



## **Linda Jurek v. Gary Kivell**

2011 | Cited 0 times | Court of Appeals of Texas | April 21, 2011

### MEMORANDUM OPINION

This appeal arises out of a long-running family dispute in which Linda Jurek fought over ownership of a home with her father, Joseph Forrest, in three separate lawsuits. In the first suit, Jurek entered into a mediation agreement with Forrest in which she agreed to settle her claims. Jurek later brought this suit alleging that Forrest and his lawyer, Gary Kivell, fraudulently induced her to sign the mediation agreement by failing to disclose Forrest's existing will. The trial court granted Kivell's summary-judgment motion and severed the claims against him. In three issues, Jurek contends that the trial court erred in granting summary judgment because she presented a scintilla of evidence to support her fraud claim, Kivell did not meet his burden of proof on his affirmative defenses, and *res judicata* does not bar the action.

We affirm.

#### Background

Joseph Forrest conveyed a home to his daughter, Linda Jurek, several decades ago, but the parties later disputed the conveyance. Forrest sued Jurek over ownership of the home and the court ordered them to mediation. Forrest attended the mediation in 1999 along with his attorney, Gary Kivell. At the mediation, Jurek agreed to surrender fee simple in the home and pay for the maintenance and property taxes in return for a life estate on the property. The mediation agreement also included a promise by Forrest to give Jurek a one-fourth future interest in the home upon his death. The mediation agreement did not require Forrest to provide any proof that a will existed or would be prepared conveying a one-fourth future interest in the home to Jurek upon his death. The trial court entered a "Final Decree" incorporating the terms of the mediation into a judgment and declaring that the mediation agreement was "binding upon the parties."

Forrest subsequently sued Jurek a second time seeking reimbursement of insurance he paid on the home and contending that she had not properly maintained the property as a life tenant and had forfeited her right to her life estate in the property. Based on the final judgment, it appears that Jurek filed a counterclaim in which she alleged that she was fraudulently induced to enter into the 1999 mediation settlement agreement. The case was tried to the court. The court found for Jurek on all of Forrest's claims, including that she had not forfeited her life estate, and awarded her attorneys' fees. The court also found that Jurek was not fraudulently induced to enter into the mediated settlement agreement.



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In 2005, Jurek filed this third lawsuit against her two sisters, both in their individual capacity and as guardians of their father who had been declared incapacitated. She alleged that Forrest and her sisters had conveyed the home to one of the sisters in violation of the mediation agreement and that such actions constituted fraud and breach of contract. When Forrest died in 2008, Jurek learned that Kivell had prepared a will approximately one year before the mediation that left the entire remainder of the estate to her sisters without providing for her one-fourth future interest in the home as mandated by the mediation agreement. She amended her lawsuit to assert that the mediated settlement agreement superseded and invalidated the will, or alternatively that Forrest intentionally made a false promise to induce her to sign the agreement without any intent to keep his promise to convey her a one-fourth future interest. She also sued Kivell claiming that he had not disclosed the existence or contents of the will during the mediation.

Kivell moved for summary judgment on both traditional and no-evidence grounds including standing, res judicata, statute of limitations, no duty to disclose, and no evidence of fraudulent inducement, causation, or damages. As summary-judgment evidence, Kivell attached his own affidavit and the final decree and judgment from the prior two lawsuits between Jurek and Forrest. In his affidavit, Kivell stated that he was not authorized at the mediation to disclose anything about his client's will. At the time he also had no memory of the will's contents or any knowledge of whether Forrest had revoked his will or intended to revoke his will in the future.

In response, Jurek argued that Kivell failed to disclose that Forrest's will did not leave her the promised one-fourth future interest in the estate, making Forrest's promise at the mediation to convey her an interest false at the time it was made. She also claimed that because Kivell prepared the will, he knew that his client's promise to make the conveyance to her was fraudulent. Jurek filed an affidavit in which she stated that she did not know of her father's will before the mediation, that Kivell concealed the will during the mediation, and that her father went to the mediation "with intent not to negotiate honestly." She also filed an affidavit from her lawyer who attended the mediation stating that the terms of Forrest's will were a "stumbling block to settlement unless the settlement specifically provided for [Forrest] to make a will guaranteeing Mrs. Jurek's springing one-fourth interest." Jurek's attorney also stated that Kivell never disclosed the existence of the will during the mediation.

The court granted summary judgment without specifying whether it was granting the no-evidence motion or the traditional summary-judgment motion. Jurek filed a motion for new trial, which was overruled by operation of law. The court subsequently severed Jurek's claims against Kivell, making the summary judgment final. Jurek timely filed a notice of appeal.

### Summary Judgment Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life Accid. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). If a trial



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court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.--Houston [1st Dist.] 2005, pet. denied). A party seeking summary judgment may combine in a single motion a request for summary judgment under the no-evidence standard with a request under the traditional summary judgment standard. *Binur v. Jacobo*, 135 S.W.3d 646, 650 (Tex. 2004). When a party has filed both a traditional and no-evidence summary-judgment motion and the order does not specify which motion was granted, we first review the propriety of the summary judgment under the no-evidence standard. See Tex. R. Civ. P. 166a(i); see *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the no-evidence summary judgment was properly granted, we need not reach arguments under the traditional motion for summary judgment. See *Ford Motor*, 135 S.W.3d at 600.

While it is not a model of clarity, we conclude that Kivell's motion was both a no-evidence and a traditional summary-judgment motion because it relies on evidence attached to the motion, seeks summary judgment based on a number of affirmative defenses, and broadly states that it is seeking summary judgment under Texas Rule of Civil Procedure 166a, "including 166a(i)." (emphasis added); see *Lewis v. Nolan*, No. 01-04-00865-CV, 2007 WL 926659, at \* 3 (Tex. App.--Houston [1st Dist.] Mar. 29, 2007, no pet.) (concluding that summary-judgment motion was both no-evidence summary-judgment motion and traditional summary-judgment motion).<sup>1</sup>

To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential element of the non-movant's claim on which the non-movant would have the burden of proof at trial. See TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523-24 (Tex. App.--Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the non-movant to present evidence raising a genuine issue of material fact as to each of the elements specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524.

In a traditional summary-judgment motion, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant moving for traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). The motion must state the specific grounds relied upon for summary judgment. TEX. R. CIV. P. 166a(c). When reviewing a summary-judgment motion, we take as true all evidence favorable to the non-movant, and indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating*, 164 S.W.3d at 661; *Provident Life Accid. Ins.*, 128 S.W.3d at 215. If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.--Houston [1st Dist.] 2005, pet. denied).



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### Fraud by Nondisclosure

In her first issue, Jurek claims that the trial court erred in granting summary judgment on her fraud claim because she presented sufficient evidence to raise a fact issue on each of the elements of fraud by nondisclosure.

The elements of fraud by nondisclosure, or fraud by omission, are (1) the defendant failed to disclose facts to the plaintiff when the defendant had a duty to disclose such facts; (2) the facts were material; (3) the defendant knew of the facts; (4) the defendant knew that the plaintiff was ignorant of the facts and did not have an equal opportunity to discover the truth; (5) the defendant was deliberately silent and failed to disclose the facts with the intent to induce the plaintiff to take some action; and (6) the plaintiff suffered injury as a result of acting without knowledge of the undisclosed facts. See *Horizon Shipbuilding, Inc. v. Blyn II Holding, LLC*, 324 S.W.3d 840, 850 (Tex. App.--Houston [14th Dist.] 2010, no pet.); *BP Am. Prod. Co. v. Marshall*, 288 S.W.3d 430, 441 (Tex. App.--San Antonio 2008, pet. granted). In addition, the plaintiff must prove that the plaintiff relied on the omission or concealment. See *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997); *Horizon Shipbuilding, Inc.*, 324 S.W.3d at 850; *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Ctr. E., Inc.*, 290 S.W.3d 554, 566 (Tex. App.--Dallas 2009, no pet.).

Kivell's no-evidence motion challenged specific elements of Jurek's fraud by nondisclosure claim by asserting that he had no duty to disclose the existence and contents of the will, and there was no evidence that his conduct fraudulently induced her to settle or that his conduct caused her any damages.

### Duty to Disclose

Jurek argues that Kivell had a duty to disclose the existence and contents of the will under the common law cause of action for fraud by nondisclosure and the state bar's disciplinary rules for professional conduct. Kivell responds that he had no duty to disclose, that any knowledge he had of the will was privileged, and he did not have his client's consent to disclose the will's existence or terms.

To recover on her fraudulent non-disclosure claim, Jurek must show that Kivell owed a duty to speak or disclose information. Whether a duty to disclose exists is a question of law. *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001). "When the particular circumstances impose on a person a duty to speak and he deliberately remains silent, his silence is equivalent to a false representation." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986); see also *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 585 (Tex. App.--Houston [1st Dist.] 2007, pet. denied).

### A. Third Party Suits Against Attorneys



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Generally, the duties that arise from the attorney-client relationship are owed solely to the client and those in privity with the attorney, not to third persons such as adverse parties.<sup>2</sup> See *Brown v. Green*, 302 S.W.3d 1, 16 (Tex. App.--Houston [14th Dist.] 2009, no pet.) (stating that "[a]n attorney only owes a duty of care to his clients and not to third parties, even if they may have been damaged by the attorney's representation of the client"); *White v. Bayless*, 32 S.W.3d 271, 275-76 (Tex. App.--San Antonio 2000, pet. denied) (affirming summary judgment because attorney owed no duty to adverse party); *Mitchell v. Chapman*, 10 S.W.3d 810, 811 (Tex. App.--Dallas 2000, pet. denied) (affirming summary judgment in favor of defendant in "a suit filed by an unsuccessful litigant against an opposing attorney," on grounds that relationship between lawyer and third party "was clearly adversarial" and lawyer "owed no legal duty" to the third party). More specifically, "[u]nder Texas law, attorneys cannot be held liable for wrongful litigation conduct" toward third parties. *Renfro v. Jones & Assocs.*, 947 S.W.2d 285, 288 (Tex. App.--Fort Worth 1997, writ denied); see also *Chu v. Hong*, 249 S.W.3d 441, 444 & n.19 (Tex. 2008) (stating that court was "especially reticent to open the door" to claims against an opposing party's attorney and that "fraud actions cannot be brought against an opposing attorney in litigation as reliance in those circumstances is unreasonable"); *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.--Houston [1st Dist.] 2005, pet. denied) (attorney qualified immunity bars lawsuits against opposing counsel "even if the conduct is wrongful in the context of the underlying lawsuit").

This rule of attorney protection exists because the third party has not retained the attorney, the attorney's services were not rendered to the third party, no privity of contract exists between the third party and the attorney, and the attorney's duties are owed only to the client. *Alpert*, 178 S.W.3d at 405; *White*, 32 S.W.3d at 275-76. Allowing claims against opposing counsel for litigation misconduct undercuts an attorney's duty to zealously represent his clients within the bounds of the law. *Alpert*, 178 S.W.3d at 405; see also *Bradt v. West*, 892 S.W.2d 56, 71-72 (Tex. App.--Houston [1st Dist.] 1994, writ denied) (stating that public has interest in "loyal, faithful and aggressive representation by the legal profession"). In fulfilling this duty, an attorney has the right to pursue legal rights that he deems necessary and proper, without being subject to liability. *Bradt*, 892 S.W.2d at 71. If attorneys could be held liable to opposing parties for statements made or actions taken in the course of representing their clients, they would be forced to balance their own potential exposure against their clients' best interests. *Id.*; see also *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 440 (Tex. App.--Houston [14th Dist.] 2000, pet. denied) (noting that attorney's concern of being sued "would favor tentative rather than zealous representation of the clients" and allowing such lawsuits "would dilute the vigor with which Texas attorneys represents their clients and would not be in the best interests of justice.").

Another reason that a non-client generally has no claim against an opposing lawyer for fraud during litigation is because a party cannot justifiably rely on the opposing party's lawyer representations or silence as a matter of law. See *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex. 1999). Generally speaking, reliance is not justified when the representation or non-disclosure takes place in an adversarial context. *Id.*



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As a result of these policy concerns, "[A]n attorney's conduct is not independently actionable by an opposing party to the suit if the conduct is part of the discharge of the lawyer's duties in representing his or her client." Alpert, 178 S.W.3d at 406; see also Chapman Children's Trust, 32 S.W.3d at 441 (affirming summary judgment on fraud and conspiracy claims by opposing party because law firm's actions were undertaken in discharge of its duties to its client); Mitchell, 10 S.W.3d at 811-12.<sup>3</sup>

### 1. Exceptions to Attorney Immunity

Attorney immunity is by no means absolute. Attorneys can be held liable for knowingly committing a fraudulent act outside the scope of their legal representation of the client. Alpert, 178 S.W.3d at 406. An attorney may also be liable, under some circumstances, for negligent misrepresentations made to a non-client. See McCamish, 991 S.W.2d at 793-94 (noting that in some circumstances non-clients rely on attorney's representations and attorney intends such reliance). Additionally, the attorney immunity doctrine does not affect any duty by the client to disclose the information. See Renfroe, 947 S.W.2d at 287.

Finally, the offending attorney can still be punished for wrongful litigation conduct by the court in which the conduct occurred under the Texas Rules of Civil Procedure. Bradt, 892 S.W.2d at 72. But a party does not have an independent right of recovery, "under any cause of action," against the attorney of an opposing party arising from conduct the attorney engaged in as part of the discharge of his duties in representing an opposing party in a lawsuit. Id. (emphasis added). "[T]he remedy is public, not private." White, 32 S.W.3d at 276.

### 2. Kivell's Alleged Conduct

Jurek was not Kivell's client or in contractual privity with him so the general rule of attorney qualified immunity applies. We note that the attorney immunity rule focuses on the kind of conduct engaged in, not on whether the conduct was wrongful in the context of the underlying lawsuit. Alpert, 178 S.W.3d at 406; Chapman Children's Trust, 32 S.W.3d at 440; White, 32 S.W.3d at 276. Thus, the key issue here is whether the attorney engaged in the alleged misconduct as part of the discharge of his duties in representing a party in a lawsuit. Alpert, 178 S.W.3d at 406. Jurek did not present any argument here or evidence below that Kivell failed to disclose information to her independent of his participation in the mediation in the lawsuit. Instead, she merely asserts that Kivell had knowledge of the will. Jurek failed to raise a fact issue indicating Kivell's conduct went beyond his representation of Forrest.

None of the other exceptions to the attorney immunity rule apply to Kivell. She did not raise a claim for negligent misrepresentation. Additionally, even if Forrest fraudulently induced Jurek to sign the agreement, Kivell would be liable only for his own conduct and not that of his client. Jurek cannot overcome the attorney immunity rule and the lack of a duty between an attorney and an adversarial third party. She, therefore, failed to raise a fact issue on the element of duty to disclose on this



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general ground.

### B. Liability Under Disciplinary Rules

Finally, Jurek contends that a duty to disclose exists under the Texas Rules of Disciplinary Conduct. Specifically, she cites Rule 1.02(c) prohibiting a lawyer from assisting a client in engaging in fraudulent conduct, and Rule 1.02(d) requiring a lawyer to "promptly make reasonable efforts . . . to dissuade a client" from committing fraud when the lawyer "has confidential information clearly establishing that a client is likely to commit a . . . fraudulent act that is like to result in substantial injury to the financial interests or property of another." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(c), (d), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2005). She further asserts that a duty is created by Rule 4.01(b) which provides that a lawyer shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid ... knowingly assisting a fraudulent act perpetrated by the client." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.01(b), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2005).

The preamble to the disciplinary rules, however, states that the rules do not in themselves create any legal duty nor create a private cause of action.<sup>4</sup> TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble ¶ 15, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2005). The rules are helpful guidelines for determining the standards of conduct for lawyers but do not create a private cause of action. See *Cruse v. O'Quinn*, 273 S.W.3d 766, 775 (Tex. App.--Houston [14th Dist.] 2008, pet. denied) (rules do not establish negligence per se case or private cause of action, but may be considered in determining public policy); *McGuire, Craddock, Strother & Hale, P.C. v. Transcon. Realty Investors, Inc.*, 251 S.W.3d 890, 896 (Tex. App.--Dallas 2008, pet. denied) (stating that disciplinary rules do not create private cause of action and rules establish appropriate conduct of lawyers "solely for the purpose of discipline within the profession"); *Brown*, 302 S.W.3d at 16 n.17 (following *McGuire* and holding that there is no legal authority that attorney can be liable based solely on violation of disciplinary rules); *Judwin Properties, Inc. v. Griggs & Harrison, P.C.*, 981 S.W.2d 868, 870 (Tex. App.--Houston [1st Dist.] 1998, no pet.) (holding that disciplinary rules are "not enforceable" through negligence claim). Based on these cases and the language in the preamble that a violation of the Disciplinary Rules does not create presumption that a legal duty to a client has been breached, let alone a duty to a non-client, we decline to create a duty to speak for the tort of fraudulent nondisclosure based solely on the Rules.

Jurek failed to raise a fact issue as to Kivell's duty to disclose the existence of Forrest's will. The trial court, therefore, properly granted Kivell's motion for summary judgment. We overrule Jurek's first issue. Because this is dispositive of the issues presented, we need not address whether summary judgment based on the remaining grounds was proper. See *Ford Motor*, 135 S.W.3d at 600.

Conclusion



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We affirm the judgment of the trial court.

Panel consists of Justices Higley, Brown, and Bennett.<sup>5</sup>

1. As part of her second issue, Jurek argues that the trial court improperly shifted the burden for summary judgment on Kivell's affirmative defenses onto her because Kivell only filed a no-evidence motion. We reject this argument because we read Kivell's motion as both a traditional and a no-evidence summary judgment motion.

2. We describe the protection provided to attorneys from claims by their adversaries as "qualified immunity" from civil liability because it only applies to claims by non-clients for actions taken in connection with representing a client in litigation. *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.--Houston [1st Dist.] 2005, pet. denied); *Dixon Fin. Servcs., Ltd. v. Greenberg, Peden, Siegmeyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at \*7 (Tex. App.--Houston [1st Dist.] Mar. 20, 2008, pet. denied) (mem. op.). This principle is also described as the "attorney immunity doctrine." *Reagan Nat'l Adver. of Austin, Inc. v. Hazen*, No. 03-05-00699-CV, 2008 WL 2938823, at \*2 (Tex. App.--Austin July 29, 2008, no pet.).

3. This court has repeatedly held that a fraud action against an opposing attorney is not actionable when the attorney's alleged conduct is part of the discharge of the attorney's duties in representing his client: *Bosch v. Armstrong*, No. 01-08-00847-CV, 2009 WL 1635318, at \*3-4 (Tex. App.--Houston [1st Dist.] June 11, 2009, no pet.) (upholding summary judgment on claims for malicious prosecution, defamation, fraud, and abuse of process by plaintiff against opposing counsel in underlying litigation); *Dixon Fin. Servs., Ltd. v. Greenberg*, No. 01-06-00696-CV, 2008 WL 746548, at \*9 (Tex. App.--Houston [1st Dist.] Mar. 20, 2008, no pet.) (upholding summary judgment on claims for conversion, abuse of process, fraud and conspiracy to defraud by plaintiff against opposing counsel in underlying litigation, noting plaintiff cannot "salvage an otherwise untenable claim merely by characterizing it as tortious"); *Alexander v. Malek*, No. 01-06-01156-CV, 2008 WL 597652, at \*3 (Tex. App.--Houston [1st Dist.] Mar. 6, 2008, no pet.) (mem. op.) (affirming summary judgment on claims based on attorney's representations to opposing party regarding trial date).

4. The preamble states: "Violation of the Texas Disciplinary Rules of Professional Conduct does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached . . . . Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." TEX. DISCIPLINARY R. PROF'S CONDUCT preamble ¶ 15, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2005).

5. The Honorable Alfred H. Bennett, Judge of the 61st District Court of Harris County, participating by assignment.

