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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JEFFREY R. GUNTER,

Plaintiff and Appellant,

v.

DAVID PARKER et al.,

Defendants and Respondents.

B288546

(Los Angeles County
Super. Ct. No. BC608819)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. White, Judge. Affirmed.

Goodkin & Lynch, Daniel L. Goodkin, Michael A. Shakouri and Allison J. Law for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez, Kenneth C. Feldman and Larissa G. Nefulda for Defendants and Respondents.

Jeffrey Gunter¹ appeals from the summary judgment entered in favor of David Parker and Parker Mills, LLP (collectively, Parker). He contends summary judgment was improvidently granted because there exist triable issues of fact as to his malpractice and breach of fiduciary claims against Parker. We affirm the judgment.

PROCEDURAL HISTORY

This matter began almost 20 years ago as a construction dispute that has resulted in malpractice actions against three lawyers and their law firms. The underlying lawsuits are described below.

The Construction Lawsuit

In February 2000, Gunter hired general contractor, Hans J. Kostrzewski (HJK), to demolish his existing home in Brentwood and build a new one. Gunter's contract with HJK provided for termination of the contract under three circumstances:

(1) Gunter could terminate HJK for "cause" with 15 days' written notice, specifying any deficiencies in the work and allowing HJK the opportunity to cure; (2) Gunter could immediately terminate HJK for "convenience" upon written notice; or (3) HJK could terminate the contract for Gunter's breach of the contract with 15 days' written notice, allowing Gunter the opportunity to cure.

By February 2002, construction on Gunter's home remained incomplete and he retained Robert Mann to represent him in a dispute with HJK. On March 5, 2002, Johanna Gunter locked the site and ordered the construction crew to leave. Mann sent HJK a termination letter the following day. The letter did

¹ Jeffrey Gunter sued individually and as executor of his wife's estate. For convenience, we refer to them collectively as Gunter.

not provide HJK with 15 days' notice, did not specify what deficiency prompted the termination, and did not provide the opportunity to cure.

A roofing subcontractor subsequently sued HJK and Gunter, claiming he was owed approximately \$42,000. HJK cross-complained against Gunter, alleging Mann's letter failed to terminate him for cause pursuant to the contract terms. Thus, he was entitled to be paid \$518,874 for the work he performed.

Gunter retained Gerald Malanga to defend him and to file a cross-complaint against HJK and other subcontractors for breach of contract and construction defects, alleging he incurred \$972,325 to repair the defects and complete the project. The matter proceeded to binding arbitration in 2008, resulting in a \$560,521 award in favor of HJK. The arbitrator found Mann was retained to help resolve differences between Gunter and HJK, not to terminate HJK. The arbitrator further found HJK was terminated for convenience by Gunter, not for cause. The parties ultimately settled the matter for \$500,000, to be paid by Gunter to HJK.

The Malanga Malpractice Action

In late 2009 or early 2010, Gunter retained Parker to represent him in a malpractice action against Malanga. According to Gunter, Malanga should have become aware of a potential malpractice action against Mann when HJK first filed his cross-complaint alleging Mann failed to properly terminate him under the contract. Gunter calculated the one-year statute of limitations period expired on or about November 3, 2004. (Code Civ. Proc., § 340.6, subd. (a).) Gunter alleged Malanga was negligent when he failed to timely inform Gunter of Mann's malpractice or of the limitations period.

Parker made a written demand for arbitration to Malanga's counsel on January 26, 2010, before the limitations period against Malanga was set to expire.² In that letter, Parker asked Malanga's counsel to confirm that Gunter was entitled to binding arbitration pursuant to Malanga's retainer agreement and that the "action" was deemed "commenced" for purposes of the statute of limitations. On February 8, 2010, Parker exchanged a series of emails with Malanga's counsel regarding a tolling agreement.

"[Parker]: Please confirm today that your client acknowledges that the dispute is subject to binding arbitration per the retainer agreement he [Malanga] himself prepared, and that my demand constituted commencement of the action for purposes of the statute of limitation[s]. Then let's talk about whether it is possible to resolve short of arbitration."

"[Malanga's counsel]: I will agree that your demand constituted commencement of the action for S/Ls [statute of limitations] purposes which is all I think you need at this point. The rest of the issues are under discussion."

"[Parker]: Does that mean you are not now acknowledging that your own client's retainer agreement requires binding arbitration?"

"[Malanga's counsel]: I am not going to tell what I am thinking at the moment. I am researching certain issues

² According to Gunter, Malanga's representation of him ceased on August 4, 2009, and he had until August 4, 2010, to bring a malpractice action.

which could potentially affect your right to compel binding arbitration. That is all. I should have an answer shortly. You have your agreement that the S/Ls is now deemed tolled so you are not prejudiced.”

On August 1, 2011, Parker sent a letter to Malanga’s counsel demanding binding arbitration under Malanga’s retainer agreement. Over the course of many months, the parties negotiated the terms of the arbitration, including the forum and the number of arbitrators.

On October 19, 2012, however, Parker was informed Malanga would not agree to binding arbitration because the retainer agreement was not signed by the parties. In fact, a retainer agreement had been signed, but it was not discovered until much later.

Gunter then retained Timothy McGonigle of McGonigle PC (McGonigle) to represent him against Malanga. McGonigle filed a complaint on February 2, 2013, alleging legal malpractice and breach of fiduciary duty. The complaint alleged Malanga breached his duty of care when he failed to advise Gunter of Mann’s negligence, selected an arbitrator who handled a prior mediation between the parties, failed to warn Gunter that the arbitrator had not made necessary disclosures, told him that the arbitrator’s decision was not binding, failed to disclose significant developments in the case, and threatened to withdraw if Gunter wanted to proceed to trial.

Malanga demurred to the complaint on statute of limitations grounds. The trial court sustained the demurrer without leave to amend, finding the February 8, 2010 emails did not toll or waive the statute of limitations. Gunter appealed.

This court agreed the February 8 emails did not toll the limitations period. However, we reversed and remanded with directions for the trial court to allow Gunter leave to amend his complaint to allege equitable estoppel on the ground Malanga induced him to delay filing suit. (*Gunter v. Malanga* (Feb. 5, 2015, B253621) [nonpub. opn.].)

Gunter so amended his complaint on remand and overcame another demurrer on the equitable estoppel/statute of limitations argument. Malanga then moved for summary judgment, again arguing the statute of limitations barred Gunter's claims. Malanga additionally made several merits-based arguments, contending he did not breach his duties or cause damage to Gunter. Among other things, Malanga adopted the arbitrator's conclusion that Johanna Gunter orally terminated HJK for convenience the day before Mann sent his termination letter and thus, a claim against Mann would have failed. Gunter filed an opposition to the summary judgment motion, but settled for \$125,000 at a mandatory settlement conference shortly before the trial court was to issue a ruling on it.

The Parker Malpractice Action

Gunter brought suit against Parker and McGonigle on January 22, 2016, for legal malpractice and breach of fiduciary duty.³ He alleged Parker failed to obtain a valid tolling agreement, failed to commence arbitration or file a complaint within the limitations period, and concealed information about the statute of limitations issue from him. Gunter alleged he "accepted a lower settlement offer than [he] would have, but for the anticipated failure of the equitable estoppel argument. In other words, Defendants' failures with respect to the statute of

³ McGonigle is not a party to this appeal.

limitations in the Malanga Action resulted in a worsened position for negotiating a settlement.”

Parker moved for summary judgment on the ground Gunter’s claims against Malanga lacked merit because, among other things, Gunter’s potential legal malpractice claim against Mann was not viable. They also argued Gunter could not establish causation or breach in the malpractice claim because Gunter would have prevailed on the equitable estoppel issue as a matter of law.

In opposition, Gunter argued that but for the statute of limitations defense, he could have obtained full damages, including the \$525,000 he paid to HJK. Instead, he was forced to settle the suit against Malanga for much less than his actual damages, which totaled over \$1.5 million.

The trial court granted Parker’s summary judgment motion. It reasoned, “In the context of [Gunter’s] burden to demonstrate causation for a legal malpractice cause of action, in order to raise a triable issue of material fact as to whether [Gunter’s] equitable estoppel argument would have failed and Malanga’s statute of limitations defense would have been successful, [Gunter] must present evidence that ‘to a legal certainty,’ [Gunter] would have received a better settlement but for Defendants’ professional negligence in letting the statute of limitations expire as to [the] claims against Malanga.” The trial court concluded, “It is far from a legal certainty that this Court—which overruled Malanga’s demurrer on the ground of the statute of limitations—would more likely than not have granted Malanga’s motion for summary judgment seeking to dispose of the equitable estoppel theory. If [Gunter] and their counsel were

unable to read between the lines, it is a regrettable oversight on their part.”

Gunter timely appealed.

DISCUSSION

Gunter contends he has met his burden to show a triable issue of material fact as to both the malpractice and the breach of fiduciary duty causes of action. Thus, the trial court erred in granting summary judgment. We disagree.

I. Standard of Review

Summary judgment is appropriate where “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.” (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show “that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.” (*Id.*, subd. (p)(2).) In doing so, the plaintiff cannot rely solely on the allegations or denial of his pleadings, “but, instead, shall set forth the specific facts showing that a triable issue of material fact exists” (*Ibid.*) On appeal, we review the trial court’s decision de novo, considering the evidence that was before the trial court, except that to which objections were made and sustained. (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 913.)

Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was “‘to liberalize the granting of [summary judgment]

motions.’” (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542 (*Perry*); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.) It is no longer called a “disfavored” remedy. “Summary judgment is now seen as ‘a particularly suitable means to test the sufficiency’ of the plaintiff’s or defendant’s case.” (*Perry*, at p. 542.)

In legal malpractice claims, the absence of causation or damages may be decided on summary judgment “only if, under undisputed facts, there is no room for a reasonable difference of opinion.” (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864.)

II. The Malpractice Cause of Action

Here, Parker has the initial burden to show one or more elements of the malpractice cause of action cannot be established. They met their burden by presenting evidence that Gunter cannot show to a legal certainty that he would have received a greater settlement from Malanga but for Parker’s negligence in failing to obtain a valid tolling agreement and allowing the statute of limitations to run. Parker relies on what are known as “settle and sue” cases, which address the circumstances presented here: a client sues his former attorney after settlement, alleging he would have received a higher settlement but for the former attorney’s negligence.

We find these cases persuasive and shift the burden to Gunter to demonstrate a triable issue of material fact. We conclude that Gunter fails to meet his burden to establish a triable issue of material fact as to causation and damages.

A. The Law Regarding Legal Malpractice

“[A]n attorney is subject to liability for malpractice when his or her negligent investigation, advice, or conduct of the client’s affairs results in loss of a meritorious claim.” (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1092.) “In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney’s negligence.” (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.)

“[T]he plaintiff must establish that *but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims. [Citation.]” (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241.) “‘Damage to be subject to a proper award must be such as follows the fact complained of as a *legal certainty*.’ [Citation.]” (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518 (*Marshak*).) “Thus, a plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would *certainly* have received more money in settlement or at trial.” (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528, italics added (*Slovensky*).)

“The requirement that a plaintiff need prove damages to ‘a legal certainty’ is difficult to meet in any case. It is particularly so in ‘settle and sue’ cases . . . ,” which are inherently speculative. (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 166 (*Filbin*).) This is because “the amount of a compromise is often ‘an educated guess of the amount that can be recovered at trial and what the opponent was willing to pay or accept. Even skillful and experienced negotiators do not know whether they received the maximum settlement or paid out the minimum acceptable. Thus, the goal of a lawyer is to achieve a ‘reasonable’ settlement, a concept that involves a wide spectrum of considerations and broad discretion. [¶] Theoretically, any settlement could be challenged as inadequate, and the resolution is likely to require a trial [¶] . . . [¶] A claim regarding an inadequate settlement often fails because it is inherently speculative. Negligence cannot be predicated on speculation that the attorney or another attorney could have secured a more advantageous settlement or the fortuitous event that a jury instead of a judge may have returned a higher award. A client, who was a plaintiff, must establish not only that concluding such a settlement fell outside the standard of care, but also what would have been a reasonable settlement and that such sums would have been agreed to and could have and would have been paid.” (*Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1462–1463, fn. 13, quoting 4 Mallen, Legal Malpractice (5th ed. 2000) Error Settlement, § 30.41, pp. 582–585.)

Courts have found summary judgment appropriate in settle and sue cases due to the speculative nature of causation and damages. In *Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1587 (*Namikas*), the husband sued his former attorney for

negligently recommending he enter into a marital settlement agreement which based permanent spousal support on a calculation by the DissoMaster, a software program used by the court to determine temporary spousal support. Years later, the trial court modified the amount of spousal support after the husband retained a new attorney, who argued spousal support should be calculated using a forensic marital standard of living analysis rather than the DissoMaster program. (*Id.* at p. 1579.)

The trial court entered summary judgment for the former attorney, which was affirmed on appeal. The appellate court found the husband failed to demonstrate a triable issue as to whether he would have received a more favorable outcome absent the former attorney's purported negligence. Although he submitted a declaration that he would not have agreed to pay the higher amount had a forensic marital standard of living analysis been provided to him prior to settlement, he presented no evidence that his ex-wife would have accepted a lower offer. (*Namikas, supra*, 225 Cal.App.4th at p. 1584.) Her attorney instead stated in a declaration that he would not have agreed to a lower amount. (*Ibid.*) In any event, the husband failed to show that a lower support payment necessarily would have resulted in a better outcome. His ex-wife may have demanded a larger property settlement or demanded he pay her attorney fees. (*Id.* at p. 1584.)

The husband also failed to meet his burden to show a triable issue of fact regarding whether, but for the purported negligence, he would have received a better outcome at trial. The husband had submitted evidence of the forensic marital standard of living analysis, an expert opinion that the use of the DissoMaster calculation resulted in a higher level of support than

would have been obtained at trial, and the trial court's order reducing spousal support. The court found "[t]his evidence fell short of the showing of damage required to survive summary judgment. [Citation.] To the extent this evidence implied that [the husband] would have received a better outcome had he gone to trial, it failed to show 'what that better outcome *would* have been.' " (*Namikas, supra*, at p. 1585.)

In *Marshak, supra*, 72 Cal.App.4th 1514, a plaintiff claimed that an attorney negligently advised him to settle a dissolution action for less than the case was worth. The trial court granted summary judgment in favor of the attorney. On appeal, the court affirmed, holding that the plaintiff must prove that he would have obtained a better outcome had his attorney recommended he reject the settlement offer and what that better outcome would have been. The plaintiff "proffered no evidence to establish the value of his case," other than his own declaration as to values and because the plaintiff had not "intimated how he would establish" that his wife would have settled for less "or that, following trial, a judge would have entered judgment more favorable than that to which he stipulated." (*Id.* at p. 1519; see also *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 663 (*Thompson*) [plaintiff did not show the "underlying case would have settled at all, let alone at an earlier date, for the same amount, or with the same structure."].)

B. Parker Met Their Initial Burden

Parker bears the initial burden to show Gunter cannot establish at least one element of his legal malpractice claim. They assert Gunter cannot show the statute of limitations defense is the but for cause of the unsatisfactory settlement.⁴

In support, Parker submitted evidence that the equitable estoppel claim would have been successful, namely, the demand to arbitrate on January 26, 2010, and the February 8, 2010 email exchange. This evidence showed Malanga's counsel assured Parker that "you have your agreement that the S/L is now deemed tolled so you are not prejudiced" and "that your demand constituted commencement of the action for S/Ls purposes which is all I think you need at this point." Further, David Parker attested in his declaration that he had worked on many cases with Malanga's attorney. He was therefore comfortable relying on these assurances when he chose not to file a formal arbitration demand or complaint before the limitations period expired. If he had known that Malanga would subsequently refuse to arbitrate, he would have timely filed the complaint or sought arbitration.

⁴ The trial court found the equitable estoppel/statute of limitations issue applied to the element of causation, focusing on the "but for" cause of Gunter's damages. The settle and sue cases, on the other hand, generally focus on the element of damages, that is, whether a larger settlement would have been achieved. "In the legal malpractice context, the elements of causation and damage are particularly closely linked." (*Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 591.) Whether considering causation or damages, our conclusion remains the same. Gunter cannot show the parties would have agreed to a higher settlement but for Parker's negligence.

At the time of the settlement, the trial court had not yet ruled on Malanga's summary judgment motion. Without a decision by the trial court, it was speculative to assume the statute of limitations defense would have won the day for Malanga, given the evidence described above. In addition, Malanga did not lack other defenses or arguments to rebut Gunter's claims against him. Indeed, Malanga made several merits-based arguments, at least one of which stemmed from the arbitrator's findings regarding Mann's culpability in the construction dispute.⁵ This evidence, coupled with the timing of the settlement, is sufficient to shift the burden to Malanga.

We are also persuaded by the settle and sue cases that Parker met their initial burden to show Gunter cannot establish damages. The basis for Gunter's malpractice claim is identical to the settle and sue cases. Just as in *Marshak*, Gunter complained he "accepted a lower settlement offer than [he] would have, but for the anticipated failure of the equitable estoppel argument. In other words, [Parker's] failures with respect to the statute of limitations in the Malanga Action resulted in a worsened position for negotiating a settlement." This allegation highlights the

⁵ In the respondent's brief, Parker sets forth in detail the deficiencies of Gunter's claims against HJK, Mann, and Malanga. In particular, Malanga stated in a declaration that he advised Gunter of a potential malpractice claim against Mann in February 2005 and July 2006. He also referred Gunter to a malpractice attorney in January 2009. However, Gunter never retained that attorney or authorized Malanga to pursue a claim against Mann. Because we conclude Gunter cannot show he would have received a larger settlement but for the statute of limitations defense, we need not determine whether summary judgment was also appropriate because the underlying claims were not viable.

speculation necessary to consider Gunter's damages claim. As in *Namikas*, there is no indication that Malanga would have made a higher offer at the settlement conference and what that higher offer would have been.

C. Gunter Failed to Meet His Burden to Show the Existence of a Triable Issue of Material Fact

Gunter must now demonstrate a triable issue of material fact as to causation and damages. Gunter asserts Malanga's and his expert's declarations show that a reasonable mind could conclude Malanga would have offered more to settle absent the statute of limitations defense. We disagree.

Malanga's declaration described the HJK case and asserted he was forced to argue Gunter substantially complied with the contract when he terminated HJK due to Mann's negligence. At the time of the arbitration, he believed Gunter was "likely" to win because he presented "so much evidence" HJK failed to complete the work as promised. He was surprised when the arbitrator ruled in favor of HJK.

Malanga also stated he was confident he would defeat any claim of equitable estoppel because he did nothing to delay arbitration or induce Parker's reliance. Malanga therefore expected to win summary judgment, but decided to settle to limit his exposure and "be done with the case." Malanga further disclosed "the statute of limitations argument was a major component in deciding what amount to offer."

Edward McKinnon was offered as an expert on insurance industry custom and practice relating to claims settlement where a statute of limitations defense is at issue. McKinnon opined the statute of limitations defense created a "significant risk that Malanga could successfully defeat the Gunters' claims at trial."

He explained, the statute of limitations argument created an “all or nothing” situation, giving Malanga’s insurer a significant advantage during settlement negotiations and thus the insurer made a settlement offer that was far below Malanga’s policy limits.

As in *Namikas* and the cases discussed above, this evidence falls short of the showing necessary to survive summary judgment. The declarations fail to establish a triable issue of fact that, but for Parker’s negligence, Malanga would have settled for a higher amount. The declarations merely affirm the statute of limitations defense allowed Malanga to make a low settlement offer. There is nothing in the declarations to suggest that the parties would have otherwise settled at all or for a higher amount. Rather, Malanga asserted in his declaration that he was confident in all of the arguments made in the summary judgment motion, which was not limited to the statute of limitations issue, but included arguments discussing the merits of the underlying claims against HJK and Mann.

Although both declarations characterized the statute of limitations defense as presenting Gunter with a “significant” risk of losing and was a “major” component of the settlement offer, neither established what Malanga would have done absent the statute of limitations defense. Further, McKinnon summarily dismissed all of Malanga’s merits-based arguments without presenting any analysis as to their viability. “[A]n issue of fact is not raised by ‘cryptic, broadly phrased, and conclusory assertions.’ [Citation.]” (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196.) In short, the declarations do not overcome the speculative nature of a settle and sue case. As a result, summary judgment was properly granted on this basis.

Gunter attempts to circumvent the settle and sue cases in three ways, none of which we find convincing. First, he attempts to limit the applicability of settle and sue cases only to circumstances involving “negligent handling of the settlement itself (as opposed to some other negligent act which impacted the plaintiff’s legal position).” *Thompson, supra*, 36 Cal.App.4th 657, disproves this theory because the former attorneys in that case negligently failed to prosecute the underlying case, but took no part in handling the settlement. Under *Thompson*, the settle and sue case analysis applies even when the legal malpractice consists of “some other negligent act which impacted the plaintiff’s legal position.”

Second, Gunter contends the settle and sue cases do not apply because his damages are not limited to an unsatisfactory settlement. According to Gunter, Parker’s negligence is the but for cause of two additional categories of damages: (1) attorney fees incurred to litigate the statute of limitations and equitable estoppel issues under the “tort of another” doctrine⁶ and (2) damages demonstrated by a case-within-a-case analysis. We find no merit to Gunter’s arguments.

Gunter has not incurred any attorney fees under the tort of another doctrine because those fees are only recoverable when a person is “required to act in the protection of his interest by bringing or defending an action against a third person” (*Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620.) *Sindell v. Gibson Dunn & Crutcher* (1997) 54 Cal.App.4th 1457 (*Sindell*), clearly illustrates the limits of the doctrine.

⁶ Gunter also asserts disgorgement of Parker’s fees are appropriate damages to his breach of fiduciary duty claim. We discuss that claim in the next section.

In *Sindell*, the attorney failed to obtain a signed waiver from the decedent's wife relinquishing her interest in the decedent's property. The wife's children from a different marriage sued on their mother's behalf, arguing she was entitled to half of his estate. The court held the fees incurred by the decedent's beneficiaries in defending against a claim on the estate were recoverable damages in a malpractice action against the attorney. (*Id.* at p. 1470.)

Here, Gunter was not required to defend his claims in a separate action as a result of Parker's negligence. The fees which he claims were unnecessarily incurred, but for Parker's negligence, were incurred in the same litigation. Thus, they are not recoverable under the tort of another doctrine.

Our holding comports with the well-established rule that a plaintiff may not recover as tort damages legal fees paid to a negligent attorney. (*Orrick Herrington & Sutcliffe v. Superior Court* (2003) 107 Cal.App.4th 1052, 1058–1060.) The *Orrick* court reasoned that equating legal fees with tort damages would eliminate the requirement that plaintiff prove a better result would have been achieved but for the attorney's negligence, because tort damages would exist every time an attorney collected a fee. (*Ibid.*) The court instead held that fees paid to a negligent attorney may form the basis of a breach of contract claim where the plaintiff alleges he was overcharged for the attorney's services. (*Id.* at p. 1061.) Gunter does not allege a breach of contract claim here.

We also reject Gunter's attempt to "double dip" by counting as separate damages the amounts he could have recovered from Mann and HJK under a case-within-a-case analysis. In general, the measure of damages in a legal malpractice action is the value

of the claim lost. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1050.) Thus, Gunter may not assert that he would have recovered a higher settlement amount from Malanga plus the value of his claims against Mann and HJK. The settlement from Malanga encompassed the value of those lost underlying claims.

Third, Gunter attempts to discredit the analysis in the settle and sue cases, arguing they unfairly create different burdens for the parties: he is required to show to a “legal certainty” that he would have received a better outcome while Parker merely had to show Gunter could have survived Malanga’s motion for summary judgment. It is well established that a triable issue of material fact exists “if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion *in accordance with the applicable standard of proof.*” (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850, italics added, fn. omitted.)

Here, courts have applied the “legal certainty” standard in other types of legal malpractice cases, not simply in settle and sue cases. (*Filbin v. Fitzgerald*, *supra*, 211 Cal.App.4th at p. 165, fn. 8 [cases cited within]; *Marshak*, *supra*, 72 Cal.App.4th at p. 1518; *Slovensky*, *supra*, 142 Cal.App.4th at p. 1528.) In any event, as discussed above, Gunter has failed to present any evidence that he would have received a larger settlement absent the statute of limitations defense. He thus failed to meet his burden to show a triable issue existed even if he was not required to show it to a “legal certainty.”

Further, we find unpersuasive Gunter's argument that there is a triable issue of fact as to whether he would have received a better outcome at trial but for Parker's negligence. According to Gunter, it was unlikely he would have been able to prove equitable estoppel to a jury, even if he survived summary judgment on that theory. Gunter's argument fails because he does not cite to any evidence that creates a triable issue as to whether he would have received a better outcome at trial absent Parker's negligence. As in *Namikas*, this remains a matter of improper speculation. In any case, Gunter did not allege he would have received a better outcome at trial. He only alleged he would have received a better settlement. "To create a triable issue of material fact, the opposition evidence must be directed to issues raised by the pleadings." (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1264.) We thus need not consider factual or legal assertions not included the pleadings.

Finally, we reject Gunter's public policy arguments. The policies in favor of settlements and mitigation of damages do not relieve Gunter of his burden to show a triable issue of fact as to causation and damages.

III. The Breach of Fiduciary Duty Claim

Gunter next contends summary judgment should not have been granted because the trial court erroneously concluded the breach of fiduciary duty claim was duplicative of the malpractice claim. Gunter asserts the claims are not duplicative because the factual basis for the breach of fiduciary duty claim is different from that for the malpractice claim; that is, Parker committed malpractice by failing to obtain a valid tolling agreement while it breached their fiduciary duty by failing to advise him of the issue. This caused Gunter to continue to pursue the case, incurring

“thousands more in attorney’s fees paid to Respondents to continue litigating a claim Respondents were well aware would be barred by the statute of limitations.”

We fail to see the difference between the claims. To prove a breach of fiduciary duty, the plaintiff must show the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432–433.) Malpractice requires the same elements of duty, breach, causation, and damages. (*Coscia v. McKenna & Cuneo, supra*, 25 Cal.4th at p. 1199.) In the operative complaint, Gunter alleged the same facts—Parker’s negligence and concealment of the statute of limitations issue caused Gunter to incur attorney fees in the Malanga action—underlay the malpractice claim and the breach of fiduciary duty claim.

Even if we accept Gunter’s contention that the two claims are not duplicative, we conclude summary judgment was properly granted because Gunter has again failed to demonstrate a triable issue of material fact as to causation. (*Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1187 [“we affirm a summary judgment if it is correct under any theory”].) According to Gunter, his damages for the breach of fiduciary duty claim are comprised of the fees he paid to Parker to continue litigating his claims against Malanga. Gunter does not assert, much less direct us to any evidence, that he would have stopped litigating the claim against Malanga had Parker informed him of the statute of limitations issue when Malanga asserted that defense. Indeed, the record shows he continued to pursue the Malanga action even after he learned of the statute of limitations issue. Thus, Gunter has failed to show a dispute of fact as to causation.

DISPOSITION

The judgment is affirmed. Parker is awarded costs on appeal.

BIGELOW, P. J.

We concur:

GRIMES, J.

WILEY, J.