THIRD DIVISION
ELLINGTON, P. J.,
ANDREWS and RICKMAN, JJ.

March 12, 2018

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A17A1472. INGRAM v. FOY & ASSOCIATES, PC et al.

ELLINGTON, Presiding Judge.

Johnnie Mae Ingram ("Ingram") brought this legal malpractice action in the Superior Court of Fulton County against the attorneys who had represented her in a personal injury action and their law firms. The trial court granted the motion for summary judgment filed by one of the firms, Foy & Associates, PC, its owner, John Foy, and one of its lawyers, Charles Johnson (collectively, "the Foy firm"). The trial court also granted the motion for partial summary judgment filed by the other firm, Atlanta Injury Group at Jaffe Law Center, LLC, d/b/a Atlanta Trial Lawyers Group, its owner, Adam Jaffe, and one of its lawyers, Katherine Franke (collectively, "the

Jaffe firm"). Natasha Ingram, the adminstratrix of Ingram's estate, appeals.[1] The appellant contends, inter alia, that a question of material fact exists regarding whether the Foy firm is liable for failing to bring a claim within the time allowed against a nursing home for injuries Ingram allegedly sustained while receiving care there. In addition, the appellant contends that a question of material fact exists regarding whether the Jaffe firm is liable under its association agreement with the Foy firm for the Foy firm's failure to bring a timely claim against the nursing home. For the reasons explained below, we affirm.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[.]" OCGA § 9-11-56 (c).

> [A] defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case, but may point out by reference to the evidence in the record that there is an absence of evidence to support any essential element of the nonmoving party's case. . . . Summary judgments enjoy no presumption of correctness on appeal, and an appellate court must satisfy itself de novo that the

[1] Ingram died on February 23, 2016, and Natasha Ingram was substituted as the party plaintiff.

> requirements of OCGA § 9-11-56 (c) have been met. In our de novo review of the grant of a motion for summary judgment, we must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant.

(Citations and punctuation omitted.) *Cowart v. Widener*, 287 Ga. 622, 624 (1) (a) (697 SE2d 779) (2010). Viewed in the light most favorable to the appellant, the record shows the following facts, which are undisputed unless otherwise noted.

Ingram's injuries. On March 24, 2011, Ingram, who was then 68 years old, was being transported home by Grady Memorial Hospital in a van. As a Grady employee was lowering Ingram, who was seated in her motorized wheelchair on the wheelchair lift, to the ground, Ingram and the wheelchair fell off the lift to the ground. Ingram landed face down, hitting her head on a rock, and the wheelchair fell on top of her, hitting her lower back and buttocks.

Ingram was then transported back to Grady Memorial Hospital where she complained of pain on the right side of her head, right knee pain, bilateral hip pain, and general body pain. Her treating physician recorded, "Work up [was] negative for significant injury," and Ingram was discharged the next morning. Ingram deposed that in the days after her fall her hip and buttocks were very sore.

Four days after the wheelchair fell on Ingram, she retained the Foy firm to represent her for injuries sustained in the incident. A representative from the Foy firm went to Ingram's house to have her sign an Attorney-Client Contract.

On April 1, 2011, eight days after the fall with Grady, Ingram went to the emergency room with chest pain and trouble breathing. She became unresponsive and was intubated and admitted to the intensive care unit of Emory University Hospital Midtown. Ingram later deposed that when she went to Emory she had an open wound on her right hip. The appellant deposed that she was present when Ingram was examined at Emory and that she saw abrasions on Ingram's right buttock. Ingram's other daughter deposed that she was present when Ingram was examined at Emory and that she saw a large, dark bruise on Ingram's right buttock. Approximately three weeks later, Ingram was discharged from Emory and admitted to Kindred Atlanta Hospital to be weaned off the ventilator and for intensive rehabilitation.

Ingram remained at Kindred from April 21, 2011, to July 29, 2011. Ingram's daughter deposed that she was present when Ingram was examined when she first arrived at Kindred and again saw a dark bruise on Ingram's right buttock. She deposed that the bruise on Ingram's buttock became a serious wound while Ingram was at Kindred, became infected, and required surgeries to drain. The appellant

deposed that the wound on Ingram's buttock that required surgery was in the same location as the abrasions that appeared after the initial fall from the wheelchair lift. Ingram deposed that one of her doctors told her that the wounds were caused by the fall on March 24, 2011. Ingram's daughter also heard the doctor give that opinion. Ingram also developed a pressure wound over her sacrum, near her anus, that became badly infected.

The appellant deposed that she and other family members met with a Foy firm lawyer and a paralegal, while Ingram was still at Kindred, to find out what was going on with the case. The appellant told them about the infected wounds Ingram had developed at Kindred and the surgeries and asked about suing Kindred for what they did to Ingram. The appellant deposed that the lawyer told the family that they decided to pursue Grady for all damages, including those resulting from the care at Kindred, under the theory that but for the March 24, 2011 fall Ingram never would have required care at Kindred. The appellant deposed that during a later meeting the lawyer reiterated that they were going to take care of everything by going after Grady and that they were not going to pursue Kindred.

On July 29, 2011, Ingram was transferred from Kindred back to Emory where she remained until September 20, 2011. With long term treatment, the wounds

improved, but they never fully healed and continued to cause Ingram significant pain and loss of mobility until her death in 2016.

The Foy firm's pre-suit demand and filing of the complaint. On November 20, 2012, the Foy firm sent a presuit demand letter to Zurich American Insurance Company, Grady's insurer, proposing to settle the case for $2 million. Under the heading "DAMAGES," the letter listed Ingram's medical bills, by provider, from the initial fall to the date of the demand, including $716,819 from Kindred. In 2013, the Foy firm filed a complaint on behalf of Ingram against Grady Memorial Hospital Corporation d/b/a Grady Health Systems and Zurich. John Foy deposed that the decision not to assert claims against Kindred was a matter of strategy.

The Foy firm later voluntarily dismissed the first case without prejudice and subsequently filed a renewal suit against Grady and Zurich on September 12, 2014. On December 16, 2014, a Notice of Status Conference for March 3, 2015, was entered by the Court and sent to John Foy.

Association of the Jaffe firm. On January 27, 2015, the Foy firm associated the Jaffe firm to take the lead in litigating Ingram's claims. Ingram had expressly consented to such an association in her contract with the Foy firm. Pursuant to the terms of the association agreement, the Jaffe firm would "assume the role of lead

counsel, taking primary responsibility for all court dates, hearings and trials . . . to the conclusion of the case." At that time, the Foy firm sent a disk containing its complete file on the Ingram case to the Jaffe firm, including the renewal complaint against Grady and the Notice of Status Conference. Katherine Franke received the file, executed the association agreement, and returned the agreement to the Foy firm. She did not review the contents of the digital file received from the Foy firm but assigned the case to an associate. Franke deposed that the procedure was for the associate to review the file and put any scheduled events on the firm's calendar but the associate apparently overlooked the notice of the March 3, 2015 status conference.

Dismissal of Ingram's action for want of prosecution. The Jaffe firm did not appear on behalf of Ingram at the March 3, 2015 status conference, and the case was immediately dismissed with prejudice for want of prosecution. Franke filed a substitution of counsel and entry of appearance for herself, Adam Jaffe, and the Jaffe firm on March 17, 2017.

In his deposition, Adam Jaffe conceded that the Jaffe firm began representing Ingram when Katherine Franke executed the association agreement, which was prior to the date of the status conference, and therefore that the Jaffe firm was responsible for appearing at the conference. Similarly, Franke deposed that she and the Jaffe firm

formally entered the case when she signed the association agreement in January 2015 and it was their duty to attend the status conference, not the Foy firm's duty. She deposed that the delay in filing the substitution of counsel and entry of appearance was an administrative error and an oversight.

1. The appellant contends that there is evidence in the record to support each essential element of her case against the Foy firm for its failure to assert a timely claim against Kindred for Ingram's injuries, including the pressure wounds that developed while she was cared for at Kindred and, therefore, that the trial court erred in granting the Foy firm's motion for summary judgment.

> In a legal malpractice action, the plaintiff must establish three elements: (1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff. . . . [W]ith respect to the "ordinary care, skill and diligence" element, the law imposes upon persons performing professional services the duty to exercise a reasonable degree of skill and care, as determined by the degree of skill and care ordinarily employed by their respective professions under similar conditions and like surrounding circumstances.

(Citations and punctuation omitted.) *Leibel v. Johnson*, 291 Ga. 180, 181 (728 SE2d 554) (2012). "A client suing his/her attorney in a case not only must prove by expert

legal testimony that the claim was valid and would have resulted in a judgment in the client's favor, but also that the judgment would have been collectible in some amount." Id. at 191, n. 1 (citing suggested pattern jury instruction).

Two witnesses provided expert legal testimony in this case, and they disagreed about whether, in deciding not to assert a negligence claim against Kindred, the Foy firm failed to exercise a reasonable degree of skill and care, under the circumstances.[2] Notwithstanding the conflicting expert opinion evidence regarding the second element of the appellant's legal malpractice claim against the Foy firm, the firm contends that it is entitled to judgment as a matter of law, based on judgmental immunity, for its decision to pursue only Grady for Ingram's injuries. In *Hudson v. Windholz*, 202 Ga. App. 882 (416 SE2d 120) (1992), this Court quoted with approval a federal appellate decision holding:

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[2] The Foy firm's expert witness, Frank Beltran, deposed by affidavit that the Foy firm's decision not to name Kindred as a party and to pursue Grady and its insurer for all damages arising from the March 24, 2011 fall, including those allegedly subsequently related arising from care at Kindred, "was reasonable and did not constitute a failure to exercise ordinary care, skill, and diligence given the circumstances and facts of Ms. Ingram's underlying action."

The appellant's expert witness, Aaron Towns, testified that a reasonably prudent attorney would have asserted claims against Kindred as well as Grady, to avoid the "open chair" defense, where Grady would seek to blame the absent Kindred for most of Ingram's damages.

> There can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight. If this were permitted, the original trial would become a "play within a play" at the malpractice trial. Georgia has adopted the doctrine of judgmental immunity, holding the tactical decisions made during the course of litigation require, by their nature, that the attorney be given a great deal of discretion.

(Citations and punctuation omitted.) Id. at 886 (1). The Court went on to hold that, because the evidence showed that the attorney assessed the relative strengths and weaknesses of the plaintiffs' claims and exercised his best, informed judgment prior to recommending that the plaintiffs execute a release in favor of one potential defendant, "any error or mistake in judgment by [the attorney] as to this recommendation is protected by the doctrine of judgmental immunity and may not serve as the basis for a legal malpractice action against [the attorney]." Id. at 886-887 (3).

Because the undisputed evidence in this case shows that the decision to bring suit only against Grady was a tactical decision made in the exercise of professional judgment, the appellant's legal malpractice action against the Foy firm is barred by

the doctrine of judgmental immunity. *Hudson v. Windholz*, 202 Ga. App. at 886-887 (3).[3]

2. The appellant contends that the trial court erred in "reforming" the association agreement between the Foy firm and the Jaffe firm to find that the Jaffe firm is not liable for obligations it undertook under the agreement. In the Jaffe firm's motion for partial summary judgment, the firm conceded that triable issues remain regarding whether its lawyers' negligence caused or contributed to the dismissal of Ingram's suit against Grady, whether Grady was negligent, and the extent of any damages that may have been recovered from Grady but for the dismissal of the renewal complaint. The firm argued that it cannot be held liable, however, for "the

[3] See *Engelman v. Kessler*, 340 Ga. App. 239, 244 (1) (797 SE2d 160) (2017) (Where the evidence established that the defendant law firm's attorneys analyzed the terms of the client's prenuptial agreement and advised her as to the strengths and weaknesses regarding the enforceability of the agreement and what steps would be entailed in contesting the agreement, the client failed to show negligence on the part of the attorneys.); *Mosera v. Davis*, 306 Ga. App. 226, 232-233 (701 SE2d 864) (2010) (Where the evidence showed that the defendant law firm's attorneys recommended that their client agree to a settlement pursuant to which he received a deed to secure debt but agreed not to file it unless his adversaries defaulted on their settlement obligations and advised the client of the consequences of failing to file a deed to secure debt; that the client understood the risks involved; and that this was the best deal they could obtain for him, given the opposing party's demands and the client's desire to settle, the record established that the attorneys had exercised their best, informed judgment given the circumstances. Consequently, the doctrine of judgmental immunity precluded a finding of liability.).

Kindred Damages," that is Ingram's respiratory failure several days after the initial fall, her admission to Emory, the later transfer to Kindred, and the pressure wounds that developed there. In terms of the "trial within a trial" that occurs with claims of legal malpractice, the Jaffe firm argued that the appellant failed to identify any medical evidence that Grady's alleged negligence was the proximate cause of the Kindred Damages. If Ingram cannot prove that she would have recovered against Grady for the Kindred Damages in the underlying negligence action, then she cannot recover against the Jaffe firm for the Kindred Damages for its alleged negligence in failing to appear at the status conference that resulted in the dismissal with prejudice of Ingram's suit against Grady. *Leibel v. Johnson*, 291 Ga. at 181.[4] In addition, the Jaffe firm argued that, because any claim against Kindred was already time-barred by the time it assumed representing her, Ingram cannot recover against the firm for her loss of her claim against Kindred. The trial court granted the Jaffe firm's motion for partial summary judgment as to the Kindred Damages.

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[4] In moving for partial summary judgment, the Jaffe firm submitted the affidavit of Joseph Micca, MD, an internist with experience in geriatric medicine and wound care, who opined that the multiple wounds Ingram experienced on her sacrum, right hip, and buttocks were not a result of the March 24, 2011 fall from the Grady van.

As far as we can discern, the appellant contends that, by ruling that Ingram cannot recover against the firm for her loss of her claim against Kindred, the trial court reformed the association agreement and modified the term that the Jaffe firm would assume the role of lead counsel in representing Ingram for injuries and damages sustained on March 24, 2011. This argument lacks merit. The trial court's summary judgment ruling on the legal malpractice claim does not purport to reform the association agreement. It simply reflects the fact that under the agreement the Jaffe firm assumed the duties of counsel from the date Franke executed the agreement. The association agreement does not contain any provision wherein the Jaffe firm agreed to indemnify the Foy firm or otherwise answer for any professional negligence committed before the Jaffe firm assumed responsibility for prosecuting Ingram's claims. This unsupported argument presents no basis for reversal.

Judgment affirmed. Andrews and Rickman, JJ., concur.