IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 6, 2006 Session

MICHAEL AUSTIN v. MICHAEL H. SNEED

Appeal from the Circuit Court for Davidson County
No. 03C-1967 Robert E. Corlew, III, Designated Judge

No. M2006-00083-COA-R3-CV - Filed November 13, 2007

This appeal involves a claim for legal malpractice. The client hired the lawyer to file suit in the United States District Court against the Metropolitan Police Department and several of its officers to recover damages for the use of excessive force. The District Court dismissed the claims against the Metropolitan Police Department and later dismissed the claims against the individual officers because the lawyer had failed to amend the complaint to name the officers individually despite having their names. After all his claims had been dismissed, the client filed a legal malpractice action against his former lawyer in the Circuit Court for Davidson County. The lawyer conceded that he had been negligent but asserted that his former client's excessive force claim against the individual officers was so weak that it never would have succeeded. Following a bench trial, the trial court awarded the client $24,008.50 in damages. On this appeal, the lawyer asserts that the trial court erred by finding that his former client would have prevailed with his federal excessive force claim because the police officers had not used excessive force. He also asserts that the trial court erred by granting a partial summary judgment on the necessity and reasonableness of his former client's medical expenses. Finally, the lawyer insists that the client failed to prove that the exacerbation of his chronic back problems was caused by the conduct of the officers. We have determined that the portion of the judgment attributable to the medical expenses that the client incurred as a result of the officers' excessive force must be reversed because the client failed to present competent evidence that his injuries were caused by the conduct of the officers. We have also determined that the portion of the judgment representing damages for pain and suffering and loss of capacity to enjoy life must be vacated, and that the case must be remanded for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part; Vacated in Part; and Remanded

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., joined. WILLIAM B. CAIN, J., not participating.

Michael H. Sneed, Nashville, Tennessee, Pro Se.

Larry L. Crain, Brentwood, Tennessee, for the appellee, Michael Austin.

OPINION

I.

In August 1999, Michael Austin was a 49-year-old employee of the Davidson County Circuit Court Clerk. He had worked in the clerk's office for approximately twelve years. Prior to working in the clerk's office, Mr. Austin had been employed by the Davidson County Sheriff for a similar period of time. He had a college degree and had practically completed the requirements for a law degree. Mr. Austin had chronic problems with his back. He was diagnosed with lordosis – an extreme inward curvature of the lower back – when he was eighteen or nineteen years old, and he had also been diagnosed with degenerative arthritis in his back and elsewhere in his body.

Mr. Austin and his family lived in Old Hickory. At the end of the workday on August 18, 1999, he was working in his yard when he saw two childhood friends talking nearby. He joined the group but had barely been able to exchange pleasantries when six to eight plain-clothed police officers descended on the group. The officers, who were apparently looking for a criminal who lived in the area, ordered the men to put their hands behind their heads, to get down on their knees, and to cross their legs.

Mr. Austin complied with the officers' commands and did not make any threatening gestures or attempt to flee. He gave his address and provided his identification to one of the officers. He also informed one of the officers that he had a degenerative arthritic back condition that would become extremely painful if he were required to kneel with his legs crossed. The officer ordered him to kneel anyway, and Mr. Austin complied because the officers' firearms were drawn, and he believed he might be shot if he did not comply.

As Mr. Austin complied with the instructions to sit on his crossed legs, he felt a pop in his spine as if something had slipped. Within five minutes or so, the officers obtained Mr. Austin's cellular telephone and wallet showing that he was not the person they were looking for. Nonetheless, the officers required Mr. Austin to remain sitting on his crossed legs for thirty minutes. Mr. Austin told the officers that he was experiencing intense pain. After approximately fifteen minutes, one of the officers permitted him to slightly change his position to get some relief. Mr. Austin's legs, however, had to remain crossed. When he later tried to change his position again, the officers instructed him not to move. Mr. Austin and his friends were allowed to get up and were released approximately thirty minutes after being detained by the police.

Mr. Austin experienced significant back pain following the incident. Within two or three months, he required his wife's assistance to put on his socks and tie his shoelaces. Mr. Austin went to see his family doctor and was referred to a series of specialists. The treatment for his back condition included three epidural steroid injections, administered every six months, and strong pain medication including Oxycontin and Hydrocodone. While Mr. Austin had missed work due to back pain prior to the incident, he was no longer able to work full-time in the months after the incident. Mr. Austin now has difficulty sitting. He takes strong pain medication, and the pain is at times so severe that it interferes with his sleep. He can no longer work due to his disability.

After talking to an acquaintance who was a general sessions judge, Mr. Austin decided to consult a lawyer. In April or May of 2000, he discussed his case with Michael H. Sneed. Mr. Austin described what had happened to him and told Mr. Sneed that he desired to obtain compensation for

the injuries he had sustained at the hands of the police on August 18, 1999. Mr. Sneed agreed to take Mr. Austin's case. He told Mr. Austin that he would file a civil rights action in federal court and that the Metropolitan Government would eventually agree to a settlement. Mr. Sneed never informed Mr. Austin that his case was weak or non-meritorious.

Mr. Sneed decided to pursue a recovery for Mr. Austin based on the theory that the Metropolitan Police Department "had a racially discriminatory policy by allowing white officers to patrol predominately black areas while not allowing black officers to patrol predominately white areas." Because Mr. Austin could not provide him the names of the police officers involved in the August 18, 1999 incident, Mr. Sneed filed a civil rights complaint in the United States District Court for the Middle District of Tennessee against the Metropolitan Government of Nashville and Davidson County ("Metropolitan Government") and several unknown police officers. The complaint alleged that Mr. Austin was "seized or arrested solely due to the fact that he [was] an African-American male" and requested $750,000 in compensatory damages and $250,000 in punitive damages.

Mr. Austin had difficulties contacting Mr. Sneed after the lawsuit was filed. He eventually discovered that Mr. Sneed had moved. In December 2000, Mr. Austin learned that the Metropolitan Government had provided Mr. Sneed the names of the police officers involved in the August 18, 1999 incident. When Mr. Austin asked whether something should be done with the names, Mr. Sneed was unresponsive.

In January 2001, Mr. Sneed informed the District Court that his license to practice law had been suspended and requested to be relieved as Mr. Austin's lawyer. Mr. Sneed informed the District Court at that time that Mr. Austin had already engaged another lawyer. In fact, Mr. Sneed did not arrange for a substitute lawyer for Mr. Austin until after he filed his motion. This lawyer represented Mr. Austin until September 24, 2001 when Mr. Sneed filed a notice of appearance stating that he was resuming his representation of Mr. Austin. Mr. Sneed continued to assure Mr. Austin that the Metropolitan Government would settle the case.

The District Court dismissed Mr. Austin's claims against the Metropolitan Government on April 22, 2002. However, it declined to dismiss his claims against the individual police officers. Rather, it entered an order requiring Mr. Austin to show cause why his claims against the individual officers should not be dismissed. The order stated:

> On December 22, 2000, Metro identified the police officers involved in the incident that gave rise to this action: Steve Hewitt, Michael Mann, Jason Beddoe, Ernest Cecil, Michael Gilliland and Ronald Fielder. (Docket Entry No. 49, Metro's Response to Plaintiff's First Set of Interrogatories, Exhibit 1 at Interrogatory 9). Yet, none of the Individual officers was ever served with process and, under Sixth Circuit precedent, this action never commenced against the Individual officers. Bufalino v. Michigan Bell Tel. Co., 404 F. 2d 1023, 1028 (6th Cir. 1968). Moreover, the one-year statute of limitations applicable to § 1983 actions appear[s] to have run. Tenn. Code Ann. § 28-3-104.

> It is **ORDERED** that the Plaintiff is given twenty (20) days to show cause why this action should not be **DISMISSED**. A show cause hearing is set for **Friday, May 17, 2002** . . ..

Mr. Sneed did not contact Mr. Austin about the dismissal of his claims against the Metropolitan Government or the show cause order. Mr. Austin did not obtain a copy of the District Court's order until four days after the date originally set for the show cause hearing. He was surprised and upset and did not understand what was happening. When Mr. Austin was finally able to track Mr. Sneed down, Mr. Sneed told him that the hearing had been continued until June 3, 2002.

Mr. Austin attended the June 3, 2002 hearing. During the hearing, Mr. Sneed asked the District Court to relieve him from representing Mr. Austin. The District Court granted the request and gave Mr. Austin thirty days to find another lawyer. Mr. Austin tried to find another lawyer to represent him in the federal proceeding, but no lawyers would accept the case in light of the shape it was in. After more than thirty days elapsed without a response from Mr. Austin or a lawyer representing him, the District Court dismissed Mr. Austin's claims against the individual police officers, thereby barring any future claims against them based on the statute of limitations.

On July 10, 2003, Mr. Austin filed a legal malpractice action against Mr. Sneed in the Circuit Court for Davidson County. Mr. Austin filed two motions for default judgment, and on December 18, 2003, the trial court granted Mr. Austin a default judgment and set a trial for damages on April 5, 2004. Mr. Sneed finally filed an answer on March 1, 2004, and on April 16, 2004, the trial court set aside the default judgment. On September 15, 2005, the trial court granted Mr. Austin's motion for partial summary judgment finding that the $9,008.50 in medical expenses Mr. Austin incurred following the August 18, 1999 incident were necessary and reasonable.

The defense that Mr. Sneed presented at the September 12, 2005 trial was novel. While he did not contest that his representation of Mr. Austin fell below the applicable standard of care, Mr. Sneed insisted that Mr. Austin's civil rights claims against both the Metropolitan Government and the individual officers could never have succeeded. In addition to his own testimony, Mr. Austin presented the testimony of an attorney who opined that Mr. Sneed's representation of Mr. Austin fell below the standard of care and that Mr. Austin's excessive force claim against the individual police officers would have prevailed if it had been properly presented. Mr. Sneed did not testify and called no witnesses on his behalf.

On September 21, 2005, the trial court mailed a letter to the parties stating that it had concluded that Mr. Austin had proved that Mr. Sneed had committed legal malpractice and that it had determined that Mr. Austin would have recovered $15,000.00 for pain and suffering and $9,008.50 for medical expenses. Accordingly, on October 5, 2005, the trial court entered a final order awarding Mr. Austin a $24,008.50 judgment against Mr. Sneed. Mr. Sneed has appealed.

II.
THE STANDARDS OF REVIEW

The standards this court uses to review the results of bench trials are well-settled. With regard to a trial court's findings of fact, we will review the record de novo and will presume that the

findings of fact are correct "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). We will also give great weight to a trial court's factual findings that rest on determinations of credibility. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). If, however, the trial court has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997); *Hardcastle v. Harris*, 170 S.W.3d 67, 78-79 (Tenn. Ct. App. 2004).

The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not to conclusions of law. Accordingly, appellate courts review a trial court's resolution of legal issues without a presumption of correctness and reach their own independent conclusions regarding these issues. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980 S .W.2d 365, 367 (Tenn. 1998); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 71 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 48 S.W.3d 732, 734 (Tenn. Ct. App. 2000).

III.
CLAIMS FOR LEGAL MALPRACTICE

Almost twenty-five years ago, the Tennessee Supreme Court observed that the "settled general rule . . . is that an attorney . . . may be held liable to his [or her] client for damages resulting from his [or her] failure to exercise [the] ordinary care, skill, and diligence . . . which is commonly possessed and exercised by attorneys in practice in the jurisdiction." *Spalding v. Davis*, 674 S.W.2d 710, 714 (Tenn. 1984). To prevail in a legal malpractice action, a plaintiff must prove: (1) that the defendant lawyer owed a duty to the plaintiff, (2) that the lawyer breached the duty, (3) that the plaintiff was damaged, (4) that the lawyer's conduct was the cause in fact of the plaintiff's damages, and (5) that the lawyer's conduct was the proximate or legal cause of the plaintiff's damages. *Gibson v. Trant*, 58 S.W.3d 103, 108 (Tenn. 2001); *Tenn-Fla. Partners v. Shelton*, ___ S.W.3d ___, ___, 2007 WL 595562, at *4 (Tenn. Ct. App. 2007); *Shearon v. Seaman*, 198 S.W.3d 209, 214 (Tenn. Ct. App. 2005).

As a general but not universal rule, a lawyer's duty arises from an employment relationship with his or her client in which both the lawyer and the client consent to the establishment of an attorney-client relationship. *Akins v. Edmondson*, 207 S.W.3d 300, 306 (Tenn. Ct. App. 2006); *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000).[1] In addition, a lawyer's conduct breaches his or her duty when it falls below the applicable statewide standard for attorneys practicing in Tennessee. *Chapman v. Bearfield*, 207 S.W.3d 736, 739-40 (Tenn. 2006). Finally, a plaintiff in a legal malpractice case has been damaged when liability has been imposed upon it or when it has lost a legal right, remedy, or interest. *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998); *Hartman v. Rogers*, 174 S.W.3d 170, 173-74 (Tenn. Ct.

[1] Relying on Restatement (Second) of Torts § 552, at 126-27 (1977), this court has recognized that non-clients may have a cause of action against a lawyer based on information negligently supplied for the guidance of others. *Akins v. Edmondson*, 207 S.W.3d at 306-07.

App. 2005); *Parnell v. Ivy*, 158 S.W.3d 924, 927 (Tenn. Ct. App. 2004); *Cherry v. Williams,* 36 S.W.3d 78, 84 (Tenn. Ct. App. 2000).

When a legal malpractice claim is based on the negligent handling of litigation that results in an adverse judgment or a dismissal of a claim, the plaintiff must prove that it would have prevailed in the underlying action had it not been for the negligent conduct of its lawyer. *Shearon v. Seaman*, 198 S.W.3d at 214; *Gay & Taylor, Inc. v. Am. Cas. Co. of Reading, Pa.*, 53 Tenn. App. 120, 125, 381 S.W.2d 304, 306 (1964).[2] Accordingly, a plaintiff bringing a legal malpractice action must prove a case-within-a-case. *Viar v. Palmer*, No. W2004-02080-COA-R3-CV, 2005 WL 1606067, at *4 (Tenn. Ct. App. July 6, 2005) (No Tenn. R. App. P. 11 application filed); *Bruce v. Olive*, 1996 WL 93580, at *3. In the first case, the plaintiff must prove that its lawyer's conduct fell below the applicable standard of care. In the second case, the plaintiff must prove that it had a meritorious claim or remedy that it lost or that it was found liable when it should not have been due to its attorney's negligence. *See Mihailovich v. Laatsch*, 359 F.3d 892, 904-05 (7th Cir. 2004).

The courts use an objective standard when determining whether a former client would have prevailed in the underlying suit. *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal. Rptr. 2d 780, 793 (Ct. App. 1997); 5 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 33.1, at 3-4 (5th ed. 2000) ("*Legal Malpractice*"). Under an objective standard, the trier of fact views the underlying suit from the standpoint of what a reasonable judge or jury would have decided but for the attorney's negligence. *Phillips v. Clancy*, 733 P.2d 300, 303 (Ariz. Ct. App. 1986).[3] Where the underlying action, as in this case, is a federal claim that was filed in the United States District Court for the Middle District of Tennessee, we look to the Sixth Circuit's jurisprudence for the substantive law that will guide our assessment of whether Mr. Austin would have more likely than not prevailed upon his excessive force claim.

IV.
MR. AUSTIN'S EXCESSIVE FORCE CLAIM

Because Mr. Sneed does not contest the trial court's conclusion that he was negligent, the pivotal question in this case is whether Mr. Austin would have prevailed with his excessive force claim against the individual officers involved in the August 18, 1999 incident. In addition to his own testimony regarding the August 18, 1999 incident and its effects, Mr. Austin presented the testimony of a lawyer with experience trying civil rights claims in federal court who opined that his excessive force claim would have succeeded but for Mr. Sneed's negligence.[4] Mr. Sneed put on no proof of

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[2] *See also Jessup v. Tague*, No. E2002-02058-COA-R3-CV, 2004 WL 2709203, at *3 (Tenn. Ct. App. Nov. 29, 2004) (No Tenn. R. App. P. 11 application filed); *Bruce v. Olive*, No. 03A01-9509-CV-00310, 1996 WL 93580, at *3-4 (Tenn. Ct. App. Mar. 4,1996) (No Tenn. R. App. P. 11 application filed).

[3] *See also e.g.*, *Justice v. Carter*, 972 F.2d 951, 957 (8th 1992). *Cornett v. Johnson,* 571 N.E.2d 572, 575 (Ind. Ct. App. 1991); *Witte v. Desmarais*, 614 A.2d 116, 122, (N.H. 1992); *Harline v. Barker*, 912 P.2d 433, 441 (Utah 1996); *Daugert v. Pappas*, 704 P.2d 600, 603 (Wash. 1985).

[4] The prevailing view is that this sort of expert testimony has no place in the second phase of the case-within-the-case. 5 *Legal Malpractice* § 33.17, at 140. Mr. Sneed has not taken issue with the introduction of this testimony.
(continued...)

his own. Rather, he argued that the excessive force suit that he had prepared and filed for Mr. Austin could never have succeeded.

A.

In legal malpractice cases such as this one, the case-within-a-case approach is the accepted and traditional approach for resolving the issues involved in the underlying proceeding. 5 *Legal Malpractice* § 33.8, at 68-69. It enables the trial court to avoid confusing the issues by trying the issue of the lawyer's negligence first and then addressing what should have happened in the underlying proceeding had it not been for the lawyer's negligence. 5 *Legal Malpractice* § 33.25, at 172-73. In the first phase of the proceeding, the plaintiff must prove that its lawyer breached the applicable standard of care. Except when a lawyer's negligence is within the common knowledge of lay persons, the plaintiff must present expert evidence regarding the standard of care and the standard of conduct. *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 406 (Tenn. 1991); *Blocker v. Dearborn & Ewing*, 851 S.W.2d 825, 827 (Tenn. Ct. App. 1992); 5 *Legal Malpractice* § 33.17, at 128.

Expert testimony plays a different role in the second phase of a legal malpractice trial. The purpose of the second phase is to recreate or litigate the legal proceeding that was never tried. During this phase, it is customary for the parties to call and examine the persons who would have been witnesses and to present the demonstrative and documentary evidence that would have been presented but for the defendant lawyer's negligence. 5 *Legal Malpractice* § 33.8, at 68-69. This is the evidence that the fact-finder considers when determining whether the legal malpractice plaintiff would have prevailed in the underlying suit. Expert testimony is required only to the extent that it would have been required in the underlying suit.

The outlines of the case-within-the-case in this proceeding are difficult to discern. In addition to his own testimony, Mr. Austin presented the testimony of a lawyer who opined that Mr. Sneed's failure to join the individual police officers as defendants fell below the applicable standard of professional practice. Mr. Sneed did not seriously contest this testimony. In fact, in his opening statement, Mr. Sneed skirted this issue by arguing that legal malpractice cases went beyond questions of simple negligence and required the plaintiff to "prove that you would have prevailed in the underlying litigation." Mr. Sneed essentially argued that any negligence on his part did not matter because Mr. Austin's case would never have survived a summary judgment or directed verdict.

With the case in this posture, it is not surprising that the case-within-the-case was truncated. Mr. Austin did not call any of his companions who were also detained during the August 18, 1999 incident, any of the officers involved in the incident, or any witnesses to establish his damages. Mr. Sneed did not even try to litigate the case-within-the-case. While he cross-examined Mr. Austin, he presented no evidence of his own. He did not call any of the officers involved in the August 18, 1999 incident, and he presented no evidence to rebut Mr. Austin's damage claim. Instead, he argued,

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[4](...continued)
Therefore, we leave for a future case the question of the admissibility of expert testimony regarding whether the underlying action would have been settled or won and the amount of the probable judgment or settlement.

in essence, that Mr. Austin would not have succeeded against the individual officers because the officers would have been entitled to a judgment as a matter of law.

B.

Mr. Sneed asserted that Mr. Austin's excessive force claim against the individual officers would have failed as a matter of law for three reasons: (1) the officers never touched Mr. Austin during the August 18, 1999 incident, (2) the actions of the officers during the August 18, 1999 incident were objectively reasonable, and (3) Mr. Austin failed to prove that the officers' conduct resulted in a violation of a clearly established right. The strength of Mr. Sneed's arguments is weakened by the absence of factual support because of his failure to present any evidence regarding the reasons for and reasonableness of the officers' conduct during the August 18, 1999 incident. While the evidence presented by Mr. Austin to support his excessive force claim is by no means strong, it is sufficient to withstand Mr. Sneed's arguments.

Absence of Physical Contact

Mr. Sneed first asserts that Mr. Austin's excessive force claim fails because the police officers did not touch him during the August 18, 1999 incident. The problem with Mr. Sneed's argument is that within the Sixth Circuit "claims of excessive force do not necessarily require allegations of assault." *Cornwell v. Dahlberg*, 963 F.2d 912, 915 (6th Cir. 1992). In fact, the United States Court of Appeals for the Sixth Circuit has recognized excessive force claims in cases where the alleged use of excessive force did not involve physical contact. *Holmes v. City of Massillon*, 78 F.3d 1041, 1048 (6th Cir. 1996); *see also Davis v. Bergeon*, 187 F.3d 635 (Table), 1999 WL 591448, at *5 (6th Cir. 1999).

Objective Reasonableness of the Officers' Actions

Mr. Sneed next argues that Mr. Austin's excessive force claim would have failed because the conduct of the officers during the August 18, 1999 incident was objectively reasonable. He insists that the officers could properly ignore Mr. Austin's statements about his back condition and his complaints about the pain caused by requiring him to kneel cross-legged. Once again, Mr. Sneed is simply incorrect in his understanding of the law as it exists in the Sixth Circuit.

An officer making an investigative stop or arrest has "the right to use some degree of physical coercion or threat thereof to effect it." *Saucier v. Katz*, 533 U.S. 194, 208, 121 S. Ct. 2151, 2160 (2001). However, the Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ." The reasonableness of a particular seizure depends not only on when it is made, but also on how it is carried out. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989). Where a police officer uses excessive force, his or her actions can give rise to a claim under 42 U.S.C. § 1983. *Bass v. Robinson*, 167 F.3d 1041, 1045 (6th Cir. 1999). Whether the use of force was excessive is measured using an objective reasonableness standard. *Griffith v. Coburn*, 473 F.3d 650, 656 (6th Cir. 2007). The question posed thereby is whether under the totality of the circumstances, the officer's conduct was objectively reasonable. *Fox v. DeSoto*, 489 F.3d 227, 236-37 (6th Cir. 2007)*;*

Griffith v. Coburn, 473 F.3d at 656; *Kostrzewa v. City of Troy*, 247 F.3d 633, 639 (6th Cir. 2001).

There is general agreement in excessive force cases that officers must take note when subjects display some objective indicia of injury or disability, such as a cast, sling, neck brace, or wheelchair. *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir. 1998); *Caron v. Hester*, No. CIV. 00-394-M, 2001 WL 1568761, at *5 (D.N.H. Nov. 13, 2001). However, the United States Court of Appeals for the Sixth Circuit has gone one step further by holding that an excessive force claim can arise from a failure of officers to respond to a claim of disability or injury when conducting an arrest, even in the absence of objective indicia of disability or injury. *Walton v. City of Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1993).[5] Thus, the federal courts in the Sixth Circuit have consistently considered statements regarding pain made to officers when considering excessive force claims.[6] The Sixth Circuit has indicated that its jurisprudence "does not make actual knowledge a prerequisite;" rather, it can be enough, depending upon the other circumstances (for example not resisting arrest or attempting to evade arrest), that an arrestee inform officers of an injury or pain that they are experiencing. *Grooms v. Dockter*, 76 F.3d 378 (Table), 1996 WL 26917, at *1-2 (6th Cir. 1996).

Mr. Austin described what took place on August 18, 1999. He testified that he fully cooperated with the officers' instructions, made no attempt to evade arrest, and posed no threat. He kneeled on the ground as instructed and put his hands behind his head as instructed. When asked to cross his legs, he informed the officers that doing so would cause him severe pain because of a degenerative arthritic back condition. He complained of his pain throughout the approximately thirty minute detention. After about fifteen minutes, he was allowed to shift his position slightly but not permitted to uncross his legs. When Mr. Austin attempted to shift again to gain some form of relief from the severe pain, he was ordered not to move.

The officers required Mr. Austin to keep his legs crossed for more than thirty minutes even though they became aware within five minutes after detaining him that he was not the individual whom they were seeking. The officers knew that Mr. Austin was not the person they were seeking. They also knew that Mr. Austin was being entirely cooperative and was not posing a threat. In addition, the officers knew that Mr. Austin was complaining that being forced to kneel cross-legged was causing severe pain because of a medical condition. The officers' only response to Mr. Austin's persistent pleas was to repeatedly state that it would only be a few more minutes. While this is not the strongest case of excessive force, Mr. Austin has certainly made his prima facie case that under the totality of the circumstances the officers' conduct was not objectively reasonable.

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[5] *Walton v. City of Smithfield* has been superseded by statute and modified on other grounds, but its finding that an officer may be required to take into account assertions from an arrestee that he or she suffers from a disability or injury when conducting an arrest remains intact. *See e.g.*, *Pigram ex rel. Pigram v. Chaudoin*, 199 Fed.Appx. 509, 514-15 (6th Cir. 2006); *Lyons v. City of Xenia*, 417 F.3d 565, 576 (6th Cir. 2005); *Mechler v. Hodges*, No. C-1-02-948, 2006 WL 2927253, at *6-7 (S.D. Ohio Oct. 11, 2006).

[6] *Lyons v. City of Xenia*, 417 F.3d at 576; *Martin v. Heideman*, 106 F.3d 1308, 1310 (6th Cir. 1997); *see also Pigram ex rel. Pigram v. Chaudoin*, 199 Fed.Appx. at 514-15; *Mahan v. Sundmacher*, No. 1:06-cv-54, 2007 WL 1395476, at *6 (W.D. Mich. May 10, 2007); *Mechler v. Hodges*, 2006 WL 2927253, at *6-7.

While there are potential reasons that the officers' conduct could have been reasonable, Mr. Sneed has failed to carry his side of the case-within-the-case. In defending himself in this legal malpractice action, Mr. Sneed failed to present any evidence challenging whether the events transpired in the manner described by Mr. Austin or demonstrating circumstances that would make the officers' actions reasonable. A former client faces a difficult uphill climb in proving legal malpractice in the course of litigation. This court will not accept Mr. Sneed's invitation to make this burden tougher and arguably almost insurmountable by allowing unsupported speculation and supposition to become evidence. Thus, while there are a number of theoretically possible explanations for the officers' behavior that this court could conceive of that might make such behavior reasonable, we will not, where Mr. Austin has made his prima facie case, make Mr. Sneed's side of the case-within-the-case for him by means of supposition.[7]

The Officers' Qualified Immunity

Finally, Mr. Sneed argues that Mr. Austin's excessive force claim would not have survived the officers' assertion that they were entitled to qualified immunity because their conduct on August 18, 1999 did not violate a clearly established right. As with his earlier arguments, Mr. Sneed's arguments regarding qualified immunity reflect a misunderstanding of the applicable law.

Based on the fact that Mr. Sneed presented no evidence supporting the reasonableness of the officers' conduct during the August 18, 1999 incident, we accredit Mr. Austin's testimony that the officers' conduct was objectively unreasonable.[8] However, determining that the officers' conduct was unreasonable does not end the inquiry into whether Mr. Austin would have prevailed on his excessive force claim. We must still determine whether the individual officers would have been entitled to qualified immunity.

If the officers' conduct during the August 18, 1999 incident did not violate a clearly established constitutional right, they would have been protected by qualified immunity. The United States Supreme Court has stated that:

> Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted. . . . Because the focus is on whether the officer had fair notice that her

[7] Mr. Sneed argues that Mr. Austin cannot prevail because he did not identify in the course of the trial the individual police officers who acted with excessive force. Mr. Sneed contends the trial court could not "pronounce a judgment against an unknown party." The judgment, however, is not against the individual officers or the Metropolitan Government, but instead against Mr. Sneed for malpractice. Perhaps it has escaped Mr. Sneed's attention, but the entire foundation for the cause of action against him is that Mr. Austin's action against the officers was dismissed because of his failure to identify the individual officers and because the statute of limitations now bars suit against those officers.

[8] It would be error to interpret this case as condemning or excusing the individual police officers who have not had an opportunity to present their version of events. The manner in which Mr. Sneed presented his side of the case-within-the-case may be more a reflection upon his poor job of lawyering in his own defense than the actions of the officers.

> conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 599 (2004). As for what constitutes a clearly established right in the context of an excessive force claim, the Court explained that

> the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Brosseau v. Haugen, 543 U.S. at 198-199, 125 S. Ct. at 599.

The officers involved in the August 18, 1999 incident were on notice (1) that the use of excessive force in effectuating an arrest violates the Fourth Amendment,[9] (2) that the Fourth Amendment required them to take into account the risk of violence or flight posed by the arrestee, the seriousness of the crime they suspected the arrestee of committing, and whether the arrestee was actively resisting arrest,[10] (3) that excessive force does not require an allegation of assault and that the conditions under which officers detain a person are relevant for purposes of the Fourth Amendment,[11] and (4) that the unnecessary infliction of pain on an arrestee constitutes a Fourth Amendment violation.[12] Accordingly, within the Sixth Circuit, a police officer would have been aware that a failure of officers to respond to Mr. Austin's pleas, given that he posed no threat, did not resist arrest, did not attempt to evade arrest, and was identified as the wrong person shortly after the detention began, was a violation of Mr. Austin's clearly established Fourth Amendment rights.

C.

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[9] Two years ago, the United States Court of Appeals noted that "[i]n this circuit . . . police officers would have been aware as of 1983 that a Fourth Amendment seizure must be effectuated with 'the least intrusive means reasonably available.'" *St. John v. Hickey*, 411 F.3d 762, 774-75 (6th Cir. 2005) (quoting *United States v. Sanders*, 719 F.2d 882, 887 (6th Cir.1983)).

[10] *St. John v. Hickey*, 411 F.3d at 774 (citing *Graham v. Connor*, 490 U.S. at 396, 109 S. Ct. at 1872).

[11] *St. John v. Hickey*, 411 F.3d at 775 (citing *Cornwell v. Dahlberg*, 963 F.2d 912, 915 (6th Cir. 1992)).

[12] *St. John v. Hickey*, 411 F.3d at 775 (citing *Martin v. Heideman*, 106 F.3d 1308, 1312-13 (6th Cir. 1997); *Walton v. City of Southfield*, 995 F.2d at 1342.

Based on this record, we have concluded that Mr. Sneed has failed to demonstrate that the individual police officers would have been entitled to a judgment as a matter of law on Mr. Austin's excessive force claim. The officers were not entitled to qualified immunity, and Mr. Austin presented evidence from which the trier-of-fact could conclude that they did not act reasonably by forcing Mr. Austin to remain in a painful kneeling position long after they had determined that he was not the person they were seeking. Therefore, we have determined that Mr. Austin has satisfactorily demonstrated that he would have been able to prove that the officers used excessive force during the August 18, 1999 incident.

V.
MR. AUSTIN'S PROOF OF DAMAGES

Mr. Sneed also asserts that even if Mr. Austin demonstrated that he could have proved that the officers used excessive force during the August 18, 1999 incident, Mr. Austin must still demonstrate that he would have been able to prove that he sustained injuries caused by the conduct of the officers and that he would have been entitled to recover damages for those injuries. Mr. Sneed insists that Mr. Austin has failed to prove a causal connection between the officers' conduct and his claimed injuries. On this point, we agree with Mr. Sneed.

In a legal malpractice case, the injury that the client suffers is the loss of a right, remedy or interest or the imposition of liability. Compensatory damages, which are the measure of that injury, consist of both direct and consequential damages. When the malpractice occurs in the context of litigation, the direct damages include the difference between the amount actually received or paid and the amount that would have been received or paid but for the lawyer's negligence. 3 *Legal Malpractice* § 20.1, at 120.[13] The consequential damages can include damages for emotional distress and related personal injuries, injuries to reputation, economic losses, and the expenses incurred in suing the attorney for legal malpractice. 3 *Legal Malpractice* §§ 20.1, 20.9 – 20.14, at 121, 138-54.

Because Mr. Austin's claim against the individual officers would have been pursuant to 42 U.S.C. § 1983, we must turn to federal law which, in federal civil rights actions, draws from, but is not circumscribed by, principles in tort law borrowed from the states. *Chatman v. Slagle*, 107 F.3d 380, 384-85 (6th Cir. 1997). In excessive force cases, expert medical testimony is not necessary when the cause of a physical or psychological injury is within the common knowledge of lay persons. However, when the cause of an injury is not within the common knowledge of lay persons, expert medical evidence, either in the form of medical records explaining causation, affidavits, depositions, or live testimony is required. *See e.g.*, *Wagner v. Bay City*, 227 F.3d 316, 320 n. 3 (5th Cir. 2000); *Barnes v. Anderson*, 202 F.3d 150, 158-61 (2d Cir. 1999); *Saunders v. City of Chicago*, 320 F. Supp.2d 735, 739 (N.D. Ill. 2004); *Lewis v. Bd. of Sedgwick County Comm'rs*, 140 F. Supp.2d 1125, 1140 (D. Kan. 2001). Where an injury is complex or closely related to a pre-existing condition, expert evidence is critically important. *Barnes v. Anderson*, 202 F.3d at 158-61 (complex injury); *Lewis v. Bd. of Sedgwick County Comm'rs*, 140 F. Supp.2d at 1140 & n.8 (injury related to a pre-existing condition). In these circumstances, the fact-finder cannot make a rational

[13] *Eastman v. Messner,* 721 N.E.2d 1154, 1158 (Ill. 1999); *Hoitt v. Hall*, 661 A.2d 669, 673 (Me. 1995); *Carbone v. Tierney*, 864 A.2d 308, 318 (N.H. 2004).

determination regarding whether the excessive force caused the injury. *Barnes v. Anderson*, 202 F.3d at 160.

Mr. Austin has a severe back condition that has plagued him since college. The condition is degenerative, and it was this condition that caused Mr. Austin to experience pain when the officers asked him to sit on his crossed legs. Following the August 18, 1999 incident, Mr. Austin sought treatment for his back, incurred medical expenses, and later became disabled. Mr. Austin has proved that he incurred $9,008.50 in medical expenses after the August 18, 1999 incident, and he had presented evidence that these expenses were necessary and reasonable. However, he failed to present any medical evidence from which the fact-finder could have concluded that the problems he was experiencing with his back after the August 18, 1999 incident were caused by the excessive force of the officers over a thirty minute period rather than his degenerative back condition. Without probative medical evidence establishing a causal connection between the conduct of the officers and the medical treatment Mr. Austin sought and received following the August 18, 1999 incident, the trial court erred by awarding Mr. Austin $9,008.50 in medical expenses.

We now turn to the $15,000 award to Mr. Austin for pain and suffering and loss of capacity for the enjoyment of life. It is unclear to this court the extent to which this award was impermissibly predicated upon the trial court's errant determination that Mr. Austin had carried his burden with regard to showing that the excessive force incident caused additional long-term damage to his back and to what extent it was based upon the permissible damages that Mr. Austin would have been entitled to recover. Mr. Austin may recover compensatory damages related to the excruciating pain that he experienced on the evening of August 18, 1999, or at a minimum nominal damages related to the violation of his constitutional rights. Accordingly, we have no choice other than to remand the case to enable the trial court to again address the award for pain and suffering and loss of capacity for the enjoyment of life in light of this court's ruling.

VI.

We reverse the portion of the October 5, 2005 judgment awarding Mr. Austin $9,008.50 for the medical expenses he incurred following the August 18, 1999 incident. We also vacate the $15,000 award for pain and suffering and loss of the capacity for enjoyment of life and remand this portion of the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal in equal proportions to Michael H. Sneed and to Michael Austin for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.