

Affirmed and Memorandum Opinion filed July 22, 2021.



In The

Fourteenth Court of Appeals

NO. 14-19-01004-CV

BARRETT WAKEFIELD, Appellant

V.

**WILLIAM B. UNDERWOOD III, AND UNDERWOOD, JONES,
SCHERRER, PLLC, Appellees**

**On Appeal from the 55th District Court
Harris County, Texas
Trial Court Cause No. 2017-83168**

MEMORANDUM OPINION

Appellant Barrett Wakefield appeals from a no-evidence summary judgment on his negligence claim against his former attorneys who allegedly settled a lawsuit against him without his approval. We affirm the trial court's judgment because Wakefield failed to adduce evidence of malpractice damages.

I. Background

Wakefield was one of several defendants in a lawsuit in which the intervenors, Sam and Claudia Ayers, alleged claims for breach of fiduciary duty, fraud, money had and received, conspiracy, and breach of contract based on a Rule 11 settlement agreement. The appellees, William B. Underwood III and Underwood, Jones, Scherrer, PLLC, represented Wakefield and other defendants in the underlying litigation. Underwood and an attorney for the Ayers signed a Rule 11 settlement agreement for the Ayers to dismiss their claims against Wakefield and the other defendants in exchange for \$140,000. Wakefield and the other defendants did not comply with the Rule 11 settlement agreement, and the trial court signed a judgment in the Ayers' favor based on the agreement. The judgment was for \$140,000 in damages, \$15,500 in attorney's fees, and \$12,000 in appellate attorney's fees for an unsuccessful appeal. Wakefield unsuccessfully appealed. *See Wakefield v. Ayers*, No. 01-14-00648-CV, 2016 WL 4536454 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet.) (mem. op.).

In this case, Wakefield sued the appellees for negligence, i.e., legal malpractice, alleging that they did not obtain approval from him before entering into the Rule 11 settlement agreement on his behalf.¹ He alleged that he would not have approved the agreement, and as such, he suffered damages in the amount of the judgment entered against him in the underlying lawsuit plus his expenses in appealing the judgment.

The appellees filed a motion for a no-evidence summary judgment, contending that Wakefield could not prove, among other things, that any breach by the appellees proximately caused damages to Wakefield. The appellees argued

¹ He sued the appellees for other claims that he ultimately nonsuited.

that without expert testimony, Wakefield could not prove that he would have prevailed in the underlying litigation had the case not been settled.

Wakefield filed a response and attached evidence. He argued that expert testimony was not required because the causal link between the appellees' conduct and his damages was within a jury's common understanding. He testified by affidavit that he denied all the allegations against him in the underlying suit and that the allegations were not true. He alleged that his damages were the amount of the summary judgment awarded against him in the underlying suit plus \$10,000 in attorney's fees for the appeal. He did not submit any expert testimony.

II. Standard of Review

A court must grant a defendant's motion for a no-evidence summary judgment unless the plaintiff produces evidence raising a genuine issue of material fact on the challenged elements of the claim. *See* Tex. R. Civ. P. 166a(i). A no-evidence motion for summary judgment must be sustained if the evidence offered to prove a vital fact is no more than a mere scintilla. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003). Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion. *Id.* More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Id.*

We consider the summary judgment evidence in the light most favorable to the non-movant. *Id.* We review summary judgments de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex. 2004).

III. Analysis

Like in the trial court, Wakefield contends on appeal that he suffered damages in the amount of \$167,500 based on the summary judgment rendered against him in the underlying suit plus \$10,000 for his attorney's fees related to appealing that judgment. He contends that no expert testimony is necessary because the causal link between his damages and the appellees' breach of care is within a jury's common understanding.

Damages in a legal malpractice case are the difference between the result obtained for the client and the result that would have been obtained with competent counsel. *Elizondo v. Krist*, 415 S.W.3d 259, 263 (Tex. 2013). When a legal malpractice claim arises from prior litigation, the client must prove that they would have obtained a more favorable result in the underlying litigation had the attorney conformed to the proper standard of care. *Rogers v. Zanetti*, 518 S.W.3d 394, 401 (Tex. 2017). The traditional means of resolving what should have happened in the underlying case is to recreate the underlying case, also known as the "case-within-a-case" or "suit-within-a-suit" method. *Id.* But damages need not be measured only against the result the client would have obtained if the case had been tried to a final judgment. *Elizondo*, 415 S.W.3d at 263. An alternative method to establish malpractice damages requires an analysis of settlements made under comparable circumstances. *Id.* at 270. This analysis requires expert testimony; it cannot be based solely on the testimony of the claimant. *Id.* "Generally, in a legal malpractice case, expert witness testimony is required to rebut a defendant's motion for summary judgment challenging the causation element." *Starwood Mgmt., LLC ex rel Gonzalez v. Swaim*, 530 S.W.3d 673, 679 (Tex. 2017).

Wakefield presented evidence that the judgment against him in the underlying suit was based on the appellees' entering into an unauthorized Rule 11

settlement agreement. But this evidence does not raise a material issue of fact regarding *malpractice* damages. See *Elizondo*, 415 S.W.3d at 270 (expert testimony required to prove that settlement for plaintiffs in underlying suit was inadequate; although plaintiffs adduced evidence of actual damages in the underlying suit, “this does not mean they raised a material issue of fact as to *malpractice* damages”). Wakefield presented no evidence to show that, absent the unauthorized settlement agreement, he would have obtained a more favorable result in the underlying litigation—either through a lower settlement amount with the Ayers or a final judgment following a trial. See *Walker v. Morgan*, No. 09-08-00362-CV, 2009 WL 3763779, at *1, *5 (Tex. App.—Beaumont Nov. 12, 2009, no pet.) (mem. op.) (upholding summary judgment for attorney on legal malpractice claim based on attorney’s entering into unauthorized Rule 11 settlement agreement because the plaintiff failed to adduce expert testimony concerning the viability, value, and strength of the settled claim in the underlying lawsuit); cf. *Elizondo*, 415 S.W.3d at 270 (reasoning that the plaintiffs in the underlying suit had to prove that they probably would have recovered a greater settlement absent the malpractice, and this proof required expert testimony). Wakefield’s conclusory denial of wrongdoing in the underlying litigation cannot substitute for an explanation by an attorney with knowledge of the applicable law and facts concerning the underlying lawsuit. See *Elizondo*, 415 S.W.3d at 264–65 (expert’s conclusory testimony that value of the plaintiffs’ case in the underlying suit was \$2 to \$3 million instead of the \$50,000 settlement was inadequate to establish malpractice damages); see also *Walker*, 2009 WL 3763779, at *5.

This case is not similar to those in which expert testimony was not required. See *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119 (Tex. 2004) (recognizing cases in which expert testimony was not required because the clients

testified that they made decisions and took actions that resulted in their injuries based of their lawyers' bad advice). Rather, to determine whether the settlement and judgment based on it caused malpractice damages to Wakefield, a fact finder must be able to reasonably conclude that the result of the underlying lawsuit or a settlement in that lawsuit would have been more favorable to Wakefield compared to the unauthorized settlement. Wakefield has not satisfied this burden with summary judgment evidence.

IV. Conclusion

The trial court did not err by granting the appellees' motion for a no-evidence summary judgment. Wakefield's sole issue is overruled. The trial court's judgment is affirmed.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Christopher and Justices Wise and Hassan.