

**Affirmed and Opinion filed August 30, 2001.**



**In The**

**Fourteenth Court of Appeals**

---

**NO. 14-00-00226-CV**

---

**GERRY M. GRIGGS, Appellant**

**V.**

**ROBERT M. WOOD, Appellee**

---

---

**On Appeal from the 281st District Court  
Harris County, Texas  
Trial Court Cause No. 96-33450**

---

---

**OPINION**

In this legal malpractice action, Gerry M. Griggs appeals a summary judgment granted in favor of Robert M. Wood on the grounds that: (1) the summary judgment did not dispose of Griggs's breach of fiduciary duty, deceptive trade practices act ("DTPA"), and breach of contract claims; (2) the trial court erred in striking his fourth amended petition; and (3) he submitted sufficient evidence to preclude summary judgment on his

malpractice claim.<sup>1</sup> We affirm.

### **Background**

Wood, an attorney, represented Griggs in an ERISA<sup>2</sup> lawsuit (the “ERISA action”) in federal court against several defendants. In that case, Griggs sought recovery of benefits that had not been paid by his employee retirement plan (the “plan”). In 1995, the federal court ruled in that case, among other things, that Griggs take nothing on his claim for breach of fiduciary duty against Richard Rosen, President of Advanced Energy Technology Company Inc. (“AET,” Griggs’s former employer), and trustee of the plan.

In 1996, Griggs sued Wood in the instant lawsuit in connection with Wood’s representation of Griggs in the ERISA action. Griggs’s third amended petition alleged that Wood was negligent in the ERISA action by failing to: (1) sue on behalf of the plan; (2) plead claims for equitable relief; (3) offer evidence that the plan was under-funded or damaged by Rosen’s alleged breach of fiduciary duty; (4) conduct discovery and develop evidence necessary to defeat Halliburton’s<sup>3</sup> motion for summary judgment against Griggs’s alter ego claim; (5) conduct discovery and develop evidence necessary to maintain causes of action against Halliburton and its directors for breach of fiduciary duty

---

<sup>1</sup> As a preliminary matter, Wood argues that this court should dismiss Griggs’s appeal as improperly perfected because the notice of appeal fails to state the date of the judgment, the order appealed from, and whether the appeal was to the First or Fourteenth Court of Appeals. Even if a notice of appeal contains such defects, they do not prevent the appeal from being perfected or deprive the appeals court of jurisdiction. *See* TEX. R. APP. P. 25.1(b) (“The filing of a notice of appeal by any party invokes the appellate court’s jurisdiction over all parties to the trial court’s judgment or order appealed from. Any party’s failure to take any other step required by these rules . . . does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal.”). Because the complained of defects do not hinder our ability to decide the appeal, they do not warrant ordering appellant to correct them by amendment. Accordingly, we overrule Wood’s jurisdictional challenge.

<sup>2</sup> “ERISA” is an acronym for Employee Retirement Income Security Act of 1974. *See* 29 U.S.C. § 1001-1461. (1999).

<sup>3</sup> Halliburton allegedly was a majority stockholder in AET and took action to divert employees’ funds from being deposited in the plan’s bank account. Griggs settled his claims against Halliburton, and it was dismissed from the ERISA action.

and self-dealing; (6) appeal the final judgment; (7) identify the defendants as fiduciaries, state why they were fiduciaries, and identify which fiduciary duties they breached; (8) plead and prove certain ERISA violations; and (9) plead for benefits on behalf of Griggs.

Wood filed a motion for summary judgment against Griggs's claims in March of 1998 (the "March motion"), which asserted that Griggs had no expert testimony to show that Wood had breached the applicable standard of care or proximately caused injury to Griggs. After a sequence of summary judgment responses and replies by the parties, the trial court granted Wood a partial "no evidence" summary judgment in July of 1998 (the "July order"), stating that "[Grigg's] claims of negligence that derive from non-ERISA causes of action are dismissed."<sup>4</sup>

On August 17, 1998, Griggs filed a fourth amended petition (the "1998 fourth amended petition") which added breach of fiduciary duty, DTPA, and breach of contract claims based on the same facts as had been alleged in the third amended petition in support of the legal malpractice claim.<sup>5</sup> On August 18, 1998, the day after the 1998 fourth amended petition was filed, Wood filed a second motion for summary judgment (the "August motion"), which again asserted, among other things, that Griggs had no evidence that Wood proximately caused any harm to Griggs.

After another exchange of summary judgment responses and replies, the trial court granted the August motion in September of 1998 (the "September order") without specifying the ground(s) relied upon, dismissed all of Griggs's claims with prejudice, and

---

<sup>4</sup> According to the July order, claim numbers 4 and 5 from the third amended petition, which contended that Wood failed to conduct discovery and produce evidence necessary to defeat Halliburton's motion for summary judgment against Griggs's alter ego claim and failed to maintain causes of action against Halliburton and its directors for breach of fiduciary duty and self-dealing petition, were denied as a matter of law. Because Griggs does not assign error to the July order, we do not address it, or the non-ERISA claims it disposed of.

<sup>5</sup> On September 1, 1998, Wood filed a motion for sanctions asserting that Griggs had filed the 1998 fourth amended petition reasserting his non-ERISA claims in order to circumvent the July order, which disposed of those claims. Because the motion for sanctions was denied and Wood has not assigned error to the denial, we do not address it.

held that all pending motions were denied as moot. Thereafter, on August 9, 1999, Griggs filed a second fourth amended petition (the “1999 fourth amended petition”). In response, Wood filed a motion to strike the 1999 fourth amended petition, complaining that it was filed on the eve of trial, included several new allegations, and re-asserted the non-ERISA claims that had been dismissed in the July order. On August 16, 1999, the trial court struck Griggs’s 1999 fourth amended petition as being groundless and filed solely for the purpose of harassing Wood on the eve of trial.<sup>6</sup> The remaining claims in the case were subsequently disposed of, and a final judgment was entered on November 1, 1999.

### **Summary Judgment on Malpractice Claim**

Griggs’s third issue<sup>7</sup> in this appeal contends that his summary judgment evidence demonstrated Wood’s negligence sufficiently to raise a material fact issue on his legal malpractice claim against Wood, and thereby preclude summary judgment.

#### *Standard of Review*

After adequate time for discovery, a party, without presenting summary judgment evidence, may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). The trial court must grant the motion unless the respondent then produces summary judgment evidence raising a genuine issue of material fact on the challenged elements. *Id.*

In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge all reasonable inferences in the nonmovant's favor. *KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). Where, as here, a summary judgment order does not specify the grounds relied upon, the

---

<sup>6</sup> The motion to strike requested the court to strike only the 1999 fourth amended petition. Therefore, after the 1999 fourth amended petition was struck, the 1998 fourth amended petition remained a live pleading.

<sup>7</sup> We address the third issue first to facilitate an orderly presentation of the issues.

reviewing court must affirm if any of the grounds asserted in the motion are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

#### *Existence of Fact Issues*

To recover on a legal malpractice claim, a plaintiff must prove: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the breach proximately caused the plaintiff's injury; and (4) the plaintiff suffered damages from the injury. *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995). Where a client sues his attorney on the ground that the latter caused him to lose a cause of action, the plaintiff has the burden to prove that, but for the attorney's negligence, his suit would have been successful. *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948, 949 (Tex. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).<sup>8</sup> Proximate cause must be proved by evidence of probative force; it cannot be established by mere guess or conjecture. *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903 (Tex. 1980).

An expert's affidavit opposing a motion for summary judgment must present probative evidence of the facts at issue; an expert affidavit which gives no basis for its opinions is conclusory and not sufficient to raise fact issues. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *see Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999). Similarly, if an expert's opinion is based on facts that are materially different from those in evidence, the opinion is not evidence. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 596 (Tex. 1999).

In this case, Griggs alleged, and his expert's affidavit asserted, several acts and omissions by Wood which they claimed breached the applicable standard of care. However, the only evidence Griggs presented regarding causation (*i.e.*, that but for Wood's negligence, the ERISA action would have been successful) was the following portion of

---

<sup>8</sup> *See Millhouse v. Wiesenthal*, 775 S.W.2d 626, 627 (Tex. 1989) (citing *Jackson* for the similar proposition that in cases of appellate malpractice, the element of causation requires the plaintiff to prove that, but for the attorney's negligence, the client would have prevailed on the appeal of the underlying action).

the expert's first affidavit:

In my opinion, these acts and omissions, . . . were the cause of the adverse outcome on the ERISA claim. *[The federal court's] findings clearly indicate that breaches of fiduciary duty occurred and that the defendants in the Underlying Case were liable.* However, the court simply had no power to grant the relief specified in the Amended Petition, particularly when the Petition contained no claim for benefits, did not include the Plan as a party plaintiff or defendant, and so clearly requested only individual, legal relief. In my opinion, had the matter been properly pled as discussed above, the Court would have entered judgment for Plaintiff and Mr. Griggs would have been awarded substantial monetary relief.

(emphasis added).

However, contrary to the italicized portion, the federal court's findings state neither that breaches of fiduciary duty occurred nor that the defendants in the ERISA action were liable, but only that "Rosen stated that 'any deficit in this Plan is Halliburton's obligation' and demanded that the money be paid to the trust. However, Rosen has taken no legal action to collect money owed the Plan." Similarly, a United States Department of Labor report admitted into evidence in the ERISA action reflected that the plan dissolved without making full distributions to some of its participants, including Griggs, but reached no conclusion as to the reason(s) for that failure.

To the extent that Halliburton was responsible for the plan's failure to distribute the plan benefits owed to Griggs, as Rosen claimed, the settlement amount Griggs received from Halliburton exceeded the amount of the undistributed benefits he claimed. There were thus no findings by the federal court or other evidence presented in this case to show: (1) that Griggs had not recouped any plan benefits he was owed; (2) who, if anyone, was responsible for the plan's inability or failure to pay him; or (3) whether any actionable conduct on anyone's part brought about any loss the plan or Griggs suffered. In the absence of any such evidence, no fact issue is raised whether, in the absence of Wood's alleged negligence, Griggs would indeed have prevailed in the ERISA action. Accordingly, the summary judgment against Griggs's malpractice claim can be affirmed

based on Wood's assertion of no evidence of proximate cause, and Griggs's third point of error is overruled.

### **Procedural Issues**

Having concluded that no error has been shown regarding the trial court's granting of summary judgment as to Griggs's malpractice claim, we turn to Griggs's first issue which contends that neither the July nor September order disposed of the breach of fiduciary duty, DTPA, and breach of contract claims asserted in Griggs's 1998 fourth amended petition because none of those claims were addressed in either the March or August motion.

Where multiple causes of action, such as for breach of fiduciary duty, DTPA violations, and breach of contract, all arise out of allegations of bad legal advice and/or improper legal representation, such causes of action amount to nothing more than a claim of legal malpractice; and a defendant in such a case may obtain a summary judgment on all of the causes of action by disproving, as a matter of law, an element of the legal malpractice claim. *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). In addition, summary judgment may be granted on causes of action pled after the filing of a motion for summary judgment if the grounds asserted in the motion also establish that the plaintiff could not recover from the defendant on the later pled causes of action.<sup>9</sup>

In this case, as noted above, the 1998 fourth amended petition alleged new causes of action for breach of fiduciary duty, DTPA violations, and breach of contract based on the same facts as were alleged in the third amended petition to support Griggs's claims for

---

<sup>9</sup> See *Wilson v. Korthauer*, 21 S.W.3d 573, 582 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that an additional allegation of medical malpractice not addressed in the motion for summary judgment was nevertheless barred by the statute of limitations ground asserted in the motion); *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 437 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that additional allegations of negligence set forth in an amended petition and not addressed in the previously filed motion for summary judgment were negated by the trial court's ruling on that motion that there was no evidence to establish duty, breach, or causation).

legal malpractice. In essence, Griggs's only complaint against Wood is that his representation in the ERISA action fell below the applicable standard of care. Because the August motion could properly have been granted against the malpractice claim based on a lack of evidence of causation, and because the remaining claims for breach of fiduciary duty, DTPA violations, and breach of contract were, in substance, the same legal malpractice claim, the granting of summary judgment against the malpractice claim effectively disposed of the breach of fiduciary duty, DTPA, and breach of contract claims as well. Accordingly, Griggs's first issue is overruled.

Griggs's second issue contends that the trial court abused its discretion in striking his 1998 fourth amended petition when it struck his 1999 fourth amended petition. Again, as noted previously,<sup>10</sup> we interpret the trial court's August 16, 1999, order to strike only the 1999 fourth amended petition because Wood's motion to strike sought only to strike that petition. Because the 1998 fourth amended petition thereafter remained a live pleading, and because Griggs complains of the striking of the 1999 fourth amended petition only to the extent it deprived him of the claims asserted in the 1998 fourth amended petition, his second issue presents nothing for our review beyond what has been addressed in the preceding issues. Accordingly, Griggs's second issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman  
Justice

Judgment rendered and Opinion filed August 30, 2001.

Panel consists of Justices Edelman, Frost, and Murphy.<sup>11</sup>

Do not publish — TEX. R. APP. P. 47.3(b).

---

<sup>10</sup> See *supra*, note 6.

<sup>11</sup> Senior Chief Justice Paul C. Murphy sitting by assignment.