In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00017-CV

BILLY FITTS AND FREIDA FITTS, Appellants

V.

MELISSA RICHARDS-SMITH, THE LAW FIRM OF GILLAM & SMITH, LLP,
E. TODD TRACY, AND THE TRACY LAW FIRM, Appellees

On Appeal from the 71st District Court
Harrison County, Texas
Trial Court No. 14-0150

Before Morriss, C.J., Burgess and Carter,* JJ.
Memorandum Opinion by Justice Carter

*Jack Carter, Justice, Retired, Sitting by Assignment

MEMORANDUM OPINION

This case illustrates the conflicts inherent in an attorney's representation of both the driver and a passenger involved in a car accident and the dangers of failing to provide the proper disclosures. Billy Fitts and William Fitts were passengers in a Lexus driven by their brother, George Fitts. The Lexus was involved in an accident that killed George and severely injured Billy and William. On the invitation of George's family, Billy, William, and their wives, Freida and Phyllis, agreed to join George's family in pursuing a product liability action against Toyota based on a claim that George's Lexus had suddenly accelerated prior to the accident. They hired Melissa Richards-Smith (Smith) and the Law Firm of Gillam & Smith, LLP (collectively the Smith Defendants), who partnered with E. Todd Tracy (Tracy) and the Tracy Firm (collectively the Tracy Defendants), to pursue litigation against Toyota.

Without their attorneys' knowledge, Billy and Freida made a claim under George's primary liability insurance and settled their claims against George for policy limits. In the course of doing so, Billy and Freida released George, George's wife, and the primary insurance carrier from all causes of action, claims, or demands for damages arising out of the accident. Billy and Freida then attempted to collect under an umbrella policy that George had purchased, but their claim was denied based on the settlement with the primary insurance carrier and the resulting written release of claims.

Because they were unable to collect under George's umbrella policy, Billy and Freida sued the Smith and Tracy Defendants for legal malpractice and breach of fiduciary duty.[1] Billy and Freida's causes of action were based on, among other things, Smith's and Tracy's (1) failure to advise them that they might have had a cause of action against George's estate for any negligence on George's part in causing the accident, (2) failure to disclose a conflict of interest arising from their joint representation of the entire Fitts family, and (3) failure to advise them about and preserve the statute of limitations on their viable claims. Billy and Freida alleged that had the proper disclosures been made, they could have recovered under George's umbrella policy.

[1]Billy's and Freida's claims were based on the alleged violation of Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, which states, in relevant part:

> (b) [E]xcept to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
>
> > (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
> >
> > (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
>
> (c) A lawyer may represent a client in the circumstances described in (b) if:
>
> > (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
> >
> > (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

See TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013).

The Smith and Tracy Defendants filed traditional motions for summary judgment arguing (1) that Billy and Freida's legal malpractice claims could not be fractured into breach of fiduciary duty claims, (2) that the affirmative defense of release was established as a matter of law because Billy and Freida executed a written release absolving George from legal liability, and (3) that the release conclusively negated the causation and damages elements of Billy and Freida's legal malpractice claims. The trial court granted the Smith and Tracy Defendants' motions for summary judgment. We affirm.

I. Factual Background

This case is factually unique. Because the history of this case is critical to understanding the parties' legal arguments, we recite the facts chronologically.

A. Freida Sells Insurance to George and Mary Fitts

Freida Fitts was a licensed insurance agent with the Red River Member Insurance Services branch of Bockman Insurance Agency. She sold to her brother-in-law, George, and his wife, Mary, a primary automobile insurance policy, policy number DK 462980, with a per person bodily injury liability limit of $250,000.00.

George and Mary also purchased from Bockman Insurance Agency a $5,000,000.00 personal umbrella liability policy, policy number 0380965 (the Umbrella Policy), underwritten by RLI Corporation.[2] The language of the Umbrella Policy explained,

> We will pay an amount for which anyone covered by this policy becomes legally liable for **Injury** due to an **Occurrence** which takes place during the Policy Period

[2]George and Mary then signed an agent of record change in favor of Freida, making her their insurance agent on the policy.

> and in the Policy Territory. This insurance applies: . . . As excess insurance over and above the greater of:
>
> (1) the Minimum Limit of Coverage as stated in the Declarations which is required to be provided by the **Basic Policies**; or
>
> (2) the actual Limit of Coverage provided by the **Basic Policies** if such limit is greater than the Minimum Limit of Coverage as stated in the Declarations.

According to the Declarations page, the minimum coverage required was $250,000.00, which George and Mary met through their purchase of the primary insurance policy underwritten by Kemper.

B. George's 2009 Accident Prompts Freida To File Claims on George's Insurance Policies

On November 6, 2009, the Fitts brothers were driving on Highway 79 in George's Lexus. George drove, William sat in the front passenger seat, and Billy sat in the back. Ahead of George, in the same lane of travel, Shannon Budzisz stopped her truck in order to make a legal left turn. George was unable to avoid Budzisz' truck and collided into it from behind, killing himself and severely injuring his brothers.

Kemper was soon notified of the accident and began communicating with Freida, who was dealing with the insurance company on Billy's behalf. On November 23, 2009, Kemper requested Billy's hospital records. Soon thereafter, Freida filed a claim on Billy's behalf against the Umbrella Policy, and, on December 9, 2009, Freida forwarded to RLI the police report from the accident. That month, an RLI representative, Jill Tanner, informed Freida that RLI would obtain and include a copy of Kemper's entire file in the RLI investigation file.

C. The Whole Fitts Family Hires the Same Lawyers to Sue Toyota

George's son, Todd, was an attorney in Marshall, Texas. Sometime prior to December 30, 2009, Todd hired Smith to represent him, as well as George's estate, Mary, and his sister, Angela, in a sudden acceleration lawsuit against Toyota. Todd also initiated a property damage claim with Kemper for George's vehicle. Smith retrieved a copy of the police report from the accident. According to the report, the accident occurred at 4:02 p.m. The report further stated that George was "unable to avoid a collision . . . at the speed that he was travelling," "[p]ossibly due to impaired visibility caused by the setting sun." In December 2009, Gary Leinweber, a technical claims supervisor for Kemper, emailed Smith and Sharon Kristine Baker, a senior claims representative for Kemper, detailing Kemper's position regarding joining in the lawsuit against Toyota. Leinweber wrote,

> Our investigator concluded that the position of the sun in relation to the vehicle legally stopped in the roadway to turn left resulted in the driver's vision being temporarily impaired and consequently unable to see the stopped vehicle. We did not find evidence of the mat being stuck under the accelerator or other product defects that resulted in this tragic event, so we are not at this time considering entering into or participating in a products liability action.

In spite of the police report and Leinweber's email, Todd decided to continue to pursue a sudden acceleration case against Toyota.

In February 2010, Todd asked the entire Fitts family to meet with the Smith Defendants to explore the possibility of involving the entire family in the lawsuit against Toyota. Smith, who had retrieved a copy of the police report, stated, "The accident report put some fault on George due to sun in his eyes, so I looked at that going on." However, by affidavit, Smith swore that she "strategically met" with Billy, Freida, William, and William's wife, Phyllis, "outside the presence

of Todd Fitts and Mary Fitts so that if they had anything to say about George Fitts or blamed him for the accident, they would feel free to speak openly." Smith recalled this meeting as follows:

> 6. During that same meeting with Billy Fitts, Freida Fitts, William Fitts and Phyllis Fitts, William told me that he believed that George Fitts not only did nothing wrong in the wreck, but his exact words were that George saved his life.
>
> 7. William Fitts stated that George was unable to stop the car, and swerved into the other car in order to take the brunt of the impact and save William's life.
>
> 8. In that same meeting[,] Billy Fitts told me that he yelled at George to stop the car, and George tried to pump the brake, but the car continued to accelerate even though George was hitting the brake.
>
> 9. In that same meeting, both Billy and William claimed that the sun was not a factor in the accident.
>
> I0. In that same meeting, both Billy and William stated that not only was George not at fault, but neither wanted to make a claim against him.

Based on this meeting, Smith prepared attorney-client agreements for Billy and Freida and William and Phyllis.

According to Smith, the Fitts family "retained Gillam & Smith, LLP[,] to investigate an automotive products liability case against Toyota." On February 9, 2010, Billy and Freida each signed separate, but essentially identical, contingent fee contracts with Gillam & Smith. The first paragraph of both contracts specifically stated, "We the undersigned 'Client' employ and retain the law firm of GILLAM & SMITH, L.L.P. 'Attorney' and designated co-counsel to represent me in my Claim against any automobile manufacturer or parts maker arising out of a defect in the automobile owned and driven by George Fitts on November 6, 2009 . . . ." Below that paragraph, under the heading "SCOPE OF REPRESENTATION," the contract read, "GILLAM & SMITH, L.L.P.[,] agrees to investigate and evaluate our possible claim or claims, against any and all

responsible parties who may be liable for personal injuries (if any) suffered by client." (Footnote omitted).

The Smith Defendants aligned with the Tracy Defendants to better pursue the Fitts family's claims against Toyota. On the Tracy Firm client intake sheet, Billy wrote that George was travelling at a normal speed when he noticed the car in front of them and that he told George to slow down. Billy's narrative on the intake sheet continued, "[T]he car immediately speeded up. I then said 'George Stop' but we hit the vehicle."

On March 18, 2010, Smith and Tracy filed a petition on behalf of the Fitts family members against Toyota, alleging that George's Lexus "suddenly accelerated out of control and could not be stopped." That lawsuit was eventually consolidated into multidistrict litigation based out of San Diego.

D. The Kemper Release and Failed Negotiations with the Umbrella Policy Provider, RLI

Meanwhile, unbeknownst to Smith, Tracy, or Todd and as a result of Freida's negotiations, Kemper agreed to settle Billy's and Freida's claims collectively for $250,000.00.[3] After discussing the settlement with each other, Billy and Freida agreed to execute a release. They did not consult Smith, Tracy, Todd, or anyone else about the Kemper settlement or release. Freida testified that Todd was unaware that she was even negotiating with Kemper.

[3]Pursuant to the final breakdown of the settlement, Blue Cross Blue Shield would receive $41,488.88, Atlanta Memorial Hospital would receive $223.00, and PHI Air Medical would receive $12,222.90, leaving $195,865.22 for Billy and Freida.

On March 26, 2010, Baker emailed the Kemper release to Freida, with the following note: "I have attached a release for a full and final settlement of this claim in the amount of $250,000.00. This pertains only to this insurance policy and the settlement of this claim will have no affect [sic] on any claims you make against the excess insurance carrier."[4] In fact, the document released the insured, George Fitts, of all liability. The release stated:

> FOR AND IN CONSIDERATION OF the payment to me/us of the sum of Two Hundred Fifty Thousand Dollars ($ 250,000.00), and other good and valuable consideration, I/we, being of lawful age, have released and discharged, and by these presents do . . . release, acquit and forever discharge George Fitts, Mary Fitts, and Trinity Universal Insurance Company of and from [any] and all actions, causes of action, claims or demands for damages, costs, loss of use, loss of services, expenses, compensation, consequential damage or any other thing whatsoever on account of, or in any way growing out of, and all known and unknown personal injuries and death and property damages resulting or to result from an occurrence or accident that happened on or about the 6th day of November , 2009 , at or near Highway 79 Hearne TX .
>
> . . . . No promise or inducement which is not herein expressed has been made to me/us, and in executing this release I/we do not rely upon any statement or representation made by any person, firm or corporation, hereby released, or any agent . . . representing them . . . concerning the nature, extent or duration of said damages or losses or the legal liability therefor.
>
> . . . .
>
> This release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital.

[4]The Smith Defendants objected to Baker's comments on the grounds that she is not a lawyer and was attempting to render an inaccurate legal opinion and that her comments amounted to impermissible parol evidence, which could not be used to alter the meaning of an unambiguous agreement.

On March 26, 2010, Billy and Freida signed the release after reading it. On March 29, 2010, Baker informed Freida that she had received the release and would be requesting the check from Kemper. On that same day, Janna Robinson from RLI sent the following to Baker via email:

> I received a phone call this morning from Freda Fitts . . . [who] indicated that "they have settled with Kemper" and she wanted to know how to make a claim against the umbrella policy. I asked if she had settled or if Kemper had offered their limit. She said settled. I advised Freda they would not have a claim against George Fitts who is our mutual insured.
>
> If you have settled Mr. Fitts claim against George Fitts could I have a copy of the signed release? As you know, any settlement would have to be to the benefit of the named insured and not for the insurance company. Tendering or paying your limit would not exhaust your obligation to the insured absent a full release. . . .
>
> If you were not aware, the Fitts family including Billy have sued Toyota in product claim. They are alleging that the Lexus was defective. There are no allegations that our named insured, George Fitts, was in any way responsible for the accident.

After receiving this email, Baker immediately sent a copy of the Kemper release to Robinson.

E. The Aftermath of the Kemper Release

It was not until the Kemper release was signed that Freida emailed Smith on April 12, 2010, to see if she agreed with RLI's assessment that pursuing a claim under the Umbrella Policy would "go against [their] case with Toyota." Smith, who was still unaware of the Kemper release, explained,

> If you all pursue George then Toyota will certainly use that to turn the family against one another in court. If you all pursue George then you can't also pursue Toyota successfully and vice versa. It is just difficult to say George caused the wreck then turn around and say Toyota did. That is a tough question for Billy. He was there so only he knows which way to go on liability. I work for you and Billy so you have to give me my marching orders.

In spite of this advice, and although the Kemper release was already signed, Freida continued to communicate with Baker, who had previously assured her that the Kemper release would not bar recovery under the Umbrella Policy. On July 14, 2010, Baker created a note in her file stating that according to Freida, Smith was recently informed that Billy had settled with Kemper. According to Baker's note, Freida said that while "on an emotional level no one wants to blame George" for the accident, she did not know of any evidence to show that the Lexus was the cause of the accident. Baker's note documented that she informed Freida of the option of filing suit and warned her about the two-year statute of limitations, but that Freida responded that a lawsuit would result in Smith "get[ting] half their settlement."

Then, Mary somehow discovered the existence of the Kemper release. On October 13, 2010, just before Billy's deposition in the Toyota case, Freida emailed Smith and wrote,

> Melissa, Billy has never blamed George for the accident. He has been adamant from the beginning saying that the car (all of a sudden) started speeding at a high rate of speed.
>
> Why would anyone think Billy blamed George?
>
> Billy is very emotional so you might need to explain this to him in detail before his deposition. I am afraid he will not handle a deposition very well if he thinks he has hurt Mary.

Smith responded, "He had to blame George to collect money from George and Mary's insurance policy. He likely signed paperwork that said as much." When Freida asked if Smith had a copy of the Kemper release, Smith responded, "Todd sent it to me but because it hurt Mary, Todd, Angela, and the case generally I could not get involved and you had already made the deal so there

was no way to undo it . . . . You made a claim against George and Mary for George's negligence in the wreck."

On October 18, 2010, Billy gave his deposition in the Toyota case. In describing how the accident occurred, he stated,

> Well, [George] was talking to us, and that's when the car made the surge . . . . And the car kept getting faster and faster, and we came up on a car in the right-hand lane, and George didn't slow down.
>
> And I looked at George, and George was mashing the brake, pushing the brake. And this kept on a few minutes, and I looked down the road, and I seen another vehicle, and we kept getting–we kept overtaking the next vehicle.
>
> And I said, "George stop, George, stop." And he could never get the car stopped, and that's when we hit.

Billy reiterated, "George applied [the brake] two or three times after we passed the first car, and then when I hollered 'stop,' George was applying the brake then." Although Billy could not actually see George's foot on the pedal, he testified that "[George] would pick his leg up and apply [the brake]." According to Billy, George turned the steering wheel to try to avoid the collision when the brakes failed.

Other depositions were taken, and the Toyota case continued. It was not until February 2012 that Smith and Tracy met with the Fitts family to talk about settling their claims against Toyota. According to Smith, Tracy talked to the family about the results of their investigation, and they both advised the family to accept the settlement offer made by Toyota. In line with Smith and Tracy's recommendations, the entire Fitts family soon settled the Toyota case.

On May 2, 2012, after an inquiry from Freida, an RLI representative, Laina Heathman, explained to both Freida and Danny Bockman that "[t]he primary carrier settled the claim for their

limits" that RLI's file had been closed.[5] The inability to collect any money under the Umbrella Policy prompted Billy and Freida to file this lawsuit.

II. Procedural History and Facts Developed During this Lawsuit

A. Billy and Freida's Claims

On October 17, 2013, Billy and Freida filed their petition against the Smith and Tracy Defendants. They claimed that the Smith and Tracy Defendants "knew at all times that George Fitts was driving at a rapid rate of speed into the sun with a glare when he first noticed a pickup truck travelling in front of him in the same lane of traffic and preparing to turn left" and stated that Smith and Tracy "would have turned their attention on behalf of a passenger against the driver/operator of the automobile and his negligent operation and his insurance coverage including liability, underinsured coverage and the umbrella policy" had they "not been blinded by the sensationalized yet unproven allegations against Toyota." Billy and Freida pointed out that Smith failed to disclose the Leinweber email, which stated that a Kemper investigation concluded that George caused the accident and that there was no product defect. Accordingly, Billy and Freida claimed that the Smith and Tracy Defendants' joint representation of them and George's estate constituted a conflict of interest and that they "failed to communicate their respective conflicts of interest arising from representing all interested parties." They alleged that the Smith and Tracy Defendants committed (1) malpractice and breach of fiduciary duty by failing to disclose the conflict of interest, (2) malpractice and breach of fiduciary duty by failing to identify causes of

[5]On December 10, 2010, Kemper informed RLI, "The passengers in the Insured vehicle have concluded their claims also, with Billy Fitts settling for $250,000 limits in March of this year."

action that Billy and Freida could have raised against George, and (3) malpractice by allowing the statute of limitations on those causes of action to expire. Billy and Freida also alleged that as a direct result of the Smith and Tracy Defendants' malpractice in allowing the limitations period to expire, they lost their ability to recover "physical pain and suffering, loss of earning capacity past, present and future, medical expenses past, present and future, recovery for mental anguish, past, present and future as well as loss of consortium." They also sought fee forfeiture under the breach of fiduciary duty claim and exemplary damages under both causes of action.

In addition to filing a verified denial arguing that Tracy could not be sued in his individual capacity, the Smith and Tracy Defendants argued that Billy and Freida's decision to settle with Kemper and execute the Kemper release without informing the Smith and Tracy Defendants proximately caused or contributed to their injuries. They also raised the affirmative defense of release.

B. The Motions for Summary Judgment

Following some discovery, the Tracy Defendants filed a traditional motion for summary judgment claiming (1) that the "Plaintiffs[']undisclosed release of their claims against George and Mary Fitts destroyed Plaintiffs' ability to prove collectability in this case and thus defeat[ed] their ability to prove damages" and (2) that they conclusively proved the affirmative defense of release. The Tracy Defendants reiterated that Freida negotiated with Kemper and RLI before the Smith and Tracy Defendants were hired, continued negotiating with them after they were hired, failed to disclose their negotiations to anyone, and settled all of their claims against George through the Kemper release.

The Smith Defendants also filed a traditional motion for summary judgment arguing that the Kemper release established their affirmative defense and defeated the elements of proximate cause and damages. They argued that there was no reason to believe that there was any conflict of interest in the joint representation of Billy, Freida, and George's estate because Billy and Freida informed the Smith and Tracy Defendants that the accident was not George's fault. The Smith Defendants also argued that the legal malpractice claims could not be fractured into breach of fiduciary duty claims.

C. Billy and Freida's Response to the Motions for Summary Judgment

In response to the motions for summary judgment, Billy and Freida argued that Smith knew about the possibility that George might have caused the accident because, prior to their agreement to settle with Kemper, Smith had both the police report from the accident and Leinweber's December 30, 2009, email stating that the insurance company's investigation did not support the idea that the accident was caused by a product defect. Accordingly, Billy and Freida claimed that the Smith and Tracy Defendants had knowledge of an existing claim, did nothing to pursue it, and failed to inform them about a possible conflict of interest in their joint representation of the Fitts family. In reply to the argument that malpractice, assuming such occurred, did not cause their damages, Billy and Freida argued that the Kemper release did not release RLI and that they could have pursued their claim under the Umbrella Policy had the Smith and Tracy Defendants informed

them that they had viable claims and counseled them to raise those claims before the statute of limitations expired.[6]

D. The Trial Court Grants the Summary Judgment Motions after Reviewing the Evidence

The trial court reviewed all of the evidence detailed above. Additionally, it reviewed Billy's October 21, 2014, deposition. In that deposition, Billy testified that he still had no evidence that George caused the accident and did not want to change any of the testimony that he had previously given in the Toyota case. Billy stated that he never told anyone that he blamed George for the accident and that he believed the car was the cause of the accident until a February 2012 meeting during which he learned from Tracy that the accident was not caused by a product defect. Billy also admitted that he specifically told Smith that George had not caused the accident, yet claimed that Smith never asked about the accident. He added, "If the car didn't cause the accident, then George caused the accident."

As for the Kemper negotiations, Billy testified that he never personally spoke with a Kemper representative and did not learn that any claim had been filed until March 2010, the month in which he signed the Kemper release. Billy also stated that prior to that time, Freida had not told him that she had asked Kemper to settle with them. Billy admitted that he read and signed the Kemper release, but believed that he was only releasing Kemper as the primary insurance company. Billy stated that he never asked Todd any legal questions and did not inform Smith of the release until after it was signed and returned.

[6]Our review of the record reveals that Billy and Freida did not argue that they would not have signed the Kemper release absent any legal malpractice or breach of fiduciary duty.

Freida also gave a deposition on October 20, 2014, in which she claimed that she had not asked Billy how the accident occurred. Freida stated that Billy told her neither that George's driving caused the accident nor that a product defect in the Lexus caused the accident. Freida admitted that as of the date of her deposition, she did not know what caused the accident, although she knew that "the car speeded up."

According to Freida, Tammy Anderson[7] filed the claim on Billy's behalf and did so without notifying her. Freida admitted that she filed a claim on Billy's behalf with RLI and that she negotiated with Kemper without letting Todd or Smith know. Freida claimed that although she read the Kemper release, she did not seek the advice of counsel before signing it and did not understand that she was releasing George for any damages suffered by Billy and her as a result of the accident. She believed that she was only releasing Kemper as the primary insurance provider. Freida admitted that she did not inform Todd or Smith about the Kemper settlement or the check she received in the mail. She testified that Smith obtained the release after Todd somehow learned of the settlement. Smith testified that she first learned of the Kemper release around the time of Billy's deposition in the Toyota case and that she did not learn of the Umbrella Policy until after the Kemper release was signed.

In support of their interpretation of the Kemper release, Billy and Freida attached an affidavit from Bockman stating, "[T]he attachment of the umbrella occurs when the claimant and the primary insurer agree that the policy is exhausted or paid its limit." Bockman, who is not an

[7]The record mentions Anderson once and does not explain who she is.

attorney, opined that the Kemper release allowed Billy and Freida to then proceed with their claim against the Umbrella Policy.[8]

Billy and Freida also signed and filed affidavits to support their responses to the summary judgment motions. In his affidavit, Billy stated that in the initial meeting with the Fitts family, Smith "did not speak about anything concerning a claim or cause of action against anyone except Toyota." He added, "She never spoke of a claim against the driver . . . nor did she ask about my terrible injuries. She never spoke of a conflict between Ms. Smith's representation of George Fitts estate and his wife and children and my wife and I or my brother, William and his wife." Billy stated, "Ms. Smith knew about my brother George's insurance policies with Kemper and RLI but never informed my wife or me about a claim or recovery under those policies within the two (2) years of the car collision." He noted that Smith did not speak to him or Freida about the Kemper release even after she became aware of it.

In her affidavit, Freida swore that at the initial family meeting, "Smith never spoke of any claim or case other than that against Toyota. She also never spoke of any other claim or case due to George's death, or of there being any conflict in her representing all present at the meeting." William's wife, Phyllis, also swore in an affidavit as follows:

> At that meeting nothing was discussed except about Melissa Smith and a claim against Toyota because George was driving a Lexus. Ms. Smith did not ask any questions about the accident or about injuries.
>
> William and I met again with the whole group a few weeks later to discuss the agreement. William and I only met again with the whole group years later to be told there was no suit against Toyota.

[8]It is not clear which Bockman insurance agent initially sold the umbrella policy to George and Mary. Smith objected to Bockman's affidavit on several grounds, including that he was offering a legal opinion.

After reviewing all of the summary judgment evidence, the trial court granted the Smith and Tracy Defendants' motions and entered a take-nothing judgment against Billy and Freida.

III. The Trial Court Did Not Err in Granting the Summary Judgments

On appeal, Billy and Freida argue that the trial court erred in granting summary judgments to the Smith and Tracy Defendants because (1) the breach of fiduciary duty claim can be fractured from the legal malpractice claim, (2) genuine issues of material fact existed as to whether the Kemper release extinguished Billy and Freida's ability to collect under the Umbrella Policy, (3) the settlement and release with the primary insurance carrier did not negate the causation element of their claims as a matter of law, and (4) the settlement and release with the primary insurance carrier did not negate the damage element of their claims as a matter of law. Here, we find that Billy and Freida's breach of fiduciary duty claims cannot be maintained separate and apart from their legal malpractice claims and that the Kemper settlement and release extinguished their right to recover under the terms of the Umbrella Policy.

A. Standard of Review

"The standards for reviewing summary judgments are well established. We review de novo the trial court's decision to grant summary judgment." *Isaacs v. Schleier*, 356 S.W.3d 548, 555 (Tex. App.—Texarkana 2011, pet. denied) (citing *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007)). "The party moving for [traditional] summary judgment has the burden of showing no genuine issue of material fact exists and it is entitled to judgment as a matter of law." *Id.* (citing TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985)).

"A defendant seeking summary judgment must, as a matter of law, negate at least one element of each of the plaintiff's theories of recovery or plead and prove each element of an affirmative defense." *Stafford v. Allstate Life Ins. Co.*, 175 S.W.3d 537, 540 (Tex. App.—Texarkana 2005, no pet.); *see Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997), *superseded by statute on other grounds*, TEX. CIV. PRAC. & REM. CODE ANN. § 82.074, *as recognized in Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 265 (5th Cir. 2001); *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546 (Tex. 1985); *Bartosh v. Sam Houston State Univ.*, 259 S.W.3d 317, 327 (Tex. App.—Texarkana 2008, pet. denied). "[I]n deciding whether there is a disputed material fact issue precluding summary judgment, the court must take evidence favorable to the nonmovant as true . . . [and] must indulge every reasonable inference in favor of the nonmovant and resolve any doubts in the nonmovant's favor." *Stafford*, 175 S.W.3d at 540.

The trial court's orders granting the summary judgments do not specify the grounds upon which they are based. Thus, the summary judgments will be affirmed if any of the summary judgment grounds advanced by the Smith and Tracy Defendants are meritorious. *See id.* (citing *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989)); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

B. Because the Breach of Fiduciary Duty Claims Cannot Be Maintained Apart from the Legal Malpractice Claims, Summary Judgment on those Claims Was Proper

Billy and Freida argue that the facts of this case support separate breach of fiduciary duty causes of action because the Smith and Tracy Defendants had the opportunity to address the

conflict of interest when they reviewed the police report, when they received the Kemper release, and when Freida emailed Smith about collecting under George's Umbrella Policy. They believe that the Smith and Tracy Defendants never disclosed the Leinweber email because it would have undercut the Toyota case and argue that the Smith and Tracy Defendants received a benefit from the failure to disclose the conflict of interest in the form of fees or expenses recovered in the Toyota litigation.[9] We conclude that Billy and Freida's petition only raised legal malpractice claims.

"Legal malpractice is not the only cause of action under which a client can recover from [his] attorney." *Goffney v. Rabson*, 56 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *see Messner v. Boon*, 466 S.W.3d 191, 203 (Tex. App.—Texarkana 2015, pet. filed); *Isaacs v. Schleier*, 356 S.W.3d 548, 555 (Tex. App.—Texarkana 2011, pet. denied). "When the facts of a case support claims against a lawyer for something other than professional negligence," the claims may be allowed. *Murphy v. Gruber*, 241 S.W.3d 689, 695 (Tex. App.—Dallas 2007, pet. denied); *see Messner*, 466 S.W.3d at 203; *Isaacs*, 356 S.W.3d at 555–56. "However, unless the claim cannot be characterized as advice, judgment, or opinion arising from the attorney-client relationship, the cause of action is for malpractice." *Messner*, 466 S.W.3d at 203 (citing *Isaacs*, 356 S.W.3d at 556; *Brescia v. Slack & Davis, L.L.P.*, No. 03-08-00042-CV, 2010 WL 4670322, at *7 (Tex. App.—Austin Nov. 19, 2010, pet. denied) (mem. op.)). "Texas law . . . does not permit

[9]The Smith and Tracy Defendants argue that they did not believe that a conflict of interest arose from their dual representation of the Fitts family in the Toyota litigation because Billy consistently maintained that the Lexus was the cause of the accident, Billy never informed them that George was at fault, and Billy and Freida continued to communicate that Billy never blamed George for the accident. They argue that Billy never indicated that he wanted to maintain a cause of action against George, even after Smith asked for Billy's "marching orders." The Smith and Tracy Defendants also respond by pointing out that Billy and Freida have not alleged that the expenses collected in the Toyota litigation were improper.

a plaintiff to divide or fracture her legal malpractice claims into additional causes of action." *Goffney v. Rabson*, 56 S.W.3d at 190 (citing *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Smith v. Heard*, 980 S.W.2d 693, 697 (Tex. App.—San Antonio 1998, pet. denied); *Kahlig v. Boyd*, 980 S.W.2d 685, 688–91 (Tex. App.—San Antonio 1998, pet. denied); *Rodriguez v. Klein*, 960 S.W.2d 179, 184 (Tex. App.—Corpus Christi 1997, no pet.); *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 506 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Am. Med. Elecs., Inc. v. Korn*, 819 S.W.2d 573, 576 (Tex. App.—Dallas 1991, writ denied); *Bray v. Jordan*, 796 S.W.2d 296, 298 (Tex. App.—El Paso 1990, no writ)); *see Messner*, 466 S.W.3d at 203; *Isaacs*, 356 S.W.3d at 555–56.

"Generally, courts do not allow a case arising out of an attorney's alleged bad legal advice or improper representation to be split out into separate claims for negligence, breach of contract, or fraud, because the 'real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise.'" *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2003, pet. denied) (quoting *Averitt v. PriceWaterhouseCoopers L.L.P.*, 89 S.W.3d 330, 333 (Tex. App.—Fort Worth 2002, no pet.)); *see Messner*, 466 S.W.3d at 203; *Isaacs*, 356 S.W.3d at 556. "'Whether allegations against a lawyer, labeled as breach of fiduciary duty, fraud, or some other cause of action, are actually claims for professional negligence or something else is a question of law to be determined by the court.'" *Isaacs*, 356 S.W.3d at 556 (quoting *Duerr v. Brown*, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Murphy*, 241 S.W.3d at 692). The question is not so easily determined where, as here, there is an allegation of failing

to disclose a conflict of interest. *Murphy*, 241 S.W.3d at 698. While "some Texas courts have recognized that breach-of-fiduciary-duty claims alleging the lawyer obtained an improper benefit from his representation or improperly failed to disclose his own conflict of interest are not professional negligence claims[,] . . . other courts have held the claim is a professional negligence claim if the claim is really that the lawyer's conflict of interest prevented him from adequately representing the client." *Id.* at 696.

In order to determine whether the breach of fiduciary duty claim in this case is really a malpractice claim, we look to the difference between the two causes of action. "A cause of action for legal malpractice arises from an attorney giving a client bad legal advice or otherwise improperly representing the client." *Isaacs*, 356 S.W.3d at 559. On the other hand, "[t]he essence of a breach of fiduciary duty involves the 'integrity and fidelity' of an attorney." *Id.* (citing *Goffney*, 56 S.W.3d at 193). Its focus "is whether an attorney obtained an improper benefit from representing a client, while the focus of a legal malpractice claim is whether an attorney adequately represented a client." *Id.* (citing *Goffney*, 56 S.W.3d at 193; *Greathouse*, 982 S.W.2d at 172). "A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of the client's trust, engaging in self-dealing, or making misrepresentations." *Id*. "Unlike a claim for breach of fiduciary duty, legal malpractice is based on negligence, because such claims arise from an attorney's alleged failure to exercise ordinary care." *Id.* (citing *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989) (op. on reh'g)).

Billy and Freida's petition alleges that the Smith and Tracy Defendants committed malpractice by "fail[ing] to identify and address with Plaintiffs all of Plaintiffs causes of action," "allow[ing] the statute of limitations to expire and end all causes of action available to Plaintiffs," and "fail[ing] to identify and disclose the conflicts of interest that Defendants had in attempting to represent all concerned." The very same complaints also formed the breach of fiduciary duty allegations. We find that Billy and Freida's allegations challenge "the degree of care, skill, or diligence in performing [the] duty to inform appellants about issues that could arise during the representation of multiple clients and [the lawyers'] duty to communicate with and among the clients [they] represented." *Won Pak v. Harris*, 313 S.W.3d 454, 458 (Tex. App.—Dallas 2010, pet. denied) ("Even if a complaint implicates a lawyer's fiduciary duties, it does not necessarily follow that such a complaint is actionable apart from a negligence claim."). These are legal malpractice claims. *See id.*; *Murphy*, 241 S.W.3d at 698. Without more, we find that the petition does not '"allege the type of dishonesty or intentional deception that will support a breach-of-fiduciary duty claim"' apart from a legal malpractice claim. *See Isaacs*, 356 S.W.3d at 559 (quoting *Murphy*, 241 S.W.3d at 699).[10] Further, although Billy and Freida argue that the Smith and Tracy Defendants were able to recover some of their expenses in the Toyota litigation, whether an attorney personally benefitted in the form of receiving attorney fees from dual representation is

[10]In support of their position, Billy and Freida cite the following cases: *D'Andrea v. Epstein, Becker, Green, Wickliff & Hall, P.C.*, 418 S.W.3d 791 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (clarifying duties of loyalty owed by law firm to its clients); *Trousdale v. Henry*, 261 S.W.3d 221 (Tex. App.—Houston [14th Dist.] 2008, (2) pets. denied) (allowing fracturing where attorney, who misrepresented status of case to client, continued to collect fees after case dismissed); *McMahan v. Greenwood*, 108 S.W.3d 467 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (addressing attorney's failure to correct misstatements of law made to plaintiff); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (addressing situation in which attorneys who were subject of conflict of interest were themselves involved in litigation). We find these cases distinguishable.

insufficient, without more, to allege the type of dishonesty or intentional deception that will support a separate breach of fiduciary duty claim. *See Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 433 (Tex. App.—Austin 2009, no pet.).

We conclude that Billy and Freida could not maintain breach of fiduciary duty claims apart from their legal malpractice claims alleging inadequate representation. Thus, we find no error in the trial court's entry of summary judgments on the breach of fiduciary duty claims.

C. Summary Judgment on the Legal Malpractice Claims Was Proper

Billy and Freida argue that the trial court erred in determining that the Kemper release barred recovery under the Umbrella Policy. They argue (1) that the summary judgment evidence establishes that Kemper and they intended that the release only apply to "the tender of policy limits under the Kemper Primary Policy" and (2) that they produced Bockman's affidavit, which opined that the Kemper release did not release RLI. They argue that since the language of the release did not specifically include RLI, the Kemper release cannot be used to bar recovery under the Umbrella Policy.[11] Billy and Freida urge that a ruling in favor of the Smith and Tracy Defendants on this issue would establish a rule "that a release with the primary carrier would also release the umbrella carrier."

The Smith and Tracy Defendants argue that a condition precedent to the applicability of the Umbrella Policy was George's legal liability and that the plain language of the release

[11]A release is only effective against the parties that are named in the release or are described in the release with such particularity that the party's identity is not in doubt. *Schomburg v. TRW Vehicle Safety Sys., Inc.*, 242 S.W.3d 911, 913 (Tex. App.—Dallas 2008, pet. denied); *Mem'l Med. Ctr. of E. Tex. v. Keszler*, 943 S.W.2d 433, 434 (Tex. 1997) (per curiam) (citing *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420 (Tex. 1984)).

extinguished that liability. They also argue that Billy and Freida cannot rely on parol evidence, i.e., Baker's email, to establish Kemper's intent because the language of the release is unambiguous and because the Kemper release contains a merger clause. We agree with the Smith and Tracy Defendants.

1. The Release Barred Recovery under the Umbrella Policy

"A release is an agreement or contract in which one party agrees that a duty or obligation owed by the other party is discharged immediately on the occurrence of a condition." *Stafford*, 175 S.W.3d at 541 (citing *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); *Nat'l Union Fire Ins. Co. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 127 (Tex. App.—Houston [14th Dist.] 1997), *aff'd, Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692 (Tex. 2000)). "A release extinguishes a claim or cause of action and bars recovery on the released matter." *Id.*

We have previously explained,

> Like any other agreement, a release is subject to the rules of construction governing contracts, including the tenet that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained. *Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 646 (Tex. 1996); *Williams*, 789 S.W.2d at 264. When construing a contract, courts must give effect to the true intentions of the parties as expressed in the written instrument. *Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996). The contract must be read as a whole rather than by isolating a certain phrase, sentence, or section of the agreement. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995). The language in a contract is to be given its plain grammatical meaning unless doing so would defeat the parties' intent. *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96, 101 (Tex. 1999).

Stafford, 175 S.W.3d at 541.

"An unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008). In the Kemper release, Billy and Freida agreed to

> release, acquit and forever discharge George Fitts, Mary Fitts, and Trinity Universal Insurance Company of and from [any] and all actions, causes of action, claims or demands for damages, costs, loss of use, loss of services, expenses, compensation, consequential damage or any other thing whatsoever on account of, or in any way growing out of, and all known and unknown personal injuries and death and property damages resulting or to result from an occurrence or accident that happened on or about the 6th day of November , 2009 , at or near Highway 79 Hearne TX .

Thus, although RLI is not mentioned in the release, Billy and Freida released George, the insured, from any liability as a result of the accident.

"'The insurance policy does not bind the insurer for primary liability to an injured party, but its liability is contractual . . . . It contemplates that the insured must be liable to the injured person . . . before the insurer can be held liable.'" *Pool v. Durish*, 848 S.W.2d 722, 723 (Tex. App.—Austin 1992, writ denied) (quoting *Hutcheson v. Estate of Se'christ*, 459 S.W.2d 495, 496–97 (Tex. Civ. App.—Amarillo 1970, writ ref'd)). Thus, "as a general rule a party who releases an insured from liability retains no cause of action against the insurer." *Id.*

In support of their argument that the general rule should not apply, Billy and Freida focus on parol evidence introduced to support the idea that Billy, Freida, and Kemper did not intend for the release to operate as a release of the umbrella carrier.[12] The Smith and Tracy Defendants

[12]Specifically, Billy and Freida cite to their depositions and affidavits, Baker's emails, and Bockman's affidavit.

respond by noting that "[o]nly where a contract is ambiguous may a court consider the parties' interpretation and 'admit extraneous evidence to determine the true meaning of the instrument.'" *Haden*, 266 S.W.3d at 450–51 (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam)). In further support of their argument that such evidence has no weight, the Smith and Tracy Defendants cite to the following portion of the Kemper release:

> No promise or inducement which is not herein expressed has been made to me/us, and in executing this release I/we do not rely upon any statement or representation made by any person, firm or corporation, hereby released, or any agent . . . representing them . . . concerning the nature, extent or duration of said damages or losses or the legal liability therefor.
>
> . . . .
>
> This release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital.

"This [language] is typically referred to as an integration or merger clause." *Barker v. Roelke*, 105 S.W.3d 75, 83 (Tex. App.—Eastland 2003, pet. denied). "The parties' execution of a written agreement [containing such a clause] presumes that all prior negotiations and agreements relating to the transaction have been merged into [the release] and it will be enforced as written and cannot be added to, varied, or contradicted by parol evidence." *Id.* (citing *Smith v. Smith*, 794 S.W.2d 823, 827–28 (Tex. App.—Dallas 1990, no writ)).

In response to the merger clause, Billy and Freida argue that Baker's email attaching the release, which stated, "This pertains only to this insurance policy and the settlement of this claim will have no affect [sic] on any claims you make against the excess insurance carrier," was a contemporaneous statement, as opposed to a prior agreement. Thus, they argue that the collateral

and consistent exception to the parol evidence rule should apply. "If a contract is unambiguous, the parol evidence rule precludes consideration of evidence of prior or contemporaneous agreements unless an exception to the parol evidence rule applies." *Haden*, 266 S.W.3d at 451 (citing *Hubacek v. Ennis State Bank*, 317 S.W.2d 30, 31 (1958))." Under the collateral and consistent exception, "parol evidence can be used to demonstrate a prior or contemporaneous agreement that is both collateral to and consistent with a binding agreement, and that does not vary or contradict the agreement's express or implied terms or obligations." *Id.* Here, Baker's legal opinion expressed by email was clearly inconsistent with the unambiguous meaning of the terms of the release, and the collateral and consistent exception cannot be used to thwart the unambiguous language of the Kemper release. *See id.*

While there are several ways to reserve the right to purse an umbrella carrier while exhausting a primary carrier's policy limits, settling with a primary carrier and executing an unambiguous release of the insured, without reserving the right to purse the umbrella carrier in the release, is not one them. *See Barker*, 105 S.W.3d at 79; *Pool*, 848 S.W.2d at 723–24. Here, we find that the trial court properly determined that the Kemper settlement and release extinguished the right to collect under the Umbrella Policy.

2. Billy and Freida's Mutual Mistake and Fraud in the Inducement Arguments Are Not Properly before the Court

Recognizing the possibility that this Court could find that the Kemper release prevented them from collecting under the Umbrella Policy, Billy and Freida argue, in the alternative, that they could have rescinded the Kemper release based on mutual mistake or fraudulent inducement had the Smith and Tracy Defendants properly advised them to do so. These arguments were not

made before the trial court. In summary judgment practice, "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c); *see* TEX. R. APP. P. 33.1(a)(1); *D.R. Horton-Tex., Ltd. v. Markel Intern. Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009) ("A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived."); *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 862 (Tex. 2000). Accordingly, the issues of mutual mistake and fraud in the inducement are not before us for consideration.

3. Because the Kemper Release Barred Recovery under the Umbrella Policy, the Affirmative Defense of Release Was Proven as a Matter of Law

Next, Billy and Freida argue that in order to obtain summary judgment on their affirmative defense of release, the Smith and Tracy Defendants had to show not only that the Kemper release was a complete bar to any claims under the Umbrella Policy, but also that Billy and Freida could not have rescinded the Kemper release. This argument confounds the burdens of proof in summary judgment cases where the defendant seeks summary judgment on the affirmative defense of release.

"When a defendant moves for summary judgment based on an affirmative defense, the defendant bears the burden of proving each essential element of the affirmative defense." *Deer Creek Ltd. v. N. Am. Mortg. Co.*, 792 S.W.2d 198, 200 (Tex. App.—Dallas 1990, no pet.). "A release, valid on its face, until set aside, is a complete bar to any later action based on matters covered by the release." *Id.* at 201 (citing *Schmaltz v. Walder*, 566 S.W.2d 81, 83 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)); *see Tobbon v. State Farm Mut. Auto Ins. Co.*, 616

S.W.2d 243, 245 (Tex. App.—San Antonio 1981, writ ref'd n.r.e.). The Kemper release, containing unambiguous language releasing George from any liability as a result of the accident, was sufficient to establish the affirmative defense of release. *See id.*

"If the defendant/movant establishes the affirmative defense as a matter of law, then the plaintiff/nonmovant must raise a fact issue concerning the matter injected by plaintiff in confession and avoidance of the affirmative defense." *Id.* at 200–01 (citing *Sanchez v. Mem'l Med. Ctr. Hosp.*, 769 S.W.2d 656, 658 (Tex. App.—Corpus Christi 1989, no writ)). Thus, "[o]nce the release was properly pleaded, the burden then shifted to appellants to produce evidence that raised a fact issue as to a legal justification for setting aside the release." *Id.* at 201 (citing *McCall v. Trucks of Tex., Inc.*, 535 S.W.2d 791, 794 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (citing *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex. 1975)); *see Miller v. Jefferson Cnty.*, No. 03-11-00521-CV, 2013 WL 3724766, at *3 (Tex. App.—Austin July 11, 2013, no pet.) (mem. op.) (citing *Sweeney v. Taco Bell, Inc.*, 824 S.W.2d 289, 291 (Tex. App.—Fort Worth 1992, writ denied)). Here, because (1) the affirmative defense of release was established as a matter of law and (2) Billy and Freida failed to raise the issues of mutual mistake and fraud in the inducement before the trial court, we conclude that the trial court properly granted summary judgment on the affirmative defense of release.

4. Because the Kemper Release Barred Recovery under the Umbrella Policy, Summary Judgment on the Issue of Damages Was Proper

The Smith and Tracy Defendants' use of the affirmative defense of release was unusual in the sense that the defense was not used to demonstrate that they were absolved from malpractice liability under the Kemper release. Instead, it was used to demonstrate that Billy and Freida could

not establish that the inability to recover under the Umbrella Policy was the result of any legal malpractice.

A legal malpractice claim is based on negligence; therefore, damages are an essential element of the claim. *Mackie v. McKenzie*, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied) (citing *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989)). "[L]egal-malpractice damages 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). Generally, "[t]o succeed in a legal malpractice action, the plaintiff must prove 'a suit within a suit' by showing that he would have prevailed in the underlying action but for his attorney's negligence." *Mackie*, 900 S.W.2d at 449. Thus,

> [w]hen a client sues his attorney on the ground that the latter caused him to lose his cause of action, the burden of proof is on the client to prove that his suit would have been successful but for the negligence of his attorney and to show what amount would have been collectible had he recovered the judgment. *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948, 949 (Tex. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

Id. at 448–49 (affirming trial court's grant of traditional motion for summary judgment). "'Uncertainty as to the fact of legal damages is fatal to recovery.'" *McKnight v. Hill & Hill Exterminators, Inc.*, 689 S.W.2d 206, 207 (Tex. 1985) (quoting *Sw. Battery Corp. v. Owen*, 115 S.W.2d 1097, 1099 (1938)); *see Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 635 (Tex. App.—Dallas 2000, pet. denied); *Schlager v. Clements*, 939 S.W.2d 183, 186–89 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

Billy and Freida allege that the Smith and Tracy Defendants' legal malpractice prevented them from recovering under the Umbrella Policy. That damage could have occurred at two points:

when the Kemper release was signed and when the statute of limitations to file suit against George ran. Critically, Billy and Freida do not argue that they would have abstained from executing the release had they been properly advised about the potential conflicts of interest from the outset or that any malpractice caused them to execute the release. The uncontested summary judgment evidence established that the Smith and Tracy Defendants knew nothing of the Kemper release until it was executed. Thus, Billy and Freida argue, instead, that had the Smith and Tracy Defendants properly advised them of the conflict of interest when they first became aware of the Kemper release and the existence of an Umbrella Policy, they could have filed suit against George within the statute of limitations "either because the Kemper Release did not negate Appellants' claims under RLI Umbrella Policy . . . , or alternatively because Appellants could have successfully rescinded the Kemper Release."[13]

Because the release barred recovery under the Umbrella Policy, the trial court properly determined that the Smith and Tracy Defendants conclusively established that Billy and Freida would not have prevailed in their attempts to recover under the Umbrella Policy. "In order to avoid a summary judgment once a defendant has produced competent evidence negating an element of a cause of action, the plaintiff must introduce evidence which raises a fact question on that element of the cause of action." *Schlager*, 939 S.W.2d at 189; *see Centeq Realty, Inc. v. Seigler*, 899 S.W.2d 195, 197 (Tex. 1995); *Messner*, 466 S.W.3d at 210. "If the plaintiff fails to carry this burden, summary judgment is proper." *Schlager*, 939 S.W.2d at 189.

[13]This argument recognizes that until the expiration of the two-year statute of limitations, any damage flowing from the alleged malpractice could have been cured.

Billy and Freida believe that their appellate arguments regarding rescission of the Kemper release accomplished the goal of raising a fact issue on the damage element, but these arguments were not presented to the trial court. Thus, there was nothing before the trial court that raised a fact issue on whether Billy and Freida could recover under the Umbrella Policy after the release was signed. Accordingly, we find that the trial court properly determined that the Smith and Tracy Defendants conclusively negated the damages elements of Billy and Freida's claims.

IV. Conclusion

We affirm the trial court's judgment.

Jack Carter
Justice

Date Submitted: November 18, 2015
Date Decided: February 17, 2016