

# PROFESSIONAL LIABILITY UPDATE

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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.*

***Gillis v. Provost & Umphrey Law Firm, No 05-13-00892-CV, 2015 Tex. App Lexis 280, 2015 WL 170240 (Tex. App.- Dallas [5<sup>th</sup> Dist.], January 14, 2015, no pet. h.)***

*Formation of the attorney client-privilege.* Appellant meet with Appellees in regards to obtaining attorney client advice and counsel regarding a Qui Tam lawsuit regarding Dallas Independent School District and Houston Independent School District. At the initial meeting the attorney gave no definite recommendation during the meeting and made no definitive commitment concerning representing Appellant in the suit. In fact Appellant retained separate counsel to bring action against DISD and HISD.

However, before Appellant could bring an action, Appellees were retained as local counsel for another client regarding a Qui Tam suit against DISD. In Qui Tam suits, only the first relator (claimant) to file the suit can recover damages.

Appellant sued Appellees for breach of fiduciary duty arising out of an attorney-client relationship, as Appellant had

disclosed confidential information to Appellees and therefore they had a duty of loyalty and confidentiality to Appellants.

Appellees filed a Motion for Summary Judgment, which was granted on the grounds that there was no attorney client relationship, no duty of loyalty, no breach of fiduciary duty and no disclosure of any confidential information. The Court of Appeals affirmed the lower court's decision.

In effort for an attorney to breach his fiduciary duty to a client, he must have an attorney client relationship. An attorney client relationship can be made by the parties either explicitly or implicitly manifest an intention to create and attorney-client relationship. *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.-Texarkana 2005, no pet). The determination of whether there is a meeting of the minds is based upon an objective standard examining what the parties did and not their alleged subjective state of mind. *Bright v. Addison*, 171 S.W.3d 588, 596 (Tex. App.-Dallas 2005, pets. denied).

In the case at hand, Appellants argued they only had a "limited attorney-

client relationship” with Appellees. And it was that limited relationship that arose as result of the initial attorney client consultation and therefore they had a duty of loyalty that precluded Appellees in participating in an action that harmed their opportunity to file a successful False Claim Act.

Appellant’s theory failed, as fiduciary duties only arise with an attorney when a client relationship is created. As a result of there being no evidence of the formation of an attorney-client relationship, there is no fiduciary duty of loyalty.

Appellees also filed summary judgment on Appellants claim they breached their fiduciary duty of confidentiality by allegedly using information they obtained from Appellants. Appellees acknowledged that they owe both prospective clients and clients a duty not to disclose confidential information. However, in Texas a claim of disclosure of confidential information requires evidence of actual disclosure. *Brown v. Green*, 302 S.W.3d 1, 8-9 (Tex., App. –Houston [14<sup>th</sup> Dist.] 2009, no pet.) Appellants presented no evidence of Appellees disclosing the confidential information. Consequently Appellees summary judgment was properly granted.

***Copeland v. Cooper*, NO. 05-13-00541-CV, 2015 Tex. App. LEXIS 49, 2015 WL 83307 (Tex. App.-Dallas [5<sup>th</sup> Dist.] January 7, 2015, no pet. h.)**

*Damages: “Suit within suit”.* Attorney failed to answer a legal malpractice action and the Court entered a Default Judgment and took evidence on the unliquidated damages.

The client, Appellee sued her attorney, Appellant, for fraud, legal malpractice, breach of fiduciary duty and violations of the DTPA. Due to the Appellant failing to answer the suit, the

allegations in the Appellee’s Petition are admitted as the truth, except for the amount of unliquidated damages.

The Court of Appeals reversed in part the amount of damages awarded Appellee based upon Appellee’s failure to present evidence, that Appellee would have recovered in the underlying claim for violations of Title VII of the Civil Rights Act for unlawfully retaliating and for violations of the Americans with Disabilities Act (“ADA”).

In the underlying suit, Appellee had sued the Dallas Police Association (“DPA”) for violations of Title VII and the ADA. The DPA had filed Motion for Summary Judgment which was ultimately granted, due to Appellant’s failure to respond to the motion timely. As a result the Court found that the DPA had not violated Title VII, as they presented legitimate, nonretailory reason for partial denial of benefits to Appellee and that Appellee had presented no evidence she was a qualified individual with a disability under the ADA. As a result of Appellee having no evidence in opposition to the DPA motion, the Motion was granted.

Appellant used the Order granting the Motion for Summary Judgment as evidence to show that Appellee had no unliquidated damages due to his failure to respond, as Appellee failed to put on evidence at the contested hearing on unliquidated damages showing that she would have defeated the DPA’s Motion for Summary Judgment. As a result of Appellee’s failure to show that she would have survived the summary judgment and that the suit would have been successful but for the attorney’s negligence. *MND Drilling Corp. v. Lloyd*, 866 S.W.2d 29, 31-31 (Tex. App.-Houston [14<sup>th</sup> Dist] 1987, no writ). The Court of Appeals reduced the amount of her unliquidated damages from \$600,000 to her out of pocket expense of attorney’s fees of \$2,500.

denied). As such the Court of Appeals reversed and remanded the negligence claims to the trial court for further proceedings.

***Neubaum v. Stanfield, No 14-13-00943-CV, 2015 Tex. App. LEXIS 3521 (Tex. App.- Houston [14<sup>th</sup> Dist.], April 9, 2015, no pet. h.)***

*Be Careful What you Ask For.* The case involves a lawyer-client dispute, where the client sued their lawyers alleging various act of negligence as well as breach of fiduciary duties in the handling of litigation. The lawyers filed a *Traditional* Motion for Summary Judgment on various grounds, but particularly the impermissibly fracturing of negligence claims into a breach of fiduciary claims and the attorney's alleged actionable conduct did not proximately cause any damages. The Court of Appeals affirmed the lower court's decision that Plaintiff's breach of fiduciary claims was an impermissible fracturing of their negligence claims and therefore summary judgement was affirmed as to the dismissal of the breach of fiduciary duty claims.

Due to the Defendants filing a Traditional Motion for Summary Judgment, the Appellate court must consider all the evidence in the light most favorable to the nonmovant. Consequently, the Defendants had the burden of submitting summary-judgment evidence that conclusively proved their entitled to judgment.

The Defendant's Motion for Summary Judgment provided no expert evidence in support of their motion. The Defendants motion moved for traditional summary judgment; therefore, the Defendants had the burden of proving that none of their alleged negligent conduct proximately caused the plaintiff's damage. Expert evidence is necessary as to proximate cause if it is beyond the trier of facts common understating to determine the issue. *Buffington v. Sharp*, 440 S.W.3d 677, 683-684 (Tex. App.-Houston [14<sup>th</sup> Dist.], pet.