Opinion issued August 5, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00404-CV

CHRISTINE FINGER, Appellant

V.

HUGH M. RAY, III AND WEYCER, KAPLAN, PULASKI, AND ZUBER, P.C., Appellees

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On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2007-71210

DISSENTING OPINION

The majority errs in holding that appellant, Christine Finger, needed expert testimony to prove the causal connection between the alleged misrepresentations made to her by appellee, Hugh M. Ray, III, and her loss of $23,500, the amount

she seeks in restitution for attorney's fees that she paid to Ray and his law firm based on the alleged misrepresentations. Finger is not seeking damages for what she would have recovered due to Ray's negligence in representing her. Rather, as she notes, "it is crystal clear that the economic damages sought by [her] [are] in the nature of restitution for the loss of her fees paid to Ray and appellee, Weycer, Kaplan, Pulaski, and Zuber, P.C. (collectively "Ray"), . . . because of intentional false representation[s] made to her by Ray . . . ."

I would hold that Finger's claims are independent of a claim for legal malpractice and require no expert testimony to raise a fact issue on causation. The majority errs in holding to the contrary. Accordingly, I dissent.

Background

Finger obtained a judgment against David Reitman for $29,495 in damages and $1,200 in attorney's fees in settlement of a breach of contract claim against him. Reitman then filed for bankruptcy protection. Finger hired Ray to represent her during the process of collecting her judgment from Reitman and in any potential bankruptcy litigation.

Finger hired Ray based upon his "express representations . . . that he would collect [her] judgment through state court collection methods that would also provide [her] with attorneys fees and costs of pursuit and collection[;] . . . the judgment that [she] possessed was based upon fraud by Mr. Reitman[;] . . . if Mr.

Reitman filed personal bankruptcy then he, Mr. Ray, would file an action in the bankruptcy court to except [her] claim out of the bankruptcy[;] and . . . [Ray] would further proceed with the collection outside of any bankruptcy proceeding." Ray did not file a "section 523 action" to remove Reitman's debt to Finger from discharge.[1] Rather, he filed a "section 727 action" to bar Reitman's bankruptcy discharge.[2] Ultimately, the bankruptcy court approved a settlement between Finger and Reitman for $40,700. Finger then paid $23,500 to Ray for fees and expenses, and she retained $17,200 from the settlement.

Finger, in her original petition, sued Ray for legal malpractice, breach of fiduciary duties, breach of contract, and violations of the Texas Deceptive Trade Practices Act ("DTPA"),[3] which she alleged were based on Ray's false representations to her that he would take certain steps to collect her judgment against Reitman. Finger alleged that these representations induced her to hire Ray and his firm, and Ray billed and collected excessive and unreasonable attorney's fees from her. Finger sought as damages the attorney's fees and expenses that she had paid to Ray, $225,000 in mental anguish damages, an equitable fee forfeiture, a declaration that Ray breached the employment contract, and attorney's fees.

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1 *See* 11 U.S.C. § 523 (2006).

2 *See* 11 U.S.C. § 727 (2006).

3 *See* TEX. BUS. & COM. CODE ANN. §§ 17.46, 17.50 (Vernon Supp. 2009).

However, in her second amended petition, Finger dropped her legal malpractice and breach of contract claims after Ray filed his summary judgment motion.

Standard of Review

To prevail on a summary judgment motion, a movant has the burden of proving that he is entitled to judgment as a matter of law and that there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When a defendant moves for summary judgment, he must either (1) disprove at least one essential element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of his affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey*, 900 S.W.2d at 341; *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). A defendant moving for a no-evidence summary judgment must allege that there is no evidence of an essential element of the non-movant's cause of action. TEX. R. CIV. P. 166a(i); *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004). The non-movant must then produce "more than a scintilla of evidence" to create a genuine issue of material fact on the challenged elements. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex.

1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts must be resolved in her favor. *Id*. at 549.

Causation Evidence

In her sole issue, Finger argues that the trial court erred in rendering summary judgment in favor of Ray because Texas law does not require expert testimony regarding a causal connection between an alleged misrepresentation and out-of-pocket damages for money paid in reliance upon the misrepresentation. She asserts that her DTPA and breach of fiduciary duty claims are not "fractures" of a professional negligence claim. Rather, they are separate and independent claims based not on Ray's legal representation of her but on his misrepresentations that induced her to hire him. In effect, she asserts that she was induced into hiring Ray for services she did not want or need.

Finger's Claims

Attorneys owe a duty to their clients to act with ordinary care, and "[c]omplaints about an attorney's care, skill, or diligence in representing a client implicate this duty of ordinary care and sound in negligence." *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 426 (Tex. App.—Austin 2009, no pet.). A lawyer "can commit professional negligence by giving an erroneous legal opinion or erroneous advice, by delaying or failing to handle a matter entrusted to the lawyer's care, or by not using a lawyer's ordinary care in

preparing, managing, and prosecuting a case." *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App.—Dallas 2007, pet. denied). Such claims for negligence may not be fractured into separate non-negligence claims, such as breach of fiduciary duty or DTPA claims because "the real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise." *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2002, pet. denied) (citing *Averitt v. PriceWaterhouseCoopers L.L.P.*, 89 S.W.3d 330, 334 (Tex. App.—Fort Worth 2002, no pet.)).

However, the rule against fracturing professional negligence claims does not preclude a client from simultaneously asserting both negligence and non-negligence claims that arise out of common facts. *Beck*, 284 S.W.3d at 427 (citing *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.)). To do so, the client must "present a claim that goes beyond what traditionally has been characterized as legal malpractice," and not "merely reassert the same claim for legal malpractice under an alternative label." *Duerr v. Brown*, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Whether a claim is a claim for professional negligence is a question of law, and we are not bound by the labels the parties place on the claims. *Beck*, 284 S.W.3d at 427–428. Regardless of the pleaded theory, if the crux of the

complaint is that a plaintiff's attorney did not provide adequate legal representation, the claim is one for legal malpractice. *Kimleco Petroleum*, 91 S.W.3d at 924. Courts are to focus on whether "the facts that are the basis for an asserted cause of action implicate only the lawyer's duty of care or independently actionable fiduciary, statutory, contractual, or other tort duties." *Beck*, 284 S.W.3d at 428; *see also Deutsch*, 97 S.W.3d at 189–90 (if client's complaint more appropriately classified as fraud, DTPA, breach of fiduciary duty, or breach of contract, then client can assert claim other than professional negligence).

DTPA Violations

In her second amended petition, Finger alleges that during Ray's representation of her, he "committed breaches of fiduciary duties and violated [section] 17.46(b)(5)(7)(12) and (24) and [section] 17.50(a)(3)" of the DTPA by knowingly and intentionally (1) falsely representing to Finger that he would except her judgment against Reitman from Reitman's bankruptcy; (2) falsely representing to Finger that he would seize Reitman's property separately from the bankruptcy proceeding to satisfy the judgment; (3) falsely representing to Finger that he would file a Section 523 action to except Finger's judgment from discharge; (4) failing to disclose that he would not file an action to except Finger's judgment from Reitman's discharge to induce her into employing Ray, which she would not have done if Ray had disclosed that he would not file a Section 523 action; and (5)

billing and collecting excessive and unreasonable fees because his services were worthless and obtained under false pretenses.

In determining whether a claim is merely one for professional negligence or one for DTPA violations, we consider the "difference between negligent conduct and deceptive conduct." *Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex. 1998). Finger's allegations against Ray go beyond mere negligence, and instead involve deception and misrepresentations made to secure employment. *See Trousdale v. Henry*, 261 S.W.3d 221, 232 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *see also Tolpo v. DeCordova*, 146 S.W.3d 678, 685 (Tex. App.—Beaumont 2004, no pet.) (per curiam) (plaintiff's failure to contend that defendant-attorney knowingly excluded required contract term or affirmatively misrepresented effect of contract did not support independent DTPA claim, separate from plaintiff's legal malpractice claim).

In *Aiken v. Hancock*, the San Antonio Court of Appeals distinguished between deceptive and negligent conduct. 115 S.W.3d 26, 29 (Tex. App.—San Antonio 2003, pet. denied). The plaintiff alleged that his attorney (1) falsely represented that he was prepared to try the plaintiff's case, (2) failed to reveal that he was not prepared to try the case, (3) falsely represented that an expert witness was prepared to testify, and (4) failed to reveal that the expert witness was not so prepared. *Id*. The court concluded that this conduct was "conceivably negligent,"

but not deceptive, and therefore the plaintiff's allegations did not support an independent DTPA claim. *Id.*

Here, however, Finger alleges that, to induce her into employing his firm, Ray willfully made misrepresentations to her regarding the actions that he would take to collect her judgment against Reitman. The gist of Finger's complaints against Ray is not that he gave her bad legal advice or did not adequately represent her, but that he deceived her into unnecessarily hiring him. *See Kimleco Petroleum*, 91 S.W.3d at 924; *Greathouse v. McConnell*, 982 S.W.2d 165, 172 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Finger has not alleged that Ray negligently informed her that her judgment against Reitman could be excepted from the bankruptcy discharge, but she instead alleges and presented some evidence that Ray made affirmative misrepresentations and engaged in deceptive conduct to induce Finger into hiring him.[4] *See Latham*, 972 S.W.2d at 69 (had plaintiffs alleged that defendant "negligently failed to timely file their claim" and not that he had affirmatively misrepresented that he had filed and was pursuing claim, then claim would properly be one for legal malpractice).

Ray argues that he cannot be held liable for any representations he made based upon his "professional judgment" because his conduct falls within the

[4] In its order granting and denying Ray's summary judgment in part, the trial court found that "there is at least a scintilla of evidence as to whether Defendants made a misrepresentation to Plaintiff." Ray does not cross-appeal this ruling.

"professional services exemption" to the DTPA. The Texas Legislature has specifically provided that the DTPA does not apply to "a claim for damages based upon the rendering of professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill." TEX. BUS. & COM. CODE ANN. § 17.49(c) (Vernon Supp. 2009). Ray, however, raised the professional services exemption in his no-evidence motion for summary judgment, stating that legal services fall within the exemption. No-evidence summary judgment is only appropriate for essential elements of a claim or defense upon which the adverse party bears the burden of proof at trial. TEX. R. CIV. P. 166a(i). The professional services exemption from DTPA liability "is properly characterized as an affirmative defense that must be pleaded because it is a plea of confession and avoidance." *Head v. US Inspect DFW, Inc.*, 159 S.W.3d 731, 740 (Tex. App.—Fort Worth 2005, pet. denied); *Cole v. Central Valley Chemicals, Inc.*, 9 S.W.3d 207, 210 (Tex. App.—San Antonio 1999, pet. denied). As an affirmative defense, Ray bore the burden to prove that his services fell within the section 17.49(c) exemption, and, thus, he could not move for no-evidence summary judgment on this ground. Section 17.49(c) also includes several exceptions to the exemption, three of which involve express misrepresentations of material facts and unconscionable actions that cannot be characterized as advice, judgment or opinion, and failure to disclose information in violation of section 17.46(b)(24).

See TEX. BUS. & COM. CODE ANN. § 17.49(c)(1)–(3). Because Ray did not establish as a matter of law that his alleged misrepresentations did not fall within the exceptions to the professional services exemption, he is not entitled to summary judgment on the basis of this exemption. *See Gibson v. Ellis*, 58 S.W.3d 818, 826 (Tex. App.—Dallas 2001, no pet.) (where defendant did not address misrepresentations alleged in plaintiff's DTPA claim, defendant did not establish as matter of law that representations did not fall within section 17.49(c) exceptions). I would, therefore, hold that Finger has sufficiently alleged a claim for violations of the DTPA independent from a claim of legal malpractice.[5]

Breach of Fiduciary Duty

In addition to the duty to act with ordinary care, attorneys also owe fiduciary duties to their clients. *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). The attorney-client relationship "is one for the most abundant good faith, requiring absolute perfect candor, openness and honesty, and the absence of any concealment or deception." *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). In representing a client, an attorney must

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[5] Finger alleges that Ray violated five different sections of the DTPA, including section 17.46(b)(5), which prohibits the representation of services as one quality when they are really of another. The Fourteenth Court of Appeals has previously held that alleging a violation of this section of the DTPA is a "recast claim for legal malpractice." *See Goffney v. Rabson*, 56 S.W.3d 186, 192 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Sections 17.46(b)(7) and (12) prohibit similar representations. *See* TEX. BUS. & COM. CODE ANN. §§ 17.46(b)(7), (12).

"render a full and fair disclosure of facts material to the client's representation." *Beck*, 284 S.W.3d at 429 (quoting *Willis*, 760 S.W.2d at 645). Thus, a professional negligence claim focuses on "whether an attorney represented a client with the requisite level of skill," while a breach of fiduciary duty claim focuses on "whether an attorney obtained an improper benefit from representing the client." *Beck*, 284 S.W.3d at 429 (quoting *Murphy*, 241 S.W.3d at 693). A breach of fiduciary duty "most often involves the attorney's failure to disclose conflicts of interest, failure to deliver funds belonging to the client, placing personal interests over the client's interests, improper use of client confidences, taking advantage of the client's trust, engaging in self-dealing, and making misrepresentations." *Goffney*, 56 S.W.3d at 193.

In *Goffney*, the plaintiff alleged that the defendant abandoned her at trial, did not properly prepare for trial, and misled her into believing that the case had been properly prepared. The court held that the plaintiff's allegations did not "amount to [allegations of] self-dealing, deception, or misrepresentations" sufficient to support a separate cause of action for breach of fiduciary duty." *Id.* at 194. In *Beck*, the plaintiff contended that the law firm's failure to disclose the attorney's substance abuse problems breached the attorneys' fiduciary duties and resulted in an improper benefit—the attorney's fees paid by the plaintiff. *See Beck*, 284 S.W.3d at 431, 433. The court held that the firm's expectation of receiving fees

from their continued representation of the plaintiff did not convert what was essentially a professional negligence claim into a claim for breach of fiduciary duty because the plaintiff "did not allege that the [firm's] failure to disclose the [attorney's] 'alcohol and substance abuse addictions' had anything to do with the pursuit of attorney's fees or an improper benefit." *Id.* at 434; *see also Murphy*, 241 S.W.3d at 699 (holding that plaintiffs did not state independent claim for breach of fiduciary duty when they did not allege that lawyers deceived them, pursued own pecuniary interests, or obtained improper benefit by continuing to represent both clients).

In contrast, Finger alleges that Ray made affirmative misrepresentations to her and engaged in deceptive conduct to induce her to hire his firm. Unlike in *Beck*, where the firm's receipt of attorney's fees for an improper benefit was not the focus of the plaintiff's complaint, here, Ray's receipt of attorney's fees based on his misrepresentation is the basis of Finger's suit. *See Beck*, 284 S.W.3d at 433–34. Finger's complaint is not ultimately about the quality of representation that she received, but that Ray's misrepresentations induced her to unnecessarily hire an attorney, which she would not have done had Ray not made the misrepresentations. Accordingly, I would hold that Finger has sufficiently alleged a claim for breach of fiduciary duty independent from a claim of legal malpractice.

Expert Testimony Not Required

Because Finger's claims for DTPA violations and breach of fiduciary duty are independent of any claims for legal malpractice, expert testimony is not required to prove causation of her damages, an issue that is within the common experience of lay persons.

To prevail on a DTPA claim, a plaintiff must prove that a defendant's statutory violation is a producing cause of the injury. TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon Supp. 2009); *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 117 (Tex. 2004); *Hoover v. Larkin*, 196 S.W.3d 227, 232 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("A plaintiff may recover all damages, including attorney's fees, that are the result of the defendant's wrongful acts, but the burden remains on the plaintiff to demonstrate such causation."). A plaintiff must establish that an "unbroken causal connection" exists between the actionable misrepresentation and the plaintiff's injury. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 481 (Tex. 1995).

To prevail on a breach of fiduciary duty claim, a plaintiff must prove that the defendant's breach of his fiduciary duties proximately caused the plaintiff's damages. *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 508 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Both proximate and producing cause encompass causation in fact, which requires proof that a defendant's act or

omission was a substantial factor in bringing about the injury, without which the injury would not have occurred. *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 161 (Tex. 1995); *Thomas v. CNC Invs., L.L.P.*, 234 S.W.3d 111, 124 (Tex. App.—Houston [1st Dist.] 2007, no pet.). In addition to cause in fact, proximate cause also requires foreseeability. *See Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001); *Thomas*, 234 S.W.3d at 124.

In a claim for professional negligence arising from prior litigation, to establish causation, a plaintiff must prove a "suit within a suit," i.e., but for the attorney's breach of his duty, the plaintiff would have prevailed in the underlying case. *Hoover*, 196 S.W.3d at 231. The fact finder must have some basis for understanding the causal link between the attorney's negligence and the injury, and although the client's lay testimony may provide this link, in some cases the "connection may be beyond the jury's common understanding and require expert testimony." *Alexander*, 146 S.W.3d at 119. However, as previously discussed, Finger's claims against Ray are not merely disguised professional negligence claims, but are independent claims for breach of fiduciary duty and DTPA violations. Neither claim requires Finger to prove "suit within a suit" causation. *Latham*, 972 S.W.2d at 69.

In its summary judgment order, the trial court acknowledged that, generally, expert testimony is not necessary to prove causation for DTPA and breach of

fiduciary duty claims. The trial court then, however, ruled that Finger did need expert testimony to create a fact issue on causation because all of her claims are "essentially claims that but for the alleged misrepresentations by [Ray] about proceeding under section 523 as opposed to section 727 of the bankruptcy code, [Finger] would have simply filed a claim in the bankruptcy court and settled her claim with the bankrupt debtor or otherwise recovered more than she netted based upon [Ray's] efforts." According to the trial court, Finger "required a bankruptcy law expert to create a fact issue on her ability to have, at a minimum, collected more than what she netted in this case had she done as she claims she could have and merely 'filed a claim.'" If Finger had alleged that she could have collected more than Ray negotiated, given that the bankruptcy judge must approve all settlements of claims against the debtor, to raise a fact issue on causation, Finger would indeed have needed testimony about what the bankruptcy judge would do, which requires expert testimony. *See Alexander*, 146 S.W.3d at 119 (decision-maker bankruptcy judge did not testify regarding how he might have ruled if case had been presented differently, leaving jury without expert testimony explaining legal significance of omitted evidence).

Finger, however, did not allege that, had she not hired Ray, she could have collected more than the $40,700 settlement Ray negotiated with Reitman or would have netted more than $17,200 in a settlement with Reitman. Rather, Finger

asserts that had Ray not made affirmative misrepresentations, she would not have hired him at all, and would not have incurred $23,500 in attorney's fees. Finger might not have reached a settlement amount of $40,700 with Reitman without Ray's assistance, but regardless of what amount she would ultimately have recovered from Reitman, she would not have expended $23,500 in attorney's fees.

In support of her position, Finger relies on *Streber v. Hunter*, 221 F.3d 701, 726–27 (5th Cir. 2000) and *Delp v. Douglas*, 948 S.W.2d 483, 495–96 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 987 S.W.2d 879 (Tex. 1999). Ray contends that this case is factually distinguishable from *Streber* and *Delp*. He asserts that the plaintiffs in those cases were the "decision-makers" whereas here, the "ultimate decision-maker" was the bankruptcy judge, who would determine whether Finger was entitled to a greater recovery than the one negotiated with Reitman by Ray. He argues, thus, that expert testimony was required to prove what the bankruptcy judge could or would do under the particular facts. *See Streber*, 221 F.3d at 726–27; *Delp*, 948 S.W.2d at 495–96.

However, the Texas Supreme Court, in distinguishing both *Streber* and *Delp* from the facts before it in *Alexander*, noted that, in both cases, "because of [the plaintiffs'] lawyers' bad advice, [the plaintiffs] made the decision and took the actions that resulted in their injuries." *Alexander*, 146 S.W.3d at 119. On the other hand, the issue in *Alexander* involved whether a bankruptcy judge would have

decided the underlying case differently if another lawyer at the firm had handled the adversary proceeding. *See id.* at 118–19. Thus, the bankruptcy judge was the "decision maker," and the plaintiff had to produce expert testimony on how the judge would have ruled had the case been tried with a different attorney. *Id.*

Here, in contrast, Finger alleges that in making affirmative misrepresentations about the recovery that could be obtained and the procedures that Ray would use to obtain that recovery, Ray induced Finger into hiring him and his firm and paying them $23,500 in attorney's fees. Regardless of what settlement amount the bankruptcy judge would have approved if Finger herself had negotiated with Reitman, Finger asserts that she would not have hired Ray and paid $23,500 in fees had the misrepresentations not been made. On her own, Finger might have recovered the same amount that Ray had negotiated, or even less, but Ray would not have obtained her money in payment of his attorney's fees. Based on Ray's misrepresentations, Finger made the decision to hire him instead of proceeding on her own to collect her judgment from Reitman, and this caused her to incur $23,500 in attorney's fees to Ray. Like the plaintiffs in *Streber* and *Delp*, Finger was the "key decision maker."

Because the causal link between Ray's alleged misrepresentations and Finger's alleged injury, her payment of $23,500 to Ray, is not beyond the common understanding of the jurors, Finger need not produce expert testimony to raise a

fact issue on causation in regard to her DTPA and breach of fiduciary claims. *See Alexander*, 146 S.W.3d at 119–20; *Streber*, 221 F.3d at 726–27; *Delp*, 948 S.W.2d at 495–96.

Finger's Lay Testimony

Finally, within her sole issue, Finger further argues that the trial court erred in sustaining Ray's objections to her affidavit testimony, which created a material fact issue on the element of causation. Ray made five objections to various statements in Finger's affidavit.[6] He objected on hearsay and speculation grounds to Finger's assertion that, upon Reitman's bankruptcy, "[she] would have simply filed [her] claim with the bankruptcy court and negotiated with Mr. Reitman on the settlement that [she] knew he would make, based upon conversations with him, and would not have paid Mr. Ray and his law firm from [her] own funds the sum of $23,500." The trial court sustained these objections. Ray also objected to Finger's statement that she would have been able to achieve the same settlement without paying $23,500 to Ray as speculative, conclusory, hearsay, and not based on personal knowledge. He also asserted that Finger, in her affidavit, did not affirmatively indicate that she is competent to testify on this matter. The trial court also sustained these objections.

Regardless, Ray only objected to select statements made by Finger in her

[6] Although the trial court sustained four of Ray's five objections, Finger only challenges two of those rulings on appeal.

affidavit. Ray did not object to Finger's testimony that he misrepresented the actions he would pursue in collecting her judgment against Reitman or her testimony that, but for his express misrepresentations, she would not have hired him and paid $23,500 in attorney's fees. Ray also did not object to Finger's testimony that his representations were "false, serious, and willfully made" or that, although he could have "easily checked with the state court file to determine whether [Finger] was eligible for an action to take [her] judgment out of personal bankruptcy of Mr. Reitman," he did not do so, "but instead made the representations that caused [Finger] to pay him and his law firm $23,500." Even excluding Finger's testimony on which the trial court sustained Ray's objections, the remainder of Finger's testimony is sufficient to raise a genuine issue of material fact on the question of causation.

Conclusion

I would hold that Finger has, independent of any claim for legal malpractice, alleged claims for breach of fiduciary duty and under DTPA sections 17.46(b)(24) and 17.50(a)(3), which do not require expert testimony on the issue of causation. Accordingly, I would sustain Finger's sole issue and remand the case to the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Hanks, and Bland.

Justice Jennings dissenting.