IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 10/29/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

BRIDGET O'BRIEN SWARTZ, BRIAN J. THEUT, as co-guardians ad litem for the minor, Efrem Campbell, Jr.,	)	1 CA-CV 11-0059
	)	DEPARTMENT D
Plaintiffs/Appellants,	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
JAMES E. VIEH; CAMPANA, VIEH & LOEB, P.L.C., an Arizona limited liability company,	)	
Defendants/Appellees.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-014406

The Honorable John A. Buttrick, Retired Judge

AFFIRMED

William G. Walker, P.C. Phoenix
by William G. Walker
Attorneys for Plaintiffs/Appellants

Dickinson Wright/Mariscal Weeks PLLC Phoenix
by Timothy J. Thomason
Jonathan S. Batchelor
Attorneys for Defendants/Appellees

Haralson, Miller, Pitt, Feldman & McAnally, P.L.C. Tucson
by Stanley G. Feldman
and
Knapp & Roberts, P.C. Scottsdale
by David L. Abney
Attorneys for Amicus Curiae
Arizona Association for Justice/
Arizona Trial Lawyers Association

P O R T L E Y, Judge

¶1 We are asked to decide whether the superior court erred by granting summary judgment to James Vieh and Campana, Vieh & Loeb, P.L.C. ("Vieh") and dismissing the legal malpractice claims for an inadequate settlement and charging unreasonable fees. Because Bridget O'Brien Swartz and Brian J. Theut, co-guardians ad litem, for Efrem Campbell, Jr. ("Junior"), a minor, failed to have an expert to demonstrate that they could prove the case-within-a-case, we affirm the judgment.

FACTUAL BACKGROUND

A. The Medical Malpractice Lawsuit

¶2 Junior was born in 2003 and suffers from significant disabilities. His parents, Efrem Campbell Sr. and Canisha Glass, thought their child's disabilities were the result of medical negligence and hired the Goldwater Law Firm to prosecute a medical malpractice action against the obstetrician, Thomas E. Masters, D.O., and Casa Grande Community Hospital ("Hospital"). They entered into a written contingent fee agreement that

provided for a forty percent contingent fee, and Goldwater associated Vieh to prosecute the claim.[1] Vieh filed suit on behalf of Junior and his parents against Masters and the Hospital alleging that Masters had negligently delivered the child and caused his severe disabilities, including cerebral palsy.

¶3 Masters settled the claim for his malpractice policy limits of $1,000,000. Vieh sought and received approval of the settlement from the probate division of the Maricopa County Superior Court. The November 1, 2004 order also appointed Junior's mother as his conservator; approved a forty percent contingent fee; approved individual payments to each parent; approved the deposit and investment of the remainder with the First National Bank of Arizona; and authorized a monthly stipend for Junior's mother.

¶4 After a November 2005 settlement conference, the Hospital agreed to settle the lawsuit for $1,000,000, which was to be used to buy an annuity for Junior. The following month, the probate court approved the settlement, as well as using the settlement proceeds to purchase a single premium annuity from the New York Life Insurance Company to provide Junior with a

[1] Vieh agreed to pay Goldwater thirty-nine percent of its contingency fees.

monthly tax free payment[2] for life and an additional $30,000 every five years for incidental expenses. The order also approved distribution of amounts to pay the Arizona Health Care Cost Containment System medical lien, attorneys' fees and costs, and modest payments to Junior's parents.

B. The Legal Malpractice Lawsuit

¶5 After Junior's mother sought permission to use proceeds to purchase a van, the probate court appointed Theut to investigate if she was an appropriate conservator. Swartz was subsequently appointed to evaluate if Junior was eligible for public benefit programs and if he needed a special needs trust. The court also substituted Southwest Fiduciary as Junior's conservator.

¶6 The co-guardians sued Goldwater and Vieh in June 2008 for breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, legal malpractice, and breach of fiduciary duty re: conservatorship. The complaint alleged the settlements were inadequate, the lawyers breached their fiduciary duty to Junior, the contingency fee was unreasonable, and the structured settlement was inadequate for

[2] The annuity would pay Junior (through his mother, as conservator) nearly $4000 per month beginning in January 2006, and the monthly payments would increase annually by 1.5 percent beginning January 2007.

Junior's needs especially since it disqualified him from public benefits.

¶7 Vieh filed motions for partial summary judgment. The co-guardians conceded that the breach of contract and breach of fiduciary claims "are not independent of the negligence claims" and agreed those claims should be dismissed. They also stated that they were abandoning the claim for lost public benefits. The superior court subsequently granted Vieh summary judgment on the legal malpractice claim and excessive fee claim.

¶8 The remaining issues — whether Vieh was negligent in recommending purchase of the annuity; whether Vieh was subject to punitive damages; and whether Swartz negligently sold a portion of the annuity — were resolved by trial.[3] The jury returned a defense verdict for Vieh. The court subsequently entered final judgment dismissing all claims.

DISCUSSION

¶9 The co-guardians raise three issues on appeal. First, they argue that the superior court erred by determining that there was no cause of action in Arizona for legal malpractice for an unreasonable or excessive fee. Second, they contend that the court erred by determining that they were required to have a medical causation expert to establish that Vieh negligently settled the case with the Hospital. Finally, they argue that

[3] Goldwater settled and did not participate in the trial.

they should not be assessed jury fees because they were appointed by the court and have judicial immunity.

¶10 We review the summary judgment ruling de novo. *Best Choice Fund, LLC v. Low & Childers, P.C.,* 228 Ariz. 502, 506, ¶ 10, 269 P.3d 678, 682 (App. 2011). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We view the facts in the light most favorable to the non-moving parties. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 309-10, 802 P.2d 1000, 1008-09 (1990). We will affirm summary judgment if the trial court was correct for any reason. *Federico v. Maric*, 224 Ariz. 34, 36, ¶ 7, 226 P.3d 403, 405 (App. 2010).

I

¶11 The co-guardians first contend that the court erred by ruling there was no cause of action for legal malpractice for an unreasonable or excessive fee.[4] The court ruled that:

> In the absence of fraud or a breach of the agreement, neither of which is alleged here, no action for such a recovery lies under Arizona law. *In re Swartz*, 141 Ariz. 266 (1984), cited by Plaintiffs, was a disciplinary matter initiated by the State Bar alleging violations of the Code of

[4] Amicus Curiae Arizona Association for Justice/Arizona Trial Lawyers Association also filed a brief arguing that the ruling that a plaintiff cannot bring suit to challenge an allegedly excessive contingency fee charged and collected was incorrect as a matter of law.

> Professional Responsibility, not a direct damages action brought by a client.

The co-guardians argue that the Restatement (Third) of the Law Governing Lawyers § 42 (2000) provides a remedy; namely, § 42 cmt. b(iii) provides that "[a] client may sue a lawyer to recover excessive fees paid." We agree.

¶12 In *Swartz,* our supreme court examined whether a lawyer could be disciplined for excessive fees but did not preclude the client from suing to recover excessive fees. *In re Swartz*, 141 Ariz. 266, 268, 277, 686 P.2d 1236, 1238, 1247 (1984). In resolving the case, the court cited *Covert v. Randles*, 53 Ariz. 225, 230, 87 P.2d 488, 490 (1939), for the proposition that a court could "prevent collection of excessive . . . fees." *Id.* at 272, 686 P.2d at 1242.

¶13 A decade later, this court recognized that a client could challenge excessive contingent fees. In *Fallers,* a father of four minor children died from injuries incurred after an accident while riding his motorcycle and the probate division had to determine whether to approve the $2,000,000 settlement and the contingent fee award. *In re Conservatorship of Fallers*, 181 Ariz. 227, 228, 889 P.2d 20, 21 (App. 1994). The guardian ad litem challenged the contingent fee and the court reduced the fee from $315,263 to $70,260, despite the fact that the defendants' insurer only admitted liability on the eve of trial

and the lawsuit was subsequently settled four days before the damages trial. *Id.*

¶14 On appeal and after reviewing *Swartz*, we rejected the argument that the superior court has to approve a contingent fee unless the facts are egregious. *Id.* at 229, 889 P.2d at 22. Instead, and recognizing that the probate division had adopted a process to determine the "reasonableness of the [contingency] fee by balancing the considerations established in *Swartz*, E.R. 1.5(a) and *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 186-88, 673 P.2d 927, 930-32 (App. 1983)," we stated that the court cannot "base its decision of reasonableness 'solely upon the hourly rates, hours billed, or fixed percentage set in advance'" but has to use its discretion in evaluating all the relevant information case by case. *Id.* Because the court did not analyze the facts using its standards, we reversed the fee reduction and, based on the record, ordered the court to award the lawyer the contingent fee. *Id.* at 231, 889 P.2d at 24.

¶15 *Ne*ither *Swartz* nor *Fallers* limit a client's ability to challenge a contingent fee to only fraud and breach of contract claims. Similarly, § 42 of Restatement (Third) of the Law Governing Lawyers does not limit a client's legal theories for challenging a contingent fee to only breach of contract or fraud claims. Consequently, the superior court erred by determining

that an excessive fee can only be challenged by a claim for breach of contract or fraud.

II

¶16 We next turn to whether summary judgment on the legal malpractice claim was appropriate. The ruling is also the linchpin to the contingent fee analysis — if the court did not err, the fee claim has to be examined in light of that ruling because the co-guardians alleged the fee claim was part of their legal malpractice claim.

A

¶17 A plaintiff asserting legal malpractice must prove a prima facie case for negligence: "(1) the existence of an attorney-client relationship which imposes a duty on the attorney to exercise that degree of skill, care, and knowledge commonly exercised by members of the profession, (2) a breach of that duty," (3) the breach proximately caused injury, and (4) damages. *Toy v. Katz*, 192 Ariz. 73, 85, 961 P.2d 1021, 1033 (App. 1997) (citation omitted). Causation, which is generally a fact question, *see id.,* requires proof of negligence in the case-within-a-case; that is, "but for the attorney's negligence, he would have been successful in the prosecution or defense of the original suit." *Glaze v. Larsen*, 207 Ariz. 26, 29, ¶ 12, 83 P.3d 26, 29 (2004) (citing *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (App. 1986) (internal quotes omitted);

see Jefferson L. Lankford & Douglas A. Blaze, *The Law of Negligence in Arizona* § 12.03[7], 12-29 (3d ed. 2003) (explaining that the malpractice plaintiffs must demonstrate the merits of the underlying "case within the case") (internal quotes omitted).

¶18 A plaintiff responding to a motion for summary judgment in a legal malpractice case needs to present competent evidence that the lawyer was negligent and that but for the lawyer's negligence the medical malpractice case could have been successfully prosecuted. *See Glaze*, 207 Ariz. at 29, ¶ 12, 83 P.3d at 29; *see also* Ariz. R. Civ. P. 56(a). Typically, in addition to demonstrating that the lawyer negligently handled the medical malpractice action, a plaintiff would also have to demonstrate he or she would been successful in the medical malpractice case but for the lawyer's negligence, which would require a medical expert. *See* Ariz. Rev. Stat. § 12-563 (2003); *see also Seisinger v. Siebel*, 220 Ariz. 85, 94, ¶¶ 32-34, 203 P.3d 483, 492 (2009).

¶19 Moreover, if the legal malpractice claim also alleged that the lawyer was negligent for not alleging a negligent credentialing claim, a plaintiff would also need a medical expert to opine that there was evidence that a hospital was negligent in hiring or retaining a doctor. *See Tucson Med. Ctr., Inc. v. Misevch*, 113 Ariz. 34, 36, 545 P.2d 958, 960

(1976) (stating that the hospital would not be held responsible unless it had reason to know that it should have acted to see that only professionally competent persons were on its staff); *see also Purcell v. Zimbelman*, 18 Ariz. App. 75, 81-82, 500 P.2d 335, 341-42 (1972) (finding that the hospital had "the duty of supervising the competence of its staff doctors"); *see also Schelling v. Humphrey*, 916 N.E.2d 1029, 1033, ¶ 18 (Ohio 2009) (stating that the claim requires proof "that but for the lack of care in the selection or retention of the doctor, the doctor would not have . . . privileges," and the patient would not have been injured); *Brookins v. Mote*, 292 P.3d 347, 361-62, ¶¶ 60-65 (Mont. 2012) (after recognizing that negligent credentialing is a common law tort that requires proof by expert testimony of the applicable standard of care, the breach of that standard, and that the breach proximately caused plaintiff's injury). In fact, in a negligent credentialing claim the plaintiff would also have to prove that the doctor was negligent. *Schelling,* 916 N.E.2d at 1033-34, ¶ 19; c*f. Mulhern v. City of Scottsdale*, 165 Ariz. 395, 398, 799 P.2d 15, 18 (App. 1990) (explaining that "[i]n order for the employer to be held liable for negligent hiring, retention or supervision, the employee must have committed a tort").

¶20 Here, the court found that the co-guardians did not have medical experts to prove their medical malpractice case-

within-a-case; there were no listed experts to opine that the doctor was negligent or that the Hospital was negligent. The co-guardians argue, however, that they did not need any medical experts because there was "a litany of facts showing that the [H]ospital knew that Masters was an atrocious doctor who regularly committed medical malpractice in the delivery of babies." As a result, they contend that they only needed to establish that the reasonable settlement value of the case was higher than the actual settlement.

¶21 The co-guardians cite to *Fishman v. Brooks*, 487 N.E.2d 1377 (Mass. 1986) and *Thomas v. Bethea*, 718 A.2d 1187 (Md. App. 1998) to support their argument. Those cases, however, were resolved by the traditional case-within-a-case and not by the "difference between the settlement and a reasonable settlement but for any negligence." *See Bethea*, 718 A.2d at 1197; *see also Fishman*, 487 N.E.2d at 1380.

¶22 In *Fishman*, a part-time, solo real estate lawyer, who had not tried a case in more than a decade, agreed to represent a bicyclist who was seriously injured after being struck by a car. *Fishman*, 487 N.E.2d at 1379. Fishman failed to conduct any pretrial discovery and tried to get his client to settle the case. *Id*. It was only when Fishman told his client just before trial that he could not win, that his client agreed to settle the case for $160,000. *Id.*

¶23 Fishman then sued his client, who filed a counterclaim for legal malpractice and abuse of process. *Id*. at 1378. Fishman abandoned his claim, but the case proceeded to trial. *Id.* In addition to the case-within-a-case, the jury heard about the reasonable settlement value of the accident from both an experienced tort lawyer and an experienced claims adjuster. *Id.* at 1379-80. The jury returned a general verdict of $525,000 against Fishman, but found that the driver in the underlying case was 90 percent negligent and the client-bicyclist was 10 percent negligent. *Id.* at 1397. As a result, and after deductions for the client's negligence, medical expenses that had been paid and the money the client got from the earlier settlement, the judge entered a final verdict for the client for $350,500. *Id*.

¶24 On appeal, and after noting that "[a] plaintiff who claims that his attorney was negligent in the prosecution of a tort claim will prevail if he proves that he probably would have obtained a better result had the attorney exercised adequate skill and care," the Massachusetts Supreme Judicial Court stated that the "underlying action is presented to the trier of fact as a trial within a trial. If the trier of fact concludes that the attorney was negligent, a matter on which expert testimony is usually required, the consequences of that negligence are

determined by the result of the trial within a trial." *Id.* at 1380.

¶25 The court, however, included a footnote that the co-guardians rely on for their argument. The footnote suggested that if a plaintiff lost the valuable right to settle for a reasonable amount without a trial, a trial within a trial would be unnecessary if the plaintiff had argued that he was entitled to the difference "between (a) the lowest amount at which his case probably would have been settled on the advice of competent counsel and (b) the amount of the settlement." *Id.* at 1380 n.1. The footnote is, however, dictum, because the question was not before the court, since the client did not make that claim. *See id.*; *see also Creach v. Angulo*, 186 Ariz. 548, 552, 925 P.2d 689, 693 (App. 1996). Consequently, we are not persuaded by the *Fishman* footnote.

¶26 *Bethea* was also a traditional case-within-a-case legal malpractice action. *Bethea*, 718 A.2d at 1197. There, a lawyer was hired to prosecute a lead poisoning case. *Id.* at 1188. The lawyer served two of the three landlords and then advised his clients to settle the case for $2500 as to all three. *Id.* Nearly twelve years later, the minor sued the lawyer for legal malpractice. *Id.* at 1189. The trial focused on the fact that the lawyer had settled with the third landlord for no compensation, and the jury had to "determine what kind of

verdict would have been returned had the lead paint poisoning case against [the third landlord] been tried on its merits." *Id.* After answering special verdicts, judgment was entered for the minor for $125,000, but subsequently vacated because there was no evidence of what a reasonable settlement would have been twelve years earlier. *Id.*

¶27 After finding that evidence of the fair settlement value was unnecessary given the jury's verdict, the appellate court reinstated the verdict. *Id.* at 1190. The Maryland Court of Appeals took the case to decide whether a lawyer can be liable for malpractice for recommending the case be settled if the recommendation "was one that no reasonable attorney, having undertaken a reasonable investigation into the facts and law as would be appropriate under the circumstances, and with knowledge of the same facts, would have made." *Id.* at 1188. After examining case law, the court agreed with the appellate court that lawyers could be sued for professional negligence for recommending their clients settle if it resulted in loss or damage. *Id.* at 1195.

¶28 The court then turned to the measure and proof of damage. The lawyer attempted to argue that the damages for negligent settlement should be limited to "the difference between the reasonable settlement value and what was, in fact, obtained in settlement." *Id.* at 1196. The court, however,

rejected the argument because there was no evidence to support the jury's determination that the reasonable settlement value was $25,000. *Id.*

¶29 The court recognized that a client could seek the difference between the settlement and a reasonable settlement, but found that it would require proof that the "settlement fell outside the standard of care, but also what would have been a reasonable settlement and that such sums would have been agreed to and could have been paid." *Id.* (internal citation and quotation marks omitted). More importantly, the court recognized that proof would be difficult because "the settling adversary . . . is not likely to admit that . . . it would have offered substantially more in settlement than was, in fact, offered, and evidence from other persons . . . as to the actual prospect of a better settlement, has been regarded as speculative." *Id.*

¶30 The court also recognized that:

> Extraneous evidence of settlement value might be relevant to establish liability — that the settlement actually recommended and concluded was one that a lawyer exercising reasonable skill, judgment, and diligence would not have recommended — but it cannot reasonably serve to establish the measure of damages absent a showing that the case would likely have been settled for the higher amount. A lawyer cannot be held liable for not having held out for a settlement that could not have been achieved in any event.

Id. at 1196-97. In fact, given the "practical difficulties in establishing the reasonable prospect of a better settlement," the court found that the most common approach is to reject the settlement and proceed to trial and the measure of damages "becomes the difference between what was accepted in settlement and what likely would have been received from the adjudication" by proving the case-within-a-case. *Id*. at 1197.

¶31 Here, we need not resolve whether a negligent settlement case is better resolved by the traditional case-within-a-case or the difference between the settlement and a reasonable settlement. The co-guardians failed to create a genuine issue of material fact under the traditional case-within-a-case because they did not have a medical expert to opine that the doctor was negligent or that the Hospital was negligent.

¶32 Moreover, under the difference between the actual settlement and an alleged reasonable settlement approach, the co-guardians did not create a genuine issue of material fact that the Hospital would have paid more to settle the case with the addition of the negligent credentialing claim. The co-guardians did not produce testimony, expert or otherwise, that the Hospital would have paid more to settle the medical malpractice case if Vieh had added a negligent credentialing claim. The Hospital's lawyer in the underlying case testified

by deposition that he inquired if Vieh was going to amend the complaint to add a negligent credentialing claim because he needed to determine if the Hospital needed an expert. Although he noted that the additional claim would have made the case more difficult, he never suggested that the Hospital would have paid more to settle the case. Without an opinion or some evidence that the Hospital would have settled for more, *Bethea* instructs us that the value of what would have been a reasonable settlement is speculative. *Bethea,* 718 A.2d at 1196-97. Consequently, the court did not err by granting Vieh summary judgment on the legal malpractice claim.

B

¶33 We turn back to the contingency fee challenge.[5] The complaint alleged the fee was excessive as part of their legal malpractice claim. The co-guardians maintained that position in the superior court and reiterated it during appellate oral argument. As a result, we examine their claim under the legal malpractice standards.

[5] Both parties note that the probate court approved the contingency fee. Neither suggests that our review is precluded by the doctrine of collateral estoppel or that this litigation constitutes an impermissible collateral attack on a judgment of the probate court. *See Campbell v. SZL Properties, Ltd*., 204 Ariz. 221, 223, ¶ 10, 62 P.3d 966, 968 (App. 2003) (explaining that collateral estoppels may be offensive or defensive).

¶34 The co-guardians do not contend that Vieh committed legal malpractice by having a forty percent contingency fee for the medical malpractice case. Instead, they contend that Vieh was not entitled to the full contingency fee, if any, because (1) he did not spend substantial time prosecuting the case before the Hospital settled, and/or (2) he failed to professionally and aggressively prosecute the medical malpractice case against the Hospital to secure a larger settlement for Junior. The claim is, in essence, an alternative damage claim; namely, that if the co-guardians could establish their legal malpractice claim against Vieh, one element of the damages in addition to the reasonable settlement value is that he should reduce his contingency fee or have it disgorged because it was not fully earned. The claim is analogous to one for equitable unjust enrichment.

¶35 The evidence presented to oppose the motion for summary judgment, however, failed to create a genuine issue of material fact to preclude summary judgment as a matter of law. *See supra* ¶¶ 31-32. As a result, we do not need to speculate about the element of damages, including the alternate claim challenging the contingency fee. Consequently, the court did not err by granting summary judgment on the fee claim.

III

¶36 Finally, the co-guardians argue that because they were appointed by the superior court's probate division to investigate and represent Junior they have judicial immunity and should not have to pay the jury fees judgment. They, however, did not ask the superior court to reconsider the fees judgment or seek other appropriate relief after the entry of that judgment pursuant to the Arizona Rules of Civil Procedure 59 or 60.

¶37 Although they are cloaked with judicial immunity from damage actions as we stated in *Widoff v. Wiens*, 202 Ariz. 383, 386, ¶ 10, 485 P.3d 1232, 1235 (App. 2002), we did not and have not addressed whether guardians ad litem appointed by the court who file a lawsuit that results in a defense verdict are immune from a jury fees judgment. It would have been preferable for the co-guardians to first challenge the jury fees judgment with the superior court. The court, directly or with the probate division, could have addressed the issue. Because they only raised it for the first time on appeal, we consider the issue waived. *Nat'l Broker Assocs. v. Marilyn Nutraceuticals, Inc.*, 211 Ariz. 210, 216, ¶ 30, 119 P.3d 447, 483 (App. 2005). Consequently, we will not address the issue.

CONCLUSION

¶38 Based on the foregoing, we affirm the grant of summary judgment.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Presiding Judge

/s/
_____
JOHN C. GEMMILL, Judge