UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0223

September Term, 2013

ON REMAND

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LINDA A. SENEZ

v.

BRADFORD G.Y. CARNEY

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Wright,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

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Opinion by Leahy, J.

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Filed: March 28, 2016

The instant fee and legal malpractice case stems from a prior litigation involving Appellant Linda A. Senez and her neighbors, Steven and Ann Collins, regarding the ownership of a narrow tract of land along the boundary line dividing their two respective properties (hereinafter the "Collins litigation"). In 2006, the Collinses, record title holders of the disputed property, sued Ms. Senez to, *inter alia*, quiet title in the Circuit Court for Baltimore County, and Ms. Senez filed a counterclaim asserting that she acquired title to the disputed property via adverse possession. Ms. Senez thereafter hired Appellee Bradford G.Y. Carney of Royston, Mueller, McLean & Reid LLP as her attorney. Most relevant to the instant case, the circuit court found in favor of the Collinses on Ms. Senez's adverse possession claim. Following Mr. Carney's withdrawal from the case, Ms. Senez, with new counsel, appealed and ultimately did not prevail.

On October 16, 2008, Mr. Carney[1] filed a lawsuit against Ms. Senez to collect unpaid attorney's fees from the Collins litigation, and Ms. Senez counterclaimed, alleging legal malpractice. Mr. Carney filed a motion for summary judgment as to the legal malpractice claim on December 9, 2011, and the circuit court granted the motion on February 17, 2012. In her timely appeal,[2] Ms. Senez presents one issue for our review:

[1] Both Mr. Carney and his firm Royston, Mueller, McLean & Reid LLP participated in the lawsuit, but because Mr. Carney is the only party to this appeal, we will refer to Mr. Carney and his firm collectively as "Mr. Carney."

[2] On March 28, 2014, this Court issued an unreported opinion dismissing the instant appeal as untimely. *Senez v. Carney*, No. 223, Sept. Term 2013 (filed March 28, 2014). Relying on our then-valid decision of *Hiob v. Progressive American Ins. Co*., 212 Md. App. 734 (2013), we concluded that because the circuit court entered summary judgment in February 2012 and Mr. Carney voluntarily dismissed the fee claim against (continued . . .)

Did the trial court err in granting Mr. Carney's motion for summary judgment?

For the reasons set forth herein, we conclude that the circuit court did not err in granting summary judgment in favor of Mr. Carney. We affirm.

## BACKGROUND

*The Underlying Collins Litigation*[3]

The Collinses and Ms. Senez are neighboring landowners of two waterfront properties in the Middle River area of Baltimore County. In 2004, a dispute arose about the ownership of a narrow tract of land along the boundary dividing their respective properties. We have previously described the disputed property as follows:

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Ms. Senez on March 2, 2013, final judgment occurred on March 2, 2013. *Id.*, slip op. at 6. Accordingly, Ms. Senez was required to appeal within 30 days of March 2, 2013. Instead, on April 12, 2013, Ms. Senez appealed from an order (entered on March 15, 2013) establishing that all matters in the controversy had been resolved. Because her notice of appeal was not filed within 30 days of March 2, 2013, we dismissed her appeal as untimely. *Id.*

The Court of Appeals granted Ms. Senez's petition for writ of certiorari because it presented the same issue as presented in *Hiob*, which was then-pending before the Court. In its resolution of the issue in *Hiob*, the Court held that a line of voluntary dismissal was not a final "judgment" because it was not a form of judgment, it did not comply with Rule 2-601, and its docket entry did not clearly indicate that a final judgment as to all claims and parties had been entered. 440 Md. 466, 501 (2014). Pursuant to that holding, the Court also summarily vacated our decision in the instant case and remanded to this Court for further proceedings. Similarly, here, the voluntary dismissal—entered into the docket as "Voluntary Dismissal (Partial) as to Linda A. Senez with prejudice"—was not a form of judgment, did not comply with Rule 2-601, and the docket entry did not clearly reflect a final disposition of the case. The order entered on March 15, 2013, was the final judgment in this case, and Ms. Senez properly appealed within 30 days.

[3] We rely on our reported opinion of *Senez v. Collins*, 182 Md. App. 300 (2008), for a majority of these facts of the Collins litigation to the extent that they are undisputed.

> At the time the parties purchased their respective properties, the properties were separated by a concrete retaining wall (the "Wall"), which did not precisely track the property line. . . . A survey of the Senez Property, which was conducted for appellant by Bryan R. Dietz . . . showed that approximately 35 feet before meeting the sea wall, the Wall diverged from the boundary line. Between that point and the sea wall, according to the Dietz Survey, the Wall sat entirely on the Collins side of the property line. As a result, a narrow strip of the Collins Property was located on the Senez side of the Wall. That narrow strip between the Wall and the boundary line is the area of land in dispute.

*Senez v. Collins*, 182 Md. App. 300, 308-09 (2008). On September 29, 2004, the Collinses filed a lawsuit against Ms. Senez for trespass, possession, quiet title, private nuisance, invasion of privacy, and a permanent injunction related to the disputed property. Ms. Senez, represented by her first counsel, thereafter filed a counterclaim for adverse possession and a bill to quiet title on November 8, 2004. At some point between the filing of the counterclaim and the engagement in discovery,[4] Ms. Senez retained Appellee Bradford Carney of Royston, Mueller, McLean & Reid LLP as counsel, who filed his appearance on July 13, 2006.

The circuit court held a bench trial on December 8, 2006 and December 11, 2006. Noteworthy to the instant appeal,[5] Ms. Collins testified at trial that before Ms. Senez constructed a fence on her property, Ms. Senez asked Ms. Collins for permission to build

[4] During argument in favor of his motion for summary judgment and in his deposition, Mr. Carney asserted that at the time he entered his appearance, the predecessor attorney for Ms. Senez had already propounded written discovery. He could not locate the scheduling order to advise the court whether the discovery period had expired at the time he entered his appearance.

[5] As explained further in the discussion *infra*, Ms. Senez's principal arguments on appeal relate to Mr. Carney's failure to discover and discredit testimony delivered by Ms. Collins in the underlying litigation.

her "fence [to] follow the wall instead of the property line[.]" Ms. Senez testified that she did not ask permission, but that she mentioned the possibility of building the fence on top of the wall rather than alongside it, to which the Collinses did not respond negatively or affirmatively. *Senez*, 182 Md. App. at 317. Following the close of evidence, the court found in favor of the Collinses on many of their claims and, most importantly here, found against Ms. Senez as to her adverse possession claim. *Senez*, 182 Md. App. at 318-19 (footnote omitted). Then, on March 20, 2007, Mr. Carney withdrew his appearance as Ms. Senez's attorney, and Ms. Senez obtained new counsel to file an appeal. On appeal, Ms. Senez challenged solely the court's ruling on her adverse possession claim.

In a reported opinion, this Court detailed the elements of adverse possession, *see id.* at 322-26, and held that Ms. Senez satisfied the actual, open, notorious, exclusive, and continuous elements of adverse possession of the disputed property, but remanded for further fact-finding as to the hostility element only. *Id.* at 346. Specifically, this Court instructed that fact-finding was necessary to resolve whether the alleged conversation between Ms. Collins and Ms. Senez regarding whether Ms. Senez asked if she could build a privacy fence that followed the wall instead of the property line had occurred. *Id.* at 342-43. At the remand hearing held on November 18, 2009, the circuit court again found in favor of the Collinses, concluding that Ms. Collins's version of events was more credible.[6] Ms. Senez's appeals of this ruling were unsuccessful.

[6] Mr. Carney was not Ms. Senez's attorney at the remand hearing.

*Counsel Fees and Legal Malpractice Litigation*

Several days after this Court issued its reported opinion in the Collins litigation, on October 15, 2008, Mr. Carney filed a complaint in the District Court for Baltimore County against Ms. Senez for unpaid legal fees from the Collins litigation in the amount of $15,660.95[7] and for $1,470.48 in prejudgment interest. Ms. Senez filed a notice of intention to defend and request for jury trial on November 20, 2008, and the case was transferred to the Circuit Court for Baltimore County on December 2, 2008. On March 6, 2009, Mr. Carney requested an order of default due to Ms. Senez's failure to file an answer within 30 days of the transfer, and the circuit court issued a default order that day. Ms. Senez immediately filed an answer and motion to vacate the order of default. She also filed a counterclaim on April 6, 2009 (entered on April 14) for breach of contract and negligence stemming from numerous alleged inadequacies and failures in Mr. Carney's representation throughout the Collins litigation. She prayed for damages in the amount of $55,254.14. After holding a hearing, the circuit court denied Ms. Senez's motion to vacate the order of default, as well as her subsequent motions for reconsideration and to alter/amend judgment.

Ms. Senez appealed, and this Court reversed and remanded for further proceedings in an unreported opinion. *Senez v. Carney*, No. 01227, Sept. Term 2009, slip op. at 13 (filed January 10, 2011). We determined that in her motion to vacate the order of default, Ms. Senez properly stated the reasons for her failure to file an answer within 30 days and

[7] The final bill was for $16,160.95, but Ms. Senez had paid some of the fees by the time Mr. Carney filed his complaint.

provided a sufficient legal and factual basis to show a meritorious defense to Mr. Carney's fee claim pursuant to Maryland Rule 2-613(e).[8] Following remand, on June 9, 2011, Ms. Senez filed an amended counterclaim, which, *inter alia*, identified additional instances of alleged malpractice. She amended her damages request to $60,623.50 for the breach of contract claim and $1,500,000.00 for the negligence claim. On July 27, 2011, Ms. Senez filed her expert witness designation, identifying David Whitworth as her expert witness for her malpractice claim.

On December 13, 2011,[9] Mr. Carney filed a motion for summary judgment, contending that Mr. Whitworth's expert opinion failed to generate any genuine dispute of material fact, because his assertions failed to show a breach of a duty and because any breach would not have been the proximate cause of Ms. Senez's unsuccessful adverse possession claim. In her written response filed on December 27, 2011, Ms. Senez argued that there were genuine disputes of material fact, relying on Mr. Whitworth's two affidavits and deposition testimony.

After holding hearing on February 16, 2012, the court issued an oral ruling granting summary judgment in favor of Mr. Carney, ultimately concluding:

[8] Rule 2-613(e) provides, "[i]f the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead, the court shall vacate the order."

[9] The court denied Mr. Carney's first motion for summary judgment, filed on September 26, 2011, on November 14, 2011, stating that the motion was denied because "the memoranda filed are not sufficiently oriented so as to allow me to have a satisfactory understanding of all that is being argued."

> I understand [Ms. Senez's] argument that this should be a question of fact for the jury. I will say again, I'm troubled by the, a standard that would mean that, where there's no clear piece of evidence that wasn't presented, or some crucial witness wasn't called. . . . [M]aybe [Ms. Senez's attorney] has identified a better way to try the case. Maybe this evidence would have helped. . . . [I]t seems to me that before you get to this trial within a trial, you have to reach a certain level of showing that it would have made a difference. You can't just try the case a different way and hope that you get a different response from a different jury on another day. This case is clearly distinguishable from a case where a lawyer misses the statute of limitations or doesn't comply with a discovery [o]rder and is precluded from offering evidence, or doesn't offer, doesn't identify his expert timely. I really believe that the claims are second guessing Mr. Carney's strategy and tactics and speculating that if the case was tried another way, it would have changed the [j]udge's decision. I just don't think that this evidence rises to the level of allowing that evidence, . . . [i.e.] the proffers from [Ms. Senez's attorney], to get to a jury.

The court thereafter signed an order on February 17, 2012 (entered on February 23, 2012) granting summary judgment in favor of Mr. Carney. Mr. Carney thereafter filed a voluntary dismissal of the fee claim against Ms. Senez on February 27, 2013. The court then issued a final order and judgment on February 27, 2013 (entered March 15, 2013) providing that, together, its grant of summary judgment and Mr. Carney's voluntary dismissal disposed of the controversy and entering final judgment. Ms. Senez noted her appeal on April 12, 2013.

## DISCUSSION

Maryland Rule 2-501 governs motions for summary judgment and provides that a circuit court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Rule 2-501(f). The nonmoving party's written response must "(1) identify with particularity

each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony . . . , or other statement under oath that demonstrates the dispute." Rule 2-501(b). Any "response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath." *Id.* "An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Rule 2-501(c).

"The purpose of the summary judgment procedure is not to try the case or to decide the factual disputes, but to decide whether there is an issue of fact, which is sufficiently material to be tried." *Jones v. Mid-Atl. Funding Co.*, 362 Md. 661, 675 (2001) (citations omitted). Thus, "[i]n reviewing the grant of a summary judgment motion, we are concerned with whether a dispute of material fact exists," *id.* (citations omitted), and our review is *de novo*. *MAMSI Life & Health Ins. Co. v. Callaway*, 375 Md. 261, 278 (2003) (citing *Green v. H & R Block, Inc.,* 355 Md. 488, 502 (1999)). In doing so, we review the same record and issues of law as the circuit court and are "tasked with determining whether the trial court reached the correct result as a matter of law." *Id.* (citing *Tyma v. Montgomery Co.,* 369 Md. 497, 504 (2002); *Murphy v. Merzbacher,* 346 Md. 525, 530-31 (1997)). We view the evidence in the light most favorable to and draw all inferences in favor of Ms. Senez as the nonmoving party. *Jones*, 362 Md. at 676 (citations omitted).

In the legal malpractice context, "a former client may have an action against a lawyer if the client can prove (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) loss to the client proximately caused by that neglect of duty." *Thomas v. Bethea*, 351 Md. 513, 528-29 (1998) (citing *Flaherty v. Weinberg*, 303 Md. 116, 128 (1985)). "A legal malpractice action, therefore, is similar to any other negligence claim which requires that a plaintiff prove duty, breach, causation, and damage." *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 717 (2003) (citation omitted). Expert testimony is required in a legal malpractice action unless "the common knowledge or experience of [a layperson] is extensive enough to recognize or infer negligence from the facts." *Fishow v. Simpson*, 55 Md. App. 312, 319 (1983) (citing *Butts v. Wates*, 290 S.W.2d 777 (Ky. 1956), *cited in Cent. Cab Co. v. Clarke*, 259 Md. 542 (1970)).

The trial-within-a-trial doctrine is "'the accepted and traditional means of resolving issues involved in the underlying proceeding in a legal malpractice action.'" *Suder*, *supra*, 413 Md. at 232, 241 (2010) (quoting *Thomas*, 351 Md. at 533). In discussing this doctrine, the Court of Appeals has quoted the *Restatement (Third) of Law Governing Lawyers* for explanation:

> In a lawyer-negligence or fiduciary-breach action brought by one who was the plaintiff in a former and unsuccessful civil action, the plaintiff usually seeks to recover as damages the damages that would have been recovered in the previous action or the additional amount that would have been recovered but for the defendant's misconduct. **To do so, the plaintiff must prove by a preponderance of the evidence that, but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action.** The plaintiff must thus prevail in a "trial within a trial." All the issues that would have been

> litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial. . . .

*Id.* at 241-42 (emphasis added) (quoting *Restatement (Third) of Law Governing Lawyers* § 53 cmt.b (2000)). A court "must not only determine how the parties would have proceeded had there been no breach, but must also assume the role of the earlier adjudicator in order to ascertain the probable outcome of the action." *Id.* at 233. In other words, "[t]he trial-within-a-trial doctrine exposes what the result 'should have been' or what the result 'would have been' had the lawyer's negligence not occurred." *Id.* at 242 (quoting Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 35:12 (2010)) (some internal quotation marks omitted); *see also id.* at 245 ("Relitigating the underlying action for the purposes of a malpractice suit is simply a tool by which the litigants are able to wind back the clock to determine whether the attorney proximately caused the injury.").

This doctrine comes into play "where there is no bright line malpractice," i.e., where there was no obvious omission or action that patently evidenced malpractice. *Id.* at 241 (citing *Thomas*, 351 Md. at 520). Indeed, "the triggering mechanism for the trial-within-a-trial doctrine is a dispute over proximate cause." *Id.* at 243. On that issue, "'[w]hat would have been the result of a previous trial presenting issues of fact normally is an issue for the factfinder in the negligence or fiduciary-breach action.'" *Id.* at 246 (quoting *Restatement (Third) of the Law Governing Lawyers* § 53 cmt. b (2010)).

**A.**

The parties dispute whether Mr. Carney breached a reasonable duty and whether that breach caused the circuit court to find in favor of the Collinses on Ms. Senez's adverse possession claim. To that end, Ms. Senez contends that she identified numerous disputes of material fact in her written opposition to Mr. Carney's motions for summary judgment that were supported by evidence, including two of expert David Whitworth's affidavits. This evidence, Ms. Senez argues, demonstrated Mr. Carney's breach of various duties that caused the circuit court to reject her adverse possession claim in the Collins litigation. We review each allegation of material fact in turn.

Ms. Collins's Testimony

Ms. Senez's principal arguments on appeal relate to Mr. Carney's failure to discover and discredit testimony delivered by Ms. Collins in the underlying litigation. Specifically, Ms. Collins testified that before Ms. Senez constructed a fence on her property, Ms. Senez asked Ms. Collins whether her fence could "follow the wall instead of the property line?" Following the circuit court's finding against Ms. Senez regarding her adverse possession claim, this Court concluded on appeal that although Ms. Senez satisfied the actual, open, notorious, exclusive, and continuous elements of adverse possession, there was still an existing factual dispute as to the hostility element. Because the circuit court erroneously applied the law regarding hostility, it did not resolve whether the statement made by Ms. Collins was credible. *Id.* at 342-43. We explained:

> In this case, Ms. Collins's account of her conversation with [Ms. Senez], if believed, may be seen as an acknowledgment by Senez of the Collins' superior right to the disputed area, which would defeat the hostility required

> for adverse possession. On the other hand, [Ms. Senez]'s version of the conversation (that she informed [the Collinses] but did not seek their permission to locate the fence on the Wall), coupled with her conduct in erecting the fence without [the Collinses'] permission, would not evince such an acknowledgment. Interpretation of the legal effect of such a conversation is contingent on the precise facts of the conversation.

*Id.* at 345-46. On remand, the circuit court again found in favor of the Collinses, resolving that Ms. Collins's testimony was more credible as to the hostility element. Thus, the gravamen of Ms. Senez's success on her adverse possession claim, she argues, was the effect of this testimony.

*A. Failure to Take Deposition*

She first points to Mr. Whitworth's proffered expert opinion that Mr. Carney was negligent by failing to conduct pre-trial discovery, specifically by not deposing Ms. Collins. Mr. Whitworth averred that "[h]ad he taken Ms. Collins' discovery deposition he likely would have learned" that Ms. Collins would have delivered this testimony and thus could have prepared for it. The circuit court determined that by the responses to the interrogatories, Mr. Carney had "lengthy answers from the Collins[es]' that purportedly describe all the communications between the Collins[es] and the Senez[e]s concerning this matter[,] [s]o to say that he didn't conduct discovery is just wrong" and that "given his late entry into the case, the discovery that he had, it's hindsight to say he would have uncovered something important if he took the deposition[.]"

The record reflects that the attorney representing Ms. Senez before Mr. Carney entered his appearance had propounded interrogatories on the Collinses, which included questions directed at eliciting information regarding property-related communications

between the parties. Notably, the response to Interrogatory 23 (attached to Mr. Carney's motion for summary judgment) included an assertion that Ms. Senez discussed installing a fence "on their property" with the Collinses in November 2000.[10] Thus, the interrogatories prompted a response by Ms. Collins about her communications with Ms. Senez and contained information related to the conversation at issue. As a result, we cannot—even assuming that a breach occurred—ascertain a genuine dispute of material fact regarding whether "but for" Mr. Carney's failure to take Ms. Collins's deposition, Ms. Senez's adverse possession claim would have been unsuccessful. Indeed, the very limited purpose of the deposition would have been to apprise Mr. Carney of the conversation, and it appears that the interrogatory would have informed Mr. Carney that some conversation about the fence on the Collinses' property occurred.

*B. Failure to Call Witnesses*

Next, Ms. Senez points to the proffered expert opinion of Mr. Whitworth that Mr. Carney was negligent by failing to call witnesses whose testimony would have established Ms. Senez's lack of knowledge that the wall did not track the property line. In his affidavit, Mr. Whitworth averred that "it [was his] understanding" that Ms. Senez's two realtors when she purchased her property in 2000 would have testified that "neither they nor Ms. Senez knew the actual property line of Ms. Senez'[s] property was anything other than the concrete block wall" and that Ms. Senez never saw a boundary survey that

[10] In his deposition, Mr. Carney stated that he thought he knew what Ms. Collins was going to say about the conversation before trial, but explained, "I can't say for sure as I'm sitting here years after the fact."

informed her of the actual property line. He further averred that Brian Dietz, Ms. Senez's surveyor in 2004, "would have testified that one cannot rely on a location survey to discern property lines, one must have a boundary survey to do so." He asserted that Ms. Senez had not seen a boundary survey until 2004 when Mr. Dietz conducted one. This would have demonstrated, Mr. Whitworth continued, that she would not have distinguished the wall from the property line in posing her question to Ms. Collins.

The circuit court found that these averments constituted inadmissible "double hearsay" and insufficient for summary judgment purposes. Ms. Senez disputes this ruling on appeal, arguing that an expert witness is permitted to testify to facts based on inadmissible hearsay if experts in the field normally rely on such facts.

For an affidavit to be sufficient for summary judgment, the affidavit must, among other things, be based on personal knowledge and "set forth such facts **as would be admissible in evidence**[.]" Rule 2-501(c) (emphasis added). The admissibility of expert testimony is governed by Maryland Rule 5-702, which provides that the testimony must, among other things, be supported by a sufficient factual basis. "A factual basis 'may arise from a number of sources, such as facts obtained from the expert's first-hand knowledge, facts obtained from the testimony of others, and facts related to an expert through the use of hypothetical questions.'" *Taylor v. Fishkind*, 207 Md. App. 121, 143 (2012) (quoting *Sippio v. State,* 350 Md. 633, 653 (1998)). This Court has further explained:

> An expert witness may testify to an opinion based on facts ordinarily inadmissible as hearsay, but which are facts of the type reasonably relied upon by experts in the field. **The expert should relate the information on**

> **which the opinion is based so the court can decide if it is reliable and was obtained in a trustworthy manner.** The information does not have to be admitted into evidence for the expert to use it in forming an opinion. If the facts on which the expert bases his or her opinion are inadmissible as substantive proof, they may still be used to provide the required factual basis for the opinion.

*Scott v. Prince George's Cnty. Dep't of Soc. Servs.*, 76 Md. App. 357, 386-87 (1988) (emphasis added) (citations omitted).

Here, Mr. Whitworth's affidavit does not explain how he obtained knowledge of the realtors' and Mr. Dietz's proffered testimony, i.e. by interview or reviewing an interview. Instead, he simply states that "it was his understanding." He further clarified that "[i]t's not my opinion that that's what they'd say[;] [i]t's my understanding *from what I've been told* that's what they would support." This factual basis was not based on his personal, first-hand knowledge or the direct testimony of others. There was no way for the court to determine the reliability of how Mr. Whitworth acquired such information. We conclude that the circuit court did not err in determining that Mr. Whitworth's affidavit failed to satisfy Rule 2-501(c).

Even if the affidavit was sufficient, we cannot conclude that failure to call these witnesses, based on their proffered testimony, constituted a breach of a reasonable duty. A decision to call or not call witnesses—especially where the import of that testimony relates only to credibility, not to a necessary fact or alibi, for example—is a matter of trial strategy, so long as an attorney acts in good faith and with knowledge of the law. *See, e.g.*, *Simko v. Blake*, 532 N.W.2d 842, 848 (Mich. 1995) ("Here, plaintiffs are alleging that defendant was negligent in not calling [two witnesses]. This, however, is a tactical

decision that this Court may not question. Perhaps defendant made an error of judgment in deciding not to call particular witnesses, and perhaps another attorney would have made a different decision; however, tactical decisions do not constitute grounds for a legal malpractice action."). If we broadly considered such a decision to be a breach, almost every lawyer could be sued in a case resolved via a credibility determination on the ground that the lawyer could have done more to bolster the credibility of that party or of a witness for that party.

And finally, even if these failures could be considered a breach, there is no causal link between the absence of Mr. Dietz's testimony and the unsuccessful adverse possession claim. Mr. Dietz's proffered testimony that he did not conduct a boundary survey until 2004 does not establish that Ms. Senez did not know, by some other means, where the actual property line was when the alleged conversation between her and Ms. Collins occurred before 2004. The realtors' testimony would, at most, reflect that Ms. Senez did not review a boundary survey document when she purchased the property. Although this testimony would perhaps imply more of a causal connection than would Mr. Dietz's testimony (because a fact finder could determine that Ms. Senez would not have made the alleged statement to Ms. Collins if she [Ms. Senez] was not aware of the boundary line), we note that this testimony does not prove the negative: that Ms. Senez did not otherwise know the distinction between the wall and boundary line.

*C. Cross-Examination*

Last, Ms. Senez relies on Mr. Whitworth's opinion that Mr. Carney was negligent by failing to cross-examine Ms. Collins about her statement, which would have

discredited her. However, when the circuit court below queried Ms. Senez's counsel what Mr. Carney should have asked Ms. Collins to discredit her testimony on cross-examination, counsel responded with a single question: **Whether she ever saw a boundary survey or whether she ever had a boundary survey done**. It appears that Ms. Senez's position was that her answer would have to be no, because no boundary survey was conducted until 2004. As the circuit court stated, "[I]f you're going to criticize a lawyer for not cross-examining somebody, I think you ought to tell me what the question should have been that would have made a difference[.]" The proffered questioning would not demonstrate that *Ms. Senez* had not seen a boundary survey, which is what she now contends Mr. Carney should have demonstrated to the court.

In any event, we conclude that Mr. Carney's decision not to further cross-examine Ms. Collins about this statement was a matter of trial strategy, as he claimed it was in his deposition. This holds true even though he knew, according to his deposition, that this testimony could defeat the hostility element if believed by the circuit court. "Counsel's trial tactics are not a basis for a malpractice action." *Fishow*, 55 Md. App. at 322 (citing *Frank v. Bloom*, 634 F.2d 1245 (10th Cir. 1980)); *see also id*. at 317 ("To contend after the fact that a different strategy should have been employed is resorting to the infallibility of hindsight.").

In sum, we reiterate that the standard for proximate cause in a legal malpractice case is not what the result *could* have been, but what the result *would have* or *should have been*. Unsuccessful clients cannot second-guess strategies and simply try the case another way in an attempt to receive a different result via a legal malpractice action.

Legal Research and Argument

Ms. Senez also contends, based on Mr. Whitworth's proffered expert opinion, that Mr. Carney was negligent by failing to submit a pre-trial memorandum detailing the facts and elements of adverse possession (especially because this cause of action rarely arises), failing to research adverse possession thoroughly, and failing to effectively argue the law and the facts of adverse possession during closing argument.

Even if we were to conclude that Mr. Carney breached a duty by failing to submit a pre-trial memorandum, to research the law adequately, and to deliver an effective closing argument, such a breach had no causal link with the ultimate demise of Ms. Senez's adverse possession claim. On appeal from the circuit court's judgment, this Court concluded that the evidence satisfied every element of adverse possession except hostility, and the case was remanded for a limited *factual* determination about the conversation between Ms. Collins and Ms. Senez. Stated simply, the court's final resolution on remand hinged on a credibility determination, not from any legal issue that could have been influenced by legal argument on adverse possession law. It is true that perhaps counsel could have argued the law and applied it to the facts to urge the court to resolve this factual dispute in Ms. Senez's favor below, but this failure did not result in the court resolving the issue against Ms. Senez; it failed to render the finding at all. This ultimate factual resolution occurred on remand, when Mr. Carney was not Ms. Senez's legal counsel for the remand hearing. Any legal argument that could have been made at trial that Mr. Carney allegedly failed to make could have been made by newly retained counsel at the remand hearing.

Failure to File Summary Judgment Motion

Ms. Senez also relies on Mr. Whitworth's proffered expert opinion that Mr. Carney was negligent by failing to submit a pre-trial motion for summary judgment. We reject the contention that such a failure can proximately cause a litigant's lack of success at trial, because a motion for summary judgment may be denied in favor of trial even if all elements necessary for summary judgment are satisfied. *See Metro. Mortg. Fund, Inc. v. Basiliko*, 288 Md. 25, 29 (1980).

Failure to Amend Counterclaim for Damages[11]

Ms. Senez's next contention is that Mr. Carney was negligent in failing to depose Mr. Collins, which would have revealed that Mr. Collins plugged the "weep holes" in the retaining wall dividing the Senez-Collins property and caused the wall to collapse. Ms. Senez contends that her counterclaim should have been amended to seek damages amounting to the costs to reconstruct the wall. However, it appears from the record that Ms. Senez does not dispute that the retaining wall was not physically located on her property; it was entirely located on the Collinses' property. Ms. Senez cannot be awarded damages to reconstruct a wall in which she has no property interest. That the wall's destruction may have caused damage to her property, like erosion, still does not entitle Ms. Senez damages to reconstruct the wall.

[11] Ms. Senez also proffered Mr. Whitworth's testimony to establish that the legal fees calculated by Mr. Carney were excessive. We need not consider this contention, because Mr. Carney and his firm have voluntarily dismissed their action for legal fees against Ms. Senez.

**B.**

Ms. Senez also argues that this Court's opinion reversing the circuit court's denial of her motion to vacate the default order precluded the circuit court's subsequent grant of Mr. Carney's motion for summary judgment pursuant to the law of the case doctrine. The "law of the case" doctrine stands for the proposition that when "an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case." *Garner v. Archers Glen Partners*, 405 Md. 43, 55 (2008) (quoting *Scott v. State*, 379 Md. 170, 183-84 (2004)). The doctrine is inapplicable here. In the first appeal, we determined that in her motion to vacate the order of default, Ms. Senez properly provided reasons for her failure to file an answer within 30 days and stated a sufficient legal and factual basis to show a meritorious defense to Mr. Carney's fee claim pursuant to Maryland Rule 2-613(e).[12] *Senez v. Carney*, No. 01227, Sept. Term 2009, slip op. at 13 (filed January 10, 2011). Specifically regarding the meritorious defense, we explained:

> Here, [Ms. Senez] has supplied sufficient evidence to show a potentially meritorious defense to [Mr. Carney]'s claims. In her motion to vacate, [Ms. Senez] stated that she defends the claims against her by saying that [Mr. Carney] breached their contract to provide competent legal services during the trial, and that this resulted in her losing her counterclaim for adverse possession and in her failing to recover damages she believed she was entitled to recover. [Ms. Senez] also submitted two affidavits in support of her motion. The first was from Brice G. Dowell, her current attorney of record, who averred to both the reason for the failure to plead, and to the fact that his own research lead him to the conclusion that [Mr. Carney]'s

[12] Rule 2-613(e) provides, "[i]f the court finds that there is a substantial and sufficient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead, the court shall vacate the order."

> legal services were inadequate and incompetent. The second affidavit was from David G. Whitworth, Jr., a licensed Maryland attorney specializing in legal malpractice, who would serve as [Ms. Senez]'s expert witness at trial. Mr. Whitworth averred in detail about the ways in which he believed [Mr. Carney] had failed to provide competent representation. . . . The affidavits and other statements proffered by [Ms. Senez] in this case are more than mere conclusory allegations.

*Id.*, slip op. at 11-12 (footnote omitted). We rejected Mr. Carney's position that the order of default should not be vacated because he provided competent representation to Ms. Senez, because "[w]hile [Mr. Carney] may ultimately prevail, he is 'jumping the gun,' so to speak. He is not entitled to a ruling on the merits on a motion to vacate a default order, where the appellant has made a facially adequate showing of the existence of an actual controversy." *Id.*, slip op. at 12.

Our limited decision in that appeal in no way precludes an affirmance of summary judgment in favor of Mr. Carney. There, we simply held that Ms. Senez *pleaded* a *potentially* meritorious defense that was supported by evidence; we did not evaluate whether the evidence generated a dispute of material fact under the standards governing legal malpractice and summary judgment.

**JUDGMENT AFFIRMED;**

**COSTS ASSESSED TO APPELLANT.**