W. JEFFREY ROBINS, Plaintiff and Appellant, v. STEVEN R. KUHN et al., Defendants and Respondents.

No. G043752.
Court of Appeals of California, Fourth District, Division Three.

Filed May 24, **2011**.
W. Jeffrey **Robins**, in pro. per., for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Peter L. Garchie and Vanessa R. Negrete for Defendants and Respondents.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

OPINION

RYLAARSDAM, ACTING P. J.

Plaintiff W. Jeffrey **Robins** appeals from the summary judgment entered on his action for breach of fiduciary duty against his former attorneys, defendants Steven R. **Kuhn** and **Kuhn** & Belz. He contends the court applied the wrong standard with regard to lack of causation and that there were triable issues of material fact. Finding no error, we affirm.

Plaintiff requests that we take judicial notice of a minute order and strike a portion of respondents' brief relating to why the case was reassigned from Orange County Superior Court to Los Angeles Superior Court. We deny the requests as the matter complained of is immaterial to our consideration of the issues on appeal.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff hired defendants in 2004 to pursue a personal injury claim on behalf of his father, who had been hospitalized due to a fall at a movie theater. His father died several months later, having incurred over $600,000 in medical bills. In March 2005, defendants filed a lawsuit on behalf of plaintiff and two of his brothers against Regal Entertainment Group (Regal), the theater owner, for wrongful death and civil rights violations under the Unruh Civil Rights Act (Civ. Code, § 51 et seq.) and the Public Accommodations Act (Civ. Code, § 54 et seq.).

Several months later, plaintiff substituted in Eric V. Traut and the Traut Law Firm (collectively Traut) as his attorney of record. Traut handled the case for the next year and a half through two mandatory settlement conferences and trial. Plaintiff's brothers settled during the first mandatory settlement conference but plaintiff continued to litigate the case to trial. The jury rendered a defense verdict and the trial court awarded fees and costs against plaintiff in an amount over $250,000, including more than $164,000 in attorney fees. The judgment was affirmed on appeal. (***Robins*** *v. Regal Entertainment Group* (Oct. 6, 2008, G039205) [nonpub. opn.].)

Plaintiff thereafter sued defendants and Traut; he later settled with the latter for $166,000. Plaintiff alleges defendants breached their fiduciary duty to him by "(a) recklessly failing to investigate medical liens which formed the basis for damages and statutory penalties that could be claimed at trial; [¶] (b) recklessly failing to advise [him] of the addition of civil rights violations to the lawsuit which gave rise to defense attorney[] fees; [¶] (c) recklessly failing to get [his] informed consent . . . to add civil rights violations to the lawsuit; [¶] (d) recklessly failing to advise [him] of the legal ramifications and risks involved in naming [him] as [his father's] successor in interest; [¶] (e) recklessly failing to advise [him] of the possibility that he may have to pay defense attorney[] fees if the civil rights causes of action were unsuccessful at trial; [¶] (f) failing to get [his] . . . consent for the fee-splitting agreement between [defendants] and Traut; and [¶] (g) recklessly representing and advising [him] regarding the high/low offer by Regal." Plaintiff sought to recover the defense fees and costs plus interest as well as his own fees and costs incurred in the underlying action through the appeal and in the current case.

Defendants moved for summary judgment on the grounds they did not owe the duties alleged by plaintiff, he could not establish causation, and they were entitled to a complete offset of any damages by the settlement with Traut. The trial court granted the motion, ruling defendants had

demonstrated the absence of a continuing duty and that plaintiff could not establish their "actions were the proximate cause of his injuries." It reasoned, plaintiff "was found liable for fees and costs because when his co-plaintiff brothers settled their claims he was left pursuing the action on his own behalf rather than in a representative capacity." This happened over a year after defendants had been terminated as plaintiffs' attorneys and at a time Traut was representing them, and thus it was Traut's duty to explain the legal ramifications of the settlement to plaintiff. Additionally, after defendants told Traut the medical liens needed investigation, they had no authorization or duty to take further action.

Plaintiff unsuccessfully moved for a new trial. In denying the motion, the court stated, "Once plaintiff obtained new counsel, who controlled the case for over 19 months until its completion, defendants had no control over the litigation and [no] ongoing fiduciary duty to plaintiff."

DISCUSSION

1. Applicable Legal Principles

We review the grant of summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860.) Summary judgment is proper when all papers filed in favor of or in opposition to the motion show there is no triable issue of material fact and "the moving party is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); all further statutory references will be to this code unless otherwise stated.) When a defendant moves for summary judgment, its burden is to show the action has no merit, either by demonstrating one of the elements of the cause of action "cannot be established, or that there is a complete defense . . . . (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) Once this burden is met, the onus shifts to the plaintiff to provide sufficient evidence to demonstrate a triable issue of material fact exists. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.)

"[A] breach of fiduciary duty is a species of tort distinct from a cause of

action for professional negligence. [Citations.] The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. [Citation.]" (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) Nevertheless, causation of damages is an element common to both causes of action for legal malpractice and breach of fiduciary duty. (See *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 536 [elements of legal malpractice include "proximate causal connection between breach and resulting injury"].) Because plaintiff's opening brief relies on the analysis in professional negligence cases, we will as well.

2. Duties Concerning Medical Liens, Settlement Offers, and Brother's Settlements

The Supreme Court has held that attorneys cannot be held liable for failing to take action where they no longer represent a client and time remains for the successor attorney to take the appropriate action to protect the plaintiff's rights. (*Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 57 (*Steketee*) [former law firm not responsible for failing to timely file action where it stopped representing the plaintiffs nine months before statute of limitations expired]; *Stuart v. Superior Court* (1992) 14 Cal.App.4th 124, 127-128 [former attorney not responsible for failure to serve complaint and return proof of service within three-year mandatory time limit].)

In *Steketee,* the plaintiff alleged the defendants had failed to file an action for medical malpractice on his behalf within the applicable statute of limitations. But the limitations period did not expire until several months after the attorney-client relationship between plaintiff and defendant attorneys had been terminated. (*Steketee, supra,* 38 Cal.3d at p. 51.) *Steketee* concluded "[a]n attorney cannot be held liable for failing to file an action prior to the expiration of the statute of limitations if he ceased to represent the client and was replaced by other counsel before the statute ran on the client's action. [Citations.]" (*Id.* at p. 57.)

Steketee relied on *Shelly v. Hansen* (1966) 244 Cal.App.2d 210, 213-214 (*Shelly*), disapproved on other grounds in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 190, fn. 29. According to *Shelly,*

"To warrant recovery for this type of negligence plaintiff must first plead and prove that at the critical times in question there existed the relationship of attorney and client with its accompanying responsibilities. [Citations.] During the last seven months of the statutory period, the responsibility for filing the breach of contract action lay with [the subsequent attorney] and not [the former, defendant attorney]; furthermore, even if the latter had wished to do so, the proceeding could not have been instituted by him due to the termination of his employment . . . . Stated otherwise, if [defendant attorney] then had no duty to perform, how can it be properly urged that such duty was negligently carried out? Under the above circumstances, it may not be contended (as is done by plaintiff) that [the defendant attorney's] asserted negligence while acting as his counsel, was *a,* not *the,* proximate cause of the damages said to have been sustained. The `but for' rule determines cause in fact [citation]; and in *Lally v. Kuster* [(1918)] 177 Cal. 783, 787 . . ., it is declared that in a suit for negligence by a client against an attorney it must be shown that `but for' the asserted negligence an actionable claim could have been successfully maintained. Here the subsequent employment of [the second attorney] intervened to make the above rule inoperative." (*Shelly, supra,* 244 Cal.App.2d at p. 214.)

Defendants in this case moved for summary judgment under these principles, arguing they did not owe the duties alleged because the critical time was at the mandatory settlement conference when Regal made the section 998 offer, at which point they no longer represented plaintiff. Because their representation of plaintiff ended in June 2005, defendants asserted that, after their termination as plaintiff's attorneys, even if they had wanted to they could not have offered advice regarding the settlement offer or the effect of his brother's settlements, nor further investigated the medical liens.

As to the above duties, defendants set out statements of undisputed fact that they had investigated the medical liens before filing the lawsuit in March 2005. The previous June, Primax Recoveries Incorporated (Primax), PacifiCare Secure Horizons's subrogation and reimbursement agent, sent defendants a letter informing them "the benefits received by [plaintiff's father] were governed by [f]ederal Medicare [s]tatute 42 C.F.R. [§] 411.20 et seq., and as such, state anti-subrogation laws did not apply." The letter further stated the "Medicare benefits were conditional payments to which any other source of recovery was considered primary. [It] also instructed [defendants] to contact the author before settlement or judgment on [p]laintiff's case to obtain the final amount of benefits paid by the plan." Six months later, Primax notified defendants that as of the date of plaintiff's father's accident, "PacifiCare Secure Horizon held no vested right of

reimbursement[and that that right was] not waived as to reimbursement or subrogation of benefits paid in the future."

Plaintiff substituted defendants out of the case in July 2005. Thereafter, defendants sent Traut a letter informing him they had contacted St. Joseph Heritage and Primax but not Medicare and left it to him to make further contact about any outstanding liens.

Months before trial, plaintiff prepared a spreadsheet of damages, sharing the information with his brothers and Traut. He told Traut $2 million was a fair settlement but believed the case was worth over $3 million based on his research on the Unruh Civil Rights Act, under which they could treble his father's medical bills. Based on that, Traut prepared a settlement demand for over $2 million. At the mandatory settlement conference (MSC) in September 2006, Traut discovered the medical bills amounted to just over $32,000 but plaintiff continued to believe the bills were more than $600,000. Traut said "the lien amount depended on insurance and was something defendants had to prove." Plaintiff's brothers settled their claims at that MSC and a second one was held the following month.

After the first MSC, Regal served a section 998 offer to settle plaintiff's claims for $50,001. It then offered him $60,000 at the second MSC but no settlement was reached because plaintiff believed he could recover $3 million at trial.

Two days after the trial began, Traut, who by then had been the attorney of record for about 19 months, told plaintiff over "$500,000 in medical liens had been written[]off and could not be claimed as damages . . . ." Nevertheless plaintiff rejected Regal's high/low offer of $25,000/$250,000, countering it with $50,000/$500,000. A settlement was not reached and plaintiff proceeded to "trial knowing full well . . . the medical liens were only $37,000 and not $600,000 as [he] had previously believed." Plaintiff now claims he would have attempted to settle at the MSC, instead of going to trial, if he knew the medical liens were so small but since he did not know the liens had been written off, "he `was never able to accurately assess Regal's settlement offers and avoid a trial, thereby exposing him to [over] $250,[000] in defense costs.'"

Under *Steketee* and *Shelly,* defendants met their burden to show they owed no duty to plaintiff after Traut became attorney of record to further investigate the medical liens or advise him about the effect of his brother's settlements and his potential liability for attorney fees and costs if he rejected the section 998 offer and lost at trial. During oral argument,

plaintiff distinguished *Steketee* and *Shelly* on the basis they involved the former attorney's inaction whereas the present case concerns defendants' actions while they were still his attorneys. But the above allegations all involved defendants' purported failure to act after they no longer represented him. *Steketee, supra,* 38 Cal.3d 46, and *Shelly, supra,* 244 Cal.App.2d 210, thus apply.

To defeat summary judgment, plaintiff was required to "make an independent showing by a proper declaration or by reference to a deposition or another discovery product that there is sufficient proof of the matters alleged to raise a triable question of [material] fact . . . ." (*Wiz Technology Inc. v. Coopers & Lygrand* (2003) 106 Cal.App.4th 1, 10-11.) Plaintiff did not dispute most of the above facts and as to the few he did, he failed to controvert the stated material fact.

For example, plaintiff contested whether defendants informed Traut of "`their efforts'" to contact St. Joseph Heritage Healthcare and Primax, claiming Traut was merely provided with copies of correspondence. He argued "defendants knew that only medical bills for which liens existed could be claimed as damages," having written to Primax asking for an itemization of their liens and supporting bills and Primax's response there was no right to reimbursement. They also collected the medical bills and prepared a document showing more than $600,000 in medical bills, including over $500,000 for St. Joseph Hospital, which was covered by insurance. Defendants sent Regal a statement of damages claiming $57,000 in medical expenses, as well as $15 million for treble and punitive damages. But none of this showed defendants did not send Traut a letter advising him about their contacts with St. Joseph Heritage and Primax and suggesting he should further contact them regarding outstanding liens.

Similarly, plaintiff disputed defendants' statement that Traut told him after the MSC (1) the medical bills were just over $32,000, at which plaintiff laughed because he believed they were more than $600,000, and (2) "the lien amount depended on insurance and was something defendants had to prove." Plaintiff asserted there was no reference to liens in either the complaint or the page of his deposition cited by defendants and that Traut never discussed liens with him. Defendants later conceded citing the wrong page of plaintiff's deposition and identified the correct one. On that page, plaintiff acknowledged Traut told him the reason the medical bills were so low was because "[i]t depends on the insurance" and "that's for [defendants] to prove." Given his knowledge of the correlation between medical bills and liens, plaintiff failed to demonstrate a triable issue of material fact.

Plaintiff also challenged the phrase that "he decided to proceed to trial" "under the mistaken belief that hecould recover $3 million in damages . . . ." He claimed "[b]ased on [d]efendants' prior representations that [he] was acting in a representative capacity, [he] believed that he could recover damages that would be shared with the other heirs." As defendants pointed out though, "[w]hether [p]laintiff believed he could recover for himself alone or on behalf of himself and his brothers is irrelevant and immaterial" to the fact he rejected two settlement offers from Regal in anticipation of a larger recovery.

Finally, plaintiff disputed the fact he countered Regal's high/low offer of $25,000/$250,000 with $50,000/$500,000 two days after the trial began and that he proceeded to trial despite knowing all medical liens had been written off except for $37,000. He stated he followed Traut's advice and Traut did not tell him until six weeks after the trial "that the Public Accommodations Act cause of action . . . exposed him to . . . attorney[] fees, or that . . . naming him as his father's successor in interest made him liable for defense costs." This may have explained why he acted as he did but it did not establish a triable issue as to his decisions to counter the offer or continue to trial.

Based on *Steketee, supra,* 38 Cal.3d 46, and *Shelly, supra,* 244 Cal.App.2d 210, and the uncontroverted material facts, defendants did not have a duty to further investigate the medical liens or advise plaintiff about the section 998 offers or the effect of his brother's settlements.

3. Other Alleged Duties

Plaintiff contends defendants "misrepresented the law on `critical times'" by identifying only a single "critical time" whereas *Shelly, supra,* 244 Cal.App.2d 210 and *Stuart v. Superior Court, supra,* 14 Cal.App.4th 124, refer to "critical times" in the plural. He asserts "there were more than one `critical times,' but no more `critical time' than the drafting and filing of the complaint." In that regard, defendants failed to tell him they were adding, or obtain his informed consent to include, the civil rights cause of action that gave rise to the attorney fees (Civ. Code, § 55 [violation of the California public accommodations and disabled persons laws]), instead falsifying his declaration attached to the complaint. They also did not advise him of the possibility he would have to pay defense fees if the claim was

unsuccessful at trial. Further, defendants did not inform him of the risks of being named his father's successor in interest and "should have foreseen [the fee-splitting agreement with Traut] could adversely affect Traut's litigation of the matter." The trial court found a lack of causation. We do as well.

a. Causation Standard

As a preliminary matter, plaintiff argues the court erred in using the proximate cause rather than the substantial factor standard set forth in the current Judicial Council's jury instruction for breach of fiduciary duty, CACI No. 4106. According to him, *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 criticized jury instructions using "proximate cause" because they could confuse jurors and cause them "to focus improperly on the cause that is spatially or temporally closest to the harm." (*Id.* at p. 1052.) He claims defendants thus erred in relying on *Mosier v. Southern Cal. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022 and CACI No. 605 (breach of fiduciary duty) for the element of proximate cause because *Mosier* "blindly followed" a decision filed 10 days after *Mitchell* was decided and CACI No. 605 was renumbered before he filed his complaint.

But whether a defendant's conduct was a substantial factor is only one aspect of causation. "The other is legal or proximate cause." (*Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 665-666.) "`"The doctrine of proximate cause limits liability; i.e., in certain situations where the defendant's conduct is an actual cause of the harm, he will nevertheless be absolved because of the manner in which the injury occurred.'" (*Ibid.*)

Proximate cause has two prongs, cause in fact or actual cause, and the extent to which public policy considerations limit a defendant's liability for its acts. (*PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315-316.) The first is established when an act "is a necessary antecedent of an event" and ordinarily "`is a factual question for the jury to resolve.' [Citation.]" (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.) The second, on the other hand, "`"is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct."' [Citation.]" (*Ibid.*) This is a question of law for the court (*Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1035) and may

be decided by summary judgment when the underlying facts are undisputed (see *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 834).

b. Conduct Related to Defendants' Drafting of Complaint

Defendants presented the following undisputed evidence that the settlement by plaintiff's brothers and not their drafting of the complaint is what led to his personal exposure to a cost bill after the defense verdict. Plaintiff opined it would be unjust to settle for less than $2 million because "as far back as December 2004 he felt" a judge or jury would award millions of dollars based on the history of lawsuits under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.; ADA) against Regal. Three months before the case was filed, he believed $5 million could be requested from the jury due to the strength of the case.

Defendants provided a conformed copy of the complaint to plaintiff, who upon reviewing it, did not object to the civil rights claims and instead told defendants he was impressed. When plaintiff appealed the underlying judgment, Regal argued "[p]laintiff was `a person expressly authorized by statute' and not protected by . . . [section] 1026[, subdivision](b)." This is because once his brothers settled, they were prohibited from bringing any further claims arising out of the same facts and "[p]laintiff represented no one but himself and therefore was not protected from an award of costs or attorney[] fees by . . . [section] 1026[, subdivision](b)." We agreed, deciding that plaintiff's brother's settlement included damages for both wrongful death and survival claims, leaving plaintiff the sole remaining plaintiff who did not represent anyone other than himself. We stated, "when they settled, they settled. They were done. Only [plaintiff] was left in the suit. Nothing else makes sense." (***Robins*** *v. Royal Entertainment Group, supra,* G039205, p. 9.)

In his summary judgment opposition, plaintiff disputed defendants' statement that "[i]n the months leading up to the filing of the underlying complaint, [he] familiarized himself with the wrongful death statutes as well as the ADA. He was well aware that an ADA cause of action would be included in the lawsuit." Plaintiff maintained defendants' evidence showed

he "intended to pursue a wrongful death action" and "makes no mention of an ADA cause of action." But this did not controvert the fact he had become acquainted with the wrongful death and ADA statutes. Moreover, he admitted that his belief it would be unjust to settle for less than $2 million was based on his ADA research and other ADA lawsuits filed against Regal, and asked defendants whether these other lawsuits would be allowed into evidence to support his action. Plaintiff failed to explain why he would be asking to include ADA evidence if he did not know such a cause of action would be alleged.

Plaintiff also contended "[t]he wrongful death action was supposed to use the lack of ADA-required signage as evidence of Regal's negligence. When plaintiff retained [defendants] to represent his father, [they] knew that lack of signage was the main issue and wrote the retainer agreement as a `premises liability' claim, and made no mention of civil rights violations." The evidence he cited did not support that claim.

Additionally, plaintiff challenged defendants' assertion this court affirmed the judgment "because [p]laintiff's father's estate was worth nothing and he no longer represented his brothers' interests in the survival claims after they settled at the first MSC, [extinguishing his] status as a representative of the estate . . . . As a result, he was left as the sole individual and was therefore exposed to attorney[] fees and costs." He states, the court "also referenced the California Practice Guides and wrote: `If estate is not probated, successor in interest may prosecute for his or her own benefit.' This was in direct contradiction to [defendants'] letter to [p]laintiff and his brothers, after the lawsuit was already filed, that [p]laintiff was to be named to be his father's successor in interest `as a representative.'" (Underscoring omitted.) This did not gainsay the court's holding.

Plaintiff further contested defendants' statement this court determined the complaint was drafted to have all three brothers assert each cause of action, and that had plaintiff continued representing them in the survival actions as their father's successor-in-interest, "[section] 1026, subdivision (b) would have barred the imposition of attorney[] fees and costs against him. Therefore, contrary to [p]laintiff's argument, the first amended complaint as drafted would have actually prevented the award of attorney[] fees against him personally." But merely claiming he disputed this and that the lack of citation to our decision made him unable to respond did not create a triable issue of material fact.

Here, the undisputed material facts establish a lack of proximate causation between how the complaint was drafted and the court's decision to award

attorney fees against plaintiff. "`"Proximate cause" . . . is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct.'" (*Evan F. v. Hughson United Methodist Church, supra,* 8 Cal.App.4th at p. 834.) "`[L]egal responsibility,'" therefore, is "`limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability.'" (*Id.* at p. 835) In other words, "`[s]ome boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.'" (*Ibid.*) To set this boundary, the court must analyze "`the nature and degree of the connection in fact between the defendant's acts and the events of which the plaintiff complains.'" (*Ibid.*)

Examining these factors, we conclude defendants' drafting of the complaint is not "so closely connected" to the award of attorney fees as to justify imposing liability. The complaint as drafted would not have caused plaintiff to incur attorney fees if plaintiff's brothers settled only their wrongful death action and not their survival claims. In that event, plaintiff would have continued in his representative capacity as his father's successor in interest and section 1026, subdivision (b) would not have applied. But because their settlement included both the wrongful death and survivor causes of action, plaintiff was left prosecuting the complaint on his own behalf with no one to represent. The proximate cause of the award of attorney fees against plaintiff was his brother's settlements, not defendants' alleged acts or omissions in drafting the complaint.

c. Fee-Splitting Agreement

As for defendants' alleged failure to obtain his consent to the fee-splitting agreement, plaintiff claims the agreement "adversely affected Traut's litigation of his case after he became [plaintiff's] attorney" and defendants "should have foreseen" that would happen. But his failure to provide supporting argument or legal authority waives the issue. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) "Although our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in plaintiff's brief. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned. [Citation.]" (*Ibid.*)

DISPOSITION

The judgment is affirmed. The request for judicial notice and the request to strike a portion of respondents' brief are denied. Respondents shall recover their costs on appeal.

WE CONCUR.

BEDSWORTH, J.

O'LEARY, J.