APPENDIX A

Opinion issued July 28, 2020

By Gordon Goodman Justice
Panel consists of Justices Goodman,
Landau, and Hightower.

In The Court of Appeals
For The
First District of Texas
No. 01-19-00321

Wendy Meigs,
Plaintiff-Appellant-Petitioner,
v.
Todd Zucker and Bohreer & Zucker, LLC
Defendants-Appellees-Respondents.

On Appeal from the 13rd District Court
Harris County, Texas
Trial Court Case No. 2017-73029
Honorable Judy McFarland

Memorandum Opinion

This is an appeal from a no-evidence summary judgment in a legal malpractice action. Wendy Meigs retained attorney Todd Zucker and his law firm, Bohreer & Zucker LLP (collectively "Zucker" unless otherwise indicated) to represent her in a shareholder oppression suit against her former business partner. The case went to mediation, and the parties settled. But Wendy later requested that Zucker seek a court order

voiding the settlement agreement, claiming that she had been drugged at the mediation and therefore lacked the capacity to enter into the agreement when it was formed. Zucker refused and ultimately withdrew as Wendy's counsel. Wendy then sued Zucker for malpractice, alleging that he allowed her former business partner to secretly drug her at the mediation and then coerced her into signing the settlement agreement.

Zucker moved for no-evidence summary judgment, arguing, among other things, that no evidence of the elements of breach, causation, or damages existed, as Wendy had failed to designate a testifying expert witness or produce expert testimony in support of her claim. See Starwood Mgmt., LLC v. Swaim, 530 S.W.3d 673, 679 (Tex. 2017) (per curiam) ("Generally, in a legal malpractice case, expert witness testimony is required to rebut a defendant's motion for summary judgment."). Wendy requested a continuance and an extension of her deadline for designating expert witnesses, which the trial court granted. But Wendy did not designate an expert by the extended deadline, and Zucker filed an amended no- evidence motion for summary judgment, which reiterated the arguments made in the first. Wendy did not file a response. After the submission date and without holding an oral hearing, the trial court granted Zucker's amended no-evidence motion and dismissed Wendy's claims with prejudice.

On appeal, Wendy argues that the trial court erred in granting Zucker's amended no-evidence motion because (1) Wendy was never served with the motion or notice of submission; (2) the trial court failed to permit adequate time for discovery; and (3) Wendy produced, in her response to Zucker's original no- evidence motion, summary judgment evidence that raised a genuine issue of material fact as to each element challenged in Zucker's amended no-evidence motion.

We hold that (1) the record reflects Wendy was properly served; (2) the trial court permitted adequate time for discovery; and (3) Wendy failed to produce summary judgment evidence raising a genuine issue of material fact as to causation and damages because she failed to produce expert testimony, which was necessary to raise fact issues as to those elements.

Therefore, we affirm.

Background is Grossly Inaccurate and Removed and Evolved from Respondents Misrepresentations without Regard to Petitioner's files.

After the trial court granted his no-evidence motion, Zucker filed a notice of nonsuit of his counterclaim. The trial court then ordered that Zucker's counterclaim be nonsuited without prejudice and declared that all interlocutory orders had become final.

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On February 26, 2019, Wendy filed a verified motion for new trial. Wendy argued that the trial court erred in granting Zucker's no-evidence motion because she was never served with the motion or notice of submission. Wendy stated that she "suspected" the electronic filing system had been experiencing "problems" when Zucker filed the motion and notice, which prevented her from receiving electronic service and filing a response.

On April 12, 2019, Zucker filed a response to Wendy's motion for new trial, arguing that the evidence proved Wendy was properly served and noticed. Zucker explained that on November 21, 2018, he electronically filed his motion, a proposed order, and a notice of submission for hearing in accordance with Rule 21a. Zucker attached to his response a copy of the filing record with the Harris County Civil Court e-filing system, which reflected that Wendy was e-served on November 21, 2018. Zucker asserted that this evidence conclusively proved Wendy was served in accordance with Rule 21a. Zucker noted that Wendy was e-filing documents before she retained counsel; he attached e-filing service documents reflecting that Wendy had e-filed multiple documents in October 2018. Zucker asserted that the documents showed Wendy's email address was on file with the e-filing manager and thus constituted further evidence of proper service.

On April 17, 2019, the trial court denied Wendy's motion for new trial. Wendy appeals

No-Evidence Summary Judgment

On appeal, Wendy contends that the trial court erred in granting Zucker's no- evidence motion for summary judgment because: (1) she was never served with the motion or notice of its submission; (2) the trial court failed to permit adequate time for discovery; and (3) she produced, in her response to Zucker's original no-evidence motion, summary judgment evidence raising a genuine issue of material fact as to each challenged element of her malpractice claim.

A. **Standard of review**

After adequate time for discovery, a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). The motion must state the elements as to which there is no evidence. Id. Once the party seeking the no-evidence summary judgment files a proper motion, the respondent must produce summary judgment evidence that raises a genuine issue of material fact on the challenged elements. See id.; Roventini v. Ocular Scis., Inc., 111 S.W.3d 719, 722 (Tex. App.—Houston [1st Dist.] 2003, nopet.). If expert testimony is necessary to prove a challenged element at trial, the respondent must produce expert testimony to raise a genuine issue of material fact as to that element. See Praytor v. Ford Motor Co., 97 S.W.3d 237, 241–43 (Tex. App.—Houston [14th Dist.] 2002, no

pet.) (affirming no-evidence summary judgment dismissing negligence and products liability claims when nonmovant was required but failed to present expert testimony to establish causation). If the respondent fails to do so, the trial court "must" grant the motion. TEX. R. CIV. P. 166a(i); Roventini, 111 S.W.3d at 722.We review a trial court's no-evidence summary judgment de novo. Swaim, 530 S.W.3d at 678. In reviewing a no-evidence summary judgment, we consider the evidence in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. Gonzalez v. Ramirez, 463 S.W.3d 499, 504 (Tex. 2015); see City of Keller v. Wilson,
168 S.W.3d 802, 827 (Tex. 2005). We will affirm the no-evidence summary judgment if (1) there is no evidence on the challenged element, (2) the evidence offered to prove the challenged element is no more than a scintilla, (3) the evidence establishes the opposite of the challenged element, or (4) the court is barred by law or the rules of evidence from considering the only evidence offered to prove thechallenged element. Sw. Bell Tel., L.P. v. Emmett, 459 S.W.3d 578, 589 (Tex. 2015); City of Keller, 168 S.W.3d at 810.

B. **Analysis**

1. The record shows Wendy was properly served with the motion and notice of its

submission.

Wendy argues that the trial court erred in granting Zucker's amended no- evidence motion for summary judgment because she was never served with the motion or notice of its submission. Here, the record reflects that Zucker's amended no-evidence motion and the notice of its submission both contained certificates of service certifying that they were electronically served on Wendy in accordance with Rule 21a. These certificates raise a rebuttable presumption that the motion and notice were received by Wendy. See TEX. R. CIV. P. 21a(e) ("A certificate [of service] by a party or an attorney of record . . . showing service of a notice shall be prima facie evidence of the fact of service."); Roob v. Von Beregshasy, 866 S.W.2d 765, 766 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("A certificate of service creates a rebuttable presumption that the notice was served."); see also Cliff v. Huggins, 724 S.W.2d 778, 780 (Tex. 1987) ("Rule 21a sets up a presumption that when notice of trial setting properly addressed and postage prepaid is mailed, that the notice was duly received by the addressee.").Wendy contends the presumption has been rebutted by two pieces of evidence of nonreceipt: (1) her verified motion for new trial, in which she states that she never received the motion or notice, but had received other filings, and therefore "suspected" that the Harris County Civil Court e-filing system had been experiencing

"problems" when Zucker filed the motion and notice, which prevented the documents from being delivered to her; and (2) the original clerk's record, which does not include a copy of the notice of submission and, according, to Wendy, therefore supports her theory that she never received the motion or notice due to technical problems with the e-filing system. We disagree. First, in response to Wendy's motion for new trial, Zucker produced documentary evidence showing that the motion and notice were e-filed and delivered to Wendy's email address. This evidence included:

- copies of Harris County District Clerk records reflecting that Zucker's motion and notice were e-filed on November 21, 2018, at 10:43 am and accepted later that day at 11:06 am, which show that e-service was completed as of that time, see TEX. R. CIV. P. 21a(b)(3) ("Electronic service is complete on transmission of the document to the serving party's electronic filing service provider."); Brandon v. Rudisel, 586 S.W.3d 94, 102 (Tex. App.—Houston [14th Dist.] 2019, no pet.) ("The rule does not contemplate that electronic service is somehow incomplete when a party experiences computer or email problems.");
- a copy of the email sent to Wendy's email address by EFileTexas.gov and the link to the email identifying the filed documents, which show that Wendy received the motion and notice on the date they were filed;

• copies of other emails showing Wendy had e-filed multiple documents in October 2018 (before she retained counsel) and that her email address was thus on file with the e-filing manager, see TEX. R. CIV. P. 21a(a)(1) ("A document filed electronically under Rule 21 must be served electronically through the electronic filing manager if the email address of the party or attorney to be served is on file with the electronic filing manager."); and

• a copy of the document list for this case on the Harris County District Clerk website reflecting that Zucker's motion and notice were filed on November 21, 2018.

Second, regardless whether Zucker produced evidence rebutting Wendy's testimony, the trial court, as factfinder, could have disbelieved Wendy's testimony that she never received the motion or notice.

Third, Wendy's additional testimony that she "suspected" the e-filing system was experiencing "problems" when Zucker filed the motion and notice was not based on personal knowledge or other competent evidence and is thus conclusory and no evidence of the fact asserted.

Fourth, the notice of submission's absence from the original clerk's record does not support Wendy's claim that she never received the notice. The notice was not among those items that must be included in the clerk's record. See TEX. R. APP.

P. 34.5(a). So if Wendy wanted the notice to be included, she had to "specifically" request it.

designation, such as one for 'all papers filed in the case.'"). Thus, the original clerk's record did not include the notice because Wendy did not request it. The notice was, however, included in a supplemental clerk's record requested by Zucker.

We hold that Wendy has failed to rebut the presumption that she received Zucker's motion and notice.

2. The trial court permitted an adequate time for discovery.

We now consider whether the trial court permitted adequate time for discovery. Zucker filed his amended no-evidence motion for summary judgment on November 18, 2018, and set it for submission on December 17, 2018. See McInnis v. Mallia, 261 S.W.3d 197, 200 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("The pertinent date for [determining whether trial court permitted adequate time] is the final date on which the no-evidence motion is presented to the trial court for ruling."). By the date of submission:

- the case had been on file for over one year;
- the expert-designation and discovery deadlines in the original docket control order had passed;
- Zucker had already filed an original no-evidence motion emphasizing Wendy's failure to designate any expert witnesses by the original deadline; and

• Wendy had already filed a response to Zucker's original no-evidence motion, obtained a continuance of the hearing and extensions of the deadlines for designating expert witnesses and discovery, and served—and received documents responsive to—over 30 pages of written discovery.

Wendy nevertheless contends that the trial court failed to permit adequate time for discovery. More specifically, Wendy contends that the trial court should have refrained from ruling on Zucker's amended no-evidence motion until Wendy's counsel, who was retained less than three weeks before the motion's date of submission, had been afforded additional time to familiarize herself with the case, designate an expert witness, and file a response to the motion. We disagree for two reasons.

First, after Wendy retained counsel, she moved for neither a continuance of Zucker's amended no-evidence motion nor an extension of the deadline for designating expert witnesses. See Cardenas v. Bilfinger TEPSCO, Inc., 527 S.W.3d 391, 403 (Tex. App.—Houston [1st Dist.] 2017, no pet.) ("When a party contends that he has not had an adequate opportunity for discovery before the consideration of a no-evidence summary judgment, he 'must file either an affidavit explaining the need for further discovery or a verified motion for continuance.'" (quoting Tenneco Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 647 (Tex. 1996))). Because Wendy failed to request this relief, the trial court did not err in failing to grant it.

Second, even if Wendy had moved for a continuance and extension, the trial court had discretion to deny the requests since Wendy had already been afforded adequate time to designate an expert witness and respond to Zucker's no-evidence motion, as the procedural history just discussed reflects.

We hold that Zucker moved for no-evidence summary judgment after adequate time for discovery.

3. Wendy failed to produce summary judgment evidence raising a genuine issue of material fact

Finally, we consider whether Wendy produced summary judgment evidence raising a genuine issue of material fact.

In his amended no-evidence motion, Zucker asserted that no evidence existed for three essential elements of Wendy's legal malpractice claim: breach, causation, and damages. See Swaim, 530 S.W.3d at 678 (stating elements). And Zucker emphasized, once again, that even though Wendy could not prove these elements without expert testimony, she still had not designated an expert witness. Thus, Zucker filed a proper no-evidence motion.

Because Zucker filed a proper motion, the burden shifted to Wendy to produce summary judgment evidence raising a genuine issue of material fact on each challenged element. TEX. R. CIV. P. 166a(i); Roventini, 111 S.W.3d at 722. But Wendy never filed a response to Zucker's

amended no-evidence motion. When, as here, the respondent fails to file a response to a motion that states sufficient grounds for a final summary judgment, the trial court may grant the motion and dismiss the respondent's claims. See Roventini, 111 S.W.3d at 722 ("Under rule 166a(i), therefore, as opposed to rule 166a(c), which governs traditional summary judgments, the trial court may render a summary judgment by default for lack of a response by the respondent, provided the movant's motion warranted rendition of a final summary judgment based on lack of evidence to support the respondent's claim or defense.").

Wendy nevertheless argues that the trial court erred in granting Zucker's amended no-evidence motion because the evidence attached to her response to Zucker's original no-evidence motion raised fact issues precluding summary judgment. Assuming without deciding this evidence was properly before the trial court, it would not have precluded summary judgment because it did not raise a genuine issue of material fact as to the element of causation. See Swaim, 530 S.W.3d at 679 ("And when appellate courts review no-evidence summary judgments, review is of 'the evidence presented by the motion and response.'" (quoting Timpte Indus., Inc. v. Gish, 286 S.W.3d 306, 310 (Tex. 2009))).

In a legal malpractice suit, the plaintiff must generally produce expert testimony to rebut a motion for summary judgment challenging the

element of proximate cause. Swaim, 530 S.W.3d at 679. Proximate cause includes cause in fact, which is tested in part by the but-for test: would the harm alleged have occurred absent the attorney's alleged breach? Id. at 678–79. "This is a suit-within-a-suit inquiry—the actual result with the alleged misconduct or omission is compared to a hypothetical result the plaintiff claims would have occurred absent the misconduct or omission." Id. at 679. Whether the attorney's alleged negligence caused the plaintiff's alleged damages thus involves matters beyond jurors' common understanding since most jurors are not lawyers. Rogers v. Zanetti, 518 S.W.3d 504, 510 (Tex. 2017). As a result, expert testimony is generally required to prove causation in legal malpractice suit. Id.; see also Elizondo v. Krist, 415 S.W.3d 259,
270 (Tex. 2013) (in legal malpractice action based on allegedly inadequate settlement, proof of damages requires expert testimony because establishing damages requires knowledge beyond that of most laypersons); Saulsberry v. Ross, 485 S.W.3d 35, 45 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (holding expert testimony was required to prove settlement negotiations were proximate cause of damages to former client); Walker v. Morgan, No. 09-08-00362-CV, 2009 WL 3763779, at *5 (Tex. App.—Beaumont Nov. 12, 2009, no pet.) (mem. op.) (affirming no-evidence summary judgment of malpractice claim based on early settlement of lawsuit when

client failed to produce expert testimony that he would have obtained greater recovery but for his attorney's conduct). And, as Wendy concedes in her brief, this case is no exception.

Because Wendy failed to designate an expert witness or produce expert testimony in response to Zucker's no-evidence motion, she failed to raise a genuine issue of material fact as to the element of causation.(1)

Conclusion

We affirm.

Gordon Goodman Justice

Panel consists of Justices Goodman, Landau, and Hightower.

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1 We note that Wendy's live petition, in addition to claims for legal malpractice, asserted related claims for assault, fraud, conspiracy, and "forgery." Like her malpractice claims, each of these claims required expert testimony on the element

APPENDIX B
Motion for Rehearing
Filed 12/07/2020

In The Court of Appeals
For The
First District of Texas
No. 01-19-00321

Wendy Meigs,
Plaintiff-Appellant-Petitioner,
v.
Todd Zucker and Bohreer & Zucker, LLC
Defendants-Appellees-Respondents.

On Appeal from the 13rd District Court
Harris County, Texas
Trial Court Case No. 2017-73029
Honorable Judy McFarland

After returning the brief to adjust for compliance, the Court Clerk failed to allow "copying the envelope" as required per guidelines, forcing the eFile system to reassign a number and giving the appearance of not filing. Although removed from the docket for correction, without the clerk allowing the copying of the envelope, the date and time cannot be retained. Clerk allowed multiple correction submissions thereafter before dismissing the motion of 3/25/2021 for keeping the timely file hidden. .
Note: this Motion was resubmitted according to the requests by the court clerk

APPENDIX C
Motion to Reinstate
Filed 04/21/2021

In The Court of Appeals
For The
First District of Texas
No. 01-19-00321

Wendy Meigs,
Plaintiff-Appellant-Petitioner,
v.
Todd Zucker and Bohreer & Zucker, LLC
Defendants-Appellees-Respondents.

On Appeal from the 13rd District Court
Harris County, Texas
Trial Court Case No. 2017-73029
Honorable Judy McFarland

Various inconsistencies in regards to the handling of the docketing of motions noted including intentional withholding, date errors in appearance of document on docket. And addressed the earlier letter to the court regarding the fact that the 12.07.20 filing was timely with proof of submission and proof of this clerk rejecting for correction. The court clerk failed to correct the errors of eFile manipulation indicating apparent collusion to assist in the dismissing of the case in bias for Respondent.

APPENDIX D
Order Denying Motion for New Trial -Dismissal
Filed 04/17/2019

In The 133rd District Court
Harris County, Texas
Trial Court Case No. 2017-73029

Honorable Judge Judy McFarland

Wendy Meigs,
Plaintiff-Appellant-Petitioner,
v.
Todd Zucker and Bohreer & Zucker, LLC
Defendants-Appellees-Respondents.

Case dismissed by granting the Respondent's "amended" version of summary judgment; although, the "amended" summary judgment could not be found by Petitioner and eventually by temporary lawyer, Cheryl Jahani, typical leniency was not granted by McFarland.

APPENDIX E

Petition for Review
Denied 10/29/2021 by Mail

In the Supreme Court of Texas
Case no. 21-0545

In The Court of Appeals
For The
First District of Texas
No. 01-19-00321

Wendy Meigs,
Plaintiff-Appellant-Petitioner,
v.
Todd Zucker and Bohreer & Zucker, LLC
Defendants-Appellees-Respondents.

On Appeal from the 13rd District Court
Harris County, Texas
Trial Court Case No. 2017-73029
Honorable Judy McFarland

MAILED NOTICE OF DISMISSAL
RE: Case No. 21-0545 DATE: 10/29/2021
COA #: 01-19-00321-CV TC#: 2017-73029
STYLE: MEIGS v. ZUCKER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX F

Basis for Timely Petition for Writ of Certiorari
Motion for Rehearing
Denied 12/17/2021 by Mail

In the Supreme Court of Texas
Case no. 21-0545

In The Court of Appeals
For The
First District of Texas
No. 01-19-00321

Wendy Meigs,
Plaintiff-Appellant-Petitioner,
v.
Todd Zucker and Bohreer & Zucker, LLC
Defendants-Appellees-Respondents.

On Appeal from the 13rd District Court
Harris County, Texas
Trial Court Case No. 2017-73029
Honorable Judy McFarland

MAILED NOTICE OF DISMISSAL:

RE: Case No. 21-0545 DATE: 12/17/2021
COA #: 01-19-00321-CV TC#: 2017-73029
STYLE: MEIGS v. ZUCKER
Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.