DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRUCE PECK and JAN PECK, husband and wife; and DELNO HALL, a single man, Third-Party Plaintiffs/Appellants, v. GAMMAGE & BURNHAM, a professional limited liability company, Third-Party Defendant/Appellee.	No. 1 CA-CV 11-0576 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-015306

The Honorable Larry Grant, Judge

AFFIRMED

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D O W N I E, Judge

¶1 Bruce and Jan Peck and Delno Hall (collectively, "Appellants") appeal from the superior court's grant of summary judgment in favor of Gammage & Burnham, L.L.C. ("G&B"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 Jan Peck ("Peck") agreed to assist Charles Horn in building his pharmaceutical business, Medical Security Card Co. ("MSC"), in exchange for a share of MSC's net revenues. MSC did not pay Peck the agreed-upon sums.

¶3 In June of 2001, Jan and Bruce Peck assigned to Hall their claims arising from the agreement with MSC, in exchange for 50% of any recovery Hall obtained. Hall signed a contingency fee agreement with attorney Ethan Frey. Frey's fee agreement stated that he would "from time-to-time[] seek legal services from attorney David Rodgers" who was "employed by Gammage & Burnham, PLLC."

¶4 Rodgers thereafter corresponded with Horn. A June 27, 2001 letter explained Peck's assignment and advised Horn, *inter alia*, that G&B and the Law Offices of Ethan Frey represented Hall. After receiving the letter, Horn called Peck to discuss

[1] We view the evidence in the light most favorable to Appellants and draw all justifiable inferences in their favor. *See Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, 116, ¶ 17, 180 P.3d 977, 981 (App. 2008) (citations omitted).

their agreement. On June 29, 2001, Rodgers again wrote to Horn, explaining that G&B represented Peck "on a number of matters," but reiterating that she had assigned her rights to Hall, who was represented by G&B. The letter urged Horn to communicate with G&B instead of Peck or Hall.

¶5 "A day or two" before July 13, 2001, G&B learned that Rodgers' license to practice law had been administratively suspended since September 2000 due to his non-compliance with certain Mandatory Continuing Legal Education requirements. Rodgers paid sums owing to the State Bar of Arizona on July 13, 2001, and his license was reinstated that same day.

¶6 Also on July 13, 2001, Frey filed a complaint against MSC, with Hall as the only named plaintiff. The complaint contained three counts: breach of contract, "breach of trust, accounting," and breach of fiduciary duty. The next month, Rodgers left G&B to work for the law firm of Beus Gilbert, PLLC.

¶7 In January 2002, the Pecks and Hall signed a contingency fee agreement with Frey for representation regarding: (1) the claims against MSC arising from the agreement with Peck; and (2) other claims Peck had against MSC and/or Horn. The fee agreement stated that Appellants had retained Beus Gilbert as co-counsel. The agreement authorized Frey to receive one-third of any gross recovery, plus costs. Pursuant to the agreement, Appellants could terminate the

representation at any time, in which case Frey would share the contingency fee with successor counsel "on the basis of relative time spent . . . through the conclusion of the case" if successor counsel "agree[d] in writing to this arrangement."

¶8 In February 2002, MSC offered to settle for $4.5 million. The offer included $2.5 million for Peck's share of MSC revenues and $2 million for shares Peck owned in a related company. Frey and Rodgers recommended that Appellants accept the offer. Although Appellants were concerned the settlement was "not in their best interests," they nevertheless agreed to it. The settlement, though, "quickly fell apart." By March 2002, "all parties knew the settlement was dead."

¶9 Frey and Rodgers (through Beus Gilbert) filed a second lawsuit in June 2002 –- this time on behalf of both Hall and the Pecks (the "second action"). The complaint once again named MSC, and it added Horn as a defendant. The second action contained nine counts.

¶10 In November 2002, Appellants terminated Frey and advised him that their new counsel believed Frey was entitled to reasonable fees and costs, but would not agree to payment "on the basis of relative time spent." Appellants' new lawyers prosecuted the second action in the superior court for over two years, conducting a jury trial and obtaining a "liability" verdict in Appellants' favor. Before the damages phase of the

trial commenced, MSC offered to settle the second action and threatened to file bankruptcy if Appellants did not settle. Appellants settled with MSC in April 2005. The settlement amount is protected by a confidentiality agreement and order, but it significantly exceeds the previously-offered sum of $4.5 million.

¶11 Appellants refused to pay Frey or to arbitrate their fee dispute. In September 2005, the Law Offices of Ethan Frey sued Appellants to compel arbitration of the fee dispute. Appellants filed an answer, counterclaim, and third party complaint. Their original third party complaint named Frey, the Law Offices of Frey and McCue, David Rodgers, and the Law Offices of David Rodgers as third party defendants and alleged legal malpractice, breach of contract, breach of the covenant of good faith and fair dealing, and intentional/negligent misrepresentation.

¶12 Appellants later amended their pleadings to name G&B as a third party defendant and counterdefendant.[2] They alleged three counts against G&B: (1) respondeat superior liability for Rodgers' conduct while employed at G&B; (2) negligent supervision of Rodgers while at G&B; and (3) negligence based on

[2] The Third Amended Counterclaim and Amended Third Party Complaint, filed August 13, 2008, is the operative pleading for purposes of this appeal.

G&B's "duty to ensure that the attorneys it employed were fully qualified and licensed to engage in the practice of law."

¶13 G&B moved for summary judgment, arguing, *inter alia*, that Appellants could not prove that they had been damaged by G&B's conduct.[3] The superior court granted G&B's motion. Appellants timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) and -2101(B).

DISCUSSION

¶14 Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). We review *de novo* the grant of summary judgment based on the record made in the superior court. *Schwab v. Ames Constr.*, 207 Ariz. 56, 60, ¶ 17, 83 P.3d 56, 60 (App. 2004) (citation omitted). We will affirm the superior court's ruling if it is correct for any reason. *Ariz. Bd. of Regents ex rel. Univ. of Ariz. v. State ex rel. Ariz. Pub. Safety Ret. Fund Manager Adm'r*, 160 Ariz. 150, 154, 771 P.2d 880, 884 (App. 1989) (citations omitted).

[3] G&B also joined in Frey's motion for summary judgment, which argued that Appellants could not establish causation.

¶15 A plaintiff alleging legal malpractice must establish the four basic elements of negligence: duty, breach of duty, causation, and damages. *Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 12, 83 P.3d 26, 29 (2004) (citation omitted). For the reasons discussed *infra*, we conclude summary judgment was proper because Appellants failed to establish they were damaged by conduct attributable to G&B. We therefore do not address the other necessary elements of the malpractice claims and assume, solely for purposes of this appeal, that G&B owed Appellants a duty, that G&B breached its duty, and that disputed facts exist regarding causation.

¶16 "It is well settled that conjecture or speculation cannot provide the basis for an award of damages." *Rancho Pescado, Inc. v. Nw. Mut. Life Ins. Co.*, 140 Ariz. 174, 186, 680 P.2d 1235, 1247 (App. 1984). A plaintiff must establish both the *fact* of damages attributable to the defendant and the amount of damages. "[T]he amount of damages may be established with proof of a lesser degree of certainty than required to establish the fact of damages." *Id.* at 184, 680 P.2d at 1245 (citation omitted); *see also Farr v. Transamerica Occidental Life Ins. Co. of Calif.*, 145 Ariz. 1, 6, 699 P.2d 376, 381 (App. 1984) (citation omitted). ("Speculative or uncertain damages. . . will not support a judgment and proof of the fact of damages must be of a higher order than proof of the extent thereof.")

¶17 In opposing G&B's summary judgment motion, Appellants argued that the firm allowed them "to hire an unlicensed, inexperienced lawyer" and that hiring Rodgers "under false pretenses" was the "but-for cause of their malpractice damages." Appellants contended they were damaged because they were "forced" to settle in 2005 for less than they could have obtained "if the case had gone to trial with a competent lawyer in 2003." Appellants further claimed that if their case had been resolved "at the beginning of 2003," MSC would have "had the ability to pay far more."[4]

¶18 After reviewing the record, we agree with G&B that Appellants failed to establish the "fact" of damages attributable to the law firm's conduct. *See Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, 287, ¶ 14, 17 P.3d 790, 793 (App. 2000) (citation omitted) ("When the party moving for summary judgment makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the opposing party to produce sufficient competent evidence to show that an issue exists."); *see also Glaze*, 207 Ariz. at 29, ¶ 15, 83 P.3d at 29 (citation omitted) ("A claim of legal malpractice requires

[4] To the extent Appellants advance additional arguments in their opening brief, we do not consider them because they were not presented to the superior court. *See Cahn v. Fisher,* 167 Ariz. 219, 221, 805 P.2d 1040, 1042 (App. 1990) (citation omitted) (a party cannot raise new theories on appeal to seek reversal of summary judgment).

more than negligence by an attorney; in addition, 'actual injury or damages must be sustained before a cause of action in negligence is generated.'"); *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986) (in legal malpractice claim, plaintiff must prove "the fact and extent of the injury").

¶19 The claim that Appellants were damaged was predicated on the opinion of financial expert Dwight Duncan. Duncan assumed that but for the attorneys' negligence, the first lawsuit would have been resolved by January 1, 2003. He evaluated "lost opportunity cost[s]" and "the position and outlook for both the industry and MSC as of mid to late 2002 as compared to mid to late 2004 to ascertain whether MSC was in a better position to settle and fund a larger settlement than was actually achieved." Duncan concluded MSC "**was clearly in a better position to settle and fund a structured settlement**" in January 2003 than in April 2005.

¶20 Appellants' own expert, though, testified that it would have taken at least 18-24 months from filing to bring the case to trial. And Richard Strohm, Appellants' successor counsel who actually litigated the second action, testified that two years was a fair estimate of how long it would take to litigate the case, adding: "that's probably early for a large-document case, particularly where you have two large firms with a lot of motion practice."

¶21 The first lawsuit, naming only MSC and Hall as parties, and involving solely the claims that Peck had assigned, was filed on July 13, 2001. Even assuming that July 13, 2001, is the operative date, rather than the filing date of the second action, the time necessary to bring the case to trial would have elapsed after January 1, 2003.[5] And calculating a trial date from the inception of the second action –- the case that actually settled –- trial would not have commenced until December 2003 at the earliest.

¶22 Moreover, Appellants cannot establish the "fact" of damages simply by offering an economist's opinion that MSC was financially able to pay more in 2003 than in 2005. Rather, they were required to proffer evidence from which a reasonable trier of fact could conclude by a preponderance of the evidence that, absent negligence attributable to G&B, Appellants would have received more. *See Phillips*, 152 Ariz. at 418, 733 P.2d at 303 (citation omitted) (the question in a legal malpractice case is whether, but for the attorney's negligence, the plaintiff "*would have been* successful" in the underlying action) (emphasis added). A party's ability to pay is not synonymous with its willingness to pay. Other than speculation, nothing in the

[5] Appellants refer to the second action as a "re-filing" of the first lawsuit. Such a characterization is not supported by the record.

record supports this critical aspect of proof as to the "fact" of damages.

¶23 Although we are not bound by appellate decisions from other jurisdictions, *Thompson v. Halvonik*, 43 Cal. Rptr. 2d 142 (Cal. Ct. App. 1995), is instructive. The plaintiff in *Thompson* hired "Firm A" in 1987 to litigate a medical malpractice claim. *Id.* at 144. In 1990, he substituted "Firm B," which settled the case eight months later. *Id.* Plaintiff then brought a legal malpractice action against Firm A, claiming his settlement "was less favorable" than it would have been had Firm A diligently prosecuted his case and alleging that he could have used the settlement proceeds earlier. *Id.* at 144-45.

¶24 Firm A moved for summary judgment. *Id.* at 144. To support his damage claim, plaintiff offered an economist's comparison of his actual settlement with a hypothetical settlement reached eight months after the retention of Firm A. *Id.* at 145. The economist concluded that the ultimate settlement was "less advantageous" to plaintiff due to changing interest rates and underwriting practices that occurred during the three years it took to reach the settlement. *Id.* The trial court, however, deemed plaintiff's evidence "too speculative" and granted summary judgment to Firm A. *Id.* The appellate court affirmed, concluding that the evidence suggested only "speculative harm" because it did not:

> demonstrate that but for [Firm A's] delay, [plaintiff's] underlying case would have settled at all, let alone at an earlier date, for the same amount, or with the same structure. . . . [A]bsent evidence that [the hospital] would have settled with [Firm A] under exactly the same circumstances it settled with [Firm B], actual harm from [Firm A's] conduct is only a subject of surmise, given the myriad of variables that affect settlements of medical malpractice actions.

Id. at 146. As in *Thompson*, even assuming Appellants could prove that MSC was better off financially in January 2003 than it was in April 2005, Peck and Hall offered no evidence that MSC would have paid a larger settlement sum in 2003 absent negligence attributable to G&B.

CONCLUSION

¶25 For the reasons stated, we affirm the judgment of the superior court.

/s/
MARGARET H. DOWNIE,
Acting Presiding Judge

CONCURRING:

/s/
RANDALL M. HOWE, Judge

/s/
PATRICIA A. OROZCO, Judge