IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01122-COA

GRACE WEST JENNINGS **APPELLANT**

v.

THOMAS S. SHULER, INDIVIDUALLY, AND MCCLURE & SHULER, A PARTNERSHIP, COMPOSED OF THOMAS S. SHULER, JAMES MCCLURE, JR., AND JAMES MCCLURE, III, AS PARTNERS OF THE PARTNERSHIP **APPELLEES**

DATE OF JUDGMENT:	08/16/2012
TRIAL JUDGE:	HON. R. KENNETH COLEMAN
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	BRUCE S. KRAMER ELAINE SHENG
ATTORNEYS FOR APPELLEES:	DAN W. WEBB NORMA CARR RUFF
NATURE OF THE CASE:	CIVIL - LEGAL MALPRACTICE
TRIAL COURT DISPOSITION:	GRANTED SUMMARY JUDGMENT IN FAVOR OF APPELLEES
DISPOSITION:	AFFIRMED - 02/04/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

MAXWELL, J., FOR THE COURT:

¶1. In her appeal of the grant of summary judgment in favor of Thomas Shuler and his law partnership, Grace West Jennings argues the dispositive question is whether Shuler, as a matter of law, owed her a duty to file a financing statement to perfect an interest in collateral covered by a security agreement Shuler had drafted. The circuit court had granted summary judgment in Shuler's favor based on its finding Shuler owed no duty, and without a duty,

there could be no claim for legal malpractice.

¶2. We disagree with the circuit court that Shuler, *as a matter of law*, owed no duty to file a financing statement. Instead, we find that whether Shuler breached the duty of professional care owed to Jennings by not filing a financing statement is a question of fact, not resolvable on summary judgment. However, we also disagree with Jennings that this issue is dispositive and demands reversal.

¶3. We review the grant of summary judgment de novo.[1] And in our de novo review, we must consider each ground for summary judgment raised by Shuler.[2] Shuler had alternatively argued to the circuit court that even if Jennings's evidence establishes a claim that he breached a duty, Jennings could not establish Shuler's failure to file a financing statement proximately caused her injury. Shuler had also argued Jennings's legal-malpractice claim was time-barred. After considering these alternative grounds, we find the circuit court properly dismissed Jennings's legal-malpractice claim on summary judgment. Even if Jennings had made it past the hurdle of establishing a triable question of Shuler's professional negligence by not filing a financing statement, she cannot show damages proximately caused by the failure to file. Further, her claim was filed outside the three-year statute of limitations. Thus, we affirm.

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[1] *Evans v. Howell*, 121 So. 3d 919, 922 (¶14) (Miss. Ct. App. 2013).

[2] *See Brocato v. Miss. Publishers Corp.*, 503 So. 2d 241, 244 (Miss. 1987) (holding that, on the plaintiff's appeal of summary judgment, the defendants were "entitled to raise any alternative ground based on the pleadings in the court below which would support the judgment").

Background

I. Jennings Loaned More Than One-Half Million Dollars to Her Son

¶4. By the time Jennings retained Shuler to draft loan documents, she had already lent her son Luther Allen West more than $500,000, without requiring security. It was only when her other children found out about the loans—children who, along with Jennings and West, were partners in H&G Land Company, LP (H&G)—that they contacted Shuler on Jennings's behalf.

¶5. At the direction of Jennings's other son, Shuler drafted: (1) a promissory note; (2) a deed of trust on West's real property; (3) a security agreement covering West's nine percent interest in H&G, West's share in the West Family Trust, and West's interest in some farm equipment; and (4) an assignment to Jennings of West's interest in the collateral upon default, until West paid off the debt. Specifically, the security agreement granted Jennings an interest in "[a]ll farm equipment now owned or hereafter acquired by [West], including but not limited to those items of equipment set forth on Exhibit 'A' attached hereto[.]" But there was no attached Exhibit A.

¶6. On December 31, 2002, the day Jennings and West came in to sign the documents, Shuler told them he would need West's farm-equipment list in order to draft the exhibit and file a financing statement. Shuler promptly recorded the deed of trust in Panola County, Mississippi. But he did not file a financing statement with the Secretary of State's Office, because he was waiting on West's farm-equipment list. *See* Miss. Code Ann. § 75-9-501 (Rev. 2002).

¶7. Instead of receiving the farm-equipment list, in April 2003 Shuler received a visit from Bill Fleming, a trust officer with First Security Bank (FSB). Fleming showed Shuler a document in which Jennings had transferred to FSB the right to receive the loan repayments West owed Jennings. The document named Fleming as custodian. And Fleming asked Shuler to hand over the original documents in connection with the Jennings-West loan.

¶8. The transfer-of-custody document acknowledged that the security agreement was missing Exhibit A, the list of farm equipment. Shuler told Fleming that because no farm-equipment list had ever been provided, no financing statement had been filed. Shuler encouraged Fleming to get the equipment list and file the financing statement with the Secretary of State's Office. While West eventually gave Fleming the list in January 2004, no one told Shuler. And no financing statement was ever filed to perfect Jennings's interest in the collateral.

II. Jennings's Son Filed Bankruptcy

¶9. Despite West's immediate default, Jennings continued to work with her son, instead of trying to seize the collateral from him, which was certainly her right under the assignment. In April 2004, she sent West a letter acknowledging his default, threatening to obtain a judgment against him, but giving her son another chance to work things out with Fleming.

¶10. According to Jennings, she believed this letter was sufficient notice of West's default for the terms of the assignment to take effect, making her the outright owner of West's nine percent interest in H&G and West's interest in the West Family Trust. But none of the records of H&G reflected any transfer of ownership. Instead, the records showed West was

still the owner of his nine percent interest and was paid distributions accordingly.

¶11. That is until December 2005, when the H&G partners amended their partnership agreement based on West's filing bankruptcy—an event that under the terms of the partnership made West a limited partner, instead of a general partner. West did not in fact file bankruptcy until March 2006—putting the change of West's status from general to limited partner outside the ninety-day preferential-treatment period.[3] At that time, H&G stopped making distributions to West—or more precisely West's bankruptcy estate—but instead sent West's portion to Jennings.

¶12. With Shuler's aid, Jennings filed a proof of claim, asserting her status as a secured creditor. In November 2008, the bankruptcy trustee hired an attorney to investigate Jennings's and H&G's financial dealings with West pre- and post-bankruptcy. And Jennings retained new counsel to replace Shuler. In 2009, the trustee initiated an adversary proceeding—a lawsuit within the bankruptcy case to determine the validity of Jennings's secured claims.[4] In the adversary complaint, the trustee challenged Jennings's status as a secured creditor, asserting that Jennings neither filed a financing statement to perfect her interest in West's partnership interest in H&G nor took any steps, prior to West filing bankruptcy, to exercise any security interest she possessed in any of West's assets. Further, H&G had continued to treat West, not Jennings, as owner of his nine percent interest. The

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[3] *See* 11 U.S.C. § 547(b)(4)(A) (2010) (empowering bankruptcy trustee to avoid transfers made by insolvent debtor within ninety days of filing bankruptcy).

[4] *See* Fed. R. Bankr. P. 7001(2).

adversary complaint also alleged that Jennings had violated the automatic stay,[5] that she was an "insider" who had received voidable loan repayments within the year of West's filing bankruptcy,[6] and that she had failed to amend her proof of claim based on these repayments. ¶13. Jennings claims that it was not until November 26, 2008—when the bankruptcy trustee applied to hire an attorney to investigate her interest—that she learned that Shuler had never filed a financing statement. Jennings ultimately settled with the trustee in 2012, receiving $15,600 more than the appraised value of West's interest in H&G. While the bankruptcy court had rejected Jennings's assertion that she had an absolute assignment of West's pledged assets, the court did find her claim to West's share in the H&G partnership was superior to the bankruptcy estate's.

III. Jennings Sued Shuler for Legal Malpractice

¶14. Before the adversary proceeding had concluded, Jennings sued Shuler[7] for legal malpractice on November 22, 2011. In her complaint, she alleged Shuler had "negligently failed to execute the Uniform Commercial Code filings necessary to perfect [her] security interest in the collateral described in the Agreements with [West]." Consequently, her

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[5] *See* 11 U.S.C. § 362 (2010) (putting into effect a stay of efforts by creditors to collect pre-bankruptcy debts the moment the debtor files for federal bankruptcy protection).

[6] *See* 11 U.S.C. § 101(31) (2010) (defining "insider"); 11 U.S.C. § 547(b)(4)(B) (2010) (extending avoidable transfer period to one year for payments made to insiders).

[7] In addition to suing Shuler as an individual, she also sued his law partnership, McClure and Shuler, which includes Shuler, James McClure Jr., and James McClure III. For simplicity, this opinion refers to the defendants collectively as "Shuler."

secured-interest status in West's bankruptcy had been challenged in the adversary proceeding, requiring her "to engage counsel to defend her interests." And "[i]f the Trustee prevails because Shuler failed to perfect her security interest or if the Bankruptcy Court determines there was no absolute assignment, [she] will not have the security or collateral she should have received, but for the negligence of Shuler."

¶15. Shuler answered and filed a counterclaim against Jennings, H&G, FSB, Shuler's liability insurer, and the attorney representing Jennings in the adversary proceeding, along with that attorney's law firm and liability insurer.

¶16. In March 2012, Shuler filed a motion for summary judgment on Jennings's claims. In this motion, Shuler asserted:

> (1) based on the undisputed facts, Jennings could not show Shuler was negligent in failing to file the financing statement he prepared;
>
> (2) even if Jennings could show negligent actions, Jennings could not show such negligence proximately caused a compensable injury; and
>
> (3) Jennings's legal-malpractice claim was barred by the three-year statute of limitations.

The circuit court agreed with the first reason. Because the court found that "Shuler had no duty to file the financing statement," the court held Jennings's evidence that Shuler did not file a financing statement could not support Jennings's legal-malpractice claim.

¶17. The court granted summary judgment in Shuler's favor, disposing of all of Jennings's claims. The court certified its judgment as a final judgment under Mississippi Rule of Civil Procedure 54(b). And Jennings timely appealed this judgment when it became final.

Discussion

¶18. Jennings argues that, as a matter of law, Shuler owed her a duty to file a financing statement. And because Shuler admits he did not file a financing statement, Jennings asserts it was she, not Shuler, who was entitled to summary judgment on the issue of Shuler's professional negligence.[8]

¶19. We will not go as far as Jennings asks us and declare that, as a matter of law, a lawyer who does not file a financing statement in connection with any security agreement he or she has drafted has committed malpractice. But we do think the circuit court was wrong to go the opposite route to find that an attorney never owes a duty to his client to file a financing statement. Instead, whether an attorney was professionally negligent for not filing a financing statement is a case-by-case, fact-intensive question. And while it was undisputed that Shuler did not file a financing statement, it is disputed *why* he never did. So the question of whether Shuler breached a duty owed to Jennings by not filing the financing statement is not one that could have been resolved on summary judgment—in either party's favor.

¶20. Still, the question of whether Shuler breached a duty owed to Jennings by not filing the financing statement is not the only question before us on appeal. We review the grant of summary judgment de novo. *Evans v. Howell*, 121 So. 3d 919, 922 (¶14) (Miss. Ct. App. 2013). And in our de novo review, we must consider each ground for summary judgment

[8] Jennings had also filed a motion for partial summary judgment on the issues of duty and breach, claiming Shuler's professional negligence had been established by the mere fact he never filed a financing statement.

raised by Shuler. *See Brocato v. Miss. Publishers Corp.*, 503 So. 2d 241, 244 (Miss. 1987) (holding that, on the plaintiff's appeal of summary judgment, the defendants were "entitled to raise any alternative ground based on the pleadings in the court below which would support the judgment"). Shuler had alternatively suggested to the circuit court that even if Jennings's evidence establishes a claim that he breached a duty, Jennings could not show Shuler's failure to file a financing statement proximately caused her injury. Shuler had also argued Jennings's legal-malpractice claim was time-barred.

¶21. After considering these alternative grounds, we find the grant of summary judgment in Shuler's favor should be affirmed. *See id.* (disagreeing with circuit court that the claim was time-barred but nonetheless affirming the grant of summary judgment based on an alternative ground). We find that, even if Jennings established a triable question of Shuler's professional negligence by not filing a financing statement, she cannot show damages proximately caused by the failure to file. Further, her claim was filed outside the three-year statute of limitations.

I. Jennings's Failure to Establish Elements Essential to Her Claim

¶22. "Although summary judgment, in whole or in part, must be granted with great caution, it is *mandated* where the respondent has failed to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *See Mabus v. St. James Episcopal Church*, 13 So. 3d 260, 263 (¶6) (Miss. 2009) (emphasis added and quotations and citations omitted). As the plaintiff in a legal-malpractice suit, Jennings not only bears the burden to prove the existence of the

lawyer-client relationship (which Shuler conceeds) and Shuler's breach of duty, but she also bears the burden to prove that Shuler's breach of duty proximately caused her injury. *See Crist v. Loyacono*, 65 So. 3d 837, 843 (¶15) (Miss. 2011).

¶23. Here, the circuit court's analysis did not go beyond the element of duty. Because the judge found, based on undisputed facts, that Shuler owed Jennings no duty to file a financing statement, the court held Jennings's claim failed as a matter of law, without delving further into Shuler's alternative claim that Jennings failed to establish the existence of proximate cause of the injury. But in our de novo review, even if we are satisfied—as the dissent is—that a factual dispute exists over whether Shuler owed and breached a duty, we cannot end our analysis there—as the dissent does. We must also determine if Jennings has established triable issues on the remaining elements of her legal-malpractice claim.

¶24. Mississippi recognizes two types of legal-malpractice claims—one based on the theory the attorney breached the duty of care (i.e., was neglient), the other based on the theory the attorney breached a fiduciary duty. *Id.* at 842 (¶15). Jennings brought a negligence-based claim of legal malpractice. "Because attorneys are afforded a degree of professional autonomy, proof of success in the underlying case is an appropriate test for proximate cause in a negligence-based action[.]" *Id.* at 843 (¶16). "[I]t ensures that attorneys are only held professionally liable where their failures to adhere to the standard of care actually impacted the plaintiff's interests in the case." *Id.*

¶25. Here, Jennings's interest in West's partnership interest in H&G ultimately was not impacted by the lack of a filed financing statement, as Jennings succeeded in recovering from

West's bankruptcy estate more than the appraised value of the collateral that she claims that Shuler jeopardized by his negligence. *See Lawrence v. Greenline Equip., Inc.*, 676 So. 2d 291, 292 (Miss. 1996) (dismissing appeal based on intervening ruling by bankruptcy court); *see also Kruger v. Garden Dist. Ass'n*, 208 F.3d 1006, at *1 (5th Cir. 2000) (unpublished) (holding intervening favorable decision by state court rendered current appeal moot).

¶26. Jennings's legal-malpractice claim against Shuler was conditional, alleging "***if*** the Trustee prevails because Shuler failed to perfect her security interest ***or if*** the Bankruptcy Court determines there was no absolute assignment, [she] will not have the security or collateral she should have received, but for the negligence of Shuler." (Emphasis added). In the opinion dismissing the bankruptcy trustee's claim against West, the bankruptcy court found West held a valid security interest in West's nine percent interest in H&G and that her interest was superior to the bankruptcy trustee's. Thus, the conditional injury that Jennings asserted may have been caused by Shuler's negligence never resulted.

¶27. Despite not losing the value of her collateral to West's bankruptcy estate, Jennings asserts she was nevertheless injured by Shuler's inaction because it led to her being sued by the bankruptcy trustee in an adversary proceeding.[9] Even if we characterize Jennings's legal-malpractice claim as asserting a theory of breach of fiduciary duty, she still has not established a triable issue on whether it was Shuler's failure to file a financing statement that

[9] Jennings also claims she lost the value of the farm equipment. But even if Shuler had filed a financing statement covering the equipment in December 2002, Jennings would not have had the first lien on the equipment and, consequently, could not have recovered the equipment or any portion of its value.

proximately caused her claimed injury. *See Crist*, 65 So. 3d at 843 (¶16) ("[A]n attorney's breach of his fiduciary duties to his client may cause injury to the client entirely separate from the merits of the underlying case.").

¶28. "The proximate cause of an injury is that cause which in natural and continuous sequence unbroken by any efficient intervening cause produces the injury, and without which the result would not have occurred." *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So. 2d 413, 417 (Miss. 1988) (emphasis added citation omitted). If "another acting independently and of his own volition puts in motion another intervening cause which efficiently leads in unbroken sequence to the injuries," then the intervening cause "is the proximate cause." *Hoke v. W.L. Holcomb & Assocs., Inc.*, 186 So. 2d 474, 477 (Miss. 1966) (citation omitted). As is clear from reading the bankruptcy trustee's complaint, it was not simply the fact that no financing statement was filed that led to the adversary proceeding. Rather, H&G's about-face—treating West as owner of the nine percent interest and paying him dividends until he filed bankruptcy, as well as its conveniently restricting West to a limited partner more than ninety days before he filed bankruptcy—had raised a significant red flag. The trustee's concerns were compounded by Jennings's own ambivalence towards the repayment and secured status of her loans, which led to no equipment list being provided to Shuler, despite his saying he needed it before filing a financing statement, and kept Jennings from taking more decisive measures in the three years between West's default and filing bankruptcy. Further, after West filed bankruptcy, Jennings failed to amend her proof of claim, despite receiving almost $70,000 towards the repayment of West's debt.

¶29. While Jennings successfully settled all claims of wrongdoing by the trustee, it was her actions, not Shuler's, that led to the adversary proceeding. The most Jennings's evidence establishes is that Shuler's not filing a financing statement was a remote cause of her having to defend against an adversary proceeding. *See Hoke*, 186 So. 2d at 477. Because Jennings failed to present sufficient evidence to establish that Shuler's not filing a financing statement proximately caused her to lose the collateral or any other injury, summary judgment in favor of Shuler was proper.

II. Jennings's Failure to File Her Claim Within the Statute of Limitations

¶30. Summary judgment was also proper because Jennings's claim was time-barred. The three-year statute of limitations applied to Jennings's legal-malpractice claim. *See Bennett v. Hill-Boren, P.C.*, 52 So. 3d 364, 369 (¶13) (Miss. 2011) (citations omitted). It is undisputed that in April 2003 Shuler stopped his efforts to memorialize Jennings's loans to her son and secure collateral for those loans. But Jennings did not file her legal-malpractice claim until more than eight years later, in November 2011.

¶31. In her complaint, Jennings insisted her claim was timely because she did not "discover" the fact that the financing statement had not been filed with the Secretary of State until November 2008, when the bankruptcy trustee hired an outside attorney to investigate Jennings's dealings with her son. While the "discovery rule" does apply to legal-malpractice actions, *Evans*, 121 So. 3d at 923 (¶19), here we find it does not excuse her untimely claims.

¶32. Under the discovery rule, "the statute of limitations begins to run on the date that the client learns or, through the exercise of reasonable diligence, should learn of his lawyer's

negligence." *Id.* (citing *Smith v. Sneed*, 638 So. 2d 1252, 1256 (Miss. 1994)). Here, there is no question Jennings either learned or, had she exercised "reasonable diligence," should have learned of Shuler's alleged negligence—his failure to file a financing statement—by April 2003.

¶33. In the legal-malpractice context, the discovery rule applies when either "the plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question" or when "it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." *Id.* at 924 (¶22) (quoting *Channel v. Loyacono*, 954 So. 2d 415, 421 (¶19) (Miss. 2007)).

¶34. Just as in *Evans*, "there was nothing 'secretive or inherently undiscoverable' about [Shuler's] preparation of [the loan documents]." *Id.* at (¶23). No one disputes that Shuler told Jennings he needed a list of the equipment to complete Exhibit A to the security agreement and prepare a financing statement. So regardless of whether Shuler had a duty to file a financing statement even without an equipment list, Jennings knew Shuler was not going to file a financing statement unless she provided him with an equipment list—which she never did. Instead, in April 2003, she directed Shuler to hand over his file to Fleming at FSB, because she had designated Fleming custodian of the loan repayments from her son. The transfer-of-custody document presented to Shuler in April 2003 acknowledged there was no list of equipment attached to the security agreement. Further, Shuler did not try to conceal that he had not filed a financing statement. Instead, he encouraged Fleming to get an equipment list so that a financing statement could be filed to secure the collateral for the loan

repayments. Again, regardless of whether Shuler's duty to file a financing statement was non-delegable, Jennings should have known by April 2003 that Shuler had not filed—and was not going to file—a financing statement.

¶35. Nor was it "unrealistic to expect [Jennings,] a layman[,] to perceive the injury at the time of the wrongful act." *Id.* at (¶22). Jennings had hired Shuler to memorialize the hundreds of thousands of dollars in loans she had already made to her son and to secure as much collateral for the loans as possible. And Shuler had told her he could not complete the task until she provided him with an equipment list. As a layman, Jennings may not have understood the importance of filing a financing statement to protect her security interest as between her and other would-be creditors. But we cannot say it was "unrealistic" for Jennings, even as a layman, to perceive that she may be injured by the fact that, according to her attorney, the loan documents he had drafted were still incomplete when she requested they be transferred in April 2003. *See id.* (holding it was not unrealistic for a layman client to perceive a buyout agreement only covered the stock in one company, because none of the other mutually owned companies were mentioned).

¶36. Because the three-year statute of limitations began to run in April 2003, Jennings's legal-malpractice claim filed in November 2011 is time-barred. For this additional reason, we affirm the circuit court's grant of summary judgment in Shuler's favor. *See Brocato*, 503 So. 2d at 244.

¶37. **THE JUDGMENT OF THE PANOLA COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

IRVING AND GRIFFIS, P.JJ., BARNES, ISHEE, ROBERTS AND FAIR, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY LEE, C.J., AND JAMES, J.

CARLTON, J., DISSENTING:

¶38. I respectfully dissent from the majority's opinion. Because I believe that a disputed issue of material fact exists as to the purpose, scope, and hence duties and negligent breach of the agreed-upon legal representation in this case, I would find that the circuit court erred in granting summary judgment.[10] I would therefore reverse and remand the case to the Panola County Circuit Court for further proceedings.

FACTS

¶39. This case arises from a legal-malpractice claim filed by Grace West Jennings against her attorney, Thomas S. Shuler, individually, and McClure & Shuler, a partnership composed of Shuler, James McClure Jr., and James McClure III (collectively Defendants). Over a period of several years, Jennings loaned money to her son, Allen West (West). In November 2002, Jennings secured the legal services of Shuler to perfect her interest in loans that she previously made to her son, and as stated in her affidavit, she relied on Shuler in all aspects related to securing her interest in these loans. With respect to the scope of legal representation, Jennings's affidavit provides as follows:

I retained the law firm of McClure and Shuler to prepare documents

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[10] Mississippi Rule of Professional Conduct 1.2, entitled "Scope of Representation," and its comment indicate that a client determines the purpose and objectives of the representation, and the attorney determines the means by which to accomplish the objectives. Often, though, the line is blurred.

> evidencing loans I had extended to my son[,] Allen West. Pursuant to this engagement, Thomas Shuler of the law firm prepared a Promissory Note, Deed of Trust, Security Agreement[,] and Assignment concerning the loans to Allen West. I relied on Mr. Shuler to handle all necessary legal aspects concerning this engagement with respect to my loans to Allen West.

¶40. In performing the legal tasks required to accomplish the goals of his legal representation of Jennings, Shuler prepared a note, deed of trust, assignment, and security agreement on a nine percent interest in H&G Land Company, Limited Partnership (H&G), West's share in the West Family Trust, and West's interest in some farm equipment. The security agreement granted Jennings a security interest in "[a]ll farm equipment now owned or hereafter acquired by [West], including but not limited to those items of equipment set forth on Exhibit 'A' attached hereto and . . . referred to as 'Collateral.'" Shuler advised Jennings that she would need to furnish him with the list of farm equipment mentioned in the security agreement, but Shuler never received the list of farm equipment referenced in the security agreement. Shuler argues on appeal that Jennings hired him merely to draft these specified documents, but the facts in the record support Jennings's claim that securing her interest in West's collateral was an objective of the legal matters entrusted to Shuler.

¶41. On December 31, 2002, West and Jennings executed the deed of trust, the assignment, and the security agreement. Shuler recorded the deed of trust in the Panola County records of deeds of trust on January 8, 2003, but he never filed a financing statement in accordance with Mississippi Code Annotated section 75-9-501 (Rev. 2002) to perfect Jennings's security interest. In asserting that he possessed no duty to file the financing statement, Shuler explains that he never received the farm-equipment list referenced in the security agreement

that he requested from Jennings. Shuler asserts that he needed this list to prepare the financing statement for filing. He also argues that his duty to perform legal services procured by Jennings ceased when he transferred his file on the matter to First Security Bank (FSB) at Jennings's request.

¶42. On April 9, 2003, Bill Fleming, a trust officer with FSB, presented Shuler with a transfer agreement signed by Jennings that transferred custody of the loan documents into a trust account administered by FSB. Shuler informed Fleming that no financing statement had been filed to perfect Jennings's interest because he had not yet received the list of farm equipment referenced. The documents transferred to the custody of FSB also reflect a notation about the lack of a farm-equipment list. The record reflects that FSB merely maintained custody of the loan documents, and at oral argument in this case, the parties asserted no argument claiming that FSB assumed any legal-representation duties in FSB's capacity as custodian of the financial documents.[11] West later provided FSB with the equipment list in January 2004.

¶43. Subsequently, in March 2006, West filed a Chapter 12 bankruptcy. Jennings again hired Shuler to represent her. During the bankruptcy proceeding, Jennings learned that her security interest in West's collateral had not been perfected and that Shuler never filed a

[11] We acknowledge that in Defendants' brief they argue that FSB breached its duty to Jennings by failing to file the financing statement. However, no evidence in the record supports this argument or shows that Jennings engaged FSB for any legal representation.

financing statement to protect her interest in West's collateral.[12] On May 14, 2009, the bankruptcy trustee filed an adversary proceeding against Jennings to challenge her interest in West's H&G interest.

¶44. Shuler argues that the trustee would have disputed Jennings's security interest even if the interest had been perfected. However, no evidence in the record exists to support this argument. Also, this argument involves factual issues affecting the proximate cause of any resulting damages, but this argument of an inevitable dispute with the trustee fails to relate to the scope and purpose of Shuler's prior legal representation of Jennings. This argument further fails to impact the questions of whether Shuler possessed a duty to perfect Jennings's security interest with the general description of "equipment" or "farm equipment" available to him and whether he possessed a duty to reasonably pursue outstanding information that he deemed necessary to complete the legal tasks falling within the scope and objectives of his legal representation of Jennings.

¶45. After learning of the adversary proceeding, Jennings engaged David Cocke to represent her in the adversary proceeding with the trustee, and Shuler withdrew as her

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[12] Jennings argues that she did not discover the failure to file the financing statement until November 2008. On November 26, 2008, the bankruptcy trustee filed an application to hire an outside attorney to investigate claims that Jennings had converted assets from the bankruptcy estate. Jennings later filed her legal-malpractice claim against the Defendants on November 22, 2011, which was within the three-year statute-of-limitations window. *See Bennett v. Hill-Boren, P.C.*, 52 So. 3d 364, 369 (¶15) (Miss. 2011) (citing *Smith v. Sneed*, 638 So. 2d 1252, 1253 (Miss. 1994)) ("Under the discovery rule, as applied in a legal-malpractice action, the [three-year] statute of limitations begins to run on the date that the plaintiff learns, or through reasonable diligence, should have learned, of the negligence of the lawyer.").

attorney. Jennings and the bankruptcy trustee subsequently reached a settlement in which Jennings received $15,600 more than the appraised value of West's interest in H&G.

¶46. Jennings then filed her complaint against Defendants on November 22, 2011, seeking to recover damages, including the attorneys' fees she incurred during the adversary proceeding to defend her security interest in West's collateral.[13] Defendants filed a motion to dismiss or, in the alternative, a motion for summary judgment. A hearing commenced on the motion on April 20, 2012. At the conclusion of the hearing, the circuit court requested additional briefing on whether, under Mississippi law, a duty exists for an attorney to file a financing statement when a debt is secured by collateral. On June 14, 2012, the circuit court entered an order granting summary judgment in favor of Defendants, finding that no duty exists. On February 6, 2013, Defendants filed a motion to dismiss the appeal, which this Court denied.

DISCUSSION

¶47. This case involves an action for negligence against an attorney, Shuler, and assertions that he negligently failed to complete legal work required within the scope of representing his client, Jennings. Questions of material fact exist regarding whether Shuler possessed a duty to perfect Jennings's security interest in collateral pledged by her son, West, and whether Shuler negligently breached that duty. To determine whether an attorney negligently

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[13] *See Fulton v. Miss. Farm Bureau Cas. Ins. Co.*, 105 So. 3d 284, 289 (¶¶22-23) (Miss. 2012) (citing *Universal Life Ins. Co. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992)) (jury awarded attorney's fees as extracontractual damages where Fulton pleaded economic damages, including attorney's fees, as damages resulting from defendant's negligence).

handled his client's affairs entrusted to him, first the scope and purpose of the legal representation between the parties must be factually determined.[14] Also, facts must establish what legal tasks and "means" were required to be accomplished to achieve the objectives and purpose of the legal representation in this case to determine if Shuler possessed a duty to perform a specific legal task to achieve the purpose of the representation. Whether an intervening cause is substantial enough to relieve performance of a contractual duty constitutes a material question of law and fact.

¶48. In some past cases, precedent recognized that negligence per se existed because the law defined the attorney's duty in handling the particular case or legal work.[15] In *Hickox ex rel. Hickox v. Holleman*, 502 So. 2d 626, 636 (Miss. 1987) (superseded by rule on other grounds), the attorney failed to file an action within the statute of limitations, and the Mississippi Supreme Court found that such negligence constituted negligence as a matter of law.[16] This case presents a fact question as to whether Shuler acted negligently in his legal

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[14] *See generally* Miss. R. Prof. Conduct 1.2 & cmt. (discussing the scope of an attorney's representation); *Singleton v. Stegall*, 580 So. 2d 1242, 1244-45 (Miss. 1991) (finding that an attorney owes his client duties falling into three broad categories).

[15] *See Byrd v. Bowie*, 933 So. 2d 899, 904-05 (¶¶16-18) (Miss. 2006) (where negligence is established as a matter of law, then no expert testimony is needed to show duty and breach of the duty); *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1042 (¶13) (Miss. 2003) (attorney failed to file designation of expert witness within deadline set forth by Mississippi Rule of Civil Procedure 26 and the court).

[16] *See Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1215 (Miss. 1996) (discussing the elements that a plaintiff must prove by a preponderance of the evidence to recover in a legal-malpractice case); *Forbes v. St. Martin*, 2010-CA-00380-COA, 2013 WL 791847, at *15 (¶56) (Miss. Ct. App. Mar. 5, 2013) (citing *Wilbourn* in a discussion of

representation of Jennings.

¶49. Agency theory applies when a client hires an attorney to perform certain legal work,[17] and the comment to Mississippi Rule of Professional Conduct 1.3 provides that an attorney should carry through to conclusion a matter that the attorney has undertaken for the client. In this case the scope of representation defined the matters undertaken by Shuler pertaining to securing Jennings's interest in West's collateral. Statutes and precedent define the requirements to perfect and secure a creditor's interests in the collateral involved in this case. *See* Miss. Code Ann. § 75-9-501.

¶50. Section 75-9-501 provides instruction on the proper place to file to perfect a security interest in the collateral involved in this case and requires a financing statement to be filed with the Secretary of State's Office and with the chancery court of the county where the collateral is located. The collateral involved in this case included a nine percent interest in H&G, West's share in the West Family Trust, and West's interest in some farm equipment. Shuler prepared a note, deed of trust, assignment, and security agreement for Jennings, and he recorded the deed of trust in the Panola County records of deeds of trust. However,

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claims for legal malpractice and breach of fiduciary duty).

[17] *See Century 21 Deep S. Props. Ltd. v. Corson*, 612 So. 2d 359, 374 (Miss. 1992) (in applying gratuitous agency theory where attorney performed negligent title work, court concluded that purchasers who relied on defective title could recover damages; however, purchasers could not prove damages due to their failure to attempt to cure title); *Higgins Lumber Co. v. Rosamond*, 217 Miss. 1, 2-7, 63 So. 2d 408, 408-10 (1953) (discussing the principal and agency relationship and the duty of the agent to the principal in a case involving a builder and an architect).

Shuler never filed a financing statement with the Secretary of State in accordance with section 75-9-501 to perfect Jennings's interest in the collateral pledged to secure the deed of trust.

¶51. Shuler asserts that he possessed no duty to complete the steps required to perfect Jennings's security interest because Jennings failed to provide him an itemized listing of the farm equipment to be secured. Shuler requested that Jennings provide this list, but she failed to provide it to him. Shuler therefore claims that Jennings's intervening conduct of failing to provide this requested information relieved him of his duty to further perform. However, applicable statutes reflect that no such list is required to perfect the security interest in the collateral in this case.

¶52. In perfecting a security interest in accordance with section 75-9-501 with a sufficient description of collateral, Mississippi Code Annotated section 75-9-102(a)(33) (Supp. 2013) defines the category of "equipment" as "goods other than inventory, farm products, or consumer goods." Hence, the farm equipment involved as collateral in this case falls within the statutory definition of "equipment." We also acknowledge that Mississippi Code Annotated section 75-9-108 (Rev. 2002) provides that, with certain exceptions, a description of personal or real property is sufficient if the description reasonably identifies the property by category. Therefore, I would find that Shuler errs in arguing that he needed a list of itemized farm equipment to sufficiently describe the collateral securing the debt before he

could file the financing statement.[18] As established by section 75-9-108, the financing statement sufficiently describes the collateral by setting forth "equipment" as the appropriate category of the collateral.[19]

¶53. With respect to statutory requirements to perfect a security interest, Shuler erred in asserting that an itemized list of the farm equipment was required before he could perform the legal work to perfect Jennings's security interests therein. I would nonetheless find that Jennings's failure to provide Shuler the requested list of farm equipment for his stated purpose of completing the financing statement creates a factual question as to his duty to complete that legal work of perfecting Jennings's security interest and involves a question of what farm equipment Jennings sought as collateral, some or all.[20] I would therefore find no negligence per se in this case even though section 75-9-501 clearly provides the statutory

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[18] *See Forbes*, 2013 WL 791847, at *17 (¶58) (citing the Mississippi Supreme Court opinion in *Hartford Accident & Indemnity Co. v. Foster*, 528 So. 2d 255, 284-85 (Miss. 1988), and finding that "legal malpractice may be a violation of the standard of care of exercising the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, or the breach of a fiduciary duty").

[19] *See West Implement Co. v. First S. Prod. Credit Ass'n*, 815 So. 2d 1164, 1166-67 (¶11) (Miss. 2002) (ruling that the terms "equipment and machinery" in the financing statement sufficiently described the collateral and put others on notice of the interest).

[20] *See* Miss. R. Prof. Conduct 1.2 cmt. (in discussing scope of representation, acknowledging that the distinction between objectives and means to accomplish objectives of representation is often blurred; in many cases, a joint undertaking between the attorney and client is required, but the attorney should assume responsibility for technical and legal tactics); *Waggoner v. Williamson*, 8 So. 3d 147, 154-55 (¶¶14-15) (Miss. 2009) (court found genuine issues of material fact existed as to plaintiffs' claim against attorney for breach of fiduciary duty).

requirements defining the legal tasks to be performed to perfect a security interest in equipment. Due to Jennings's failure to provide an itemized list of farm equipment for the stated need of completing the legal task, I would instead find that a question of material fact exists as to whether Shuler possessed a duty to complete the legal work of securing Jennings's interest in the collateral in accordance with section 75-9-501, including the task of filing the financing statement. The determination of whether Shuler possessed such a duty involves a determination of whether Shuler should have reasonably known that the financing-statement description satisfied statutory requirements, that no specific equipment listing was required, and that the legal tasks of perfecting and filing the financing statement required no further information.[21] The determination also involves a determination of whether Jennings sought to limit the farm equipment used as collateral to identified pieces of equipment or sought to use all West's farm equipment as collateral.

¶54. The record reflects that the circuit court granted summary judgment in favor of Defendants, finding that no genuine issue as to any material fact for jury determination existed and that an attorney possesses no duty to personally file a financing statement to perfect a client's security interest. However, the determination of whether such a duty exists springs from the factual question establishing the scope of representation between the attorney and client and the matters undertaken by the attorney to accomplish the objectives

[21] See Mississippi Rules of Professional Conduct 1.1 and 1.3 for a discussion of the level of competence and diligence that a lawyer shall provide to his client. The comment to Rule 1.1 provides the factors for determining whether an attorney possesses the requisite knowledge and skill in a particular matter.

of the agreed-upon legal matters entrusted to his representation.[22] The law fails to identify who must personally file a financing statement to perfect a security interest for collateral involved herein. However, the law indeed requires such a security interest to be filed, in accordance with the applicable statute, in two locations, the Secretary of State's Office and the chancery court where the collateral is located.[23]

¶55. The statute defining how to perfect fails to address "who" performs the physical acts required. The determination of responsibility to perform the legal tasks involved rests upon the factual determination of the scope of the particular legal representation between Shuler, as attorney, and Jennings, his client. The objectives of that particular agreed-upon scope of representation define the purpose of the legal representation, and the fact question of purpose of the legal representation defines legal tasks required to accomplish that purpose. The attorney determines the means to accomplish those objectives. The attorney must determine whether legal tasks required in order to fulfill the means and objectives entrusted to his representation are such that the attorney must fulfill those tasks personally or whether the attorney may supervise others or subordinate staff to accomplish tasks required to achieve

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[22] See Mississippi Rule of Professional Conduct 1.2 for a discussion of the scope of an attorney's representation.

[23] *See* Miss. Code Ann. § 75-9-501; *see also* Miss. R. Prof. Conduct 5.1 (responsibility of supervising attorneys); Miss. R. Prof. Conduct 5.3 (responsibilities toward non-lawyer assistants); *In re Hammons*, 614 F.2d 399, 405 (5th Cir. 1980) (under Mississippi law a "secured party must determine the correct place in which to file his financing statement on the basis of the facts existing at the time when the last event necessary for the perfection of his security interest occurs").

the objectives of the representation.

¶56. After reviewing the record, I find that the circuit court erred in granting summary judgment in favor of Defendants because questions of material fact exist.[24] In this appeal by Jennings, I find that a question of material fact exists as to the following: (1) whether Shuler, as Jennings's attorney, possessed a duty to perfect her security interest; (2) the scope and purpose of his representation of her; and (3) whether he performed the legal tasks undertaken by him to perform the purpose and scope of the agreed-upon legal work or whether her failure to timely deliver the farm-equipment list relieved him of his duty to perform. I would therefore reverse the circuit court's order granting summary judgment and remand this case for further proceedings consistent with this opinion.

LEE, C.J., AND JAMES, J., JOIN THIS OPINION.

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[24] *See Forbes*, 2013 WL 791847, at *1 (¶1) (reversing chancellor's grant of summary judgment to attorney in a legal-malpractice suit); *see also Wilbourn*, 687 So. 2d at 1215 (discussing the elements that a plaintiff must prove by a preponderance of the evidence to recover in a legal-malpractice case); *Singleton*, 580 So. 2d at 1244-45 (clarifying that an attorney owes his client duties falling into three broad categories, including a duty of care, a duty of loyalty, and any duties provided by contract); *Foster*, 528 So. 2d at 284-85 (quoting Mallen and Levit, *Legal Malpractice* § 1 (2d ed. 1981) in a discussion of the dual bases for attorney malpractice liability and finding that attorney malpractice could be defined as breach of the standard of care or standard of conduct).