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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHARLES ALCALA CUENCA, Plaintiff and Appellant, v. BRUCE G. FAGEL et al., Defendants and Respondents.	B256842 (Los Angeles County Super. Ct. No. BC490795)

APPEAL from judgments of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Traut Firm and James R. Traut for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez, Kenneth C. Feldman and Barry Zoller for Defendant and Respondent Bruce G. Fagel.

Gladstone Michel Weisberg Willner & Sloane and Allen L. Michel for Defendant and Respondent George I. Nagler.

INTRODUCTION

Charles Alcala Cuenca appeals from the judgments against him entered after the trial court granted two separate motions for summary judgment brought by defendants Bruce G. Fagel, Esq. and George I. Nagler, Esq. (Code Civ. Proc., § 437c.)[1] Performing our de novo review, we conclude that Charles has failed to demonstrate a triable issue of material fact with the result that, as a matter of law, his complaint against Nagler is time barred and Fagel's conduct did not proximately cause Charles damage. Accordingly, we affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

We view the evidence according to the usual rules of appellate review. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

1. *The medical malpractice action and the trust*

Shortly after she was born, Chloee Cuenca was diagnosed with cerebral palsy. Chloee's parents, Charles and Antonette, retained defendant Fagel who filed a medical malpractice action against the health care providers on behalf of Antonette as guardian ad litem for Chloee, Antonette individually, and Charles individually (*Cuenca v. Adler, M.D.* (Super. Ct. L.A. County, No. YC029333). Fagel settled with various defendants and obtained a jury verdict in his clients' favor. Chloee's portion of the proceeds was required by law to be placed in a court-supervised trust to provide for her care. As he is not a trust and estates attorney, Fagel asked Nagler, a sole practitioner, to draft the trust.[2] The trust was approved by the trial court in the medical malpractice action in September 1998 (hereinafter the trust). Charles signed the trust in his capacity as a member of the trust advisory committee.

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[1] All further statutory references are to the Code of Civil Procedure.

[2] Charles did not dispute that Nagler was a sole practitioner in response to Nagler's fact No. 7, but did attempt to raise a triable issue about this same fact in No. 8 of Nagler's separate statement. Reviewing the evidence Charles submitted in support of his "dispute," we conclude there was no triable issue that Nagler was a sole practitioner and was not an associate of Fagel or Fagel's lawfirm.

The trust included a provision under which, in the event Chloee died, all of the remaining trust assets would be paid to Antonette, if she survived Chloee by four months.[3]

2. *The dissolution action*

In November 2004, Charles and Antonette dissolved their marriage by stipulated judgment (LASC Case No. YD 046404). Signed by both Charles and Antonette, the stipulated judgment provided, in relevant part, that Charles waived, released, and relinquished all rights to property subsequently received by Antonette after the entry of that judgment.[4] Charles warranted and represented in the stipulated judgment that he had carefully read each part of it and that he was completely aware of its contents and its legal effect. Charles does not dispute that the stipulated judgment was drafted by attorney S. Roger Rombro on behalf of both Charles and Antonette. Nor does Charles dispute that he represented himself in the divorce. Fagel did not represent Charles in the dissolution action.

3. *The probate action*

Chloee died on August 22, 2011, almost seven years after the dissolution was final. On September 6, 2011, Charles contacted the trustee who confirmed that Charles would not receive any of the $1.68 million balance. Charles hired attorney John Fischer to "deal with the entire issue of his rights to such money."

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[3] Paragraph 3 of the settlement trust reads in relevant part that upon Chloee's death, "said remaining Trust estate shall be distributed to Antonette Cuenca, if such person survives Beneficiary by four months."

[4] Paragraph 9.01 reads, "*All income, earnings and other property received or acquired by either party to this judgment, on or after the date of execution of this judgment, shall be the sole and separate property of the receiving or acquiring party*. As of the effective date of this judgment, *each party forever waives, releases and relinquishes all right, title and interest in all such income, earnings or other property so received or acquired by the other*, and the court's jurisdiction to award spousal support is terminated upon entry of judgment." (Italics added.)

Antonette appeared in the probate court and asserted her entitlement to the entire trust residue. Charles filed an objection on February 16, 2012, claiming that the remaining balance of the trust was community property, of which he was entitled to half. This probate action was settled by the parties who agreed that Antonette would pay Charles $250,000.

Charles does not dispute that he "was aware no later than February 16, 2012, the date he filed an objection in the probate court, that Antonette would be receiving all the residual funds as the trust document states."

4. *The instant legal malpractice action*

In August 2012, Charles sued Fagel and Does 1-50 seeking damages for legal malpractice, breach of fiduciary duty, fraud and deceit. Charles alleged that when he hired Fagel's law firm, he was not informed that he was entitled to be represented by independent counsel or that a conflict of interest existed between Charles and Antonette in the medical malpractice action.

Charles filed his second amended complaint naming both Fagel and Nagler as defendants. This complaint was filed on March 18, 2013, more than a year after the latest date that Charles knew or should have known of the facts upon which his claim against Nagler was based. Charles did not use a doe amendment to substitute Nagler into this action for a Doe defendant and did not allege a continuing representation on Nagler's part.

The operative complaint seeks $840,000 in damages for professional negligence, along with attorney's fees and costs incurred in the probate proceeding. The gravamen of the complaint is that defendants violated California Rules of Professional Conduct, rule 3-310(C) by failing (1) to obtain the informed consent of all clients before representing Charles, Antonette, and Chloee in the creation of the trust, and (2) to advise Charles of the actual or potential conflict of interest between him and Antonette with respect to the trust's creation. The complaint alleges that the provision distributing to Antonette any balance of the trust assets upon Chloee's death" "stripped [Charles] of his legal right to half of any funds remaining in the trust after Chloee's death" because the balance would

have been community property had the trust remained silent. It was always Charles' intent and understanding that the trust residue was community property. Thus, he alleges, if the trust had been silent about disbursement of the residue, Charles would have been entitled to half. He would not have signed the trust had Fagel and Nagler told him to seek independent counsel or had themselves advised him that under the trust, as written, he lost his community property right to half of the residue. Charles also alleges that Antonette never indicated during the dissolution action that she considered any final distribution from the trust to be her separate property.

In his answer, Nagler raised as his first affirmative defense that the action was barred by the one year statute of limitations contained in section 340.6. Fagel answered the operative complaint by denying the allegations.

5. *Nagler's motion for summary judgment*

Once the case was at issue, Nagler moved for summary judgment on the grounds (1) the action was time-barred as to him; (2) he owed Charles no duty of care because Charles was never his client; and (3) Charles waived any right he had to the residue of the trust in the dissolution action. Attached to Nagler's motion, under the authenticating declaration of his attorney, were two letters sent from Fagel to Nagler in July 1998 that discussed various aspects of the trust that Nagler was drafting. *Copies of both letters were sent to Charles*.

In his opposition, Charles conceded that there was no continuing representation between him and Nagler. Concurrently with his opposition, Charles brought a motion to amend the complaint under section 474 to substitute Nagler for a Doe defendant.

6. *Fagel's motion for summary judgment*

The sole basis for Fagel's motion was that there was no dispute of material fact with the result that as a matter of law Fagel's actions were not the proximate cause of Charles' harm. Fagel cited fact No. 8 in his separate statement that: before the trust was signed, Charles and Antonette agreed that upon Chloee's death, any remaining trust funds would be paid to Antonette who would distribute one-half to Charles. Antonette reaffirmed their agreement after the trust was approved by the court in the medical

malpractice action. As support for fact No. 8, Fagel cited paragraphs 9, 14, and 15 of the supplemental verified petition Charles signed under penalty of perjury in the probate action.

Fagel's motion observed it was undisputed that he did not represent Charles in the dissolution action when Charles released Antonette from her agreement to pay Charles one-half of the remaining trust funds. Therefore, Charles independently waived his interest in the residual property in the divorce proceeding and so Fagel did not cause Charles to lose any community property interest in the residuary. Fagel argued therefore, that he could not be liable or responsible for the waiver that Charles signed in the dissolution action and so Charles could not establish causation, an element of his professional negligence cause of action against Fagel.

Charles' opposition argued that his harm would not have occurred but for Fagel's breach of duty and that Fagel's malpractice was a " 'contributing cause' " of his damages. He argued that if Fagel had not breached his duty, Charles would have been critical of the trust's terms. If he had understood the legal import of the trust provision distributing the residue of the trust estate to Antonette, Charles asserted, he would not have released his right to future property received by Antonette in his divorce. He also argued that his waiver during the dissolution proceeding only "raises the issue of *comparative negligence*." (Italics added.) The issue of causation and apportionment of fault as between Charles and Fagel was a question of fact for the jury because "triable issues of fact regarding [Charles'] *contributory fault*" precluded summary judgment. (Italics added.)

Fact No. 8 is the only fact that Charles disputed. He argued that he believed before signing the trust that half of the balance would be his property or the entire trust balance would be his and Antonette's community property. Charles asserted that it was his understanding that Antonette was designated as the addressee of the shared property and he did not believe that the clause divested him of any interest in what remained of his daughter's estate.

Charles submitted his own material facts bearing on Fagel's duty and breach. He also asserted the legal argument that there is a causal connection between Fagel's breach of his duty and Charles' damages. He also argued that his waiver in the dissolution action was not negligent but if it were, fault should be apportioned more heavily to Nagler's and Fagel's breaches of duty over Charles' comparative negligence. Finally, Charles flatly asserted that Fagel's breach of duty caused him to incur damages.

7. *The trial court's orders granting the summary judgment motions*

The trial court granted Nagler summary judgment on all three grounds raised in his motion, but in particular, on the basis that the action was barred by the statute of limitations. The trial court granted Fagel's summary judgment motion for lack of causation. The order states, "As a matter of law, defendant Fagel cannot be liable for [Charles'] release [of Antonette from her obligation to pay him one-half of the trust balance] because defendant Fagel did not represent Charles at the time Charles gave this release to Antonette. An attorney is not liable for events which occur after the attorney's representation has ended. [Citations.]" Charles filed his timely appeals from both judgments.

DISCUSSION

1. *Standard of review*

Summary judgment "motions are to expedite litigation and eliminate needless trials. [Citation.] They are granted 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citations]" (*PMC, Inc. v. Saban Entertainment, Inc*. (1996) 45 Cal.App.4th 579, 590, disapproved on other grounds in *Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1159, fn. 11.)

A defendant meets its burden in moving for summary judgment by showing one or more essential elements of the plaintiff's cause of action cannot be established, or by establishing a complete defense to the cause of action. (§ 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849.) Once the moving defendant has met its initial burden, the burden shifts to the plaintiff to show that a triable issue of one or

more material facts exists as to that cause of action or a defense thereto. (*Aguilar*, at p. 849.)

On appeal, "[w]e independently review an order granting summary judgment. [Citation.] We determine whether the court's ruling was correct, not its reasons or rationale. [Citation.] 'In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment.' [Citation.]" (*Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 504-505.) We view the evidence in the light most favorable to Charles, as the party opposing summary judgment. (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 768.)

2. *There is no dispute of material fact with the result that Charles' cause of action against Nagler is time-barred.*

An action against an attorney for professional negligence must be brought within one year of the date the plaintiff discovers or should have discovered the facts constituting the wrongful act or omission. (§ 340.6.) The first complaint that named Nagler was filed on March 18, 2013. Charles conceded that March 18, 2013 was more than one year after his cause of action accrued, and so his complaint against Nagler was filed too late.

Charles relies on the relation back doctrine. "The general rule is that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed. [Citations.] A recognized exception to the general rule is the substitution under section 474 of a new defendant for a fictitious Doe defendant named in the original complaint as to whom a cause of action was stated in the original complaint. [Citations.] If the requirements of section 474 are satisfied, the amended complaint substituting a new defendant for a fictitious Doe defendant filed after the statute of limitations has expired is deemed filed as of the date the original complaint was filed. [Citation.]" (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176 (*Woo*).)

Among the requirements for application of the relation back doctrine under section 474 is that the new defendant in an amended complaint be substituted for an existing fictitious Doe defendant named in the original complaint. (*Woo, supra*, 75 Cal.App.4th at p. 176.) Charles' second amended complaint added Nagler as a entirely new defendant without identifying him as a substitute for a previously named fictitious defendant. Under a strict application of the section 474 procedures, Charles' amendment to bring Nagler into the lawsuit did not relate back to the date that the original complaint was filed.

Charles cites *Woo* to contend that his failure to substitute Nagler for a previously named Doe defendant was a mere procedural defect that he could cure at the same time as he opposed Nagler's summary judgment motion. *Woo* explained that "the courts of this state have considered noncompliance with the party substitution requirements of section 474 as a procedural defect that could be cured and have been lenient in permitting rectification of the defect." (*Woo, supra*, 75 Cal.App.4th at p. 177.) Charles is not incorrect that *Woo* viewed noncompliance with section 474 as a procedural defect.

However, *Woo* discussed another, nonprocedural requirement for application of the relation back doctrine under section 474, namely that the plaintiff must have been "genuinely ignorant" of the substituted defendant's identity at the time the original complaint was filed. (*Woo, supra*, 75 Cal.App.4th at p. 177.) Nagler cites *Woo* for this second requirement. Nagler argues that Charles cannot cure the defect because he cannot demonstrate that he was genuinely ignorant of Nagler's identity at the time he filed his first amended complaint, as section 474 requires. (*Ibid.*) We agree. In 1998, years before he filed his original complaint, Charles was copied on two letters from Fagel to Nagler demonstrating that Nagler drafted the trust.[5] Hence, Charles could not have been genuinely ignorant of Nagler's identity and involvement in the creation of the trust at the time he filed the original or first amended complaint. Nor has Charles explained why he

[5] At oral argument, counsel claimed that Charles never received the letters. That assertion is not in the record and, of course, the unsworn statements of attorneys are not evidence. (*Estate of Silver* (1949) 92 Cal.App.2d 173, 176.)

did not name Nagler initially, or why he waited seven months after filing the complaint to name Nagler as a defendant.[6] Accordingly, Charles is not entitled to rely on the relation back doctrine and so his recent motion under section 474 for leave to amend the complaint to substitute Nagler in for a Doe defendant is wholly ineffective.[7] Nagler demonstrated a complete defense to the complaint, and Charles has failed to dispute a material fact thereto. The trial court properly granted Nagler's summary judgment motion because it is barred by the statute of limitations,[8] and so we need not consider the alternative grounds for summary judgment relied on by the trial court.

3. *There is no dispute about the operative facts, with the result that Charles cannot establish the essential element of causation in his professional negligence cause of action against Fagel*.

The elements of a cause of action for legal malpractice are that the attorney (1) had a duty to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) breached that duty; (3) there was a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulted from the attorney's negligence. (*Kasem v. Dion-Kindem* (2014) 230 Cal.App.4th 1395, 1399.) The absence of any of these elements is fatal to recovery. (*Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 612.) Fagel's summary judgment

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[6] *Kalivas v. Barry Controls Corp*. (1996) 49 Cal.App.4th 1152 is inapposite. The trial court's conduct in *Kalivas* caused the plaintiff's attorney to misunderstand the procedure (*id*. at p. 1154), whereas nothing in the trial court's conduct here had any effect on Charles' attorney's failure to name Nagler in the original or first amended complaint.

[7] In his reply brief, Charles appears to argue that his newly brought section 474 motion for leave to amend the complaint to substitute Nagler as a Doe defendant, which had been taken off calendar pending the summary judgment motion, should be considered if we reverse the summary judgment. As we are affirming the grant of summary judgment in favor of Nagler, the argument is unavailing.

[8] We reject Charles' argument premised on the continuing representation theory because he specifically indicated in the separate statement that there was *no* continuing representation between Nagler and Charles.

motion focused on Charles' inability to establish the third element of his cause of action (§ 437c, subd. (o)(1)) by asserting that any breach of a duty on Fagel's part did not proximately cause Charles damage.

The question before us therefore, is whether there exists a triable issue of material fact that Fagel caused Charles to lose rights to the residue of the trust. The only fact Charles disputed was fact No. 8, that before signing the trust, Charles and Antonette agreed that the residue of the trust after Chloee's death would, for convenience only, be paid to Antonette who would distribute one-half to Charles and that Antonette reaffirmed this agreement after the trust was signed. This fact is supported by Charles' verified petition filed under penalty of perjury in the probate action. Charles' attempt to dispute his own words does not create a triable factual issue; it merely affirms his belief, maintained throughout all lawsuits, that he had a 50 percent interest in the balance of the trust residue. Nor do Charles' additional "facts" concerning comparative negligence and causation raise a triable issue of *fact*, as they constitute argument. Otherwise, insofar as Charles' own facts address duty and breach, they are irrelevant as Fagel's motion is premised on causation. "[O]nly *material* factual disputes bear any relevance: 'no amount of factual conflict upon other aspects of the case will preclude summary judgment.' [Citation.]" (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1379.) Ordinarily in a legal malpractice action, causation is an issue of fact for the jury to decide. However, given no dispute of *material* fact exists here, the question is one of law for the court to decide. (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187.)

In legal "malpractice cases, the crucial causation inquiry is *what would have happened* if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1242.) That is, the plaintiff "must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Id*. at p. 1244.) As we explain, Charles has not demonstrated that but for Fagel's actions, it is more likely than not that he would have obtained 50 percent of the balance of the trust funds.

Attorneys cannot be held liable for conduct that occurs after they cease to represent the client and are succeeded by another attorney who could take action to protect the client's rights. (*Steketee v. Lintz, Williams & Rothberg* (1985) 38 Cal.3d 46, 57 [attorney not liable for failing to file complaint within statute of limitations period where he ceased representing client and was replaced by other counsel who could have filed the action before the statute ran], citing *Shelly v. Hansen* (1966) 244 Cal.App.2d 210, disapproved on other grounds in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 190, fn. 29.) In *Shelly*, the defendant counsel was replaced by a new attorney, Hansen, months before the statute of limitations ran. *Shelly* stated, "The 'but for' rule determines cause in fact [citations], [and] . . . 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 Hansen *intervened to make the above rule inoperative*." (*Shelly*, at p. 214, italics added.) Likewise, in *Stuart v. Superior Court* (1992)14 Cal.App.4th 124, the appellate court held that the original attorney was entitled to summary judgment because he was no longer the attorney of record for the client and had been replaced by other counsel at the time the client allegedly lost the right to pursue his personal injury action. (*Id*. at p. 127.)

Here, it is undisputed that Fagel did not represent Charles in the 2004 dissolution proceedings when Charles, representing himself in propria persona, released his rights to after-acquired property and hence to one-half of the trust's residuary. Those representing themselves in propria persona are held to the same standards as attorneys. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) Thus, pursuant to *Steketee*, *Stuart*, and *Shelley*, the subsequent action of Charles as his own attorney "intervened to make the [but for] rule inoperative." (*Shelly v. Hansen, supra*, 244 Cal.App.2d at p. 214.) Fagel had no involvement in, or control over, Charles' decision to waive his rights to all after-acquired property rather than to demand half.

Likewise, an attorney's conduct is not the cause of the client's damages when the undisputed evidence shows that the harm was caused by the client's own independent act.

(*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 700.) In *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, the Filbins sued their attorney Fitzgerald alleging malpractice in connection with an eminent domain proceeding against them. Fitzgerald's appraiser valued the property at $4,535,000 and Fitzgerald advised the clients they were required to make a final settlement offer (§ 1250.410) in an amount less than the appraised value. (*Id*. at pp. 159-160.) The Filbins rejected this advice and obtained new counsel whose advice they followed. (*Id*. at pp. 161-162.) Although Fitzgerald's advice was incorrect, the appellate court reversed the judgment in the Filbins' favor holding that Fitzgerald's conduct was not the proximate cause of the Filbins' damage. (*Id*. at p. 168.) "[A]ttorney breaches of the standard of care are not per se actionable. [Citations.]" (*Id*. at pp. 169-170.) The *Filbin* court reasoned that "nothing Fitzgerald did, or failed to do, up to the time he departed as the Filbins' counsel caused the Filbins to do anything to their detriment." (*Id*. at p. 170.) In fact, the court noted, the client refused to follow that attorney's advice. Therefore, the *Filbin* court explained, "When it came time for the Filbins to consider whether to settle the case some two and a half months later, in mid-October, *they were free agents*. No past decision by Fitzgerald hobbled them. Nothing prevented their new counsel from giving them impartial advice. No one would stop them from going to trial. Their decision to settle was theirs and theirs alone, made with the assistance of new counsel, with no input from Fitzgerald. The consequences of that decision are likewise theirs alone." (*Id*. at p. 171, italics added; accord, *Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 115 [summary judgment in favor of defendant attorney because "[n]o causal connection exist[ed] between any alleged malpractice and appellant's loss as a matter of law" where the action taken "was [plaintiff's] own decision, against the advice of her attorneys"].)

Here, the undisputed evidence shows that the cause of Charles' damage was his own conduct in the dissolution proceeding of waiving his right to all after-acquired property. When it came time for Charles to settle his dissolution action, some six years had passed since Fagel had ceased representing him as his medical malpractice attorney. Charles was a "free agent." Even if Fagel's acts or omissions breached a duty owed to

Charles, "[a]t best, they constitute what Cardozo famously characterized as ' "negligence in the air" ' (*Palsgraf v. Long Island Railroad Co*. (1928) 248 N.Y. 339, 341)." (*Filbin v. Fitzgerald*, *supra*, 211 Cal.App.4th at p. 169.) That is, irrespective of what rights Charles may have had, or believed he had, in any trust balance after Chloee's death, his autonomous decision in the dissolution action to waive all rights he might have in after-acquired property foreclosed forever any right he may have had to those funds. Nothing Fagel did "hobbled" Charles because Charles *believed, independent of the trust's language, that he was entitled to one-half of the residue on Chloee's death and still waived his rights to all after acquired property*. Nothing prevented Charles from consulting an attorney about the waiver provision in the stipulated settlement; no one stopped him from questioning that waiver provision, refusing to sign it, or demanding one-half of the trust residue. *His decision in his divorce to waive all rights to after-acquired property and hence to 50 percent of the trust residuary was his and his alone, made with no input from Fagel*. "The consequences of that decision are likewise [his] alone." (*Filbin*, *supra*, at p. 171.)[9] Stated otherwise, Fagel's negligent conduct is not a substantial factor in bringing about Charles's harm because Charles would not have been entitled to half of the trust residue, even if Fagel had not been negligent, by virtue of his waiver of that right in the dissolution action. (*Viner v. Sweet*, *supra*, 30 Cal.4th at p. 1240, quoting from Rest.2d Torts, § 432.) Accordingly, Charles has failed to

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[9] Charles cites *Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557 and *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 271 to argue that the fact that the trust language was drafted in 1998 while his harm -- having to litigate his right to half of the trust's residuary -- did not manifest until 2012, does not undermine the causal connection between Fagel's work and Charles' interest. This accrual argument is not relevant.

Nor are we persuaded by Charles' argument in his reply brief that if he is responsible for some of his harm by settling his claim for one-half of the residuary, he still incurred attorney's fees to recover that amount. He quotes from *Callahan v. Gibson, Dunn & Crutcher LLP*, *supra*, 194 Cal.App.4th at page 582 that "[f]ees paid to a second attorney to correct errors committed by a prior attorney represent damages recoverable in a legal malpractice action." Yet, as the element of causation is absent as a matter of law, nothing Fagel did *caused* Charles any damages.

demonstrate the existence of a triable issue of material fact as to causation, with the result that the trial court properly granted Fagel summary judgment as a matter of law.

DISPOSITION

The judgments are affirmed. Respondents are awarded their costs of appeal.

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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.