Affirmed as Modified and Memorandum Opinion filed July 21, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00080-CV

ERNEST POWELL III, Appellant

V.

VICTOR GRIJALVA, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2016-41229

M E M O R A N D U M O P I N I O N

In this legal-malpractice and breach-of-fiduciary-duty case, former attorney Ernest Powell III appeals the judgment rendered on the jury's verdict against him. Because his former client Victor Grijalva presented no expert testimony on the element of causation, we conclude that the evidence is legally insufficient to support the jury's malpractice finding. On the other hand, Powell's argument that the breach-of-fiduciary-duty claim is merely an improper fracturing of the legal-malpractice claim was not raised in the trial court and therefore has not been preserved for our

review. We accordingly modify the judgment to eliminate the damages awarded for legal malpractice and affirm the judgment as modified.

I. BACKGROUND

Grijalva hired Powell to defend him in a suit filed by Lee Pham,[1] who allegedly paid Grijalva $300,000 for real property based on Grijalva's false representations that the land was zoned for commercial development. Grijalva lost the case and sued Powell, alleging legal malpractice and breach of fiduciary duty.

A. The Pham Lawsuit

After an unsuccessful mediation, Pham filed a traditional motion for summary judgment supported by evidence that Grijalva represented that the property was zoned for commercial development when, in fact, the property was restricted to residential use. Powell filed a response to the motion on Grijalva's behalf but attached only an unsigned draft of Grijalva's affidavit containing the statement, "I never represented to Plaintiff or Plaintiff's agents that the property was designated as commercial real estate." Pham pointed out in his summary-judgment reply that Grijalva had produced no summary-judgment evidence.

The trial court granted the motion and rendered judgment rescinding the sale—that is, the trial court declared the deed conveying the property void and ordered Grijalva to return the $300,000 purchase price to Pham. In addition, Grijalva was ordered to pay Pham's attorney's fees of $5,000. The judgment became final in May 2014, when Pham's claims against Grijalva were severed from Pham's claims against Grijalva's co-defendants.

According to Grijalva, Powell never told him that a motion for summary judgment had been filed, asked him to sign the affidavit attached to the summary-

[1] This name sometimes appears in the record alternatively as Pham Lee.

judgment response, or informed Grijalva of the judgment against him. Grijalva later testified that he first learned of the judgment when he received a letter from the office of Constable Ron Hickman informing him that the constable intended to execute on two of Grijalva's properties in satisfaction of the judgment.[2] Unable to reach Powell, Grijalva hired attorney Chidi D. Anunobi to represent him in Pham's post-judgment actions.

Grijalva failed to pay the judgment, and two of his properties were sold at an execution sale. The purchase price was insufficient to satisfy the judgment, and Anunobi negotiated a settlement agreement with Pham in September 2015 to extend the time for payment. When Grijalva again failed to pay as agreed, the parties amended the settlement agreement in October 2016.

B. The Powell Lawsuit

Grijalva sued Powell for legal malpractice and breach of fiduciary duty. By the time this suit was filed, however, Powell had resigned his law license in lieu of disciplinary action on an unrelated matter. Thus, Powell was no longer a practicing attorney when this case was tried.

After a jury trial in which Grijalva and Powell were the only witnesses, the jury found for Grijalva and assessed damages of $218,200.00 for Powell's "failure . . . to properly prosecute the underlying case" and $654,600.00 for breach of fiduciary duty. Grijalva moved for entry of judgment on both amounts.

Powell responded by filing a hybrid document combining his response to Grijalva's motion for judgment with Powell's own motion to disregard the jury verdict. In this filing, Powell argued that, among other things, Grijalva failed to

[2] Grijalva did not identify the date he learned of the judgment, but the record shows that Hickman's office mailed demand letters to Grijalva on July 30, November 6, and November 12, 2014.

present evidence of causation. The trial court rendered the judgment Grijalva requested, impliedly overruling Powell's motion to disregard the verdict. Powell filed a motion for new trial, which was overruled by operation of law, and then brought this appeal.

II. ISSUES PRESENTED

On appeal, Powell seeks reversal of the judgment on legal-insufficiency grounds, in that (a) Grijalva failed to present expert evidence of causation as required in a legal-malpractice claim arising from the attorney's representation of a client in litigation, and (b) Grijalva's breach-of-fiduciary-duty claim is merely an improper fracturing of his malpractice claim.

III. THE LEGAL-MALPRACTICE CLAIM

When reviewing a no-evidence challenge, we view the evidence in the light most favorable to the verdict, crediting favorable evidence when reasonable jurors could do so and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). Evidence is legally insufficient to support a jury finding when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018).

To prevail on a legal-malpractice claim, a former client must prove (1) the attorney owed the client a duty of care, (2) the attorney breached that duty, and (3) the breach proximately caused the client's damage. *Starwood Mgmt., LLC ex rel. Gonzalez v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017) (per curiam) (citing *Stanfield*

v. Neubaum, 494 S.W.3d 90, 96 (Tex. 2016)). Proximate cause consists of (1) foreseeability, and (2) cause in fact. *Windrum v. Kareh*, 581 S.W.3d 761, 777 (Tex. 2019). Neither foreseeability nor cause in fact can be established "by mere conjecture, guess, or speculation." *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004).

Cause in fact is "but-for" causation. *See Starwood*, 530 S.W.3d at 678–79. It is tested, in part, by asking whether the harm alleged would have occurred absent the attorney's alleged breach. *Id*. "In legal malpractice cases, this is a suit-within-a-suit inquiry—the actual result with the alleged misconduct or omission is compared to a hypothetical result the plaintiff claims would have occurred absent the misconduct or omission." *Id.* at 679. Proof of causation in legal-malpractice cases usually requires expert testimony. *Id.*; *Stanfield*, 494 S.W.3d at 96 n.3.

It is undisputed that no expert testimony was offered in this case. Nevertheless, Grijalva argues that the absence of expert causation testimony is not fatal to his legal-malpractice claim because the complaint has been waived, or alternatively, because no expert testimony was required.

A. Powell's no-evidence complaint has not been waived.

Grijalva states that Powell waived this complaint because Powell "never objected to [Grijalva's] decision not to have an expert testify as to breach and causation." But, Powell was not required to object; rather, causation was one of the elements of the legal-malpractice claim that Grijalva was required to prove. Because he offered no competent evidence of causation, Grijalva failed to meet that burden, as Powell appropriately pointed out in his motion to disregard the verdict. *See Cecil v. Smith*, 804 S.W.2d 509, 511 (Tex. 1991) (a no-evidence point in a motion to disregard the jury's answer to a vital fact issue preserves the complaint for appeal).

B. Expert testimony on causation was required.

Grijalva next asserts that expert testimony was not required because Powell's "lack of care and skill is so obvious that the jury could find negligence as a matter of common knowledge." This is so, Grijalva maintains, because "the critical malpractice" at issue is that Powell "failed to notify [Grijalva] that summary judgment was rendered against him." This argument fails on both legal and factual grounds.

1. No exception to the expert-testimony requirement applies.

As a legal matter, Grijalva has not cited, and we have not found, any authority for his position that there is an exception to the requirement for expert testimony of causation in the context presented here. It is true that expert evidence is not required when causation is "plainly within the common knowledge of laymen." *Arce v. Burrow*, 958 S.W.2d 239, 248 (Tex. App.—Houston [14th Dist.] 1997), *rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999). But, "when the causal link is beyond the jury's common understanding, expert testimony is necessary." *Alexander v. Turtur & Assocs., Inc*., 146 S.W.3d 113, 119–20 (Tex. 2004). And here, the common understanding of the jury does not include knowledge of the procedures and evidence required to defeat Pham's well-supported motion for summary judgment, or to avoid execution on Grijalva's properties in the face of his failure to pay the judgment.

Although Grijalva relies on *James V. Mazuca & Assocs. v. Schumann*, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied) (en banc), that case is inapplicable. The *James* court addressed the need for expert testimony to establish the standard of care and held that expert testimony was not needed to establish that an attorney breached the standard of care by failing to file a case before the statute of limitations expired. *See id.* The *James* court reasoned that "[m]issing the statute

of limitations is a classic example of negligence that any layperson can understand." *Id.* But as the Supreme Court of Texas has explained, "Breach of the standard of care and causation are separate inquiries, however, and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other. Thus, even when negligence is admitted, causation is not presumed." *Alexander*, 146 S.W.3d at 119–20.

We agree with Powell that Grijalva's legal-malpractice claim required expert testimony regarding causation. For the reasons discussed below, the evidence actually admitted is insufficient to support the judgment on this claim.

2. There is no evidence Powell's professional negligence caused Grijalva harm.

As a factual matter, the "critical malpractice" in this case was not Powell's failure to notify Grijalva of the judgment. Grijalva alleged in his pleadings that Powell failed to keep Grijalva informed about the case and "negligently respond[ed] to dispositive motions," and that harm to Grijalva from these actions consisted of "[j]udgment of $300,000.00, loss of 2 properties with net equity value of about $150,000.00, attorney fees and mental anguish." Thus, Grijalva was complaining of the adverse judgment as well as the execution of the judgment. Further, the charge asked the jury to assess damages for Powell's failure "to properly *prosecute* the underlying case."[3] We measure the sufficiency of the evidence by the charge when the opposing party does not object to it. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000).

[3] Emphasis added.

(a) There is no evidence that, but for Powell's negligence, the Pham judgment would have been more favorable to Grijalva.

Grijalva presented no evidence that Powell caused the adverse judgment. Pham's motion for summary judgment on the misrepresentation claim was supported not only by Pham's affidavit, but also by a photograph of a large sign advertising the property for sale as "Commercial Property" and "Shopping Center." In addition, Grijalva's contract with Pham bears the heading, in bold, capitalized letters, "**COMMERCIAL CONTRACT - UNIMPROVED PROPERTY**." Contrary to these representations, however, the property was subject to a restrictive covenant limiting it to residential use. Grijalva identified no evidence Powell could have obtained that was sufficient to defeat Pham's summary-judgment motion, nor was Grijalva competent to offer such an opinion.

(b) There is no evidence that, but for Powell's negligence, the execution sale could have been avoided.

Grijalva's complaint about the execution of the judgment is not merely unsupported by causation evidence; to the contrary, the evidence conclusively establishes the absence of causation. As Grijalva stated in his live pleading, he was represented in Pham's post-judgment actions not by Powell but by Anunobi, and "[a]ssertions of fact, not pled in the alternative, in the live pleadings of a party are regarded as formal judicial admissions." *Hous. First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983). Further still, the execution sale of Grijalva's properties was caused not by Powell but by Grijalva's failure to pay the judgment—a circumstance over which Powell had no control. Indeed, Grijalva admitted at trial that he attended the mediation of Pham's case on December 10, 2013—more than five months before the final judgment was rendered against him—and Powell told him at the mediation that Pham wanted his $300,000 back plus $5,000 for attorney's fees. Grijalva testified that he responded to Pham, "I'm going to re—return your money. Give me

a little time. To sell my property and pay you money." But Grijalva did not return Pham's money at the time of the mediation in 2013; at the time of the judgment in 2014; or at the time of the first settlement agreement in the autumn of 2015. Indeed, as late as October 2016, Grijalva still had not paid the judgment. Thus, even if Powell had immediately notified Grijalva of the judgment (as he assuredly should have done), Grijalva presented no evidence that he had the means to pay it and avoid the execution sale.

We sustain Powell's first issue. Because there is no evidence of causation, we reverse the portion of the judgment awarding Grijalva damages on his legal-malpractice claim.

IV. THE BREACH-OF-FIDUCIARY-DUTY CLAIM

On appeal, Powell argues for the first time that Grijalva's breach-of-fiduciary-duty claim is merely a restatement of his legal-malpractice claim. Under Texas law, a plaintiff is not permitted to divide or "fracture" a legal-malpractice claim into additional causes of action that do not sound in negligence. *Perkins v. Walker*, No. 14-17-00579-CV, 2018 WL 3543525, at *2 (Tex. App.—Houston [14th Dist.] July 24, 2018, no pet.) (mem. op.). Although a claim for breach of fiduciary duty can co-exist with a legal-malpractice claim, "the plaintiff must do more than merely reassert the same claim for legal malpractice under an alternative label." *Duerr v. Brown*, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008, no pet.). "If the gist of a client's complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim." *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Whether a claim styled as breach of fiduciary

duty is actually a claim for legal malpractice is a question of law to be determined by the court. *Perkins*, 2018 WL 3543525, at *2 (citing *Duerr*, 262 S.W.3d at 70).

As Grijalva correctly points out, however, this issue is not properly before us. "When a party fails to preserve error in the trial court or waives an argument on appeal, an appellate court may not consider the unpreserved or waived issue." *Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 604 (Tex. 2012). With the exception of fundamental error, which is not present here, a party generally must preserve a complaint for appellate review by making, and obtaining a ruling on, a timely request, objection, or motion that states the ruling sought with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. TEX. R. APP. P. 33.1. Moreover, the complaint presented on appeal must comport with the complaint raised in the trial court. *See Doan v. TransCanada Keystone Pipeline, LP*, 542 S.W.3d 794, 807 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (issue waived because appellate complaint that condemnor made no bona fide offer of an amount within the trial court's jurisdiction did not comport with trial-court complaint that condemnor made no bona fide offer at all); *Moran v. Mem'l Point Prop. Owners Ass'n, Inc.*, 410 S.W.3d 397, 407 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (trial objection that witness was not identified as a fact witness did not preserve appellate complaint that witness was not identified as an expert).

At no time did Powell apprise the trial court of his contention that Grijalva's breach-of-fiduciary-duty claim was an improper fracturing of the legal-malpractice claim, and Powell's objections to the legal and factual sufficiency of the evidence of each element of breach of fiduciary duty did not preserve his appellate complaint that, as a matter of law, Grijalva could not bring the claim at all. *See, e.g., Cajun Constructors, Inc. v. Velasco Drainage Dist.*, 380 S.W.3d 819, 827 (Tex. App.—

Houston [14th Dist.] 2012, pet. denied) (sub. op. on denial of reh'g) (appellate complaint that, as a matter of law, appellee could not recover attorney's fees in the absence of damages was not preserved by trial-court challenges to the legal and factual sufficiency of the evidence supporting submission of attorney's fees to the jury). Because this complaint is not properly before us for review, we overrule Powell's second issue.

There also is a single sentence in Powell's brief (and repeated in his reply brief) that "[a]s Appellee has presented no evidence consistent with a breach of fiduciary duty claim, there is insufficient evidence to support the jury finding." Powell has not briefed this complaint; he merely states, as to both his legal-malpractice and breach-of-fiduciary-duty claims, that Grijalva had the burden to present expert testimony proving the existence of a duty, its breach, causation, and damages.

Powell cites no authority that every element of a breach-of-fiduciary-duty claim must be supported by expert testimony, nor have we found support for such a rule. Indeed, proof of causation and damages sometimes is not required at all in a breach-of-fiduciary-duty claim against an attorney. *See Arce*, 958 S.W.2d at 248 (citing *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942), *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 507 (Tex. App.—Houston [1st Dist.] 1995, no writ), and *Russell v. Truitt*, 554 S.W.2d 948, 952 (Tex. App.—Fort Worth 1977, writ ref'd n.r.e.)). Moreover, Powell admittedly acted as Grijalva's attorney in the Pham Lawsuit, and attorneys owe their clients fiduciary duties as a matter of law. *See Trousdale v. Henry*, 261 S.W.3d 221, 229 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). These include the duties of "absolute perfect candor, openness and honesty, and the absence of any concealment or deception." *Id.* (citing *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—

Houston [14th Dist.] 2001, pet. denied)). "As a fiduciary, an attorney is obligated to render a full and fair disclosure of facts material to the client's representation." *Id.* (citing *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988)). Grijalva's testimony that Powell failed to inform him, Grijalva, of the adverse judgment in the Pham Lawsuit is legally sufficient evidence that Powell failed to comply with those duties. Powell failed to brief any issue with respect to causation and damages for the breach of fiduciary duty.

We overrule Powell's second issue, and we affirm the portion of the judgment awarding Grijalva damages for breach of fiduciary duty.

V. CONCLUSION

In the absence of expert testimony on causation, the evidence is legally insufficient to support Grijalva's legal-malpractice claim. Regarding the breach-of-fiduciary-duty claim, however, Powell failed to preserve his improper-fracturing complaint or to show that the evidence is insufficient to support the jury's findings. We accordingly modify the judgment to eliminate the award of $218,200.00 in legal-malpractice damages, and we affirm the judgment as modified.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.