Affirmed and Memorandum Opinion filed August 26, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00188-CV

J.L. CURRY, Appellant

V.

LES PICKETT AND GALLOWAY, JOHNSON, THOMPKINS, BURR & SMITH, P.C., Appellees

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2007-40848

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

Appellant, J.L. Curry, appeals a summary judgment in favor of appellees, Galloway, Johnson, Thompkins, Burr & Smith, P.C. ("the Galloway firm") and Les Pickett, an attorney with the Galloway firm, in Curry's suit for negligence and breach of fiduciary duty. In his sole issue, Curry contends the trial court erred by granting summary judgment because appellees owed him the duties of a professional fiduciary. We affirm.

I. BACKGROUND

The facts pertinent to our review of the summary judgment are undisputed. In early 2005, Curry, an attorney, met another attorney named Michael Wing when Wing used a conference room in Curry's office. On April 8, 2005, Wing contacted Curry about an investment opportunity. Wing represented that he specialized in mergers and acquisitions involving large companies, a client needed a $300,000 "bridge loan" to serve as short-term financing for a merger between two companies, and "The Johnson Group" was formed as a subsidiary of one such company to handle the bridge loan. Wing also promised to personally guarantee the loan and gave Curry a one-page "Financial Statement," summarizing his assets and liabilities.

On the same day, Curry agreed to extend the loan to The Johnson Group. Also that day, Wing executed on behalf of The Johnson Group, and personally guaranteed, both a promissory note and a security agreement pledging their assets to secure payment of the note. In the note, The Johnson Group promised to pay Curry the principle amount of the loan, plus interest and a transaction fee of $150,000. Additionally, The Johnson Group agreed to pay $50,000 to a non-profit designated by Curry; it is not clear whether this amount was in addition to, or part of, the principal, although it clearly was not included in the interest and transaction fee. Wing told Curry the Galloway firm was involved in the merger transaction and asked Curry to wire the funds to the firm's trust account. Per Curry's authorization, on April 8, 2005 and April 11, 2005, separate wire transfers of $175,000 and $125,000, respectively, were made from his bank account to the Galloway firm's trust account.[1]

As all parties to this suit agree, Wing perpetuated a fraud on Curry. The Johnson Group was a fictitious entity, and Wing did not intend for the $300,000 to fund any merger of companies. Rather, Pickett and the Galloway firm represented Wing as a defendant in a legal-malpractice case, and Wing intended to use the $300,000 to fund a settlement of that case. Wing told Pickett to expect a wire transfer from Curry to fund the

[1] The record reflects both Curry and his wife made the loan, but his wife is not a party to this suit.

settlement. At that point, no attorney in The Galloway firm had ever heard of Curry, much less had any previous relationship or communications with him. Further, no attorney in the Galloway firm was present during, or aware of, any discussions between Curry and Wing.

While the parties to the malpractice case were attempting to finalize the settlement, Pickett became aware of another unrelated case involving Wing, in which the court appointed a receiver, David Fettner, to preside over Wing's assets. Pickett contacted Fettner because Pickett was concerned about whether the $300,000 in the firm's trust account were subject to the receivership. On April 13, 2005, the parties to the malpractice case appeared for a hearing to ascertain whether the funds were subject to the receivership. Fettner was also present and obtained testimony from Wing.

Wing explained the manner in which he procured the $300,000 as follows. A "third party," from whom Wing sought help to fund the malpractice settlement, introduced him to Habil Bolin of The Johnson Group, an entity in Stockholm, Sweden. Wing spoke with Bolin by telephone. The Johnson Group was interested in paying the judgments underlying the receivership and funding the settlement of the malpractice suit. However, The Johnson Group needed to procure additional funds to accomplish this goal because it was initially unaware of the malpractice settlement and had contemplated only liquidation of the receivership. Therefore, The Johnson Group obtained a $300,000 loan from Curry in exchange for The Johnson Group's promissory note. Wing had no previous contact with Curry and spoke with him by telephone relative to this transaction. Curry subsequently wired the funds to the Galloway firm's trust account. There was no documentation of the transaction between Wing and The Johnson Group, and Wing made no promises to The Johnson Group in return for its payment; however, although his testimony was not exactly clear, Wing indicated The Johnson Group desired to liquidate the receivership so that it could then obtain some of Wing's assets without impediment.

On April 26, 2005, Pickett was copied on correspondence from Fettner to counsel for the malpractice plaintiff, opining the $300,000 belonged to the receivership and notifying Pickett that Fettner was claiming the money. On April 29, 2005, Curry wrote a

letter to Pickett authorizing transfer of the funds to Fettner's firm. On the same day, Pickett transmitted a check for the funds to Fettner. It is apparently undisputed that the funds were used to satisfy Wing's personal liabilities, and Curry was never repaid. Wing was subsequently convicted of criminal offenses for "bridge loan" schemes involving Curry and others and sentenced to federal prison.

Curry sued appellees seeking to recover the $300,000. Appellees filed a traditional motion for summary judgment. On January 21, 2009, the trial court signed an order granting the motion, ruling that Curry take nothing from appellees, and expressing the order constituted a judgment on all claims.[2]

II. STANDARD OF REVIEW AND ISSUES

A party moving for traditional summary judgment must establish there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). A defendant moving for summary judgment must conclusively negate at least one element of the plaintiff's theory of recovery or plead and conclusively establish each element of an affirmative defense. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). If the defendant establishes its right to summary judgment, the burden shifts to the plaintiff to raise a genuine issue of material fact. *Id.* We review a summary judgment *de novo*. *Knott*, 128 S.W.3d at 215. We take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in favor of the nonmovant. *Id.* When, as in this case, a trial court's order does not specify the grounds relied on in granting summary judgment, we must affirm if any of the summary-judgment grounds are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000).

Appellees moved for summary judgment on several grounds. First, appellees asserted that all Curry's claims were barred by the affirmative defenses of quasi-estoppel and equitable estoppel. Then, appellees separately challenged each of the four causes of

[2] Curry also sued Fettner and his law firm, who both filed a counterclaim, but the record reflects Curry's claim was subsequently settled, and the counterclaim was dismissed.

action pleaded by Curry: breach of fiduciary duty; negligence; conversion; and fraud.

In his sole appellate issue, Curry states that the trial court erred by granting summary judgment because "appellees owed [Curry] the duties of a professional fiduciary." In the body of his brief, Curry generally argues that appellees owed him a fiduciary duty which they breached by paying the $300,000 to Fettner. However, Curry does not specifically mention the causes of action on which he challenges summary judgment. Arguably, he challenges summary judgment on only his negligence claim because he asserts in the "Statement of Case" portion of his brief, as well as his summary-judgment response, that he sued appellees for negligence but does not mention any of his other claims. Nevertheless, because Curry's sole issue concerns the alleged existence and breach of a fiduciary duty, we liberally construe his brief as challenging summary judgment on both the negligence and breach-of-fiduciary-duty claims. However, we cannot construe Curry's brief as challenging summary judgment on his fraud and conversion claims; therefore, he has waived any error relative to summary judgment on those claims. *See Jacobs v. Satterwhite*, 65 S.W.3d 653, 655–56 (Tex. 2001).

Additionally, in his brief, Curry does not specifically mention appellees' estoppel affirmative defenses. However, as we will further discuss, the essence of these defenses was that Curry authorized the $300,000 payment to Fettner of which he now complains. In his brief, Curry suggests that appellees either did not pay, or should not have paid, the funds in accordance with his instruction. Accordingly, we will liberally construe Curry's brief as also challenging summary judgment based on the estoppel affirmative defenses.

III. ANALYSIS

Curry's complaints regarding appellees' actions fall within two categories: (1) appellees breached a fiduciary duty to disburse the funds in accordance with Curry's instruction, which corresponds with the breach-of-fiduciary-duty action alleged in his petition; and (2) appellees breached a fiduciary duty to safeguard Curry's funds, despite his instruction, which formed the basis of the negligence claim in his petition.

A. Breach-of-Fiduciary-Duty Claim

To prevail on a breach-of-fiduciary-duty claim, a party must establish a fiduciary relationship, breach of the fiduciary duty, and a resulting injury to the plaintiff or benefit to the defendant. *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied). Where the underlying facts are undisputed, determination of the existence, and breach, of fiduciary duties are questions of law, exclusively within the province of the court. *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005) (citing *Nat'l Med. Enters. v. Godbey*, 924 S.W.2d 123, 147 (Tex. 1996)).

In his live petition, Curry alleged that the funds were placed in appellees' "escrow account," which, as a matter of law, imposed a fiduciary duty on appellees "to see that they were appropriately disbursed according to the instruction of the party who placed the funds there." Curry then generally alleged that appellees breached this duty.

In their motion for summary judgment, appellees asserted there was no such escrow-agent relationship, but even if such a relationship existed, appellees committed no breach because they *did* follow Curry's instruction by paying the funds to Fettner. Appellees' latter contention, attempting to negate an element of the claim, was interrelated with their affirmative defense of quasi-estoppel. The doctrine of quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he or she acquiesced, or from which he or she accepted a benefit. *Id.* Appellees contend it would be unconscionable to hold them liable for transferring the funds considering that Curry authorized the transfer. We conclude that appellees, as a matter of law, both negated the breach element of Curry's claim and proved the quasi-estoppel defense.[3]

[3] Appellees also moved for summary judgment based on the theory of equitable estoppel, an affirmative defense which, requires, among other elements, a false representation or concealment of material fact and detrimental reliance on the misrepresentation. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515–16 (Tex. 1998). This theory is inapplicable in this case because appellees did not cite, or present evidence, of any false representation or concealment of material

Appellees presented uncontroverted proof that Curry provided no instructions, terms, restrictions, or guidance when he first wired the funds to the Galloway firm's trust account. Then, there were only two communications between Curry and appellees before appellees transferred the funds to Fettner: (1) a letter from Curry to Pickett on the day before the hearing concerning the funds; and (2) the letter from Curry to Pickett authorizing the transfer, written after the hearing and after Fettner's communication claiming the funds.

The contents of both letters are pertinent in their entirety. In the letter before the hearing, Curry wrote:

> On April 8, 2005, my wife, Sharon Curry, and I made a $300,000.00 loan to the Johnson Group. The loan was funded by a wire transfer in the amount of $175,000.00 on April 8th and wire transfer in the amount of $125,000.00 on April 11, 2005. The purpose of this letter is to certify to you that Michael Wing is not, and has never been associated with my wife and I as a partner, joint venturer or in any other capacity pertaining to this loan. Additionally, he is not an officer, director, shareholder, employee, agent or in any other way associated with or involved in my wife's wholly owned corporation, Contract Asset Management, Inc. The $175,000.00 wire was funded from a line of credit that my wife and I have at Wells Fargo Bank, and the $125,000.00 wire was funded with money on deposit in the account of Contract Asset Management, Inc. I further certify to you that Michael Wing will not receive any part of the funds that we receive in the form of principal, interest or transaction fee when the loan is repaid by the Johnson Group. If you need any additional information, please contact me.

In the subsequent letter, Curry wrote:

> On April 8, 2005, my wife, Sharon Curry, and I made a $300,000.00 loan to the Johnson Group. We funded the loan by having our bank wire $300,000.00 to the trust account of [the Galloway firm]. It is my understanding that the transaction for which the loan was obtained is ready to close, and that to facilitate the closing, it is necessary to transfer those

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fact made by Curry; it is certainly undisputed that Curry was defrauded by Wing and was not a party to any fraud. Unlike equitable estoppel, quasi-estoppel requires no showing of misrepresentation and detrimental reliance. *Eckland Consultants, Inc. v. Ryder, Stilwell Inc.*, 176 S.W.3d 80, 87 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *see Lopez*, 22 S.W.3d at 864. Indeed, despite their use of the term "equitable estoppel," the portion of appellees' motion concerning this ground essentially reiterates the quasi-estoppel contention. Therefore, we will evaluate only the quasi-estoppel defense.

> funds to the Fettner Law Firm trust account at [address]. I hereby authorize the Galloway Firm to transfer the $300,000.00 to the Fettner Firm.

In his brief, Curry states that appellees contravened his instructions because he "expressly told appellees . . . that no part of the proceeds of the loan transaction was to benefit Wing, personally." Curry later reiterates that he informed appellees "Wing was not entitled to any part of the proceeds from the loan transaction."

To the contrary, neither letter contains any such instructions. Curry apparently relies on the following portion of the first letter: "I further certify to you that Michael Wing will not receive any part of the funds that we receive in the form of principal, interest or transaction fee when the loan is repaid by the Johnson Group." This statement did not forbid use of the $300,000 deposited in the trust account to benefit Wing personally. Instead, Curry expressed that Wing would not receive any portion of The Johnson Group's *repayment* of the loan to Curry.

Then, as appellees correctly assert, in the subsequent letter, Curry explicitly authorized transfer of the $300,000 to Fettner without any limitation on the purpose for which the funds could be used. Despite this authorization, Curry contends that, when both letters are read together, he effectively expressed the funds could not be used to satisfy Wing's personal liabilities.

Curry relies on his representation in both letters that the loan was to The Johnson Group and his statement in the second letter, "It is my understanding that the transaction for which the loan was obtained is ready to close, and that to facilitate the closing, it is necessary to transfer those funds to the Fettner Law Firm trust account." However, Curry never specified the nature of the "transaction" for which he made the loan to The Johnson Group. Therefore, his letters did not foreclose the possibility that the loan was made to The Johnson Group to pay Wing's malpractice settlement, as represented by Wing at the hearing.

Curry further argues that he "confirmed to appellees that [he] had no relationship whatsoever with Wing in any '**capacity pertaining to this loan**.'" (emphasis added in

Curry's brief). Apparently, Curry contends that such a statement essentially informed appellees the loan was not intended to benefit Wing personally. However, Curry made no such statement in his letters. Indeed, Curry did have a relationship with Wing pertaining to the loan considering that Wing personally guaranteed repayment and pledged his own assets as security. The actual statement, contained in the first letter, was that Wing "has never been associated with my wife and I as a partner, joint venturer or in any other capacity pertaining to this loan." Accordingly, Curry represented that Wing was not somehow affiliated with Curry with respect to the loan.

Curry also emphasizes that he "implored" appellees in the first letter, "[i]f you need any additional information, please contact me." However, Curry did not instruct appellees to contact him for approval or to verify the purpose of the transaction underlying the loan before transferring the money to another party, but simply invited any questions appellees may have had. Consequently, the portions of the letters cited by Curry did not constitute restrictions on his express instruction to transfer the funds to Fettner.

Finally, Curry asserts that appellees "knew the whole deal stunk of lies and untruths" but nonetheless transferred the money. However, Curry cites no summary-judgment evidence showing appellees knew Wing was defrauding Curry. In fact, Pickett averred in his summary-judgment affidavit that no attorney in the Galloway firm was aware of any representations Wing made to Curry regarding the bridge loan or how Curry's funds would be used once they were deposited in the firm's trust account. Therefore, Pickett did not possess any personal knowledge which transformed Curry's statement that the "transaction for which the loan was obtained is ready to close" into effectively an instruction the funds were to be used for solely a "bridge loan," as opposed to satisfaction of Wing's liabilities.

Accordingly, because appellees disbursed the funds as instructed by Curry, the trial court did not err by granting summary judgment relative to the breach-of-fiduciary-duty claim either on the ground that appellees negated any breach or on their quasi-estoppel defense.

B. Negligence Claim

The elements of a negligence cause of action are existence of a legal duty, breach of that duty, and damages proximately caused by the breach. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

In his petition, Curry alleged that appellees owed him "a duty to safeguard his money with the care required of a professional fiduciary, or at the very least, that duty of care exercised by prudent attorneys." Curry then alleged several manners in which appellees violated this purported duty: they disbursed the funds without first consulting Curry; they disbursed the funds in a manner inconsistent "with what was represented to" Curry; and they knew or should have known that the disbursement "to satisfy the work" was not in Curry's best interest.

In their motion, appellees contended they did not commit any breach of a fiduciary duty to safeguard Curry's funds that is actionable in negligence and Curry was estopped to present his claim due to his authorization of the transfer. We conclude that appellees proved entitlement to summary judgment on both grounds. Again, these grounds are interrelated because Curry not only suggests that appellees committed a breach of fiduciary duty actionable in negligence but also raises the fiduciary-duty argument to counter appellees' quasi-estoppel defense.

Specifically, in his summary-judgment response and appellate brief, Curry expands on his allegations. As we have discussed, Curry suggests that appellees knew of Wing's fraud and thus they were negligent by complying with Curry's instruction to transfer the funds. However, as we have also discussed, appellees negated that they knew of the fraud, and Curry presented no controverting evidence.

Curry also contends appellees *should have known* that Wing was defrauding Curry based on the following "red flags" raised by Wing's testimony: payment of Wing's personal liability was being arranged and made by persons he had never met—Curry and Bolin; there was no documentation between Wing and The Johnson Group or Bolin regarding the transaction; and The Johnson Group was funding Wing's settlement with no return obligation on Wing's part. Curry argues that, based on these "red flags,"

appellees should have contacted Curry before transferring the funds to Fettner and the issue is not as "simple" as "[w]e did what we were told." Consequently, the gist of this negligence claim is that appellees owed Curry a fiduciary duty to safeguard his funds by detecting Wing's fraudulent scheme and consulting Curry to determine the true purpose for which he made the loan despite his instruction to transfer the funds to Fettner.

Curry cites no authority to support his proposition that appellees owed him such a fiduciary duty. Curry merely makes the bare assertion that "[a] lawyer should hold funds of another with the care demanded of a professional fiduciary." *See* Tex. R. App. P. 38.1(h) (providing appellant's brief must contain clear and concise argument for the contentions made, with appropriate citations to authorities and record).[4]

Nevertheless, in their motion and brief, appellees supply the authority on which Curry apparently relies. As appellees assert, a comment to Texas Disciplinary Rule of Professional Conduct 1.14, which governs "Safekeeping Property," states, "A lawyer should hold property of others with the care required of a professional fiduciary." Tex. Disciplinary R. Prof'l Conduct 1.14 cmt. 1, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9). However, appellees moved for summary judgment on the ground that a violation of the disciplinary rules does not support a private cause of action.[5]

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[4] The only case Curry cites in his entire argument, other than authority relative to our standard of review, is *Wright v. Sydow*, 173 S.W.3d 534 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). In *Wright*, we recognized that a non-client may have a viable negligent-misrepresentation claim against an attorney in certain limited situations in which the attorney owes duties to the non-client. *See id.* at 554–55. However, Curry did not plead a negligent-misrepresentation claim.

[5] In their motion, appellees also contended, albeit with respect to the breach-of-fiduciary-duty claim, that there was no attorney-client or trustee relationship between Curry and appellees giving rise to a formal fiduciary relationship and no existing relationship for purposes of imposing informal fiduciary duties. *See Meyer*, 167 S.W.3d at 330–31 (recognizing that fiduciary duties arise as a matter of law in certain formal relationships, including attorney-client and trustee relationships; and recognizing an informal fiduciary duty may result from an existing "moral, social, domestic or purely personal relationship of trust and confidence"). It is undisputed Curry was not appellees' client, and Curry did not plead appellees were trustees of the funds or that the parties had an informal fiduciary relationship. Further, on appeal, Curry does not challenge appellees' argument negating any trustee relationship and any existing relationship imposing informal fiduciary duties or even mention the possibility of such relationships. Therefore, we have considered the only basis on which Curry even suggests existence of a fiduciary relationship relative to the negligence claim—Rule 1.14.

Although the parties reference the comment to Rule 1.14, we note that the portion of the actual rule concerning disbursement of funds provides, "All funds in a trust or escrow account shall be disbursed only to those persons entitled to receive them by virtue of the representation or by law." Tex. Disciplinary R. Prof'l Conduct 1.14(c). We do not necessarily conclude that appellees violated this rule considering they disbursed the funds pursuant to Curry's instruction after taking steps to discern whether they were subject to the receivership. Regardless, to the extent Curry contends that appellees violated the fiduciary duty imposed under this rule, as recognized in the comment, by failing to further inquire whether Wing was entitled to the funds to pay his personal liabilities, Curry may not maintain a private cause of action.

The preamble to the Disciplinary Rules of Professional Conduct provides,

> These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached. . . . Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Tex. Disciplinary R. Prof'l Conduct preamble ¶ 15. Citing this preamble, our court has stated that the disciplinary rules "by their terms . . . do [not] give rise to a private cause of action." *Cuyler v. Minns*, 60 S.W.3d 209, 214 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Subsequently, our court made a similar statement although not as absolute: "[a] violation of the Disciplinary Rules does not *necessarily* establish a cause of action . . . ." *Wright v. Sydow*, 173 S.W.3d 534, 549 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (emphasis added). In *Wright*, we refused to recognize a private cause of action when the appellant failed to cite any case in which a court held that a cause of action existed based on the disciplinary rule at issue under similar, or any, facts. *See id.*

In the present case, Curry fails to expressly mention Rule 1.14, challenge appellees' contention that this rule does not create a private cause of action, or cite any authority recognizing such an action, much less under facts similar to this case. Specifically, Curry cites no authority holding that a third-party who unilaterally deposits

funds in an attorney's trust account and then instructs the attorney to disburse the funds may claim the attorney committed a breach of fiduciary duty actionable in negligence by failing to evaluate, or consult with the third-party regarding, the propriety of the disbursement. Therefore, we decline to recognize such a cause of action. *See Jones v. Blume*, 196 S.W.3d at 449–50 (holding third-party had no cause of action against an attorney for breach of fiduciary duty based on an alleged violation of Rule 1.14).[6]

Accordingly, the trial court did not err by granting summary judgment relative to the negligence claim either on the ground that appellees committed no breach of fiduciary duty actionable in negligence or on their quasi-estoppel defense.

In sum, the trial court properly granted summary judgment in favor of appellees. We overrule Curry's sole issue and affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore, and Brown.

[6] In addition to contending that any breach of a fiduciary duty to safeguard the funds under Rule 1.14 was not actionable in negligence, appellees also moved for summary judgment on the ground they did not commit such a breach. In particular, appellees denied they should have known of the fraud before disbursing the funds. Because appellees proved entitlement to summary judgment relative to Curry's "should have known" allegations on the ground that any breach of fiduciary duty was not actionable in negligence, we need not consider whether appellees negated any breach.