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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARK AUGUSTA,

Plaintiff and Appellant,

v.

KEEHN & ASSOCIATES et al.,

Defendants and Respondents.

D062002

(Super. Ct. No. 37-2008-00098339-
CU-PN-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Randa Trapp, Judge. Reversed and remanded with directions.

Martin N. Buchanan for Plaintiff and Appellant.

Pettit Kohn Ingrassia & Lutz, Douglas A. Pettit, Christina G. Bernstein for Defendants and Respondents.

Plaintiff and appellant Mark Augusta appeals from a summary judgment in favor of his former bankruptcy attorneys, defendants and respondents L. Scott Keehn and Keehn & Associates on Augusta's first amended complaint for professional negligence, breach of fiduciary duty and fraud. In that pleading, Augusta alleged defendants' negligence caused him to lose valuable claims against other attorneys who had

represented him in securities arbitrations, leading to a settlement that was \$3 million less than if those claims had been included in the settlement. The trial court granted summary judgment on grounds Augusta lacked evidence of causation and damages, and his professional negligence claim against Keehn and his law firm was time barred by the one-year statute of limitations of Code of Civil Procedure¹ section 340.6. On appeal, Augusta contends (1) defendants did not make a prima facie showing of entitlement to summary judgment on causation; (2) there are triable issues of material fact as to causation; and (3) there are triable issues of fact as to whether the one-year statute of limitations was tolled by defendants' continuous representation.

We agree defendants' evidence, including Augusta's response to a special interrogatory asking him to state all facts concerning his claim that the settlement in the underlying legal malpractice case was greatly reduced, did not meet its threshold summary judgment burden to demonstrate Augusta does not possess, and cannot reasonably obtain, evidence as to causation and damages. We further conclude Augusta's evidence raises a triable issue of material fact as to tolling under section 340.6, subdivision (a)(2), precluding summary judgment. Accordingly, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

We set out the undisputed facts from the parties' separate statements and evidence supporting their moving and opposing papers, and view other facts in the light most favorable to Augusta as the party opposing summary judgment. (§ 437c, subd. (c);

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

Neilsen v. Beck (2007) 157 Cal.App.4th 1041, 1044, fn. 1; see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335, fn. 7.) Much of the background is taken from Augusta's opposing summary judgment declaration, to which defendants objected on numerous grounds including it was irrelevant to the determination of the motion and merely reiterated his pleadings. The trial court overruled all but two of the objections, and because Augusta does not challenge the trial court's evidentiary rulings, we do not rely on those portions of Augusta's declaration, or any other evidence, to which objections were sustained. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1181.)

Events Giving Rise to the Underlying Legal Malpractice Action

In 1986, Augusta was a licensed securities sales representative for Miller & Schroeder Financial, Inc. (Miller & Schroeder), an underwriter and full service brokerage firm. In 1996, Miller & Schroeder touted to Augusta and other sales representatives Heritage Bonds, which were municipal bonds ostensibly for the purpose of financing the acquisition and conversion of older hospital properties to more specialized facilities. Miller & Schroeder provided Augusta and others certain information and disclosures and represented the bonds were good investments without any default risk. With Miller & Schroeder's encouragement, Augusta in turn sold Heritage Bonds to many of his clients. Investors eventually discovered that the Heritage Bonds were in fact fraudulent, that the Heritage Bonds principals mismanaged projects and commingled bond funds, and that Miller & Schroeder was aware of the problems but had concealed the true state of affairs. All of the Heritage Bonds eventually defaulted, resulting in losses to the investors.

Investors filed arbitration claims against Augusta and Miller & Schroeder with the National Association of Securities Dealers (NASD), and Miller & Schroeder retained counsel (first Faegre & Benson and then a different firm, Arthur Chapman) to jointly represent it and Augusta. The eventual lead attorney on the matter, Lindsay Arthur of Arthur Chapman, became aware of Miller & Schroeder's involvement in the Heritage Bond scheme as well as the fact that Miller & Schroeder was under investigation by the Securities and Exchange Commission (SEC), but no one informed Augusta that he had crossclaims against Miller & Schroeder and could assert various affirmative defenses, or that a potential conflict of interest existed. The arbitration proceedings resulted in two "six-figure" judgments against Miller & Schroeder and Augusta. Miller & Schroeder eventually filed for bankruptcy. Augusta could not satisfy the judgments and risked suspension of his brokerage license if he did not seek relief in bankruptcy. As a result of the Heritage "debacle," Augusta suffered damages in excess of \$13 million.

The Augustas Retain Keehn and File for Bankruptcy

In May 2002, Augusta met with attorney L. Scott Keehn about a potential bankruptcy filing on Augusta's and his wife's behalf, and Augusta and his wife signed an engagement letter stating that L. Scott Keehn and his then law firm, Robbins & Keehn, was retained "in connection with your [the Augustas'] problems arising out of the current cash flow/demand disparity, created by your current needs to respond to and prosecute various pending and potential litigation matters, including preparing you for obtaining formal reorganization . . . through Chapter 11 of the United States Bankruptcy Code." Keehn applied to have the bankruptcy court authorize his employment as the Augustas'

general bankruptcy counsel and submitted a declaration in which he asserted Robbins & Keehn, "as Debtors' general counsel will be able to provide Debtors with comprehensive legal services as those services are required." The verified application states in part that defendants' "employment is intended to be as broad as legally permissible but without encroaching upon the areas of engagement for which special legal counsel have been employed with the courts approval [*sic*] and will include, without limitation, representation of the Debtors in all proceedings of every description whether legal, equitable, administrative, formal, informal, mandatory, permissive, adversary or otherwise before this Court and any other appropriate Court, forum or agency, in all adversary proceedings or other litigation, whether presently pending or hereafter initiated, in this or any other Court, forum or agency"

In June 2002, Keehn filed a petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code (the Bankruptcy Code) on behalf of Augusta and his wife. The Chapter 11 plan included as an asset the prosecution of a legal malpractice action against Lindsay Arthur and his law firm. Keehn valued all of the third party litigation claims at \$25,000,000, which was the upper limit for those claims. At about the same time, Keehn assisted the Augustas in retaining an attorney to handle such an action, and at Keehn's direction, Augusta sought advice from other attorneys concerning the merits of a potential malpractice action. Augusta contacted attorney John Pickett, who informed Augusta that any legal malpractice complaint should be filed by August 1, 2002, within one year of the apparent end of the Faegre firm's representation. Keehn, however, advised Augusta that under Bankruptcy Code section 108, the Chapter 11

bankruptcy filing automatically extended by two years the statute of limitations for any independent action for which the limitations period had not elapsed. In July and August 2002, Keehn communicated with both Pickett and the Augustas concerning the Augustas' potential malpractice claims against securities arbitration counsel. The Augustas eventually chose to rely on Keehn's advice, though Pickett recommended against it.

In March 2004 the bankruptcy court, on motion of a creditor's committee, converted Augusta's Chapter 11 matter into a Chapter 7 proceeding. As a result, the Augustas were no longer debtors in possession. In June 2004 the bankruptcy trustee abandoned the malpractice claims, and they ceased to be the property of the Augustas' bankruptcy estate.

The Underlying Legal Malpractice Action Against Securities Arbitration Counsel

On June 18, 2004, Augusta filed a legal malpractice and breach of fiduciary duty complaint against various attorneys involved in the underlying securities arbitration. Though Augusta filed the complaint as a self-represented litigant, the pleading had been ghost-written by members of Keehn's law firm.

Augusta eventually retained attorney Dan Stanford to represent him in the underlying malpractice action, and Stanford filed a first amended complaint on November 16, 2004. Lindsey Arthur and his law firm thereafter moved in the alternative for summary judgment or summary adjudication on the ground Augusta's claims were barred by the section 340.6 one-year statute of limitations. The trial court tentatively granted the motion on that ground, but permitted the parties to file additional briefing on the tolling of Bankruptcy Code section 108. Stanford asked Keehn to assist them in

responding, and Keehn's law firm prepared a research memorandum on the issue and billed the Augustas for it. Keehn submitted a declaration on the Augustas' behalf in response to the court's tentative ruling.

In October 2006, the court confirmed its tentative ruling and entered summary adjudication in favor of Arthur Chapman and Lindsey Arthur on grounds the statute of limitations had run during the Augustas' bankruptcy as to the Augustas' negligence and professional liability claims. In 2007, Augusta settled for \$2 million his sole remaining claims for intentional torts against Arthur Chapman and Lindsey Arthur. Keehn conducted legal work for the Augustas in connection with their bankruptcy until July 2, 2008, and billed them for his services.

The Present Legal Malpractice Action

On December 19, 2008, Augusta filed the present action against Keehn and his law firm, and his later-filed first amended pleading alleged causes of action for professional negligence, fraud, and breach of fiduciary duties. Augusta alleged the one-year limitations period of section 340.6 was tolled through July 2, 2008, due to Keehn's continuous legal representation.

Defendants moved for summary judgment and alternatively summary adjudication. Pointing out Augusta did not file his complaint until more than two years after the securities arbitration defendants obtained summary judgment in October 2006, it argued Augusta's professional negligence cause of action was barred by the one-year statute of limitations. Defendants further argued the limitations period was not tolled in

part because Keehn did not continue to represent the Augustas regarding "the specific subject matter in which the alleged wrongful act or omission occurred." (§ 340.6, subd. (a)(2).) According to defendants, Keehn's representation was in connection with the bankruptcy proceedings only, and not the underlying malpractice action against securities arbitration counsel, in which the Augustas were represented by attorney Stanford.

Defendants additionally argued Augusta could not establish causation; that Augusta could not prove he would have received a better outcome in settlement or by litigating the underlying malpractice action to trial. Specifically, they argued Augusta was required to prove that at a settlement, Lindsay Arthur and his law firm would have agreed to settle, and would have settled for a greater amount than was actually agreed upon. According to defendants, if the case did not settle but proceeded to trial, Augusta would have to prove he would have prevailed and a jury would have awarded an amount more than the \$2,000,000 he actually received in settlement. Defendants asserted that Augusta could not prove the latter scenario in part because Augusta proceeded to trial against nonsettling securities arbitration counsel and lost.

In opposition, Augusta argued the one-year statute of limitations was tolled by the undisputed fact that Keehn continued to represent the Augustas in connection with their bankruptcy proceedings through July 2, 2008. Augusta argued his own knowledge of a potential malpractice claim did not interrupt the tolling of section 340.6, as long as Keehn still represented him in the bankruptcy matter, which, Augusta asserted, was the matter in

which the malpractice occurred. Augusta further argued his retention of attorney Stanford did not interrupt Keehn's representation so as to end tolling.

As for causation and damages, Augusta argued defendants' motion was procedurally and substantively defective on the point because their separate statement did not include any reference to causation and damages. Augusta asserted his evidence in any event raised triable issues of fact on causation and damages via declarations from attorneys Charles Grebing and Heather Rosing, counsel for Arthur Chapman and Lindsay Arthur in the underlying legal malpractice action. Grebing opined that the value of Augusta's case without the summarily adjudicated negligence and breach of fiduciary duty claims was significantly less; he stated he had communicated to Stanford that with those causes of action, Augusta's case had a potential value of \$5 million in excess of any amounts previously paid by prior settling arbitration attorney defendants. Rosing averred that Augusta's damages allegations, if substantiated, exceeded the available insurance policy limits and that in her opinion, Augusta's case against Arthur Chapman and Lindsay Arthur "was two to three times more valuable, as a general matter, with the negligence claims, as opposed to only fraud claims."

Ruling on the parties' numerous evidentiary objections, the trial court tentatively denied summary adjudication based on the statute of limitations defense, but granted summary judgment on grounds Augusta could not prove causation and damages as to all of his causes of action. Following argument on the matter, the court granted summary judgment in defendants' favor. As to Augusta's showing that Keehn had continuously represented him until July 2, 2008, the court ruled the evidence showed Keehn's advice

extended to matters related to the legal malpractice action, but after Augusta hired Stanford in November 2004, Keehn's representation in the bankruptcy matter was not sufficient to establish continuing conduct in the malpractice matter. It held that because Augusta's malpractice claim arose in October 2006 when summary judgment was granted in the underlying malpractice case against securities arbitration counsel, Augusta's December 2008 complaint was untimely. With regard to causation and damages, the court ruled Augusta's evidence was speculative because it did not demonstrate that "but for defendants' negligence, his legal malpractice case would have settled for more or gone to trial and resulted in a larger recovery." The court stated: "There is no evidence defendant in the underlying case would have settled for more or that a trier of fact would have awarded more than he obtained at settlement." It further ruled there was no evidence showing Augusta was damaged in his bankruptcy case, and thus Augusta's claims for fraud and breach of fiduciary duty based on the bankruptcy case failed.

Augusta timely appealed from the ensuing judgment.

DISCUSSION

I. *Summary Judgment Standards*

"When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed

evidence.' " (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.)

"The defendant must show that the plaintiff *does not possess* needed evidence, because otherwise the plaintiff might be able to establish the elements of the cause of action; the defendant must also show that the plaintiff *cannot reasonably obtain* needed evidence, because the plaintiff must be allowed a reasonable opportunity to oppose the

motion" (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 854

(*Aguilar*.) "A defendant can satisfy its initial burden to show an absence of evidence through 'admissions by the plaintiff following extensive discovery to the effect that he

has discovered nothing' [citation], or through discovery responses that are factually

devoid." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1302; *Cassady v. Morgan,*

Lewis & Bockius LLP (2006) 145 Cal.App.4th 220, 240.)

"Only after the defendant's initial burden has been met does the burden shift to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action." (*Chavez v. Glock, Inc., supra*, 207 Cal.App.4th at p. 1302; *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal.App.4th 1223, 1228 ["The moving party is not entitled to summary judgment unless and until it meets its procedural burden . . . regardless of whether the opposing party responds or presents any evidence. If the moving defendant fails to meet its initial burden, the burden never shifts to the opposing party to raise a factual issue"]; see also *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468-469 [where defendant fails to carry its summary judgment burden of production of evidence, "the plaintiff need not make any showing at all"].)

On appeal, "[w]e consider 'all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.' [Citation.] [¶] In doing so, we strictly construe the moving party's evidence and resolve doubts as to the existence of triable issues in favor of the party opposing summary judgment. [Citations.] We do not decide the merits, but only determine if there is evidence requiring the fact-weighting procedures of a trial." (*Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 484.)

II. Causation and Damages²

To establish a cause of action for legal malpractice arising in a civil proceeding, Augusta must prove: "(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; *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 165, 169.) Causation and damages are also elements of Augusta's causes of action for breach of fiduciary duty and fraud. (*Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 932 [breach of fiduciary duty]; *OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 869-870 [fraud].)

² Though defendants argued in their summary judgment motion that they did not provide erroneous legal advice in connection with Augusta's bankruptcy, the parties do not raise issues on appeal concerning the element of breach of duty. The focus of the briefing is limited to defendants' continuous representation, if any, and Augusta's ability to establish causation and damages.

As defendants correctly acknowledge, causation is generally a question of fact that cannot be resolved by summary judgment unless, under undisputed facts, there is no room for a reasonable difference of opinion. (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531-1532; *Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864.) Augusta must prove causation "according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice[.]" (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1235, 1241.) He must show that "*but for* the alleged negligence of the defendant attorney, [he] would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred." (*Id.* at p. 1241.) This is done by the trial-within-a-trial method. (See *id.* at p. 1240, fn. 4; *Ambriz*, at p. 1531.)

Where, as here, an attorney is alleged to have committed legal malpractice resulting in the loss of another legal malpractice action, the trial-within-a-trial concept becomes a trial-within-a-trial-within-a-trial. (*Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court* (2006) 137 Cal.App.4th 579, 586 (*Hecht*.) In such a circumstance, the plaintiff must " 'then show that the defendant attorney was negligent, that the prior attorney also was negligent, and finally that a better result should have been obtained in both underlying actions.' " (*Ibid.*) "In conducting the 'trial-within-a-trial' of a legal malpractice case, 'the goal is to decide what the result of the underlying proceeding or matter *should have been*, an objective standard.' " (*Hecht*, at pp. 585-586, quoting 4 *Mallen & Smith, Legal Malpractice* (2006 ed.) § 33.1, pp. 926-927, fns. omitted; *Ambriz*

v. Kelegian, supra, 146 Cal.App.4th at p. 1531.)³ The trial-within-a-trial method " 'is the most effective safeguard yet devised against speculative and conjectural claims It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance.' " (*Jalali v. Root* (2003) 109 Cal.App.4th 1768, 1773-1774; see also *Viner v. Sweet, supra*, 30 Cal.4th at p. 1241.)

"In the legal malpractice context, the elements of causation and damage are particularly closely linked. . . . The plaintiff has to show both that the loss of a valid claim was proximately caused by defendant attorney's negligence, and that such a loss was measurable in damages." (*Hecht, supra*, 137 Cal.App.4th at p. 591.) " ' "[T]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages." ' " (*Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1518.) And, damages must be proven to a legal certainty, not to a mere probability. (*Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1528.) " 'Unless a party suffers damage, i.e., appreciable and actual harm, as a consequence of his attorney's negligence, he cannot establish a cause of action for malpractice. Breach of duty causing only speculative harm

³ In *Viner v. Sweet*, the California Supreme Court stated: "In both litigation and transactional 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, supra*, 30 Cal.4th at p. 1242.) We do not read the *Viner* court's statement as inconsistent with the requisite objective standard; whether it uses the phrase "would have" or "should have," the California Supreme Court has recognized that the standard is an objective one. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1048-1049.)

is insufficient to create such a cause of action. [Citation.] "[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable." ' ' (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509; see *Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 661-662.)

A. *Defendants' Threshold Summary Judgment Burden*

Augusta contends defendants did not meet their threshold summary judgment burden so as to shift the burden of proof; that they presented no affirmative evidence negating causation, and instead "did nothing more than point out through argument that the plaintiff lacks needed evidence." Augusta argues defendants' separate statement did not mention evidence, facts or discovery pertaining to causation, nor did defendants present evidence as to what should have happened in the underlying malpractice action if Augusta's claims had not been dismissed. According to Augusta, the sole evidence possibly addressing the issue is a special interrogatory response in which he stated he had lost his professional negligence claims against Arthur Chapman and Lindsay Arthur because defendants had not timely filed them; those claims were valuable claims and covered by liability insurance; and had the negligence claim remained, their settlement value would have been two to three times the amount paid, or \$5 million. This discovery response, Augusta maintains, does not establish he lacks needed evidence on causation, cannot reasonably obtain such evidence, or that he "will be unable to prove [his] case by any means."

Defendants counter that they met their initial summary judgment burden to show Augusta did not have, and could not obtain, evidence to establish causation. They identify the following evidence, in part reflected in their undisputed fact Nos. 23 through 26:

- Augusta's admissions contained in his first amended complaint and original complaint;
- Augusta's responses to special interrogatory No. 50, which asked Augusta to state all facts supporting his claim that the settlement in the underlying legal malpractice case was greatly reduced because of the judgment on his negligence claims;
- Keehn's declaration stating that in Augusta's underlying legal malpractice action, the nonsettling securities counsel⁴ obtained a defense verdict;
- The trial court's ruling in the underlying malpractice action that Augusta's claim for malpractice was time barred; and
- The fact Augusta settled the intentional misconduct claims for \$2 million, and he claimed this was \$3 million less than the amount that would have been paid out but for defendants' alleged negligence.

⁴ The initial complaint prepared by Keehn in the underlying malpractice action named as defendants not only the Arthur Chapman firm and Lindsay Arthur, but also Faegre & Benson, LLP; The Rossbacher Firm; Robert Schnell, an attorney associated with the Faegre law firm; James Cahill, an attorney associated with the Rossbacher law firm; and San Diego attorney Steven Green.

Defendants maintain the trial court correctly found the evidence shifted the burden of production to Augusta because their evidence established that "had Augusta proceeded to trial against all the NASD Arbitration Attorney defendants, his case would have been defended and Augusta would have walked away with nothing." Defendants further maintain that we may assess whether they met their threshold burden by looking at the entirety of the evidence, including that presented in opposition, and that Augusta's best evidence, the Grebing and Rosing declarations, do not establish that securities arbitration counsel in the underlying case would have paid more than \$2 million in settlement or that a jury would have awarded Augusta more than \$2 million but for Keehn's alleged malpractice.

B. Analysis

We conclude that the above-referenced evidence does not prima facie show the nonexistence of any triable issue of material fact on causation or damages. (§ 437c, subd. (p)(2).)

Augusta's loss at trial against other, different, securities arbitration attorneys does not bear on the merits, or lack thereof, of Augusta's claims against Lindsay Arthur and Arthur Chapman. Defendants do not point to any evidence in the record demonstrating those defendants' roles in the underlying securities arbitration, whether they participated in the joint defense of Augusta and Miller & Schroeder, what liability or defense theories were pursued at the trial, and whether there is any similarity between the claims asserted to a defense verdict and those against Lindsay Arthur and his law firm. Defendants did not attempt to establish that the defense verdict and prior ensuing judgment, if any, in

Augusta's action against those other attorney defendants would have had any binding or res judicata effect as to Lindsay Arthur or his law firm.

Though in moving for summary judgment defendants may rely on a complaint's factual allegations as judicial admissions (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 222, fn. 3 (*Foxborough*)), Augusta's purported admissions do not establish prima facie that there are no triable issues of material fact concerning causation. To the contrary, in his original and first amended complaint, Augusta alleged that but for the summary judgment on his negligence claims, the defendants settled for \$3 million less than the amount that would have been paid. These are not the sort of admissions that would serve to *defeat* the element of causation; rather, they tend to support Augusta's claim.

Nor can we say Augusta's response to defendants' special interrogatory No. 50 establishes that Augusta has no evidence, or cannot reasonably obtain evidence, to support the elements of causation or damages. "A defendant moving for summary judgment may rely on 'factually devoid discovery responses' to show that the plaintiff's cause of action has no merit and to shift the burden to the plaintiff to demonstrate that a triable issue of one or more material facts exists as to that cause of action." (*Great American Ins. Companies v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 451, citing *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590; *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 133-134.) If a defendant seeks to rely on circumstantial evidence consisting of assertedly factually devoid discovery, the discovery responses must be such that " 'an absence of

evidence can be inferred' " and " 'the burden should not shift without stringent review of the direct, circumstantial and inferential evidence.' " (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 103.) When a defendant's interrogatory does not ask for information relevant to the issue at hand, or fails to seek all of the facts related to the challenged element in the plaintiff's case, a court will not infer that the plaintiff can produce no other evidence on that issue. (*Ibid.*, citing *Scheidig v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 81, 83; see *Gulf Ins. Co.*, at p. 134.) This is because a plaintiff's duty to answer discovery completely only extends so far as the reasonable ambit of the questions that are asked. (*Gulf Ins. Co.*, at p. 134.).

In *Scheidig v. Dinwiddie Construction Co.*, for example, the plaintiff sued the defendant for exposure to asbestos at his jobsite and defendant obtained summary judgment based on plaintiff's failure in his deposition to identify a jobsite where defendant had worked. (*Scheidig, supra*, 69 Cal.App.4th at p. 67.) The appellate court reversed the summary judgment, pointing out there was no indication any party had asked the plaintiff to identify any jobsite where that defendant had been present, and thus the court would not infer the plaintiff could not produce any other evidence to link the defendant to his illness. (*Id.* at pp. 80-81, 83.) In *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, supra*, 79 Cal.App.4th 114, the Court of Appeal reversed a summary judgment in a legal malpractice action that had been based on assertedly factually devoid discovery responses as to causation, where the interrogatory at issue did not call for information on the issue of damages sustained by the *plaintiff* as a result of attorney malpractice, but damages sustained by the *underlying plaintiff who had*

sued Gulf's insured in prior litigation. (*Id.* at pp. 135-136.) And in *Cassady v. Morgan, Lewis & Bockius LLP, supra*, 145 Cal.App.4th 220, the Court of Appeal held the trial court improperly granted summary judgment in favor of a law firm sued for indemnity by its employee attorney (and affirmed the trial court's grant of a new trial); the law firm had sought to show the attorney lacked evidence of indemnifiable expenses, pointing to discovery admissions that his time entries were not segregated or apportioned. (*Id.* at pp. 224, 243.) The appellate court held the evidence did not establish the attorney lacked, and could not obtain, needed evidence; the interrogatory encompassed a theory other than the one the attorney relied upon, and the discovery did not establish the attorney could not prove his claim by methods other than billing records. (*Id.* at p. 243.)

In their special interrogatory No. 50, defendants asked Augusta to "state all facts that support your claim that your August 2007 settlement with Arthur Chapman and Lindsay Arthur was greatly reduced because of the judgment entered on the negligence claims, as alleged in paragraph 36 of the first amended complaint." (Some capitalization omitted.) Augusta asserted various objections and responded that "the negligence (legal malpractice) claims against Arthur Chapman and Lindsay Arthur were valuable claims and claims which were covered by liability insurance. [¶] Those claims were thrown out on summary judgment . . . because the defendants had not timely filed those claims. Thereafter, only because of the efforts of counsel other than the defendants, intentional tort claims remained. However, the intentional tort claims were not covered by insurance and were substantially more difficult to prove. The intentional tort, noncovered claims were settled for the amount of \$2 million. If the negligence (legal malpractice) claims

had remained, the settlement value would have been 'two or three times the amount paid' and/or the amount of \$5 million."

The question is whether it is reasonable to infer from the discovery proffered by defendants that Augusta can produce no evidence of causation or damages as a result of Keehn's alleged negligent advice. (*Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, supra*, 79 Cal.App.4th at p. 134.) More specifically, we assess whether defendant's special interrogatory No. 50 is sufficiently comprehensive, and Augusta's response "so devoid of facts, as to lead to the inference that [Augusta] could not prove causation [or damages] upon a stringent review of the direct, circumstantial, and inferential evidence contained" in the responses. (*Andrews v. Foster Wheeler LLC, supra*, 138 Cal.App.4th at p. 107; *Scheidung v. Dinwiddie Construction Co., supra*, 69 Cal.App.4th at p. 76.)

We conclude defendants' special interrogatory No. 50 does not permit the conclusion that Augusta cannot produce evidence of causation or damages. Because this is a matter requiring a "trial-within-a-trial-within-a-trial" approach (*Hecht, Solberg, Robinson, Goldberg & Bagley v. Superior Court, supra*, 137 Cal.App.4th at p. 586), Augusta must eventually meet a burden to show that he should have obtained a better result not only in the malpractice action against securities arbitration counsel, but also in the underlying securities arbitration. However, the proffered interrogatory focuses only on the reduced value of the 2007 settlement of the underlying malpractice action. We cannot characterize Augusta's response as "devoid" of facts or "incomplete or evasive on that point." (E.g., *Union Bank v. Superior Court, supra*, 31 Cal.App.4th at p. 578

[plaintiff's interrogatory responses admitting he had no evidence and stating mere *beliefs* that a particular set of facts occurred in response to a question requesting all facts supporting an element of their claims, permitted an inference they possessed no facts to support that element].) Augusta's response set forth reasonably specific facts as to the settlement's value that he was eventually able to support with the Grebing and Rosing declarations. Defendants' "failure to ask more pointed and specific questions does not establish an absence of evidence." (*Cassady v. Morgan, Lewis & Bockius LLP, supra*, 145 Cal.App.4th at p. 244.) Augusta's interrogatory response, therefore, does not permit the conclusion that he cannot present sufficient evidence of causation and damages, and it did not shift the burden to Augusta to raise a triable issue of fact as to those elements.

On appeal, the only argument made by defendants is that Augusta's discovery response "demonstrates that Augusta does not have any evidence beyond conclusory allegations that he lost \$3 [million] as a result of Keehn's negligence" and that "Augusta's position that the claims were 'valuable' because they were potentially covered by liability insurance is insufficient to establish causation and damages against Keehn." The latter assertion is a mischaracterization of Augusta's response, which states *not* that the negligence claims *were potentially* covered by liability insurance, but that they *were* covered by insurance. In any event, as we have concluded, special interrogatory No. 50 is not so comprehensive to make it a situation in which "the court[] could infer from an incomplete or evasive reply that the plaintiffs had no other facts to support their case." (*Scheidig v. Dinwiddie Construction Co., supra*, 69 Cal.App.4th at p. 83; *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1439-1440.)

Because defendants did not meet their initial burden of production, we need not address whether Augusta's evidence raises a triable issue of material fact.

III. *Tolling by Continuous Representation*

We turn to whether summary judgment was properly granted on Augusta's professional negligence cause of action on grounds it was time barred under section 340.6. Augusta does not take issue with defendants' initial burden as to the defense;⁵ he argues only that the evidence raises triable issues of fact as to whether defendants' representation within the meaning of section 340.6, subdivision (a)(2) continued by virtue of Keehn's efforts up to July 2, 2008, or whether it ceased at some point before December 19, 2008, the date Augusta filed the present malpractice lawsuit.

Pointing to the undisputed fact that Keehn continued his efforts on the Augustas' behalf and billed for his time in connection with their bankruptcy matter, Augusta contends Keehn continuously represented him "regarding the specific subject matter in which the alleged wrongful act or omission occurred"—that is, the bankruptcy proceedings—through July 2, 2008, less than one year before the present malpractice lawsuit was filed. Augusta argues Keehn's negligence occurred during his representation as bankruptcy counsel when he misadvised the Augustas of the effect of the Bankruptcy Code on the statute of limitations for their legal malpractice claims; that Keehn admitted

⁵ Defendants who seek summary judgment on an affirmative defense bear an overall burden of persuasion that there is a complete defense to the plaintiff's action; in meeting this burden, defendants have the initial burden of production entailing them to "present[] . . . 'evidence' " supporting a prima facie showing of the nonexistence of any triable issue of material fact as to the defense. (*Aguilar, supra*, 25 Cal.4th at p. 850 & fn. 11)

he represented the bankruptcy estate in connection with all of its assets, including Augusta's malpractice claims; Keehn coordinated with outside counsel regarding the interplay between the bankruptcy and other litigation; and Keehn billed the Augustas for services that were directly related to the malpractice claims, including ghost writing the initial complaint.

Augusta alternatively argues, citing *Neilsen v. Beck, supra*, 157 Cal.App.4th at p. 1054, he raised triable issues of fact as to whether Keehn continuously represented him up to July 2, 2008, by providing legal services in matters that were "intertwined and related, having overlapping objectives and purposes." Augusta points to Keehn's deposition admission "that his basic strategy in the bankruptcy was to hold off Augusta's creditors so that Augusta could pursue his outside litigation claims and eventually use the litigation proceeds to pay off creditors." Finally, Augusta argues that notwithstanding his retention of attorney Stanford to pursue the underlying malpractice claim, Keehn's representation in the bankruptcy matter continued, including to assist Stanford in opposing the summary judgment, and Keehn never advised him he would no longer provide legal advice in connection with outside litigation relating to the bankruptcy. In making the latter argument, Augusta would have us distinguish *Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051 (*Lockton*) and *Foxborough, supra*, 26 Cal.App.4th 217, on which the trial court relied in granting summary judgment.

A. *Legal Principles*

Section 340.6, subdivision (a) provides: "An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. . . . [I]n no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist: [¶] (1) The plaintiff has not sustained actual injury. [¶] (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred." Under the statute's plain language, "continuous relationship tolling . . . applies only so long as representation continues 'regarding the specific subject matter in which the alleged wrongful act or omission occurred.'" (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 514, fn. 8; *Lockton, supra*, 184 Cal.App.4th at p. 1062.)

"Generally, continuous representation requires 'an ongoing relationship and activities in furtherance of the relationship.' [Citation.] . . . '[S]o long as there are unsettled matters tangential to a case, and the attorney assists the client with these matters, he is acting as his representative.'" (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 571; *Gold v. Weissman* (2004) 114 Cal.App.4th 1195, 1201.) The standard is objective: " 'Continuity of representation ultimately depends, not on the

client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck, supra*, 157 Cal.App.4th at p. 1049, quoting *Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1498; *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 116.) Further, "[t]he limitations period can be tolled even though the client is aware of the attorney's negligence" and " 'consulting another attorney is not tantamount to ending a prior relationship, [thus] the court will not use that occurrence as a benchmark which, standing alone, signals the termination of the attorney and client's relationship.' " (*Neilsen*, at p. 1049.) However, "[o]nce representation on [the specific subject matter in which the negligence occurred] ends, a client must bring timely suit, notwithstanding that the attorney may continue to represent the client on a range of matters and a direct suit against the attorney may interfere with the attorney-client relationship in all other such matters." (*Beal Bank, SSB v. Arter & Hadden, LLP, supra*, 42 Cal.4th at p. 514, fn. 8.) "The continuing representation tolling provision 'is not applicable when there is a continuing relationship between the client and the attorney involving only unrelated matters.' " (*Neilsen*, at p. 1053, quoting *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1528.)

The legislative purposes underlying section 340.6, subdivision (a)(2)'s continuous representation exception are to " "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to

represent the client until the statutory period has expired." ' ' " (*Beal Bank, SSB v. Arter & Hadden, LLP, supra*, 42 Cal.4th at p. 511.)

B. *Augusta's Evidence Raises Triable Issues of Fact as to the Scope of Keehn's Representation as the Augustas' Bankruptcy Counsel*

We agree Augusta's evidence raises triable issues of material fact as to the scope and nature of defendants' ongoing representation, and in turn application of section 340.6, subdivision (a)(2) tolling, precluding summary judgment on statute of limitations grounds. It is undisputed that defendants' bankruptcy work was ongoing and continued to July 2, 2008, only five months before Augusta filed the present action; Keehn in his moving summary judgment declaration and deposition admitted that "[t]he Keehn Defendants' representation of the Augustas ended on July 2, 2008 when the last legal service was performed in connection with the Bankruptcy Case."

Thus, up to July 2, 2008, Keehn and Augusta had " 'an ongoing relationship' " and that Keehn performed " 'activities in furtherance of the relationship.' " (*Jocer Enterprises, Inc. v. Price, supra*, 183 Cal.App.4th at p. 571, quoting *Nielsen v. Beck, supra*, 157 Cal.App.4th at p. 1050.) The question is the scope of Keehn's relationship; whether his allegedly deficient advice concerning Bankruptcy Code section 108's effect on the statute of limitations of Augusta's underlying malpractice claims was entirely unrelated to his role as the Augustas' general bankruptcy counsel. As stated, the limitations period is not tolled under section 340.6, subdivision (a)(2) by virtue of "a continuing relationship between the client and attorney involving only unrelated matters." (*Crouse v. Brobeck, Phleger & Harrison, supra*, 67 Cal.App.4th at p. 1528.)

Augusta's evidence permits a trier of fact to conclude that Keehn's role as general bankruptcy counsel extended to advice concerning Augusta's pursuit of his legal malpractice claims against securities arbitration counsel as well as other third party litigation claims. For example, Keehn discussed with Augusta how the creditor's committee would handle those claims. In opposition to the summary judgment motion, Augusta presented excerpts from Keehn's deposition in which Keehn recounted his conversations with Augusta: "We talked about—about pursuing the malpractice claims while the Chapter 11 was pending. And my conclusion and what I told him was that it would be a—it would not be something the committee would approve outside of a confirmed plan." And Keehn agreed that Augusta's underlying malpractice claims were part of the bankruptcy res. Keehn advised Augusta that as the debtor in possession, he controlled the timing and prosecution of the claims, which were the property of the estate, and that any recovery would have to be used in a manner consistent with the Bankruptcy Code. In his deposition, Keehn stated that he had not recommended that the Augustas file a Chapter 7 bankruptcy "[b]ecause [he] had formed the professional opinion that there would be more utility to [the Augustas] if they were able to retain their assets, pursue their litigation claims, and pay their creditors over time." Augusta followed Keehn's advice to use the Chapter 11 as a "vehicle for holding off his other creditors while he litigated his [claims against third parties]" Keehn's efforts extended to assisting the Augustas in retaining counsel for the malpractice claims, and providing supplemental briefing on Bankruptcy Code section 108 after the superior court tentatively

granted summary judgment in favor of Lindsay Arthur and his law firm. Keehn engaged in at least one lengthy meeting with Pickett and the Augustas, and his billing records indicate the meeting was "regarding issues relating to evaluation of claims against [securities arbitration counsel]; [and] development of overview strategy for enhancing prosecution value of same."

Keehn's summary judgment declaration indicates that his allegedly negligent advice pertained to the legal effect of the Augustas' bankruptcy on the limitations period for their malpractice action.⁶ Nor is there any dispute that Keehn assisted Augusta in filing the underlying malpractice action by drafting the initial complaint for Augusta to file as a pro per. Under the circumstances, a reasonable trier of fact could readily conclude that Keehn's role as bankruptcy counsel was not entirely unrelated but rather was connected to Augusta's underlying legal malpractice claims against securities arbitration counsel and that Keehn's assertedly negligent advice as to the Bankruptcy Code's impact on the statute of limitations on those claims was given in his capacity as the Augustas' bankruptcy counsel, which representation did not end until July 2, 2008. It

⁶ In his moving summary judgment declaration, Keehn recounts one of his discussions with attorney Pickett: "During at least one of those phone calls [with Pickett,] Mr. Pickett asked about what impact, if any, the Bankruptcy would have on the applicable statute of limitations. In response I explained to him the provisions of Section 108 of the Bankruptcy Code . . . extended by two years any applicable statute of limitations that had not expired prior to the filing of the Bankruptcy case for any action filed a [*sic*] debtor-in-possession (and that Augusta would have been a Debtor in Possession in his Chapter 11 case) or a bankruptcy trustee. At the request of Mr. Pickett, I wrote a July 3, 2002 letter ('the Letter') addressed to Augusta confirming the two year extension provided by section 108, and simultaneously provided a courtesy copy of that letter to Mr. Pickett."

is of no moment that Augusta may have learned or suspected that Keehn's advice was negligent; a client's awareness of the attorney's negligence and consultation of another attorney will not interrupt the tolling of the limitations period "so long as the client permits the attorney to continue representing the client regarding the specific subject matter in which the alleged negligence occurred." (*O'Neill v. Tichy* (1993) 19 Cal.App.4th 114, 121.)

Defendants' counter arguments do not persuade us otherwise. They first assert Augusta's opposition has a procedural flaw: that his separate statement does not contain facts that identify the specific subject matter of the representation as the general bankruptcy. We reject that assertion, as Augusta lodged his engagement letter with defendants, which states that defendants' representation was as "general bankruptcy counsel during the prosecution of the Chapter 11 reorganization case." A court is not required to grant or deny a motion for summary judgment simply because a party has not included a particular fact in its separate statement; we have discretion to consider his evidence, particularly where Augusta specifically referenced it in his opposing papers. (*Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal.App.4th 635, 652-653.) And, whether defendants' legal representation as general bankruptcy counsel was the "specific subject matter in which the wrongful act or omission occurred" (§ 340.6, subd. (a)(2)) is a conclusion, not a "material fact" that must be included in a separate statement. (§ 437c, subd. (b)(3).)

Defendants further argue Augusta did not submit admissible evidence showing Keehn provided legal services relating to the underlying legal malpractice action against the securities arbitration counsel in the one year before he filed the present lawsuit. According to defendants, their representation was exclusively as bankruptcy counsel, and the specific matter in which the alleged legal malpractice occurred "was not [Keehn's] general bankruptcy services, but his specific advice regarding the statute of limitations on Augusta's claims against his former NASD Arbitration Attorneys." However, as we have explained, that argument fails in view of the overlapping and related nature and scope of defendants' bankruptcy representation with Augusta's legal malpractice claims against securities counsel.

Finally, citing *Beal Bank, SSB v. Arter & Hadden, LLP, supra*, 42 Cal.4th 503, *Lockton, supra*, 184 Cal.App.4th 1051, *Foxborough, supra*, 26 Cal.App.4th 217, and other cases, defendants argue the section 340.6, subdivision (a)(2) tolling ended in November 2004 when Augusta retained attorney Stanford to represent him in the underlying legal malpractice action. But the question in *Beal Bank* was whether tolling would apply to an attorney's former law firm and partners after the attorney leaves the firm, taking an aggrieved client with him. (*Beal Bank*, at pp. 505, 512.) Other than for its general principles pertaining to continuous representation tolling, that holding has no application to the facts of this case, as Keehn continued to represent the Augustas as their bankruptcy counsel to a point within the one-year limitations period.

Nor does *Lockton* persuade us to hold differently. *Lockton* was decided in the context of a demurrer, and the question was whether the attorney defendants' representation of the plaintiff in a federal action also constituted representation of the plaintiff in his claims against other attorney defendants (the Morrison defendants). (*Lockton, supra*, 184 Cal.App.4th at p. 1065.) The plaintiff's pleadings (his earlier verified complaints) indicated the defendant attorneys had informed the plaintiff they would not name the Morrison defendants in the federal action, that he should retain new counsel to pursue those claims, and the action against the Morrison defendants should be filed in state court. (*Id.* at p. 1066.) The client followed that advice and hired new counsel to file the action. (*Ibid.*) The appellate court held the attorney defendants' tasks were completed and events inherent in the representation had occurred when (1) they told the client they would not sue the Morrison defendants and (2) the client retained new counsel, who filed the action in state court. (*Ibid.*) Importantly, there were no factual allegations that defendants advised or consulted with the client or his new counsel with respect to the Morrison action between the new counsel's retention and the trial court's order ending the Morrison action. (*Id.* at p. 1068.) Contrary to *Lockton*, Keehn did interact with Augusta's new attorney, attorney Stanford, in connection with the underlying legal malpractice action, taking remedial steps to minimize his apparent error by filing a declaration on Augusta's behalf in opposition to Arthur Chapman's summary judgment motion. Such actions on Keehn's part are an important consideration, as they further the purposes behind the tolling provision: permitting attempts to repair the

attorney-client relationship or allow the attorney to correct or minimize an apparent error. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618.)

And in *Foxborough, supra*, 26 Cal.App.4th 217, the court rejected a claim of tolling based on continuous representation because the undisputed evidence showed the clients had retained different counsel to prosecute the claims, and "the record conspicuously lack[ed] any indication of contact between [the attorney and the clients concerning the subject matter] in the following two years" (*Id.* at p. 229, fn. omitted.) The sole evidence of any continuing relationship between the attorney and clients was as an expert witness in the litigation, which did not toll the limitations period. (*Ibid.* [holding "the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff"].) Here, Keehn's representation did in fact continue after the Augustas hired attorney Stanford, and a reasonable trier of fact can conclude it was in the same matter—the bankruptcy—in which Keehn's assertedly negligent advice was given.

Because the evidence concerning Keehn's representation raises triable issues of material fact as to continuous representation tolling of section 340.6, we conclude summary judgment was improperly granted.

DISPOSITION

The judgment is reversed and the matter remanded with directions that the trial court enter a new order denying defendants' motion for summary judgment. Augusta shall recover his costs on appeal.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.