Reversed and Remanded and Opinion filed June 15, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01099-CV

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JOHN J. LAUGHLIN, Appellant

V.

EDWARD BERGMAN and FOUTS & MOORE, L.L.P., Appellees

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 96-001518

O P I N I O N

This is an appeal from a summary judgment in a legal malpractice case. The underlying lawsuit involved claims by appellant, John J. Laughlin, against Edward Bergman and Fouts & Moore, appellees, for breach of fiduciary duty, fraud, DTPA violations and conspiracy. Appellees moved for summary judgment based on their assertions that: (1) Bergman's ethical duties as a lawyer prevented him from disclosing certain information to Laughlin, thus defeating Laughlin's claim as a matter of law; (2) Laughlin's claims for damages are so speculative that he cannot prove causation as a matter of law; (3) because Bergman was not representing Laughlin in matters pertaining to the reorganization of Laughlin's corporation,

he had no duty to disclose certain information to him, and (4) there was no conspiracy involved in this case because the actions taken were legal. Laughlin challenges the summary judgment on appeal on the bases that (a) the trial court erred in granting summary judgment to the appellees as movants because Laughlin controverted their summary judgment proof addressing his breach of fiduciary duty and conspiracy claims, thus preventing summary disposition, and (b) summary judgment was improper on his fraud and DTPA claims because appellees' did not address these claims in their summary judgment motion. We reverse the trial court's judgment and remand this case for further proceedings.

I.
Factual Background

In 1990, John Laughlin, with Jim Sweiter, founded Ameristar Fuels Corporation (Ameristar), and remained a shareholder, officer, and director of Ameristar until he was removed by Sweiter and David Wallace on January 17, 1994. As early as 1990, Laughlin was using the legal services of Bergman. Later, Bergman and his firm represented both Laughlin and Ameristar in litigation with certain joint venture partners. Laughlin's removal forms the basis of this litigation. John Laughlin sued Edward Bergman and Bergman's former law firm of Fouts & Moore based on Bergman's participation in his removal. Laughlin alleges, and the record demonstrates, that Bergman attended a dinner meeting with Sweiter and Wallace on January 11, 1994, six days prior to Laughlin's removal. At this meeting, Bergman was told by Wallace and Sweiter that they intended to remove Laughlin as President of Ameristar and that he was to keep the meeting and the pending termination secret. Bergman agreed, and later allowed Sweiter and Wallace to use the conference room at Fouts & Moore for the termination meeting. Finally, when Laughlin called Bergman the day of the termination meeting to ask him what the purpose of the meeting was, Bergman feigned ignorance of the meeting's purpose.

Laughlin objects to Bergman's actions because he alleges Bergman breached his fiduciary duties to him by participating in the "conspiracy" to oust him as an officer and

director of Ameristar. Laughlin claims Bergman owed him fiduciary duties because Bergman represented both his personal, as well as Ameristar's corporate, interests in litigation. According to Laughlin, the breach occurred: first, when Bergman agreed to keep the information he learned regarding Laughlin's impending termination a secret; second, when he facilitated the clandestine plans by allowing Wallace and Sweiter to use the conference room at Fouts & Moore in order to fire him, and third, when he responded he did not know the purpose of the meeting when he was asked directly by Laughlin.

II.
Standard of Review

The standards an appellate court uses to review summary judgment proof are as follows: (1) the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant must be taken as true, and (3) every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985); *see also Perez v. Cueto*, 908 S.W.2d 29, 31 (Tex.App.—Houston [14 Dist.] 1995, no writ). Here, Laughlin is the non-movant and we must, therefore, indulge every reasonable inference, and resolve all doubts, in his favor.

III.
Summary Judgment

Summary judgment may be granted on the basis of uncontroverted testimonial evidence of an interested witness if that evidence "is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." *See* Tex. R. Civ. P. 166a(c); *see also Casso v. Brand*, 776 S.W.2d 551, 558 (Tex.1989). The language "could have been readily controverted" does not simply mean that the movant's summary judgment proof could have been easily and conveniently rebutted. Rather, it means that testimony at issue is of a nature which can be effectively countered by opposing evidence."

See Casso, 776 S.W.2d at 558; *see also Huffine v. Tomball Hosp. Authority* 979 S.W.2d 795,801-02 (Tex. App.—Houston [14th Dist.] 1998, no writ). However, summary judgment is inappropriate if the credibility of the affiant or deponent is likely to be a dispositive factor in the resolution of the case. *See Casso*, 776 S.W.2d at 558; *see also Winkler v. Kirkwood Atrium Office Park*, 816 S.W.2d 111, 114 (Tex.App.—Houston [14th Dist.] 1991, writ denied).

Appellees moved for summary judgment on either of the following alternative grounds: Bergman, pursuant to Texas law and Texas Rules of Professional Conduct, had no choice but to preserve the confidence of what he was told at the January 11, 1994 dinner meeting because it was an attorney-client communication, and thus Bergman owed no duty to Laughlin to disclose that information; or no act or omission by Bergman was the proximate or producing cause of any injury or damage to Laughlin. We construe these grounds as addressing only the malpractice and DTPA claims asserted by Laughlin.

Appellee's summary judgment proof in support of the foregoing grounds consists of Bergman's affidavit and various excerpts from depositions of Laughlin. After describing the events leading to Laughlin's termination, Bergman ends his affidavit with a series of self-serving statements and legal conclusions ostensibly supporting both of the alternative grounds set out in the summary judgment. Bergman avers that he was required to keep the information regarding Laughlin's impending termination secret and that he breached no duty to Laughlin by withholding that information, and that no act or omission on his part was the proximate or producing cause of any injury or damage to Laughlin. The precise words used by Bergman in the three paragraphs of his affidavit in which he sought to prove his entitlement to judgment as a matter of law are as follows:

> 11. "On the morning of Monday, January 17, 1994, approximately one hour before the meeting was scheduled to begin, I received a phone call from Laughlin in which Laughlin asked me what the meeting was about. Because I was unable to tell Laughlin the truth without violating my duties to Ameristar, I told Laughlin I "did not know." *I did not intend to deceive Laughlin* with that statement, nor

> *did I intend for Laughlin to rely* on that statement in deciding to attend the meeting.
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> 13. ...*In my opinion* I owed no duty to Laughlin to disclose that information [regarding Laughlin's impending termination], and consequently breached no duty to Laughlin by withholding it. *In my opinion* I acted properly and consistent [sic] with that which a reasonably prudent attorney would have done under the same or similar circumstances by not disclosing the substance of the January 11, 1994 dinner meeting to Laughlin.
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> 14. *In my opinion*, no act or omission on my part between the time I learned of Laughlin's impending termination on January 11, 1994 and its occurrence on January 17, 1994 was the proximate or producing cause of any injury or damage to Laughlin. *In my opinion*, disclosure to Laughlin of his impending termination at any point after January 11, 1994, in all reasonable probability, would not have changed the outcome of events from those that actually transpired, or have placed Laughlin in a better position today. *In my opinion*, my statement to Laughlin, approximately one hour before the January 17, 1994 board meeting took place, that I "did not know" the purpose of the meeting was not the proximate cause or producing cause of any injury or damage to Laughlin, because, at that point, there was nothing Laughlin could do to prevent the meeting from occurring."

(emphasis added).

In paragraph eleven, Bergman asserts that he did not intend to deceive Laughlin with his prevarication concerning his purported lack of knowledge about the purpose of the meeting. Self-serving statements by interested witnesses about what they knew or intended are not easily controverted and will not support a motion for summary judgment. *See Allied Chem. v. De Haven*, 752 S.W.2d 155, 158 (Tex. App. — Houston [14th Dist.] 1988, writ denied). Thus, paragraph 11 cannot provide support for the summary judgment, and it would have been error for the trial court to rely on its contents.

The purpose of paragraph thirteen in Bergman's affidavit is to establish, as a matter of law, that because he neither owed a duty to Laughlin nor caused any of Laughlin's damages, Laughlin's claims were not meritorious. However, this paragraph is also flawed. Paragraph thirteen does not contain the legal basis or reasoning for Bergman's opinion that he owed no

duty to Laughlin to refrain from lying to him. The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). A statement comprised only of legal conclusions is insufficient to support summary judgment as a matter of law. *See Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991).[1] Further, a legal conclusion in an affidavit is insufficient to establish the existence of a fact in support of a motion for summary judgment. *See Mercer v. Doran Corp.*, 676 S.W.2d 580, 593 (Tex. 1984). Therefore, we consider Bergman's legal conclusions as providing no proof about the presence or absence of a duty to answer truthfully Laughlin's question regarding the purpose of the meeting.

Bergman's paragraph fourteen contains conclusory statements that neither his acts nor his omissions were the proximate cause of Laughlin's damages. The determination of proximate cause is a question of fact for the jury in a legal malpractice action. *See Millhouse v. Wiesenthal*, 775 S.W.2d 626, 627 (Tex. 1989). Bergman's statements in paragraph fourteen are legal conclusions purporting to establish the fact that neither his acts or omissions were the cause in fact — the element common to proximate and producing cause — of Laughlin's damages. However, as noted above, a legal conclusion in an affidavit is insufficient to establish the existence of a fact in support of summary judgment. *See Mercer*, 676 S.W.2d at 583. Thus, because paragraph fourteen cannot establish that Bergman's acts were not the cause in fact of Laughlin's damages, it will not defeat that element of Laughlin's negligence and DTPA claims.

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[1] The facts in *Anderson* are strikingly similar to the case *sub judice*. There, Anderson was represented by attorney Snider. Anderson sued based on acts and omissions of Snider claiming legal malpractice, breach of contract and violations of the DTPA. Snider's motion for summary judgment stated in part:

> I have reviewed the Plaintiff's Original Petition, my file and material documents filed with the Court, and it is clear that I acted properly and in the best interest of [Anderson] when I represented her, and that I have not violated the DTPA. I ... have not been guilty of any negligence or malpractice. [Anderson] has suffered no damages or legal injury as a result of my representation of her.

The Court held that without the legal basis or reasoning for Sinder's opinion that he did not commit malpractice, violate the DTPA, etc., Snider's affidavit is simply a sworn denial of Anderson's claims.

Moreover, summary judgment is inappropriate based on Bergman's summary judgment proof because Bergman's credibility is at issue. In paragraph eleven, Bergman states that when he responded "I don't know" when pointedly asked by his client about the purpose of the meeting, he "did not intend to deceive Laughlin . . .nor did [he] intend for Laughlin to rely on that statement in deciding to attend the meeting." Further, in paragraphs thirteen and fourteen, Bergman posits that "in his opinion" he breached no duty nor proximately caused Laughlin's injuries. Because Bergman has chosen to base his defense upon his intent and understanding of his duties as attorney for Laughlin and Ameristar, his credibility is likely to be a dispositive factor in the resolution of the case. *See Casso*, 776 S.W.2d at 558. However, as noted above, if the credibility of the affiant is likely to be a dispositive factor in the resolution of the case, summary judgment is inappropriate. *See id.*; *see also Winkler*, 816 S.W.2d at 114. Thus, Bergman, has not met his burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *See Nixon*, 690 S.W.2d at 548.

Because causation is an element for each of Laughlin's asserted claims, and Bergman failed to negate the existence of causation as a matter of law, we hold the trial court incorrectly granted summary judgment on all of Laughlin's claims. Accordingly, we reverse the trial court's judgment and remand this case for further proceedings.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed June 15, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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