IN THE COURT OF APPEALS OF IOWA

No. 2-290 / 11-0552
Filed June 27, 2012

KLEVER BELISARIO MIRANDA,
NANCY CLOTILDE CAMPOVERDE,
and CESAR MIRANDA,
Plaintiffs-Appellants,

vs.

MICHAEL H. SAID, LAW OFFICES
OF MICHAEL H. SAID, P.C.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Plaintiffs appeal following a trial on their legal malpractice claim against defendants arising from services the defendants provided in the plaintiffs' immigration matter. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Angela L. Campbell of Dickey & Campbell Law Firm, PLC, Des Moines, for appellants.

Kevin J. Driscoll and Eric G. Hoch of Finley, Alt, Smith, Scharnberg, Craig, Hilmes & Gaffney, P.C., Des Moines, for appellees.

Heard by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

MULLINS, J.

Plaintiffs, Klever Miranda, Nancy Campoverde, and Cesar Miranda, appeal following a jury trial on their legal malpractice claim against defendants, Michael Said and Law Offices of Michael H. Said, P.C. (Said). Plaintiffs assert the district court erred in (1) refusing to submit their claim of mental suffering damages to the jury; (2) dismissing their claim for punitive damages; (3) refusing to submit to the jury their claim for lost-chance damages; (4) dismissing Cesar Miranda as a plaintiff; and (5) denying part of their motion for sanctions, costs, and attorney fees. We affirm in part, reverse in part, and remand.

I. BACKGROUND AND PROCEEDINGS.

Klever Miranda came to the U.S. without proper authorization from Ecuador in 1989, followed by his wife, Nancy Campoverde in 1992. Cesar Miranda and his sister, Alba, joined their parents in the U.S. later.[1] Klever sought legal assistance to help with his immigration status, but was unsuccessful.[2] Klever later sought the assistance of Said in 2002 to have his previous immigration case reopened and his order of deportation suspended. This attempt was once again unsuccessful, although Klever remained in the U.S. Klever, Nancy, and Cesar sought Said's assistance again in 2005, after Cesar had gotten married to a U.S. citizen and his citizenship application was pending. The family hoped Cesar's new immigration status might provide Klever and

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[1] Klever and Nancy also had another child while they were in the U.S., Rolando, whose birth in the U.S. gave him automatic citizenship.

[2] It was alleged at trial that previous attorneys employed by Klever rendered ineffective assistance in representing Klever in asylum petitions and appeals. As this information does not affect the outcome of the current appeal, we will not detail the long and complex journey Klever's case has taken through the immigration system.

Nancy with additional immigration options. Cesar signed an attorney fee contract with Said for Said to represent his parents in the immigration matter. The contract provided the fees and expenses would total $11,000. Cesar signed the contract, but Klever and Nancy paid the attorney fees.

Said advised Klever and Nancy that they could file immigration forms after Cesar became a citizen in which Cesar would sponsor them so that they could obtain lawful permanent resident status and eventually citizenship. However, in order to take advantage of this opportunity, Said advised Klever and Nancy had to leave the U.S. as the forms had to be presented at the consulate in their native country of Ecuador. Once they were in Ecuador, Said stated they would then have to present waiver forms to immigration officials, which would list Cesar as a "qualifying relative," in order to gain re-entry to the U.S. Based on his past experience, Said told Klever and Nancy he believed they had a good chance of success in re-entering the U.S. with the waiver form. Cesar, who was present at the meeting and often interpreted for his parents, remembers Said saying they had a "99% chance of success," and that the only way the waivers could be denied is if Cesar was not their son or they had committed crimes in Ecuador or the U.S.

Based on Said's advice, Klever, who was still subject to a deportation order, voluntarily left the U.S. in 2005 to await the time when Cesar would become a citizen. The paperwork was prepared by Said, and when Cesar became a citizen in June of 2006, forms were filed with Department of Homeland Security to show Cesar's relationship to Klever and Nancy. In 2007, Nancy left

the U.S. with the waiver packets in hand in order to attend an immigration interview at the consulate in Ecuador with her husband. Neither Nancy nor Klever looked at the waiver packets before they reached the consulate for their interview. During the interview the couple discovered that Cesar was not in fact a "qualifying relative" under the law for the waiver, and they would not be able to gain re-entry to the U.S. In addition, because Klever and Nancy had been in the U.S. without proper authorization, their departure from the U.S. triggered a mandatory ten-year bar to re-entry. Klever and Nancy were then stranded in Ecuador, separated from their children in the U.S. for ten years.

Cesar, along with his parents, Klever and Nancy, filed a legal malpractice lawsuit against Said. Said maintained that while he was aware Cesar did not meet the technical definition of a "qualifying relative" under the statute, he believed the consulate had discretion to grant the waivers as he had been successful in the past in ten to fifteen other cases in obtaining the waiver using a client's child as a "qualifying relative." Plaintiffs filed discovery requests and then a motion to compel asking that Said be required to produce proof of these ten to fifteen cases where Said had named the client's child as a "qualifying relative." Despite the court's order, Said never produced the records and was subject to a spoliation instruction at trial.

The case proceeded to a jury trial on November 15, 2010.[3] Plaintiffs' expert, Laura Lichter, an attorney practicing immigration law in Colorado with

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[3] Because Klever and Nancy are subject to a ten-year bar to re-entry, they were not able to attend the trial in person. They sought permission to appear via telephone, but

clients from Central and South America, testified the waiver form prepared by Said had a zero percent chance of success at the consulate as the officials had no discretion with respect to who could be a "qualifying relative." She testified that both Klever and Nancy had other immigration options that would not have required them to leave the country. In addition, she testified Klever had an "excellent" chance of success and Nancy a fifty percent chance of success to obtain lawful residency. In her opinion, the $11,000 paid for Said's work was a complete waste of money, and based on how Said filed the paperwork, the consulate could have investigated Klever and Nancy for fraud.

Said's own experts testified that filing the immigration forms using Cesar as the "qualifying relative" fell below the standard of care. Said finally stipulated during trial that:

> [D]efendants' use of adult child Cesar Miranda as the qualifying relative for an I-601 application for waiver of inadmissibility fell below the standard of care even though defendants believed at the time the use of an adult child as a qualifying relative for an I-601 application for waiver of inadmissibility was permissible. Defendants dispute that they have caused any damage to plaintiffs or that plaintiffs have sustained any damages.

Prior to the submission of the case to the jury, Said made a motion for a directed verdict asserting plaintiffs failed to prove causation and damages. With respect to damages, Said asserted plaintiffs were not entitled to emotional distress damages, or lost-chance damages. He claimed plaintiffs failed to prove entitlement to punitive damages and had no right to make a claim for the return of the legal fees they paid to him for the work performed. The court granted the

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this request was denied by the district court when defendants objected. This ruling was not appealed.

directed verdict with respect to the claims for emotional distress damages, lost-change damages, and punitive damages. The court denied the motion with respect to the proximate cause and the legal fee damages. The court dismissed Cesar from the lawsuit as the only damages to be submitted to the jury were the legal fees paid to Said, and the evidence established Klever and Nancy paid these fees, not Cesar.

The case was submitted to the jury, and the plaintiffs made an offer of proof on their emotional distress damages. The jury returned a verdict on November 19, 2010, awarding the plaintiffs $12,500: $11,000 for the fees paid to Said for the representation of the plaintiffs beginning in 2005 and $1500 for part of the fees paid to Said for the representation of Klever beginning in 2002. Plaintiffs filed a motion for a new trial objecting to the district court's decision to grant Said's directed verdict motion on the issues of punitive damages, emotional distress damages, lost-chance damages, along with its decision to dismiss Cesar from the lawsuit. The district court denied plaintiffs' motion for a new trial.

Plaintiffs also filed a motion for sanctions and to tax costs and attorney fees, seeking the court to order Said to pay (1) the attorney fees plaintiffs expended in prosecuting the motion to compel, (2) the witness fees and expenses of plaintiffs' expert, (3) the cost of the depositions and counsel's travel expenses to the depositions, and (4) plaintiffs' attorney fees in prosecuting the malpractice action. The district court denied all requests except for a reduced amount of witness fees associated with plaintiffs' expert's testimony and the

attorney fees associated with the motion to compel. From these rulings, plaintiffs appeal.

II. SCOPE OF REVIEW.

Our review of the district court's decision on a motion for a directed verdict is for correction of errors at law. *Hill v. Damm*, 804 N.W.2d 95, 98 (Iowa Ct. App. 2011). A directed verdict is warranted "only if there was no substantial evidence to support the elements of the plaintiff's claim." *Pavone v. Kirke*, 801 N.W.2d 477, 487 (Iowa 2011). Our role is to determine whether the trial court correctly concluded whether there was substantial evidence to warrant submission of the case to the jury. *Id.* "Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *Figley v. W.S. Indus.*, 801 N.W.2d 602, 609–10 (Iowa Ct. App. 2011). We view the evidence in the light most favorable to the party against whom the motion was directed. *Id*. at 610. "If reasonable minds could reach different conclusions based upon the evidence presented, the issue must be submitted to the jury for determination." *Id*. It is considered prudent for the court to submit the case to a jury even if the case is weak so as to avoid wasting judicial and party resources in conducting a second trial in the event we find error in granting a directed verdict motion. *Hill*, 804 N.W.2d at 98.

We review the district court's decision on the taxation of costs for an abuse of discretion. *Cline v. Richardson*, 526 N.W.2d 166, 169 (Iowa Ct. App. 1994). We also review the district court's grant or denial of attorney fees for an

abuse of discretion. *NevadaCare Inc. v. Dep't of Human Servs.*, 783 N.W.2d 459, 469 (Iowa 2010). We reverse discretionary rulings only when the ruling rests on grounds that are clearly unreasonable or untenable. *Id*.

III. MENTAL DISTRESS DAMAGES.

Plaintiffs assert first the district court erred in directing a verdict in favor of Said on plaintiffs' non-economic mental distress damages. Plaintiffs maintain they suffered these damages as a direct result of Said's breach of his duty, and for them to receive full compensation, the district court's decision must be reversed and their case remanded for a new trial on damages alone. Said maintains the district court was correct in denying the plaintiffs compensation for their mental distress damages as Iowa law does not permit recovery of such damages in the absence of physical harm to the plaintiff.

We recognize that generally a party may not recover damages for emotional distress premised on negligence where the plaintiff has suffered no physical harm. *Lawrence v. Grinde*, 534 N.W.2d 414, 420 (Iowa 1995). Our courts have carved out an exception to this rule "where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm." *Id*. We must look to see whether the relationship was

> so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the [obligation] that such suffering will result from its breach.

Id. at 421. There must be "both a close nexus to the action at issue and extremely emotional circumstances" to permit the recovery of emotional distress damages in a breach of contract case. *Id*. The emotional distress must "naturally ensue[ ] from the acts complained of." *Id*. at 422. Our courts have permitted emotional distress damages without physical injury in medical malpractice actions, *Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990), in the performance of a funeral contract, *Meyer v. Nottger*, 241 N.W.2d 911, 921 (Iowa 1976), and in the negligent delivery of a telegram announcing the death of a close relative. *Cowan v. W. Union Tel. Co.*, 98 N.W. 281, 283 (Iowa 1904).

Normally, emotional distress damages are not a reasonably foreseeable consequence of an act of legal malpractice, *Lawrence*, 534 N.W.2d at 422, but such damages can be recoverable if the lawyer is contracted to perform services involving deeply emotional responses in the event of a breach. *See Wagenmann v. Adams*, 829 F.2d 196, 221–22 (1st Cir. 1987) (permitting the recovery of emotional distress damages where attorney's ineffectiveness resulted in client being forcibly deprived of his liberty and confined to a mental hospital); *dePape v. Trinity Health Sys., Inc.*, 242 F. Supp. 2d 585, 615 (N.D. Iowa 2003) (finding emotional distress damages recoverable against an immigration attorney for legal malpractice); *Kohn v. Schiappa*, 656 A.2d 1322, 1325 (N.J. Super. Ct. Law Div. 1995) (permitting recovery of emotional distress damages in cases of legal malpractice where attorney is retained for non-economic purposes); *see generally* D. Dusty Rhoades and Laura W. Morgan, *Recovery for Emotional Distress Damages in Attorney Malpractice Actions*, 45 S.C. L. Rev. 837, 845–49

(1994) (noting the cases permitting the recovery of emotional distress damages in legal malpractice actions when the attorney's actions resulted in the client's loss of liberty or loss of family).

In *Lawrence*, the attorney failed to disclose on the bankruptcy forms a settlement the client had obtained from a former business partner. 534 N.W.2d at 416. The federal government learned of the settlement and indicted the client for bankruptcy fraud. *Id*. at 417. After the federal court found the client not guilty of fraud, the client brought a malpractice action against his former attorney. *Id*. In rejecting the client's claim for emotional distress damages, the supreme court found the client's damage claim was "one step removed from the negligent act in preparing the bankruptcy petition. Were it not for the indictment by the federal government for fraud, there would have been no basis for Lawrence's claim." *Id*. at 422. The court concluded that the bankruptcy attorney's duty to manage the bankruptcy process was not coupled with matters of mental concern or with the feelings of the client, so that the breach of the duty would necessarily and reasonably result in mental anguish or suffering of the client. *Id.* at 423. The court also found the emotional distress of the client was too far removed from the defendant's negligence and did not naturally ensue from the negligent acts. *Id*.

In contrast, the federal district court of Iowa in *dePape* found emotional distress damages recoverable in a legal malpractice action where the attorneys negligently filed immigration documents on behalf of Dr. dePape and counseled Dr. dePape to lie to immigration officials about the extent of work he intended to perform in the U.S. 242 F. Supp. 2d at 616. In that case, the court found the

attorney and client shared a special relationship that gave rise to the duty to avoid causing the client emotional harm. *Id*. at 615. Instead of assisting Dr. dePape with his immigration issues, the attorneys' negligence "placed Dr. dePape directly in harm's way." *Id*. at 616. The court found the attorneys not only failed to provide Dr. dePape sufficient information for him to make an informed decision about his immigration status, but also counseled him to lie to INS officials in order to gain entry to the U.S. under false pretenses. *Id*.

The court noted that the attorneys would not have been liable for the mental distress that could have resulted from a failed *legitimate* attempt to enter the U.S. because it would be unfair to hold a lawyer responsible for the decision of an independent governmental entity. *Id*. However, the attorneys' conduct led directly to the immigration officials denying Dr. dePape's visa and accusing Dr. dePape of being a liar. *Id.* Thus, the court found the emotional distress damages suffered by Dr. dePape were not "one-step removed," as they were in *Lawrence*, permitting recovery. *Id.*

In this case, Klever, Nancy, and Cesar sought Said's assistance in obtaining lawful permanent residency in the U.S. Said was aware of Klever's and Nancy's desire to stay in the country with their children and knew the importance Klever and Nancy placed on keeping the family together. In fact, Said prepared a memorandum of extreme hardship as part of the waiver packets Klever and Nancy presented to the consulate. In the memorandum for Klever, Said wrote:

> [B]oth the Petitioner's family as well as the Petitioner would suffer extreme hardship if his request for a waiver is not granted. The Petitioner's family consists of two United States Citizen children, one of whom is under the age of 18, and two United

> States Citizen grandchildren. It is the separation of the Petitioner from his young son that is most troublesome. The Petitioner's child is a United States Citizen and having been born in the United States does not know of any life outside of his current situation. He does not speak fluent Spanish nor will he be able to maintain his current health and educational level in Ecuador. Moreover, the separation of the child from his father would further broaden the symptoms of the disorder such as, increasing his levels of low self-esteem, furthering his fearfulness of risks, and promoting poor concentration.
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> The son and grandchildren of the Petitioner would also suffer detriment if they followed their father and grandfather to live in Ecuador because the children were all born here in the U.S. and do not speak the language fluently. Likewise, if the children remain in the U.S. without the presence of their father and grandfather, their emotional wellbeing would be substantially at risk. Numerous studies have demonstrated that extreme hardship occurs to children when parents are separated. . . .
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> Moreover, the Petitioner is diabetic and is unable to obtain the necessary care in Ecuador. He and his family worry that his health is rapidly declining and that he will be unable to pay for any medical necessities that he may have with regard to his current health condition. The Petitioner and his family are extremely anxious as to what could happen if his condition does worsen and he is without proper medical care and the care of his immediate family to help care for him.
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> The impact of separation is not exaggerated especially when factors such as the remoteness of the border from Iowa which limits frequent visitation and the exorbitant telephone rates which restricts communication between the family members further. These barriers alone can lead to depression, grief, and impoverishment to any or all family members. Therefore, for the reasons stated above along with the supporting documents, the Petitioner, Klever Miranda, does respectfully request that his waiver be granted and he be allowed to rejoin his family in the United States.[4]

From this memorandum, it is clear Said knew of the emotional distress that could result from Klever's and Nancy's separation from their family. While Said could not be held liable for the emotional distress that would have resulted from the failure of a *legitimate* attempt for Klever and Nancy to stay in or re-enter

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[4] The memorandum attached to Nancy's waiver is substantially the same.

the country, the evidence at trial made clear that the waivers Said prepared had no chance of success as Cesar was not a "qualifying relative." In addition, Said failed to inform Klever and Nancy of the potential failure of the waiver, instead telling them that they had a 99% chance of a successful re-entry.

As a direct result of Said's actions, Nancy and Klever are now barred from entering the U.S. for ten years. They are separated from their children, including their minor son. We find the nature of the relationship between the parties here was such that there was a duty on Said's behalf to "exercise ordinary care to avoid causing emotional harm." *See Lawrence*, 534 N.W.2d at 420. From the nature of his representation of Klever and Nancy and the contents of the memorandum quoted above, Said was aware or should have been aware that a breach of his duty would necessarily or reasonably result in mental anguish or suffering of his clients. Because the emotional distress suffered by Klever, Nancy, and Cesar was a reasonably foreseeable consequence of a breach of duty by Said, the plaintiffs should have been permitted to present the evidence of their mental suffering to the jury as part of their damages.[5]

IV. PUNITIVE DAMAGES.

Plaintiffs also assert the district court erred in granting Said's directed verdict motion on punitive damages. Plaintiffs claim the record supports an award of punitive damages in this case because Said was aware the plaintiffs did not have a "qualifying relative" as required by the waiver, but nevertheless chose

[5] We find here only that emotional distress damages are potentially recoverable by the plaintiffs in this case. The adequacy of the proof of the emotional distress suffered is for the trial court to determine on remand.

to file the waivers instead of pursuing other more plausible immigration options, and failed to give the clients the information about the risks and merits of their legal options. Plaintiffs claim Said recklessly disregarded their rights by misadvising them of the probability of success in obtaining the waivers and being able to re-enter the U.S. Finally, plaintiffs claim Said's actions were a part of a persistent course of conduct in ten to fifteen other cases, and soon unsuspecting clients will find out they are not on a citizenship track and will be subject to deportation.

In order to justify submitting a claim for punitive damages to the jury, it must be shown the defendant acted with a "willful and wanton disregard for the rights or safety of another." *Wilson v. IBP, Inc.*, 558 N.W.2d 132, 142 (Iowa 1996). Willful and wanton conduct is demonstrated when "an actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 529 (Iowa 2007). "Mere negligent conduct is not sufficient to support a claim for punitive damages." *McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000).

Punitive damages are only appropriate when actual or legal malice is shown in the record. *Id*. "Actual malice is characterized by such factors as personal spite, hatred, or ill will. Legal malice is shown by wrongful conduct committed or continued with a willful or reckless disregard for another's rights."

Id. In addition, the evidence supporting such an award must be proven by a preponderance of clear, convincing, and satisfactory evidence. Iowa Code § 668A.1(1)(a) (2009); *Wilson*, 558 N.W.2d at 142.

The district court, in refusing to submit the claim for punitive damages to the jury, found there was not "anything even close to adequate proof of punitive damages." It found the plaintiffs failed to prove the level of conduct needed in order to justify submitting the claim. We disagree. The plaintiffs offered evidence at trial demonstrating that there was no reasonable basis to support the advice and direction Said gave to Klever and Nancy. Said admitted he was aware Cesar was not a "qualifying relative" under the law, but yet he advised the plaintiffs that they had a 99% chance of re-entry. Said's justification for this course of conduct was his assertion he had been successful in this approach in ten to fifteen other cases, yet he provided no corroboration of his testimony regarding these alleged successful cases, even in the face of an order compelling disclosure.

This is not a case where there is a reasonable disagreement over the relative risks of the conduct at issue, making punitive damages inappropriate. *See Larson v. Great W. Cas. Co.*, 482 N.W.2d 170, 174 (Iowa Ct. App. 1992). Every expert who testified at trial stated the action taken by Said had no possibility of success, and yet he persisted in advising his clients to take actions that would result in being separated from their family, including their minor child, for at least ten years. In our review of the evidence in the light most favorable to Klever and Nancy, we find sufficient evidence from which the jury could conclude

Said's conduct demonstrated a willful or reckless disregard for the plaintiffs' rights, and so conclude the district court erred in refusing to submit the punitive damage claim to the jury.

V. LOST-CHANCE DAMAGES.

Next, plaintiffs claim the district court erred in directing a verdict against them on their claim of lost-chance damages. Plaintiffs assert that while they were successful under the traditional causation standard, this method did not adequately compensate them for their "irretrievably lost opportunity to remain in the United States." Plaintiffs contend this case is precisely the situation that should apply the lost chance doctrine as (1) plaintiffs had a preexisting legal condition regarding immigration for which they sought legal advice, (2) there existed a certain likelihood of success in obtaining a successful outcome, (3) through his negligence, Said reduced that chance, and (4) Said's negligence destroyed any chance of a successful outcome.

Said asserts on appeal that lost-chance damages have only been applied in medical malpractice cases in Iowa, and thus, they are not applicable in legal malpractice cases. In addition, he claims lost-chance damages are only an alternative way for a plaintiff to prove causation where the plaintiff cannot otherwise prove the case under the traditional "but for" analysis. Because plaintiffs were able to prove their case under the traditional analysis, Said maintains they are not entitled to lost-chance damages.

Under the lost-chance doctrine, "a victim who suffers from a preexisting adverse condition . . . and is then subjected to another source of injury . . . may

have a claim for the second event. The rationale is that, if it were not for the second event, the victim might have survived the first." *Wendland v. Sparks*, 574 N.W.2d 327, 330 (Iowa 1998). "A plaintiff could claim that, as a result of the intervention of the defendant's tortious conduct, he lost the chance to recover from the preexisting condition or otherwise avoid some untoward consequence of it." *Id*. at 331 (citations omitted).

Assuming without deciding that such a claim could be recoverable in a legal malpractice action, we agree with the district court that in this case the defendants were entitled to a directed verdict. The district court in granting the directed verdict on this issue stated:

> Lost chance. Boy, with the exception of the legal fees, I just don't see nor do I understand that type of damage here. Based on the explanation that has been given to me, we are just talking about the value of being able to live in the United States. I'll even grant you that that probably has some value. It probably has great value, but we have to measure it somehow. I don't know of any kind of damage in any kind of case in a jury case where we just turn the jury loose. You have to give them some kind of guidance, even if it is not to a mathematical certainty. We always do that. We don't just say, Take a shot at it and we will see what happens.
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> So, you know, we have tried to import a concept into this legal malpractice case—at least this is my view—we have tried to import a concept that previously exists—has previously existed in the context of medical malpractice where somebody doesn't diagnose or treat something soon enough and somebody dies—this is the usual case—they die because of it. So they have lost their chance of survival.
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> Now we are talking about a lost chance of the American dream or something like that, I guess. But even if it is a cognizable element of damage, we do not have the proof—we don't have any proof, with the exception of legal fees, as to what its value would be. The jury would be absolutely striking out into completely uncharted territory here based on the record that we have. I am not going to permit that. Right or wrong, I am not going to permit it.

"As a general rule, the party seeking damages bears the burden of proving them; if the record is uncertain and speculative as to whether a party has sustained damages, the factfinder must deny recovery." *Data Documents, Inc. v. Pottawattamie Cnty*., 604 N.W.2d 611, 616 (Iowa 2000). As the district court stated, mathematical certainty is not required, but plaintiffs "must at least present sufficient evidence to allow the factfinder to make an approximate estimate of the loss." *Id*. at 617. The record needs to contain a reasonable basis "from which the factfinder can infer or approximate the damages." *Miller v. Rohling*, 720 N.W.2d 562, 572 (Iowa 2006). In this case, the jury had only speculation on which to base any estimation or approximation of the damage claimed by the plaintiffs in not being able to stay in the U.S. during the ten-year bar. As the jury would have had no evidence on which to base the damages, we agree with the district court a directed verdict in favor of Said was appropriate on the record made by the plaintiffs.

In addition, as noted by Said, plaintiffs were able to prove causation and damages under the traditional "but for" analysis. The lost-chance doctrine is an alternative method of proving a negligence case. *Mead v. Adrian*, 670 N.W.2d 174, 178 (Iowa 2003) ("[A] personal representative may recover damages for a lost chance of survival as an alternative to a traditional wrongful-death recovery."); *Wendland*, 574 N.W.2d at 330 ("The lost-chance theory has often been urged in cases against intervening tortfeasors in which the plaintiff cannot meet the traditional requirements for showing proximate cause by the 'probable' standard . . . .").

While both the traditional and lost chance theories can be submitted to the jury, they are alternatives to each other, not in addition to each other. *Mead*, 670 N.W.2d at 180 ("[I]f both a traditional wrongful-death claim and a lost-chance-of-survival claim are submitted, the proportionally reduced recovery for lost chance would be included within and duplicated by an award of traditional wrongful-death damages."). If the trier of fact finds the plaintiff failed to prove proximate cause under the traditional standard, it may yet believe that the defendant's negligence deprived the plaintiff of a chance to survive and award a smaller proportion of the total damage suffered by the plaintiff. *Id*. However, where the jury awarded damages based on the traditional analysis, it is improper to permit recovery for lost-chance damages as well. *Id*. ("[I]t [is] nevertheless improper to allow an award for lost chance of survival when the jury found from the evidence that ordinary wrongful-death damages were proximately caused by the defendant's negligence.").

Even if the court had permitted the jury to consider the claim for lost chance, the total award of damages would not have been higher as plaintiffs contend here, but would have been proportionally less. *Id*. ("The nature of a claim for lost chance of survival is such that it must be proportionally less than a recovery for traditional wrongful-death damages for the same decedent in the same case."). Thus, in this case where the jury found plaintiffs were entitled to recover under the traditional analysis, it would have been improper for the district court to permit recovery based on lost-chance too. We find no error in the district court's decision to direct a verdict in favor of Said on the lost-chance damages.

VI. DISMISSING PLAINTIFF CESAR MIRANDA.

Plaintiffs also claim the district court erred in dismissing Cesar as a plaintiff in the lawsuit. They claim the district court incorrectly determined Cesar had not suffered any damages because his parents paid the attorney fees to Said. Plaintiffs argue that Cesar testified to the travel expenses incurred in traveling to Ecuador to see his parents. In addition, Cesar testified during the offer of proof of the mental distress damages he suffers as a result of being separated from his parents for ten years.

We agree with the district court that plaintiffs failed to establish the amount if any Cesar had paid in travel expenses to see Klever and Nancy. At trial Cesar testified his monetary position did not allow him to visit his parents "very much" because "*[i]f* we go there, our expenses just for my wife and I and my kids, just the flight tickets is over $5000." (Emphasis added.) While there was testimony that it cost $1000 per ticket to go to Ecuador, there was no indication as to how many trips had been made in the past or how many are planned in the future until the ten-year bar expires. We agree with the district court that plaintiffs failed to prove Cesar suffered economic damages as a result of Said's negligence.

However, because we find the jury should have been permitted to hear evidence of the non-economic mental distress damages and punitive damages, we also find Cesar should be reinstalled as a plaintiff in the damages re-trial as the plaintiffs presented evidence during the offer of proof to establish Cesar suffered emotional distress as result of Said's negligence. We therefore reverse the district court's decision dismissing Cesar Miranda from the case.

VII. MOTION FOR SANCTIONS, COSTS AND ATTORNEY FEES.[6]

Finally, plaintiffs assert the district court erred in denying their request for attorney fees and a portion of their request for costs. They claim the district court should have ordered Said to pay the full amount of travel expenses incurred by their expert to testify at trial, in addition to two days of witness fees for a total amount of $728.79. The district court instead permitted only one day of expert witness fees and only 200 miles of travel expenses for a total award of $240. Next, plaintiffs claim the district court should have ordered Said to pay $1678.15, which represents the costs and travel expenses incurred by the plaintiffs in obtaining the deposition testimony of Said, Cesar, Said's experts Sweeney and Yang, and plaintiffs' expert Lichter. The district court refused to order the expenses associated with any of these depositions finding "plaintiffs fail to state how much, if any, of any of the subject depositions were used by plaintiffs at trial."

The plaintiffs also assert the district court erred in refusing to order Said to pay their attorney fees incurred in prosecuting the malpractice action in the amount of $61,560.54. The plaintiffs contend because the attorney fee contract permitted Said to recover his fees in the event the plaintiffs did not pay their legal bill and because Said wrote the attorney fee contract unilaterally not advising the plaintiffs to obtain independent legal advice before signing it, the court should read into this contract an agreement that Said would pay the plaintiffs' attorney fees in the event he breached the contract. The district court denied this request

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[6] Plaintiffs only appealed from the district court's ruling on costs and attorney fees.

finding, "Plaintiffs cite no authority to support this proposition. Further there is no express contractual language nor any statute allowing plaintiffs to recover their attorney's fees."

With respect to Lichter's trial testimony, while plaintiffs sought witness fees for two days—one day of travel and one day of testimony—we find no abuse of discretion in the district court awarding costs for only one day and restricting the mileage to only 200 miles under Iowa Code sections 622.72[7] and 625.2.[8] We also find no abuse of discretion in the district court's decision not to award any expenses associated with the procurement of the deposition testimony. Pursuant to Iowa Rule of Civil Procedure 1.716,[9] only the portion of the costs necessarily incurred for depositions offered and admitted in trial shall be awarded against the losing party. The only deposition offered and admitted into evidence at trial was Said's expert, Sweeney, and his deposition was offered in evidence by Said, not by the plaintiffs. Thus, the plaintiffs failed to offer evidence that the expenses

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[7] Iowa Code section 622.72 provides:

> Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed one hundred fifty dollars per day while so employed.

[8] Iowa Code section 625.2 provides, "The losing party, however, shall not be assessed with the cost of mileage of any witness for a distance of more than one hundred miles from the place of trial, unless otherwise ordered by the court at the time of entering judgment."

[9] Iowa Rule of Civil Procedure 1.716 provides:

> Costs of taking and proceeding to procure a deposition shall be paid by the party taking it who cannot use it in evidence until such costs are paid. The judgment shall award against the losing party only such portion of these costs as were necessarily incurred for testimony offered and admitted upon the trial.

incurred in taking Sweeney's deposition were necessarily incurred. *See* Iowa R. Civ. P. 1.716.

Finally, we agree with the district court's decision not to award plaintiffs their attorney fees. Attorney fees are recoverable as costs only when a contract or statute specifically provides for recovery. *NevadaCare,* 783 N.W.2d at 469. Plaintiffs cite no statute that permits recovery of attorney fees in this case, and the written attorney fee contract between the plaintiffs and Said did not contain a clear and express provision to that effect. *Id*. at 470. As a result, the district court did not abuse its discretion in denying recovery of attorney fees in this case.

VII. CONCLUSION.

In conclusion, we find the district court correctly granted Said's directed verdict motion with respect to the lost-chance damages and did not abuse its discretion in denying plaintiffs' requests for the assessment of costs and attorney fees. However, we find the district court did err in refusing to submit plaintiffs' claims of mental suffering and punitive damages to the jury. As a result of this finding, we also find the district court erred in dismissing Cesar Miranda as a plaintiff. We therefore affirm in part, reverse in part, and remand this case for a trial only on the issues of mental distress and punitive damages.

Costs on appeal are assessed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.