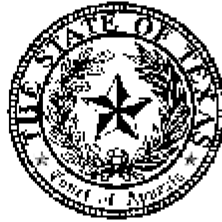
Affirmed and Opinion filed July 19, 2001.



In The

Fourteenth Court of Appeals

NO. 14-98-01167-CV

BUTAN VALLEY, N.V., Appellant

V.

CANDACE L. SMITH, Appellee

On Appeal from the County Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 616,981

O P I N I O N

Butan Valley, N.V., appeals from a judgment favoring Candace Smith in her lawsuit to recover unpaid legal fees. A jury awarded Smith $4,700 in actual damages and $5,000 in attorney's fees. On appeal, Butan Valley contends the trial court made errors in the submission of the jury charge. We affirm.

I. Background

In October 1991, attorney Smith filed a lawsuit on behalf of Butan Valley against Omama Corporation. The two companies each owned a 50 percent interest in a tract of real property, and Butan Valley alleged that Omama had failed to pay its share of the expenses and taxes on the property. Smith pursued the case for Butan Valley through settlement negotiations, pleadings, discovery, and hearings.

When Omama failed to respond to the requests for admissions because it was, at that time, without legal representation, Smith filed a motion to compel answers to discovery. At the hearing on the motion, the trial judge refused to grant the motion but suggested that Smith file a motion for summary judgment. By the time this motion was filed, Omama had retained new counsel.

A settlement was reached, but Butan Valley withdrew its agreement. Smith then prepared a motion to withdraw as counsel, and Butan Valley agreed to it. Butan Valley subsequently paid $4,000 to Smith for past services.

In April 1993, Smith filed the present lawsuit seeking unpaid legal fees in the amount of $5,022.51. She plead for recovery under, *inter alia*, theories of breach of contract and quantum meruit. After the jury found in Smith's favor, the trial court entered judgment awarding her $4,700 in actual damages, $5,000 in attorney's fees, and pre- and post-judgment interest.

II. Submission on Damages

Under its first point of error, Butan Valley contends that the jury charge does not support the judgment rendered: (1) because it failed to submit a question on the issue of causation of damages, as required for recovery on a breach of contract cause of action; and (2) because in the question on damages it asked the jury to find the "reasonable value" of Smith's services and not the amount of damages caused by the breach of the contract. The jury charge

as submitted by the trial court included the following questions:

> **QUESTION NO. 1.**
>
> Did Butan Valley N.V. fail to comply with its contract with Candace Smith?
>
> Answer "Yes" or "No."
>
> ANSWER: "Yes"
>
> [. . .]
>
> **QUESTION NO. 3.**
>
> What is a reasonable fee, if any, for the services provided by Candace L. Smith to Butan Valley, N.V. which have not yet been paid?
>
> In determining a reasonable fee for legal services, consider the following factors:
>
> 1. the time and labor required;
> 2. the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
> 3. the likelihood that the acceptance of the particular employment will preclude other employment by the attorney;
> 4. the fee customarily charged in the locality for similar services;
> 5. the nature and length of the professional relationship with client;
> 6. the experience, reputation, and ability of the attorney or attorneys performing the services; and
> 7. the amount of money in controversy and the results obtained.
>
> Answer in dollars and cents, if any.
>
> ANSWER: "$4,700.00"

Butan Valley contends that although Question No. 1 is a proper submission for breach of contract, the court erred in then submitting Question 3, which would be more appropriate for a recovery based on *quantum meruit*. Specifically, Butan Valley suggests that Question 3 is improper because it fails to make an inquiry regarding causation and fails to set up the

correct measure of contract damages.

The record reveals that questions 1 and 3, as submitted to the jury, were virtually identical to questions 1 and 3 as proposed by Butan Valley. It is well settled in Texas that a party may not invite error by requesting an issue and then object to its submission on appeal. *General Chemical Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993); *Winkle v. Tullos*, 917 S.W.2d 304, 316-17 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

Butan Valley attempts to bypass this problem by suggesting that the jury verdict on this charge, as a matter of law, cannot support a judgment because question 1 asks about breach of contract and question 3 provides the measure of damages for a completely different cause of action plead by Smith, i.e. *quantum meruit*, and thus cannot be used to support the award of damages for breach of contract. Question 3, however, was included in a group of issues, along with questions 1, 2, and 4, such that the jury was instructed to not answer question 3 unless it found a breach of contract in response to question 1. It is clear, therefore, that both the court and Butan Valley intended question 3 to provide the measure of damages for the jury to use if they found Butan Valley breached the contract. Thus, even if the measure of damages in the charge was improper as a matter of law, Butan Valley waived the argument in the trial court because it invited the error in its proposed charge. *See De La Lastra*, 852 S.W.2d at 920; *Winkle*, 917 S.W.2d at 316-17.

Furthermore, not only did Butan Valley invite any error in the measure of damages, it failed to subsequently object to any such error. This court has consistently held that failure to object to the charge on an improper measure of damages waives the issue on appeal. *See, e.g., Riddick v. Quail Harbor Condominium Assn., Inc.*, 7, S.W.3d 663, 675 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *West v. Carter*, 712 S.W.2d 569, 574 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). Butan Valley failed to preserve its complaints. We therefore overrule this point of error.

III. Omitted Instruction

In its second point of error, Butan Valley contends that the trial court erred in refusing to submit its requested instruction regarding the affirmative defense of failure of consideration.[1] Question 2 of the jury charge read as follows:

QUESTION NO. 2.

Was Butan Valley, N.V.'s failure to comply excused?

Answer "Yes" or "No."

ANSWER: "No."

This submission was substantially similar to Texas Pattern Jury Charge 101.21. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES-BUSINESS, CONSUMER, EMPLOYMENT PJC 101.21 (1997).

Butan Valley also requested the following instruction, but it was refused: "Failure to comply by Butan Valley, N.V. is excused by Candace L. Smith's previous failure to comply, if any, with a material obligation of the same agreement." Butan Valley's proposed instruction was substantially similar to PJC 101.22. It was properly requested and in substantially correct form. It is this instruction that Butan Valley claims the court erroneously refused.

A. Legal Moorings

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[1] Butan Valley plead failure of consideration along with breach of contract, unconscionability, negligence, breach of warranty, DTPA violations, *et al*. In *Greathouse v. McConnell*, 982 S.W.2d 165 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), the court agreed with the attorney-defendant that the client-plaintiff should not be allowed to fracture what was essentially a legal malpractice claim into numerous other causes of action. *Id*. at 172. S*ee also Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 481 (Tex. App.—Dallas 1995, writ denied)(cause of action arising out of bad legal advice or improper representation is legal malpractice). A breach of contract cause of action may also be raised in the attorney-client context when the issue involves excessive fees. *See Jampole v. Matthews*, 857 S.W.2d 57, 62 (Tex. App.—Dallas 1993, writ denied). Although Smith does not complain on appeal that Butan Valley should have been limited to a legal malpractice cause of action, and thus we do not address the merits of the argument, we wish to point out the irregularity lest our opinion be taken as authorizing the use of failure of consideration in such contexts.

The commentary following PJC 101.21 states that accompanying instructions, such as PJC § 101.22, are mandatory because, standing alone, PJC 101.21 does not encompass any specific grounds of defense, citing *Traeger v. Lorenz*, 749 S.W.2d 249 (Tex. App.—San Antonio 1988, no writ). *Id*. at 101.2, comment. Although we generally agree with the Committee that such instructions are preferred, our analysis is not to end there.

While a trial court should submit appropriate accompanying instructions, the failure to do so is not reversible error *per se*. *Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986). To determine whether an alleged error in the jury charge is reversible, the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety. *Id*. Alleged error will be deemed reversible only if, when viewed in the light of the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment. *Id*; *Howell Crude Oil Co. v. Donna Refinery Partners, Ltd.*, 928 S.W.2d 100, 110 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

Butan Valley contends that the trial court erred in refusing the requested instruction because Smith's performance under the contract was so lacking in value as to constitute a failure of consideration and thus Butan Valley was itself excused from performing. A failure of consideration occurs when, after an agreement is reached, the promised performance fails.[2] *Estate of Menifee v. Barrett*, 795 S.W.2d 810, 814 (Tex. App.—Texarkana 1990, no writ). A complete failure of consideration constitutes a defense to an action on a contract. *Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A.*, 666 S.W.2d 549, 553 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd). A partial failure of consideration will not

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[2] Some commentators prefer to use either "failure of performance" or "material breach" instead of "failure of consideration." *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 237, reporter's notes (1979)(failure of performance); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES-BUSINESS, CONSUMER, EMPLOYMENT PJC 101.22, comment (1997)(material breach).

invalidate a contract and prevent recovery thereon but merely entitles the injured party to a suit for damages. *Huff v. Speer*, 554 S.W.2d 259, 263 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.)(citing *American Nat'l Bank of Houston v. American Loan & Mort. Co.*, 228 S.W. 169, 172 (Tex. Comm'n App. 1921, judgm't adopted)(when the consideration received under the contract is substantial, the partial failure of consideration does not invalidate the contract but is a defense *pro tanto* thereto)).

In determining the nature of an alleged failure of consideration, or material breach, courts will consider, among other things, the extent to which the nonbreaching party is deprived of the benefit that it could have reasonably anticipated from full performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 241(a)(1979). The less the non-breaching party is deprived of the expected benefit, the less substantial the failure of consideration. *See Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994). In a legal services contract, such as in the present case, the expected benefit is competent legal representation and not a guarantee of a particular outcome. This is especially true when the service provided is the prosecution of a lawsuit.

B. Analysis

The question at issue in the present case can be stated as follows: Was Smith's performance under the contract so lacking in value as to constitute a failure of consideration that was so substantial as to excuse Butan Valley's performance? *See* 6 *Corbin on Contracts* § 1253 (1962). We must consider this question in terms of our standard of review, i.e., when viewed in the light of the totality of these circumstances, the alleged charge error amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment. *Island Recreational*, 710 S.W.2d at 555.

1. Pleadings

We must first examine the pleadings. *Id*. Butan Valley filed an answer and a counter-

claim alleging the affirmative defense of failure of consideration, as well as other defenses and affirmative claims, including breach of contract, unconscionability, negligence, breach of warranty, and DTPA violations. In other words, Butan Valley properly plead failure of consideration, but it also plead a number of other causes of action with similar elements of proof.

2. Evidence at Trial

Next, we must examine the evidence presented at trial. *Id*. Butan Valley contends the evidence demonstrates that there was a failure of consideration in that Smith mishandled the lawsuit against Omama and, therefore, Butan Valley received substantially no value from the representation or at least after a certain point.

The evidence demonstrated that Smith engaged in initial negotiations with Omama, drafted and filed the lawsuit against Omama, drafted and served discovery requests, drafted and filed motions, and attended hearings, all on behalf of Butan Valley. The evidence further demonstrated that she negotiated a settlement that was initially agreed to by both Omama and Butan Valley. This settlement was, at least arguably, more favorable to Butan Valley than was the final settlement agreement.[3]

Still, Butan Valley contends that Smith's services were substantially defective in several ways, including, most importantly, that she failed to immediately file a motion for summary

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[3] The settlement negotiated by Smith was basically for the full transfer of Omama's 50% interest in the property to Butan Valley. The evidence in the record regarding the terms of the subsequent settlement is murky, but the terms apparently included the transfer of only a 25% interest in the property from Omama to Butan Valley. Although the final settlement gave Butan Valley only a 75% ownership when the earlier settlement would have given them 100%, Osama Al Kasabi testified that he preferred the eventual settlement because it also included Omama's agreement to pay two years of back taxes and expenses (1991-92). Unfortunately, the record lacks any definitive evidence on the value of the property, the amount of taxes and expenses owed, or the monetary value of the two settlements. It is, therefore, impossible to accurately compare the two settlements. Additionally, there was testimony that, at the time of the original settlement, Omama may not have been financially capable of paying money as part of a settlement, so that the terms of the eventual settlement would not have been feasible at the earlier point in time.

judgment when the judge suggested that she do so and that she failed to take advantage of the fact that Omama went almost seven months without legal representation.

a. Motion for Summary Judgment

Butan Valley contends that if Smith had performed her job properly, the trial court would have granted a motion for summary judgment long before the initial settlement occurred. In her deposition, Smith admitted that, at the hearing on the motion to compel discovery requests, the judge suggested that she file a motion for summary judgment and indicated he would grant it.

In her trial testimony, Smith explained that the main reason for the judge's encouragement of the motion was to spur the other side to answer the outstanding discovery requests. The court refused to grant the motion to compel, and Smith says that the judge suggested the motion for summary judgment as something that would get Omama's attention. She further testified that the reason she did not immediately file the motion was because she did not have a firm basis on which to request a specific sum of money for damages. She stated that Osama Al Kasabi, her contact at Butan Valley, had up to that point failed to provide her with the documentation (mainly cancelled checks) supporting the claim for damages, and Osama refused to let his father, the official corporate representative, sign an affidavit in order to support the damages claim. In order to secure proof for the damages amount, Smith had served a second set of requests for admissions on Omama, with the approval of Osama. At this point, Omama hired new legal counsel and answered the admissions. Eventually, Smith did file a motion for summary judgment, with an attached, signed affidavit. Omama responded claiming, *inter alia*, that the motion had certain technical defects. The trial court had not ruled on the motion by the time of Smith's withdrawal.

In his testimony, Osama Al Kasabi at first denied that Smith ever told him that an affidavit would suffice instead of another set of admissions. But, under cross-examination, he admitted that he did receive the affidavit. Butan Valley also presented the testimony of Jerry

Schutza as a legal expert. Schutza testified that when a judge tells you to do something you should do it, and, in his opinion, the judge would have granted a timely filed motion for summary judgment under these circumstances. He further opined that the first set of requests for admissions was improperly worded and that there would have been no need for the second set if she had drafted the first set correctly. But he admitted that not all of the fault necessarily lay with Smith, because she could not force her client to sign an affidavit if the client refused.

Paul Clote, the legal expert on behalf of Smith, testified that any technical defects in the motion for summary judgment could have been handled by amending the motion or the attached affidavit and were not necessarily deadly to the motion. Clote agreed with Smith that it was essential to have an ascertained amount of damages before filing the motion for summary judgment and that it would have been impossible to secure proof of damages through the use of the request for admissions when she had not been provided with enough information to include an amount for damages in the requests. He further opined that a court's advising counsel to file a motion for summary judgment is not a promise that it will be granted.

Butan Valley would have us believe that the sum of the evidence regarding the motion for summary judgment proves a total failure of consideration. However, even if Smith had quickly filed the motion, it may well have spurred Omama to retain new counsel and fight the motion, and there was no iron-clad guarantee that the judge would grant the motion, even if we assume the judge indicated he was willing to sign the order. We, therefore, view this argument based on the delay in filing the motion for summary judgment as highly speculative concerning the theory of failure of consideration.

b. Omama Without Representation

Butan Valley next contends that Smith's failure to capitalize on the almost seven months that Omama went without official counsel in the case evidences a total failure of consideration. Schutza, Butan Valley's expert, testified that Smith should have pressed the lack of opposing counsel to her advantage by filing, in addition to a motion for summary judgment, a motion to

compel answers to discovery, a motion to strike Omama's pleadings, or a motion to compel discovery.

Clote, Smith's expert, testified that while the fact that a party is without representation should be brought to the judge's attention, most judges will give unrepresented parties every leeway in obtaining an attorney. He further stated that, since Omama had filed an answer in the case, it would be highly unlikely the judge would grant a default judgment against the company.

Paul Hoefker, Omama's attorney, testified that part of their strategy in the case was to delay as much as possible. This suggests that Omama was monitoring the litigation closely and would have responded to any serious motions. Meanwhile, Smith testified that she did not want to file a motion to strike Omama's pleadings because she wanted Omama to answer discovery so she could prove damages. She did file a motion to compel and she did get deemed answers to the first set of requests for admissions. When she filed the second set of admissions, which threatened to complete the puzzle for summary judgment, Omama did, in fact, enter counsel in the record.

Butan Valley's argument regarding the time that Omama went unrepresented is also highly speculative in nature. Smith had strategic reasons not to press the issue, and it was very possible that if pushed Omama would have retained counsel and responded to any outstanding filings, as they eventually did in response to the second set of requests..

c. Inconsistent Statements

It is difficult from the record to decipher exactly what Butan Valley's operating theory of the case was in the trial court. Butan Valley's counsel stated in its appellate brief, as well as in jury voir dire and in closing argument, that the services provided by Smith provided no value to the corporation because she failed to do the things that would have made a difference in the lawsuit. This broad refrain is not born out by the evidence presented at trial, nor even by the testimony of its own witnesses. In its brief, Butan Valley further states that Osama Al Kasabi, the sole fact witness for the corporation, testified that the corporation received no

value from her services. A careful review of the record reveals, however, that what Al Kasabi actually said was that the corporation received no value from the filing of certain motions in the lawsuit against Omama. By his own words, his testimony was limited to particular parts of her representation and not to the representation in its entirety. He further affirmatively stated that Smith did deserve payment for some of what she did. The record also demonstrates that Butan Valley continued to pay Smith's fees even after it says it was no longer receiving any value from her work.[4]

Furthermore, Butan Valley's own expert witness, Schutza, placed a value of $3,000 on the services that Smith provided to the corporation in prosecuting the lawsuit. He charged that she did some things that she shouldn't have and that she failed to do certain things that she should have, but he concluded only that she overcharged Butan Valley and not that she provided no consideration under the contract.

In short, there is no evidence even remotely supporting the broadly phrased contention that Smith did nothing to further the lawsuit. The claim presented at trial instead appears to be that Smith's failure to immediately pursue summary judgment resulted in additional litigation costs and an eventual result that was less positive for Butan Valley than they could have received on summary judgment. This is a rather speculative argument for a total failure of consideration. It is almost completely dependent on the assumption that a summary judgment filed immediately after the court's suggestion could have contained sufficient proof of liability and damages that the court would have granted it, and, hence, all of Smith's work after that point was essentially valueless. As detailed above, the evidence does not support this assumption.[5]

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[4] This evidence could have potentially supported a claim that Butan Valley waived any failure of consideration; however, since the issue was not raised or addressed in the trial court, we will not address it on appeal.

[5] The parties argue about other issues as well that are not particularly relevant to our analysis, for example, whether they were ready for a particular trial setting and, if not, whose fault that was, and whether Smith was active enough in getting depositions set or whether she was hampered in this regard by Osama.

3. Jury Charge as a Whole

Turning to the remainder of the charge, we see that a broad range of questions were asked regarding Smith's alleged poor performance, including DTPA violations, breach of warranty, and unconscionability. To some degree, these claims share elements of proof with the failure of consideration issue because they are all based on the allegations of poor or improper performance of services by Smith. The jury found against Butan Valley on each and every one of the issues. It is interesting to note that Butan Valley did not request a submission on its own plead claim for contract damages.

Furthermore, the jury awarded Smith $4,700 in actual damages out of the $5,022.51 she requested.[6] Given that Question No. 3 on damages asked the jury what was a reasonable fee for her services, considering such factors as the results obtained and the ability of the attorney, it is clear that the jury did not believe that Smith provided Butan Valley with completely or even substantially valueless representation.

C. Conclusion

Having considered the pleadings, the evidence presented at trial, and the jury charge in its entirety, we find that any error in omitting the requested failure of consideration instruction did not amount to such a denial of the rights of Butan Valley as was reasonably calculated and probably did cause the rendition of an improper judgment. *See Island Recreational*, 710 S.W.2d at 555; *Howell Crude Oil*, 928 S.W.2d at 110. Accordingly, we overrule Butan Valley's second point of error.

The judgment of the trial court is affirmed.

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[6] Smith's invoices to Butan Valley included a charge of 2.5 hours to amend a notice of deposition. Butan Valley's attorney questioned Smith forcefully on this issue, and she explained that it was probably a mistake and the real charge should have been .25 hours. This apparent overcharge may well explain the difference between the amount Smith requested and the amount the jury awarded.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justices Sears, Lee, and Amidei.[*******]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*******] Senior Justices Ross A. Sears and Norman Lee and Former Justice Maurice Amidei sitting by assignment.