Motions for Rehearing Overruled; Affirmed in Part and Reversed and Remanded in Part and Supplemental Opinion on Rehearing filed November 24, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00362-CV

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KIMBERLY HANSEL and RODNEY TOW AS TRUSTEE FOR THE ESTATE OF KIMBERLY HANSEL, DEBTOR, Appellants

V.

KRUSE & LASER, A LAW FIRM, ALVIN LASER, LISA POWELL, and MARGARET LITTLE, Appellees

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On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 94-07030

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

The following opinion supplements the opinion issued in this case on August 31, 1999.

Appellants' Motion for Rehearing

Appellants' motion for rehearing argues that our affirmance of the summary judgment in favor of Little is in error because: (1) the public policy defense was not alleged or asserted against the claims of Rodney Tow; (2) the defense is not meritorious; and (3) the summary judgment evidence does not establish that Little is entitled to judgment as a matter of law. We disagree.

As to the first contention, section IV(G) of Little's motion for summary judgment is entitled, "The *Plaintiffs'* Claims Violate Public Policy" (emphasis added). The only plaintiff in this case besides Hansel was Tow. The section refers repeatedly to the "plaintiffs" (plural), and concludes by stating, "For these reasons, *Plaintiffs'* claims are against public policy, and *Plaintiffs' entire case should be barred*" (emphasis added). Therefore, the public policy defense was asserted against the claims of Tow.

As to the second and third contentions, as our original opinion reflects, appellants' brief did not challenge this ground for summary judgment on any basis other than that bankruptcy law is controlling over state law public policy restrictions. Because appellants' brief did not challenge the evidence supporting this ground for summary judgment or any other aspects of it, these contentions present nothing for our review on rehearing. Accordingly, appellants' motion for rehearing is denied.

Powell's Motion for Rehearing

In addition to the matters addressed in our original opinion, Powell's motion for rehearing also argues that: (1) Tow lacks standing to pursue the appeal because he has now been discharged as bankruptcy trustee; (2) Hansel suffered no damages as a result of the bankruptcy filing because she has now been fully discharged in bankruptcy; (3) Hansel cannot recover mental anguish damages in a legal malpractice case as a matter of law; and (4) there was sufficient summary judgment evidence to negate the pre-petition and post-petition claims against Powell. Again, we disagree.

Standing

With regard to the first two contentions, Powell asks us to take judicial notice of two bankruptcy court orders which discharge Hansel from all dischargeable debts and discharge Tow as bankruptcy trustee. Both orders were entered after the summary judgment in this case. Powell contends that because Tow has been discharged as trustee, there is no party with legal standing to pursue the claims on behalf of the bankruptcy estate on appeal. However, Powell has cited no authority stating that the discharge of the bankruptcy trustee necessarily deprives him of standing to complete the appeal and negates the possibility that anyone else could succeed him in possessing such standing. Without such authority or other sufficient basis, we decline to dismiss the appeal as to the claims of Hansel's bankruptcy estate.

Lack of Damage

Powell also contends that Hansel's final bankruptcy discharge from her debts establishes that she suffered no damages from the bankruptcy filing. However, even if this is true, which we do not decide, the final bankruptcy discharge order was not among the summary judgment evidence before the trial court in this case and is thus not a proper basis on which to affirm the summary judgment. *See* TEX. R. CIV. P. 166a(c). Therefore, we overrule Powell's first two grounds for rehearing.

Mental Anguish

Powell next contends that the summary judgment should have been affirmed on the ground that Hansel's mental anguish damages are not recoverable because they allegedly resulted from economic losses caused by an attorney's negligence. *See Douglas v. Delp*, 987 S.W.2d 879, 885 (Tex. 1999). However, summary judgment may be granted only on the issues expressly set out in the motion. *See* TEX. R. CIV. P. 166a(c). As noted in our original opinion, the portion of Powell's motion for summary judgment on mental anguish damages did not challenge them based on the legal bar set forth in *Douglas*, but only based on the character of the mental anguish damages Hansel alleged:

> Hansel does not have any mental anguish damages. Legally sufficient evidence of mental anguish damages requires "more than mere worry, anxiety,

> vexation, embarrassment or anger." It is a showing of intense pain that is required. Even a "disturbing" event does not qualify for the recovery of mental anguish damages unless the event involves a threat to one's physical safety or reputation, or involved the death of, or serious injury to, a family member. It is only when a plaintiff presents direct evidence of the nature, duration and severity of the mental anguish in a manner that evidences substantial disruption in the plaintiff's daily routine that such a claim is legally sufficient.
>
> Hansel's alleged mental anguish is legally insufficient. Hansel offered no factual support to an appropriate interrogatory regarding her damages. In her deposition, Hansel could not state, directly or otherwise, anything that has disrupted her daily routine as a result of severe and lasting mental anguish. In fact, Hansel's only support for her mental anguish claim is that she is "stressed." As such, Hansel's claim for mental anguish damages is legally insufficient, and Powell is entitled to summary judgment.

(citations omitted). Powell further contends that this court cannot ignore existing law, even if it changed during the pendency of the appeal, and that because Texas law no longer permits a plaintiff to recover mental anguish damages based on purely economic losses, this court should not hold to the contrary. We disagree. In seeking summary judgment, Powell was free to assert the principle set forth in *Douglas*, even though the law had not yet changed to approve it. Having chosen instead to assert another ground, Powell is not entitled to affirmance of the summary judgment on a basis different than that presented to the trial court. Therefore, Powell's third ground for rehearing is overruled.

Sufficiency of the Evidence

Powell next contends that she did not assert a "no evidence" summary judgment against appellants' pre-petition claims, as our original opinion concluded, and she outlines the evidence she claims supports that ground for summary judgment. According to Powell's motion for summary judgment, the negligent acts that Tow alleged against Powell included: (1) failing to disclose: (a) the true purpose of the bankruptcy proceeding, *i.e.*, to benefit Republic Insurance; (b) the conflict between the interests of Republic and Hansel; (c) Hansel's potential claim against Republic for failing to settle claims against Hansel within policy limits; (2) failing to advise Hansel of the ramifications of bad faith conduct in legal proceedings; and

(3) encouraging the filing of a false oath in Hansel's bankruptcy. However, rather than affirmatively negate any of these contentions, the relevant portion of Powell's motion for summary judgment instead asserted that:

> *There is no evidence* that Powell was involved, in any manner, in the representation of Hansel during the Jennifer Cain lawsuit. . . .
>
> *[T]here is no evidence* that infers Powell was involved in [the alleged purpose for Hansel's bankruptcy filing or the selection or retention of Little to act as counsel for Hansel].
>
> *Tow . . . cannot support any claim,* that Powell knew or had reason to know about the alleged purpose for filing bankruptcy, or any other alleged aspect of the Jennifer Cain lawsuit. . . .
>
> To the extent Tow complains that Hansel was instructed to give a false oath or make false statements in her bankruptcy, *there is no evidence* to indicate that Powell ever instructed Hansel not to tell the truth. Therefore, Powell is entitled to summary judgment against [Tow] because *there is no evidence* to support any pre-petition claims against Powell.

(citations omitted) (emphasis added). Moreover, the facts that Powell was not *involved* in the Cain lawsuit or the alleged improper purpose for filing Hansel's bankruptcy, even if established by the evidence, do not prove that she did not *know* of that purpose or have a duty to disclose it to her client, Hansel.[1]

Lastly, Powell's motion for rehearing argues that Hansel has no post-petition claims against Powell because: (1) Hansel has denied that Powell told her to perjure her testimony; and (2) Powell did not represent Hansel in the Cain lawsuit and thus cannot be liable for failing to appeal the Cain judgment. The first contention pertains to Powell's summary judgment ground that Hansel's initial failure to be discharged from the Cain judgment in bankruptcy

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[1] Powell further relies on evidence in which she claims Hansel admitted that: (1) Powell did not know the bankruptcy was at Laser's instruction; (2) Powell asked why the bankruptcy was being filed; and (3) Powell did not know the reason for filing bankruptcy. Because Hansel was not competent to testify about the knowledge possessed by Powell, any attempt to do so was purely speculative and thus no evidence. Moreover, although Powell's asking Hansel why the bankruptcy was being filed could be considered *some* evidence of a lack of knowledge on Powell's part, it does not establish that fact as a matter of law, as required for summary judgment..

court resulted from Hansel's own perjured testimony rather than any negligence by Powell in withdrawing Hansel's motion to set aside the order exempting the Cains' claims against appellants from discharge. However, because our original opinion expressly affirmed the summary judgment with regard to this claim, Powell has already received the relief she seeks in this ground for rehearing.

As to the second contention, Powell's motion for rehearing states "Hansel has no complaint against [Powell] for any alleged failure to appeal the judgment in the *Cain* case." To the extent this is true, summary judgment against such an unpled claim would have been unnecessary and inappropriate. Moreover, we can find no portion of Powell's motion for summary judgment which addresses this aspect. Accordingly, this contention presents nothing for our review, Powell's fourth ground for rehearing is overruled, and her motion for rehearing is denied.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 24, 1999.
Panel consists of Justices Fowler, Edelman, and Smith.[2]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[2] Senior Justice Jackson B. Smith, Jr., sitting by assignment.