PROFESSIONAL LIABILITY UPDATE

Fall 2013

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This newsletter is intended to summarize the most significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every case involving professional liability issues during the period or of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the author and do not necessarily reflect the views of Shannon, Gracey, Ratliff & Miller, L.L.P.

I. Legal Malpractice

A. Duty

Only a party in privity with an attorney may sue the attorney for malpractice. *Rogers v. Walker*, No. 13-12-00048-CV, 2013 WL 2298449, 2013 Tex. App. LEXIS 6452 (Tex. App.—Corpus Christi May 23, 2013, pet. filed) (mem. op.)

Ted G. Walker prepared Louise Rogers's will. In the will, Louise Rogers named her stepson Ronald Rogers as executor. After her death, Ronald sought to be appointed executor. However Gayle Creel, Louise Rogers' natural child, hired Ted L. Walker, the son of Ted G. Walker, to oppose Ronald's appointment and seek his appointment instead. After a hearing, the court appointed Creel.

Ronald appealed Creel's appointment. The court of appeals reversed the appointment and remanded. Ronald was subsequently appointed executor. A few months later, Creel admitted having paid creditors and himself without court approval. Ronald obtained a judgment against Creel for return of the estate's assets on the basis of fraud and embezzlement.

Almost two years later, Ronald, as executor, sued Creel's attorney Ted L. Walker for legal malpractice, among other causes of action. Walker obtained a summary judgment. Ronald appealed.

Generally, only a party in privity with the attorney can sue for malpractice. As executor, Ronald stands in the decedent's shoes. Walker asserted that he owed no duty to the decedent as an attorney or fiduciary. Ronald argued that Walker's father prepared the will and that Walker and his father were professionally associated at the time. However the court of appeals held that Walker's evidence conclusively established that he and his father were not professionally affiliated in any way and that neither he nor his firm were hired to prepare the will.

The court of appeals went further and stated that even if there was a professional association between the attorneys when the will was drafted, the decedent's attorney-client relationship was with Ted L. Walker's father. Ronald provided no authority that a relationship between the attorneys imputed the attorney-client relationship to Ted L. Walker himself.

Failing to restrict the scope of representation or disclaim the attorney-client relationship led to a finding of an attorney-client relationship despite the attorney's claim of being a mere scrivener. *Vuong v. Taiwai Luk*, No. 01-11-00178-CV, 2013 WL 174560, 2013 Tex. App. LEXIS 369 (Tex. App.—Houston [1st Dist.], Jan. 17, 2013, no pet.) (mem. op.)

Taiwai Luk sought to purchase a restaurant from Tommy Nguyen. The two reached an agreement and went to attorney David Vuong to complete the bill of sale and close the transaction. Luk then paid the purchase price and bought equipment for the restaurant. However the landlord repeatedly refused to allow the transfer of the lease to the restaurant space.

Luk nevertheless opened the restaurant and operated it for over a month while the landlord thought Nguyen was still operating it. When he delivered rent by himself and

asked about transferring the lease, and the landlord again refused, he realized the landlord would never accept him as a tenant and that Nguyen lied to him. A few days later he handed in the keys.

Luk sued Nguyen and Vuong. He claimed Vuong committed legal malpractice. Vuong testified that he acted as a mere scrivener in memorializing the transaction and did not give either legal advice, thereby not giving rise to an attorney-client relationship.

The trial court disagreed. It found that Luk did not want to pay the purchase price unless a lawyer drew up their agreement. Luk wanted a lawyer to witness the representations and guarantee Nguyen sold the restaurant to him. When Nguyen told Vuong he forgot to bring the lease agreement, Vuong proceeded. Vuong did not contact the landlord or verify the lease was assigned. Vuong did not advise Luk that he could lose his investment if the lease assignment was rejected. Numerous terms in the bill of sale were not suggested or agreed to by either party. The bill of sale did not identify the lease, its terms, or representations Nguyen made about it. Instead Vuong advised that the document properly memorialized their agreement and they could close the transaction. Drafting the bill of sale required legal judgment and discretion. Luk justifiably relied on Vuong's legal education, training, and experience. Vuong formed an attorney-client relationship by offering to perform a legal service for $300, being paid the fee, performing the services, not restricting the scope of representation or disclaiming the attorney-client relationship, and offering advice or opinion related to the transaction.

Concluding the evidence was legally and factually sufficient to support the trial court's findings regarding existence of an attorney-client relationship between Vuong and Luk, Vuong's breach of duty, and that Vuong's breach caused Luk's damages, the court of appeals affirmed the judgment against Vuong.

B. Causation

> Proof of each element in the underlying suit is necessary to prove causation in the legal malpractice suit. *Kelly & Witherspoon, LLP v. Hooper*, 401 S.W.3d 841 (Tex. App.—Dallas 2013, no pet.)

In September 2004, Charles and Jeanette Hooper were in an auto accident. They were rear-ended by a woman who identified herself as Mrs. M.C. Morse. The Hoopers experienced pain immediately after the accident and throughout that day, sought treatment that evening, and continued a course of treatment. Jeanette made a full recovery but Charles's problems persisted.

In September 2005, the Hoopers hired Kelly & Witherspoon to represent them in their personal injury suit. In July 2006, Witherspoon sent a demand letter. In August 2006, another attorney at the firm filed an original petition against M.C. Morse. In December 2006, M.C. Morse filed a motion for summary judgment in which he asserted he was not the driver of the car that hit the Hoopers' car.

In February 2007, before the trial court granted M.C. Morse's summary judgment, Witherspoon filed an amended petition adding Alice Z. Morse as a defendant. Alice Morse moved for summary judgment, apparently on limitations grounds and the trial court granted the motion.

The Hoopers sued the firm and both Kelley and Witherspoon individually for legal malpractice. At trial, the Hoopers' expert

testified in support of the elements of the legal malpractice claim. The jury found both Kelley and Witherspoon negligent and awarded damages. The trial court entered judgment on the verdict.

On appeal, the lawyers argued there was no evidence that the Hoopers would have prevailed in the underlying litigation. The court of appeals determined there was evidence of some damage but legally insufficient evidence of other damage.

The court held that proving causation in the legal malpractice case based on underlying litigation requires competent evidence of all of the elements of the underlying claim. Thus, if medical expert testimony was needed for the underlying claim, it was needed for the malpractice claim.

In this case, the Hoopers' head and neck pain right after the accident did not require expert testimony because the nature of the condition, the logic of events, and temporal proximity were sufficient. The Hoopers' conditions were within the common knowledge and experience of laypersons, did not exist before the accident, appeared close in time after the accident, and were within the common knowledge and experience of laypersons as being caused by auto accidents.

However, Charles Hooper's continued problems long after the accident required expert testimony. The court concluded a lay jury could not reasonably find a causal connection to the subsequent health issues without the assistance of expert testimony. Because none of the medical records admitted into evidence supplied the necessary opinion, and damages were submitted in broad form such that the court could not determine what damages the jury included, the court reversed and remanded.

Expert testimony is required to prove causation in a legal malpractice claim. *Haddy v. Caldwell*, 403 S.W.3d 544 (Tex. App.—El Paso 2013, pet. denied)

George and Ana Haddy hired John W. Caldwell, Jr. to pursue a medical malpractice claim against U.S. Army physicians for their treatment of Ana. Caldwell failed to designate an expert and file an expert report. The court granted summary judgment in favor of the U.S. Army physicians.

Haddy then sued Caldwell for legal malpractice. Caldwell filed a no-evidence motion for summary judgment. Haddy failed to produce an affidavit from a legal expert in response. The trial court granted the motion.

Haddy argued that Caldwell's negligence was obvious to any layperson. The court of appeals remarked that even if that were true, Haddy failed to address why testimony of a legal expert was not necessary to show causation. Where malpractice arises from prior litigation, the plaintiff bears the burden of proving the impact on the outcome of the case of any failure to meet the standard of care. Without expert testimony, it is too great a leap from Caldwell's failure to designate an expert and file an expert's report to the Haddys' successful recovery.

Haddy suggested the medical opinions he provided sufficed to show causation. Setting aside the issue of whether the opinions were competent summary judgment evidence, the court noted that the medical opinions addressed the standard of care, breach, and causation in the underlying suit, and concluded they were no evidence of causation because they failed to even

address the causal link between the legal malpractice and damages.

C. Damages

> Damages may be proven by comparison to similar claims, but the comparison must be shown—a conclusory statement by an expert is insufficient. *Elizondo v. Krist*, No. 11-0438, 2013 WL 4608558, 2013 Tex. LEXIS 677 (Tex. Aug. 30, 2013)

Approximately 4,000 claims were filed against BP related to the March 2005 explosion at the BP Amoco Chemical Company refinery in Texas City. BP made the business decision to settle every claim. Jose Elizondo was one of the people injured by the explosion. His lawyers made an initial demand of $2 million, but he accepted BP's counter offer of $50,000. The settlement was also supposed to cover his wife's loss of consortium claim, although she did not join in signing the release.

The Elizondos sued the lawyers for failing to obtain an adequate settlement. The lawyers filed several motions for summary judgment. The trial court granted some of them, including the motions on damages. The court of appeals affirmed, holding that the trial court did not err because the Elizondos had not presented more than a scintilla of competent evidence of damages.

As evidence of a fact issue on damages, the Elizondos presented: (1) an expert's affidavit; and (2) their own deposition testimony. The Supreme Court of Texas determined that neither raised a fact issue.

In his affidavit, the expert recited his qualifications, including his familiarity of other settlements with BP. He stated that BP focused on ten criteria in determining the value of a case for settlement purposes, and he listed them. He described the basic facts of Elizondo's situation. He then concluded that based on the information provided and his experience and knowledge, a plaintiff's attorney acting within the standard of care would have obtained a settlement or verdict in the range of $2–$3 million. He also opined that the $50,000 settlement was basically nuisance value and a reasonably competent plaintiff's lawyer would have continued to prosecute the claim until BP made a fair and reasonable offer.

The lawyers argued that the affidavit was defective because a legal malpractice suit is a suit within a suit and proof was required of what the plaintiff would have recovered after a trial absent negligence. The court disagreed and held that the measure of damages is the difference between the result obtained for the client and the result that would have been obtained with competent counsel. Damages can be based on a comparison of settlements, especially where a single defendant settled thousands of claims and tried none to verdict.

The court nevertheless held the expert affidavit insufficient. The affidavit was conclusory because nothing bridged the gap between the expert's familiarity with other settlements and the facts of this case with his opinion of value at $2–$3 million. There was no analysis of cases with injuries and circumstances similar to the Elizondos'.

The other BP settlements were subject to confidentiality provisions, so the court considered whether the parties' previous discovery disputes involving access and disclosure of the settlements warranted denial of summary judgment because the Elizondos were deprived of the evidence they needed to prove their claim. The court concluded the discovery disputes did not warrant denial of summary judgment

because the Elizondos' requests to access the settlement information were for other issues; the Elizondos never argued that they needed evidence of the settlements in order to prove their damages.

In addition to the expert affidavit, the Elizondos argued that the testimony each gave on their actual damages was sufficient. But actual damages are not evidence of malpractice damages. The Elizondos were only injured if they probably would have received more than $50,000 in the absence of malpractice. Proving malpractice damages requires expert testimony, because the factors balanced in determining settlement values requires an evaluation certainly beyond the understanding of most jurors. The plaintiff's testimony is necessarily insufficient to prove such damages. This is particularly so where, as here, Elizondo also testified that he does not know the value of his claim or his wife's, and neither he nor his wife know whether anyone with a similar situation received a larger settlement.

Where a case settles for less than its true value, the defense attorney's malpractice resulted in no harm to it. *Daneshjou v. Bateman*, 396 S.W.3d 112 (Tex. App.—Houston [14th Dist.] 2013, pet. denied)

M. B. Daneshjou and his construction company sued clients for unpaid fees. The clients counterclaimed, and Daneshjou hired Robert H. Bateman to defend him and his company. The clients obtained an $8.2 million judgment, and then the parties reached a settlement in which the clients received $4 million.

Daneshjou sued Bateman for mishandling the defense. The jury found breach and causation. When asked what sum of money would fairly and reasonably compensate Daneshjou for damages caused by Bateman's negligence, the jury answered, $300,000.

Bateman asked the trial court to calculate Daneshjou's recovery using the formula set out in *Keck, Mahin & Cate v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania*, 20 S.W.3d 692 (Tex. 2000), which would result in a take-nothing judgment. Daneshjou responded that *Keck* was inapplicable and the court should render judgment in the amount of $300,000—the amount the jury returned in its verdict. The trial court signed a take-nothing judgment from which Daneshjou appealed.

Citing *Keck*, the plurality opinion stated the measure of damages is "the extent that the attorney's negligence caused the client to pay more to the third party than the client would have paid if his attorney had not been negligent." Thus, if the case settles for less than its true value, the attorney's malpractice caused the client no harm.

Taking the judgment in the underlying suit as the case's value as inflated by Bateman's malpractice, and $300,000 as the jury's effectual answer to the question of what amount of the judgment was caused by Bateman's negligence, the court reached a true value of the case at $7.9 million. The underlying litigation settled for less than that amount, so the take-nothing judgment was proper.

The first concurrence pointed out that Daneshjou failed to comply with the requirements of the Texas Rules of Appellate Procedure regarding the record. The court must therefore presume the omitted portions of the record were relevant to the appeal and support the trial court's judgment. With that presumption, the

concurrence considered addressing the "judicial dicta" from *Keck* to be unnecessary.

The second concurrence agreed with the plurality's disposition for three reasons, one of which was that the failure to provide the necessary record prevented assessment of whether the trial court properly rendered a take-nothing judgment. But it also questioned the plurality's reasoning by distinguishing *Keck* and asserting the correct measure of damages is the impact of Bateman's negligence on the amount of settlement—a question the plurality's math did not answer.

D. Fracturing

> Complaints by a client about false representations regarding a divorce decree, concealing information regarding an agreement between the parties and verification of assets, and inducing the client to sign a divorce decree were claims of legal malpractice because they related to the attorney's competence. *Vara v. Williams*, No. 03-10-00861-CV, 2013 WL 1315035, 2013 Tex. App. LEXIS 4051 (Tex. App.—Austin March 28, 2013, pet. filed) (mem. op.)

Veronica Chavez Vara hired Melissa Morgan Williams to represent her in her divorce. The parties entered into a mediated settlement agreement. After the court signed a final divorce decree, the parties began disputing issues concerning the agreement and the disclosure of assets each had verified. Vara hired new counsel for the post-divorce proceedings.

Vara sued Williams asserting several causes of action, including legal malpractice. After Vara failed to designate testifying experts by the deadline, Williams sought summary judgment on all causes of action. Williams argued the legal malpractice cause of action failed because Vara did not have the required expert testimony and the other causes of action failed because they were components of an impermissibly fractured legal malpractice claim.

Vara then amended her petition, ultimately settling on DTPA violations, breach of fiduciary duty, and fraud. She contended that because Williams's motion for summary judgment was based on her previous petition, and she was not asserting any grounds of negligence whatsoever, that Williams's request to dispose of the entire case was improper. Williams's summary judgment motion did address the remaining live claims and the trial court granted her motion in its entirety. Vara appealed.

The appellate court explained that malpractice plaintiffs may not transform a claim that sounds only in negligence into other claims. They may assert other causes of action supported by the facts, however. The issue in determining whether a claim is an impermissibly fractured malpractice claim or a separate cause of action is whether the gist of the complaint is that the attorney did not exercise the degree of care, skill, or diligence that attorneys of ordinary skill and knowledge commonly possess and exercise. Here, Vara specifically complained that Williams made false representations regarding the divorce decree, concealed information concerning the agreement and verification of assets, and induced her into signing the divorce decree, all of which she relied on to her detriment. The court of appeals concluded the gist of these complaints were that Williams did not competently fulfill her duties. It therefore held the causes of action were impermissibly fractured components of a legal malpractice

claim, and Vara's failure to designate an expert was fatal. The court affirmed the trial court's judgment in favor of Williams.

> An attorney's benefit from additional billing at a reasonably hourly rate for the additional work he recommends is not an improper benefit that supports a breach of fiduciary duty claim; An allegation that conduct was intentional does not automatically make that conduct distinct from legal malpractice. Harris & Greenwell, LLP v. Hilliard, No. 13-12-00089-CV, 2013 Tex. App. LEXIS 9486 (Tex. App.—Corpus Christi August 1, 2013, no pet.) (mem. op.)

Jennifer Hilliard hired Jim Harris of Harris & Greenwell as co-counsel in her suit against her ex-husband to enforce contractual alimony payments. Hilliard paid all fees billed by the firm up until she directly reached a settlement agreement with her ex-husband, including fees in excess of $30,000 for a two-year mandamus proceeding that determined Harris was not disqualified for having previously represented Hilliard's husband in a disciplinary proceeding. Hilliard had raised several issues with her attorneys regarding billing, including their failure to provide an itemized list of charges and exceeding their authority. The firm's final bill was nevertheless initially sent in summary form with only a total amount due. After she obtained an itemized list, Hilliard subtracted the services she did not agree to, that she thought were not the firm's responsibility, or that she felt were unnecessary.

The firm declined her offer to pay the lower balance she claimed was due and sued her for failure to pay fees. Hilliard counterclaimed for legal malpractice, breach of fiduciary duty, fraud and DTPA violations. The legal malpractice claim was dismissed during trial, but the remaining claims went to the jury, which found in Hilliard's favor. The trial court rendered judgment on the verdict. The firm appealed, arguing that the trial court erred in entering judgment because the remaining claims were impermissibly fractured legal malpractice claims.

The acts and omissions Hilliard complained of were filing the writ of mandamus without advising her of the likely costs and delay, failing to advise her that Harris's previous representation of her ex-husband would be a problem, and engaging in irregular and dishonest billing practices. The court of appeals held that each essentially complained of the care, skill, or diligence that attorneys of ordinary skill and knowledge commonly possess, and were thus impermissibly fractured malpractice claims.

A party's characterization of its own claim does not bind the court. Instead, the court will analyze whether a claim is essentially that the attorney failed to adequately represent the client. If so, it is an impermissible fracturing of a negligence claim. Additionally, the mere fact that fiduciary duties are implicated does not make a claim a breach of fiduciary duty. This is because courts look to the fiduciary relationship to determine the standard of care of lawyers.

Hilliard contended Harris's actions in pursuing the mandamus amounted to self-dealing because he stood to profit from the associated fees charged. Where the only benefit to an attorney is a reasonable hourly rate, that is not an improper benefit. An attorney working at an hourly rate stands to earn more if more work is performed, but

that does not make recommending additional work a breach of fiduciary duty. Recommending additional work if unreasonable or unnecessary may be actionable, but the basis is professional malpractice and not breach of fiduciary duty.

Harris did disclose the prior representation of Hilliard's ex-husband. The problem was his failure to disclose it could be an issue in her alimony enforcement action. Complaining of the failure to foresee the complication that would arise is a complaint that Harris did not exercise the degree of care, skill, or diligence that attorneys of ordinary skill and knowledge commonly possess.

The billing practices Hilliard complained of were essentially that the firm failed to properly inform, advise, and communicate to her the basis for charging fees. The fees she disputed were for ordinary legal services, and nothing supported a conclusion that unnecessary services were performed in order to obtain an improper benefit. The court of appeals noted that failure to disclose information and making false or misleading or inadequate representations have all been held to sound in negligence (citing, among others, *Vara*, *supra*).

Hilliard's allegations the firm acted intentionally did not make her claims automatically distinct from legal malpractice. A complaint may still sound in professional negligence even if it is alleged the attorney acted intentionally. The court criticized *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477 (Tex. App.—Dallas 1995, writ denied), which would support the opposite conclusion. *Sullivan* cited *Estate of Degley v. Vega*, 797 S.W.2d 299 (Tex. App.—Corpus Christi 1990, no writ), for the proposition that legal malpractice and fraud relating to fees for legal services were distinct and the latter may give rise to a non-negligence claim. The instant court of appeals pointed out that in its *Vega* opinion, fracturing was not expressly considered, so *Vega* does not support the proposition that its sister court relied on it for.

E. Limitations

The *Hughes* tolling rule must be affirmatively pleaded. *Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, LLP*, 404 S.W.3d 75 (Tex. App.—Houston [14th Dist.] 2013, no pet.)

Haase and his company retained Abraham, Watkins, Nichols, Sorrels, Agosto and Friend to head the litigation team in asserting a patent infringement claim against a company whose product allegedly infringed on its patented formula. A test of the allegedly infringing product was conducted that showed the product's viscosity was substantially below the patented formula. The results were shown to a testifying expert and therefore discoverable, but not disclosed to the other side for more than a year and a half. During that time, the law firm withdrew from the litigation team. The parties later disputed whether the firm was informed of the testing.

To sanction the failure to disclose the testing, the district court struck Haase's pleadings and imposed monetary sanctions in June 2007. By a March 2009 order, the court of appeals reversed the death penalty sanctions and reduced the monetary sanctions from more than $2.7 million to approximately $120,000.

On remand the jury returned a verdict finding misappropriation of trade secrets and patent infringement. The court entered a

judgment reduced by the amount Haase had been sanctioned.

In March 2011, while a second appeal was pending, Haase filed suit against the Abraham firm. He alleged, among other things, that the firm's negligence resulted in the sanctions against him. The firm defended the allegation on limitations grounds. The trial court granted summary judgment in favor of the firm.

On appeal, Haase argued that the tolling rule of *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991) should apply to toll limitations on the malpractice claim until all appeals of the underlying claim were resolved. The statute of limitations for legal malpractice is two years from accrual. Generally, a legal malpractice cause of action accrues when the client sustains a legal injury. The court of appeals determined Haase sustained a legal injury when the court imposed sanctions in June 2007. Under the general rule, limitations would then have run in 2009, barring Haase's 2011 suit. But if the *Hughes* tolling rule applied, limitations would not begin to run until the first appeal, which finally decided the sanctions issues, in 2009. Haase's malpractice suit would then have been filed before limitations would bar it.

The *Hughes* tolling rule did not apply, however, because Haase failed to plead it. The court of appeals held that Haase was required to affirmatively plead *Hughes* tolling because it is a plea in avoidance. In so holding, the court looked to *Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 517 (Tex. 1988), in which the Supreme Court of Texas held the discovery rule must be affirmatively pleaded because it is a plea in avoidance. A plea in avoidance is one that admits the truth of the alleged facts but then alleges additional facts that deprive the admitted facts of their ordinary legal effect, or to obviate, neutralize, or avoid them. The court of appeals concluded *Hughes* tolling was just as much a plea in avoidance as the discovery rule. Haase did not plead *Hughes* tolling, even after the firm clearly pleaded limitations.

Haase did assert *Hughes* tolling in the sur-reply to the firm's motion for summary judgment. The firm did not object. But nothing in the sur-reply could preclude summary judgment because the sur-reply was not timely filed, Haase did not obtain leave to file late, and the trial court did not indicate that it was nevertheless considered. Except on leave of court, the adverse party to a motion for summary judgment must file and serve written response not later than seven days before the hearing. The sur-reply was filed the day of the hearing, 13 minutes before the scheduled setting.

Haase also included a single paragraph on the subject of limitations in the timely-filed response. The paragraph was characterized by the firm as an awkward effort to quasi-assert the discovery rule. The firm objected, noting Haase had not pleaded the discovery rule. Because the firm did not address *Hughes* tolling in its reply, the court of appeals inferred it did not believe the issue had been raised. In its own analysis, the court of appeals held the paragraph was insufficient to raise *Hughes* tolling because it did not cite *Hughes* or use language that limitations should be "tolled."

F. Economic Loss Rule

> The economic loss rule does not prevent an attorney's client from recovering in tort because a written fee agreement exists. *Fleming v. Kinney*, 395 S.W.3d 917 (Tex. App.—Houston [14th Dist.] 2013, pet. filed)

George Fleming and his law firm represented 8,051 clients in litigation seeking recovery from damages caused by Fen-Phen. The pharmaceutical company insisted on an aggregate settlement covering all plaintiffs' claims. The required 95% of Fleming's clients agreed to the $339 million settlement.

The clients signed written contingency fee agreements that allowed Fleming to recover reasonable expenses in handling each claim. In the settlement, each client received a statement showing deductions for expenses. After reviewing the expenses, 600 clients sued Fleming for deducting from their share of the recovery the echocardiograms (used to screen potential clients) of non-clients. They alleged this boosted Fleming's fees by $20 million at their expense.

Fleming argued the economic loss rule precludes the clients' recovery on tort-based claims because the complaints focus on the economic loss which is the subject of the fee agreement. However, Fleming provided no authority showing the economic loss rule foreclosed a breach of fiduciary duty claim in connection with an attorney-client fee agreement. The court was unable to find authority either.

The court noted several observations by the Texas Supreme Court in cases centering on interpretation of fee agreements that demonstrate that a lawyer's duties are overlaying considerations in analyzing the attorney-client fee agreement. For example, in Hoover v. Slovacek, LLP v. Walton, 206 S.W.3d 557, 560 (Tex. 2006), the Texas Supreme Court stated, "When interpreting and enforcing attorney-client fee agreements, it is not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship." Based on such observations, the court rejected Fleming's suggestion that the existence of an attorney-client fee agreement allowed contractual duties to exclude fiduciary duties.

II. Breach of Fiduciary Duty: Attorneys

A. Causation

> Absent evidence a person would not have changed his will had the attorney declined to assist him in doing so, the attorney's assistance does not cause injury to another because a person is free to change their will. *Randall v. Goodall & Davison, P.C.*, No. 03-12-00005-CV, 2013 WL 3481518, 2013 Tex. App. LEXIS 8022 (Tex. App.—Austin July 2, 2013, pet. filed) (mem. op.)

LeAnn Randall and her late husband had jointly engaged J. Mark Avery, an attorney at Goodall & Davison, to craft an estate plan that left three approximately equal shares of their combined property to Randall and his two children from his prior marriage. But the couple had also been experiencing marital difficulties. Randall's husband later contacted the estate planner and reduced the share he would leave to Randall. She was not aware of the changes. Upon his death, Randall learned that he left her only an annuity; she received no property through his will, and she was no longer the

beneficiary of the $1.75 million life insurance policy or his retirement benefits.

Randall sued Avery and his firm for legal malpractice and breach of fiduciary duty. They moved for summary judgment, arguing there was no evidence their actions caused any damages. The trial court granted summary judgment in their favor. Randall appealed.

Randall asserted Avery and the firm breached their fiduciary duty to her by helping Dr. Randall revise his will. The court of appeals held there was no evidence of a causal link between Randal's husband excluding her from his will and Avery failing to decline to represent him in doing so. Dr. Randall had an absolute right to change his will and he could use any lawyer. There was no summary judgment evidence presented that he would not have changed his will had Avery refused to assist him.

B. Damages

> Attorney's fees incurred in underlying litigation may be an element of damages for legal malpractice, but attorney's fees are not an element of damages for breach of fiduciary duty. *Hollister v. Maloney, Martin & Mitchell LLP*, No. 14-12-00529-CV, 2013 WL 2149823, 2013 Tex. App. LEXIS 6110 (Tex. App.—Houston [14th Dist.] May 16, 2013, no pet.) (mem. op.)

Tracy Hollister was an important fact witness in the underlying environmental litigation suit. The plaintiffs in that suit agreed to give Hollister a 7% cut of the net proceeds recovered in order to ensure his cooperation. The plaintiffs retained Maloney, Martin & Mitchell to represent them in that litigation. After a partial settlement, Hollister received a portion of the funds as agreed. A separate action ensued over the recovery of additional funds. The plaintiffs interpleaded funds from a second settlement into the registry of a Galveston court. Hollister filed a response to the interpleader in which he also asserted claims against the firm for breach of fiduciary duty and legal malpractice.

In the interpleader action, the law firms and attorneys obtained a summary judgment against Hollister disposing of all his claims. Hollister appealed only the breach of fiduciary duty claim, arguing there was an implied attorney-client relationship with him and that he suffered damages because he incurred attorney's fees in order to collect the funds due him. The court of appeals clarified that the precedent Hollister relied on allowed recovery of attorney's fees as actual damages in a legal malpractice suit as to the fees incurred in the underlying litigation. However, Hollister's situation was different because he incurred fees in pursuit of his breach of fiduciary duty action, not to remedy attorney malpractice in the underlying suit. And the general rule is that attorney's fees are not recoverable in breach of fiduciary claims. Thus, the court affirmed the trial court.

III. Attorney Immunity

> Absent fraud, malice, or activity entirely beyond the duties of attorneys, an attorney's conduct in representing a client is privileged. *Sacks v. Zimmerman*, 401 S.W.3d 336 (Tex. App.—Houston [14th Dist.] 2013, pet. filed)

Deana Pollard Sacks' membership in a local fitness club was terminated. She sued the club, two named employees, and several

unnamed employees, alleging a scheme to terminate her membership. Brian Weil Zimmerman and Andrew Todd McKinney, IV represented certain of the defendants. Years into the suit, Sacks amended her petition to add Zimmerman and McKinney as defendants and alleged they invaded her privacy by using or obtaining her medical records in violation of her privacy rights. Zimmerman and McKinney answered, pleading qualified immunity, and filed special exceptions. After hearing the special exceptions, the trial court dismissed Sacks's claims against them with prejudice. She appealed.

The court of appeals explained that an attorney generally has immunity from claims made by an opposing party based on conduct the attorney undertook in representation of a client. This is because an attorney should not be placed in a situation where he is forced to choose between their client's best interest or their own potential exposure. But the immunity does not apply to fraudulent or malicious conduct. In this case, all the conduct Sacks complained of was discovery conducted in the case. The court of appeals remarked that Sacks failed to identify any conduct that is fraudulent or entirely foreign to the duties of an attorney. Neither is an invasion of privacy claim recognized as falling in a category of fraudulent or malicious conduct. The court of appeals accordingly affirmed the trial court.

IV. Professional Negligence: Engineering

> Intentional torts need a certificate of merit where they arise out of the provision of professional services. *Dunham Eng'g, Inc. v. Sherwin-Williams Co.*, 404 S.W.3d 785 (Tex. App.—Houston [14th Dist.] 2013, no pet.)

The City of Lake Jackson hired Dunham Engineering DEI to design and produce engineering plans and specifications for a municipal water tower project, to advertise for contractor bids, and help the city review and select a winning bid.

Dunham's specifications required Tnemec paint products. Sherwin-Williams requested that its products be substituted for Tnemec's, but Dunham rejected the request. Sherwin-Williams sued Dunham for intentional interference with prospective business relationships, business disparagement and product disparagement. Dunham filed a motion to dismiss, arguing Sherwin-Williams's certificate of merit failed to meet the statutory requirement. When the trial court denied its motion, Dunham filed an interlocutory appeal.

Dunham argued the certificate of merit was defective, among other reasons, because it did not set forth the unlawful action, error, or omission, and the factual basis for each claim. Sherwin-Williams argued that it was not required to file a certificate of merit for intentional torts. The court of appeals disagreed with Sherwin-Williams and held that based on the plain language of the 2009 version of the statute, the certificate of merit must address each theory of recovery for damages without limitation as to the nature of the theory of recovery, as long as it arises out of the provision of professional services. Sherwin-Williams's tort claims arose out of

professional services provided by Dunham because they pertained to preparation of project plans and specifications, as well as Dunham's actions surrounding the evaluation of bids and advice to the city.

The court of appeals nevertheless determined Sherwin-Williams's certificate of merit sufficient because the affidavit set forth facts adequate to provide the court a basis to determine the suit was not frivolous, even with respect to the intentional torts.

> Nonsuits may not be used to circumvent certificate of merit requirements. *Bruington Eng'g, L.T.D. v. Pedernal Energy, L.L.C.*, 403 S.W.3d 523 (Tex. App.—San Antonio 2013, no pet.)

Pedernal Energy sued Bruington Engineering and three other entities alleging damage to an oil well and the surrounding formation caused by problems with fracturing equipment. When Bruington filed a motion to dismiss because Pedernal did not submit a certificate of merit, Pedernal nonsuited Bruington without prejudice.

In the course of litigation against the remaining entities, Pedernal designated an expert who included in his opinion that Bruington failed to perform in a good and workmanlike manner and failed to properly supervise the fracturing job. Seven months after the nonsuit, Pedernal amended its petition to bring Bruington back into the lawsuit and asserted the same causes of action against Bruington. Pedernal attached the designated expert's affidavit to the amended petition.

Bruington filed a second motion to dismiss on the basis of Pedernal's failure to comply with the certificate of merit requirements. The trial court denied the motion, and Bruington filed an interlocutory appeal.

The court of appeals first considered whether Bruington waived its right to appeal its second motion to dismiss for failure to appeal the nonsuit without prejudice, as Pedernal argued. The court held that "a section 150.002(e) motion to dismiss with prejudice is a claim for affirmative relief that survives nonsuit because, otherwise, the nonsuit would defeat the purpose of deterring meritless claims." The trial court's order of nonsuit did not express an intent to dispose of all claims and all parties; thus, it was a ministerial act to carry out Pedernal's right to a nonsuit and did not resolve Bruington's pending motion for dismissal under section 150.002(e).

The court determined that all the allegations in Pedernal's amended petition arose out of the provision of professional services, so Pedernal was required to file a certificate of merit with its original petition. The court clarified that this meant Pedernal was required to file the certificate of merit with its "first-filed complaint asserting a claim for damages arising out of the provision of professional services by a licensed or registered professional," not the first-served complaint or an amended complaint. The only exception to the statutory requirement is when the statute of limitations will run within 10 days and that presents a time constraint. The court reasoned that Pedernal should not be allowed to circumvent the statute by nonsuiting Bruington without prejudice and then bringing Bruington back into the case with an appropriate certificate of merit.

V. Officer and Director Liability

> The fiduciary shield doctrine may prevent the exercise of general jurisdiction over a person whose only

> contacts with the forum were made on behalf of a company, but it does not prevent the exercise of specific jurisdiction over the individual for actions arising from or relating to the contacts made on behalf of the company. *Cagle v. Clark*, 401 S.W.3d 379 (Tex. App.—Texarkana 2013, no pet.)

When Martin Lake Energy Services defaulted on a revolving credit facility, the lienholder sought a receiver over all of its property. Cagle and Martin Lake Construction intervened. Cagle and Martin Lake Construction also filed a petition against Martin Lake Energy and its officer, Timothy J. Clark, a New York resident, individually. The trial court applied the fiduciary shield doctrine and determined that the court did not have jurisdiction over Clark because his only contacts with Texas were on behalf of Martin Lake Energy and there was no evidence that the corporation was Clark's alter ego.

The court of appeals explained that the fiduciary shield doctrine applies only to exercising general jurisdiction over an individual. If the fiduciary's actions on behalf of the company give rise to the claims, a court may exercise specific jurisdiction to hold the fiduciary liable for his own actions. Clark allegedly made misrepresentations to Cagle, and Cagle's cause of action arises from and relates to those misrepresentations. Therefore the court had specific jurisdiction over Clark.

The court of appeals also noted that a promoter cannot be an agent of a company that doesn't exist, and therefore the fiduciary shield does not apply to such a promoter. Clark had contacts with Texas prior to the formation of Martin Lake Energy. The court did not determine whether his pre-formation contacts would support general jurisdiction over Clark, however.