

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0192

EDWARD JACKSON

VERSUS

A. WAYNE STEWART & ASSOCIATES,  
A. WAYNE STEWART AND DAMON MILEY

Judgment Rendered: November 2, 2007

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Appealed from the  
Twenty-First Judicial District Court  
In and for the Parish of Livingston, Louisiana  
Trial Court Number 86,964  
Honorable M. Douglas Hughes, Judge

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Scott M. Emonet  
Baton Rouge, LA

Attorney for  
Plaintiff – Appellee  
Edward Jackson

DeVan Pardue  
Springfield, LA

Attorney for  
Defendant – Appellant  
Damon Miley

A. Wayne Stewart  
Livingston, LA

In Proper Person  
Defendant – Appellee

Jasper Brock  
Livingston, LA

In Proper Person  
Defendant – Appellee

Freeman R. Matthews  
New Orleans, LA

Attorney for  
Intervenor – Appellee  
Medical Center of Louisiana at  
New Orleans

\*\*\*\*\*

BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.



WELCH, J.

In this legal malpractice suit, the defendant, Damon Miley, appeals a judgment rendered in favor of the plaintiff, Edward Jackson, for damages totaling \$32,950.00, plus legal interest from the date of judicial demand. The judgment was rendered after a “trial” where neither the plaintiff nor any other witness appeared or testified. Instead, various documents were introduced and filed into evidence (without proper authentication) by an attorney, purportedly representing the plaintiff, but who had previously intervened in the suit after being discharged by the plaintiff in order to assert a privilege for his fee. Because the record before us does not contain a basis for the trial court’s factual findings on liability (or damages), we reverse the judgment of the trial court and render judgment dismissing, with prejudice, the plaintiff’s claims against the defendant, Damon Miley.

### I. FACTUAL AND PROCEDURAL HISTORY

On June 12, 1998, the plaintiff was involved in an automobile accident, and as a result of that accident, he was allegedly injured. The plaintiff initially retained attorney Francis A. Touchet<sup>1</sup> to represent him in an action for personal injuries; however, the plaintiff was subsequently referred to and entered into a contract for professional services for that matter with attorney Damon Miley of the law firm A. Wayne Stewart & Associates. Mr. Miley filed the petition for damages on July 27, 1999, more than one year from the date of the accident.<sup>2</sup>

On October 13, 1999, the plaintiff, represented by attorney Peyton P. Murphy of the Murphy Law Firm, commenced these proceedings by filing a petition for damages naming as defendants A. Wayne Stewart, Damon Miley, and

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<sup>1</sup> Mr. Touchet has since been disbarred. See **In Re Touchet**, 99-3125 (La. 2/4/00), 753 So.2d 820.

<sup>2</sup> This suit was filed in the 19<sup>th</sup> Judicial District Court, Parish of East Baton Rouge and bore the caption “*Edward Jackson versus U S Agencies Insurance Company, et al.*,” Number 462,933 Division H.

A. Wayne Stewart & Associates.<sup>3</sup> In this suit, the plaintiff alleged that he contracted with the defendants to handle his personal injury case arising from his June 12, 1998 motor vehicle accident, that the defendants filed that suit for damages fifteen days beyond the applicable prescriptive period,<sup>4</sup> and therefore, the defendants had acted negligently. As a result of their alleged negligence (or malpractice), the plaintiff contended that the defendants were liable to him for damages.

On August 18, 2000, Mr. Murphy filed a Petition of Intervention in the malpractice suit alleging that he was original counsel for the plaintiff; however, the plaintiff discharged him without cause and enlisted the services of other counsel for the purpose of continuing the malpractice suit. Therefore, he requested that he be allowed to intervene in the suit to assert the rights and privileges set forth in his employment contract with the plaintiff on any proceeds of any judgment or settlement paid to the plaintiff.

Thereafter, no other attorney ever enrolled as counsel of record on behalf of the plaintiff. However, the trial court conducted several status conferences between the parties during which attorney Scott M. Emonet, also of the Murphy Law Firm, represented the plaintiff. Additionally, Mr. Emonet filed several pre-trial memorandums, pre-trial “inserts,” and proposed jury instructions on behalf of the plaintiff into the record of these proceedings.

This matter was ultimately scheduled for a trial on the merits “beginning the week of APRIL 3, 2006, with final pre-trial conference to be held on MONDAY,

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<sup>3</sup> By supplemental and amending petition, Jasper S. Brock, IV, another attorney with the law firm of A. Wayne Stewart & Associates, was added as a defendant in this suit. On January 8, 2003, the plaintiff voluntarily dismissed his claims against Mr. Brock without prejudice.

<sup>4</sup> See La. C.C. arts. 3447 and 3492.

APRIL 3, 2006 at 1:00 p.m.”<sup>5</sup> After the trial court issued the notice of trial, Mr. Miley requested a continuance of the trial (because his counsel had a trial scheduled in a United States District Court) to which the plaintiff objected.<sup>6</sup> The record does not disclose the trial court’s ruling on the motion for continuance; however, the minutes of the trial court on April 3, 2006 make it evident that the trial court denied the motion.

On April 3, 2006, both the plaintiff and the defendant failed to personally appear for trial; however, Mr. Emonet did appear on behalf of the plaintiff. On that date, the minutes of the trial court in this matter reflect the following:

This matter appearing on the Civil Pre-Trial Docket this date. Personally present in Open Court were: counsel, Scott M. Emonet on behalf of the plaintiff. Mr. Emonet offered, introduced and filed into evidence Plaintiff Exhibit 1: Petition and contract. Mr. Emonet offered, introduced and filed into evidence Plaintiff Exhibit 2: emergency Medical Services Records. Mr. Emonet offered, introduced and filed into evidence Plaintiff Exhibit 3: Medical Records from Charity Hospital. Mr. Emonet offered, introduced and filed into evidence Plaintiff Exhibit 4: Acadian Ambulance Records. Mr. Emonet offered, introduced and filed into evidence Plaintiff Exhibit 5: Records from Earl K. Long Hospital. Mr. Emonet offered, introduced and filed into evidence Plaintiff Exhibit 6: Property Damage. Mr. Emonet offered, introduced and filed into evidence Plaintiff Exhibit 7: Accident Report. Mr. Emonet stated total medicals are \$17,033.86 and his total property damage is \$2,950.00. The court allowed counsels [*sic*] thirty (30) days to file memorand[a] to the court.

On May 1, 2006, Mr. Miley filed: a trial memorandum requesting an involuntary dismissal of the plaintiff’s claims since the plaintiff failed to personally appear at trial;<sup>7</sup> a motion (and memorandum in support) to disqualify the Murphy

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<sup>5</sup> On June 5, 2003, A. Wayne Stewart and A. Wayne Stewart & Associates filed a motion for summary judgment claiming that there were no genuine issues of material fact as to the lack of an attorney-client relationship between A. Wayne Stewart and A. Wayne Stewart & Associates and the plaintiff. In reasons for judgment dated June 23, 2004, the trial court granted the motion for summary judgment. Although the record before us does not contain a valid final judgment in accordance with the trial court’s written reasons in this regard, it appears that the only remaining defendant at the time of the trial on the merits was Mr. Miley.

<sup>6</sup> A copy of the motion for a continuance is not contained in the record; however, the plaintiff’s objection to the motion is contained therein.

<sup>7</sup> See La. C.C.P. art. 1672(A)(1).

Law Firm as counsel for plaintiff since the Murphy Law Firm had been discharged by the plaintiff and was an intervenor in the matter; objections to the exhibits introduced into evidence on behalf of the plaintiff by the Murphy Law Firm on the basis that the exhibits were not properly authenticated;<sup>8</sup> and a motion for sanctions and attorney fees against the Murphy Law Firm for their conduct in this case.

On May 9, 2006, the trial court issued written reasons for judgment, which provided as follows:

In this matter, plaintiff was involved in an automobile accident on June 12, 1998. There was an attorney-client relationship between plaintiff and defendant Miley. Suit was filed by Miley on behalf of plaintiff on July 27, 1999, after the prescriptive period. Therefore, since the prescriptive period had passed, negligent representation applies. Defendant Miley is found to be liable.

Thereafter, the trial court awarded the plaintiff damages as follows:

Medical expenses	\$16,505.22
Motor Cycle	\$ 2,950.00

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As to general damages, applying relevant case law to the facts in this case, the court awards \$50,000.00.

Further, plaintiff is awarded legal interest from the date of judicial demand as well as all court costs.

A written judgment in conformity with this ruling of the trial court was signed on May 30, 2006.<sup>9</sup> Mr. Miley timely moved for a new trial, again seeking the involuntary dismissal of the plaintiff's claims, the disqualification of the Murphy Law Firm as counsel for the plaintiff, and sanctions against the Murphy Law Firm and again, objecting to the evidence submitted by the Murphy Law Firm at trial. By judgment signed on September 30, 2006, the trial court granted Mr.

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<sup>8</sup> See La. C. E. arts. 901 and 902.

<sup>9</sup> The trial court's May 9, 2006 written reasons and the May 30, 2006 judgment are silent as to the defendant's motion for involuntary dismissal, objections to the evidence, motion to disqualify the Murphy Law Firm, and motion for sanctions. When a judgment is silent as to a claim or demand, it is presumed that the trier of fact denied the relief sought. See **Caro v. Caro**, 95-0173, p. 7 (La. App. 1<sup>st</sup> Cir. 10/6/95), 671 So.2d 516, 520. Accordingly, we conclude that the trial court denied such requests.

Miley's motion for new trial.

In subsequent reasons for judgment dated October 25, 2006, the trial court modified its previous damage award for medical expenses to reflect an award of \$10,000.00<sup>10</sup> and modified its previous general damage award to reflect an award of \$20,000.00. A written judgment in conformity with the trial court's ruling in this regard was signed on November 28, 2006, and it is from this judgment that Mr. Miley has appealed.<sup>11</sup>

## II. LAW AND DISCUSSION

To establish a claim for legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) negligent representation by the attorney; and (3) loss caused by that negligence. **Costello v. Hardy**, 2003-1146, p. 9 (La. 1/21/04), 864 So.2d 129, 138. The plaintiff bears the burden of proof of each of these elements. **Gibson v. Herman, Herman, Katz, & Cotlar, L.L.P.**, 2004-2204, p. 11 (La. App. 4<sup>th</sup> Cir. 2/15/06), 927 So.2d 1178, 1184, writ denied, 2006-0615 (La. 5/26/06), 930 So.2d 27. Failure to prove any one of these elements is fatal to the claim. See Costello, 2003-1146 pp. 9-12, 864 So.2d 129, 138-139.

In this case, the plaintiff's claims against the defendant were based solely on the following uncertified documents: a copy of a Uniform Motor Vehicle Traffic Accident Report for a motor vehicle accident on June 12, 1998, involving the plaintiff; a copy of a contract for professional services between the plaintiff and A. Wayne Stewart & Associates, by Mr. Miley; a copy of a petition for damages filed by Mr. Miley on behalf of the plaintiff on July 27, 1999, in the 19<sup>th</sup> Judicial District

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<sup>10</sup> It appears that some of the medical expenses originally sought by the plaintiff at trial and thereafter awarded by the trial court included expenses for the delivery of a baby (the plaintiff is a male) and expenses pre-dating the June 12, 1998 accident, and therefore, as the trial court subsequently concluded, were "not applicable to this case."

<sup>11</sup> Although the trial court specifically denied Mr. Miley's motions for involuntary dismissal and for sanctions in its October 25, 2006 written reasons, the November 28, 2006 judgment is again silent as to the defendant's motion for involuntary dismissal, objections to the evidence, motion to disqualify the Murphy Law Firm, and motion for sanctions, and therefore we again conclude that the trial court denied such requests. See footnote 9.

Court; and copies of medical bills and records for the plaintiff.<sup>12</sup>

We find this evidence insufficient to prove the plaintiff's claim for malpractice against Mr. Miley. While the plaintiff may have arguably established an attorney-client relationship between the plaintiff and Mr. Miley, in order to succeed in his claim for malpractice, the plaintiff was also required to prove that Mr. Miley was negligent and that this negligence caused the plaintiff a loss. In other words, the plaintiff was still required to prove that Mr. Miley's action in filing the petition for damages on July 27, 1999 caused the plaintiff a loss of the opportunity to assert his claims for personal injuries arising from the June 12, 1998 motor vehicle accident. Based on the evidence in the record, we find that the plaintiff failed to do so.

Although on the face of the petition for damages, it appears that Mr. Miley may have filed suit beyond the prescriptive period allowed for the plaintiff's claims, see La. C.C. arts. 3447 and 3492, there is no evidence in this record demonstrating that the plaintiff *actually* lost the opportunity to assert his claims against the defendants in that matter. The record does not contain a judgment dismissing the plaintiff's claims in his personal injury suit on the basis of prescription (or otherwise). And, neither the plaintiff nor any other witness testified at trial that the plaintiff's suit for personal injuries had been dismissed or

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<sup>12</sup> In Mr. Miley's fourth assignment of error, he contends that the trial court erroneously admitted these exhibits into evidence because they were not properly authenticated. We agree. "Authentication" is a process whereby something is shown to be what it purports to be. La. C.E. art. 901; **Newpark Resources, Inc. v. Marsh & McLennan of Louisiana, Inc.**, 96-0935, p. 5 (La. App. 1<sup>st</sup> Cir. 2/14/97), 691 So.2d 208, 211, writ denied, 97-0691 (La. 4/25/97), 692 So.2d 1094. Because authentication of evidence is a condition precedent to admissibility, an exhibit that is not authenticated does not constitute competent evidence. La. C.E. art. 901(A); **Price v. Roy O. Martin Lumber Co.**, 2004-0227, p. 8 (La. App. 1<sup>st</sup> Cir. 4/27/05), 915 So.2d 816, 822, writ denied, 2005-1390 (La. 1/27/06), 922 So.2d 543. The documents submitted by Mr. Emonet in this case did not qualify as self-authenticating documents pursuant to La. C.E. arts 902, 904, or 905. Thus, the plaintiff was required to present evidence sufficient to support a finding that the documents were what the plaintiff claimed they were. See La. C.E. art. 901(A). Louisiana Code of Evidence article 901(B) includes a non-exclusive list of methods that may be utilized to authenticate evidence. The record before us does not contain any evidence offered by the plaintiff to authenticate the documents submitted into evidence. Thus, we find that the documents offered by Mr. Emonet at trial were not properly authenticated. However, notwithstanding this error, we find reversal of the trial court's judgment warranted on other grounds as discussed herein.

that a defendant in that suit ever raised the issue of prescription.<sup>13</sup> Thus, the plaintiff's failure to prove this essential element was fatal to his claim for malpractice against Mr. Miley. Because the trial court concluded otherwise, and determined that Mr. Miley was liable to the plaintiff for negligent representation or legal malpractice, we find that its judgment was clearly wrong.<sup>14</sup>

Moreover, absent a factual basis for the imposition of liability, it follows that the trial court also erred in awarding damages in favor of the plaintiff. Therefore, we hereby reverse the November 28, 2006 judgment of the trial court and dismiss the plaintiff's claims against Mr. Miley with prejudice.<sup>15</sup>

### **III. CONCLUSION**

For the above and foregoing reasons, the November 28, 2006 judgment of the trial court is hereby reversed, and judgment is rendered dismissing the plaintiff's claims against Mr. Miley with prejudice.

All costs of this appeal are assessed to the plaintiff/appellee, Edward Jackson.

**REVERSED AND RENDERED.**

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<sup>13</sup> See La. C.C.P. art. 927; La. C.C. art. 3452.

<sup>14</sup> A trial court's factual determinations are reviewed by an appellate court under the manifest error-clearly wrong standard. See *Stobart v. State, DOTD*, 617 So.2d 880, 882 (La. 1993).

<sup>15</sup> Because of our disposition herein, we pretermit discussion of the Mr. Miley's remaining assignments of error.