Reversed and Remanded and Opinion filed November 30, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00750-CV

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DARRYL GLENN CAMPBELL, Appellant

V.

LYLE RICHARD BRUMMETT, Appellee

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 95-29817

O P I N I O N

This is an appeal from a summary judgment in a suit alleging legal malpractice, breach of contract, negligence, fraud, breach of fiduciary duty, and violations of the Texas Deceptive Trade Practices Act (DTPA). The trial court granted summary judgment in favor of Lyle Richard Brummett, appellee. Darryl Glenn Campbell, appellant, perfected this appeal. Because we find that material issues of fact exist, we reverse and remand.

I. Factual Background

Brummett is an inmate at the Huntsville Unit of the Texas Department of Criminal Justice, Institutional Division, serving two life sentences. On August 12, 1993, Brummett sent an unsolicited letter to Campbell requesting his representation and services before the Texas Board of Pardons and Paroles ("the Board").

Campbell, a disbarred attorney, often represented inmates before the Board. On August 19, 1993, in response to Brummett's letter, Campbell drove to the Huntsville Unit to meet with Brummett. To gain access to Brummett outside of the normal visiting hours, Campbell presented his invalid Bar card to the prison officials and filled out an "attorney application to visit an inmate form." Campbell then met with Brummett and, according to Campbell, informed Brummett that he had been disbarred, but that he would still be able to present Brummett's information to the Board. After this meeting, Campbell drove to Brummett's former residence to meet with Brummett's wife to arrange payment for Campbell's services. After some discussion, and another meeting, a check in the amount of fifteen hundred dollars was tendered to Campbell.

After the acceptance of the check issued by Brummett's wife, Campbell made several trips to the Huntsville Unit to visit Brummett: November 5, 1993; December 17, 1993; and January 1, 1994. After this last meeting on January 1, 1994, Campbell informed Brummett that he had been denied parole, and declined any further contact with Brummett. On August 26, 1994, Brummett sent Campbell a letter terminating their relationship and demanding the return of the fee paid to Campbell.

Campbell refused to refund this fee stating that no guarantee was given as to the outcome of the Board's proceedings. Brummett then filed suit, alleging damages of fifteen hundred dollars in connection with the claims listed above, and later moved for summary judgment on those claims. The trial court granted Brummett's summary judgment motion, and Campbell brings this appeal.

II. Standard of Review

The standards for reviewing summary judgments are well settled:

1. The movant for summary judgment has the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.
2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in his favor.

See Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 223 (Tex. 1999).

When the trial court's order granting summary judgment does not specify the ground or grounds relied on for the its ruling, we affirm the judgment if any theory advanced by the movant has merit. *See State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). To prevail on appeal, the appellant must show that each of the independent arguments alleged in the motion for summary judgement is insufficient to support a summary judgment. *See Insurance Co. of N. America v. Security Ins. Co.*, 790 S.W.2d 407, 410 (Tex. App.—Houston [1st Dist.] 1990, no writ).

III. Genuine Issues of Material Fact

Campbell's first and second points of error are interrelated. In his first point of error, Campbell claims the trial court erred in granting summary judgment when there were genuine issues of material fact.[1] In his second point of error, Campbell contends the trial court erred in awarding exemplary damages when there were issues of material fact to be resolved. In evaluating whether the trial court erred in granting the summary judgment, we evaluate each cause of action to see if any has merit. We start our analysis with the breach of fiduciary duty because it is the only cause of action that does not require proof of actual causation or economic damage. *See Arce v. Burrow*, 958 S.W.2d 239, 248 (Tex. App.–Houston [14th Dist.] 1997), *aff'd as modified*, 997 S.W.2d 229 (Tex. 1999). Finally, Brummett's claims of breach

[1] We construe this as a "Malooly" point of error, which permits argument as to all possible grounds upon which summary judgment should have been denied. *See Malooly Brothers, Inc., v. Napier*, 461 S.W.2d 119 (Tex. 1970).

of contract, negligence, fraud and violations of the DTPA are addressed collectively in part III. B below because they share the common element of damages.

A. Breach of Fiduciary Duty

Campbell argues the trial court erred in granting summary judgment if the basis on which the motion was granted was for breach of a fiduciary duty "because there existed multiple issues of fact." We construe Campbell's point of error broadly, such that the statement of an issue or point raised on appeal will be treated as covering every subsidiary question that is fairly included. *See* TEX. R. APP. P. 38.1(e).

In Brummett's summary judgment proof, his declaration states, "Mr. Campbell represented himself to me as an attorney, licensed by the State of Texas." Campbell specifically denies this contention in his answer to Brummett's petition by stating that, "there was no attorney–client relationship," that he "never held himself out to Plaintiff as an attorney," and "explained to all the inmates I visited that I was a disbarred attorney." Campbell reiterates these statements in his response to Brummett's motion for summary judgment.

1. Elements of a Breach of Fiduciary Duty

A fiduciary duty is a "formal, technical relationship of confidence and trust that imposes upon a fiduciary greater duties as a matter of law." *See Caserotti v. State Farm Ins. Co.*, 791 S.W.2d 561, 565 (Tex. App.—Dallas 1990, writ denied). Fiduciary duties arise as a matter of law in certain formal relationships that the law recognizes, including that special status of an attorney–client relationship. *See Insurance Co. of N. America v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). The attorney–client relationship is based on a contractual relationship in which the attorney agrees to render services for the client. *See Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.).

Outside of the cases in which formal fiduciary duties arise as a matter of law, Texas also recognizes that certain informal relationships may also give rise to a fiduciary duty which are referred to as "confidential relationships." *See, e.g.*, *MacDonald v. Follett*, 142 Tex. 622, 623, 180 S.W.2d 334, 338 (1944). As a prerequisite, these confidential relationships require the parties to have developed a mature

relationship with each other, such that one party is justified in expecting the other to act in its best interest. *See Insurance Co. of N. America,* 981 S.W.2d at 674. Thus, while a fiduciary or confidential relationship may arise from the circumstances of a particular case, to impose such a relationship in a business transaction, the relationship must exist prior to, and apart from the agreement made the basis of the suit. *See Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995).

A survey of Texas case law shows that these confidential relationships may arise in one of two situations. The first is "where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one." *Fitz-Gerald v. Hull*, 150 Tex. 39, 48, 237 S.W.2d 256, 261 (1951); *Crim Truck & Tractor Co. v. Navistar Int'l. Transp. Corp*., 823 S.W.2d 591, 594 (Tex. 1992). Because not every relationship involving a high degree of trust and confidence rises to the stature of a formal fiduciary relationship, the law recognizes the existence of confidential relationships only in those rare cases "in which influence has been acquired and abused, in which confidence has been reposed and betrayed." *Crim. Truck & Tractor,* 823 S.W.2d at 594*; accord, Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex. 1980).

The second situation in which a confidential relationship may be established is where there is an unequal bargaining position between the parties to the contract. *See Arnold v. National County Mut. Fire Ins. Co*., 725 S.W.2d 165, 167 (Tex. 1987); *Bank One of Texas, N.A v. Stewart*, 967 S.W.2d 419, 442 (Tex. App.—Houston[14th Dist.] 1998, no writ). Texas law specifically holds that a fiduciary relationship is not created based solely on the fact that two parties enter into a contractual relationship.[2] *See Crim. Truck & Tractor,* 823 S.W.2d at 594. Therefore, under either standard, a fiduciary relationship is not created lightly, especially in contractual relations. *See Thigpen v. Locke*, 363 S.W.2d

[2] Every contract includes an element of confidence and trust that each party will faithfully perform his obligation under the contract. *See Crim. Truck & Tractor,* 823 S.W.2d at 595. Texas, however, specifically rejects the implication of a general duty of good faith and fair dealing in all contracts. *See id.* at n.5. Where, however, certain relationships give rise to a tort duty of good faith and fair dealing, that duty merely requires the parties to deal fairly with one another and does not encompass the often more onerous burden that requires a party to place the interest of the other party before his own, often attributed to a fiduciary duty. *See id.* at 595. A breach of this contractual duty of good faith and fair dealing gives rise only to a cause of action for breach of contract, and does not give rise to an independent tort cause of action. *See id.* at n.5

247, 253 (Tex.1963). The mere fact that one person trusts another, and relies upon his promise to perform a contract, does not rise to a confidential relationship. *See Crim Truck & Tractor*, 823 S.W.2d at 594. The existence of a confidential relationship is usually a question of fact. *See Id.*

2. Analysis

Brummet's breach of fiduciary duty claim relies solely on his assertions that Campbell: (1) failed to disclose to Brummett his negligence; (2) failed to disclose to Brummett information regarding the effect of Campbell's failure to obtain the necessary Board votes in order for Brummett to gain parole; and (3) failed to advise and/or disclose to Brummett the consequences of not obtaining and/or securing the necessary two votes for Brummett to gain parole. These assertions are contained in Brummett's declaration.

This summary judgment proof is insufficient to entitle Brummett to judgment as a matter of law. Although this proof might be sufficient to establish that a breach of a fiduciary relationship occurred, genuine issues of fact exist as to the threshold question of whether the fiduciary relationship was created. In his affidavit, Campbell specifically states he did not represent himself to Brummett as an attorney, and that he disclosed to Brummett his status as a disbarred attorney. By doing this, Campbell repudiates the essence of Brummett's claim. In so doing, he creates a genuine issue of material fact regarding Brummett's entitlement to summary judgment on his breach of fiduciary duty claim. Moreover, Brummett has not cited, nor have we been able to find, a case in which a non-lawyer has been held to the same elevated standard as that of a lawyer in an attorney–client relationship.

Brummett also has not established as a matter of law that a confidential relationship existed with Campbell. Brummett does not claim to have relied upon Campbell, nor does he cite any previous business dealings or other relationship with Campbell that would justify a confidential relationship, or support the conclusion that this was a mature relationship. The mere fact that one person trusts another, and relies upon his promise to perform a contract, does not give rise to a confidential relationship. *See Crim Truck & Tractor,* 823 S.W.2d at 594.

Brummett and Campbell were also of equal bargaining positions engaged in an arms length transaction. It was Brummett that independently selected Campbell based on his reputation that he had been "successful in this area before." We find that Campbell was nothing more than a messenger/spokesman for Brummett,

conducting a task that Brummett could have accomplished himself. In fact, in Brummett's motion for summary judgment on negligence, Brummett states he hired Campbell merely to "assist and represent him in the parole process." We find this particularly revealing, given that at the time, the specialized skills of an attorney were not necessary for the presentation of information or arguments to the Board. *See Cruz v. Skelton*, 543 F.2d 86, 96 (5th Cir. 1976) (holding that due process does not require appointment of counsel to indigent inmates because procedures for considering parol applications to Texas Board do not present forum in which special analytical, research or forensic skills of lawyers are necessary, nor even likely to prove particularly helpful.). The goal of the Board is to standardize it's decisions with the ultimate objective of creating a system that will allow consideration of every inmate for parole measured by the same standards, rules, and criteria: "a system not based upon pressure, money, nor whom the inmate may know; but based upon merit and proper application of a standardized criteria for selection." *Id. at* 91. Brummett has not brought forth any summary judgment proof demonstrating a confidential relationship with Campbell establishing a duty in Campbell to act in Brummett's best interest.

Accordingly, we hold Brummett's summary judgment proof was insufficient as a matter of law to support judgment on Brummett's claim for breach of fiduciary duty, and the trial court erred if summary judgment was granted on that basis.

B. Damages as a Common Element to the Remaining Causes of Action

In order for Brummett to succeed on his remaining claims, Brummett must prove each element of those claims, including damages, as a matter of law. *See Cosgrove v. Grimes*, 774 S.W.2d 662, 664-65 (Tex. 1989) (holding damages are required element of negligence and legal malpractice); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990) (holding damages are required element of fraud); *Roberts v. Healey*, 991 S.W.2d 873, 878 (Tex. App. —Houston[14th Dist.] 1999, pet. denied) (holding damages are required element of DTPA action); *Husson v. Schwan's Sales Enterprises, Inc.*, 896 S.W.2d 320, 326 (Tex. App.— Houston [1st Dist.] 1995, no writ) (holding damages are required element of breach of contract).

The only evidence of damages Brummett presents in support of his summary judgment motion is a copy of a check in the amount of fifteen hundred dollars made payable to Campbell. Brummett claims

Campbell damaged him by taking this money, thus depriving him of the amount and interest earning capacity thereof.

Given that Campbell, in his affidavit, states he "spent a large amount of time and energy to [sic] plaintiff's cause," we find there is a genuine issue of material fact on the issue of damages as to Brummett's various claims. Viewing the evidence in the light most favorable to the nonmovant, we do not have a sufficient factual basis for concluding Campbell did not earn this disputed amount through his efforts.

We also note that no other evidence was submitted that would justify any legally recognized finding of damages such as evidence of mental pain or suffering. Further, for public policy reasons, Brummett cannot claim that his continued incarceration forms the basis of his damage. *See Peeler v. Hughes & Luce*, 909 S.W.2d 494, 497-98 (Tex. 1995) (holding that unless convicted inmate can prove his innocence, he cannot claim his incarceration or parole forms basis of damages in action against his attorney because his criminal conduct is the only proximate cause of injury suffered as result of that conviction).

Accordingly, the motion for summary judgment cannot be affirmed on any of these causes of action because he has not proven damages as a matter of law. We therefore sustain Campbell's first point of error. Based on our holding in this point of error, we need not reach Campbell's second point of error regarding exemplary damages. *See Texas Builders v. Keller*, 928 S.W.2d 479, 481 (Tex. 1996) (punitive damages may not be awarded unless actual damages are found.)

IV. Res Judicata

In his third point of error, Campbell raises the issue of res judicata. Appellant has not properly presented this issue for our review because he presents no argument or authority to support this contention. *See* TEX. R. APP. P. 38.1(h). When a point of error is not adequately briefed, it is deemed waived. *See Dodd v. Dodd*, 17 S.W.3d 714, 715 (Tex. App.—Houston[1st Dist.] 2000, no pet. h.).

V. Conclusion

Because material questions of fact exist involving Brummett's claims, summary judgment for Brummett was improper. Therefore, the judgment of the trial court is reversed and this case is remanded to the trial court for further proceedings.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed November 30, 2000.

Panel consists of Justices Anderson, Fowler and Edelman.

Do Not Publish — TEX. R. APP. P. 47.3(b).