Reversed and Remanded and Opinion filed January 24, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00100-CV

MAURICE SMITH, DEL BOSQUE, CARL DENMAN, RODNEY FROST, and PHIL WELDON, Appellants

V.

CUTRER & JEFFERSON, WALTER JEFFERSON, and GREGORY L. HENNIG, Appellees

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On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 98-07476

O P I N I O N

This is a legal malpractice case. The appellants/clients alleged negligence against the appellees/lawyers retained to represent them in two unsuccessful lawsuits. The trial court granted the lawyers' motion for summary judgment. The clients now challenge that ruling. We reverse the trial court's judgment and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

In June 1991, the law firm of Cutrer & Jefferson filed a lawsuit against Borden, Inc., on behalf of Gary Alred,[1] Del Bosque, Rodney Frost, and Phil Weldon. The plaintiffs were all former distributors of Borden milk and other dairy products. Borden removed the suit to federal court, and in March 1992, the United States District Court for the Southern District of Texas entered a final judgment ordering that the plaintiffs take nothing by their claims. The plaintiffs filed no appeal from this judgment.

Four months later, Cutrer & Jefferson filed a second lawsuit against Borden on behalf of Alred, Bosque, Frost, Weldon, and two other Borden distributors, Carl Denman and Maurice Smith. The claims in the second Borden lawsuit were tried to a jury, resulting in a judgment of over $2.3 million. Borden appealed, and in November 1996, the United States Court of Appeals for the Fifth Circuit reversed and rendered judgment that the plaintiffs take nothing on their claims. *Alred v. Borden, Inc.*, No. 94-20840 (5th Cir. Nov. 8, 1996) (unpublished opinion). The plaintiffs in the second lawsuit took no further action in their lawsuit against Borden.

On February 17, 1998, appellants filed a legal malpractice suit against Cutrer & Jefferson and two of the firm's lawyers, Walter Jefferson and Gregory Hennig (collectively referred to hereafter as the "Lawyers"). Appellants' petition alleged the Lawyers (1) negligently permitted the first Borden lawsuit to be dismissed with prejudice and then failed to inform appellants of the dismissal's legal effect; (2) negligently approved a pre-trial order in the second Borden lawsuit containing stipulations that were inconsistent with appellants' contention that they each had a contract with Borden, causing the trial court's judgment to be reversed on appeal; and (3) failed to properly develop a case based on the theory that implied contracts existed between appellants and Borden. The Lawyers moved for summary

[1] Although Alred was a named plaintiff in the original malpractice petition, he later non-suited his claims and is not a party to this appeal.

judgment on the following five grounds:

(1) appellants' claims relating to the dismissal of the first Borden lawsuit are barred by limitations;

(2) the district court's dismissal of the first Borden lawsuit was a determination by the court that the evidence was factually insufficient to support appellants' claims, a determination that was later confirmed by the Fifth Circuit's reversal of the judgment in the second Borden lawsuit;

(3) the stipulations in the pre-trial order for the second Borden lawsuit reflected facts admitted by appellants in sworn testimony;

(4) notwithstanding the stipulations, the Fifth Circuit reviewed the record and found that no reasonable jury could have inferred the existence of an agreement between appellants and Borden; and

(5) appellants are not entitled to exemplary damages as a matter of law.

The trial court granted the Lawyers' summary judgment motion without stating the grounds on which its judgment was based. Appellants raise four issues on appeal: (1) the Lawyers failed to negate their negligence as a matter of law; (2) the Lawyers failed to negate the element of proximate cause as a matter of law; (3) the Lawyers have not proven that the claims arising out of their alleged negligence in handling the first Borden lawsuit are barred by limitations; and (4) the trial court erred in granting summary judgment on appellants' claims for exemplary damages.

II. STANDARD OF REVIEW

The applicable standard of review is whether the Lawyers, as the summary judgment movants, established that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law on the grounds set forth in their motion. *See Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 645-46 (Tex. 2000). We presume that all proof favorable to the nonmovants is true, and we indulge every reasonable inference in favor of the nonmovants. *Phan Son Van v. Peña*, 990 S.W.2d 751, 753 (Tex. 1999). Summary judgment is proper if the defendant conclusively negates at least one essential element of the

plaintiff's claim or conclusively establishes all elements of an affirmative defense. *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). A legal malpractice claim consists of four elements: (1) duty, (2) breach of duty, (3) proximate cause, and (4) damages. *See Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995). Because the trial court's order did not specify the grounds for its ruling, we will affirm if any of the theories advanced in the motion are meritorious. *See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

III. THE FIRST BORDEN LAWSUIT

In their petition, appellants allege the Lawyers were negligent in their handling of the first Borden lawsuit. Specifically, appellants claim the Lawyers filed a defective petition and then failed to amend it in response to Borden's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion and entered a take-nothing judgment against Bosque, Frost, and Weldon. Appellants further allege the Lawyers failed to inform them about the legal effect of the first lawsuit's dismissal. As a result of the dismissal of the first lawsuit, the Fifth Circuit held that the doctrine of res judicata barred Bosque, Frost, and Weldon from asserting their claims in the second lawsuit. According to appellants, but for the Lawyers' negligence, the district court's judgment in favor of Bosque, Frost, and Weldon in the second Borden lawsuit would have been affirmed. In their motion for summary judgment, the Lawyers argued (1) this particular malpractice claim was barred by limitations, and (2) the district court determined in the first lawsuit that the evidence was factually insufficient to support appellants' claims, a determination the Fifth Circuit confirmed in its opinion in the second lawsuit.

A. Limitations

In their third issue, appellants contend the Lawyers have not proven that the statute of limitations bars the claims arising out of the first Borden lawsuit. The legal malpractice claims in this case are governed by the two-year statute of limitations. *See* TEX. CIV. PRAC.

& REM. CODE ANN. § 16.003(a) (Vernon Supp. 2002); *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). Limitations generally begin to run when facts have come into existence that authorize a claimant to seek a judicial remedy. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 120 (Tex. 2001). The first Borden lawsuit was dismissed on March 23, 1992, but appellants did not file their malpractice claim until February 17, 1998. Appellants assert two arguments, however, as to why the statute of limitations does not bar their suit.

1. *Hughes* Tolling

Appellants argue that under *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991), the statute of limitations on their malpractice claim was tolled until November 8, 1996, the date the Fifth Circuit entered judgment in the second Borden lawsuit. In *Hughes*, the court held that "when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted." *Id.* at 157. Focusing on the court's use of the word "claim," appellants contend that the claim the district court dismissed in the first Borden suit was identical to the claim being litigated in the second suit. Appellants therefore urge that the statute of limitations on their malpractice claim was tolled until all appeals were exhausted in the second Borden lawsuit.

We disagree with appellants' interpretation of the Texas Supreme Court's holding in *Hughes*. Elsewhere in the opinion, the court makes it clear that limitations should be tolled only until appeals have been exhausted in the particular lawsuit in which the attorney allegedly committed malpractice. *See id.* at 155 ("We hold that the statute of limitations was tolled until all appeals were exhausted on *the underlying suit in which the malpractice allegedly occurred*.") (emphasis added). Under appellants' interpretation of *Hughes*, a malpractice claim based on an attorney's conduct during litigation that is otherwise barred by limitations could be revived simply by re-urging the original claim in a new lawsuit. We therefore conclude that the *Hughes* tolling rule does not apply to a second lawsuit that violates the doctrine of res judicata and that relitigates the merits of the prior lawsuit in

which the lawyer allegedly committed malpractice.

2. Discovery Rule

Appellants also argue that the Lawyers failed to negate application of the discovery rule. The Texas Supreme Court has held that the discovery rule applies to legal malpractice actions; therefore, the statute of limitations does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his claim. *Willis*, 760 S.W.2d at 646. A defendant seeking summary judgment on the basis of limitations must prove when the claim accrued and must negate the discovery rule by proving as a matter of law that there is no genuine issue of fact about when the plaintiff discovered or should have discovered the nature of the injury. *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990). Discovering the "nature of the injury" requires knowledge of both the wrongful act and the resulting injury. *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998).

In support of their summary judgment motion, the Lawyers submitted the affidavit of Gregory Hennig, one of the attorneys representing appellants in both underlying lawsuits. Appellants do not controvert Hennig's affidavit; rather, they contend that it fails to establish when appellants knew or should have known that the Lawyers allegedly committed a wrongful act injuring them. Specifically, appellants argue that none of the Lawyers ever told appellants that the first Borden lawsuit's dismissal was the result of malpractice. However, the proper inquiry is whether appellants should have discovered facts establishing the Lawyers' alleged negligence, had they exercised reasonable care and diligence. *See Willis*, 760 S.W.2d at 646. Knowledge of facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the claim is in the law equivalent to knowledge of the claim for limitations purposes. *See Bayou Bend Towers Council of Co-Owners v. Manhattan Constr. Co.*, 866 S.W.2d 740, 747 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

Hennig's uncontroverted affidavit states:

- after the first Borden lawsuit was dismissed, Hennig immediately called in Bosque, Frost, and Weldon and advised them of the order dismissing the lawsuit and the basis for dismissal;
- Hennig advised Bosque, Frost, and Weldon that if the first Borden lawsuit was not appealed then claims accruing before March 23, 1992, would be barred;
- Hennig suggested to Bosque, Frost, and Weldon that "they might want to seek advice from separate counsel about what they should do in connection with this matter";
- Weldon later told Hennig that Weldon had conferred with independent counsel to review the matter;[2]
- before filing the second lawsuit, Hennig advised Bosque, Frost, and Weldon that they "could only seek to recover any damages that they suffered that were caused by Borden after the dismissal";
- Hennig advised Bosque, Frost, and Weldon that he could not act as their attorney in the second Borden lawsuit if they decided to pursue an appeal of the first suit through a new attorney "or to pursue whatever rights they might have";
- Hennig had "lengthy" conversations with Bosque, Frost, and Weldon following the first lawsuit's dismissal and advised each of them "that they could have another attorney review their situation and advise them."

The question for this court is whether, based on this uncontroverted testimony, the Lawyers have proven as a matter of law that Bosque, Frost, and Weldon should have discovered, through the exercise of reasonable care and diligence, that they had a claim against the Lawyers before February 16, 1996. We conclude that the Lawyers have not.

It is undisputed that, before the second Borden lawsuit was filed, Bosque, Frost, and Weldon were all aware that the first Borden lawsuit had been dismissed. Ordinarily, armed with knowledge that his or her lawsuit had been dismissed with prejudice, a reasonably

[2] Weldon also testified in his deposition that he consulted another attorney at some point between the dismissal of the first Borden lawsuit and the filing of the second suit.

prudent person would be put on notice to inquire whether a legal malpractice claim exists. However, appellants' negligence claim is not limited to the fact that their first lawsuit was dismissed; Bosque, Frost, and Weldon further allege that the Lawyers negligently misinformed them of the legal effect of that dismissal. Appellants claim that this series of events resulted in the Fifth Circuit's reversal of a favorable judgment in the second lawsuit.

In his affidavit, Hennig states that "immediately" after the first lawsuit's dismissal, he told appellants that if that suit was not appealed, "their claims would be barred with respect to any claims accruing prior to March 23, 1992," the date of the dismissal. Four months later, Bosque, Frost, and Weldon joined with the other appellants in the second Borden lawsuit filed by the Lawyers on their behalf. Hennig states that, before filing the second suit, he advised Bosque, Frost, and Weldon that they "could only seek to recover any damages that they suffered that were caused by Borden after the dismissal." Although the federal district court in the second Borden lawsuit allowed Bosque, Frost, and Weldon's claims to proceed with respect to damages accruing after the first lawsuit was dismissed, the Fifth Circuit held that all of their claims were barred by res judicata, including those claims that accrued after March 23, 1992.

We conclude that a reasonably prudent person could have relied on Hennig's erroneous statements that the first lawsuit's dismissal barred only those claims accruing up to that time, and, on that basis, could have believed that a viable claim against Borden still existed. The decision by Bosque, Frost, and Weldon to join the second Borden lawsuit, filed by the same lawyers shortly after the first suit's dismissal, raises a fact question as to whether they relied on those statements. To the extent they did, they passed up an opportunity to either appeal the first suit's dismissal or investigate a potential malpractice claim. Accordingly, the Lawyers failed to establish as a matter of law that Bosque, Frost, and Weldon should have discovered the existence of their malpractice claim against the Lawyers before the Fifth Circuit issued its opinion in November 1996. To hold otherwise would be

to say that Bosque, Frost, and Weldon could not rely on their own lawyer's statements,[3] which would diminish the attorney-client relationship and require a diligent client to hire a second lawyer to review the first lawyer's actions at every difficulty. *See Medical Protective Co. v. Groce, Locke & Hebdon*, 814 S.W.2d 124, 129 (Tex. App.—Corpus Christi 1991, writ denied).

We note that Hennig's affidavit states that, after informing Bosque, Frost, and Weldon of the lawsuit's dismissal, Hennig "suggested to [them] that they might want to seek advice from separate counsel about what they should do in connection with this matter," and that Hennig advised them "they could have another attorney review their situation and advise them." Also, Weldon testified that he actually talked to another lawyer. This summary judgment proof does not conclusively establish when Bosque, Frost, and Weldon discovered or should have discovered their claim. At best, it merely presents a fact question as to whether they actually relied on Hennig's statements.

We cannot say that the Lawyers have conclusively established that, more than two years before the malpractice suit was filed, Bosque, Frost, and Weldon discovered or, in the exercise of reasonable diligence, should have discovered that the Lawyers were allegedly negligent in permitting the first lawsuit to be dismissed and then misinforming them of the dismissal's legal effect and that this alleged negligence was a cause of their alleged injuries. Therefore, the Lawyers are not entitled to summary judgment based on limitations. We sustain appellants' third issue.

B. Sufficiency of the Evidence

In their motion for summary judgment, the Lawyers also argued that the first Borden lawsuit was dismissed based on the district court's determination that the evidence was

[3] Although Hennig's affidavit refers to Bosque, Frost, and Weldon as his "former clients" following the first lawsuit's dismissal, the Lawyers have not conclusively established that the attorney-client relationship had been terminated at the time of Hennig's statements or at any time during the four months between the dismissal of the first lawsuit and the filing of the second suit.

insufficient to support the claims raised by Bosque, Frost, and Weldon. The Lawyers further contend that the Fifth Circuit confirmed this determination in its opinion in the second Borden lawsuit. In other words, even if the Lawyers were negligent in handling the first lawsuit, that negligence did not proximately cause appellants' injuries as a matter of law because the Fifth Circuit would have reversed Bosque, Frost, and Weldon's claims anyway. In their second issue, appellants contend that the Lawyers have not negated proximate cause as a matter of law. We agree.

The question of how an appeal would have been decided but for an attorney's alleged negligence typically requires a review of the trial record and the briefs. *See Klein v. Reynolds, Cunningham, Peterson & Cordell*, 923 S.W.2d 45, 47 (Tex. App.—Houston [1st Dist.] 1995, no writ). The only portions of the trial record from the second Borden lawsuit included in the summary judgment record in this case are the Fifth Circuit's opinion, excerpts from the pre-trial order, limited excerpts from the trial transcript, and the trial court's orders denying the Lawyers' motion for judgment as a matter of law and motion for a new trial. Therefore, we must determine whether this limited record conclusively establishes that the Fifth Circuit would have reversed the second Borden lawsuit even in the absence of the Lawyers' alleged malpractice.

In its opinion, the Fifth Circuit clearly holds that the doctrine of res judicata barred the claims of Bosque, Frost, and Weldon. As a result of this holding, the Fifth Circuit states, "[W]e need only examine whether there is sufficient evidence in the record to allow a reasonable jury to conclude that contracts existed between Borden and Denman, and Borden and Smith." The Lawyers' argument is based on an unproven assumption that the claims of Bosque, Frost, and Weldon are identical to the those of Denman and Smith. The summary judgment record does not contain any of the pleadings from either Borden lawsuit. Furthermore, for the two appellants whose claims are addressed, the Fifth Circuit's opinion

describes their claims differently[4] and analyzes the evidence for each separately. The Lawyers have not conclusively established that their alleged negligence in handling the first Borden lawsuit was not a proximate cause of appellants' damages. Thus, with respect to those claims arising from the first lawsuit, we sustain appellants' second issue.

IV. THE SECOND BORDEN LAWSUIT

Appellants' complaint regarding the second Borden lawsuit concerns certain stipulations that were included in a pre-trial order signed by the Lawyers. Appellants allege that the Lawyers failed to understand the legal effect of the stipulations, agreed to stipulations that were inconsistent with the facts, and failed to request permission to retract the stipulations. Appellants also claim that the Lawyers failed to properly develop the legal theory of an implied contract between Borden and each appellant. The Lawyers asserted the following grounds for summary judgment: (1) the facts set forth in the contested stipulations were based on appellants' sworn testimony; and (2) notwithstanding the stipulations, the Fifth Circuit reviewed the record and found insufficient evidence to support the existence of any agreement between Borden and appellants.

A. The Stipulations

The Lawyers first argue that the stipulations on which appellants' malpractice claim relies were each based on sworn testimony. Appellants complain of the following four statements appearing in the pre-trial order under the heading "Stipulations and Agreed Facts":

- "Borden never promised any of the plaintiffs that neither Borden nor anyone else would sell in their territory."

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[4] In its opinion, the Fifth Circuit characterized the claims of Denman and Smith as follows:

> Denman alleges that Borden had breached contracts with him concerning subsidies, special allowances, and credit on returned merchandise. Smith argues that Borden had breached contracts with him concerning price setting as well as "primary or exclusive resale rights of Borden dairy products in a pre-determined or set geographical territory or route area."

- "Borden never agreed with any of the plaintiffs that Borden would always continue to do business with them on the same terms and conditions as it had in the past."
- "Borden never promised any of the plaintiffs that Borden would always continue to do business with them on the same terms and conditions as it had in the past."
- "Borden never agreed that any of the various discounts, rebates, allowances, subsidies and other credits and payments listed above would always continue."

In their summary judgment motion, the Lawyers point to several deposition and trial excerpts, arguing that each appellant testified to the facts upon which the stipulations were made. The Lawyers then conclude that "it cannot, and should not, be malpractice to stipulate to the facts testified to under oath by one's client." In other words, the Lawyers contend that, as a matter of law, they did not breach the standard of care and, therefore, were not negligent. Appellants argue in their first issue that the Lawyers failed to establish a lack of negligence as a matter of law. We agree with appellants.

To prevail on their summary judgment motion, the Lawyers had to establish that there is no genuine issue of material fact whether their conduct constituted malpractice. A matter is conclusively established for summary judgment purposes only if ordinary minds cannot differ as to the conclusion to be drawn from the proof. *Frasier v. Schauweker*, 915 S.W.2d 601, 604 (Tex. App.—Houston [14th Dist.] 1996, no writ). Here, summary judgment would be appropriate only if the stipulations were so clearly supported by appellants' testimony that no reasonable mind could conclude that the Lawyers did not breach the standard of care. The Lawyers failed to meet this burden.

Initially, we note that the Lawyers did not present any proof regarding the applicable standard of care for the entry of stipulations.[5] Nowhere do the Lawyers cite to testimony

[5] Appellants argue that as the summary judgment movants, the Lawyers were required to present expert testimony on the applicable standard of care, citing *Jatoi v. Decker, Jones, McMackin, Hall & Bates*, 955 S.W.2d 430, 434 (Tex. App.—Fort Worth 1997, pet. denied). Because we find that the Lawyers' summary judgment proof is otherwise deficient, we need not decide whether the absence of such expert

from appellants that the parties *never* agreed, or that Borden *never* promised, to continue to do business on the same terms and conditions as in the past. In fact, in one of the excerpts the Lawyers cite, Weldon was asked whether he had any regular business dealings with Borden that he believed "obligated Borden to operate in the same manner for as long as [Weldon] continued as a distributor," to which Weldon responded, "Yes." Bosque testified Borden told him that as long as he was a distributor, Borden "would take care of me," which to him meant that he would be subject to the same agreement as his predecessor. Bosque further testified that Borden always upheld this agreement in its dealings with him. At best, the remaining excerpts cited by the Lawyers merely suggest that appellants did not remember any specific agreements or promises they may have had with Borden.[6] The Lawyers' summary judgment proof is insufficient to establish as a matter of law that their conduct did not constitute a breach of the standard of care. We sustain appellants' first issue.[7]

B. Sufficiency of the Evidence

The Lawyers' motion for summary judgment also argued that, notwithstanding the stipulations, the Fifth Circuit carefully reviewed the trial record in the second Borden lawsuit and found insufficient evidence to support the existence of agreements between Borden and the individual appellants. In short, the Lawyers argue that their negligence, if any, did not proximately cause appellants' alleged damages. As noted above, appellants contend in their second issue that the Lawyers failed to negate the element of proximate cause as a matter of law. Again, we agree with appellants.

As noted above, with respect to Bosque, Frost, and Weldon, the Fifth Circuit's

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testimony by itself defeats a summary judgment motion on a legal malpractice claim.

[6] A careful review of the cited excerpts reveals that many are unrelated to or provide no support whatsoever for the stipulations.

[7] We do not suggest that the entry of stipulations unsupported by express, sworn testimony necessarily constitutes malpractice. We simply hold that the testimony set forth in the Lawyers' motion fails to conclusively negate the breach element in appellants' malpractice claim, particularly given the absence of proof on the applicable standard of care.

opinion expressly states that their claims were barred by res judicata, and therefore, the court was *not* reviewing the evidence with respect to those claims. The summary judgment record contains nothing to indicate that the claims of Bosque, Frost, and Weldon were identical to those of Denman and Smith, which *were* reviewed by the court. Accordingly, summary judgment as to Bosque, Frost, and Weldon was inappropriate.

We also find that the trial court erroneously granted summary judgment against Denman and Smith. In the second Borden trial, the jury found that both Denman and Smith had a contract with Borden under which each had the right to control prices in his territory "in a manner that would afford him the primary or exclusive managing control of profits or losses." The Fifth Circuit concluded that "[a]fter carefully reviewing the record and for the following reasons, the record does not provide sufficient evidence upon which a reasonable jury could have inferred the existence of such a contract between Borden and Denman or Borden and Smith." The Lawyers contend that because the Fifth Circuit concluded the record contained insufficient evidence to support the jury's findings, the court would have reversed the judgment in favor of Denman and Smith even without the stipulations. We disagree.

The Lawyers' argument might have merit if the Fifth Circuit had reviewed the evidence supporting the jury's findings that contracts existed between Borden and both Denman and Smith under the same standard we traditionally apply to determine legal sufficiency. We are not convinced, however, that the Fifth Circuit's opinion justifies this conclusion. The Fifth Circuit described its standard of review as a determination whether "the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable jurors could not arrive at a contrary verdict." This language is more akin to the standard we apply when reviewing the *factual* sufficiency of the evidence, whereby the appellate court considers and weighs all the evidence, not just that supporting the verdict, and sets aside the verdict if the jury's finding is against the great weight and preponderance of the evidence. *See Dow Chemical Co. v. Francis*, 46 S.W.3d

237, 242 (Tex. 2001).

Furthermore, in the Fifth Circuit's discussion of the evidence, its reliance on the stipulations is undeniable. For example, the court begins its discussion of Denman's claims as follows:

> Denman argues that he had a contract with Borden which ensured him the indefinite payment of certain, [*sic*] rebates, credits, and subsidies. However, in the parties' pretrial order, Denman stipulates that Borden never made such promises: "Borden never agreed that any of the various discounts, rebates, allowances, subsidies and other credits and payments listed above would always continue." Furthermore, Denman stipulated that "Borden never agreed with any of the plaintiffs that Borden would always continue to do business with them on the same terms and conditions as it had in the past," and that "Borden never promised any of the plaintiffs that Borden would always continue to do business with them on the same terms and conditions as it had in the past." Thus, even if Denman could show that Borden had contracted with Denman to pay certain, [*sic*] rebates, credits, and subsidies in the past, Denman stipulated that Borden was under no contractual obligation to do so in the future. [Footnote omitted.]

With respect to Smith's claims, the Fifth Circuit states:

> As for Smith, he also argues that Borden "set" his prices and infringed upon his sales territory, thus, violating the terms of an alleged contract. . . . As stated earlier, the parties—including Smith—stipulated that Borden never promised Smith an exclusive territory, nor did Borden promise Smith that it would always continue to do business with him in the future in the same manner that it had done so in the past. The evidence simply does not support a jury finding that Borden had made an agreement with Smith as to exclusive territory rights or non-competition between Borden and Smith.

Nowhere in its opinion does the Fifth Circuit suggest that it reviewed the evidence independent of the stipulations and determined that the evidence was insufficient to support the jury's verdict. To the contrary, the Fifth Circuit states that it reached this conclusion "[a]fter carefully reviewing the record *and for the following reasons*,"[8] reasons that clearly

[8] Emphasis added.

included the pre-trial stipulations. Accordingly, the Lawyers have not established as a matter of law that the Fifth Circuit's judgment would have been the same in the absence of the stipulations. We sustain appellants' second issue.

V. EXEMPLARY DAMAGES

In their fourth issue, appellants argue that the Lawyers were not entitled to summary judgment on appellants' claim for exemplary damages. In their petition, appellants allege that the Lawyers acted with malice. The petition defines "malice" as an act or omission

> 1. which, when viewed objectively from the standpoint of [the Lawyers], at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
> 2. of which [the Lawyers] had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety or welfare of others.

Recovery of exemplary damages is limited by the Texas Civil Practice and Remedies Code. Under the current version of chapter 41, exemplary damages may be awarded if they result from "malice," which the statute defines using the same language found in appellants' petition. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001(7)(B), 41.003(a)(2) (Vernon 1997). However, the current statute applies only to claims that accrue after September 1, 1995. Act of Apr. 11, 1995, 74th Leg., R.S., ch. 19, § 2, 1995 Tex. Gen. Laws 108, 113.

The Lawyers argue that appellants' claims all accrued before 1995, and therefore appellants have not properly pleaded a basis for the recovery of exemplary damages. Appellants counter that the Lawyers failed to establish as a matter of law when their malpractice claim accrued. Even if we assume that appellants' claims accrued before September 1, 1995, however, the Lawyers are not entitled to summary judgment on this ground. The type of conduct appellants label as "malice" meets the definition of "gross negligence" set forth in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994). Under the pre-1995 version of chapter 41, exemplary damages are recoverable if the

plaintiff's harm results from gross negligence. *See* Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, 1987 Tex. Gen. Laws 37, 44-45. Thus, regardless of the label appellants placed on the Lawyers' alleged conduct, appellants' petition supports an award of exemplary damages. We sustain appellants' fourth issue.

VI. CONCLUSION

The Lawyers have not established their entitlement to judgment as a matter of law on any of the grounds raised in their summary judgment motion. Accordingly, we reverse the summary judgment granted in their favor and remand this case to the trial court for further proceedings.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 24, 2002.
Panel consists of Justices Edelman, Frost and Murphy.[9]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[9] Senior Chief Justice Paul C. Murphy sitting by assignment.