Affirmed and Memorandum Opinion filed May 27, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00753-CV

PRIMIS CORP. AND LOUIS CARRANZA, Appellants

V.

SAMUEL L. MILLEDGE AND THE MILLEDGE LAW FIRM, P.C., Appellees

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On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 2005-63583

M E M O R A N D U M O P I N I O N

A corporation and its principal owner sued an attorney and his professional corporation alleging professional negligence, breach of contract, and violations of the Texas Deceptive Trade Practices Act. After a bench trial, the trial court rendered a take-nothing judgment and found that, though the attorney was negligent, his negligence was not the proximate cause of damage to the plaintiffs. On appeal, the plaintiffs assert that the trial court erred by failing to find causation, by denying the plaintiffs leave to file a trial amendment, and by excluding an exhibit from evidence. We reject the challenge to

the trial court's finding regarding causation and conclude that any error regarding the second and third issues was harmless. Accordingly, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2003, appellants/plaintiffs Primis Corporation and Louis Carranza (hereinafter collectively "Primis") were sued by Merrill Lynch Business Financial Services, Inc. On or about June 11, 2003, appellees/defendants Samuel L. Milledge and The Milledge Law Firm, P.C. (collectively hereinafter "Milledge") agreed to represent Primis in this lawsuit, and Primis paid Milledge a $5,000 retainer. Milledge asserts that the retainer was limited to work on the Merrill Lynch lawsuit; Primis asserts that it was a general retainer.

On or about June 23, 2003, Primis was served with citation in a lawsuit filed against Primis by AAR Incorporated. In this suit, AAR sought confirmation of an arbitration award rendered against Primis Corporation and in favor of AAR for more than $147,000. AAR also asserted a claim against Louis Carranza for breach of fiduciary duty seeking the same money judgment that it sought against Primis Corporation as well as punitive damages. Carranza delivered the citation for the AAR lawsuit to Milledge's office when there was no attorney there. On July 11, 2003, Milledge sent Carranza a letter, stating that for Milledge to represent Primis in the AAR suit, Primis would need to pay a $5,000 retainer. Milledge noted that the deadline to file an answer in the AAR suit was July 28, 2003, and Milledge requested that the retainer be paid by July 16, 2003.

Primis did not pay the $5,000 retainer Milledge requested in the July 11 letter, and no answer was filed on behalf of Primis in the AAR suit. On August 22, 2003, the trial court in the AAR suit granted a default judgment, awarding AAR $147,130, attorney's fees, and prejudgment interest against Primis Corporation and $135,655 in actual damages, plus prejudgment interest and $271,310 in punitive damages against Carranza. Primis asserts that shortly after learning of this default judgment, Primis paid Milledge $2,000 on August 29, 2003, for legal services to attempt to have this judgment set aside. At trial, Milledge denied receiving this payment from Primis. Milledge testified that, at the urging

of Primis's accountant, Milledge agreed to file a motion for new trial in an effort to get the trial court to set aside the default judgment.

Milledge filed a motion for new trial in the AAR suit, which the trial court denied. Milledge filed no further motions in that suit other than a motion to withdraw as counsel. Primis did not appeal from the default judgment in favor of AAR.

Primis filed suit against Milledge in the trial court below asserting claims for negligence, breach of contract, and violations of the Texas Deceptive Trade Practices Act. The case was tried to the bench. The trial court rendered a take-nothing judgment against Primis. The trial court filed findings of fact and conclusions of law, stating among other things the following:

- Carranza left the AAR citation and petition at Milledge's office without meeting with Samuel Milledge.
- Carranza was under the reasonable impression that Milledge would file an answer in the AAR lawsuit on behalf of Primis.
- If a Texas attorney fails to advise a non-client that the attorney is not representing the non-client under circumstances that reasonably would lead the non-client to believe that the attorney is representing the non-client, then the attorney owes a negligence duty to the non-client. If an attorney is aware or should have been aware that his conduct would lead a reasonable person in the position of a non-client to believe that the attorney was representing that person, then the attorney has a duty to advise the non-client that the attorney is not representing the non-client.
- Even though Milledge did not represent Primis prior to the due date for Primis's answer in the AAR lawsuit, Milledge owed Primis a duty to clearly and unambiguously advise Primis that Milledge would not be filing an answer for Primis. Milledge did not discharge this duty. The July 11, 2003 letter from Milledge was unclear given that only a month earlier Primis had paid Milledge a $5,000 retainer. Milledge knew or should have known that Carranza believed that Primis was represented and that an answer would be filed.
- Milledge committed multiple acts of malpractice, including "failing to give advice, opinion, or relevant information when legally obligated to do so; delaying or not handling a matter entrusted to his care; improperly preparing and managing Primis [sic] and Carranza's litigation; failure to perform reasonable investigation of the litigation, the issues presented, and the information available; and failure to act with the minimum degree of skill, prudence or knowledge required of any Texas attorney."

- Milledge's negligence was not the cause of any of Primis's alleged damages.
- Milledge did not violate the Texas Deceptive Trade Practices Act.
- Primis did not have a contract with Milledge regarding the AAR lawsuit; therefore, Primis cannot recover for breach of contract.

Did the trial evidence conclusively prove that Milledge's negligence caused Primis's alleged damages?

In the first issue, Primis asserts that the trial court erred by failing to find that Milledge's negligence caused Primis's alleged damages. We construe Primis's issue and argument to challenge the legal sufficiency of the trial court's finding that Milledge's negligence was not the cause of any of Primis's damages. Because Primis had the burden of proof as to this issue, for Primis to succeed in its legal-sufficiency challenge, we must conclude that Primis conclusively proved that Milledge's negligence was a proximate cause of Primis's alleged damages. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001); *Green v. Alford*, 274 S.W.3d 5, 17–18 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (en banc). In making this determination, we must consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *See id.* at 827. We must determine whether the evidence at trial would enable a reasonable and fair-minded person to find the facts at issue. *See id.* The factfinder is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See id.* at 819. Evidence is conclusive only if reasonable people could not differ in their conclusions. *See id.* Because findings of fact in a bench trial have the same force and dignity as a jury verdict, we review them for legal sufficiency of the evidence under the same standards we apply in reviewing a jury's findings. *See Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991).

Primis did not introduce, and the trial record does not contain, expert testimony

regarding causation. Therefore, we must consider whether expert testimony was required. The record must provide an evidentiary basis establishing a causal link between the attorney's asserted negligence and the plaintiff's asserted harm. *See Alexander v. Turtur & Associates, Inc*., 146 S.W.3d 113, 119 (Tex. 2004). A failure of proof can result if expert testimony is limited to whether the defendant violated the standard of care. *See id*. Proof of causation of injury often requires expert testimony concerning what a reasonably prudent attorney would have done under the circumstances. *See id*. When the causal link between the attorney's negligence and the alleged damages is beyond the trier of fact's common understanding, expert testimony is necessary. *See id*. at 119–20. In a legal malpractice case predicated on professional negligence during litigation, expert testimony generally is required to determine whether the result of the underlying litigation would have been different but for the attorney's alleged negligence. *See id*.

Primis agreed that Primis Corporation owed AAR $78,031.25. Primis's theory of recovery was that, had a reasonably prudent attorney represented Primis in the AAR lawsuit, the result would have been no liability for Carranza and liability for Primis Corporation only for $78,031.25. To make this causation determination, the trier of fact would have to assess whether, with reasonably prudent counsel, the trial court would have vacated or modified the arbitration award against Primis Corporation as well as whether Carranza would have successfully defended himself against AAR's claims. This causation inquiry was beyond the trier of fact's common understanding; therefore, expert testimony was necessary for Primis to prove causation.[1] *See id*. (holding expert testimony

[1] The Supreme Court of Texas has held that findings of fact in a bench trial have the same force and dignity as a jury's verdict and that fact findings should be reviewed for sufficiency of the evidence under the same standards, regardless of whether the jury or the trial court was the fact finder. *See Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). This court has held that we review a trial court's finding of no causation in a bench trial in a legal malpractice case under the same legal and factual sufficiency standards applied in reviewing a jury verdict. *See Simon v. D. Miller & Assocs*., 2009 WL 335068, at *3–4 (Tex. App.—Houston [14th Dist.] Feb. 12, 2009, pet. denied) (mem. op.). Therefore, we analyze the legal sufficiency of the evidence in this case in the same way as we would in a case tried to the jury. More specifically, the same legal sufficiency analysis applies to bench trials addressing causation in legal malpractice cases predicated on professional negligence. *See Abdelhak v. Farney*, No. 04-07-00121-CV, 2007 WL 4180133, at *4-5 (Tex. App.—San Antonio Nov. 28, 2007, no pet.) (mem. op.) (*Alexander*'s

necessary for causation regarding outcome of underlying adversary proceeding); *F.W. Indus., Inc. v. McKeehan*, 198 S.W.3d 217, 221–22 (Tex. App.—Eastland 2005, no pet.) (holding expert testimony necessary for causation regarding the effect of a bankruptcy filing by client's debtor upon client's claims against debtor); *Arce v. Burrow*, 958 S.W.2d 239, 252 (Tex. App.—Houston [14th Dist.] 1997) (holding expert testimony necessary for causation issue regarding settlements of personal injury and wrongful death cases), *aff'd in part, rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999). Primis did not introduce, and the trial record does not contain, any expert testimony regarding causation.[2]

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requirement of expert testimony to establish causal link between professional negligence and client's injury applies in bench trials just as it does in jury trials; "We are unable to conclude that *Alexander* is inapplicable to cases presented to the trial court rather than a jury."). This rule makes sense in a legal-malpractice context; although a trial judge may be competent to evaluate whether an attorney breached a duty to his client and whether this breach caused damage, these are factual issues that must be established in the evidence at trial and subjected to the adversary process. A trial judge's private thoughts regarding these issues are not evidence, and they are not reflected in the record. Nor are they subjected to the adversarial process. *See Lentino v. Fringe Employee Plans*, Inc., 611 F.2d 474, 481 (3d Cir. 1979) (holding expert testimony is needed in legal-malpractice cases under Pennsylvania law under certain circumstances regardless of whether the fact finder is the jury or the trial judge); *Bonhiver v. Rotenberg, Schwartzman & Richards*, 461 F.2d 925, 928–29 (7th Cir. 1972) (same as *Lentino* under Illinois law). Moreover, a conclusion that judges have "experience and legal education superior to that of most jurors" does not justify changing the type of causation proof required according to whether a professional negligence case against a lawyer is tried to a jury or to the bench. *See Abdelhak*, 2007 WL 4180133, at * 5. "Inevitably, this premise would turn an objective criterion — is it beyond the knowledge of most jurors — into a subjective one." *Id*.

[2] The only expert witness Primis called was Primis's trial counsel. After providing expert testimony regarding Primis's attorney's fees request, Primis's trial counsel indicated that he wanted to testify as an expert regarding "what a prudent attorney would or would not do." In response, the trial court suggested that trial counsel could speak to whether Milledge's actions met the standard of care during closing argument. Primis's counsel agreed that he would follow the trial court's suggestion and speak to these matters during closing argument. The closing argument of Primis's trial counsel, however, does not constitute expert testimony. The trial court did not rule that Primis's counsel would be prevented from testifying as an expert regarding what a prudent attorney would have done, and Primis did not object in the trial court or on appeal that Primis was prevented from offering expert testimony. Though Primis's counsel did make several statements during his closing that addressed causation, these statements do not constitute evidence. But even if counsel had made these statements on the witness stand testifying as an expert, these statements were conclusory and would not have raised a fact issue on causation. *See Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (stating that conclusory expert testimony does not raise a fact issue).

In the absence of this required expert testimony, the trial court did not err in finding that Milledge's negligence was not the cause of any of Primis's damages. Under the applicable standard of review, Primis has not shown that Primis conclusively proved that Milledge's negligence was a proximate cause of any of Primis's alleged damages. Accordingly, we overrule the first issue.

Did the trial court reversibly err by denying Primis leave to amend the petition?

In the second issue, Primis asserts that the trial court erred in denying Primis leave to file a trial amendment adding claims for gross negligence, fraud, and breach of fiduciary duty. Primis also asserts that the trial court erred in denying Primis's post-trial motion to reconsider this ruling. In Primis's oral motions for leave to amend pleadings during trial and in Primis's post-trial written motion to reconsider, Primis never stated that Primis wished to amend the petition to seek fee forfeiture. *See Burrow v. Arce*, 997 S.W.2d 229, 237–47 (Tex. 1999) (holding that a client may obtain fee forfeiture as remedy under a breach-of-fiduciary-duty claim, even in absence of damages caused by attorney's negligence or breach of fiduciary duty). Primis sought to add only claims for money damages, and proof of causation was required as to these claims. However, as discussed above, there was no expert testimony at trial regarding causation, and the trial court did not err in finding no causation. On this record, even if we presume that the trial court erred in denying leave to file a trial amendment, any such error did not probably cause the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1. Accordingly, we overrule the second issue.

Did the trial court reversibly err by excluding from evidence a copy of a check?

In the third issue, Primis asserts that the trial court erred by refusing to admit into evidence a copy of a August 29, 2003 check for $2,000 from Primis to Milledge. During his testimony, Milledge denied receiving such a check. Near the end of the bench trial, Primis offered a copy of the check to impeach the testimony of Milledge and another witness. On appeal, Primis also asserts that this evidence was needed to show that a

contract existed between Primis and Milledge. Though the trial court did not admit this exhibit into evidence, the trial court stated that another exhibit already had been admitted into evidence that indicated Milledge cashed an August 29, 2003 check from Primis and that the trial court did not find credible the testimony from Milledge and another witness to the effect that Milledge did not cash such a check. As stated by the trial judge, the trial court concluded that Milledge had cashed the check in question based on other trial evidence. On this record, even if we presume that the trial court erred in excluding a copy of the check from the trial evidence, any such error did not probably cause the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1. Accordingly, we overrule the third issue.

Having overruled all of Primis's issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Boyce.