CASE NOTE

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Evidentiary Standards in the Legal Malpractice Trial-Within-a-Trial

CONTENTS

I. INTRODUCTION

Like malpractice actions in general, the standards of proof required for each element of a legal malpractice claim evolved as legal malpractice claims became increasingly common. State and federal courts consequently produced a diverse range of opinions as jurisdictions continually adjust to evolving standards. The courts often seek to balance these standards of proof against their own precedent and the need to serve their particular notions of equity and justice. Perhaps the most contentious of these evolving standards of proof is the current state of the causation element, which is a critical test that must be satisfied to prevail in

a legal malpractice claim.[1] This issue was taken up by the Georgia Supreme Court in *Leibel v. Johnson*.[2]

II. FACTS

Attorney Steven Leibel represented the appellee, Dr. Mary Johnson, in her suit against Scottish Rite Hospital of Alpharetta, Georgia for gender discrimination and age discrimination.[3] At trial, the judge dismissed all state law claims and granted summary judgment to Scottish Rite regarding all other claims.[4] A request for reconsideration was denied, and the appellate court dismissed Leibel's untimely motion for appeal.[5] Johnson then filed a legal malpractice action against Leibel because he failed to introduce a fact issue in the face of Scottish Rite's motion for summary judgment and that he failed to file a timely notice of appeal.[6]

Johnson prevailed on her legal malpractice claim against Leibel at the trial level; however, the court subsequently granted Leibel's motion for new trial when it was discovered that Leibel previously sued one of the jurors in an unrelated action many years before the case at hand when the juror served as mayor of the town.[7] The appellate court overturned the trial court because the non-disclosure of the previous suit against the mayor was only the result of an honest mistake in an answer during voir dire and did not rise to the level of juror misconduct necessary to support Leibel's motion for new trial.[8]

The appellate court then addressed Leibel's claim that expert testimony introduced by Johnson was wrongfully allowed to support the jury's findings on the issue of proximate causation in Johnson's claim of legal malpractice.[9] Leibel essentially argued the court invaded the province of the jury because "the jury could reach the same conclusion [on the issue] independently of the opinion of others."[10] The appellate court rejected this argument on the grounds that expert testimony is only admissible to

1. *See generally* Trousdale v. Henry, 261 S.W.3d 221, 227 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (listing the required elements for establishing a legal malpractice claim).

2. Leibel v. Johnson, 728 S.E.2d 554 (Ga. 2012).

3. Johnson v. Leibel, 703 S.E.2d 702, 706 (Ga. Ct. App. 2010), *rev'd*, 728 S.E.2d 554 (Ga. 2012).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 706–08.

9. *Id.* at 708–09.

10. *Id.* at 709 (quoting Sotomayor v. TAMA I, LLC, 617 S.E.2d 606, 610 (Ga. Ct. App. 2005)).

support a finding of proximate causation in a legal malpractice cause of action when "a lay person could not competently determine whether or not the negligence of the attorney proximately caused the plaintiff's damages, i.e., whether or not the plaintiff would have prevailed in the underlying action."[11] Leibel appealed his case to the Georgia Supreme Court on the issue of admissibility of expert testimony to prove causation in a legal malpractice suit.[12]

III. HOLDING

The Georgia Supreme Court held the issue of causation in this legal malpractice action was entirely within the purview of the jury; therefore, expert testimony was inadmissible to prove the causation element of legal malpractice and was admissible only to prove a breach of duty by the defendant-attorney.[13]

IV. ANALYSIS

Both the appellate court and the supreme court noted the bedrock tenets of a legal malpractice action: (1) the plaintiff must prove employment of the defendant as their attorney; (2) the plaintiff must prove negligence (failure to exercise ordinary care); and (3) the plaintiff must prove that, but for the negligence of the defendant, the plaintiff would have prevailed in the underlying action.[14] *Leibel* hinged upon the different standards of proof between the second and third prongs of the test outlined above.[15] Under the second prong (negligence), expert testimony is generally required to prove a breach of duty by the defendant attorney because "expert testimony is necessary to establish the parameters of acceptable professional conduct."[16] The idea is that the jury cannot determine on its own, without the aid of expert testimony, whether the

11. *Id.* at 709 (citing Ross v. Edwards, 560 S.E.2d 343 (Ga. Ct. App. 2002)).

12. Leibel v. Johnson, 728 S.E.2d 554, 555 (Ga. 2012).

13. *Id.* at 555–57.

14. *See id.* at 555 (describing the elements of a legal malpractice cause of action); *Johnson*, 703 S.E.2d at 708 (reiterating the elements of a legal malpractice cause of action). Some jurisdictions, such as Texas, explicitly include damages as the fourth necessary element; others still include a fifth element. *See, e.g.*, George S. Mahaffey, *Cause-in-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 402–03 (2004) (enumerating five elements for a legal malpractice cause of action and noting the disagreement among jurisdictions about the exact elements required).

15. *See Leibel*, 728 S.E.2d at 556 (finding expert testimony appropriate for the second prong, but not necessarily for the third prong).

16. *Id.* (quoting Berman v. Rubin, 227 S.E.2d 802, 806 (Ga. Ct. App. 1976)).

defendant-attorney's behavior constituted a breach of his fiduciary duty to the client.

Courts often make the error of extending the application or requirement of expert testimony from the second prong of the test, which only examines the breach of duty, to the third prong of the test, which examines causality and the meritorious nature of the plaintiff's original cause of action in the underlying trial.[17] The preferred standard of proof with regard to causation is the "but for" test, which asks if the plaintiff's injury would have occurred in the absence of the defendant-attorney's alleged malpractice.[18] This portion of a legal malpractice case is commonly referred to as a "case-within-a-case," "trial-within-a-trial," or "suit-within-a-suit."[19] The doctrine has broad application with regard to causation in legal malpractice cases,[20] although a few jurisdictions have challenged or rejected it.[21] Under this doctrine, the plaintiff has the burden of proof to show the cause was meritorious, i.e., the plaintiff would have prevailed in the underlying action but for the negligence of the defendant-attorney.[22]

17. *Cf.* Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 119 (Tex. 2004) (clarifying the important distinction that "[b]reach of the standard of care and causation are separate inquiries, however, and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other" and that "even when negligence is admitted, causation is not presumed" (citing Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 181–82 (Tex. 1995))).

18. *See* George S. Mahaffey, *Cause-in-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 409 (2004) (noting the emergence of the "but for" test as the preferred method for determining causation in legal malpractice actions, which will not award damages to a plaintiff when his or her injury would have occurred even in the absence of the defendant-attorney's alleged malpractice in the underlying case); *see also Leibel*, 728 S.E.2d at 556 (applying the "but for" test to proof of causation in the subject action (citing Blackwell v. Potts, 598 S.E.2d 1 (Ga. Ct. App. 2004))).

19. *See, e.g.*, Stephen E. McConnico, Jennifer Knauth & Robin Bigelow, *Unresolved Problems in Texas Legal Malpractice Law*, 36 ST. MARY'S L.J. 989, 991–92 (2005) (using all three terms in discussing the legal malpractice cause of action in Texas).

20. *See* William Jordan, *Trial-Within-a-Trial Doctrine Applies When Causation Is Disputed, Even If Malpractice Claim Did Not Involve Lost Opportunity to Try Underlying Case*, 35 No. 5 PROF. LIABILITY REP. art. 7 (2010) (describing the wide application of the trial-within-a-trial doctrine to malpractice causation issues).

21. *See, e.g.*, Vahila v. Hall, 674 N.E.2d 1164, 1170 (Ohio 1997) (rejecting the trial-within-a-trial doctrine because "[s]uch a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim"). *But see* Viner v. Sweet, 70 P.3d 1046, 1053 (Cal. 2003) ("In any event, difficulties of proof cannot justify imposing liability for injuries that the attorney could not have prevented by performing according to the required standard of care.").

22. *See* George S. Mahaffey, *Cause-in-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 410 (2004) ("In a litigation legal malpractice case, it is well-settled that a plaintiff must show that he or she had a meritorious claim or defense that was lost

This is not to say attorneys can never use expert testimony to support a finding of causation in a legal malpractice claim; such evidence is admissible when a layperson could not possibly determine the issue of causation without such expert testimony.[23] In *Leibel*, however, the Georgia Supreme Court faulted the appellate court for allowing expert testimony in the subject case.[24] The court made the crucial distinction that the jury in a legal malpractice action is not asked to determine how the particular jury in the underlying action would have ruled in absence of the defendant-attorney's alleged malpractice, a determination that would almost certainly require expert opinion to aid the jury in its decision.[25] Instead, the jury in the legal malpractice action is asked "what a *reasonable* jury would have done had the underlying case been tried without the attorney negligence alleged by the plaintiff."[26] In essence, the *Leibel* court determined:

> Because the jury in the malpractice case was not being asked to decide what a prior jury would have done, it was merely being asked to do exactly what any jury in a discrimination lawsuit would do, which is evaluate the evidence in the case and decide the case on the merits. This is a task that is solely for the jury, and that is not properly the subject of expert testimony.[27]

It is therefore logically inconsistent to require the jury to perform the same task any trier of fact would be required to perform on their own in the underlying litigation while simultaneously requiring an expert to aid the jury in such a task in the legal malpractice case. Expert testimony is required to aid the jury's decision in medical malpractice cases and in some complex litigation, so this variety of evidence is generally deemed admissible and is often required to prove causation in a legal malpractice

as a result of the former attorney's negligence in order to demonstrate cause-in-fact."); *see also* Jeffrie D. Boysen, Comment, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 308, 317 (2011) ("In the suit-within-a-suit approach, both the malpractice claim and the underlying suit are tried in front of the same jury to determine whether the plaintiff would have won the suit but for the negligence of the lawyer.").

23. *Cf.* Stephen E. McConnico, Jennifer Knauth & Robin Bigelow, *Unresolved Problems in Texas Legal Malpractice Law*, 36 ST. MARY'S L.J. 989, 1002 (2005) (acknowledging that expert testimony on causation may be necessary in some legal malpractice claims, but clarifying it is not necessary where the decision can be made by ordinary lay people).

24. *See Leibel*, 728 S.E.2d at 556 ("[T]he [c]ourt of [a]ppeals was incorrect in its conclusion that the jury in the malpractice case was tasked with deciding an issue that could not be resolved by the average lay person.").

25. *See id.* (differentiating between the appellate court decision and the proper standards of proof employed in a legal malpractice action).

26. *Id.*

27. *Id.*

claim relating to those lawsuits.[28] Otherwise, the province of the jury must not be invaded on the causation issue. However, if the proof of causation hinges upon a legal decision made by the court in the underlying case, causation may be considered a question of law properly determined by the judge in the legal malpractice case.[29]

The Texas Supreme Court has recognized the trial-within-a-trial method since 1989.[30] The Texas approach is similar to that of *Leibel* in that the jury must determine if a reasonable jury could find "but for" causation of the plaintiff's injury.[31] The question of whether this standard was subjective, i.e., would the jury in the underlying case have rendered a verdict in favor of the plaintiff, or whether the standard is instead objective, i.e., would a reasonable jury have found in favor of the plaintiff, was left open by the Texas Supreme Court in many recent decisions involving legal malpractice claims.[32] With regard to the admissibility of expert testimony, Texas, like Georgia, requires expert testimony to prove causation in legal malpractice cases wherein the causation element in the underlying case could not be decided by the jury without the aid of an expert on the particular issue at hand.[33] Expert testimony is always required to prove the negligence element of legal malpractice in Texas cases,[34] and such testimony is required when a layperson (juror) could not properly find on the causation element in the absence of the aid of an expert because the matter is beyond the realm of common knowledge available to the jury.[35]

28. *See* Johnson v. Leibel, 703 S.E.2d 702, 709 (Ga. Ct. App. 2010) (describing particular types of cases that require expert testimony to prove causation).

29. Stephen E. McConnico, Jennifer Knauth & Robin Bigelow, *Unresolved Problems in Texas Legal Malpractice Law*, 36 ST. MARY'S L.J. 989, 998 (2005).

30. *See generally* Cosgrove v. Grimes, 774 S.W.2d 662, 665 (Tex. 1989) (finding sufficient evidence in the record to support the jury's finding of negligence and causation).

31. *See, e.g.*, Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 181–82 (Tex. 1995), *abrogated by* Ford Motor Co. v. Ledesma, 242 S.W.3d 32 (Tex. 2007) (requiring the jury make the reasonable inference that the defendant-attorney proximately caused damages to the plaintiff).

32. *See, e.g.*, Stephen E. McConnico, Jennifer Knauth & Robin Bigelow, *Unresolved Problems in Texas Legal Malpractice Law*, 36 ST. MARY'S L.J. 989, 1003 (2005) (reviewing recent case history in Texas legal malpractice and concluding the question of objective versus subjective remains open for the issue of causation of damages).

33. *See id.* at 1011–12 (naming medical malpractice, securities, and intellectual property as certain areas of the law that often require specialized expert testimony to aid the jury in its decision on the causation element).

34. *See id.* at 1016 (restating the general rule regarding the requirement of expert testimony in deciding whether negligence occurred).

35. *See, e.g.*, Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 118–19 (Tex. 2004) (considering the argument that "the jury was not competent to decide, without resort to expert testimony, whether the result of the underlying adversary proceeding would have been different but

The trial-within-a-trial method is often criticized for the burden it places upon the plaintiff, who must acquire sufficient evidence, prove the meritorious nature of her case, and procure relevant expert testimony (if admissible, required, or both).[36] The plaintiff will effectively be trying two cases in one and will possess the burden of proof on all required evidentiary matters; the defendant will consequently have no burden of proof and will have the added advantage of being an attorney possessed with presumably superior legal knowledge of the underlying cause to aid his defense. If expert testimony is required or is admissible to prove causation, it may be difficult for the plaintiff to obtain testimony from the trial judge in the underlying action because of ethical concerns or time constraints, even though the testimony of the judge would likely be the strongest possible testimonial evidence with regard to the truth of the matter.[37] Instead, former judges and trial lawyers are often used for this testimonial purpose, despite their likely secondhand knowledge of the underlying case.[38]

In an attempt to mitigate the difficulties faced by plaintiffs in proving the causation element of legal malpractice, a minority of jurisdictions instituted rules that shift the burden of proof for causation from the plaintiff to the defendant once the plaintiff proves the first two prongs of the test (employment and negligence).[39] While the difficulty faced by plaintiffs in proving a legal malpractice claim may discourage malpractice suits in a manner that minimizes litigation before the court, "the use of the trial-within-a-trial method may actually help insulate attorneys from liability because plaintiffs may be discouraged from taking action against [the attorneys] in the first place."[40] The justification for shifting the

for the alleged malpractice" because this was a complex commercial law case); Coastal Tankships, U.S.A., Inc. v. Anderson, 87 S.W.3d 591, 603 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (requiring expert testimony to prove causation because the underlying case involved complex causes of a personal injury).

36. *See* Jeffrie D. Boysen, Comment, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 308, 314–15 (2011) (describing common problems encountered by plaintiffs attempting to prove a legal malpractice claim).

37. *See id.* at 330–31 (bemoaning the difficulties faced by plaintiffs in acquiring effective expert testimony to support a claim of legal malpractice); VINCENT R. JOHNSON, LEGAL MALPRACTICE IN A NUTSHELL 107 (2011) (recounting the general principle that the trial judge in an underlying cause of action may be relevant, but will likely be inadmissible).

38. Jeffrie D. Boysen, Comment, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 308, 332 (2011).

39. *See, e.g.*, Deerfield Plastics Co., Inc. v. Hartford Ins. Co., 536 N.E.2d 322, 324 (Mass. 1989) (shifting the burden to the defendant after plaintiff proves the first two prongs of the test).

40. *Id.* at 334; *see also* Vahila v. Hall, 674 N.E.2d 1164, 1169 (Ohio 1997) (stating that "[a] standard of proof that requires a plaintiff to prove to a virtual certainty that, but for the defendant's

burden of proof on causation to the attorney, requiring the attorney prove his negligence was not the proximate cause of the plaintiff's injury, is based upon the superior position that the defendant-attorney occupies in relation to his former client who has now brought charges against him.[41] The basic idea is, by proving the employment and negligence elements of a legal malpractice cause of action, the plaintiff has made a prima facie showing of negligence that should therefore require rebuttal by the defendant-attorney because the attorney's position in the underlying cause makes her the proper party to bear the burden of proof on the causation element.[42]

This approach is demonstrated in a minority of jurisdictions through the adoption of burden-shifting in legal malpractice cases where the plaintiff has first proved negligence. The Louisiana Supreme Court previously justified its decision to shift the burden of proof to the defendant-attorney on the issue of causation because the plaintiff proved negligence and "it is unlikely that the attorney would have agreed to handle a claim completely devoid of merit."[43] The implicit logic is that an

negligence, the plaintiff would have prevailed in the underlying action, in effect immunizes most negligent attorneys from liability" and that "the certainty requirement protects attorneys from liability for their negligence" (citation omitted)); George S. Mahaffey, *Cause-in-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 411 (2004) ("[M]any legal scholars (and several courts) have criticized the 'case-within-a-case' approach as placing too high a burden on already beleaguered plaintiffs because it forces the plaintiff to essentially litigate and try two separate actions."); Jeffrie D. Boysen, Comment, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 308, 340 (2011) (deciding the trial-within-a-trial method used to adjudicate the causation element in legal malpractice cases "raises questions of fairness, ethics, accountability, and efficiency" and shifting the burden of proof in such cases would be a proper solution to the matter).

41. *See* George S. Mahaffey, *Cause-in-Fact and the Plaintiff's Burden of Proof with Regard to Causation and Damages in Transactional Legal Malpractice Matters: The Necessity of Demonstrating the Better Deal*, 37 SUFFOLK U. L. REV. 393, 427 (2004) ("[B]ecause the attorney has control over the underlying matter and all information relating to it, it is most likely that the attorney's negligence in the prosecution of the matter would negatively impact the very information and evidence that would be needed by the client in the subsequent malpractice case to demonstrate that the claim was meritorious."); Jeffrie D. Boysen, Comment, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY'S J. LEGAL MAL. & ETHICS 308, 337 (2011) ("The attorney will have more legal knowledge of the evidence gathered from the underlying trial than the plaintiff; therefore it makes more sense for the attorney to utilize the evidence instead of placing the burden on the plaintiff to prove causation without the same legal skills.").

42. *Cf.* Cosgrove v. Grimes, 774 S.W.2d 662, 664 (Tex. 1989) ("An attorney malpractice action in Texas is based upon negligence." (citing Fireman's Fund Amer. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); Patterson & Wallace v. Frazer, 79 S.W. 1077 (Tex. Civ. App.—San Antonio 1904, no writ), *rev'd on other grounds*, 94 S.W. 324 (Tex. 1906))).

43. Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109, 1110 (La. 1982).

attorney would likely only represent the meritorious claims of a client; therefore, the onus lies on the attorney to prove the underlying matter would not have been determined in a different manner had the attorney not engaged in negligence with regard to the previous suit.[44] The Massachusetts Supreme Court has likewise endorsed shifting the burden of proof for causation to the defendant-attorney in a number of cases, noting "an attorney defending a malpractice action may not rely on the consequences of his own negligence to bar recovery against him."[45] Subsequent state and federal cases in Massachusetts approved of this burden-shifting as a proper avenue for adjudicating legal malpractice suits.[46]

V. CONCLUSION

Leibel demonstrates the broad application of the trial-within-a-trial method across a majority of jurisdictions faced with determining the causation element of a legal malpractice claim. In *Leibel*, the Georgia Supreme Court also espoused the majority principle that expert testimony will always be required to prove the negligence element of a malpractice cause of action and that expert testimony will not be required to prove the causation element of such an action unless it is beyond the ability of a lay person to determine causation without relevant expert testimony.

While courts in Texas and across the country generally adopt the above principles, increased litigation of legal malpractice causes of action has brought about a profusion of new case law and the standards of proof are constantly evolving. Some jurisdictions responded to criticism of the trial-within-a-trial standard by shifting the burden of proof on causation to the defendant-attorney. Additional remedies may be on the horizon and the emergent field of legal malpractice continues to demand the attention of all practitioners who seek to avoid claims of malpractice made by former clients.

44. *See id.* (applying burden shifting for proof of causation when an attorney failed to timely file the claim).

45. Jernigan v. Giard, 500 N.E.2d 806, 807 (Mass. 1986).

46. *See* St. Paul Fire & Marine Ins. Co. v. Birch, Stewart & Kolas, 408 F. Supp. 2d 59, 61 (D. Mass. 2006) (approving of the burden shifting invoked by the Massachusetts Supreme Court in previously litigated legal malpractice claims); Deerfield Plastics Co., Inc. v. Hartford Ins. Co., 536 N.E.2d 322, 324 (Mass. 1989) (shifting the burden to the defendant).