Motion for Rehearing Overruled, Opinion of August 26, 1999, Withdrawn, Affirmed and Substitute Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00268-CV

SUSAN C. LEE, INDIVIDUALLY, AND SUSAN C. LEE, TRUSTEE FOR SUSAN C. GIBSON, AND SUSAN C. GIBSON, Appellants

V.

DONNA KLINE AND GARY GROTE, Appellees

On Appeal from the Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 137,506-403

O P I N I O N ON R E H E A R I N G

Defendants filed a motion for rehearing in this case. *See* TEX. R. APP. P. 49.1. It is denied. However, our original opinion is withdrawn and this substituted opinion is issued in its stead.

Donna Kline ("Kline") brought this action against Susan C. Lee, Individually, and Susan C. Lee, Trustee for Susan C. Gibson, and Susan C. Gibson (individually as "Lee" and

"Gibson" or collectively as "Defendants") to recover attorney fees. Defendants filed a counterclaim against Kline and Gary Grote ("Grote"), alleging legal malpractice. The trial court granted Grote's motion for summary judgment. The remaining claims proceeded to a jury trial. The trial court instructed a verdict in Kline's favor on Defendants' malpractice action. On Kline's action to recover attorney fees, the jury found in favor of Kline and awarded her $114,207.21. In its final judgment, the trial court found that, based upon the jury's findings, Kline possesses a good, valid and subsisting interest in any recovery obtained by Defendants in the underlying estate case pursuant to Kline's contingent fee contract.[1]

Defendants assign twelve issues on appeal, alleging that Kline failed to obtain necessary jury findings, challenging the sufficiency of the evidence to support the judgment, and that Grote's motion for summary judgment should have been denied because it was unsupported by competent evidence and did not dispose of all issues in the case. Defendants also contend that "the trial judge should have been recused from the trial of this case." Lastly, Defendants assert that "the trial court erred in not conditioning the award of appellate attorney's fees on a successful appeal." We affirm.

I. BACKGROUND

Defendants retained Kline in July 1994. Kline was retained to represent Gibson in an action against Gibson's uncle, who was the executor of the estate of his and Lee's mother (Estate of Katherine Pillot Barnhart, Deceased).[2] Defendants agreed to pay Kline $225 per hour. Defendants were not satisfied with the executor's management of a trust created pursuant to the deceased's will. Defendants believed that disbursements into the trust accounts were not being made by the executor pursuant to the terms of the trust.

The law firm of Butler & Binion was lead counsel in the action brought by

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[1] *See Lee, et al. v. Lee, et al.*, No. 14-97-00162-CV (*In re Estate of Katherine Pillot Lee Barnhart, Deceased*). The underlying estate case is presently on appeal in this Court, assigned to another panel.

[2] The underlying estate action was filed by Defendants in 1988.

Defendants. Kline was retained by Defendants to "help and advise [Defendants] in regard to the handling of the case" and to act as lead counsel on behalf of Gibson. The executor was represented by the law firm of Vinson & Elkins. Butler & Binion withdrew from the case sometime in early 1995. Through Kline's efforts, the Dallas law firm of Thomas, Sheehan & Culp was retained to become Defendants' lead counsel in March 1995. When this firm became lead counsel, the fee agreement was modified. Defendants expressly agreed to continue to pay Kline $225 per hour, $250 per hour for Don Sheehan, and $300 per hour for Tom Thomas. Defendants also expressly agreed to pay a 10% contingency fee on any "recovery." It was further agreed that 40% of the 10% contingency fee would be paid to Kline and that the remaining 60% would be paid to Thomas, Sheehan & Culp.

The relationship between Defendants and Kline was genuinely affable[3] until September 1995, when Kline received correspondence from Gibson wherein the demand was made to Kline to "withdraw from the case immediately." Kline obeyed Gibson's demand and withdrew from the case.[4] Prior to withdrawing, Kline received approximately $78,000 in attorney fees from Defendants. These attorney fees were incurred between July 1994 and December 1994. After Kline withdrew, she billed Defendants for her time invested in their case between December 1994 and July 1995. Kline's attorney fees for that period of time totaled $110,388.77. Defendants refused to pay the bill and Kline intervened in the underlying estate case to recover her attorney fees.

Following a trial, the jury awarded Kline $114,207.21 for "legal services she performed for [Defendants] on an hourly basis under the contract." The jury also found that Defendants did not discharge Kline for "good cause." Consequently, in its judgment, the trial court found that Kline possesses "a good, valid and subsisting interest in any recovery

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[3] The record shows that Defendants and Kline vacationed together in the Virgin Islands and exchanged gifts between July 1994 and July 1995.

[4] The law firm of Thomas, Sheehan & Culp remained in the case as lead trial counsel. After the trial of the underlying estate case in January 1996, the law firm was awarded $1,500,000 for attorney fees.

by [Defendants] pursuant to her contingent fee contract . . . ."

II. DISCUSSION

Jury Findings on Fairness of Contingent Fee Agreement

In Defendants' first issue, they aver that "Kline failed to prove and to secure findings that she dealt fairly with Gibson and Lee . . . ." They contend that the contingent fee agreement was unfair and invalid because it was made after Kline was initially retained by Defendants.[5]

Kline's original fee agreement provided that Defendants would pay Kline $225 per hour, plus expenses, for legal services she performed in the underlying estate case. The fee agreement between Defendants and Kline was modified when Thomas, Sheehan & Culp was retained to join Kline in representing Defendants. On March 30, 1995, Daniel Sheehan drafted an agreement which outlined the terms of his firm's representation of Defendants in the underlying estate case. The agreement provided that "[o]ur fee will be the sum of: (a) reasonable hourly rates including Donna Kline at the rate of $225 per hour and members of Thomas, Sheehan & Culp, L.L.P. who work on the case with Tom Thomas' rate at $300 per hour and Dan Sheehan's rate at $250 per hour, plus (b) *ten percent (10%) of all Recovery, if any*." (emphasis added). The agreement further provided that "[c]ontingency fees will be divided between us, sixty percent (60%) to Thomas, Sheehan & Culp, L.L.P., *and forty percent (40%) to Donna C. Kline*." (emphasis added). The record shows that the agreement was executed by both Defendants.

Defendants assert that because the contingent fee agreement between Kline and Defendants was made during the existence of their attorney-client relationship, there was a "presumption of unfairness" of the agreement. They contend that the only way Kline could

[5] As we understand Defendants' first issue, they are not challenging the award of $114,207.21. This amount was awarded to Kline based on her hourly billing rate of $225.

defeat that presumption was by obtaining a jury finding that the agreement was fair and reasonable. In making this claim, defendants rely on *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964). There, the supreme court held that where an attorney contracts with his or her client for compensation during the existence of an attorney-client relationship, there "is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney." *Id.* at 739 (citations omitted); *see also Robinson v. Garcia*, 804 S.W.2d 238, 248 (Tex.App.–Corpus Christi 1991, writ denied).

Although Defendants did not request a jury instruction concerning the fairness and reasonableness of the contingent fee agreement, they did request that the trial court submit the following question to the jury: "Do you find from a preponderance of the evidence that the making of the March 30, 1995 retainer agreement constituted an unconscionable action or course of action with respect to the attorney's fees to be paid to Donna Kline?"[6] The trial court refused to submit Defendants' tendered question to the jury because there was "no evidence to support the elements in the definition of unconscionable conduct or course of action." The trial court also found no "evidence of taking advantage or lack of knowledge or ability or experience or capacity or grossly unfair [because] there is [no] evidence on any of those points."

Jury instructions and questions are proper only if they are raised by the written pleadings and are supported by the evidence.[7] *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex.

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[6] "Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, *in substantially correct wording*, has been requested in writing and tendered by the party complaining of the judgment." TEX. R. CIV. P. 278 (West 1999) (emphasis added); *Mason v. Southern Pacific Transp. Co.*, 892 S.W.2d 115, 117-18 (Tex.App.–Houston [1st Dist.] 1994, writ denied) (where party complaining of the judgment on appeal failed to tender a written question to the trial court concerning the defendant's duty of care, point of error was waived on appeal); *see also* note 8, *infra*. Defendants' tendered jury instruction appears to be consistent with their contention that Kline violated the Texas Deceptive Trade Practices Act. *See* TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (Vernon Supp. 1998). However, the trial court instructed a verdict in Kline's favor on that issue.

[7] We note that the issue regarding the fairness and reasonableness of the contingent fee agreement (continued...)

1992); *Knoll v. Neblett*, 966 S.W.2d 622, 633 (Tex.App.–Houston [14th Dist.] 1998, no pet.); *Bean v. Baxter Healthcare Corp.*, 965 S.W.2d 656, 661 (Tex.App.–Houston [14th Dist.] 1998, no pet.); *see also* TEX. R. CIV. P. 278 (West 1999). A trial court may properly refuse to submit an issue to the jury where no evidence exists to warrant its submission.[8] *Elbaor*, 845 S.W.2d at 243.

Further, presumptions that are imposed by law must be supported by the evidence presented during trial in order to be considered by the trier of facts. We note the following:

> Courts have frequently remarked that presumptions are only intended to take the place of facts and cannot be relied upon where the facts are shown; or that no presumption can stand in the face of facts. According to such authorities a presumption is an artificial thing, a mere house of cards, which one moment stands with sufficient force to determine an issue, but at the next, by reason of the slightest rebutting evidence, topples utterly out of consideration of the trier of facts.

Combined American Ins. Co. v. Blanton, 353 S.W.2d 847, 849 (Tex. 1962).

The record in this case is replete with competent evidence to rebut the presumption of unfairness concerning the contingent fee agreement. For example, Kline testified that "from the time we started talking about contingency arrangements with [another law firm], [Defendants] said if someone is going to get a contingency fee, we want you to get part of it, because you have done so much for us . . . ." Conversely, there was no evidence presented by Defendants to suggest that Kline's forty percent contingent fee was unfair or

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[7] (...continued)
was not raised in any of Defendants' pleadings or tendered jury questions in this case. *See* TEX. R. CIV. P. 278 (West 1999). Further, our review of the record, including Defendants' motion for new trial, discloses that the fairness and reasonableness of the contingent fee agreement was not an issue in this case at the trial level. *See A.V.A. Services, Inc. v. Parts Indus. Corp.*, 949 S.W.2d 852, 854 (Tex.App.–Beaumont 1997, no writ); *see also Steel v. Rhone Poulenc, Inc.*, 962 S.W.2d 613, 618 (Tex.App.–Houston [1st Dist.] 1997, no pet.); *Hughes v. Thrash*, 832 S.W.2d 779, 788 (Tex.App.–Houston [1st Dist.] 1992, no writ).

[8] "It is elementary that undisputed factual issues need not be submitted to the jury" *Koral Indus., Inc. v. Security-Connecticut Life Ins. Co.*, 788 S.W.2d 136, 149 (Tex.App.–Dallas 1990, writ denied). As noted, Defendants' specific complaint on appeal does not appear to have been a disputed factual issue at trial.

unreasonable. Indeed, the evidence in the record supports the inference that the agreement was entered into freely and voluntarily by Defendants based upon their full understanding of the affect of the contingent fee agreement. *See Archer*, 390 S.W.2d at 739.

The presumption upon which Defendants rely "disappeared like chaff in the wind" upon the introduction of Kline's evidence contradicting the applicable legal presumption. *See Praetorian Mutual Life Ins. Co. v. Humphreys*, 484 S.W.2d 413, 417 (Tex.App.–Fort Worth 1972, writ ref'd n.r.e.). Thereafter, the presumption, previously existent, no longer constituted evidence. *See id.*; *see also Sudduth v. Commonwealth County Mutual Ins. Co.*, 454 S.W.2d 196, 198 (Tex. 1970).

Accordingly, there being no evidence of unfairness or unreasonableness in the record, a specific finding by the jury that Kline's contingent fee agreement with Defendants was fair and reasonable was not necessary. *See Elbaor*, 845 S.W.2d at 243. Defendants' first issue is overruled.

Parties

In issues two, three, four, five and six, Defendants contend that the trial court erred by entering its judgment against each Defendant under "all three contracts." Defendants maintain that they were not jointly and severally liable on each contract. Defendants also assert that Defendant Susan C. Lee, Trustee for Susan C. Gibson was not a proper party to the suit brought by Kline.

Defendants' allegations of trial court error in issues two through six, inclusive, are waived. "Where a defendant does not file a sworn pleading complaining of a defect of parties before the case is called to trial, such defect is waived." *Sunbelt Const. Corp., Inc. v. S & D Mechanical Contractors, Inc.*, 668 S.W.2d 415, 418 (Tex.App.–Corpus Christi 1983, writ ref'd n.r.e.); *Allright, Inc. v. Burgard*, 666 S.W.2d 515, 517 (Tex.App.–Houston [14th Dist.] 1983, writ ref'd n.r.e.); *Butler v. Joseph's Wine Shop, Inc.*, 633 S.W.2d 926, 929-30 (Tex.App.–Houston [14th Dist.] 1982, writ ref'd n.r.e.); *see also* TEX. R. CIV. P. 93(4)

(West 1999); *Shawell v. Pend Oreille Oil & Gas Co.*, 823 S.W.2d 336, 338 (Tex.App.–Texarkana 1991, writ denied) (a defendant must complain about a defect in the parties before the case is called to trial). Thus, nothing is presented for appellate review.

On rehearing, Susan C. Lee, Trustee, chastises this court for summarily disposing of five points of error; she claims that she was never a party to the suit in her capacity as trustee. We beg to differ. By her Second Amended petition, Donna Kline sued - and served - Susan C. Lee in her capacity as Trustee; Kline also sued Lee in that capacity in a supplemental petition. Moreover, Susan C. Lee, Trustee, appeared in the suit of her own volition in a counterclaim and a third party petition. That pleading began as follows: "NOW INTO COURT, Susan Camille Lee, individually and as Trustee for Susan C. Gibson, and Susan C. Gibson, and files this their Third Amended Original Counterclaim combined with Third Amended Original Third Party Petition complaining of Donna Kline and Gary Grote. . . ." Unquestionably, Susan C. Lee, Trustee, was a party to the lawsuit, appeared in the lawsuit, and requested affirmative relief from the trial court. We overrule issues two through six.

Separate Jury Findings on "Each Contract"

Defendants contend in their seventh issue that Kline "invited reversible error" by failing to obtain jury findings upon which an accurate judgment can be entered against them. They contend that the trial court committed reversible error by submitting one, broad question to the jury concerning the amount of attorney fees owed under the contracts, rather than submitting separate jury questions concerning the amount of attorney fees "owed under each contract."

In interpreting Rule 277, our Supreme Court held that broad-form submissions "shall" be used "whenever feasible" and that trial courts do not possess any discretion to submit separate questions with respect to each element of a case. *Texas Dep't of Human Serv. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). Broad-form submissions must be used "in any and every instance in which it is capable of being accomplished." *Id.* The court also stated that

broad-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. *Id.* "Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer." *Id.*

Here, the trial court submitted the following, broad-form question to the jury: "What reasonable amount, if any, is owed to Donna Kline for the necessary legal services she performed for [Defendants] on an hourly basis under the contracts?" The jury answered this question by awarding Kline $114,207.21. The record shows that this amount was entirely consistent with Kline's evidence. Kline testified that Defendants agreed to pay her $225 per hour, plus expenses, for legal services. Kline testified that the amount of her unpaid reasonable and necessary attorney fees and expenses related to her time spent preparing the underlying estate case totaled $110,388.27. Kline also testified that she billed Defendants an additional $3,818.94 for reasonable and necessary attorney fees for representing Defendants in a suit involving one of Defendants' neighbors. Kline testified that the total amount owed to her on an hourly basis for legal services she performed for Defendants totaled $114,207.21.

At trial, the only disputed fact related to Kline's hourly attorney fees under the contracts was the amount owed by Defendants. The question submitted by the trial court was framed to resolve that disputed fact. Trial courts possess "broad discretion in framing questions to be submitted, 'subject only to the requirement that the questions submitted must fairly submit the disputed issues for the jury's determination.'" *Libhart v. Copeland*, 949 S.W.2d 783, 799 (Tex.App.–Waco 1997, no writ). We discern no abuse of trial court discretion in submitting the complained of question.

Further, assuming *arguendo* that the trial court should have submitted separate questions to the jury in this case, to reverse a judgment based upon error in the charge, Defendants must establish that the error complained of amounted to such a denial of the rights of the Defendants that it was reasonably calculated to cause, and probably did cause,

rendition of an improper judgment. *See Insurance Co. of North America v. Morris*, 928 S.W.2d 133, 143 (Tex.App.–Houston [14th Dist.] 1996, no writ). Defendants must also establish that they "distinctly" and "specifically" objected to the complained of question so as to have preserved the issue for appellate review. *Kirk v. State of Texas*, 651 S.W.2d 840, 844 (Tex.App.–El Paso 1983, no writ). Concerning the former, Defendants do not develop in their argument how the trial court's complained of jury question caused the rendition of an improper judgment. *See Insurance Co. of North America*, 928 S.W.2d at 143. As to the latter, contrary to Defendants' assertion in their brief, the record shows that Defendants failed to distinctly and specifically object to the complained of question submitted by the trial court to the jury. *See Kirk*, 651 S.W.2d at 844. Issue seven is overruled.

Good Cause

In their eighth issue, Defendants contend that the jury's finding that Kline was not discharged by Defendants for "good cause" was against the great weight and preponderance of the evidence.

The same standard of review applies in reviewing factual sufficiency challenges, regardless of whether the court of appeals is reviewing a negative or affirmative jury finding and regardless of which party had the burden of proof. *Blonstein v. Blonstein*, 831 S.W.2d 468, 473 (Tex.App.–Houston [14th Dist.] 1992, writ denied). After consideration of all of the evidence, a verdict will be set aside only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.*; *see also Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986). The trier of fact is the sole judge of the credibility of the witnesses and the weight to be accorded their testimony. *Id.* Therefore, in determining the sufficiency of the evidence, appellate courts must recognize from the verdict of the jury what the jury, in its discretion, chose to believe. *Shafer Plumbing & Heating, Inc. v. Controlled Air, Inc.*, 742 S.W.2d 717, 720 (Tex.App.–San Antonio 1987, no writ). In doing so, we must accept the jury's resolution of

any conflicts or inconsistencies in the evidence and testimony. *Id*. The jury is free to believe or disbelieve any witness' testimony in whole or in part. *Murphy v. Texas Farmers Ins. Co.*, 982 S.W.2d 79, 85 (Tex.App.–Houston [1st Dist.] 1998, no pet. h.). The jury is entitled to disbelieve a witness even though that witness is neither impeached nor contradicted. *Id.*

In Question Two, the jury in this case was asked, "Did [Defendants] discharge Donna Kline for good cause?" The jury was instructed that "a client has 'good cause' to discharge an attorney if the attorney fails to perform her duties in the manner that an attorney of ordinary skill and ability would have performed her duties under the same or similar circumstances." The jury responded to Question Two in the negative.

In their brief, Defendants contend that Kline's performance deteriorated "dramatically" after the contingent fee agreement was executed on March 30, 1995. No criticisms were made of Kline's performance between the time she was retained in July 1994 and March 1995. To show that Kline was discharged for "good cause" in September 1995, Defendants rely solely on criticisms of Kline's performance made at trial by Daniel Sheehan. First, Sheehan did not testify in this case as an expert witness concerning whether Kline met the appropriate standard of care. *See Greathouse v. McConnell*, 982 S.W.2d 165, 174 (Tex.App.–Houston [1st Dist.] 1998, no pet.). Indeed, neither Sheehan nor any other witness in this case was designated as an expert witness on legal malpractice.[9] Second, Sheehan was Kline's co-counsel, not her employer. Kline was employed by Defendants. Sheehan's criticisms of Kline's performance, testifying as only a fact witness,[10] are immaterial as to whether *Defendants* discharged Kline for "good cause." Defendants direct this Court to no

[9] To establish compliance with the appropriate standard of care in a legal malpractice case, expert testimony is required. *Jatoi v. Decker, Jones, McMackin, Hall & Bates*, 955 S.W.2d 430, 434 (Tex.App.–Fort Worth 1997, pet. denied).

[10] Lay or fact witnesses are subject to the general rule that a witness' testimony must be limited to facts which the witness has personal knowledge, and a witness must not give a personal opinion or legal conclusion unless he or she is designated as an expert witness. *United Way of San Antonio, Inc. v. Helping Hands Lifeline Found., Inc.*, 949 S.W.2d 707, 713 (Tex.App.–San Antonio 1997, no writ).

testimony in the record by Defendants to support a finding that Kline was discharged by Defendants for good cause. Finally, concerning whether any of Sheehan's criticisms of Kline's performance were ever communicated to Defendants, in their brief, Defendants rely on Sheehan's testimony wherein he testified that he told Defendants that "Kline was not of any real use to me in getting the case ready."

On the other hand, the record is replete with testimony and evidence that shows Kline performed in a diligent manner in preparing the underlying estate case. Kline testified that she prepared pleadings and motions, attended hearings, prepared interrogatories on behalf of Defendants, deposed several witnesses, secured expert witnesses, assisted in getting Defendants' accounting and tax affairs in order, and prepared a portion of the jury charge that was ultimately utilized in the trial of the underlying estate case. Kline testified that she was instrumental in, *inter alia*, developing the portion of the estate case that resulted in Defendants receiving a verdict for $840,000 on the sale of property located on Westheimer. Further, one of the key expert witnesses in the estate was Dr. Harold Stephen Grace. Dr. Grace is an expert "in litigation consulting on complex business and financial matters." Kline brought Dr. Grace into the estate case in May 1995. Dr. Grace testified that Kline supplied him with all the necessary documents he needed to develop a strategy and his testimony for the estate case. Dr. Grace testified that Kline possessed a cogent grasp of the issues involved in estate case. In preparing his testimony in the underlying estate case, Dr. Grace testified that "my time sheets would reflect that the overwhelming majority of my time, over 90 percent would be spent with Donna Kline." Dr. Grace testified that he and Kline developed the strategy that he used to testify in the estate case. Defendant Susan Lee told Dr. Grace after he testified in the underlying estate case that his testimony "was the high point of the trial."

Reviewing all the evidence in the light of what the verdict reveals the jury obviously believed, we cannot conclude that the verdict "is contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See Shafer Plumbing & Heating, Inc.*, 742

S.W.2d at 721; *see also Blonstein*, 831 S.W.2d at 473-74. Issue eight is overruled.

Declaratory Judgment

In their ninth issue, Defendants assert that the trial court erred in entering its declaratory judgment which decreed that Kline possesses a "valid and subsisting" contingent interest in any recovery obtained by Defendants in the underlying estate case, pursuant to the contingent fee agreement of March 30, 1995.

The purpose of the Uniform Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity about rights, status, and other legal relations. *Hasty, Inc. v. Inwood Buckhorn Joint Venture*, 908 S.W.2d 494, 499 (Tex.App.–Dallas 1995, writ denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-.011 (Vernon 1997). Defendants maintain that the trial court's declaratory judgment in this case "does not terminate the uncertainty or controversy giving rise to [the] lawsuit." However, Defendants do not identify in their brief what "uncertainty or controversy" remains. The trial court's declaratory judgment merely decrees that the parties' contingent fee contract is valid. "A trial court may construe a contract in a declaratory judgment suit either before or after a breach occurs." *Id.*

As to the effect of any potential disputes between the parties in this case, a "declaratory judgment may be entered if it serves a useful purpose in resolving a controversy between the parties, *even if actual or potential disputes remain*." *Town of Griffing Park v. City of Port Arthur*, 628 S.W.2d 101, 102 (Tex.App.–Beaumont 1981, writ ref'd n.r.e.) (emphasis added). Indeed, "[t]he fact that other issues in the general controversy remain unresolved by a declaratory judgment does not deprive the court of the power and discretion to render such a judgment." *Id.* (citation omitted); *see also Hawkins v. Texas Oil & Gas Corp.*, 724 S.W.2d 878, 891 (Tex.App.–Waco 1987, writ ref'd n.r.e.).

We note that the trial court did not enter a monetary award to Kline based upon the contingent fee contract because the amount of Defendants' recovery in the underlying estate has not been finally adjudicated. *See* note 1, *supra*. All that remains is the calculation of

Kline's contingent interest in Defendants' recovery, if any. We hold, therefore, that the trial court did not err in granting a declaratory judgment, which decreed that Kline's contingent fee interest in Defendants' monetary recovery is valid. Issue nine is overruled.

Gary Grote's Motion for Summary Judgment

In their tenth issue, Defendants assert that the trial court erred in granting Gary Grote's motion for summary judgment on (1) Defendants' action for malpractice against Grote, and (2) Grote's action to recover attorney fees from Defendants which were incurred when Grote represented Defendants in a lawsuit involving one of Defendants' neighbors.

The standard of review to be followed in a summary judgment is well-established. The movant has the burden of showing that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Schlager v. Clements*, 939 S.W.2d 183, 186 (Tex.App.–Houston [14th Dist.] 1996, writ denied). In deciding whether or not there is a disputed material fact issue precluding summary judgment, proof favorable to the non-movant will be taken as true. *Id.* Every reasonable inference must be indulged in favor of the non-movant and any doubts are resolved in his or her favor. *Id.*; *see also Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Summary judgment for the defendant is proper when the proof shows that no genuine issue of material fact exists on one or more of the essential elements of the plaintiff's cause of action, or when the defendant establishes each element of an affirmative defense as a matter of law. *Id.*; *see also Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990). A defendant who moves for summary judgment has the burden of showing as a matter of law that no material issue of fact exists on the plaintiff's cause of action. *Id.*; *see also Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 166-67 (Tex. 1987).

The function of a summary judgment is not to deprive a litigant of its right to a full hearing on the merits of any real issue of fact but to eliminate patently unmeritorious claims and untenable defenses. *Id.*; *Dallas Cent. Appraisal Dist. v. G.T.E. Directories Corp.*, 905

S.W.2d 318, 319 (Tex.App.–Dallas 1995, writ denied). The purpose of the summary judgment rule is not to provide either a trial by deposition or a trial by affidavit, but to provide a method of summarily terminating a case when it clearly appears that only a question of law is involved and that no genuine issue of material fact remains. *Id.*

In a legal malpractice case, as here, the plaintiff must prove a duty owed to him or her by the defendant, a breach of that duty, injury proximately caused by the breach, and damages. *Schlager*, 939 S.W.2d at 186; *see also Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995). A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney, based on the information the attorney has at the time of the alleged act of negligence. *Id.* To prevail in a legal malpractice action, a plaintiff must prove "a suit within a suit" by demonstrating that he or she would have prevailed in the underlying action but for his or her attorney's negligence. *Id.* at 186-87. Although proximate cause in a legal malpractice action is usually a question of fact, it may be determined as a matter of law if the circumstances are such that reasonable minds could not arrive at a different conclusion. *Id.* If the attorney demonstrates that his failure to act was not the cause of any damages to the client, a summary judgment may be proper. *Id.*

Defendants filed legal malpractice actions against Gary Grote and Donna Kline. Their action was filed as a counterclaim to Kline's action to recover attorney fees. As to Grote, Defendants alleged that he represented Defendants on matters unrelated to the underlying estate case during 1994-95. Defendants alleged that Grote committed legal malpractice because he breached his employment contract, was negligent in representing Defendants, breached fiduciary duties by charging excessive attorney fees and by communicating with a juror in the underlying estate case, was negligent and grossly negligent in communicating with a juror in the underlying estate case, knowingly violated the Deceptive Trade Practices Act (DTPA), relative to his representation of Defendants, and conspired with Kline to interfere with the underlying estate case by obtaining juror information sheets and

communicating with a juror in that case for the purpose of causing a mistrial.[11]

Grote moved for summary judgment, contending that he was entitled to a judgment as a matter of law on Defendants' malpractice action and on his claim for attorney fees. Defendants contend that Grote's motion for summary judgment should have been denied because it was unsupported by competent summary judgment proof and did not dispose of all of the issues in the case. We disagree.

Grote asserted in his motion that he was entitled to summary judgment on Defendants' malpractice action and his attorney fees action because the attorney fees he charged were reasonable and customary and that he was competent in performing the kind of legal services he performed for Defendants. In support of his motion, Grote attached copies of Defendants' responses to requests for admissions and a detailed affidavit which outlined his qualifications and which showed that his performance in representing Defendants was consistent with the standard care of what a reasonable and prudent attorney would have exercised based on the information the attorney had at the time of the alleged act of malpractice.[12] Grote also

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[11] Defendants' allegations stem from the following event: After a jury had been selected in the underlying estate case, Grote, an attorney, was playing soccer with a team-mate and friend, Earl Thomas. Thomas mentioned that he was serving jury duty that day in a case involving a will dispute. Grote responded to Thomas by saying, "Oh, it's not the Lee case?" Thomas responded that indeed it was the Lee case. Grote informed Thomas, *inter alia*, that because he was involved in litigation to recover attorney fees from Lee that Thomas should report their conversation to the judge the following morning. Thomas followed Grote's instructions and reported it to the judge the following morning. The judge declared a mistrial because of Thomas' conversation with Grote, in addition to problems with at least four other jurors. The judge noted that if Thomas was the only problem he would allow the trial to proceed but he could not allow it to proceed because another juror stated that she was suffering from intolerable pain and could not afford to serve, another juror stated that he was schizophrenic, and another stated he had to be with his wife who was taken to an emergency room. The judge concluded, "I have reached the conclusion I am very uncomfortable with the jury. I have never had a jury that has been more creative with excuses. It seems to be pandemic among them, and it's well, if you don't buy this excuse, I've got this excuse."

[12] Notably, nowhere in Defendants' pleadings nor in Defendants' responses to Grote's motion for summary judgment, is an attempt made to show that Defendants possessed *any* evidence to show that Defendants could prove the "suit within a suit" by demonstrating that they would have prevailed in the action complained of but for Grote's alleged malpractice. *See Schlager*, 939 S.W.2d at 186. Indeed, this Court is left in the dark as to what it was that Grote did in the complained of action that showed he committed legal

(continued...)

attached a copy of his billing invoice which reflected the amount of attorney fees owed by Defendants. Further, as to Defendants' allegations that Grote violated the DTPA by failing "to exercise due care and diligence in representing Susan C. Gibson and Susan C. Lee in the *Estate* case," the record clearly refutes this allegation. Grote's summary judgment unequivocally establishes that Grote never represented either Defendant in the underlying estate case. Finally, as to Defendants' allegations that Grote's communication with a juror in the underlying estate case showed that he was involved in a conspiracy with Kline "to interfere with or compromise" the underlying estate case, the summary judgment proof and record shows that this claim is at best, meritless, and at worst, frivolous.[13] *See* note 13, *supra*.

In sum, we hold, contrary to Defendants' contentions, that Grote's summary judgment proof was not conclusory and that it responded to all of Defendants' pled causes of action. *See Mackie v. McKenzie*, 900 S.W.2d 445, 451-52 (Tex.App.–Texarkana 1995, writ denied); *see also Klein v. Reynolds, Cunningham, Peterson & Cordell*, 923 S.W.2d 45, 49 (Tex.App.–Houston [1st Dist.] 1995, no writ). Further, the record shows that Defendants' causes of action against Grote were "patently unmeritorious." *See Schlager*, 939 S.W.2d at 186. The trial court did not err in granting Grote's motion for summary judgment. Issue ten is overruled.

Recusal

In their eleventh issue, Defendants aver that the trial court erred in refusing to recuse Judge Wood from the trial of this case.

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[12] (...continued)
malpractice or violated the DTPA. *See Greathouse*, 982 S.W.2d at 174 (summary judgment appropriate where plaintiff fails to raise a fact issue concerning the "suit within a suit" element of a legal malpractice cause of action).

[13] Attached to Grote's motion for summary judgment are copies of the transcripts from Grote's and Juror Thomas' testimony before the trial court concerning their communication.

Citing Rule of Civil Procedure 18b(2), Defendants contend that Judge Wood possessed "personal knowledge of the evidentiary facts concerning the proceeding" and was a "material witness to the Kline and Grote matter in the [underlying estate] litigation." *See* TEX. R. CIV. P. 18b(2) (West 1999). Defendant's eleventh issue is without merit. The gist of Defendants' complaint is that Judge Wood acquired "personal knowledge" and was a "material witness" to the instant case because during the underlying estate case he (1) heard testimony concerning to Grote's communication with Juror Thomas, (2) made certain in-court rulings, and (3) presided over the underlying estate case.

Judicial rulings alone almost never constitute a valid basis for a recusal motion because they cannot possibly show reliance by a judge upon extrajudicial sources. *Ludlow v. DeBerry*, 959 S.W.2d 265, 271 (Tex.App.–Houston [14th Dist.] 1997, no writ). None of Judge Wood's knowledge of the facts of the instant case, if any, resulted from extrajudicial sources nor his "personal knowledge." *See id.* Further, there is no provision contained within Rule 18b(2) that would support Defendants' contention that Judge Wood was a "material witness" in the underlying estate litigation. *See* TEX. R. CIV. P. 18b(2) (West 1999).

There was no abuse of trial court discretion in denying Defendants' motion to recuse. *See Hector v. Thaler*, 927 S.W.2d 95, 99 (Tex.App.–Houston [1st Dist.] 1996, writ denied); *see also* TEX. R. CIV. P. 18a(f) (West 1999). Issue eleven is overruled.

Attorney's Fees

In their twelfth issue, Defendants contend that the trial court erred in not conditioning the award of appellate attorney's fees to Kline upon a successful appeal. In response to a jury question, the jury awarded Kline attorney's fees for the trial, for an appeal to the court of appeals, and for an appeal to the Texas Supreme Court. In the trial court's judgment, the respective awards of attorney's fees to Kline were subject to remittitur if no appeal was taken. In other words, no attorney's fees would be awarded to Kline for appeals if

Defendants chose not to appeal the trial court's judgment. The trial court's judgment concerning the award of attorney's fees is proper. *See International Security Life Ins. Co. v. Spray*, 468 S.W.2d 347, 349-50 (Tex. 1971). Finally, Defendants' argument that Kline's appellate attorney's fee award should have been conditioned upon Defendants' unsuccessful appeal is rendered moot by our decision to affirm the trial court's judgment. *See Siegler v. Williams*, 658 S.W.2d 236, 241 (Tex.App.–Houston [1st Dist.] 1983, no writ). Issue twelve is overruled.

The judgment is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Corrected Opinion filed January 13, 2000.

Panel consists of Chief Justice Murphy, Justices Hudson and Fowler.

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