary judgment affidavits, which include extracts from depositions. There is no significant conflict in the evidence. (3a) Roberta Ishmael, the plaintiff, was formerly married to Earl F. Anders. The couple had three children. They lived in Gridley, [***4] where Mr. Anders was a partner in a family trucking business. Domestic difficulties resulted in a separation, and Mrs. Anders moved to Sacramento where she secured employment. She and her husband agreed upon a divorce and property settlement. She knew that she was entitled to one-half the marital property.

Mr. Anders called upon defendant Robert Millington, a Gridley attorney who had for some time repre-

sented him and his trucking firm. Mr. Millington advised Anders that if he could establish adulterous conduct by Mrs. Anders, he might be awarded more than one-half the community property. For one reason or another there was a decision that the wife rather than the husband would apply for divorce. At Anders' request Mr. Millington agreed to act as the wife's attorney, to prepare the necessary papers and to file a divorce action for her. He drew up a complaint and a property settlement agreement and handed these documents to Mr. Anders, who took them to Sacramento and had his wife sign them. She knew that Mr. Millington had represented her husband in the past. Faulty recall prevents ascertainment whether Mrs. Anders ever met personally with the attorney before the papers were [***5] drawn. She did not discuss the property settlement agreement with the attorney before she signed it. Mr. Millington believed the divorce and property settlement arrangements were "cut and dried" between the husband and wife; he "assumed that she knew what she was doing;" he believed that she was actually getting half the property but made no effort to confirm that belief.

In her deposition the former Mrs. Anders testified that in signing the complaint and property settlement agreement she relied solely on her husband and did not rely on the attorney. Later, when so instructed, she traveled to the courthouse at Oroville, where she and her corroborating witness met Mr. Millington. He escorted her through a routine ex parte hearing which resulted in an interlocutory divorce decree and judicial approval of the property settlement.

[*525] According to her complaint, the former Mrs. Anders discovered that in return for [***595] a settlement of \$ 8,807 she had surrendered her right to community assets totaling \$ 82,500. Ascribing her loss to the attorney's negligent failure to make inquiries as to the true worth of the community property, she seeks damages equivalent to the [***6] difference between what she received and one-half the asserted value of the community.

(4) Summary judgment proceedings are not available where there are issues of fact to be tried; the question posed to the trial court and to this reviewing court is whether the pleading and affidavits disclose triable issues of fact. (*Simmons v. Civil Service Emp. Ins. Co.*, 57 Cal.2d 381, 384 [19 Cal.Rptr. 662, 369 P.2d 262].) There being practically no conflict in the facts, affirmance or reversal turns on a decision whether the trial court undertook to decide issues of fact reserved for jury determination.

(5) In any negligence action the existence of a duty of care owed by the defendant to the plaintiff is a question of law for the court. (*Amaya v. Home Ice etc.*

Co., 59 Cal.2d 295, 307-308 [29 Cal.Rptr. 33, 379 P.2d 513].) If a duty exists, the complementary degree of care exacted of the defendant -- usually that of a reasonable man of ordinary prudence in a like situation -- is also declared by law. (Prosser on Torts (3d ed.) pp. 153, 207; Rest. 2d Torts, § 328B.) (6) Breach of duty is usually a fact issue for the jury; if the circumstances permit a reasonable doubt whether the defendant's [***7] conduct violates the boundaries of ordinary care, the doubt must be resolved as an issue of fact by the jury rather than of law by the court. (Warner v. Santa Catalina Island Co., 44 Cal.2d 310, 318 [282 P.2d 12]; Mosley v. Arden Farms Co., 26 Cal.2d 213, 217 [157 P.2d 372, 158 A.L.R. 782].) ¹ (7) Given a breach of duty by the defendant, the decision whether that breach caused the damage (that is, causation in fact) is again [*526] within the jury's domain; but where reasonable men will not dispute the absence of causality, the court may take the decision from the jury and treat the question as one of law. (Basin Oil Co. v. Baash-Ross Tool Co. 125 Cal.App.2d 578, 603 [271 P.2d 122]; see 2 Witkin, Summary of Cal. Law (1960) 1483-1484; Rest.2d Torts, § 434; Prosser, Proximate Cause in California, 38 Cal.L.Rev. 369, 375-383, 420-421.)

1 An early California decision states that when the facts of a legal malpractice action are ascertained, the question of negligence is one of law for the court. (Gambert v. Hart, 44 Cal. 542, 552.) The Gambert statement is discussed with obvious misgivings in Floro v. Lawton, 187 Cal.App.2d 657, 674-676 [10 Cal.Rptr. 98].) The notion of attorneys' negligence as an issue of law is contrary to the weight of authority in other states. (See Wade, The Attorney's Liability for Negligence (reprinted in Roady and Andersen, Professional Negligence) 217, 228.) It is also contrary to the modern California concept that the legal malpractice suit is but one variety of negligence action, governed by the general doctrines of pleading and proof prevailing in negligence actions. (Hege v. Worthington, Park & Worthington, supra, 209 Cal.App.2d at p. 677; Modica v. Crist, supra, 129 Cal.App.2d at p. 146.)

[***8] (8) By the very act of undertaking to represent Mrs. Anders in an uncontested divorce suit, Mr. Millington assumed a duty of care toward her, whatever its degree. Described in terms traditionally applicable to the attorney-client relationship, the degree of care exacted by that duty was that of a figurative lawyer of ordinary skill and capacity in the performance of like tasks. (Lucas v. Hamm, supra, 56 Cal.2d at p. 591.)

The degree of care is related to the specific situation in which the defendant found himself. The standard is that of ordinary care under the circumstances of the particular case. (Cucinella v. Weston Biscuit Co., 42 Cal.2d 71, 80 [265 P.2d 513]; see cases cited 2 Witkin, Summary of Cal. Law (1960) 1411; Rest. 2d Torts, § 283.) (9) A lawyer owes undivided loyalty to his client. Minimum standards of professional ethics usually permit him to [***596] represent dual interests where full consent and full disclosure occur. ² The loyalty he owes one client cannot consume that owed to the other. Most descriptions of professional conduct prohibit his undertaking to represent conflicting interests at all; or demand that he terminate the three-way relationship [***9] when adversity of interest appears. ³ Occasional statements sanction informed [*527] representation of divergent interests in "exceptional" situations. Even those statements demand complete disclosure of all facts and circumstances which, in the attorney's honest judgment, may influence his client's choice, holding the attorney civilly liable for loss caused by lack of disclosure. (Allstate Ins. Co. v. Keller, supra, 149 N.E.2d at p. 486; Crum v. Anchor Cas. Co., 264 Minn. 378 [119 N.W.2d 703]; Smallwood v. Overseas Storage Co., 263 App.Div. 609 [33 N.Y.2d 876, 880-881]; see additional cases cited 7 C.J.S., Attorney and Client, § 151, note 50.)

2 See Grove v. Grove Valve & Regulator Co., 213 Cal.App.2d 646, 652-653 [29 Cal.Rptr. 150]; Lessing v. Gibbons, 6 Cal.App.2d 598, 605 [45 P.2d 258]. The Rules of Professional Conduct of the State Bar, approved by the Supreme Court pursuant to Business and Professions Code section 6076, provide:

"Rule 6. A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment."

"Rule 7. A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned."

[***10]

3 See Cheatham, Cases and Materials on Legal Profession, p. 151 et seq. Anderson v. Eaton, 211 Cal. 113, 116 [293 P. 788], states: ". . . [An] attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest." While rule 6 of the California Rules of Professional Conduct (fn. 1, supra) seemingly permits representation of adverse interests after disclosure of the relation and with the

clients' consent, Canon 6 of the American Bar Association demands "full disclosure of the facts." The "facts" should include a revelation of the detriment to which the dual representation exposes the client and the possible need of representation by independent counsel. (*Allstate Ins. Co. v. Keller*, 17 Ill. App.2d 44 [149 N.E.2d 482, 486, 70 A.L.R.2d 1190].) Without reference to the minimum standards fixed by professional canons, California courts have repeatedly held that counsel should terminate a relationship when the discharge of duty to one client conflicts with duty to another. (*Dettamanti v. Lompoc Union School Dist.*, 143 Cal.App.2d 715, 723 [300 P.2d 78]; *Hammitt v. McIntyre*, 114 Cal.App.2d 148, 153-154 [249 P.2d 885]; *McClure v. Donovan*, 82 Cal.App.2d 664, 666 [186 P.2d 718]; *Pennix v. Winton*, 61 Cal.App.2d 761, 773 [143 P.2d 940, 145 P.2d 561].)

[***11] Divorces are frequently uncontested; the parties may make their financial arrangements peaceably and honestly; vestigial chivalry may impel them to display the wife as the injured plaintiff; the husband may then seek out and pay an attorney to escort the wife through the formalities of adjudication. We describe these facts of life without necessarily approving them. Even in that situation the attorney's professional obligations do not permit his descent to the level of a scrivener. The edge of danger gleams if the attorney has previously represented the husband. A husband and wife at the brink of division of their marital assets have an obvious divergence of interests. (10) Representing the wife in an arm's length divorce, an attorney of ordinary professional skill would demand some verification of the husband's financial statement; or, at the minimum, inform the wife that the husband's statement was unconfirmed, that wives may be cheated, that prudence called for investigation and verification. Deprived of such disclosure, the wife cannot make a free and intelligent choice. Representing both spouses in an uncontested divorce situation (whatever the ethical implications), the attorney's [***12] professional obligations demand no less. He may not set [**597] a shallow limit on the depth to which he will represent the wife. ⁴

4 The Committee on Ethics of the Los Angeles Bar Association has condemned dual representation in divorce suits even with parties' consent, basing its opinion on American Bar Association Canon 6 rather than the California rules. (Opinion No. 207, July 10, 1953, 29 L.A. Bar Bulletin 137.) An aggravated instance of dual representation in a divorce suit appears in *In re Rubin*, 7 N.J. 507 [81 A.2d 776], and *Staedler v. Staedler*, 6 N.J. 380 [78 A.2d 896, 28 A.L.R.2d 1291]; see

Drinker, Problems of Professional Ethics in Matrimonial Litigation, 66 Harv. L.R. 443-464.) Specifically discussing dual representation in uncontested divorce actions, Professor Henry S. Drinker states:

"The American Bar Association, the Michigan Committee, and the two New York Committees have held that the lawyer for one spouse should not recommend a lawyer for the other, or prepare the pleadings or papers or testimony for the other or act for or give legal advice to the other in any respect, and that disclosure to the court, even before the decree, would not make this proper.

". . . .

"Apparently the decisions which would insulate the parties and their respective lawyers completely from one another are based on the fiction that the interests of parties to a divorce suit are necessarily and always antagonistic to one another and on the further assumption that this was necessary to secure proper protection for the interest of the state in preserving their marital status. It would, however seem very questionable as to whether such protection is needed in a bona fide case, where it is clear that the wife honestly wants the divorce and is not coerced into it by an obviously dominant husband, where the allowance proposed by him is reasonable, and where the lawyer suggested to her by the husband or by his lawyer has not theretofore represented the husband. It is manifest that such suggestion is but natural and occurs all the time in uncontested cases. To condemn it where it is openly disclosed would seem both futile and unnecessary." (Drinker, *Legal Ethics*, pp. 128-129.) (Italics added.)

[***13] [*528] The general standard of professional care described in *Lucas v. Hamm, supra*, is appropriate to the garden variety situation, where the attorney represents only one of several parties or interests. It falls short of adequate description where the attorney's professional relationship extends to two clients with divergent or conflicting interests in the same subject matter. A more specific statement of the same rule is needed to guide the fact trier to the law's demands when the attorney attempts dual representation. (11) In short, an attorney representing two parties with divergent interests must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation. ⁵

5 In *Anderson v. Eaton*, *supra*, 211 Cal. at page 116, the level of disclosure is fixed as that necessary to permit the client's "free and intelligent consent." In *Allstate Ins. Co. v. Keller*, *supra*, disclosure is demanded of "all facts and circumstances within [the attorney's] knowledge, which, in his honest judgment, might be likely to affect the performance of his duty for that client." (149 N.E.2d at p. 486.)

[***14] (12) In view of the degree of care imposed by law on an attorney in defendant's position, a fact trier might reasonably find him negligent in failing to disclose to plaintiff the limited representation she was receiving and in failing to point to the possibility of independent legal advice. The question of breach [*529] was thus a triable issue which could not be resolved on a summary judgment motion. We pass to the causation factor.

As we noted earlier, the general doctrine of negligence law establishes causality as a fact issue for the jury except in those cases where reasonable men cannot differ. At this point defendant adverts to the rule requiring reliance upon the attorney's advice, as stated in *McGregor v. Wright*, *supra*, and *Modica v. Crist*, *supra*. Although by way of dictum, these cases seemingly announce an unyielding rule of causality, requiring not only that the attorney gave advice but also that the client relied on that advice. The *McGregor-Modica* formulation [**598] implies that the attorney's conduct does not as a matter of law cause the client's harm where there is no reliance.

(13) To pose lack of reliance as a fixed doctrinal demand invades [***15] the jury's province as the trier of causation in fact; alternatively, such a demand rests upon the unacceptable proposition that all reasonable men will agree in rejecting the attorney's conduct (including his inaction and silence) as a cause of damage where the client relies on other sources of information. The *McGregor-Modica* demand for reliance cannot be regarded as a fixed condition of recovery or as authority for a finding of noncausality as a matter of law.

(14) Legal malpractice may consist of a negligent failure to act. (*Feldesman v. McGovern*, 44 Cal.App.2d

566, 568 [112 P.2d 645]; see *Gambert v. Hart*, *supra*, 44 Cal. at p. 552; *Hege v. Worthington, Park & Worthington*, *supra*, 209 Cal.App.2d at pp. 676-678; *Pete v. Henderson*, 124 Cal.App.2d 487-489 [269 P.2d 78].) The attorney's negligence, whether consisting of active conduct or a failure to act, need not be the sole cause of the client's loss. (*Modica v. Crist*, *supra*, 129 Cal.App.2d at p. 146; see 2 Witkin, Summary of Cal. Law (1960) p. 1485; Prosser, *Proximate Cause in California*, 38 Cal.L.Rev. 369, 378.) (15) Here the attorney is charged not with erroneous advice, but with failure [***16] to advise, failure to investigate, failure to disclose. The wife's reliance on her husband's alleged misrepresentations is not at all inconsistent with the claim that her loss was the result of the attorney's negligent failure. A jury might find that the husband's misrepresentations were a realizable likelihood which made the attorney's inaction negligent, thus forming a concurrent (and not superseding) cause of harm. (*Richardson v. Ham*, 44 Cal.2d 772, 777 [285 P.2d 269]; *Mosley v. Arden Farms Co.*, *supra*, 26 Cal.2d at pp. 218-219; *Rest. 2d Torts*, § 449.) Causation [*530] was a jury question which could not be resolved as a matter of law.

(16) Contributory negligence on plaintiff's part was specially pleaded and, if established, would bar malpractice recovery. (*Theobald v. Byers*, 193 Cal.App.2d 147, 150 [13 Cal.Rptr. 864, 87 A.L.R.2d 986]; Note, 45 A.L.R.2d 5, 17-18.) (17) Plaintiff, as she testified, relied on her husband's list of assets; apparently did not trouble to investigate or even to inquire whether she was getting her share of property; was seemingly content to let her husband take charge; accepted his attorney for the limited purpose of piloting [***17] her through the divorce formalities. A court, however, cannot say that reasonable jurors would inevitably characterize her conduct as contributory negligence. That issue was a triable issue of fact.

(3b) Thus, notwithstanding the lack of conflict in the evidence, the summary judgment rests on the determination of issues reserved for decision by a fact trier and which could not be resolved as a matter of law. Since triable issues of fact existed, the motion should have been denied.

Judgment reversed.

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(Cite as: 63 A.D.3d 796, 880 N.Y.S.2d 698)

C

Supreme Court, Appellate Division, Second Department, New York.

John KLUCZKA, respondent-appellant,
v.

Salvatore A. LECCI, appellant-respondent.

June 9, 2009.

Background: Client brought legal malpractice against attorney who represented him in divorce action. The Supreme Court, Nassau County, Cozzens, J., denied attorney's motion for summary judgment dismissing complaint, and denied client's motion for summary judgment on issue of liability, and for summary judgment dismissing attorney's counterclaim to recover unpaid legal fees. Parties cross-appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) attorney established his prima facie entitlement to judgment as matter of law;
- (2) client's summary judgment evidence failed to establish element of causation; but
- (3) fact issue precluded summary judgment on attorney's counterclaim to recover unpaid legal fees.

Affirmed as modified.

West Headnotes

[1] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

Attorney and Client 45 ⇌ 107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k107 k. Skill and care required. Most Cited

Cases

In order to prevail in an action to recover damages for legal malpractice, a plaintiff must establish that defendant attorney failed to exercise ordinary reasonable skill and knowledge commonly possessed by a member of legal profession, and that breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages.

[2] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of litigation. Most Cited

Cases

To establish element of causation in legal malpractice action, a plaintiff must show that he or she would have prevailed in underlying action or would not have incurred any damages but for the attorney's negligence.

[3] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

Failure to demonstrate proximate cause requires dismissal of legal malpractice action regardless of whether attorney was negligent.

[4] Judgment 228 ⇌ 185.3(4)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(4) k. Attorneys. Most Cited Cases

Attorney, moving for summary judgment in action brought by former client, alleging that attorney committed legal malpractice by recommending that client enter into stipulation with his wife in divorce action without obtaining appraisals of property or

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his pension, established his prima facie entitlement to judgment as matter of law by demonstrating that stipulation was provident agreement which provided both parties with benefits, and that his allegedly negligent failure to obtain appraisals did not cause client to incur any damages.

[5] Judgment 228 ⇐ 185.3(4)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(4) k. Attorneys. Most Cited Cases

Client's summary judgment evidence failed to demonstrate that, but for his attorney's alleged malpractice in recommending that he enter into stipulation with his wife in divorce action without obtaining appraisals of property or his pension, he would have been able to negotiate more favorable settlement, as required to establish element of causation in legal malpractice action.

[6] Judgment 228 ⇐ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, cases involving. Most Cited Cases

Genuine issue of material fact existed as to whether attorney's performance of legal services in divorce action, as measured against that of an attorney of reasonable skill and knowledge, was negligent, precluding summary judgment on attorney's claim to recover unpaid legal fees.

****699** Michael T. Lamberti, Woodbury, N.Y., for appellant-respondent.

Jeffrey Levitt, Amityville, N.Y., for respondent-appellant.

PETER B. SKELOS, J.P., FRED T. SANTUCCI, RUTH C. BALKIN, and RANDALL T. ENG, JJ.

***797** In an action to recover damages for legal malpractice, the defendant appeals from stated portions of an order of the Supreme Court, Nassau County (Cozzens, J.), dated October 4, 2007, which, inter alia, denied that branch of his motion which was for summary judgment dismissing the complaint, and the plaintiff cross-appeals, as limited by his brief, from so much of the same order as denied his cross motion for summary judgment on the issue of liability and for summary judgment dismissing the defendant's counterclaim to recover unpaid legal fees.

ORDERED that the order is modified, on the law, by deleting the provision thereof denying that branch of the defendant's motion which was for summary judgment dismissing the complaint, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, with costs to the defendant.

The plaintiff retained the defendant attorney to represent him in a divorce action commenced by his former wife. The divorce action was settled by a stipulation pursuant to which the plaintiff agreed, inter alia, to waive his interest in the marital residence and give his former wife a share of his pension benefits, while she agreed to waive her interest in another property, and forgive certain child support arrears. The plaintiff thereafter commenced this action, contending that the defendant had ****700** committed legal malpractice by recommending that the plaintiff enter into the stipulation without obtaining appraisals of the subject real property or his pension.

[1][2][3] In order to prevail in an action to recover damages for legal malpractice, a plaintiff must establish that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the leg-

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al profession, and that the breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages (see *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d 438, 442, 835 N.Y.S.2d 534, 867 N.E.2d 385; *Malik v. Beal*, 54 A.D.3d 910, 911, 864 N.Y.S.2d 153; *Carrasco v. Pena & Kahn*, 48 A.D.3d 395, 396, 853 N.Y.S.2d 84). To establish the element of causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney's negligence (see *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 8 N.Y.3d at 442, 835 N.Y.S.2d 534, 867 N.E.2d 385; *Wray v. Mallilo & Grossman*, 54 A.D.3d 328, 329, 863 N.Y.S.2d 228; *Carrasco v. Pena & Kahn*, 48 A.D.3d at 396, 853 N.Y.S.2d 84). The failure to demonstrate proximate cause requires dismissal of a legal malpractice action regardless of whether the attorney was negligent (see *Leder v. Spiegel*, 31 A.D.3d 266, 267-268, 819 N.Y.S.2d 26, *affd.* 9 N.Y.3d 836, 840 N.Y.S.2d 888, 872 N.E.2d 1194).

[4][5] *798 Here, the defendant made a prima facie showing that he was entitled to summary judgment by demonstrating that the stipulation in the underlying divorce action was a provident agreement which provided both parties with benefits, and that his allegedly negligent failure to obtain appraisals did not cause the plaintiff to incur any damages. In opposition, the plaintiff failed to raise an issue of fact as to whether he incurred damages by submitting evidentiary proof that, but for the defendant's alleged negligence, he would have been able to negotiate a more favorable settlement (see *Rapp v. Lauer*, 229 A.D.2d 383, 384, 644 N.Y.S.2d 569; *Rogers v. Ettinger*, 163 A.D.2d 257, 258, 558 N.Y.S.2d 540). Accordingly, the Supreme Court should have granted that branch of the defendant's motion which was for summary judgment dismissing the complaint.

[6] However, the court properly denied that branch of the plaintiff's cross motion which was for summary judgment dismissing the defendant's

counterclaim to recover unpaid legal fees. An attorney may not recover fees for legal services performed in a negligent manner even where that negligence is not a proximate cause of the client's injury (see *Martin, Van de Walle, Guarino & Donohue v. Yohay*, 149 A.D.2d 477, 480, 539 N.Y.S.2d 797; *Campagnola v. Mulholland, Minion & Roe*, 148 A.D.2d 155, 158, 543 N.Y.S.2d 516, *affd.* 76 N.Y.2d 38, 556 N.Y.S.2d 239, 555 N.E.2d 611). Here, the submissions of both parties demonstrate that there is a sharply disputed issue of fact as to whether the defendant's performance of legal services, as measured against that of an attorney of reasonable skill and knowledge, was negligent (see *Kutner v. Catterson*, 56 A.D.3d 437, 867 N.Y.S.2d 156). Thus, the issue of whether the defendant is entitled to recover legal fees on his counterclaim must await resolution at trial.

In light of our determination, we need not reach the defendant's remaining contention.

N.Y.A.D. 2 Dept., 2009.

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▷

Court of Appeals of Indiana,
Third District.

Sue LANDAU, Appellant-Plaintiff Below,
v.
Jack BAILEY, Appellee-Defendant Below.

No. 49A02-9304-CV-162.

Feb. 24, 1994.

Rehearing Denied June 13, 1994.

Legal malpractice action was brought against attorney who had represented plaintiff client in her dissolution of marriage proceeding. Attorney's motion for summary judgment was granted by the Marion Superior Court, Gerald S. Zore, J., and client appealed. The Court of Appeals, Staton, J., held that: (1) there were issues of fact with respect to attorney's failure to present evidence of value of the law business of client's husband, precluding summary judgment; (2) trial court acted within its discretion in finding that accountant was properly qualified expert witness; but (3) substance of accountant's affidavit was violative of accountant/client privilege.

Reversed.

Hoffman, J., concurred in the result and dissented with opinion.

West Headnotes

[1] Appeal and Error 30 ⇌ 852

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k851 Theory and Grounds of Decision
of Lower Court

30k852 k. Scope and theory of case.
Most Cited Cases

Appeal and Error 30 ⇌ 863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
General

30k862 Extent of Review Dependent on
Nature of Decision Appealed from

30k863 k. In general. Most Cited
Cases

Appeal and Error 30 ⇌ 934(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k934 Judgment

30k934(1) k. In general. Most Cited
Cases

When reviewing entry of summary judgment, Court of Appeals stands in the shoes of the trial court and does not reweigh the evidence but will consider the facts in the light most favorable to the nonmoving party and may sustain summary judgment on any theory supported by the designated materials, and standard of review is not altered when trial court has entered "findings and conclusions." Trial Procedure Rule 56(C).

[2] Judgment 228 ⇌ 185(2)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(2) k. Presumptions and burden of proof. Most Cited Cases

Burden is on party moving for summary judgment to prove there are no genuine issues of material fact and that he is entitled to judgment as a matter of law, and once movant has sustained this burden, opponent must respond by setting forth specific facts showing genuine issue for trial and may not simply rest on allegations of his pleadings. Trial

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Procedure Rule 56(C).

[3] Judgment 228 ⇌ 181(33)

228 Judgment

228V On Motion or Summary Proceeding
 228k181 Grounds for Summary Judgment
 228k181(15) Particular Cases
 228k181(33) k. Tort cases in general.

Most Cited Cases

Summary judgment is rarely appropriate disposition of actions based on negligence claims. Trial Procedure Rule 56(C).

[4] Judgment 228 ⇌ 181(2)

228 Judgment

228V On Motion or Summary Proceeding
 228k181 Grounds for Summary Judgment
 228k181(2) k. Absence of issue of fact.

Most Cited Cases

Fact is "material" so as to preclude summary judgment if its existence facilitates resolution of issue involved. Trial Procedure Rule 56(C).

[5] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding
 228k181 Grounds for Summary Judgment
 228k181(15) Particular Cases
 228k181(16) k. Attorneys, cases involving. Most Cited Cases

There were issues of material fact precluding summary judgment in former wife's action against attorney who represented her in dissolution of marriage, for alleged legal malpractice in failing to present evidence as to the goodwill value of her husband's law practice, as to whether the law practice in fact had substantial value and whether wife had indicated to attorney unwillingness to spend money for preparation and presentation of such evidence. Trial Procedure Rule 56(C).

[6] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding
 228k181 Grounds for Summary Judgment
 228k181(15) Particular Cases
 228k181(16) k. Attorneys, cases involving. Most Cited Cases

Whether attorney in dissolution of marriage case breached duty to client to act so as to preserve client's property interests was a question of fact and was improperly determined as a conclusion of law on motion for summary judgment.

[7] Attorney and Client 45 ⇌ 106

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
 45k106 k. Nature of attorney's duty. Most Cited Cases

Attorney has duty at all times to protect and preserve rights and property of client.

[8] Divorce 134 ⇌ 787

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)5 Valuation, Division or Distribution of Particular Property or Interests

134k787 k. Licenses, education and degrees; compensating payments. Most Cited Cases (Formerly 134k253(2))

Divorce 134 ⇌ 794

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)5 Valuation, Division or Distribution of Particular Property or Interests

134k794 k. Businesses and associated assets in general. Most Cited Cases

(Formerly 134k253(2), 134k252.3(1))

Professional practice may have value for pur-

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poses of marital asset distribution, and assuming that one spouse's law practice had economic value, other was presumptively entitled to receive half of that value in distribution of marital assets. West's A.I.C. 31-1-11.5-11(c).

[9] Judgment 228 ⇌ 185(5)

228 Judgment

228V On Motion or Summary Proceeding
 228k182 Motion or Other Application
 228k185 Evidence in General
 228k185(5) k. Weight and sufficiency.

Most Cited Cases

Judgment 228 ⇌ 186

228 Judgment

228V On Motion or Summary Proceeding
 228k182 Motion or Other Application
 228k186 k. Hearing and determination.

Most Cited Cases

Trial court on motion for summary judgment may consider designated pleadings, exhibits, depositions, affidavits and testimony, but may not resolve conflicting facts or assess credibility.

[10] Evidence 157 ⇌ 536

157 Evidence

157XII Opinion Evidence
 157XII(C) Competency of Experts
 157k536 k. Knowledge, experience, and skill in general. Most Cited Cases

Evidence 157 ⇌ 546

157 Evidence

157XII Opinion Evidence
 157XII(C) Competency of Experts
 157k546 k. Determination of question of competency. Most Cited Cases

Expert may be qualified by practical experience as well as by formal training, and whether he is qualified as expert is matter within the sound discretion of the trial court.

[11] Evidence 157 ⇌ 543(1)

157 Evidence

157XII Opinion Evidence
 157XII(C) Competency of Experts
 157k543 Value

157k543(1) k. In general. Most Cited

Cases

Trial court acted within its discretion in finding "trained" accountant, who was enrolled agent qualified to address tax matters before the Internal Revenue Service (IRS), to be qualified expert witness as to value of law practice, though he was not certified public accountant and despite contention that he lacked experience in evaluating businesses, where it was averred that he had gained experience in investigation of assets of corporations, partnerships and individuals while employed as IRS field representative.

[12] Privileged Communications and Confidentiality 311H ⇌ 405

311H Privileged Communications and Confidentiality

311HVII Other Privileges

311Hk405 k. Accountant and client. Most Cited Cases

(Formerly 410k196.2)

Affidavit by accountant submitted in favor of attorney in legal malpractice action was violative of accountant/client privilege, where accountant had conducted review of records on behalf of plaintiff client and had billed plaintiff for that professional service, and subsequently disclosed the results of that review in his affidavit. West's A.I.C. 25-2-1-23 (b).

[13] Privileged Communications and Confidentiality 311H ⇌ 405

311H Privileged Communications and Confidentiality

311HVII Other Privileges

311Hk405 k. Accountant and client. Most Cited Cases

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(Formerly 410k196.2)

Accountant/client privilege is personal to the client rather than to the accountant. West's A.I.C. 25-2-1-23(b).

*265 Jon R. Pactor, Indianapolis, for appellant-plaintiff.

William H. Vobach, Todd J. Kaiser, Locke Reynolds Boyd & Weisell, Indianapolis, for appellee-defendant.

STATON, Judge.

Sue Landau filed a malpractice complaint against her former divorce attorney, Jack Bailey. Bailey's motion for summary judgment was granted; Landau now appeals. She presents for our review two (restated) issues:^{FN1}

FN1. Landau articulated an additional issue concerning Bailey's failure to file a timely request for findings of fact and conclusions of law in the dissolution court. However, she concedes that her allegation concerning the omission is related to "other issues which are not yet adjudicated and are not subject to this appeal." Brief of Appellant, p. 40. She refers to Bailey's pending counterclaim for unpaid attorney fees.

I. Whether the trial court erroneously granted summary judgment in favor of Bailey.

II. Whether Landau's motion to strike the affidavit of Michael Redford should have been granted.

We reverse.

During April 1989, Landau retained Bailey to represent her in the dissolution of her marriage to Gary Landau, an Indianapolis attorney. On August 18, 1989, the trial court heard evidence concerning the marital assets. However, no evidence was presented as to the goodwill value of Gary Landau's

solo law practice. The Landaus' marriage was dissolved on September 19, 1989.

On August 19, 1991, Landau filed a complaint alleging that Bailey's negligence caused her to receive less than her entitlement in the marital property division. On May 22, 1992, Bailey moved for summary judgment; the motion was granted on August 28, 1992.

*266 I.

Summary Judgment

[1] Landau claims that the trial court erroneously (1) resolved disputed facts in Bailey's favor and (2) concluded that Bailey had no duty to present evidence of the value of Gary Landau's law practice. The trial court entered extensive "findings and conclusions" which assist this court in determining the reasons for the trial court's decision; however, the standard of review of a summary judgment is not altered. *P.M.S., Inc. v. Jakubowski* (1992), Ind.App., 585 N.E.2d 1380, 1381.

[2] Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind.Trial Rule 56(C). The burden is on the moving party to prove there are no genuine issues of material fact, and he is entitled to judgment as a matter of law. Once the movant has sustained this burden, the opponent must respond by setting forth specific facts showing a genuine issue for trial; he may not simply rest on the allegations of his pleadings. *Stephenson v. Ledbetter* (1992), Ind., 596 N.E.2d 1369, 1371. At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. T.R. 56(C).

[3] When reviewing an entry of summary judgment, we stand in the shoes of the trial court. We do not weigh the evidence but will consider the facts in the light most favorable to the nonmoving party. *Collins v. Covenant Mut. Ins. Co.* (1992),

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Ind.App., 604 N.E.2d 1190, 1194. We may sustain a summary judgment upon any theory supported by the designated materials. T.R. 56(C). However, summary judgment is rarely an appropriate disposition of actions based upon negligence claims. *Stephenson, supra*, at 1371.

[4] Landau contends that the designated materials reveal factual disputes as to the economic value of Gary Landau's law practice and the reasonableness of Bailey's representation relative thereto. A fact is material if its existence facilitates the resolution of an issue involved. *Anderson v. State Farm Mutual Automobile Insurance Co.* (1984), Ind.App., 471 N.E.2d 1170, 1172.

[5] Our review of the designated materials supports Landau's contention that issues of material fact remain. Bailey and accountant Michael Redford contend that the law practice had no measurable economic value; Bruce Allman, CPA, contends that an appraisal would have revealed that the law practice had "substantial" value. Record, pp. 26, 33, 56. Regarding his representation, Bailey averred that: (1) he advised Landau of the results of his investigation concerning the law practice; (2) he informed Landau that the law practice had value and was part of the marital estate and (3) Landau elected not to present expert testimony on the issue due to a lack of funds. Record, pp. 25, 113. Landau and Marla Eichmann averred that Bailey advised Landau that the law practice lacked a value susceptible of proof at trial. Record, pp. 58, 60; Supp. Record, p. 27 (Landau depo., p. 130).

[6] Furthermore, Landau correctly contends that the trial court erred in reaching the following "conclusion of law:"

"The defendant Bailey was under no duty to pursue the preparation and presentation of evidence on the issue of the ongoing value of the law practice of Gary Landau in the divorce case in Cause No. 30C01-8901-DR55, here the plaintiff had indicated an unwillingness to spend the money for such preparation and presentation of evidence

and, therefore, the defendant Bailey was not guilty of negligence malpractice in failing to prepare and present such evidence at the divorce trial."

Record, p. 143.

[7][8] An attorney has the duty to at all times protect and preserve the rights and property of the client. *Matter of Indiana State Bar* (1990), Ind., 550 N.E.2d 311, 313. A professional practice may have value for purposes of marital asset distribution. *Cleary v. Cleary* (1991), Ind.App., 582 N.E.2d 851. Pursuant to IND.CODE 31-1-11.5-11(c), Landau was entitled to receive one-half *267 of the total marital assets absent an articulation by the trial court of specific reasons supporting a deviation. Assuming that Gary Landau's law practice had economic value, Landau was presumptively entitled to receive one-half of that value in the distribution of marital assets. Clearly, Bailey had a duty to act so as to preserve his client's property interests. Whether Bailey breached that duty is a question of fact. *Stephenson, supra*, at 1372.

Moreover, the foregoing "conclusion of law" incorporated the resolution of disputed facts and the assessment of credibility. In an attempt to withstand the motion for summary judgment, Landau offered evidence that Bailey failed to adequately investigate or advise her of the potential value of Gary Landau's law practice. Bailey responded with evidence that he conducted an adequate investigation and informed Landau of his conclusions but that Landau elected not to present evidence at trial of the law practice value. The trial court resolved the conflicting evidence in Bailey's favor.

[9] A trial court, upon motion for summary judgment, may consider the designated pleadings, exhibits, depositions, affidavits and testimony, but may not resolve conflicting facts or assess credibility. *Skrypek v. St. Joseph Valley Bank* (1984), Ind.App., 469 N.E.2d 774. Here, the materials offered for the trial court's consideration disclosed factual disputes which must, for summary judgment

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purposes, be considered in a light favorable to the non-movant. The trial court improperly resolved disputed facts to conclude that Bailey was not negligent in his representation of Landau.

II.

Motion to Strike Redford Affidavit

Landau next contends that the trial court should have struck the affidavit of Michael Redford. Although we reverse the summary judgment, we address this issue because Redford's competency may be challenged at trial.

[10][11] Landau complains that Redford was not a properly qualified expert witness because he lacked experience in evaluating businesses and was not a certified public accountant. An expert may be qualified by practical experience as well as by formal training and whether he is qualified as an expert is a matter within the sound discretion of the trial court. *Willis v. State* (1987), Ind.App., 512 N.E.2d 871, 876, *trans. denied*.

Redford averred that he is a "trained" accountant and an enrolled agent qualified to address tax matters before the Internal Revenue Service. He further averred that he had gained experience in the investigation of the assets of corporations, partnerships and individuals while employed as an Internal Revenue Service field representative. Landau offered no evidence to controvert Redford's averments. The trial court acted within its discretion in finding Redford to be a properly qualified expert witness.

[12][13] However, Landau additionally contends that the substance of Redford's affidavit was violative of the accountant/client privilege. We agree. IND.CODE 25-2-1-23(b) provides that information derived from or as the result of professional services rendered by an accountant is confidential and privileged. The privilege is personal to the client rather than to the accountant. *Ernst & Ernst v. Underwriters National Assurance Co.* (1978), 178 Ind.App. 77, 381 N.E.2d 897, 899 *reh. denied, trans. denied*.

Redford conducted a review of Gary Landau's law practice records on Landau's behalf and billed Landau for that professional service. He subsequently disclosed the results of that review in his affidavit. Redford thus revealed information derived from professional services rendered to Landau, in contravention of I.C. 25-2-1-23(b).

Reversed.

ROBERTSON, J., concurs.

HOFFMAN, J., concurs in result and dissents with opinion.

HOFFMAN, Judge, concurring in result and dissenting.

I concur in the result as to the reversal of summary judgment inasmuch as Bailey failed to designate evidentiary matter; however, I *268 dissent from the finding that Redford's affidavit was violative of the accountant/client privilege.

The parties to a summary judgment proceeding must expressly designate to the trial court evidentiary matter which supports their respective positions. Summary judgment is appropriate if the designated evidentiary matter shows 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. *Brockmeyer v. Fort Wayne Public Transp.* (1993), Ind.App., 614 N.E.2d 605, 606. The existence of a genuine issue of material fact shall not be ground for reversal of a summary judgment once entered, unless such fact was designated to the trial court and is included in the record.

See id. at 606-607;

Ind. Trial Rule 56(H).

Here, Bailey failed to specifically designate the evidentiary matter supporting his position. This Court may no longer search the record for evidence to support a party's position. Because Landau did specifically designate the evidentiary matter upon which she based her motion in opposition, I concur in the result as to the determination that summary

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judgment was inappropriate.

However, I do not agree that the affidavit submitted by Redford was violative of the accountant/client privilege. In pertinent part, the statute states:

"The information derived from or as the result of such professional services shall be deemed confidential and privileged: Provided, That nothing herein shall be construed as prohibiting a certified public accountant or a public accountant from disclosing any data required to be disclosed by the standards of the profession ... in making disclosure where [the] financial statements, or the professional services of the accountant ... are contested."

IND.CODE § 25-2-1-23 (1988 Ed.) (amended 1992).

Here, the adequacy of the accounting services are contested. Although the proceeding is against the attorney for legal malpractice, the accounting services are directly implicated as being deficient. The privilege personal to Landau, created by the relationship, was destroyed when Landau placed the substance of the services at issue in the lawsuit.

For the above-stated reasons, I concur in result and dissent.

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JEROME R. LEWIS, Petitioner, v. THE SUPERIOR COURT OF SACRAMENTO COUNTY, Respondent,; VIRGINIA A. SULLIVAN, Real Party in Interest

Civ. No. 17031

Court of Appeal of California, Third Appellate District

77 Cal. App. 3d 844; 144 Cal. Rptr. 1; 1978 Cal. App. LEXIS 1261

January 23, 1978

SUBSEQUENT HISTORY: [***1] As Modified February 22, 1978. The petition of the real party in interest for a hearing by the Supreme Court was denied April 13, 1978.

DISPOSITION: The petition for a writ of mandate is denied and the order to show cause is discharged.

SUMMARY:

Plaintiff brought an action for legal malpractice, seeking actual and punitive damages for defendant attorney's failure to claim her husband's retirement benefits as community property in her complaint for divorce. Defendant moved for summary judgment, contending that, since the property was neither divided as community property nor set aside as separate property, plaintiff was a tenant in common as to the benefits and could recover against her husband. The motion was denied.

The Court of Appeal denied defendant's petition for writ of mandate to compel entry of summary judgment, holding that, while defendant's analysis of plaintiff's continued rights in the property was correct, there were remaining triable issues of fact as to whether plaintiff had been damaged by defendant's negligence. The court noted that plaintiff's interest in the property might not be collectable in that the husband may have made elections under the pension plan adverse to plaintiff, may have spent part of the proceeds or have left the jurisdiction, or may be entitled to assert defenses to an action by plaintiff. (Opinion by Reynoso, J., with Friedman, Acting P. J., and Paras, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a) (1b) Dissolution of Marriage; Separation § 50 -- Division of Community and Quasi-community Property -- Property Subject to Division -- Effect of Decree Upon Unadjudicated Property. -- The interest of both spouses in community property is present, existing and equal and, as to community property that is not mentioned in either the pleadings or the dissolution decree, becomes an interest in the property as tenants in common. Thus, a wife's interest in her husband's pension benefits was not divested by a final judgment of dissolution that incorporated a property settlement agreement dividing certain property as community property, acknowledging that there was no separate property, and failing to mention or award the pension benefits.

(2a) (2b) Judgments § 78 -- Res Judicata -- Judgment as Merger or Bar -- Matters Concluded -- Split Causes of Action -- Divorce Decree -- Unadjudicated Community Property Rights. -- A suit by a former spouse to enforce an existing interest in former community property that was not mentioned or awarded in either the pleadings or the judgment in the dissolution action is not an attempt to split a cause of action so as to bar the action under the doctrine of res judicata.

(3) Summary Judgment § 21 -- Hearing and Determination -- Issues Precluding Judgment -- Ability to Mitigate Damages. -- A motion for summary judgment may be granted only where the papers submitted show that there is no triable issue of fact. Thus, in an action for legal malpractice based upon defendant's failure to

assert plaintiff's community property interest in pension benefits during his handling of her divorce action, the trial court properly denied defendant's motion for summary judgment, notwithstanding defendant's contention that, since plaintiff's rights in the property had not been divested by the divorce decree, plaintiff had not shown any damages due to defendant's negligence, where the issue of whether plaintiff's interest in the property was collectable from the husband remained unresolved.

(4) Damages § 7 -- Compensatory Damages -- Mitigation -- Duty of Injured Party to Minimize. -- A defendant is not required to compensate for damages avoidable by reasonable efforts or enhanced by plaintiff's own actions.

COUNSEL: Bolling, Pothoven, Walter & Gawthrop, Theodore D. Bolling, Jr., Freidberg & Mart and Craig E. Farmer for Petitioner.

No appearance for Respondent.

Russell, Jarvis, Estabrook & Dashiell, Laurence B. Dashiell and Freidberg & Mart for Real Party in Interest.

JUDGES: Opinion by Reynoso, J., with Friedman, Acting P. J., and Paras, J., concurring.

OPINION BY: REYNOSO

OPINION

[*846] [**1] Petitioner Jerome R. Lewis, an attorney, is a defendant in a legal malpractice suit brought against him by real party in interest Virginia A. Sullivan. For convenience [**2] and consistency we shall refer to the parties as defendant and plaintiff respectively.¹

¹ For further review of defendant's troubles arising over his handling of dissolution actions during the period in which this case arose, see *Smith v. Lewis* (1975) 13 Cal.3d 349 [118 Cal.Rptr. 621, 530 P.2d 589, 78 A.L.R.3d 231].

[***2] Defendant seeks a writ of mandate after the Sacramento Superior Court denied his motion for summary judgment. (1a) He contends that as a matter of law plaintiff cannot establish damages as the result of his failure to claim her husband's military pension as community property in her dissolution action. Defendant asserts that since the pension was not divided as a community asset and not set aside as separate property of the husband, plaintiff is a tenant in common as to that asset and can belatedly assert her interest against her former husband. We agree with defendant's analysis of the law,

but hold that this does not establish his right to summary judgment. We thus deny the petition.

[*847] In November 1968, plaintiff retained defendant to represent her in a divorce action against her then husband. A complaint for divorce was filed on December 2, 1968. The complaint listed certain property as community. Mr. Sullivan filed an appearance, stipulation, and waiver of further notice, and his default was entered.

On February 27, 1969, an amended interlocutory decree of divorce was entered incorporating a marital settlement agreement entered into by the parties. The [***3] final decree of divorce was entered January 19, 1970, and incorporated all the provisions of the amended interlocutory decree.

Mr. Sullivan's Air Force retirement benefits were not listed as community property or separate property in the pleadings, decrees or settlement agreement of the parties.

Plaintiff filed a complaint stating four causes of action. Essentially, she alleged that due to defendant's failure to claim such benefits as community property, she was damaged in the amount of \$ 200,000. In addition, she seeks punitive damages in the amount of \$ 400,000.

I

Defendant contends that plaintiff may assert an interest in her husband's Air Force retirement benefits as a tenant in common, in a separate action brought after the final judgment of divorce, and thus she has suffered no damages.

We review several Supreme Court cases from *Brown v. Brown* (1915) 170 Cal. 1 [147 P. 1168], to *Estate of Williams* (1950) 36 Cal.2d 289 [223 P.2d 248, 22 A.L.R.2d 716], and one court of appeal decision. The teaching of those cases is that a decree of divorce which does not adjudicate or dispose of property interests does not bar a subsequent suit. [***4] On the other hand, a decree which does adjudicate property rights and makes a division is final as to the property which is actually divided.

Brown v. Brown, supra, 170 Cal. 1, involved a default judgment of divorce. The complaint in the divorce alleged "there is no community property," and the interlocutory judgment found the allegations of the complaint to be true. (*Id. at pp. 4-5.*) The court reasoned that a default judgment is a complete adjudication of all facts well pleaded in the complaint, and thus the interlocutory judgment adjudged that there was no community property at the time the complaint was filed. (*Id. at [*848] pp. 5-6.*) The wife sought to assert an interest in property acquired by the husband after the interlocutory judgment but before the final judgment. The court al-

lowed her to do this in a separate action, holding that the after-acquired property was not included in the complaint, no issue had been tendered as to that property, and the litigation was final only to that which had been included in the pleadings. (*Id. at p. 7.*) In a companion appeal the wife was not allowed to assert [***5] an interest in property held at the time of the interlocutory judgment, since the title to that property was adjudicated in the statement that no community property existed. (See *Brown v. Brown, supra, 170 Cal. at pp. 8, 9.*)

[**3] In 1919 the California Supreme Court stated that if a divorce is granted without any disposition of the community property, the former wife becomes owner of one-half of the community property as a tenant in common with the former husband. (*Estate of Brix (1919) 181 Cal. 667, 676 [186 P. 135].*)

The major case relied upon by plaintiff in contesting defendant's petition is *Metropolitan Life Ins. Co. v. Welch (1927) 202 Cal. 312 [260 P. 545]*. In that case the default divorce decree awarded the wife the household furniture as community property, as well as "all of the community property of plaintiff and defendant." (*Id. at p. 314.*) The complaint had listed the furniture as the community property of the marriage and had sought the award of such community property. (*Id. at p. 314.*) The Supreme Court held that the portion of the judgment awarding "all of the [***6] community property" was void, being in excess of the relief sought in the complaint. (*Id. at p. 315.*) Relying on *Brown v. Brown, supra, 170 Cal. 1*, the court further held that the decree operated as an adjudication that at the time of the complaint there was no community property other than that listed. (*Id. at p. 317.*) The wife therefore could not assert an interest in an insurance policy insuring husband's life in a subsequent suit, since the divorce decree settled the husband's ownership of the policy. (*Id. at p. 317.*) The court restated the rule of *Brix, supra, 181 Cal. 667*, that where the decree makes no disposition a subsequent suit is appropriate to establish a wife's interest. (*Id. at p. 318.*)

Five years later in *Tarien v. Katz (1932) 216 Cal. 554 [15 P.2d 493, 85 A.L.R. 334]*, the Supreme Court ruled that where a decree finds that there is community property but does not dispose of the property, the parties remain tenants in common and a subsequent suit is available to secure rights thereto. (*Id. at p. 559.*)

[*849] In 1936 the Court of Appeal held that when [***7] a final decree of divorce did not adjudicate the rights of the parties to a certificate of insurance and did not attempt to dispose of the certificate, the parties remained tenants in common and a subsequent suit was available to the parties. (*McBride v. McBride (1936) 11 Cal.App.2d 521, 523 [54 P.2d 480].*) The court did not

state whether the divorce decree had divided or disposed of any other community property. (*Id. at p. 523.*)

The question was again before the Supreme Court in *Estate of Williams (1950) 36 Cal.2d 289 [223 P.2d 248, 22 A.L.R.2d 716]*. That case involved a default judgment without division of any property on a complaint alleging that there was no community property. (*Id. at p. 291.*) The court ruled that a determination of the property rights is proper but not essential to a divorce action, and if it does not appear that property rights were determined in a divorce action they are not deemed to have been adjudicated and may be subject to an independent action. (*Id. at pp. 292-293.*) The court noted the provisions of *Code of Civil Procedure section 1911 [***8]*: "That only is deemed to have been adjudged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." (*Id. at p. 292.*)

The cases we have reviewed do not clarify what result follows when the court considers a portion of the community property which it divides, but does not determine rights to other property. However, more recent cases indicate there when the court divides some community property but fails to consider other property, the property not considered is subject to a subsequent suit and the parties remain tenants in common as to that property.

In re Marriage of Karlin (1972) 24 Cal.App.3d 25 [101 Cal.Rptr. 240], involved an appeal from a dissolution decree dividing the community property, which failed to divide certain property. The court stated that the property not divided may be litigated in further proceedings. (*Id. at p. 34.*) This was dictum, however, since the court was modifying the dissolution decree to include a division of the property left unadjudicated. (*Ibid.*)

Shortly thereafter, *In re Marriage of Elkins (1972) 28 Cal.App.3d 899 [105 Cal.Rptr. 59] [***9]* was decided. It involved an oral agreement, undisclosed to the trial court, dividing certain property. (*Id. at p. 903.*) The court ruled such agreements contrary to public policy and stated that the [*850] agreement creates no rights in either party. (*Id. at p. 903.*) The court stated: "Indeed, it has long been the rule that property which is not mentioned in the pleadings as community property is left unadjudicated by the decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile." (*Ibid.*) This again was dictum. The court held that the trial court should divide the property in the dissolution decree since the time for reopening the judgment under *Code of Civil Procedure section 437c* had not expired.

In a major Supreme Court community property opinion (*In re Marriage of Brown (1976) 15 Cal.3d 838*

[126 Cal.Rptr. 633, 544 P.2d 561]), the court clarified the law holding that nonvested pension rights are community property. In discussing whether to accord full retroactivity to its decision, the court stated: "Yet under settled principles of California [***10] community property law, 'property which is not mentioned in the pleadings as community property is left unadjudicated by the decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile'" (15 Cal.3d at pp. 850-851.), relying upon *Elkins, supra*. The court then allowed retroactivity only to decrees not yet final or to those in which the court retained jurisdiction to divide such rights. The statement in *Brown* was thus dictum also.

Finally, *In re Marriage of Cobb* (1977) 68 Cal.App.3d 855 [137 Cal.Rptr. 670], involved an attempt by a wife to assert an interest in her former husband's pension after the final decree of dissolution failed to provide her an interest. The wife filed an order to show cause in the dissolution action for a modification. The trial court denied modification of the division of property but did modify the spousal support award. Wife did not appeal, and the husband appealed from the order modifying spousal support. The trial court's refusal to modify the division of property was due to its determination that the original award was res judicata. The Court of Appeal [***11] stated that since neither the pleadings nor the judgment mentioned the pension, the court was without jurisdiction to consider the pension in a modification proceeding but the parties remained tenants in common and the pension was subject to future litigation to dispose of the parties' rights thereto. (*Id.* at p. 860, fn. 1.) This was dictum, since the wife did not appeal the refusal of the trial court to divide the property.

Defendant asserts that the rule thus stated in dictum is the law of California. We must determine whether this is true.

[*851] (2a) The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation involving the same controversy. (4 Witkin, Cal. Procedure (2d ed. 1971) § 147, Judgment, p. 3292.) The doctrine has a double aspect, a prior judgment is a bar in a new action on the same cause of action, and in a new action on a different cause of action the former judgment is a collateral estoppel, being conclusive on issues actually litigated in the former action. (*Id.* at p. 3293.) The doctrine is based upon the sound public policy of limiting litigation by preventing a party who has had one [***12] fair trial on an issue from again drawing it into controversy. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811 [122 P.2d 892].) The purposes of res judicata are to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial

system, and to provide repose by preventing a person from being harassed by vexatious litigation. (*People v. Taylor* (1974) 12 Cal.3d 686, 695 [117 Cal.Rptr. 70, 527 P.2d 622].) In determining whether the doctrine is applicable in a particular situation a court must balance the need to limit litigation against the right to a fair adversary proceeding in which a party may fully present his case. (*Ibid.*)

(1b) (2b) The interest of a wife in community property is present, existing and equal to that of her husband. (*Civ. Code*, § 5105.) The court is directed, in a dissolution action, to divide the community property equally between the parties (*Civ. Code*, § 4800), but that division is not the inception of a wife's interest. Rather, the wife's interest arose when [***13] the property was acquired. (*Civ. Code*, §§ 5107, 5108, 5110.) The portion of Mr. Sullivan's retirement benefits which was earned during marriage was community property and plaintiff had a one-half interest. (*In re Marriage of Brown, supra*, 15 Cal.3d 838; *In re Marriage of Fithian* (1974) 10 Cal.3d 592 [111 Cal.Rptr. 369, 517 P.2d 449].)

In the dissolution of plaintiff's marriage, the property settlement agreement incorporated in the final judgment listed certain property as community property and provided for division of that property. The agreement further provided: "We acknowledge and agree neither of us is now possessed of any separate property." It is clear that the pension was not adjudged to be separate property of the husband, and was not divided as community property. It is now plaintiff's contention that the omission divested her of her interest in the pension due to the fortuity that the pension was in her husband's name and payable to him. We disagree.

[*852] Prior to the dissolution the pension belonged to both parties. The judgment of divorce did not [***14] award wife an interest in the pension, but neither did it award the pension to the husband. Plaintiff's interest was present, existing and equal to that of her husband prior to divorce and a judgment which did not purport to affect that interest will not have the effect of terminating such interest. The purposes of res judicata should not be exalted over the policy of allowing a party a full and fair hearing on the merits of a controversy. To hold otherwise would defeat the express declaration of the Civil Code that a wife's interest is present, existing and equal to that of the husband in the community property.² The parties remain tenants in common to such unadjudicated property.

² But see *Kelley v. Kelley* (1977) 73 Cal.App.3d 672 [141 Cal.Rptr. 33], in which Division One of the Court of Appeal, Fourth Appellate District held that although property not

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1978 Cal. App. LEXIS 1261, ***

divided in a dissolution is subject to further suit, the husband may assert res judicata as a defense. Since the matter could have been litigated in the dissolution, it may not be litigated later. The rule of *Kelley*, is actually the rule against splitting a cause of action. (See *Sutphin v. Speik* (1940) 15 Cal.2d 195, 202 [99 P.2d 652, 101 P.2d 497]; *Avery v. Avery* (1970) 10 Cal.App.3d 525, 529 [89 Cal.Rptr. 195].) We do not believe a suit to enforce an existing interest splits the cause of action. Such suits may always be necessary where one party is in control of property belonging to another. We emphasize that wife's suit would not be to establish an interest, but only to enforce an existing interest in the pension.

[***15] II

A party to (3) an action may move for summary judgment and the motion shall be granted if the papers submitted show that there is no triable issue of fact and that the moving party is entitled to judgment as a matter of law. (*Code Civ. Proc.*, § 437c.) Defendant has not attempted to argue that there is no triable issue as to the question of negligence, he argues only that plaintiff can show no loss due to her ability to recover pension payments.

Our determination above does not establish that plaintiff cannot establish the existence of damages. Thus, the summary judgment motion cannot be granted. The plaintiff's former husband may have been receiving

pension payments which plaintiff may not be able to recover now. He may have made elections under the terms of the pension which would adversely affect plaintiff's interest. The former husband may be out of the jurisdiction of the state and plaintiff may thus be unable to reach the pension. In addition the husband may have defenses against a suit for a portion of the pension, based upon the agreement between the parties rather than the res judicata effect of the judgment. These issues, [***16] among others, may establish that defendant's negligence caused damage [*853] to plaintiff and thus raise factual issues that must be resolved at trial. We cannot order the trial court to grant summary judgment on the [**6] record before us, and thus the petition for a writ of mandate will be denied.

(4) Finally, we note that defendant is not required to compensate for damages avoidable by reasonable effort. (*Green v. Smith* (1968) 261 Cal.App.2d 392, 396 [67 Cal.Rptr. 796].) If plaintiff, by her own action, unnecessarily enhances her loss she may not recover for such enhanced loss. (*Pretzer v. California Transit Co.* (1930) 211 Cal. 202, 209 [294 P. 382].) Upon trial of the matter defendant may seek to establish that plaintiff has a collectible interest in the pension, and to the extent that this is established defendant will be exonerated from liability.

The petition for a writ of mandate is denied and the order to show cause is discharged.

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(Cite as: 884 S.W.2d 674)

▷

Missouri Court of Appeals,
Eastern District,
Division Four.

Ina Carole LONDON, Plaintiff/Appellant,

v.

Bernard WEITZMAN, Defendant/Respondent.

No. 63506.

May 3, 1994.

Motion for Rehearing and/or Transfer to Supreme
Court Denied June 6, 1994.

Former client brought action against attorney seeking damages for legal malpractice, and jury assessed client's damages at \$500,000 and assessed fault at 60% against attorney and 40% against client. The Circuit Court, City of St. Louis, David Mason, J., granted attorney's motion for judgment notwithstanding verdict, and client appealed. The Court of Appeals, Carl R. Gaertner, J., held that: (1) client's expert witness' testimony was sufficient to permit jury to find existence of identifiable damages caused by attorney's alleged professional negligence; (2) determination that client was 40% at fault was supported by evidence; and (3) interest was not recoverable on unliquidated claim.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⇌ 934(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k934 Judgment

30k934(1) k. In General. Most Cited

Cases

Judgment 228 ⇌ 199(3.9)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in
General

228k199 Notwithstanding Verdict

228k199(3.9) k. Where Directed Verdict or Binding Instructions Would Have Been Proper. Most Cited Cases

Motion for judgment notwithstanding verdict presents issue of whether plaintiff mademissible case and, therefore, Court of Appeals reviews evidence in light most favorable to plaintiff's case and accords her all reasonable beneficial inferences which can be drawn from evidence, and court disregards defendant's evidence except to extent it supports verdict.

[2] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases

(Formerly 45k105)

Plaintiff seeking to recover damages for legal malpractice must prove that defendant lawyer was negligent by showing that he failed to exercise degree of skill and diligence ordinarily used under same or similar circumstances by members of legal profession, that plaintiff sustained some loss or injury, and that there was causal connection between negligence and loss.

[3] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and Costs. Most Cited Cases

To prove damages and causation in legal malpractice claim, plaintiff must establish that "but for" attorney's negligence, result of underlying pro-

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ceeding would have been different.

[4] Evidence 157 ⇌ 571(10)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(10) k. Damages. Most

Cited Cases

Finding of identifiable damages caused by attorney's alleged professional negligence and estimate of amount of former client's damages was supported by former client's expert witness' testimony that process by which dissolution court divides marital property begins at point of 50/50 split and that in advising former client to accept settlement of 20% of marital assets attorney failed to exercise appropriate standard of care.

[5] Evidence 157 ⇌ 571(1)

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k571 Nature of Subject

157k571(1) k. In General. Most

Cited Cases

In legal malpractice action, former client's expert should have been allowed to express opinion based upon his years of experience regarding what fair and equitable distribution of marital property would have been under all facts and circumstances shown in evidence.

[6] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful

Acts

45k129(4) k. Damages and Costs. Most

Cited Cases

Testimony regarding specific amount of dam-

ages former client sustained as result of attorney's alleged malpractice was not essential element of former client's legal malpractice action.

[7] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful

Acts

45k129(3) k. Trial and Judgment. Most

Cited Cases

Instruction in legal malpractice action that jury had to assess percentage of fault to former client if it believed that client failed to inform attorney that she did not know her marital rights or failed to inform attorney that client fired former attorney at her husband's request was erroneous, where attorney possessed copy of client's letter to former attorney advising him that she had been kept in dark regarding financial affairs and where firing of former attorney was antecedent to, not contributory with, negligence of attorney as causative factor.

[8] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

Determination that former client was 40% at fault for damages caused by alleged legal malpractice of attorney was supported by evidence that former client willingly brought dissolution proceeding to conclusion without sufficient knowledge or information with which to determine fairness of settlement agreement.

[9] Interest 219 ⇌ 39(2.15)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in

General

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219k39(2.5) Prejudgment Interest in General

219k39(2.15) k. Liquidated or Unliquidated Claims in General. Most Cited Cases

As general rule, interest is not recoverable on unliquidated claim.

[10] Appeal and Error 30 ⇌ 882(12)

30 Appeal and Error

30XVI Review

30XVI(C) Parties Entitled to Allege Error

30k881 Estoppel to Allege Error

30k882 Error Committed or Invited by Party Complaining

30k882(12) k. Instructions in General. Most Cited Cases

Attorney could not allege on appeal that former client's right of recovery for alleged legal malpractice was fully barred because jury assessed percentage of fault against her, where legal file reflected that attorney offered comparative fault affirmative defense instruction given by court. MAI No. 32.01, subd. 2.

*675 Laurence D. Mass, Donna Aronoff Smith, St. Louis, for plaintiff, appellant.

Lawrence B. Grebel, St. Louis, for defendant, respondent.

CARL R. GAERTNER, Judge.

In this action seeking damages for legal malpractice, the jury assessed plaintiff's damages at \$500,000 and assessed fault at 60 percent against defendant and 40 percent against plaintiff. Both plaintiff and defendant filed motions for judgment notwithstanding the verdict (JNOV). The trial court denied plaintiff's motion but granted that of defendant. Plaintiff appeals. We reverse.

[1] Although much of the testimony in the case was in sharp contradiction, our consideration of the evidence is clear. Because a motion for judgment notwithstanding the verdict presents the issue of whether the plaintiff made a submissible case, we

review the evidence in the light most favorable to the plaintiff's case and accord her all reasonable beneficial inferences which can be drawn from the evidence. *Jamrozik v. M.T. Realty & Investment Corp.*, 843 S.W.2d 394, 395 (Mo.App.1992). We disregard defendant's evidence except to the extent it supports the verdict. *Hinton v. State Farm Mutual Automobile Ins. Co.*, 741 S.W.2d 696, 700 (Mo.App.1987). We state the facts in accord with these principles.

The thirty-two year marriage of plaintiff Ina Carole London, and Norman London was dissolved by decree of the Circuit Court of Cole County on June 29, 1984. During the early years of the marriage, plaintiff was a homemaker and raised two children while Mr. London developed a successful practice in the field of criminal law. When the children were older, plaintiff worked as a travel agent and for several years operated her own travel agency which was financed by her husband. This agency was sold in 1978 and the proceeds of the sale were retained by plaintiff's husband. Thereafter, plaintiff had two brief periods of employment in the field of hotel management during 1979 and 1981. During the time plaintiff operated her travel agency, she engaged in one incident of marital infidelity while on a trip to Europe. Although aware of the incident, her husband did not want to end the marriage until plaintiff insisted upon a divorce in 1984. On the other hand, plaintiff testified that her husband's persistent heavy drinking and violent displays of temper contributed to the breakup of the marriage.

By late 1983, after several attempts to resolve their problems by consultation with marriage counselors, plaintiff was living almost full-time at the home they had built in Scottsdale, Arizona, while her husband was continuing his full-time law practice in St. Louis and sporadically visiting his wife. She wrote her husband a letter in which she stated "our marriage is over." Although he neither wanted or asked for a divorce, he called her and said she should file for divorce.

Plaintiff testified that throughout the marriage she had, without objection on her part, been "kept in the dark" about finances. She had no idea of what her husband's income was nor did she have any information concerning investments. Her husband gave her \$3,000 or \$4,000 per month to operate the household, and she was content not to make any inquiry about financial matters.

*676 On the advice of a friend's husband, a stockbroker, she prepared a list of her yearly expenses which totaled \$47,143.70. This figure was low because of some expenses, such as property taxes, insurance, and medical expenses, which her husband always paid. The broker provided her with two alternatives which he stated would supply her with an income of \$40,000 to \$42,000 per year: 1) a property settlement of \$500,000 to be paid over a period of two or three years, or 2) a lump sum cash payment of \$250,000, the house in Arizona, maintenance of \$30,000 for 10 1/2 years, and maintenance thereafter of \$10,000 per year.

By telephone plaintiff retained Mr. Gerald Rimmel, a St. Louis attorney, to represent her in the dissolution proceeding. She sent him her expense list and the two proposals outlined by the stockbroker and asked him to obtain information concerning marital assets and her husband's income. Plaintiff then called her husband and told him she had retained a lawyer. He flew to Arizona and persuaded her to fire Mr. Rimmel. He told plaintiff that if a hostile attorney forced a public revelation of his financial condition, serious consequences could result. Her husband dictated a letter discharging Mr. Rimmel which she typed and mailed. Her husband then recommended that she retain defendant, Bernard Weitzman, who was an old friend. Defendant had been the best man for her husband at their wedding. Her husband contacted defendant and made arrangements for her to be represented.

Plaintiff talked to defendant concerning the divorce on two occasions. Somehow defendant had obtained the information she had mailed to Mr. Rimmel. In their first conversation, defendant told

plaintiff that the \$500,000 proposal was "way too much based on what Norman had" and the second alternative was much more reasonable. Defendant told plaintiff that she could never get more than that because the law passed in 1974, due to "woman's lib", actually hurt a wife's ability to obtain alimony. He told plaintiff the second alternative was very generous. In their second conversation, defendant told plaintiff her husband had agreed to the second proposition. He assured her that it was more than fair. At no time did defendant tell plaintiff that he would not represent her if there was any dispute with her husband. She never received a list of her husband's assets. She signed and returned the petition for dissolution and a separation agreement which defendant mailed to her.

She acceded to her husband's wish to have the court proceeding in Jefferson City in order to avoid publicity. She flew to St. Louis on June 28, 1984, and plaintiff, her husband, and defendant drove together to Jefferson City the next day. Her husband told her the judge would ask her some questions and she should answer "yes" to whatever he asked. She did so. She signed a number of papers but did not read them. Defendant did not explain any of the papers to her.

If plaintiff had been told that her husband's income in 1984 was \$505,000, over \$300,000 the year before that and over \$600,000 before that, she would not have agreed to settle for \$30,000 per year for ten years. If she had been advised that the marital assets totaled \$1,840,000 plus the \$250,000 paid to her as her share of the marital property, she would never have agreed to settle for what she did.

Defendant admitted he never gave plaintiff any advice regarding her rights under the laws of Missouri. He knew from plaintiff's letter to Mr. Rimmel that she had been kept in the dark about financial matters and had requested that Mr. Rimmel obtain tax returns and other financial information from her husband. He did not tell the dissolution judge that he considered himself a mere scrivener and he had not given plaintiff any advice. He never obtained

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any information concerning plaintiff's husband's income and, although required by local court rule, he did not file a statement of income and expenses for either party.

As mentioned above, this evidence was sharply disputed by defendant. However the jury resolved this dispute by finding in favor of plaintiff and assessing her damages at \$500,000. The jury assessed forty percent fault against plaintiff, and the court entered judgment of \$300,000. Defendant filed a motion for judgment notwithstanding the verdict. *677 Plaintiff filed a similar motion, asking the trial court to set aside the submission and finding of comparative fault and to enter judgment for the full amount of the verdict. She also moved for pre-judgment interest. Neither party filed a motion for new trial. The trial court sustained defendant's motion for JNOV and denied plaintiff's motions.

I.

Submissibility

[2][3] It is well-established in Missouri that a plaintiff seeking to recover damages for legal malpractice must prove: 1) that the defendant lawyer was negligent by showing that he or she failed to exercise that degree of skill and diligence ordinarily used under the same or similar circumstances by members of the legal profession; 2) that plaintiff sustained some loss or injury; and 3) a causal connection between the negligence and the loss. *Rodgers v. Czamanske*, 862 S.W.2d 453, 458 (Mo.App.1993); *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo.App.1988); *Pool v. Burlison*, 736 S.W.2d 485, 486 (Mo.App.1987). To prove damages and causation, the plaintiff must establish that "but for" the attorney's negligence the result of the underlying proceeding would have been different. *Rodgers*, 862 S.W.2d at 458; *Bross v. Denny*, 791 S.W.2d 416, 421 (Mo.App.1990).

[4][5][6] In a written memorandum of law filed with his order sustaining defendant's JNOV motion, the trial judge acknowledged that plaintiff had produced evidence sufficient to establish all three elements of legal malpractice. The motion was sus-

tained solely on the ground that the plaintiff failed to prove a specific amount of damages with reasonable certainty. In so ruling, the court misconstrued the rule against speculative damages which relates not to the difficulty in calculating the amount of damages but to the more basic question of whether there are specifically identifiable damages. The rule is well-stated by R.E. Mallen and J.M. Smith, *Legal Malpractice*, Volume I, § 16.3 (3d Ed.1989):

In a legal malpractice action, a court may be tempted to characterize the plaintiff's damage claim as speculative because of the difficulty in liquidating the claim. This is because legal malpractice litigation often involves hypothetical questions which have real consequences. For example, how much did the client lose when the lawsuit was not prosecuted? Or, how much better off would the client have been had the suit been defended or been defended more competently?

No one can say precisely what the plaintiff lost or should have lost in such situations, but difficulty or imprecision in calculating damages does not exculpate the attorney. Even though damages cannot be calculated precisely, they can be estimated. Otherwise, attorneys could avoid liability merely because damages are difficult to measure. The beneficiaries would tend to be those attorneys whose errors were the greatest and whose conduct succeeded in complicating the issue of calculating the extent of the client's injury.

Thus, damages are speculative only if the uncertainty concerns the fact of whether there are *any* damages rather than the amount.

Plaintiff's expert witness, Allen Russell, an attorney experienced in the field of family law, testified that the process by which a dissolution court divides marital property begins at the point of a 50/50 split. The division may be affected by marital misconduct which has led to the breakup of the marriage or has imposed an undue burden upon the relationship. However, where the injured party wants to continue the marriage even after the mis-

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conduct of the other party, such misconduct would not normally be considered. Mr. Russell further testified that in advising plaintiff to accept a settlement of twenty percent of the marital assets defendant failed to exercise the appropriate standard of care that an attorney must meet. This evidence was sufficient to permit the jury to find the existence of identifiable damages caused by defendant's professional negligence and to make an informed estimate of the amount of plaintiff's damages. *Bross v. Denny*, 791 S.W.2d at 421. The trial court erred in refusing to allow plaintiff's expert to express an opinion based upon his years of experience regarding what a fair and equitable*678 distribution of marital property would be under all of the facts and circumstances shown in evidence. *Id.* Moreover, the trial court erred in ruling on the motion for JNOV that such testimony was an essential element of plaintiff's case. The order granting defendant's motion for JNOV is reversed.

II.

Comparative Fault

Plaintiff's second point on appeal charges trial court error in overruling her motion requesting the court to enter judgment in the full amount of the jury's assessment of damages without reduction for comparative fault. She alleges the court erred in submitting an issue of comparative fault on the theories advanced by defendant.

[7] It is important to bear in mind that in addressing this issue we are concerned only with the question of submissibility of the issue of comparative fault. Much of plaintiff's argument on the point is directed toward challenging the three disjunctive theories submitted to the jury in defendant's comparative fault instruction patterned after MAI 32.01(2), which reads as follows:

In your verdict you must assess a percentage of fault to plaintiff, if you believe:

First, plaintiff failed to inform defendant she did not know her marital rights, or

plaintiff fired Gerald Rimmel as her lawyer at her husband's request and hired defendant knowing a settlement had not been reached, or

plaintiff agreed to the terms of the separation agreement without knowing her marital assets or her husband's income, and

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff directly caused or directly contributed to cause any damage plaintiff may be (sic) sustained.

The term "negligent" or "negligence" as used in this instruction means the failure to use that degree of care that an ordinary careful and prudent person would use under the same or similar circumstances.

We agree with plaintiff's contention that the instruction is erroneous. Plaintiff's failure to inform defendant she did not know her marital rights, assuming she had some duty to do so, could not have been a proximate cause of her damages. It is undisputed that defendant possessed a copy of plaintiff's letter to Mr. Rimmel advising him that she had been kept in the dark regarding financial affairs and requesting that he find out about her husband's income and the marital property. Her failure to advise defendant of what he already knew is not negligence contributing to her loss. Furthermore, firing Mr. Rimmel was antecedent to, not contributory with, the negligence of defendant as a causative factor. *See, Van Vacter v. Hierholzer*, 865 S.W.2d 355, 358 (Mo.App.1993).

However, neither in the trial court nor before this court has plaintiff requested a new trial because of the erroneous instruction. Rather, she seeks only to have the judgment assessing a percentage of fault against her set aside. For this purpose our concern focuses on the submissibility of the issue of comparative fault and whether any one of defendant's theories was supported by the evidence and was sufficient in law to warrant the assessment of a per-

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centage of fault against plaintiff.

[8] By her own admission, plaintiff agreed to the terms of the separation agreement without knowing about the marital assets or her husband's income. She was under no compulsion to do so until defendant obtained and furnished her with the information which she now claims it was his duty to provide. The jury could have found that by willingly bringing the dissolution proceeding to a conclusion without sufficient knowledge or information with which to determine the fairness of the settlement agreement plaintiff failed to exercise that degree of care that an ordinarily careful and prudent person would have exercised under the same or similar circumstances. The verdict of the jury finding plaintiff was forty percent at fault is supported by the law and the evidence. Point denied.

III.

Prejudgment Interest

[9] In plaintiff's final point on appeal, she claims entitlement to prejudgment interest *679 because she would have received interest on any unpaid amount of the dissolution award from the date of the dissolution. This novel argument overlooks the fact that the amount of damages she claimed in her amended petition, the difference between what she received and an equitable share of marital assets, and a just and adequate award of maintenance are not fixed, pre-determinable sums. As a general rule, interest is not recoverable on an unliquidated claim. *Catron v. Columbia Mutual Ins. Co.*, 723 S.W.2d 5, 6 (Mo. banc 1987); *Ohlendorf v. Feinstein*, 670 S.W.2d 930, 936 (Mo.App.1984). Nothing in this case brings it within any recognized exception to the general rule, nor did plaintiff seek to invoke § 408.040.2 RSMo. (Cum.Supp.1993) by making a record of a specific pre-trial demand for settlement. Finally, plaintiff did not pray for interest in her amended petition. Point denied.

IV.

In the respondent's brief, defendant raises an additional point in an effort to salvage the JNOV. He contends that contributory negligence, not com-

parative fault, is the appropriate affirmative defense in a case involving economic loss. Therefore, he asserts, plaintiff's right of recovery is fully barred because the jury assessed a percentage of fault against her.

[10] The legal file reflects that defendant offered the comparative fault affirmative defense instruction, MAI 32.01(2), given by the court. The record does not contain any proffered instruction on the defense of contributory negligence which was refused. Defendant cannot be heard on appeal to complain of the theory of defense he chose to submit to the jury. Point denied.

The judgment of the trial court is reversed, and the cause is remanded with directions to reinstate the judgment in favor of plaintiff in the amount \$300,000 plus costs. Costs on appeal assessed against defendant.

GRIMM, P.J., and AHRENS, J., concur.

Mo.App. E.D. 1994.
London v. Weitzman
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END OF DOCUMENT

For Dockets See 2:95CV00159

United States District Court, D. New Jersey.
W. James MACNAUGHTON, Plaintiff,
v.
NBF CABLE SYSTEMS, INC., Defendants.
No. 95-159 (WGB).
June 18, 1996.

Not for Publication

Opinion

Appearances:

W. James MacNaughton, Esq., pro se plaintiff, 90 Woodbridge Center Drive, Suite 610, Woodbridge, New Jersey 07095, Leslie Kujawski Carr, Esq., Bumgardner, Hardin & Ellis, 673 Morris Avenue, Springfield, New Jersey 07081, Attorneys for Defendant

Bassler, District Judge:.

Plaintiff, W. James MacNaughton ("MacNaughton"), moves for summary judgment. This Court's jurisdiction is pursuant to 28 United States Code Section 1332(div)rsity of citizenship). For the reasons set forth below, the Court denies MacNaughton's motion for summary judgment.

I. BACKGROUND

For the purposes of this motion, the Court relates the facts in a light most favorable to the non-moving party, NBF Cable Systems, Inc ("NBF").

The parties' dispute concerns legal fees allegedly owed for work performed by MacNaughton, a New Jersey attorney, for NBF in a Florida litigation over the validity of exclusive cable television service agreements. MacNaughton moves for summary judgment on his claim arguing that NBF's charge that the legal fees are unreasonable must be supported by expert testimony and the since NBF has not identified any such expert witness, the Court must grant summary judgment.

On November 4, 1993, the NBF entered into a retainer agreement with MacNaughton in which NBF agreed to pay certain legal services and disbursements. MacNaughton provided legal services on behalf of NBF in connection with the development of its cable television systems in Broward County, Florida through November, 1994, for which he received a total payment of \$48,571.36. MacNaughton alleges an unpaid balance of \$54,731.05. NBF asserts that the amount of time expended by MacNaughton was excessive and, in part, unauthorized and therefore claims that MacNaughton has been fully compensated for the services he performed.

On January 13, 1995, MacNaughton brought this collection action seeking payment of the \$54,731.05 plus in-

terest allegedly owed.

MacNaughton further argues that he is entitled to partial summary judgment as a matter of law because \$7,360 of the claim is for work on a summary judgment motion in which NBF joined.

II. DISCUSSION

A. The Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, 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). Whether a fact is material is determined by the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue involving a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1219 n.3 (3d Cir. 1988), cert. denied, 490 U.S. 1098 (1989).

The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party satisfies this requirement, the burden shifts to the nonmoving party to present evidence that there is a genuine issue for trial. *Id.* at 324. In determining whether any genuine issues of material fact exist, the Court must resolve "all inference, doubts, and issues of credibility against the moving party." *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983), cert. *dism'd.*, 465 U.S. 1091 (1984) (citing *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972)).

In deciding a summary judgment motion, the Court's role is not "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

B. MacNaughton's Motion for Summary Judgment

MacNaughton moves for summary judgment on his claim, arguing that NBF must have an expert witness who will testify that the legal fees MacNaughton charged were unreasonable. He cites *Sommers v. McKinney*, 287 N.J.Super. 1 (App.Div. 1996), in support of his position that without an expert witness, summary judgment against NBF is required as a matter of law. The court in *Sommers* said that "[e]xpert testimony is required in cases of professional malpractice where the matter to be addressed is so esoteric that the average juror could not form a valid judgment as to whether the conduct of the professional was reasonable." (citing *Butler v. Acme Markets, Inc.*, 89 N.J. 270 (1982)). Since the case at hand is not a professional malpractice case, *Sommers* does not apply.

MacNaughton has provided no other authority to support his proposition that expert testimony is needed in cases, such as this one, where a client defends by asserting that the fees were unreasonable, excessive and, in part, unauthorized.

MacNaughton also argues that summary judgment in his favor is appropriate because NBF's only defense is that a portion of the fees concerned work on a summary judgment motion which NBF claims was unauthorized. MacNaughton argues that this is an insufficient defense as a matter of law to support judgment for the remaining balance and that "Moreover, NBF joined in the 'unauthorized' summary judgment motion, executed affidavits in support of it and has benefitted from it." (Memorandum of Law in Support of Plaintiff's Motion for Summary

Judgment at 2).

MacNaughton cites *Power-Matics, Inc. v. Ligotti*, 79 N.J.Super. 294 (App.Div. 1963), as supporting his proposition that NBF must pay for the work done on the summary judgment motion because NBF joined in the motion and has derived benefits from it. The court in *Power-Matics* indicated that "when a person, with expectation of remuneration, confers benefits of services upon another, under such circumstances that it would be unjust and inequitable for the person receiving the benefits to retain them without compensation therefore, the law will support a recovery for the value of such benefits conferred." *Power-Matics*, 79 N.J.Super, at 306 (quoting *Rabinowitz v. Mass. Bonding & Ins. Co.*, 119 N.J.L. 552, 556 (E. & A. 1938)). Thus, *Power-Matics* indicates that a quasi-contract is created in such instances when benefit is conferred upon one party at another's expense. *Id.*

Here, MacNaughton has certainly conferred a benefit upon NBF by providing legal services. However, NBF has compensated MacNaughton for his services and NBF defends that the amount of compensation provided is sufficient. In support of its defense, NBF attempts to show that part of MacNaughton's fees was for work that was unauthorized and that MacNaughton defied NBF's wishes to "work expediently and efficiently towards a trial." (Exhibit A, Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment). NBF has the right to assert such a defense for a jury to determine whether or not the time expended by MacNaughton, and the manner of MacNaughton's defense, was reasonable.

Contrary to what MacNaughton argues, an expert witness is not required to determine whether MacNaughton's defense of NBF was reasonable. NBF cites *Ball v. Posey*, 222 Cal.Rptr. 746 (Cal.App. 1 Dist. 1986), in support of the proposition that a jury can determine the reasonableness of MacNaughton's services based solely upon their common knowledge and experience.

Ball's specific holding, as MacNaughton points out, is that expert testimony is "not needed to determine the value of the few proper services" performed by an attorney in an estate matter. *Ball* 222 Cal.Rptr. at 749. The reasoning of *Ball*, however, applies outside the trusts and estates context. In *Bunn v. Lucas, Pino and Lucas*. 342 P.2d 508, 519 (Cal. Dist. Ct. App. 1959), for example, the court held that "[e]xpert testimony as to the reasonable value of attorney's legal services is unnecessary."

Moreover, the court in *Barlin v. Barlin*, 319 P.2d 87 (Cal. Dist. Ct. App. 1957), indicated that even though expert testimony is admissible when determining the reasonable value of an attorney's services, "it is neither essential nor conclusive, and the court or jury may disregard it entirely." ' *Barlin* 319 P.2d at 92. If in a trial, a court or jury may disregard expert testimony as to the reasonable value of legal fees, such expert witness is not required to establish a defense to MacNaughton's claim. Therefore, the Court **denies** MacNaughton's motion for summary judgment.

Since the Court denies MacNaughton's motion for summary judgment, it need not determine whether, as argued by NBF, the existing scheduling order makes the summary judgment motion untimely.

III. CONCLUSION

Based upon the foregoing reasons, the Court denies MacNaughton's motion for summary judgment.

An appropriate Order accompanies this Opinion.

Dated: June 17, 1996

WILLIAM G.BASSLER, U.S.D.J.

END OF DOCUMENT

H

Supreme Court of Connecticut.

Robert J. MARGOLIN

v.

KLEBAN AND SAMOR, P.C., et al.

No. 17388.

Argued April 12, 2005.

Decided Oct. 11, 2005.

Background: Client sued attorneys alleging legal malpractice in underlying breach of employment contract action, alleging attorneys failed to obtain prejudgment remedy to insure collection of a default judgment. The Superior Court, Judicial District of Fairfield, Thim, J., entered judgment on jury's verdict for client. Attorneys appealed.

Holdings: On transfer from the Appellate Court, the Supreme Court, Vertefeuille, J., held that:

- (1) evidence was sufficient to support judgment for client of \$1,040,183;
- (2) financial statement was admissible as business record;
- (3) financial statement was admissible to show the truth of the information in the statement;
- (4) evidence was sufficient for jury to find that defendant in underlying action had sufficient assets to satisfy judgment if prejudgment remedy was obtained; and
- (5) client's damages in malpractice action were determined by underlying default judgment.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇌ 1079

30 Appeal and Error

30XVI Review

30XVI(K) Error Waived in Appellate Court

30k1079 k. Insufficient Discussion of Objections. Most Cited Cases

Assignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by the Supreme Court.

[2] Appeal and Error 30 ⇌ 930(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k930 Verdict

30k930(1) k. In General. Most Cited Cases

Appeal and Error 30 ⇌ 931(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k931 Findings of Court or Referee

30k931(1) k. In General. Most Cited Cases

In reviewing a sufficiency of the evidence claim, the Supreme Court must consider the evidence, including reasonable inferences which may be drawn therefrom, in the light most favorable to the parties who were successful at trial, giving particular weight to the concurrence of the judgments of the judge and the jury, who saw the witnesses and heard the testimony.

[3] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and Costs. Most Cited Cases

Evidence was sufficient to establish existence and amount of default judgment obtained by client against defendants in underlying action, thus supporting judgment for client of \$1,040,183 in legal malpractice case based on attorney's and law firm's failure to obtain prejudgment remedy in underlying

case that precluded client from recovering damages, notwithstanding client's failure to provide written proof of underlying judgment in malpractice action; client testified that he had obtained default judgment in exact amount that was sought in underlying complaint, which was \$1,061,356, plus interest, and underlying complaint was admitted into evidence in malpractice action as a full exhibit.

[4] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases

Plaintiff in an attorney malpractice action must generally establish: (1) the existence of an attorney-client relationship, (2) the attorney's wrongful act or omission, (3) causation, and (4) damages.

[5] Appeal and Error 30 ⇌ 1050.1(7)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)10 Admission of Evidence

30k1050 Prejudicial Effect in General

30k1050.1 Evidence in General

30k1050.1(3) Particular Actions or Issues, Evidence Relating to

30k1050.1(7) k. Negligence and Torts in General. Most Cited Cases

Any error by trial court in allowing plaintiff in attorney malpractice action to offer evidence in support of "case-within-a-case" method of showing causation and damages, where underlying action had resulted in plaintiff's obtaining of default judgment, was harmless, because plaintiff's evidence of existence and amount of default judgment was sufficient to support jury's verdict in malpractice action.

[6] Appeal and Error 30 ⇌ 766

30 Appeal and Error

30XII Briefs

30k766 k. Defects, Objections, and Amendments. Most Cited Cases

Supreme Court would decline to consider claim of defendant law firm and attorney that plaintiff client failed to adequately prove that prejudgment remedy was available to client in his underlying action against business associate, on defendants' appeal from judgment for plaintiff in malpractice action alleging that defendants' negligent failure to obtain prejudgment remedy prevented plaintiff from collecting judgment, where defendants argued the point in only three conclusory sentences and without substantive legal analysis, with one additional one sentence statement, in earlier portion of brief, of legal proposition that expert testimony was required on proximate causation in a legal malpractice action, and, in support of such proposition, defendants cited only two decisions of the Appellate Court, neither of which contained substantive analysis of the issue.

[7] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence. Most Cited Cases

Evidence was sufficient to establish that default judgment obtained by plaintiff client in underlying action against business associate was uncollectible, as required to show, in malpractice action, that failure of defendant law firm and attorney to obtain prejudgment remedy in underlying action precluded plaintiff from collecting judgment via that remedy, in view of evidence that associate could not be located by plaintiff or by investigators hired, separately, by associate's former wife and trustee in bankruptcy action involving associate's business, as well as evidence that associate lost nearly all of his assets as result of divorce and twice underwent unsuccessful treatment for drug and alcohol addiction.

[8] Evidence 157 ⇌ 351

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k351 k. Unofficial or Business Records in General. Most Cited Cases

Evidence 157 ⇌ 373(1)

157 Evidence

157X Documentary Evidence

157X(D) Production, Authentication, and Effect

157k369 Preliminary Evidence for Authentication

157k373 Form and Sufficiency in General

157k373(1) k. In General. Most Cited Cases

Financial statement of defendant in underlying defamation and breach of employment contract action was admissible as business record in legal malpractice action against plaintiff's attorneys, where defendant's wife testified that financial statement was accurate, that statement was made for purpose of obtaining a business loan in the ordinary course of their business, and that she maintained the statement in the business office. C.G.S.A. § 52-180.

[9] Appeal and Error 30 ⇌ 970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases

Trial court's ruling on the admissibility of evidence is entitled to great deference, and reviewing court will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion.

[10] Evidence 157 ⇌ 351

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k351 k. Unofficial or Business Records in General. Most Cited Cases

To be admissible under the business record exception to the hearsay rule, a trial court judge must find that the record satisfies each of the following conditions: (1) that the record was made in the regular course of business, (2) that it was the regular course of such business to make such a record, and (3) that it was made at the time of the act described in the report, or within a reasonable time thereafter. C.G.S.A. § 52-180.

[11] Evidence 157 ⇌ 351

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k351 k. Unofficial or Business Records in General. Most Cited Cases

Financial statement of defendant in underlying defamation and breach of employment contract action was not limited to admission in legal malpractice action to show that defendant was seeking a business loan, but also for the truth of the business information in the statement, as evidence that defendant had sufficient assets at beginning of underlying trial to satisfy default judgment, even though financial statement was hearsay, where statement was admissible under business records exception to hearsay rule. C.G.S.A. § 52-180.

[12] Evidence 157 ⇌ 351

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k351 k. Unofficial or Business Records in General. Most Cited Cases

Business records are routinely admitted into evidence under the business records exception for the truth of the business information reported therein because the documents bear an inherent trustworthiness as records on which businesses rely to conduct their daily affairs. C.G.S.A. § 52-180.

[13] Evidence 157 ⇌ 351

157 Evidence

157X Documentary Evidence

157X(C) Private Writings and Publications

157k351 k. Unofficial or Business Records in General. Most Cited Cases

The use of business records at trial has not been limited to establishing the fact of the transaction for which the documents were created; rather, the records may be used to establish the truth of their contents. C.G.S.A. § 52-180.

[14] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence. Most Cited Cases

Evidence was sufficient for jury, in legal malpractice action based on attorney's alleged negligent failure to obtain prejudgment remedy for plaintiff client, to find that defendant in underlying action had sufficient assets at time underlying action was filed such that a prejudgment remedy existed to satisfy the default judgment for just over \$1 million later obtained, where financial statement made about 13 months before filing the underlying action showed an investment account worth approximately \$2.5 million, and defendant's wife's testimony as to the source of assets sold by the defendant created inference that the investment account had not been diminished.

[15] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and Costs. Most Cited Cases

Jury's verdict of \$1,040,183 in legal malpractice action against law firm and attorney whose al-

leged negligent failure to obtain prejudgment remedy precluded collection of default judgment in client's underlying action against business associate was not excessive, even if client could not have proven that amount had underlying action gone to trial, in view of client's evidence that amount of default judgment in underlying action was at least \$1,061,356, and that client was unable to recover on default judgment because of defendants' negligent failure to obtain prejudgment remedy.

[16] Damages 115 ⇌ 96

115 Damages

115VI Measure of Damages

115VI(A) Injuries to the Person

115k96 k. Discretion as to Amount of Damages. Most Cited Cases

Damages 115 ⇌ 104

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k104 k. Discretion as to Amount of Damages. Most Cited Cases

Damages 115 ⇌ 119

115 Damages

115VI Measure of Damages

115VI(C) Breach of Contract

115k119 k. Discretion as to Amount of Damages. Most Cited Cases

Damages 115 ⇌ 127.3

115 Damages

115VII Amount Awarded

115VII(A) In General

115k127.3 k. Excessive Damages in General. Most Cited Cases

The amount of a damages award is a matter peculiarly within the province of the trier of fact, and size of the verdict alone does not determine whether it is excessive.

[17] Damages 115 ⇌ 127.3

115 Damages

115VII Amount Awarded

115VII(A) In General

115k127.3 k. Excessive Damages in General. Most Cited Cases

The only practical test to apply to a verdict to determine if the damages award is excessive is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption.

[18] Appeal and Error 30 ⇌ 933(1)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k933 Order Granting or Refusing New Trial

30k933(1) k. In General. Most Cited Cases

A trial court's refusal to set aside a verdict for excessive damages is entitled to great weight and every reasonable presumption should be indulged in favor of its correctness because from the vantage point of the trial bench, a presiding judge can sense the atmosphere of a trial and can apprehend far better than the appellate court can, on the printed record, what factors, if any, could have improperly influenced the jury.

****656** Barbara A. Frederick, with whom were Kerry R. Callahan and, on the brief, Daniel R. Canavan, Hartford, for the appellants (named defendant et al.).

Steven D. Ecker, Hartford, with whom was Bradley K. Cooney, Madison, for the appellee (plaintiff).

SULLIVAN, C.J., and BORDEN, KATZ, PALMER and VERTEFEUILLE, Js.

VERTEFEUILLE, J.

767** The defendants, the law firm of Kleban and Samor, P.C. (law firm), and Jonathan *657** D. Elliot, an attorney with the law firm,^{FN1} APPEAL ^{FN2} FROM THE JUDGMENT of the trial court, rendered after a jury trial, awarding \$1,040,183 in damages to the plaintiff, Robert J. Margolin. The defendants previously had represented the plaintiff in an action against a former business partner and four business entities (underlying action). In the present case, the plaintiff alleged legal malpractice because the defendants negligently had failed to obtain a prejudgment remedy in the underlying action,^{FN3} thereby ***768** leaving the plaintiff unable to collect the default judgment that he ultimately obtained after changing attorneys.

FN1. During trial, the trial court granted the motion for a directed verdict filed by the defendant Thomas E. Minogue, Jr., another attorney with the law firm, from which decision the plaintiff has not appealed. References herein to the defendants are to the law firm and Elliot only.

FN2. The defendants appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

FN3. A prejudgment remedy "means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of, his property prior to final judgment" General Statutes § 52-278a(d). A prejudgment remedy is available upon a finding by the court that "there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any de-

fenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff" General Statutes § 52-278d (a)(1).

The dispositive issues in this appeal are whether: (1) the evidence was sufficient to prove the existence and the amount of a default judgment in the underlying action; (2) the evidence was sufficient to prove that the default judgment was uncollectible; (3) the evidence was sufficient to prove that attachable assets were available to satisfy the default judgment had the defendants sought a prejudgment remedy; and (4) the amount of the verdict was excessive. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In May, 1991, the plaintiff entered into an employment contract with Professional Team Publications, Inc. (Team Publications), a sports publishing business that he and Peter C. Jaquith had established that year. The employment contract provided for the plaintiff to receive a salary of \$1,011,356 over five years. The company struggled financially during its first year, causing the plaintiff to make three loans to Team Publications, including a loan of \$50,000 on July 1, 1991. None of the loans was repaid. Similarly, the plaintiff did not receive any of the salary promised by the employment contract, or any reimbursement of other expenses guaranteed by the contract, including relocation expenses and out-of-pocket expenses for travel.

In 1992, Jaquith negotiated the sale of Team Publications' assets to another sports publishing company, Sports Media, Inc. (Sports Media). In the course of the negotiations, Jaquith improperly seized control of Team *769 Publications and dismissed the plaintiff from its board of directors, in violation of the plaintiff's employment contract. The agreement that Jaquith negotiated with Sports Media did not require Sports Media to fulfill Team Publications' contractual obligations to the plaintiff, despite a term in the plaintiff's employment contract requiring any successor company to assume

those obligations. In January, 1993, at a stockholders' meeting of a company related to Team **658 Publications, Jaquith made defamatory statements concerning the plaintiff's performance with Team Publications, falsely accusing him of various improper and incompetent actions. Team Publications was forced into bankruptcy by debtors in February, 1993, and Sports Media entered bankruptcy in 1997.

In July, 1993, the defendants filed the underlying action on behalf of the plaintiff against Jaquith.^{FN4} The complaint alleged in part that Jaquith's tortious interference*770 with the plaintiff's employment contract prevented the plaintiff from receiving his salary of \$1,011,356 over five years, as well as other contractual benefits. The complaint further alleged that Jaquith fraudulently induced the plaintiff to make the July 1, 1991 loan of \$50,000 to Team Publications, which was not repaid. The complaint also claimed that Jaquith made defamatory statements about the plaintiff that caused him injury. After the plaintiff terminated his relationship with the defendants and obtained new counsel, the underlying action culminated in a default judgment against Jaquith awarding the plaintiff the damages requested in the complaint. The judgment was rendered following a hearing in damages at which the plaintiff testified. The defendants did not seek or obtain a prejudgment remedy against Jaquith at any time during their representation of the plaintiff in the underlying action. After unsuccessful efforts to locate Jaquith, the plaintiff failed to collect any portion of the default judgment against him. The plaintiff later filed the malpractice action against the defendants that is the subject of the present appeal.^{FN5} **659 Additional facts will be set forth as necessary.

FN4. The defendants in the underlying action included two businesses related to Team Publications, Career Information Services, Inc. (Career), a sister company, and Specialty Publishers, Inc. (Specialty), the parent company. The other defendants

were Sports Media and Venture Partners, Ltd., a consulting firm hired by Jaquith. Team Publications was not a defendant because it was in bankruptcy when the action was filed. The claims against Career and Specialty included breach of contract and failure to repay the plaintiff's loans to Team Publications. The claims against Sports Media included breach of contract and fraud. The claims against Venture Partners, Ltd., included tortious interference with the employment contract, fraud and defamation. No money ever was recovered from Career, Specialty and Sports Media and the plaintiff settled his claims against Venture Partners, Ltd.

These defendants and claims in the underlying action are not relevant to the present appeal because, in the legal malpractice action, jury interrogatories were not requested by either party or given by the court and, thus, the verdict for the plaintiff was a general verdict. Under the general verdict rule, "if any ground for the verdict is proper, the verdict must stand; only if every ground is improper does the verdict fall." (Internal quotation marks omitted.) *Kalams v. Giacchetto*, 268 Conn. 244, 254, 842 A.2d 1100 (2004). Because the plaintiff's claims, as they related to the defendants' failure to protect the plaintiff's right to recover against Jaquith, form a sufficient basis to sustain the jury's verdict, we need only consider those claims to resolve this appeal.

FN5. The plaintiff's five count complaint alleged malpractice against the law firm, Elliot, and Thomas E. Minogue, Jr.; see footnote 1 of this opinion; breach of contract against the law firm, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et

seq., against all three defendants. The trial court granted the defendants' motion for a directed verdict as to all claims against Minogue and as to the CUTPA claims against the remaining defendants. Only the breach of contract and malpractice claims against the law firm and Elliot were submitted to the jury. The jury returned a verdict for the plaintiff without specifying on which counts of the complaint it was based. Because the jury's verdict can be sustained based on the malpractice counts, we need not consider the plaintiff's breach of contract claim. See *Kalams v. Giacchetto*, 268 Conn. 244, 254, 842 A.2d 1100 (2004) (verdict sustained under general verdict rule if any ground proper). We apply the general verdict rule because the trial court instructed the jury on the separate elements of the legal malpractice and breach of contract causes of action, as well as the distinct factual findings necessary to sustain a verdict on each count. Cf. *Alexandru v. Strong*, 81 Conn.App. 68, 79, 837 A.2d 875, cert. denied, 268 Conn. 906, 845 A.2d 406 (2004) (summary judgment rendered on breach of contract claim where legal malpractice allegations were merely restated in contract language); *Caffery v. Stillman*, 79 Conn.App. 192, 197-98, 829 A.2d 881 (2003) (same).

[1] *771 On appeal, the defendants raise numerous claims of evidentiary insufficiency and trial court impropriety. The defendants argue that the plaintiff should have been required to prove, in the present malpractice action, the existence and the amount of the default judgment in the underlying action, and that he should not have been permitted to present evidence concerning the merits of the underlying action. Alternatively, the defendants claim that, if the plaintiff properly was permitted to prove the merits of the underlying action, he failed to do so with sufficient evidence.^{FN6}

FN6. The defendants also argue that the plaintiff should not have been permitted to present evidence concerning the claims of defamation and fraudulent inducement against Jaquith in the underlying action because the plaintiff did not pursue them in the hearing in damages. The defendants' brief does no more than make a bald assertion of this claim, without analysis. "We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly.... [A]ssignments of error which are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court." (Internal quotation marks omitted.) *Knapp v. Knapp*, 270 Conn. 815, 823 n. 8, 856 A.2d 358 (2004). Accordingly, we decline to consider this issue.

The defendants further claim that the court improperly refused to instruct the jury on Jaquith's assertion of a special defense based on privilege to the defamation claim in the underlying action. Once again, the defendants' brief merely asserts the claim without analysis and, therefore, we decline to consider the issue.

The defendants also challenge the sufficiency of the plaintiff's proof of his right to recover in this malpractice action. The defendants contend that the plaintiff failed to prove that he was unable to collect the judgment against Jaquith. The defendants further claim that the plaintiff failed to prove that Jaquith possessed sufficient attachable assets from which the plaintiff would have been able to recover the damages awarded in *772 the underlying action had the defendants obtained a prejudgment remedy. Finally, the defendants argue that the amount of the verdict in the present case was excessive. We conclude that all of these claims are without merit.^{FN7}

FN7. The defendants also raise numerous claims concerning the plaintiff's proof of his right to recover against Sports Media in the underlying action, including claims that the plaintiff's evidence was insufficient to prove by clear and convincing evidence that Sports Media engaged in fraud, that a prejudgment remedy was legally available against Sports Media under New York law and that Sports Media possessed sufficient attachable assets. We need not reach these claims because the jury reasonably could have based its verdict in the present case on the evidence concerning the plaintiff's right to recover against Jaquith in the underlying action.

I

We consider first the defendants' claim that the plaintiff failed to prove sufficiently the existence and amount of the default judgment in the underlying action and that without such proof he may not prevail in the present case. We conclude that the evidence in support of the default judgment was sufficient to sustain the jury's verdict.

****660** The following additional facts are necessary to the resolution of this issue. During the trial of the malpractice action, the plaintiff testified concerning the proceedings in the underlying action. He specifically testified that he was present for the hearing in damages that followed the trial court's issuance of a default against Jaquith. The plaintiff testified that he knew how the amount of the judgment against Jaquith was calculated, and stated that "[i]t was the exact amount that [the law firm] had filed in their complaint ... plus interest." In the present case, the complaint in the underlying action previously had been admitted into evidence; it alleged that the plaintiff sought damages from Jaquith for the unpaid contractual salary amount of \$1,011,356 and the unpaid loan of \$50,000, in addition *773 to other unquantified damages, including damages for reimbursement of expenses under the contract and damages for Jaquith's defamation of

the plaintiff at the stockholders' meeting.

The plaintiff's attorney then reviewed with him an affidavit of debt filed in conjunction with the hearing in damages and asked him if the total claims of \$1,706,853.56 listed there were the same as the amount of the judgment entered against Jaquith. The defendants' attorney objected, arguing that the best evidence of the exact amount of the judgment would be the judgment itself. The plaintiff's attorney then withdrew his question. Later, when the plaintiff's attorney again asked the plaintiff about the exact amount of the default judgment against Jaquith, the defendants again objected. The trial court sustained the objection and indicated to the plaintiff's attorney that the exact amount of the judgment needed to be proved by written proof of the judgment. The plaintiff's attorney responded: "[I]f the court is requiring that we have written proof of the judgment then we are going to have to obtain a transcript of that and offer that into evidence before the trial is concluded." The plaintiff eventually concluded his case without presenting written proof of the judgment.

[2] "We begin with the well established and rigorous standard for reviewing sufficiency of evidence claims. ... We must consider the evidence, including reasonable inferences which may be drawn therefrom, in the light most favorable to the parties who were successful at trial ... giving particular weight to the concurrence of the judgments of the judge and the jury, who saw the witnesses and heard the testimony The verdict will be set aside and judgment directed only if we find that the jury could not reasonably and legally have reached their conclusion.... We apply this familiar and deferential scope of review, however, in light of *774 the equally familiar principle that the plaintiff[s] must produce sufficient evidence to remove the jury's function of examining inferences and finding facts from the realm of speculation." (Citations omitted; internal quotation marks omitted.) *Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 50, 873 A.2d 929 (2005).

[3][4] "In general, the plaintiff in an attorney

malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." *Mayer v. Biafore, Florek & O'Neill*, 245 Conn. 88, 92, 713 A.2d 1267 (1998).^{FN8} The plaintiff here sought to establish causation and damages in part by proof that he had obtained a default judgment of a specific amount against Jaquith, upon which he **661 could not recover because of the defendants' negligent failure to obtain a pre-judgment remedy. The plaintiff's evidence of the default judgment consisted of his own testimony that he had obtained a judgment against Jaquith, the amount of which was "the exact amount that [the law firm] had filed in their complaint ... plus interest." The complaint indicated that the plaintiff sought to recover from Jaquith the unpaid contractual salary amount of \$1,011,356 and the unpaid loan of \$50,000, in addition to other unquantified damages. Thus, the jury reasonably could have found, based on the plaintiff's testimony and the documentary evidence, that the plaintiff had obtained a default judgment against Jaquith for at least \$1,061,356, an amount more than sufficient to support the jury's award of damages of \$1,040,183 in the present legal malpractice case.

FN8. The defendants do not challenge on appeal the plaintiff's proof of either the existence of an attorney-client relationship or the defendants' negligence.

The defendants argue that the plaintiff failed to establish the amount of the judgment against Jaquith because he did not admit into evidence written proof of the *775 judgment. Because the trial court ruled that the plaintiff should present written evidence as proof of the judgment amount and he failed to do so, the defendants argue, the plaintiff must be considered to have failed to prove that fact. We disagree.

[5] The plaintiff's testimony that the damage award in the default action was the exact amount requested in the complaint, together with the admission of the complaint into evidence as a full exhibit,

constituted sufficient evidence of the amount of the judgment. The failure to present a transcript of the hearing in damages or a certified copy of the judgment did not render the admitted evidence insufficient to sustain the jury's verdict. We will not find evidence insufficient merely because other evidence, not introduced, might have proved the fact in question with greater specificity. "[W]e must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict In making this determination, [t]he evidence must be given the most favorable construction in support of the verdict of which it is reasonably capable." (Internal quotation marks omitted.) *Carrol v. Allstate Ins. Co.*, 262 Conn. 433, 442, 815 A.2d 119 (2003). In the present case, the plaintiff's evidence, viewed in the light most favorable to sustaining the jury's verdict, was sufficient to establish the amount of the default judgment against Jaquith.^{FN9}

FN9. In legal malpractice actions, the plaintiff typically proves that the defendant attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the defendant not been negligent. This traditional method of presenting the merits of the underlying action is often called the "case-within-a-case." 5 R. Mallen & J. Smith, *Legal Malpractice* (5th Ed.2000) § 33.8, pp. 69-70. In the present case, in addition to presenting evidence of the existence and the amount of the default judgment against Jaquith, the plaintiff alternatively sought to prove that, if the underlying action had been tried, he would have prevailed on the merits and would have been entitled to damages. The defendants argue that the plaintiff should not have been permitted to prove causation or damages by the "case-within-a-case" method because of the existence of the default

judgment.

Because the plaintiff's evidence of the existence and amount of the default judgment was sufficient, we need not determine whether the plaintiff properly was permitted to litigate the underlying action as a supplement to his evidence concerning the default judgment. The default judgment constituted a sufficient basis for the jury's verdict and, if the trial court improperly allowed the plaintiff to prove the "case-within-a-case," that error was harmless.

Similarly, because the plaintiff sufficiently proved the existence and amount of the default judgment, we need not reach the defendants' challenges to the plaintiff's evidence concerning the merits of the underlying action. Therefore, we decline to consider the defendants' claims that the plaintiff failed to prove: (1) by clear and convincing evidence that Jaquith fraudulently had induced the plaintiff to make the July 1, 1991 loan of \$50,000; (2) that Jaquith's interference with the plaintiff's employment contract was tortious; (3) that the plaintiff would have been paid his salary and repaid his loan but for Jaquith's interference; and (4) that the plaintiff suffered substantial harm as a result of Jaquith's defamatory statements.

****662 *776 II**

[6] The defendants next argue that, even if the plaintiff proved his entitlement to damages against Jaquith in the underlying action, he did not provide sufficient evidence that the defendants' failure to obtain a prejudgment remedy rendered him unable to recover those damages.^{FN10} On this point, the defendants claim, first, that the plaintiff's evidence was insufficient to prove that the default judgment was uncollectible, and, second,*777 that there was insufficient evidence to prove that Jaquith owned

assets that were subject to attachment and sufficiently valuable to satisfy the default judgment. Specifically, the defendants claim that the plaintiff failed to prove that a Connecticut investment account owned by Jaquith was available for attachment and sufficient to satisfy the default judgment.

^{FN11} The defendants claim that the trial court improperly relied on the business records exception to the hearsay rule to admit into evidence a financial statement that showed the existence and value of the investment account and that the evidence failed to prove that the account contained sufficient value when the underlying action was filed to satisfy the subsequent default judgment. We disagree.

FN10. The defendants further claim that the plaintiff insufficiently proved that a prejudgment remedy was available legally because expert testimony was required to prove proximate causation and the plaintiff's expert witness failed to testify that the trial court would have granted a request for such a remedy in the underlying action. The defendants' brief argues this point in only three conclusory sentences and without substantive legal analysis. An additional one sentence statement of the legal proposition that expert testimony is required on proximate causation in a legal malpractice action is found in an earlier portion of the brief. For that proposition, the defendants cite two decisions of the Appellate Court. *Beecher v. Greaves*, 73 Conn.App. 561, 564, 808 A.2d 1143 (2002) (per curiam), and *Somma v. Gracey*, 15 Conn.App. 371, 374-75, 544 A.2d 668 (1988), neither of which contains substantive analysis of the issue. Because the defendants failed to provide meaningful analysis or to cite authoritative precedent, we decline to consider this issue. See *Knapp v. Knapp*, 270 Conn. 815, 823, n. 8, 56 A.2d 358 (2004) (analysis required to avoid abandoning issue).

FN11. The defendants also challenge the plaintiff's proof of the availability of Jaquith's other assets, including his Connecticut house. Because we conclude that the plaintiff sufficiently proved the availability of the investment account, and that the value of the account was sufficient to satisfy the default judgment, we need not reach these claims.

A

[7] We first consider the claim that the plaintiff failed to prove that the judgment against Jaquith was uncollectible. The jury reasonably could have found the following additional facts, which are necessary to our resolution of this issue. After securing the default judgment, the plaintiff unsuccessfully attempted to locate Jaquith by contacting numerous individuals and companies with which Jaquith was associated. After divorcing Jaquith in June, 1995, his former wife, Sharon Lesk, sought to collect an unpaid debt from Jaquith. She was unable to find him or even determine**663 whether he was alive, despite hiring private investigators and making numerous personal inquiries. Jaquith lost nearly all of his remaining assets in 1995 as a result of the divorce. In 1995 and 1996, Jaquith twice underwent unsuccessful treatment for drug and alcohol addiction. The trustee in the Team Publications bankruptcy action engaged *778 investigators who were unable to find Jaquith. Jaquith's attorneys in the underlying action moved to withdraw in July, 1997, because they had not been paid and did not know where to contact him.

We conclude that the plaintiff's evidence that Jaquith was impoverished and that multiple individuals with financial incentive to find him were unable to do so in 1996 and 1997, was sufficient to support an inference by the jury that the judgment against him was uncollectible. The default judgment was entered after Jaquith's unsuccessful treatment for substance abuse and after the loss of his assets in the divorce.^{FN12} On the basis of this evidence, the jury reasonably could have found that

the plaintiff was unable to collect the judgment against Jaquith in the underlying action.

FN12. Although the jury was not informed of the exact date of the hearing in damages in the underlying action, which was held on January 21, 1998, the jury reasonably could have inferred that the default judgment was entered soon after Jaquith's attorneys' motion to withdraw was granted on September 9, 1997.

B

We next consider the defendants' claim that the plaintiff's evidence was insufficient to prove that Jaquith possessed sufficient attachable assets to satisfy the default judgment. The defendants challenge the plaintiff's proof on the grounds that the trial court improperly admitted into evidence a financial statement showing the existence and value of the investment account and that the evidence failed to establish the value of the account at the time the underlying action was filed.

The following additional facts are necessary to our resolution of these issues. Jaquith owned an investment account in Connecticut worth \$2.5 million as of June, 1992. The existence and value of the investment account was proven through the admission of a personal financial statement prepared by Jaquith in 1992 listing the *779 account as an asset. The financial statement indicated that Jaquith possessed assets worth more than \$20 million. Lesk testified that she and Jaquith prepared the financial statement in June, 1992, in order to qualify for a business loan in the ordinary course of business, that loan applications were made in the ordinary course of their business, that she maintained the document in the business office, and that it was a true and accurate representation of their financial assets as of June, 1992.

Additional evidence established that, between 1993 and 1995, Jaquith was forced to sell some of his assets prior to losing the remaining assets in the dissolution action in June, 1995. As a result of litig-

ation with several printing companies to whom Jaquith had given personal guarantees on behalf of his businesses, Jaquith paid a judgment of an unspecified amount in 1993 and another debt sometime after that in connection with a separate lawsuit that was filed in 1993, paid another \$100,000 in 1994, and lost ownership of a house in California by way of foreclosure in 1995. In 1994 and 1995, Jaquith took more than \$843,500 out of a business he owned; in 1995, he was forced to sell shares of stock in Sports Media worth \$381,500; and, in 1995, he sold one of his businesses for \$500,000. The underlying action was **664 brought by the defendants on behalf of the plaintiff in July, 1993.

1

[8] The defendants claim that the trial court improperly admitted Jaquith's financial statement showing the existence of the \$2.5 million investment account because the financial statement constituted hearsay and failed to satisfy the criteria for the business records exception to the hearsay doctrine. We disagree.

[9] "It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference.... We will make every reasonable presumption in *780 favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *State v. William C.*, 267 Conn. 686, 700-701, 841 A.2d 1144 (2004). "[General Statutes §] 52-180 FN13 sets forth an exception to the evidentiary rule otherwise barring admission of hearsay evidence for business records that satisfy express criteria.... [S]ee also Conn.Code Evid. § 8-4 (incorporating § 52-180).... The rationale for the exception derives from the inherent trustworthiness of records on which businesses rely to conduct their daily affairs." (Citations omitted; internal quotation marks omitted.) *State v. Christian*, 267 Conn. 710, 757-58, 841 A.2d 1158 (2004).

FN13. General Statutes § 52-180(a) provides: "Any writing or record, whether in the form of an entry in a book or other-

wise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter."

[10] "To be admissible under the business record exception to the hearsay rule, a trial court judge must find that the record satisfies each of the three conditions set forth in ... § 52-180. The court must determine, before concluding that it is admissible, that the record was made in the regular course of business, that it was the regular course of such business to make such a record, and that it was made at the time of the act described in the report, or within a reasonable time thereafter.... In applying the business records exception ... [§ 52-180] should be liberally interpreted." (Internal quotation marks omitted.) *Id.*, at 758, 841 A.2d 1158.

Jaquith's financial statement was admitted by the court as a business record based on the undisputed testimony of Lesk that she and Jaquith had prepared the statement in June, 1992, to qualify for a business loan in the ordinary course of business, that applications*781 for loans were made in the ordinary course of their business, that she maintained the document in the business office, and that it was a true and accurate representation of their assets as of June, 1992. The document thus satisfied the criteria for the business records exception.

[11] The defendants further challenge the document, however, by arguing that it was admissible, if at all, only to prove the fact that Jaquith and Lesk had applied for a loan, and not to prove the truth of the information reported in the document. They base this argument on the language of § 52-180(a), which provides that a business record "made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence

of the act, transaction, occurrence or event"

[12][13] Such a narrow reading of the statute would not comport with existing **665 case law. Business records are routinely admitted under the business records exception for the truth of the business information reported therein because the documents bear an inherent trustworthiness as records on which businesses rely to conduct their daily affairs. See *State v. William C.*, supra, 267 Conn. at 702, 841 A.2d 1144. The use of the records has not been limited to establishing the fact of the transaction for which the documents were created. Rather, the records may be used to establish the truth of their contents. See, e.g., *State v. Kirsch*, 263 Conn. 390, 400-409, 820 A.2d 236 (2003) (blood test properly admitted under business records exception to prove blood alcohol level); *Calcano v. Calcano*, 257 Conn. 230, 241-42, 777 A.2d 633 (2001) (chiropractor's treatment notes properly admitted under business records exception to prove prior injury); *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 597-603, 717 A.2d 713 (1998) (loan documents should have been admitted under business records exception to show amount of *782 debt); cf. *Pagano v. Ippoliti*, 245 Conn. 640, 651, 716 A.2d 848 (1998) (meeting notes admissible as business record but their description of statements made by meeting participant constituted inadmissible second level of hearsay). Indeed, if the business record only proved that an act occurred, it would not constitute an exception to the hearsay rule. See *State v. Watley*, 195 Conn. 485, 490, 488 A.2d 1245 (1985) (if conversation admitted to show it took place, it is not hearsay). Thus, the trial court acted within the scope of its discretion and properly admitted Jaquith's financial statement as evidence of his assets in June, 1992.

2

[14] The defendants next challenge the evidentiary value of the financial statement, arguing that the document shows only the status and value of Jaquith's assets in June, 1992, and does not prove that the assets were available for attachment when the

underlying action was brought in July, 1993. We disagree.

The defendants argue that Lesk testified that Jaquith's financial troubles required him to dispose of many of his assets prior to the dissolution judgment in 1995, when Lesk was awarded the couple's remaining assets. Lesk's testimony concerning the sale of various assets, however, did not indicate any dissipation of the investment account between June, 1992, when the financial statement was prepared, and July, 1993, when the underlying action was filed and a prejudgment remedy could have been sought. Lesk did not testify that the investment account was affected by any of these transactions and, to the extent that her testimony established that Jaquith was selling many of his assets, those sales occurred primarily in 1994 and 1995, well after the defendants filed the underlying action on the plaintiff's behalf in July, 1993. Interpreting the evidence in the light most favorable to sustaining the verdict, and *783 allowing for reasonable inferences drawn therefrom, the jury reasonably could have found that the investment account, which was worth \$2.5 million in June, 1992, continued to have sufficient value in July, 1993, that, if attached, would have allowed the plaintiff to recover on the subsequent default judgment.

III

[15] Finally, the defendants claim that the amount of the verdict in the present case was excessive. We disagree.

The following additional facts are necessary to resolve this claim. In February, 1993, Team Publications was forced into bankruptcy. Both the plaintiff and Jaquith**666 filed claims against the bankrupt estate. Among the estate's remaining assets were 500,000 shares of Sports Media stock. When, at the plaintiff's urging, the bankruptcy trustee counted the shares, he discovered that more than 300,000 of those shares were missing and he eventually learned that 109,000 of the shares had been sold for more than \$300,000 by Jaquith for his personal benefit. During his presentation of the

"case-within-a-case," the plaintiff presented evidence that the defendants' negligent representation of him resulted in the bankruptcy trustee's failure to recover this amount from Jaquith as well as the loss of other bankruptcy assets totaling \$1.2 million.

[16][17][18] "The law concerning excessive verdicts is well settled. The amount of a damage award is a matter peculiarly within the province of the trier of fact, in this case, the jury.... The size of the verdict alone does not determine whether it is excessive. The only practical test to apply to [a] verdict is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption.... The trial court's refusal to *784 set aside the verdict is entitled to great weight and every reasonable presumption should be indulged in favor of its correctness.... This is so because [f]rom the vantage point of the trial bench, a presiding judge can sense the atmosphere of a trial and can apprehend far better than we can, on the printed record, what factors, if any, could have improperly influenced the jury." (Internal quotation marks omitted.) *Label Systems Corp. v. Aghamohammadi*, 270 Conn. 291, 323, 852 A.2d 703 (2004).

The defendants' argument that the verdict was excessive rests upon their interpretation of the plaintiff's evidence concerning the amount of damages to which he would have been entitled if the underlying action had been tried. The defendants contend that, because Team Publications filed for bankruptcy, the plaintiff could expect to be compensated on his contract claims against Team Publications only from the bankrupt estate. Moreover, they claim, he received all that he was entitled to receive, except his share of the \$300,000 taken by Jaquith and the \$1.2 million reduction in the value of the bankruptcy estate from the defendants' alleged negligence. The defendants argue that the plaintiff's share of the bankruptcy estate was 11.5 percent and, thus, his share of these amounts would

be no more than \$139,000. The defendants argue, therefore, that the plaintiff's recovery on the employment contract should have been limited to this amount. The defendants further contend that his additional damages against Jaquith were limited to \$50,000 for fraudulent inducement to make the July 1, 1991 loan and nominal damages on the defamation claim. Thus, the defendants argue that the plaintiff should not be entitled to recover damages in excess of \$1 million because he would not have been able to recover that amount in the underlying action.

The defendants' argument focuses exclusively on the amount of damages to which the plaintiff would have *785 been entitled had the underlying action been tried. In other words, the defendants attack the sufficiency of the plaintiff's evidence in the malpractice action to prove his damages claim in the underlying action. Those damages were proved alternatively, however, by the plaintiff's evidence of the amount of the default judgment entered in the underlying action after the hearing in damages. The amount of damages that **667 the plaintiff would have been able to prove in a contested trial on the merits of the underlying action is not dispositive on this issue because the plaintiff presented sufficient evidence to enable the jury to find that the amount of the default judgment in the underlying action was at least \$1,061,356, and that the plaintiff was unable to recover on that default judgment because of the defendants' negligent failure to obtain a pre-judgment remedy. Accordingly, the jury reasonably awarded the plaintiff damages in the amount of \$1,040,183.

The judgment is affirmed.

In this opinion the other justices concurred.

Conn.,2005.
Margolin v. Kleban and Samor, P.C.
275 Conn. 765, 882 A.2d 653

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▷

United States District Court,
 E.D. Virginia.

Constance A. McCLUNG, Plaintiff,

v.

William Massie SMITH, Jr., and Paxson, Smith, Gilliam & Scott, P.C., Defendants.

Civ. A. No. 3:93cv549.
 Dec. 20, 1994.

Client brought legal malpractice action against attorney who had represented her in divorce action. After trial without jury, the District Court, Payne, J., held that: (1) husband was agent of client with regard to financial matters, and was in special relationship with client, so that husband owed fiduciary duty to client and could have been subject to action for accounting of husband's handling of client's separate funds and marital funds; (2) failure of attorney to seek action for accounting constituted legal malpractice; (3) client was entitled to damages of \$211,677.43 due to attorney's failure to seek action for accounting; (4) attorney's failure to respond to discovery requests, perform formal discovery, seek interim support for client, and perfect appeal, and conduct at equitable distribution hearing, constituted legal malpractice; (5) malpractice in representation resulted in damages to client of \$257,520; and (6) client was entitled to prejudgment interest at prime interest rate which was applicable during period of award of interest.

Judgment entered.

West Headnotes

[1] Attorney and Client 45 ⇌ 106

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k106 k. Nature of attorney's duty. Most Cited Cases

Attorney and Client 45 ⇌ 107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k107 k. Skill and care required. Most Cited Cases

Under Virginia law, lawyers are charged with obligation to use reasonable degree of care, skill, and diligence in handling matters entrusted to them and are bound contractually to perform work they agree to undertake for their clients.

[2] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases
 (Formerly 45k105)

Under Virginia law, to prevail in action for legal malpractice plaintiff must prove attorney's employment, neglect or breach of duty by attorney, and loss proximately caused by that neglect or breach.

[3] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases
 (Formerly 45k105)

Under Virginia law, negligence is actionable only if it was proximate cause of claimed damages, and proof alone of negligence by attorney is insufficient basis for recovery in legal malpractice action.

[4] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases
 (Formerly 45k105)

Under Virginia law, trier of fact in legal malpractice action must consider merits of underlying action,

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and plaintiff must consequently prove "case-within-the-case."

[5] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited

Cases

Under Virginia law, there is no single formula for measuring damages in legal malpractice actions, and appropriate measure of damages must be determined by facts and circumstances of each case.

[6] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited

Cases

Under Virginia law, damages in legal malpractice action will be calculated on basis of value of what was lost or consequences of adverse judgment suffered by client; although client is not required to prove exact amount of incurred damages, she is required to show facts and circumstances from which trier of fact can make reasonably certain estimate of damages.

[7] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited

Cases

Under Virginia law, requirement that client must show actual damages in order to recover in legal malpractice action does not permit negligent lawyer to evade responsibility for malpractice by claiming that damages are too speculative in nature to be determined.

[8] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited Cases

Under Virginia law, attorney was negligent in failing to seek action for accounting against husband of client in relation to husband's use of client's separate funds during series of transactions in which beachfront property was acquired as marital property where, had attorney made reasonable inquiry he would have determined that husband owed client fiduciary duty due to agency relationship and also due to special relationship which existed between husband and client because of client's vulnerability and fact that husband was much more sophisticated than wife with regard to property transactions, and actions attorney did take revealed that something was seriously amiss with husband's handling of funds.

[9] Principal and Agent 308 ⇌ 1

308 Principal and Agent

308I The Relation

308I(A) Creation and Existence

308k1 k. Nature of the relation in general.

Most Cited Cases

Principal and Agent 308 ⇌ 14(1)

308 Principal and Agent

308I The Relation

308I(A) Creation and Existence

308k14 Implied Agency

308k14(1) k. In general. Most Cited Cases

Under Virginia law, "agency" is fiduciary relationship created by express or implied agreement of parties. Restatement (Second) of Agency § 1.

[10] Principal and Agent 308 ⇌ 48

308 Principal and Agent

308II Mutual Rights, Duties, and Liabilities

308II(A) Execution of Agency

308k48 k. Nature of agent's obligation. Most

Cited Cases

Under Virginia law, agent is fiduciary with respect to matters within scope of his agency. Restatement (Second) of Agency § 13.

[11] Husband and Wife 205 ⇌ 21

205 Husband and Wife
 205I Mutual Rights, Duties, and Liabilities
 205k20 Agency of Wife for Husband
 205k21 k. In general. Most Cited Cases

Husband and Wife 205 ⇌ 25(1)

205 Husband and Wife
 205I Mutual Rights, Duties, and Liabilities
 205k25 Agency of Husband for Wife
 205k25(1) k. In general. Most Cited Cases
 Under Virginia law, relationship of husband and wife does not per force establish agency, but spouse can be authorized to act as agent of other spouse. Restatement (Second) of Agency § 22.

[12] Principal and Agent 308 ⇌ 69(1)

308 Principal and Agent
 308II Mutual Rights, Duties, and Liabilities
 308II(A) Execution of Agency
 308k69 Individual Interest of Agent
 308k69(1) k. In general. Most Cited Cases

Principal and Agent 308 ⇌ 70

308 Principal and Agent
 308II Mutual Rights, Duties, and Liabilities
 308II(A) Execution of Agency
 308k70 k. Acting for parties adversely interested. Most Cited Cases
 Under Virginia law, absent express agreement to contrary, agent is subject to duty to his principal to act solely for benefit of principal in all matters connected with his agency. Restatement (Second) of Agency § 387

[13] Principal and Agent 308 ⇌ 78(1)

308 Principal and Agent
 308II Mutual Rights, Duties, and Liabilities
 308II(A) Execution of Agency
 308k78 Actions for Accounting
 308k78(1) k. Rights of action, defenses, and conditions precedent. Most Cited Cases

Principal and Agent 308 ⇌ 79(1)

308 Principal and Agent
 308II Mutual Rights, Duties, and Liabilities
 308II(A) Execution of Agency
 308k79 Actions for Negligence or Wrongful Acts of Agent
 308k79(1) k. Rights of action and defenses.

Most Cited Cases

Under Virginia law, wide range of remedies are available for principal aggrieved by agent's breach of contract or breach of fiduciary duty; principal may maintain action for breach of contract, action for tort, action for restitution either at law or in equity, or action for accounting. Restatement (Second) of Agency §§ 399 (a, b, d, e).

[14] Principal and Agent 308 ⇌ 48

308 Principal and Agent
 308II Mutual Rights, Duties, and Liabilities
 308II(A) Execution of Agency
 308k48 k. Nature of agent's obligation. Most Cited Cases

Under Virginia law, agency relation, like partnership, is of fiduciary character, and principles which oblige partners to exercise good faith and integrity in their dealing with one another apply equally to principal and agent.

[15] Account 9 ⇌ 1

9 Account
 9I Right of Action and Defenses
 9k1 k. Nature and grounds of right to an account.
 Most Cited Cases

Under Virginia law, "accounting" is form of equitable relief which is available upon order of court in equity providing for accounting of funds among those with partnership or other fiduciary relation inter se, and may be sought along with purely restitutionary remedies.

[16] Principal and Agent 308 ⇌ 79(1)

308 Principal and Agent
 308II Mutual Rights, Duties, and Liabilities

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308II(A) Execution of Agency

308k79 Actions for Negligence or Wrongful Acts of Agent

308k79(1) k. Rights of action and defenses. Most Cited Cases

Trusts 390 ⇌ 289

390 Trusts

390VI Accounting and Compensation of Trustee

390k289 k. Duty to account in general. Most Cited Cases

Fundamental equitable remedy of an accounting has long been available to require trustees or agents to account for their actions in dealing with funds of beneficiaries or principals.

[17] Principal and Agent 308 ⇌ 78(4)

308 Principal and Agent

308II Mutual Rights, Duties, and Liabilities

308II(A) Execution of Agency

308k78 Actions for Accounting

308k78(4) k. Presumptions and burden of proof. Most Cited Cases

Under Virginia law, in action for accounting burden is placed on agent to establish that he has properly applied or disposed of assets entrusted to him by principal.

[18] Husband and Wife 205 ⇌ 25(1)

205 Husband and Wife

205I Mutual Rights, Duties, and Liabilities

205k25 Agency of Husband for Wife

205k25(1) k. In general. Most Cited Cases

Husband and Wife 205 ⇌ 205(1)

205 Husband and Wife

205VI Actions

205k205 Rights of Action Between Husband and Wife

205k205(1) k. Nature and form of remedy.

Most Cited Cases

Under Virginia law, agency relationship existed between husband and wife, and wife was entitled to action for accounting against husband, where husband and

wife agreed that husband would have access to wife's funds for specific purpose of purchases of marital property and that husband would be responsible for use of funds for several complex financial transactions in which separate funds would be obtained, applied to agreed-upon purpose, and returned to wife upon completion of permanent financing, and where, due to wife's vulnerability and weakened condition resulting from her dependence on alcohol, wife relied on husband to handle financial transactions entrusted to him.

[19] Fraud 184 ⇌ 7

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k5 Elements of Constructive Fraud

184k7 k. Fiduciary or confidential relations.

Most Cited Cases

Under Virginia law, certain special relationships can create fiduciary obligation.

[20] Principal and Agent 308 ⇌ 48

308 Principal and Agent

308II Mutual Rights, Duties, and Liabilities

308II(A) Execution of Agency

308k48 k. Nature of agent's obligation. Most Cited Cases

Under Virginia law, weakened condition of principal is significant factor in determining nature and extent of fiduciary duty of agent.

[21] Trusts 390 ⇌ 111

390 Trusts

390I Creation, Existence, and Validity

390I(C) Constructive Trusts

390k111 k. Questions for jury. Most Cited Cases

Under Virginia law, breach of fiduciary duty creates constructive trust by operation of law.

[22] Husband and Wife 205 ⇌ 1

205 Husband and Wife

205I Mutual Rights, Duties, and Liabilities

205k1 k. The relation in general. Most Cited Cases

Trusts 390 ⇌ 103(3)

390 Trusts

390I Creation, Existence, and Validity

390I(C) Constructive Trusts

390k103 Contracts and Transactions Between Persons in Confidential Relations

390k103(3) k. Husband and wife. Most Cited Cases

Under Virginia law, relationship of husband and wife can form basis for confidential relationship which, if certain other circumstances are present, will warrant imposition of trust.

[23] Husband and Wife 205 ⇌ 1

205 Husband and Wife

205I Mutual Rights, Duties, and Liabilities

205k1 k. The relation in general. Most Cited Cases

Husband and Wife 205 ⇌ 205(1)

205 Husband and Wife

205VI Actions

205k205 Rights of Action Between Husband and Wife

205k205(1) k. Nature and form of remedy. Most Cited Cases

Under Virginia law, special relationship between husband and wife created fiduciary duty on part of husband, and wife was entitled to action for accounting against husband even if agency relationship did not exist, where for many years husband had handled complex marital finances and wife's own finances, at time when wife's separate funds were entrusted to husband for limited purpose of acquiring beachfront property wife was substantially weakened by dependence on alcohol, wife relied upon husband to handle funds for purchase of property, and husband was professional who was knowledgeable about property transaction with regard to which wife had virtually no knowledge of or sophistication.

[24] Account 9 ⇌ 4

9 Account

9I Right of Action and Defenses

9k4 k. Fiduciary relations. Most Cited Cases

Under Virginia law, accounting in equity against fiduciary is authorized by statute. Va.Code 1950, § 8.01-31 .

[25] Fraud 184 ⇌ 7

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k5 Elements of Constructive Fraud

184k7 k. Fiduciary or confidential relations. Most Cited Cases

Under Virginia statute governing remedies in civil actions, definition of fiduciary is not exclusive, and simply specifies that certain kinds of fiduciaries are included within meaning of term. Va.Code 1950, § 8.01-2 .

[26] Account 9 ⇌ 4

9 Account

9I Right of Action and Defenses

9k4 k. Fiduciary relations. Most Cited Cases

Principal and Agent 308 ⇌ 79(1)

308 Principal and Agent

308II Mutual Rights, Duties, and Liabilities

308II(A) Execution of Agency

308k79 Actions for Negligence or Wrongful Acts of Agent

308k79(1) k. Rights of action and defenses. Most Cited Cases

There is no indication that Virginia General Assembly intended statutes authorizing accounting in equity in fiduciary relationship to supplant well-settled common law pursuant to which accounting is available to redress breach of fiduciary responsibility inherent in agency relationship or in other special relationship recognized as giving rise to fiduciary duty. Va.Code 1950, § 8.01-31 .

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[27] Divorce 134 ⇌ 741

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)3 Proportion or Share Given on Division

134k731 Particular Factors and Considerations

134k741 k. Contributions during marriage in general; marital role. Most Cited Cases (Formerly 134k252.2)

Equitable distribution of marital assets was enacted by Virginia General Assembly for purpose of enabling courts to compensate spouses for their respective contributions to acquisition of property obtained during marriage without regard to title when marriage is dissolved; ultimate purpose is to divide fairly marital assets, taking into account respective monetary and nonmonetary contributions of husband and wife to acquisition and maintenance of property and to marriage itself. Va.Code 1950, § 20-107 .

[28] Divorce 134 ⇌ 508

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(A) In General

134k506 Constitutional and Statutory Provisions

134k508 k. Purpose. Most Cited Cases (Formerly 134k199.7(2), 134k4)

Husband and Wife 205 ⇌ 205(1)

205 Husband and Wife

205VI Actions

205k205 Rights of Action Between Husband and Wife

205k205(1) k. Nature and form of remedy. Most Cited Cases

Under Virginia law, it is clearly not purpose of equitable distribution scheme to deprive aggrieved

spouse of generally recognized remedy of action for accounting for misapplication or misappropriation of separate funds entrusted to other spouse pursuant to special relationship. Va.Code 1950, § 20-107 .

[29] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited

Cases

Under Virginia law, damages recoverable in action for legal malpractice depend upon nature of injury caused by malpractice.

[30] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited

Cases

Under Virginia law, client was entitled to damages of \$211,677.43 in legal malpractice action based on attorney's failure to seek action for accounting against client's husband, who owed client fiduciary duty with regard to handling of marital funds and client's separate funds in purchase of marital property, where client's inheritance was charged \$104,752.88 to repay principal and interest on loans for purchase of house, husband could not explain disposition of \$8,750 of wife's assets he received, \$183,354.55 of wife's interests in trust assets was used to obtain loans for construction on property, and only \$85,000 was paid to builder for construction and thus became equity in marital assets.

[31] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, conduct of attorney who represented client in divorce action in neglecting to file timely responses to first and second requests for admis-

sions filed by client's husband constituted legal malpractice where wife had provided information which would have permitted substantive denials of each admission sought by second requests, even though first request would have been admitted, and as result of attorney's neglect client was unable as matter of law to challenge propositions asserted in admissions which handicapped in material way client's ability to deal with divorce action and ultimate disposition of property.

[32] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, conduct of attorney who represented client in divorce action in failing to file formal discovery until so late in proceedings that court excused husband from any obligation to respond to discovery constituted legal malpractice where failure to conduct discovery left attorney wholly unable to address issues raised by husband at equitable distribution hearings, precluded any meaningful impeachment of husband, who was highly susceptible to impeachment, precluded attorney from assessing value of husband's law practice, kept attorney from understanding significance of evidence in his possession, and rendered attorney's representation utterly ineffective and caused client actual damage.

[33] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, there are instances when it is professionally acceptable for attorney to rely on informal discovery rather than to institute formal discovery.

[34] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, conduct of attorney who represented client in divorce action in failing to value husband's law practice as marital asset and accepting husband's statements that law practice had negative value constituted legal malpractice where attorney conceded that at time of actions in question there was support for proposition that law practice was marital property, attorney at equitable distribution hearing offered no evidence as to value of law practice, and expert testified that at date of hearing husband's law practice had fair market value of \$152,000.

[35] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, conduct of attorney in failing to retain court reporter for equitable distribution hearing in divorce proceeding constituted legal malpractice where divorce was bitterly contested and there was reasonable likelihood of appeal.

[36] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, while standard of care required of attorney does not always require retention of court reporter for hearings, it is not acceptable professional conduct for attorney to neglect to retain court reporter and provide for record in bitterly contested divorce case where adverse spouse is contentious and asserting irrational positions, there are funds to provide for transcript of trial proceedings, and there is reasonable likelihood of appeal.

[37] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

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Cases

Under Virginia law, failure of attorney to prepare client for equitable distribution hearing in divorce action by not briefing her on what to expect or reviewing topics about which she was to testify constituted malpractice where client was unprepared to testify and was unable to relate her side of issues in case, notwithstanding attorney's contention that less preparation was required due to fact that judge refused to allow testimony in traditional form and required narrative summary testimony instead.

[38] Federal Courts 170B ⇌ 903

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)6 Harmless Error

170Bk903 k. Examination and impeachment of witnesses. Most Cited Cases

Witnesses 410 ⇌ 266

410 Witnesses

410III Examination

410III(B) Cross-Examination

410k266 k. Right to cross-examine and re-examine in general. Most Cited Cases

Under Virginia law, deprivation of right to cross-examine witnesses does not lie within discretion of any court and is reversible error.

[39] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, failure of attorney to perfect appeal in divorce action constituted legal malpractice where trial court committed reversible error by refusing to permit cross-examination of witnesses and failure to perfect appeal deprived client of opportunity to obtain reversal.

[40] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, conduct of attorney at equitable distribution hearing in divorce action constituted legal malpractice where purpose of hearing was to determine value of house and attorney took no discovery of client's husband's expert witness or husband on issue of appraisal, was unable to present evidence which existed that house had been appraised at amount substantially less than amount testified to by client's husband, and did not question or cross-examine client's husband when he described plan to purchase house during hearing even though client had earlier claimed to be penniless, and as result of attorney's conduct judge reached unjust determination of value of and equity in house.

[41] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, failure of attorney to seek interim spousal support for client during pendency of divorce proceedings constituted legal malpractice where client informed attorney that she needed financial support, period between separation and divorce was 14 months during which period client was required to pay \$2,000 per month on mortgage out of her separate income and borrowings from relatives, and wife as result sustained loss of \$28,000 and was additionally required to borrow \$50,000 to avoid foreclosure.

[42] Federal Courts 170B ⇌ 903

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)6 Harmless Error

170Bk903 k. Examination and impeachment of witnesses. Most Cited Cases

Witnesses 410 ⇌ 266

410 Witnesses

410III Examination

410III(B) Cross-Examination

410k266 k. Right to cross-examine and re-

examine in general. Most Cited Cases

Refusal of trial court judge to allow cross-examination is such a fundamental deprivation of right, with such far reaching consequences, that it requires reversal and rehearing.

[43] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Virginia law, conduct of attorney in failing to perfect appeal on behalf of client in divorce action constituted legal malpractice where due to failure of trial judge to allow cross-examination at equitable distribution proceeding reversal would have been required and issue of cross-examination was preserved for appeal.

[44] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited

Cases

Under Virginia law, malpractice of attorney in representing client in equitable distribution and divorce proceedings resulted in damages to client of \$257,520 where as result of malpractice client suffered adverse judgment of \$188,500, was deprived of interim spousal support and attorney's fees and paid to attorney fees which for all practical purposes were wasted, had client been competently represented property could have been equally distributed and no monetary award made and would have been entitled to interim spousal support of \$28,000 during pendency of action, client was instead required due to lack of support to incur debt of additional \$25,000, and client paid law firm \$16,020 in fees.

[45] Interest 219 ⇌ 39(2.6)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in Gener-

al

219k39(2.5) Prejudgment Interest in General

219k39(2.6) k. In general. Most Cited

Cases

Under Virginia law, "prejudgment interest" is not element of damages, but is statutory award for delay in payment of money due, or compensation for loss of use of money. Va.Code 1950, § 8.01-382 .

[46] Federal Courts 170B ⇌ 415

170B Federal Courts

170BVI State Laws as Rules of Decision

170BVI(C) Application to Particular Matters

170Bk415 k. Damages, interest, costs and

fees. Most Cited Cases

State law controls entitlement to prejudgment interest in diversity cases.

[47] Interest 219 ⇌ 31

219 Interest

219II Rate

219k31 k. Computation of rate in general. Most

Cited Cases

While determination of rate of prejudgment interest is generally matter entrusted to discretion of district court, in diversity cases that discretion is circumscribed by legal interest rate proscribed by state law.

[48] Interest 219 ⇌ 39(2.15)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in Gener-

al

219k39(2.5) Prejudgment Interest in General

219k39(2.15) k. Liquidated or unliquidated

claims in general. Most Cited Cases

Under Virginia law, award of prejudgment interest is permissible, even if claim is unliquidated, so long as there is rational basis in evidence upon which to fix date when interest should begin to run. Va.Code 1950, §

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8.01-382 .

[49] Interest 219 ⇌ 39(2.15)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in General

al

219k39(2.5) Prejudgment Interest in General

219k39(2.15) k. Liquidated or unliquidated

claims in general. Most Cited Cases

Under Virginia law, no exception exists in language of statute governing prejudgment interest placing beyond its reach cases in which there exist bona fide legal disputes. Va.Code 1950, § 8.01-382 .

[50] Interest 219 ⇌ 39(2.50)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in General

al

219k39(2.5) Prejudgment Interest in General

219k39(2.50) k. Torts; wrongful death.

Most Cited Cases

Under Virginia law, prejudgment interest was awarded in legal malpractice action based on attorney's failure to seek action for accounting against husband of client who owed client fiduciary duty for mishandling of client's separate funds from first day of following year after final decree in equitable distribution proceeding was entered on last day of November in preceding year; any accounting proceedings initiated would likely have been resolved in tandem with equitable distribution proceedings, judgment would have become final 21 days after entry, and short additional time was allowed for reflection following delivery of order and holiday schedule. Va.Code 1950, § 8.01-382 .

[51] Interest 219 ⇌ 31

219 Interest

219II Rate

219k31 k. Computation of rate in general. Most

Cited Cases

Under Virginia law, use of average prime interest

rate in each year since beginning of period in which prejudgment interest was awarded to calculate award of prejudgment interest was reasonable, considering underlying purpose of prejudgment interest, where during entire period prime rate was less than judgment rate permitted by statute. Va.Code 1950, § 8.01-382 .

***1390** Thomas E. Albro, Patricia D. McGraw, John K. Taggart, III, Tremblay & Smith, Charlottesville, VA, for plaintiff.

William D. Bayliss, Dana D. McDaniel, Robert T. Mayo, Williams, Mullen Christian & Dobbins, Richmond, VA, for defendants.

MEMORANDUM OPINION

PAYNE, District Judge.

Constance A. McClung instituted this action against William Massie Smith, Jr. and Paxson, Smith, Gilliam & Scott, P.C., the law firm in which he was a partner, to recover damages that McClung claims to have sustained as the consequence of legal malpractice. The case was tried to the court, sitting without a jury, and was submitted for decision following briefing and argument.

THE GENERAL BACKGROUND

On October 26, 1976, McClung married John Lowe, a lawyer then engaged in the general practice of law in Charlottesville.^{FN1} It was the second marriage for each party. McClung's son from her previous marriage was subsequently adopted by Lowe. The couple lived in Charlottesville in what is referred to as the Blue Ridge Road house which Lowe owned when he and McClung were married. After McClung funded more than \$100,000 in improvements to the Blue Ridge Road house, it was titled jointly.

FN1. Many of the exhibits refer to McClung by her married name Constance A. Lowe. For convenience, she will be referred to here only as McClung.

McClung was not employed outside the home during the marriage, but she contributed substantially to the family's income from the annual yield of the "Dadiani" and the "Anthony Oil" trusts, both of which were her

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separate property. Both trusts were administered by the Leavenworth National Bank & Trust Company in Leavenworth, Kansas ("LNB"). From 1978 to 1989, the trusts generated approximately \$422,000 in income. In addition to the trust income, McClung received other separate funds by gift and inheritance, which she contributed to the marriage.^{FN2} Lowe's sole source of income was his law practice which, during that same period, generated approximately \$644,000 in income.

FN2. Lowe admitted at deposition that "the hard numbers of money coming into the marriage were coming in heavily on the side of Connie" and further that "[t]he kinds of contributions I was making I think would be much more vague and arguable." (PEx. 189, part 1, page 19).

During the marriage, Lowe handled all of the couple's financial transactions, including McClung's individual finances. Lowe established an account in her name and deposited approximately \$500.00 each month to fund certain household expenses and McClung's personal expenses.

As early as 1980, McClung reported to her psychiatrist that she was having marital difficulties with Lowe. (Tr. 251). Not long thereafter, McClung developed a dependency on alcohol which grew progressively worse. Lowe was fully aware of her dependency and the results of it. (PEx. 88; PEx. 89). In the Spring of 1988, McClung was admitted to Springwood, a drug and alcohol rehabilitation clinic. McClung's indulgence in alcohol was accompanied by numerous acts of adultery, all of which were subsequently condoned by Lowe. The record does not reflect a possible cause of McClung's alcoholism, but it convincingly demonstrates that McClung was substantially weakened by her addiction to alcohol and that, with Lowe's encouragement, she became evermore dependent upon him to handle her financial affairs.

The central focus of this action is Lowe's use of McClung's separate funds for the purchase of two beachfront properties in Emerald Isle, North Carolina: the "Sea Dunes house" and the "Inlet Drive house."

Further evidence of the extent of Lowe's control over McClung's affairs is found in a general power of attorney she executed in Lowe's favor in July 1978 (PEx. 177, p. 1) and in a special power of attorney she executed in February 1988 to allow Lowe to handle a refinancing of the Inlet Drive house. (PEx. 127; PEx. 177, pp. 2-3).

McClung asserts that Smith committed malpractice in two ways. First, he is alleged *1391 to have breached his contract of employment to secure an accounting from Lowe for the misappropriation of certain separate funds entrusted to him by McClung for purchasing and building the Sea Dunes house and the Emerald Isle house. Second, he is alleged to have negligently represented McClung in the divorce and dissolution proceedings instituted by Lowe.

DISCUSSION

[1][2] The basic legal principles against which Smith's conduct must be measured is the law of legal malpractice of Virginia. It is well-settled that lawyers are charged with the obligation to use a reasonable degree of care, skill and diligence in handling the matters entrusted to them and are bound contractually to perform the work they agree to undertake for their clients. *Glenn v. Haynes*, 192 Va. 574, 66 S.E.2d 509, 512 (1951). To prevail in an action for legal malpractice, a plaintiff must prove: (1) the attorney's employment; (2) neglect or breach of duty; and (3) a loss proximately caused by that neglect or breach. *Stewart v. Hall*, 770 F.2d 1267 (4th Cir.1985).

[3][4] Because negligence is actionable only if it was the proximate cause of the claimed damages, see *Maryland Casualty Co. v. Price*, 231 F. 397 (4th Cir.1916), proof of negligence alone is an insufficient basis for recovery. *Duvall, Blackburn, Hale & Downey v. Siddiqui*, 243 Va. 494, 416 S.E.2d 448 (1992). This means that:

[I]n making the determination that an attorney's negligence proximately caused a client's damages, the trier of the malpractice action must find that the *result in the underlying action would have been different but for the attorney's negligent performance.*

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Stewart, 770 F.2d at 1269 (emphasis added). Thus, the trier of fact in the malpractice action must consider the merits of the underlying action, and consequently the plaintiff must prove a "case-within-the case." See *Stewart*, 770 F.2d at 1270; *Byrd v. Martin, Hopkins, Lemon and Carter, P.C.*, 564 F.Supp. 1425 (W.D.Va.1983) (diversity legal malpractice action under Virginia law required court to assess merits of the underlying claim), *aff'd*, 740 F.2d 961 (4th Cir.1984); *Goldstein v. Kaestner*, 243 Va. 169, 413 S.E.2d 347 (1992).

[5][6][7] There is no single formula for measuring damages in legal malpractice actions; and therefore, the appropriate measure of damages must be determined by the facts and circumstances of each case. *Duvall*, 243 Va. 494, 416 S.E.2d at 450. Damages will be calculated on the basis of the value of what was lost or the consequences of the adverse judgment suffered by the client; and, although the client is not required to prove the exact amount of incurred damages, she is required to show facts and circumstances from which the trier of fact can make a reasonably certain estimate of those damages. *Id.* But, the actual damage requirement does not permit a negligent lawyer to evade responsibility for malpractice by claiming that the damages are too "speculative" in nature to be determined. *Better Homes, Inc. v. Rodgers*, 195 F.Supp. 93 (N.D.W.Va.1961).

The Virginia Supreme Court, in *Allied Prods., Inc. v. Duesterdick*, 217 Va. 763, 232 S.E.2d 774, 776 (1977), cited the following rationale for requiring the plaintiff to prove actual injury:

If an attorney, in disregard of his duty, neglects to appear in a suit against his client, with the result that a default judgment is taken, it does not follow that the client has suffered damage, because the judgment may be entirely just, and one that would have been rendered notwithstanding the efforts of the attorney to prevent it.

Duesterdick, 232 S.E.2d at 775 (citing *Price*, 231 F. at 402). Even after a client has proved her case, if she "has suffered a judgment for money damages as the proximate result of [her] lawyer's negligence, such

judgment constitutes actual damage recoverable in a suit for legal malpractice only to the extent such judgment has been paid." *Id.*, 217 Va. 763, 232 S.E.2d at 717.

With these principles in mind, and on the basis of the facts proved by a preponderance of the evidence, the court considers McClung's claims that Smith was negligent in failing to institute an action for an accounting *1392 and in representing her in the divorce proceedings.

I SMITH'S FAILURE TO SECURE AN ACCOUNTING OF LOWE'S MISHANDLING AND MISAPPROPRIATION OF MCCLUNG'S SEPARATE FUNDS

The Purchase Of The Sea Dunes House

In the summer of 1983 Lowe and McClung decided to purchase a beach house located on Sea Dunes Drive in Emerald Isle, North Carolina. By letter dated September 27, 1983, Lowe outlined to McClung's grandfather, D.R. Anthony, III, the reasons which prompted the desire to purchase the Sea Dunes house and asked for a loan with which to purchase it.

Lowe sent the letter "at Connie's request." (PEx. 83). He represented that the Sea Dunes house was a good investment and had the potential to be a retirement home. He explained that they needed the loan because their financial reserves had been exhausted by debt which Lowe had incurred to finance an ill-fated representation referred to as the "Garwood case" and by educational expenses for their son. (PEx. 83).

The requested loan was in the amount of \$159,000. To that end, Lowe represented the following:

Is it possible for Connie to obtain the money for this house from an advance against an estate or trust of which she is a present or future beneficiary? The house would be titled in Connie's name. Connie understands that if such an advance required selling of assets, incurring capital gains taxes, those tax payments would be added on to the \$159,000.00 as an advance.

If that is not possible, could an estate or trust lend her the money on some sort of delayed payoff of principal and interest in several years? If not, could she obtain a loan from or through you, secured by a lien against the corpus of her share of the Dadiani trust or other inheritance?

Connie asked me to emphasize that any assistance she received would be kept completely confidential, with only you knowing about it.

I am sending this by mail express to get it to you promptly. Connie is worried about someone else seizing the chance to pick up this exceptional buy before we have our finances lined up.

(PEX. 83, p. 2).

In response, McClung's grandparents loaned McClung and Lowe a total of \$95,000 (\$60,000 from Mrs. Anthony in three installments and \$35,000 from Mr. Anthony in two installments). (PEX. 84). On October 16, 1983, McClung's grandfather confirmed delivery of checks to McClung totalling \$95,000 and suggested that McClung's disbursement from the Anthony Oil trust in the amount of \$8,750 should also be applied to the purchase of the Sea Dunes house. (PEX. 84). The correspondence surrounding the transaction reflects that these funds were to be advanced temporarily pending permanent financing at a lower interest rate than was then commercially available. The loans were evidenced by five promissory notes in the total amount of \$95,000 which were executed by Lowe and McClung and sent to McClung's grandparents on October 24, 1983. (PEX. 85).

McClung understood that the proceeds of the \$95,000 loan from the Anthonys and a distribution of \$8,750 from the Anthony Oil trust, a total of \$103,750, were to be applied as a payment toward the purchase price of \$159,000, leaving a balance of \$55,250, which McClung understood was to be financed by a loan from Cooperative Savings and Loan Association in Jacksonville, North Carolina ("Cooperative"). In reality, however, only \$55,343.43 of the \$103,750 was deposited with Cooperative because Lowe used slightly more than \$48,000 of these funds to pay his separate credit

card debts. (Tr., 209-10; PEX. 189, part 2, pages 46-49; 137-38). Of the \$55,343.43 actually deposited in Cooperative, only \$34,129.68 was actually applied to its intended purpose: acquisition of the Sea Dunes residence. (PEX. 117; PEX. 171). Lowe was unable to explain the disposition of the difference of approximately \$21,000, but plaintiff's expert, G. David Hamar, determined that it was used to service the mortgage debt. (PEX. 171). McClung never authorized*1393 the use of these funds for any purpose other than the purchase of the Sea Dunes house. (Tr. 210).

The funds entrusted to Lowe for that purpose were deposited in an account at Cooperative which was to be solely in McClung's name. (PEX. 87). The bank erroneously established a joint account and, on February 13, 1984, Lowe instructed Cooperative to rectify the error, but confirmed that he was entitled to write checks against McClung's account because: "I handle the check writing for her in regard to her expenses...." (PEX. 87).

The undisputed record is that the \$69,620.12 of the \$103,750 entrusted to Lowe for the purchase of the Sea Dunes house was not available for that purpose at the closing. Consequently, it was necessary to replace those funds with the proceeds of a larger loan from Cooperative. The mortgage therefore was \$124,000 rather than the \$55,250 to which McClung had agreed. (PEX. 116; PEX. 117). McClung learned of the discrepancy at closing, but Lowe declined to explain it and McClung did not press the matter.

Although the Anthonys received an annual interest payment in 1985, there were no further payments made on the loans. (PEX. 86). At the time of Mr. Anthony's death in March 1988, the unpaid principal and interest was \$104,572.88. As contemplated in the original financing proposal made by Lowe in 1983 (PEX. 83), the unpaid loan balance was satisfied by a charge against McClung's share of a trust which became available upon her grandfather's death. (PEX. 94).

In sum, the preponderance of the evidence shows that Lowe acted on McClung's behalf in securing the loan, handling the loan proceeds, arranging the purchase of the Sea Dunes house and dealing with Cooperative

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respecting the financing for it. Although Lowe assumed liability on the underlying notes, the loan proceeds were deposited in an account in McClung's name. The advance from the Anthony Oil Account also was McClung's separate property.

By agreement between McClung and Lowe, her separate funds were to be applied for the purchase of the Sea Dunes house with the understanding that they would be replaced promptly upon the obtention of permanent financing at a lower interest rate. That never occurred. Therefore, when McClung's grandfather died, the loan deficiency was assessed against her.

The Purchase Of The Inlet Drive House

In 1986, McClung and Lowe decided to build a new, larger home on Inlet Drive in Emerald Isle. Lowe and McClung agreed to finance the purchase of a lot and the construction of the house with loan proceeds and with the equity in the Sea Dunes house, which they planned to sell.

They agreed to purchase the beach front lot on Inlet Drive from Mr. and Mrs. Royall for \$185,000. The down payment of \$40,000 was borrowed from LNB on December 19, 1986. That loan was evidenced by a promissory note executed by Lowe and McClung and secured by a pledge of McClung's trust assets. (PEx. 120). McClung and Lowe understood that the loan proceeds were to be used to purchase the lot. As was true generally and in respect of the Sea Dunes transaction, Lowe acted for McClung in arranging the purchase and in handling the loans. The Royalls financed the \$145,000 balance of the purchase price taking back a deed of trust as security for the note (PEx. 121).

In March 1987, Lowe approached LNB in pursuit of a \$200,000 loan to finance construction of the house on the lot purchased from the Royalls. McClung agreed that Lowe should act in her behalf, understanding that the proceeds were to be used for construction and that they would be replaced when permanent financing was concluded. By letter dated March 5, 1987, Barker confirmed that LNB would advance \$200,000 to Lowe and McClung for this purpose (PEx. 123), and a promissory note reflecting the advance of these funds was executed

on April 29, 1987 by McClung and Lowe. (PEx. 122). This loan too was secured by McClung's interest in the two trusts held at, and administered by, LNB.

The funds borrowed from Leavenworth were disbursed upon Lowe's request into a joint LNB bank account against which Lowe drew numerous checks. At deposition, Lowe *1394 was unable to recall the exact disposition of the \$200,000 loan from LNB in April 1987, but he acknowledged having disbursed \$121,000 to himself by checks on which he was the payee. Plaintiff's expert accountant, G. David Hamar, traced the funds and determined that the loan proceeds were disbursed as follows:

- (1) \$121,500.00 to John Lowe;
- (2) \$17,811.17 to Kurtis Chevrolet for a Blazer titled to the law firm of Lowe & Jacobs, P.C.; and
- (3) \$60,000.00 total to L. Martin (the Builder of the Inlet Drive house);

for a total of \$199,311.77. (PEx. 171).

Later in 1987, again acting upon McClung's agreement and purportedly on her behalf, Lowe requested an additional \$100,000 loan from LNB for the purpose of completing construction. LNB made the loan which was evidenced by a promissory note in the principal amount of \$100,000. The note, dated November 10, 1987, was executed by McClung and Lowe and the proceeds were deposited in the joint LNB account. This loan, too, was to be repaid once permanent financing was in place and it too was secured by McClung's interest in the Anthony Oil and Dadiani trusts (PEx. 122). At deposition, Lowe claimed no recollection respecting the disposition of the loan proceeds except that he wrote checks to himself in the amount of \$43,000. However, by tracing the funds from various bank records, Hamar determined that the \$100,000 loan was disbursed as follows:

- (1) \$4,700.00 to various unidentified payees;
- (2) \$25,000.00 to United Virginia Bank;
- (3) \$43,000.00 total to Lowe;

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(4) \$25,000.00 to L. Martin (builder);

The traceable disbursements, of which only \$25,000 appears to be related to the Inlet Drive house, totalled \$97,700. (PEx. 171).

The record establishes that McClung understood FN3 that the loans of \$100,000 and \$200,000 by LNB, which were secured by McClung's separate assets in the Anthony Oil and Dadiani trusts, were to be used to finance construction of the Inlet Drive house and that the loans were to be repaid when permanent financing was secured from First Southern Mortgage Company. At deposition, Lowe confessed to the same understanding. In fact, he told LNB's Barker that McClung and he intended the LNB loans to be a bridge, or temporary construction loans, to be repaid either upon permanent financing or from a large judgment Lowe expected to secure in pending litigation. (Lowe Dep., PEx. 189, part 2, pp. 160-161). Lowe later acknowledged having told Barker that the loans would be repaid from permanent financing to be obtained from First Southern Savings Bank. (Lowe Dep., part 2, pp. 168-69).

FN3. On May 17, 1988, Lowe confirmed in a letter to LNB his understanding that the purpose of these loans was to finance a real estate purchase. The letter also outlines a repayment plan, but the plan was never implemented by Lowe. (PEx. 91).

The record establishes that, as in the Sea Dunes transaction, Lowe assumed responsibility for the transactions which produced loans from LNB totalling \$340,000, which encumbered McClung's assets in that amount. The testimony of Barker, Lowe's deposition testimony, and documents executed in connection with the LNB and First Southern transactions confirm McClung's understanding about how the \$340,000 borrowed from LNB was to be repaid. First, the permanent loan of \$300,000 from First Southern would yield \$115,000 after satisfying the deed of trust note held by the Royalls and the original \$40,000 loan from LNB for the lot. In that regard, the loan application to First Mortgage, which Lowe executed for McClung as her attorney-in-fact discloses that the purpose was to "payoff

construction and Lot loan." Second, it was estimated that the net equity to be realized after sale of the Sea Dunes house would be \$75,000. (PEx. 91). Third, the net equity from the sale of the Blue Ridge Road home in Charlottesville jointly owned by McClung and Lowe was projected to be \$150,000. (PEx. 91). The funds from these sources would discharge yield a total of \$340,000 which would discharge the indebtedness to LNB, thereby removing encumbrances from McClung's trust assets and would leave the couple with *1395 the Emerald Isle house and a mortgage of \$300,000 in favor of First Southern.

As part of the process of approving the \$300,000 permanent financing loan, First Southern obtained an appraisal of the Inlet Drive property from Hockenyos Appraisal Services. The appraisal was signed by Robert Smolenski as "appraiser" and by Mark Hockenyos as "review appraiser." It valued the property, including both the lot and improvements, at \$430,000 as of January 13, 1988. (PEx. 136). FN4

FN4. First Southern was provided with a satisfactory completion certificate dated March 1, 1988 from Hockenyos Appraisal Services certifying that "with the exception of certain items costing approximately \$20,000 to \$25,000 to complete, all conditions to the earlier appraisal had been met." (PEx. 136).

The Inlet Drive house was completed on March 1, 1988 and the proceeds of the permanent loan were disbursed on March 4, 1988. (PEx. 128-129). However, notwithstanding Lowe's representations to First Southern and Barker at LNB respecting the proposed use of the First Southern proceeds, the loan proceeds were not used to satisfy the temporary loans made by LNB and secured by McClung's trust assets. Instead, the permanent financing, after deductions for prepaid financing and closing charges, was disbursed as follows:

1. \$162,909.78 was used to satisfy principal and interest on the Royall note;
2. \$43,673.99 was escrowed for completion of the construction;

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3. \$10,696.26 was used to pay points and interest for First Southern;
4. \$50,343 was used to pay off the second mortgage which NCNB held on the Sea Dunes house;
5. \$10,378.62 was used to discharge Lowe's separate obligation to Maryland National Bank Association;
6. \$12,245.85 was used to satisfy Lowe's separate obligation to Central Fidelity Bank; and
7. \$9,752.41 was used to pay Lowe's separate obligation to United Virginia Bank.

(PEX. 171; PEX. 128). These payments, totalling \$288,978.91, were made at Lowe's direction. At deposition, Lowe admitted that payments made to Maryland National Bank Association, Central Fidelity Bank, and the United Virginia Bank, were in satisfaction of his sole, and separate, indebtedness. (PEX. 129; PEX. 189, part 2, pages 171-173). None of the permanent loan proceeds were applied to the LNB loans which then totalled \$340,000, plus interest.

As a consequence, some of McClung's separate assets, which were pledged as security to LNB, were applied to curtail the loan balances as they came due. (PEX. 94). Specifically, on March 1, 1988, LNB charged McClung's trust with \$40,000 to discharge the first of the three LNB loans. On the same day, LNB applied \$60,000 to partially curtail the \$200,000 loan. Also, between 1987 and 1988, LNB applied \$83,354.55 of McClung's assets to further curtail the LNB loans (PEX. 138; PEX. 139; PEX. 171). The record also shows that on July 13, 1988, LNB received a check for \$50,000 from the law firm Lowe & Jacobs which was applied to reduce the \$100,000 and the \$200,000 loans by \$25,000 each. (PEX. 171). The balance of the LNB loans was satisfied by a payment of \$145,634.53 which apparently came from the sale of the Blue Ridge Road house. (PEX. 171).

The NCNB Line Of Credit

At about the time Lowe arranged the last loan from LNB for the purpose of completing the Inlet Drive house, he undertook to arrange for himself a line of

credit with NCNB National Bank of North Carolina. On December 22, 1987, Lowe applied for, and received, a line of credit from NCNB in the principal amount of \$50,000. Notwithstanding that the application was not signed by McClung, Lowe listed her name as an applicant. The application listed, as assets, the Sea Dunes house; McClung's interest in the Dadiani trust which in the application Lowe valued at \$750,000; McClung's interest in her grandfather's estate; and Lowe's law practice, which on the application Lowe valued at \$150,000. (PEX. 132). A later document substituted the Inlet Drive house for the Sea *1396 Dunes house on the asset list. At various times, both houses were mortgaged as security for the NCNB line of credit.

The NCNB line of credit was advanced, and paid off in full, on three separate occasions, for a total of \$148,866.74. The first payoff was in March 1988 from the proceeds of the First Southern mortgage. The second payoff was in June 1988, by a check in the amount of \$50,000 drawn on the account of Lowe and Jacobs. The third payoff was in March 1989 from the sale of the Sea Dunes house. (PEX. 189, Lowe Dep., part 2, page 147-150; PEXs. 104, 129, 130, 132, 133, 171). At deposition, Lowe claimed not to recall how he used any of the \$150,000 he borrowed against the NCNB line of credit, but he acknowledged that McClung never drew funds from the NCNB line of credit.

McClung's Retention Of Smith

Although McClung and Lowe resumed a marital relationship after her release from Springwood in 1988, the marriage continued to deteriorate. The process was accelerated by McClung's increasing suspicions respecting Lowe's past handling of her separate assets.

In early January 1989, McClung met with Smith because of her stated concern that Lowe may have misused her separate funds and because of her desire to put her finances into order. To obtain that result, McClung retained Smith to determine the uses to which her funds and separate property had been put by Lowe who had managed all of her financial affairs. (Smith's Dep., pp. 14, 19-20; Tr. 223, 294, 297). McClung explained to Smith that she desired an accounting of her separate funds. Her principal concern was that Lowe may have

been misapplied, or misappropriated, the funds which she had entrusted to him for the sole purpose of purchasing and constructing the two beach homes. McClung also provided Smith with evidence that her grandfather had loaned McClung funds to purchase the Sea Dunes house and with other rudimentary financial information as well as the names of individuals at LNB.

Smith agreed to represent McClung in this endeavor, notwithstanding that he had no previous experience in obtaining accounting of funds in fiduciary relationships. (Smith Dep., pp. 12-13, 67-68). The law firm opened a file entitled "General Business/Financial" representation. The first of the few efforts Smith made to fulfill this obligation occurred on January 31, 1989, when Smith informed Barker at LNB that McClung "has recently concluded that she needs to regain control of her financial affairs. Apparently, for the past ten or twelve years her husband, John C. Lowe, has regulated these matters, including her dealings with Leavenworth National Bank." (PEX. 93). Smith went on to explain that he was attempting to help McClung "piece together the details of her finances" and requested Barker to provide "as much background information as you can conveniently provide," (PEX. 93) including "copies of the instruments creating the trusts from which [McClung's] income is derived, together with copies of transaction reports, correspondence from John C. Lowe, file memoranda and the like." (PEX. 93). Smith also asked for information regarding "the nature and amounts of the obligations of Mr. and Mrs. Lowe, secured by the North Carolina real estate, or otherwise, to the trusts." (PEX. 93).

Barker responded on February 17, 1989, by providing a copy of the will creating the Dadiani trust in which McClung held a 1/8 th income interest, and copies of the 1988 reports for the Dadiani trust and for the Anthony Oil trust in which McClung held a 1/24 th interest. Barker also informed Smith that on March 3, 1988 McClung had received a distribution in the amount of \$261,974.11 representing her 1/14 th share of a trust distributed on the event of her grandfather's death. Barker outlined the distribution as follows:

1. \$104,572.88 used to pay off the original \$95,000 in

loans from the Anthony's which were intended to be a down payment on the Sea Dunes house, upon which no payments had been made;

2. \$100,000 applied to loans made by LNB;

3. \$57,401.23 was forwarded to McClung.^{FN5}

FN5. McClung claims that, until discovery during this action, she had believed her interest in her grandfather's trust was only \$57,401.23. It was not until then that she claims to have realized the rest of the proceeds had been applied to satisfy joint obligations which she believed had been paid off.

*1397 (PEX. 94). Finally, Barker informed Smith that the outstanding loan balance owed to LNB as of February 17, 1989 was \$152,977.46 and that LNB was applying all of McClung's income interest to pay off the two remaining notes as provided in the security agreements.

Smith also made inquiry of Roger Moore, an attorney in Jacksonville, North Carolina on February 2, 1989. Smith informed Moore that McClung was "attempting to piece together the details of her finances as quietly and delicately as possible." To assist in that process, Smith asked Moore to determine the title of record on two parcels of real estate owned by McClung and Lowe on Emerald Isle. (PEX. 178).

To assist Smith's investigation into her finances, on March 1, 1989, McClung delivered Smith checks from the Cooperative checking account and advised Smith that she had asked Lowe for the checkbook for that account. The same day Smith requested Cooperative to close the joint account and open a separate account in McClung's name. To that end, Smith enclosed a blank check drawn on the Cooperative joint account and explained that McClung "requests that you complete [this check] to close-out that account" and instructed Cooperative that the "enclosed, completed check" was to be used "to open a new account in her name." (PEX. 179).

After Smith accepted the assignment to help Mc-

Clung secure an accounting of her finances, the Sea Dunes house and the Blue Ridge Road house were sold. The Sea Dunes house closed on March 15, 1989 with total proceeds of \$186,146.27 disbursed as follows:

1. \$113,296.41 to repay the Cooperative indebtedness (originally \$124,000);
2. \$49,523.65 to repay NCNB for a second mortgage that is held on the Inlet Drive property;
3. \$10,791.50 in miscellaneous charges including sales, commissions, title insurance, taxes; and
4. \$12,484.71 to Lowe and McClung.

(PEX. 130). The Blue Ridge Road house closed on March 31, 1989. The sale price was \$330,000 of which \$319,044.14 was disbursed in cash and the purchasers gave a note for \$10,000. The sale proceeds were distributed as follows:

1. \$86,859.04 to Atlantic Financial, the holder of the first mortgage;
2. \$66,185.64 to Crestar, the holder of the second mortgage; and

(PEX. 131). This left a net balance to McClung and Lowe of \$165,905.90 after payment of some closing costs. Of this amount, \$145,634.53 was paid to LNB to satisfy the principal and interest remaining on the \$100,000 and \$200,000 loans. (PEX. 171). Of the remaining \$21,000, \$11,000 was used to pay tuition for Christian Lowe and \$10,000 was to be given to McClung. However, she never received that payment. As of March 1989, the Sea Dunes and the LNB obligations had been discharged and there remained a debt of \$300,000 to First Southern secured by a mortgage on the Inlet Drive house.

Thus, by March 1989, Smith had knowledge that substantial amounts of McClung's separate funds which had been entrusted to Lowe were unaccounted for. Other parts of the record confirm that Smith was aware of the possibility that Lowe had misappropriated or misapplied McClung's funds and of the consequent need to secure an accounting from Lowe.

For example, when Lowe discovered that McClung had retained Smith to determine the state of McClung's financial affairs and Lowe's handling of her funds, he became incensed over McClung's desire to probe his handling of her funds. The couple separated on March 26, 1989. Lowe refused to discuss his handling of McClung's funds. This, of course, should have alerted Smith that Lowe considered, as a matter of concern, his financial stewardship of McClung's assets.

On July 31, 1989, Smith informed Lowe that McClung expected him to make the June and July mortgage payments on the *1398 First Southern mortgage, which was secured by the Inlet Drive house. Smith stated that McClung's expectations were based upon the fact that:

\$96,000.00 from her grandfather's estate was intended to be put into the house, but was apparently used by you for other purposes. In addition, approximately \$30,000.00 from the North Carolina account (\$11,000.00 of which has been repaid from the Crestar joint account) was spent by you in various ways contrary to the agreement between you and Connie as to the purpose of that account, which was established with her money.

(PEX. 180) (emphasis added).

Subsequent related events also confirm that Smith understood the need for an accounting. For example, Lowe refused the July 1989 request that he make the mortgage payments on the Inlet Drive house and the loan went into default. To prevent foreclosure, Smith wrote, at McClung's request, McClung's grandmother on October 18, 1989, requesting a loan in the amount of \$50,000. (PEX. 97). Smith's letter reflects two telling observations. First, he said: "... it was and is Connie's money which was used to purchase the land and build the [Emerald Isle] house." (PEX. 97). Then, describing the mission for which he had been retained, Smith said: "[a]t some point we trust the Court will require John to ... provide her an accounting for the money which we feel he has manipulated over the years. The problem is timing. It is unlikely we will obtain a resolution from the Court before foreclosure proceedings are instituted."

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(PEX. 97) (emphasis added). On November 24, 1989, McClung's grandmother loaned her \$50,000 to prevent foreclosure. (PEX. 185). Smith, however, took no steps to implement the assignment he had undertaken for McClung.

In fact, the record shows that the only measures Smith took in furtherance of the representation was to request a limited number of records from LNB; to ask a North Carolina lawyer to determine the way in which certain real estate was titled; and to review the checking account records from Cooperative and close and reopen that account. To the extent that Smith attempted, at trial, to suggest that he had taken undefined other measures to investigate the nature and extent of Lowe's handling of McClung's separate funds, the court declines to credit his testimony because on this subject, and in general, Smith is not worthy of belief. He is a convicted felon and his testimony before this court on that issue, and several others, does not square with the record. Furthermore, Smith's demeanor while testifying was that of a man who was willing to say anything in order to avoid facing the consequences of his abject performance as a lawyer in discharging the duties McClung had retained him to perform.

The evidence establishes that McClung and Lowe agreed that her separate funds would be used to purchase the Sea Dunes and Inlet Drive houses. Lowe, acting for McClung, in pursuit of that purpose received the proceeds of the loans from McClung's grandfather (\$95,000), the distribution from the Anthony Oil Account (\$8,750), and the three LNB loans (\$340,000). Lowe did not apply those funds to the limited purposes for which they were entrusted to him. If he had, the permanent financing would have discharged the loans and McClung's assets would not have been applied to satisfy any of them.

The record establishes clearly and convincingly that Lowe applied some of the funds he secured to discharge his own separate indebtedness. In like measure, it proves that Lowe was unable to account for substantial amounts of the funds entrusted to him.

McClung Would Have Been Entitled To An Ac-

counting From Lowe

[8] The few steps that Smith took toward fulfilling the representation yielded enough information to demonstrate that something was seriously amiss in the way that Lowe had handled McClung's separate funds, yet Smith failed to follow through and, for all practical purposes, abdicated his professional responsibilities to his client. If Smith had made a reasonable inquiry, he would have determined that, as McClung's testimony and Lowe's own correspondence confirm, McClung and Lowe agreed that Lowe would have access to her separate funds for a specific*1399 purpose and that Lowe was to be responsible for the several, somewhat complex financial transactions by which those separate funds would be obtained, applied to the agreed upon purpose, and returned upon completion of permanent financing. That inquiry also would have shown that, at the time, Lowe was a practicing lawyer whose education, experience and knowledge of financial matters were far superior to McClung's and that, throughout the relevant period, McClung, who was weakened and vulnerable by her increasingly serious dependence upon alcohol, relied on Lowe to handle the financial transactions entrusted to him by virtue of their agreement.

[9][10][11] In sum, a reasonable inquiry would have shown that Lowe was McClung's agent for, and in connection with, the purpose of obtaining access to, and use of, her separate funds to this specific, but limited, purpose. Agency is a fiduciary relationship created by express or implied agreement of the parties. Restatement (Second) Of Agency § 1 (1958). And, "[a]n agent is a fiduciary with respect to matters within the scope of his agency." Restatement (Second) Of Agency § 13 (1958); *H-B Ltd. Partnership v. Wimmer*, 220 Va. 176, 257 S.E.2d 770 (1979). The relationship of husband and wife does not *per force* establish an agency, but a spouse can be authorized to act as the agent of the other spouse. Restatement (Second) Of Agency § 22 (1958); *Littreal v. Howell*, 203 Va. 394, 124 S.E.2d 16 (1962); *Painter v. Lingon*, 193 Va. 840, 71 S.E.2d 355 (1952).

[12] The agency relation is founded in an agreement between the parties, but the agency contract "is a special kind of contract, since an agent is not merely a

promisor or a promisee but is also a fiduciary." Restatement (Second) Of Agency, Chapter 13, Topic 1, Introductory Note, page 171. Moreover, "[t]he existence of the fiduciary relation between the parties, and the duty of the agent not to act for the principal contrary to orders, modify all agency agreements and create rules which are sui generis and which do not apply to contracts in which one party is not an agent for the other. Further, unlike most other contracting parties, the agent may be subject to tort liability to the principal for failing to perform his duties." *Id.* Consequently, absent express agreement to the contrary, "... an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Restatement (Second) Of Agency § 387 (1958); *Bull v. Logetronics, Inc.*, 323 F.Supp. 115 (E.D.Va.1971).

[13] The unique nature of the agency relationship, and these fundamental principles of agency law, which are firmly imbedded in the substantive law of Virginia, create a wide range of remedies for a principal aggrieved by an agent's breach of contract or a breach of fiduciary duty. Thus, the principal may maintain an action for breach of contract, an action for tort, an action for restitution, either at law or in equity, or an action for an accounting. Restatement (Second) Of Agency § 399(a), (b), (d) and (e).

[14] In *Klotz v. Klotz*, 202 Va. 393, 117 S.E.2d 650 (1961), the Supreme Court of Virginia was called upon to review an accounting pursuant to a partnership agreement between husband and wife. There, the court made clear that contractual arrangements between a husband and wife were to be treated in accordance with the law applicable to the agreement into which they had entered, holding that:

the obligations of a business contract deliberately and fairly made between husband and wife are binding on them in the same manner as contractual obligations assumed by other contracting parties. (citation omitted) They may not be disregarded by one against the will of the other. Nor may their terms be changed at the whim or caprice of one of the parties, or by courts on a theory that different terms would now be more equitable. The relationship of partners is of a fidu-

ciary character and imposes upon them the obligation to exercise good faith and integrity in their dealings with one another in the partnership affairs.

Klotz v. Klotz, 117 S.E.2d at 655. An agency relation, like a partnership, is also of a fiduciary character and the principles established in *Klotz v. Klotz* apply with equal force to an agency relationship.

*1400 [15][16][17][18] Under Virginia law, an accounting is a form of equitable relief which is available upon order of a court in equity "providing for an accounting of funds among those with a partnership or other fiduciary relation inter se. Often these actions are a form of restitutionary relief, and may be sought along with purely restitutionary remedies..." Leigh B. Middleditch, Jr. and Kent Sinclair, *Virginia Civil Procedure*, § 3.4(I) (2nd Ed.1992).

Accounting is a two-stage process. First, the account is to be stated; this is the determination of who owes what. Second, the account is to be settled; this is the payment by the debtor of the money found to be owing.

W. Hamilton Bryson, *Handbook on Virginia Civil Procedure*, Chapter XII, C, 2(c) (2nd Ed.1989). This fundamental equitable remedy has long been available to require trustees or agents to account for their actions in dealing with the funds of beneficiaries or principals. *Bain v. Pulley*, 201 Va. 398, 111 S.E.2d 287 (1959). Moreover, in the action for an accounting, the burden is on the agent to establish that he has properly applied or disposed of the assets entrusted to him by the principal. *Bain v. Pulley*, 111 S.E.2d at 291; *Boden v. Renihan*, 299 Mich. 226, 300 N.W. 53 (1941). Thus, McClung clearly would have been entitled to an accounting under well-settled principles of Virginia common law. And, she would have enjoyed, in that proceeding, the procedural advantage of having the burden of proof fall on Lowe.

[19][20][21][22][23] Furthermore, Virginia recognizes that certain special relationships can create a fiduciary obligation. *Webb v. Webb*, 16 Va.App. 486, 431 S.E.2d 55 (1993). See *In re Decker*, 295 F.Supp. 501

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(W.D.Va.1969), *aff'd sub nom., Woodson v. Gilmer*, 420 F.2d 378 (4th Cir.1970). Here, the record establishes that, for many years, Lowe had handled the complex marital finances and McClung's own separate finances; that McClung was not involved in the financial matters of the marriage; that, at the time the funds were entrusted to Lowe for the limited purpose of acquiring the beach front property, McClung was substantially weakened by her dependence upon alcohol; that, with Lowe's encouragement, she relied upon him to handle the separate funds to be applied to this limited purpose FN6; that Lowe was a professional who was knowledgeable about the legal and financial aspect of land transactions and financing thereof; and that McClung had virtually no knowledge of, or sophistication with respect to, such matters. Considering all of these virtually undisputed facts, McClung could have established the existence of a fiduciary obligation even if there had been no agreement to support an agency relationship. *Webb v. Webb*, 16 Va.App. 486, 431 S.E.2d at 58-60; *Boden v. Renihan*, 299 Mich. 226, 300 N.W. 53, 57-58 (1941). This fiduciary relationship also would have permitted an action for an accounting under Virginia common law. FN7

FN6. The weakened condition of a principal is a significant factor in determining the nature and extent of the fiduciary duty of an agent. *Redford v. Booker*, 166 Va. 561, 185 S.E. 879 (1936).

FN7. The breach of a fiduciary duty creates a constructive trust by operation of law. *Green-span v. Osheroff*, 232 Va. 388, 351 S.E.2d 28 (1986); *Horne v. Holley*, 167 Va. 234, 188 S.E. 169 (1936). The law of Virginia has long recognized that the relationship of husband and wife can form the basis for a confidential relationship which, if certain other circumstances are present, will warrant imposition of a trust. See *Hudson v. Clark*, 200 Va. 325, 106 S.E.2d 133 (1958); *Battle v. Rock*, 144 Va. 1, 131 S.E. 344 (1926). Thus, on this record, Lowe also could have been subjected to an accounting as a trustee, even if there were no agreement to

support a finding of agency.

[24] In addition to these common law remedies, an accounting in equity against a fiduciary is authorized by statute in Virginia. Va.Code Ann. § 8.01-31. McClung predicates her request for an accounting on both the common law and the right conferred by the statute.

Smith and the law firm advance several theories in support of their contention that McClung would not have been entitled to an accounting against Lowe. Each is addressed in turn.

First, they argue that the term "fiduciary" in § 8.01-31 is circumscribed by the definition of "fiduciary" in Va.Code Ann. § 8.01-2 which does not include "husband and wife" *1401 and this means, they say, that a husband or a wife is beyond the reach of the term fiduciary in § 8.01-31. "Accordingly, an accounting under § 8.01-31 is not available by one spouse against the other." (Defendant's Post-Trial Brief, pp. 5-6). The argument is without merit.

[25] Section 8.01-2 is entitled "General definitions for this title." It provides

As used in this title, unless the context otherwise requires the term:

* * * * *

(3) 'Fiduciary' shall include anyone or more of the following:

- a. guardian,
- b. committee,
- c. trustee,
- d. executor,
- e. administrator, and administrator with the will annexed, or
- f. curator of the will of any decedent.

That argument proves too much. The statutory

definition of fiduciary is not an exclusive one. Rather, it simply specifies that certain kinds of fiduciaries are included in the term.

[26] Moreover, there is no indication in the statute or in Virginia decisional law that the General Assembly intended Section 8.01-2 to supplant the well-settled common law pursuant to which an accounting is available to redress a breach of the fiduciary responsibility inherent in an agency relationship or in the special relationship shown to have existed here. For those reasons, the statute cannot be accorded the construction urged by Smith and the law firm.

Second, Smith and the law firm argue that allowing an accounting between a husband and a wife would have a "disastrous effect on marital harmony" and on "the judicial system." This argument is premised on the erroneous view that here an accounting is sought between a husband and wife "without the existence of another legal relationship between the parties." The record establishes both an agency reached by agreement between Lowe and McClung and the kind of special relationship which classically yields a fiduciary obligation. An accounting is available to remedy a breach of the fiduciary duties thusly created. Accordingly, this policy argument is of no efficacy on the facts of this case.

Moreover, the defendants have cited, and the court has found, no authority which, in the name of furthering marital harmony, would exempt from the remedy of an accounting a spouse who has been entrusted with the separate funds of another for a limited purpose and misapplied them. The court declines the invitation to create such authority here.

Third, the defendants argue that the record does not establish an agreement between Lowe and McClung. The court has found otherwise and will not repeat here the reasoning which led to that finding.

Fourth, Smith and the law firm argue that Lowe did not receive McClung's separate funds because her trust was used as security for loans that were joint obligation and the proceeds of which were deposited in a joint

checking account, thereby transmuting them to marital funds. This argument ignores the fact that the loans from the Anthonys and the Anthony Oil disbursement were deposited in an account which Lowe himself understood to be only in McClung's name.

Furthermore, the argument elevates form over substance. The undisputed record is that Lowe received the loan proceeds only because he arranged the transaction so that McClung's separate assets secured the loans. When the loans were not repaid, McClung's separate assets were used to repay them. Lowe, in essence, was entrusted with access to certain of McClung's separate funds in the form of their full credit value which he was to apply to a particular purpose so that McClung's separate funds would be freed and returned to her as separate property.

Lowe initiated the loans, arranged their terms and was fully aware of the consequences of a default. Thus, when he misapplied the loan proceeds, he did so with knowledge that the separate funds which had been entrusted to him to secure the loans automatically would replace the loan proceeds which he applied to his own use and misapplied in breach of his agreement and trust. Under *1402 the facts of this case, the transmutation theory has no applicability.

Finally, Smith and the law firm argue that McClung is not entitled to an accounting because Virginia's equitable distribution scheme, Va.Code Ann. § 20-107, provides the only remedy available to adjust financial relationships during marriage. This argument, of course, wholly ignores that the facts here demonstrate the existence of an independent relationship, whether by agency or by a trust flowing from the special relationship recognized in *Webb v. Webb*, which supports entitlement to an accounting.

More importantly, the argument ignores the testimony of the expert witnesses presented by both sides which established that the scope of the financial adjustment provided by equitable distribution is limited by what is actually available at the end of the marriage to distribute which, of course, means that equitable distribution would never provide a spouse an adequate rem-

edy for the dissipation or misapplication of separate funds entrusted to the other spouse unless the marital estate were sufficiently large to permit a recovery within the framework of equitable distribution.

[27][28] As the defendants point out, equitable distribution was enacted for the purpose of enabling courts to compensate spouses for their respective contributions to the acquisition of property obtained during the marriage without regard to title when the marriage is dissolved. The ultimate purpose is to divide fairly the marital assets taking into account their respective monetary and non-monetary contributions to the acquisition and maintenance of property and to the marriage itself. Swisher, *Virginia Family Law*, § 11-1, at 322 (1991). It is clearly, therefore, not the purpose of the equitable distribution scheme to deprive an aggrieved spouse of a generally recognized remedy for the misapplication or misappropriation of separate funds entrusted to the other spouse pursuant to a special relationship.

Nor did the commencement of the divorce and dissolution proceedings preempt the availability of an accounting. The two proceedings could have progressed separately or, as acknowledged by both experts, they could have been consolidated for discovery, resolution by a commissioner and ultimate decision by the court. In either event, the state court could have assured that the two proceedings did not produce inconsistent or overlapping decisions.

The Accounting

[29] Under Virginia law, the damages recoverable in an action for legal malpractice depend upon the nature of the injury caused by the malpractice. Hence, McClung must show with reasonable certainty the damage she sustained as a consequence of Smith's failure to secure an accounting from Lowe for his disposition of McClung's separate funds.

It is those separate funds that were amenable to an accounting because of the agreement and the special relationship which created a fiduciary duty in Lowe. The corollary of this proposition, of course, is that McClung has not shown entitlement to an accounting from Lowe for his handling of her separate funds not brought with-

in the reach of the fiduciary duties thusly created.^{FN8}

FN8. Notwithstanding that Lowe handled the family finances and McClung's separate assets throughout the marriage and that McClung executed a general power of attorney in Lowe's favor in 1978 (which she claims verbally to have revoked in 1985), the proof does not establish, until 1983, either an agreement on how McClung's separate funds would be used or the coalescence of circumstances found to have created the special relationship which imposed a fiduciary obligation, even if no agreement had existed.

On this record, therefore, the focus of an accounting would be on: (1) the loans from McClung's grandparents and the Anthony Oil trust disbursement for purchase of the Sea Dunes house, the principal total of which was \$103,750; and (2) the loans from LNB for the acquisition and construction of the Inlet Drive lot and house the principal total of which was \$340,000. It therefore is necessary to determine what, of these sums, McClung lost.

*1403 1. The Sea Dunes Transaction

[30] The undisputed record is that McClung's inheritance from her grandfather was charged \$104,572.88 to repay the principal and interest on the Anthony loans for the Sea Dunes house. In an accounting, it would have been Lowe's burden to account for the separate funds entrusted to him for the purchase of the Sea Dunes house. Considering that fundamental principle and the facts in this record, Lowe would not have been able to discharge his burden. Lowe admitted misappropriation of \$48,000 to pay his separate credit card debt. It appears that \$21,000 was used to service the Cooperative mortgage obligation and that \$34,129.68 was applied originally to the purchase of the Sea Dunes house. However, it also appears that the equity in the Sea Dunes house was not used to satisfy the Anthony loans or was otherwise returned to McClung. Of the sale price, \$186,146.27, Cooperative received \$113,296.41; Lowe's personal line of credit was satisfied with a payment of \$49,523.45; taxes, fees and commissions consumed \$10,791.50; and a check for \$12,484.71 was is-

sued to Lowe and McClung (PEx. 130). Lowe could not explain the disposition of that sum. Nor was Lowe able to explain disposition of the Anthony Oil trust disbursements (\$8,750). McClung therefore has proved damage in the amount of \$113,322.88 attributable to Smith's malpractice in failing to secure an accounting respecting the Sea Dunes transaction.

2. The Inlet Drive Transaction

The record likewise establishes that Lowe received \$340,000 in LNB loans secured by McClung's separate funds for the Inlet Drive transaction. McClung is entitled to an accounting of those separate funds. It, therefore, is necessary to assess how much, if any, of these funds McClung lost.

First, McClung's interest in her grandfather's testamentary trust was assessed \$40,000 toward satisfaction of the \$40,000 LNB loan. Second, \$60,000 of McClung's interest in that trust was applied toward curtailment of the \$200,000 LNB loan. Third, a total of \$83,354.55 in McClung's trust assets were applied to further curtail the LNB loans. This loss totalled \$183,354.55.^{FN9} This amount also would have been amenable to the remedy of an accounting.

FN9. The balance of the LNB loans were satisfied by payment of \$50,000 by Lowe's law firm and by \$145,634.53 which came from the equity in the sale of the Blue Ridge Road house. McClung understood that the equity in the Blue Ridge Road house was to be applied to the purchase of the Inlet Drive house. Therefore, she agreed to that use of her marital property and it would not be subject to an accounting. McClung did not agree to the payment by the law firm, however, she has made no claim to any part of this payment.

The record establishes that the LNB loan proceeds totalling \$340,000, Lowe wrote checks to himself totalling \$164,500 and that Lowe spent \$17,811.17 for an automobile titled in his law firm's name, but used exclusively by him. This misappropriation of McClung's separate funds aggregated \$182,311.17, leaving \$1,043.38 untraced. Considering that the burden would

have been on Lowe to have accounted for funds entrusted to him, McClung has established that Lowe would have been held accountable for the entire loss which she sustained in the Inlet Drive transaction.

However, it appears from the record that the builder of the Inlet Drive house actually received \$60,000 from the \$200,000 LNB loan and \$25,000 from the \$100,000 LNB loan. Thus, Lowe applied these proceeds to their intended purpose and, in an accounting would have received credit for having done so. Further, McClung received the Inlet Drive in equitable distribution. Hence, the loss should be reduced by \$85,000, the amount which the record reflects was paid to the builder and which is therefore reflected in the value of the property which McClung received in the distribution.

Taking into account the demonstrated misapplication of separate funds and the burden which Lowe would have had in an action for accounting, McClung has discharged her burden to prove that, in an accounting, she would have been entitled to \$211,677.43^{FN10} from Lowe by virtue of breach of fiduciary duty in connection with the LNB loans and *1404 the Inlet Drive transactions. Hence, she has carried the burden of proof on the damage issue in this component of her malpractice claim.

FN10. This is the sum of \$104,572.88, \$8,750.00 and \$98,354.55 (\$183,354.55-\$85,000).

II

SMITH'S REPRESENTATION OF MCCLUNG IN THE DIVORCE PROCEEDINGS

Following the separation on March 26, 1989, the relationship between Lowe and McClung continued to worsen and, in November 1989, Lowe instituted divorce proceedings. McClung retained Smith to represent her in those proceedings. Smith's representation of McClung in the divorce proceedings prompted several allegations of malpractice all of which were either admitted or proved by a preponderance of the evidence.

Failure To Respond To Requests For Admissions

[31] It is undisputed that Smith neglected to file

timely responses to the First and Second Requests for Admissions filed by Lowe. Although the First Requests would have been admitted, the record shows that McClung had provided information which would have permitted substantive denials of each admission sought by the Second Request (PEx. 20; PEx. 190; Smith Dep., p. 23; Tr. pp. 320-23). Smith's post-trial brief admits that this was malpractice.

As a result of Smith's neglect, McClung was unable, as a matter of law, to challenge the propositions asserted in the admissions. That meant that she was:

- (1) Unable to contest that Lowe contributed more than half of all funds that were spent on the acquisition of the Inlet Drive property;
- (2) Unable to contest that Lowe contributed more than half of the funds spent on improving the Blue Ridge house during the marriage;
- (3) Unable to argue that Lowe had engaged in conduct which amounted to constructive desertion, cruelty, adultery, actual desertion or any other fault, which under the law would have permitted McClung to obtain a divorce; and
- (4) Unable to argue that Lowe had misappropriated or misapplied any of McClung's separate funds.

Without question this admitted professional defalcation by Smith handicapped in a material way McClung's ability to deal with the divorce action and the ultimate disposition of the property in the equitable distribution proceedings.^{FN11}

FN11. The Answer and Cross-Bill filed in the divorce proceedings contains all of these assertions and there was evidence to support each of them. McClung may not have prevailed on all of them, but the inability to pursue them at trial precluded consideration of any of these points. That inability is itself a form of damage because it deprived McClung of information that would have been useful in the divorce proceedings and in negotiating a settlement.

Failure To Investigate Lowe's Alleged Infidelity

McClung reported to Smith that she had reason to believe that Lowe had committed adultery. Smith admits that he did not investigate the information he received from McClung. (Tr. 359; PEx. 190; Smith Dep., p. 44). However, the record here fails to establish that reasonable inquiry would have enabled McClung to prevail on this issue.

Failure To Conduct Discovery

[32] Smith did not file formal discovery until so late in the proceedings that the state court excused Lowe from any obligation to respond to it. (Tr. 446-47; PEx. 56). Smith's post-trial brief admits that this was malpractice. And, of course, it was.

Smith's failure to conduct discovery left him wholly unable to address the issues raised by Lowe at the equitable distribution hearings, precluded any meaningful impeachment of Lowe who was highly susceptible to impeachment, precluded Smith from assessing the value of Lowe's law practice, and kept Smith from understanding the significance of evidence in his possession. All of this rendered Smith's representation of McClung utterly ineffective and caused McClung actual damage.

[33] At trial, Smith sought to explain away this fundamental failure of duty by *1405 claiming that he had relied on informal discovery. Without doubt, there are instances when it is professionally acceptable to rely on informal discovery rather than to institute formal discovery. However, for several reasons, this was not one of them.

First, Smith told McClung in July 1990 that he was going to take Lowe's deposition (DEx. 13). Second, at trial, Smith was not able to identify the informal discovery which he had pursued, except to say that he reviewed financial records in Lowe's law office. Nor could Smith explain how the results obtained in informal discovery, whatever that may have been, justified failure to proceed formally. In fact, the indelible impression left by Smith's trial testimony on this point was that he was not telling the truth. That impression was confirmed by the post-trial affidavit of Lowe's secretary which shows that Smith never examined financial re-

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cords of any sort in Lowe's law office (Wangenstein Aff., ¶¶ 5-8).

Finally, it was obvious from the obstinate, irrational, conflicting and contentious positions being taken by Lowe that informal discovery would not adequately protect McClung's interests. (PEX. 1-82; PEX. 100-110).

Failure To Value Lowe's Law Practice As A Marital Asset

[34] In December 1987, when he applied for the NCNB line of credit, Lowe represented that his law practice had a value of \$150,000. (PEX. 132). In the divorce proceedings, Lowe took the position that the law firm had a negative value of \$250,000. Smith never explored the issue by formal discovery or otherwise. Nor did Smith seek expert assistance in valuing this asset. Instead, he simply accepted Lowe's view that the law firm had a negative value. As a result, Smith offered no evidence at the equitable distribution hearings of the value of Lowe's law practice. McClung's expert, Donald Lemons, established that this was malpractice.

It appears that, at the time of the divorce proceedings, Smith did not understand that the law practice could be a marital asset. For example, Smith never introduced evidence of McClung's contributions to the law practice and the guarantees she had provided for its debts. Nor did Smith list as an appeal point, the state court's error in concluding that the law firm was not marital property. At deposition in this case, Smith conceded that, in 1990, there was support in the decisional law, for the proposition that Lowe's law practice was marital property.

The record at trial established that, as of December 31, 1989, the law practice had a fair market value of \$152,000. (PEX. 170). Louis C. Einwick, Jr., an expert in valuing professional corporations and associations, such as law firms, testified that the so-called "hard assets" had a value of \$152,000^{FN12} and a goodwill value of \$36,000. The record does not support a goodwill value, but it does permit a finding that the "hard asset" value was \$152,000 as of December 31, 1989.

FN12. "Hard assets" are furniture, equipment,

supplies, cash and accounts receivable. Einwick originally valued the hard assets at \$171,000 but had to deduct an account receivable of \$19,000 that was solely owned by Lowe's partner.

At the trial of this action, Smith and the law firm offered no evidence of the law firm's value. Instead, they defended that issue principally on the theory that McClung's evidence was insufficient to carry her burden because the valuation date was March 26, 1989 and that there was no evidence of value on that date.^{FN13} This, they say, precludes a recovery on this issue.

FN13. They also argue that the debt from the "Garwood case" substantially reduced the value of the law firm. The preponderance of the evidence and Einwick's report establishes that by 1989 the so-called "Garwood debt" did not have that impact.

The argument ignores the fact that Lowe himself valued the law practice at \$150,000 in December 1987. Nor does it take into account that the record fails to show the value of the law firm was materially different in March 1989 than it was in December 1989. Taken as a whole, the preponderance of the evidence supports McClung's position, as explained by Einwick, that the "hard assets" of the law firm should have been, and but for Smith's neglect would have been, valued at *1406 \$152,000 in the equitable distribution proceedings.

Failure To Prepare For, Or Perform Adequately During, The Equitable Distribution Hearing

Smith's failure to conduct discovery, his failure to investigate the facts, his failure to appreciate the significance of the information and documents in his possession and his failure to prepare affected adversely his ability to represent McClung in the equitable distribution hearings. Those proceedings were in two installments, one on September 27, 1990 for the purpose of classifying property; the other on November 16, 1990 for the purpose of valuing the Inlet Drive house. Smith's performance on each occasion was abysmal. And, in each instance, Smith's incompetence cost McClung dearly.

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[35][36] First, Smith failed to arrange for the services of a court reporter at the September hearing. Smith and the law firm correctly contend that the standard of care does not always require retention of a court reporter. However, it is not acceptable professional conduct to neglect to provide for a record in a bitterly contested divorce case, where, as here, the adverse spouse is contentious and asserting irrational positions, there are funds to provide for a transcript of trial proceedings and there is the reasonable likelihood of an appeal.

[37] Second, Smith failed to prepare McClung for the September hearing.^{FN14} McClung testified that, although Smith met with her shortly before the hearing, he did not brief her on what to expect. Nor did he review with her the topics about which she was to testify. That is malpractice.

FN14. The absence of a transcript necessarily requires reliance on testimony and court records to ascertain what actually occurred at the September hearing.

Apparently, the state court judge refused to allow testimony in the traditional form, requiring narrative summary testimony instead. It may lie within the discretion of a state court judge to require presentation of the evidence in that form, but the ability of a client to present the facts in such a circumstance requires at least as much preparation as does a traditional examination. McClung was prepared for neither and, according to her testimony in this case, she was unable to relate her side of the issues in the divorce cases. Smith unconvincingly asserted that his preparation of McClung was greater than she claims, but he was unable to recite any particulars to support his version of that issue.

[38][39] The briefs filed in the improperly perfected appeal establish that the state trial judge also refused to permit cross-examination of witnesses after they rendered their narrative summaries. Apparently, Smith objected to this deprivation which, of course, does not lie within the discretion of any court. This error would have required reversal, but Smith's failure to perfect an appeal deprived McClung of the ability to secure that result.

Lowe described Smith as "befuddled" at the September equitable distribution hearing. According to Lowe:

Mr. Smith did not probe at all, he did not ask, he did not seem prepared to inquire about financial matters, about the value of my law firm, about value of the property, source or derivation of funds, questions that would lead to a proper basis for an award of lump sum spousal support or periodic spousal support.

(PEx. 189, part 1, pp. 12-13).

The purpose of the November hearing was to determine the value to be placed on the Inlet Drive house for equitable distribution. Smith's performance at that hearing also was inadequate and was extremely damaging to McClung.

[40] Smith arranged for an appraisal and offered the testimony of an expert that the value was \$360,000. However, Smith took no discovery of Lowe's expert or Lowe on this issue, even though, from the text of a letter sent by Lowe to the state court judge on September 30, 1990 (PEx. 111) and from correspondence between Lowe and Smith in October (PEx. 112; PEx. 113), Smith knew that Lowe intended to claim a much higher value. At the November hearing, Lowe offered*1407 an appraisal by Hockenyos Appraisal Service setting the value at \$740,000.

However, because Smith had never examined the records respecting the purchase and financing of the Inlet Drive house, he was unprepared and, as a result, was unable to show that on January 13, 1988, Hockenyos had appraised the Inlet Drive house for First Southern and had established the value at \$430,000 (PEx. 136; PEx. 190; Tr. 231-33, 431-33, 434-39; Smith Dep., pp. 77-78).^{FN15} Smith clearly could have ascertained the existence of the previous Hockenyos appraisal either by reviewing the files respecting the permanent financing or by conducting discovery. Smith inexcusably did neither.

FN15. The record indicates that the construction cost for the Inlet Drive house may have

been slightly more than \$600,000. The cost of construction apparently was increased because of changes and other factors that would not be reflected in market value. The Hockenyos appraisal for First Southern Mortgage was made at the end of construction and updated at closing which meant that the cost of construction would have been available to Hockenyos as the appraisal was updated.

Nor did Smith offer into evidence a letter written to him by Lowe on September 14, 1989, in which he, as an owner of the property who is competent to testify as to value under Virginia law, represented that the value of the Inlet Drive property was \$450,000. (PEx. 101; PEx. 190; Smith Dep., p. 73). The same letter reflected Lowe's view that "[n]o one in their right mind thinks that the house is worth anything like \$800,000." (PEx. 101).

Finally, during the hearing Lowe made an offer to purchase the Inlet Drive house for \$700,000, representing that a group of investors would back his offer when the state trial judge questioned whether Lowe had the wherewithal to perform. Notwithstanding that lead and the earlier letter to the judge on September 30 wherein Lowe claimed to be penniless, Smith was not able to cross-examine Lowe to determine whether the investor group even existed (Tr. 232-34) (which, from the limited record available here, it likely did not). The extent of Smith's ineptitude is exemplified by the fact that he was surprised by this development, notwithstanding that correspondence between him and Lowe in October, 1990 (PEx. 112; PEx. 113) made reference to an investor group and advanced a tentative offer of \$700,000 which Smith countered with a demand of \$800,000. (PEx. 113).

In sum, Smith's performance in the November hearing was completely inept. His abject failure in representing McClung permitted the state court judge to enter an order setting the value of the Inlet Drive house at \$675,000, determining that the equity was \$377,000 and entering a judgment against McClung in the amount of \$188,500, one-half of the equity. The record may have permitted that result, but the truth did not. This unjust

result was wrought by Smith's failure to investigate, failure to take discovery, failure to prepare for the hearing, and failure to use information in his possession or otherwise readily available.

Smith's Failure To Seek Interim Spousal Support

[41] McClung informed Smith that she needed financial support while the divorce proceedings were pending. Smith, however, failed to request interim spousal support. This, according to McClung's expert witness, Donald Lemons, was negligence.

Smith contends that a hearing for pendente lite support was held, but that the request was denied. The record does not support that assertion.

McClung testified that Smith never mentioned such a hearing to her. The state court record does not contain a petition for interim support on McClung's behalf. Smith could not recall whether he offered evidence of McClung's need for support or whether McClung was given notice of the hearing. Smith's time records contain no entries reflecting preparation for, or participation in, such a hearing. Nor does the state court record reflect an order denying an application for interim spousal support. Considering these facts and Smith's demeanor while testifying, the court declines to credit Smith's version of events and finds that there was no ^{FN16}*1408 application for, or hearing on, temporary support.

FN16. Smith's own account of this supposed hearing, even if credited, would not alter the conclusion that his representation of McClung on this issue was inadequate. Smith says that the hearing was conducted only on the basis of statements of the financial condition of the parties. Considering the testimony of both experts and the record, McClung's side of this issue could not have been presented adequately on such a limited basis.

The period between separation and divorce was 14 months. During that period, McClung was required to pay the mortgage payment on the Emerald Isle house in the amount of \$2,000 a month, which she paid out of her separate income and borrowings from her relatives.

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As a consequence, McClung sustained a loss of \$28,000. And, she was required to borrow \$50,000 to avoid foreclosure during the pendency of the divorce proceedings.

Failure To Perfect An Appeal

[42][43] It is undisputed that Smith failed to perfect the appeal he initiated on McClung's behalf and that, as a result, the appeal was dismissed. Smith's performance throughout the equitable distribution proceedings was so inept that an appeal may not have succeeded but for the state court judge's refusal to allow cross-examination. That is such a fundamental deprivation of a right, with such far reaching consequences, that it would have required reversal and rehearing. Although, Smith preserved this point for appeal, his admitted malpractice in failing to perfect the appeal forfeited the opportunity to take advantage of it.

In sum, Smith's performance as a lawyer in the divorce

Inlet Drive house	\$450,000
Law Firm	152,000
<u>Personal Property</u>	50,000 (undisputed)
Total Gross Marital Estate	\$652,000
<u>Less Marital Debt</u>	298,000 (the amount owed on the Inlet Drive house)
Net Marital Estate	\$354,000

Assuming, as both experts testified, that the state court judge would have divided the property equally, each party would have been entitled to receive property or cash in an amount of \$177,000.

McClung was in possession of the Inlet Drive house which had a net equity of \$152,000 and she was in possession of one-half of the personal property which was worth \$25,000. Lowe was in possession of his law firm which also had a net value of \$152,000 and one-half of the personal property, worth \$25,000. Thus, it would have been unnecessary to make a monetary award to either McClung or Lowe to achieve equitable distribution under the equal allocation formula determined by the state

and dissolution proceedings was completely inadequate. McClung could have done no worse in those proceedings if she had been unrepresented. In fact, because of Smith's incompetence, she was unrepresented for all practical and legal purposes.

The Consequences Of The Malpractice

[44] Smith's malpractice pervaded every aspect of the divorce proceedings and, as a result, McClung suffered an adverse judgment in the amount of \$188,500, was deprived of interim spousal support and attorney's fees and paid the law firm legal fees which, for all practical purposes, were wasted.

If McClung had been competently represented in the equitable distribution proceedings, the total marital estate would have been valued as follows:

court judge, an allocation challenged by neither McClung or Smith. Instead, because of Smith's malpractice, a judgment was entered against McClung in the amount of \$188,500.

McClung would have been entitled to interim spousal support of \$28,000. As a result of Smith's malpractice, she received nothing. Moreover, she was required to borrow \$50,000 to avoid foreclosure. Interim support would have permitted her to incur one-half of that obligation. Thus, the damages for this act of malpractice should be increased by \$25,000 for a total of \$53,000.

Finally, McClung paid the law firm \$16,020 in at-

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torney's fees. McClung is entitled to a refund of all of the attorney's fees because the representation she received from Smith was wholly inadequate. It would be unconscionable to permit the law firm to retain any *1409 of the funds McClung paid for such grossly inadequate representation.

In sum, Smith's malpractice in the dissolution action resulted in damages to McClung in the amount of \$257,520.

Smith argues that the decision of the Supreme Court of Virginia in *Allied Products v. Duesterdick*, 217 Va. 763, 232 S.E.2d 774 (1977) precludes McClung from claiming damage from the \$188,000 judgment against her because she has not discharged that judgment. *Duesterdick* does not apply here. First, McClung actually made a partial payment to Lowe of \$60,000. (PEx. 187; PEx. 188). Second, Lowe has recorded the judgment, placed a lien against McClung's property and she was able to forestall foreclosure only upon payment of \$60,000 and an agreement that he will receive first dollar out of any proceeds in this action. *Id.* For these reasons, *Duesterdick* does not apply here.

III

TOTAL DAMAGES AND INTEREST

As explained in section I, McClung suffered damages in the amount of \$211,677.43 as a consequence of Smith's malpractice in failing to institute an accounting. As a consequence of Smith's malpractice in the dissolution action, McClung suffered damages in the amount of \$257,520. Her total damages, therefore, are \$469,197.43.

[45] McClung claims entitlement to prejudgment interest at the rate of 8% for the period March 1, 1989 through July 31, 1991 and at 9% thereafter. McClung's claim for prejudgment interest is based on Va.Code Ann. § 8.01-382 which provides that, in an action at law or a suit in equity, a jury, or court sitting without a jury "may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence." Prejudgment interest is not an element of damages, but, instead, is a statutory award for the delay in the payment of money due, *Na-*

tionwide Mut. Ins. Co. v. Finley, 215 Va. 700, 214 S.E.2d 129 (1975), or compensation for the loss of use of money. *Marks v. Sanzo*, 231 Va. 350, 345 S.E.2d 263 (1986).

[46][47][48][49] State law controls entitlement to prejudgment interest in diversity cases and the determination of the rate of prejudgment interest is generally a matter entrusted to the discretion of the district court, *United States v. Dollar-Rent-A-Car Systems, Inc.*, 712 F.2d 938 (4th Cir.1983). However, that discretion is circumscribed by the legal interest rate proscribed by state law. *J.W. Creech, Inc. v. Norfolk Air Conditioning Corp.*, 237 Va. 320, 377 S.E.2d 605 (1989). An award of interest is permissible, even if the claim is unliquidated, *Beale v. King*, 204 Va. 443, 132 S.E.2d 476 (1963), so long as there is a rational basis in the evidence upon which to fix the date when interest should begin to run. Nor, contrary to the defendant's argument, is there an exception in the language of the statute placing beyond its reach cases in which there exist bona fide legal disputes. *Gill v. Rollins Protective Services Co.*, 836 F.2d 194 (4th Cir.1987).

Applying these principles to the factual record in this action, it is not appropriate to award prejudgment interest for the periods, or at the rates, requested by McClung. The record, however, supplies sufficient information on which to calculate appropriate prejudgment interest.

[50] First, the court concludes that interest ought to be calculated from January 1, 1991. The record establishes that the equitable distribution proceedings were concluded on November 16, 1990 and that the final decree was tendered to the state court judge on November 30, 1990. It is probable that any accounting proceedings initiated by McClung would have been resolved in tandem with the equitable distribution proceedings once Lowe had filed for divorce. Thus, it is likely that those proceedings, whether conducted separately or upon consolidation, would have been concluded at the same time as the dissolution proceedings to avoid the prospect of inconsistent judgments or an unfair result to either party. The judgment would have become final twenty-one days after entry. Allowing time for reflection fol-

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lowing delivery of the order November 30, 1990 and considering the holiday schedule, it is appropriate to fix January 1, 1991 as the *1410 date upon which prejudgment interest should begin to accrue.

[51] For all of that period until now, the prime interest rate has been less than the judgment rate permitted by Virginia law. Considering the underlying purposes of the prejudgment interest contemplated by Va Code Ann. § 8.01-382, it seems reasonable to establish the average prime interest rate in each year from 1991 to date as the appropriate rate for the calculation of interest. That rate was: 8.46% in 1991; 6.25% in 1992; 6.00% in 1993 and 7.02% through December 20, 1994.
FN17

FN17. Federal Reserve Bulletin, Financial Markets, § 1.33 PRIME RATE CHARGED BY BANKS, Short-Term Business Loans, November 1994. This bulletin is in the file. The prejudgment interest for 1991, 1992 and 1993 is \$39,694.10, \$29,324.84 and \$28,155.85, respectively. From January 1 through November 30, 1994 and for December 1 through 20, 1994, the prejudgment is \$30,192.85 and \$1,804.00, respectively.

CONCLUSION

For the foregoing reasons, McClung is entitled to judgment in her favor in the amount of \$469,197.43 in damages and \$129,171.64 in prejudgment interest, a total of \$598,369.07. Judgment shall be entered in McClung's favor in that amount and post-judgment interest thereon shall run at the statutory rate from December 21, 1994 until the judgment is paid.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

E.D.Va., 1994.
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89 F.3d 829, 1996 WL 334470 (C.A.4 (Va.))
 (Table, Text in WESTLAW), Unpublished Disposition
 (Cite as: 89 F.3d 829, 1996 WL 334470 (C.A.4 (Va.)))

H

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.

United States Court of Appeals, Fourth Circuit.
 Constance McCLUNG, Plaintiff-Appellee,
 v.
 William Massie SMITH, Jr.; Gilliam, Scott &
 Kroner, P.C., Defendants-Appellants.
 Constance McCLUNG, Plaintiff-Appellant,
 v.
 William Massie SMITH, Jr.; Gilliam, Scott &
 Kroner, P.C., Defendants-Appellees.

Nos. 95-1106, 95-1187.
 Argued March 4, 1996.
 Decided June 19, 1996.

E.D.Va.

AFFIRMED IN PART AND REMANDED IN PART.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge. (CA-93-549). ARGUED: William DeLaney Bayliss, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, Richmond, Virginia, for Appellants. Thomas E. Albro, TREMBLAY & SMITH, L.L.P., Charlottesville, Virginia, for Appellee. ON BRIEF: Robert Temple Mayo, WILLIAMS, MULLEN, CHRISTIAN & DOBBINS, Richmond, Virginia, for Appellants. John K. Taggart, III, Patricia D. McGraw, TREMBLAY & SMITH, L.L.P., Charlottesville, Virginia, for Appellee.

Before MURNAGHAN and ERVIN, Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by desig-

nation.

OPINION

PER CURIAM:

*1 The instant appeal concerns an attorney malpractice action brought in federal district court under diversity jurisdiction by Constance McClung, a client, against William Massie Smith, Jr., her attorney, and his law firm, Paxson, Smith, Gilliam, & Scott P.C. (collectively "the defendants").^{FN1} McClung first retained the services of Smith to conduct an accounting of alleged misuse of her separate assets by her then husband, John Lowe, and subsequently, to represent her in a divorce from Lowe.

FN1. Only days before oral argument, the court was informed that Smith had died since the district court trial. As of oral argument before this court, no one had been appointed to represent his interests. The court has received no filing indicating that a personal representative has been appointed in order that he or she could be substituted for Smith pursuant to Rule 43 of the Rules of Appellate Procedure. The parties represented to the court at oral argument, however, that Smith's personal estate would not be subject to any judgment. Hence, Smith's estate will not be affected by this opinion.

McClung filed a lawsuit against Smith and his law firm alleging malpractice for failing to obtain an accounting and negligent misrepresentation in her divorce. After a non-jury trial, the district court in a thorough and well-reasoned opinion ruled that the defendants had committed malpractice in both the accounting matter and divorce proceeding. The district court awarded damages of \$211,677.43 for the failure to obtain an accounting and \$257,520 for malpractice in the divorce proceeding. The district court also awarded McClung \$129,171.64 in pre-

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judgment interest calculated with the average prime interest rates from January 1, 1991 to the date of judgment, December 20, 1994, and postjudgment interest at the statutory rate from the date of judgment until it is paid. The defendants have appealed. McClung has cross-appealed arguing that the district court erred in calculating her prejudgment interest when it applied the average prime interest rate instead of the Virginia statutory rate of interest.

The defendants contend that they did not commit malpractice as to the accounting because McClung had no legal entitlement to an accounting from Lowe. They further argue that the district court committed multiple errors in calculating damages for malpractice in the divorce proceeding. Based on our extensive review of the record and our consideration of the parties' arguments, we find no error in and, therefore, adopt the district court's conclusions, with the exception of the interest rate applied to the award of prejudgment interest.^{FN2}

FN2. We wish to clarify one matter. The defendants place a great deal of reliance on the argument that no accounting was due because the funds Lowe spent were marital and were used to pay off marital debts. We find that regardless of whether the funds he spent became marital funds through commingling or remained separate and regardless of whether the funds were used to pay off marital or separate debt, that argument misses the point that Lowe also misused his wife's separate funds, which were entrusted to him under a fiduciary relationship. He did not use the separate funds for the limited purposes for which McClung entrusted them to him and, as a result, McClung's separate funds were diminished.

State law governs the award of prejudgment interest in diversity cases. *United States v. Dollar-Rent-A-Car Systems, Inc.*, 712 F.2d 938, 940 (4th Cir.1983). The Virginia Code allows a jury or a court sitting without a jury to award prejudgment interest in an action at law or a suit in equity.

Va.Code Ann. § 8.01-382 (Michie 1992). McClung requested prejudgment interest at the statutory rate of 8% from March 1, 1989 to July 31, 1991, and 9% thereafter. The district judge, however, determined that interest should start only as of the date any judgment from the divorce proceedings would have become final, approximately January 1, 1991.^{FN3} He further determined that the actual interest rate was entrusted to the discretion of the court, although circumscribed at its upper limit by the statutory rate. He, therefore, applied the average prime interest rate, which for most of the relevant time period was less than the Virginia statutory rate applicable to prejudgment interest.

FN3. McClung has not raised the date the judge chose as a grounds for appeal. Thus, we adopt January 1, 1991 as the date from which prejudgment interest should begin to run.

*2 In applying the average prime interest rate, the district judge relied on the Fourth Circuit's holding in *Dollar Rent-A-Car* that where federal law applies, the determination of the rate of interest is a matter left to the discretion of the trial court and not determined by state law. 712 F.2d at 941. In *Dollar Rent-A-Car*, however, the court was not applying state law because it was not sitting with diversity jurisdiction. *Id.* Here, jurisdiction is based on diversity of citizenship. Thus, Virginia state law clearly applies. Indeed, the district judge awarded prejudgment interest pursuant to the Virginia Code § 8.01-382. But, he failed to apply the statutory rate of interest provided for in the Virginia Code at § 6.1-330.54 of 8% per annum through July 31, 1991, and 9% per annum thereafter. Va.Code Ann. § 6.1-330.54 (Michie 1993). Instead, the district judge applied the average prime interest rate, which, as previously stated, was less than the statutory rate for most of the relevant time period. The district court erred, as a matter of law, by not applying the statutory rate of interest. On remand, the district court should recalculate the prejudgment interest using the Virginia statutory rate of interest.

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(Table, Text in WESTLAW), Unpublished Disposition
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Accordingly, we

AFFIRM IN PART AND REMAND IN PART.

C.A.4 (Va.),1996.
McClung v. Smith
89 F.3d 829, 1996 WL 334470 (C.A.4 (Va.))

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H

Supreme Court of Idaho,

Boise, January 1991 Term.

Frances McDONALD, Plaintiff-Appellant

v.

Robert C. PAINE, Parry Robertson, Daly & Larson,
a partnership, and Does I through V, fictitiously
named, Defendants-Respondents.

No. 18950.

April 29, 1991.

Client brought legal malpractice action against her attorney alleging negligence in handling of her divorce. The District Court of the Fourth Judicial District, County of Ada, Robert M. Rowett, J., granted summary judgment in favor of attorney and appeal was taken. The Court of Appeals reversed. On appeal, the Supreme Court, McDevitt, J., held that: (1) any income on husband's inherited portion of trust would be community property, and (2) material fact issues existed as to whether there was any income on inherited portion of trust.

Opinion of Court of Appeals vacated; decision of district court reversed and matter remanded.

West Headnotes

[1] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Material issues of fact existed as to whether there was any income on husband's inherited portion of trust, which would be community property, precluding summary judgment for divorce attorney in client's legal malpractice action alleging that at-

torney failed to protect her community property interest in trust income.

[2] Husband and Wife 205 ⇌ 249(2.1)

205 Husband and Wife

205VII Community Property

205k249 Property Acquired During Marriage in General

205k249(2) Particular Property or Circumstances of Acquisition

205k249(2.1) k. In General. Most Cited Cases

(Formerly 205k249(2))

Husband's mere expectancy of right to possess and enjoy portion of trust corpus sometime in future was not interest to which community property interest could attach.

[3] Husband and Wife 205 ⇌ 251

205 Husband and Wife

205VII Community Property

205k251 k. Property Acquired by Devise, Bequest, or Inheritance. Most Cited Cases

Percentage of trust corpus that husband inherited upon death of his father was husband's separate property where husband transferred into trust his own separate property consisting of percentage of family business in return for expectancy of right to possess and enjoy percentage of trust corpus sometime in the future. I.C. § 32-906.

[4] Husband and Wife 205 ⇌ 251

205 Husband and Wife

205VII Community Property

205k251 k. Property Acquired by Devise, Bequest, or Inheritance. Most Cited Cases

Any income on husband's inherited portion of trust was community property, even though not received until after divorce, where husband inherited noncontingent right to percentage of trust corpus immediately upon death of his father and prior to divorce and, at that time, trustee was under legal

obligation to render accounting of trust assets to trust beneficiaries and to distribute to husband his percentage of trust corpus.

[5] Husband and Wife 205 ⇌ 249(3)

205 Husband and Wife

205VII Community Property

205k249 Property Acquired During Marriage in General

205k249(2) Particular Property or Circumstances of Acquisition

205k249(3) k. Insurance and Retirement Benefits. Most Cited Cases

Husband and Wife 205 ⇌ 249(5)

205 Husband and Wife

205VII Community Property

205k249 Property Acquired During Marriage in General

205k249(5) k. Time When Character Determined; Continuance of Character. Most Cited Cases

Pension benefits which are earned during marriage are community property, even if not received until after marriage.

[6] Husband and Wife 205 ⇌ 249(3)

205 Husband and Wife

205VII Community Property

205k249 Property Acquired During Marriage in General

205k249(2) Particular Property or Circumstances of Acquisition

205k249(3) k. Insurance and Retirement Benefits. Most Cited Cases

Term life insurance policy, paid for with community funds during marriage, is community property.

****260 *726** Ellis, Brown, Sheils & Steele, Boise, for plaintiff-appellant. Stephen C. Brown argued.

Quane, Smith, Howard & Hull, Boise, for defendants-respondents. Thomas J. Ryan argued.

McDEVITT, Justice.

This is the saga of a woman who has spent over fourteen years in her quest to obtain what she perceives as her share of the marital estate. Having been unsuccessful in her efforts to obtain her desired relief against her ex-husband, Frances McDonald now seeks relief against the attorney who represented her in the divorce.

On March 3, 1947, Frances McDonald and Ray Barlow exchanged vows and became man and wife. On June 16, 1951, Nellie Barlow, Ray's mother, passed away. In her will, Nellie Barlow bequeathed to her son Ray, 20% of the family business holdings which included ranches in Idaho, Oregon, and Washington.

In 1963, the Barlow family patriarch, K.C. Barlow, began to fail in health. To insure a smooth transition of the family business, K.C. Barlow established the K.C. Barlow Revocable Trust on July 31, 1963. Into this trust K.C. Barlow transferred all of his business holdings. Ray and Frances Barlow also irrevocably transferred Ray's 20% inherited interest in the family business into this trust. In consideration of this transfer, the trust guaranteed Ray Barlow 30% of the trust corpus upon the death of K.C. Barlow.

On December 22, 1964, K.C. Barlow died. Upon the death of his father, Ray Barlow became irrevocably entitled to 30% of the K.C. Barlow trust corpus. This interest could not be diminished nor enhanced, his interest was subject only to liquidation of the trust assets, payment of expenses, and the eventual distribution of proceeds by the trustee.

While the trust instrument instructed the trustee to liquidate the trust as soon as possible, the trustee's efforts to marshal assets, liquidate those assets, and then make the mandated distributions took well over a decade to accomplish. During this time, the trustee managed the assets, received income, and paid necessary expenses.

It was also during this period that the marriage

of Ray and Frances Barlow came upon hard times. On October 22, 1976, Ray Barlow filed for divorce from his wife.

Shortly after the divorce was filed and was still pending, the trustee finally began making distributions as required by the trust instrument. On December 29, 1976, **261 *727 the trust made its first distribution of approximately \$160,000 in cash and other consideration, to Ray Barlow. The divorce was granted on September 2, 1977, dissolving the marriage of Ray Barlow and Frances McDonald. After this date, the trustee continued to make distributions to Ray Barlow totaling approximately \$315,000.

After the divorce was final and upon learning that she may have given away a substantial property interest, Frances McDonald filed an equitable action against Ray Barlow alleging fraud to justify modifying the divorce decree. The trial court ruled that a portion of the \$160,000 distribution received prior to the divorce was community property and modified the decree. The Idaho Court of Appeals FN1 reversed the trial court's decision and held that the divorce decree was *res judicata* as to the community property questions and that there was an insufficient showing to support a determination of fraud.

FN1. *McDonald v. Barlow*, 109 Idaho 101, 705 P.2d 1056 (Ct.App.1985).

[1] The present action was filed on August 28, 1979, and held in abeyance pending the equitable action against Ray Barlow. After the resolution of the appeal against her ex-husband, the plaintiff pursued this action against her attorney, Robert Paine. McDonald claims that she relinquished her property rights to her ex-husband's family trust on the advice of her attorney. Frances McDonald asserts that her attorney failed to inquire into the facts surrounding the trust, nor did he request a copy of the trust instrument from Mr. Barlow. Thus, Frances McDonald claims that her counsel failed to protect her community property interest in distributions made

by the trust to Ray Barlow both before and after the divorce.

The trial court granted summary judgment in favor of the defendant and his law firm. The trial court determined that the distributions from the trust were the separate property of Ray Barlow so there was no damage in failing to seek more information concerning the trust. The Court of Appeals reversed and determined that part of the \$160,000 distribution received by Mr. Barlow during the pendency of the divorce proceedings was community property, but that any distributions received after the divorce were the separate property of Mr. Barlow.

The sole issue we confront in this appeal is whether the income, if any, earned by the trust on Ray Barlow's 30% share of the trust corpus, after the death of K.C. Barlow and before the divorce of Frances McDonald and Ray Barlow, is community property.

STANDARD OF REVIEW

We begin our review by noting that in an appeal from summary judgment, our standard of review is the same as the standard of the trial court. *Meridian Bowling Lanes v. Meridian Athletic*, 105 Idaho 509, 670 P.2d 1294 (1983). Accordingly, we review the record and construe all facts in favor of the non-moving party to determine if there are material facts at issue that would preclude the grant of summary judgment.

Frances McDonald does not now dispute that the 20% of the family business that she and Ray Barlow transferred to the K.C. Barlow Trust was the separate property of Ray Barlow. The sole issue is how to treat the income earned by the trust. The plaintiff asserts that while the property transferred during the marriage to the trust was the separate property of Ray Barlow, pursuant to I.C. § 32-906 the income from this property is community property.

[2] We first must discuss the status of the 20%

that Ray and Frances Barlow transferred into the trust. While the trust was revocable, it was only revocable as to K.C. Barlow for the duration of his life. When the Barlows transferred this property into the trust, they lost all right and title to it. After the transfer, Ray Barlow had a mere expectancy of the right to possess and enjoy 30% of the trust corpus sometime in the future. There was no interest to which a community property interest could attach.

[3][4] ****262 *728** The 30% of the trust corpus that Ray Barlow inherited upon the death of his father presents a more serious obstacle. Respondent argues for a "possession" theory. Under the possession theory, a community property interest would only attach to earnings after the property came into the actual physical possession of Ray Barlow. Thus, under this theory, no community property interest attached until Ray Barlow received the first \$160,000 distribution, and then only the earnings on the \$160,000 before the divorce was final would be community property; subsequent distributions after the divorce would be separate property. Frances McDonald urges us to adopt a "vesting" theory to characterize a portion of the distributions as community property. Under this theory, Ray Barlow's rights to 30% of the trust corpus vested immediately upon the death of his father; any earnings on the 30% interest inherited from his father before the divorce was finalized would be community property.

The problem of determining the status of property at a certain point in time was previously undertaken by this Court in determining when property was "acquired" for community property purposes. This Court has stated:

The status of property as separate or community is fixed as of the time when it is acquired. The word 'acquired' contemplates the inception of title ... Stated in another way, the status of title, as belonging to one estate or the other is determined by the status of the original right matured into full title.

Fisher v. Fisher, 86 Idaho 131, 135-136, 383 P.2d 840, 842 (1963).

Fisher involved the purchase of a farm before marriage by the husband. After the marriage, payments on the farm were made with community funds. Upon divorce, the wife asserted that the farm was community property. The *Fisher* court held that the farm purchased by the husband was his separate property, subject to reimbursement to the community for payments made with community funds. The *Fisher* court did not look to when actual legal title was obtained, but when the property right in the farm was acquired. In that case, the husband acquired the property before marriage, so it was separate property and remained so during the marriage.

[5][6] This rule of law to determine the character of property when it is acquired has been applied in various situations. Pension benefits which are earned during marriage are community property, even if not received until after marriage. *Shill v. Shill*, 115 Idaho 115, 765 P.2d 140 (1988); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975). A term life insurance policy, paid for with community funds during marriage, is community property. *Travelers Ins. Co. v. Johnson*, 97 Idaho 336, 544 P.2d 294 (1975).

In the instant case, Ray Barlow acquired a non-contingent right to 30% of the trust corpus immediately upon the death of his father. This right to 30% of the trust corpus could not be augmented nor diminished by the trustee. The only contingency was the ability of the trustee to sell the trust assets and make distributions "as soon as possible." From the time of K.C. Barlow's death, the trustee of the K.C. Barlow trust was under a legal obligation to render an accounting of the trust assets to the trust beneficiaries, *Matter of Trust of Grover*, 109 Idaho 687, 710 P.2d 597 (1985); and to distribute to Ray Barlow 30% of the trust corpus as required by the trust document. *Robertson v. Swayne*, 85 Idaho 239, 378 P.2d 195 (1963). Although possession was delayed until distribution, the right to 30% of the trust cor-

pus was acquired immediately upon the death of K.C. Barlow. While the 30% interest acquired by Ray Barlow was his separate property, pursuant to I.C. § 32-906, the income from the date of death of K.C. Barlow on that 30% interest, if any, would be community property and should have been accounted for and divided upon the dissolution of the marriage of Frances McDonald and Ray Barlow. Therefore we hold that there was a triable issue of fact and summary judgment was improper.

Our holding today is consistent with our previous holdings in *Swope v. Swope*, 112 Idaho 974, 739 P.2d 273 (1987) and *Simplot v. Simplot*, 96 Idaho 239, 526 P.2d 844*729 **263 (1974). The issue we faced in *Swope* was whether the retained earnings of a separate property partnership constituted income within the scope of I.C. § 32-906. This Court held that because a partner has the right to direct the payment of partnership earnings, the retained earnings were community property. This is analogous to the present case. The right to direct payment entails the right to receive those earnings, which is the precise issue we deal with today. Ray Barlow received by inheritance an absolute right to 30% of the K.C. Barlow Trust immediately upon the death of his father. In *Simplot* we held that because a minority shareholder did not have the right to direct payment of or exercise control over the corporation's retained earnings, the shareholder had not received those retained earnings. Without the right to receive the retained earnings, the retained earnings remained the property of the corporation.

In conclusion, we vacate the opinion of the Court of Appeals and reverse the decision of the district court. We remand this case to the district court for proceedings consistent with this opinion.

Costs to appellant.

BAKES, C.J., and BISTLINE, JOHNSON and BOYLE, JJ., concur.

Idaho, 1991.
McDonald v. Paine

119 Idaho 725, 810 P.2d 259

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Supreme Court of Nebraska.
Vernon E. McWHIRT, Appellee,

v.

Michael W. HEAVEY et al., Appellants.

No. S-94-589.

July 12, 1996.

Client brought legal malpractice action against attorney, on basis that attorney was negligent in advising client to accept settlement offer in dissolution action. The District Court, Douglas County, Mary G. Likes, J., entered judgment and award of \$91,000 for client. Attorney appealed. The Supreme Court, White, C.J., held that: (1) client's acceptance of settlement did not bar client from maintaining action, and (2) whether attorney's conduct in advising client to accept settlement offer was proximate cause of client's losses was issue for jury.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇌ 761

30 Appeal and Error

30XII Briefs

30k761 k. Points and arguments. Most Cited Cases

Errors assigned but not argued will not be addressed.

[2] Appeal and Error 30 ⇌ 866(3)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k866 On Appeal from Decision on Motion for Dismissal or Nonsuit or Direction of

Verdict

30k866(3) k. Appeal from ruling on motion to direct verdict. Most Cited Cases

With regard to overruling motion for directed verdict made at close of all of evidence, appellate review is controlled by rule that directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from evidence, where issue should be decided as matter of law.

[3] Trial 388 ⇌ 141

388 Trial

388VI Taking Case or Question from Jury

388VI(A) Questions of Law or of Fact in General

388k141 k. Uncontroverted facts or evidence. Most Cited Cases

Trial 388 ⇌ 142

388 Trial

388VI Taking Case or Question from Jury

388VI(A) Questions of Law or of Fact in General

388k142 k. Inferences from evidence. Most Cited Cases

Trial court should direct verdict as matter of law only when facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.

[4] Trial 388 ⇌ 139.1(6)

388 Trial

388VI Taking Case or Question from Jury

388VI(A) Questions of Law or of Fact in General

388k139.1 Evidence

388k139.1(5) Submission to or Withdrawal from Jury

388k139.1(6) k. "Some", "slight", or "any" evidence. Most Cited Cases

Trial 388 ⇌ 178

388 Trial

388VI Taking Case or Question from Jury

388VI(D) Direction of Verdict

388k178 k. Hearing and determination.

Most Cited Cases

Party against whom verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have benefit of every inference which can reasonably be drawn from evidence; if there is any evidence which will sustain finding for party against whom motion is made, case may not be decided as matter of law.

[5] Judgment 228 ⇌ 199(3.5)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in General

228k199 Notwithstanding Verdict

228k199(3.5) k. Propriety of judgment in general. Most Cited Cases

In order to sustain motion for judgment notwithstanding verdict, court resolves controversy as matter of law and may do so only when facts are such that reasonable minds can draw but one conclusion.

[6] Judgment 228 ⇌ 199(3.1)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in General

228k199 Notwithstanding Verdict

228k199(3.1) k. Matters admitted by motion. Most Cited Cases

Judgment 228 ⇌ 199(3.2)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in General

228k199 Notwithstanding Verdict

228k199(3.2) k. Evidence and infer-

ences that may be considered or drawn. Most Cited Cases

On motion for judgment notwithstanding verdict, moving party is deemed to have admitted as true all material and relevant evidence admitted which is favorable to party against whom motion is directed, and, further, party against whom motion is directed is entitled to benefit of all proper inferences deducible from relevant evidence.

[7] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited Cases

Client who has agreed to settlement of action is not barred from recovering against his or her attorney for malpractice if client can establish that settlement agreement was product of attorney's negligence.

[8] Divorce 134 ⇌ 1284(1)

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(I) Appeal

134k1277 Discretion

134k1284 Settlement Agreements and Stipulations

134k1284(1) k. In general. Most Cited Cases

(Formerly 205k281)

In determining whether proposed settlement meets statutory requirement of conscionability, trial judge has discretion to request production of evidence on such issue, but has no affirmative duty to make such request. Neb.Rev.St. § 42-366(2).

[9] Evidence 157 ⇌ 90

157 Evidence

157III Burden of Proof

157k90 k. Nature and scope in general. Most Cited Cases

It is duty of parties and their counsel to produce evidence on issues before court, and to place this duty on trial judge would overstep bounds of judicial propriety.

[10] Negligence 272 ⇌ 1694

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1694 k. Standard of proof; evidentiary showing required. Most Cited Cases
(Formerly 272k136(9))

In negligence case, trial court should sustain motion for directed verdict or for judgment notwithstanding verdict only when evidence, viewed in light most favorable to party against whom motion is directed, fails to establish actionable negligence.

[11] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases
(Formerly 45k105)

Plaintiff alleging attorney negligence must prove attorney's employment, attorney's neglect of reasonable duty, and that such negligence resulted in and was proximate cause of loss, that is damages, to client.

[12] Evidence 157 ⇌ 547.5

157 Evidence

157XII Opinion Evidence

157XII(D) Examination of Experts

157k547.5 k. Certainty of testimony; probability, or possibility. Most Cited Cases

Trial 388 ⇌ 84(2)

388 Trial

388IV Reception of Evidence

388IV(C) Objections, Motions to Strike Out, and Exceptions

388k80 Sufficiency and Scope of Objection

388k84 Scope and Questions Raised

388k84(2) k. Expert or opinion evidence. Most Cited Cases

Objection to opinion of expert based upon lack of certainty in opinion is objection based upon relevance.

[13] Trial 388 ⇌ 105(1)

388 Trial

388IV Reception of Evidence

388IV(C) Objections, Motions to Strike Out, and Exceptions

388k105 Effect of Failure to Object or Except

388k105(1) k. In general. Most Cited Cases

If, when evidence is offered, party against whom such evidence is offered fails to object or to insist upon ruling on objection to introduction of such evidence, and otherwise fails to raise question as to its admissibility, that party is considered to have waived whatever objection he or she may have had thereto, and evidence is in record for consideration same as other evidence.

[14] Appeal and Error 30 ⇌ 204(7)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k202 Evidence and Witnesses

30k204 Admission of Evidence

30k204(7) k. Opinion evidence and hypothetical questions. Most Cited Cases

Attorney who was defendant in legal malpractice action failed to object to testimony of expert who testified that attorney breached standard of care, and so attorney could not raise issue on appeal of whether expert's opinion lacked certainty.

[15] Evidence 157 ⇌ 570

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k570 k. In general. Most Cited

Cases

Triers of fact are not required to take opinions of experts as binding upon them.

[16] Evidence 157 ⇌ 570

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k569 Testimony of Experts

157k570 k. In general. Most Cited

Cases

Trial 388 ⇌ 139.1(3)

388 Trial

388VI Taking Case or Question from Jury

388VI(A) Questions of Law or of Fact in

General

388k139.1 Evidence

388k139.1(1) Province of Court and

Jury

388k139.1(3) k. Weight of evidence. Most Cited Cases

Determination of weight that should be given expert testimony is uniquely within province of fact finder.

[17] Negligence 272 ⇌ 379

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k379 k. "But-for" causation; act without which event would not have occurred. Most Cited Cases

(Formerly 272k56(1.12))

Negligence 272 ⇌ 384

272 Negligence

272XIII Proximate Cause

272k374 Requisites, Definitions and Distinctions

272k384 k. Continuous sequence; chain of events. Most Cited Cases

(Formerly 272k56(1.7))

Proximate cause of injury is that which, in natural and continuous sequence, without any efficient intervening cause, produces injury, and without which injury would not have occurred.

[18] Damages 115 ⇌ 184

115 Damages

115IX Evidence

115k183 Weight and Sufficiency

115k184 k. In general. Most Cited Cases

To maintain negligence cause of action, plaintiff must prove damages with reasonable certainty.

[19] Damages 115 ⇌ 95

115 Damages

115VI Measure of Damages

115VI(A) Injuries to the Person

115k95 k. Mode of estimating damages in general. Most Cited Cases

Damages 115 ⇌ 103

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k103 k. Mode of estimating damages in general. Most Cited Cases

In negligence case, proper measure of damages is that which will place aggrieved party in position in which he or she would have been had there been no negligence.

[20] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and judgment. Most Cited Cases

Whether conduct of attorney in advising client to accept settlement offer was proximate cause of client's losses was issue for jury in client's legal malpractice action against attorney, that arose out of dissolution action, in light of testimony of expert that if client had gone to trial, client's inherited property would have been separated from marital property, and alimony payments would have been lower.

[21] Evidence 157 ⇌ 506

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k506 k. Matters directly in issue. Most Cited Cases

Expert testimony regarding status of law is generally not admissible.

****329** *Syllabus by the Court*

1. **Appeal and Error.** Errors assigned but not argued will not be addressed.

2. **Directed Verdict: Appeal and Error.** With regard to overruling a motion for directed verdict made at the close of all of the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.

3. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.

***537** 4. **Directed Verdict.** The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party

against whom the motion is made, the case may not be decided as a matter of law.

5. **Judgments: Verdicts.** In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.

6. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.

7. **Attorney and Client: Malpractice: Negligence: Proof.** A client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence.

8. **Attorney and Client: Evidence: Judges.** It is the duty of the parties and their counsel to produce evidence on the issues before the court, and to place this duty on the trial judge would overstep the bounds of judicial propriety.

9. **Directed Verdict: Negligence: Evidence.** In a negligence case, a trial court should sustain a motion for directed verdict or for judgment notwithstanding the verdict only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence.

10. **Attorney and Client: Negligence: Proximate Cause: Proof.** There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client.

11. **Trial: Expert Witnesses.** An objection to an opinion of an expert based upon lack of certainty in the opinion is an objection based upon relevance.

12. **Trial: Evidence: Waiver.** If, when evidence is offered, the party against whom such evidence is offered fails to object or to insist upon ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, **330 that party is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence.

13. **Trial: Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them.

14. **Trial: Expert Witnesses.** The determination of the weight that should be given expert testimony is uniquely within the province of the fact finder.

15. **Proximate Cause: Words and Phrases.** The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred.

16. **Actions: Negligence: Damages: Proof.** As an element of a negligence cause of action, a plaintiff must prove damages with reasonable certainty.

*538 17. **Negligence: Damages.** In a negligence case, the proper measure of damages is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence.

Francis T. Belsky, of Katskee, Henatsch & Suing, Omaha, for appellants.

Thomas C. Emery, of Emery, Nye, Blazek, & Hemphill, Omaha, for appellee.

Before WHITE, C.J., and FAHRNBRUCH, LAN-

PHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, Chief Justice.

This is a legal malpractice action brought by the plaintiff-appellee, Vernon E. McWhirt (McWhirt), for damages resulting from the alleged negligence of the defendants-appellants, Michael W. Heavey, individually; Michael W. Heavey, P.C., a Nebraska professional corporation; and Dwyer, Wood, Heavey & Grimm, a partnership. A jury returned a verdict in favor of McWhirt and awarded him \$91,000, and the trial court entered a judgment accordingly. The defendants appeal.

The appellants assign the following errors: (1) The trial court erred in overruling the appellants' motions for directed verdict and for judgment notwithstanding the verdict and in submitting the case to the jury because McWhirt failed to adduce evidence pertaining (a) to the standard of care and the appellants' violation thereof, (b) to proximate causation, and (c) to damages; (2) the trial court erred in overruling the appellants' motion for summary judgment; (3) the trial court erred in overruling the appellants' demurrer ore tenus; and (4) the trial court erred in overruling the appellants' motion for new trial. We affirm.

On May 17, 1988, Florence McWhirt filed the underlying dissolution action against McWhirt. On May 20, McWhirt employed Heavey of Dwyer, Wood, Heavey & Grimm to represent his interests during the dissolution action. The dissolution action was scheduled for trial on November 23.

*539 The contested issues in the divorce proceedings were (1) the division of real and personal property, (2) child support, (3) alimony, and (4) the characterization of approximately \$41,000 in cash and property which McWhirt had inherited from his parents during the course of his marriage.

At the time of the divorce, the McWhirts had been married for 24 years. They had three children,

two of whom had reached the age of majority. Custody of their 15-year-old son was awarded to Florence McWhirt.

Both parties were employed. McWhirt was earning \$14.42 per hour. He also had a pension valued at \$8,184. At the time of the divorce, Florence McWhirt was earning \$4.80 per hour. The parties owned a \$50,000 home. McWhirt had inherited property from his parents originally valued at \$41,669.69. This property included an insurance policy, savings bonds, money, and other personal property. McWhirt testified that at the time of the divorce trial, this property was valued at approximately \$37,537.39.

Close to the time the McWhirts separated, McWhirt recorded some of Florence McWhirt's phone conversations and placed a voice-activated tape recorder in their bedroom while he was out of town. McWhirt ****331** suspected that his wife was having an affair. After discovery of the recording devices, Florence McWhirt's counsel made threatening remarks about criminal prosecution for wiretapping.

The parties in the case at bar provided different versions at trial of how Heavey acted in his representation in the McWhirts' divorce. According to McWhirt, he met with Heavey on November 21, 1988, to discuss the dissolution proceedings that were to take place 2 days later. At this meeting, Heavey told McWhirt that he was going to present as an exhibit McWhirt's answers to the interrogatories requested by Florence McWhirt's counsel. This was the only exhibit that Heavey prepared for trial. Heavey told McWhirt that he would call him as a witness. Heavey never prepared McWhirt to be a witness. Heavey told McWhirt that he would cross-examine Florence McWhirt on her testimony if necessary. Heavey also told McWhirt that he should not worry about wiretapping threats.

***540** At this meeting, Heavey failed to discuss and advise McWhirt as to (1) alimony obligations, (2) child support obligations, (3) disposition of the

family residence, (4) disposition of McWhirt's inheritance property, (5) valuation of McWhirt's pension, (6) McWhirt's potential obligation to pay his wife's attorney fees, or (7) any other pertinent matters. Heavey did not inform him of what to expect at the trial.

McWhirt concedes that prior to this meeting Heavey and he did discuss his inheritance. He also concedes that Heavey informed him that inherited property is ordinarily set off from the marital property and granted to the recipient.

According to McWhirt, on the morning of November 23, the day of the trial, McWhirt met Heavey at the courthouse about an hour before the trial was to begin. At this time, Florence McWhirt's counsel presented Heavey and McWhirt with a proposal for settlement. McWhirt had not had any prior discussions of how the case should be settled.

Under the proposal, among other things, Florence McWhirt was to receive the house, and McWhirt was to pay a \$20,000 lump-sum property distribution and \$500 per month in alimony for Florence McWhirt's lifetime. Upon remarriage, the alimony would not terminate but could be considered by a court pursuant to an application to modify. McWhirt was also to pay \$340 per month for child support. Florence McWhirt was also to receive a significant portion of the personal property that McWhirt inherited from his parents in the division of the parties' estate.

While McWhirt and Heavey were reviewing the proposal, Florence McWhirt's counsel approached them and mentioned the recording devices. Heavey told McWhirt not to be concerned with this because he did not think it was pertinent to the case.

After reviewing the proposal that morning, McWhirt thought "there was considerable amounts of inheritance property, inheritance money included in marital property." McWhirt then stated to Heavey, "I thought they could not include inherit-

ance properties and monies and personal properties inherited into a marital property." Heavey responded by stating, "I didn't think they could." Heavey told McWhirt not *541 to worry about the personal property or inheritance money because alimony was a larger concern.

In discussing the alimony provision, McWhirt asked Heavey, "Is this right that they can award her alimony for life?" Heavey responded, "I don't know." Heavey said he would go find an attorney he knew who was at the courthouse and ask him. Heavey returned and told McWhirt that Judge Reagan, the presiding judge, often grants lifetime alimony. McWhirt had previously briefly discussed alimony with Heavey at an earlier date. At that time, Heavey told McWhirt that he would not have to pay alimony for a very long period and that the payment would not be very much in value.

McWhirt and Heavey discussed the settlement proposal further, and McWhirt then asked Heavey, "Well, what do you think about this?" According to McWhirt, Heavey responded, "I don't know, you know.... It's kind of up to you. We could go into trial. You could do worse. You could do better.... I'm not sure. It's kind of up to you."

**332 Florence McWhirt's counsel then approached them and offered to reduce the lump-sum payment to \$10,000 and the lifetime alimony payments to \$400 per month. When his case was called, McWhirt again asked Heavey what he thought of the proposal and received no clear response. McWhirt testified that he then stated to Heavey, "Might as well accept this, if you think this is the best we can do." McWhirt subsequently accepted the settlement proposal with the modifications in the lump-sum payment and alimony.

Heavey's testimony conflicted with McWhirt's testimony in several respects. According to Heavey, he had several contacts with McWhirt prior to the trial, but he did not record all of these conversations on his billing statements. Heavey engaged in 7 hours of preparation for the trial; he prepared sever-

al trial exhibits but discarded them after the trial; he advised McWhirt concerning the possibility of having to pay alimony and the specific amount he would have to pay; and he told McWhirt that the settlement proposal was close to a "worst case scenario." Heavey claims he would have preferred to try the case and told McWhirt that he could probably do better at trial.

*542 During the trial, Heavey did not present any evidence. Florence McWhirt's counsel gained admission of several exhibits pertaining to the child support calculations and documents regarding the property to be allocated to McWhirt and Florence McWhirt. At one point, the court asked McWhirt to acknowledge the settlement as the agreement that the parties negotiated and voluntarily entered. McWhirt made this acknowledgment. The court then found that the agreement was not unconscionable and approved the agreement.

McWhirt called Heavey within a few days after the trial and inquired whether the settlement could be set aside. Heavey referred McWhirt to another attorney.

McWhirt's new counsel filed an objection to the decree and a motion for new trial. On December 23, 1988, the court overruled the objection and motion. On appeal, this court affirmed the judgment of the trial court. *McWhirt v. McWhirt*, 236 Neb. xxii (1991).

On November 21, 1990, McWhirt filed this action. In his petition, McWhirt alleged that Heavey failed to exercise the knowledge, skill, and ability ordinarily possessed by members of the legal profession. He alleged that Heavey was negligent (1) in failing to prepare McWhirt to be a trial witness in his own divorce case, (2) in failing to prepare for the divorce trial, (3) in failing to exercise a reasonable degree of care and skill in negotiating a property settlement agreement, (4) in failing to know Nebraska law regarding inherited property and alimony, (5) by advising McWhirt that the trial judge ordinarily awarded alimony for life, and (6) by ad-

vising McWhirt that the trial result might be worse than the final proposed settlement offer.

On December 21, 1993, the appellants filed a motion for summary judgment. A hearing on this motion was held on January 13, 1994, where 10 exhibits were received into evidence. This evidence included depositions of McWhirt, Heavey, and Jerome Ortman, McWhirt's expert witness. On January 28, the appellants' motion was overruled.

Trial began on March 28, 1994. Heavey's counsel demurred *ore tenus*, contending that (1) the petition failed to state any cause of action in negligence against the appellants, (2) no *543 damages were cognizable under the law, (3) the allegations were not alleged as the proximate cause of any damages. The court overruled the motion.

McWhirt's expert witness, Ortman, is an attorney who has practiced law in Omaha, Nebraska, for 24 years. Approximately 50 percent of his practice consists of domestic relations cases.

In his testimony, Ortman first described the divorce process and divorce law in Nebraska. Regarding nonmarital property, Ortman testified that the general rule in Nebraska is that property inherited by one party of the marriage is considered to be outside the marital estate and set off for the party that inherited the property. He also testified that lifetime alimony is not favored in Nebraska.

**333 Ortman recited the specific documents of the McWhirt divorce he reviewed in preparation of his testimony. Ortman was then asked to provide his opinions concerning different aspects of the McWhirt divorce.

Ortman specifically stated on numerous occasions, without objection, that it was his opinion that Heavey's conduct fell below the requisite standard of care. Ortman's opinions as to Heavey's specific deviations from the standard of care included, among other things; failure to prepare a child support worksheet, failure to prepare an exhibit identi-

fying marital property, failure to obtain a real estate appraisal, failure to properly prepare for trial, failure to advise McWhirt concerning alimony and improper advice regarding lifetime alimony, and failure to advise McWhirt to reject the property settlement proposal. He also testified that it was his opinion that Heavey committed legal malpractice.

Ortman was also asked to respond to a hypothetical involving a factual situation that reflected the McWhirts' situation at the time of divorce. He testified as to how he would represent his client under the hypothetical. He gave his opinion as to the reasonable and probable outcome of a trial involving the hypothetical. He gave his opinion as to how much alimony would be awarded to the wife under the hypothetical. Ortman testified that the payment period would be between 2 to 3 years at a minimum and approximately 10 years at a maximum. He testified *544 that if the court required payment for 2 to 3 years, the monthly payment would be approximately \$400 per month. Ortman testified that if the court decided to spread out the obligation over 10 years, the payment would be approximately \$200 per month.

Ortman also testified that under this hypothetical, he was of the opinion that the property inherited by the husband would be considered by the court as a nonmarital asset and would be set off to the husband outside the award of marital property. He testified that he was of the opinion that a court would divide the marital property evenly between the husband and wife. Ortman was also of the opinion that the husband would be required to pay some of the wife's attorney fees.

In summing up his testimony, Ortman testified that it was his opinion that in Heavey's representation of McWhirt, Heavey deviated from the standard of care required of domestic relations lawyers in the area in which Heavey practiced.

McWhirt also presented the expert testimony of Dennis Sullivan, an actuarial scientist. The parties stipulated that he was an expert. Sullivan testified

as to the present value of McWhirt's pension. Sullivan also testified regarding the excess alimony McWhirt was paying when comparing his current payment with the alimony payment possibilities presented during Ortman's testimony. Exhibits were admitted to support Sullivan's testimony.

The appellants moved for a directed verdict at the close of McWhirt's case in chief and at the close of all of the evidence. These were overruled by the court. On April 7, 1994, the appellants filed a motion for judgment notwithstanding the verdict and a motion for new trial. These motions were overruled, and this appeal followed.

As previously mentioned, the appellants assign errors as to the court's denial of (1) summary judgment, (2) demurrer ore tenus, (3) directed verdict, (4) judgment notwithstanding the verdict, and (5) new trial.

Preliminarily, we can summarily dispose of the appellants' assignments of error regarding their motion for summary judgment, demurrer ore tenus, and motion for new trial. These were not discussed with any particularity in the briefs. The *545 appellants' brief did not contain any legal or factual discussion regarding these motions.

[1] Errors assigned but not argued will not be addressed. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995). Therefore, we will not address these motions and will address only the assigned errors regarding directed verdict and judgment notwithstanding the verdict.

[2][3] With regard to overruling a motion for directed verdict made at the close of all of the evidence, appellate review is controlled **334 by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). A trial court should direct a verdict as a matter of law only when the facts are

conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995).

[4] The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Id.*

[5] In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Critchfield v. McNamara*, 248 Neb. 39, 532 N.W.2d 287 (1995).

[6] On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Id.*

[7] The appellants contend that they were entitled to judgment as a matter of law because McWhirt's acceptance of the settlement proposal is an absolute bar to a subsequent professional*546 negligence action against his or her attorney. This argument is supported by the appellants' contention that pretrial settlement claims should be encouraged by the courts.

This court has never previously had the opportunity to determine this precise issue. However, other jurisdictions have decided the issue.

The Supreme Court of Connecticut decided a case similar to the instant case. In *Grayson v. Wolfsey, Rosen, Kweskin*, 231 Conn. 168, 169, 646 A.2d

195, 197 (1994), the Supreme Court of Connecticut addressed the issue of "whether a client who has agreed to the settlement of a marital dissolution action on the advice of his or her attorney may then recover against the attorney for the negligent handling of her case." The defendants in *Grayson* argued that the plaintiff was barred as a matter of law because the plaintiff entered an agreement to settle the marital dissolution action. The defendants argued that their contention was particularly appropriate because the court presiding over the dissolution action reviewed and approved the settlement agreement.

The court in *Grayson* held that "a client who has agreed to the settlement of an action is not barred from recovering against his or her attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence." *Id.* at 177, 646 A.2d at 201. The court stated:

We reject the invitation of the defendants ... to adopt a rule that promotes the finality of settlements and judgments at the expense of a client who, in reasonable reliance on the advice of his or her attorney, agrees to a settlement only to discover that the attorney had failed to exercise the degree of skill and learning required of attorneys in the circumstances. "Although we encourage settlements, we recognize that litigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks."

*547 *Id.* at 174-75, 646 A.2d at 199 (quoting *Ziegelheim v. Apollo*, 128 N.J. 250, 607 A.2d 1298 (1992)).

We share this view espoused by the Supreme Court of Connecticut. To clarify, we support the implementation of policies and procedures that encourage fair and amicable pretrial settlements. See

Neb.Rev.Stat. § 42-366 (Reissue 1993). However, "we decline**335 to adopt a rule that insulates attorneys from exposure to malpractice claims arising from their negligence in settled cases if the attorney's conduct has damaged the client." *Grayson*, 231 Conn. at 175, 646 A.2d at 200.

Our holding is in accord with the majority of jurisdictions that have addressed this issue. See, *Malfabon v. Garcia*, 111 Nev. 793, 898 P.2d 107 (1995); *Grayson v. Wofsey, Rosen, Kweskin, supra*; *Ziegelheim v. Apollo, supra*; *Fishman v. Brooks*, 396 Mass. 643, 487 N.E.2d 1377 (1986); *Edmondson v. Dressman*, 469 So.2d 571 (Ala.1985); *Cook v. Connolly*, 366 N.W.2d 287 (Minn.1985). But see *Muhammad v. Strassburger, et al.*, 526 Pa. 541, 587 A.2d 1346 (1991).

Nor do we think that a different result is required because of the fact that the judge presiding over the dissolution proceedings approved the settlement agreement.

[8] Pursuant to § 42-366(2), the terms of a settlement agreement "shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable." However, in determining whether the proposed settlement meets the statutory requirement of conscionability, the trial judge has discretion to request the production of evidence on such issue, but has no affirmative duty to make such a request. See *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980).

[9] In *Buker*, this court stated, "It is the duty of the parties and their counsel to produce evidence on the issues before the court, and to place this duty on the trial judge would overstep the bounds of judicial propriety." *Id.* at 575-76, 288 N.W.2d at 735. The court's general inquiry pursuant to § 42-366(2) does not serve as a substitute for the diligent investigation and preparation for which counsel is responsible.

*548 We note that this court has previously held that an attorney's failure to communicate an offer of settlement to a client does not constitute professional negligence unless the evidence establishes that the proposed settlement was not unconscionable. *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985). *Smith* involved an attorney's failure to communicate to his client a \$25,000 settlement offer of a \$147,000 marital estate. The plaintiff contended that the attorney's failure to communicate this offer was professional negligence because the plaintiff would have accepted the offer. The plaintiff's own expert witness, however, testified that the settlement offer was probably unconscionable. We concluded that without evidence that the settlement was not unconscionable and would have been accepted by the court, no action for malpractice existed because the plaintiff's acceptance would have been meaningless.

Smith is distinguishable from the case at bar. *Smith* involved the attorney's alleged failure to communicate the offer. In *Smith*, this court found that the attorney was following the guidelines as to what would be deemed by a court to be unconscionable. The case at bar, however, involves Heavey's alleged misrepresentations and lack of knowledge of divorce law as it pertained to the various settlement provisions offered by Florence McWhirt. Heavey's duty was not to determine whether the court would find the settlement conscionable, but, rather, to exercise the requisite knowledge and skill to competently advise his client of this settlement. The issue of conscionability is not determinative of this case.

In sum, the appellants were not entitled to judgment as a matter of law merely because of the fact that McWhirt agreed to the settlement.

The appellants also contend that the district court erred in overruling their motions for directed verdict and judgment notwithstanding the verdict because the evidence pertaining to the issues of negligence, proximate cause, and damages was insufficient as a matter of law and should not have

been submitted to the jury.

[10] "In a negligence case, a trial court should sustain a motion for directed verdict*549 or for judgment notwithstanding the verdict only when the evidence, viewed in the light most favorable to the party against whom the motion is directed, fails to establish actionable negligence." **336*Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 919, 473 N.W.2d 94, 100 (1991).

[11] "There are three elements a plaintiff alleging attorney negligence must prove: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss [damages] to the client..." *Id.*

Heavey's employment is undisputed. Regarding Heavey's alleged neglect of a reasonable duty, the appellants set forth two arguments. First, the appellants contend that McWhirt failed, as a matter of law, to present sufficient expert testimony regarding the standard of care and regarding the certainty of the expert's opinions as to Heavey's failure to meet that standard of care.

As mentioned previously, McWhirt's expert, Ortman, testified that in his opinion Heavey fell below the standard of care in several aspects when handling McWhirt's case. Ortman recited several of Heavey's actions which he did not believe met the standard of care, including failing to trace the inherited assets, giving improper advice regarding lifetime alimony testimony, negotiating the settlement in the manner that he did, and failing to advise McWhirt to refuse the settlement.

Heavey's counsel failed to object to Ortman's opinions. He did make three objections. Twice he objected to questions which were leading, and he also objected to Ortman's giving his opinion as to whether McWhirt suffered damage as a result of Heavey's deviation from the required standard of care.

[12][13] An objection to an opinion of an expert based upon lack of certainty in the opinion is an objection based upon relevance. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). If, when evidence is offered, the party against whom such evidence is offered fails to object or to insist upon ruling on the objection to introduction of such evidence, and otherwise fails to raise the question as to its admissibility, that party is considered to have waived whatever objection he or she may have *550 had thereto, and the evidence is in the record for consideration the same as other evidence. *Id.*

[14] The appellants, having failed to raise objections to Ortman's testimony, are now precluded from asserting that Ortman's opinion lacked certainty.

[15][16] Triers of fact are not required to take opinions of experts as binding upon them. *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993). The determination of the weight that should be given expert testimony is uniquely within the province of the fact finder. *Id.* Ortman's testimony regarding whether Heavey deviated from the requisite standard of care was properly submitted to the jury for consideration.

The appellants also argue that the conduct of Heavey amounted only to mere errors of judgment and not professional negligence. We find, however, that when looking at all of the evidence submitted in a light most favorable to McWhirt, reasonable minds could differ as to whether Heavey's conduct amounted to professional negligence or only to mere errors of judgment.

[17] In regard to proximate cause and damages, the appellants contend that McWhirt failed, as a matter of law, to provide sufficient evidence regarding the appellants' conduct being the proximate cause of any loss sustained by McWhirt. The proximate cause of an injury is that which, in a natural and continuous sequence, without any efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Steuben*

v. City of Lincoln, 249 Neb. 270, 543 N.W.2d 161 (1996).

[18][19] "As an element of a negligence cause of action, a plaintiff must prove damages ... with reasonable certainty." *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 919, 473 N.W.2d 94, 100 (1991). "In a negligence case ... the proper measure of damages is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence...." *Id.* at 920, 473 N.W.2d at 100.

[20] The appellants argue that McWhirt's failure to provide expert testimony regarding **337 the issue of proximate causation bars his claim as a matter of law. The appellants contend that *551 where the issue of causation is technical and not within the common knowledge of the jury, expert testimony is required to establish the same, citing the legal malpractice case *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991). They contend the case at bar is such a case. However, the appellants' use of the proposition set forth in *McVaney* is misplaced.

McVaney involved an action by a plaintiff against the defendant law firm for its alleged failure to timely file a negligence action against the Metropolitan Utilities District for an explosion that destroyed the plaintiff's building. In *McVaney*, when this court was discussing the need for expert testimony as to proximate cause, we were discussing the burden on the plaintiff in proving the underlying negligence action, not the legal malpractice action. We stated that "the issue of causation of the explosion in McVaney's building was highly technical and not within the common knowledge and usual experience of a factfinding jury." *Id.* at 463, 466 N.W.2d at 508.

The underlying action in the instant case is divorce. Therefore, to survive a directed verdict, McWhirt was required to adduce evidence that Heavey's negligent actions caused McWhirt to accept the settlement proposal, and to adduce evid-

ence showing damages with reasonable certainty resulting from the acceptance of the settlement and from forgoing trial by comparing his obligations under the settlement with those obligations he would have incurred if the case had gone to trial.

McWhirt testified that he believed all of his damages to be caused by the negligence of Heavey. Specifically, he stated that because of Heavey's negligence causing him to accept the settlement, he lost the inherited property, he incurred higher alimony and child support obligations, and he incurred attorney fees in attempting to have the decree set aside. McWhirt stated that he was pressured by Heavey into accepting the proposal.

Based on the evidence when viewed most favorably to McWhirt, reasonable minds could conclude that McWhirt would not have accepted the settlement proposal if it was not for Heavey's alleged acts of professional negligence. The parties *552 conceded that if the settlement had not been accepted, the case would have proceeded to trial.

[21] McWhirt produced sufficient evidence to enable a jury to determine with reasonable certainty the damages proximately caused by the appellants. Ortman accurately testified that the general rule in this state is that alimony allowances requiring a husband to pay a fixed amount for an indefinite period of time are not favored. See *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981). He also accurately testified that inherited property is considered nonmarital property. See *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Although expert testimony regarding the status of the law is generally not admissible, see *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995), Heavey did not object to the admissibility of Ortman's opinions concerning the law.

McWhirt also presented Ortman's opinion as to what would have been the reasonable and probable result of the property distribution if the case had gone to trial. Ortman stated that the inherited property would be separated from the marital property

and would remain McWhirt's separate property. He stated that the marital property would be divided evenly. Lastly, Ortman stated that the alimony would be anywhere from \$200 to \$400, depending on the amount of years of payment the court imposed.

Several exhibits were admitted during McWhirt's testimony regarding marital property, nonmarital property, attorney fees incurred in attempting to set aside the decree, and differences in child custody obligations under the Nebraska Child Support Guidelines.

Finally, McWhirt introduced the expert opinion of Sullivan as to the present value of McWhirt's pensions and differences in alimony payments between McWhirt's current payments and Ortman's opinion as to what the court would have imposed after a trial.

**338 For the reasons stated above, we find that when drawing all reasonable inferences in McWhirt's favor, the court correctly refused to find in favor of the appellants as a matter of law. We therefore affirm.

AFFIRMED.

CAPORALE, J., participating on briefs.

Neb., 1996.
McWhirt v. Heavey
250 Neb. 536, 550 N.W.2d 327

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Appeals Court of Massachusetts,
Barnstable.
Judith MEYER

v.

Augustus F. WAGNER, Jr.

No. 01-P-1123.

Argued Sept. 6, 2002.

Decided March 4, 2003.

Client brought legal malpractice, consumer protection, and other claims against attorney who represented her in divorce action. Attorney counter-claimed to recover payment for legal services. The Superior Court Department, Barnstable County, Elizabeth B. Donovan, J., struck malpractice claim in connection with preparation and execution of settlement agreement, entered judgment on jury verdict for attorney on remaining negligence claim and attorney's counterclaim, and entered judgment for attorney following trial to the court on consumer protection claim. Client appealed. Transferring case on its own motion, the Supreme Judicial Court, 429 Mass. 410, 709 N.E.2d 784, affirmed in part, reversed in part, and remanded for retrial. On remand, the Superior Court Department, Richard F. Connon, J., entered judgment notwithstanding the verdict (JNOV) as to jury's determination that attorney had been negligent. Client appealed. The Appeals Court, Cowin, J., held that evidence established that attorney's negligence caused client's damages.

Reversed and remanded.

West Headnotes

[1] Judgment 228 ⇌ 199(1)

228 Judgment

228VI On Trial of Issues

228VI(A) Rendition, Form, and Requisites in
General

228k199 Notwithstanding Verdict

228k199(1) k. In General. Most Cited

Cases

Whether evidence is sufficient is a question of law, for purposes of a motion for judgment notwithstanding the verdict (JNOV).

[2] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful
Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

Evidence established that negligence of wife's attorney, after settlement of divorce action, caused wife's damages, as element of legal malpractice, as to husband's failure to make payments to divide the marital estate; if attorney had made timely effort to compel husband to give mortgages on properties, or in lieu thereof had obtained immediate attachments on the properties, possibility that husband would sell properties for prices below market value would have been reduced if not eliminated, and attorney could have asked court to divest husband of power to conduct the sales himself.

[3] Appeal and Error 30 ⇌ 979(1)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k976 New Trial or Rehearing

30k979 For Insufficiency of Evidence

30k979(1) k. In General. Most

Cited Cases

New Trial 275 ⇌ 72(3)

275 New Trial

275II Grounds

275II(F) Verdict or Findings Contrary to Law
or Evidence

275k67 Verdict Contrary to Evidence

275k72 Weight of Evidence

275k72(3) k. Discretion of Court.

Most Cited Cases

Whether to set aside a verdict because it is against the weight of the evidence is a question addressed to the discretion of the trial judge, and his decision will not be disturbed unless that discretion has been abused.

[4] New Trial 275 ⇌ 66

275 New Trial

275II Grounds

275II(F) Verdict or Findings Contrary to Law or Evidence

275k66 k. Verdict Contrary to Law or Instructions. Most Cited Cases

The trial judge may set aside a verdict if he determines that the jury failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law.

****35*494** George C. Deptula, Boston, for the plaintiff.

James R. DeGiacomo, Boston (Judith K. Wyman with him) for the defendant.

Present: GRASSO, COWIN, & GREEN, JJ.

COWIN, J.

The plaintiff, having been represented by the defendant attorney (among others) in connection with her divorce proceedings, sued the defendant on various theories for losses allegedly incurred by her as a result of that representation. A trial resulted in a jury verdict for the defendant on certain claims, directed verdicts for the defendant on other claims, and a finding by the judge in the defendant's favor on the plaintiff's ***495** claim under G.L. c. 93A.^{FN1} On appeal by the plaintiff, the Supreme Judicial Court transferred the case on its own initiative from the Appeals Court, affirmed the judgments entered on the directed verdicts and the G.L. c. 93A finding, and reversed the judgment entered on the jury verdict. See *Meyer v. Wagner*, 429 Mass. 410, 411,

425, 709 N.E.2d 784 (1999).

FN1. The jury also returned a verdict in the amount of \$70,000 on the defendant's counterclaim for attorney's fees.

The surviving claims were retried, and the judge submitted two special questions, see Mass.R.Civ.P. 49(a), 365 Mass. 812 (1974), to the jury. In response, the jury answered that the defendant had not been negligent in the preparation or execution of the settlement agreement that resolved the plaintiff's divorce case, or in the advice that he provided in that action, but that the defendant had been negligent in failing adequately to secure the marital assets and that the plaintiff had incurred a loss of \$750,000 as a result. On motion of the defendant, the judge, concluding that there was no evidence to support a finding that the defendant's negligence caused the plaintiff any loss, set aside the jury's verdict in favor of the plaintiff, and entered judgment notwithstanding the verdict for the defendant. See Mass.R.Civ.P. 50(b), as amended, 428 Mass. 1402 (1998). In the alternative, the judge allowed the defendant's motion for new trial, stating that the verdict was against the weight of the evidence and that denial of the motion "would be inconsistent with substantial justice."^{FN2} See Mass.R.Civ.P. 50(b); Mass.R.Civ.P. 59(a), 365 Mass. 827 (1974).

FN2. The judge characterized this as a "contingent" ruling, intending it to apply only in the event that the judgment notwithstanding the verdict was reversed.

The plaintiff has appealed, contending that the judge's actions on the two posttrial motions were erroneous. The plaintiff asserts also that the judge improperly excluded evidence pertaining to the values of certain assets controlled by the husband and that admission of such evidence could have persuaded the jury to return a verdict in favor of the plaintiff on the first issue (i.e., the alleged negligence of the defendant with respect to the separation agreement itself). However, the plaintiff has

stated in her brief that she would be satisfied with reinstatement of the jury verdict. We reverse both the judgment notwithstanding the *496 verdict and the order allowing a new trial. See Mass.R.Civ.P. 50(c)(1), as amended, 428 Mass. **36 1402 (1998). In light of these dispositions, we do not reach the evidentiary issues identified by the plaintiff.

1. *Relevant facts.* We sketch the undisputed facts sufficiently for an understanding of the case, supplementing them as necessary elsewhere in the opinion. For greater factual detail, see *Meyer v. Wagner*, 429 Mass. at 412-416, 709 N.E.2d 784. The plaintiff's husband was engaged in the business of real estate development and construction. He conducted his operations by means of interrelated companies, with assets and liabilities frequently intermingled. Other investors had interests in certain of the husband's business dealings. The plaintiff, by other counsel, commenced a divorce proceeding in November, 1987. In March, 1988, she retained the defendant to replace her previous attorney. During the pendency of the case, the husband regularly attempted to obstruct the proceedings, including wilfully violating court orders. In addition, following the initiation of the divorce case, it appears that he may have used "shell" corporations or "straws" for the purpose of holding title to various of his real estate interests. The plaintiff, on a number of occasions, explained to the defendant that her husband would use these devices to dissipate or conceal marital assets.

On July 27, 1989, several days after trial of the divorce case had commenced, the parties settled and executed a separation agreement that was incorporated in a judgment of divorce nisi. That portion of the separation agreement that is relevant to this appeal provided for a division of the marital estate whereby the plaintiff would receive \$250,000 within 100 days of the execution of the agreement; an additional \$100,000 within one year of that date (to be increased to \$150,000 payable the following year in the event that payment was not timely made); and an additional \$600,000 upon the earlier

of the sale of certain vacant land owned by the husband on Blueberry Lane in Sandwich or on December 31, 1989. The agreement further provided for the prompt sale of the marital residence on Cranberry Lane in Sandwich, with the plaintiff permitted to continue to reside there until the property was sold. The husband also agreed to give to the plaintiff mortgages on the properties at Blueberry *497 Lane and Cranberry Lane, as well as on certain commercial property in Sandwich (the Village Realty Trust), said mortgages to secure payment of the amounts owed to the plaintiff as her share of the marital estate. It was agreed that those mortgages would be subject to existing mortgages on the properties in question. The existing mortgages included a \$500,000 mortgage on the Cranberry Lane property; a mortgage of unspecified amount on the Blueberry Lane property; and a \$600,000 blanket mortgage on the Cranberry Lane and Blueberry Lane properties.^{FN3}

FN3. As indicated above, the jury found that the defendant had not been negligent in his representation of the plaintiff to this point.

Despite the provision of the separation agreement that called for the giving of mortgages as security, the defendant did not obtain any mortgages from the husband at the time of the entry of judgment on July 27, 1989. There was testimony that the defendant thereafter arranged to meet the husband at the Barnstable Registry of Deeds to obtain his signature on, and to record, the mortgages, but the husband did not appear as scheduled. In any event, there were no immediate further attempts on the defendant's part to obtain the agreed-upon mortgages. Likewise, the defendant took no action pursuant to **37 Mass.R.Dom.Rel.P. 70 (1975), or otherwise, to bring about the mortgage conveyances by other means.^{FN4} In addition, the defendant made no attempt at that time to seek attachments or restraints with respect to any other property in which the husband had an interest.

FN4. For example, rule 70 authorizes a

judge to enter a judgment divesting a party of real or personal property, or to appoint another person to take the action in lieu of that party.

The husband did not make a timely payment to the plaintiff of \$250,000 within 100 days (by November 4, 1989) as he was required to do by the judgment incorporating the separation agreement. On November 3, 1989, he entered into a purchase and sale agreement providing for the sale of the marital residence on Cranberry Lane for a purchase price of \$1,125,000. The purchaser agreed to release to the husband a cash deposit of \$250,000 in return for a mortgage on both the marital residence and the vacant property at Blueberry Lane to secure repayment of the deposit in the event that the sale was not completed. Following the filing by the defendant of a complaint *498 for contempt for the husband's failure to pay the \$250,000 installment as required, the husband, on or about November 30, 1989, paid the amount in question.^{FN5}

FN5. It is unclear whether the \$250,000 was the deposit paid and released by the purchaser of the Cranberry Lane property, or was generated from other sources.

The husband then failed to make a timely payment of the \$600,000 installment due December 31, 1989 (the Blueberry Lane property not having been sold by this time). The defendant filed another complaint for contempt and, on January 19, 1990, obtained attachments on the Cranberry Lane and Blueberry Lane properties to secure the amounts owed to the plaintiff. The attachment on Cranberry Lane, however, was subordinate to the purchaser's \$250,000 mortgage and was, as will be seen, of limited value. See discussion *infra* at 502-504, 784 N.E.2d at 39-41. Meanwhile, the plaintiff, aware that the Cranberry Lane residence was now under agreement, negotiated with the purchasers regarding sale to them of personal property belonging to her at that location and ultimately agreed to accept \$75,000 from the purchasers for all of the furniture and electronics (as well as an additional \$5,000

from the broker who promised to contribute that sum when the real estate sale closed).

The Cranberry Lane transaction sold for the agreed-upon price of \$1,125,000 on January 26, 1990. The plaintiff released the attachment in her favor on the property so that the sale could be completed. Because the husband had already received a deposit of \$250,000, \$875,000 was paid at the closing. Of this, \$500,000 was paid to the first mortgagee to remove its lien, and an additional \$300,000 was paid to the holder of the blanket mortgage on the Cranberry Lane and Blueberry Lane properties to clear the portion of that lien that encumbered the Cranberry Lane real estate. Taxes and fees consumed most of the remainder (despite the fact that the broker did not receive his commission). The sum of \$15,300 was placed in escrow and was eventually received by the plaintiff.

Subsequently, the husband purportedly entered into an agreement with other purchasers to sell the Blueberry Lane property for \$450,000 and sought a dissolution of the attachment in favor of the plaintiff so that the transaction could be concluded. *499 When the plaintiff opposed the lifting of the attachment, it was revealed that the sales price for the property was actually \$700,000. In April, 1990, a Probate and **38 Family Court judge concluded that the husband was in contempt of the divorce judgment for failure to pay the \$600,000 due on or before December 31, 1989.^{FN6} By the time the smoke cleared, the purchasers had backed out. On November 29, 1990, the defendant obtained attachments on all other real estate in the name of the husband or other entities controlled by him. The husband made no further efforts to sell the Blueberry Lane property, and on December 11, 1990, the holder of the first mortgage foreclosed, thus leaving the plaintiff with nothing from that source.

FN6. The judge imposed a thirty-day jail sentence that was stayed by a single justice of this court pending appeal. The Probate and Family Court judge's order was subsequently reversed because the judge had

not conducted an additional evidentiary hearing on the husband's ability to pay. See *Meyer v. Meyer*, 30 Mass.App.Ct. 1108, 569 N.E.2d 858 (1991).

The plaintiff discharged the defendant in the spring of 1991. Neither the \$600,000 amount already in arrears, nor the \$150,000 amount due July 27, 1991 (\$100,000 not having been paid by July 27, 1990), were ever paid. The husband filed for bankruptcy for himself and his corporations. He died on September 27, 1992. The plaintiff received the \$15,300 sum in escrow at the time of the sale of the Cranberry Lane property, and another \$50,000 to \$60,000 as a result of the husband's bankruptcy proceeding.

[1] 2. *Judgment notwithstanding the verdict.* The trial judge granted judgment notwithstanding the verdict on the ground that, even if the defendant was negligent in failing to obtain security or otherwise moving to realize the plaintiff's expectation that she would receive another \$750,000, there was insufficient evidence to justify a finding that that negligence caused the plaintiff's loss. Whether evidence is sufficient is a question of law. See *Brighetti v. Consolidated Rail Corp.*, 20 Mass.App.Ct. 192, 193, 479 N.E.2d 708 (1985). A verdict must be sustained if "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor" of the plaintiff. *500 *Service Publications, Inc. v. Gorman*, 396 Mass. 567, 571, 487 N.E.2d 520 (1986) (citations omitted). See *Poly v. Moylan*, 423 Mass. 141, 145, 667 N.E.2d 250 (1996), cert. denied, 519 U.S. 1114, 117 S.Ct. 956, 136 L.Ed.2d 843 (1997); *Brown v. Gerstein*, 17 Mass.App.Ct. 558, 560, 460 N.E.2d 1043 (1984). In acting upon the question whether evidence is sufficient, the judge does not resolve conflicting evidence, and inferences therefrom, adversely to the prevailing party. See *Tosti v. Ayik*, 394 Mass. 482, 494, 476 N.E.2d 928 (1985); *Tovey v. Cambridge*, 274 Mass. 324, 326, 174 N.E. 474 (1931). The inquiry is not intended to invite the

judge to substitute his view of the evidence for that arrived at by the jury. *Tosti v. Ayik*, *supra*. We apply the same standard as the judge, but do not defer to his view of the evidence. *MacCormack v. Boston Edison Co.*, 423 Mass. 652, 659, 672 N.E.2d 1 (1996).

[2] Here, the question is whether any negligence of the defendant brought about the loss to the plaintiff of \$750,000, or any portion thereof, of her allocated share of the marital estate. The defendant does not assert that the evidence was insufficient to support the negligence determination, confining his contention to the proposition that the plaintiff's loss was not attributable to his negligence, but rather to factors over which he had no control. The judge agreed, concluding that the loss was caused by a decline in the real estate market rather than by the defendant's failure to obtain security at an earlier date or take other steps to compel an earlier sale.

*39 The judge's conclusion in this regard not only was not compelled by the evidence, but also disregarded contrary evidence on which the jury could permissibly rely. There was expert testimony that, despite the general decline in real estate prices that took place during the period, waterfront property on Cape Cod had maintained much, if not all, of its previous value. Thus, one expert testified that the marital home on Cranberry Lane had a fair market value in January, 1990, of \$1.8 million, while another expert opined that the fair market value of that property at that time was between \$1.6 million and \$1.8 million. That another appraisal valued the property at \$1.2 million does not negate the right of the jury to rely on the evidence of higher value. If the Cranberry Lane property was worth \$1.8 million in January, 1990, but sold for only \$1.125 million, the jury could reasonably conclude that the plaintiff lost \$675,000 in this single transaction.

*501 The jury could also rationally find, in accordance with the testimony of other expert witnesses testifying on the subject of divorce litigation, that the defendant could have taken steps to bring about the sale of the Cranberry Lane property

at what the jury permissibly found was its fair market value rather than at the substantially lower price at which it actually sold in January, 1990. There was testimony that this could have been accomplished in either of two ways. There could have been a timely effort to compel the husband to give the mortgages that he was obligated to provide pursuant to the divorce judgment (or, in lieu thereof, obtain immediate attachments on the properties). That would have eliminated, or certainly reduced, the possibility of a below-market sale, given that purchasers would be unwilling to acquire the properties encumbered by liens in favor of the plaintiff.^{FN7} See discussion *supra* at 498, 784 N.E.2d at 37; *infra* at 502-504, 784 N.E.2d at 39-41. In the alternative, the defendant could have requested that the court divest the husband of the power to conduct the sales himself, instead placing the authority to do so in a fiduciary whose objective would be to maximize the value received. See note 4, *supra*. That this might be a desirable approach should have been apparent based on justified suspicions regarding the husband's motives, as well as on his failure to provide the required mortgages.

FN7. Normally, liens on real estate are satisfied by the seller from the proceeds received by the purchaser. The purchaser thus receives a clean title. If the purchase price is insufficient to satisfy the liens, the liens will not be released unless the seller applies sufficient funds from other sources, or unless the lienholders agree to release for lesser amounts.

In ruling on the motion for judgment notwithstanding the verdict, the judge considered the options described above, and concluded that a finding that such steps would have produced a purchaser who would have paid a higher price was "speculation and conjecture based on possibilities rather than probabilities." See *McNamara v. Honeyman*, 406 Mass. 43, 46, 546 N.E.2d 139 (1989). This determination fails to do justice to the evidence. Expert witnesses testified that the fair market

value of the Cranberry Lane property at January, 1990, was, as we have noted, as high as \$1.8 million. Fair market value is that price likely to be arrived *502 at by a willing seller under no compulsion to sell^{FN8} and an informed purchaser. By testifying **40 that the fair market value of the marital home was in the range of \$1.6 million to \$1.8 million, the experts effectively testified that buyers were available who were willing and able to pay that amount. The jury could credit this testimony, then draw the reasonable inference that a good faith effort to market the property would have generated a sales price at or close to the fair market value. To the extent that there might still be a shortfall in what was owed to the plaintiff following a sale of the marital home at the fair market value, the jury could reasonably find that that shortfall could have been satisfied by the earlier obtaining of restraints on other property of the husband.

FN8. While the husband may have been under compulsion to sell because of the divorce judgment, it was not a compulsion to sell for less than fair market value. Indeed, the husband was implicitly obligated to attempt to sell for enough cash to satisfy the plaintiff's entitlement.

We address various theories asserted by the defendant to support his argument that the evidence does not warrant the jury's finding that his negligence brought about the plaintiff's loss. He argues that by a provision of the separation agreement, an agreement found by the jury not to have been a product of negligence on his part, the plaintiff released her interest in all of the husband's assets except for those properties to be mortgaged to secure her right to receive \$1,000,000 as her allocated share of the marital estate. The implication that the defendant seeks to draw is that therefore no other properties could be used as security for what the plaintiff was owed. That conclusion is illogical. The plaintiff's release reflects only that she asserted no claim against the marital estate over and above the \$1,000,000 to which the parties stipulated in the

separation agreement. It does not preclude the use of other assets as security for that \$1,000,000.

The defendant relies in addition on the fact that the plaintiff, having obtained an attachment on the Cranberry Lane property on January 19, 1990, released that attachment a week later so that the sale of the property at a price of \$1.125 million could be completed. From this the defendant reasons that the plaintiff must have been satisfied with the transaction. The conclusion *503 that the plaintiff was content with a sale of a principal asset of the marital estate that netted her virtually nothing is not compelling. The jury could permissibly have found that the execution by the husband of a \$250,000 mortgage on the property had considerably narrowed the plaintiff's options. While the defendant attempts to minimize the significance of the mortgage securing the \$250,000 advance by the purchaser because that mortgage was discharged at the closing, the fact is that that mortgage was senior to the plaintiff's attachment and thus took on considerable importance. It meant that any effort by the plaintiff to obstruct the \$1.125 million sale of the Cranberry Lane property would have been likely to result in a foreclosure by the purchaser-mortgagee (that probably being the only way in which to recover his \$250,000 advance). Such a foreclosure would have rendered the plaintiff's attachment of no value. Unless the plaintiff bid on the property herself, thereby risking her own funds, either the mortgagee or another bidder would have ended up with the property unencumbered by the plaintiff's attachment. Having been placed in this unfavorable position by the defendant's failure to obtain for her a security position with greater priority, the plaintiff cannot be faulted if she did not wish to compete for the property. It follows that her agreement to release the attachment was an agreement to release an interest that had little or no value in any event, and did not constitute the surrender of a realistic opportunity to preserve the value of the asset. She was entitled to let the transaction proceed in an effort to realize whatever net proceeds **41 might come her way.

FN9

FN9. Furthermore, on evidence that the defendant had represented to the Probate and Family Court judge that the plaintiff's rights were adequately secured, the jury could conclude that the plaintiff reasonably continued to rely on the assumption that she would ultimately realize her share out of other marital assets.

Both the trial judge and the defendant emphasize the fact that, while approximately six months passed between entry of the judgment of divorce nisi and the obtaining of attachments on the Cranberry Lane and Blueberry Lane properties, no other liens were placed on those properties during that period except for the subsequently discharged \$250,000 mortgage to the Cranberry Lane purchaser. They conclude therefrom that the *504 plaintiff incurred no loss as a result of the failure to secure the property earlier. For the reasons set forth above, that conclusion is unwarranted. The giving of the \$250,000 mortgage altered the entire landscape. The jury could reasonably believe that, had the defendant obtained for the plaintiff at an earlier time the security to which she was entitled, the husband's manipulation of the purchase price would not have been possible, and the plaintiff would not have been damaged.

The jury was presented with evidence that was in conflict. While a finding that negligence on the defendant's part caused loss to the plaintiff was plainly not compelled, it was certainly permitted. It is for the jury to sort out conflicting inferences that are possible from conflicting evidence. It was error to conclude that there was no rational basis for the verdict.

FN10

FN10. The defendant argues that, even if the verdict is upheld, he should not be charged with \$150,000 of the plaintiff's loss because that amount was not due to be paid by the husband until July 27, 1991, whereas the plaintiff terminated the defendant's services in the spring of that year. The date of the defendant's discharge is ir-

relevant. The jury could find that his negligence was responsible for a loss that occurred when he no longer represented the plaintiff.

[3][4] 3. *Alternative grant of new trial.* Asserting that "it is clear that the jury misunderstood the applicable standard of negligence and or the law of real estate attachments and mortgages," the judge concluded that the verdict was against the weight of the evidence and contingently ordered a new trial. Whether to set aside a verdict because it is against the weight of the evidence is a question addressed to the discretion of the trial judge, and his decision will not be disturbed unless that discretion has been abused. *Robertson v. Gaston Snow & Ely Bartlett*, 404 Mass. 515, 520-521, 536 N.E.2d 344, cert. denied, 493 U.S. 894, 110 S.Ct. 242, 107 L.Ed.2d 192 (1989). The judge may set aside a verdict if he determines that the jury "failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law." *Hartmann v. Boston Herald-Traveler Corp.*, 323 Mass. 56, 60, 80 N.E.2d 16 (1948). "The standard that a trial judge is to apply on a motion for a new trial in a civil case is whether the verdict is so markedly against the weight of the evidence as to suggest that the jurors allowed themselves to be misled, were swept away by bias or prejudice, or for a combination of reasons, including misunderstanding of applicable law, *505 failed to come to a reasonable conclusion." *W. Oliver Tripp Co. v. American Hoechst Corp.*, 34 Mass.App.Ct. 744, 748, 616 N.E.2d 118 (1993).

While we would ordinarily defer to the trial judge, who is in a better position to evaluate the trial proceedings, the conclusion that a jury verdict is against the weight of the evidence and the allowance of a new trial are not immune from review. **42 Here, the judge concluded that juror confusion regarding the law of negligence and the law of real estate attachments and mortgages led to "an unreasonable conclusion" because "[t]he weight of the evidence points overwhelmingly to the fact that [the defendant's] breach of duty was not causally

connected to [the plaintiff's] loss; unquestionably her loss resulted from the sharp decline in the real estate market."

As we have discussed above, the evidence that supported the judge's view of the case was neither "overwhelming" nor "unquestionable." There was evidence that the decline in the real estate market did not affect the properties in question, as well as evidence that the defendant's negligence was the cause of the plaintiff's inability to obtain her entitled share of the marital estate by means of the sale of those properties. The judge effectively substituted his own understanding of Cape Cod real estate market conditions at the relevant time for that of expert witnesses who had testified to the contrary, and then relied on his own view of the evidence to overcome both the contrary expert testimony and the jury's adoption thereof. Thus, his conclusion that the verdict was against the weight of the evidence was based entirely on a rejection of that evidence with no basis other than the judge's own disagreement with it. We do not find support in the record for the proposition that the jury was confused or misled, or that they arrived irresponsibly at an eccentric decision. It is the job of the jury, not the judge, to weigh conflicting evidence and to draw reasonable inferences, and they appear to have done so here. The judge should not decide the case as if sitting without a jury. *Robertson v. Gaston Snow & Ely Bartlett*, 404 Mass. at 520, 536 N.E.2d 344. The judge, convinced that evidence that the defendant's negligence caused the plaintiff's loss was insufficient, was drawn inevitably to the conclusion that the jury's verdict was against the weight of the evidence. His ruling on the sufficiency of the evidence on this *506 issue was, as we have held, error; and we are convinced that that same fundamental error inspired the alternative, contingent ruling granting a new trial. Accordingly, that ruling must also be reversed.

4. *Disposition.* We note that the jury's verdict in the amount of \$750,000 does not appear to give weight to certain amounts received by the plaintiff

for which the defendant may be entitled to credit. These include the sum of \$15,300 received by the plaintiff from an escrow account established in connection with the Cranberry Lane sale, as well as an amount estimated to be between \$50,000 and \$60,000 received by her as a result of the husband's bankruptcy proceedings. On remand, there should be a determination whether such amounts were in fact received and, if so, whether they should be credited against the \$750,000 otherwise awarded.

The judgment is reversed and the jury verdict is reinstated subject to determinations on remand in accordance with this opinion. The contingent order granting a new trial is reversed.

So ordered.

Mass.App.Ct.,2003.

Meyer v. Wagner

57 Mass.App.Ct. 494, 784 N.E.2d 34

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Court of Appeals of Georgia.
 MILLSAPS
 v.
 KAUFOLD et al.

No. A07A1132.
 Oct. 9, 2007.

Reconsideration Denied Oct. 25, 2007.
 Certiorari Dismissed Dec. 4, 2007.

Background: Former client filed a legal malpractice claim against attorney. The Superior Court, Toombs County, Palmer, J., granted attorney summary judgment. Former client appealed.

Holding: The Court of Appeals, Johnson, P.J., held that a genuine issue of material fact existed as to whether attorney's actions in former client's divorce action caused the dissipation of marital assets to the detriment of former client, precluding summary judgment.

Reversed.

West Headnotes

[1] **Attorney and Client 45** ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
 45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases

To prevail on a legal malpractice claim, a client must prove that (1) he employed the defendant attorney; (2) the attorney failed to exercise ordinary care, skill, and diligence; and (3) this failure was the proximate cause of damages to the client.

[2] **Attorney and Client 45** ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
 45k105.5 k. Elements of Malpractice or Neg-

ligence Action in General. Most Cited Cases

To establish proximate cause, for the purpose of a legal malpractice claim, the client must show that but for the attorney's error, the outcome would have been different; any lesser requirement would invite speculation and conjecture.

[3] **Judgment 228** ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

A genuine issue of material fact existed as to whether attorney's actions in failing to identify various corporations controlled by former client's husband and failing to file a notice of lis pendens against certain properties, in former client's divorce action, dissipated marital assets to the detriment of former client, precluding summary judgment in former client's legal malpractice case.

****345** Stewart, Melvin & Frost, Frank Armstrong III, Nancy L. Richardson, Gainesville, for appellant.

Carr & Palmer, Emory L. Palmer, Atlanta, for appellees.

JOHNSON, Presiding Judge.

***44** This appeal is from the grant of summary judgment to an attorney sued by his former client for legal malpractice. Because the trial court erred in concluding that there is no evidence that the attorney's alleged negligence proximately caused damage to the former client, we reverse the grant of summary judgment.

Shannon Millsaps retained attorney Howard Kaufold to represent her in a divorce action. The final divorce decree was entered pursuant to a settlement agreement under which Millsaps received

various pieces of property that, after paying off debts and encumbrances, allegedly netted her approximately \$120,000. After the divorce, Millsaps sued Kaufold for legal malpractice, claiming that his failures to identify and name as defendants to the divorce action corporations controlled by Millsaps' former husband and to file a notice of lis pendens against certain properties allowed the former husband to encumber the properties and dissipate marital assets.

[1][2] Kaufold moved for summary judgment. The trial court granted the motion, finding that Millsaps cannot show that Kaufold's negligence proximately caused her alleged damages. Millsaps appeals.

To prevail on a legal malpractice claim, a client must prove that (1) he employed the defendant attorney; (2) the attorney failed to exercise ordinary care, skill, and diligence; and (3) this failure was the proximate cause of damages to the *45 client. To establish proximate cause, the client must show that but for the attorney's error, the outcome would have been different; any lesser requirement would invite speculation and conjecture. The defendant attorney is entitled to summary judgment if he shows that there is an absence of proof adduced by the client on the issue of proximate cause.^{FN1}

FN1. (Punctuation and footnotes omitted.)
Holmes v. Peebles, 251 Ga.App. 417, 419,
554 S.E.2d 566 (2001).

[3] In the instant case, Millsaps attached to her complaint an expert affidavit of a divorce lawyer who declared that Kaufold's failure to file a notice of lis pendens at the time he filed the divorce action was a deviation from the standard of care owed to Millsaps, that his negligence failed to protect Millsaps' financial interests, that his failure allowed the former husband to obtain an additional loan against property in question, and that the direct result of such failure was that Millsaps suffered financial

harm.

The record also contains the deposition of another domestic relations attorney who testified that Kaufold erred in failing to determine all the corporations involved in the divorce action. She testified that it is elementary practice to file a notice of lis pendens, which she does in every case, and that in her opinion it is malpractice per se not to file such a notice. When asked how Millsaps was damaged by Kaufold's errors, the expert witness testified that if Kaufold had protected the assets, the former husband never would have been able to milk money from the **346 corporations or encumber the properties with additional loans.

In response to Kaufold's motion for summary judgment, Millsaps filed an affidavit from that same domestic relations attorney which reiterated her deposition testimony. In the affidavit, the attorney averred that Kaufold had breached the standard of care for domestic relations attorneys by, among other things, failing to identify corporations controlled by the former husband, failing to name such corporations as defendants in the divorce action and failing to file a notice of lis pendens against real estate owned by those corporations and the former husband. The attorney opined that Kaufold's errors were the proximate cause of financial damages suffered by Millsaps in the divorce. She stated that but for Kaufold's errors, the marital estate would not have been dissipated and Millsaps would have received substantially more assets than she did in the final decree.

In support of her opinion that Millsaps would have received a substantially larger award or settlement of marital assets, the attorney cited the sworn financial statement of the former husband *46 indicating that four months after the filing of the divorce action he had a net worth of over \$2 million. Opining that marital estates are typically divided equally, the attorney reasoned that Millsaps and her former husband would have each gotten approximately \$1 million of that property. However, because of Kaufold's failures to protect the value of the mar-

ital estate, the former husband was allowed to systematically dissipate the estate to the extent that when the divorce was finalized a year later, the total value of assets received by Millsaps was, at most, approximately \$120,000, as claimed by Kaufold. Accordingly, as a proximate result of Kaufold's failure to protect the marital assets, the attorney concluded that Millsaps was damaged by at least \$880,000.

Despite this expert testimony showing proximate cause of damages, Kaufold argues that Millsaps cannot show that the outcome of her divorce action would have been different but for Kaufold's errors since there is evidence, including the former husband's affidavit, that the former husband would not have entered into any settlement agreement other than that which resolved the divorce action. In support of this argument, Kaufold cites the case of *Hopkinson v. Labovitz*,^{FN2} which affirmed a trial court's finding of no evidence of damages with, among other holdings, the following language.

FN2. 263 Ga.App. 702, 589 S.E.2d 255 (2003).

While Hopkinson introduced testimony that she would not have made the agreement she made if she had known her ex-husband's true income, Labovitz presented evidence that her ex-husband would not have settled for a higher amount than he did. Because it takes both parties to reach an agreement, she has not shown that she could have settled her divorce for higher alimony.^{FN3}

FN3. *Id.* at 706(1)(b), 589 S.E.2d 255.

Hopkinson, however, is materially different from, and does not control, the instant case. First, *Hopkinson* is not a legal malpractice case but is a fraud case. Moreover, unlike the instant case, it is not premised on a claim that a negligent lawyer did not properly protect marital assets by failing to identify various corporations controlled by the husband and failing to file a notice of lis pendens against certain properties. While evidence that an

ex-husband would not have entered into a different settlement may have precluded a showing of damages in the fraud action at issue in *Hopkinson*, under the facts of the instant case, such evidence simply creates a genuine issue of material fact as to whether the outcome of the underlying divorce *47 action would have been different but for the attorney's alleged errors in failing to protect various assets. Here, Millsaps' showing that Kaufold's alleged errors proximately caused damage to her is not based on mere speculation or conjecture, but is based on evidence sufficient to create a jury issue and survive summary judgment.^{FN4}

FN4. Compare *Szurovy v. Olderman*, 243 Ga.App. 449, 452-453, 530 S.E.2d 783 (2000) (claims of damages too speculative where no evidence of former husband's assets).

To prevail at summary judgment under OCGA § 9-11-56, the moving party must **347 demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. OCGA § 9-11-56(c). A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case.^{FN5}

FN5. (Emphasis omitted.) *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991).

Because the affidavits, depositions and other evidence in the record reveal that there are genuine issues of material fact, the trial court erred in granting summary judgment to Kaufold. Accordingly, that summary judgment ruling must be reversed.

Judgment reversed.

PHIPPS and MIKELL, JJ., concur.

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 (Cite as: 2003 WL 21509023 (Ohio App. 9 Dist.))

H

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio,
 Ninth District, Summit County.
 Jon Eric MORRIS, et al., Appellees,
 v.
 John MORRIS, Appellant.

No. 21350.
 Decided July 2, 2003.

Client brought legal malpractice claim against attorney. The Court of Common Pleas, Summit County, No. CV 2001 06 3073, entered judgment in favor of client and attorney appealed. The Court of Appeals, Whitmore, J., held that: (1) evidence of client's prior felony conviction for gross sexual imposition and pandering obscenity was not admissible, and (2) expert testimony was not required to establish that attorney's breach of duty was proximate cause of client's economic damages.

Affirmed.

West Headnotes

[1] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
 45k129 Actions for Negligence or Wrongful
 Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

Evidence of client's prior felony conviction for gross sexual imposition and pandering obscenity was not admissible in client's legal malpractice action against attorney, where probative value of evidence was substantially outweighed by danger of unfair prejudice; nature of charges would have had

highly negative impact on jury, and fact felony conviction occurred more than one year after client hired attorney to help him obtain liquor license decreased probative value of conviction because it made it less likely that felony conviction prevented client from obtaining liquor license. Rules of Evid., Rules 403, 609.

[2] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
 45k129 Actions for Negligence or Wrongful

Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

Expert testimony was not required in legal malpractice action to establish that attorney's breach of duty was proximate cause of client's economic damages, where evidence was sufficient to allow jury to determine that attorney's breach of duty proximately caused client's damages; client, who sought to purchase liquor license, entered into management agreement, purchase agreement and lease, in reliance on attorney's advice, agreements were one-sided and benefited seller, attorney had not reviewed agreements or discussed them with client before advising client to sign them, and attorney failed to properly fill out application for liquor license.

Appeal from Judgment Entered in the Court of Common Pleas, County of Summit, Ohio, Case No. CV 2001 06 3073. John B. Lindamood and Daniel E. Clevenger, Attorneys at Law, North Canton, OH, for Appellant.

Ted Chuparkoff, Attorney at Law, Akron, OH, for Appellee.

WHITMORE, Judge.

*1 {¶ 1} Defendant-Appellant John D. Morris has appealed from a decision of the Summit County

Court of Common Pleas that rendered judgment in favor of Plaintiff-Appellee Jon Eric Morris on his claim of legal malpractice. This Court affirms.

I

{¶ 2} On June 29, 2001, Appellee filed an action against Appellant, a professional attorney, for legal malpractice. Appellee alleged that he hired Appellant for his legal services in aiding Appellee in completing a managerial agreement, purchase agreement, and liquor license transfer with Art's Daughters, Inc.

{¶ 3} Appellee claimed in his complaint that, from April 29, 1998 through July 2000, Appellant "commenced a legal procedure to complete the sale and transfer of Art's Daughters Inc.'s liquor license" to Appellee. However, Appellee alleged that Appellant failed to exercise reasonable care, skill, and diligence in obtaining the liquor license because Appellee was never able to procure said license. Appellee alleged that Appellant breached his legal duty, and that as a consequence of that breach, Appellant directly and proximately caused Appellee damages, including, but not limited to, the loss of \$20,000 as payment for the liquor license, criminal arrest, loss of earnings, serious emotional distress, loss of enjoyment of life and lost expenses.

{¶ 4} Prior to trial, the case was referred to a court mediator. However, mediation was unsuccessful, and the case was referred back to the trial court. Before a jury trial was to proceed, Appellee filed a motion in limine, whereby he requested the trial court to exclude any evidence of Appellee's felony conviction which occurred after he retained Appellant's legal services and before he sustained his alleged economic damages. The trial court did not rule on Appellee's motion until the case proceeded to trial, during which time both parties presented arguments outside the hearing of the jury. After oral arguments, the trial court granted Appellee's motion.

{¶ 5} The jury returned a verdict in favor of Appellee and awarded him damages in the amount

of \$70,007.97. Appellant filed a motion for judgment notwithstanding the verdict, or in the alternative, motion for a new trial; Appellee filed a brief in opposition. The trial court denied Appellant's motion. Appellant has timely appealed, asserting two assignments of error.

II

Assignment of Error Number One

"THE TRIAL COURT ABUSED [ITS] DISCRETION IN FAILING TO ADMIT EVIDENCE OF [APPELLEE'S] PRIOR FELONY CONVICTION."

[1] {¶ 6} In Appellant's first assignment of error, he has argued that the trial court abused its discretion when it failed to admit evidence of Appellee's prior felony conviction. Specifically, Appellant has contended that Appellee's prior conviction was properly admissible because it went to the ultimate issue of proximate cause and it "could also have been used to attach [sic] the credibility of [Appellee]."

{¶ 7} This Court has previously explained that:

*2 "A motion *in limine* is a request for a preliminary order regarding the admissibility of evidence that a party believes may be improper or irrelevant. The purpose of a motion *in limine* is to alert the court and counsel of the nature of the evidence in order to remove discussion of the evidence from the presence of the jury until the appropriate time during trial when the court makes a ruling on its admissibility." (Citations omitted.) *Nurse & Griffin Ins. Agency, Inc. v. Erie Ins. Group* (Nov. 7, 2001), 9th Dist. No. 20460, at 3.

{¶ 8} Furthermore, an appellate court does not need to determine the propriety of an order granting or denying such a motion unless the claimed error is preserved by an objection, proffer, or ruling on the record at the proper point during the trial. *Harbottle v. Harbottle*, 9th Dist. No. 20897, 2002-Ohio-4859, at ¶ 55; *Garrett v. Sandusky* (1994), 68 Ohio St.3d 139, 141, 624 N.E.2d 704. This is because a "ruling on a motion in limine is

only a preliminary ruling. Any objection to the denial of a motion in limine must be renewed once the evidentiary issue is presented during trial in order to properly preserve the question for appeal." *Dobbins v. Kalbaugh*, 9th Dist. Nos. 20714, 20918, 20920, 2002-Ohio-6465, at ¶ 20, appeal not allowed (2003), 98 Ohio St.3d 1513, 2003-Ohio-1572, citing *State v. Hill* (1996), 75 Ohio St.3d 195, 202-203, 661 N.E.2d 1068. Therefore, a party who has been prohibited from presenting certain evidence at trial must "seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." *Harbottle*, supra at ¶ 56, quoting *State v. Grubb* (1986), 28 Ohio St.3d 199, 503 N.E.2d 142, paragraph two of the syllabus.

{¶ 9} In the instant case, Appellant properly proffered the substance of the excluded evidence immediately after the trial court granted Appellee's motion in limine. Before Appellant's trial counsel commenced cross-examination of Appellee, trial counsel requested permission to approach the bench. The trial court immediately called a recess, and the following colloquy took place:

"THE COURT: The Court's going to grant the motion in limine in total under [Evid.R. 609].

"We do have a felony, but the felony was committed after the fact and [Evid.R. 609] is subject to-specifically subject to [Evid.R. 403] which is the probative value has to outweigh the prejudice.

"So, [Appellant] is going to be prohibited from mentioning any felony of [Appellee] here.

"If he would have brought his character into evidence through his direct, then it would be under a different rule you could have gotten a little further into it, but I think under [Evid.R. 609] and [Evid.R. 403] everything should be prohibited here.

"[APPELLANT'S COUNSEL]: Well, if it please

the Court, I mention only that [Evid.R. 609] also provides in (B) a provision where the credibility, i.e., truthfulness of anyone under sentence within ten years can be introduced for that purpose and we are talking in a case like this about who said what to whom and when. That's terribly important.

*3 "THE COURT: Yes, but it is all subject to [Evid.R. 403].

"[APPELLANT'S COUNSEL]: Of course it is.

"THE COURT: Right. So, I don't think that's an absolute right to begin with under [Evid.R. 609]. [Evid.R. 609] is quite lengthy. It's got (A), (B), (C), (D), (E), (F), all right, and (A)(1) is subject to [Evid.R. 403], okay.

"Evidence that a witness is convicted of a crime is admissible if within excess of one year, subject to [Evid.R. 403].

"[Evid.R. 403] is probative value over prejudice, all right.

"[APPELLANT'S COUNSEL]: Well, yesterday, as I recall the request, which was filed ten dates [sic] late, they also said why not just mention the felony, not the specifics of it.

"THE COURT: Well, he had that as a fall back position.

"[APPELLANT'S COUNSEL]: [Appellee's] witnesses already mentioned the criminal charges[.]

"THE COURT: What was [the witness'] testimony in that regard?

"[APPELLANT'S COUNSEL]: The reasons why the [liquor] license could not be transferred, that was number five.

"THE COURT: Well, nevertheless that's all speculative, you know. It's not absolute prohibition regarding transfer of license from what I saw in the motion which the felony precludes a transfer.

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"[APPELLANT'S COUNSEL]: Well, that occurred three months before they shut it down.

"THE COURT: I know, but it's all pretty speculative and it happened after the fact. I'm going to grant the motion in total.

"[APPELLANT'S COUNSEL]: Please note my exceptions.

"THE COURT: Okay."

{¶ 10} It is apparent from the discussion that took place outside the hearing of the jury that Appellant attempted to introduce evidence of Appellee's prior conviction, but was prohibited from doing so when the trial court granted Appellee's motion in limine on the ground that the probative value of the prior conviction was substantially outweighed by the danger of unfair prejudice. As Appellant properly preserved the issue of the motion in limine for appeal, we now turn to the propriety of the trial court's decision to overrule Appellant's objections to the exclusion of the evidence. See *Sergi v. Sergi* (July 31, 1996), 9th Dist. No. 17476, at 19, appeal not allowed (1996), 77 Ohio St.3d 1490 (stating that because a motion in limine is a preliminary ruling, and cannot serve as a basis for error on appeal, an appellate court's review is limited to whether the trial court incorrectly overruled the party's objections at trial).

{¶ 11} Initially, we note that the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, syllabus. The admission or exclusion of evidence by a trial court will not be reversed on appeal absent a clear and prejudicial abuse of discretion. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163, 407 N.E.2d 490. An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

*4 {¶ 12} Here, the trial court found that Appellee's prior conviction for gross sexual imposition and pandering obscenity was not admissible pursuant to Evid.R. 609 and Evid.R. 403. Evid.R. 609(A) provides, in pertinent part:

"For the purpose of attacking the credibility of a witness:

"(1) subject to Evid.R. 403, evidence that a witness other than the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted.

"(2) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶ 13} As indicated in Evid.R. 609, a trial court must consider Evid.R. 403 in conjunction with Evid.R. 609. *State v. Wright* (1990), 48 Ohio St.3d 5, 548 N.E.2d 923, syllabus. Under Evid.R. 403, evidence that is otherwise admissible (1) must be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury, and (2) may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence. Therefore, in considering the admission or exclusion of evidence under Evid.R. 609 and Evid.R. 403, a trial judge "has broad discretion in determining the extent to which testimony will be admitted * * *. When exercising this discretion, all relevant factors must be weighed." *Wright*, 48 Ohio St.3d at 8, 548 N.E.2d 923.

{¶ 14} After reviewing the record, we find that the trial court did not abuse its discretion when it prohibited the admission of Appellee's prior felony conviction on the ground that its probative value was substantially outweighed by the danger of unfair prejudice. Although relevant to the issue of Appellee's credibility, the nature of the charges for which Appellee was convicted would, as the court intimated, have a highly negative impact upon the jury. Moreover, it appears that the conviction occurred more than a year after Appellee hired Appellant to help him obtain a liquor license; this decreased the probative value of the conviction because it made it less likely that the felony conviction prevented Appellee from obtaining a liquor license. The trial court also noted that despite Appellant's argument that a felony conviction was the reason and/or contributing factor to the denial of a liquor license as opposed to the malpractice of Appellant, a felony conviction is not an "absolute prohibition regarding transfer of license from what I saw in the motion which the felony precludes a transfer."

*5 {¶ 15} Accordingly Appellant's first assignment of error is not well taken.

Assignment of Error Number Two

"[APPELLEE] FAILED TO ESTABLISH HIS BURDEN OF PROOF THAT THE DAMAGES ALLEGED WERE A PROXIMATE RESULT OF [APPELLANT'S] BREACH OF DUTY."

[2] {¶ 16} In Appellant's second assignment of error, he has argued that Appellee failed to establish his burden of proof that the damages alleged were a proximate result of Appellant's breach of duty. Specifically, Appellant has contended that an expert is required to show that an attorney's breach of duty is the proximate cause of a client's economic damages. We disagree.

{¶ 17} In order to prevail on a legal malpractice claim, Appellee had the burden to prove: (1) an attorney-client relationship existed at the time of the incident; (2) that Appellant breached his duty by failing to provide competent legal services; and

(3) that he suffered damages as a proximate result of Appellant's breach of duty. *Thomarios v. Lieberth* (Feb. 19, 1992), 9th Dist. No. 15229, at 3, citing *Palmer v. Westmeyer* (1988), 48 Ohio App.3d 296, 298, 549 N.E.2d 1202; *Edward L. Gilbert Co., LPA v. Levy* (Mar. 27, 1996), 9th Dist. No. 17292, at 8. "Generally, expert testimony is required 'to establish a claim of legal malpractice based on an alleged failure to exercise the knowledge, skill, and ability ordinarily possessed and exercised by the legal profession similarly situated * * *.' " *Levy*, supra at 9, quoting *Holley v. Massie* (1995), 100 Ohio App.3d 760, 764, 654 N.E.2d 1293. If, however, the breach is so obvious that it can be determined by the court or is within the ordinary knowledge and experience of laymen then an expert is not required. *Hooks v. Ciccolini*, 9th Dist. No. 20745, 2002-Ohio-2322, at ¶ 10, appeal not allowed, 96 Ohio St.3d 1514, 2002-Ohio-4950, certiorari denied (2003), 538 U.S. 910, 123 S.Ct. 1490, 155 L.Ed.2d 232, citing *Bloom v. Dieckmann* (1983), 11 Ohio App.3d 202, 203, 464 N.E.2d 187.

{¶ 18} In the case sub judice, Appellant has not argued that Appellee failed to show that an attorney-client relationship existed or that Appellant breached his duty. Rather, Appellant's arguments are directed at Appellee's alleged failure to show through expert testimony that his damages were the direct and proximate result of Appellant's breach of duty. He has contended that "[a] jury cannot determine the proximate cause of an alleged breach of duty unless there is expert testimony in a legal malpractice case that the breach proximately resulted in the alleged damage that [Appellee] was claiming[.]" and that "[b]y [Appellee's] counsel's own admission, no such evidence was presented to the jury at the trial court level."

{¶ 19} As discussed above, expert testimony may be required to establish the second prong of a legal malpractice claim, namely the professional standard of conduct and the attorney's breach of duty. See *Levy*, supra at 9; *Hooks*, supra at ¶ 10; *Nelson v. Klima* (Sept. 15, 1994), 8th Dist. No.

65421, 1994 Ohio App. LEXIS 4059, at *7 ("With regard to the * * * breach of duty, we note that expert evidence is ordinarily necessary to establish the element of breach of the duty of care[.]"). However, it appears that an expert is not required to prove the third prong of a legal malpractice claim, or proximate cause. See *Robinson v. Calig & Handleman* (1997), 119 Ohio App.3d 141, 144, 694 N.E.2d 557.

*6 {¶ 20} In *Robinson*, a client brought a legal malpractice action against his attorney and the attorney's firm for failing to take his divorce case to trial. The trial court granted the attorney's motion for summary judgment and the client appealed. On appeal, the client contended that the trial court erred in requiring him to prove, in effect, the success he would have achieved had the attorney and her firm taken his divorce case to trial. The appellate court reversed the judgment of the trial court, and specifically rejected the portion of the trial court's decision which inferred that an expert cannot render an opinion as to proximate cause. *Robinson*, 119 Ohio App.3d at 144, 694 N.E.2d 557. The *Robinson* court held that "[w]ith appropriate foundation, an expert may opine concerning the proximate cause aspect of a legal malpractice case." (Emphasis added.) *Id.*

{¶ 21} As in *Robinson*, we conclude that an expert may render an opinion on the issue of proximate cause. See *Montgomery v. Gooding, Huffman, Kelly & Becker* (N.D. Ohio 2001), 163 F.Supp.2d 831, 837 (stating that Ohio law does not require expert witness evidence to establish proximate cause in legal malpractice actions). The issue of proximate cause is generally a question of fact, and is therefore a matter for the jury. *Farlow v. Board of County Cmmrs.* (Apr. 18, 1979), 9th Dist. Nos. 2812, 2813, at 11; *Platinum Fin. Servs. v. Gurney* (Oct. 31, 1996), 8th Dist. No. 69481, 1996 Ohio App. LEXIS 4802, at *29, appeal not allowed (1997), 78 Ohio St.3d 1428, citing *Merchants Mut. Ins. Co. v. Baker* (1984), 15 Ohio St.3d 316, 473 N.E.2d 827. Here, the jury could infer from the

evidence presented at trial that Appellant's breach of duty proximately caused Appellee's damages.

{¶ 22} At trial, Joseph Oliver, the attorney for Art's Daughters, Inc., testified that he entered into an agreement with Appellee, whereby Art's Daughters, Inc. would sell Appellee a liquor license for approximately \$20,000. After Appellee and Mr. Oliver orally agreed to the sale of the liquor license, Mr. Oliver stated, he drew up a management agreement, purchase agreement, and lease to effectuate the sale of the license. He testified that the management agreement clearly stipulated that Appellee was prohibited from selling liquor under the license until the license was properly transferred from Art's Daughters, Inc. to Appellee.^{FN1} When Mr. Oliver learned that Appellee was selling liquor under a liquor license that was still in the name of Art's Daughters, Inc., he faxed a letter to Appellant on January 15, 1999. At trial, Mr. Oliver testified to the contents and intent of the faxed letter:

FN1. During the trial, Appellant read the following from the management agreement: "Buyer does not have the right to operate under the permit until and unless * * * buyer's application * * * has been approved by the Ohio Division of Liquor control and the purchase price for the permit has been released out of escrow to seller as contemplated under the purchase agreement."

"[In the letter], I'm indicating to [Appellant] that I just learned that [Appellee] was selling alcoholic beverages at the store and I had just learned that the application had not been filed, the application for transfer of permit had not been filed with the Department of Liquor Control. I pointed out that it had been [Appellee's] obligation under the agreement to file that application. I pointed out that pursuant to the management agreement [Appellee] did not have the right to sell liquor at the premises until the application had been approved. * * * And I think the clear intent was that [Appellee] should stop [selling liquor] or else

make other arrangements to get permission to do that."

*7 ¶ 23} Mr. Oliver testified that Appellant sent a reply to the January 15, 1999 fax, which read: "Reply: FYI: My client is operating pursuant to management agreement, John Morris."

¶ 24} Appellee testified that he initially discussed purchasing Art's Daughters, Inc.'s liquor license without Appellant's legal advice, and that he only required Appellant's services after Mr. Oliver had reduced their oral negotiations to writing. Appellee stated that he asked Mr. Oliver to send copies of the written agreements to Appellant, and he asked Appellant to "check it over." Appellee further testified that before he signed the agreements, he talked to Appellant and was told that it was "okay to sign them." Appellee stated that he did not personally read the contents of the agreements, and when asked why he did not read the agreements before signing them he replied: "That's what I hired a lawyer for."

¶ 25} Appellee stated that after signing the agreements, he began to make further preparations for the opening of his club/bar. Although he stated that he had entered into a lease agreement for the bar before he agreed to purchase Art's Daughters, Inc.'s liquor license, he testified that after he signed the agreements he remodeled the interior of the bar and purchased such items as bottled liquor, beer, drinking glasses, a software package called "digital dining," and bar signs.

¶ 26} Appellee further testified that after receiving a liquor license, which was still in the name of Art's Daughters, Inc., he began to sell liquor in October or November 1998. Appellee stated that in June 2000, police arrived at his bar and arrested Appellee for selling liquor without a permit. Appellee explained: "Well, [the police] shut the bar down, they hauled out all the liquor, they filed charges against me. They took my business." When asked if Appellant knew that he was selling liquor under a liquor license that was still in the name of Art's Daughters, Inc., Appellee replied: "Yes."

¶ 27} Alan Matavich, an attorney practicing in Youngstown, Ohio, testified on behalf of Appellee as an expert witness. Mr. Matavich stated that he reviewed the management agreement, purchase agreement, and lease, along with other items such as letters, liquor license applications, and copies of permits. Mr. Matavich testified that he believed Appellant deviated from the standard of care when he advised Appellee to sign the purchase agreement because "the purchase and sale agreement [are] weighted almost entirely in favor of the seller." He further explained:

"That purchase and sale agreement called for the entire purchase price for the liquor permit to be paid to the seller upon the filing of the permit with the Division of Liquor Control.

"It didn't provide to hold back any money to satisfy delinquent taxes.

"There was some clauses in the agreement that if the deal did not go through, that the money was to be paid back to the purchaser[.]

*8 "Well, the money was already gone and in my opinion an attorney should never have advised his client that it was acceptable to sign that agreement."

8B¶ 28} Mr. Matavich also believed that Appellant deviated from the standard of care when Appellant advised Appellee to sign the management agreement because the management agreement "specifically said that [Appellee] was not allowed to use the permit to sell alcoholic beverages. In other words, that language, in my opinion, defeated the entire purpose of a managerial agreement ." Mr. Matavich further stated that Appellant deviated from the standard of care when he attempted to transfer the liquor license from the transferor, Art's Daughters, Inc., to the transferee, Appellee. He explained that Appellant failed to properly fill out the application for the liquor license because Appellant listed the applicant as an individual, but noted that the applicant was signing in the capacity of a lim-

ited liability company. The difference, Mr. Matavich explained, "sends conflicting signals as to who actually is asking for the transfer, is it an individual by the name of Jon Eric Morris or is it a limited liability company." Mr. Matavich testified that the incorrectly submitted application caused an unnecessary delay in processing.

{¶ 29} Mr. Matavich also testified that more delays were caused because, on the advice of Appellant, Appellee was paying taxes in the name of Top Shelf, Inc. According to Mr. Matavich, Appellee should have been paying taxes in the name of Art's Daughters, Inc. until the liquor license was properly transferred.

{¶ 30} John Giua, an attorney practicing in Canton, Ohio, testified on behalf of Appellant as an expert witness. Mr. Giua testified that some of the problems Appellee experienced in attempting to obtain a liquor license were not the fault of Appellant. He stated that when Appellant initially filed an application to obtain a liquor license it was delayed because the name of the seller was incorrect; Mr. Oliver failed to transfer the liquor license from Arthur Ealy, now deceased, to Art's Daughters, Inc. When asked during direct examination if he had an opinion after "having gone through all of these documents, based upon your training and experience and education that the handling of this matter insofar as [Appellant] for trying to reconstruct and put this thing together and transfer a license was within the standard of care for trying to get a license transferred[.]" Mr. Giua responded: "I do not believe that [Appellant] deviated from the standard of care in this particular manner. This matter was a very unusual situation." Mr. Giua later explained on cross-examination that his opinion was based on his belief that Appellant did not have any involvement in Appellee's signing of the agreements.

{¶ 31} On cross-examination, Mr. Giua also stated that the management agreement was pro-seller because it was "a one-way, one-sided type of arrangement" that benefited the seller. Further, when asked if it "[w]ould * * * have been a devi-

ation from the standard of care if [he] would have advised [Appellee] to sign [the management agreement,]" Mr. Giua replied: "I would think so." Additionally, Mr. Giua testified that if Appellant told Appellee to sign the agreements "without any other discussion, I would think it would be bad advice."

*9 {¶ 32} Appellant testified that he agreed with Mr. Matavich and Mr. Giua, in that he also believed that "[the agreements] were bad documents, I don't dispute that." He testified that he received copies of the documents from Appellee, but he stated that he did not review the documents. Despite this testimony, he admitted that he told Appellee to "[g]o ahead and sign [the agreements]," based upon what Appellee and Mr. Oliver told him. He further stated that he believed Appellee could legally sell liquor under the management agreement, despite the fact that the liquor license issued in the name of Art's Daughters, Inc. was never transferred to Appellee and the terms of the management agreement expressly prohibited the sale of liquor until the liquor license was transferred to Appellee. Appellant explained:

"So the managerial agreement prohibition against selling, and this has always been my legal opinion and it will be my opinion until the day that I die, is that that provision [which prohibited Appellee from selling liquor until the liquor license was transferred to him] was effectively waived by [Joseph] Oliver saying that Art's Daughters, Inc. was selling liquor at State Road effective and he says in one document they stopped selling [November 15, 1998]."

{¶ 33} On cross-examination, Appellant stated that Appellee never hired him to look at the management agreement, purchase agreement, and lease. Appellant stated that despite Mr. Oliver's testimony that he talked to Appellant about the documents before Appellee signed them, Appellant never approved the documents for signing. Although Appellant's testimony clearly conflicted with both Mr. Oliver's and Appellee's testimony that Appellant did, in fact, approve the signing of the documents,

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Appellant admitted on cross-examination that "[i]n hindsight and me sitting here today, no, I wouldn't have recommended [Appellee] sign those documents."

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{¶ 34} As an expert was not required to testify regarding proximate cause, and the evidence presented at trial was sufficient to allow a jury to determine that Appellant's breach of duty proximately caused Appellee's damages, we find that Appellant's second assignment of error lacks merit.

III

{¶ 35} Appellant's assignments of error are overruled. The judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

*10 Costs taxed to Appellant.

Exceptions.

BAIRD, P.J., and BATCHELDER, J., CONCUR.

Ohio App. 9 Dist., 2003.
Morris v. Morris

209 A.D.2d 222, 618 N.Y.S.2d 307
 (Cite as: 209 A.D.2d 222, 618 N.Y.S.2d 307)

▷

Supreme Court, Appellate Division, First Department, New York.

Laura Drummond NEWBACH, etc., et al.,
 Plaintiffs-Respondents,

v.

GIAIMO & VREEBURG, et al., Defendants-Respondents,
 and

Koopersmith, Feigenbaum & Potruch, et al., Defendants-Appellants.

Nov. 10, 1994.

Representatives of client's estate sued law firm for legal malpractice. The Supreme Court, New York County, Sherman, J., denied firm's motion for partial summary judgment. Firm appealed. The Supreme Court, Appellate Division, held that genuine issue of material fact existed as to whether estate suffered actual damages as result of firm's allegedly negligent failure to change beneficiary of client's life insurance policy.

Affirmed.

West Headnotes

[1] Abatement and Revival 2 ⇌ 52

2 Abatement and Revival

2V Death of Party and Revival of Action

2V(A) Abatement or Survival of Action

2k51 Causes of Action Which Survive

2k52 k. In General. Most Cited Cases

Legal malpractice claim survives client's death and may be prosecuted by client's estate representative. McKinney's EPTL 11-3.2(b).

[2] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Genuine issue of material fact, precluding summary judgment for law firm in legal malpractice action by representatives of client's estate, existed as to whether estate suffered actual damages as result of law firm's allegedly negligent failure to change beneficiary of client's life insurance policy.

****308** Before ELLERIN, J.P., and ROSS, RUBIN and NARDELLI, JJ.

***222 MEMORANDUM DECISION.**

Order, Supreme Court, New York County (Burton S. Sherman, J.), entered October 4, 1993, which, *inter alia*, denied defendants-appellants' motion for partial summary judgment seeking to dismiss that aspect of the complaint alleging legal malpractice in failing to effect a change of the beneficiary of decedent's life insurance policy, unanimously affirmed, with costs.

[1][2] The IAS court properly concluded that plaintiffs have a viable claim for legal malpractice in their capacity as representatives of decedent's estate. As duly appointed representatives of the estate, plaintiffs are entitled to commence an action "for injury to person or property" following "the death of the person in whose favor the cause of action existed" (EPTL 11-3.2[b]). A legal malpractice claim survives a client's death and may be prosecuted by the client's estate representative (*see, e.g., McEvoy v. Garcia*, 114 A.D.2d 401, 494 N.Y.S.2d 125). Defendants-appellants do not deny that their handling of decedent's life insurance policy may have been negligent; rather, they contend that the estate suffered no actual damages "because the proceeds of the policy were to be divided between the children as decedent's intended beneficiaries, as opposed to [the] estate". However, plaintiffs clearly have made a showing, regardless

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of whom would have been named beneficiaries of the life insurance policy had decedent's instructions been carried out, that decedent's and, by extension, the estate's financial interests were damaged during the matrimonial settlement negotiations by the failure to replace the husband as the beneficiary of decedent's \$1 million life insurance policy. Apparently neither defendants-appellants nor any of the other defendants were aware that the policy itself clearly indicated that decedent was the owner of the policy and retained the right to change the beneficiary. Thus, during the matrimonial settlement negotiations, not only was a change in beneficiary never effected, but the policy was mistakenly treated as being owned by the husband with himself as beneficiary. Consequently, as plaintiffs note, decedent's bargaining position was disadvantaged, since decedent and counsel "negotiated a settlement *223 in which the \$1,000,000.00 of life insurance benefits were distributed to her estranged husband as though he owned the policy". Although the value of such a disadvantage cannot be readily quantified, a showing of damages sufficient for summary judgment purposes has been made. Regarding defendants-appellants' contention that there was no privity between the law firm and plaintiffs, the IAS court properly concluded that "[since] the estate has a viable claim against [the law firms] and plaintiffs have not brought suit in other than a representative capacity, the issue of privity * * * [need] not be addressed".

N.Y.A.D. 1 Dept.,1994.
Newbach v. Giaimo & Vreeburg
209 A.D.2d 222, 618 N.Y.S.2d 307

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295 A.D.2d 586, 744 N.Y.S.2d 205, 2002 N.Y. Slip Op. 05473
(Cite as: 295 A.D.2d 586, 744 N.Y.S.2d 205)

C

Supreme Court, Appellate Division, Second Department, New York.

Brian W. O'CONNOR, Appellant,

v.

BLODNICK, ABRAMOWITZ AND BLODNICK,
et al., Respondents.

June 24, 2002.

Client brought action against former attorney, to recover damages for breach of contract and legal malpractice. The Supreme Court, Nassau County, Burke, J., dismissed breach of contract claim. Client appealed. The Supreme Court, Appellate Division, held that: (1) allegations stated claim for breach of contract, and (2) former attorney had burden to establish that fees he received were reasonable.

Reversed.

West Headnotes

[1] Attorney and Client 45 ⇌ 16

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k16 k. Privilege from Arrest or Service of Process. Most Cited Cases

Allegations by client that former attorney charged excessive fees, that former attorney charged client twice his usual rate without explanation for such higher rate, and that former attorney failed to support charges assessed with itemized statement of hours spent on client's case, stated prima facie claim against former attorney for breach of contract.

[2] Attorney and Client 45 ⇌ 140

45 Attorney and Client

45IV Compensation

45k139 Value of Services

45k140 k. In General. Most Cited Cases

Overbilling and padding of costs by an attorney on his billing statement can constitute a breach of contract.

[3] Attorney and Client 45 ⇌ 166(3)

45 Attorney and Client

45IV Compensation

45k157 Actions for Compensation

45k166 Evidence

45k166(3) k. Value of Services or Amount of Compensation. Most Cited Cases

In breach of contract action by client against former attorney, former attorney had the burden of establishing that fees he received for legal services rendered were fair and reasonable, even though client already paid fees.

****205** Michael F. Mongelli II, P.C., Flushing, NY, for appellant.

Blodnick, Gordon, Fletcher & Sibell, P.C., Westbury, N.Y. (Lawrence M. Gordon of counsel), for respondents.

FRED T. SANTUCCI, J.P., MYRIAM J. ALTMAN, GLORIA GOLDSTEIN and DANIEL F. LUCIANO, JJ.

***586** In an action, *inter alia*, to recover damages for breach of contract and legal malpractice, the plaintiff appeals, as limited by his brief, from so much of a judgment of the Supreme Court, Nassau County (Burke, J.), entered April 23, 2001, as, upon the granting of that branch of the defendants' motion which was to dismiss the third cause of action sounding in breach of contract made at the close of his case, dismissed that cause of action.

ORDERED that the judgment is reversed insofar as appealed from, on the law, and the plaintiff is

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granted a new trial on the third cause of action sounding in breach of contract limited to the issue of whether the fees paid to the defendants were fair and reasonable, with costs to abide the event.

At issue is whether the trial court properly dismissed the third cause of action **206 sounding in breach of contract. At his examination before trial, which was admitted in evidence as part of the plaintiff's direct case, the defendant Edward L. Blodnick acknowledged that the \$400 premium rate charged to the plaintiff was twice his usual rate. He acknowledged that he could not recall whether he ever charged this premium rate to *587 any other client. He claimed that he charged twice his usual rate on the ground that the plaintiff was not required to pay the fees within 30 days of billing. The defendants' bills itemized services rendered, but not the number of hours expended.

The trial court granted the defendants judgment as a matter of law at the close of the plaintiff's case on the ground that the plaintiff failed to satisfy his burden of establishing that "the number of hours or the hourly rates charged were erroneously computed, or that the services billed for were not performed at all" or were unnecessary.

[1][2][3] The plaintiff established a prima facie case that the fees assessed were excessive based upon Edward K. Blodnick's testimony at his examination before trial that he charged the plaintiff twice his usual rate, his inability to provide a reasonable explanation for imposition of the premium rate, and his inability to support the charges assessed with records of hours spent on the case. Overbilling and padding of costs can constitute a breach of contract (see *Graphic Offset Co. v. Torre*, 78 A.D.2d 788, 433 N.Y.S.2d 13), and can give rise to a cause of action in favor of a client and against an attorney (see *U.S. Ice Cream Corp. v. Bizar*, 240 A.D.2d 654, 659 N.Y.S.2d 492). As a matter of public policy, the defendants had the burden of establishing that their compensation was fair and reasonable (see *Shaw v. Manufacturers Hanover Trust Co.*, 68 N.Y.2d 172, 176, 507 N.Y.S.2d 610,

499 N.E.2d 864; *Matter of Bizar & Martin v. U.S. Ice Cream Corp.*, 228 A.D.2d 588, 589, 644 N.Y.S.2d 753; *Malamut v. Doris L. Sassower, P.C.*, 171 A.D.2d 780, 567 N.Y.S.2d 499).

The fact that the fees in question were already paid to the defendants did not alter the fact that the defendants bore the ultimate burden of proof as to the reasonableness of their fees (see *Jacobson v. Sassower*, 66 N.Y.2d 991, 993, 499 N.Y.S.2d 381, 489 N.E.2d 1283). A new trial must be granted to afford them an opportunity to satisfy their burden of proof.

The plaintiff's remaining contentions are without merit.

N.Y.A.D. 2 Dept., 2002.
O'Connor v. Blodnick, Abramowitz and Blodnick
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391 N.W.2d 51
 (Cite as: 391 N.W.2d 51)

C

Court of Appeals of Minnesota.
 OAKES & KANATZ, Respondents,

v.

Romana L. SCHMIDT, Appellant.

No. C0-85-1829.

July 29, 1986.

Law firm brought action against divorce client to collect attorney's fees. The District Court, Ramsey County, James M. Lynch, J., entered judgment against client for attorney's fees and granted summary judgment against her on her counterclaim alleging negligent practice of law. Client appealed. The Court of Appeals, Forsberg, J., held that question of fact existed as to whether law firm was negligent in inducing client to agree to settlement in divorce action.

Reversed.

Randall, J., filed dissenting opinion.

West Headnotes

Judgment 228 ⇐ **181(16)**

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Question of fact existed as to whether law firm was negligent in inducing divorce client to agree to divorce settlement.

**52 Syllabus by the Court*

The trial court erred in granting summary judgment when it characterized the attorney malpractice action as an attack on a negotiated dissolution judgment and decree.

Peter A. Bologna, Murnane, Conlin, White, Brandt

& Hoffman, Saint Paul, for respondents.

M. Guy Ross, Limited Income Legal Assistance, Minneapolis, for appellant.

Heard, considered and decided by FORSBERG, P.J., and SEDGWICK and RANDALL, JJ.

OPINION

FORSBERG, Judge.

Romana Schmidt appeals from judgment entered against her for attorney's fees and summary judgment against her on her counterclaim alleging negligent practice of law. She does not dispute the judgment against her for attorney's fees, but appeals from the final judgment because this court dismissed a prior appeal from the summary judgment only as taken from a partial summary judgment.

Oakes & Kanatz, the respondent, moves to dismiss for Schmidt's failure to provide an approved statement of the proceedings. We deny the motion because the record is adequate to review the issue raised on this appeal, namely whether the trial court erred in granting summary judgment.^{FN1}

^{FN1} We note that the two trial court judges did submit their own approved statement of the proceedings. See Minn.R.Civ.App.P. 110.03.

FACTS

Schmidt alleges negligent practice of law in her dissolution action because (1) Oakes & Kanatz did not adequately prepare for a pretrial conference at which a final settlement was negotiated and read into the record; (2) the law firm did not obtain a valuation of the homestead, the major marital asset; (3) the law firm did not prepare her for the pretrial conference because it did not explain to her that a final settlement could be reached at the conference and did not explain to her the consequences of the settlement ultimately reached; (4) Schmidt did not un-

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derstand the settlement agreement or its consequences; (5) the law firm intimidated her into agreeing to the settlement, which awarded her less than one-half the marital assets; and (6) the law firm failed to preserve her nonmarital interest in the homestead.

Oakes & Kanatz relies on Schmidt's statements at the hearing where the settlement was read into the record:

MS. OAKES: Ms. Schmidt, you heard the stipulation as it has been recited into the record by Mr. Nelson. Did you understand the recitation?

MS. SCHMIDT: Yes.

MS. OAKES: You and I have discussed the terms of the agreement?

MS. SCHMIDT: Yes.

MS. OAKES: And do you agree that the stipulation as recited into the record is agreeable to you?

MS. SCHMIDT: Yes.

Oakes & Kanatz submitted no affidavits in support of its motion for summary judgment.

Schmidt relies on her affidavit, which states:

[T]he details and implications of the property settlement were never fully explained by [Oakes & Kanatz] to *53 [Schmidt]. * * * Affiant was told that she had no choice but to agree. * * * [I]t was only as a consequence of this pressure applied by [Oakes & Kanatz], that affiant agreed to allow the unexplained, non-understood agreement to stand. * * * Affiant was denied the opportunity to enter into the "Stipulation" of the dissolution in an advised and uncoerced manner.

ISSUE

Did the trial court err in granting summary judgment?

ANALYSIS

Oakes & Kanatz argues that Schmidt is estopped from claiming that she was not adequately advised and did not understand the settlement by her previously quoted testimony that she did understand the settlement. Oakes & Kanatz relies on *Peterson v. American Family Mutual Insurance Co.*, 280 Minn. 482, 160 N.W.2d 541 (1968). There an assignee of an insured motorist sued the insurer to recover the amount of a verdict in excess of the policy limits, claiming that the insurer refused to settle a claim within the policy limits in bad faith. The assignee was also the plaintiff in the original action and took an assignment of the insured's cause of action from the trustee in bankruptcy proceedings instituted by the insured.

The insured testified at bankruptcy proceedings that he thought he was not in the wrong and was sure he could recover on his counterclaim. Prior to trial the insurance company advised the insured of an offer to settle within the policy limits. He was warned that if he lost the case there might be a large judgment against him for more than his insurance coverage. He refused to settle, stating that the insurance company should not pay the plaintiff any money because of the accident:

They wanted me to sign an agreement to a lawsuit on my own insurance company and I disagreed to do it because I had no feeling I was in the wrong in this accident and the insurance company should not have been liable.

Peterson, 280 Minn. at 485, 160 N.W.2d at 543. The court held that the insured was laboring under a misapprehension of the facts, the testimony which he previously gave is now binding on him and his assignees. *Id.* at 488, 160 N.W.2d at 545. This case is distinguishable from *Peterson* because Schmidt has presented evidence that she was misled with respect to the significance of the proposed settlement and did not understand the settlement.

We reverse because the trial court made the same error of law that we addressed in *Virsen v. Rosso, Beutel, Johnson, Rosso & Ebersold*, 356

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N.W.2d 333 (Minn.Ct.App.1984). *Virsen* reversed summary judgment in favor of a law firm sued for malpractice. The plaintiff claimed that the law firm had been negligent in settling a suit against a former business associate of the plaintiff. The plaintiff had accepted the settlement at a conference held in the presence of a judge. The trial court dismissed the action solely because the plaintiff had agreed to the settlement. This court rejected this reasoning, noting that the plaintiff claimed that "he agreed to the settlement under pressure from [the law firm], [which] had inadequately represented his interests during the entire pre-settlement process." *Virsen*, 356 N.W.2d at 336. We also noted that the plaintiff claimed that "[the law firm] failed to engage in reasonable and prudent discovery and investigation." *Id.* This court determined that the trial court erroneously accepted the law firm's argument that the plaintiff's action was one to vacate or set aside the settlement. This court reasoned that this position

fails to distinguish between cases where a party is simply claiming that a settlement was inequitable, and cases such as this one for legal malpractice which allege reliance upon negligent conduct of an attorney. * * * [T]he prayer for relief in this action is against the attorney *54 and not against the settlement itself or the parties thereto.

Id. at 335.

Here, the trial court similarly misinterpreted the negligence action as an attack on the negotiated judgment and decree:

[I]t would appear that [Schmidt's] counterclaim is an attempt to collaterally attack the decree and judgment properly entered in her dissolution.

[Schmidt] is therefore estopped from asserting her counterclaim * * *.

The trial court erred when granting summary judgment because there are several issues of material fact raised by Schmidt. *See* Minn.R.Civ.P. 56.03;

Betlach v. Wayzata Condominium, 281 N.W.2d 328, 330 (Minn.1979) (on appeal from summary judgment, appellate court must determine whether the trial court erred in its application of the law). Among the issues of fact to be tried are (1) whether or not Oakes & Kanatz failed to explain the settlement agreement to Schmidt; (2) whether the failure to explain was negligent; (3) whether Oakes & Kanatz coerced Schmidt into agreeing to the settlement; (4) whether Oakes & Kanatz obtained a valuation of the homestead; (5) whether any such failure was negligent; (6) causation; and (7) damages. *See Christy v. Saliterman*, 288 Minn. 144, 150, 179 N.W.2d 288, 293-94 (1970).

DECISION

The trial court erred in granting summary judgment for respondent. Respondent's motion to dismiss is denied.

Reversed.

RANDALL, J., dissents.

RANDALL, Judge, dissenting.

I respectfully dissent. I would have affirmed the trial court's grant of summary judgment to respondents.

The case involves after-the-fact allegations by a client. There had been a completed dissolution pursuant to stipulated terms agreed to in open court, and later appellant expressed dissatisfaction with the economics of her settlement. The allegations are general in nature, basically revolving around a claim that appellant should have received more from the stipulated settlement.

The elements of negligent practice of law are stated in *Christy v. Saliterman*, 288 Minn. 144, 150, 179 N.W.2d 288, 293-94 (1970):

[T]he client has the burden of proving the existence of the relationship of attorney and client; the acts constituting the alleged negligence * * *; that it was the proximate cause of the damage; and that but for such negligence * * * the client would

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have been successful in the prosecution or defense of the action.

The existence of an attorney/client relationship was not in dispute and appellant did make claims constituting the alleged negligence. However, the record shows no genuine specifics alleged by appellant concerning (1) proximate cause; (2) that but for the claimed negligence, appellant would have received more; and (3) that appellant would have been more successful by further negotiations or a trial.

Further, although not essential to defeat the motion for summary judgment, expert testimony in a legal malpractice case is important and appellant offered no expert testimony that respondent acted improvidently.

What record there is was thoroughly reviewed by a trial court cognizant of the claims and counter-claims. I find nothing in the record convincing me to reverse the trial court's summary judgment on the merits of appellant's claim.

Minn.App.,1986.
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**In re the Marriage of DUCK SOON and SANG HYUB PARK. DUCK SOON
PARK, Appellant, v. SANG HYUB PARK, Respondent**

L.A. No. 31143

Supreme Court of California

27 Cal. 3d 337; 612 P.2d 882; 165 Cal. Rptr. 792; 1980 Cal. LEXIS 177

June 30, 1980

PRIOR HISTORY: Superior Court of Los Angeles County, No. D-815183, Christian E. Markey, Jr., Judge.

DISPOSITION: As a result of extrinsic factors, Mrs. Park was deprived of a fair adversary hearing. There are no equitable defenses which would bar the relief she seeks. Accordingly, the trial court abused its discretion when it denied her motion to vacate. ⁹ The judgment is reversed.

⁹ Mrs. Park also contends that *Code of Civil Procedure sections 284, 285 and 286* were violated, thereby rendering the judgment of dissolution void or voidable. However, in light of the disposition of the extrinsic fraud or mistake claim, it is not necessary to address the merits of Mrs. Park's procedural objections.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied a wife's motion for eviction of a judgment of dissolution of marriage which awarded custody of the children and substantially all of the community property to the husband. The motion was made on the ground the judgment was entered after the wife had been involuntarily deported to Korea, with neither her attorney or the court being aware of her departure. The trial court denied the motion. (Superior Court of Los Angeles County, No. D-815183, Christian E. Markey, Jr., Judge.)

The Supreme court reversed the judgment, holding that as a result of extrinsic factors, the wife was deprived of a fair adversary hearing and there were no equitable

defenses which would bar the relief she sought. The court held that the husband, by concealing the fact of his wife's involuntary deportation and her inability to be present and contest the proceeding, breached his duty of disclosure and perpetrated a fraud on the court well as his wife. The court also held that because the wife's original attorney did not file a formal substitution of attorneys, and the wife never consented to the new attorney's representation, and the new attorney was not "associated" with the attorney of record, no attorney properly appeared on the wife's behalf. The court also held the wife was deprived of a fair adversary hearing by the inadequacy of her representation by her new attorney, who never consulted with her, did not know she had been deported, offered no evidence on her behalf and made no attempt to cross-examine the husband, the only witness to testify at the dissolution hearing. The court further held the wife was not guilty of inexcusable neglect or laches in challenging the validity of the judgment. (Opinion by Bird, C. J., expressing the unanimous view of the court.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) Judgments § 38 -- Opening and Vacating Judgments and Defaults -- Grounds -- Extrinsic Factors.
--A final judgment may be set aside by a court if it has been established that extrinsic factors have prevented one party to the litigation from presenting his or her case. While the grounds for such equitable relief are commonly stated as being extrinsic fraud or mistake, those terms

are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing.

(2a) (2b) (2c) Judgments § 46 -- Opening and Vacating Judgments and Defaults -- Grounds -- Nonappearance at Trial -- Dissolution of Marriage.

--The trial court abused its discretion in denying a wife's motion for vacation of a judgment of dissolution of marriage which awarded custody of the children and substantially all of the community property to the husband, where it appeared the wife's involuntary deportation rendered her incapable of attending her dissolution proceeding, where her husband was aware of his wife's inability to be present and contest the action, but concealed those facts and thus breached his duty of disclosure and perpetrated a fraud on the court as well as his wife, where the wife never consented to representation by a new attorney who appeared on her behalf, who was not an associated attorney, where the new attorney's representation was inadequate in that he never consulted with the wife, did not know she had been deported, offered no evidence on her behalf and made no attempt to cross-examine the husband, who was the only witness to testify at the dissolution hearing, where the wife was not guilty of inexcusable neglect or laches in seeking relief, and where the wife presented facts indicating a sufficiently meritorious claim to entitle her to a fair adversary hearing.

(3) Attorneys at Law § 17 -- Attorney-client Relationship -- Authority of Attorneys -- Associated Attorneys. --In a dissolution of marriage proceeding which took place in the absence of the wife who had been abruptly deported and who was represented by a new attorney when her old attorney was appointed a court commissioner, the trial court should not have recognized the new attorney as appearing on behalf of the wife where the record showed the new attorney was not "associated" on the case but nevertheless attempted to act as the sole attorney, and where the wife never consented to his representation and wasn't even notified of his actions.

(4) Judgments § 54 -- Equitable Relief -- Limitations -- Neglect -- Laches. --A motion to vacate a judgment should not be granted where it is shown that the party requesting equitable relief has been guilty of inexcusable neglect or that laches should attach. In evaluating such factors, the trial court must look to the extent of prejudice to the opposing party, and to the reasonableness of the moving party in not filing a motion to vacate earlier.

(5) Judgments § 48 -- Opening and Vacating Judgments and Defaults -- Affidavit of Merits. --A party moving to vacate a judgment on grounds of extrinsic

fraud or mistake does not have to demonstrate with certainty that a different result would obtain on retrial; rather, facts must be shown indicating a sufficiently meritorious claim to entitle the party to a fair adversary hearing.

COUNSEL: Darryl Leemon for Appellant.

Selwyn & Capalbo, Herbert E. Selwyn and Sandra Kamenir for Respondent.

JUDGES: Opinion by Bird, C. J., expressing the unanimous view of the court. Tobriner, J., Mosk, J., Clark, J., Richardson, J., Manuel, J., and Newman, J., concurred.

OPINION BY: BIRD

OPINION

[*339] [**884] [***794] Appellant challenges the denial of her motion to vacate a judgment of dissolution of marriage entered after her deportation to Korea.¹

1 Appellant also sought to amend the petition for dissolution to include a petition for the nullity of her marriage. This court has not been asked to review the denial of that proposed amendment.

[*340] I

Appellant wife and respondent husband were married on May 28, 1968, and separated on August 23, 1972. On September 18, 1972, Mrs. Park's attorney of record filed a petition for dissolution. On October 19, 1972, an order to show cause hearing was held and Mrs. Park was awarded custody of the children, child support and exclusive possession of the family home.

[**885] [***795] On September 24, 1973, a judgment of dissolution was entered with custody of the children, as well as substantially all the community property, being given to the husband. Mrs. Park seeks to vacate this judgment. She bases her claim on certain events that she stated occurred between the order to show cause hearing and the judgment of dissolution.

During the pendency of the dissolution proceeding, the Immigration and Naturalization Service (INS) ordered appellant to leave the United States. Her immigration attorney applied for a stay of deportation. However, sometime after January 8, 1973, she was notified by the INS to report for deportation on January 15, 1973. Although her attorney advised her that she would not be deported, she was arrested on January 15, 1973, in her home by the INS and immediately sent to Korea. The only belongings she was able to take had to be packed in a single suitcase. Her husband was present at her arrest.

Due to the swiftness of her deportation, she was unable to notify her attorney in the immigration matter or her attorney in the dissolution proceeding. Neither of them or the court was aware of her departure.

In Korea, Mrs. Park enlisted the aid of an interpreter to send a letter to her attorney in the dissolution matter. Unfortunately, this letter, which detailed the circumstances of her deportation, was returned unopened.

On August 24, 1973, an interlocutory hearing was held at which a new attorney appeared on Mrs. Park's behalf. The original attorney of record had been appointed a court commissioner so he asked another attorney to appear in his place. (See *Gov. Code*, § 68082.)² No formal substitution of attorneys was ever filed with the court (see *Code Civ. Proc.*, § 284), and Mrs. Park never received notice of the informal substitution.

2 *Government Code section 68082* provides: "During his continuance in office, a court commissioner, judge of a court of record, or county clerk shall not practice law in any court of this state or act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights, or other proceedings before any department of the state or general government or courts of the United States. As used in this section, the practice of law includes being in partnership or sharing fees, commissions, or expenses in the practice of law with any person acting as an attorney in this state."

[*341] At the hearing, the court was informed for the first time that Mrs. Park was in Korea. No indication was given by either counsel or Mr. Park that Mrs. Park had been involuntarily deported. On the contrary, the testimony of Mr. Park and the statements of his attorney suggested a voluntary departure.³

3 The following remarks by Mr. Park and his counsel are illustrative:

The Court: "Do you have a complete property settlement agreement?"

Husband's Counsel: "No, Your Honor. The petitioner is living in Korea now. [para.] She left Mr. Park with the children, the assets and the debts"

". . . ."

The Court: "Why haven't you been able to enter into a property settlement agreement?"

Husband's Counsel: "Because the wife is Korea [*sic*]. The wife left the children and the

husband and is now in Korea, and there is an enormous amount of hostility"

". . . ."

Husband's Counsel: "And did she, in January of this year, leave you with the two children?"

Husband: "Yes."

Husband's Counsel: "And she is now back in Korea?"

Husband: "Yes."

". . . ."

Husband's Counsel: "Now, did your wife take the 1972 Dodge with her?"

Husband: "Yes."

Husband's Counsel: "When she left the house?"

Husband: "Yes."

Husband's Counsel: "And about half of the furniture and one of the televisions?"

Husband: "Yes."

The attorney who appeared on behalf of Mrs. Park apparently did nothing on her behalf. He had never met Mrs. Park and was unaware of the cause of her absence. There was no attempt to move for a continuance, to challenge Mr. Park's testimony, or to present evidence on Mrs. Park's behalf. Further, the new attorney failed to inform the court commissioner who presided at the interlocutory hearing that another commissioner had refused to hear the matter earlier [**886] [***796] that day because there was no substitution of attorneys on file and no recent financial declaration.

Following the hearing, the court awarded Mrs. Park the 1972 Dodge automobile, and some items of furniture and personalty which were in her possession and control. The children and the remaining community property, including two businesses and the equity in the home, were awarded to Mr. Park. Final judgment was entered on January 16, 1974.

[*342] In February of 1977, Mrs. Park was granted permission to reenter the United States which she did on June 24th. For the first time, she learned of the judgment of dissolution. It was at this point that she hired an attorney to seek the vacation of that judgment. Such a motion was filed on August 11, 1977.

In support of her motion to vacate, Mrs. Park filed a sworn affidavit which indicated that "[after] my letter directed to my attorney . . . was returned to me in the mail, I did not know what else I could do to reach him,

except to return to the United States as quickly as possible." Mrs. Park had immediately sought reentry into the United States but her application was not granted until well after the judgment of dissolution was entered.

The trial court refused to grant the motion to vacate and this appeal ensued.

II

(1) A final judgment may be set aside by a court if it has been established that extrinsic factors have prevented one party to the litigation from presenting his or her case. (*Olivera v. Grace* (1942) 19 Cal.2d 570, 575 [122 P.2d 564, 140 A.L.R. 1328].) The grounds for such equitable relief are commonly stated as being extrinsic fraud or mistake. However, those terms are given a broad meaning and tend to encompass almost any set of extrinsic circumstances which deprive a party of a fair adversary hearing. It does not seem to matter if the particular circumstances qualify as fraudulent or mistaken in the strict sense. (*Zastrow v. Zastrow* (1976) 61 Cal. App. 3d 710, 716 [132 Cal. Rptr. 536]; *In re Marriage of Coffin* (1976) 63 Cal. App. 3d 139, 149 [133 Cal. Rptr. 583]; *Davis v. Davis* (1960) 185 Cal. App. 2d 788, 794 [8 Cal. Rptr. 874].) For example, in *Landon v. Landon* (1946) 74 Cal. App. 2d 954 [169 P.2d 980], the husband was stranded in China at the outbreak of World War II and consequently, was unable to attend the dissolution proceeding. Aware of her husband's predicament and his unsuccessful attempts to return to this country, the wife concealed those facts from the court. As a result of this concealment, a default judgment was entered. When the husband asked the trial court to vacate its judgment, the court granted his motion and the Court of Appeal affirmed. It held that "[the] concealment of facts which, if revealed to the trial court, might result in the postponement of an adjudication until [*343] the absent party can be heard constitutes extrinsic fraud." (*Id.*, at p. 957.)

(2a) In the present case, Mrs. Park's involuntary deportation rendered her incapable of attending her dissolution proceeding. Mr. Park was well aware of his wife's inability to be present and contest the action. Disclosure of his wife's disability to the court might have resulted in the postponement of the dissolution proceeding until Mrs. Park could be present. Clearly, Mr. Park had a duty to inform the court of the extrinsic facts that prevented his wife's attendance. (*Id.*; see also *Olivera v. Grace*, *supra*, 19 Cal.2d at p. 577; *Edison v. Edison* (1960) 178 Cal. App. 2d 632, 634 [3 Cal. Rptr. 201].) By concealing those facts, Mr. Park breached his duty of disclosure and perpetrated a fraud upon the court as well as his wife. (*Edison v. Edison*, *supra*, 178 Cal. App. 2d at p. 634; *Olivera v. Grace*, *supra*, 19 Cal.2d at p. 577; *Rice v. Rice* (1949) 93 Cal. App. 2d 646, 651 [209 P.2d 662].)⁴

4 Equitable relief might also be given based solely on Mrs. Park's deportation and her attorney's appointment as court commissioner. (Cf. *Weitz v. Yankosky* (1966) 63 Cal.2d 849 [48 Cal. Rptr. 620, 409 P.2d 700]; see also *Dingwall v. Vangas, Inc.* (1963) 218 Cal. App. 2d 108, 113 [32 Cal. Rptr. 351].) However, in light of the clear presence of extrinsic fraud, it is not necessary to address this alternative theory for relief.

[***797] Mrs. [**887] Park's representation at the adversary hearing by another attorney does not alter the fact that she was denied a fair hearing. Her original attorney did not file a formal substitution of attorneys pursuant to *Code of Civil Procedure section 284*. Further, Mrs. Park never consented to the new attorney's representation. (3) Therefore, unless it can be established that the new attorney was "associated" with the attorney of record, the former should not have been recognized by the trial court as appearing on behalf of Mrs. Park. (See *Wells Fargo & Co. v. City etc. of S.F.* (1944) 25 Cal.2d 37, 42-43 [152 P.2d 625].) This court has never explicitly defined the term "associated." However, an attorney will not be considered an associated attorney where he "attempts to act as the sole attorney." (*Id.*, at p. 43.) The facts in the present case indicate that the new attorney attempted to act in precisely that manner. When asked by the court, "[are] you the attorney of record, counsel?" the new attorney replied, "I think there's been a substitution filed. I hope there has." He was the only attorney who appeared in court on behalf of Mrs. Park. Following the appointment as court commissioner of the attorney of record, all court documents were sent to and signed by the new attorney as attorney for Mrs. Park.

[*344] There are some additional facts that militate against considering the attorney, who purportedly appeared on behalf of Mrs. Park, as an associated attorney. First, Mrs. Park never consented to his representation. She wasn't even notified of his actions. Moreover, there was no reason for her to expect that another attorney would be "associated" on the case. Second, it is unlikely that Mrs. Park's original attorney intended that an association be formed since it would have been a violation of the law if the attorney of record (now a court commissioner) remained associated on the case. (See *Gov. Code, § 68082*.) Finally, the record seems to indicate that Mr. Park's attorney believed the new attorney was acting as sole counsel for Mrs. Park. During the court's questioning of the new attorney, Mr. Park's counsel interjected, "the last attorney of record, Your Honor . . . as you know, has been elevated to commissioner." (Italics added.)

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The record indicated that the new attorney was not associated on the case. Therefore, the trial court should not have so recognized him. As a result, the court was without authority to enter judgment other than by default. (*McMunn v. Lehrke* (1915) 29 Cal. App. 298, 308 [155 P. 473]; see also *Wells Fargo & Co. v. City etc. of S.F.*, supra, 25 Cal.2d at pp. 42-43; *Epley v. Califro* (1958) 49 Cal.2d 849, 854 [323 P.2d 91].)

(2b) However, it is not necessary for the court to conclude that no attorney properly appeared on Mrs. Park's behalf to find that she was denied a fair adversary hearing. (*Saunders v. Saunders* (1958) 157 Cal. App. 2d 67, 72-73 [320 P.2d 131]; see also *Olivera v. Grace*, supra, 19 Cal.2d at pp. 577-578; *Dei Tos v. Dei Tos* (1951) 105 Cal. App. 2d 81, 83 [232 P.2d 873].) The inadequacy of the new attorney's representation is a further basis for holding that Mrs. Park was deprived of a fair adversary hearing.

The attorney purporting to appear on Mrs. Park's behalf never consulted with his "client." He did not even know that she had been deported.⁵ No investigation was made of Mr. Park's alleged valuation of the community assets and no objection was made to the use of a year old financial statement as the basis upon which to divide the community property. No evidence was offered on behalf of Mrs. Park and no attempt was made to cross-examine Mr. Park, the only witness to testify [*345] at the dissolution [**888] [***798] hearing.⁶ Under these circumstances, it would be an exaltation of form over substance to conclude that the mere presence of an attorney resulted in a fair adversary hearing sufficient to foreclose the remedy of equitable relief.

5 As a result, the new attorney could not have known Mrs. Park's feeling about the custody of her children, her estimate of the value of the community property, or the amount and value of the property that she took with her to Korea.

6 The sum total of the attorney's participation at the dissolution proceeding consisted of four inconsequential remarks. Quite fittingly, two of those remarks were, "I have nothing to add to that, Your Honor" and "I have nothing, Your Honor."

(4) However, a motion to vacate a judgment should not be granted where it is shown that the party requesting equitable relief has been guilty of inexcusable neglect or that laches should attach. (See *Olivera v. Grace*, supra, 19 Cal.2d at p. 575; *Wilson v. Wilson* (1942) 55 Cal. App. 2d 421, 427 [130 P.2d 782]; *Kulchar v. Kulchar* (1969) 1 Cal.3d 467, 473 [82 Cal. Rptr. 489, 462 P.2d 17, 39 A.L.R.3d 1368].) Mr. Park argues that there was inexcusable neglect because Mrs. Park did not notify the court or her counsel of her deportation. He also asserts

that the motion to vacate was filed too long after the interlocutory decree was entered. In passing on this argument, the court must look to the extent of prejudice to the opposing party, and to the reasonableness of the moving party in not filing the motion to vacate earlier. (*Weitz v. Yankosky*, supra, 63 Cal.2d at p. 857; see also *Hallett v. Slaughter* (1943) 22 Cal.2d 552, 556-557 [140 P.2d 3].) In the present case, no claim of prejudice has been articulated by Mr. Park or his attorney.⁷ Further, Mrs. Park was arrested for involuntary deportation in front of her husband. The immigration lawyer knew of the possibility of Mrs. Park's deportation and knew who was representing her in the dissolution proceeding, but did nothing.⁸ Mrs. Park did not know that her original attorney in the dissolution had been appointed a court commissioner thereby removing him from her case. Under these circumstances, it was reasonable for Mrs. Park to assume that her husband or her attorney would inform the court of the involuntary nature of her absence. (Cf. *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal. App. 2d 347, 353 [66 Cal. Rptr. 240] [reliance on one's attorney does not in and of itself constitute negligence]; see also *Weitz v. Yankosky*, supra, 63 Cal.2d 849; *Hallett v. Slaughter*, supra, 22 Cal.2d 552.)

7 Although relitigation of the issue of dissolution and community property rights will be time consuming and cause additional expense, such prejudice does not arise out of the delay. Therefore, it cannot be considered in determining whether Mrs. Park's delay in bringing the motion to vacate was inexcusable. (*In re Marriage of Coffin*, supra, 63 Cal. App. 3d at p. 155.)

8 The immigration attorney had recommended the services of the original attorney of record in the dissolution proceeding to Mrs. Park. He also was the immigration attorney for Mr. Park.

[*346] After her deportation, Mrs. Park tried to reach her attorney by letter without success. She immediately applied for reentry into the United States and entered as soon as reentry was granted. Her failure to do any more was reasonably explained by her ignorance of the workings of our judicial system and her inability to communicate without the aid of an interpreter. (Cf. *Watson v. Watson* (1958) 161 Cal. App. 2d 35 [325 P.2d 1011]; *Karlein v. Karlein* (1951) 103 Cal. App. 2d 496 [229 P.2d 831].)

The speed with which Mrs. Park moved to vacate the judgment of dissolution once she learned of its entry also shows diligence. Less than a month after she learned for the first time that a judgment of dissolution had been entered against her, she employed an attorney to file a motion to vacate the judgment. Despite her problems with the language and culture, Mrs. Park at-

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tempted to challenge the court's action in her absence. This can scarcely be denominated inexcusable neglect.

Mr. Park next claims that relief should not be granted because the result would not be different on retrial. (5) However, Mrs. Park does not have to demonstrate with certainty that a different result would obtain on retrial. Rather, she must show facts indicating a sufficiently meritorious [**889] [***799] claim to entitle her to a fair adversary hearing. (*Olivera v. Grace*, *supra* 19 Cal.2d at p. 579; see also *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540 [305 P.2d 20].)

In this case, the division of the community property was made without the aid of an up-to-date financial declaration. Book value was used to assess the assets of the community in a one-year-old financial statement that was on file. Long term liabilities were used to offset assets without any consideration being given to the future receipts that the assets would produce. (Cf. *In re Marriage of Folb* (1975) 53 Cal. App. 3d 862, 876 [126 Cal. Rptr. 306].) Finally, Mrs. Park was awarded only those "items of furniture and furnishings and personalty in her possession or control," despite the fact that Mrs. Park's

"possessions" consisted only of those items she could hastily pack into a single suitcase on the day she was arrested. All these facts suggest that if Mrs. Park is properly represented at a new hearing, the judgment might well differ materially from that entered in September of 1973.

[*347] III

(2c) As a result of extrinsic factors, Mrs. Park was deprived of a fair adversary hearing. There are no equitable defenses which would bar the relief she seeks. Accordingly, the trial court abused its discretion when it denied her motion to vacate.⁹ The judgment is reversed.

9 Mrs. Park also contends that *Code of Civil Procedure* sections 284, 285 and 286 were violated, thereby rendering the judgment of dissolution void or voidable. However, in light of the disposition of the extrinsic fraud or mistake claim, it is not necessary to address the merits of Mrs. Park's procedural objections.

C

Court of Appeals of Michigan.
Laurie PETERSON, Plaintiff-Appellant,
v.
SIMASKO, SIMASKO & SIMASKO, PC, and
Patrick M. Simasko, Defendants-Appellees.

Docket No. 194651.
Submitted Oct. 14, 1997, at Lansing.
Decided March 20, 1998, at 9:10 a.m.
Released for Publication June 29, 1998.

Client brought legal malpractice action against attorneys, alleging that attorneys failed to act within scope of duty owed her when they failed to place lien on former husband's worker's compensation claim. The Macomb Circuit Court, Peter J. Maceroni, J., granted summary disposition for attorneys. Client appealed. The Court of Appeals held that attorney should have placed lien to secure payment of portion of award to which she was entitled under divorce judgment.

Reversed and remanded.

West Headnotes

[1] Attorney and Client 45 ⇐ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases
(Formerly 45k105)

To establish the existence of legal malpractice, a plaintiff must show: (1) the existence of an attorney-client relationship, (2) negligence in the legal representation of the plaintiff, (3) that the negligence was a proximate cause of an injury, and (4) the fact and extent of the injury alleged.

[2] Attorney and Client 45 ⇐ 109

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and Omissions of Attorney in General. Most Cited Cases

For purposes of client's malpractice claim, attorneys owed client duty to place lien on her former husband's worker's compensation claim before claim was paid to secure payment to her of that portion of compensation award to which she was entitled under terms of property settlement provision of judgment of divorce.

**469*707 Thomas A. Stotz, Roseville, for Plaintiff-Appellant.

John Perrin, St. Clair Shores, for Defendants-Appellees.

Before HOLBROOK, P.J., and MICHAEL J. KELLY and GRIBBS, JJ.

PER CURIAM.

In this appeal as of right, plaintiff seeks the reinstatement of her legal malpractice action after it was summarily dismissed on defendants' motion pursuant to MCR 2.116(C)(10). We reverse and remand for trial. This case is being decided without oral argument pursuant to MCR 7.214(E).

[1] *708 To establish the existence of legal malpractice, a plaintiff must show: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Simko v. Blake*, 448 Mich. 648, 655, 532 N.W.2d 842 (1995).

[2] Here, plaintiff's malpractice action is premised on a claim that defendants failed to act within the scope of the duty owed to her when they failed to place a lien on her former husband's worker's compensation claim before the claim was paid. Plaintiff asserts that such action was necessary to

secure payment to her of that portion of the compensation award to which she was entitled under the terms of the property settlement provision of a judgment of divorce. In light of the nature of plaintiff's claim, the question before the trial court was whether an attorney of ordinary learning, judgment, or skill, under the circumstances presented in this **470 case, would have placed a lien on the settlement before it was paid to plaintiff's former husband in October 1992. *Simko, supra* at 655-656, 532 N.W.2d 842.

The trial court erroneously concluded that *Petrie v. Petrie*, 41 Mich.App. 80, 199 N.W.2d 673 (1972), did not provide authority to include within the duty defendants owed plaintiff an obligation to impress a lien for payment of the property settlement against the worker's compensation award. *Petrie* expressly provides that financial obligations imposed on a party by a judgment of divorce are not debts for purposes of M.C.L. § 418.821; M.S.A. § 17.237(821) and, therefore, payment of such obligations may be enforced by impressment of a lien against any worker's compensation award paid to the obligated party. *Petrie, supra* at 82-84, 199 N.W.2d 673. *709 Accordingly, an attorney of ordinary learning, judgment, or skill, under the circumstances presented in this case, would have placed a lien on the settlement before it was paid to plaintiff's former husband. *Simko, supra* at 655-656, 532 N.W.2d 842; see also *Teodorescu v. Bushnell, Gage, Reizen & Byington (On Remand)*, 201 Mich.App. 260, 264-265, 506 N.W.2d 275 (1993).

Reversed and remanded. We do not retain jurisdiction.

Mich.App., 1998.
Peterson v. Simasko, Simasko & Simasko, PC
228 Mich.App. 707, 579 N.W.2d 469

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H

Court of Special Appeals of Maryland.
PICKETT, HOULON & BERMAN, et al.

v.

Elizabeth Catherine HAISLIP.

No. 307 Sept. Term 1987.

Nov. 12, 1987.

Client brought action against law firm which represented her in divorce action alleging malpractice. The Circuit Court, Prince George's County, Richard J. Clark, J., entered judgment in favor of client. Appeal and cross appeal were taken. The Court of Special Appeals, Rosalyn B. Bell, J., held that: (1) any failure of client to identify and value all marital property did not bar jury from finding that she was entitled to recover; (2) client produced sufficient evidence of value of marital property; (3) jury could award damages based on evidence of value of ex-husband's stock; and (4) client was entitled to jury trial on damages; and (5) issue of whether attorneys were negligent in connection with advice regarding extension of alimony was for jury.

Ordered accordingly.

West Headnotes

[1] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

(Formerly 45k105)

To recover based on legal malpractice, claimant must establish attorney's employment, his neglect of reasonable duty, and that negligence resulted in and was proximate cause of loss to client.

[2] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

Any failure of client, who claimed legal malpractice which led to her receiving less in settlement in divorce action than she should have, to identify and value all marital property did not bar jury from finding that client was entitled to recover.

[3] Divorce 134 ⇌ 689

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or Division

134k688 Particular Interests as Separate or Marital Property

134k689 k. In general. Most Cited Cases

(Formerly 134k253(2))

Divorce 134 ⇌ 764

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)4 Valuation of Property or Interest in General

134k762 Evidence in General

134k764 k. Presumptions and burden of proof. Most Cited Cases

(Formerly 134k253(2))

Divorce 134 ⇌ 876.2(2)

134 Divorce

134V Spousal Support, Allowances, and Dispos-

ition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k876 Evidence

134k876.2 Presumptions and Burden of Proof

134k876.2(2) k. Nature or character of property or ownership in general. Most Cited Cases

(Formerly 134k876, 134k253(2))

In divorce proceeding where property disposition is at issue, party asserting marital property interest in specific property has burden of producing evidence as to identity and value of that property.

[4] Divorce 134 ⇌ 683

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or Division

134k679 Separate or Marital Property in General

134k683 k. Commingled funds; tracing. Most Cited Cases

(Formerly 134k252.3(3))

In applying source of funds rule in divorce action, Court of Special Appeals considers not only which spouse contributed to funds but also whether ultimate source was marital or nonmarital.

[5] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited Cases

Source of funds rule was not applicable on appeal of legal malpractice action in which client alleged that she received less in settlement than she should have due to attorneys' conduct; there was no

evidence to suggest that any of property identified in client's case was nonmarital nor was there any suggestion that that was an issue in underlying divorce action outside of ex-husband's interest in his law practice.

[6] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

Client produced sufficient evidence of value of marital property, for purposes of her legal malpractice action against attorneys who represented her in divorce action; there was testimonial evidence as well as financial statements and tax returns establishing value.

[7] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

Client's failure to introduce evidence of marital debt did not render marital property incapable of correct valuation, for purposes of client's legal malpractice action against attorneys who represented her in divorce action; client affirmatively described and valued numerous marital assets and that having been done, burden of introducing contrary evidence to lower that value by amount of marital debt shifted to attorneys.

[8] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most

Cited Cases

In legal malpractice action based on negligence, claimant may only recover those damages that are affirmatively proven.

[9] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

Claimant in legal malpractice action must prove damages with reasonable certainty; damages may not be based on speculation and conjecture.

[10] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

Jury could award damages in favor of client, who alleged legal malpractice in connection with her divorce action, based on evidence that certain stock held by her husband was marital property which should have been valued at a higher price than it was.

[11] Jury 230 ⇌ 14(1)

230 Jury

230II Right to Trial by Jury

230k14 Particular Actions and Proceedings

230k14(1) k. In general. Most Cited Cases

Client was entitled to jury trial of legal malpractice action, even though underlying dispute over correct disposition of marital property would have been decided solely by judge sitting in equity. Const.Declaration of Rights, Arts. 5, 23; U.S.C.A. Const.Amend. 6.

[12] Appeal and Error 30 ⇌ 215(2)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k214 Instructions

30k215 Objections in General

30k215(2) k. Instructions referring to evidence and matters of fact. Most Cited Cases

Attorneys failed to preserve for review on appeal of legal malpractice action issue that client, who contended that attorney failed to conduct adequate discovery on value of assets in underlying divorce action in that she received less in settlement than she should have, had burden to affirmatively prove identity and value of those items client contended constituted marital property where attorneys did not object to jury instruction on burden of proof.

[13] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and judgment. Most Cited Cases

Issue of whether attorneys were negligent with respect to advice to client in divorce action regarding extension of alimony was for jury.

[14] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

Client was not entitled to retrial of issue of whether attorneys were responsible for client's failure to receive indefinite alimony in divorce action, although client contended that evidence of her and her husband's respective standards of living after trial on disposition of marital property was not ad-

mitted; effective financial disparity at time of trial was relevant as to whether trial court in divorce action would award indefinite alimony but later disparity was not relevant in determining whether to extend alimony.

****288 *92** Alvin I. Frederick (Jeffrey J. Hines and Eccleston and Seidler, on the brief), Baltimore, for appellants.

Christopher G. Hoge (Daniel Crowley and Crowley, Hoge & Fein, on the brief), Washington, D.C., for appellee.

Argued before GILBERT, C.J., and ALPERT and ROSALYN B. BELL, JJ.

ROSALYN B. BELL, Judge.

In a legal malpractice action, a jury of the Circuit Court for Prince George's County rendered Elizabeth Haislip a verdict in the amount of \$75,582.50 against Pickett, Houlon & Berman and Sanford Z. Berman.

This case began in 1981 with the retention by Mrs. Haislip of Mr. Berman of the law firm Pickett, Houlon & Berman. Prior to this time, Mrs. Haislip had separated from her husband and had filed a suit for divorce through another attorney on the grounds of adultery.

***93** In October of 1981, a hearing was held and as a result of that hearing Mrs. Haislip was awarded a divorce. The issues of alimony and property rights were reserved by the court for later determination.

In January of 1982, the issues of alimony and property rights came before the court for trial. At that trial, Mrs. Haislip testified on her standard of living and certain alleged items of marital property. At the conclusion of the first day of trial, a conference was held with the trial judge who ****289** indicated that he had reviewed the case and was inclined to award Mrs. Haislip alimony for only three years.

Following the conference with the court, the parties entered into settlement negotiations. As a result of these negotiations, the parties agreed to four years of nonmodifiable, nonadjustable alimony, two years at \$15,000 and two years at \$12,000. The marital home would be sold, and the net proceeds divided. The parties agreed to divide equally three properties, Martin's Acres, 381 Joint Venture and Old Marshall Hall. In addition, Mrs. Haislip was to receive approximately \$108,000 as a monetary award to be paid over six years starting in 1982 at \$18,000 per year. Upon the completion of the payment, the jointly held stock of Peoples Security Bank would be conveyed to Mr. Haislip.

In December of 1983, Mr. Berman wrote Mrs. Haislip advising her that if she was not rehabilitated during her four year alimony term, she could petition the court to extend the term. The letter further advised her that she must file such a petition within the four-year period.

In August of 1984, Mrs. Haislip retained new counsel, Steven Friedman. Mr. Friedman stated that Mrs. Haislip asked him to move for an extension of alimony payments. Although Mr. Friedman thought the stipulations' provisions, "nonmodifiable, nonadjustable," meant that the alimony agreement could not be extended, he nevertheless attempted to obtain an extension. He was unsuccessful. Mr. Friedman charged Mrs. Haislip \$300 for his services.

***94** In May of 1985, Mrs. Haislip filed a legal malpractice complaint against Mr. Berman and his law firm, alleging breach of contract and negligence. The allegations central to the issues on appeal involve alimony, rights to marital property and costs incurred as a result of Mr. Berman's advice. Specifically, she contends Mr. Berman failed to conduct adequate discovery on the value of the assets and hence she received less in settlement than she should have. On appeal, appellants do not claim that the discovery was adequate. Mrs. Haislip also claims that she was damaged as a result of his advice relative to the extension of alimony, arguing that she should have received indefinite alimony.

In the malpractice case, the jury rendered a special verdict with questions and answers. These questions were in three separate categories:

I.

1. Q. "Do you find that the Defendant was negligent in failing to seek pendente lite alimony for the Plaintiff?" A. "[Y]es."

2. Q. "Do you find the Plaintiff sustained damages as a result of the Defendant's negligence in failing to seek pendente lite alimony?" A. "[Y]es."

3. Q. "What damages do you find the Plaintiff sustained as a result of the Defendant's negligent failure to seek pendente lite alimony?" A. "...\$2600."

II.

1. Q. "Do you find that the Defendant was negligent in failing to pursue formal discovery concerning Mr. Haislip's assets and income?" A. "[Y]es."

2. Q. "Do you find that the Defendant was negligent in failing to employ an expert or experts to evaluate Mr. Haislip's assets?" A. "[Y]es."

3. Q. "Do you find that the Defendant was negligent in presenting Mrs. Haislip's case to the Court on January 25, 1982?" A. "[N]o."

*95 4. Q. "Do you find as a result of the Defendant's negligence that Mrs. Haislip failed to receive an equitable distribution of the marital property." A. "[Y]es."

"The amount of these damages as found by the jury is \$72,682.50."

5. Q. "Do you find as a result of the Defendant's negligence that Mrs. Haislip failed to receive an award of permanent alimony?" A. "[N]o."

III.

1. Q. "Do you find that the Defendant was negligent in advising the Plaintiff**290 that the Court had the authority to extend the alimony payments that the parties had agreed to on January 26, 1982?" A. "[Yes]."

2. Q. "Do you find that the Plaintiff sustained damages as a result of the Defendant's negligence in advising her that she could seek an extension of the alimony payments that the parties had agreed to on January 26th, 1982?" A. "[Y]es."

3. Q. "What damages do you find the Plaintiff sustained as a result of the Defendant's negligence in advising her that she could seek an extension of the alimony payments agreed to on January 26th, 1982?" A. "The damages awarded are \$300."

Following the jury verdict in the legal malpractice trial, Mr. Berman and Pickett, Houlon & Berman appealed. They contest the verdict in categories II and III. They raise four questions:

"I. Whether the trial court improperly denied Appellants' Motion for Directed Verdict when the Appellee failed to produce sufficient evidence regarding the identity and value of alleged marital property.

"II. Whether the trial court improperly denied Appellants' Motion for Separate Trial on the issues of alimony and marital property disposition.

"III. Whether the trial court acted improperly by failing to instruct the jury that the Appellee had the burden *96 of proving the identity and value of the items Appellee alleged constituted marital property.

"IV. Whether Appellant Berman's advice was correct as a matter of law when he advised Appellee that she possessed the right to seek an extension of alimony payments."

Mrs. Haislip cross-appealed and raises one question:

"Whether the trial Court properly excluded post-January 26, 1982 evidence regarding of [sic] the Haislips' respective standards of living."

SUFFICIENCY OF THE EVIDENCE

[1] In order to recover based on legal malpractice, the claimant must establish: "(1) the attorney's employment; 2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client." *Kendall v. Rogers*, 181 Md. 606, 611, 31 A.2d 312 (1943); *Glasgow v. Hall*, 24 Md.App. 525, 529, 332 A.2d 722 (1975).

[2] In the case *sub judice*, appellants do not contest the employment or neglect elements but contend that appellee did not establish that appellants' negligence resulted in and was the proximate cause of her loss. Appellants primarily contend that to do so, appellee was required to "prove that she would have prevailed in the underlying divorce action but for the alleged acts or omissions of the appellants." Appellee claimed that appellants' actions caused her to receive less than an equitable share of the marital property. Thus, appellants assert that appellee must affirmatively prove this alleged equitable share. Appellants insist that appellee failed in her proof in that she did not identify *all* the marital assets, did not value *all* the marital assets, did not identify the source of funds, and did not classify the debt. Appellants conclude that because appellee failed to identify and value all the marital property the jury was barred from finding that she was entitled to recover. We disagree.

*97 The case *sub judice*, while implicating marital property laws, is a malpractice action. The primary focus is therefore on whether appellee met her burden to survive a directed verdict motion in a legal malpractice case. In order to understand the damages claimed in the legal malpractice case, it is necessary to examine the Marital Property Act.^{FN1} This Act forms the basis for a monetary award in a divorce case.

FN1. Maryland's Property Disposition in

Divorce and Annulment Act, Md.Code Ann. (1974, 1980 Repl.Vol. & 1981 Cum.Supp.). §§ 3-6A-01 through 3-6A-07 of the Courts and Judicial Proceedings Article.

- **291 Marital Property Act-

[3][4] Maryland defines marital property as "property, however titled, acquired by 1 or both parties during the marriage." Md.Fam. Law Code Ann. § 8-201(e)(1) (1984).^{FN2} Marital property does not include property acquired before marriage, acquired by gift or inheritance from a third party, or excluded by valid agreement. In addition, any property directly traceable to these sources is excluded. Md.Fam.Law Code Ann. § 8-201(e)(2) (1984). In a divorce proceeding where property disposition is at issue, the party asserting a marital property interest in specific property has the burden of producing evidence as to the identity and value of that property. *Green v. Green*, 64 Md.App. 122, 139, 494 A.2d 721 (1985). The court must then follow a three-step process when disposing of the marital property. First, if there is a dispute as to whether certain property is marital property, the court shall determine which property is marital property. § 8-203(a). In resolving that dispute, the source of the funds rule may be applicable. In applying the rule, we consider not only which spouse contributed the funds but also whether the ultimate source was marital or nonmarital. *Grant v. Zich*, 300 Md. 256, 477 A.2d 1163 (1984); *Harper v. Harper*, 294 Md. 54, 448 A.2d 916 (1982). *98 Secondly, it must determine the value of such property. § 8-204. Finally, it "may grant a monetary award as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded." § 8-205(a). In making such a monetary award, the court must consider ten factors, as set forth in the statute. § 8-205(a). *See, e.g., Schweizer v. Schweizer*, 55 Md.App. 373, 375, 462 A.2d 562 (1983), *modified on appeal*, 301 Md. 626, 484 A.2d 267 (1984). Only those marital assets which have been sufficiently identified and valued can be considered in any court award. *Green*, 64 Md.App. at

139, 494 A.2d 721. Appellants claim that the trial court ought to have granted their motion for a directed verdict because appellee's evidence as to the identity and value of marital property was inadequate as a basis for a monetary award and hence insufficient to go to the jury.

FN2. The negligent acts complained of occurred prior to the adoption of the Family Law Article and the sections referred to appear in Md.Code Ann. § 3-6A-01 *et seq.* The codification and subsequent amendments affected no pertinent change.

-Standard of Review-

In reviewing a trial court's grant of a motion for judgment notwithstanding the verdict, the evidence and all reasonable inferences which can be drawn from it must be considered in the light most favorable to the party opposing the motion. *Impala Platinum, Ltd. v. Impala Sales, Inc.*, 283 Md. 296, 328, 389 A.2d 887 (1978). Only where reasonable minds cannot differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the plaintiff, does the issue in question become one of law for the court and not of fact for the jury. *Burns v. Goynes*, 15 Md.App. 293, 301, 290 A.2d 165 (1972), *cert. denied*, 410 U.S. 938, 93 S.Ct. 1398, 35 L.Ed.2d 603 (1973). We, therefore, review the evidence elicited in the malpractice action relating to the identity and value of marital property with those principles in mind.

-Evidence of Identity of Marital Property-

Appellee testified that neither she nor her husband had brought any significant assets into the marriage and that their standard of living at the beginning of the marriage had been quite modest. While Mr. Haislip had brought a *99 car and approximately \$8,000 to \$9,000 into the marriage, appellee inherited during the marriage approximately \$8,000 from her mother. Thus, the parties' contributions of nonmarital property were about even. Appellee stated that, from the date of their wedding until their separation in 1980, Mr. Haislip's law practice prospered and he became active in bank-

ing, real estate and other investments. By the time of the divorce in 1982, the Haislips had substantial interests in a number of business enterprises. Other marital assets included the family home, 9,691 shares of Peoples Security Bank **292 stock, and an array of personal property. While appellee admitted that her understanding of the parties' various real estate holdings was not extensive, and that she did not personally know their value, she identified a number of those assets at trial. These were also identified through the introduction of a number of financial statements. Several additional assets were also identified through these financial statements. FN3 Appellee's identification of each asset was corroborated by the Haislips' joint tax returns from 1979 and 1980. Finally, there was testimony that in 1963 Mr. Haislip helped organize the People's Security Bank and that he subsequently purchased 9,691 shares of its stock. By appellee's uncontroverted testimony, all of these were marital property.

FN3. Appellee's witness, Marlin Husted, also identified a marital asset, namely a five percent interest in a partnership known as Bank Building Associates, acquired no earlier than late 1978. His identification of this asset was corroborated by Mr. Haislip's September 30, 1981 financial statement, admitted into evidence at trial.

Appellants argue that the trial court's confusion over the identity of marital assets is reflective of the insufficient evidence which was before the jury. They highlight the court's confusion by quoting a statement by the trial judge made outside the presence of the jury:

"Prospect Park Apartments, I have not the foggiest idea of what it is, nor do I know what Woodyard Road Joint Venture is other than what I am reading on this financial *100 statement, or Henson Valley, or these two lots in Capital Heights."

In fact, Prospect Park Apartments, Woodyard Road Joint Venture, and Henson Valley Development Corporation were each identified three separ-

ate times. First, appellee identified them in her testimony. Second, each was listed on the Haislips' 1980 joint tax return. Finally, each appeared in the four financial statements introduced into evidence. The Capital Heights property was also identified through the four financial statements, referred to as "2 Lots-Central Ave. across from proposed Metro Station."

It is apparent that the court's frustration with the assessment of damages stemmed from the fact that questions relating to marital property arose without the convenience of having testimony from both parties to the marriage. The court expressed itself on this issue as follows:

"It is just a difficult ballgame all together in this type of case to try to evaluate marital property than it would be in a domestic case in evaluating marital property where both of the parties to the marriage are parties to the case. Both of their lawyers are here. I can say to their lawyers get me this information. I need this information to make my decision." ^{FN4}

FN4. At trial, appellants claimed that, because of the equitable nature of the underlying matter, the court and not the jury should determine damages. The court rejected appellants' argument. The court did agree to assume the negligence of appellants and independently evaluate the facts and, outside the presence of the jury, report its assessment of damages. The trial court correctly reasoned that if it was reversed on this issue, it would not be necessary to retry the case.

The absence of Mr. Haislip and the time lapse of almost five years between the property disposition hearing and the trial of appellee's case against appellants for malpractice increased the complexity of the instant litigation. It certainly made identification and valuation of the marital property more difficult. ^{FN5} Section 8-203(a) expressly provides

*101 that the court shall determine which property is marital property, "if there is a dispute as to whether certain property is marital property." (Emphasis added.) To the extent that appellee identified property of the marriage, other than the law practice, the factfinder could justifiably**293 conclude that it was marital property since no claim was made to the contrary. ^{FN6}

FN5. As appellee so aptly points out, "[I]t is ironic that Appellants accuse Appellee of failure to identify marital property with the degree of certainty necessary in a domestic relations action when a jury has found that it was Appellants' negligent representation which foreclosed Appellee from her only opportunity to identify marital assets in the domestic proceeding."

FN6. Appellee's uncontroverted testimony was that Mr. Haislip had not brought any property into the marriage save a small amount of cash.

[5] Appellants argue in their brief that "[t]he only method of identifying and valuing alleged marital property is to ascertain the source of funds used to purchase that alleged marital property." This would add an element of proof far beyond that envisioned by the Court of Appeals in *Harper v. Harper*, 294 Md. 54, 448 A.2d 916 (1982), when it established the "source of funds rule." If a party contends property acquired during the marriage is other than marital, the court will look to the source of the funds used to acquire it in order to determine what percentage, if any, is marital. *Harper*, 294 Md. at 80, 448 A.2d 916. In this case, no evidence was presented by appellants to suggest that any of the property identified in appellee's case was non-marital. Nor was there any suggestion that this was an issue in the underlying divorce action, outside of the ex-husband's interest in his law practice. ^{FN7} Hence, the source of the funds was not an issue in determining what was marital property in this appeal.

FN7. The law practice is not an issue in this appeal.

-Evidence of Value of Marital Property-

[6] Appellee produced sufficient evidence of the value of the Haislips' marital property. Appellee relied on the testimony of James Fielding and Marlin Husted, the financial *102 statements, and the tax returns in evidence. Mr. Fielding, an accountant who served as an expert witness for appellee, testified that he believed the September 30, 1981 financial statement, showing Mr. Haislip's net worth at \$530,084, to have been undervalued by at least \$70,000. Moreover, Mr. Fielding opined that the listed values of the law practice, Henson Valley Development Corp., Woodyard Road Joint Venture and the Peoples Security Bank stock were too low as reflected on that statement. Appellee also called Mr. Marlin Husted, ex-president of Peoples Security Bank, to testify as to his opinion concerning the value of Mr. Haislip's bank stock at the time of the divorce. He testified on direct examination as follows:

"Q. Do you know what the book value of Peoples Security Bank was as of January 26, 1982?

"A. Well, not certain, but it would be somewhere, I would think, between 28 and \$30 a share....

"Q. Do you have an opinion within a reasonable degree of certainty, based on your experience, Mr. Husted, as to the correct multiple that might be utilized in relating book value to actual value as of January 1982, for the common stock of Peoples Security Bank?

"A. The-my opinion in that time frame, as it relates to the value of the bank in the-in an atmosphere of ceiling [sic] because that was the beginning of a wave of the sale of banks, my opinion at that time would have been that the value should have been at least one and a half times book, at a minimum."

Appellants noted, in their cross-examination of

Mr. Husted, that Peoples Security Bank had offered its stock for sale to employees and existing shareholders for \$30 a share in 1981. This did not change Mr. Husted's opinion that the value of Mr. Haislip's stock in January of 1982 was at least one-and-one-half times the book value:

"Q. In your opinion, Mr. Husted, is there any difference in the value of stock offered for sale to employees under a stock option plan, and the value of stock held in a 10,000 *103 or 14,000 share lot owned by somebody such as yourself or Mr. Haislip? ...

"A. Absolutely there is a difference.

"Q. Why is that, sir?

"A. Because a two and a half or three percent interest in a corporation, that block of stock is conceived to have some degree of control, at least with other similar blocks of stock, and therefore it is worth more."

[7] Appellants claim that appellee produced no evidence of marital debt. They argue that debt must be considered when **294 determining the value of marital property. Thus, appellants contend that appellee's failure to introduce such evidence renders the marital property incapable of correct valuation. We disagree.

Appellants would have us hold appellee accountable for both the proving of the value of the marital property and the reducing of that value because of marital debt. In essence, appellants want appellee to not only prove her case, but prove their case too.

In *Schweizer v. Schweizer*, 301 Md. 626, 484 A.2d 267 (1984), the Court of Appeals held that once marital property has been identified and valued, its value is adjusted downward by the amount of the marital debt. *Schweizer*, 301 Md. at 637, 484 A.2d 267. It is the obligation of the party asserting a marital property interest in specific property to produce evidence as to the identity and value of

that property. *Green*, 64 Md.App. at 139, 494 A.2d 267. Once that party makes out a prima facie case, the burden of producing evidence to refute those claims shifts to the other party. *District Heights Apartments v. Noland Co.*, 202 Md. 43, 50-51, 95 A.2d 90 (1952); *c.f. Randolph v. Randolph*, 67 Md.App. 577, 508 A.2d 996 (1986).

Here, appellee affirmatively described and valued numerous marital assets. That having been done, the burden of introducing contrary evidence to lower that value by the amount of marital debt shifted to appellants. Appellants offered no evidence substantiating the identity or value of *104 marital debt. Thus, the effect of the existence of any marital debt is not an issue in this case.

-Burden in Malpractice Cases-

In order for appellee to demonstrate that the disposition of marital property negotiated by appellants on her behalf was inequitable as a result of appellants' negligence, it was necessary for her to satisfy a jury that she would have fared better had she been given adequate representation. Appellants incorrectly argue that since appellee did not identify and value all of the marital property, she failed to prove her underlying cause of action. Maryland case law supports the proposition that the trial court should omit alleged marital items from its determination of marital property if there is insufficient evidence as to the identity and value of the alleged marital assets. *Green v. Green*, 64 Md.App. 122, 139, 494 A.2d 721 (1985). If the property is not evaluated on the record, the court may not make an award based on that property. *Komorous v. Komorous*, 56 Md.App. 326, 330, 467 A.2d 1039 (1983). Therefore, in the case *sub judice*, even if appellee failed to identify and value *all* marital property, this does not mean that she did not establish her entitlement to any monetary award. It does mean that only that property which *was* sufficiently identified and valued could be considered in determining the value of the monetary award.

[8][9] In a malpractice action based on negligence, the claimant may only recover those dam-

ages that are affirmatively proved. *Jones v. Malinowski*, 299 Md. 257, 269, 473 A.2d 429 (1984). The claimant must prove the damages with "reasonably certainty," and they may not be based on "speculation and conjecture." *Lazorcak v. Feuerstein*, 273 Md. 69, 75, 327 A.2d 477 (1974); *Suburban Trust Co. v. Waller*, 44 Md.App. 335, 348, 408 A.2d 335 (1979).

In the case *sub judice*, we have a unique situation. Appellants agree that the basis for the jury's award was an asset identified as marital property and evaluated in the testimony. Their motion for judgment notwithstanding the *105 verdict indicates that appellants concede precisely how the verdict was arrived at:

"Simple mathematics reveals the basis for the jury's award. On his September 1982 [sic] financial statement Mr. Haislip indicated that he held 9,691 shares of People's [sic] Security stock, valued at \$30.00 per share. Counsel argued, on the basis of Marlin Husted's testimony, that the real value of these shares was \$45.00 per share. By taking the difference in value ... one obtains \$145,365.00. Taking half share of this amount, assuming Plaintiff receives a 50% marital share, you arrive at the jury's award of \$72,682.50."

**295 The trial judge agreed with this analysis, and found it to be supported by a writing from the jury:

"That's exactly what they did.... I don't think there is any question. If you read the jury issues, there is some scribbling above the figure, and at the time I read the jury issue I looked at the scribbling, didn't pay any attention to it, but I'm looking at it now and it appears to be the word stock. So that's what they did, all the damages were based on the value of the stock."

Appellants' and the trial judge's analysis of the jury award provides more than sufficient support for the jury's decision. Appellee's unrefuted testimony established that, other than the small amounts that she and her husband had brought into the mar-

riage, everything else owned by the Haislips at the time of separation fell within the statutory definition of marital property. Appellee identified the bank stock and called Marlin Husted, who testified that the bank had been founded in September of 1963, several years after the Haislips' marriage. Existence of the bank stock as marital property was corroborated by various financial statements, as well as the Haislips' 1979 and 1980 joint income tax returns. Mr. Husted opined that he believed "book value" of the stock to be between \$28 and \$30 per share and that actual value of Mr. Haislip's block was one and one-half times that amount, at a minimum. Mr. Fielding*106 also testified that the value of the bank stock exceeded \$30 per share.

[10] The jury verdict is consistent with both the divorce and malpractice laws of this State. Under *Green*, the fact finder can only consider that property which was adequately identified and valued in determining a monetary award. *Green*, 64 Md.App. at 139, 494 A.2d 721. Under *Jones*, the claimant is only entitled to those damages that are affirmatively proved with reasonable certainty. *Jones*, 299 Md. at 269, 473 A.2d 429. Here, the jury found that appellee had sufficiently shown that the Peoples Security Bank stock was marital property which should have been valued at \$45.00 per share. Therefore, we hold that the jury could award damages based on that evidence.

If we were to adopt appellants' concept of appellee's burden in a malpractice case, we would have to hold that a claimant would have to deal with the underlying case by putting on a case, then putting on the best case for the other side to refute his or her own claim. That has not been the law nor do we propose to adopt such a requirement.

JURY AWARD OF DAMAGES

Appellee brought a legal malpractice action against appellants alleging breach of contract and negligence. Having requested a jury trial pursuant to Rule 2-511,^{FN8} it would appear that appellee was entitled to a jury trial concerning all issues of fact. Appellants claim that the issue before this

court

FN8. Rule 2-511 provides in part:

"(a) Right Preserved.-The right of trial by jury as guaranteed by the Maryland Constitution and the Maryland Declaration of Rights or as provided by law shall be preserved to the parties inviolate."

"is whether the decision of the trial court, sitting in equity without a jury in the underlying equity case, making a marital property award, should be treated as a matter of fact (concerning which the Appellee would be *107 entitled to jury trial) or a matter of law (which ought to be determined by the Court, acting without a jury)."

Appellants argue that the decision should be treated as a matter of law because the underlying dispute over the disposition of marital property would have been decided solely by a judge sitting in equity. According to appellants, a judge sitting in a domestic proceeding while considering the statutory factors "is bound only by his own morality, honesty and conscience." They contend that the jury could never be adequately instructed so as to permit a finding by the jury as to what the equity court in the underlying action would have done absent appellants' negligence. Thus, because of the equitable nature of the damage issue,**296 the court and not the jury should have determined the damages. We disagree.

Even though our Legislature has given the court exclusive jurisdiction over matters affecting the family, the present action is not a divorce action. This is a suit charging an attorney with negligence, and the Maryland Constitution guarantees a jury trial if a party request one.^{FN9} While the right to trial by jury is a constitutional one, no similar guarantee exists to trial by the court.

FN9. According to the Maryland Constitution, "the right of trial by Jury of all issues

of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved." Md. Const. art. 23.

Thomas Jefferson described the jury as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." *Lucky Ned Pepper's Ltd. v. Columbia Park & Rec. Assoc.*, 64 Md.App. 222, 225, 494 A.2d 947 (1985), quoting Thomas Jefferson, *Letters to Thomas Paine* (1789). Maryland's constitutional provision outlining the right to a jury trial states in part:

"The inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law."

*108 Md. Const. art. 5. Consistent with that passage, our courts have long held that the right to trial by jury in civil actions remains inviolate to the extent that it existed at common law. *Knee v. Baltimore City Passenger Ry. Co.*, 87 Md. 623, 624, 40 A. 890 (1898).

The English common law courts recognized long ago that the question of negligence remains the province of the jury. In *Patterson v. Wallace*, 1 MacQ. 748 (1854); 23 L.T.O.S. 249, H.L., the issue was whether certain undisputed facts established negligence. The trial judge took the case from the jury. The House of Lords reversed, holding that it was a pure question of fact for the jury. The United States Supreme Court, in *Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, 665, 21 L.Ed. 745 (1873), relying on *Patterson*, also held that the question of negligence is one for the jury. The Court said:

"It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge....

"We find ... that ... it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

Railroad Co., 84 U.S. at 664.

In accordance with this tradition, Maryland courts hold that negligence is a question of fact to be determined by the jury. *Curley v. General Valet Service*, 270 Md. 248, 264, 311 A.2d 231 (1973). In *Curley*, the Court upheld the jury's finding of negligence and the subsequent damage award. The Court said: "Maryland has gone almost as far as any jurisdiction that we know of in holding that meager evidence of negligence is sufficient to carry the case to the jury." *Curley*, 270 Md. at 264, 311 A.2d 231.

[11] In the case *sub judice*, appellee brought a legal malpractice action based on negligence. Therefore, we hold that under the Maryland Constitution and case law, appellee was entitled to a jury trial.

*109 Ordinarily, in a negligence action, the jury properly determines any damages. See *Ralph Pritts & Sons, Inc. v. Butler*, 43 Md.App. 192, 403 A.2d 830 (1979); *Jones v. Malinowski*, 299 Md. 257, 473 A.2d 429 (1984). This case is complicated by the fact that in assessing damages, the jury was required to consider principles of Maryland divorce law which statutorily have been relegated to the province of the equity court. Appellants claim that because the underlying dispute over the disposition of marital property would have been decided solely by a judge sitting in equity, the court, as a matter of law, should have determined the damages. We reject appellants' argument.

The distinction between issues of law and fact in legal malpractice cases has been addressed in other jurisdictions. In ***297 Chocktoot v. Smith*, 280 Or. 567, 571 P.2d 1255 (1977), the Supreme Court of Oregon, en banc, characterized the issue before it as follows:

"Who, judge or jury, must decide whether an attorney's negligence harmed his client, and upon what evidence, when the negligence concerned an issue decided by the court rather than a jury."

Chocktoot, 571 P.2d at 1256.

In *Chocktoot*, plaintiff claimed that the attorney had negligently represented a client in an earlier action involving the client's right to a share of a decedent's estate.^{FN10} After directing a verdict for plaintiff on the issue of negligence, the trial court ruled that it had the responsibility to decide whether the outcome of the client's heirship was changed by defendant's negligence. On appeal, appellee argued that for those actions which were tried before the court in the first instance, damages resulting from negligent representation should also be assessed by a judge. Judge Linde, writing for the Court rejected this argument:

FN10. The client had died before suit was brought. Plaintiff, as personal representative, claimed that client was decedent's son but that as a result of defendant's failure to discover and present material evidence to that effect, client had been denied recovery at the earlier proceeding. *Chocktoot*, 571 P.2d at 1256.

*110 "... (appellee's proposal) would withdraw from the jury in the malpractice trial the evaluation of the probable outcome of purely factual disputes in all nonjury cases, including all equity, probate, or administrative proceedings. ... *there is no reason why the jury cannot replicate the judgment of another factfinding tribunal, whatever its composition.*"

Chocktoot, 571 P.2d at 1259 (emphasis supplied).

Instead, the court relied on the distinction between law and fact to determine whether the question of damages was properly before the jury or the court:

"The question what decision should have fol-

lowed in the earlier case if the defendant attorneys had *taken proper legal steps* is a question of law for the court.... The question what outcome should have followed if defendants had *conducted a proper investigation, presentation (or exclusion) of evidence, or other steps bearing on a decision based on the facts remains a question of fact for the jury....*"

Chocktoot, 571 P.2d at 1259 (emphasis supplied).

In *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis.2d 94, 362 N.W.2d 118 (1985), the Wisconsin Supreme Court examined the roles of judge and jury in a case factually similar to the present one. *Helmbrecht* involved an action for legal malpractice arising out of an attorney's negligent representation of a client in her divorce action. At the underlying trial, the attorney had appeared with his client but with no other witnesses to testify to the value of the marital assets or the client's need for maintenance. He then entered into a stipulation with opposing counsel which client became dissatisfied with, leading to her action against him. *Helmbrecht*, 362 N.W.2d at 122. The jury returned a verdict in favor of appellee and awarded \$250,000 in damages. The trial court subsequently granted appellant's motion for judgment notwithstanding the verdict. The Court found that there was insufficient evidence to show that, had the divorce proceeding come to trial, the judge would have *111 awarded anything more than the appellee received from the stipulation.

Wisconsin, like Maryland, has statutorily granted the court, sitting without a jury, exclusive jurisdiction over all actions affecting marriage. On appeal, appellants in *Helmbrecht* argued that the trial court erred in allowing the jury to decide the issue of causation and damages. Appellants claimed that because the divorce suit would have been tried before a trial judge and not a jury, the jury in the legal malpractice action should not be allowed to determine the damages.^{FN11} The Wisconsin **298 Supreme Court rejected the appellant's argument in spite of the fact that the Legislature had given the

court exclusive jurisdiction over family matters. *Helmbrecht*, 362 N.W.2d at 134. The Court, relying heavily on *Chocktoot*, said, "The focus is not on whether the original action is tried before a jury, but, rather, whether the issue remaining in the malpractice action is one of law or one of fact." *Helmbrecht*, 362 N.W.2d at 134. The question of damages was considered to be an issue of fact properly before the jury. *Helmbrecht*, 362 N.W.2d at 134. Finally, the Court held that in determining damages, the jury did not have to decide what the divorce judge in the underlying case would have done; it had to decide what a reasonable judge would have done had the attorney not been negligent. *Helmbrecht*, 362 N.W.2d at 125.

FN11. Appellants offer no case law in support of their argument. The first case they cite, *Ex Parte Reynolds*, 447 So.2d 701 (Ala.1984), involved the right to a jury trial when the complaint raises equitable issues and the amended complaint involves legal issues. Appellants' other case, *Olson v. Aretz*, 346 N.W.2d 178 (Minn.App.1984), supports the proposition that a plaintiff in a legal malpractice action based on negligence is entitled to a jury trial despite the presence of underlying equitable issues.

We agree with the analysis of the Oregon and Wisconsin courts. In the case *sub judice*, appellee brought a legal malpractice action based on negligence. Having requested a jury trial, she was entitled to a jury determination on all *112 issues of fact. In Maryland, the questions of negligence and damages are issues of fact rightfully before the jury.

Appellants have not challenged the sufficiency of the jury instruction regarding the assessment of damages. Significantly, appellants *did not* argue that the court did not adequately instruct the jury; they argued that the court *could not* adequately instruct the jury.^{FN12} In determining damages, the jury had the assistance of expert testimony and

evidence of the marital relationship and marital assets. In oral arguments before this Court, appellants admitted that the judge spent between one and two hours instructing the jury on Maryland's marital property law. In addition, with the aid of a chart, the judge explained to the jury in great detail the statutory factors that must be considered in making a marital award. Appellants do not contend that this part of the jury instructions was incorrect.

FN12. Appellants imply that, in evaluating the evidence, there is a specific figure all reasonable judges would concur on as an appropriate monetary award. That is just not so. The potential for a great latitude in monetary awards is one of the strengths (or perhaps a weakness) of the marital property laws. There is rarely, if ever, going to be only one figure that can be deemed an "equitable" award. Hence, ordinarily the amount cannot be said to be determined as a matter of law.

We are confident that when a jury is properly instructed on the law, as it was in this case, it can reasonably apply the law to the particular facts involved and resolve the issue of what a *reasonable* judge would have awarded in the initial divorce action. We see no reason why the jury could not substitute its judgment for the fact finder of the initial action, be it a jury, judge or domestic relations master. Throughout the country, juries decide issues every day no more complicated than what a reasonable judge would have awarded as property division and maintenance.^{FN13} Therefore, we hold that the trial court was correct in submitting *113 the question of damages arising from appellants' negligence to the jury.

FN13. It is hard to conceive of issues more complex than determining the damages resulting from infliction of emotional distress or sorting out multiparty, multicount contract suits, yet juries are constantly given those responsibilities.

JURY INSTRUCTIONS

[12] Appellants claim that the trial court erred in not instructing the jury "that appellee had the burden to affirmatively prove the identity and value of those items she contended constituted marital property."

Appellants did not preserve this issue for our review. At trial, appellants excepted to the court's not giving an instruction that appellee had the burden of identifying and valuing the marital property. The court brought the jurors back in and instructed **299 them on appellee's burden of proof. The court excused the jury and asked whether anybody had any further exceptions to the instructions. Appellants' counsel responded, "Defendants' [sic] satisfied, your Honor."

Under Rule 1085, when a party has the option of objecting, his failure to do so while it is still within the power of the trial court to correct the error is regarded as a waiver estopping him from obtaining a review of the point or question on appeal. *Lohss v. State*, 272 Md. 113, 119, 321 A.2d 534 (1974). Here, appellants not only failed to object following the court's reinstructions, but stated they were satisfied with the jury instructions. Thus, appellants have waived their right to review of that point. In any event, in view of our holding that it is unnecessary to prove each item of marital property, the requested instruction would still have been properly excluded.

EXTENSION OF ALIMONY

[13] The settlement agreement in the underlying case provided appellee with four years of alimony and indicated that it was "nonadjustable, non-modifiable." Prior to the expiration of the statutory time period, appellants wrote appellee advising her of her right to petition the court for an extension of alimony. At trial, the jury found that appellants were negligent in providing that advice and awarded appellee \$300. On appeal, appellants claim that *114 the advice was correct as a matter of law and claim that the jury award should therefore be reversed.

As discussed earlier,^{FN14} the jury's verdict should not be disturbed "[i]f a non-moving party offers 'any evidence competent, pertinent and coming from the legal source, legally sufficient to prove plaintiff's case.' " *Levitsky v. Prince George's County*, 50 Md.App. 484, 497, 439 A.2d 600 (1982)

FN14. *See* Standard of Review, *supra*.

We hold that appellee produced sufficient evidence to allow the jury to determine the question of appellants' negligence. First, appellant Berman's letter advising appellee of her right to petition for an extension of alimony was admitted into evidence. Second, appellee introduced the court order denying her motion for an extension of alimony. Third, Stephen Friedman, the attorney who filed the motion for an extension on appellee's behalf, testified that he did not understand how appellant Berman could have given that advice, in light of the absolute "language contained in the settlement agreement."^{FN15} Finally, appellee's expert on the standard of care for Maryland domestic relations lawyers testified that appellant Berman's advice fell below the standard of care, because the words "nonadjustable, nonmodifiable" mean precisely what they say.

FN15. Mrs. Haislip sought and was awarded damages resulting from pursuing a modification of her alimony. The jury found that this claim for modification was not a valid one. Whether she should have been able to recover for expenses resulting from pursuing a claim which might have violated Rule 1-341 was never raised by cross-appellees.

Taken together, the jury could have found that appellant Berman was negligent in advising appellee that she had a right to seek an extension of alimony.

CROSS-APPEAL

[14] At trial, cross-appellant claimed that, be-

cause of cross-appellee's negligence, she failed to receive an award *115 of indefinite alimony. The jury disagreed and specifically found that cross-appellee was not responsible for cross-appellant's failure to receive indefinite alimony. On appeal, cross-appellant claims that this issue should be retried because evidence of the Haislips' respective standards of living after January 26, 1982 was not admitted. Cross-appellant argues:

"[D]ue to the exclusion of major portions of Cross-Appellant's evidence by the trial court, the jury was not allowed to consider whether there was a substantial enough disparity between the standards of living enjoyed by the Haislips subsequent to divorce to warrant an extension of the four years' alimony provided for in the agreement, absent Cross-Appellee Berman's characterization of such alimony as 'nonmodifiable, non-adjustable.' "

****300** The fundamental defect in cross-appellant's argument is her misunderstanding of Maryland law relating to alimony. The effect of the Haislips' financial disparity at the time of trial is relevant as to whether the court would award indefinite alimony. Later disparity generally is not relevant in determining whether to award an extension of alimony.

-Indefinite Alimony-

Under the 1980 revisions of the Maryland marital law, the court can follow one of two avenues in awarding alimony-indefinite or for a term. Unless the party receiving alimony meets one of the two preconditions to an award of indefinite alimony, the court will only award rehabilitative alimony. Under § 11-106(c), the court can grant a party indefinite alimony. This type of alimony lasts until one party dies, the party receiving the alimony remarries, or until modified by the court. Under that section, the court can only grant this type of alimony under specific circumstances. Number one, if because of either age or health it is evident to the court that the party receiving alimony "cannot reasonably be expected to make substantial progress toward becoming

self-supporting." § 11-106(c)(1). The other exception is if "even after the party seeking alimony will have made as much progress toward becoming self-supporting as can *116 reasonably be expected, the respective standards of living of the parties will be unconscionably disparate." § 11-106(c)(2).

In the case *sub judice*, cross-appellant argues that because the court excluded all post-January 1982 evidence the jury lacked sufficient evidence to determine whether she failed to receive indefinite alimony because of cross-appellee's negligence. We disagree.

If the court decides to award indefinite alimony, that decision is made at the conclusion of the trial on the issue of the disposition of the marital property. In resolving whether to award indefinite alimony, the court considers only that evidence introduced at the trial. In this case, the trial was in January of 1982, therefore, the court would only have before it the parties' pre-January 1982 financial information. It would not have had the parties' post-January 1982 financial information because that was not yet in existence. Therefore, even if cross-appellant would have received indefinite alimony but for cross-appellee's negligence, the court in making that award could not have based it on the disparity of the parties' post-January 1982 financial status. It would have been awarded based only on the financial information introduced during the January 1982 hearing.^{FN16}

FN16. Judge Taylor, who presided at the divorce trial, testified in the malpractice case. He stated that he had only been willing to give cross-appellant two, possibly three years of alimony.

-Extension of Alimony-

In her brief, cross-appellant claims:

"It is important to note that there is not any serious question that Mr. Berman did give bad advice on this point. The jury found him negligent for advising Cross-Appellant that the Court had

authority to extend the alimony payments. ... That being the case, the critical question was whether Cross-Appellant sustained damages as a result of this erroneous advice. The jury's decision that she did not result from Cross-Appellant's *117 inability to sustain her burden of proof, due to the trial court's evidentiary rulings."

Cross-appellant correctly states that the jury found Berman negligent in advising her that the court had the authority to extend the alimony payments. Cross-appellant incorrectly concludes that the jury failed to award damages on that issue because of the trial court's evidentiary rulings. In fact, the jury *did* award cross-appellant \$300; ostensibly the amount of money cross-appellant spent in acting on that advice. Cross-appellant confuses the issue of whether Berman was negligent in advising her to seek an extension of alimony with the issue of whether Berman was negligent in allowing the "nonmodifiable, nonadjustable" provision to be included in the settlement agreement.

Cross-appellant was awarded rehabilitative alimony for four years. Ordinarily, **301 under Md.Fam.Law Code Ann. § 11-107 (1984), cross-appellant would have had the right to apply for an extension of alimony, providing this was done within the statutory time period. Cross-appellant was precluded from taking advantage of that section because of the "nonmodifiable, nonadjustable" provision in the settlement agreement. The post-1982 financial information was only applicable *if* cross-appellant was eligible for an extension of alimony. At trial, the jury was not asked to consider whether Berman was negligent in incorporating the "non-modifiable, nonadjustable" provision in the agreement. Therefore, it is not surprising that the jury did not find that Berman was negligent in regard to that provision.

Pursuant to Rule 2-522, the court required the jury to return a special verdict in the form of written findings upon specific issues. That Rule provides in part:

"If the court fails to submit any issue raised by the pleadings or by the evidence, all parties waive their right to a trial by jury of the issues omitted unless before the jury retires a party demands its submission to the jury."

Here, cross-appellant never demanded that the jury be given the question of cross-appellee's negligence in permitting*118 the "nonmodifiable" provision. In addition, cross-appellant does not argue on appeal that Berman was negligent in including that provision. Under Rule 2-522, even if cross-appellant had raised this issue on appeal, it was not properly preserved for our review.

JUDGMENT AFFIRMED. COSTS TO BE PAID FOUR-FIFTHS BY APPELLANTS/CROSS-APPELLEES AND ONE-FIFTH BY APPELLEE/CROSS-APPELLANT.

Md.App.,1987.

Pickett, Houlon & Berman v. Haislip

73 Md.App. 89, 533 A.2d 287

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Court of Appeals of Arizona,
Division 1, Department E.

Jackqueline L. REED, a single woman,
Plaintiff-Appellant/Cross-Appellee,

v.

MITCHELL & TIMBANARD, P.C., an Arizona
corporation; Sheldon Mitchell and Jane Doe
Mitchell, husband and wife; Kerry B. Moore and
John Doe Moore, wife and husband, Defend-
ants-Appellees/Cross-Appellants.

No. 1 CA-CV 92-0348.

April 11, 1995.

Review Denied Sept. 26, 1995. FN*

FN* Corcoran, J., of the Supreme Court,
did not participate in the determination of
this matter.

Client brought legal malpractice action against attorneys who had represented her in divorce proceeding, alleging that they were negligent in failing to adequately secure note given to her by her former husband. The Superior Court of Maricopa County, Cause No. CV 89-29965, Thomas Dunevant, III, J., granted summary judgment for attorneys on limitations grounds but denied their request for fees and costs. Parties appealed. The Court of Appeals, Kleinschmidt, J., held that: (1) statute of limitations did not begin to run before client received letter from newly retained counsel indicating that judgment obtained on note had not been recorded and that she might not be able to collect on it; (2) fact issues existed as to malpractice claim; (3) simple legal malpractice resulting in pecuniary loss which in turn causes emotional upset, even with physical symptoms, will not support claim for damages for emotional distress; and (4) denial of costs and fees was justified.

Affirmed in part, reversed and remanded in part.

West Headnotes

[1] Attorney and Client 45 ⇌ 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful

Acts

45k129(1) k. In General; Limitations.

Most Cited Cases

Legal malpractice actions are subject to two-year statute of limitations for tort claims. A.R.S. § 12-542.

[2] Limitation of Actions 241 ⇌ 55(3)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(3) k. Negligence in Performance of Professional Services. Most Cited Cases

Claim for legal malpractice accrues when: (1) plaintiff knows or reasonably should know of attorney's negligent conduct, and (2) plaintiff's damages are ascertainable and not speculative or contingent.

[3] Limitation of Actions 241 ⇌ 55(3)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k55 Torts

241k55(3) k. Negligence in Performance of Professional Services. Most Cited Cases

Statute of limitations governing client's malpractice claim against attorneys who represented her in divorce proceeding did not begin to run until newly retained new counsel sent letter informing client that judgment she had obtained against former husband on note had not been recorded and that she might not be able to collect on it, and not, as contended by attorneys, on earlier date when

husband allegedly defaulted on note and wife first consulted with new counsel. A.R.S. § 12-542 .

[4] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Material fact issues existed in client's malpractice action against attorneys who represented her in divorce proceeding as to whether dissolution judgment adequately securing note given against husband would have been signed by judge but for attorneys' negligence and as to whether client sustained any damages as result of alleged negligence, precluding summary judgment for attorneys.

[5] Witnesses 410 ⇌ 71

410 Witnesses

410II Competency

410II(A) Capacity and Qualifications in General

410k69 Judges, Jurors, and Judicial Officers, as Witnesses as to Proceedings by or Before Them

410k71 k. Judges, Justices of the Peace, and Other Magistrates. Most Cited Cases

In context of client's malpractice action against attorneys who represented her in divorce proceeding, testimony of judge who handled dissolution on whether he would have signed judgment but for attorneys' alleged negligence was precluded as a matter of public policy.

[6] Damages 115 ⇌ 57.1

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emo-

tional Distress

115k57.1 k. In General. Most Cited Cases

(Formerly 115k49.10)

Simple legal malpractice resulting in pecuniary loss which in turn causes emotional upset, even with physical symptoms, will not support claim for damages for emotional distress.

[7] Costs 102 ⇌ 2

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k1 Nature and Grounds of Right

102k2 k. In General. Most Cited Cases

Costs 102 ⇌ 194.44

102 Costs

102VIII Attorney Fees

102k194.44 k. Bad Faith or Meritless Litigation. Most Cited Cases

Even if statute of limitations had run on client's malpractice claim against her attorneys, trial court did not abuse its discretion in denying attorneys' requests for costs and fees for pursuing groundless claim; trial court found that statute of limitations question was debatable issue, and there was no showing that client pursued action in bad faith. A.R.S. §§ 12-341.01 , subd. C, 12-349; 16 A.R.S. Rules Civ.Proc., Rule 11.

****622*314** Arthur N. Gorman and Deborah A. Nastro, Phoenix, for plaintiff-appellant/cross-appellee.

Burch & Cracchiolo, P.A. by Daniel Cracchiolo, Daryl Manhart and Karen J. Williams, Phoenix, for defendants-appellees/cross-appellants.

OPINION

KLEINSCHMIDT, Judge.

The Defendants are a law firm and lawyers who represented the Plaintiff, Jackqueline Reed, in a divorce proceeding. Reed sued them, alleging that

they failed to adequately secure a promissory note given to her by her former husband. The Defendants moved for summary judgment and partial summary judgment on the grounds, among others, that Reed's malpractice action was barred by the statute of limitations. Because the trial **623 *315 judge found the statute had run, he granted summary judgment to the Defendants but denied their request for attorney's fees and costs. Reed appealed, and the Defendants cross-appealed the denial of their request for fees and costs.

The trial court erred in holding that Reed's action was time-barred. We also reject the Defendants' contentions, which were not addressed by the trial court, that they are entitled to judgment on the merits because Reed cannot prove the essential elements of her malpractice action, and cannot prove any damages resulting from the malpractice. However, we agree with Defendants that Reed is not entitled to recover damages for emotional distress. Accordingly, we reverse the decision of the trial court on the limitations issue, grant partial summary judgment for the Defendants on the emotional distress issue, and remand this case for further proceedings on the merits. Our decision moots the cross-appeal, but even if it did not, we would affirm the trial court's denial of the Defendants' request for fees and costs.

FACTS AND PROCEDURAL HISTORY

In 1983, Jacqueline Reed retained the Defendants to represent her in her divorce from her husband, Dr. Eldon Reed. In April 1984, a formal decree of dissolution prepared by the Defendants was entered by the judge, which, among other things, ordered the husband to give Reed a \$250,000 promissory note. The interest bearing note was payable at the rate of at least \$1,000 per month beginning May 1, 1984, with a balloon payment of the remaining balance due on May 1, 1986. The order stated:

Said note shall be secured by any assets awarded Husband herein having a value of up to 125% of the face value of the note, which assets shall be

chosen by the Wife.

Dr. Reed executed the note in August 1984. Two months later, he pledged several limited partnership interests, tendered a mortgage on his \$36,400 condominium, and delivered the stock certificates of his professional corporation as security for the note. The Defendants informed their client of these transactions and sent her copies of the pertinent documents. Although the Defendants told Reed they had secured her note with all available assets, they never attempted to secure the \$62,419 in cash proceeds from the sale of the family residence awarded to Dr. Reed, never attempted to secure the \$620,000 in his Deferred Compensation Plan, and never attempted to secure his \$44,620 interest in a medical building, or the equipment, tangible assets and accounts receivable belonging to his professional corporation.

On May 1, 1986, Dr. Reed failed to make the balloon payment called for by the note. The note may have been extended for a year—the parties dispute the point—but in any event, even if an extension was granted, Dr. Reed failed to pay the note on May 1, 1987. Pursuant to Reed's petition for an order to show cause, the court, on August 10, 1987, ordered that Reed have judgment against her former husband on the note.

At that point, the Defendants told Reed that they did not do collection work and they referred her to attorney David Harowitz. Reed consulted with Harowitz on September 25, 1987. She told him that she wanted to collect on a judgment against her ex-husband, but she was afraid that he might become angry and cease making spousal maintenance and child support payments.

Harowitz reviewed Reed's divorce file in late October 1987. On October 26, 1987, he wrote her a letter informing her that the August 10, 1987 judgment against Dr. Reed had not been recorded and that he thought Dr. Reed's pension plan assets were unreachable. In December 1987, Harowitz noticed Dr. Reed for a debtor's exam. Dr. Reed wrote

Harowitz that he would not appear, and the doctor called his former wife and allegedly harassed her for trying to collect the judgment. As a result, Reed told Harowitz to discontinue any collection efforts.

On May 29, 1988, Dr. Reed filed for Chapter 7 bankruptcy. Reed retained a bankruptcy**624 *316 attorney, John J. Herbert, to represent her in those proceedings. After reviewing her divorce file, Herbert told Reed that the Defendants may have committed malpractice by failing to secure the note.

On October 25, 1989, Reed filed this legal malpractice suit against the Defendants, asserting claims for breach of contract and for negligence based on the Defendants' alleged failure to properly secure the note. Reed's expert witness, J. Emery Barker, testified that the Defendants had fallen below the standard of care by not specifying in the decree the assets which were to serve as security for the note or by not requiring Dr. Reed to execute security documents to be attached to the decree.

The Defendants moved for summary judgment. They argued that Reed's complaint was barred by the statute of limitations. They also argued that they were entitled to summary judgment on the alternate grounds that Reed could not have prevailed on her claim against her husband even if the Defendants had not been negligent, that Reed could not prove damages against them because the debt from her former husband could have been collected after Reed discharged the Defendants as her attorneys, and that Reed was not entitled to damages for emotional distress. Reed counter-moved for summary judgment on the limitations issue, contending that her complaint was timely filed. The trial court ruled in favor of the Defendants, holding:

Assuming arguendo that the promissory note was inadequately secured, giving the Plaintiff every benefit of the doubt, it is clear that the Plaintiff knew or should have known that Dr. Reed was not going to pay and that a question regarding the adequacy of the security was presented as of September 25, 1987.

As of September 25, 1987, Dr. Reed had defaulted on the promissory note and had not made the balloon payment due on May, 1986 or on May, 1987, assuming that a one year extension ... had been granted.... Further, the Plaintiff had retained attorney David Harowitz to try to collect on the note. Mr. Harowitz had begun work to determine whether any assets existed upon which to execute when he was instructed by the Plaintiff to stop.

Therefore, assuming there was lawyer malpractice on Defendants' part, and damages resulting therefrom, the negligence and damages were ascertainable and nonspeculative, on September 25, 1987.

The trial court did not rule on the Defendants' alternative grounds for summary judgment.

Reed moved for reconsideration. The trial court denied her motion, holding:

The inquiry is when the Plaintiff could have reasonably discovered the alleged malpractice. In other words, when the plaintiff should have or could have known of the alleged malpractice. The Plaintiff could have known of the malpractice if she had not terminated Mr. Harowitz. To conclude otherwise would suggest that the Plaintiff could engage Mr. Harowitz, or other counsel, ad infinitum and terminate the professional relationship as she did in this case and the statute of limitations would never run.

After the trial court ruled in their favor, the Defendants sought an award of their costs and attorneys' fees pursuant to Rule 11, Arizona Rules of Civil Procedure, and Ariz.Rev.Stat. Ann. ("A.R.S.") sections 12-341.01(C) and 12-349. The Defendants maintained that the lawsuit was obviously time-barred and unsubstantiated from the start. The trial court denied this motion, finding that the "statute of limitations issue as applied to the facts in this case is fairly debatable and susceptible to the divergent interpretations of Plaintiff and Defendants" and that

each side had a " 'good faith' basis for the position taken."

**THE MALPRACTICE ACTION IS NOT
TIME-BARRED**

In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the party opposing the motion. *Hill-Shafer Partnership v. Chilson Family Trust*, 165 Ariz. 469, 472, 799 P.2d 810, 813 (1990). We are not bound by any conclusions **625 *317 of law drawn by the trial court. *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 114, 412 P.2d 47, 54 (1966).

[1][2] The parties agree that, in Arizona, legal malpractice actions are subject to the two-year statute of limitations for tort claims set forth in A.R.S. section 12-542. *Tullar v. Walter L. Henderson, P.C.*, 168 Ariz. 577, 580, 816 P.2d 234, 237 (App.1991). A claim for legal malpractice accrues when: (1) the plaintiff knows or reasonably should know of the attorney's negligent conduct; and (2) the plaintiff's damages are ascertainable, and not speculative or contingent. *Id.* at 579, 816 P.2d at 236.

[3] The Defendants argue that Reed's cause of action accrued, at the latest, in September 1987. By that time, Dr. Reed had defaulted on the note, Reed had converted the obligation into a judgment for the full amount of the note, and she had retained Harowitz to assist her in her collection efforts. They say that by September 1987, the alleged negligence had occurred, the alleged damage had been sustained, and Reed was aware or should have been aware of the facts underlying her cause of action for malpractice.

The Defendants focus on Dr. Reed's default on the note and tread lightly over the question of when Reed should have reasonably discovered that the note had not been adequately secured. Before Reed obtained a judgment on the note, the Defendants continually assured her that they had secured all available assets. After she obtained the judgment, Reed was referred to, and promptly contacted, a

collection attorney to attempt collection on the security underlying the note. The Defendants argue, and the trial court found, that Reed's cause of action against them accrued at that time-on the date of her *first* consultation with Harowitz-September 25, 1987. Yet, at that point, Harowitz had not had an opportunity to review Reed's divorce file, or make any effort to collect on the note. We do not see how Reed could reasonably have been aware that the note was inadequately secured at that time.

We conclude that the statute of limitations on Reed's malpractice claim could not have begun to run before October 27, 1987, the earliest date on which Reed could have received the letter Harowitz sent her which, generously interpreted in favor of the Defendants, gave Reed some reason to believe that the note was not adequately secured. Reed herself recognizes that her cause of action may have accrued at this time. In her opening brief, she acknowledges that Harowitz's letter was arguably the "first evidence that the note was truly uncollectible." At that point, Reed's damages were definite and ascertainable and one could possibly conclude that she reasonably should have been aware of the facts underlying her cause of action for malpractice. Reed filed her lawsuit against the Defendants on October 25, 1989, within two years of the accrual date. Accordingly, her action is not time-barred. The trial court should have granted Reed's motion for summary judgment on this issue. In view of our conclusion, we need not address Reed's argument, raised in her brief, that her cause of action did not accrue until her husband filed bankruptcy in May 1988.

THERE IS SUFFICIENT EVIDENCE OF NEGLIGENCE TO RAISE A JURY QUESTION

[4] The Defendants argue that they are entitled to summary judgment because Reed cannot prove that, but for their negligence, she would have been successful in collecting the funds her husband owed her. *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App.1986). The Defendants submit that the sole act of malpractice identified by Reed's

expert was their failure to either list all of the security in the decree and present it to the judge for signature, or to require Dr. Reed to execute security documents as attachments to the decree. They claim that Reed's expert, an attorney, could only speculate that the court would have approved and signed such a judgment. They argue that such speculation is insufficient, as a matter of law, to establish that Reed would have prevailed.

[5] The judge who handled the dissolution is the only one who could give a definitive**626 *318 answer on this issue, and his testimony is precluded as a matter of public policy. *Id.* at 420, 733 P.2d at 305 (testimony of judge is usually excluded as too prejudicial to opposing party and as presenting an appearance of impropriety). Instead, the trier of fact must employ an objective standard to determine whether a reasonable judge would have signed the decree listing the security for the debt. *See id.* at 418, 733 P.2d at 303. The deposition testimony of Reed's expert was stronger than mere speculation. He testified that he believed the proposed decree would have been signed. The Defendants did not present any evidence rebutting Barker's testimony on this issue. The jury, as the trier of fact, has the duty to determine what a reasonable judge would have done.

In addition, although the Defendants chide Reed for not presenting evidence that Dr. Reed's attorney would not have objected to the proposed decree, they have not presented any evidence that the attorney would have objected. Even if such evidence had been presented, the jury could still find that the judge would have entered the decree over such objection.

The Defendants also argue that they are entitled to summary judgment because Reed cannot prove any damages arising from their alleged negligent conduct-an essential element of her malpractice claim. *Vivian Arnold Realty Co. v. McCormick*, 19 Ariz.App. 289, 294, 506 P.2d 1074, 1079 (1973). They argue that Reed's failure to attempt to execute against her ex-husband's assets from the time

she obtained the default judgment in August 1987, to the time he filed bankruptcy in May 1988, is the real cause of her damages. Further, the Defendants argue that Reed still cannot ascertain or establish her damages because the debt on the note was declared nondischargeable in the bankruptcy.

At most, the Defendants' arguments raise questions of fact regarding whether Reed has actually suffered a loss as the result of the Defendants' alleged negligence and her possible contributory negligence or failure to mitigate her damages. These must be resolved by the jury. *See* Ariz. Const. Art. 18, § 5 and A.R.S. § 12-2505(A) (defense of contributory negligence is always question of fact for the jury).

REED IS NOT ENTITLED TO DAMAGES FOR EMOTIONAL DISTRESS

[6] Reed asserts that the alleged malpractice put her financial security at risk, and as a result, she has suffered emotional distress and various ills including headaches, stomachaches and neck pains. The Defendants argue that, as a matter of law, Reed cannot recover damages for emotional distress as part of her malpractice claim, and they seek partial summary judgment on this issue. We hold that simple legal malpractice resulting in pecuniary loss which in turn causes emotional upset, even with physical symptoms, will not support a claim for damages for emotional distress.

One Arizona case, *Deno v. Transamerica Title Ins. Co.*, 126 Ariz. 527, 530, 617 P.2d 35, 38 (App.1980), has held that in the absence of outrageous conduct or bad faith, a person who suffers pecuniary loss as the result of a negligently prepared title report, is not entitled to recover damages for emotional distress resulting from the loss. Most other jurisdictions which have considered this issue in the context of legal malpractice have held that "damages for emotional injuries are not recoverable where they are a *consequence* of other damages caused by the attorney's negligence." 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 16.11 at 904 (3d ed. 1989 and Supp.1993) (citing

cases from numerous jurisdictions); *see also* D. Dusty Rhoades and Laura W. Morgan, *Recovery for Emotional Distress Damages in Attorney Malpractice Cases*, 45 S.C.L.Rev. 837, 839 (1994), in which the authors, in describing the holdings of some courts, say, "consequential damages for emotional distress are not recoverable when the client's direct damages are strictly economic or pecuniary." Rhoades and Morgan also observe that there is an exception to the general rule to allow recovery for emotional distress which is caused by malpractice that results in direct damages to a personal, as opposed to an economic interest. Examples of such personal damages are the loss of liberty or **627 *319 damage to a family relationship. Rhoades and Morgan, *supra* at 842-44. *See also Holliday v. Jones*, 215 Cal.App.3d 102, 264 Cal.Rptr. 448 (1989) (negligent handling of criminal defense). So too, as *Deno* notes, the rule disallowing recovery for emotional distress does not apply if the attorney's conduct involves fraud, intentional conduct, a willful fiduciary breach or physical contact. 126 Ariz. at 529, 617 P.2d at 37; *see also Legal Malpractice* § 16.11 at 904.

A number of cases from other jurisdictions support the general rule. *See Smith v. Superior Court*, 10 Cal.App.4th 1033, 13 Cal.Rptr.2d 133, 136-37 (1992) (mere negligence will not support recovery for mental suffering where the defendant's tortious conduct has resulted only in an economic injury to the plaintiff); *Bowman v. Doherty*, 235 Kan. 870, 686 P.2d 112, 118 (1984) (evidence of willful or wanton conduct required before plaintiff may recover emotional distress damages from attorney in legal malpractice suit); *Selsnick v. Horton*, 96 Nev. 944, 620 P.2d 1256, 1257 (1980) (no emotional distress damages against attorney for malpractice absent proof of extreme and outrageous conduct causing such anguish or distress); *Hilt v. Bernstein*, 75 Or.App. 502, 707 P.2d 88, 95-96 (1985) (no emotional distress damages allowed in legal malpractice suit if injury is based upon an economic claim); *but see Tara Motors v. Superior Court*, 276 Cal.Rptr. 603, 608-09 (App.1990) (divided court declined to

follow prior California precedent and allowed claim for emotional distress damages in legal malpractice suit holding that "substantial damages" requirement for economic loss would prevent abusive, unfounded allegations of emotional distress); *Salley v. Childs*, 541 A.2d 1297, 1300-01 (Me.1988) (ignoring inconsistent authority and holding that once client establishes pecuniary loss due to malpractice, client can recover all damages proximately caused by malpractice, including emotional distress damages).

Reed counters, however, with the argument that Arizona case law allows recovery of emotional distress damages when the tortfeasor's conduct was not intentional or willful and wanton. She relies on several insurance bad faith cases as support for this proposition, including *Farr v. Transamerica Occidental Life Ins. Co.*, 145 Ariz. 1, 699 P.2d 376 (App.1984). However, the tort of bad faith is still an intentional one—the defendant insurer must either have knowledge of, or reckless disregard for, the lack of a reasonable basis for denying an insurance claim. *Id.* at 5, 699 P.2d at 380.

Reed also relies on *Thomas v. Goudreault*, 163 Ariz. 159, 166-67, 786 P.2d 1010, 1017-18 (App.1989), in which we held that a landlord's breach of duties imposed by the Arizona Residential Landlord and Tenant Act provided a basis for the recovery of damages for emotional distress that resulted from mere negligence. The basis for the holding in *Thomas*, however, is akin to the principle that damages for emotional distress are recoverable where the injury is personal, as opposed to economic. We acknowledged in *Thomas* that a failure to comply with the Landlord Tenant Act resulted in property damage, but we went on to say: "However, the more immediate damage that he [the plaintiff] suffers is the annoyance and discomfort of living in inadequate housing." *Id.* at 167, 786 P.2d at 1018.

Here, Reed has not alleged that the Defendants intentionally harmed her or acted in bad faith while handling her divorce action. Further, because the

direct result of the alleged malpractice is purely economic, the exception allowing recovery for emotional distress when the interest affected is a personal one is not applicable. Accordingly, Reed may not recover damages for emotional distress, and the Defendants are entitled to partial summary judgment on this issue.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' REQUEST FOR ATTORNEYS' FEES

[7] On cross-appeal, the Defendants argue that the trial court erred in denying their requests for costs and attorneys' fees pursuant to Rule 11, Arizona Rules of Civil Procedure,^{FN1} and ****628*320** A.R.S. sections 12-341.01(C)^{FN2} and 12-349.^{FN3} Defendants base their request for fees and costs on their argument that Reed's action was clearly time-barred and unsubstantiated from the outset. This premise cannot be reconciled with our conclusion that Reed's action was, in fact, timely filed.

FN1. Rule 11 is violated by the filing of a pleading when the party or counsel knew, or should have known by such investigation of fact and law as was reasonable and feasible under all the circumstances, that the claim or defense was insubstantial, groundless, frivolous, or otherwise unjustified. It is also violated by the filing of pleadings for an improper purpose such as those intended to harass, coerce, extort, or delay.

Boone v. Superior Court, 145 Ariz. 235, 241-42, 700 P.2d 1335, 1341-42 (1985).

FN2. A.R.S. § 12-341.01(C) provides:

Reasonable attorney's fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith.

FN3. A.R.S. § 12-349 provides:

Except as otherwise provided by and not inconsistent with another statute ... the court shall assess reasonable attorney's fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars ... if the attorney or party ...

1. Brings or defends a claim without substantial justification.

Even if the statute of limitations had run, a trial court's denial of attorneys' fees is reviewed under an abuse of discretion standard (*Jones v. Queen Ins. Co.*, 76 Ariz. 212, 214, 262 P.2d 250, 251 (1953)), and the Defendants have not presented any evidence of such an abuse in this case. The trial court found that the statute of limitations question was a "debatable issue," and that each side had asserted a good faith, valid argument. We agree that because the statutes and procedural rule relied on by the Defendants only authorize the award of fees where the argument asserted was groundless and lacking in good faith, the trial court properly denied the Defendants' fee request.

CONCLUSION

The trial court erred in finding Reed's action time-barred. The Defendants' remaining claims for summary judgment lack merit, except that the Defendants are entitled to partial summary judgment on Reed's claim for damages for emotional distress. On cross-appeal, the trial court's decision denying Defendants' application for fees and costs is affirmed. This case is reversed and remanded for further proceedings consistent with this opinion.

NOYES, P.J., and GARBARINO, J., concur.

Ariz.App. Div. 1, 1995.
Reed v. Mitchell & Timbanard, P.C.
183 Ariz. 313, 903 P.2d 621

END OF DOCUMENT

C

Supreme Court of Arkansas.
L. V. RHINE, Appellant,
v.
Mildred HALEY, Appellee.

No. 5-3194.

May 4, 1964.

Rehearing Denied June 1, 1964.

Action against an attorney for malpractice. The Circuit Court, Greene County, Charles W. Light, J., entered judgment for client and attorney appealed and client cross-appealed in regard to allowance of interest. The Supreme Court, Johnson, J., held that evidence supported giving of instruction setting forth client's alternative theories of recovery based on negligence of attorney in failing to obtain a lien in connection with a property settlement, and in failing to exercise reasonable care to collect amounts due under the settlement.

Affirmed on appeal and on cross-appeal.

West Headnotes

[1] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and Judgment. Most Cited Cases

Evidence, in malpractice suit against an attorney, supported giving of instruction setting forth client's alternative theories of recovery based on negligence of attorney in failing to obtain a lien in connection with a property settlement, and in failing to exercise reasonable care to collect amounts due under the settlement.

[2] Appeal and Error 30 ⇌ 882(9)

30 Appeal and Error

30XVI Review

30XVI(C) Parties Entitled to Allege Error

30k881 Estoppel to Allege Error

30k882 Error Committed or Invited by Party Complaining

30k882(9) k. Matters Elicited on Cross-Examination. Most Cited Cases

Even if it might have been improper for client who brought a malpractice suit against her former attorney to testify on redirect examination as to legal meaning and effect of certain portions of a property settlement agreement which client asserted did not properly protect her rights, attorney could not complain of such testimony where he cross-examined at length with reference to client's understanding and knowledge of the meaning of the agreement.

[3] Attorney and Client 45 ⇌ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(3) k. Trial and Judgment. Most Cited Cases

Evidence, in action by client against an attorney for malpractice, presented a question for the jury as to reasonableness of attorney's unsuccessful efforts to collect directly from client's former husband amounts due her under a property settlement.

[4] Appeal and Error 30 ⇌ 205

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k202 Evidence and Witnesses

30k205 k. Exclusion of Evidence. Most Cited Cases

Error could not be asserted in regard to sustain-

ing of an objection to a question propounded on cross-examination where no offer of proof was made to show what the answer of the witness would have been.

[5] Appeal and Error 30 ⇌ 882(8)

30 Appeal and Error

30XVI Review

30XVI(C) Parties Entitled to Allege Error

30k881 Estoppel to Allege Error

30k882 Error Committed or Invited by Party Complaining

30k882(8) k. Admission of Evidence in General. Most Cited Cases

Appeal and Error 30 ⇌ 1051(1)

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)10 Admission of Evidence

30k1051 Facts Otherwise Established

30k1051(1) k. By Other Evidence in General. Most Cited Cases

If evidence of a nature similar to that to which objection is made and overruled has been admitted without objection, error, if any, in receipt of the evidence is either waived or not prejudicial, and, in any event, complaint cannot be made about receipt thereof.

[6] Trial 388 ⇌ 105(3)

388 Trial

388IV Reception of Evidence

388IV(C) Objections, Motions to Strike Out, and Exceptions

388k105 Effect of Failure to Object or Except

388k105(3) k. Expert and Other Opinion Evidence. Most Cited Cases

Admission of testimony of two expert witnesses, without objection, in regard to a certain matter, was an effective waiver of right to object to testimony of two other expert witnesses on the

same matter on ground of irrelevancy.

[7] Evidence 157 ⇌ 512

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k512 k. Due Care and Proper Conduct in General. Most Cited Cases

Expert testimony as to what ordinarily careful and prudent practitioners of law in a certain county would have done under the same or similar circumstances was properly received in a malpractice action against an attorney on issue of whether the attorney was negligent, and such evidence was not inadmissible on theory it amounted to testimony as to matters of law.

[8] Evidence 157 ⇌ 512

157 Evidence

157XII Opinion Evidence

157XII(B) Subjects of Expert Testimony

157k512 k. Due Care and Proper Conduct in General. Most Cited Cases

An attorney's testimony as to negligence and standards of conduct is properly received in a malpractice action against an attorney.

[9] Trial 388 ⇌ 251(2)

388 Trial

388VII Instructions to Jury

388VII(D) Applicability to Pleadings and Evidence

388k249 Application of Instructions to Case

388k251 Pleadings and Issues

388k251(2) k. Nature of Action or Issue in General. Most Cited Cases

Refusal to give a requested instruction in malpractice action against an attorney as to whether or not attorney was not bound to file a property settlement agreement for recordation was proper where no issue was raised as to whether failure to file the instrument for record was negligence.

[10] Trial 388 ⇌ 260(3)

388 Trial

388VII Instructions to Jury

388VII(E) Requests or Prayers

388k260 Instructions Already Given

388k260(3) k. Evidence and Matters of Fact. Most Cited Cases

Refusal to give a requested instruction in malpractice action against an attorney that attorney had benefit of presumption that he had correctly discharged every obligation that he owed to client was not error in view of fact court instructed that burden was on plaintiff to establish her case by a preponderance of the evidence.

[11] Interest 219 ⇌ 44

219 Interest

219III Time and Computation

219k44 k. Creation or Accrual of Indebtedness. Most Cited Cases

Even though damages recoverable by client in malpractice action against an attorney were liquidated in that they were based on failure of attorney to collect amounts due under a property settlement agreement, client was not entitled to interest on amount awarded from date such amounts were due in view of fact that claim against attorney was in tort with interest allowable only from date of judgment.

****656 *73** Ward & Mooney, Jonesboro, Howard A. Mayes, Paragould, for appellant.

W. B. Howard, Jonesboro, for appellee.

JOHNSON, Justice.

This is an appeal from a judgment in favor of a client against an attorney an allegations of professional neglect or malpractice. The client, appellee Mildred Haley, retained appellant L. V. Rhine, an attorney, to represent her in a suit for divorce and a settlement of her property rights. The appellant undertook the employment. A property settlement agreement was drafted and signed and, sub-

sequently, appellee was granted a decree of divorce.

The property settlement bound appellee's husband to pay appellee and for appellee's benefit various sums of money totaling approximately \$13,000.00, which appellee had advanced to her husband during the years when the parties enjoyed a more amicable relationship. At the time of its execution appellee's husband, Dr. R. J. Haley, was the owner of several hundred acres of land in Greene and Lawrence Counties. The property settlement provided for no lien or tie on the lands and property of R. J. Haley to secure the amounts which he agreed to pay his wife.

Soon after the execution of the property settlement and the rendition of the decree of divorce, Dr. Haley defaulted and failed to make payments in accordance with the property settlement. Appellee again consulted appellant, with reference to the default and the collection of the amounts due her. While there was strenuous denial on the part of appellant, appellee contended that appellant undertook to collect such amounts.

After a considerable lapse of time, during which Dr. Haley paid relatively little on the obligations due appellee, Haley sold all his real property, took the proceeds and all his personal property and absconded to Louisiana with his new wife. After fruitless efforts to collect from her former husband, appellee instituted the present suit in Greene Circuit Court. A jury trial was requested. Following a lengthy hearing, instructions and argument, ***74** the jury returned a verdict in favor of appellee in the sum of \$12,898.27. From judgment on the verdict appellant prosecutes this appeal.

Appellant has filed a 292 page abstract and brief, urging eleven principal points ****657** for reversal. Several of the points are so interrelated as to allow their consolidation.

I.

[1] In points 1, 2, 4 and 5 appellant asserts the

trial court erred in the giving of Court's Instruction No. 6. In each instance appellant contends that one or more features of the instruction were abstract for want of evidence, and appellant further contends that the entire instruction was abstract in that there was no evidence to go to the jury on any aspect of the instruction. Instruction No. 6 is as follows:

'You are instructed that the plaintiff, Mrs. Haley, bases her right to recover in this action against the defendant, Mr. Rhine, upon two separate and alternative theories and in order to recover she must prove her contentions under either one or both of those theories, as hereinafter set out.

'It is Mrs. Haley's contention that at or about the time she signed the property settlement agreement, Mr. Rhine was negligent in failing to speak or act in the performance of a duty that he owed to Mrs. Haley with reference to the legal effect and consequences of that document, or that under the circumstances, in violation of a professional obligation, failed to incorporate within the instrument referred to, or in some other instrument, provisions which would effect a lien upon the property of Dr. Haley, and that such failure was a failure to exercise ordinary skill and care in the exercise of his duty. If you find from a preponderance of the evidence that the defendant was negligent in performing his professional duties in these particulars you will find for the plaintiff, and unless you do so find there can be no recovery for the plaintiff under this theory.

*75 'The plaintiff, Mrs. Haley, further contends that even though you may find that Mr. Rhine had discharged his professional obligations to Mrs. Haley with respect to the property settlement and that thereby his contract of employment was terminated by the entry of the divorce decree, that thereafter a contract was entered into by and between her and Mr. Rhine whereby he undertook to collect the indebtedness owing as a result of the property settlement and that he failed to exercise reasonable and ordinary care in effecting this collection. You are instructed that if you find from a

preponderance of the evidence that a contract or agreement, either express or implied, was entered into by and between the plaintiff and defendant for the collection of the indebtedness owing by Dr. Haley and further that the defendant failed to exercise ordinary skill and care in effectuating that collection, then and in that event you will return a verdict for the plaintiff, and unless you do so find there can be no recovery for the plaintiff under this theory.'

Was the instruction abstract in any particular?

On appeals from circuit court it is not our function to re-try the case. We have examined the record for the sole purpose of ascertaining whether there was any evidence to sustain the giving of the instruction and support the resulting verdict and judgment. We think this question must be answered in the affirmative.

As indicated, the record is rather bulky and voluminous, and it would serve no useful purpose to detail the evidence at length. Suffice it to say there was ample evidence to justify the submission to the jury of the issues set forth in Instruction No. 6. When viewed in the light most favorable to appellee, as is our duty, there was evidence to show that the appellant was employed to draft the property settlement and procure the decree of divorce. In so drafting the property settlement, the appellant did not incorporate a lien to secure his client in **658 the collection of the amounts due her, nor did he advise the client of the legal effect of her execution of the instrument. In particular, he did not advise the client *76 that by her execution of the agreement in question she was placing it within the power of her husband to follow the very course which he subsequently pursued.

The testimony was adequate to sustain a finding that after appellee's former husband made default appellant undertook to collect the amounts due her, and that at the time of such undertaking Dr. Haley was in possession of property having a value in excess of the amounts due appellee. It was undis-

puted that appellant failed to collect these amounts.

Some of the most outstanding attorneys in northeast Arkansas gave testimony indicating that appellant's course of conduct in connection with the employment failed to measure up to that which an ordinarily careful and prudent practitioner would have employed under the same or similar circumstances. The state of the record being thus, we cannot say that the trial court erred in giving Instruction No. 6 nor that the verdict and judgment are not supported by the evidence.

II.

[2] Appellant complains that in the course of her testimony and on re-direct examination, appellee was allowed to make a so-called 'self-serving declaration,' stating her understanding of the legal meaning and effect of certain portions of the property settlement agreement. Assuming, without deciding, that such testimony would ordinarily be improper, it is clear from the record that any error in this respect was invited by appellant. Appellant cross-examined appellee at length with reference to her understanding and knowledge of the meaning of the various words and phrases used in the property settlement agreement. Having embarked on this line of inquiry, appellant cannot now complain because appellee accepted his invitation to give such testimony and because the matter was pursued further on re-direct examination. *Standard Life & Accident Ins. Co. v. Schmaltz*, 66 Ark. 588, 53 S.W. 49.

*77 III.

[3] Appellant insists that he was entitled to a directed verdict on the ground that appellee had made no reasonable effort to collect directly from her former husband the amounts due her under the property settlement. In our view, the reasonableness of appellee's efforts to collect directly from her former husband was a question for the jury. Among other things, the record reflects that appellee brought an action against the holder of certain notes

received by her ex-husband as part of the purchase price for the real property which he sold preparatory to absconding. In that action, to which her former husband was made a party by constructive service, appellee attempted to have her former husband declared to be the real and beneficial owner of the notes in question and to fasten a lien on such notes by equitable garnishment. This suit was unsuccessful at the trial level, and an appeal was prosecuted to this court, wherein we affirmed the action of the trial court in denying relief to appellee. See *Haley v. Greenhaw*, 235 Ark. 481, 360 S.W.2d 753.

In addition to prosecution of the cited case, appellee testified to an unsuccessful search for property owned by her ex-husband in Arkansas and further testified that her attorneys had unsuccessfully attempted to collect the money from Dr. Haley in Louisiana.

Appellant suggests other steps which appellee might have pursued in attempting collection directly from the assets of her former husband. Without commenting upon the efficacy of such propositions advanced by appellant, it is sufficient to say that there was an issue of fact on this question and appellant was not entitled to a directed verdict on this theory.

**659 IV.

[4] In an apparent attempt to establish that Dr. Haley could still be compelled to pay appellee the amounts due her, appellant on cross-examination propounded a question to appellee about the amount which Dr. Haley earned *78 each month while practicing in Paragould. This question was objected to and the objection sustained on the ground of irrelevancy. When the objection was sustained appellant made no attempt to make an offer of proof or to show what the answer of the witness would have been, had she been permitted to answer. Under the long standing rule of this court, we cannot speculate as to what the answer would have been. Therefore, having failed to complete

the record on this matter, appellant is now in no position to assert error on this point. *City of Prescott v. Williamson*, 108 Ark. 500, 158 S.W. 770.

Appellee interrogated the lawyers called by her as experts on the propriety of a lawyer devoting his efforts to the collection of a personal debt, rather than attempting to collect for the client, where the client's debtor is also the lawyer's debtor. The appellant objected to such interrogation on the ground that the hypothetical questions propounded to these witnesses failed to include the element that the lawyer was still employed by the client at the time he attempted to collect his own debt. It is appellant's insistence that any such conduct on his part occurred only after the termination of the attorney-client relationship. In asserting that the admission of such testimony was erroneous, appellant apparently takes the position that any answer to the question would be irrelevant.

An examination of the record reveals that four witnesses were interrogated by hypothetical questions with reference to the duty of a lawyer to place the interests of his client above that of his own. The first witness questioned about the matter was attorney Maurice Cathey. When this witness was questioned on the subject, appellant interposed a general objection, without stating the ground therefor. This objection was sustained by the trial judge. Whereupon the appellee made an offer or proof out of the hearing of the jury. Upon resumption in the presence of the jury, appellee re-phrased the question in the following language:

*79 'Q. Mr. Cathey, I am going to state a new question. Assume the relationship of attorney and client, wife who signed the property settlement and attorney still existed, assuming further that the husband who was a party to the property settlement owed a note signed by the attorney as surety, would a reasonable, prudent and careful practitioner in this community attempt to collect the note wherein he was personally liable while doing nothing about collecting the amount due the wife?'

Appellee's counsel then inquired, 'Does that meet the objection?' In response to this inquiry the court said, 'I will permit the question to be answered.' Appellant made no objection whatever to the propounding of the quoted question, nor the ruling of the court permitting it to be answered. Neither did he object to the answer or move that the answer be stricken.

The next witness to be interrogated on the subject was attorney Cecil Grooms. When a question substantially similar to the question previously propounded to attorney Cathey was asked of attorney Grooms the appellant objected, 'I object to that question, the hypothesis does not include the fact, state of employment.' Without a ruling by the court on the objection, appellee voluntarily modified the question propounded, as follows: 'With the further additional assumption, Mr. Grooms, assume further the attorney was still employed by the wife?' Thereupon the witness answered the question without any further objection by appellant or any ruling of the court. Later attorney Frank **660 Sloan was questioned on the same issue, and appellant objected on the ground that the record showed that he made no attempt to collect his personal obligation until after termination of his employment by appellee. This last objection was apparently that the matter was irrelevant on the issue of appellant's negligence. On cross-examination of witness Sloan, appellant propounded a hypothetical question on the same issue, with emphasis on the assumption that any efforts to collect his personal obligation occurred after termination of this employment. The witness*80 answered that there would be no impropriety in attempting to collect or collecting personal obligations at that time.

Finally, attorney G. D. Walker was questioned by appellee by hypothetical questions on the same subject and appellant objected on the ground that the hypothesis failed to encompass the fact that appellant's efforts to collect his own obligation were after termination of his employment by appellee. This objection was overruled and the wit-

ness allowed to answer. Again appellant, on cross-examination of witness Walker, elicited testimony that there was nothing improper in collecting amounts due him, or for which he was liable, after termination of employment by appellee. By this cross-examination, appellant supplied the alleged missing element of the hypothesis and followed the procedure heretofore approved by this court. *Shaver v. Parsons Feed & Farm Supply, Inc.*, 230 Ark. 357, 322 S.W.2d 690; *New Empire Insurance Co. v. Taylor*, 235 Ark. 758, 362 S.W.2d 4.

We have gone into some detail to set forth the state of the record and the grounds of the objections interposed by appellant because this matter initially gave us some concern. However, with the record as indicated we are impelled to the conclusion that appellant waived all objections to the testimony in question.

Appellant's objections fall into two classes: (1) The hypotheticals failed to incorporate all pertinent facts, and (2) the matter was irrelevant to the issue of negligence. Appellant was apparently satisfied with the modified questions propounded to witnesses Cathey and Grooms and did not reiterate or renew his objection to this testimony from these witnesses on any ground. Certainly the modifications of the questions to these two witnesses before they answered corrected the objections interposed by appellant. Thus when the witnesses Sloan and Walker were interrogated on this subject, there was already testimony, admitted without objection, establishing the same facts to which these witnesses testified. Further, appellant cross-examined these witnesses and *81 proved by them that there was nothing improper in protecting his own interests after cessation of his employment. The testimony of Cathey and Grooms established and proved the rule objected to in the testimony of Sloan and Walker.

[5] In *LaGrand v. Arkansas Oak Flooring Co.*, 155 Ark. 585, 245 S.W. 38, it was contended that a question propounded to an expert was improper. In that case the court said:

'Conceding, without deciding, that the question was an improper one, the appellant is not in an attitude to complain of the ruling of the court, for the error, if it be an error, was waived by the appellant by not objecting to a precisely similar question propounded by appellee's counsel on cross-examination to an expert witness which appellant had introduced to prove the nature of the injury to appellant's eye.'

This court has never deviated from the rule of *LaGrand* on the many other occasions when the question has presented itself. *Payne v. Thurston*, 148 Ark. 456, 230 S.W. 561; *Ward v. Ft. Smith Light & Traction Co.*, 123 Ark. 548, 185 S.W. 1085; *Dierks Lumber & Coal Co. v. Tollerson*, 186 Ark. 429, 54 S.W.2d 61; *Schlosberg v. Doup*, 187 Ark. 931, 63 S.W.2d 337; **661 *Arkansas Power & Light Co. v. Boyd*, 188 Ark. 254, 65 S.W.2d 919. In some of the authorities it is said that when evidence of a similar nature has been admitted without objection, the error is waived. In others it is said that the error is not prejudicial. However, the holding of all of the authorities may be summed up by saying that in a situation such as that shown by the record in the case at bar appellant is in no position to complain.

[6] The fact that appellant objected on the ground of irrelevancy as to the testimony of witnesses Sloan and Walker, whereas his earlier objections to the testimony of Cathey and Grooms were as to the form of the hypothetical question, is of no moment, because the earlier objections were corrected, and the testimony of the first *82 two witnesses, when admitted, came in without any objections. Therefore the admission of the testimony of Cathey and Grooms, without objection, was an effective waiver of the right to object to the testimony of Sloan and Walker on the ground of irrelevancy.

VI.

[7] The witnesses mentioned in the discussion of the preceding point were called by appellee to testify as to what ordinarily careful and prudent

practitioners in the Greene County area would have done under the same or similar circumstances. Appellant complains that such testimony is improper in that it allowed the witnesses to testify as to conclusions of law, and that no witness may be allowed to testify as to the law. It is said that when these witnesses gave their opinion as to the proper method of procedure, and when they explained the reasons for such procedure by reference to the governing law, they were usurping the function of the court. It is contended that the trial court has the sole and exclusive authority to advise the jury as to matters of law. Many authorities are cited by appellant in support of this proposition. However, the testimony in question was not proof as to conclusions of law, but, rather, it was evidence of standards of conduct for attorneys in the community in question, and references to the laws were purely by way of explanation as to proper methods of procedure. The challenged testimony simply went to the issue of whether appellant was negligent in the performance of his professional employment.

In the early case of *Pennington v. Yell*, 11 Ark. 212, this court said:

'reasonable diligence and skill constitute the measure of an attorneys engagement with his client. He is liable only for gross negligence or gross ignorance in the performance of his professional duties; and this is a question of fact to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with and skilled in the same kind of business,*83 (as the cases of *Russell v. Palmer*, 2 Wil. 325, and of *Godfrey v. Dalton*, 6 Bing. 460.) These doctrines are sustained by all the authorities with unanimity and distinctness. 4 Burr. 2060. 3 Camp. 17, 19. 2 Bos. & Pul. 357. 4 Ala. 594. 2 Porter 210. 2 How. (Miss.) 317. 2 Greenl.Ev., sec. 144, p. 137.'

In *Hampel-Lawson Mercantile Co. v. Poe*, 169 Ark. 840, 277 S.W. 29, this court had occasion to discuss and elaborate on the *Pennington* case as follows:

'Because the relation between an attorney and client is one of trust and confidence, our own court, in *Pennington v. Yell*, supra, declared that the failure to exercise ordinary care as above defined on the part of an attorney is *crassa negligentia*-gross negligence. When our court declared that an attorney is liable only for gross negligence or gross ignorance in the **662 performance of his professional duties, it was but tantamount to saying that an attorney is liable to his client for a failure to exercise ordinary care as above defined. 6 C.J. § 226; *Holmes v. Peck*, 1 R.I. 242; *Goodman v. Walker*, 30 Ala. 482, 495.'

[8] The testimony in question was for the purpose of furnishing the jury with a guide and a standard by which to measure appellant's conduct under the circumstances in determining the ultimate issue of whether appellant was or was not negligent. While as an abstract proposition, it is improper to call witnesses to testify as to conclusions of law, this was not the situation in the case at bar. As to the propriety of an attorney's testimony as to negligence and standards of conduct in a malpractice action, the weight of authority is to the effect that such testimony is proper and permissible. In 5 Am.Jur., *Attorneys at Law*, § 140, p. 342, it is said:

'In actions against attorneys for negligence, want of skill, or disobedience to instructions, the ordinary rules of evidence are applicable * * *. Whether an attorney has been negligent or has displayed such ignorance in the performance of his professional duties as to render him liable to his client for damages resulting therefrom*84 is sometimes to be ascertained from the testimony of those who are conversant with, and skilled in, the same kind of business.' (Citing *Pennington v. Yell*, 11 Ark. 212, 52 Am.Dec. 262.)

See also *Automobile Underwriters, Incorporated v. Smith*, 131 Ind.App. 454, 166 N.E.2d 341 (1960); *Lynch v. Republic Pub. Co.*, 40 Wash.2d 379, 243 P.2d 636 (1952).

VII.

[9] Appellant requested the following instruction:

'You are instructed that when Attorney L. V. Rhine was employed by Mrs. Mildred Haley to assist her and her husband in reducing a property settlement agreement to writing and to procure for her a decree of divorce from her husband, Mr. Rhine was not bound, in the absence of a special agreement, to file that written agreement for recordation or to see that it was made a public records. Such filing and recording of written instruments is no part of an attorney's duty, unless he has specially undertaken it.'

This instruction was properly refused by the trial court for the reason that it was abstract. No evidence was adduced by either party and no instruction was given by the court submitting any issue as to any negligence on the part of appellant in failing to file for record the property settlement in question. Although there were allegations in the complaint to the effect that such failure was negligent, appellee apparently abandoned this theory at trial, and there was no reason for instructing the jury on a matter which was extraneous to the issues to be determined.

VIII.

[10] Appellant requested the following instruction:

'You are instructed that defendant L. V. Rhine entered this trial with the benefit of a legal presumption that he had fully and correctly discharged every obligation that he ever owed to Mrs. Haley, and you must give *85 him the benefit of that presumption throughout the trial unless you become convinced by a preponderance of the evidence that he failed to perform some duty which you find that he owed to Mrs. Haley.'

This instruction was refused by the trial court. It will be observed that the instruction was, in the final analysis, a request to charge that the burden

was on appellee to establish her case by a preponderance of the evidence. This matter had already **663 been covered by Court's Instruction No. 6 (supra, part I.). In a substantially similar situation this court held that there was no error in failing to give instructions as to legal presumptions which merely amounted to placing the burden of proof upon the plaintiff where such burden had been fairly placed upon the plaintiff in other instructions. *Cockerham v. Barnes*, 230 Ark. 197, 321 S.W.2d 385. See also *Moore v. Lawson*, 210 Ark. 553, 196 S.W.2d 908. Therefore there was no error in refusing appellant's requested instruction set out above.

[11] Appellee has cross-appealed, contending that since every item of her damage was liquidated and because the items which she was precluded from collecting from her ex-husband bore interest according to their terms, the trial court erred in failing to add interest to the jury verdict. It is argued that the trial court reserved the question of whether interest was allowable for determination after rendition of the jury's verdict. However after rendition of the verdict, the trial court refused interest. There was no error in the action of the trial court in disallowing these items of interest. Although appellee's claim against her ex-husband was on contract, her claim against appellant was in tort on the theory that appellant was guilty of negligence.

In *Southern Farm Bureau Cas. Ins. Co. v. Hardin*, 233 Ark. 1011, 351 S.W.2d 153, this court modified a judgment by deleting an amount added by the trial court to the jury verdict for interest. This modification was for the reason that the action was in tort and interest was allowable only from the date of judgment. Appellee recognizes*86 the force of this holding, but in effect urges us to overrule the case. We see no valid reason for so doing. Accordingly, the cross-appeal is denied.

Finding no error in the proceedings, the case is affirmed on appeal and on cross-appeal.

Ark. 1964

378 S.W.2d 655
238 Ark. 72, 378 S.W.2d 655
(Cite as: 238 Ark. 72, 378 S.W.2d 655)

Rhine v. Haley
238 Ark. 72, 378 S.W.2d 655

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C

Supreme Court of Wyoming.
Theresa McCalla RINO, Appellant (Plaintiff),
v.
Katherine L. MEAD, Mead & Mead, Attorneys at
Law; and James T. Sorensen, Appellees
(Defendants).
Theresa McCalla Rino, Appellant (Plaintiff),
v.
Katherine L. Mead, Mead & Mead, Attorneys at
Law, and James T. Sorensen, Appellees
(Defendants).

Nos. 01-108, 01-165.
Sept. 27, 2002.

Client filed professional malpractice action against her divorce attorney and accountant, alleging that defendants failed to investigate and properly value law firm of client's former husband. The District Court, Teton County, Keith G. Kautz, J., granted defendants' summary judgment motions. Client appealed. The Supreme Court, Voigt, J., held that: (1) genuine issues of material fact as to whether attorney hired accountant and attorney experts, prepared for mediation session, and prepared for trial precluded summary judgment in favor of attorney; (2) trial court's decision granting summary judgment to attorney on issue of collateral estoppel was law of the case; and (3) accountant did not breach professional standard of care by preparing financial statement.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Judgment 228 ⇌ 185(2)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General

228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases

Initial burden is on movant seeking summary judgment to make prima facie showing that there are no genuine issues as to any material fact and that he is entitled to judgment as matter of law; if movant makes such a showing, burden then shifts to party opposing motion to present specific facts showing existence of genuine issues of material fact. Rules Civ.Proc., Rule 56(c).

[2] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Judgment 228 ⇌ 181(33)

228 Judgment

228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(33) k. Tort Cases in General.

Most Cited Cases

Summary judgments are not favored in malpractice actions, since mixed questions of law and fact usually involved in negligence actions concerning existence of duty, standard of care, and proximate cause are ordinarily not susceptible to summary adjudication. Rules Civ.Proc., Rule 56(c).

[3] Negligence 272 ⇌ 1693

272 Negligence

272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts

272k1693 k. Negligence as Question of Fact or Law Generally. Most Cited Cases

Whether particular defendant's actions have violated required duty, as would support negligence

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claim, is generally question for jury.

[4] Judgment 228 ⇌ 181(33)

228 Judgment

- 228V On Motion or Summary Proceeding
- 228k181 Grounds for Summary Judgment
- 228k181(15) Particular Cases
- 228k181(33) k. Tort Cases in General.

Most Cited Cases

Negligence 272 ⇌ 210

272 Negligence

- 272II Necessity and Existence of Duty
- 272k210 k. In General. Most Cited Cases

Negligence 272 ⇌ 1692

272 Negligence

- 272XVIII Actions
- 272XVIII(D) Questions for Jury and Directed Verdicts
- 272k1692 k. Duty as Question of Fact or Law Generally. Most Cited Cases
- Existence of duty is question of law, making absence of duty the surest route to summary judgment in negligence actions.

[5] Appeal and Error 30 ⇌ 863

30 Appeal and Error

- 30XVI Review
- 30XVI(A) Scope, Standards, and Extent, in General
- 30k862 Extent of Review Dependent on Nature of Decision Appealed from
- 30k863 k. In General. Most Cited Cases

One consequence of summary judgments not being favored in negligence actions is that, once granted, they are subject to more exacting scrutiny on appeal. Rules Civ.Proc., Rule 56(c).

[6] Judgment 228 ⇌ 185(5)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(5) k. Weight and Sufficiency.

Most Cited Cases

Expert opinion evidence is not usually sufficient to support motion for summary judgment because weight to be given such testimony is generally issue for trier of fact. Rules Civ.Proc., Rule 56(c).

[7] Judgment 228 ⇌ 185.1(4)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.1 Affidavits, Form, Requisites and Execution of

228k185.1(4) k. Matters of Fact or Conclusions. Most Cited Cases

Movant seeking summary judgment cannot prevail merely by asserting position on ultimate fact in supporting affidavit. Rules Civ.Proc., Rule 56(c).

[8] Judgment 228 ⇌ 185(5)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185 Evidence in General

228k185(5) k. Weight and Sufficiency.

Most Cited Cases

Summary judgment based upon expert opinion affidavits may be appropriate when showing made by movant is sufficient and uncontroverted. Rules Civ.Proc., Rule 56(c).

[9] Judgment 228 ⇌ 185.3(4)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(4) k. Attorneys. Most Cited Cases

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Judgment 228 ⇌ **185.3(21)**

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(21) k. Torts. Most Cited Cases

While standard of care and any violation thereof generally must be established through expert testimony in malpractice case, nonmoving plaintiff responding to summary judgment motion has no obligation to present expert testimony at pretrial stage, unless movant establishes that no material questions of fact exist with respect to allegations in complaint. Rules Civ.Proc., Rule 56(c).

[10] Attorney and Client 45 ⇌ **63**

45 Attorney and Client

45II Retainer and Authority

45k63 k. The Relation in General. Most Cited Cases

Attorney-client relationship is a contractual one.

[11] Attorney and Client 45 ⇌ **107**

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k107 k. Skill and Care Required. Most Cited Cases

General standard of care for lawyers in Wyoming is that degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in practice of law in state.

[12] Attorney and Client 45 ⇌ **129(2)**

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence. Most Cited Cases

In legal malpractice action, establishment of actual standard adhered to by reasonable, careful, and prudent lawyer must typically be accomplished through expert testimony.

[13] Attorney and Client 45 ⇌ **129(2)**

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence. Most Cited Cases

Expert testimony is not required in legal malpractice action where common sense and experience of layperson are sufficient to establish standard of care.

[14] Accountants 11A ⇌ **10.1**

11A Accountants

11Ak10 Actions

11Ak10.1 k. In General. Most Cited Cases

After establishing duty based on accountant-client contract, plaintiff in accounting malpractice case has obligation to establish (1) accepted standard of accounting care or practice, (2) that accountant's conduct departed from that standard, and (3) that accountant's conduct was legal cause of injuries suffered.

[15] Judgment 228 ⇌ **181(16)**

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, Cases Involving. Most Cited Cases

Genuine issues of material fact as to whether attorney in client's divorce case hired accountant and attorney experts, prepared for mediation session, prepared for trial, and gave correct advice as to treatment in property division of retirement account of client's former husband precluded summary judgment in favor of attorney in client's legal

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malpractice action.

[16] Judgment 228 ⇌ 181(2)

228 Judgment

228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) k. Absence of Issue of Fact.

Most Cited Cases

First rule for entry of summary judgment is that there must not remain any genuine issues as to any material facts. Rules Civ.Proc., Rule 56(c).

[17] Judgment 228 ⇌ 185(2)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases

Non-moving party's obligation to counter motion for summary judgment with materials beyond pleadings does not arise until movant has made prima facie showing that there are no such issues. Rules Civ.Proc., Rule 56(c).

[18] Courts 106 ⇌ 99(3)

106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k99 Previous Decisions in Same Case as Law of the Case

106k99(3) k. Jurisdiction, Dismissal, Nonsuit, and Summary Judgment, Rulings Relating To. Most Cited Cases

Trial court's decision granting summary judgment to attorney in client's legal malpractice action on issue of collateral estoppel as to issues decided when trial court in client's divorce proceeding enforced settlement agreement was "law of the case" in malpractice case, where decision in divorce case was not appealed, and neither attorney nor client, on appeal in malpractice case, presented argument

for or against trial court's application of collateral estoppel.

[19] Judgment 228 ⇌ 634

228 Judgment

228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General

228k634 k. Nature and Requisites of Former Adjudication as Ground of Estoppel in General. Most Cited Cases

Courts are to consider four factors in deciding whether collateral estoppel doctrine applies: (1) whether issue decided in prior adjudication was identical with issue presented in present action, (2) whether prior adjudication resulted in judgment on the merits, (3) whether party against whom collateral estoppel is asserted was party or in privity with party to prior adjudication, and (4) whether party against whom collateral estoppel is asserted had full and fair opportunity to litigate issue in prior proceeding.

[20] Judgment 228 ⇌ 720

228 Judgment

228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k716 Matters in Issue
228k720 k. Matters Actually Litigated and Determined. Most Cited Cases

Judgment 228 ⇌ 724

228 Judgment

228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k723 Essentials of Adjudication
228k724 k. In General. Most Cited Cases

"Collateral estoppel doctrine" prohibits relitigation of issues that were actually and necessarily involved in prior action between same parties.

[21] Courts 106 ⇌ 99(1)

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106 Courts

106II Establishment, Organization, and Procedure

106II(G) Rules of Decision

106k99 Previous Decisions in Same Case as Law of the Case

106k99(1) k. In General. Most Cited Cases

Under "law of the case doctrine," court's decision on issue of law made at one stage of case becomes binding precedent to be followed in successive stages of same litigation.

[22] Accountants 11A ⇌ 8

11A Accountants

11Ak6 Contracts, Employment, and Compensation

11Ak8 k. Performance of Contract; Duties and Liabilities. Most Cited Cases

Accountant did not breach professional standard of care by preparing financial statement for client and client's husband that was based on information submitted by couple and that was used during mediation session in couple's divorce case, and thus client could not maintain accountant malpractice claim, although client maintained that value of husband's law firm as disclosed on statement was knowingly false, since accountant gave notice to client that statement would be based on information given to accountant and that accountant would not audit information and would not be relied upon to disclose errors or illegal acts.

*15 C.M. Aron of Aron and Hennig, LLP, Laramie, Wyoming, Representing Appellant.

Richard E. Day and Susan Chapin Stubson of Williams, Porter, Day & Neville, P.C., Casper, Wyoming, Representing Appellee Katherine L. Mead and Mead & Mead, Attorneys at Law.

Mark W. Gifford, Casper, Wyoming, Representing Appellee James T. Sorensen.

Before HILL, C.J., and GOLDEN, LEHMAN,^{FN*}

and VOIGT, JJ., and DONNELL, D.J.

FN Chief Justice at time of oral argument.*

VOIGT, Justice.

[¶ 1] These consolidated appeals are challenges to the district court's grant of summary judgment to an attorney and an accountant in a professional malpractice case and the district court's further denial by inaction of a subsequent motion to reconsider. We affirm the summary judgment in favor of the accountant because there are no genuine issues of material fact as to whether he made any professional representations that were relied upon by the appellant, and he is entitled to a judgment as a matter of law. However, we reverse the summary judgment granted to the attorney because she did not establish a prima facie case entitling her to summary judgment.

FACTS

[¶ 2] In October 1996, J. Douglas McCalla (McCalla) filed for divorce from Theresa McCalla, now Theresa Rino (Rino). McCalla was represented by attorney John Stark (Stark). Rino hired Katherine L. Mead (Mead) to represent her. With the assistance of a mediator, McCalla and Rino settled child custody and support issues, leaving for trial only the issue of property and debt division.

[¶ 3] Shortly before the date set for trial, McCalla, Rino, Stark, and Mead met to attempt to work out the property and debt issues. Also in attendance was appellee James T. Sorensen (Sorensen), who had acted as the McCallas' accountant during their marriage. Sorensen brought with him to the meeting a compiled financial statement he recently had prepared for the McCallas to *16 enable them to extend a bank credit line. That compiled financial statement was used at the meeting as the basis for a division of the marital assets and debts between McCalla and Rino. A settlement was reached and Stark advised the district court to

cancel the trial.

[¶ 4] After the settlement meeting, a written settlement agreement was prepared. Rino refused to sign the agreement, terminated Mead's employment, and obtained new counsel. McCalla then filed a motion to enforce the agreement. After a hearing, an order was entered enforcing the settlement. The terms of the agreement were incorporated into the Decree of Divorce filed May 1, 1998.

[¶ 5] On September 23, 1999, Rino filed a professional malpractice complaint against Mead and Sorensen. Specifically, the complaint alleged that Mead had violated the following professional duties owed to Rino:

1. A duty of loyalty to her interests.
2. A duty to be truthful to her, and to honestly and in good faith keep her fully advised of the facts and law applicable to her legal situation in the divorce case, and of the preparations the attorneys had made for the trial set to commence on September 29, 1997.
3. A duty to investigate the applicable facts, particularly the valuation of the husband's interest in his law firm, and to evaluate the effect of those facts on the legal proceedings.
4. A duty to prepare for the trial set to commence on September 29, 1997, including but not limited to the duty to prepare the expert witnesses she allegedly had retained.
5. A duty to prepare for, advise Rino with regard to, and participate in, the mediation conducted on September 24, 1997, including but not limited to the duty to be conversant with the relevant financial facts which were in dispute between the parties, and a duty to negotiate zealously on behalf of Rino.

[¶ 6] The complaint alleged that Sorensen had violated the following professional duties owed to Rino:

1. A duty of loyalty to her interests when he purported to act on her behalf.

2. A duty to be truthful and unbiased with respect to the valuation of the husband's interest in his law firm.

3. A duty to provide accounting information that was truthful and represented accurately what it purported to show about the parties' assets and liabilities.

[¶ 7] Finally, Rino's complaint alleged that, as a result of the malpractice of Mead and Sorensen, Rino received more than \$400,000.00 less than she should have received in the property division.

[¶ 8] Sorensen and Mead separately filed motions for summary judgment. Mead argued that the district court's enforcement of the settlement agreement collaterally estopped Rino from later contending that she had not agreed to the settlement. Sorensen's primary argument was that Rino knew the compiled financial statement was never intended by Sorensen as a representation of the value of the properties listed. The district court granted both motions and these appeals followed.

ISSUES

[¶ 9] The parties do not agree as to what issues are before this Court. To more fully present the parties' viewpoints, we will set forth the issues as they have been stated by them. Rino lists the issues as follows:

1. Whether it is error to grant summary judgment in favor of a lawyer sued for malpractice when there is [a] dispute of fact as to the following errors by the attorney:
 - a. Failure to hire an expert accountant for trial as promised.
 - b. Failure to provide advice or explanation of misleading financial documents with regard to the client's husband's law firm, showing the husband's interest in the law firm to have virtually

zero value.

c. Failure to hire an attorney expert for trial to testify to the value of the husband's work in progress, as the attorney had promised.

d. Failure to obtain information about the client's husband's law firm financials and work in progress.

*17 e. Failure to assert a claim for alimony as promised.

f. Failure to be prepared to try the case.

g. Settlement of the case without the client's authority.

h. Incorrect legal advice concerning the client's right to a share of her husband's retirement account accumulated during the marriage.

2. Whether the court can disregard the opinions of the client's expert because they are based on assuming the hypothetical facts of the client's allegations of malpractice.

3. Whether the court can disregard the deposition testimony of the client's experts because the transcripts were filed of record by the opposing parties rather than the client.

4. Whether a court can rely on an expert opinion that there was no legal malpractice in a divorce case, when the expert considered only material from the divorce case while failing to consider any of the disputed facts in the malpractice claim itself.

5. Whether a client has to offer contradictory expert testimony when the lawyer's expert has given no opinion that there was an absence of malpractice.

* * *

6. Where both parties' experts agree it is accountant malpractice to present and use false and

misleading financial information, whether the court can grant summary [judgment] on the factual issue of whether the financial information was misleading.

* * *

7. Whether it is error for the trial court to deny [W.R.C.P.] 60 relief when the court was incorrect with regard to the timely filing of the plaintiff's expert information in opposition to summary judgment.

[¶ 10] Mead contends that the sole issue before this Court is whether the district court properly entered summary judgment in favor of Mead when Rino failed to submit appropriate expert affidavits or other testimony to establish a genuine issue of material fact to counter the affidavit of Mead's expert that Mead acted in a reasonable, careful and prudent manner with respect to her representation of Rino and did not fall below the applicable standard of care.

[¶ 11] Sorensen presents the accountant malpractice issue as being whether summary judgment was appropriate where Rino failed to submit expert testimony to counter the testimony of Sorensen's expert that Sorensen complied in all respects with the applicable standard of care, where there was uncontroverted evidence that Sorensen effectively disclaimed any representation regarding the accuracy of the information presented in the compiled financial statement, and where Rino admitted that she did not rely upon the financial statement compiled by Sorensen.

STANDARD OF REVIEW

[1] [¶ 12] Rulings on summary judgment motions are governed by the following language found in W.R.C.P. 56(c):

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

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issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Our standard for the appellate review of a summary judgment was recently reiterated in *Hasvold v. Park County School Dist. No. 6*, 2002 WY 65, ¶ 11, 45 P.3d 635, 637-38 (Wyo.2002) (quoting *Unicorn Drilling, Inc. v. Heart Mountain Irr. Dist.*, 3 P.3d 857, 860 (Wyo.2000)):

"Summary judgment is proper only when there are no genuine issues of material fact and the prevailing party is entitled to judgment as a matter of law.... We review a summary judgment in the same light as the district court, using the same materials and following the same standards. 'We examine the record from the vantage point most favorable to the party opposing the motion, and we give that party the benefit of all favorable inferences which may fairly be drawn from the record.' ... Summary judgment serves the purpose of eliminating formal trials where only questions of law are involved.... We review a grant of summary judgment by deciding a question of law de novo and *18 afford no deference to the district court's ruling on that question....

... A material fact is any fact that, if proved, would have the effect of establishing or refuting an essential element of a claim or defense asserted by a party...."

Summary judgment is a drastic remedy because it denies a trial to the non-moving party. *Coones v. F.D.I.C.*, 848 P.2d 783, 795 (Wyo.1993). The initial burden is on the movant to make a prima facie showing that there are no genuine issues as to any material fact and that he is entitled to a judgment as a matter of law. *Hozian v. Weathermon*, 821 P.2d 1297, 1298 (Wyo.1991) (quoting *Boehm v. Cody Country Chamber of Commerce*, 748 P.2d 704, 710 (Wyo.1987)). If the movant makes such a showing, the burden then shifts to the party opposing the motion to present specific facts showing the existence of genuine issues of material fact. *Hozian*, 821 P.2d at 1298 (quoting *Boehm*, 748 P.2d at 710).

[2][3][4][5] [¶ 13] Over the years, this Court has repeatedly stated that summary judgments are not favored, especially in negligence actions. See, for example, *Roitz v. Kidman*, 913 P.2d 431, 432 (Wyo.1996); *Hozian*, 821 P.2d at 1298; and *Dubus v. Dresser Industries*, 649 P.2d 198, 201 (Wyo.1982). This rule is particularly true in malpractice actions. *DeHerrera v. Memorial Hospital of Carbon County*, 590 P.2d 1342, 1345 (Wyo.1979) (quoting *Holl v. Talcott*, 191 So.2d 40, 46 (Fla.1966), cert. denied, 232 So.2d 181 (Fla.1969)). The mixed questions of law and fact usually involved in a negligence action concerning the existence of a duty, the standard of care and proximate cause "are ordinarily not susceptible to summary adjudication." " *Hozian*, 821 P.2d at 1298 (quoting *Kobielusz v. Wilson*, 701 P.2d 559, 560 (Wyo.1985)). Whether a particular defendant's actions have violated the required duty is generally a question for the jury. *Bancroft v. Jagusch*, 611 P.2d 819, 821 (Wyo.1980). The existence of a duty is, however, a question of law, "making an absence of duty the surest route to summary judgment in negligence actions." " *Schuler v. Community First Nat. Bank*, 999 P.2d 1303, 1306 (Wyo.2000) (quoting *Daily v. Bone*, 906 P.2d 1039, 1043 (Wyo.1995)); *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405, 408 (Wyo.1997). One consequence of the fact that summary judgments are not favored in negligence actions is that, once granted, they are subject to "more exacting scrutiny" on appeal. *Woodard v. Cook Ford Sales, Inc.*, 927 P.2d 1168, 1169 (Wyo.1996).

[6][7][8][9] [¶ 14] Expert opinion evidence is not usually sufficient to support a motion for summary judgment because the weight to be given such testimony is generally an issue for the trier of fact. *Western Sur. Co. v. Town of Evansville*, 675 P.2d 258, 262 (Wyo.1984) (quoting *Castleberry v. Collierville Medical Associates, Inc.*, 92 F.R.D. 492, 493 (W.D.Tenn.1981)). That is especially true of an affidavit that contains opinions and conclusions. *Western Sur. Co.*, 675 P.2d at 262. The movant cannot prevail "merely by asserting a position on an ul-

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timate fact in the supporting affidavit." *Greenwood v. Wierdsma*, 741 P.2d 1079, 1087 (Wyo.1987). On the other hand, a summary judgment based upon expert opinion affidavits may be appropriate "when the showing made by the movant is sufficient and uncontroverted." *Conway v. Guernsey Cable TV*, 713 P.2d 786, 788 (Wyo.1986) (quoting *Mealey v. City of Laramie*, 472 P.2d 787 (Wyo.1970)). The most likely scenario for that to occur is where the only issue is one requiring expert opinion because the case is of a highly technical nature, such that laypersons could not understand it. *Western Sur. Co.*, 675 P.2d at 263. In such case, if the expert opinion testimony is not controverted, summary judgment may be appropriate. *Id.* While it is true that in a malpractice case the standard of care and any violation thereof generally must be established through expert testimony, "the nonmoving plaintiff has no obligation to present expert testimony at the pretrial stage, unless the movant establishes that no material questions of fact exist with respect to the allegations in the complaint." *Metzger v. Kalke*, 709 P.2d 414, 422 (Wyo.1985).

PROFESSIONAL MALPRACTICE

[¶ 15] Much of Wyoming's professional malpractice law has developed in the arena of medical malpractice.

[10] [¶ 16] This Court has imported that law into the field of legal malpractice:

*19 After establishing a duty, the plaintiff in a medical malpractice case

" ' "has the obligation to establish (1) the accepted standard of medical care or practice, (2) that the doctor's conduct departed from the standard, and (3) that his conduct was the legal cause of the injuries suffered." ...'

... We conclude that the test applicable in our medical malpractice cases should also apply in the analogous situation of a legal malpractice claim."

Moore v. Lubnau, 855 P.2d 1245, 1248 (Wyo.1993) (quoting *Metzger*, 709 P.2d at 421 and *Harris v. Grizzle*, 625 P.2d 747, 751 (Wyo.1981)).
FN1

FN1. This focus on the tort principles of negligence should not detract from the continued recognition that the attorney-client relationship is a contractual one. In *Jackson State Bank v. King*, 844 P.2d 1093, 1095-96 (Wyo.1993), we declined to extend the comparative negligence statute to a legal malpractice claim because such a claim is based on contract. Similarly, in *Long Russell v. Hampe*, 2002 WY 16 ¶ 11, 39 P.3d 1015, 1020 (Wyo.2002), we held that a plaintiff in a legal malpractice case based on allegations of negligence is not entitled to present a claim for emotional distress damages, which is a tort remedy. In addition, a cause of action against an attorney may sound in contract where the allegation is the violation of a specific contract term, rather than the violation of a professional duty imposed by law. See the related discussion as to accountant malpractice.

[11][12][13] [¶ 17] The general standard of care for lawyers in Wyoming is " '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.' " *Moore*, 855 P.2d at 1248. As with medical malpractice, establishment of the actual standard adhered to by a "reasonable, careful and prudent" lawyer must typically be accomplished through expert testimony. *Peterson v. Scorsine*, 898 P.2d 382, 388 (Wyo.1995); *Moore*, 855 P.2d at 1249. However, expert testimony is not required where the common sense and experience of a layperson are sufficient to establish the standard of care. *Meyer v. Mulligan*, 889 P.2d 509, 516 (Wyo.1995) (quoting *Moore*, 855 P.2d at 1248).

[¶ 18] This Court has not previously been

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called upon to say whether these same principles apply to allegations of accountant malpractice. We cannot see why they should not.

As in the case of lawyers, doctors, architects, engineers, and others engaged in rendering professional services for compensation, it is implied in all contracts for the employment of public accountants that they will render their services with that degree of skill, care, knowledge, and judgment usually possessed and exercised by members of that profession in the particular locality, in accordance with accepted professional standards and in good faith without fraud or collusion. While not insurers against damage, it is generally recognized that accountants may be held liable to clients for damages resulting from fraud, misconduct, or negligence in their professional undertaking.

¹ Am.Jur.2d *Accountants* § 19 at 543 (1994) (footnote omitted); ^{FN2} see also *Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 848 P.2d 856, 860 (1992).

FN2. By quoting this source, we are not adopting a locality rule for testing accountant malpractice.

[14] [¶ 19] Just as with other professionals, a question has been raised as to whether an allegation of accountant malpractice sounds in tort or in contract.

Since a client's malpractice action against an accountant is necessarily based to some degree on a violation of the parties' contract, either by malfeasance or nonfeasance, some jurisdictions adhere to the view that an action for accountant malpractice is maintainable only on a breach of contract theory. However, the courts have more frequently recognized that accountants may be held liable to clients for malpractice in actions founded both on contract and tort.

¹ Am.Jur.2d *Accountants*, *supra*, § 20 (footnote

omitted). Some courts consider the action to be one in contract if the allegation is a violation of a specific contract term, but in tort if the allegation is a violation of a duty imposed by law as a result of the contractual relationship. See, for example, *Thomas v. Cleary*, 768 P.2d 1090, 1092 n. 6 (Alaska 1989); *Billings Clinic v. Peat Marwick Main & Co.*, 244 Mont. 324, 797 P.2d 899, 908 (1990); and *20 *DOIT, Inc. v. Touche, Ross & Co.*, 926 P.2d 835, 841-42 (Utah 1996). When the cause of action for professional negligence sounds in tort, the elements are "(1) the duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." *Linck v. Barokas & Martin*, 667 P.2d 171, 173 n. 4 (Alaska 1983).

[¶ 20] We conclude that the standards as to professional malpractice that we have formerly adopted for medical malpractice, and have extended to legal malpractice, should apply equally in regard to allegations of accountant malpractice. Nothing has been shown to this Court to suggest that the practice of accounting, or the relationship between accountant and client, requires a different standard. After establishing a duty based on the accountant-client contract, the plaintiff in an accounting malpractice case has the obligation to establish (1) the accepted standard of accounting care or practice, (2) that the accountant's conduct departed from that standard, and (3) that the accountant's conduct was the legal cause of the injuries suffered.

DISCUSSION

LEGAL MALPRACTICE

[15] [¶ 21] In its decision letter, the district court concluded that summary judgment in Mead's favor was appropriate because (1) Mead's submissions established a prima facie case that she was not negligent; (2) the issues were such that expert testimony was required to establish the standard of care

and any violation thereof; and (3) Rino had not countered Mead's expert's testimony. We reverse because we find that Mead's submittals, including the affidavit of Mead's expert, did not establish that there were no genuine issues of material fact, and, thus, the burden did not shift to Rino to produce expert testimony. *Havens v. Hoffman*, 902 P.2d 219, 222-23 (Wyo.1995) (quoting *Roybal v. Bell*, 778 P.2d 108, 112-14 (Wyo.1989)).

[¶ 22] The affidavit of Mead's expert does contain some facts in substantiation of its conclusion that Mead's conduct did not fall below the standard of care. For instance, the affidavit cites to correspondence that shows Mead had considered the value of McCalla's law practice, as well as the issue of alimony. Beyond that, however, the affidavit does not counter Rino's other factual allegations that Mead failed to hire accountant and attorney experts as promised, failed to prepare for the mediation session, failed to prepare for the trial, and failed to give correct advice as to the treatment of McCalla's retirement account in the property division. With these issues of material fact remaining, Mead's expert's opinion that Mead "acted in a reasonable, careful and prudent manner with respect to her representation of" Rino is simply premature.

[16][17] [¶ 23] The first rule for the entry of a summary judgment is that there must not remain any genuine issues as to any material facts. Indeed, the non-moving party's obligation to counter a motion for summary judgment with materials beyond the pleadings does not arise until the movant has made a prima facie showing that there are no such issues. *Hozian*, 821 P.2d at 1298 (quoting *Boehm*, 748 P.2d at 710). That showing was not made in this case. It cannot be said, as a matter of law, that Mead's conduct did not violate the standard of care when what Mead may or may not have done remains controverted.

[18][19][20] [¶ 24] Before advancing to the malpractice allegations against Sorensen, we must address another substantial issue that was raised in Mead's summary judgment motion, was ruled upon

in the district court's decision letter, was mentioned in the final order, but has not been addressed in this appeal. Mead contended in her motion that, under the doctrine of collateral estoppel, Rino was barred from relitigating issues in this case that had been decided when the district court enforced the settlement agreement. The collateral estoppel doctrine prohibits the relitigation of issues that were actually and necessarily involved in a prior action between the same parties. *Kahrs v. Board of Trustees for Platte County School Dist. No. 1*, 901 P.2d 404, 406 (Wyo.1995). *21 Courts are to consider four factors in deciding whether the doctrine applies:

"(1) whether the issue decided in the prior adjudication was *identical* with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding."

Id. (quoting *Slavens v. Board of County Com'rs for Uinta County*, 854 P.2d 683, 686 (Wyo.1993)) (emphasis in original).

[¶ 25] In its decision letter, the district court concluded that collateral estoppel applied as to some issues, but not others:

Collateral estoppel, then, precludes [Rino's] claims that Mead agreed to the settlement without Rino's consent, and that she entered into the settlement under duress because Rino was unprepared for trial. Collateral estoppel does not pre[v]ent Rino from claiming that Mead gave her bad advice about alimony, property values and retirement because those claims made no difference at the settlement enforcement hearing.

[¶ 26] The decision letter was dated December 7, 2000, and was filed on December 11, 2000. Some wrangling over the form of the order fol-

lowed. On February 20, 2001, the district court judge signed the Order Granting Defendant Mead's Motion for Summary Judgment. That order contains the following "finding and conclusion:"

4. Judge Guthrie of the Ninth Judicial District heard the motion to enforce settlement and found that a settlement was reached on September 24, 1997, that the settlement terms were "inherently fair and equitable," that there was no evidence of fraud or undue influence in reaching the settlement, and that [Rino] assented to the settlement. [Rino] did not appeal Judge Guthrie's decision.

The order then granted summary judgment to Mead "as to all claims."

[21] [¶ 27] We presume that the intent of the cited portion of the order was to grant summary judgment to Mead on the issue of collateral estoppel as outlined in the decision letter. Inasmuch as Judge Guthrie's decision was not appealed, and inasmuch as neither Mead nor Rino have in this appeal presented argument for or against the district court's application of collateral estoppel, the district court's ruling on that issue remains the law of the case.^{FN3}

FN3. "Under the 'law of the case' doctrine, a court's decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." *Triton Coal Co. v. Husman, Inc.*, 846 P.2d 664, 667 (Wyo.1993).

[¶ 28] Reversal of the summary judgment granted to Mead on the grounds set forth above forecloses any need to discuss Rino's appeal of the denial by inaction of her W.R.C.P. 60(b) motion raised as her seventh issue on appeal.

ACCOUNTANT MALPRACTICE

[22] [¶ 29] In response to interrogatories pro-
 pounded by Sorensen, Rino identified Sorensen's
 alleged acts of professional negligence as:

(1) At the settlement conference he presented a financial statement of ... McCalla's purported net worth that was knowingly false, or which he should have known was false. Among other things it reflected a net negative value of [McCalla's] partnership interest in his law firm, and generally misrepresented [McCalla's] assets and liabilities. (2) He had a conflict of interest in that he purported to act in [Rino's] interest as his client, when he apparently was acting in [McCalla's] interest and the interest of [McCalla's] law firm. (3) He misrepresented values of assets and the tax effects and valuations for divorce property division purposes, and in doing so he gave legal advice for which he was not qualified.

[¶ 30] The undisputed facts developed in the material supporting and opposing Sorensen's motion for summary judgment include the following:

*22 1. During September 1997, Sorensen prepared a compiled financial statement for the McCallas' use in extending a bank credit line.

2. Prior to issuing the compiled financial statement, Sorensen delivered to Rino a client representation letter that indicated in part that the McCallas were "responsible for the fair presentation of the statements of financial condition...." McCalla signed the letter, but Rino refused.

3. Prior to issuing the compiled financial statement, Sorensen delivered to Rino an engagement letter that provided, in part, as follows:

We will perform the following service(s):

1. We will compile, from information you provide, the statement of financial condition of J. Douglas & Theresa McCalla as of September 5, 1997 in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. We will not audit or review such financial statements. Our report on the financial

statements is presently expected to read as follows:

We have compiled the accompanying statement of financial condition of J. Douglas & Theresa McCalla as of September 5, 1997, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants.

A compilation is limited to presenting in the form of financial statements information that is the representation of the individuals whose financial statements are presented. We have not audited or reviewed the accompanying statement of financial condition and, accordingly, do not express an opinion or any other form of assurance on it.

* * *

Our engagement cannot be relied upon to disclose errors, irregularities, or illegal acts, including fraud or defalcations, that might exist. However, we will inform you of any such matters that come to our attention unless they are clearly inconsequential.

4. Rino signed the engagement letter, acknowledging that it was in accordance with her understanding.

5. During the mediation session, Sorensen reminded McCalla and Rino that they each had their own valuation expert.

6. In her deposition testimony, Rino admitted that, at the mediation session, she did not rely on the valuation of McCalla's interest in his law firm contained in the compiled financial statement because she believed it to be "very inaccurate."

7. Rino was aware that she needed her own valuation expert and had designated such an expert as a witness.

8. Rino was aware that, after her separation from McCalla, Sorensen had continued to act as McCalla's accountant.

[¶ 31] It is clear that Rino knew that Sorensen had prepared the compiled financial statement in the limited fashion described in the disclaimers. Sorensen's expert established that, in doing so, Sorensen had not violated the professional standard of care. Rino did not counter that opinion with an expert opinion to the contrary. In fact, Rino's expert testified during his deposition that he had not formed an opinion as to whether or not Sorensen had complied with the applicable standard of care.

[¶ 32] The compiled financial statement plus the accompanying client representation letter and engagement letter effectively disclaimed any representation by Sorensen as to the accuracy of the values contained therein. Any reliance by Rino on the values set forth in the compiled financial statement would have been unreasonable. *Davis v. Wyoming Medical Center, Inc.*, 934 P.2d 1246, 1251 (Wyo.1997) (quoting *Lincoln v. Wackenhut Corp.*, 867 P.2d 701, 703 (Wyo.1994)). Further, Rino admitted in her deposition testimony that she did not rely on those values. At the mediation session, Sorensen reminded both McCalla and Rino that each needed his or her own valuation expert. Rino testified that she knew she needed her own valuation expert and that she believed the value of McCalla's interest in his law firm to be much more than the value shown in the compiled financial statement. Indeed, Rino had designated*23 an expert to testify as to the value of the marital estate.

[¶ 33] In her appellate brief, Rino contends that, by granting summary judgment to Sorensen, the district court was, in effect, deciding the fact question of whether the information in the compiled financial statement was misleading. That is not the case. Whether or not that information was misleading does not matter; the undisputed facts show that Rino knew that Sorensen was not representing the information as being accurate, and Rino did not rely on its accuracy. In other words, the accuracy of the

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information was not a material fact as it relates to the summary judgment motion.

[¶ 34] The district court was correct in granting Sorensen's motion for summary judgment. There are no genuine issues of material fact and Sorensen is entitled to judgment as a matter of law. Sorensen's expert established the professional standard of care and gave an opinion based on the undisputed facts that Sorensen did not breach that standard. Rino did not counter those opinions with a contrary expert opinion.

CONCLUSION

[¶ 35] Summary judgment should not have been granted to attorney Mead because there remain genuine issues of material fact as to Mead's conduct. Because those issues of material fact remain, the burden did not shift to Rino to produce expert testimony to counter Mead's expert. Summary judgment was, however, properly granted to accountant Sorensen because no genuine issues of material fact remain, Sorensen established through expert opinion testimony that he did not breach the professional standard of care, and Rino presented no expert evidence to the contrary.

[¶ 36] The summary judgment in favor of Mead is reversed, the summary judgment in favor of Sorensen is affirmed, and the case is remanded to the district court. Such remand does not include those issues determined by the district court to be barred by the doctrine of collateral estoppel.

Wyo.,2002.
Rino v. Mead
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▷

Supreme Court of New Jersey.

Michael A. SAFFER, as a Former Member of Klein
Chapman, a Partnership, Plaintiff-Respondent,

v.

William W. WILLOUGHBY, Jr., Defendant-Appel-
lant.

Argued Oct. 24, 1995.

Decided Feb. 5, 1996.

After attorney fee arbitration committee awarded attorney fees, attorney sought confirmation of award and entry of judgment. Client filed motion for stay pending disposition of legal malpractice complaint. The Superior Court, Law Division, denied application for stay, confirmed award, and entered final judgment for attorney. Client appealed. The Superior Court, Appellate Division, affirmed. Client appealed. The Supreme Court, Coleman, J., held that: (1) fee arbitration committee lacked jurisdiction to decide legal malpractice claims, but it could consider evidence of malpractice for limited purpose of affecting quality of services rendered in assessing reasonableness of fee; (2) fact that client elected arbitration forum and continued in that forum even after malpractice complaint was filed did not preclude stay of arbitration award pending disposition of malpractice complaint; (3) client was entitled to recover reasonable expenses and attorney fees as consequential damages; and (4) if consequential damages and balance of uncollectible judgment arising from malpractice were awarded to and collected by client in malpractice action, attorney would be entitled to collect his fee.

Reversed.

West Headnotes

[1] Alternative Dispute Resolution 25T ⇌ 375

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and En-
forcement of Award25Tk366 Appeal or Other Proceedings for
Review25Tk375 k. Hearing and Determination
in General. Most Cited Cases

(Formerly 33k73.1 Arbitration)

Although old rules were in effect at time of attorney fee arbitration, new rules were relevant to question of what impact, if any, appeal from arbitration award would have on fee arbitration process. R. 1:20A-1 to R. 1:20A-6.

[2] Attorney and Client 45 ⇌ 160

45 Attorney and Client

45IV Compensation

45k157 Actions for Compensation

45k160 k. Conditions Precedent. Most
Cited Cases

Before attorney can file suit against client to recover fee, attorney must notify client of availability of fee arbitration. R. 1:20A-6.

[3] Alternative Dispute Resolution 25T ⇌ 374(1)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and En-
forcement of Award25Tk366 Appeal or Other Proceedings for
Review25Tk374 Scope and Standards of Re-
view25Tk374(1) k. In General. Most
Cited Cases

(Formerly 33k76(1) Arbitration)

Policy reasons for restricting grounds for appealing attorney fee determination of fee arbitration committee are same as those underlying creation of procedure in first place: to provide swift, fair and inexpensive method of resolving fee disputes and to

protect clients who can ill afford time and expense of defending committee judgment on appeal. R. 1:20A-1(e); R. 1:20A-3(c)(4).

[4] Alternative Dispute Resolution 25T ⇌ 231

25T Alternative Dispute Resolution

25TII Arbitration

25TII(E) Arbitrators

25Tk228 Nature and Extent of Authority

25Tk231 k. Particular Issues or Questions. Most Cited Cases

(Formerly 33k29.2 Arbitration)

Fee arbitration committee lacks jurisdiction to decide legal malpractice claims. R. 1:20A-2(a), (b)(3), (c)(2).

[5] Alternative Dispute Resolution 25T ⇌ 175

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and Contest

25Tk175 k. In General. Most Cited Cases

(Formerly 33k1 Arbitration)

Filing of legal malpractice claim does not deprive fee arbitration committee of jurisdiction to decide fee dispute. R. 1:20A-2(a), (b)(3), (c)(2).

[6] Alternative Dispute Resolution 25T ⇌ 231

25T Alternative Dispute Resolution

25TII Arbitration

25TII(E) Arbitrators

25Tk228 Nature and Extent of Authority

25Tk231 k. Particular Issues or Questions. Most Cited Cases

(Formerly 33k34.3 Arbitration)

In course of deciding reasonableness of attorney fee, fee arbitration committee may consider evidence of malpractice for limited purpose of affecting quality of services rendered in assessing reasonableness of fee. R. 1:20A-2(c)(2).

[7] Alternative Dispute Resolution 25T ⇌ 406

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk406 k. Pleading and Evidence of Award as Estoppel or Defense. Most Cited Cases (Formerly 33k72.3 Arbitration)

Even when malpractice evidence is considered by attorney fee arbitration committee for limited purpose of affecting quality of services rendered to determine reasonableness of fee, neither evidence submitted to committee nor decision or settlement made in connection with fee arbitration proceeding is admissible in legal malpractice action in superior court. R. 1:20A-2(c)(2)(B).

[8] Alternative Dispute Resolution 25T ⇌ 186

25T Alternative Dispute Resolution

25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and Contest

25Tk185 Stay of Arbitration

25Tk186 k. In General. Most Cited Cases

(Formerly 33k23.5(1) Arbitration)

That client elected attorney fee arbitration forum and continued in that forum after legal malpractice complaint was filed against attorney did not preclude stay of arbitration award pending disposition of already-filed malpractice complaint; arbitration rules expressly permitted simultaneous processing of malpractice claim in superior court while proceeding with fee arbitration, and client did not discover basis for malpractice claim until after 30-day period to withdraw request for arbitration had expired. R. 1:20A-2(c)(2)(A); R. 1:20A-3(b)(1).

[9] Alternative Dispute Resolution 25T ⇌ 251

25T Alternative Dispute Resolution

25TII Arbitration

25TII(F) Arbitration Proceedings

25Tk251 k. Mode and Course of Proceedings in General. Most Cited Cases (Formerly 33k31 Arbitration)

When during pendency of attorney fee arbitration and after 30-day period for withdrawal of arbitration request has elapsed, client discovers substantial malpractice claim against lawyer, fee committee must permit client to have new 30-day window of opportunity to withdraw request for arbitration, commencing on day client discovers substantial malpractice claim; however, new 30-day window of opportunity will not be permitted if basis for substantial malpractice claim is known to client before 30-day withdrawal period expires. R. 1:1-2; R. 1:20A-3(b)(1).

[10] Alternative Dispute Resolution 25T ⇌ 357

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk353 Confirmation or Acceptance by Court

25Tk357 k. Proceedings. Most Cited Cases

(Formerly 33k73.1 Arbitration)

If substantial basis for legal malpractice claim is discovered after attorney fee arbitration committee has awarded fee, client may seek stay of award from superior court either before or after award has been confirmed; trial court must first determine whether substantial claim of malpractice exists and, if so, then grant stay of arbitration award on terms and conditions fixed by court. R. 2:9-5.

[11] Alternative Dispute Resolution 25T ⇌ 372

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk366 Appeal or Other Proceedings for Review

25Tk372 k. Proceedings for Transfer. Most Cited Cases

(Formerly 33k73.1 Arbitration)

In granting stay of arbitration award based upon determination that substantial claim of legal

malpractice exists, posting of bond or cash as condition of stay should not ordinarily be required because fee awarded is often tightly intertwined with legal malpractice claim. R. 2:9-5.

[12] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and Costs. Most Cited Cases

Legal fees and expenses expended by client to recover favorable legal malpractice verdict against attorney should be deemed consequential damages, even though alleged malpractice did not affect judgment obtained by attorney alleged to have committed malpractice; however, if consequential damages proximately related to malpractice claim and balance of uncollectible judgment allegedly arising from malpractice were awarded to and collected by client in malpractice action, attorney would be entitled to collect his fee.

[13] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and Costs. Most Cited Cases

Client may recover for losses which are proximately caused by attorney's negligence or malpractice.

[14] Attorney and Client 45 ⇌ 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(1) k. In General; Limitations. Most Cited Cases

Purpose of legal malpractice claim is to put

plaintiff in as good a position as he or she would have been had attorney kept his or her contract.

[15] Attorney and Client 45 ⇌ 153

45 Attorney and Client

45IV Compensation

45k153 k. Deductions and Forfeitures. Most Cited Cases

Ordinarily, attorney may not collect attorney fees for services negligently performed.

[16] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and Costs. Most Cited Cases

Negligent attorney is responsible for reasonable legal expenses and attorney fees incurred by former client in prosecuting legal malpractice action; those are consequential damages that are proximately related to malpractice.

[17] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and Costs. Most Cited Cases

In typical legal malpractice case, unless negligent attorney's fee is determined to be part of damages recoverable by client, client would incur legal fees and expenses associated with prosecuting legal malpractice suit.

[18] Alternative Dispute Resolution 25T ⇌ 380

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk380 k. Merger and Bar of Causes of

Action and Defenses. Most Cited Cases

(Formerly 33k81 Arbitration)

In New York, final determination of attorney's fee by arbitration panel bars client from bringing subsequent legal malpractice action based on reasoning that fee award necessarily included finding of no malpractice.

[19] Alternative Dispute Resolution 25T ⇌ 380

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk380 k. Merger and Bar of Causes of Action and Defenses. Most Cited Cases

(Formerly 33k81 Arbitration)

In New Jersey, because fee arbitration committee is without jurisdiction to decide legal malpractice claim, final determination of attorney fee by arbitration committee does not bar client from bringing subsequent legal malpractice action. R. 1:20A-2(c)(2).

****529*260** Jeffrey A. Donner, Bernardsville, for appellant (Shain, Schaffer & Rafanello, attorneys).

Leonard A. Peduto, Jr., Roseland, for respondent (Chapman, Henkoff, Kessler, Peduto & Saffer, attorneys; Mr. Peduto and Patricia A. Cauldwell, on the brief).

The opinion of the Court was delivered by

COLEMAN, J.

This case involves a fee dispute between an attorney and a former client. The former client filed a request for fee arbitration with the District XI Fee Arbitration Committee (Fee Committee). Six months after filing the request, and before a decision was reached, the client discovered evidence that convinced him to file a legal malpractice action in the Law Division against his former attorney. The client, represented by new counsel, presented evidence of the alleged malpractice to the Fee Committee. He argued that a negligent attorney was

not entitled to collect a fee.

The case requires us to determine the appropriate procedure a Fee Committee should follow when the basis for a legal malpractice claim is discovered after the time permitted for withdrawing an arbitration request has expired. The Appellate Division declined*261 to grant any relief. We granted certification, 140 *N.J.* 326 (1995), and stayed the judgment.

We hold that under the unique circumstances of this case and the controlling rules in effect during the arbitration, the Fee Committee should have granted the client a thirty-day window of opportunity after discovery of the alleged malpractice to withdraw the request for arbitration. In the absence of that opportunity for Willoughby to withdraw the request for arbitration, the Appellate Division should have stayed the fee award pending disposition of the legal malpractice complaint.

I

Defendant William W. Willoughby, Jr., is a former professional basketball player who played for various teams in the National Basketball Association from 1975 through 1984. During that time, Willoughby retained the services of All-Pro Reps, Inc. (All-Pro), and its principals, Jerry Davis and Lewis Scheffel, as agent and business manager, respectively.

For most of his career, Willoughby arranged for All-Pro to receive a portion of his earnings with the expectation that the funds would be invested on his behalf. Davis and Scheffel, however, diverted most of the money, without Willoughby's authorization, into tax shelters. Approximately \$1 million of Willoughby's money was lost.

Davis brought an action against Willoughby, alleging that he was owed \$129,000 in fees. Willoughby retained Michael A. Saffer, Esq. to represent him in the litigation. Saffer asserted counterclaims against Davis, alleging breach of fiduciary duty and misappropriation of funds. When Wil-

loughby requested Saffer to implead Scheffel as a third-party defendant with respect to the counterclaims, Saffer refused. Saffer stated there was no evidence to support Scheffel's involvement in the scheme to mishandle Willoughby's money.

*262 A jury awarded Willoughby \$768,047.84 in compensatory damages and \$100,000 in punitive damages on the counterclaim. The Appellate Division affirmed but reduced the award to \$750,957.78. Less than one month after the verdict against him was rendered, Davis filed a petition under Chapter 11 of the Bankruptcy Code. Consequently, Willoughby was able to collect only \$150,000 of the total judgment and has little hope of collecting any more.

After Davis filed his petition in bankruptcy, Saffer withdrew his representation of Willoughby due to Willoughby's failure to pay Saffer's legal fee. Willoughby alleged that Saffer breached their original fee agreement and billed at excessive rates and for duplicative work. Willoughby retained new counsel who filed a request for arbitration of Saffer's fee with the Fee Committee for Passaic County.

During the course of the arbitration, Willoughby and his new lawyer reviewed Saffer's file on the Davis-Willoughby litigation. **530 The file contained a copy of a promissory note signed by Scheffel that allegedly tied Scheffel to the misappropriation of Willoughby's earnings. Willoughby alleges that Saffer intentionally or negligently withheld this evidence when he advised Willoughby that there was no legal basis for impleading Scheffel. Willoughby further alleges that had Scheffel been held jointly liable for the judgment, Willoughby would have been able to collect the full amount of his damages from Scheffel.

Willoughby's new lawyer presented evidence of the alleged malpractice to the Fee Committee at its next scheduled hearing, arguing that an attorney who commits malpractice is not entitled to a fee. Additionally, the lawyer filed, on Willoughby's be-

half, a malpractice complaint in the Law Division on May 17, 1993, claiming as damages the difference between the full amount of the judgment against Davis and the amount he had been unable to collect.

The Fee Committee rendered its decision on August 11, 1993. It found that Saffer met his burden of proving the reasonableness of his fee based on the criteria set forth in the *Rules of Professional *263 Conduct (RPC)* 1.5. It is unclear, however, whether, or to what extent, the Fee Committee considered Willoughby's malpractice claim against Saffer when rendering its award. Saffer and his firm were awarded a total fee of \$120,000, of which \$103,510 remains unpaid.

When Saffer sought confirmation of the award and entry of a judgment, Willoughby filed a motion for a stay pending disposition of the legal malpractice complaint. The Law Division on December 20, 1993, denied Willoughby's application for a stay, confirmed the award, and entered final judgment for Saffer in the sum of \$103,510 with interest. The Appellate Division affirmed, holding that the pending malpractice action did not satisfy any of the statutory grounds to vacate an arbitration award under *N.J.S.A. 2A:24-8*.

II

-A-

The procedure for arbitration of attorney's fees has been in place in New Jersey since 1978. The policy underlying the fee arbitration system is the promotion of public confidence in the bar and the judicial system.

If it is true-and we believe it is-that public confidence in the judicial system is as important as the excellence of the system itself, and if it is also true-as we believe it is-that a substantial factor that erodes public confidence is fee disputes, then any equitable method of resolving those in a way that is clearly fair to the client should be adopted.... The least we owe to the public is a swift, fair and inexpensive method of resolving fee dis-

putes.

[*In re LiVolsi*, 85 N.J. 576, 601-02, 428 A.2d 1268 (1981).]

[1] *Rules* 1:20A-1 to -6 govern the fee arbitration process. Substantial revisions to those rules were adopted on January 31, 1995, and became effective on March 1, 1995. Although the old rules were in effect for the Willoughby-Saffer arbitration, the new rules are relevant to the question of what impact, if any, this appeal will have on the fee arbitration process.

*264 [2] The State is divided into districts, each of which has its own Fee Committee. A request for arbitration is handled by the district in which the attorney practices. When a client requests fee arbitration, participation by the attorney is mandatory. *R. 1:20A-3*. Before an attorney can file suit against a client to recover a fee, the attorney must notify the client of the availability of fee arbitration. *R. 1:20A-6*; *Chalom v. Benesh*, 234 N.J.Super. 248, 257-58, 560 A.2d 746 (1989).

The District Fee Arbitration Committees have limited jurisdiction. "Each fee committee shall, pursuant to these rules, have jurisdiction to arbitrate fee disputes between clients and attorneys." *R. 1:20A-2(a)*. The attorney has the burden of proving the reasonableness of the attorney's fee by a preponderance of the evidence. *R. 1:20A-3(b)(1)*. The determination of reasonableness is based on the factors set forth in *RPC* 1.5. *Ibid*. Those factors include:

- (1) the time and labor required, the novelty and difficulty of the questions involved, **531 and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;

- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent.

[RPC 1.5.]

Rule 1:20A-1(e) provides, "[a] Fee Committee shall not render advisory opinions." The determination of the committee is binding and generally cannot be appealed on the merits. *Rule 1:20A-3(c)* states that a determination by the committee is not appealable absent failure of a committee member to be disqualified, failure of the committee to follow the rules, or actual fraud by a committee member. The new rules, however, add an additional ground for appeal: "a palpable mistake of law by the fee committee which on its face was gross, unmistakable, or in manifest disregard of the *265 applicable law, which mistake has led to an unjust result." *R. 1:20A-3(c)(4)*.

[3] The policy reasons for restricting the grounds for appealing the determination of a Fee Committee are the same as those underlying the creation of the procedure in the first place: to provide a "swift, fair and inexpensive method of resolving fee disputes" and "protect clients who can ill afford the time and expense of defending a Committee judgment on appeal." *In re LiVolsi, supra*, 85 N.J. at 602, 428 A.2d 1268.

Withdrawal from arbitration by the client is only permitted within thirty days after the request for arbitration is docketed by the secretary of the Fee Committee. *R. 1:20A-3(b)(1)*. Prior to the 1990 amendments to the rules, however, a client could withdraw from arbitration at any time up to the commencement of the hearing. The thirty-day pro-

vision was added to protect both the members of a Fee Committee and the attorneys. The prior situation was considered to be unfair to Fee Committee members who volunteer their time. Last minute withdrawals waste their time and money. Last minute withdrawals were also unfair to the attorney. A client could delay paying a bill, file a request for arbitration after the attorney served the client with notice of intent to sue for the fee, and then withdraw from the arbitration at the last minute. Commentary to *Rule 1:20A-3*; 125 N.J.L.J. 730 (1990). The purpose of the thirty-day rule is to minimize such dilatory tactics.

-B-

[4] The facts of this case require us to focus on whether the rules permit a Fee Committee to arbitrate the merits of a malpractice claim when evidence of malpractice is presented to a Fee Committee.

A Fee Committee has jurisdiction only "to arbitrate fee disputes between clients and attorneys." *R. 1:20A-2(a)*. The rules specifically provide that the "fee committee shall not have jurisdiction to *266 decide ... claims for monetary damages resulting from legal malpractice, although a fee committee may consider the quality of services rendered in assessing the reasonableness of the fee pursuant to *RPC 1.5*." *R. 1:20A-2(c)(2)* (emphasis added).

A Fee Committee is expected to decline to hear any matter "in which the primary issues in dispute raise substantial legal questions in addition to the basic fee dispute...." *R. 1:20A-2(b)(3)*. The manual provided by the Office of Attorney Ethics to Fee Committee members states that attorney malpractice presents such a question. It provides:

Fee Committees generally should not pass on constitutional or other substantial legal issues because their decisions are, practically speaking, unappealable. Moreover, Fee Committees are primarily created to render fair and fast decisions. They are not designed to hear two-week long cases where the client's defense to a \$40,000

****532** fee is that the lawyer is guilty of malpractice, a substantial legal issue.

[Office of Attorney Ethics of the Supreme Court of New Jersey, *District Fee Arbitration Committee Manual for Committees Appointed by the Supreme Court of New Jersey* 26 (1993).]

In addition, a pamphlet provided to clients inquiring about fee arbitration states, "when the primary issues in dispute raise substantial legal questions in addition to the basic fee dispute, such as a claim of legal malpractice, the fee committee may decline to hear the case." Office of Attorney Ethics of the Supreme Court of New Jersey, *Information About the Supreme Court of New Jersey's Attorney Fee Arbitration System* (1993), reprinted in *District Fee Arbitration Manual*, *supra*, at 56-57.

[5][6] We interpret the rules to mean that a Fee Committee lacks jurisdiction to decide legal malpractice claims. But the filing of a malpractice claim does not, however, deprive the Fee Committee of jurisdiction to decide the fee dispute. In the course of deciding the reasonableness of a fee, a Fee Committee may consider evidence of malpractice for the limited purpose of affecting "the quality of services rendered in assessing the reasonableness of the fee pursuant to *RPC 1.5*." *R. 1:20A-2(c)(2)*.

[7] The rules contemplate that malpractice claims are to be filed in and adjudicated by the Superior Court. Even when ***267** malpractice evidence is considered by a Fee Committee for the limited purpose of affecting the quality of the services rendered, neither the evidence submitted to a Fee Committee nor the "decision or settlement made in connection with a fee arbitration proceeding shall be admissible evidence in a legal malpractice action" in the Superior Court. *R. 1:20A-2(c)(2)(B)*.

-C-

[8] Although the Fee Committee continued to have jurisdiction to decide the fee dispute after the malpractice claim was raised before the Fee Com-

mittee, as well as after the malpractice complaint was filed with the Superior Court, Willoughby asserts that he would not have requested arbitration in the first instance had he known about the malpractice at that time. When the alleged malpractice was discovered, the thirty-day deadline for withdrawal of the request had already expired. *See R. 1:20A-3(b)(1)*. The essence of his objection to proceeding with arbitration after discovery of a basis to allege malpractice was that unless the arbitration award was stayed, he would be compelled to pay a fee for services that involved malpractice.

In denying his request for a stay, the Appellate Division observed that Willoughby "elected the arbitration forum and continued in that forum even after the malpractice complaint was filed." Those facts should not have prejudiced the application for a stay because the provisions of *Rule 1:20A*, in existence in 1993, did not preclude processing both claims simultaneously. The 1995 version expressly permits simultaneous processing of a malpractice claim in the Superior Court while proceeding with fee arbitration. *R. 1:20A-2(c)(2)(A)*.

Beyond that, Willoughby was not allowed to withdraw his request for arbitration when he discovered the basis for a malpractice claim because the thirty-day period in which he could have withdrawn his request for arbitration had expired. Unless the client is permitted to withdraw from arbitration or the arbitration award stayed, the client can be compelled to pay the lawyer's ***268** fee while contending in a legitimate malpractice case that the lawyer's malpractice bars collection of the entire fee awarded. That is precisely Willoughby's claim since he was unable to withdraw from arbitration or obtain a stay of the fee award. Willoughby does not wish to pay even a reasonable fee to Saffer unless the malpractice claim has been concluded in a manner that does not extinguish the fee award.

[9] We establish the following procedure to resolve the dilemma in which Willoughby finds himself. When during the pendency of a fee arbitration and after the thirty-day period for withdrawal has

elapsed, a client discovers a substantial malpractice claim against the former lawyer, we direct the Fee **533 Committee, pursuant to *Rule* 1:1-2, to relax *Rule* 1:20A-3(b)(1) to permit the client to have a new thirty-day window of opportunity to withdraw the request for arbitration. The window of opportunity commences the day the client discovers the substantial malpractice claim within the meaning of *Grunwald v. Bronkesh*, 131 N.J. 483, 494, 621 A.2d 459 (1993). *Rule* 1:20A-3(b)(1) will not be relaxed, however, if the basis for a substantial malpractice claim is known to the client before the thirty-day withdrawal period expires.

[10][11] If the substantial basis for a malpractice claim is discovered after a Fee Committee has awarded a fee, a client may seek a stay of the award from the Superior Court either before or after the award has been confirmed. The trial court shall first determine whether a substantial claim of malpractice exists, and if so, then grant a stay of the arbitration award on terms and conditions fixed by the court pursuant to *Rule* 2:9-5. Because the fee awarded is often tightly intertwined with the legal malpractice claim, posting of a bond or cash as a condition of the stay should not ordinarily be required. In the present case, the fee awarded was deposited with the Superior Court Clerk. Also, if Willoughby prevails, his recovery may be substantially greater than the fee awarded.

We direct that the arbitration award be stayed pending disposition of the already filed malpractice complaint. Ordinarily, filing *269 of the malpractice complaint should be a precondition to granting a stay of a fee award.

III

[12] Next we examine the impact the fee awarded will have on any malpractice verdict. Willoughby stipulated during oral argument that if a jury exonerates Saffer, he agrees that the arbitration award is fair and reasonable. He contends that if a jury finds malpractice, however, Saffer should be precluded from recovering any fee proximately related to his negligence. Another aspect of that issue

is whether the legal fees and expenses expended to recover a favorable verdict against Saffer should be deemed consequential damages. Stated another way, if Saffer committed malpractice, should he be permitted to recover any of the arbitration award?

The general rule in some jurisdictions permits a lawyer who rendered negligent services to collect his or her reasonable fee less damages sustained by the client.

A client may recover the actual damages sustained by an attorney's malpractice, negligence, or wrongful act. In the case of malpractice or negligence the liability of the attorney is limited to the damages directly and proximately caused by his [or her] conduct.

[7A C.J.S. § 273a.]

One commentator has observed:

There has been much debate as to whether the damages are reduced by what the attorneys' fees would have been in the underlying action. The earlier cases hold that such fees are to be deducted since the plaintiff was neither entitled to nor anticipating such recovery without a deduction for the attorneys' fees. However, the recent cases holding otherwise have clearly indicated that the potential fee that the attorney would have recovered is not deductible. Thus, the client receives, at least in the eyes of some, a windfall benefit which the courts may feel is deserved by the client having to endure two lawsuits.

[David J. Meiselman, *Attorney Malpractice: Law and Procedure* § 4:3 (1980).]

In the few reported fee cases, courts have held that a client's recovery in a malpractice action should be reduced by the fee to which the attorney would have been entitled had the matter been handled competently. Those courts did not apply the doctrine of *270 *quantum meruit*, but instead reasoned that any recovery gained "would have been subject to the contingent fee basis" anyway.

E.g., *McGlone v. Lacey*, 288 *F.Supp.* 662, 665 (S.D.1968); *Sitton v. Clements*, 257 *F.Supp.* 63, 65 (E.D.Tenn.1966), *aff'd*, 385 *F.2d* 869, 870 (6th Cir.1967).

The majority of courts addressing the issue recently have held otherwise. Those courts found that an attorney is not entitled to deduct from the amount due the client a **534 sum representing the legal fee to which the attorney would have been entitled had the matter been competently handled. Those courts reasoned that the additional legal fees that a client typically incurs in pursuing the malpractice action cancel out any fee that the plaintiff would have owed the negligent attorney had that attorney provided competent services. *Kane, Kane & Kritzer, Inc. v. Altagen*, 165 *Cal.Rptr.* 534, 538, 107 *Cal.App.3d* 36 (Ct.App.1980); *Winter v. Brown*, 365 *A.2d* 381, 386 (D.C.Ct.App.1976); *Christy v. Saliterman*, 288 *Minn.* 144, 179 *N.W.2d* 288, 307 (1970); *Campagnola v. Mulholland, Minion & Roe*, 76 *N.Y.2d* 38, 556 *N.Y.S.2d* 239, 242-43, 555 *N.E.2d* 611, 614-15 (N.Y.1990); *Foster v. Duggin*, 695 *S.W.2d* 526, 527 (Tenn.1985).

Two of those courts that adopted the majority rule further held that an injured client may recover the additional attorney's fees incurred in the malpractice action as consequential damages. *Winter, supra*, 365 *A.2d* at 386; *Foster, supra*, 695 *S.W.2d* at 527.

More recently, some courts have applied the doctrine of *quantum meruit* to determine a negligent attorney's fee. *Johns v. Klecan*, 198 *Ill.App.3d* 1013, 145 *Ill.Dec.* 71, 76, 556 *N.E.2d* 689, 694 (1990); *Forrester v. Dawalt*, 562 *N.E.2d* 1315, 1317-18 (Ind.Ct.App.1990); *Rocha v. Ahmad*, 676 *S.W.2d* 149, 156 (Tex.Ct.App.1984). Additionally, the Supreme Court of Tennessee applied the doctrine of *quantum meruit* in determining whether the conduct of an attorney that amounted to a violation of a disciplinary rule warranted a forfeiture of the attorney's fee. *Crawford v. Logan*, 656 *S.W.2d* 360, 364-65 (Tenn.1983).

*271 Following *Foster, supra*, the First Circuit Court of Appeals rejected the majority rule. *Moore v. Greenberg*, 834 *F.2d* 1105, 1109-13 (1st Cir.1987). That court held that "where counsel's efforts produced an offer which he then wrongfully failed to relay to the client, the settlement sum should be reduced by the amount of the lawyer's pre-agreed contingent fee (if readily ascertainable) in calculating damages for legal malpractice." *Id.* at 1113.

One commentator supports the application of the *quantum meruit* doctrine to cases involving attorney malpractice, and characterizes *Foster, supra*, and *Moore, supra*, as espousing "the new rule." Samuel J. Cohen, *The Deduction of Contingent Attorneys' Fees Owed to the Negligent Attorney from Legal Malpractice Damage Awards: The New Modern Rule*, 24 *Torts & Ins.L.J.* 751, *passim* (1989); see David A. Barry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 *Mass.L.Rev.* 74, 78 (1993) (advocating a deduction of a lawyer's legal fees and expenses from a malpractice award).

[13][14] This Court has previously identified the broad standard to be applied. A client "may recover for losses which are proximately caused by the attorney's negligence or malpractice." *Lieberman v. Employers Ins.*, 84 *N.J.* 325, 341, 419 *A.2d* 417 (1980) (citations omitted). The purpose of a legal malpractice claim is "to put a plaintiff in as good a position as he [or she] would have been had the [attorney] kept his [or her] contract." *Ibid.*

Applying the principles articulated in *Lieberman, supra*, and following the majority rule in other jurisdictions, the Appellate Division in *Strauss v. Fost*, 213 *N.J.Super.* 239, 242, 517 *A.2d* 143 (1986), held that "a negligent attorney in the appropriate case is not entitled to recover his [or her] legal fees." The court refrained from establishing a hard and fast rule, but concluded that the "general rule should be that the negligent attorney is to be considered precluded from recovering his attorney's fee and, therefore, the total amount of the initial recovery [in the legal *272 malpractice action] would be

awardable [to the plaintiff]." *Id.* at 243, 517 A.2d 143.

[15][16][17] We adopt the reasoning and result reached in *Strauss*. Ordinarily, an attorney may not collect attorney fees for services negligently performed. In addition, a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in prosecuting the legal malpractice action. Those are consequential damages that are proximately related to the malpractice. In the typical case, unless the negligent attorney's fee is determined to be part of the damages recoverable by a plaintiff, the plaintiff would incur the **535 legal fees and expenses associated with prosecuting the legal malpractice suit.

Although the present case is exceptional, in that the alleged malpractice does not affect the judgment obtained by the attorney alleged to have committed malpractice, Willoughby is nonetheless entitled to reasonable expenses and attorney fees, as consequential damages, incurred in a successful malpractice prosecution. Because this is an exceptional case, if the consequential damages that are proximately related to the malpractice claim and the balance of the uncollectible judgment against Davis are awarded to and collected by Willoughby in the malpractice action, Saffer would be entitled to collect his fee. Willoughby concedes that the amount of Saffer's fee award is reasonable and should be paid under those circumstances.

IV

[18][19] Saffer also argues that the malpractice claim is without merit because the fee arbitration award conclusively means that there was no malpractice. In support of this proposition he cites *Altamore v. Friedman*, 602 N.Y.S.2d 894, 193 A.D.2d 240 (1993). In New York, however, unlike New Jersey, a final determination of an attorney's fee by an arbitration panel bars a client from bringing a subsequent malpractice action based on the reasoning that the fee award "necessarily included the finding of no malpractice." *273 *Id.* at 898-99, 193 A.D.2d 240. Such a conclusion is not warranted in

New Jersey because a Fee Committee is without jurisdiction to decide a malpractice claim. R. 1:20A-2(c)(2).

The judgment of the Appellate Division is reversed. The judgment entered pursuant to the Fee Committee's award is stayed pending disposition of the malpractice claim.

For reversal-Chief Justice WILENTZ, and Justices HANDLER, POLLOCK, O'HERN, GARIBALDI, STEIN, and COLEMAN-7.

Opposed-None.

N.J., 1996.

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143 N.J. 256, 670 A.2d 527

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H

Supreme Judicial Court of Maine.

Audrey M. SCHNEIDER

v.

Harrison L. RICHARDSON and William B. Troubh, Individually and as Partners in the Firm of Richardson, Hildreth, Tyler & Troubh, a Successor Partnership.

Dec. 31, 1979.

Wife, who had obtained uncontested divorce, brought action to recover against her attorney, his associates and their firm on theory that their negligence in failing to apprise themselves fully as to applicable law and to adequately investigate husband's financial status resulted in wife's acceptance of property settlement without being fully informed. The Superior Court, York County, ruled that wife had failed to demonstrate that she would have been entitled to a contested divorce and entered judgment for defendants, and wife appealed. The Supreme Judicial Court, Archibald, J., held that: (1) wife was not required to show that she would have been granted divorce in a contested proceeding before she could maintain the negligence action; (2) genuine issue of material fact as to whether defendants' investigation of husband's financial position was negligent precluded summary judgment; and (3) contention that counsel for wife had agreed to a procedure under which she had to establish, as a prerequisite to obtaining the negligence action, that she would have prevailed in a contested divorce proceeding was not supported by the record.

Appeal sustained; judgment for defendants vacated; remanded for further proceedings.

West Headnotes

[1] **Attorney and Client 45** ⇌ **129(2)**

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

Client cannot recover against attorney for his negligent representation in a suit unless client proves that he could have been successful in the suit absent such negligence.

[2] **Attorney and Client 45** ⇌ **129(2)**

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

Wife, who obtained uncontested divorce, was not required to show that she would have been granted divorce in a contested proceeding before she could maintain action against her attorney, his associates and their firm on theory that their negligence in failing to apprise themselves fully as to applicable law and to adequately investigate husband's financial status resulted in wife's acceptance of property settlement without being fully informed.

[3] **Judgment 228** ⇌ **181(16)**

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, cases involving. Most Cited Cases

In action by wife, who had obtained uncontested divorce, to recover against her attorney, his associates and their firm on theory that their negligence in failing to apprise themselves fully as to applicable law and to adequately investigate husband's financial status resulted in wife's acceptance of property settlement without being fully in-

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formed, genuine issue of material fact in regard to whether defendants' investigation of financial position of husband was negligent precluded summary judgment.

[4] Attorney and Client 45 ⇌ 86

45 Attorney and Client

45II Retainer and Authority

45k86 k. Stipulations and admissions. Most Cited Cases

Evidence 157 ⇌ 246

157 Evidence

157VII Admissions

157VII(D) By Agents or Other Representatives

157k246 k. Attorneys. Most Cited Cases

Attorney's admission of fact may be used against him if it is made in management of litigation and for purpose of influencing the proceedings; such factual admissions and procedural agreements will be binding on client on proof of the attorney-client relationship.

[5] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

Record in legal malpractice action did not establish that plaintiff's counsel had unequivocally agreed to a bifurcated or "suit within a suit" procedure so that the plaintiff was bound to try the case in that posture, even if the trial court erred in ordering bifurcation that would require the plaintiff to establish that the plaintiff would have prevailed in the divorce action giving rise to the malpractice charge before the defendant attorneys' negligence would be submitted to the jury.

*657 Lawrence P. Mahoney (orally), Portland, T. A. Fitandes, Biddeford, for plaintiff.

Pierce, Atwood, Scribner, Allen, Smith & Lancaster, Ralph I. Lancaster, Jr. (orally), John J. O'Leary, Jr., Portland, for defendants.

Before POMEROY, WERNICK, ARCHIBALD, GODFREY and NICHOLS, JJ.

ARCHIBALD, Justice.

On March 2, 1972, Audrey Schneider was granted an uncontested divorce from Herman Schneider. The attorney [FN1] who represented her in that proceeding also handled the property settlement and child custody agreement. The final divorce judgment adopted and incorporated this agreement. Both Mr. and Mrs. Schneider signed the "Settlement Agreement," and their signatures were witnessed by their respective attorneys. No appeal was taken from the divorce judgment.

FN1. Defendant William B. Troubh.

Four years later Mrs. Schneider filed a negligence action against Attorney Troubh, his legal associates, and their firm, alleging that the defendants failed to apprise themselves fully as to the applicable law and to investigate adequately the financial status of Mr. Schneider prior to the divorce proceeding. These omissions, the complaint asserted, resulted in Mrs. Schneider's accepting a property settlement without being fully informed as to the facts and the alternatives available to her.

A justice of the Superior Court, on motion of the defendants and after extended argument, granted the defendants' request for a bifurcated trial pursuant to M.R.Civ.P. 42(b). The court proceeded on the theory that Mrs. Schneider must demonstrate, as a prerequisite to maintaining the action that, had the 1972 divorce been contested, she would have prevailed. In a non-jury hearing before the single justice, evidence adduced was limited to that preliminary issue, with the defendants' attorney representing Herman Schneider's [FN2] position on that issue. The Superior Court Justice then ruled that Mrs. Schneider had failed to demonstrate her legal

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entitlement to a contested divorce, and he ordered judgment for the defendants without reaching the negligence aspect of the case. It is that procedure and the resultant judgment for the defendants which generated this appeal.

FN2. Mr. Schneider was not a party to this proceeding and did not testify. He had not been represented by the defendants' attorney when the 1972 divorce action was heard and the property settlement agreed upon.

We sustain the appeal.

The issues on appeal may be separated. Preliminarily, the question is whether Mrs. Schneider's success in a contested divorce is a necessary prerequisite to maintenance of the negligence action and, in any event, whether counsel for the plaintiff had bound himself to try the case in this posture because of his alleged admissions before and during trial.

The next issue, which cannot be resolved until the above threshold questions are addressed, deals with the legal basis for upholding the presiding justice's conclusion that the plaintiff was not entitled to a contested divorce in 1972. In view of our resolution of the threshold issues, however, we need not reach this latter point.

We have held that

(b) by accepting the employment, (an attorney) impliedly agree(s) to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake and (will subject) himself to liability to his client for negligence in rendering his professional services.

Sohn v. Bernstein, Me., 279 A.2d 529, 532 (1971).

Applying this doctrine in *Maine Bonding & Casualty Co. v. Mahoney, Me.*, 392 A.2d 16, 19

(1978), we concluded that the failure to plead the relevant statute of limitations was not negligence since "(p)leading the statute was inappropriate to (the) facts and would have been no defense" and "could *658 not be deemed legal negligence to fail to so plead since no damages could result."

[1] Assuming negligent representation, a plaintiff must prove nevertheless that he could have been successful in the initial suit "absent the attorney's negligent omission to act." *Sohn v. Bernstein*, 279 A.2d at 532. This requirement is merely the assertion of the established principle that proof of proximate causation is necessary to the maintenance of a negligence action. Thus, mere negligence on the part of an attorney is not sufficient to impose liability if, for example, his client's claim is meritless or barred by the statute of limitations. Such negligence is considered "malpractice in a vacuum," since no damages could possibly flow therefrom. E. g., *Niosi v. Aiello*, 69 A.2d 57 (D.C.Mun.App.1949) (the plaintiff not legally entitled to recover under wrongful death statute since not within the definition of dependent); *Vooth v. McEachen*, 181 N.Y. 28, 73 N.E. 488 (1905) (settlement of claim without authority from client immaterial in light of insolvent nature of debtor).

[2] The foregoing principles cannot be disputed. We do not agree, however, that they are dispositive on the facts of this case. Where the single justice erred was in requiring proof of success in a contested divorce prior to admitting any evidence on the issue of the negligent practice of law.

As between the Schneiders, the 1972 divorce action had been resolved by the issuance of a valid and final judgment from which no appeal had been taken.

No authority has been cited by either side which supports (or contradicts) the procedure followed by the justice below. The cases to which we are directed are clearly distinguishable on various grounds. Thus, *Nioso v. Aiello*, supra, for example, involved a meritless claim. Obviously, no damages

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could flow from the failure to prosecute such a case. Similarly, *Wooddy v. Mudd*, 258 Md. 234, 265 A.2d 458 (1970), involved the determination by the court that the plaintiff was not entitled to a divorce. Thus, the failure of the attorney to sue on the grounds of adultery could not cause any damages since the claim would not have been successful. Finally, cases involving the failure of an attorney to file suit prior to expiration of the statute of limitations also require success in the original suit in order to establish causation and damages.

In this case no such proof is necessary to eliminate any speculation that a divorce would be granted to Mrs. Schneider. In fact, a divorce was granted; whether it could have been as a contested matter becomes immaterial. All that was necessary for the plaintiff to prove was that a divorce judgment was entered on her complaint incorporating a property settlement, the quantum of which was the result of some negligent omission by the defendants. Whether Mrs. Schneider received appropriate legal advice when she signed the property agreement is the real issue in controversy.

[3] Summary judgment was inappropriate in this context. Certainly, at least one question of fact remains unresolved, i. e., whether the defendants' investigation of the financial position of Mr. Schneider was negligent. The failure of the defendants to become versed in the law and to discover the husband's true financial status is the gravamen of the complaint, and the plaintiff should have been allowed to proceed with proof of these contentions.

[4] We turn next to the argument that, even if the court erred in ordering bifurcation, the plaintiff was bound to try the case in that posture because of a pre-trial agreement to do so between counsel. It is true that an attorney's admission of fact may be used against him if they are made "in the management of litigation and for the purpose of influencing the proceedings." *Liberty v. Haines*, 101 Me. 402, 404, 64 A. 665, 666 (1906). See also *Evans Products Co. v. Clinton Bldg. Supply, Inc.*, 174 Conn. 512, 391 A.2d 157 (1958); *Sanders Engin-*

ering Co. v. Small, 115 Me. 52, 97 A. 218 (1916). Such factual admissions and procedural agreements will be binding on a client upon proof of the attorney-client relationship. That such procedural adoptions control the manner in which a case is to be tried, however,*659 presupposes the unambiguous and unequivocal nature of the agreement leading to that undertaking. It is one thing to adopt factual admissions subject to the right of the factfinder to assess their weight.[FN3] It is quite another matter to bind procedurally an attorney to the trial of a case in a certain posture unless it is clear that such was intended.

FN3. By using the word "admission" we rule out the concept of a stipulation, a formal offer which dispenses with the need for proof. Rather, we use admission in the sense of a statement admitted against a party-opponent. M.R.Evid. 801(d)(2).

[5] The defendants argue that plaintiff's counsel had agreed to the "suit within a suit" method of trial procedure. Under this approach defendants' counsel argues (as he did before the presiding justice) that the trial must be bifurcated, namely, (1) the plaintiff must prove to the justice in the absence of the jury that "Mrs. Schneider could have a divorce in 1972 on a contested basis" and (2) assuming an affirmative finding, to then prove before the jury the defendants' negligence. Defense counsel not only urges the foregoing as a proper procedure but goes further and argues that plaintiff's counsel unequivocally agreed thereto.

We have read the record carefully to see if such an agreement can be found therein from the very extended and somewhat confusing colloquy between the court and counsel. After listening to counsel argue the point (consuming thirty pages of the transcript), the justice below observed: "The Court is in partial agreement and in partial disagreement and partial uncertainty concerning the respective positions of opposing counsel." The justice then denied the defendants' motion for bifurcation.

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Counsel then resumed their procedural debate, consuming approximately another forty pages of the transcript, after which the justice reversed his prior ruling and directed counsel to proceed with a bifurcated trial. Previous to plaintiff's only witness's testifying, the record discloses the following:

(PLAINTIFF'S COUNSEL): But the record should clearly indicate, your Honor, that we are proceeding pursuant to the Court's ruling that we must proceed in this manner on motion by the defendant.

THE COURT: No question about that; however

(PLAINTIFF'S COUNSEL): Over our objection.

THE COURT: That is, I hope, adequately, sufficiently noted on the record.

The above quoted summary of plaintiff's counsel's position is fully supported in the record. We can find no consent in unequivocal terms by plaintiff's counsel that the bifurcation procedure was by agreement. For example, at one point plaintiff's counsel stated:

We are testing whether (Defendant Troubh) was educated in the law and we are testing whether that education was transmitted to his client so she can make an informed judgment as to accept (sic) the settlement he was recommending to her. That is the heart of the case. We do not have to in effect prove . . . that a divorce would have been granted.

At the hearing held March 7, 1979, defense counsel urged several times that plaintiff's counsel had agreed to the bifurcation procedure "yesterday." However, we have no record before us of what was done or said "yesterday," namely, on March 6, 1979.

The record before us does not support the position urged by the defendants.

The entry is:

Appeal sustained.

Judgment for defendants vacated.

Remanded for further proceedings.

McKUSICK, C. J., and GLASSMAN, J., did not sit.

Me., 1979.

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C

United States District Court,
N.D. Illinois,
Eastern Division.

Denise SOBILO f/k/a Iman Seleman, Plaintiff,
v.

Lawrence S. MANASSA, Riffner, Barber, Rowden
& Scott, LLC., a law firm, and Thomas M. Gure-
witz, Defendants.

No. 06 C 543.
March 16, 2007.

Background: Client brought legal malpractice suit against attorneys and law firm, stemming from their representation of client in an Illinois divorce proceeding. Client alleged that attorneys' negligent handling of the divorce allowed her ex-husband to dissipate nearly \$2 million in assets and flee to Egypt. Defendants filed motion for summary judgment.

Holding: The District Court, Castillo, J., held that genuine issues of material fact precluded summary judgment for attorneys.

Motions denied.

West Headnotes

[1] **Attorney and Client 45** ⇌ **105.5**

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

Under Illinois law, to prevail on a claim of legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship giving rise to a duty on the part of the attorney; (2) a negligent act or omission by the attorney constituting a breach of that duty; (3) proximate cause establishing that, but for the attorney's negligence, the plaintiff would have prevailed in the underlying ac-

tion; and (4) actual damages.

[2] **Negligence 272** ⇌ **431**

272 Negligence

272XIII Proximate Cause

272k430 Intervening and Superseding Causes

272k431 k. In general; foreseeability of other cause. Most Cited Cases
(Formerly 272k432)

Under Illinois negligence law, "superseding cause" means the act of a third person or other force which, by its intervention, breaks the causal relationship between the original wrongdoer and the plaintiff's injury, and when the causal connection is broken, the independent act of the third person or force becomes the proximate cause of plaintiff's injury.

[3] **Federal Civil Procedure 170A** ⇌ **2515**

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort cases in general.

Most Cited Cases

Under Illinois law, genuine issues of material fact existed as to whether client's claim to her share of marital assets was still reasonably viable at the time attorneys ceased their representation, and thus whether successor counsel cut off the chain of causation, precluding summary judgment for attorneys in legal malpractice claim alleging that attorneys' negligent handling of divorce allowed client's ex-husband to dissipate nearly \$2 million in assets and flee to Egypt.

[4] **Attorney and Client 45** ⇌ **112**

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited Cases

Illinois law recognizes that a prior attorney's

negligence may be the proximate cause of a plaintiff's damages where the plaintiff's underlying claim is no longer viable when his representation ends.

[5] Negligence 272 ⇌ 1713

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1712 Proximate Cause

272k1713 k. In general. Most Cited

Cases

Under Illinois negligence law, foreseeability may be decided by the court as a matter of law where the issue is so clear that reasonable minds could not differ.

[6] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Under Illinois law, ex-husband's alleged actions in dissipating marital assets and absconding to Egypt during the course of divorce proceedings were not unforeseeable as a matter of law, supporting client's legal malpractice claim against attorneys, alleging that attorneys' negligent handling of divorce allowed client's ex-husband to dissipate nearly \$2 million in assets and flee to Egypt. S.H.A. 750 ILCS 5/501(a)(2)(i).

[7] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

The plaintiff in a legal malpractice case must essentially prove a case within a case by showing that her attorney was negligent and, additionally, that absent the attorney's negligence she would have prevailed in the underlying litigation.

[8] Federal Civil Procedure 170A ⇌ 2515

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort cases in general.

Most Cited Cases

Under Illinois law, genuine issues of material fact existed as to whether at least some of the assets ex-husband dissipated constituted marital assets, and whether client, the ex-wife, was entitled to at least a portion of the assets in divorce, precluding summary judgment for attorneys in legal malpractice action brought by client, alleging that attorneys' negligent handling of divorce allowed client's ex-husband to dissipate nearly \$2 million in assets and flee to Egypt. S.H.A. 750 ILCS 5/503(a), (b).

[9] Divorce 134 ⇌ 680

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)2 Property Subject to Distribution or Division

134k679 Separate or Marital Property in General

134k680 k. In general. Most Cited

Cases

(Formerly 134k252.3(3))

Under Illinois marital dissolution law, any doubt as to the nature of property is resolved in favor of finding that the property is marital. S.H.A. 750 ILCS 5/503(a), (b).

[10] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited Cases

In a legal malpractice action, a plaintiff's actual injury is measured by the amount of money she would have actually collected had her attorney not been negligent.

[11] Federal Civil Procedure 170A ⇌ 2515

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort cases in general.

Most Cited Cases

Under Illinois law, genuine issues of material fact existed as to whether client could have, in part or in whole, recovered in underlying divorce action had attorneys not been negligent, precluding summary judgment for attorneys in client's legal malpractice claim alleging that attorneys' negligent handling of divorce allowed client's ex-husband to dissipate nearly \$2 million in assets and flee to Egypt.

[12] Federal Civil Procedure 170A ⇌ 2515

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort cases in general.

Most Cited Cases

Under Illinois law, genuine issues of material fact existed as to whether attorney had evidence that would allow him to obtain a temporary restraining order stopping client's ex-husband from transferring money to Egypt, precluding summary judgment for attorney in legal malpractice action brought by client alleging that attorney's negligent handling of divorce allowed client's ex-husband to dissipate nearly \$2 million in assets and flee to Egypt.

[13] Lis Pendens 242 ⇌ 22(1)

242 Lis Pendens

242k22 Operation and Effect in General

242k22(1) k. In general. Most Cited Cases

Lis Pendens 242 ⇌ 24(1)

242 Lis Pendens

242k23 Purchasers Pending Suit

242k24 In General

242k24(1) k. In general. Most Cited Cases

Under Illinois law, while a lis pendens notice does not give the filer a lien or act as an injunction preventing sale of the property, it gives notice to purchasers of the land that there may be superior interests, and the failure to record a lis pendens notice will result in the loss of the property if it is sold to a bona fide purchaser, defined as a purchaser for value who had no notice of the pending suit. S.H.A. 735 ILCS 5/2-1901.

[14] Lis Pendens 242 ⇌ 24(1)

242 Lis Pendens

242k23 Purchasers Pending Suit

242k24 In General

242k24(1) k. In general. Most Cited Cases

Under Illinois law, if no lis pendens notice is filed, and the subsequent purchaser did not otherwise have notice of the pending suit, he takes the property free of any interest determined in the suit. S.H.A. 735 ILCS 5/2-1901.

[15] Federal Civil Procedure 170A ⇌ 2515

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort cases in general.

Most Cited Cases

Under Illinois law, genuine issues of material fact existed as to whether attorney's failure to file a lis pendens notice on property was a proximate cause of some of client's damages with respect to the property, precluding summary judgment for attorney in legal malpractice action brought by client alleging that attorney's negligent handling of divorce allowed client's ex-husband to dissipate

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nearly \$2 million in assets and flee to Egypt. S.H.A. 735 ILCS 5/2-1901.

[16] Federal Civil Procedure 170A ⇌ 2515

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2515 k. Tort cases in general.

Most Cited Cases

Under Illinois law, attorney's alleged failure to properly investigate client's husband's finances, failure to seek an order freezing husband's accounts, and failure to pursue available remedies to recoup the money that had already been wire-transferred, prior to attorney's representation of client, precluded partial summary judgment for attorney in legal malpractice action on grounds that his negligence was not the proximate cause of loss with respect to such funds.

*808 Donald L. Johnson, Julie A. Boynton, Johnson Law Firm, Joseph Thomas Gentleman, Law Office of Joseph Gentleman, Chicago, IL, for Plaintiff.

Amir Tahmassebi, Daniel Francis Konicek, Konicek & Dillon, P.C., Geneva, IL, Daniel B. Meyer, O'Hagan Spencer, L.L.C., Edward C. Eberspacher, Smithamundsen LLC, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

CASTILLO, District Judge.

Denise Sobilo f/k/a Iman Seleman ("Plaintiff") filed this legal malpractice suit, premised on diversity jurisdiction, against Defendants, attorney Lawrence S. Manassa and his law firm (referred to collectively as "Defendant Manassa") and attorney Thomas M. Gurewitz ("Defendant Gurewitz"), both of whom represented her in an Illinois divorce proceeding. Plaintiff claims that Defendants' negligent handling of the divorce allowed her ex-husband to dissipate nearly \$2 million in assets and flee to

Egypt. (R. 1, Compl. ¶¶ 4-24.) Before the Court are separate summary judgment motions filed by Defendant Manassa and Defendant Gurewitz. For the following reasons, the motions are denied.

RELEVANT FACTS^{FN1}

FN1. These facts are derived from the parties' statements of facts and exhibits filed in support thereof pursuant to Local Rule 56.1. Unless otherwise indicated, the facts contained herein are undisputed.

I. Factual Background

Defendant Manassa and Defendant Gurewitz are attorneys licensed to practice law in Illinois. (R. 77, Pl.'s Resp. to Def. Manassa's Facts ¶ 2; R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 4.) Plaintiff is a citizen of the State of Indiana. (R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 1.)

In 1984, Plaintiff^{FN2} married Hamed Seleman ("Hamed"), an Egyptian national, in a religious ceremony held in Chicago, Illinois. (R. 77, Pl.'s Resp. to Def. Manassa's Facts ¶ 5; R. 61, Def. Manassa's Facts, Ex. K (Judgment for Dissolution of Marriage dated Dec. 16, 2005 ("Divorce Judgment"))) at 2.) During their marriage, the couple had four sons: Yusef, born in 1985; Amir, born in 1987; Omar, born in 1989; and Zakariya, born in 1992. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at 2.) In addition to the religious ceremony, the couple went through a civil marriage ceremony sometime around the birth of their youngest son. (R. 77, Pl.'s Resp. to Def. Manassa's Facts ¶ 5; R. 55, Def. Gurewitz's Facts, Ex. G (Sobilo's Dep. Tr.) at 18.)

FN2. Plaintiff assumed the Egyptian name Iman Seleman at the time of her marriage. In the course of the divorce proceeding, she resumed the use of her maiden name, Denise Sobilo. (R. 55, Def. Gurewitz's Facts, Ex. G (Sobilo's Dep. Tr.) at 20-21.)

During the marriage, Hamed owned several pieces of real property, including properties located

at 5140 King Drive, Chicago, Illinois ("the King Drive property"); 3553 West Irving Park Road, Chicago, Illinois ("the Irving Park property"); and an apartment building located at 3001-09 West 19th Street in Chicago, Illinois ("the West 19th property"). (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at ¶ 12; R. 91, Def. Manassa's Resp. to Pl's Add. Facts ¶ 14.) The parties dispute whether these properties were acquired during the marriage, a key issue for determining whether they constitute marital property. (See R. 90, Def. Gurewitz's Resp. to Pl's Add. Facts ¶¶ 16-17, 29). *809 The divorce court found that the properties were acquired during the marriage. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at ¶¶ 12, 27.) Plaintiff has presented additional evidence that the Irving Park and King Drive properties were acquired in 2000, while she and Hamed were married. (R. 77, Pl.'s Resp. to Def. Manassa's Facts, Ex. 1 (Trustee's Deed) and 2 (Closing Statement).)

Hamed also owned a number of businesses during the marriage, including King Soliman Entertainment, Nefertiti Café, Sphinx International, Sphinx, Inc., Green Oak Management (which managed and collected rent on the King Drive property), Stone Reach Management, and Drexel Apartments. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at ¶¶ 27-28; R. 91, Def. Manassa's Resp. to Pl's Facts ¶¶ 15, 26.) Defendant Gurewitz admits that King Soliman Entertainment and Nefertiti Café were started during the marriage, but disputes whether the other businesses were started during the marriage. (See R. 90, Def. Gurewitz's Resp. to Pl's Add. Facts ¶¶ 16-17, 29). The divorce court found that all of the businesses specified above were acquired during the marriage. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at ¶¶ 12, 27.) Plaintiff did not work outside the home during most of the marriage. (R. 55, Def. Gurewitz's Facts, Ex. G (Sobilo's Dep. Tr.) at 17-19.)

In October 2001, Plaintiff filed a petition for dissolution of marriage in Lake County, Illinois (the "2001 proceeding"). (R. 79, Pl.'s Resp. to Def.

Gurewitz's Facts ¶ 7.) She retained attorney Stuart Gordon (a non-party to this litigation) to represent her. (*Id.*) On the same day the petition was filed, Gordon obtained a temporary restraining order prohibiting Hamed from transferring any marital assets. (R. 55, Def. Gurewitz's Facts, Ex. J (Report of Benjamin P. Hyink) ("Hyink's Report") at 9.) Shortly after the case was filed, Plaintiff and Hamed reconciled, and the case was dismissed.

In June 2002, Plaintiff retained Defendant Manassa to file a second action for dissolution of marriage in Lake County ("the 2002 proceeding"). (R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 9.) The petition alleged that Hamed had "dissipated marital income and assets, for which he should compensate and reimburse the marital estate." (R. 61, Def. Manassa's Facts, Ex. D (Petition for Dissolution of Marriage, filed June 14, 2002) ("2002 Petition") at ¶ 18.) Defendant Manassa also obtained a temporary restraining order prohibiting Hamed from transferring marital assets and requiring him to turn over his passport. (R. 77, Pl.'s Resp. to Def. Manassa's Facts ¶¶ 8-11; R. 55, Def. Gurewitz's Facts, Ex. J (Hyink's Report) at 9-10.) A few months after the case was filed, Plaintiff and Hamed again reconciled, and the case was dismissed. (R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 10; R. 55, Def. Gurewitz's Facts, Ex. G (Sobilo's Dep. Tr.) at 39.)

Between April and September 2003, Hamed made a series of wire-transfers to Egypt totaling approximately \$50,000. (R. 61, Def. Manassa's Facts, Ex. K at Ex. F (Wire Transfer History Provided by Foster Bank ("Wire Transfer History")); R. 91, Def. Manassa's Resp. to Pl's Add. Facts ¶ 31; R. 90, Def. Gurewitz's Resp. to Pl's Add. Facts ¶ 34; R. 55, Def. Gurewitz's Facts, Ex. P (Wire Transfer Records).) During this period, Hamed also sold the West 19th Street property and received net proceeds of approximately \$600,000. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at ¶ 13.)

In September 2003, Plaintiff filed a third action for dissolution of marriage in Lake County ("the

2003 proceeding") and was again represented by Defendant Manassa. (R. 77, Pl.'s Resp. to Def. Manassa's Facts *810 ¶ 14; R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 11.) Plaintiff did not pay a new retainer before the 2003 petition was filed.^{FN3} (R. 61, Def. Manassa's Facts, Ex. C (Manassa's Dep. Tr.) at 54-55.) The 2003 petition again alleged that Hamed had "dissipated marital income and assets, for which he should compensate and reimburse the marital estate." (R. 61, Def. Manassa's Facts, Ex. G (Petition for Dissolution, filed Sept. 23, 2003 ("2003 Petition")) at ¶ 18.) During October 2003, Hamed continued to make wire-transfers to Egypt totaling approximately \$300,000. (R. 91, Def. Manassa's Resp. to Pl.'s Facts ¶ 31; R. 90, Def. Gurewitz's Resp. to Pl.'s Facts ¶ 34; R. 55, Def. Gurewitz's Facts, Ex. P (Wire Transfer Records).)

FN3. The parties dispute whether Plaintiff formally "re-retained" Defendant Manassa to represent her in the 2003 proceeding or whether the 2003 case was merely a continuation of his representation in the 2002 case. (R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 11; R. 77, Pl.'s Resp. to Def. Manassa's Facts ¶ 14.)

In November 2003, Defendant Manassa filed a motion for a temporary restraining order enjoining Hamed from dissipating the marital assets.^{FN4} (R. 61, Def. Manassa's Facts, Ex. C (Manassa's Dep. Tr.) at 66-67; R. 55, Def. Gurewitz's Facts, Ex. J (Hyink's Report) at 2.) After a hearing on Plaintiff's motion, the court entered the following order by agreement of the parties:

FN4. We note that the motion for a temporary restraining order has not been included in the documents before us. Both parties reference the motion in their filings, and Hyink's report indicates that he reviewed the motion, filed November 5, 2003, in the context of rendering an opinion in the case. (R. 55, Def. Gurewitz's Facts, Ex. J (Hyink's Report) at 2.)

Each party shall be enjoined from spending, transferring, encumbering, hiding or otherwise hypothecating any marital property (or personal or business property) or transferring money from any accounts, except for monies necessary for reasonable living expenses. This provision does not seek to freeze any accounts, or bar either party from using funds necessary for their (and their childrens) day to day needs, and for their normal course of business.

(R. 55, Def. Gurewitz's Facts, Ex. E (State Court Order, dated Nov. 19, 2003) ("the November 2003 Order").) Defendant Manassa did not serve this order on any of the financial institutions where Hamed held accounts. (R. 77, Pl.'s Resp. to Def. Manassa's Facts ¶ 26.)

On November 26, 2003, less than a week after the entry of the court's November 2003 order, Hamed granted a second mortgage of \$400,000 on the Irving Park property to a third party, Sami M. Rageb. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at ¶ 18 & Ex. A (Junior Mortgage).) Although the matter is disputed by Defendant Manassa (but not Defendant Gurewitz), Plaintiff claims that Hamed made additional wire transfers to Egypt totaling approximately \$750,000 sometime before the end of 2003. (See R. 91, Def. Manassa's Resp. to Pl.'s Add. Facts ¶ 35; R. 59, Def. Gurewitz's Chronology at 2.)

On January 16, 2004, Plaintiff retained Defendant Gurewitz to represent her.^{FN5} (R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 12.) On January 29, 2004, Hamed made a wire transfer of approximately \$250,000 to Egypt. (R. 91, Def. Manassa's Resp. to Pl.'s Add. Facts ¶ 31; R. 90, Def. Gurewitz's Resp. to Pl.'s Add. Facts ¶ 34.) On *811 February 3, 2004, Defendant Gurewitz formally filed his appearance in the case. (R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 13.) Defendant Manassa remained counsel of record until that date. The following month Defendant Gurewitz filed a motion for temporary relief on Plaintiff's behalf in which he alleged, among other matters, that Hamed had

"closed all the parties' joint accounts, dissipated other substantial assets, and stopped supporting the family." (R. 61, Def. Manassa's Facts, Ex. N (Petition for Temporary Relief filed March 3, 2004), at ¶ 12). The motion requested that Hamed be ordered to return a vehicle to Plaintiff and pay various family expenses, but did not seek any specific relief related to freezing Hamed's bank accounts. (*See id.* at 5-6.)

FN5. There is a dispute about precisely when Plaintiff terminated Defendant Manassa. (*See* R. 77, Pl.'s Resp. to Def. Manassa's Facts ¶ 27.) At her deposition Plaintiff testified that she was "guessing" it was sometime in December 2003. (R. 55, Def. Manassa's Facts, Ex G (Sobilo's Dep. Tr.) at 138.)

On July 9, 2004, Plaintiff sent a letter to Defendant Gurewitz terminating him. (R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 14; R. 61, Def. Manassa's Facts, Ex. I (Letter to Thomas Gurewitz dated July 9, 2004.)) Defendant Gurewitz's motion for leave to withdraw was granted on July 30, 2004. (R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶ 15.) Plaintiff thereafter proceeded without counsel for several weeks. During this period, the King Drive property was sold pursuant to court order for \$2.5 million. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at ¶¶ 14, 15.) The net proceeds totaled only \$7,000 after payment of numerous liens on the property. (*Id.* ¶¶ 16.) In late August and early September 2004, Hamed made additional wire transfers to Egypt totaling approximately \$350,000. (R. 91, Def. Manassa's Resp. to Pl.'s Add. Facts ¶¶ 31; R. 90, Def. Gurewitz's Resp. to Pl.'s Add. Facts ¶ 34-35.)

In September 2004, Plaintiff retained attorney Mari-Jo Jacquette ("Jacquette") to represent her. (R. 61, Def. Manassa's Facts, Ex. H (Suppl. App. of Mari-Jo Jacquette dated Sept. 14, 2004.)) Jacquette is not a party to this litigation. Jacquette filed her appearance on September 14, 2004, along with an emergency motion requesting that Hamed be found

in contempt for violating the November 2003 order. (R. 61, Def. Manassa's Facts, Ex. S (Emergency Petition for Rule to Show Cause, filed Sept. 14, 2004.)) Jacquette submitted documentation showing that Hamed had improperly wire-transferred money in violation of the November 2003 order and argued that there was a risk he would continue to dissipate the marital assets. (*Id.* ¶ 14 & Ex. C.) Among other relief, the motion requested that Hamed's accounts be frozen, that he be found in contempt, and that he be jailed for six months as punishment for his "wilful and contemptuous conduct." (*Id.* at 6.)

In response to the motion, with Hamed present, the court entered an order freezing Hamed's accounts, issued a rule to show cause why Hamed should not be held in contempt, and set the matter for further hearing. (R. 61, Def. Manassa's Facts, Ex. T (State Court Order, dated Sept. 14, 2004.)) After leaving court that day, Hamed initiated a wire transfer of approximately \$115,000 to Egypt. (*See* R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) ¶¶ 20-21 & Ex. F (Wire Transfer History); R. 91, Def. Manassa's Resp. to Pl.'s Facts ¶ 32; R. 90, Def. Gurewitz's Resp. to Pl.'s Facts ¶ 36.) On that same day, Hamed also quit-claimed the Irving Park property to Sami M. Rageb. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) ¶ 22 & Ex. B (Quit Claim Deed).)

Hamed appeared in court on at least one other occasion, September 28, 2004. (R. 55, Def. Gurewitz's Facts ¶ 24 & Ex. I (State Court Order dated Sept. 28, 2004.)) Sometime thereafter Hamed's counsel withdrew; he then obtained another attorney, *812 who withdrew some months later. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at 1.) Eventually Hamed stopped appearing at scheduled court hearings, and the court found him in default. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at 1.) Hamed's present whereabouts are unknown, although Plaintiff suspects he is living in Egypt. (R. 55, Def. Gurewitz's Facts, Ex. G (Sobilo's Dep. Tr.) at 35.)

On December 16, 2005, the court entered a judgment of dissolution of marriage in Hamed's absence. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment).) Among other relief, the court: awarded Plaintiff sole custody of the children; ordered Hamed to pay \$4,000 per month in child support and a lump sum of \$30,100 in past due child support; awarded Plaintiff \$746,549.18, representing funds Hamed had transferred to Egypt in violation of the November 2003 order; awarded Plaintiff sole interest in the Nefertiti Café; ordered Hamed to pay Plaintiff \$22,700 for failing to comply with discovery orders; and awarded Plaintiff \$20,000 in attorneys' fees. (*Id.* ¶¶ A-V.) It is undisputed that Plaintiff has been unable to collect on the judgment. (R. 79, Pl.'s Resp. to Def. Gurewitz's Facts ¶¶ 36-37.)

II. Procedural History

In January 2006, Plaintiff filed this action against the Defendants alleging that they negligently failed to prevent Hamed from dissipating the marital assets, precluding her from obtaining her share of those assets in the divorce.^{FN6} (R. 1, Compl.¶¶ 4-24.) She alleges that both attorneys breached their duty of care in several respects, including failing to serve copies of the November 2003 order on banks with which Hamed was known to hold accounts, and failing to record *lis pendens* notices with respect to the King Drive and Irving Park properties. (*Id.* ¶¶ 6-13.) According to Plaintiff, had Defendants acted diligently, Hamed would not have been able to dissipate her share of the marital assets and abscond to Egypt. (*Id.* ¶¶ 7, 18.)

FN6. Plaintiff filed a separate suit before District Judge Virginia M. Kendall, *Sobilo v. Seleman, et al.*, 06 C 0461 (N.D. Ill. filed Jan. 25, 2006), against Hamed and several other individuals, including Sami M. Rageb ("Rageb"), all of whom are alleged to be Hamed's close associates. Plaintiff claims that the defendants engaged in a conspiracy to defraud her of her

interests in the King Drive and Irving Park properties. (*Sobilo v. Seleman, et al.*, 06 C 0461, R. 71, First Am. Compl.). In October 2006, Plaintiff settled with Rageb; the claims against other defendants remain pending. (*Id.*, R. 63, Minute Order Granting Motion to Dismiss as to Defendant Rageb). According to the docket, Plaintiff is still attempting to effect service over Hamed and at least one other defendant. (*Id.*, R. 54, Minute Order Granting Motion for Extension of Time to Effect Service.)

Defendant Manassa and Defendant Gurewitz have filed separate motions for summary judgment. They raise several overlapping arguments. (R. 64, Def. Manassa's Mot. for Summ. J.; R. 51, Def. Gurewitz's Mot. for Summ. J.) In his motion, Defendant Manassa argues that he is entitled to judgment because: (1) successor counsel Jacquette could have remedied the harm allegedly caused by his negligence and, thus, as a matter of law he was not the proximate cause of Plaintiff's injury; (2) he "did not have any evidence that would allow him to obtain a TRO stopping [Hamed] Seleman from transferring money to Egypt"; (3) Hamed's actions were not foreseeable; and (4) Plaintiff has not demonstrated that she suffered any actual damages as a result of his alleged negligence. (R. 66-2, Def. Manassa's Mem. in Supp. of Mot. for Summ. J. at 2-12.)

In his motion, Defendant Gurewitz adopts Defendant Manassa's arguments 3 *813 and 4 related to foreseeability and actual damages. He also raises two additional arguments: (1) successor counsel Jacquette's own negligence "breaks the chain of causation and absolves Gurewitz of liability for any damages occasioned upon Plaintiff"; and (2) he is entitled to judgment because Plaintiff cannot prove the underlying divorce judgment "was or is collectible." (R. 53, Def. Gurewitz's Mem. in Supp. of Mot. for Summ. J. at 1, 2-9.) Defendant Manassa joins in Defendant Gurewitz's argument 2 related to collectibility of the underlying judgment. (*See R.*

66-2, Def. Manassa's Mem. in Supp. of Mot. for Summ. J. at 12.)

Alternatively, Defendant Gurewitz moves for partial summary judgment as to certain of Plaintiff's claims. Specifically, he argues that his failure to file a *lis pendens* notice was not the proximate cause of Plaintiff's damages with respect to the Irving Park property, and further, that he cannot be held responsible for any wire transfers that occurred prior to January 16, 2004, the date upon which he became Plaintiff's counsel. (R. 53, Def. Gurewitz's Mem. in Supp. of Mot. for Summ. J. at 10-15.) We will address each of these arguments in turn.

LEGAL STANDARDS

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding a motion for summary judgment, the Court must "construe all facts in the light most favorable to the nonmoving party and draw all reasonable and justifiable inferences in favor of that party." *King v. Preferred Tech. Group*, 166 F.3d 887, 890 (7th Cir.1999). Summary judgment is not appropriate if there are disputed issues of fact remaining, or if the court must make "a choice of inferences" arising from undisputed facts. *Harley-Davidson Motor Co., Inc. v. PowerSports, Inc.*, 319 F.3d 973, 989 (7th Cir.2003). "The choice between reasonable inferences from facts is a function of a fact-finder, and when multiple reasonable inferences exist on a genuine issue of material fact, summary judgment will not be appropriate." *Id.*

LEGAL ANALYSIS

[1] Because this case is premised on diversity jurisdiction, Illinois substantive law applies. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Ocean Atlantic Dev. Corp. v. Aurora Christian Sch., Inc.*, 322 F.3d 983, 995 (7th Cir.2003). Under Illinois law, to prevail on a claim of legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship giving rise to a duty on the part of the attorney; (2) a negligent act or omission by the attorney constituting a breach of that duty; (3) proximate cause establishing that, but for the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) actual damages. *Mihailovich v. Laatsch*, 359 F.3d 892, 905 (7th Cir.2004). In these motions, Defendants focus on issues related to causation and damages. We address first the arguments that are raised by both Defendants.

*814 I. Proximate Cause

A. Whether Successor Counsel Jacquette Cuts Off The Chain of Causation Such That Defendants Cannot Be Held Liable for Plaintiffs' Damages.

Defendants raise similar arguments that they are absolved from liability because successor counsel, Mari-Jo Jacquette, was the last to represent Plaintiff and had means available to her to remedy any injury caused by Defendants' alleged negligence. (R. 66-2, Def. Gurewitz's Mem. in Supp. of Mot. for Summ. J. at 2-5; R. 53, Def. Gurewitz's Mem. in Supp. of Mot. for Summ. J. at 3-7.) In essence, Defendants are arguing that they were not the proximate cause of Plaintiff's injury. As the Illinois Supreme Court has explained, the term "proximate cause" encompasses two distinct requirements: cause in fact and legal cause. *Young v. Bryco Arms*, 213 Ill.2d 433, 290 Ill.Dec. 504, 821 N.E.2d 1078, 1085 (2004). The first requirement, cause in fact, is established "when there is a reasonable certainty that a defendant's acts caused the injury." *Id.* The second requirement, legal cause, is established only if the defendant's conduct is "so closely tied to the plaintiff's injury that he should

be held legally responsible for it." *Id.* Proximate cause is ordinarily a fact-laden issue that must be decided by the trier of fact. *Abrams v. City of Chicago*, 211 Ill.2d 251, 285 Ill.Dec. 183, 811 N.E.2d 670, 674 (2004) ("[P]roximate cause is generally an issue of material fact in a negligence suit.").

In arguing that they should be absolved of liability for Plaintiff's injury as a matter of law, Defendants rely on a line of Illinois cases beginning with *Land v. Greenwood*, 133 Ill.App.3d 537, 88 Ill.Dec. 595, 478 N.E.2d 1203 (1985), a malpractice case involving successive representation by different attorneys. In *Land*, the first attorney represented plaintiff for several months but failed to effect service on several of the defendants. After he withdrew, Plaintiff hired a second attorney. Approximately four months after the second attorney was retained, the defendants were finally served. They moved to dismiss based on the delay in effecting service, and the court dismissed the case with prejudice. The plaintiff then sued the first attorney, but not the second, for legal malpractice. *Id.* at 1204-05.

Under this particular set of facts, the *Land* court held that the plaintiff could not state a claim for legal malpractice against the first attorney because "it is only a matter of speculation as to whether the suit would have been barred at the time defendant was discharged." *Id.* at 1205. In dismissing the underlying case, the court had concluded only that failure to effect service four months after the second attorney was obtained demonstrated a lack of diligence; there was no indication whether the court would have found a lack of diligence based on failure to effect service at the time the first attorney withdrew. *Id.* Further, the *Land* court observed that the second attorney had an absolute right to voluntarily dismiss the case and refile it, which would have prevented an involuntary dismissal with prejudice. *Id.* The bottom line in the *Land* court's view was that the plaintiff's cause of action was "viable" at the time of the first attorney's

withdrawal, but was not viable when the second attorney "got through with it." *Id.* Thus, the plaintiff could prove no set of facts connecting the first attorney's conduct to any damages he had sustained. *Id.* at 1206.

In subsequent cases, Illinois courts have applied *Land* to bar malpractice claims where it could not be proven that the first attorney was the proximate cause of the plaintiff's damages. See *815 *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill.App.3d 618, 266 Ill.Dec. 122, 773 N.E.2d 1192 (2002) (first attorney was not the proximate cause of plaintiff's damages even though dismissal resulted from his failure to prosecute the case; Illinois statute allowed successor attorney sufficient time to reinstate plaintiff's case, which he inadvertently failed to do); *Cedeno v. Gumbiner*, 347 Ill.App.3d 169, 282 Ill.Dec. 600, 806 N.E.2d 1188 (2004) (applying *Land* to hold that trial court's acceptance of legally unsound basis for granting summary judgment served as an intervening cause absolving former attorneys for negligent handling of client's case).

Defendants argue that pursuant to this line of cases, they are absolved of liability because it was not they, but successor counsel Jacquette, who caused Plaintiff's damages. There is a threshold question, raised by Plaintiff, whether this court must apply the *Land* cases, all of which were decided at the appellate court level. Under the *Erie* doctrine, we must apply state substantive law; where the Illinois Supreme Court has not ruled on an issue, decisions of the Illinois appellate courts control. *Allen v. Transamerica Ins. Co.*, 128 F.3d 462, 466 (7th Cir.1997). However, if there is a conflict among the appellate courts or other persuasive indications that the Illinois Supreme Court would not follow the rulings of the appellate courts, we must attempt to predict how the Illinois Supreme Court would decide the issue. *Id.*; *Allstate Ins. Co. v. Westinghouse Elec. Corp.*, 68 F.Supp.2d 983, 986-87 (N.D.Ill.1999).

Plaintiff argues that the Illinois Supreme Court

would reject *Land* and its progeny, and would instead follow *Lopez v. Clifford Law Offices*, 362 Ill.App.3d 969, 299 Ill.Dec. 53, 841 N.E.2d 465 (2005), which Plaintiff reads as a rejection of the liability-shifting rule adopted in *Land*. We do not agree with Plaintiff that *Lopez* is in conflict with *Land*; instead we find these case wholly consistent. In *Lopez*, the plaintiff consulted an attorney regarding a proposed wrongful death suit. The attorney misadvised him that a two-year statute of limitations applied to his lawsuit, when in fact the statute of limitations was one year. Before a complaint was filed, the first attorney ceased his representation. Plaintiff then retained another attorney, but believing he had two years during which to file a complaint, he delayed some months in obtaining new counsel. By the time he retained the second attorney, the one-year statute of limitations had run. Plaintiff then brought a legal malpractice action against the first attorney based on his negligent advice. *Id.* at 468-69.

The *Lopez* court found the *Land* cases distinguishable for a key reason, specifically, successor counsel was not retained until "after the expiration of the statute of limitations, *i.e.*, when the successor counsel could not have cured the problem created by the incorrect advice." *Id.* at 476. Thus, the first attorney could not be absolved of liability as a matter of law; instead, the issue of proximate cause would have to be decided by the trier of fact. *Id.* at 476. The court noted that one California court had concluded that in cases involving successive representation, the issue of proximate cause must always be decided by the jury. *See id.* (citing *Cline v. Watkins*, 66 Cal.App.3d 174, 135 Cal.Rptr. 838 (1977).) While recognizing this approach, the *Lopez* court found it unnecessary to "reexamine the rationale underlying the holdings in *Land* and *Mitchell* ... since in this case no successor was retained before the statute of limitations actually ran." *Lopez*, 299 Ill.Dec. 53, 841 N.E.2d at 476. Plainly stated, we find nothing in *Lopez* that conflicts with *Land*.

*816 [2] Moreover, assuming there were a conflict among the Illinois appellate courts, we would have little difficulty predicting that the Illinois Supreme Court would follow the *Land* cases, which simply apply an ordinary causation principle that is applicable to all negligence cases: Where there are successive negligent actors, the negligence of the second actor, under certain circumstances, may be deemed a superseding cause, which relieves the original negligent actor of liability. *See Lopez*, 299 Ill.Dec. 53, 841 N.E.2d at 475. Under Illinois law, "superseding cause" means the act of a third person or other force which, by its intervention, breaks the causal relationship between the original wrongdoer and the plaintiff's injury. *Abrams*, 285 Ill.Dec. 183, 811 N.E.2d at 676; *Wehmeier v. UNR Indus., Inc.*, 213 Ill.App.3d 6, 157 Ill.Dec. 251, 572 N.E.2d 320, 338 (1991). When the causal connection is broken, the independent act of the third person or force becomes the proximate cause of plaintiff's injury. *Abrams*, 285 Ill.Dec. 183, 811 N.E.2d at 676.

In the *Land* cases, the original attorney avoided liability because it could not be shown that his negligence proximately caused the plaintiff's loss. The involvement of a successor attorney at the point where harm to the client's cause of action could have been completely averted extinguished the cause of action against the original attorney. Instead, the successor attorney's own actions had proximately caused the plaintiff's damages. *See Land*, 88 Ill.Dec. 595, 478 N.E.2d at 1205 (second attorney could have averted involuntary dismissal by taking a voluntary nonsuit and refileing the action within one year); *Mitchell*, 266 Ill.Dec. 122, 773 N.E.2d at 1193 (second attorney had absolute right to reinstate case that was dismissed for want of prosecution within two years but failed to do so through inadvertence).

[3][4] For the same reason we believe the Illinois Supreme Court would follow the *Land* cases, we conclude that these cases do not absolve Defendants of liability as a matter of law. The *Land* cases represent an exception to the rule that prox-

imate cause must be determined by the jury, because in those cases the plaintiff could not establish that the first attorney had proximately caused her injury. Not all cases are so clear-cut. As the Seventh Circuit has held, "Illinois law recognizes that a prior attorney's negligence may be the proximate cause of a plaintiff's damages where the plaintiff's underlying claim is no longer viable when his representation ends." *Mihailovich*, 359 F.3d at 905. Where the viability of a plaintiff's claim following discharge of the first attorney is in dispute, summary judgment is not appropriate. As the *Mitchell* court explained:

[T]here may be circumstances where the first attorney could be held to be a proximate cause of plaintiff's damages where his acts or omissions leave doubt about the subsequent viability of plaintiff's claims after his representation ends.... In those cases, it would be for the jury to determine whether the case was in fact reasonably 'viable' at the time of the discharge. Reasonable minds could differ as to whether the first attorney's actions or omissions were a proximate cause of plaintiff's injury.

Mitchell, 266 Ill.Dec. 122, 773 N.E.2d at 1194-95; see also *Mihailovich v. Laatsch*, No. 99 C 4780, 2001 WL 969072 at *5 (N.D.Ill. Aug.23, 2001) (distinguishing *Land* and denying summary judgment where reasonable jury could conclude that plaintiff's case was no longer "viable" when original attorney ceased representation).

The question here, whether Plaintiff's claim to her share of the marital assets *817 was still "reasonably viable" at the time Defendants ceased their representation, is a matter on which reasonable minds could differ. See *Mitchell*, 266 Ill.Dec. 122, 773 N.E.2d at 1194-95. The evidence shows that by the time Jacquette entered the case, most of Hamed's bank accounts had already been dissipated. Defendant Manassa argues that Jacquette's presence in the case when Hamed was still within the United States-and could have been jailed for contempt-is itself enough to relieve him of liability.

(See R. 92, Def. Manassa's Reply in Supp. of Mot. for Summ. J. at 7-11.) He relies on the testimony of Plaintiff's expert, Benjamin P. Hyink ("Hyink"), to support this argument. (*Id.*) Hyink did not testify, as Defendant Manassa suggests, that jailing Hamed for contempt would have automatically resulted in the return of the money he sent to Egypt; his testimony was that jailing Hamed was a method of "hopefully compelling him to return assets to the United States." (R. 55, Def. Gurewitz's Facts, Ex. K (Hyink's Dep. Tr.) at 56.) It is apparent from Hyink's testimony that the return of the funds was not a foregone conclusion simply because Hamed remained in the United States after the Defendants' representation ended. (See *id.* at 22, 157-59, 170-71, 199.) Indeed, as Hyink pointed out, even if successor counsel had succeeded in having Hamed jailed, Hamed could have simply opted to sit in jail rather than restore the funds. (*Id.* at 182 ("He might still be in jail if he were put in jail. The assets would still be outside the jurisdiction.")) We therefore do not find this argument persuasive.

Defendant Gurewitz goes a step further by arguing that Jacquette herself was negligent in failing to remedy the harm caused by Defendants' alleged omissions, and must therefore be deemed a superseding cause of Plaintiff's injuries. In making this argument, Defendant Gurewitz relies on the testimony of Plaintiff's expert, Hyink.^{FN7} We again find the matter one on which reasonable minds could differ. *Dugan v. Sears, Roebuck & Co.*, 113 Ill.App.3d 740, 73 Ill.Dec. 320, 454 N.E.2d 64, 67 (1983) ("If different minds might reasonably draw different inferences from the facts given, then the court must defer to the judgment of the jury on the accompanying issues of foreseeability and the effect of an intervening cause."); see also *Hooper v. Cook County*, 366 Ill.App.3d 1, 303 Ill.Dec. 476, 851 N.E.2d 663, 669 (2006) (whether a party was negligent is ordinarily a factual determination to be made by the jury).

FN7. Although Defendant Gurewitz has his own expert in the case, Charles Fleck,

he did not ask Fleck to offer an opinion regarding Jacquette's negligence because, in his view, "Plaintiff's own expert had already proven a case for professional negligence against Jacquette." (R. 88, Def. Gurewitz's Reply in Supp. of Mot. for Summ. J. at 4 n. 2.)

The evidence before us shows that the same day Jacquette filed her appearance, she filed an emergency motion requesting that Hamed's bank accounts be frozen. She provided the court with documentation of at least one wire-transfer made to Egypt in violation of the court's November 2003 order. She also sought the surrender of Hamed's passport and requested that he be jailed for contempt. While Hyink expressed the view that Jacquette's emergency motion could have been better drafted, he repeatedly emphasized that he did not analyze Jacquette's actions in detail and could offer no opinion about whether her representation was deficient. (R. 55, Def. Gurewitz's Facts, Ex. K (Hyink's Dep. Tr.) at 171-74, 182-83, 187-88, 192.) He further pointed out, "[Jacquette] did take some steps. She did act and made extensive efforts to control [Hamed's] physical being." (*Id.* at 182.) Hyink noted*818 that the effectiveness of Jacquette's actions was "limited because of the assets not being in the jurisdiction" by the time she entered the case, which, in his view, was a result of Defendants' lack of diligence. (*Id.* at 180.) Hyink also testified that trying to force the return of the assets was "not as easy or as certain as getting an injunction barring the transfer of assets" in the first place. (*Id.* at 199.) For these reasons, we find the evidence falls short of establishing as a matter of law that Jacquette was a superseding cause of Plaintiff's damages.^{FN8}

FN8. While Plaintiff would ultimately bear the burden of proving that Defendants proximately caused her injury, Defendants would bear the burden of production with respect to their claim that a third party was the sole proximate cause of Plaintiff's injuries. "A defendant has the right not only

to rebut evidence tending to show that defendant's acts are negligent and the proximate cause of claimed injuries, but also has the right to endeavor to establish by competent evidence that the conduct of a third person, or some other causative factor, is the sole proximate cause of plaintiff's injuries.... [I]f the evidence is sufficient, the defendant is entitled to an instruction on this theory." *Leonardi v. Loyola Univ. of Chicago* 168 Ill.2d 83, 212 Ill.Dec. 968, 658 N.E.2d 450, 459 (1995). We note further that under Illinois law there may be more than one proximate cause of an injury. *See id.* at 455 ("A person who is guilty of negligence cannot avoid responsibility merely because another person is guilty of negligence that contributed to the same injury.").

Because reasonable minds could differ as to whether Plaintiff's claim to the marital assets was "reasonably viable" when Defendants ceased their representation, and whether Jacquette was a superseding cause of Plaintiff's injury, the matter must be decided by a jury. Accordingly, we decline to grant summary judgment to Defendants.

B. Whether The Acts of Hamed Seleman Were Unforeseeable

[5] Next, Defendant Manassa argues, and Defendant Gurewitz joins him in arguing, that Hamed's actions were unforeseeable as a matter of law. Foreseeability is a subset of the proximate cause determination; the inquiry is whether the plaintiff's injury is of a type that a reasonable person in the defendant's situation would see as a likely result of his conduct. This is ordinarily a question for the jury. *Young*, 290 Ill.Dec. 504, 821 N.E.2d at 1086. Foreseeability may be decided by the court as a matter of law where the issue is so clear that reasonable minds could not differ. *Id.* For instance, in *Pacelli v. Kloppenberg*, 65 Ill.App.3d 150, 22 Ill.Dec. 250, 382 N.E.2d 570, 571 (1978), relied on by Defendants, the court found that an at-

torney could not be held liable for failing to protect the plaintiff from the actions of a licensed real estate broker, who stole money the plaintiff had deposited into an escrow account. The court found "nothing in the record to suggest that defendant had any reason to question the honesty" of the broker, who was himself the plaintiff's fiduciary. *Id.* at 571. In considering the foreseeability of the broker's actions, the court concluded, "Duty is imposed not on the mere possibility of occurrence, but on what the reasonably prudent man would then have foreseen as likely to happen." *Id.*

[6] To the extent Defendants believe *Pacelli* stands for the principle that a defendant can never be held liable for the criminal acts of a third party, such a definitive rule has in recent years given way to a case-by-case analysis of whether the third party's criminal acts were foreseeable. *See Bourgonje v. Machev*, 362 Ill.App.3d 984, 298 Ill.Dec. 953, 841 N.E.2d 96, 117 (2005) ("While at one time criminal acts were presumed unforeseeable, the law has developed to recognize that criminal acts may become foreseeable in a variety *819 of circumstances...."). In this case, unlike in *Pacelli*, there is evidence from which a reasonable jury could conclude that Hamed's actions were foreseeable. As a general matter, we do not find it entirely unforeseeable that a spouse would dissipate or abscond with marital assets during the course of a divorce proceeding. *See generally In re Marriage of Schmitt*, 321 Ill.App.3d 360, 254 Ill.Dec. 484, 747 N.E.2d 524 (2001) (trial court properly granted temporary restraining order where there was a risk husband would dissipate marital assets); *In re Marriage of Gurda*, 304 Ill.App.3d 1019, 238 Ill.Dec. 236, 711 N.E.2d 339 (1999) (husband improperly dissipated marital assets); *In re Marriage of Toth*, 224 Ill.App.3d 43, 166 Ill.Dec. 478, 586 N.E.2d 436 (1992) (both spouses improperly dissipated marital assets). Indeed, the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"), 750 ILCS 5/101 *et seq.*, provides various remedies, such as freezing bank accounts and prohibiting the sale of assets without a court order, precisely because it

is not unusual that a spouse might appropriate marital assets before they can be divided by the court. *See* 750 ILCS 5/501(a)(2)(i).

Additionally, while the matter is disputed, Plaintiff testified that she informed both attorneys about her concerns Hamed would dissipate the marital assets. (R. 55, Def. Gurewitz's Facts, Ex. G (Sobilo's Dep. Tr.) at 212-14, 219-20.) Hamed's history of dissipating assets is also reflected in the pleadings drafted by Defendant Manassa in both the 2002 and 2003 cases (which would have been apparent to Defendant Gurewitz upon his review of the file), and in the petition for temporary relief filed by Defendant Gurewitz in the 2003 case. (R. 61, Def. Manassa's Facts, Ex. D (2002 Petition) ¶ 18 & Ex. G (2003 Petition) ¶ 18; R. 61, Def. Manassa's Facts, Ex. N (Petition for Temporary Relief) at ¶ 12.) Plaintiff's expert opined that given Hamed's history, Defendants should have recognized the risks and taken greater steps to independently investigate Hamed's finances and prevent his dissipation of the marital assets. (R. 55, Def. Gurewitz's Facts, Ex. J (Hyink's Report) at 20-25.) Thus, we reject Defendants' argument that Hamed's actions were unforeseeable as a matter of law.^{FN9}

FN9. We note that Defendant Gurewitz has adopted Defendant Manassa's foreseeability argument without any analysis of how the facts specifically pertaining to him demonstrate that he could not have foreseen Hamed's actions. (R. 53, Def. Gurewitz's Mem. in Supp. of Mot. for Summ. J. at 15.) Finding no such analysis, we reject his argument for the same reasons.

II. Actual Damages

A. Whether There Is Evidence Plaintiff Would Have Been Entitled to Any of The Assets That Hamed Dissipated

[7] Next, Defendant Manassa argues, and Defendant Gurewitz joins him in arguing, "There is no evidence that Sobilo suffered actual damages" as a

result of their alleged negligence. (R. 66, Def. Manassa's Mem. in Supp. of Mot. for Summ. J. at 10.) Defendants are correct that Plaintiff must prove actual damages to recover for legal malpractice. *See Mihailovich*, 359 F.3d at 904-05. The plaintiff in a malpractice case must essentially prove a "case within a case" by showing that her attorney was negligent and, additionally, that absent the attorney's negligence she would have prevailed in the underlying litigation. *Id.*; *Klump v. Duffus*, 71 F.3d 1368, 1373 (7th Cir.1996). Defendants argue that Plaintiff cannot demonstrate actual damages because: (1) there is no evidence that any of the money Hamed wire-transferred to *820 Egypt constituted marital assets; and (2) there is no evidence that Plaintiff would have been awarded any of this money in the divorce.

[8][9] Under the IMDMA, all property acquired during the marriage is presumed to be marital unless it falls under an enumerated category, such as property acquired by gift or legacy to one spouse. *See* 750 ILCS 5/503(a). The statute creates a rebuttable presumption that property acquired during the marriage is marital, regardless of how title is held. 750 ILCS 5/503(b); *In re Marriage of Wanstreet*, 364 Ill.App.3d 729, 301 Ill.Dec. 706, 847 N.E.2d 716, 721 (2006). The burden is on the spouse claiming that a piece of property is not marital to prove by clear and convincing evidence that the property sought to be excluded falls under one of the statutory exceptions. *Id.* § 503(b); *Wanstreet*, 301 Ill.Dec. 706, 847 N.E.2d at 721. Any doubt as to the nature of the property is resolved in favor of finding that the property is marital. *Berger v. Berger*, 357 Ill.App.3d 651, 293 Ill.Dec. 954, 829 N.E.2d 879, 887 (2005).

Although numerous fact disputes remain regarding the marital assets, there is evidence in the record from which a reasonable jury could find the following: during the marriage, Hamed was the breadwinner of the family and Plaintiff was a homemaker; during the marriage Hamed acquired several pieces of real property and started several

businesses; Hamed disposed of several assets immediately prior to and during the 2003 divorce proceeding; Hamed made numerous wire-transfers to Egypt prior to and during the pendency of the 2003 case, including from bank accounts held in the name of his businesses. (*See* pages 808-12, *supra.*) Given the strong presumption in favor of classifying property as marital, we find it highly unlikely that *none* of the properties, businesses, or funds held in Hamed's bank accounts constituted marital property.

Likewise, a reasonable jury could find that Plaintiff would have been awarded some of these assets in the divorce. Indeed, the divorce court awarded Plaintiff sole rights to the Nefertiti Café, along with approximately \$750,000 in wire-transferred funds, reflecting the court's view that Plaintiff was entitled to these assets under the IMDMA. (R. 61, Def. Manassa's Facts, Ex. K (Divorce Judgment) at 7.) Plaintiff's expert opined that the court took the view that since it was impossible to ascertain the full extent of the marital estate due to Hamed's extensive subterfuge, awarding these assets to Plaintiff was a fair division of the property. (R. 55, Def. Gurewitz's Facts, Ex. K (Hyink's Dep. Tr.) at 25.) Plaintiff's expert also opined that Plaintiff would have been entitled to at least 50 percent of all additional marital assets had they not been dissipated. (R. 55, Def. Gurewitz's Facts, Ex. J (Hyink's Report) at 18.)

Because we find evidence from which a jury could conclude that at least some of the assets Hamed dissipated constituted marital assets, and that Plaintiff was entitled to at least a portion of these assets in the divorce, we decline to grant summary judgment on this ground.

B. Whether Plaintiff Has Failed To Prove That The Underlying Judgment "Was or Is" Collectible

[10] Next, Defendant Gurewitz argues, and Defendant Manassa joins him in arguing, that Plaintiff's malpractice claim fails because she cannot demonstrate the underlying divorce judgment

"was or is" collectible. (R. 53, Def. Gurewitz's Mem. in Supp. of Mot. for Summ. J. at 9.) Defendants are correct that Plaintiff must prove she would have recovered in the underlying action to succeed on her malpractice *821 claim. As the Seventh Circuit has explained, "In a malpractice action, a plaintiff's 'actual injury' is measured by the amount of money she would have actually *collected* had her attorney not been negligent." *Klump*, 71 F.3d at 1374 (emphasis in original). Awarding damages above that which the plaintiff could have actually collected in the underlying suit would result in a "windfall" to the plaintiff. *Id.* In other words, if the plaintiff could not have collected a full judgment from the defendant in the underlying case, the attorney's negligence did not injure her in that amount: "[S]he simply could not lose what she could never have had." *Id.* at 1375; see also *Bloome v. Wiseman, Shaikewitz, McGivern, Wahl, Flavin & Hesi, P.C.*, 279 Ill.App.3d 469, 216 Ill.Dec. 197, 664 N.E.2d 1125, 1131 (1996) ("The legal malpractice action places the plaintiff in the same position he or she would have occupied but for the attorney's negligence.... The link exists to ensure that the plaintiff is in no better position by bringing suit against the attorney than if the underlying action against the third-party tortfeasor had been successfully prosecuted.").

[11] Defendants argue that Plaintiff cannot establish collectibility of the underlying judgment because "[b]y her own testimony (and thus a fact not in dispute), she was and still is unable to collect one single cent of it." (R. 53, Def. Gurewitz's Mem. in Supp. of Mot. for Summ. J. at 9.) We find this argument unpersuasive. Plaintiff claims that she has been unable to collect the divorce judgment because Defendants were negligent in failing to take adequate steps to preserve the marital estate so that she could obtain her share of it in the divorce. What she would have collected in the divorce absent the Defendants' negligence is the appropriate measure of her damages.^{FN10} See *Klump*, 71 F.3d at 1374 (under Illinois law "plaintiff's 'actual injury' is measured by the amount of money she would have

actually collected *had her attorney not been negligent*") (emphasis added).

FN10. Plaintiff argues that the issue is whether she can prove Hamed was "solvent" at the time of the 2003 proceeding, not whether the underlying judgment is collectible. (R. 78, Pl.'s Resp. to Def. Gurewitz's Mot. for Summ. J. at 9-11.) Plaintiff is correct that some courts have discussed solvency in lieu of collectibility. See *Bloome*, 216 Ill.Dec. 197, 664 N.E.2d at 1131; *Goldzier v. Poole*, 82 Ill.App. 469 (Ill.App.Ct.1899). We do not see a conflict in the law as Plaintiff does, however; we believe this to be simply different ways of characterizing the same inquiry, namely, whether the plaintiff would have actually *recovered* in the underlying litigation. The type of proof required to satisfy this element will differ from case to case. *Bloome*, 216 Ill.Dec. 197, 664 N.E.2d at 1131. Regardless of the terminology used, the central issue is whether the plaintiff's recovery in the underlying litigation "could in part or in whole have been realized had the attorney not been negligent." *Id.* (citing *Goldzier*, 82 Ill.App. at 472). This will be Plaintiff's burden to prove at trial. *Klump*, 71 F.3d at 1374 (plaintiff bears the burden of proving "the amount she would have actually collected from the tortfeasor as an element of her malpractice claim"). In regards to solvency, we note that the evidence before us indicates that Hamed was solvent at the time of the 2003 proceeding. See *Bloome*, 216 Ill.Dec. 197, 664 N.E.2d at 1131 (finding underlying defendant was solvent because he had the ability to generate income).

Defendants' reliance on *Sheppard v. Krol*, 218 Ill.App.3d 254, 161 Ill.Dec. 85, 578 N.E.2d 212 (1991) does not change our conclusion. In *Sheppard*, the lack of information about who had manu-

factured a forklift, the product at issue in the plaintiff's underlying products liability suit, made it wholly speculative whether and to what extent plaintiff would have recovered in the underlying suit. The plaintiff nonetheless argued that he should be allowed to seek compensation against his attorney "for the loss of any chance he had to recover" in the underlying case. *822 *Sheppard*, 161 Ill.Dec. 85, 578 N.E.2d at 217. The court disagreed, observing that "our legal system does not permit liability based on conjecture." *Id.* Here, Plaintiff is not seeking conjectural damages for the loss of "any chance" she had to recover in the divorce case. Rather, she seeks to recover her share of the marital assets which she claims were lost due to Defendants' negligence. While the full extent of the marital estate may never be known because of Hamed's deception,^{FN11} Plaintiff could recover her share of the *known* marital assets if she can prove that Defendants were negligent. *See Klump*, 71 F.3d at 1374. Accordingly, we decline to grant summary judgment on this ground.

FN11. For instance, Plaintiff's damages expert, Jerome Lipman, has revealed evidence suggesting that Hamed may have had foreign bank accounts and a business relationship with a Canadian company that deals with offshore transactions and investments. (R. 55, Def. Gurewitz's Facts, Ex. Q (Lipman's Report) at 7.)

III. The Defendants' Remaining Arguments

We turn now to the separate arguments raised by Defendant Manassa and Defendant Gurewitz, respectively.

A. Whether Defendant Manassa "did not have any evidence that would allow him to obtain a TRO stopping Seleman from transferring money to Egypt"

Defendant Manassa argues that he is entitled to summary judgment because "there is no proof Manassa could have obtained a temporary restraining order (TRO) stopping Seleman from transferring funds." (R. 66, Def. Manassa's Memo. in Supp. of

Mot. for Summ. J. at 6.) The gist of Defendant Manassa's argument is that, even though there is considerable evidence Plaintiff informed him of her concerns about Hamed's dissipation of assets prior to the 2002 case, the circumstances were entirely changed by the time of the 2003 proceeding. He asserts, "Sobilo informed Manassa that she was no longer concerned that Seleman was dissipating funds from the marital estate or that he would flee the country with their children." (R. 77, Pl.'s Resp. to Def. Manassa's Facts ¶ 18.) Whether Plaintiff made this statement is one of the many factual disputes that exist in this case. (*Id.*; R. 55., Def. Gurewitz's Facts, Ex. G (Sobilo Dep. Tr.) at 49, 149-50, 210-14, 220.)

There is also a dispute as to whether a competent attorney would simply rely on his client's assessment of the risk that her spouse might dissipate or abscond with assets. Plaintiff's expert, Hyink, opined that Defendant Manassa should have conducted his own investigation of Hamed's finances. (*See* R. 55, Def. Gurewitz's Facts, Ex. J (Hyink's Report) at 20-26.) Had he done so he would have discovered substantial evidence of Hamed's dissipation of assets. (R. 55, Def. Gurewitz's Facts, Ex. J (Hyink's Report) at 22-23, Ex. K (Hyink's Dep. Tr.) at 35-36, 167-68.) Hyink also opined that the November 2003 order entered by agreement of Defendant Manassa was "very poor, poorly drawn and not a proper approach to this kind of situation," and that Defendant Manassa should have sought a TRO specifically freezing Hamed's accounts. (R. 55, Def. Gurewitz's Facts, Ex. K (Hyink Dep. Tr.) at 36, 167-68).

[12] Even if there was no dispute as to the underlying facts, Defendant Manassa's view that he no longer had any reason to suspect that Hamed might dissipate or abscond with assets is but one inference that can be taken from the facts. Another inference, representing Plaintiff's view, is that even though Hamed had returned *823 some of their assets to a joint account, the 2003 proceeding was merely a continuation of the 2002 proceeding presenting all

the same issues, including that Hamed might dissipate or abscond with marital assets. (*See* R. 55, Def. Gurewitz's Facts, Ex. G (Sobilo Dep. Tr.) at 49, 210-223.) There is evidence supporting Plaintiff's view, including Defendant Manassa's testimony that he did not require her to fill out a new client intake sheet when she contacted him about filing the 2003 petition; instead, he simply worked off the intake sheet prepared with respect to the 2002 case, adding some notes, including that Hamed had recently purchased a condominium in Egypt. (R. 61, Def. Manassa's Facts, Ex. C (Manassa Dep. Tr.) at 21.)

Whether Plaintiff's or Defendant Manassa's view should prevail is not a matter that can be decided here, since making a choice among reasonable inferences is a function of the fact-finder. *See Harley-Davidson Motor Co.*, 319 F.3d at 989. Because there is evidence from which a reasonable jury could conclude that Defendant Manassa had a sufficient basis to move for a TRO, his motion for summary judgment is denied.

B. Whether Defendant Gurewitz Is Entitled To Partial Summary Judgment

Defendant Gurewitz raises two alternative arguments in favor of partial summary judgment on certain of Plaintiff's claims.

1. Whether Defendant Gurewitz's Failure to Record a Lis Pendens Notice "Is Not A Proximate Cause That Allowed Hamed to Convey The Irving Park Property"

Defendant Gurewitz first argues that his failure to record a *lis pendens* notice on the Irving Park property was not the proximate cause of Plaintiff's damages with respect to the property. *Lis pendens*, in plain terms, means "pending suit." *Admiral Builders Corp. v. Robert Hall Vill.*, 101 Ill.App.3d 132, 56 Ill.Dec. 627, 427 N.E.2d 1032, 1035 (1981). The Illinois *lis pendens* statute provides that when a lawsuit is pending involving a piece of real property, the filing of a *lis pendens* notice with the recorder of deeds constitutes constructive notice of the lawsuit to any person who subsequently ac-

quires an interest in that property. 735 ILCS 5/2-1901; *City of Chicago v. Ramirez*, 366 Ill.App.3d 935, 304 Ill.Dec. 62, 852 N.E.2d 312, 322 (2006). A person who acquires the property after the recording of the *lis pendens* notice takes the property subject to any superior interests that may be determined in the lawsuit. *See* 735 ILCS 5/2-1901; *Ramirez*, 304 Ill.Dec. 62, 852 N.E.2d at 322.

Defendant Gurewitz argues that his failure to register a *lis pendens* notice could not possibly have caused the loss of the Irving Park property because "a *lis pendens* notice does not act as a prophylactic to the transfer of real estate." (R. 53, Def. Gurewitz's Mem. in Supp. of Mot. for Summ. J. at 11.) As evidence for this proposition he points out that Hamed was able to convey the property to Sami M. Rageb even though Charter One Bank had recorded a Notice of Foreclosure, which he argues is the equivalent of *lis pendens* notice, prior to the sale. He also points out that even though Plaintiff, through attorney Jacqueline, eventually recorded a *lis pendens* notice in October 2005, Rageb was able to convey the property four months later to an unknown third party. Therefore, Defendant Gurewitz argues, "Plaintiff cannot prove that, but for Gurewitz's negligent failure to record a *lis pendens* notice against the Irving Park Property, Hamed would not have been able to convey it." (*Id.* at 12.)

[13][14] Defendant Gurewitz misses the point of the *lis pendens* statute. While a *824 *lis pendens* notice does not give the filer a lien or act as an injunction preventing sale of the property, it "gives notice to purchasers of the land that there may be superior interests." *In re Leonard*, 125 F.3d 543, 545 (7th Cir.1997). The failure to record a *lis pendens* notice will result in the loss of the property if it is sold to a "bona fide purchaser," defined as a purchaser for value who had no notice of the pending suit. *See First Midwest v. Pogge*, 293 Ill.App.3d 359, 227 Ill.Dec. 713, 687 N.E.2d 1195, 1198 (1997); *Admiral Builders Corp.*, 56 Ill.Dec. 627, 427 N.E.2d at 1037. A purchaser cannot claim

to be a bona fide purchaser if a *lis pendens* notice was filed prior to the date he or she acquired an interest in the property. See *First Midwest*, 227 Ill.Dec. 713, 687 N.E.2d at 1198; see also *Sec. Sav. & Loan Ass'n v. Hofmann*, 181 Ill.App.3d 419, 130 Ill.Dec. 197, 537 N.E.2d 18, 20 (1989) (recording of *lis pendens* notice by wife in divorce case prevented mortgagee from claiming to be innocent purchaser and thus wife's interest was superior to mortgagee's). Conversely, if no *lis pendens* notice is filed, and the subsequent purchaser did not otherwise have notice of the pending suit, he takes the property free of any interest determined in the suit. FN12 See *First Midwest*, 227 Ill.Dec. 713, 687 N.E.2d at 1198.

FN12. Contrary to Defendant Gurewitz's suggestion, the Illinois Uniform Fraudulent Transfer Act ("UFTA"), 740 ILCS 160/1 *et. seq.*, does not provide an automatic remedy for Plaintiff. (R. 88, Def. Gurewitz's Reply in Supp. of Mot. for Summ. J. at 11.) Under the UFTA, Plaintiff could not void a transfer made to a bona fide purchaser. 740 ILCS 160/9; *Kennedy v. Four Boys Labor Serv., Inc.*, 279 Ill.App.3d 361, 216 Ill.Dec. 160, 664 N.E.2d 1088, 1093 (1996).

[15] Thus, although the sale of the Irving Park property may not have been prevented if Defendant Gurewitz had filed a *lis pendens* notice, the absence of a *lis pendens* notice will make it more difficult for Plaintiff to assert her interest in the property against subsequent purchasers. Moreover, in Hyink's view, the recording of a *lis pendens* by Defendants might have made it less likely that Hamed would have fled the jurisdiction, since he would have had less ability to liquidate his assets. (R. 55, Def. Gurewitz's Facts, Ex. K (Hyink's Dep. Tr.) at 66-67.) Hyink also suggested that the existence of a *lis pendens* notice might have made the property less attractive to potential buyers and thus, in an indirect way, hampered the sale of the property. (R. 55, Def. Gurewitz's Facts, Ex. K. (Hyink's Dep. Tr.)

at 80-83.) We therefore find evidence from which a reasonable jury could conclude that Defendant Gurewitz's failure to file a *lis pendens* notice was a proximate cause of some of Plaintiff's alleged damages with respect to the Irving Park property, precluding summary judgment on this claim.

2. Whether Defendant Gurewitz Lacked A Duty To Prevent Wire Transfers Occurring Prior to January 16, 2004

[16] Defendant Gurewitz's final argument is that he had "no duty to prevent" any wire transfers that were made prior to January 16, 2004, the date on which he and Plaintiff executed a retainer agreement. FN13 While Defendant Gurewitz had no *825 duty, or even any ability, to *prevent* wire-transfers that occurred prior to his representation, we find evidence in the record from which a reasonable jury could conclude that Defendant Gurewitz's negligence was a proximate cause of Plaintiff's injury with respect to these funds. Specifically, Plaintiff's expert opined that Defendant Gurewitz breached the standard of care in failing to properly investigate Hamed's finances, failing to seek an order freezing Hamed's accounts, and failing to pursue available remedies to recoup the money that had already been wire-transferred. (R. 55, Def. Gurewitz's Facts, Ex. J (Hyink's Report) & Ex. K (Hyink Dep Tr.) at 170-76.) According to Plaintiff's expert, had Defendant Gurewitz taken these steps, the previously transferred assets might have been restored. FN14 For these reasons, we decline to grant partial summary judgment to Defendant Gurewitz.

FN13. In a footnote, Defendant Gurewitz posits-without elaboration-that he "arguably" had no duty to undertake any action on Plaintiff's behalf until February 3, 2004, the date upon which the state court granted his motion for leave to file a substitution of counsel. (R. 53, Def. Gurewitz's Mem. In Supp. of Mot. for Summ. J. at 13 n. 3.) Without any specific argument by Defendant Gurewitz as to why his duties as counsel did not arise on the date he

signed a retainer agreement with Plaintiff, we decline to give the matter further consideration. We note, however, that Hyink found it "unusual" and "not very prompt" that Defendant Gurewitz waited nearly three weeks to move for substitution of counsel following his retention by Plaintiff. (R. 55, Def. Gurewitz's Facts, Ex. K (Hyink's Dep. Tr.) at 33-34.) Hyink further testified that given the exigencies of this case, Defendant Gurewitz could have filed an emergency motion for substitution of counsel immediately after being retained. (*Id.* at 34-35.)

FN14. We note additionally that Defendant Gurewitz's liability is not necessarily limited to the \$250,000 transferred during the time he was Plaintiff's counsel. As Plaintiff's expert pointed out, when Defendant Gurewitz began his representation there was more than \$400,000 in assets still within the United States. Plaintiff's expert opined that had Defendant Gurewitz acted diligently by properly investigating Hamed's finances and taking appropriate steps to prevent the transfer of funds, all of that money would have remained within the divorce court's jurisdiction. (R. 55, Def. Gurewitz's Facts, Ex. K (Hyink's Dep. Tr.) at 59-60.)

DEFENDANT MANASSA'S MOTION TO STRIKE

Finally, Defendant Manassa moves to strike Plaintiff's affidavit submitted in opposition to his summary judgment motion, arguing that it improperly contradicts various portions of her sworn deposition testimony. (R. 93, Def. Manassa's Mot. to Strike.) The Court has discretion in deciding whether to strike the affidavit. *Adusumilli v. City of Chicago*, 164 F.3d 353, 359 (7th Cir.1998).

Defendant Manassa first takes issue with Paragraph 2 of the affidavit, in which Plaintiff states: "I told all my attorneys that represented me in my di-

vorce, including Manassa when he filed the 2003 divorce case ... that I feared Hamed would dissipate marital assets and potentially abscond." (R. 77, Pl.'s Resp. to Def. Manassa's Facts, Ex. 6 (Pl.'s Aff.) at ¶ 2.) Defendant Manassa points to various portions of Plaintiff's testimony that he claims contradicts this statement, including her testimony that she did not recall whether she had a face-to-face meeting with Defendant Manassa prior to his filing of the 2003 case, and that she could not recall if she specifically informed Defendant Manassa of her fear that Hamed would abscond before the filing of the 2003 case. (R. 93, Def. Manassa's Mot. to Strike at 2-3.) As we read it, Plaintiff's deposition testimony was that she was unsure about whether she had a formal meeting with Defendant Manassa prior to the filing of the 2003 case, not whether she conveyed to him her continuing belief that Hamed might dissipate the marital assets. (*See* R. 55, Def. Gurewitz's Facts, Ex. G (Sobilo's Dep. Tr.) at 213-14, 219-20.) At other points in her testimony, she testified that she did convey her fears to Defendant Manassa about Hamed dissipating assets during the 2003 case. (*Id.* at 213-14, 200, 220) We note additionally that *826 the testimony cited by Defendant Manassa pertains only to Hamed absconding; it states nothing about whether Plaintiff recalled telling Defendant Manassa about her fear that Hamed would dissipate assets. Further, Defendant Manassa's own testimony suggests that the two may have had discussions about Hamed's potential to abscond at some point during the 2003 case, even if they did not have a formal discussion on that topic prior to the filing of the case. (*See* R. 61, Def. Manassa's Facts, Ex. C (Manassa's Dep. Tr.) at 102.) To the extent there are ambiguities in the deposition testimony, we believe this a matter best sorted out by the jury. *Szymanski v. Rite-Way Lawn Maint. Co., Inc.*, 231 F.3d 360, 365-66 (7th Cir.2000) (inconsistencies within deposition testimony and affidavit were "best left to a jury making a credibility determination.").

Assuming there is some conflict between Plaintiff's deposition testimony and her affidavit,

the proper course is for us to simply disregard the affidavit. *Pourghoraishi v. Flying J., Inc.*, 449 F.3d 751, 759 (7th Cir.2006); *Piscione v. Ernst & Young, LLP*, 171 F.3d 527, 532-33 (7th Cir.1999). We have found no need to rely on Plaintiff's assertion in Paragraph 2 because, as discussed in Sections I and III above, we have found other evidence creating a fact issue as to what Defendants knew or should have known regarding the likelihood that Hamed would dissipate the marital assets. Thus, we decline to strike Paragraph 2.

Defendant Manassa also takes issue with Paragraphs 4 and 15 of the affidavit, in which Plaintiff attests that the funds Hamed wire-transferred to Egypt constituted marital assets, and that three transfers made in 2003 came from a certificate of deposit held at Foster Bank. (R. 77, Pl.'s Resp. to Def. Manassa's Facts, Ex. 6 (Pl.'s Aff.) at ¶¶ 4, 15.) At her deposition Plaintiff indicated that she did not know the exact source of the wire-transferred funds because they were still being traced. (See R. 55, Def. Gurewitz's Facts, Ex. G (Sobilo's Dep. Tr.) at 209-11, 228.)

We do not see an inherent conflict in the two documents, as it is clear from the record that the source of the wire-transferred funds is a complex matter which has been under investigation during this litigation. Plaintiff's damages expert, Jerome Lipman, has poured through Hamed's bank accounts and business records in an attempt to discern the source of the wire-transferred funds, and has discovered a tangled web of deposits, withdrawals, and wire-transfers made from Hamed's numerous accounts. (See R. 55, Def. Gurewitz's Facts, Ex. Q (Lipman's Report).) Nevertheless, assuming there is a conflict between the affidavit and deposition testimony, we have not relied on Paragraphs 4 and 15 of Plaintiff's affidavit in determining whether there are fact disputes that preclude summary judgment. See *Pourghoraishi*, 449 F.3d at 759. As discussed in Section II above, we have found other evidence in the record apart from the affidavit creating a fact dispute regarding Plaintiff's actual damages. For

these reasons, we decline to strike these paragraphs.

CONCLUSION

For the reasons set forth above, Defendant Manassa's motion for summary judgment (R. 64) is denied, and Defendant Gurewitz's motion for summary judgment (R. 51) is denied. Defendant Manassa's motion to strike (R. 93) is also denied.

The parties are directed to reevaluate their settlement positions in light of this ruling and undertake new efforts to settle this case. A status hearing will be held in open court on **April 10, 2007 at 9:45 a.m.**, at which time counsel shall be prepared to *827 report on the status of settlement discussions and, if necessary, provide a proposed date for the trial of this matter. Finally, if this matter will proceed to trial, the parties are directed to reevaluate their respective motions in limine in light of this opinion.

N.D.Ill.,2007.

Sobilo v. Manassa
479 F.Supp.2d 805

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LINDA E. STANLEY, Plaintiff and Appellant, v. DIANA RICHMOND et al., Defendants and Respondents.

No. A062468.

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

35 Cal. App. 4th 1070; 41 Cal. Rptr. 2d 768; 1995 Cal. App. LEXIS 551; 95 Cal. Daily Op. Service 4598; 95 Daily Journal DAR 8016

June 14, 1995, Decided

PRIOR HISTORY: [***1] Superior Court of the City and County of San Francisco, No. 914517, Carlos Bea, Judge.

DISPOSITION: Of course, we express no opinion about the ultimate disposition of appellant's claims. We merely hold that the trial court erred by ruling that she did not make a prima facie showing of each element of her causes of action for breach of fiduciary duty, professional negligence, and breach of contract. For all the foregoing reasons, the judgment of the trial court is reversed and the cause remanded for a new trial. Costs to appellant.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiff filed an action for breach of fiduciary duty, legal malpractice, and breach of contract against the attorney who represented her in a dissolution of marriage proceeding at the same time the attorney was in the process of forming a new law firm with plaintiff's husband's attorney. At the close of plaintiff's evidence in a jury trial, the trial court granted defendant's motion for nonsuit, ruling that plaintiff was required--and failed--to present expert testimony on the applicable standard of care for family law attorneys, and that plaintiff failed to present evidence that, but for defendant's alleged breach of fiduciary duty, plaintiff would have obtained a better result in the dissolution proceedings. (Superior Court of the City and County of San Francisco, No. 914517, Carlos Bea, Judge.)

The Court of Appeal reversed and remanded for a new trial, holding that plaintiff established a prima facie case of breach of fiduciary duty, professional negligence, and breach of contract. The court held that the testimony by plaintiff's expert on legal ethics about the Rules of Professional Conduct and the common law of attorney fiduciary duty, and his opinions that defendant violated her duties under each, were plainly sufficient to establish the first two elements of a cause of action for breach of fiduciary duty, the existence of the duty, and its breach. When taken together with defendant's own expert testimony and her denials, the expert's testimony was more than sufficient to raise questions of fact whether defendant had an actual conflict of interest by virtue of her agreement to go into practice with the opposing attorney, whether she obtained an informed consent to her continued employment as plaintiff's counsel of record after that conflict arose, whether her representation of plaintiff was compromised by her relationship with the other attorney, and whether she breached her fiduciary duties with respect to withdrawal from the action. The court further held that defendant's own testimony was sufficient to raise a question of fact as to her negligence in advising plaintiff about the consequences of ceding her interest in her husband's government pension, and her failure to obtain an offset for the tax liability plaintiff incurred as the result of a monetary distribution she received from her former law firm. The court also held that the evidence was sufficient to establish that it was more likely than not that the conduct of defendant was a substantial factor in causing plaintiff's claimed damages. There was substantial evidence that, because of defendant's plan to go into practice with the other attorney before the expiration of plaintiff's right of first refusal on the purchase of

the family home, defendant had placed undue pressure on her client to settle the property division issues more quickly than necessary and on less favorable terms than plaintiff could have obtained without the time constraints. (Opinion by Phelan, J., with Smith, Acting P. J., and Hearle, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Dismissal and Nonsuit § 48--Nonsuit--Evidence--Sufficiency. --In determining whether a plaintiff's evidence is sufficient to withstand a motion for nonsuit, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to the plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give to the plaintiff's evidence all the value to which it is legally entitled, including every legitimate inference that may be drawn from the evidence in the plaintiff's favor.

(2) Attorneys at Law § 20--Attorney-client Relationship--Liability of Attorneys--Breach of Fiduciary Duty--Elements--Evidence. --A breach of fiduciary duty is a specie of tort distinct from a cause of action for professional negligence. The elements of a cause of action for breach of fiduciary duty by an attorney are existence of a fiduciary duty, breach of the fiduciary duty, and damage proximately caused by the breach. The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his or her client. Whether an attorney has breached a fiduciary duty to his or her client is generally a question of fact. Expert testimony is not required, but is admissible to establish the duty and breach elements of a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge.

(3a) (3b) Attorneys at Law § 15--Attorney-client Relationship--Conflict of Interest--Breach of Fiduciary Duty--Attorney in Process of Forming Law Firm With Opposing Counsel During Representation in Dissolution Proceeding. --In an action for breach of fiduciary duty against an attorney who represented plaintiff in a dissolution of marriage proceeding while she was in the process of forming a new law firm with the attorney for plaintiff's husband, the testimony of an expert in

legal ethics, when taken together with defendant's own expert testimony and her denials, was more than sufficient to establish both the duty and breach elements of the cause of action. The expert testified that, by entering into and commencing performance under an agreement to form a new law firm with her opposing counsel, defendant arguably moved into an attorney-client relationship with plaintiff's husband that "flowed through" her prospective law partner, without plaintiff's consent, which violated both the literal proscription of the Rules of Professional Conduct on simultaneous representation of conflicting interests (*Rules of Professional Conduct, rule 5-102(A) & (B)*), and the common law fiduciary duties she owed to plaintiff. The evidence was sufficient to show that defendant's personal interests in having the other attorney join her in the practice of law as "ostensible partners," before plaintiff's case could be wrapped up, actually conflicted with her duty to obtain for her client a reasonable settlement of the outstanding property division issues in the dissolution action.

[See 1 **Witkin**, Cal. Procedure (3d ed. 1985), § 95.]

(4) Attorneys at Law § 11--Attorney-client Relationship--Duties of Attorney to Client--Loyalty. --One of the principal obligations that binds an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him or her by those who employ him or her, and at every peril to himself or herself to preserve the secrets of his or her client. This obligation is a very high and stringent one. It is also an attorney's duty to protect the client in every possible way, and it is a violation of that duty to assume a position adverse or antagonistic to the client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. By virtue of this rule an attorney is precluded from assuming any relationship that would prevent him or her from devoting his or her entire energies to his or her client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself or herself in a position where he or she may be required to choose between conflicting duties, or be led to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he or she should alone represent.

(5) Attorneys at Law § 22--Attorney-client Relationship--Liability of Attorneys--Acts Constituting Malpractice--Negligent Investigation, Advice, or Conduct. --An attorney is subject to liability for malpractice when his or her negligent investigation, advice, or conduct of the client's affairs results in loss of a meritorious claim. When rendering advice to a client, an attorney assumes an obligation to the client to undertake reasonable re-

search in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based on an intelligent assessment of the problem. This includes a duty to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.

(6) Attorneys at Law § 25--Attorney-client Relationship--Liability of Attorneys--Trial of Malpractice Actions--Action Against Legal Specialist--Necessity for Expert Testimony. --Where a malpractice action is brought against an attorney holding herself or himself out as a legal specialist and the claim against the attorney relates to her or his expertise, then only a person knowledgeable in the specialty can define the applicable duty of care and render an opinion on whether it was met. However, where the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required. If the attorney's negligence is readily apparent from the facts of the case, then any testimony of an expert may not be necessary.

(7) Attorneys at Law § 25--Attorney-client Relationship--Liability of Attorneys--Trial of Malpractice Actions--Negligence of Attorney in Advising Client in Dissolution Proceeding to Cede Entire Interest in Spouse's Pension--Necessity for Expert Testimony. --In an action for breach of fiduciary duty against an attorney who represented plaintiff in a dissolution of marriage proceeding while she was in the process of forming a new law firm with the attorney for plaintiff's husband, it was a question of fact within the ken of a lay jury, without the necessity of expert testimony, to decide whether defendant was negligent in advising plaintiff to cede her entire interest in her husband's federal pension. Plaintiff had informed defendant of the importance of her retaining health care benefits under the pension and had specifically requested legal advice on the advantages and disadvantages of waiving her interest in the pension. Yet, defendant's advice demonstrated a total failure to perform even the most perfunctory research on the legal issues. Had plaintiff retained just a \$1 interest in the pension, she would have kept her health coverage thereunder. The jury could decide whether defendant's failure to conduct research and her failure to discover information that could have been easily discovered through standard research techniques was a violation of the applicable standard of care.

(8) Attorneys at Law § 25--Attorney-client Relationship--Liability of Attorneys--Trial of Malpractice Actions--Negligence of Attorney in Failing to Obtain Offset for Tax Liability for Client in Dissolution Proceeding--Necessity for Expert Testimony. --In an

action for breach of fiduciary duty against an attorney who represented plaintiff in a dissolution of marriage proceeding while she was in the process of forming a new law firm with the attorney for plaintiff's husband, it was a question of fact within the ken of a lay jury, without the necessity of expert testimony, to decide whether defendant was negligent in failing to obtain an offset for the tax liability plaintiff incurred as a result of the distribution to her of the full amount of the payments from the buyout of her partnership interest in her former law firm. There was no dispute that the payments were a community asset awarded to plaintiff in the final distribution of property as part of a strategy to equalize the uneven division of other community assets. In these circumstances, the tax consequences of the distribution must be considered when there is proof of an immediate and specific tax liability arising in connection therewith, and each party is responsible for one-half of the capital gains taxes incurred by the sale regardless of the party's share of the sale proceeds. Testimony about these requirements, coupled with evidence that defendant had unnecessarily rushed to finalize the property division, was sufficient to raise a question of fact as to a negligent failure to provide for the tax aspects of the payments.

(9) Attorneys at Law § 25--Attorney-client Relationship--Liability of Attorneys--Trial of Malpractice Actions--Breach of Fiduciary Duty--Proximate Cause of Damages--Sufficiency of Evidence. --In an action for breach of fiduciary duty against an attorney who represented plaintiff in a dissolution of marriage proceeding while she was in the process of forming a new law firm with the attorney for plaintiff's husband, the trial court erred in granting defendant a nonsuit after the close of plaintiff's evidence. The evidence was sufficient to establish that it was more likely than not that the conduct of defendant was a substantial factor in causing plaintiff's claimed damages. There was substantial evidence that, because of defendant's plan to go into practice with the other attorney before the expiration of plaintiff's right of first refusal on the purchase of the family home, defendant had placed undue pressure on her client to settle the property division issues more quickly than necessary and on less favorable terms than plaintiff could have obtained without the time constraints.

(10) Attorneys at Law § 25--Attorney-client Relationship--Liability of Attorneys--Trial of Malpractice Actions--Breach of Fiduciary Duty--Emotional Distress Damages. --Damages for emotional distress suffered by an attorney's client are recoverable if directly caused by the attorney's conduct in breach of her or his fiduciary duties.

COUNSEL: Moore & Moore and Howard Moore, Jr., for Plaintiff and Appellant.

Plastiras & Forsblad and Basil Plastiras for Defendants and Respondents.

JUDGES: Opinion by Phelan, J., with Smith, Acting P. J., and Hearle, J., concurring.

OPINION BY: PHELAN, J.

OPINION

[*1075] [**769] PHELAN, J.

Linda E. Stanley (appellant) timely appeals from a judgment of nonsuit entered as to her claims for breach of fiduciary duty, legal malpractice, and breach of contract. These claims against respondents Diana Richmond (Richmond or respondent) and her law firm, Richmond & Chamberlin (collectively, hereinafter, respondents), arose out of a dissolution proceeding [***2] in which Richmond represented appellant, and C. Rick Chamberlin (Chamberlin), an attorney with whom Richmond was in the process of forming a new law firm, represented appellant's husband, Dr. John Stanley (Dr. Stanley). At the close of appellant's evidence in a jury trial, the court granted respondents' motion for nonsuit (*Code Civ. Proc.*, § 581, subd. (c)), ruling that appellant was required--and failed--to present expert testimony on the applicable standard of care for family law attorneys, and that appellant failed to present evidence that, but for Richmond's alleged breach(es) of fiduciary duty, appellant would have obtained a better result in the dissolution proceedings.

We conclude that appellant established a prima facie case of breach of fiduciary duty, professional negligence, and breach of contract. Accordingly, we reverse the judgment of the trial court and remand for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

Viewed in the light most favorable to appellant, with all presumptions, inferences and doubts resolved in her favor (*Carson v. Facilities Development Co.* (1984) 36 Cal. 3d 830, 838-840 [206 Cal. Rptr. 136, 686 P.2d 656]), the evidence presented [***3] to the trier of fact was as follows. [*1076]

Appellant and Dr. Stanley were married in 1958 and separated on January 6, 1986. When the couple separated, appellant moved out of the family home. Dr. Stanley petitioned for dissolution of the marriage in June 1986.

Appellant is a litigation attorney specializing in bankruptcy matters. She was a partner in the law firm of Dinkelspiel & Dinkelspiel until June 1986, when she left

to start a new firm, Taylor & Stanley. On February 1, 1989, Taylor & Stanley was acquired by Nossaman, Gunther, Knox & Elliot (the Nossaman firm), a statewide general service law firm with its main offices in Los Angeles and San Francisco.

In June 1987, appellant retained Richmond to represent her in the marital dissolution proceedings. At the time, Richmond's law offices were located at 100 Embarcadero Center in San Francisco, in space she sub-leased from the Nossaman firm. Richmond's written retainer agreement provided that, "We will exert our best efforts on your behalf consistent with the canons of ethics of the legal profession, to provide legal counsel, advice, and representation."

Dr. Stanley retained Chamberlin as his attorney for the dissolution [***4] proceedings in or about February 1988. Chamberlin was at the time a partner with Stotter, [**770] Chamberlin & Coats, whose offices were at 1735 Franklin Street in San Francisco.

A. June 1988 Trial re Division of Marital Property.

A three-day trial on the marital property issues was held in June 1988. Two of the issues at trial were the division of the family residence in Belvedere, which was valued at \$825,000, and disposition of Dr. Stanley's University of California (UC), Veterans' Administration (VA), and "TIAA/CREF" retirement accounts. The retirement accounts were worth over \$600,000 in the aggregate. Another asset subject to distribution at trial was appellant's Dinkelspiel & Dinkelspiel partnership withdrawal payments. Appellant and Dr. Stanley stipulated before trial that the community property interest in those payments was \$37,600.

At the end of the trial, the court denied appellant's request to award her the family residence and ordered the home sold, but provided that either party could bid on the property. The court further ordered that the Dinkelspiel & Dinkelspiel payments be awarded to appellant, and that Dr. Stanley's retirement plans should be divided [***5] equally in kind. On June 21, 1988, the parties were directed to draft a proposed final judgment for the court's approval. Over the following eight months, the parties continued to dispute [*1077] many specifics of the property division, and exchanged six drafts of the form of judgment before finally settling the matter. ¹

1 At least two of these drafts were exchanged after Richmond's alleged conflict of interest arose.

B. Posttrial Efforts to Finalize the Marital Property Division.

After the trial of the property issues was concluded, appellant began to complain that Richmond had become

ineffectual in efforts to wind up the dissolution. For example, on December 9, 1988, appellant wrote to Richmond and expressed concern about Richmond's apparent unwillingness to challenge Chamberlin on key issues. Unknown to appellant, Richmond had met with Chamberlin in July or August of 1988 and invited him to join her in the practice of law. Richmond wanted Chamberlin to relocate with her when she moved her [***6] offices later in the year. At that time, Chamberlin declined the invitation and Richmond claimed she "abandoned that concept."

In or about October 1988, Dr. Stanley listed the Belvedere house for sale, at an asking price of \$1,150,333. Dr. Stanley thereafter received several offers on the property, none of which was acceptable. At the time, appellant was unable to bid on the house because her law firm, Taylor & Stanley, was doing poorly.

Also in October 1988, however, appellant's financial situation began to change. That was when she began negotiating an employment agreement with the Nossaman firm, to begin working there on February 1, 1989. Her new salary would improve her financial condition considerably.

On January 12, 1989, an acceptable all-cash offer to purchase the Belvedere home for \$1,008,000 was made by Paul and Elizabeth Wiser (the Wiser offer). At that time, appellant did not specify terms on which she would buy Dr. Stanley's interest in the house, but she did authorize respondent to convey to Dr. Stanley her intent to exercise her right of first refusal.

Less than two weeks later, on January 23, Richmond received a telephone call from Chamberlin in which he reportedly [***7] said Dr. Stanley was becoming impatient and had instructed him to bring a motion to compel acceptance of the Wiser offer unless appellant came up with specific, acceptable terms. When Richmond called to tell appellant of the threatened motion, appellant initially said she was too busy dealing with the Nossaman firm about her new employment arrangements. Later the same day, however, appellant called Richmond back to say she had struck a deal with the Nossaman firm and to propose paying Dr. Stanley "\$250,000 via a loan." On January 24, [*1078] Richmond wrote to appellant setting forth terms--specifically a \$360,000 purchase price--under which Chamberlin had indicated Dr. Stanley would [**771] agree to appellant's purchase of his share of the house. Apparently, Chamberlin also informed Richmond that, if appellant obtained a \$250,000 bank loan, Dr. Stanley might be willing to take a note from appellant for the \$110,000 balance.

Appellant testified that the pressure Dr. Stanley and the two lawyers were applying to compel sale of the house in late January was inappropriate, unnecessarily

intense, and contrary to the family court's orders. Under all versions of the proposed [***8] final judgment in the dissolution action, appellant had a fixed period of time--90 days--from acceptance of a third party offer to purchase her husband's interest in the Belvedere house. The Wiser offer was made on or about January 12, and appellant communicated her intent to exercise her rights of first refusal on the same date. Appellant thus had until at least April 12 to obtain financing to buy out Dr. Stanley.

A plausible reason for the intense pressure surfaced within two days after appellant learned about Chamberlin's plan to compel sale of the house. On or about January 25, Chamberlin called Richmond to inquire if she was still interested in having him join her in the practice of law. Richmond told Chamberlin that she was, indeed, still interested, and agreed to check if there was additional space in the building where she had leased offices to relocate her law practice.

Also on January 25, Richmond called appellant to tell her that she and opposing counsel Chamberlin were "seriously discussing taking offices together within the next 60 days." Richmond confirmed their conversation in a letter dated January 26. Stanley testified about her reaction to Richmond's news: "My [***9] first impression was to laugh in disbelief. I was just amazed that here I was in a situation where the opposing counsel and my attorney were going to go [in]to practice or going to share offices together. But I said, well, that's all the more reason to get this judgment finished, which has languished all this time." Stanley further testified that she understood "taking offices together" to mean that Richmond and Chamberlin would be renting space in the same building--as Richmond had done with the Nossaman firm--but not that they would be starting a new law firm together. Apparently, Richmond's and Chamberlin's plan was to open the new law firm within 60 days of January 25, i.e., by March 26, when Richmond's sublease with the Nossaman firm expired. ² In a curious twist of the concept of attorney-client confidentiality, Richmond asked appellant to keep the information private as it was "not yet general knowledge." In her confirming [*1079] letter of January 26, Richmond also noted that her plan to go into practice with Chamberlin was "yet another reason to conclude your dissolution as soon as we possibly can."

2 In fact, Richmond and Chamberlin probably began practicing fewer than 60 days after giving appellant notice of their plan. On or about March 22, 1989, appellant received some papers in an envelope bearing a mailing label with the firm name "Richmond & Chamberlin" printed on it.

[***10] Contrary to Richmond's representations to her client on January 25 and 26 that she and Chamber-

lin were merely "discussing taking offices together," a jury could infer from their conduct that, by that time, they had already agreed to go into practice together and were actively organizing their new law firm, Richmond & Chamberlin. Richmond admitted that within 48 hours of her telephone call to appellant on January 25, she and Chamberlin met with a realtor to acquire additional office space for their new law firm. While continuing to represent opposing parties in ongoing litigation, Richmond and Chamberlin also selected associates (from among the attorneys employed by their separate law firms), stationery, forms of retainer, announcements, computers, and a telephone system for Richmond & Chamberlin. A bank account was also established in the firm name at Wells Fargo Bank. By February 1, Richmond and Chamberlin had made arrangements for the additional office space Chamberlin needed. Attorney fees due Chamberlin from the proceeds of the sale of the Belvedere house would be used to finance his move into Richmond's law offices.

On Friday, January 27, Richmond sent Chamberlin a detailed [***11] offer under which appellant would buy Dr. Stanley's share of the Belvedere house for \$250,000 cash, with a [**772] note to Dr. Stanley for the balance of the suggested \$354,000 purchase price. As part of that proposal, Richmond suggested that the UC pension be used as necessary to equalize the division of community property assets. That same day, Chamberlin served a motion to compel appellant to accept the Wiser offer and to obtain appointment of a receiver if appellant refused to join in the sale. The motion was noticed for hearing on February 16. Appellant's responsive pleadings were, thus, due by noon on Thursday, February 9. Appellant instructed Richmond in writing to "get this off calendar & negotiate with Rick" about her offer to buy Dr. Stanley's interest in the house. She also called Richmond early in the week of January 30 to ask her to "ensure that [Dr. Stanley's] motion to compel the sale of the house is taken off calendar."

Also on January 27, Dr. Stanley delivered a handwritten note to his ex-wife at her San Francisco apartment. Appellant interpreted her ex-husband's note, entitled "Rough Outline of John's Proposal," as an offer to sell the house. Accordingly, [***12] she faxed a purported acceptance directly to Chamberlin, saying that she had applied for bank loans in the amount of \$550,000 [*1080] and that she accepted Dr. Stanley's suggestion that any shortfall be made up out of her share of the UC retirement account. After obtaining approval from Richmond's office, Chamberlin responded directly to appellant, saying that Dr. Stanley's note was not intended as an offer and that he would be responding to Richmond's January 27 letter by February 8.

On Thursday, February 2, Richmond dictated a letter to appellant, saying that she had discussed appellant's January 27 offer with Chamberlin, and that Dr. Stanley was likely to reject any proposal that would require him to accept a note from appellant or remain obligated on the existing mortgage. In the same letter, Richmond informed appellant that she would be out of the office until Wednesday, February 8, on business and a ski trip. Richmond also responded to her client's demand that Chamberlin's motion to compel be taken off calendar, as follows: "This is not reasonably achievable no matter who opposing counsel is. The fact is that the two of you have a favorable offer. Either it should be [***13] accepted or you should buy out [Dr. Stanley] on reasonable terms. If we have to argue the motion, you should know that our responsive papers are due with the court no later than February 9, 1989, and my prediction is that the judge would allow the other offer to go forward unless you can truly match its terms." Richmond did not explain when or how she would be defending appellant against Chamberlin's motion to compel sale of the house.

On Friday, February 3, appellant wrote to Richmond to reiterate her desire to exercise her right of first refusal, and to describe her efforts to obtain appropriate bank financing. She informed Richmond that she considered Dr. Stanley's and Chamberlin's pursuit of the motion to compel sale to be sanctionable in the circumstances, and admonished Richmond to "[b]e an advocate."

On Tuesday, February 7, appellant wrote to Chamberlin and threatened to seek to disqualify him because of a conflict of interest, saying, "Business partners should not be representing parties on the opposite sides of the lawsuit." On the same day, appellant responded to Richmond's February 2 letter and complained that she had been unavailable and ineffective in representing [***14] appellant's interests. Appellant also specifically charged that she was being "adversely affect[ed]" by Richmond's conflict of interest "now that you and Rick will be practicing in the same offices starting on March 1."

When Richmond returned from her ski trip on Wednesday, February 8, she served a substitution of attorneys by which she would have been replaced as counsel of record by appellant proceeding in propria persona. In [*1081] her brief, Richmond describes this action as a "response to appellant's loss of confidence." Appellant refused to sign the substitution form because she did not believe she could competently represent herself or obtain new counsel on such short notice. When Richmond served appellant with the substitution form, she knew that appellant was trying to arrange new counsel, but that the attorney she had selected, John McCall, could not appear in the action until March 3 or March 10 at the earliest.

[**773] Also on February 8, Chamberlin responded to appellant's January 27 proposal to buy Dr. Stanley's interest in the house. In that letter, Chamberlin suggested for the first time that appellant cede her interest in Dr. Stanley's VA pension--rather [***15] than a portion of his UC retirement account--as an "equalizing mechanism" in appellant's purchase of the house.

On February 9, Richmond filed a two-paragraph opposition to Chamberlin's motion to compel, arguing only that a sale to third parties would result in adverse tax consequences for both appellant and her ex-husband. Richmond mentioned appellant's right of first refusal, but she did not inform the court that appellant had a full 90 days (until at least April 12) to consummate her own purchase of the house. Also on February 9, Richmond filed an ex parte motion to withdraw from the case, and to continue the hearing on Chamberlin's motion. The ex parte motions were put over for hearing with Chamberlin's motion on February 16.

On February 14, appellant met with Richmond and asked her for advice about "the pluses and minuses of John's taking all of the [VA] Retirement Plan rather than substantially all of the [UC] Voluntary Plan." After discussing the matter with an actuary and analyzing the practical advantages of retaining rights to the UC pension and disadvantages of "taking an actuarial value of a pension versus dividing it in kind," but without doing any research on the [***16] law governing federal pensions, Richmond advised appellant to waive her interest in the VA pension.

On February 16, the parties appeared in Marin County Superior Court, only to discover that the assigned judge was not present and that the motion would be heard by Judge Beverly Savitt. Judge Savitt was willing to accept a disqualification because she had previously served as a settlement judge in the case. Instead of proceeding before a different judge on her motions for a continuance and to withdraw from the case, however, Richmond met with appellant in the corridor of the Marin County Superior Court and induced her to enter into a settlement which was read into the record. Appellant objected that she did not understand the agreement she was being asked to make. In response, Richmond told her client, "Don't be a baby, this is the [*1082] way you will get your house." Appellant explained that she went ahead with the settlement "at the request of Diana Richmond," AS FOLLOWS: "I was--I had--I had a lawyer who was--basically abandoned me, and I was looking at losing my house, and she said that's the only way I could get the house, so I walked in and agreed."

Under the terms of [***17] the settlement entered on the record on February 16, appellant ceded her entire interest in Dr. Stanley's VA pension to him, received the

entire cash settlement from the buyout of her partnership interest in Dinkelspiel & Dinkelspiel without any allowance for the tax consequences to her, and approved a division of the community property which miscalculated the amount of rent due the community from the Dr. Stanley's use of the family home during the pendency of the dissolution.

On February 28, appellant received a copy of Chamberlin's draft of the proposed judgment, which was to reflect the February 16 agreement. She immediately realized that, even though she had ceded both her interest in the VA pension and another asset, there was a \$70,000 shortfall in the plan for her to purchase the Belvedere house.

On March 7, at appellant's insistence, Richmond prepared and filed a motion to set aside the February 16 agreement on the ground that the stipulation was "based on mistaken fact, mistaken values, because of [Dr. Stanley's] misrepresentations and clerical error." Richmond demanded that appellant delete from her supporting declaration a passage in which she had described the February [***18] 16 agreement as "the hurried product of two lawyers with a conflict anxious to get out of the case." Richmond also refused to allow appellant to make any reference to the conflict of interest created by the formation of her law firm with opposing counsel because, she claims, "[I]t wasn't true." However, Richmond did include arguments that appellant entered into the stipulation under "an honest mistake of the facts," and that "[appellant's] mistake can be inferred from the totality of the confused and pressured atmosphere surrounding the making of the stipulation and the fact that its terms run counter to her purpose in making it."

[**774] On March 15, John McCall substituted into the case to represent appellant. McCall felt that his hands were tied with respect to obtaining relief from the February 16 settlement. Confronted with that situation, McCall arranged a four-way meeting between himself, appellant, Chamberlin, and Dr. Stanley. At that meeting, McCall was able to secure an agreement which permitted appellant to buy Dr. Stanley's interest in the house, but was unable to modify the settlement in any other respect. McCall attributed his limited [*1083] success, in [***19] part, to Dr. Stanley whom he described as "aggressively mean-spirited concerning these negotiations." Appellant paid McCall fees totaling \$2,290.60 to "mitigate the damages caused by Richmond's conflict of interest."

In August 1989, appellant learned that, although she was an otherwise eligible unremarried ex-spouse of a civil service employee, she was not allowed to enroll in the Federal Employees' Health Benefits (FEHB) Program because she had ceded her entire interest in Dr. Stanley's

VA pension. Had she retained a minimum \$1 interest in the VA pension, she would have been eligible for life-time health insurance from the FEHB at very low cost, as well as a possible survivor's annuity.

On August 18, 1989, appellant wrote to Richmond and asked if she knew appellant would have been eligible for FEHB health insurance if she had reserved a \$1 interest in Dr. Stanley's civil service pension as a part of the February 16 settlement. Richmond replied that she "did not know" appellant was thereby foreclosed from receiving the federal benefits.

C. Expert Testimony re Breach of Fiduciary Duty and Malpractice.

Professor Richard Zitrin, an expert in legal ethics, testified that [***20] Richmond had a conflict of interest as of January 25, as follows: "She had decided just at a time when a lot of things were happening on the case, particularly relating to the house, the Stanley house, that she and Mr. Chamberlin were going to join forces in some way and open a law office, and that created a conflict of interest between her desire to open a law office with Mr. Chamberlin, who is opposing counsel, and her obligation to represent [appellant] in the domestic relations matter." Professor Zitrin further opined that the conflict was not adequately disclosed to appellant by the January 26 letter. Rather, he said, when the conflict of interest arose, Richmond had an obligation to inform appellant of the nature and consequences of the conflict and to obtain her informed written consent to continued representation. Richmond did neither. Zitrin also testified that Richmond breached her duties to her client by forcing appellant to remove from her declaration for the March 7 motion the statement that the erroneous judgment was "the hurried product of two lawyers with a conflict anxious to get out of the case." He said this was a violation of the client's right to control the [***21] litigation, and an effort by Richmond to protect her own interests over those of her client.

[*1084] Professor Zitrin further testified that Richmond violated *rule 5-102 (A) of the California Rules of Professional Conduct*³ (*rule 5-102*) which provides, in relevant part: "A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment." He explained that Mr. Richmond acquired an interest in [**775] the subject matter of the representation when "she and Chamberlin decided to become office mates and take steps in that direction," and that she violated *rule 5-102* by failing to make full disclosure of the nature and consequences of her conflict of interest

and of her relationship with an adverse party, Dr. Stanley, a relationship which "flowed through Mr. Chamberlin." Given that she did not have her client's informed consent to the conflict, Richmond had a further duty to withdraw as soon as practical, but [***22] only after taking "reasonable steps to avoid foreseeable prejudice to the rights of [her] client, including giving due notice to [the] client [and] allowing time for employment of other counsel" (Former rule 2-111; see also rule 3-700(A)(1)(2).)

3 All references to rules in this case will be to the California Rules of Professional Conduct which were in effect in from June 1987 through March 1989, while Richmond was representing appellant in the dissolution action. Those rules were significantly revised and renumbered, effective May 27, 1989, and amended again in August 1992. "Former *rule 5-102* (as well as former rule 4-101 [requiring attorneys to preserve the confidentiality of client matters]) became part of current rule 3-310 following [the Supreme Court's] adoption of the revised Rules of Professional Conduct of the State Bar of California on November 28, 1988. The former rules governing attorneys' duties of confidentiality and loyalty were thus consolidated into a single rule." (*Flatt v. Superior Court* (1994) 9 Cal. 4th 275, 288, fn. 5 [36 Cal. Rptr. 2d 537, 885 P.2d 950].)

[***23] At the end of Professor Zitrin's testimony, the court denied a motion by respondents' counsel for a ruling as a matter of law that there had been no violation of *rule 5-102*. The court ruled that, under a proper instruction pursuant to *rule 5-102*, the jury would decide as a matter of fact whether Richmond had violated her fiduciary duties to appellant.

Richmond designated herself as an expert on the standards of care applicable to family law specialists, and appellant exercised her right to call Richmond in her case-in-chief to testify on that issue. (See *Evid. Code*, § 776.) In that regard, Richmond testified that she owed appellant a duty to "use diligence, skill and prudence" in her performance of professional services, and to "make reasonable research into the [VA] existing statutes and regulations pertaining to the matters" about which she was advising appellant, at least "[t]o the extent [she] didn't already know them." As a family law specialist, and as part of her duty of "due diligence," she also said [*1085] she had a duty "[t]o keep abreast of changes in family law." Richmond defined "research" as including both factual and legal research, the latter involving [***24] "looking at the law to see what the law is," and "looking to see if the law has changed since you last

looked at it." She further opined that "the research that one does should be proportional to the task assigned."

With respect to the services at issue in this case, Richmond testified that "The task assigned to me was to weigh these pensions," and to "compare and advise [appellant] of the [UC] retirement with the [VA] pension." She admitted that there was plenty of money in the UC retirement account to equalize the property division and that, in fact, appellant's preference had consistently been "to use the [UC] retirement to make up the shortfall." Richmond also acknowledged that she knew there were federal regulations governing Dr. Stanley's VA pension, and that the law governing federal pensions had "changed dramatically and unexpectedly over time," but that she did not consult them to formulate her advice to appellant and had not done so "for a considerable period" before appellant asked her to research the pension issues. She thus failed to discover that, by retaining at least a \$1 interest in the VA pension, appellant could have participated in the low-cost federal [***25] health insurance programs. ⁴ Richmond, nevertheless, advised appellant to give up her entire interest in the VA pension.

4 Appellant made an offer of proof that retaining a \$1 interest in the VA pension would have yielded lifetime benefits worth \$14,000 to \$150,000, depending on the assumptions used to calculate the value of the benefits. The trial court deemed it unnecessary to hear testimony from appellant's damages expert on this issues before hearing Richmond's nonsuit motion.

James Petray, a certified public accountant who prepared appellant's tax returns, testified about the tax effect of appellant's receipt of the Dinkelspiel settlement payments. He said she incurred a tax liability of \$14,312 in tax years 1988 and 1989, which was directly traceable to the Dinkelspiel payments, and that this amount was reasonably ascertainable both at the time of trial in June 1988 and at the time of settlement in February 1989.

D. The Judgment of Nonsuit.

At the conclusion of appellant's case-in-chief, [***26] the trial court invited Richmond to move for nonsuit pursuant to *Code of Civil Procedure section 581, subdivision (c)*. The court believed appellant was required and failed to present testimony from a family law expert to show that Richmond's conduct fell below the standard of care for professional [**776] negligence, and that appellant would have obtained a more favorable settlement if she had had conflict-free counsel. The court did not draw any distinction between appellant's three causes of action, and applied the same malpractice standards to [*1086] each. This timely appeal fol-

lowed entry of an order granting Richmond's motion for nonsuit.

II. DISCUSSION

The issue presented in this appeal is whether appellant presented substantial evidence--including any required expert testimony--to support a prima facie claim of breach of fiduciary duty, professional negligence, and/or breach of contract. (See *Diesel Electric Sales & Service, Inc. v. Marcos Marine San Diego, Inc.* (1993) 16 Cal. App. 4th 202, 211 [20 Cal. Rptr. 2d 62].) (1) "In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. [***27] Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the plaintiff[s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[s] favor' " (*Campbell v. General Motors Corp.* (1982) 32 Cal. 3d 112, 118 [184 Cal. Rptr. 891, 649 P.2d 224].)

A. *Professor Zitrin's Expert Testimony Was Sufficient to Establish Both the Duty and Breach Elements of a Cause of Action for Breach of Fiduciary Duty.*

Appellant first contends that the trial court erred by applying the same evidentiary standards to each of her three claims. More specifically, she argues that it was error to require testimony from a family law expert about the negligence standard of care in order to make a prima facie showing of breach of fiduciary duty. (2) Appellant is, of course, correct that a breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence. (*Barbara A. v. John G.* (1983) 145 Cal. App. 3d 369, 382-383 [193 Cal. Rptr. 422]; cf. *Budd v. Nixen* (1971) 6 Cal. 3d [***28] 195, 200 [98 Cal. Rptr. 849, 491 P.2d 433] [elements of cause of action for professional negligence].) The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. (*Pierce v. Lyman* (1991) 1 Cal. App. 4th 1093, 1101 [3 Cal. Rptr. 2d 236].)

The scope of an attorney's fiduciary duty may be determined as a matter of law based on the Rules of Professional Conduct which, "together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his [or her] client." (*Mirabito v. Liccardo* (1992) 4 Cal. App. 4th 41, 45 [5 Cal. Rptr. 2d 571]; *David Welch Co. v. Erskine & Tulley* (1988) 203 [*1087] Cal. App. 3d 884, 890 [250 Cal. Rptr. 339].) Whether an attorney has breached a fiduci-

ary duty to his or her client is generally a question of fact. (*David Welch Co. v. Erskine & Tulley, supra*, 203 Cal. App. 3d at p. 890.) Expert testimony is not required (*id. at pp. 892-893*), but is admissible to establish the duty and breach elements of [***29] a cause of action for breach of fiduciary duty where the attorney conduct is a matter beyond common knowledge (*id. at p. 893; Mirabito v. Liccardo, supra*, 4 Cal. App. 4th at pp. 45-46; see also *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1146-1147 [217 Cal. Rptr. 89]*).

(3a) Professor Zitrin's testimony about the Rules of Professional Conduct and the common law of attorney fiduciary duty, and his opinions that Richmond violated her duties under each, were plainly sufficient to establish the first two elements of a cause of action for breach of fiduciary duty. Indeed, when taken together with Richmond's own expert testimony and her denials, Zitrin's testimony was more than sufficient to raise questions of fact whether Richmond had an actual conflict of interest by virtue of her agreement to go into practice with Chamberlin, whether she obtained an informed consent to her continued employment as appellant's counsel of record after that conflict arose, whether her representation of appellant was compromised by her relationship [**777] with Chamberlin, and whether she breached her fiduciary duties with respect to withdrawal from the action.

While there was no evidence [***30] that Richmond actively participated in advising her client's ex-husband, Professor Zitrin provided two theories under which appellant could establish that Richmond's loyalty to appellant was impaired by her agreement to go into practice with Chamberlin before the dissolution action was wrapped up. First, by entering into and commencing performance under an agreement to form a new law firm with her opposing counsel, Richmond arguably moved into an attorney-client relationship with Dr. Stanley that "flowed through" her prospective law partner, Chamberlin. Notwithstanding the fact that she and Chamberlin were not yet sharing office space, a jury could reasonably find that, by assuming such a position without obtaining written consent from appellant, Richmond (and Chamberlin) violated both the literal proscription on simultaneous representation of conflicting interests (*rule 5-102(A) & (B)*), and the common law fiduciary duties she owed to appellant. (Cf. *Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 9-11 [136 Cal. Rptr. 373]* [attorney violated *rule 5-102(B)* by representing client in a personal injury matter while, without the knowledge and consent of the client, another partner in [***31] same law firm was representing client's wife in divorce action]; see also *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1056 [8 Cal. Rptr. 2d 228]*, [law firm "created conflict" by assuming representation of

plaintiff company A [*1088] against defendant company B and concurrently representing subsidiary of B in unrelated litigation, and violation of rule 3-310(B) could not be cured by dropping subsidiary of B like a "hot potato" in order to continue representation of A]; *Cinema 5, Ltd. v. Cinerama, Inc. (2d Cir. 1976) 528 F.2d 1384, 1386-1387* [conduct of lawyer was "prima facie improper" where he represented client as a defendant in an antitrust action, while his law partner sued the same client in a different court as an alleged conspirator in an unlawful takeover attempt]; *McCafferty v. Musat (Colo.Ct.App. 1990) 817 P.2d 1039, 1044* [plaintiff's attorney who was negotiating with and received offer to join law firm that was representing defendant in products liability case had a nonwaivable conflict of interest].)⁵

5 The parties have not cited and our research has not revealed any California case directly on point. However, two cases from other jurisdictions, *Cinema 5, Ltd. v. Cinerama, Inc., supra*, 528 F.2d 1384, and *McCafferty v. Musat, supra*, 817 P.2d 1039, provide the most closely analogous factual situations we have been able to uncover. In *Cinema 5, Ltd.*, which was cited by our Supreme Court with approval in *Flatt v. Superior Court, supra*, 9 Cal. 4th at pages 286-287, the lawyer who was charged with a conflict of interest was a partner in two different law firms, one in Buffalo, New York, and one in New York City. The court held that when the client retained a member of the Buffalo firm to defend it in the antitrust action, ". . . it was entitled to feel that at least until that litigation was at an end, it had his undivided loyalty as its advocate and champion [citation] and could rely upon his 'undivided allegiance and faithful, devoted service.'" (*Cinema 5, Ltd. v. Cinerama, Inc., supra*, 528 F.2d at p. 1386.) The New York City firm was, thus, subject to mandatory disqualification. (*Ibid.*)

McCafferty v. Musat, supra, 817 P.2d 1039, a malpractice case, is most closely on point, although it arose in a true civil litigation (personal injury) context and fails to distinguish between claims of professional negligence and breach of fiduciary duty against a litigator who was accused of providing deficient representation in prosecuting and settling a products liability case because of a conflict of interest. In that case, the plaintiff, McCafferty, was a miner who was seriously injured in a blasting accident. (*Id. at pp. 1040-1041.*) There was evidence that the manufacturer of an explosive fuse cord was negligent in preparing instructions and providing training for the safe use of its product. (*Id. at p. 1041.*) The attorney, Musat, accepted the case and ad-

vised McCafferty he had strong claims which would probably yield a settlement that would provide McCafferty with \$60,000 a year for the rest of his life. (*Ibid.*) However, approximately five months after filing suit--and unbeknownst to McCafferty--Musat began actively seeking employment with the law firm that was representing the defendant manufacturer. Two months later, prior to completion of substantial discovery, Musat received an offer of employment from the defense firm. (*Ibid.*) Upon receiving the offer, Musat informed his client of the conflict of interest. He also changed his advice about the value of the plaintiff's claims, saying that McCafferty "had no case" against the manufacturer. Musat also conveyed a \$5,000 settlement offer to McCafferty and advised him to accept it, calling it a "gift" that was tendered by the defendant as a favor to Musat. (*Ibid.*) McCafferty accepted the settlement offer, and Musat began working at the defense firm. Subsequently, McCafferty sued Musat, claiming that by recommending settlement before adequately pursuing discovery, Musat had breached the retainer agreement and negligently failed to use the degree of skill, knowledge, and judgment ordinarily possessed by members of the legal profession. The issue of Musat's professional negligence was presented in a "trial within a trial," after which the jury found that McCafferty would have recovered \$801,600 against the manufacturer of the blasting cord (*id. at p. 1043*), and that Musat was negligent in advising his client about the settlement offer (*id. at p. 1044*). The Colorado Court of Appeals affirmed the judgment entered on the jury verdict, holding that there was sufficient evidence both as to the manufacturer's negligence in failing to provide adequate safety instructions, and as to Musat's negligence in communicating inaccurate information to his client about the settlement value of the case. (*Id. at pp. 1044-1045.*) That evidence included expert testimony that Musat had a nonwaivable conflict of interest and should have withdrawn from McCafferty's case as soon as he began seeking employment with the defense firm, and that he had violated that negligence standard of care when he conveyed inaccurate information about the \$5,000 settlement offer to McCafferty after seeking and obtaining an offer of employment from opposing counsel. (*Ibid.*)

[***32] [*1089] [**778] At oral argument, respondent's counsel contended that Richmond had no conflict of interest and, thus, no duty to obtain appellant's written consent, until the actual "merger" of her practice with that of Chamberlin. That is, although she admittedly

agreed to the merger on January 25, and was in the process of performing under that agreement, she contends no conflict of interest arose until she and Chamberlin actually moved into their joint offices in March 1989. We disagree. We recognize that discussions about a law firm merger can take a variety of forms and proceed through many stages--from casual conversation, to serious negotiations, to agreement in principle, to formal agreement, to intensive planning of the details of the merger. At some point in those discussions, the parties *must* confront and resolve (or "clear") the conflicts presented by the merger plan. Out of an abundance of caution, and to avoid the problems that occurred in this case, it may be prudent to obtain written consent from all affected clients as soon as the parties begin serious negotiations toward a merger. That way, if insurmountable conflicts exist, the parties can make a sound [***33] decision about whether to proceed with the merger. While it may be difficult, as a general matter, to establish a bright line test for when that point has been reached, we have no difficulty concluding that the line was crossed in this case without a satisfactory resolution of the conflict generated when counsel for a wife and a husband in a hotly contested divorce proceeding agreed to merge their practices before a final disposition of the case.

What was at stake when Richmond agreed to form a new law firm with her opposing counsel, while they continued simultaneously to represent adverse parties in a highly contentious dissolution action, was her *duty of loyalty* to appellant. (See *Flatt v. Superior Court, supra, 9 Cal. 4th at p. 284.*) (4) Our Supreme Court recently reaffirmed the long-standing definition of an attorney's duty of loyalty to his or her client, as follows: "One of the principal obligations which bind[s] an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril to himself to preserve the secrets of his client. [Citations.] This obligation is a very high and stringent one. It is [***34] also an attorney's duty to protect his client in every possible way, and it is a violation of that duty to assume a position adverse or antagonistic to his [*1090] client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. [Citation.] *By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests.* Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the inter-

est which he should alone represent.' " (*Flatt v. Superior Court*, *supra*, 9 Cal. 4th at p. 289, quoting *Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788], italics in *Flatt*; see also [**779] *Betts v. Allstate Ins. Co.* (1984) 154 Cal. App. 3d 688, 715-716 [201 ***35] Cal. Rptr. 528].)

(3b) Because a reasonable trier of fact could find that Richmond and Chamberlin agreed on or about January 25 to go into practice together, and were well underway with the logistics of establishing their new law firm, Richmond would have been subject to immediate and "automatic" disqualification under the rule applicable to cases of dual representation. (*Flatt v. Superior Court*, *supra*, 9 Cal. 4th at pp. 284-285.) "The reason for such a rule is evident, even (or perhaps especially) to the nonattorney. A client who learns that his or her lawyer is also representing a litigation adversary . . . cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. All legal technicalities aside, few if any clients would be willing to suffer the prospect of their attorney continuing to represent them under such circumstances." (*Id.* at p. 285.) At a minimum, Richmond was required to make full and timely disclosure of the extent of her relationship with Chamberlin and to obtain appellant's intelligent, informed consent to the dual representation. (*Id.* at p. 285, fn. 4; but cf. [***36] *Klemm v. Superior Court* (1977) 75 Cal. App. 3d 893, 898 [142 Cal. Rptr. 509] ["As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed."].) This, of course, she did not do. Even if she had, however, appellant testified that she would have fired Richmond on January 26 and hired substitute counsel if she had known the extent of Richmond's involvement with Chamberlin on January 25. Instead, Richmond concealed from her client the fact that she had made a commitment to join forces with opposing counsel. On this view of the evidence, Richmond surely violated her duty of loyalty to appellant.

Perhaps more importantly, the evidence is sufficient to show that Richmond's personal interests in having Chamberlin join her in the practice of law as "ostensible partners," before appellant's case could be wrapped up, [*1091] actually conflicted with her duty to obtain for her client a reasonable settlement of the outstanding property division issues in the dissolution action. Both appellant and Professor Zitrin testified about several instances of Richmond placing herself in a position [***37] where she was required to choose between conflicting duties to her client and her new law partner (or her own self-interest), and arguably resolved those conflicts adversely to her client. For example, there was evidence that Richmond filed a hastily prepared,

half-hearted opposition to Chamberlin's motion to compel the sale of the Belvedere house, without informing the court that appellant had almost two more months to finalize her own purchase of her husband's share of the property. Based on this evidence, a reasonable trier of fact could find that Richmond undermined her client's position before the court and weakened her position in the settlement negotiations.

There is also evidence that, in her haste to open her new law firm with Chamberlin, Richmond placed undue pressure on appellant to accept a settlement that was significantly changed in the late stages of the parties' negotiations--after the conflict of interest arose--without performing adequate legal research and without utilizing available time for consideration of certain downside consequences for appellant. ⁶ Rather than pursuing her motion to be relieved as appellant's counsel, Richmond forged ahead with settlement [***38] negotiations on February 16, after predicting to appellant that "the judge would allow the other offer to go forward," and that agreeing to the flawed settlement was "the only way [appellant] could get the house." At trial, Richmond was forced to concede that a continuance of Chamberlin's motion was likely if she had pressed the issue of her conflict of interest. When viewed in the light most favorable to appellant, this evidence could support a finding that, because of a conflict of interest, Richmond overlooked significant drawbacks to her advice that appellant waive her entire interest in the VA [**780] pension (with concomitant loss of lifetime health benefits), and accept her husband's community property interest in the Dinkelspiel payments (without an offset for taxes she paid on the capital gain attributable to his half).

6 To the extent expert testimony may have been required to establish the adequacy of Richmond's advice to appellant on the terms of the settlement, Richmond's own testimony was sufficient to satisfy that requirement. (See § III, B., *post.*)

[***39] Finally, there is evidence that Richmond forced appellant to remove all references to her conflict of interest in her March 7 motion for relief from the judgment. On this evidence, a reasonable trier of fact could find that Richmond was protecting her own professional and economic interests by suppressing this information and, thus, deprived appellant of a plausible ground for obtaining relief from unfavorable aspects of the February 16 [*1092] stipulation. Under these circumstances, we conclude that a reasonable trier of fact could find that Richmond violated her fiduciary duties. ⁷

7 In her retainer agreement, Richmond promised appellant she would use her "best efforts on

your behalf consistent with the canons of ethics of the legal profession, to provide legal counsel, advice, and representation." The proof that Richmond violated the Rules of Professional Conduct and other fiduciary duties owed to her client is, thus, sufficient to support a claim that Richmond's conduct amounted to a breach of contract as well. (See *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal. 3d 176, 181 [98 Cal. Rptr. 837, 491 P.2d 421].)

[***40] B. Respondent's Own Testimony Was Sufficient to Raise a Question of Fact as to Her Negligence in Advising Appellant About the Consequences of Ceding Her Interest in Her Ex-husband's VA Pension, and in Providing for the Tax Consequences of the Dinkelspiel Payments.

As to her cause of action for professional negligence, appellant contends that the trial court erred in ruling that she did not present sufficient expert testimony about the applicable standard of care and the breach of that standard by Richmond. Specifically, appellant argues that Richmond's complete failure to research the federal statutes and regulations governing the VA pension, and to provide for the tax consequences of the Dinkelspiel payments, were obvious instances of negligence as to which the trier of fact did not need expert testimony. Alternatively, appellant argues that Richmond's own testimony was sufficient to establish the standard of care and the breach elements of her malpractice claim. As we will discuss, we find merit in both of these arguments.

(5) It is well settled in California that an attorney is subject to liability for malpractice when his or her negligent investigation, advice, or conduct [***41] of the client's affairs results in loss of a meritorious claim. (*Gutierrez v. Mofid* (1985) 39 Cal. 3d 892, 900 [218 Cal. Rptr. 313, 705 P.2d 886].) When rendering advice to a client, "[A]n attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem." (*Smith v. Lewis* (1975) 13 Cal. 3d 349, 358-359 [118 Cal. Rptr. 621, 530 P.2d 589, 78 A.L.R.3d 231].) This includes a duty to "discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." (*Id.* at p. 358.)

Richmond's expert testimony about the standard of care applicable to her advice to appellant about the "pluses and minuses" of waiving her interest in the VA pension was, in all material respects, consistent with the foregoing standards. In addition, respondent acknowledged that she was under a duty [*1093] as a family

law specialist "[t]o keep abreast of changes in family law," and that "the status and divisibility of federal--of pensions governed by federal statutes [***42] has changed dramatically and unexpectedly over time." Richmond was unquestionably qualified to testify about the standards of care for a family law specialist in advising a client about property division matters and, in fact, gave such testimony. However, because Richmond denied that it was below the standard of care to fail to advise appellant about the consequences of waiving her rights to the VA pension there was no expert testimony on the issue of breach of the applicable standard of care.

[**781] This was not a fatal flaw in appellant's prima facie case. (6) "Where a malpractice action is brought against an attorney holding [herself] out as a legal specialist and the claim against the attorney relates to [her] expertise, then only a person knowledgeable in the specialty can define the applicable duty of care and render an opinion on whether it was met. (*Wright v. Williams* (1975) 47 Cal. App. 3d 802, 810-811. . . .) However, '[w]here the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required.' (*Wilkinson v. Rives* (1981) 116 Cal. App. 3d 641, 647-648. [***43] . . .; see also *Wright v. Williams*, *supra*, 47 Cal. App. 3d at p. 811.) In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary." (*Goebel v. Lauderdale* (1989) 214 Cal. App. 3d 1502, 1508 [263 Cal. Rptr. 275] [expert testimony from bankruptcy specialist not necessary to establish professional negligence claim against bankruptcy attorney who failed to perform even the most perfunctory legal research and, thus, advised his general contractor client to handle financial affairs in a manner that violated *Penal Code* section 484b].)

(7) Appellant argues that Richmond's breach of the professional standard of care as to two aspects of her advice on the February 16 settlement were "so clear that a trier of fact may find professional negligence unassisted by expert testimony." (*Goebel v. Lauderdale*, *supra*, 214 Cal. App. 3d at p. 1508.) We agree. Appellant had informed Richmond early in the proceedings that retention of her health coverage--under which she received benefits from 1976 through the date of the final decree and judgment on dissolution in March 1989--was an important goal going [***44] into the proceedings by which the marital property would be divided. Appellant also specifically asked for legal advice on the "pluses and minuses" of waiving her interests in Dr. Stanley's VA and UC retirement accounts. Richmond admitted that appellant specifically asked for a letter explaining "the advantages or disadvantages of taking the [UC pension] vs. the [VA] pension."

As in *Goebel v. Lauderdale, supra*, respondent's advice with respect to the VA pension "demonstrates a total failure to perform even the most perfunctory research" on the legal issues presented by Dr. Stanley's proposal that [*1094] appellant cede that asset entirely to him. ⁸ (214 Cal. App. 3d at p. 1508.) The testimony of a family law expert was not necessary to establish whether respondent was negligent by failing to perform a simple research task, and by responding to a client's request for advice about the "pluses and minuses" of a decision without the benefit of valuable, and readily available, information. This was *not* an unsettled question of law. It is undisputed that appellant would have been eligible for valuable benefits under the FEHB program if the court had ordered a [***45] minimum \$1 interest in Dr. Stanley's civil service retirement benefits. (See 5 C.F.R. former § 831.1704.) Although the precise value of those benefits was disputed, there is a showing that they were worth in excess of \$14,000.

8 Of course, the criminal conviction of the client in *Goebel v. Lauderdale, supra*, 214 Cal. App. 3d at pages 1505-1506, was a more severe injury than that suffered by appellant. Nevertheless, the point of that case is that an attorney who fails to perform any research on a question of law as to which the client has sought his or her professional advice, and as to which there is a reasonably clear answer that is "easily discovered through standard research techniques," may be held liable for professional negligence without the benefit of expert testimony from a specialist in the field. (*Id.* at pp. 1508-1509; see also *Smith v. Lewis, supra*, 13 Cal. 3d at p. 358.)

An attorney who has conducted a "thorough, contemporaneous research effort," demonstrated "detailed [***46] knowledge of legal developments and debate in the field," and made a decision which represented a "reasoned exercise of an informed judgment grounded upon a professional evaluation of applicable legal principles," may be entitled to judgment as a matter of law. (*Davis v. Damrell* (1981) 119 Cal. App. 3d 883, 888 [174 Cal. Rptr. 257].) However, the differences between Richmond's professional conduct and [**782] that of the lawyer in *Davis v. Damrell, supra*, "inexorably point to potential liability." (*Aloy v. Mash* (1985) 38 Cal. 3d 413, 418 [212 Cal. Rptr. 162, 696 P.2d 656].) Richmond admitted she did not know about the health benefits available to an unremarried former spouse of a civil servant with only the most minimal stake in the civil servant's pension. ⁹ She also admitted that she knew there were applicable federal regulations and that the law governing federal pensions had been quite volatile in the years preceding the Stanleys' divorce. Nevertheless, she completely failed to research standard legal materials

containing information that was important to her client's decision on the property division. We hold that it was a question of fact within the [***47] ken of a lay jury to decide whether respondent's failure to conduct a few minutes--or even a few hours--of legal research, and her failure to discover information [*1095] that could have been "easily discovered through standard research techniques," was a violation of the applicable standard of care. (*Goebel v. Lauderdale, supra*, 214 Cal. App. 3d at p. 1509.)

9 Richmond did not need to look any further than a family law treatise of which she is now an "Editorial Consultant" to determine that the federal Civil Service Retirement Spouse Equity Act of 1984 (Pub.L. No. 98-615 (Nov. 8, 1984) 98 Stat. 3195) "provides certain health benefits for unremarried former spouses." (1 Cal. Family Law Practice & Procedure (2d ed. 1995) § 21.32[2], p. 21-62; see also 2 Cal. Family Law Practice & Procedure (1st ed. 1989) § 24.43[2], pp. 24-161 through 24-162.)

(8) Although it is a closer question, we find the same to be true of Richmond's failure to obtain an offset for the tax liability appellant incurred [***48] as a result of the distribution to her of the full amount of the Dinkelspiel payments. There is no dispute that the Dinkelspiel payments were a community asset awarded to appellant in the final distribution of property as part of a strategy to equalize the uneven division of other community assets. Indeed, Richmond admitted as much in the trial of this action. It is settled that, in these circumstances, the tax consequences of the distribution must be considered when there is proof of an immediate and specific tax liability arising in connection therewith, and each party is responsible for one-half of the capital gains taxes incurred by the sale regardless of the party's share of the sale proceeds. (*In re Marriage of Clark* (1978) 80 Cal. App. 3d 417, 422 [145 Cal. Rptr. 602]; *In re Marriage of Davies* (1983) 143 Cal. App. 3d 851, 856-857, fn. 1 [192 Cal. Rptr. 212].) ¹⁰ As Richmond recognizes, both appellant and John McCall testified about these requirements and about the actual tax liability appellant incurred because of the Dinkelspiel payments. Coupled with evidence that Richmond was unnecessarily rushing to finalize the Stanleys' property division, this testimony was [***49] sufficient to raise a question of fact as to a negligent failure to provide for the tax aspects of the Dinkelspiel payments.

10 Contrary to the argument in Richmond's brief, the 1984 Federal Tax Reform Act (26 U.S.C. § 1041(a)(2)) did not supersede the relevant portions of *In re Clark, supra* (See *In re*

35 Cal. App. 4th 1070, *; 41 Cal. Rptr. 2d 768, **;
1995 Cal. App. LEXIS 551, ***; 95 Cal. Daily Op. Service 4598

Marriage of Harrington (1992) 6 Cal. App. 4th 1847, 1852 [8 Cal. Rptr. 2d 631].

C. There Are Questions of Fact Whether Respondent's Breach of Fiduciary Duty and/or Negligence Caused Appellant's Claimed Damages.

(9) The only remaining question is whether there was sufficient evidence, either disputed or undisputed, that the alleged breaches of fiduciary duty or professional negligence were legal causes of damage to appellant. (See *Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 153 [65 Cal. Rptr. 406, 28 A.L.R.3d 368]*.) It is plaintiff's burden to establish "a reasonable basis for the conclusion that it was more likely than not that the conduct of the defendant was a substantial factor [***50] in the result." (*Ibid.*) We conclude that appellant's evidence is sufficient to raise questions of fact under this standard of causation.

Viewed in the light most favorable to appellant and with all conflicts and inferences resolved in her favor, there is substantial evidence that, because [*1096] of Richmond's plan to go into practice with Chamberlin before the expiration of appellant's right of first refusal, Richmond placed undue pressure on her client to settle the property division issues more quickly than necessary and on less [**783] favorable terms than appellant could have obtained without the time constraints. Certainly, a jury could reasonably infer that Richmond's failure to perform reasonable legal research about the advantages of the VA pension was the product either of her neglect or abandonment of appellant's cause, or of her eagerness to put appellant's case behind her so she and Chamberlin could open their new law offices as planned. This inference arises from the facts that on February 14, with only two days to go before Chamberlin's motion was to be heard, appellant discussed the matter with Richmond and asked for her advice; Richmond rendered a [***51] written opinion the very next day; and then--accepting appellant's version of the events as true--pressured appellant into a settlement waiving all rights in the VA pension the following day. There is, at most, a question of fact whether Dr. Stanley would have accepted a proposal that allowed appellant to retain a \$1 interest in his VA pension so as to preserve her right to a lifetime of very low-cost health benefits. However, on the evidence presented, a jury could reasonably find that such a minimal restructuring of the marital property division would not have been a "deal breaker." ¹¹

11 We agree with appellant that testimony about what Dr. Stanley would have done in response to a proposal to reserve for appellant a \$1 interest in his VA pension was irrelevant. It would have been nothing more than speculation given Richmond's failure to research appellant's

rights under the federal regulations. As we have discussed, Dr. Stanley initiated the proposal to take the VA pension in connection with appellant's purchase of his interest in the Belvedere house. The VA pension had an actuarial value of \$64,000. He wanted the VA pension. He had demonstrated some flexibility in structuring the sale of the house to appellant when he offered to take "the VA retirement or UC or both or whatever works out." The difference between \$64,000 and \$63,999 is so minimal that the jury could easily find specious the suggestion the \$1 difference would have been a deal killer.

[***52] There is also substantial evidence from which a reasonable trier of fact could find that appellant was damaged by Richmond's negligent failure to obtain an offset for the tax liability appellant incurred by accepting the full amount of the community property interest in the Dinkelspiel payments. At the trial of property issues in June 1988, the question of tax consequences attending the distribution of community assets was deferred for the parties' negotiations in connection with the drafting of a judgment. Thus, the issue of tax consequences to appellant due to the Dinkelspiel payments remained an open question until February 16, when the parties read their stipulation into the record. However, that issue was not addressed or resolved in the parties' negotiations and the Dinkelspiel payments were allocated to appellant without any offset for the tax consequences. Thus, the jury could accept or reject appellant's theory that the tax consequences of the Dinkelspiel payments [*1097] should have been considered but were overlooked--with the net result that appellant received less than one-half of the community property--either because Richmond did not want to challenge Chamberlin [***53] on the issue or was in a hurry to finalize the property division so they could get on with their new law practice. In addition, based on Richmond's own characterization of the events of February 16, the jury could reasonably infer from "the totality of the confused and pressured atmosphere surrounding the making of the stipulation and the fact that its terms run counter to [appellant's] purpose in making it" that a mistake had been made in the final computations, and that it was Richmond--not appellant--who had made it.

Of course, as Richmond correctly notes, a violation of the Rules of Professional Conduct does not, in and of itself, render an attorney liable for damages. (*Rule 1-100; Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 658 [109 Cal. Rptr. 269, 73 A.L.R.3d 1164]; Mirabito v. Liccardo, supra, 4 Cal. App. 4th at p. 46, fn. 2.*) However, the evidence in this case is capable of showing that appellant's interests in an equal division of the marital property were prejudiced by Richmond's conduct in

violation of her fiduciary duties, as well as by professional negligence. (Cf. *Mirabito v. Liccardo*, *supra*, 4 Cal. App. 4th at p. 45 [client suffered [***54] financial losses from estate planning attorney's advice to invest in businesses in which attorney had a personal interest].)

[**784] (10) Finally, we note that appellant appears to claim a right to recover damages for emotional distress suffered as a result of Richmond's conflict of interest. Richmond impliedly concedes that such damages are recoverable if directly caused by the attorney's conduct in breach of her fiduciary duties. (*Branch v. Homefed Bank* (1992) 6 Cal. App. 4th 793, 800 [8 Cal. Rptr. 2d 182]; *McDaniel v. Gile* (1991) 230 Cal. App. 3d 363 [281 Cal. Rptr. 242]; and cases collected in *Cooper v. Superior Court* (1984) 153 Cal. App. 3d 1008, 1010-1013 [200 Cal. Rptr. 746].) If credited by the jury, appellant's testimony about the extreme pressure she was under and her state of mind during the last few weeks of Richmond's representation--including feelings of abandonment and betrayal by her attorney, anxiety over her

possible loss of her family home, and undue pressure to obtain financing on a timetable established for the benefit of her attorney and opposing counsel--as well as her loss of lifetime health benefits, may well be sufficient to support an [***55] award of damages for emotional distress from the alleged breaches of fiduciary duty.

III. CONCLUSION

Of course, we express no opinion about the ultimate disposition of appellant's claims. We merely hold that the trial court erred by ruling that she did [*1098] not make a prima facie showing of each element of her causes of action for breach of fiduciary duty, professional negligence, and breach of contract. For all the foregoing reasons, the judgment of the trial court is reversed and the cause remanded for a new trial. Costs to appellant.

Smith, Acting P. J., and Haerle, J., concurred.

C

Supreme Court of Idaho,
Boise, February 2011 Term.
Pamela K. Joerger STEPHEN, Plaintiff/Re-
spondent/Cross-Appellant,

v.

SALLAZ & GATEWOOD, CHTD., Dennis Sallaz
and Scott Gatewood, Defendants/Appel-
lants/Cross-Respondents.

No. 36322.
March 17, 2011.

Background: Former client brought legal malprac-
tice action against divorce attorneys and law firm.
The District Court, Ada County, Michael R.
McLaughlin, J., entered judgment in a bench trial in
favor of client against one attorney and law firm,
but denied client's request for attorney fees.

Holdings: On cross-appeals, the Supreme Court, J.
Jones, J., held that:

- (1) divorce attorney committed legal malpractice by failing to investigate, inform, and advise client regarding the fair market value of marital property;
- (2) law firm was liable for attorney's legal malpractice;
- (3) trial court's determination of damages in legal malpractice action against divorce attorney was not clearly erroneous; and
- (4) neither party was entitled to attorney fees.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇌ 846(6)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in
General
30k844 Review Dependent on Mode of
Trial in Lower Court

30k846 Trial by Court in General
30k846(6) k. Consideration and ef-
fect of findings or failure to make findings. Most
Cited Cases

Appeal and Error 30 ⇌ 1010.1(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and
Findings
30XVI(I)3 Findings of Court
30k1010 Sufficiency of Evidence in
Support
30k1010.1 In General
30k1010.1(1) k. In general.

Most Cited Cases

When reviewing a district court's conclusions
following a bench trial, the Supreme Court is lim-
ited to ascertaining whether the evidence supports
the findings of fact, and whether the findings of fact
support the conclusions of law.

[2] Appeal and Error 30 ⇌ 994(3)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and
Findings
30XVI(I)1 In General
30k994 Credibility of Witnesses
30k994(3) k. Province of trial court.

Most Cited Cases

Appeal and Error 30 ⇌ 1011.1(5)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and
Findings
30XVI(I)3 Findings of Court
30k1011 On Conflicting Evidence
30k1011.1 In General
30k1011.1(5) k. Substantial sup-
porting evidence. Most Cited Cases

Appeal and Error 30 ⇌ 1012.1(2)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)3 Findings of Court

30k1012 Against Weight of Evidence

30k1012.1 In General

30k1012.1(2) k. Province of trial court. Most Cited Cases

When reviewing a district court's conclusions following a bench trial, Supreme Court liberally construes the facts in favor of the district court's decision because it is the province of the district court to weigh the evidence and determine the credibility of the witnesses; findings of fact will not be overturned if supported by substantial, albeit conflicting, evidence.

[3] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited Cases

Divorce attorney committed legal malpractice by failing to investigate, inform, and advise client regarding the fair market value of real property that was part of the settlement agreement; because client retained the attorney for assistance with her divorce proceedings, this representation implicitly included assistance with the valuation of the marital property, and accepting husband's proposed value, or making a minimal investigation into the value of the property because client provided attorney with a substantially lower value, would have demonstrated the diligence and competence that was expected of attorney.

[4] Attorney and Client 45 ⇌ 63

45 Attorney and Client

45II Retainer and Authority

45k63 k. The relation in general. Most Cited Cases

Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

A legal malpractice action is based on a combination of tort and contract theories; the attorney-client relationship is generally based on contract principles, while the negligence standard is based on tort principles.

[5] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

The elements of a legal malpractice action are: (1) the existence of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) failure to perform the duty; and (4) the negligence of the lawyer must have been a proximate cause of the damage to the client.

[6] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and evidence. Most Cited Cases

The burden of proving that the attorney failed to act with proper skill and that damages resulted therefrom is on the plaintiff client in a legal malpractice action and likewise, the burden is on the plaintiff to show that the negligence of the attorney was a proximate cause of the client's damage.

[7] Appeal and Error 30 ⇌ 842(4)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(4) k. Questions as to negligence. Most Cited Cases

The existence of a duty of care is a question of law over which the Supreme Court exercises free review.

[8] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

An attorney's duty arises out of the contract between the attorney and his or her client.

[9] Attorney and Client 45 ⇌ 107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k107 k. Skill and care required. Most Cited Cases

While the rules of professional conduct cannot be used as a basis to impose civil liability, they are informative of the standard of care that an attorney owes to his or her client.

[10] Attorney and Client 45 ⇌ 30

45 Attorney and Client

45I The Office of Attorney

45I(B) Privileges, Disabilities, and Liabilities

45k30 k. Partnership of attorneys; law firms. Most Cited Cases

Law firm was liable for attorney's legal malpractice in divorce proceeding, even though it was not licensed to practice law pursuant to professional malpractice statute; pursuant to statute regarding professional service corporations, corporation was liable for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services. West's I.C.A. §§ 5-219 (4), 30-1306

[11] Limitation of Actions 241 ⇌ 165

241 Limitation of Actions

241IV Operation and Effect of Bar by Limitation

241k165 k. Operation as to rights or remedies in general. Most Cited Cases

Statutes of limitation do not have a bearing on professional malpractice claims, other than to establish the time in which they must be brought.

[12] Corporations and Business Organizations 101 ⇌ 2501

101 Corporations and Business Organizations

101IX Corporate Powers and Liabilities

101IX(E) Torts

101k2501 k. Nature and ground of corporate liability. Most Cited Cases

Corporations and Business Organizations 101 ⇌ 2505

101 Corporations and Business Organizations

101IX Corporate Powers and Liabilities

101IX(E) Torts

101k2505 k. Negligence. Most Cited Cases

A corporation is liable for the negligent or wrongful act of employees acting on behalf of the corporation.

[13] Appeal and Error 30 ⇌ 781(7)

30 Appeal and Error

30XIII Dismissal, Withdrawal, or Abandonment

30k779 Grounds for Dismissal

30k781 Want of Actual Controversy

30k781(7) k. Effect of compliance with judgment or order or acceptance of benefits. Most Cited Cases

Issue of whether other divorce attorney was jointly liable for legal malpractice was moot on appeal, where client had already been paid the full amount of judgment.

[14] Appeal and Error 30 ⇌ 781(1)

30 Appeal and Error

30XIII Dismissal, Withdrawal, or Abandonment

30k779 Grounds for Dismissal

30k781 Want of Actual Controversy

30k781(1) k. In general. Most Cited

Cases

Supreme Court may dismiss an appeal when it appears that the case involves only a moot question.

[15] Action 13 ⇌ 6

13 Action

13I Grounds and Conditions Precedent

13k6 k. Moot, hypothetical or abstract questions. Most Cited Cases

A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.

[16] Action 13 ⇌ 6

13 Action

13I Grounds and Conditions Precedent

13k6 k. Moot, hypothetical or abstract questions. Most Cited Cases

A case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.

[17] Appeal and Error 30 ⇌ 781(1)

30 Appeal and Error

30XIII Dismissal, Withdrawal, or Abandonment

30k779 Grounds for Dismissal

30k781 Want of Actual Controversy

30k781(1) k. In general. Most Cited

Cases

Supreme Court may rule on a moot issue: (1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest.

[18] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful

Acts

45k129(4) k. Damages and costs. Most

Cited Cases

Interest 219 ⇌ 39(2.20)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in General

219k39(2.5) Prejudgment Interest in General

General

219k39(2.20) k. Particular cases and

issues. Most Cited Cases

Trial court's determination of damages in legal malpractice action against divorce attorney was not clearly erroneous; although court declined to grant client the premium she negotiated on the amount husband owed her in the divorce settlement, which was based on her allowing husband to pay in monthly installments over a period of 24 months, the court did award prejudgment interest on the additional amount that it determined client should have received in the divorce.

[19] Costs 102 ⇌ 198

102 Costs

102IX Taxation

102k198 k. Form and requisites of application in general. Most Cited Cases

If the party is claiming that a statute provides authority for an award of attorney fees, the party must cite to the statute and, if applicable, the specific subsection of the statute upon which the party relies.

[20] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful

Acts

45k129(4) k. Damages and costs. Most Cited Cases

Former client in legal malpractice action failed to request attorney fees pursuant to any provision of statute allowing for such fees in civil actions, and thus, she was not entitled to an award of attorney fees. West's I.C.A. § 12-120(3) .

[21] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited Cases

Attorney in legal malpractice action failed to identify the specific provision under statute allowing for attorney fees in civil actions pursuant to which he sought fees, and thus, his fee request was deficient. West's I.C.A. § 12-120(3) .

[22] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited Cases

Because former client's claim for discretionary costs in legal malpractice action was not timely made, the district court did not abuse its discretion in denying her request. Rules Civ.Proc., Rule 54(d)(1)(D), (d)(5).

[23] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts

45k129(4) k. Damages and costs. Most Cited Cases

Both parties in appeal in legal malpractice action prevailed and lost in about equal proportions,

and thus, neither party was entitled to attorney fees on appeal.

****1258** Gary L. Quigley, Meridian, for appellants.

Clark & Associates, Boise, for respondent. Eric R. Clark argued.

J. JONES, Justice.

***523** This is an appeal from a legal malpractice judgment entered against attorney Scott Gatewood and the law firm of Sallaz & Gatewood, Chtd. Appellants argue the district court erred in finding that professional malpractice had occurred. Both parties appeal the denial of their respective requests for attorney fees. We affirm.

I.

Factual and Procedural Background

This case arises from a malpractice action brought by Pamela Joerger Stephen ("Pamela") against the law firm of Sallaz & Gatewood, Chtd., Scott Gatewood ("Gatewood") and Dennis Sallaz ("Sallaz") (all three of the defendants are herein collectively referred to as "Appellants"). Pamela's ex-husband, Gary Stephen ("Stephen"), filed for divorce in May of 2003. During the divorce proceedings, Stephen retained attorney Ann Shepard to represent him, and Pamela retained Sallaz & Gatewood, Chtd. Pamela claims the Appellants committed malpractice by failing to make inquiries into her mental status during the divorce proceedings and by failing to properly investigate, inform, and advise her regarding the fair market value of real property that was part of the settlement agreement, which resulted in her receiving less than her equitable share of the community property.

The district court found that Gatewood was liable for malpractice in his representation of Pamela for (1) failing to inquire into Pamela's mental status prior to trial or for failing to seek a continuance, and (2) failing to investigate, inform, and advise her with respect to the value of the couple's Crescent Rim property. The court determined that Sallaz &

Gatewood, Chtd., was also liable for the malpractice judgment.

With regard to the first finding, the district court noted that Gatewood had many indications of Pamela's alleged mental incapacity. Specifically, Pamela disclosed to Gatewood during a June 2003 meeting that she suffered from bi-polar disorder, that she had attempted suicide on two separate occasions, and that she was taking medications for her condition. The court also noted that Pamela was living in an unstable environment at the time of the divorce proceedings because she was residing in the couple's Crescent Rim property with another man while Stephen made payments on the property. Pamela was also receiving income from the couple's rental property at the time, but failed to make mortgage payments or pay other expenses on the rental property. Gatewood was also aware that Pamela had *524 **1259 been involuntarily hospitalized approximately one week before the trial was scheduled to begin but "did not inquire of [Pamela] where she had been hospitalized, for what reason or by what doctor." Stephen's attorney also advised Gatewood that Pamela was using methamphetamine. Finally, the court noted that Gatewood had to personally visit Pamela's residence on several occasions in an effort to speak to her. Gatewood even filed a motion to withdraw as Pamela's attorney in July of 2004, identifying a "total communication breakdown" as the basis for the motion. Although the motion was ultimately withdrawn, Pamela testified that she received very little correspondence, court pleadings or discovery information from Gatewood during the divorce proceedings.

On the second issue, the district court found that because Pamela was never informed of Stephen's valuation of the couple's Crescent Rim property, she undervalued the property for purposes of settlement. The parties exchanged discovery requests in September of 2003, including interrogatories seeking, among other things, the other's valuation of the Crescent Rim property. Stephen was the first to respond, and he disclosed the property

value to be \$500,000. Pamela testified that Gatewood never informed her of this valuation and Gatewood testified he could not recall if he had. Pamela subsequently valued the property at only \$385,500. This final valuation was used in the couple's final settlement agreement. There was also evidence that a judgment lien against the Crescent Rim property had been paid prior to trial, but the amount of the lien was nonetheless credited to Stephen in the settlement.

On the first day of the divorce trial, the parties informed the district court that they had reached a proposed settlement agreement. When the court asked Pamela if she understood the agreement, Pamela responded that she was in agreement "as far as I know." However, Gatewood testified that Pamela was "clear in her thoughts and understanding" at the time of the proceedings and that he "did not believe that she was impaired as a result of methamphetamine use and/or mental health issues."

In the subsequent malpractice action against Appellants, the court found that Gatewood breached duties owed to Pamela and imposed liability in the amount of \$27,435.00 against Gatewood, personally, as well as against Sallaz & Gatewood, Chtd. However, the district court declined to assess any personal liability against Sallaz because the court found that he had never provided any legal services to Pamela, nor had he acted in a supervisory capacity over Gatewood. The court made this finding despite Sallaz being named as an attorney in documents filed with the court during the divorce proceedings and despite Sallaz's affiliation with Sallaz & Gatewood, Chtd.^{FN1} The court also awarded Pamela \$5,359.49 in costs, but refused to award discretionary costs pertaining to the appointment of a guardian ad litem during the course of the malpractice action. Pamela and Sallaz both sought an award of attorney fees, but both requests were denied.

FN1. Pamela executed a fee agreement with Sallaz & Gatewood, Chtd. on June 16, 2003, but the firm was not incorporated

until September 9, 2003. Therefore, it is likely that Sallaz and Gatewood were operating as a general partnership at the time of entering into this agreement.

On appeal, Appellants argue that the district court erred in its determination of the duties owed to Pamela, and contend that there was no evidence establishing a breach of any duties. They also argue that Pamela's malpractice claim is barred by judicial estoppel and judgmental immunity, and that liability cannot be imposed upon a law firm. Pamela argues that the final damage award is in error, and that Sallaz should be personally liable for the malpractice judgment. Both Sallaz and Pamela argue that the court erred in denying their request for attorney fees, and Pamela argues the court erred in denying her request for discretionary costs.

II.

Issues on Appeal

I. Is the malpractice judgment against Gatewood supported by substantial evidence?

**1260 *525 II. Are Pamela's incapacity claims barred by the doctrines of judicial estoppel and judgmental immunity?

III. Can liability be imposed against Sallaz & Gatewood, Chtd.?

IV. Did the district court err in determining Sallaz was not personally liable?

V. Did the district court err in calculating the damage award to Pamela?

VI. Did the district court err in denying attorney fees to either Sallaz or Pamela?

III.

Analysis

A. Standard of Review

[1][2] When reviewing a district court's conclusions following a bench trial, this Court "is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact

support the conclusions of law." *Borah v. McCandless*, 147 Idaho 73, 77, 205 P.3d 1209, 1213 (2009). This Court liberally construes the facts in favor of the district court's decision because it is the province of the district court to weigh the evidence and determine the credibility of the witnesses. *Id.* Findings of fact will not be overturned if supported by substantial, albeit conflicting, evidence. *Id.*

B. The District Court's Finding that Gatewood Committed Legal Malpractice is Supported by Substantial Evidence.

Appellants contend the district court erred in finding that Gatewood committed legal malpractice in his representation of Pamela. Specifically, they argue that the district court misapprehended the duty owed to Pamela as a client with a diminished capacity, and that there was no evidence to support the finding of breach in that regard. Additionally, they argue that Gatewood had no duty to investigate the value of the Crescent Rim property because there was not a significant difference in the values provided by the parties, and because attorneys are permitted to rely on the valuations provided by their clients. FN2

FN2. Appellants also argue that Pamela cannot challenge a single aspect of her settlement agreement, specifically the valuation of the Crescent Rim property, without violating the rule of *McGrew v. McGrew*, 139 Idaho 551, 559, 82 P.3d 833, 841 (2003). In that case, after a settlement agreement was stipulated to in court, the ex-wife learned that the judgment was void for lack of jurisdiction and sought to invalidate only the distribution of the railroad retirement pension pursuant to Rule 60(b)(4). *Id.* However, the Court ruled that to allow this would "permit her to unilaterally craft the division of the community property and debts.... She could not, however, affirm the decree with respect to the items awarded to her and seek only to set aside an item awarded to Paul." *Id.*

This case is distinguishable from *McGrew* because Pamela is not seeking to invalidate the settlement agreement, and is certainly not invoking Rule 60(b)(4). Rather, she is using the undervaluation of the Crescent Rim property as a basis for a separate malpractice action against her attorney, which has no effect on the settlement agreement with her ex-husband. Therefore, *McGrew* is inapplicable to this case.

Pamela argues that Gatewood breached the duties he owed to her by failing to properly investigate, inform, and advise her as to the value of the Crescent Rim property, separate and apart from his breach for failing to investigate her diminished capacity. She argues that Gatewood never told her about the \$500,000 valuation made by Stephen and that no competent attorney would have knowingly advised a client to provide a substantially lower valuation. Pamela also argues there was sufficient evidence to support the malpractice finding regarding her diminished capacity.

The district court found that Gatewood breached duties he owed to Pamela by failing to investigate, inform, and advise her regarding the value of the Crescent Rim property when such a disparity existed between the valuations provided by the parties. The court found that Gatewood's failure to inquire into Pamela's mental state and to take appropriate protective measures also breached the duties he owed her.

[3] We affirm the district court's finding that Gatewood committed legal malpractice by failing to investigate, inform, and advise Pamela regarding the value of the Crescent Rim property. Therefore, it is unnecessary to address the district court's finding that *526 **1261 Gatewood committed malpractice by failing to adequately inquire into Pamela's alleged diminished capacity. For this reason, we also decline to address Appellants' judicial estoppel and judgmental immunity arguments.

[4][5][6] A legal malpractice action is based on

a combination of tort and contract theories. The attorney-client relationship is generally based on contract principles, while the negligence standard is based on tort principles. See *Harrigfeld v. Hancock*, 140 Idaho 134, 136, 90 P.3d 884, 886 (2004).

The elements of a legal malpractice action are: (a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damage to the client.

Id. The burden of proving that the attorney failed to act with "proper skill and that damages resulted therefrom is on the plaintiff client and likewise, the burden is on the plaintiff to show that the negligence of the attorney was a proximate cause of the client's damage." *Id.* (internal citation omitted).

[7][8] "The existence of a duty of care is a question of law over which this Court exercises free review." *Jones v. Starnes*, 150 Idaho 257, 260, 245 P.3d 1009, 1012 (2011). "An attorney's duty arises out of the contract between the attorney and his or her client." *Harrigfeld*, 140 Idaho at 137, 90 P.3d at 887. In this case, Pamela retained Gatewood's firm "to represent [her] interests in connection with a divorce and related matters." A requisite component of a divorce action is the valuation of property making up the community estate. See generally *McGrew*, 139 Idaho at 559, 82 P.3d at 841. Therefore, because Pamela retained the firm for assistance with her divorce proceedings, this representation implicitly included assistance with the valuation of the Crescent Rim home.

[9] In providing such assistance, Gatewood owed Pamela the duties of competent and diligent representation, as well as adequate communication. See Idaho Rules of Professional Conduct (I.R.P.C.) 1.1, 1.3, 1.4.^{FN3} See also *Heinze v. Bauer*, 145 Idaho 232, 238, 178 P.3d 597, 603 (2008). In order to provide competent representation, an attorney must use the "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the rep-

resentation." I.R.P.C. 1.1 (emphasis added). To be adequately prepared and thorough, the attorney must make "inquiry into and analysis of the factual and legal elements of the problem...." *Id.*, cmt. 5. Additionally, an attorney must be diligent in providing representation, and zealously pursue the client's objectives as defined by the scope of the representation. *See* I.R.P.C. 1.3. Finally, in terms of communication, an attorney must keep the client informed about the matter for which the attorney was retained, and must also explain the matter to the client so that the client can make informed decisions. I.R.P.C. 1.4.

FN3. While the rules of professional conduct cannot be used as a basis to impose civil liability, *see* I.R.C.P., *Scope*, ¶ 20, they are informative of the standard of care that an attorney owes to his or her client. *See Johnson v. Jones*, 103 Idaho 702, 705, 652 P.2d 650, 653 (1982) (using professional responsibility rules to identify the standard of care owed by an attorney acting under a conflict of interest).

There is substantial evidence in the record that Gatewood violated these duties in regard to the Crescent Rim property. Pamela testified, and Gatewood was unable to rebut, that she was never informed of Stephen's initial \$500,000 valuation of the property. Without this information, Pamela relied on an "old appraisal" to make her estimation of the property's value, and ultimately provided a value that was over one-hundred-thousand dollars less than Stephen's valuation. This does not appear to be an informed decision on Pamela's behalf, as there is no rational explanation for allowing Pamela to undercut the value of the couple's most valuable real property community asset, when Stephen had previously provided a higher valuation. Indeed, the discovery response containing the \$500,000 valuation was submitted upon Stephen's oath, making it difficult for him to later assert a lesser value. While it is ordinarily true that an attorney can accept the client's valuation of property without performing

****1262 *527** an independent investigation thereof, an attorney in a divorce proceeding must also pursue the most equitable division of community assets for his or her client. Accepting Stephen's proposed value, or making a minimal investigation into the value of the Crescent Rim property because Pamela provided him a substantially lower value, would have demonstrated the diligence and competence that is expected of an attorney in Gatewood's position. At the very least, Gatewood was obligated to advise Pamela of Stephen's higher valuation and discuss the legal implications of her proposing a lesser value. Instead, Gatewood failed to provide Pamela with information that was critical for her to make an informed decision.

There is also evidence that Stephen was credited for a \$28,000 judgment lien against the Crescent Rim property, when it had been paid off nearly two months before the settlement. Gatewood testified that he had no knowledge that the debt had been paid prior to settlement and further testified that, even if he had known, it would not have changed the settlement agreement because he believed Pamela was receiving adequate temporary maintenance. This justification does not embody the type of zealous representation that is expected of an attorney in reaching the most equitable property distribution in a divorce case, nor does it embody the type of thoroughness and investigation that would be expected of a competent attorney in Gatewood's position.

Because the district court's finding that Gatewood breached his duties to Pamela by failing to investigate, inform, and advise her regarding the value of the Crescent Rim property is supported by substantial, albeit conflicting, evidence, we affirm the district court's holding that Gatewood committed legal malpractice in his representation of Pamela.

C. Sallaz & Gatewood, Chtd., is Liable for Gatewood's Malpractice.

[10] Appellants argue that Sallaz & Gatewood, Chtd., cannot be held liable for Gatewood's mal-

practice because the entity is not licensed to practice law, as is "required" by I.C. § 5-219. They point to language stating that "professional malpractice," as used in the statute, "refers to wrongful acts or omissions in the performance of professional services by any person, firm, association, entity or corporation licensed to perform such services under the law of the state of Idaho." I.C. § 5-219 (4). On the other hand, Pamela argues that liability is appropriate based on the plain language of I.C. § 30-1306. The district court determined that Gatewood had committed malpractice and that the firm of Sallaz & Gatewood, Chtd., in addition to Gatewood individually, was liable to Pamela in the amount of \$27,435.00.

[11] In support of their argument that I.C. § 5-219 negates a claim for professional malpractice against an entity that is not licensed to perform the services in question, Appellants cite *Owyhee County v. Rife*, 100 Idaho 91, 593 P.2d 995 (1979). In that case, the Court considered whether the two-year statute of limitations in I.C. § 5-219 (4) applied to accountants who were not at that time required to be licensed. *Id.* at 96, 593 P.2d at 1000. The Court determined that the statute did not apply to the accountants because they were unlicensed. *Id.* That did not mean, however, that they were not subject to a malpractice suit. It only meant that the longer four-year statute of limitations in either I.C. § 5-217 or I.C. § 5-224 applied. *Id.* Nothing in I.C. § 5-219 or in *Rife* immunizes a person or entity carrying on a profession from being sued for malpractice, just because the applicable professional standards do not require the particular person or entity to have a license. Statutes of limitation do not have a bearing on professional malpractice claims, other than to establish the time in which they must be brought.

[12] Idaho's corporate code applies here and it is clear that a corporation is liable for the negligent or wrongful act of employees acting on behalf of the corporation. I.C. § 30-1304 provides that a group of licensed individuals rendering the same

professional service may organize for the purpose of forming a professional service corporation. I.C. § 30-1306 further provides that the corporation will be liable for the wrongful acts of its agents. "The corporation shall be liable up to the full value of its property for any *528 **1263 negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services." I.C. § 30-1306. Therefore, the district court correctly ruled that Sallaz & Gatewood, Chtd., is liable for Gatewood's malpractice.^{FN4}

FN4. There is insufficient evidence before this Court to determine whether Sallaz & Gatewood, Chtd., was acting in its partnership capacity, or in its corporate capacity, when entering into the fee agreement with, and subsequently providing representation for, Pamela. However, even if the firm was acting as a partnership, the firm would still be liable for Gatewood's malpractice. *See* I.C. 53-3-305(a).

D. Pamela's Argument Concerning Sallaz's Personal Liability is Moot.

Pamela argues on cross-appeal that the district court erred by failing to impose personal liability against Sallaz because the firm had not yet incorporated at the time Pamela executed the fee agreement and that, as a general partnership, Sallaz would be jointly liable for Gatewood's malpractice. Appellants argue there is no basis to impose personal liability against Sallaz because he never formed an attorney-client relationship with Pamela. The district court determined that Pamela's professional malpractice claim did not arise until after Sallaz & Gatewood, Chtd., had incorporated and, therefore, Sallaz was shielded from any personal liability.

[13][14][15][16][17] It was disclosed in the record, and confirmed in oral argument, that Pamela has already been paid the full amount of the judgment. Therefore, any ruling on this issue would

have no practical effect. Thus, the issue is moot. Additionally, such a determination would require evidence of the law firm's status at the time of executing the fee agreement and during the course of its subsequent representation of Pamela, including in particular whether or not the corporation assumed the obligations of the partnership, none of which is in the record. Therefore, this Court declines to address the issue.

This Court may dismiss an appeal when it appears that the case involves only a moot question. A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. A case is moot if it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome.

Goodson v. Nez Perce County Bd. of County Comm'rs, 133 Idaho 851, 853, 993 P.2d 614, 616 (2000) (internal citations omitted). The same applies to a discrete issue in an appeal. The Court may nonetheless rule on a moot issue "(1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest." *Idaho Dep't of Health and Welfare v. Doe*, 150 Idaho 103, 108, 244 P.3d 247, 252 (Ct.App.2010) (internal citations omitted).

In this case, a determination that Sallaz, in addition to Gatewood, is personally liable for the malpractice judgment would have "no practical effect upon the outcome" because the judgment has already been paid and satisfied. Therefore, there is no risk that Gatewood, or the firm, would not be able to pay the judgment. Additionally, there is no risk of repetition of harm and there are no public policy concerns at play that would warrant the application of the mootness exceptions. Indeed, the only effect of a determination of whether or not Sallaz is liable would be upon the district court's

denial of a fee award to Sallaz, i.e. if he is liable, denial of the fee was proper but, if he is not liable, the reverse may be the case. However, because we hold that neither party is entitled to attorney fees under I.C. § 12-120(3), there is no need to address the issue.

E. The District Court Did Not Commit Error in its Assessment of Damages.

Pamela also argues on cross-appeal that the court erred by reducing her \$41,500 malpractice damage award by \$14,065. In the divorce proceedings, using the values employed in the property settlement agreement, Pamela was to receive \$33,935 as her half of the net value of the community estate. Stephen**1264 *529 did not have the funds to pay that amount in a lump sum at the time of settlement, so it was agreed that he would pay in monthly installments over a period of 24 months. In exchange for allowing him to pay on a deferred basis, it was agreed that Stephen would pay \$2,000 per month-a premium, presumably for loss of use of the money. Pamela claims her damages should include the premium amount for which she bargained, which represents the \$14,065 reduction by the district court in the malpractice award.

[18] This Court reviews a district court's determination of damages pursuant to a clearly erroneous standard. See I.R.C.P. 52(a). See also *Young v. Scott*, 108 Idaho 506, 510, 700 P.2d 128, 132 (Ct.App.1985). In this case, the district court determined that Gatewood's negligence caused Pamela to value the Crescent Rim property at \$385,000, when the actual fair market value was \$440,000-a difference of \$55,000. Additionally, the district court found that Gatewood's failure to take into account the payoff of the \$28,000 judgment lien against the property increased the value of the community estate by an additional \$28,000. Therefore, Gatewood's breach caused \$83,000 in total damages, entitling Pamela to recover \$41,500 (one-half of the community's increased net value). However, the court determined that Pamela had already been paid \$14,065 pursuant to the stipu-

lated settlement agreement, such that her malpractice award must be reduced to avoid double payment. The district court reasoned that such payments exceeded her portion of the net value of the community estate by \$14,065 and, therefore, reduced her malpractice damages to \$27,435.

The court declined to grant Pamela the premium she negotiated on the amount Stephen owed her in the divorce settlement. However, the court did award pre-judgment interest on the additional amount that it determined Pamela should have received in the divorce. This determination of damages is not clearly erroneous and, therefore, the district court's award is affirmed.

F. Neither Party is Entitled to Attorney Fees Under I.C. § 12-120(3) .

Sallaz argues the district court erred in denying him attorney fees pursuant to I.C. § 12-120(3) because attorney malpractice cases have been determined to be commercial transactions within the meaning of the statute,^{FN5} and because the district court erred in not holding him to be the prevailing party. Pamela argues that the district court did not abuse its discretion in denying Sallaz's request because she was the overall prevailing party. We hold that neither party is entitled to attorney fees under I.C. § 12-120(3) because neither party made an appropriate fee request under that statute in the district court.

FN5. In connection with this argument, Sallaz cites *City of McCall v. Buxton*, 146 Idaho 656, 201 P.3d 629 (2009) wherein we held that, "The commercial transaction ground in I.C. § 12-120(3) neither prohibits a fee award for a commercial transaction that involves tortious conduct, nor does it require that there be a contract." *Id.* at 665, 201 P.3d at 638. That case involved a professional malpractice claim arising out of what appeared to be a commercial transaction. We noted that a fee award might be appropriate in such a case. *Id.* However, we need not determine whether

this case involved a commercial transaction, nor whether the judge erred by failing to find Sallaz to be the prevailing party. A requisite for obtaining a fee award is to make a proper request therefore, which did not happen in this case.

[19] It is oft repeated by this Court that, "If the party is claiming that a statute provides authority for an award of attorney fees, the party must cite to the statute and, if applicable, the specific subsection of the statute upon which the party relies." *Bream v. Benscoter*, 139 Idaho 364, 369, 79 P.3d 723, 728 (2003). We continued:

For example, if the party seeks an award of attorney fees under Idaho Code § 12-120(3) on the ground that the case is an action to recover in a commercial transaction, the party should, to the extent necessary, provide facts, authority, and argument supporting the claim that the case involves a "commercial transaction" and that such transaction is the gravamen of the lawsuit.

Id. at 369-70, 79 P.3d at 728-29 (2003). Neither party paid heed to this holding in district court.

****1265** 530[21] Pamela failed to request attorney fees pursuant to any provision of I.C. § 12-120 . Therefore, she was not entitled to a fee award under that section. In his fee request, Sallaz got a little closer to the mark but did not go far enough. In his motion for an award of fees, he cited I.C. §§ 12-120 and 12-121 . He did not appeal the denial of fees under I.C. § 12-121 and did not identify the specific provision of I.C. § 12-120 pursuant to which he sought fees. In his memorandum of costs and fees, he identified I.C. § 12-121 , I.C. § 12-123 , and several civil procedure rules in support of his fee request. He did hint at I.C. § 12-120(3) , stating "[p]ursuant to Rule 54(e)(3), *Idaho Rules of Civil Procedure*, as well as *Idaho Code § 12-120(3)* , I hereby state that the total amount of attorney's fees incurred by Defendant ..." However, the document does not disclose whether he purports to seek fees

based on a contract or on the commercial transaction ground. Thus, the fee request was deficient and the district court properly denied his fee request, albeit for other reasons.

Stephen v. Sallaz & Gatewood, Chtd.
150 Idaho 521, 248 P.3d 1256

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G. Pamela is Not Entitled to Discretionary Costs.

[22] Pamela argues the district court erred in failing to award her discretionary costs relating to the appointment of a guardian ad litem in the malpractice case. Idaho Rule of Civil Procedure 54(d)(1)(D) provides that a court may award discretionary costs where they are demonstrated to be "necessary and exceptional." However, all requests for costs must be supported by an itemized memorandum filed no later than 14 days after the entry of judgment. I.R.C.P. 54(d)(5). The judgment was entered in this case on December 1, 2008, and as of February 9, 2009, Pamela's request for discretionary costs was not supported by an itemization of such costs. Although Pamela claims to have subsequently filed such an itemization, in order to meet the timeline set forth in the rule, this itemization had to be filed no later than December 15, 2008-14 days after the December 1, 2008, judgment-in order to be timely. Because Pamela's claim for discretionary costs was not timely made, the district court did not abuse its discretion in denying her request.

H. Attorney Fees on Appeal.

[23] Both parties request an award of attorney fees on appeal. However, neither party can be characterized as the prevailing party in this case, both parties having prevailed and lost in about equal proportions.

IV.

Conclusion

The judgment of the district court is affirmed. We decline to award costs and attorney fees to any of the parties on appeal.

Chief Justice EISMANN, and Justices BURDICK,
W. JONES and HORTON concur.

Idaho, 2011.

719 So.2d 325, 23 Fla. L. Weekly D1929
(Cite as: 719 So.2d 325)

H

District Court of Appeal of Florida,
Fourth District.
Virginia TARLETON, Appellant/Cross-Appellee,
v.

ARNSTEIN & LEHR, a partnership, Appellee/
Cross-Appellant.

No. 97-1237.

Aug. 19, 1998.

Rehearing, Rehearing En Banc, Certification of
Question and Conflict Denied Nov. 2, 1998.

Client brought legal malpractice action against law firm that represented her in divorce action. After jury returned verdict finding firm's negligence was responsible for 75% of client's damages, the Circuit Court, Palm Beach County, Fred A. Hazouri, J., entered judgment notwithstanding the verdict for law firm. Client appealed. The District Court of Appeal held that: (1) sufficient evidence supported jury's finding that law firm's negligence in advising client to enter into settlement agreement in divorce action proximately caused her damages, even in absence of expert testimony, and (2) client was not comparatively negligent for relying on law firm's advice.

Affirmed in part, reversed in part, and remanded.

Gross, J., filed concurring opinion.

West Headnotes

[1] Attorney and Client 45 ⇨ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases
(Formerly 45k105)

To prevail on a legal malpractice claim, the plaintiff must prove: (1) attorney's employment; (2)

attorney's neglect of a reasonable duty; and (3) attorney's negligence resulted in and was the proximate cause of loss to the client.

[2] Attorney and Client 45 ⇨ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

To prevail on the legal malpractice claim, the client has to prove that she would have prevailed on the underlying action but for the attorney's negligence.

[3] Negligence 272 ⇨ 1675

272 Negligence

272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)5 Weight and Sufficiency
272k1674 Proximate Cause
272k1675 k. In General; Degrees of Proof. Most Cited Cases
(Formerly 272k56(1.2))

In negligence actions, courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury.

[4] Attorney and Client 45 ⇨ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence. Most Cited Cases

Expert testimony was not required in legal malpractice action to establish that law firm's negligence in advising client to enter into settlement agreement in underlying divorce action proximately caused her damages; jury was competent to determine whether client would have received greater amount in divorce action but for firm's negligence.

[5] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(2) k. Pleading and Evidence.

Most Cited Cases

Sufficient evidence supported jury's finding that law firm's negligence in advising client to enter into settlement agreement in divorce action proximately caused client's damages in that she would have received greater amount if she had gone to trial, where expert testified that promissory notes signed by client's ex-husband would have been admissible in divorce action, that notes would have been enforceable, and that firm's breach of standard of care caused client's damages, release signed as part of settlement precluded future action to enforce promissory notes, and accountant testified that ex-husband owe client more money than was reflected in promissory notes.

[6] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases (Formerly 45k105)

Client cannot be found to be comparatively negligent in legal malpractice action for relying on an attorney's erroneous legal advice or for failing to correct errors of the attorney which involve the exercise of professional expertise.

[7] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of Litigation. Most Cited Cases

Client was not comparatively negligent for relying on law firm's erroneous advice that she could still bring suit against ex-husband to enforce promissory notes even if she entered into settlement

agreement in divorce action.

*326 Dyanne E. Feinberg and Lewis N. Brown of Gilbride, Heller & Brown, P.A., Miami, and Joseph E. Altschul of Altschul & Landy, P.A., Weston, for appellant/cross-appellee.

John Beranek of Ausley & McMullen, Tallahassee, and J. Michael Burman of Burman, Critton & Luttier, North Palm Beach, for appellee/cross-appellant.

PER CURIAM.

Virginia Tarleton ("Former Wife") appeals and Arnstein & Lehr (the "Firm") cross-appeals from a final judgment in a legal malpractice action. We affirm the Firm's cross-appeal without further discussion. However, we reverse the final judgment because we find merit in the points raised by Former Wife on appeal.

This case concerns a legal malpractice action that arose out of the Firm's representation of Former Wife in a 1993 divorce action. During opening statements, Former Wife's counsel stated to the jury that they were going to hear a "trial within a trial." He explained that they would not only be trying the Firm's conduct in the malpractice action, but that it would also be necessary to try the underlying dissolution proceeding.

Former Wife and Former Husband were married in 1977 and they launched numerous companies together. The companies were very successful. The couple had an oral agreement that they would maintain their assets separately, but be equally responsible for household expenses.

*327 In 1984, the couple started having disputes over business matters, and Former Wife left her position as president of one of the couple's companies. In exchange for her resignation, Former Wife testified that Former Husband told her that he would pay for all of the previously shared household expenses. To support her testimony, a document entitled "Agreement" was introduced in evidence.

While the couple remained married, the common household expenses increased to over \$23,000 per month. In 1988, Former Husband began facing financial difficulties and was unable to pay the joint household expenses. Former Wife then began to draw on her savings in order to pay for such expenses. In order to keep track of the sums Former Wife was expending, Former Husband signed a series of promissory notes in which he acknowledged that he had to repay Former Wife for the advances that she was making for the household expenses. At the time the couple divorced, the promissory notes reflected that Former Husband owed Former Wife over \$700,000 for the advances she had made.

In 1992, Former Wife filed a Petition for Dissolution of Marriage. She hired the Firm to represent her in the dissolution proceeding. The Firm recommended to Former Wife that she pursue two separate lawsuits, one seeking dissolution and the other seeking to recover on the promissory notes.

Former Wife entered into a settlement agreement with Former Husband in the dissolution action based upon the representations of the Firm that she would be able to bring a separate action to enforce the debt underlying the promissory notes. Former Wife testified that she asked the Firm about the "release" clause in the settlement agreement and was assured she could bring an action on the promissory notes.

After the divorce was final, the Firm was unable to represent Former Wife in any subsequent action against Former Husband. Therefore, Former Wife hired another attorney and discussed filing a separate suit against Former Husband for the money owed her under the promissory notes. However, her new attorney told her that she could not pursue any further claim on the promissory notes against Former Husband because of the release clause in the settlement agreement. Former Wife then brought a legal malpractice claim against the Firm.

Former Wife's expert, James Miller ("Expert"), testified that the Firm's representation of Former Wife fell below the proper standard of care and constituted malpractice. In particular, he found that the Firm's conduct departed from the proper standard of care in advising Former Wife that she could enter into the marital settlement agreement and still pursue a separate cause of action against Former Husband to enforce the promissory notes. Further, Expert opined that the promissory notes would have been admissible in the dissolution proceeding, and if they constituted a preponderance of the evidence, would have led the judge to conclude that the marital contracts existed and would, thus, be enforceable.

Former Wife's Accountant, Harvey Muskat ("Accountant"), reviewed the promissory notes, bank accounts, and other financial data concerning the parties assets. Based upon his review of this information, he concluded that Former Husband owed Former Wife a large sum of money. In performing the accounting, he discovered that Former Husband owed Former Wife more money than was reflected in the promissory notes. He determined that Former Husband owed Former Wife a total of \$1,990,290.

Following the dissolution, the parties' joint real estate was sold for \$6,049,700. This money was used to pay off joint debts totaling \$3,837,141. Thus, \$2,212,560 remained to be split between the parties. Pursuant to the settlement agreement, Former Wife received \$1,256,640 and Former Husband received \$955,920. If the distribution of assets had been evenly divided, Former Husband would have received \$150,360 more. Thus, Accountant concluded that Former Husband owed Former Wife \$1,990,290 less the \$150,360 extra she received under the settlement agreement, for a total of \$1,839,930.

At the close of the Firm's case, the Firm renewed its directed verdict motion on Former Wife's negligence claim. Specifically, *328 the Firm argued that there was no evidence establishing proximate cause because there was no evidence presen-

ted that a judge would have awarded Former Wife more than what she received from the settlement agreement. The trial court expressed its concern that there was no evidence as to what a reasonable judge would have awarded Former Wife if a dissolution proceeding had taken place. However, the trial court reserved ruling on this motion until the jury returned its verdict. The trial court also denied Former Wife's motion for directed verdict on the issue of comparative negligence.

The jury returned a verdict, finding that the Firm was negligent and that its negligence was responsible for 75 percent of Former Wife's damages. The jury also found that Former Wife was comparatively negligent and that her comparative negligence was responsible for 25 percent of her damages. The jury determined that Former Wife's damages totaled \$960,000. Thereafter, the Firm filed a motion for judgment notwithstanding the verdict. In addition, Former Wife filed a motion for entry of judgment in accordance with her motion for directed verdict on the issue of comparative negligence. After a hearing on these motions, the trial court granted the Firm's motion, finding that "there was no evidence (or reasonable inference therefrom) presented as to the issue of proximate causation upon which a jury could lawfully have returned its verdict because no expert testimony was presented that, but for the negligence of the attorney involved, a more favorable result would have been achieved for the Plaintiff [Former Wife] in the underlying cause of action." The trial court denied Former Wife's motion. Subsequently, the trial court entered final judgment in favor of the Firm.

In her first point on appeal, Former Wife argues that the trial court erred in directing a verdict in favor of the Firm because expert testimony was not required to prove proximate cause in a legal malpractice action. The Firm counters that insufficient evidence was presented on the issue of proximate cause and that the trial court properly directed a verdict in its favor.

[1][2] In Florida, to prevail on a legal malprac-

tice claim, the plaintiff must prove the following three elements: (1) the attorney's employment; (2) the attorney's neglect of a reasonable duty; and (3) the attorney's negligence resulted in and was the proximate cause of loss to the client. *See Anderson v. Steven R. Andrews, P.A.*, 692 So.2d 237, 240 (Fla. 1st DCA 1997); *Bolves v. Hullinger*, 629 So.2d 198, 200 (Fla. 5th DCA 1993); *Weiner v. Moreno*, 271 So.2d 217, 219 (Fla. 3d DCA 1973). "The third element regarding the loss to the client is not satisfied unless the plaintiff demonstrates that there is an amount of damages which the client would have recovered but for the attorney's negligence." *Sure Snap Corp. v. Baena*, 705 So.2d 46 (Fla. 3d DCA 1997); *see Fernandes v. Barrs*, 641 So.2d 1371, 1375 (Fla. 1st DCA 1994); *Bolves*, 629 So.2d at 200. This requirement has resulted in a legal malpractice action being referred to as a "trial within a trial." *Silvestrone v. Edell*, 701 So.2d 90, 92 (Fla. 5th DCA 1997)(Sharp, J., dissenting); *see Michael Kovach, P.A. v. Pearce*, 427 So.2d 1128, 1129 (Fla. 5th DCA 1983). To prevail on the malpractice claim, the client has to prove that she would have prevailed on the underlying action but for the attorney's negligence.

In the instant case, there is no dispute that the first two elements have been satisfied. Thus, this appeal focuses on whether Former Wife presented sufficient evidence to satisfy the third element. In essence, Former Wife is asserting that her Accountant's testimony, coupled with her Expert's testimony, provided sufficient evidence with which the jury could have concluded that but for the Firm's negligence, she would have received a greater amount than she received under the settlement agreement. The Firm's position is that Former Wife failed to satisfy the third element because her Expert failed to provide a specific opinion as to whether she would have received a larger amount if her dissolution proceeding went to trial, than the amount she received under the settlement agreement.

[3] "In negligence actions Florida courts follow

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the more likely than not standard of causation and require proof that the negligence*329 probably caused the plaintiff's injury." *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So.2d 1015, 1018 (Fla.1984). Further, the *Gooding* court noted:

On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

Id. (quoting *Prosser, Law of Torts* § 41 (4th ed.1971) (footnotes omitted)). In *Gooding*, a medical malpractice case, the plaintiff's expert testified that the inaction of the hospital staff violated acceptable medical standards, but failed to testify that in the absence of such inaction, the patient's chances of survival would have been more likely than not. *Id.* at 1017. The supreme court upheld the trial court's directed verdict in favor of the hospital because the plaintiff failed to prove causation. *Id.* at 1018. It found that the expert testimony was insufficient to establish probable cause because such testimony established at most an equal chance for the patient's survival. *Id.*

Former Wife acknowledges *Gooding*, but asserts that a legal malpractice case differs from a medical malpractice case. She claims that in a medical malpractice case, the average juror would be unable to determine whether the alleged negligence caused the death of the patient without the aid of expert medical testimony. In this legal malpractice action, however, she argues that the jury, as fact finder, is presented with all the facts of the underlying dissolution case and asked to apply those facts to the law to determine what the result would have been if the action had gone to trial. If this factual

determination by the jury establishes an amount greater than the amount received by the client, then the proximate cause element of the legal malpractice action has been satisfied. In essence, she claims that it is not necessary for an expert to specifically testify that the client had a "more likely than not" chance of obtaining a better result but for the attorney's malpractice where the jury could conclude from the evidence presented that the client would have obtained a better result if she had proceeded to trial.

The Firm counters that it was necessary for Expert to testify that it was more likely than not Former Wife would have obtained a better result but for the Firm's negligence because the underlying divorce action was a matter outside the competence of the common lay jury. Both parties turn to cases from other jurisdictions to support their views. We find *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis.2d 94, 362 N.W.2d 118 (1984) to be the most persuasive.

In *Helmbrecht*, a client brought a malpractice action against her former attorney who had represented her in a divorce action. *Helmbrecht*, 362 N.W.2d at 121. To prove the element of proximate causation, she had to establish that the divorce award she actually received was less than what a reasonable judge who was aware of all the facts would have awarded in the divorce action. *Id.* at 131. The Wisconsin Supreme Court found that the jury should substitute its judgment for that of the fact finder of the initial dissolution action in determining the proximate cause issue. *Id.* at 135. From the evidence presented, it was the jury's duty to determine what the outcome of the dissolution proceeding would have been without the attorney's negligence. *Id.* at 131, 135. The supreme court noted that the Legislature had codified the various factors to be weighed and balanced by a judge in a dissolution action and concluded that a jury that was properly instructed on the law could reasonably apply the law to the particular facts involved and resolve the issue of what a reasonable judge would

have awarded in the underlying dissolution action. *Id.* at 136-37 (finding that "the question of what a reasonable judge would have awarded as property division and maintenance is no more complicated than other issues decided by juries every day all across this nation").

*330 [4] The Firm argues that expert testimony stating that a reasonable judge would have awarded more than she received under the settlement agreement was necessary because a dissolution proceeding was a matter outside the competence of the common lay jury. The Firm's strongest case in support of this contention is *Meyer v. Mulligan*, 889 P.2d 509 (Wy.1995). However, *Meyer* is distinguishable from the instant case. In *Meyer*, a client brought a legal malpractice claim against his attorney for failing to properly draft legal documents. *See Meyer*, 889 P.2d at 513. The Wyoming Supreme Court determined that expert testimony was required to prove proximate causation under the facts presented because the question of whether the attorney could have drafted the documents differently to have avoided the subsequent damaging effects was not a question that lay people could competently determine. *Id.* at 516. Unlike *Meyer*, the instant case involves the jury simply applying the facts to the various rules that the Florida Legislature has set out in chapter 61, Florida Statutes (1997), regarding the dissolution of marriage and the distribution of marital assets. As such, we believe that the lay jury was competent to determine that Former Wife would have been awarded more but for the Firm's negligence. *See Helmbrecht*, 362 N.W.2d at 136-37.

[5] In the instant case, the testimony of Former Wife's Expert and Accountant was sufficient to support the jury's finding that Former Wife would have received a greater amount if she had not entered into the settlement agreement. Expert testified that the promissory notes would have been admissible in the dissolution case, that there was enough evidence for a court to find that the couple had a deal regarding the payment of expenses, and that their

deal would be enforceable unless it was against public policy. Further, Expert testified that the Firm's breach of the standard of care was the cause of damages to Former Wife. The Accountant testified that upon reviewing the promissory notes, bank accounts, and other financial data, he determined that Former Husband owed Former Wife more money than was reflected in the promissory notes. This evidence was sufficient to support the jury's finding that Former Wife would have recovered a greater sum if she had gone to trial.

Under the "trial within a trial" standard of proving proximate cause, the jury necessarily has to determine whether the client would have prevailed in the underlying action, in this case the dissolution action, before determining whether the client would prevail in the malpractice action. Because the jury is substituting its judgment for the fact finder of the dissolution proceeding, no expert testimony specifically stating that a reasonable judge would have given her more than she received in the settlement agreement would be required to establish proximate causation. To establish proximate causation, Former Wife must demonstrate that there is an amount of damages which she would have recovered but for the Firm's negligence. *See Barrs*, 641 So.2d at 1375; *Bolles*, 629 So.2d at 200. From the evidence noted above, the jury, sitting as the trier of fact in the dissolution action, determined the amount Former Wife would have been awarded if she went to trial and concluded that the amount was greater than she received under the settlement agreement. Thus, Former Wife has established the proximate cause element.

In sum, we conclude that the trial court erred in ruling that Former Wife failed to satisfy the proximate cause element because she did not present expert testimony specifically stating that she would have obtained a more favorable result but for the Firm's negligence. Thus, the trial court erred in overriding the jury's verdict. Accordingly, we reverse the final judgment and remand the case to the trial court for the reinstatement of the jury's verdict.

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 (Cite as: 719 So.2d 325)

In her second point on appeal, Former Wife asserts that the trial court erred in denying her motion for directed verdict on the issue of comparative negligence. In denying Former Wife's motion, the trial court determined that the jury could find that Former Wife was a sophisticated businessperson who could have easily read the plain language of the settlement agreement and seen that she was giving up her right to pursue any other claim against Former Husband, *331 despite the fact that the Firm told her that she would still be able to bring such a claim.

[6][7] A client cannot be found to be comparatively negligent for relying on an attorney's erroneous legal advice or for failing to correct errors of the attorney which involve the exercise of professional expertise. *See Becker v. Port Dock Four, Inc.*, 90 Or.App. 384, 752 P.2d 1235, 1239 (1988); *Theobald v. Byers*, 193 Cal.App.2d 147, 13 Cal.Rptr. 864, 866-67 (1961). Here, Former Wife relied on the Firm's representation that she could still bring her claims on the promissory notes even if she signed the settlement agreement. Simply because she was somewhat sophisticated in business matters does not impose upon her the burden to second guess her attorney's advice or to hire a second attorney to see if such advice was proper. The reason the Firm was hired was for their legal expertise and superior knowledge of the legal implications that the signing of the marital settlement agreement would entail. Thus, we find that the trial court erred in failing to direct a verdict in favor of Former Wife on the issue of comparative negligence. *See Becker*, 752 P.2d at 1239; *Theobald*, 13 Cal.Rptr. at 866-67. Accordingly, upon remand, we instruct the trial court to strike that portion of the jury's verdict finding that Former Wife was 25 percent comparatively negligent.

AFFIRMED IN PART, REVERSED IN PART,
 AND REMANDED.

GUNTHER and SHAHOOD, JJ., concur.
 GROSS, J., concurs specially with opinion.
 GROSS, Judge, concurring.

I write separately to emphasize several points. This case does not concern the necessity of an expert to establish the breach of the appropriate standard of care, where that issue is contested in a legal malpractice action. This case did concern litigation malpractice, for which the "trial within a trial" approach was proper. I agree that an expert was not *necessary* in this case to establish causation. Whether expert testimony was permissible on this issue in a family law litigation malpractice case is within the trial court's discretion under § 90.702, Florida Statutes (1997).

Reference to the transcript of the trial demonstrates some confusion as to the appropriate causation standard. The trial court charged the jury pursuant to § 61.075, Florida Statutes (1995), regarding equitable distribution of marital assets. As was the case with the Wisconsin statute in *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis.2d 94, 362 N.W.2d 118, 137 (1984), § 61.075 has codified the various factors to be considered by a judge in making an equitable distribution. The existence of a valid contract between a husband and wife is the type of factor a judge could take into consideration under § 61.075(1)(j) as being "necessary to do equity and justice between the parties." The jury was required to determine what a reasonable judge would have awarded in the underlying dissolution, had it had the proof of the marital contracts before it. The equitable distribution statute requires the application of common sense and fairness, qualities which the jurors brought to the courtroom and which they were capable of applying without the assistance of an expert in this case.

Fla.App. 4 Dist., 1998.
 Tarleton v. Arnstein & Lehr
 719 So.2d 325, 23 Fla. L. Weekly D1929

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C

Court of Appeals of Arizona,
Division 2, Department A.

Harriet TENNEN, Plaintiff/Appellant

v.

Robert L. LANE and Elsa Lane, husband and wife,
Defendants/Appellees.

No. 2 CA-CIV 5480.

Nov. 18, 1985.

Review Denied April 1, 1986.

Action was brought for legal malpractice against attorney who allegedly assisted former husband in obtaining fraudulent property agreement from former wife prior to divorce. The Superior Court, Maricopa County, Cause No. C-432262, William T. Moroney, J., granted directed verdict for attorney and former wife appealed. The Court of Appeals, Birdsall, P.J., held that whether attorney's alleged misconduct in obtaining property agreement was causally related to ex-wife's damages when ex-husband absconded with marital assets presented question for trier of fact.

Reversed.

West Headnotes

[1] Negligence 272 ⇐ 1713

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1712 Proximate Cause

272k1713 k. In General. Most Cited

Cases

(Formerly 272k136(25))

When evidence presented in negligence action fails to show causal connection between tort and damage, directed verdict is mandatory.

[2] Attorney and Client 45 ⇐ 129(3)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful

Acts

45k129(3) k. Trial and Judgment. Most

Cited Cases

Whether fraudulently obtained property agreement proximately caused damage to former wife presented question for trier of fact in former wife's legal malpractice action against attorney who assisted former husband in obtaining property agreement.

**1031 *94 Renaud, Cook & Videan, P.C. by James M. Videan, Phoenix, for plaintiff/appellant.

**1032 *95 Monbleau, Vermeire & Turley by Albert R. Vermeire, Phoenix, for defendants/appellees.

OPINION

BIRDSALL, Presiding Judge.

This appeal is from a directed verdict against the plaintiff, Harriet Tennen, in a legal malpractice claim against the defendant, Robert L. Lane, an attorney practicing in Phoenix. The verdict was directed because the trial court found, as a matter of law, that no evidence showed that the malpractice, if any, was a proximate cause of any damage to the plaintiff. The obvious issue on appeal is whether this finding was error. We reverse.

The facts giving rise to the appellant's claim, viewed in the most favorable manner to her, follow. The appellant was married to Bob Tennen in Mexico in 1963. Her prior marriage was dissolved in a Mexican divorce proceeding shortly before her marriage to Tennen. Bob Tennen was in the jewelry business in Tucson at the time of the marriage, but had accumulated little or no wealth. After a brief time in Tucson, they moved to Phoenix, where his business prospered. His Phoenix business was in-

corporated and he was the sole stockholder. Although nominally a director, the appellant did not participate in the management of the business. She did, however, help in the business by making deliveries between the Phoenix stores, doing design work, setting up store windows, and making molds and castings.

Sometime prior to June 8, 1979, Bob agreed to sell the business to a Delaware corporation for \$920,000, payable \$170,000 at closing and the balance of \$750,000 by deferred payments over five years. The buyers were required to pay the seller's income tax resulting from the sale. He did not tell Harriet about this proposed sale.

On June 8, Harriet and Bob went to the appellee's office and executed a "Declaration of Property Agreement." That agreement provided, in part, that the stock in the jewelry corporation was Bob's separate property. The appellee did not explain the agreement to Harriet, nor did Bob. Neither did the appellee advise Harriet that she should have independent legal advice. The agreement was not a property settlement in contemplation of divorce. There was no marital discord at that time. Harriet signed the agreement without reading it. She was not told about the pending sale. Harriet believed the appellee was her attorney. He had previously written her will, which he was safekeeping in his office. He had also been counsel for the corporation, and Bob's attorney.

Before proceeding with the purchase, the buyers requested that Harriet consent to the sale and prepared an "adoption, ratification and consent." On June 12, Bob, one of the buyers, and the appellee took this form to the appellant at her home, where Bob asked her to sign it. Bob told the appellant she was signing something for the I.R.S. No one explained the document to her, and she signed without knowing what she was signing. The appellee notarized her signature on that agreement. We set forth that agreement in its entirety:

"I, the undersigned, wife of Robert Tennen, do

hereby acknowledge that I have carefully read the foregoing Stock Purchase Agreement and all exhibits made a part thereof (hereinafter called the "Agreement"), and I understand its meaning and effect; that I fully and truly consent to, approve of and join in the purposes of the Agreement and the wisdom of the Agreement's provision; that I do hereby make fully and unconditionally subject to the terms of the Agreement any community property interest that I may now or hereafter have in any property referred to in the Agreement (including, without limitation, any and all shares of capital stock referred to in the Agreement as the Shares, and any and all cash sums delivered or to be delivered pursuant to the Agreement, any and all promissory notes delivered or to be delivered pursuant to the Agreement, and the proceeds of each of the **1033 *96 foregoing), and that I promise and agree to execute any and all instruments, to be fully bound by all applicable terms and conditions of the Agreement and to do any and all things necessary and proper to accomplish the purposes set forth in the Agreement. I do hereby irrevocably appoint my husband, my Attorney-in-Fact for the purposes of modifying, amending, supplementing or terminating the Agreement and I do hereby authorize, approve, ratify, confirm and adopt any such modification, amendment, supplement or termination as may at any time, and from time to time, be made by my husband. I hereby agree that I am and shall be bound by the terms and conditions of the Agreement as surviving spouse, heir, legatee, executrix and/or administratrix in the event that I shall survive my husband."

About two and one-half weeks after June 12, 1979, Bob, at Harriet's request, gave her a copy of the declaration of property agreement. This was just before he left on a trip to Europe. On February 11, 1980, Harriet, represented by new counsel, filed a petition for dissolution of the marriage. In that petition she also sought to have the property agreement set aside, alleging that it had been fraudulently procured. Bob was present in Arizona and first ap-

peared in the dissolution by the appellee, attorney Lane. However, shortly thereafter new counsel was substituted to represent him. An answer and counterclaim for annulment were filed on his behalf. The annulment pleading theorized that the Mexican marriage was invalid. However, before the dissolution action could be tried, Bob discounted the balance owing on the sale of the jewelry business and disappeared with the money. The appellant has never received any of the proceeds from the sale.

With Bob gone to places unknown, his attorney was permitted to withdraw and the dissolution proceeded as a default. It was heard by Judge Cecil B. Patterson, Jr. The decree, which was entered February 25, 1981, contained a finding that the husband had disappeared and that a court receiver had been appointed on that date to handle the liquidation of the property allocated in the decree to the husband and "for the location of assets secreted by the husband." The decree awarded the marital home to the appellant and ordered the sale of another house, with the sale proceeds to go to her. It also awarded her an automobile and up to \$500,000 of the proceeds from the sale of the business, with the remainder of the \$1,000,000 sale price to go to the husband. The decree also found that the marriage was valid and the declaration of property was invalid, "as having been procured at a time the wife was not represented, was not able to understand the content of the document, was not informed as to the content of the document, and her signature on this document was procured in an unfair manner." The property agreement was set aside.

The complaint in the legal malpractice action from which this appeal is taken was filed March 24, 1981. The verdict was directed May 2, 1983, and judgment entered May 27. The appellant testified she would not have signed the property agreement or the consent if she had known what they were. However, the appellee argues that no evidence shows what would have happened had she not signed. He points out that although two of the buyers' attorneys' depositions were taken, they were

never asked what the buyers would have done without the property agreement or the consent.^{FN1}

The stock was in Bob Tennen's name. He could have sold it without the appellant's consent. He could, likewise, have sold the business, or taken the jewelry. For these reasons he contends that what would have happened, but for the malpractice is pure speculation.

FN1. This evidence was before the court on pretrial motions but was not evidence in the trial.

[1] We agree with the appellee that, when the evidence presented in a negligence action fails to show a causal connection between the tort and the damage, a directed verdict is mandatory. *Green v. Jennings*, 26 Ariz. 132, 222 P.2d 1039 *97 **1034 (1924). Where proof of causation would be left to the jury's speculation, a directed verdict is properly entered. *Shaner v. Tucson Airport Authority, Inc.*, 117 Ariz. 444, 573 P.2d 518 (App.1977). Although proximate cause is a question of fact to be determined by a jury, if no evidence would permit a finding of such cause, the question is one of law for the court to decide. *Flowers v. K-Mart Corporation*, 126 Ariz. 495, 616 P.2d 955 (App.1980). Although we find no legal malpractice decision in Arizona containing the above legal principles, the decisions of our sister states have applied these principles in such cases. See *Sprigg v. Garcin*, 105 Cal.App.3d 869, 164 Cal.Rptr. 677 (1980); *Collins v. Greenstein*, 61 Haw. 26, 595 P.2d 275 (1979); *Blue Water Corp., Inc. v. O'Toole*, 336 N.W.2d 279 (Minn.1983); *Chalet Apartments v. Farm & Home Savings Association*, 658 S.W.2d 508 (Mo.App.1983).

[2] However, the converse of these principles must be observed when there is evidence of a causal connection between the negligence and the damage. The attorney representing the appellant in the dissolution testified that because of the declaration of property agreement, she was unable to tie up the sales proceeds as she would have been able to do absent the agreement. She testified that, but for that

document, the property would have been presumed to be the community property of the parties, and that the effect of the agreement was to render that presumption was no longer valid. She testified further that the preliminary injunction issued by the clerk of the superior court pursuant to A.R.S. § 25-315 would then have applied to that property. That order enjoins the parties from transferring, encumbering, concealing, selling, or otherwise disposing of any of their joint, common, or community property without the written consent of the other party or the permission of the court. This evidence is sufficient to create a question of fact to be decided by the jury on the issue of proximate cause. If the husband had been enjoined, he could not have absconded with the property without violating the court's order. That is the appellee's argument to show the connection between the tort and her damage.

The trial court believed, and the appellee urges on appeal, that it was necessary for the appellant to prove what would have happened with regard to the sale, but for the negligence. We disagree. The evidence showed what happened with the negligence, and this is all that appellant was required to prove. See *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983) (evidence held to permit a finding that because the defendant was served too much liquor he caused an automobile collision; *Brand v. J.H. Rose Trucking Co.*, 102 Ariz. 201, 427 P.2d 519 (1967) (when there is any evidence of negligent conduct which reasonable men might infer was one of the proximate causes of an accident, the cause must be submitted to the jury). *Ofstedahl v. City of Phoenix*, 129 Ariz. 85, 628 P.2d 968 (App.1981). There was evidence that the appellee's negligence was a proximate cause of damage to the appellant, and the trial court therefore erred in directing a verdict. "The question of proximate cause is usually for the jury and it is only when reasonable persons could not differ that the court may direct a verdict on the issue." *Markowitz v. Arizona Parks Board and State of Arizona*, 146 Ariz. 352, 358, 706 P.2d 364, 370 (1985).

The appellee also contends that the Tennen's marriage in Mexico was invalid and therefore the jewelry business could not have been community property. See *Cross v. Cross*, 94 Ariz. 28, 381 P.2d 573 (1963). This question was presented to the trial court in two motions for summary judgment. In the first motion, the appellee argued that Harriet's Mexican divorce was invalid and therefore she could not have contracted a valid marriage to Tennen. The trial court rejected that contention but, in the same under-advisement ruling, held: "[h]ad the issue of the validity of the Mexican marriage of the parties been litigated in *Tennen v. Tennen*, Tennen would have been estopped to deny the validity of the Mexican marriage." In the second motion, the appellee successfully contended that ****1035 *98** the Tennen's Mexican marriage was invalid because it occurred only eighteen days after Harriet's divorce. Evidence was offered to show that the law of Mexico, the civil code of the state of Sonora, and the national code of Mexico required a ten-month waiting period before remarriage, or a waiting period of one year following a voluntary divorce. Where the marriage does not comply with the requirements of the place where contracted, there is no marriage. See *Gamez v. Industrial Commission*, 114 Ariz. 179, 559 P.2d 1094 (App.1976). Also, at the time of the marriage, A.R.S. § 25-320, requiring that parties wait one year before a new marriage, was still in effect. The trial court's ruling on this second motion was that the Tennen's Mexican marriage was invalid. However, the trial court did not set aside its previous ruling that Bob Tennen was estopped to deny the validity of the marriage. This was no oversight. In a later statement to counsel in another hearing concerning evidentiary questions, the trial judge noted that he had already ruled that Mr. Tennen was estopped to claim the marriage invalid. Trial counsel did not disagree.

The appellee has not presented the question of whether Bob Tennen would have been estopped as an issue in a cross-appeal. That procedure is necessary to obtain appellate review. See *Santanello v. Cooper*, 106 Ariz. 262, 475 P.2d 246 (1970);

Hackin v. Gaynes, 103 Ariz. 13, 436 P.2d 127 (1968); *DeLozier v. Smith*, 22 Ariz.App. 136, 524 P.2d 970 (1974).

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The trial court also ruled, however, that appellee was not precluded by the divorce decree from attacking the validity of the marriage. Thus appellee argues that as a result of this ruling and the trial court's ruling that the marriage was invalid, appellant "was foreclosed as a matter of law from asserting any theory of recovery depending upon the existence of a marital community." This argument misses the mark. The property in which appellant claims an interest either belonged to her, or to her former husband, or both. As a result of the dissolution decree, the validity of which is unchallenged, she was determined to have a vested and enforceable interest in that property *as against Tennen*. The existence and validity of that interest *as against Tennen* is not properly the subject of litigation in this action. Rather, the only issue here is whether, as a result of appellee's alleged malpractice, she was unable to enforce the rights she was subsequently determined to possess *as against Tennen*.

We want to make it abundantly clear that the only issue presented on appeal is the sufficiency of the evidence of proximate cause, i.e., was there enough to make the defendant go forward with his evidence. The record contains other evidence from which the jury could have found that the appellee did not commit malpractice, that there were intervening, superceding causes and that the alleged malpractice was not a proximate cause. We do not decide any of those issues. The jury was foreclosed from deciding them.

Reversed.

LACAGNINA and FERNANDEZ, JJ., concur.

Ariz.App., 1985.
Tennen v. Lane
149 Ariz. 94, 716 P.2d 1031

▷

Court of Appeals of Michigan.
 Anahid TEODORESCU, Plaintiff-Appellee,
 v.
 BUSHNELL, GAGE, REIZEN & BYINGTON, De-
 fendant-Appellant. (On Remand)

Docket No. 133474.
 Submitted Feb. 2, 1993, at Detroit.
 Decided Aug. 17, 1993, at 9:05 a.m.
 Released for Publication Oct. 19, 1993.

Divorce client brought legal malpractice action against attorneys. The 37th District Court, George E. Montgomery, J., entered judgment for client. Attorneys appealed. The Macomb Circuit Court, Kathleen Jansen, J., affirmed award for loss of marital home but reversed award of attorney fees. Attorneys appealed. The Court of Appeals held that: (1) attorneys negligently represented client who lost house in foreclosure following judgment of divorce; (2) attorneys' negligence was a proximate cause of damages to client; and (3) collectibility is affirmative defense to action for legal malpractice that has to be pleaded and proved by defendant.

Affirmed.

Michael J. Kelly, J., concurred and filed opinion.

West Headnotes

[1] Negligence 272 ⇌ 1691

272 Negligence
 272XVIII Actions
 272XVIII(D) Questions for Jury and Directed Verdicts
 272k1691 k. In General. Most Cited Cases (Formerly 272k136(1))
 Directed verdicts are disfavored in most negligence cases.

[2] Appeal and Error 30 ⇌ 927(7)

30 Appeal and Error
 30XVI Review
 30XVI(G) Presumptions
 30k927 Dismissal, Nonsuit, Demurrer to Evidence, or Direction of Verdict
 30k927(7) k. Effect of Evidence and Inferences Therefrom on Direction of Verdict. Most Cited Cases

In reviewing denial of motion for directed verdict, Court of Appeals will examine evidence presented up to time of motion in light most favorable to plaintiff, and plaintiff will be given benefit of every reasonable inference that may be drawn from evidence.

[3] Trial 388 ⇌ 142

388 Trial
 388VI Taking Case or Question from Jury
 388VI(A) Questions of Law or of Fact in General
 388k142 k. Inferences from Evidence. Most Cited Cases

If reasonable minds could differ with regard to whether plaintiff has met burden of proof, motion for directed verdict should not be granted.

[4] Trial 388 ⇌ 139.1(13)

388 Trial
 388VI Taking Case or Question from Jury
 388VI(A) Questions of Law or of Fact in General
 388k139.1 Evidence
 388k139.1(5) Submission to or Withdrawal from Jury
 388k139.1(13) k. Prima Facie Case. Most Cited Cases

Defendant is entitled to directed verdict where plaintiff has failed to establish prima facie case.

[5] Attorney and Client 45 ⇌ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k105.5 k. Elements of Malpractice or Negligence Action in General. Most Cited Cases
(Formerly 45k105)

In action for legal malpractice, plaintiff must establish: existence of attorney-client relationship; acts that are alleged to constitute negligence; that negligence was a proximate cause of injury; and fact and extent of injury alleged.

[6] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

Attorneys negligently represented client who lost house in foreclosure following judgment of divorce; loss of house was merely manifestation of injury caused by attorneys' earlier negligence including their failure to take steps to prevent foreclosure and allowing house to be included in judgment, without objection, despite pending foreclosure.

[7] Attorney and Client 45 ⇌ 76(1)

45 Attorney and Client

45II Retainer and Authority
45k76 Termination of Relation
45k76(1) k. Act of Parties. Most Cited Cases

Attorney and Client 45 ⇌ 106

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k106 k. Nature of Attorney's Duty. Most Cited Cases

Relationship between attorneys and client ended when trial court granted attorneys' motion to withdraw, not on date upon which attorneys decided to cease representing client, and until motion was granted, attorneys were obligated to exert their best efforts to wholeheartedly advance client's le-

gitimate interest with fidelity and diligence.

[8] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of Litigation. Most Cited Cases

Attorneys' negligence was a proximate cause of damages to client who lost house in foreclosure after attorneys failed to take steps to prevent foreclosure and allowed house to be included in judgment, without objection, despite pending foreclosure; financial harm to client from attorneys' actions was readily foreseeable, and client was not required before bringing suit to avail herself of judgment's "fraud provision" since provision was concerned only with concealed assets.

[9] Negligence 272 ⇌ 1713

272 Negligence

272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1712 Proximate Cause
272k1713 k. In General. Most Cited Cases

(Formerly 272k136(25))

Proximate cause is question of fact that is generally to be decided by jury.

[10] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(2) k. Pleading and Evidence. Most Cited Cases

In client's legal malpractice action against attorneys, it was attorneys' burden to prove that client failed to mitigate her damages.

[11] Attorney and Client 45 ⇌ 129(2)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful
Acts

45k129(2) k. Pleading and Evidence.
Most Cited Cases

Collectibility is affirmative defense to action for legal malpractice that must be pleaded and proved by defendant, and burden of showing complete or partial uncollectibility is on defendant.

[12] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful
Acts

45k129(4) k. Damages and Costs. Most
Cited Cases

If attorney asserting collectibility as affirmative defense to action for legal malpractice can show that judgment would have been only partly collectible, client's damages would be limited to amount collectible.

[13] Attorney and Client 45 ⇌ 129(4)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful
Acts

45k129(4) k. Damages and Costs. Most
Cited Cases

Fact that client was in possession of unsatisfied judgment against former husband for loss of marital home did not compel finding that jury verdict in favor of client for legal malpractice in connection with foreclosure of home amounted to double compensation.

[14] Damages 115 ⇌ 15

115 Damages

115III Grounds and Subjects of Compensatory
Damages

115III(A) Direct or Remote, Contingent, or
Prospective Consequences or Losses

115III(A)1 In General

115k15 k. Nature and Theory of Com-
pensation. Most Cited Cases

Plaintiff at common law is permitted to pursue and recover separate judgments from multiple tortfeasors, but may only recover one compensation or satisfaction for single injury.

****276*262** Samuel H. Gun, Southfield, for
plaintiff.

Plunkett & Cooney by Christine D. Oldani and
Frank W. Brochert, Detroit, for defendant.

Before WAHLS, P.J., and MICHAEL J. KELLY
and CONNOR, JJ.

ON REMAND

PER CURIAM.

This is a legal malpractice claim that arose out of defendant's representation of plaintiff in a divorce action. A 37th District Court jury found in favor of plaintiff and awarded her damages of \$128,000. Defendant appealed to the Macomb Circuit Court, which affirmed the judgment's award of \$100,000 for plaintiff's loss of the marital home, but reversed the award of \$28,000 for legal fees. This Court denied defendant's application for leave to appeal, but the case was subsequently remanded to this Court for consideration as on leave granted. 436 Mich 871 (1990). On appeal, defendant claims that the trial court erred in denying its motion for a directed verdict, raising numerous arguments. We disagree and affirm.

According to the testimony presented by plaintiff, she retained defendant in October 1976. She was told that her trial, if one occurred, would be handled by Mr. Gage or Mr. Reizen, attorneys with defendant. Mr. Henry, another attorney with defendant, was responsible for reviewing the business records of plaintiff's husband. Henry told plaintiff that her husband, a medical doctor, had substantial assets. The husband had been ordered ***263** to continue paying the mortgage on the marit-

al home during the proceedings. Just before trial commenced in November 1977, plaintiff received notice that her husband had stopped making mortgage payments. Plaintiff informed another of defendant's attorneys, Chrys Kotsis, of this, and was told, "We'll handle it."

Gage, Reizen, and Henry were not present at trial. Instead, the trial was handled by Kotsis and David Kohl. Kotsis did not recall whether any of the husband's business records were offered as evidence at trial, while Kohl admitted that he did not review the records. No expert testimony was presented regarding the value of the husband's practice. At the conclusion of the trial on December 2, 1977, the trial judge indicated from the bench that plaintiff would be awarded the house, free and clear of the mortgage, alimony, and other things. The house was the most valuable asset awarded.

Plaintiff received a notice of foreclosure on December 28, 1977. Kotsis knew the following day that proceedings for foreclosure and a sheriff's sale had begun. Defendant took no action concerning the foreclosure. Plaintiff consulted with other attorneys, but did not hire them. After plaintiff met with defendant's attorneys on January 19, 1978, defendant**277 decided to withdraw as plaintiff's counsel and filed its motion on January 31. The parties to the divorce appeared in court on February 6. Plaintiff had other counsel present at the hearing, but he did not file an appearance. The trial court informed those present that it would not allow counsel for either side to substitute or withdraw until after the judgment was entered, which occurred the same day.

Eleven days after the judgment was entered, foreclosure occurred. Despite her efforts to retain *264 the house, plaintiff was evicted the following year. Plaintiff filed the present action on February 6, 1980, alleging attorney malpractice in that defendant had inadequately represented her in the divorce and had failed to protect from foreclosure the marital home that had been awarded to her.

[1][2][3][4][5] Directed verdicts are disfavored in most negligence cases. *Vsetula v. Whitmyer*, 187 Mich.App. 675, 679, 468 N.W.2d 53 (1991). In reviewing the denial of a motion for a directed verdict, we will examine the evidence presented up to the time of the motion in a light most favorable to the plaintiff. The plaintiff is given the benefit of every reasonable inference that may be drawn from the evidence. If reasonable minds could differ with regard to whether the plaintiff has met the burden of proof, a motion for a directed verdict should not be granted. *Howard v. Canteen Corp.*, 192 Mich.App. 427, 431, 481 N.W.2d 718 (1992); *Goldman v. Phantom Freight, Inc.*, 162 Mich.App. 472, 477, 413 N.W.2d 433 (1987). A defendant is entitled to a directed verdict where a plaintiff has failed to establish a prima facie case. *Stoken v. J.E.T. Electronics & Technology, Inc.*, 174 Mich.App. 457, 463, 436 N.W.2d 389 (1988). In an action for legal malpractice, a plaintiff must establish (1) the existence of an attorney-client relationship, (2) the acts that are alleged to constitute negligence, (3) that the negligence was a proximate cause of the injury, and (4) the fact and extent of the injury alleged. *Coleman v. Gurwin*, 195 Mich.App. 8, 10-11, 489 N.W.2d 118 (1992); *Lowman v. Karp*, 190 Mich.App. 448, 451, 476 N.W.2d 428 (1991).

[6][7] Defendant first claims plaintiff failed to show any acts of negligence. In particular, defendant argues that it cannot be held liable for plaintiff's loss of the house because the attorney-client relationship*265 had ended before the sheriff's sale. FNI We disagree. First, the testimony of defendant's expert witness that defendant refers to on appeal is irrelevant to our review of the denial of a motion for a directed verdict. Evidence of numerous acts of negligence were presented in plaintiff's case in chief, including defendant's failure to take any steps to prevent foreclosure and its allowing the house to be included in the judgment, without objection, despite the pending foreclosure. The trial court in the divorce action awarded plaintiff the house free and clear, and, had the court been made

aware of the status of the house, it would probably have awarded plaintiff unencumbered assets to achieve an equitable division of property. The ultimate loss of the house was merely the manifestation of the injury caused by defendant's negligence.

^{FN2} We also find defendant's reliance on *Boyle v. Odette*, 168 Mich.App. 737, 425 N.W.2d 472 (1988), to be misplaced. ^{FN3} *Boyle* does not hold that an attorney**278 may cut off his liability for negligent acts by ending the attorney-client relationship *266 before the harm caused by the acts reaches its full extent.

FN1. While the point is not important to the resolution of this argument, we note that defendant's claim that the relationship ended on January 19, 1978, the date upon which defendant decided to cease representing plaintiff, is without merit. The relationship ended on February 6, 1978, the day the trial court granted defendant's motion to withdraw. Until that time, defendant was obligated to exert its best efforts to wholeheartedly advance plaintiff's legitimate interest with fidelity and diligence. *State Bar of Michigan v. Daggs*, 384 Mich. 729, 732, 187 N.W.2d 227 (1971).

FN2. On appeal, plaintiff rather colorfully summarizes defendant's position: "Having admitted to severing Plaintiff's arm, Defendant seems to suggest that it is not liable for any damages resulting therefrom simply because it managed to leave the scene before the exact instant when the victim actually bled to death."

FN3. Defendant points to the following passage in *Boyle, supra*, 168 Mich.App. p. 745, 425 N.W.2d 472:

We agree with defendant Odette that he cannot be held liable for failing to file a social-host action prior to expiration of the period of limitation where he ceased to represent plaintiff and was replaced

by other counsel before the statutory period ran on her underlying action.

[8][9] Defendant next claims that plaintiff failed to show that defendant's negligence was a proximate cause of her damages. Proximate cause is a question of fact that is generally to be decided by a jury. *Fiser v. Ann Arbor*, 417 Mich. 461, 474-475, 339 N.W.2d 413 (1983). Defendant does not specifically discuss the substance of plaintiff's proofs in connection with this argument, but rather casts the issue of proximate cause as one of law. That is, defendant argues that irrespective of whether plaintiff's proofs showed causation in fact, defendant should not be held legally responsible. Again, the testimony of defendant's experts regarding proximate cause, noted in defendant's appellate brief, is irrelevant to whether plaintiff established a prima facie case.

[10] With regard to the legal component of proximate cause, legal cause is often stated in terms of foreseeability. *Richards v. Pierce*, 162 Mich.App. 308, 317, 412 N.W.2d 725 (1987). We hold that it is readily foreseeable that defendant's failure to take steps to prevent foreclosure or to seek the inclusion of other unencumbered assets in the judgment would cause plaintiff financial harm. Defendant also argues that plaintiff's failure to avail herself of the judgment's "fraud provision" should bar this action. The fraud provision was concerned only with concealed assets. The marital home was not a concealed asset, nor is there any indication that the business assets of plaintiff's husband were concealed. Rather, defendant failed to attempt to discover them or present evidence of their value at trial. Furthermore, we do not consider resort to the fraud provision to be an element of a prima facie case of legal malpractice. If defendant's argument is understood to be that plaintiff failed to *267 mitigate her damages, then it was defendant's burden to prove so, not plaintiff's. *Brooks v. Rose*, 191 Mich.App. 565, 571-572, 478 N.W.2d 731 (1991); *Dep't of Civil Rights v. Horizon Tube Fabricating, Inc.*, 148 Mich.App. 633, 637, 385 N.W.2d 685

(1986). The same is true with regard to the 1983 money judgment that the plaintiff obtained against her former husband, which will be discussed *infra*, and the apparent failure of plaintiff's subsequent counsel to seek a contempt order against her husband. Nor is the "suit within a suit" doctrine applicable to this case. See *Coleman, supra*, 195 Mich.App. p. 12, 489 N.W.2d 118, for a brief discussion of the limited scope of the doctrine.

Defendant also claims that plaintiff "failed in her proximate causation burden because she omitted to prove the collectibility of any so-called judgment she would have received but for Defendant Law Firm's negligence." While acknowledging that no Michigan authority holds that a "collectibility" element must be shown in order to establish a prima facie case of legal malpractice, defendant does draw our attention to authorities from other jurisdictions that impose this requirement. The gist of the argument is that if plaintiff's husband could not have satisfied a greater judgment, then plaintiff is left in the same position she would have been in had there been no attorney malpractice. Although this argument is made in connection with the proximate cause issue, it is more accurately an argument relating to the damages element of the claim.

[11][12] Several jurisdictions impose a collectibility requirement on legal malpractice claims, at least where an attorney is engaged to prosecute an action and does so negligently. See anno: *268 *Measure and elements of damages recoverable for attorney's negligence in preparing or conducting litigation-Twentieth Century cases*, 90 ALR4th 1033, § 17, pp 1071-1076. In the majority of those jurisdictions, the burden of showing collectibility is on the plaintiff. We decline to follow these authorities. Rather, we choose to follow the minority view and hold that collectibility is an affirmative defense to an action for legal malpractice that must be pleaded and proved by the defendant. The burden of showing complete or partial uncollectibility is on the defendant.^{FN4} **279 *Jourdain v. Dineen*, 527 A.2d 1304 (Me.1987). Because we are at present

concerned only with whether plaintiff established a prima facie case of legal malpractice, this holding does not require that the judgment be reversed.

FN4. If, for example, a defendant could show that a judgment would have been only partially collectible, then a plaintiff's damages would be limited to the amount collectible.

[13][14] In 1983, plaintiff obtained a money judgment against her former husband in the Macomb Circuit Court, Judge Kenneth Sanborn presiding. Among other things, the judgment awarded plaintiff a sum certain for the loss of the marital home. There is no indication in the record that the judgment was ever satisfied, nor is there any argument that it was. Defendant now argues that reversal is required because "being in possession of such a Judgment, it must be said that Plaintiff suffered no damages for loss of the marital home and that the Jury Verdict of \$100,000.00 for the marital home amounted to double compensation to which Plaintiff is not entitled." This argument merits little discussion. Being in possession of an unsatisfied judgment is a far different matter than being in possession of an unencumbered house.^{FN5} Moreover, at common law a plaintiff is permitted to pursue and recover separate judgments from *269 multiple tortfeasors, but may only recover one compensation or satisfaction for a single injury. *Kaminski v. Newton*, 176 Mich.App. 326, 328, 438 N.W.2d 915 (1989).^{FN6} Defendant's argument would have merit had the judgment been satisfied, and whether defendant now possesses any claim to that judgment is a question that is not before us.

FN5. For example, an unsatisfied judgment does not keep the rain off one's head.

FN6. *Bourke v. Warren*, 118 Mich.App. 694, 325 N.W.2d 541 (1982), a case relied upon by defendant, is consistent with this rule. Unlike the present case, the plaintiffs in *Bourke* "recovered" a judgment, which implies satisfaction.

Affirmed.

MICHAEL J. KELLY, Judge (*concurring*).

While I concur in the result, I write separately to emphasize that plaintiff was not required to establish that her husband was "collectible." This was not an element of plaintiff's prima facie case. The fact that a judgment may not be collectible at the time of its entry does not mean that it will not become collectible at some time during the ten-year enforcement or renewal period. M.C.L. § 600.5809(3); M.S.A. § 27A.5809(3).

Just as defendant had the burden to show uncollectibility, it also had the burden of proving that the Sanborn judgment had been paid, because satisfaction is also an affirmative defense. MCR 2.111(F)(3)(a).

Mich.App., 1993.

Teodorescu v. Bushnell, Gage, Reizen & Byington
201 Mich.App. 260, 506 N.W.2d 275

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For Opinion See 2007 WL 926957 , 2006 WL 2390505

United States District Court, D. Arizona.
VERVE, LLC, Plaintiff,

v.

HYPERCOM CORPORATION, Defendant;
Hypercom Corporation, Counterclaimant,

v.

Verve, LLC; Raymond M. Galasso; Kevin R. Imes; and Simon, Galasso & Frantz, P.L.C., Counterclaimants.
No. Civ 05-0365-PHX-FJM.

October 19, 2006.

Hypercom Corporation's Response to Verve Trial Memorandum Re "China Doll" Factors

Sid Leach (#019519), Monica A. Limón-Wynn (#019174), Snell & Wilmer L.L.P., One Arizona Center, 400 E. Van Buren Street, Phoenix, AZ 85004-2202, Telephone: (602) 382-6372, Facsimile: (602) 382-6070, Attorneys for Counterclaimant Hypercom Corporation, sleach@swlaw.com, mlimon-wynn@swlaw.com.

The Counterdefendants (hereafter "Verve") argue that Hypercom's proof of damages on its malicious prosecution and abuse of process claims do not meet the requirements of *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (Ariz. App. 1983), or L.R.Civ. 54.2(c)(3) (2006). Verve also argues that a jury has "no basis" for determining reasonable attorneys fees without expert testimony.

Verve's memorandum raises the issue of how damages are to be proven in a malicious prosecution action. However, Verve's memorandum does not cite any malicious prosecution cases or abuse of process cases to support the arguments advanced by Verve.

The *China Doll* case does not govern here. The *China Doll* case "set forth guidelines for the filing of affidavits in support of requests for attorneys fees where the parties have agreed by contract that the prevailing party shall be entitled to recover reasonable attorneys fees." *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. at 185, 673 P.2d at 929. The underlying rationale of that case was driven by the necessity of managing the "ever-burgeoning growth of fee applications" submitted to courts under "numerous statutes" in view of the fact that "more judicial time will necessarily be devoted to a consideration of requests for fees." *Id.*, 138 Ariz. at 186, 673 P.2d at 930. Thus, the rationale for requiring detailed fee applications in *China Doll*, *i.e.*, to reduce the amount of judicial resources required for the court to assess the reasonableness of attorneys fees based upon a detailed fee application and without the necessity of a full trial on the merits, does not apply here. *China Doll* did not involve a case where attorneys' fees were an element of damages for malicious prosecution.

Nor does L.R.Civ. 54.2(c)(3) govern this case. That local rule only applies under circumstances where the final judgment "does not determine the propriety and the amount of attorneys' fees authorized by statute or by contract" and the court does not establish

"other procedures for determining such fees." L.R.Civ. 54.2(a). In fact, the local rule expressly states that it does *not* apply under these circumstances: "This Local Rule does not apply to claims for attorneys' fees and related

non-taxable expenses which may be recoverable as an element of damages or to claims for attorneys' fees and related expenses for violations of the Federal Rules of Civil Procedure or under 28 U.S.C. § 1927."

Id. The distinction drawn in the applicability of this local rule recognizes the significant differences between claims for attorneys' fees recoverable as an element of damages, and circumstances like those faced in the *China Doll* case where the amount of attorneys' fees must be determined by the court based upon a fee application without a trial. The underlying policy considerations that support the requirement of detailed fee applications in order to reduce the amount of judicial resources expended in assessing the reasonableness of an attorneys' fee award do not come into play when attorneys' fees are recoverable as an element of damages in a trial on the merits.

Verve acknowledged in court that they had not found a governing case involving the level of proof required for proving attorneys fees as an element of damages on a claim for malicious prosecution. In view of Verve's failure to locate an Arizona case on point, Hypercom looked at cases in other jurisdictions that have squarely faced this issue.

The case of *Haswell v. Liberty Mutual Insurance Co.*,^[FN1] 557 S.W.2d 628 (Mo. 1977), is instructive and persuasive. In that case, the defendant challenged a jury verdict awarding damages for malicious prosecution on grounds that the "plaintiff offered no evidence that the fee was reasonable." 557 S.W.2d at 637. The trial court admitted evidence of attorneys fees paid as a result of the malicious lawsuit. Noting that "[o]ther jurisdictions passing on this precise issue have held that payment of attorneys' fees in a malicious prosecution action by the plaintiff is *prima facie* evidence of the reasonableness of said fees," 557 S.W.2d at 637 n.7, the court said:

FN1. The *Haswell v. Liberty Mutual Insurance Co.*, 557 S.W.2d 628, 633 (Mo. 1977) case was cited with approval in *Bradshaw v. State Farm Mutual Automobile Ins. Co.*, 157 Ariz. 411, 417, 758 P.2d 1313, 1319 (1988), although it was cited for a different proposition of law and not for the point discussed herein, which was not at issue in *Bradshaw*.

Defendants liken this case to those concerning medical expenses where our courts have generally held that in order to recover for medical expenses incurred there must be substantial evidence that such expenses were reasonable and necessary. However, the cases cited properly recognize that such proof may be made by inference from the circumstances, and that payment of a bill for such services should properly be considered some substantial evidence of the reasonableness of the charge. The rationale of these rulings is plain. Where no evidence of collusion or bad faith appears, the court and the jury are entitled to presume and ascribe honest motives, good faith and right conduct in the preparation and submission of the bill. Based upon the common experience of everyday life, the jury may infer that people do not pay bills where the reasonableness of the charge is disputed. This rationale would appear to be particularly applicable in situations such as the case before us. There could be no clear expectation of recovering the amount paid because such recovery is entirely contingent on the outcome of the second suit. Thus, the likelihood of collusion is remote. We therefore hold that sufficient evidence of reasonableness was presented here. Of course, if the reasonableness of the amount charged is disputed, the defendant remains free to attack the reasonableness of the charge by evidence, argument or both.

557 S.W.2d at 637 (citations and footnote omitted).

The approach by the *Haswell* court is reasonable and comports with common sense. In the absence of evidence of collusion or bad faith, the fact that the attorneys' fees were actually paid should be sufficient, in the absence of any other evidence, to establish a *prima facie* case of reasonableness. *Drumm v. Cessnum*, 61 Kan. 467, 473,

59 P. 1078, 1080 (1900) ("When it does not appear that the attorneys' fees and other expenses are obviously excessive, testimony of the amounts paid will constitute a *prima facie* case, and it will be assumed in such case that the attorneys' fees so paid were reasonable unless the contrary appears."). There is no policy reason for establishing a higher standard in a malicious prosecution case where attorneys' fees are an element of damages. Hypercom's evidence is sufficient to go to the jury. Of course, Verve is and was free to attack the reasonableness of the attorneys' fees and to offer any evidence Verve may have of collusion, bad faith, unreasonableness, or lack of causation.

In *Barlin v. Barlin*, 156 Cal. App.2d 143, 149-50, 319 P.2d 87, 91-92 (Cal. App. 2nd Dist. 1957), the court specifically rejected the contention that expert testimony is required on the reasonableness of the attorneys' fees claimed as damages in a malicious prosecution suit. According to the *Barlin* court, "proof of the reasonable value of legal services by expert testimony, while admissible, is *not indispensable* in establishing the value thereof." 156 Cal. App.2d at 149, 319 P.2d at 91 (emphasis added). The court held that it was not error to submit the issue to the jury based upon testimony as to the amount of attorneys' fees that the plaintiff paid in defense of the malicious action. 156 Cal. App.2d at 149, 319 P.2d at 91-92 ("The respondent testified as to the amount of attorney's fees which she had paid in defense of the attachment action which the jury could accept or reject as evidence of the reasonable value of such services"). The *Barlin* court quoted the following passage from another California case on point:

It is contended by appellant that there is no evidence of the reasonable value of the services rendered by Wheeler, and, therefore, the judgment must be reversed. In so arguing appellant assumes that expert testimony is essential to establish the reasonable value of an attorney's services. This assumption is not justified. While expert testimony is admissible, it is neither essential nor conclusive, and the court or jury may disregard it entirely. In the instant case the nature and extent of the services were in evidence. Moreover, the testimony of the witness Shea shows that the parties agreed to a fee equal to the sum of the executor's fees plus a bequest of \$ 2,000. The fee agreed upon by the parties is some evidence of the reasonable value of the services, and the jury could accept this evidence."

Mitchell v. Towne, 31 Cal.App.2d 259, 266, 87 P.2d 908, 912-13 (Cal. App. 1st Dist. 1939) (citations omitted).

Reasonableness does not necessarily have to be shown by direct testimony, expert or otherwise. *McIntosh v. Wales*, 21 Wyo. 397, 418-19, 134 P. 274, 280 (1913) ("Evidence that such a fee amounting to \$ 250 had been paid by herself and her husband was proper to go to the jury as an item of expense if reasonable in amount, and it appearing that the hearing was held in a country precinct a distance of eighty miles from the county seat where her attorneys resided, without railroad connection, we think it may be assumed that the amount was reasonable *although its reasonableness was not shown by testimony.*") (emphasis added).

Verve's request that the court "instruct the jury that it may only award Hypercom nominal attorneys' fees as damages" should be denied. *Waufle v. McLellan*, 51 Wis. 484, N.W. 300, 301 (1881) (jury verdict of nominal damages reversed. "Neither did it require direct proof to show that it was necessary for the plaintiff to employ counsel to conduct his defense, or that \$50 was a very reasonable fee for his services.").

The evidence offered by Hypercom is sufficient to establish at least a *prima facie* case for attorneys' fees as an element of damages on a malicious prosecution claim, and the jury should be allowed to decide the issue of compensatory damages based on the evidence submitted by Hypercom.

RESPECTFULLY SUBMITTED this 19th day of October, 2006.

SNELL & WILMER L.L.P.

By s/ Sid Leach

Sid Leach

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Attorneys for Counterclaimant Hypercom Corporation

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Supreme Court of Nebraska.
 Beverly J. WOOD, appellant,
 v.
 McGRATH, NORTH, MULLIN & KRATZ, P.C.,
 appellee.

No. S-96-1243.
 Feb. 12, 1999.

Client brought legal malpractice action against attorney who had represented her in dissolution proceeding which was concluded by settlement and decree. At the close of the evidence, the District Court, Douglas County, Joseph S. Troia, J., directed verdict in favor of attorney, and client appealed. The Court of Appeals, 7 Neb.App. 262, 581 N.W.2d 107, affirmed, and client petitioned for further review. The Supreme Court, Connolly, J., held that doctrine of judgmental immunity did not apply to attorney who failed to advise client of unsettled nature of law regarding whether unvested stock options were part of marital estate and whether marital estate's unvested stock options should have been valued without deducting potential capital gains tax.

Reversed and remanded.

West Headnotes

[1] Appeal and Error 30 ⇌ 842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in
 General

30k838 Questions Considered

30k842 Review Dependent on Whether
 Questions Are of Law or of Fact

30k842(1) k. In general. Most Cited
 Cases

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower

court's ruling.

[2] Attorney and Client 45 ⇌ 112.50

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
 45k112.50 k. Research and knowledge of
 law. Most Cited Cases

Doctrine of judgmental immunity did not apply to attorney who failed to advise client in dissolution proceeding of unsettled nature of law regarding whether unvested stock options were part of marital estate and whether marital estate's unvested stock options should have been valued without deducting potential capital gains tax, that proposed settlement resolved issues against her, and that trial judge could possibly have resolved issues in her favor.

[3] Attorney and Client 45 ⇌ 112.50

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
 45k112.50 k. Research and knowledge of
 law. Most Cited Cases

Attorney's judgment or recommendation on an unsettled point of law is immune from suit, and the attorney has no duty to accurately predict the future course of unsettled law.

[4] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
 45k112 k. Conduct of litigation. Most Cited
 Cases

Supreme Court insists that attorneys advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks.

[5] Attorney and Client 45 ⇌ 101(1)

45 Attorney and Client

45II Retainer and Authority
 45k101 Settlements, Compromises, and Re-

leases

45k101(1) k. In general. Most Cited Cases
Decision to settle a controversy is the client's.
Code of Prof.Resp., EC 7-7.

[6] **Attorney and Client** 45 ⇐ 109

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k109 k. Acts and omissions of attorney in
general. Most Cited Cases

Where there are reasonable alternatives, the attorney should inform the client that the issue is uncertain, unsettled, or debatable and allow the client to make the decision.

[7] **Attorney and Client** 45 ⇐ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of litigation. Most Cited
Cases

Because the client bears the risk when settling or refusing to settle a dispute, it is the client who should assess whether the risk is acceptable, not the attorney. Code of Prof.Resp., EC 7-7, EC 7-8.

[8] **Attorney and Client** 45 ⇐ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of litigation. Most Cited
Cases

Doctrine of judgmental immunity does not apply to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement; rather, whether an attorney is negligent for such a failure is determined by whether the attorney exercised the same skill, knowledge, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of all other legal tasks.

****103 Syllabus by the Court**

***109 1. Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

2. Attorneys at Law. An attorney's judgment or recommendation on an unsettled point of law is immune from suit, and the attorney has no duty to accurately predict the future course of unsettled law.

****104 3. Attorney and Client: Compromise and Settlement.** The Nebraska Supreme Court insists that lawyers advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks.

***110 4. Attorney and Client: Compromise and Settlement.** The decision to settle a controversy is the client's.

5. Attorney and Client: Compromise and Settlement. An attorney should exert his or her best efforts to ensure that a client has been provided the information necessary to assess the risks and benefits of either settling or proceeding to trial.

6. Attorney and Client. Where there are reasonable alternatives, the attorney should inform the client that the issue is uncertain, unsettled, or debatable and allow the client to make the decision.

7. Attorney and Client: Compromise and Settlement. Because the client bears the risk when settling or refusing to settle a dispute, it is the client who should assess whether the risk is acceptable, not the attorney.

8. Attorney and Client: Compromise and Settlement: Negligence: Immunity. The doctrine of judgmental immunity does not apply to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement. Rather, whether an attorney is negligent for such a failure is determined by whether the attorney exercised the same skill, knowledge, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of all other legal tasks.

David Geier, of Healey & Wieland Law Firm, Lincoln, for appellant.

John R. Douglas and Terry J. Grennan, of Cassem,

Tierney, Adams, Gotch & Douglas, Omaha, for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, and McCORMACK, JJ.

CONNOLLY, J.

We granted the appellant, Beverly J. Wood's petition for further review of the Nebraska Court of Appeals' decision. The Court of Appeals concluded that as a matter of law, Timothy J. Pugh, an attorney with the appellee, the law firm of McGrath, North, Mullin & Kratz, P.C. (McGrath), did not breach the standard of care or commit legal malpractice by failing to inform Wood that the law relating to two issues relevant to a divorce settlement was unsettled and that the settlement resolved those issues against her. We reverse the Court of Appeals' decision and conclude that the doctrine of judgmental immunity does not apply to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement agreement.

*111 BACKGROUND

We set out the facts focusing on the issues raised in Wood's petition for further review. For a more detailed recitation of the facts, see *Wood v. McGrath, North*, 7 Neb.App. 262, 581 N.W.2d 107 (1998).

Wood brought a legal malpractice action against McGrath, alleging that Pugh had negligently represented her in a dissolution action. The underlying dissolution action was concluded by settlement and decree. In her petition against McGrath, Wood alleged that Pugh allowed her to accept less than her share of the marital estate and was negligent by, inter alia, failing to inform her that (1) the settlement reflected a distribution which excluded all rights to then unvested stock options which her husband held through his employment at Werner Enterprises, Inc.; (2) the state of the law indicated that a trial court could likely include all such stock options within the marital estate; (3) the

settlement reflected a distribution which excluded approximately \$210,489 from the marital estate to account for potential capital gains tax on the stock that the couple owned; and (4) the state of the law indicated that a trial court could likely value the Werner stock without deducting any potential capital gains tax.

At trial, Wood testified that Pugh told her the settlement awarded her 40 percent of the marital estate and that when she asked if that was appropriate, she said Pugh told her **105 a judge would award her anywhere from 35 to 50 percent-that she could do better or worse than the settlement by going to trial. However, Wood testified that Pugh never discussed the different terms of the settlement, never mentioned any alternatives to settling, never provided any reasons to reject the settlement, and never discussed the potential outcome of a trial. She stated that she would not have signed the agreement if Pugh had told her that a trial court might include the unvested stock options as part of the marital estate and that a trial court might prohibit the deduction of potential capital gains tax when valuing the stock, contrary to what the settlement proposed.

Two attorneys testified as expert witnesses for Wood. David Domina stated that when a property settlement raises the issue of unvested stock options, the decision is the client's whether to *112 pursue the issue to trial or to nonetheless settle the issue and that a lawyer breaches the applicable standard of care by failing to inform the client of the existence of the issue and the related law. Domina testified that when a settlement agreement deducts potential capital gains taxes from the value of a marital estate, a lawyer breaches the applicable standard of care by failing to inform a client of the effect of the deduction and the related law. Paul Galter testified that given the terms of the settlement agreement presented to Wood, Pugh breached the standard of care because Pugh did not give Wood sufficient information on the unvested stock options and capital gains tax issues. Galter stated

that Pugh had a duty to tell Wood that the agreement raised the issues; to explain their effects to Wood; and to explain what the relevant law on the issues was, including what courts in other jurisdictions had held, before permitting her to sign the agreement.

At the close of Wood's evidence, McGrath moved for a directed verdict, which the court sustained on the issues of the stock valuation and the exclusion of unvested stock options.

On appeal, Wood asserted, inter alia, that the trial court erred in granting McGrath's directed verdict, arguing that Pugh breached the standard of care by failing to properly advise her in regard to the settlement agreement.

The Court of Appeals noted that the law on both the inclusion of unvested stock options in the marital estate and the consideration of potential capital gains taxes in valuing the estate were unsettled in Nebraska at the time the parties entered into the agreement. *Wood v. McGrath, North*, 7 Neb.App. 262, 581 N.W.2d 107 (1998). Accordingly, the court held that the judgmental immunity rule applied and concluded that Pugh's acts and omissions relating to the issues were not negligent as a matter of law. The court then stated that "Pugh, upon exercise of informed judgment, was not obligated to give additional advice regarding the unsettled nature of relevant legal principles." *Id.* at 282, 581 N.W.2d at 121.

ASSIGNMENT OF ERROR

In her petition for further review, Wood asserts that the Court of Appeals erred in affirming the trial court's judgment.

*113 SCOPE OF REVIEW

[1] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998).

ANALYSIS

[2] Wood argues that the doctrine of judgmental immunity does not apply to Pugh's failure to inform her of the law relating to the unvested stock options and capital gains tax deduction issues; that the settlement resolved those issues against her; and that given the body of law on the issues at the time, a trial judge might have resolved those issues in her favor. McGrath notes that the law regarding those issues was unsettled in Nebraska when Pugh represented Wood and argues that the doctrine of judgmental immunity applies to an attorney's decision regarding unsettled law, citing *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998). McGrath thus contends that when presenting a client with a settlement, an attorney has no duty to inform **106 a client of possible options when the law relating to a relevant issue is unsettled.

[3] In *Baker, supra*, this court held that an attorney is not liable for an error in judgment on a point of law which has not been settled by this court and on which reasonable doubt may be entertained by well-informed lawyers. Thus, an attorney's judgment or recommendation on an unsettled point of law is immune from suit, and the attorney has no duty to accurately predict the future course of unsettled law. This immunity rule encourages practicing attorneys in this state to predict, in a professional manner, the outcome of legal issues relevant to their clients' cases. See Canon 7, EC 7-3 and 7-5, of the Code of Professional Responsibility. However, Pugh's recommendations (or lack thereof) on the unvested stock options and capital gains tax issues are not before us. Rather, the issue is whether the doctrine of judgmental immunity applies to Pugh's failure to inform Wood that the law relating to unvested stock options and potential capital gains tax issues, while unsettled in Nebraska, were settled in other jurisdictions in a manner which would have been favorable to Wood. The question of whether an attorney owes a duty to inform a client of the unsettled nature of relevant*114 law was not addressed in *Baker*. Thus, we must determine whether to extend the *Baker* judgmental immunity

rule to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement agreement.

[4][5] "[W]e insist that lawyers ... advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks." *Bruning v. Law Offices of Ronald J. Palagi*, 250 Neb. 677, 689, 551 N.W.2d 266, 272 (1996) (citing *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*, 231 Conn. 168, 646 A.2d 195 (1994)). See, also, *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). We declined in *McWhirt v. Heavey*, 250 Neb. at 547, 550 N.W.2d at 335, " 'to adopt a rule that insulates attorneys from exposure to malpractice claims arising from their negligence in settled cases if the attorney's conduct has damaged the client.' " We decline to adopt such a rule now.

The decision to settle a controversy is the client's. See Canon 7, EC 7-7. If a client is to meaningfully make that decision, he or she needs to have the information necessary to assess the risks and benefits of either settling or proceeding to trial. "A lawyer should exert his or her best efforts to ensure that decisions of a client are made only after the client has been informed of relevant considerations." Canon 7, EC 7-8. The desire is that a client's decision to settle is an informed one.

[6] The attorney's research efforts may not resolve doubts or may lead to the conclusion that only hindsight or future judicial decisions will provide accurate answers. The attorney's responsibilities to the client may not be satisfied concerning a material issue simply by determining that a proposition is doubtful or by unilaterally deciding the issue. Where there are reasonable alternatives, the attorney should inform the client that the issue is uncertain, unsettled or debatable and allow the client to make the decision.

2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 17.15 at 531-32 (4th ed.1996).

Additionally, an allegation that an attorney is

negligent by failing to inform a client of an unsettled legal issue relevant to a settlement does not demand that an attorney accurately predict *115 the future course of unsettled law. Thus, an allegation that an attorney did not properly inform a client of relevant unsettled legal issues does not provide the same need for immunity from suit as does an attorney's judgment or recommendation in an area of unsettled law.

In *Williams v. Ely*, 423 Mass. 467, 668 N.E.2d 799 (1996), lawyers affiliated with a law firm prepared disclaimers for clients in which the clients renounced their remainder and contingent interests in a family trust. In affirming the lower court's ruling that a competent estate planning attorney would have advised that the law was unsettled regarding the appropriate time to file the disclaimers, the *Williams* court recognized the difference between alleging negligence for a recommendation based upon an area of unsettled law **107 and alleging negligence for failing to inform a client of relevant unsettled law.

It does not matter that the opinion that the disclaimers would generate no adverse gift tax consequences was a reasonable view of the law in 1975. The problem is not that Gaston Snow gave reasonable advice that in time proved to be wrong. The problem is that the apparent certainty of the opinion given, at a time when the issue was not conclusively resolved, denied the plaintiffs the opportunity to assess the risk and to elect to follow alternative estate planning options.

Id. at 476, 668 N.E.2d at 806. See *First Nat. Bank of Clovis v. Diane, Inc.*, 102 N.M. 548, 698 P.2d 5 (N.M.App.1985) (holding that while lawyer was not liable for his error in judgment on unsettled legal issue, jury properly considered whether lawyer was negligent for failing to inform client of risk created by unsettled law that recommendation was based upon).

In *Crosby v. Jones*, 705 So.2d 1356 (Fla.1998), which the Court of Appeals relied upon, the *Crosby*

court addressed whether an attorney must inform a client of the unsettled law relevant to the client's case. In the underlying case, Crosby advised Jones to settle with one of two tort-feasors, but in doing so, Crosby did not advise Jones that a decision from a Florida appellate district court had determined that settling in such a situation would be adverse to her interests. On appeal in her suit against the second tort-feasor, Jones' appellate district court *116 ruled adversely to her. See *Jones v. Gulf Coast Newspapers, Inc.*, 595 So.2d 90 (Fla.App.1992). Jones sued Crosby for malpractice, and on appeal, the *Crosby* court held that the attorney had no duty to inform the client of the unsettled nature of the law. However, the court's decision was based upon the fact that at the time of Crosby's recommendation, (1) a statute and a Florida Supreme Court decision appeared to be on point and supported Crosby's recommendation, see Fla. Stat. ch. 768.041(1) (1973), and *Sun First National Bank of Melbourne v. Batchelor*, 321 So.2d 73 (Fla.1975), and (2) two prior decisions issued by Jones' own appellate district court, the same court that ruled adversely in the underlying case, also supported Crosby's recommendation to settle. See *Crosby* at 1358-59, 1359 n. 2.

In *Crosby*, 705 So.2d at 1359, the court noted that its decision "does not mean that an attorney should never be required to inform a client regarding a conflict in the law; however, when an interpretation has been made as to the state of the law in a given district and that interpretation has a proper basis of support," an attorney need not advise his or her client of case law from other jurisdictions. Indeed, the facts and the holding in *Crosby* indicate that that case involved the failure to advise a client in an area of *apparently settled* law, rather than *unsettled* law. Thus, regarding apparently settled law, our decision in *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998), would be dispositive and in accordance with *Crosby*. In the instant case, however, Pugh had no case law from this jurisdiction which supported the settlement agreement's determinations on the unvested em-

ployee stock options or capital gains tax issues.

In *Davis v. Damrell*, 119 Cal.App.3d 883, 174 Cal.Rptr. 257 (1981), which the Court of Appeals also cited for support, the *Davis* court held that under the circumstances, the doctrine of judgmental immunity applied to the attorney's failure to inform the client of the unsettled nature of the law relating to a settlement agreement. "As a matter of policy," the court stated that an attorney should not be required to compromise his or her good faith and informed judgment by advising the client of the unsettled nature of relevant legal principles. *Id.* at 889, 174 Cal.Rptr. at 260.

[7] *117 The fallacy in the *Davis* court's reasoning is that when determining whether to settle a dispute, it is the client, not the attorney, who bears the risk. Because the client bears the risk, it is the client who should assess whether the risk is acceptable, not the attorney. See Canon 7, EC 7-7 and 7-8; *Williams v. Ely*, 423 Mass. 467, 668 N.E.2d 799 (1996); 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 17.15 (4th ed.1996).

**108 Ultimately, we cannot support what would be the clear result of extending the judgmental immunity rule in the instant case. If we conclude that the judgmental immunity rule applies to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement, an attorney could forgo conducting research or providing a client with information on a relevant legal issue once he or she determined that the legal issue at hand was unsettled in this state. We fail to see how this result promotes the settlement of disputes in a client's best interests.

[8] We conclude that the doctrine of judgmental immunity does not apply to an attorney's failure to inform a client of unsettled legal issues relevant to a settlement. Our conclusion makes no judgment as to whether Pugh was negligent. It imposes no additional duty as a matter of law to research or inform a client on unsettled legal matters. Rather, it simply directs that consistent with *Bruning v. Law*

Offices of Ronald J. Palagi, 250 Neb. 677, 551 N.W.2d 266 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); and *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991), whether an attorney is negligent for such a failure is determined by whether the attorney exercised the same skill, knowledge, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of all other legal tasks. At the same time, an attorney's ultimate recommendation in an area of unsettled law is immune from suit. *Baker v. Fabian, Thielen & Thielen, supra*. Such a result gives the client the benefit of both professional advice and the information necessary to make an informed decision whether to settle a dispute.

CONCLUSION

The Court of Appeals erred in concluding that Pugh was not negligent as a matter of law in failing to inform Wood of the *118 unsettled nature of the law regarding whether unvested stock options were part of the marital estate and whether the marital estate's unvested stock options should have been valued without deducting potential capital gains tax. Accordingly, we reverse the Court of Appeals' decision and remand the cause to the Court of Appeals with directions to remand the cause to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STEPHAN and MILLER-LERMAN, JJ., not participating.

Neb., 1999.

Wood v. McGrath, North, Mullin & Kratz, P.C.
256 Neb. 109, 589 N.W.2d 103

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Supreme Court of New Jersey.
Miriam ZIEGELHEIM, Plaintiff-Respondent and
Cross-Appellant,

v.

Stephen APOLLO, individually and Stephen
Apollo, a professional Corporation, Defendants-Appellants and Cross-Respondents.

Argued Feb. 3, 1992.

Decided June 23, 1992.

Former client brought malpractice action against attorney. The Superior Court granted attorney's motion for summary judgment, and client appealed. The Superior Court, Appellate Division, affirmed in part and cross petitions for certification were granted. The Supreme Court, Handler, J., held that: (1) client who agrees to settlement may maintain malpractice action even without a showing of fraud, and (2) fact that settlement is fair does not preclude finding that attorney was incompetent in not obtaining a better settlement.

Affirmed in part and reversed in part, and remanded.

Clifford, J., dissented and filed an opinion in which Garibaldi, J., joined.

West Headnotes

[1] Attorney and Client 45 ⇌ 107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k107 k. Skill and care required. Most Cited

Cases

Lawyers owe a duty to their clients to provide their services with reasonable knowledge, skill, and diligence.

[2] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Necessary steps to proper handling of case include careful investigation of the facts of the matter, formulation of legal strategy, filing of appropriate papers, and maintenance of communication with the client.

[3] Attorney and Client 45 ⇌ 106

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k106 k. Nature of attorney's duty. Most

Cited Cases

In accepting a case, lawyer agrees to pursue goals of client to extent the law permits, even when the lawyer believes the clients desires are unwise or ill-considered.

[4] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Because clients desires may be influenced in large measure by advice attorney provides, lawyer is obligated to give the client reasonable advice and, as legal matter progresses and circumstances change, wishes of the client may change as well and the lawyer is obligated to keep the client informed of the status of the matter for which the lawyer has been retained and is required to advise the client of the various legal and strategic issues that arise.

[5] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, cases in-

volving. Most Cited Cases

In legal malpractice cases, as in other cases, summary judgment is appropriate only when there is no genuine dispute of material fact.

[6] Judgment 228 ⇌ 185.3(4)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(4) k. Attorneys. Most Cited Cases

Testimony of client's expert that wives such as client often receive upwards of 50% of the marital estate and that client's chance of winning such a large fraction of the estate would have been especially good because the couple had enjoyed a high standard of living raised genuine issue of fact as to whether attorney negligently advised client that her chances of winning more than the 20% of the estate called for in settlement were not good.

[7] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of litigation. Most Cited Cases

Dissatisfied litigant may recover from attorney for malpractice in negotiating a settlement which the client has accepted, even in the absence of showing of actual fraud.

[8] Attorney and Client 45 ⇌ 107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k107 k. Skill and care required. Most Cited Cases

Attorneys are supposed to know the likelihood of success for the types of cases they handle and are supposed to know the range of possible awards in those cases.

[9] Judgment 228 ⇌ 185.3(4)

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(4) k. Attorneys. Most Cited Cases

Where both parties produced expert reports for the lower court, although the status of those records with respect to motion for summary judgment was unclear, if the court had not considered conflicting factual contentions contained in the reports when granting summary judgment, it would have been error to rule against plaintiff on the basis of an incomplete record.

[10] Judgment 228 ⇌ 186

228 Judgment

228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k186 k. Hearing and determination. Most Cited Cases

Trial court should consider all the information it knows to be available when evaluating claims for summary judgment and should assure itself that the parties have had a reasonable opportunity to obtain and submit material information to the court and, in appropriate circumstances, it should insist on the presentation of that evidence.

[11] Attorney and Client 45 ⇌ 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client
45k112 k. Conduct of litigation. Most Cited Cases

Fact that party has received a settlement that was fair and equitable does not necessarily mean that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent.

[12] Divorce 134 ⇌ 890

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k882 Judgment or Decree

134k890 k. Res judicata and conclusiveness. Most Cited Cases

(Formerly 134k255)

Determination on client's motion to set aside divorce settlement that the settlement was fair and equitable did not collaterally estop the client from asserting malpractice action against the attorney for failure to obtain a better settlement.

[13] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, cases involving. Most Cited Cases

Genuine issue of fact existed as to whether attorney negligently delayed in finalizing settlement of divorce action and whether settlement recited by husband's attorney in court was not the written settlement to which client had agreed.

[14] Judgment 228 ⇌ 181(16)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(16) k. Attorneys, cases involving. Most Cited Cases

Genuine issue of fact existed as to whether attorney was negligent in not writing down terms of settlement prior to hearing at which settlement was recited in court and approved by client and her husband.

[15] Attorney and Client 45 ⇌ 109

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k109 k. Acts and omissions of attorney in general. Most Cited Cases

Attorneys cannot be held liable simply because they are not successful in persuading the opposing party to accept certain terms.

****1299 *253** James P. Anelli, Roseland, for defendants-appellants and cross-respondents (Friedman Siegelbaum, attorneys; James P. Anelli and Mark C. Maniscalco, on the briefs).

***254** Robert A. Baron, Englewood, for plaintiff-respondent and cross-appellant (Baron & Baron, attorneys).

The opinion of the Court was delivered by

HANDLER, J.

In this case we must decide what duties an attorney owes a client when negotiating a settlement and whether a client's agreement to a negotiated settlement bars her from recovering from her attorney for the negligent handling of her case.

I

Miriam Ziegelheim, plaintiff, and Irwin Ziegelheim were married on September 11, 1955, and were divorced by a final decree dated August 5, 1983. During the early years of their marriage, Mrs. Ziegelheim was gainfully employed, assisting her husband in his business ventures and working for other employers as well. After the Ziegelheims adopted two infant sons she ****1300** became a full-time homemaker. The couple separated in August 1979.

In September 1979, Mrs. Ziegelheim retained defendant, attorney Stephen Apollo, to represent her in her anticipated divorce action. Because this appeal relates to the trial court's granting of summary judgment against plaintiff, we assume for the purposes of our decision that all of the facts she alleges relating to Apollo's handling of her divorce are true. According to Mrs. Ziegelheim, she and

Apollo met on several occasions to plan various aspects of her case. She told him about all of the marital and separate assets of which she was aware, and they discussed her suspicion the Mr. Ziegelheim was either concealing or dissipating certain other assets as well. In particular, Mrs. Ziegelheim told Apollo that she thought her husband had \$500,000 hidden in the form of cash savings and bonds. Accordingly, she asked Apollo to make a thorough inquiry into her husband's assets, including cash, bonds, patents, stocks, pensions, life insurance, profit-sharing plans, and real estate.

*255 When Mrs. Ziegelheim contacted Apollo, she also was aware of a tax deficiency that had been assessed by the Internal Revenue Service against the Ziegelheims on their joint returns. She specifically advised Apollo of her desire that any property settlement agreement absolve her of responsibility for the deficiency. She also insisted that the divorce end with her retention of the marital home, free and clear, with Mr. Ziegelheim assuming the mortgage; that she be awarded \$45,630 per year in alimony (with adjustments for inflation); and that Mr. Ziegelheim obtain a life insurance policy in the amount of \$500,000 to secure payment of alimony.

In September 1990, Irwin Ziegelheim filed for divorce in the Superior Court, Chancery Division. Through Apollo, Mrs. Ziegelheim filed her answer and a counterclaim. Because both Mr. and Mrs. Ziegelheim sought to terminate their marriage, the only issues to be resolved at the consolidated trial were the payment of alimony, the identification of the marital property, and the equitable distribution of that property.

According to Mrs. Ziegelheim, Apollo failed to discover important information about her husband's assets before entering into settlement negotiations with Mr. Ziegelheim's attorney, Sheldon Liebowitz. Apollo hired an accountant who valued the marital estate at approximately \$2,413,000. Mrs. Ziegelheim claims that the accountant substantially underestimated the estate because of several oversights

by Apollo, including his failure to locate a bank vault owned by Mr. Ziegelheim; to locate or determine the value of his tax-free municipal bonds; to verify the value of his profit-sharing plan at Pilot Woodworking, a company in which he was the primary shareholder; to search for an estimated \$500,000 in savings; to contact the United States Patent Office to verify the existence of certain patents he held; to inquire into a \$1,000,000 life insurance policy naming an associate of his as the beneficiary; to verify the value of certain lake-front property; and to verify the value of his stock holdings. She alleges that had Apollo made a proper inquiry, it would have been apparent that the marital *256 estate was worth approximately \$2,562,000, or about \$149,000 more than the accountant found.

On November 4, 1982, Apollo, Mrs. Ziegelheim, and her accountant commenced settlement discussions with Liebowitz, Mr. Ziegelheim, and Mr. Ziegelheim's accountant. Several proposals and counter-proposals were made over several days, and the discussions culminated on November 8, 1982, when the parties entered into a property settlement agreement governing distribution of the marital estate as well as arrangements for payment of alimony. Later that day, the agreement was orally entered into the record before the judge presiding over the divorce action. Liebowitz recited to the court what he understood to be the terms of the settlement, asking Apollo to interrupt if the recitation contained any errors. Apollo never interrupted to indicate that he thought Liebowitz's representations were inaccurate. Under the agreement, Mrs. Ziegelheim was granted alimony for fifteen years, totalling approximately**1301 \$330,000 and averaging approximately \$22,000 per year. Mrs. Ziegelheim received the marital home and Mr. Ziegelheim received the couple's lake house. (The parties subsequently disagreed over which of them was to assume the mortgage on the marital home; two transcripts of the hearing differed on the point. The conflict was resolved at a subsequent hearing, in which the court determined that audio recordings of Liebowitz's recitation revealed that Mrs. Ziegel-

heim was to assume the mortgage.) The Ziegelheim's other personal property also was allocated between them. Mrs. Ziegelheim received shares in Pilot Woodworking, which the company would redeem according to a set schedule, and Mr. Ziegelheim promised to contribute \$400 per year toward the purchase of a life term insurance policy. Mr. Ziegelheim also agreed to indemnify Mrs. Ziegelheim for any tax liabilities incurred for the years 1979, 1980, and 1981 "except for liabilities created by Mrs. Ziegelheim." In sum, Mrs. Ziegelheim was to receive approximately \$333,000 in alimony, \$6,000 in contributions to insurance costs, and \$324,000 in property, the last figure representing approximately *257 fourteen percent of the value of the estate (as appraised by Apollo and the accountant). Mr. Ziegelheim was to receive approximately \$2,088,000 in property, approximately eighty-six percent of the value of the estate.

When testifying before the court immediately after the settlement was read into the record, both Mrs. Ziegelheim and Mr. Ziegelheim stated that they understood the agreement, that they thought it was fair, and that they entered into it voluntarily. Mrs. Ziegelheim now asserts, however, that she accepted the agreement only after Apollo advised her that wives could expect to receive no more than ten to twenty percent of the marital estate if they went to trial. She claims that Apollo's estimate was unduly pessimistic and did not comport with the advice that a reasonably competent attorney would have given under the circumstances. Had she been advised competently, she says, she would not have accepted the settlement.

The settlement was not finalized until August 2, 1983. According to Mrs. Ziegelheim, the written agreement failed to conform with the oral agreement in that it did not indemnify her for tax deficiencies for which she claims her former husband was wholly responsible. She also claims that the nine-month delay in putting the agreement into final written form was unnecessary, and that it caused her to lose one year's interest on the first

\$75,000 owed to her pursuant to the stock-redemption clause.

In 1984, Mrs. Ziegelheim filed a malpractice action against Apollo and contemporaneously sought to reopen the divorce decree and set aside the property settlement. While the motion to set aside the settlement was pending, the malpractice action was called to trial. Because the malpractice action was premature in the absence of a ruling on the motion to reopen the divorce decree, she voluntarily dismissed the action against Apollo in April 1987 and subsequently filed a second malpractice claim against him. The family court denied her motion to set aside the settlement agreement, concluding that the record *258 demonstrated that "both plaintiff and defendant unequivocally accepted the agreement and felt that it was fair." In July 1988, the Appellate Division affirmed, stating that the parties had "entered into settlement after extensive negotiations" and that "defendant unequivocally stated that she accepted the settlement without coercion." As a result of that decision, Mrs. Ziegelheim was left only with her case against Apollo, the case before us now.

Mrs. Ziegelheim filed a five-count complaint against Apollo. Under the first count, she alleged that he was negligent in handling her case because he delayed in securing a final written settlement and thereby caused her to lose interest on the payments due under the settlement; because the written settlement did not contain the tax indemnification clause she wanted; and because the written settlement did not require Mr. Ziegelheim to make as large a contribution to the life insurance costs as she wanted. In the second**1302 and third counts she alleged that defendant was negligent in handling her case because he permitted it to settle for less than it should have. In the fourth count she alleged that defendant was negligent in handling her case because he permitted the case to settle under circumstances that ensured an unfair outcome; because he failed to use proper procedures in preparing and negotiating the case; and because he con-

vinced her to accept an agreement that a reasonably prudent attorney would have advised against accepting. In the fifth count she alleged that he was negligent in handling her case because he failed to reduce the complex settlement proposal to writing, compromising her ability to understand its terms and to give informed and reasoned consent to them.

Apollo moved for summary judgment. Each side relied on reports prepared for them by outside experts in support of their respective positions, although neither side's report was formally entered into evidence. (Nevertheless, the report of Mrs. Ziegelheim's expert was included in her appendix filed with the Appellate Division, which referred to it in its disposition of the case.) During her deposition, Mrs. Ziegelheim asserted that *259 Apollo had told her that she could expect to receive no more than twenty percent of the marital estate if she took her case to trial. Her statement was quoted in her expert's report. Although neither side's report was admitted into evidence, and although Apollo denied making the statement attributed to him, Apollo assumed for the purpose of assessing his motion for summary judgment that he had told Mrs. Ziegelheim that the settlement agreement represented the most that she would receive if the matter were tried.

The trial court ruled in favor of defendant on all counts. It noted that Mrs. Ziegelheim had stated on the record that she understood the settlement and its terms, that she thought the terms were fair, and that she had not been coerced into settling. With respect to her claims relating to the life insurance policy and the tax indemnification, the court found that Apollo could not be faulted for a failure to persuade an adversary to agree to the terms his client desired. Similarly, with respect to her claim that Apollo unnecessarily delayed in the execution of the agreement, the court observed that it can take considerable time to complete written settlements, and that the record revealed that Apollo made an effort to have the agreement executed in a timely fashion. With respect to her claim that Apollo

failed to investigate her case properly, the court ruled that her claim was precluded by the findings that the Chancery Division, Family Part, made when she attempted to re-open the settlement itself. Noting that the family court had found no evidence of concealed assets, the trial court ruled that Apollo could not be faulted for his failure to discover concealed assets that did not exist.

On the subject of Apollo's controversial opinion relating to the probability that Mrs. Ziegelheim would receive a more favorable disposition if her case went to trial, the court stated:

It is well established in New Jersey that an attorney is not a guarantor of his opinions and could not be held liable for giving an opinion about a settlement. *Procenik [Procanik] v. Cillo*, 226 N.J. Super. 132, 154 [543 A.2d 985] (App.Div.1988); *St. Pius X House of Retreats v. Camden Dio[cese]*, 88 N.J. 571, 588 [443 *260 IA.2d 1052] (1932). An attorney is not an insurer, he's not a guarantor of the soundness of his opinions of success of the outcome of the litigation in which he's employed to conduct. He's not answerable for error of judgment in the conduct of the case or for every mistake which may occur in practice. *McCullough v. Sullivan*, 102 N.J.L. 381, 384 [132 A. 102] (E. [&] A. 1926).

In the present case, Mrs. Ziegelheim voluntarily entered into the settlement agreement. She stated on the record that she understood the settlement and its terms, that she thought the settlement in all its terms were just, and that she was not coerced into settling. She also stated she understood she could try the matter if so desired.

With these statements on the record, the plaintiff could not now, in hindsight, **1303 bring an action against her former attorney because she's unhappy with the terms of the settlement. Plaintiff participated in the settlement negotiation and represented to the Court she understood the terms and was not coerced into settling.

While it is true that Mr. Apollo may have advised differently than another attorney, this does not give rise to legal malpractice. Different attorneys will give differing opinions. That is with [sic] the law protects an attorney when he gives an opinion.

The Appellate Division affirmed the trial court with respect to all claims except the claim under count four in which Mrs. Ziegelheim alleged that defendant was negligent in handling her case because he convinced her to accept an agreement that a reasonably prudent attorney would have advised against accepting.

Cross-petitions for certification were granted. 126 N.J. 390, 599 A.2d 166 (1991).

II

[1][2] Like most professionals, lawyers owe a duty to their clients to provide their services with reasonable knowledge, skill, and diligence. *St. Pius X House of Retreats v. Diocese of Camden*, 88 N.J. 571, 588, 443 A.2d 1052 (1982). We have consistently recited that command in rather broad terms, for lawyers' duties in specific cases vary with the circumstances presented. "What constitutes a reasonable degree of care is not to be considered in a vacuum but with reference to the type of service the attorney undertakes to perform." *Id.* at 588, 443 A.2d 1052. The lawyer must take "any steps necessary in the *261 proper handling of the case." *Pasanante v. Yormark*, 138 N.J. Super. 233, 239, 350 A.2d 497 (1975). Those steps will include, among other things, a careful investigation of the facts of the matter, the formulation of a legal strategy, the filing of appropriate papers, and the maintenance of communication with the client. *Id.* at 238-39, 350 A.2d 497.

[3][4] In accepting a case, the lawyer agrees to pursue the goals of the client to the extent the law permits, even when the lawyer believes that the client's desires are unwise or ill-considered. *Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325, 340, 419 A.2d 417 (1980). At the same time, because the

client's desires may be influenced in large measure by the advice the lawyer provides, the lawyer is obligated to give the client reasonable advice. As a legal matter progresses and circumstances change, the wishes of the client may change as well. Accordingly, the lawyer is obligated to keep the client informed of the status of the matter for which the lawyer has been retained, and is required to advise the client on the various legal and strategic issues that arise. *In re Yetman*, 113 N.J. 556, 563, 552 A.2d 121 (1989); *Lieberman, supra*, 84 N.J. at 340, 419 A.2d 417; *In re Loring*, 73 N.J. 282, 290, 374 A.2d 466 (1977).

In this case, Mrs. Ziegelheim made several claims impugning Apollo's handling of her divorce, and the trial court dismissed all of them on Apollo's motion for summary judgment. As we explain, we believe that the trial court's rulings on several of her claims were erroneous.

[5] In legal malpractice cases, as in other cases, summary disposition is appropriate only when there is no genuine dispute of material fact. *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 74, 110 A.2d 24 (1954). A litigant has a right to proceed to trial "where there is the slightest doubt as to the facts." *Ruvolo v. American Casualty Co.*, 39 N.J. 490, 499, 189 A.2d 204 (1963). All inferences are drawn in favor of the party *262 opposing the motion for summary judgment. *Judson, supra*, 17 N.J. at 75, 110 A.2d 24.

[6] On Mrs. Ziegelheim's claim that Apollo negligently advised her with respect to her chances of winning a greater proportion of the marital estate if she proceeded to trial, we conclude, as did the Appellate Division, that there was a genuine dispute regarding the appropriate advice that an attorney should give in cases like hers. According to the expert retained by Mrs. **1304 Ziegelheim, women in her position—who are in relatively poor health, have little earning capacity, and have been wholly dependent on their husbands—often receive upwards of fifty percent of the marital estate. The expert said that Mrs. Ziegelheim's chances of winning

such a large fraction of the estate had she gone to trial would have been especially good because the couple had enjoyed a high standard of living while they were together and because her husband's earning capacity was "tremendous" and would remain so for some time. Her expert's opinion was brought to the trial court's attention, as was the expert report of Mr. Ziegelheim. If plaintiff's expert's opinion were credited, as it should have been for purposes of summary judgment, then Apollo very well could have been found negligent in advising her that she could expect to win only ten to twenty percent of the marital estate.

[7][8] Apollo urges us to adopt the rule enunciated by the Pennsylvania Supreme Court in *Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick*, 526 Pa. 541, 587 A.2d 1346 (1991), that a dissatisfied litigant may not recover from his or her attorney for malpractice in negotiating a settlement that the litigant has accepted unless the litigant can prove actual fraud on the part of the attorney. Under that rule, no cause of action can be made based on negligence or contract principles against an attorney for malpractice in negotiating a settlement. The Pennsylvania Supreme Court rationalized its severe rule by explaining that it had a "longstanding *263 public policy which encourages settlements." *Id.*, 587 A.2d at 1348.

New Jersey, too, has a longstanding policy that encourages settlements, but we reject the rule espoused by the Pennsylvania Supreme Court. Although we encourage settlements, we recognize that litigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks. Attorneys are supposed to know the likelihood of success for the types of cases they handle and they are supposed to know the range of possible awards in those cases.

As we noted in *Levine v. Wiss & Co*, 97 N.J.

242, 246, 478 A.2d 397 (1984), "One who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession in good standing in similar communities." We have found in cases involving a great variety of professionals that deviation from accepted standards of professional care will result in liability for negligence. Professionals subject to that rule include doctors, *e.g.*, *Betenbaugh v. Princeton Hospital*, 50 N.J. 390, 235 A.2d 889 (1967); dentists, *e.g.*, *Sanzari v. Rosenfeld*, 34 N.J. 128, 167 A.2d 625 (1961); chiropractors, *e.g.*, *Rosenberg by Rosenberg v. Cahill*, 99 N.J. 318, 492 A.2d 371 (1985); pharmacists, *e.g.*, *In re Suspension of Heller*, 73 N.J. 292, 374 A.2d 1191 (1977); insurance brokers, *e.g.*, *Milliken v. Woodward*, 64 N.J.L. 444, 45 A. 796 (Sup.Ct.1900); and accountants, *e.g.*, *Levine, supra*, 97 N.J. at 246, 478 A.2d 397. Lawyers are clearly included as well, *e.g.*, *St. Pius X House of Retreats, supra*, 88 N.J. 571, 443 A.2d 1052; *Lieberman, supra*, 84 N.J. 325, 419 A.2d 417; *Passanante, supra*, 138 N.J.Super. 233, 350 A.2d 497. Like most courts, we see no reason to apply a more lenient rule to lawyers who negotiate settlements. *See, e.g.*, *Helmbrecht v. St. Paul Insurance Co.*, 122 Wis.2d 94, 362 N.W.2d 118 (1985); *264 *Segall v. Berkson*, 139 Ill.App.3d 325, 93 Ill.Dec. 927, 487 N.E.2d 752 (1985); *Rhine v. Haley*, 238 Ark. 72, 378 S.W.2d 655 (1964); *Ishmael v. Millington*, 241 Cal.App.2d 520, 50 Cal.Rptr. 592 (1966). After all, the negotiation of settlements is one of the most basic and most frequently undertaken tasks that lawyers perform.

[9][10] Apollo argues that the Appellate Division inappropriately considered the report prepared by Mrs. Ziegelheim's expert when it reversed the trial court's judgment. As noted, both parties produced expert reports at the trial level. The status of the reports is unclear. We should state as a **1305 preliminary matter that had the court not considered the conflicting factual contentions contained within the parties' reports, the court would have been in error to rule against the plaintiff on the basis of an in-

complete record. A trial court should consider all of the information it knows to be available when evaluating claims for summary judgment. It should assure itself that the parties have had a reasonable opportunity to obtain and submit material information to the court, and, in appropriate circumstances, it should insist on the presentation of such evidence. See *Sholtis v. American Cyanamid Co.*, 238 N.J. Super. 8, 19, 568 A.2d 1196 (App.Div.1989). The record in this case makes plain, however, that the trial court was in fact aware of the basic point of Mrs. Ziegelheim's expert's report, even though the court did not examine the report closely. The trial court's opinion reveals that summary judgment was awarded to Apollo notwithstanding plaintiff's contention, supported by specific factual allegations, that Apollo rendered improper advice. Moreover, Apollo's lawyer had informed the court that the defense, too, had secured an expert's report. In admitting that, the defense virtually conceded that there was a genuine dispute over the propriety of Apollo's advice. Summary judgment should not be granted when the moving party demonstrates through *its own* submissions that there is a genuine dispute over material fact, regardless of the presence or absence of submissions by the opposing party. *Judson, supra*, 17 N.J. at 75, 110 A.2d 24.

***265** Although the Appellate Division reversed the trial court on Mrs. Ziegelheim's claim relating to Apollo's advice, it affirmed the trial court on all other claims. On the issue of Apollo's alleged failure to make a proper investigation into Mr. Ziegelheim's assets, the trial court ruled that litigation on that issue was precluded by the family court's determination that the settlement was fair and equitable. We conclude that the family court's determination should not have barred Mrs. Ziegelheim from litigating that claim.

[11][12] The doctrine of issue preclusion, or collateral estoppel, "bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." *State v. Gonzalez*,

75 N.J. 181, 186, 380 A.2d 1128 (1977). In this case, Apollo argues that the doctrine was applied properly to Mrs. Ziegelheim's claims, even though Apollo himself was not a party to the prior litigation, because *she* was a party to the prior litigation, and her allegations that the agreement was unfair and that Mr. Ziegelheim had concealed certain assets were fully and fairly litigated in that case. It is true that we no longer limit application of issue preclusion doctrine exclusively to cases in which both parties were involved in the prior proceeding, and that we no longer impose an ironclad "mutuality" requirement for application of the doctrine. *Id.* at 188-91, 380 A.2d 1128. The doctrine may be applied in certain circumstances against a party even when it could not be applied against the party seeking its application. *Ibid.* Even so, we do not believe that the doctrine should have been applied in this case.

The fact that a party received a settlement that was "fair and equitable" does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent. Thus, in this case, notwithstanding the family court's decision, Mrs. Ziegelheim still may proceed against Apollo in her negligence action.

266** Moreover, another aspect of the alleged professional incompetence that led to the improvident acceptance of the settlement was the attorney's own failure to discover hidden marital assets. When Mrs. Ziegelheim sought to reopen her divorce settlement, the family court denied her motion with the observation that "[a]mple opportunity existed for full discovery," and that "the parties had their own accountants as well as counsel." The court did not determine definitively that Mr. Ziegelheim had hidden no assets, but stated instead that it "suspected that everything to be *1306** known was known to the parties." The earlier ruling did not implicate the competence of counsel and, indeed, was premised on the presumptive competence of counsel. Hence, defendant cannot invoke that ruling now

to bar a challenge to his competence. Mrs. Ziegelheim should have been allowed to prove that Apollo negligently failed to discover certain assets concealed by her former husband.

[13] The Appellate Division also affirmed the trial court's dismissal of Mrs. Ziegelheim's claims that Apollo negligently delayed in finalizing the settlement and that the written settlement differed from the one recited by Mr. Ziegelheim's lawyer. Again we conclude that she should have been allowed to litigate those claims on the merits. To be sure, lawyers generally cannot be held liable for their failure to persuade opposing parties to agree to terms, but Mrs. Ziegelheim alleges here that the two sides had agreed to terms and that Apollo simply failed to see to it that the terms were put into writing. Apollo may be able to refute her factual account, but he should not have prevailed on summary judgment, for there were genuine disputes concerning the accuracy of the written version and the reason for the nine month delay in finalizing it.

[14] Mrs. Ziegelheim's final claim is that Apollo was negligent in not writing down the terms of the settlement prior to the hearing in which the settlement was recited and approved by her and Mr. Ziegelheim. She asserts that a competent attorney would have written them down so that she could *267 review them and make an informed and reasoned assessment of their fairness. At trial she may be able to prove that she would not have accepted the settlement offer had it been presented to her in writing for her review. She may be able to demonstrate, for example, that Apollo's oral presentation of the settlement obscured the fact that it did not include the tax and insurance provisions she desired. We cannot determine the merits of those allegations and decline to speculate on defendant's possible refutation of them. We simply observe that on this record, her final claim, too, presents genuine issues of material fact and should not have been resolved on summary judgment.

[15] In holding as we do today, we do not open the door to malpractice suits by any and every dis-

satisfied party to a settlement. Many such claims could be averted if settlements were explained as a matter of record in open court in proceedings reflecting the understanding and assent of the parties. Further, plaintiffs must allege particular facts in support of their claims of attorney incompetence and may not litigate complaints containing mere generalized assertions of malpractice. We are mindful that attorneys cannot be held liable simply because they are not successful in persuading an opposing party to accept certain terms. Similarly, we acknowledge that attorneys who pursue reasonable strategies in handling their cases and who render reasonable advice to their clients cannot be held liable for the failure of their strategies or for any unprofitable outcomes that result because their clients took their advice. The law demands that attorneys handle their cases with knowledge, skill, and diligence, but it does not demand that they be perfect or infallible, and it does not demand that they always secure optimum outcomes for their clients.

III

The judgement of the Appellate Division is affirmed in part and reversed in part and the matter is remanded in accordance with this opinion.

*268 CLIFFORD, J., dissenting in part.

I take to be settled, beyond the necessity for citation of authority, the proposition that to establish a *prima facie* case of legal malpractice a plaintiff must demonstrate that the defendant lawyer failed to meet the standard of professional performance in the legal community, thereby causing loss or damage to the plaintiff. Equally well established is the requirement for expert testimony to demonstrate both the standard and the defendant's deviation therefrom. In this case plaintiff submitted **1307 no expert report on defendant's motion for summary judgment; therefore the trial court granted the motion-correctly, in my view.

That both parties had experts' reports in their hip pockets and that the trial court may have been aware of those reports is of no moment. Plaintiff did not even mark her expert's report for identifica-

tion, never mind in evidence. In fact, the report is before us only because plaintiff's attorney included it-wholly improperly, without leave of court-in the record submitted to the Appellate Division. To declare, as the Court does, *ante* at 264, 607 A.2d at 1304, that "[t]he status of the reports is unclear" and that both parties "produced expert reports at the trial level" is to take with the record liberties that can be characterized generously only as "unwarranted." In the pithy expression of Alfred E. Smith, commenting in 1936 on Franklin D. Roosevelt's presidency, "baloney" is what it is (as in: "No matter how you slice it, it's still baloney." Gorton Carruth & Eugene Ehrlich, *The Harper Book of American Quotations* § 187.136 (1988). (That Gov. Smith's position did not represent the majority view either has not escaped my attention.) And while I am still in this now-meandering parenthesis, I think the occasional resort to slang in our judicial opinions does not sully them, for slang, according to no less a literary figure than Carl Sandburg, is "a language that rolls up its sleeves, spits on its hands and goes to work." Laurence J. Peter, *Peter's Quotations, Ideas for Our Time* 284 (1987)). To suggest, as the Court does, *ante* at 264, 607 A.2d at 1305, that the trial court*269 "did not examine the report closely" is to ascend to new heights of flummery. The trial court never even saw the report, much less "examined" it. And so plaintiff's submissions of proof were simply not sufficient to withstand defendant's motion for summary judgment.

A final note. I agree entirely with the Court that a party's expression of satisfaction with the terms of the settlement of a matrimonial action does not end the matter-that is, standing alone it does not constitute an absolute bar to a malpractice action against the lawyer. But I am unwilling to bend the sensible structure of our summary-judgment jurisprudence by substituting for our review a new record that goes beyond the "settlement" issue and then to decide the case on that record rather than on the one created at trial.

I dissent from so much of the Court's judgment as affirms the Appellate Division's reversal of summary judgment on Count Four.

Justice GARIBALDI joins in this opinion.
For affirmance in part, reversal in part and remandment-Chief Justice WILENTZ and Justices HANDLER, POLLOCK, O'HERN and STEIN-5.
For reversal and remandment-Justices CLIFFORD and GARIBALDI-2.

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