Affirmed and Majority Opinion and Concurring and Dissenting Opinion filed December 14, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00267-CV

JOSE L. ELIZONDO AND GUILLERMINA ELIZONDO, Appellants/Cross-Appellees

V.

RONALD KRIST, THE KRIST LAW FIRM, P.C., KEVIN D. KRIST AND WILLIAM T. WELLS, Appellees/Cross-Appellants

On Appeal from the 129th District Court
Harris County, Texas
Trial Court Cause No. 2007-50121

MAJORITY OPINION

Appellants and cross-appellees Jose L. Elizondo and his wife, Guillermina Elizondo, appeal the trial court's orders granting summary judgment in favor of appellees and cross-appellants Ronald D. Krist, The Krist Law Firm, P.C., Kevin D. Krist, and William T. Wells (collectively, "the Lawyers"). In six issues, the Elizondos contend the trial court erred in granting the Lawyers' motions for summary judgment and abused its discretion in striking portions of the affidavit of the Elizondos' lawyer expert. In a cross-issue, the Lawyers argue the trial court erred in denying their motions for summary

judgment on the nonexistence of an attorney-client relationship with Mrs. Elizondo. We affirm.

I

Jose Elizondo was working at the BP Amoco Chemical Company plant in Texas City when an explosion occurred in March 2005. The blast threw him about twenty feet. Jose received medical attention for neck and back injuries, and returned to work several days later. He continued to be affected by emotional problems, however, as several of his close co-workers were killed.

Shortly after the explosion, Jose met with attorney William Wells. Wells had been recommended by Jose's supervisor at BP. During the meeting with Wells, Jose signed a power of attorney, retaining Wells to represent him in all claims against BP arising out of the explosion. Guillermina Elizondo was not at the meeting and did not sign the power of attorney.

Wells subsequently sent a demand letter to BP asking for a settlement of $2 million for the Elizondos' claims. BP responded by offering $50,000. Wells then decided to enlist Ronald Krist, Kevin Krist, and the Krist Law Firm as additional counsel in the hope that they could negotiate a larger settlement. Wells referred several cases arising out of the explosion, including Jose's, to the Krist Law Firm. Ronald and Kevin Krist arranged to meet with counsel for BP to discuss the cases and try to settle them. After the meeting, however, BP's settlement offer to Jose was still $50,000.

Wells and Kevin Krist met with Jose to discuss BP's settlement offer and his options. Ultimately, Jose decided to accept BP's offer, and signed a release and settlement agreement. Although the release was drafted to include Guillermina and included a separate, printed space for her signature, she never signed the release because one of the attorneys at the settlement meeting told Jose that it was not necessary. After he signed the agreement, Jose never contacted any of the Lawyers again.

In August 2007, Jose learned that an attorney named "Krist" who had handled claims for some of the explosion victims was now working for BP. He consulted an attorney and, that same month, filed an action against the Lawyers. In an amended petition, Jose and Guillermina asserted claims for professional negligence, breach of fiduciary duty, violations of the Texas Deceptive Trade Practices Act ("DTPA"), common-law fraud, fraudulent misrepresentations, negligent representations, and fraudulent inducement. They also sought recovery of actual and exemplary damages. Jose and Guillermina alleged, among other things, that the Lawyers failed to obtain a larger settlement for Jose and never discussed pursuing or settling a loss-of-consortium claim—which was now time-barred—on Guillermina's behalf. They also alleged that Jose was "sold down the river" so that Ronald Krist could represent BP in connection with the underlying claims of the Elizondos and others.

The Lawyers filed various motions for summary judgment asserting, among other things, no evidence of damages, impermissible fracturing or "claim splitting" of a legal malpractice claim into claims for breach of fiduciary duty, fraud, negligent misrepresentation and DTPA violations, no attorney-client relationship with Guillermina, and termination of the attorney-client relationship with Jose upon his execution of a release. The Lawyers also argued that fee-forfeiture damages could not be recovered as a matter of law. The trial court granted some of the Lawyers' summary judgment motions and denied others. Based on all of the summary-judgment rulings, the trial court rendered a final, take-nothing judgment against the Elizondos on all of their claims. This appeal followed.

II

In their first and second issues, the Elizondos contend the trial court erred by dismissing Jose's and Guillermina's claims on the ground that they presented no evidence of damages. In their sixth issue, they contend the trial court abused its discretion in striking portions of the affidavit of their expert, attorney Arturo Gonzalez. Because the

Elizondos offered attorney Gonzalez's affidavit as some evidence of their alleged damages, we will begin with the trial court's ruling on the Lawyers' objections to Gonzalez's affidavit.

A

In their no-evidence motions for summary judgment, the Lawyers argued that all of the Elizondos' claims should be dismissed because they have no evidence of damages. Specifically, the Lawyers argued that the Elizondos had no evidence that BP was willing to pay anything more than what Jose Elizondo agreed to accept and the Elizondos could not identify anyone who obtained a larger settlement. In response, the Elizondos offered their own deposition testimony and Gonzalez's affidavit.

In his affidavit, Gonzalez averred that, based on his experience working on the BP docket at two plaintiffs' law firms, he had personal knowledge of the values of cases these firms settled on behalf of their clients, and he had personally participated in the settlement and mediation process for many cases. Gonzalez's nine-page affidavit described in detail his background as a licensed attorney, his experience in BP litigation, the confidentiality of the settlements with BP, the criteria considered in the settlement process, and the specifics of the Elizondo case, including his opinions on the Lawyers' liability and damages.

The trial court struck the following portions of Gonzalez's affidavit:

- **General Value of Elizondo Case**

> Based on the factual information provided and reviewed by me, my experience in the BP litigation, my knowledge of general settlement values and in the criteria and protocol relied upon to establish general settlement values in the BP litigation, it is my opinion that for a plaintiffs' attorney acting within the standard of care applicable to the same or similar circumstances, using reasonable due diligence, the Elizondo case would have had a general value, by way of settlement or verdict, in the range of between Two Million ($2,000,000.00) and Three Million ($3,000,000.00)

> dollars. Guillermina Elizondo's individual claim would represent some part of that value, but Jose's claim would represent the majority of that value. The settlement value of the Elizondo claim is not distinguished as compensatory, non-economic or exemplary in nature, but instead is a single value offered by BP so that BP could avoid a trial or jury verdict.
>
> - In my opinion, . . . the Lawyers would have garnered far in excess of the $50,000 offer which was supposedly the most that BP would ever pay.
> - [T]hese cases were heavily evaluated and settlements obtained were significantly higher as compared to the average personal injury lawsuit in the state of Texas.

The Elizondos contend that the trial court abused its discretion in striking these portions of Gonzalez's affidavit, and that the exclusion of this testimony probably caused the rendition of an improper judgment. They argue that if Gonzalez's testimony had been allowed, it would have established that their claims would have had a value of between $2 and $3 million. But the Elizondos do not challenge any specific evidentiary grounds for the trial court's ruling. Instead, they merely assert that Gonzalez's qualifications were unchallenged and he has "personal knowledge and extensive experience in settling a portion of the 4000 claims arising out of the BP explosion, all of which BP settled before a jury could return a verdict."[1]

The decision whether to admit or exclude evidence is committed to the sound discretion of the trial court. *City of Brownville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to any guiding principles. *Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241–42 (Tex. 1985). A trial court's evidentiary ruling must be upheld if there is a legitimate basis for it. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Even if the exclusion of evidence is found to be an abuse of discretion, it does not warrant reversal unless the error probably caused the rendition of an improper judgment. *Id.*

[1] By not challenging the evidentiary basis for the trial court's rulings or the Lawyers' objections, the Elizondos have arguably waived any error in those rulings. Regardless of this deficiency, we will address the merits of the trial court's rulings.

The Lawyers assert that Gonzalez's testimony is conclusory, self-serving, based on hearsay, devoid of analysis, speculative, and otherwise incompetent. They also complain that Gonzalez sought to testify about the settlement value of the Elizondos' underlying claims based on facts he is precluded from disclosing or discussing due to the confidential nature of the information concerning other BP settlements.

In his affidavit, Gonzalez states that the settlement process and settlement amounts are confidential and therefore he is "precluded pursuant to the confidentiality provisions from divulging specific settlement amounts related to the monetary payments by BP to specific plaintiffs."[2] And although Gonzalez lists specific criteria he contends BP "focused on" when determining settlement values, he offers no analysis to explain how these factors would be applied to the Elizondos' situation. He also fails to link settlement amounts to specific injuries and circumstances, and provides no comparison of settlement amounts of similar claims. Thus, Gonzalez's affidavit offers only conclusory and speculative opinions.

Conclusory statements by an expert witness are insufficient to raise a question of fact to defeat summary judgment. *McIntyre v. Ramirez*, 109 S.W.3d 741, 749 (Tex. 2003). An expert must provide a reasoned basis for his opinion. *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999). *Burrow* involved a legal-malpractice action that arose out of the representation of plaintiffs in a class action lawsuit that ended in settlement. The expert for the defendant lawyers averred that he had reviewed all the relevant facts and concluded that the plaintiffs' settlements were fair and reasonable. *Id.* at 235–36. The Supreme Court of Texas held the expert's affidavit was insufficient because he did not

[2] The Elizondos sought to obtain discovery regarding various documents relating to the BP settlements and, in response, the Lawyers asserted various objections. The Elizondos also asked for a court order under which Gonzalez could reveal specific information regarding the BP settlements, and the Lawyers opposed this motion. But, the Elizondos have not asserted on appeal that the trial court sustained the Lawyers' discovery objections or denied this motion, and the Elizondos have not cited any place in the record in which the trial court made any ruling in this regard. In addition, the Elizondos have not assigned error or presented argument challenging any such ruling by the trial court.

state the basis for his opinion. *Id.* The court described the expert's testimony as "Take my word for it, I know: the settlements were fair and reasonable." *Id.* at 236. We conclude that Gonzalez's affidavit is similarly insufficient.

Accordingly, the trial court did not abuse its discretion in excluding those portions of Gonzalez's affidavit. We therefore overrule the Elizondos' sixth issue.

B

In their first and second issues, the Elizondos contend that, even if portions of Gonzalez's affidavit were properly stricken, they presented competent evidence of their damages through their deposition testimony and the non-stricken portions of Gonzalez's affidavit.

1

To prevail on a no-evidence summary-judgment motion, a movant must allege that there is no evidence of an essential element of the adverse party's claim. Tex. R. Civ. P. 166a(i); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). The trial court must grant the motion unless the respondent produces summary-judgment evidence raising a genuine issue of material fact. Tex. R. Civ. P. 166a(i). However, the respondent is "not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." *Hamilton v. Wilson*, 249 S.W3d 425, 426 (Tex. 2008).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *City of Keller v. Wilson*, 168 SW.3d 802, 824 (Tex. 2005). We sustain a no-evidence summary judgment if (1) there is a complete absence of proof of a vital fact, (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove

a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *See id.* at 810. Less than a scintilla of evidence exists when the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, and in legal effect is no evidence. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions as to the existence of the vital fact. *Id.*

2

Here, Jose contends that he should have received a larger settlement than he got, and Guillermina contends that she obtained no settlement because her consortium claim was not pursued. But the trial court struck those parts of the Elizondos' attorney-expert's affidavit concerning the value of their cases "by way of settlement or verdict," and the record contains no other objective evidence of the value of either Jose's or Guillermina's case.

Concerning Jose, summary judgment was proper on all of his claims because there is no evidence that he would have received more from BP than the $50,000 he received in settlement. In his deposition, Jose could not identify anyone who obtained a larger settlement for similar claims, the amount of any other settlement received, or whether the settlements were for injuries like those he suffered. Jose also admitted he had no idea what the value of his claim is. On appeal, Jose focuses on the harm that he suffered from the explosion, but this evidence is no evidence of damage from the Lawyers' alleged negligence in prosecuting his claim. Guillermina likewise testified that she did not know the value of Jose's claims, and she did not know of anyone who received a larger settlement for the same type of claim. Jose's and Guillermina's testimony presented no legally sufficient evidence of the value of Jose's claim.

Guillermina's testimony concerning her loss-of-consortium claim is likewise no evidence of damage from the Lawyers' alleged wrongdoing. Loss of spousal consortium is an independent cause of action derivative of the injured person's claim. *See Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 328 (Tex. 1993) (defining spousal consortium as the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage). On appeal, Guillermina points to her testimony concerning the changes in her relationship with Jose after the explosion, but, like Jose's testimony concerning his injuries from the explosion, this testimony is not evidence of the recovery she would have received if her claim had been prosecuted without malpractice. Guillermina admitted she did not know what the value of her own claim is, and she did not know of any spouse who recovered any greater amount from BP. Jose also admitted he had no idea what the value of his wife's claim is. The Elizondos have presented no evidence of the value of Guillermina's claim.

Further, the non-stricken portions of attorney Gonzalez's affidavit do not otherwise provide evidence of the Elizondos' damages. The Elizondos point to Gonzalez's statements that a diligent attorney would have prosecuted Jose's claims further if the pre-litigation settlement offer was not in the range of $2 to $3 million, and that Jose's case "had value substantially in excess of BP's 'best offer.'" Gonzales also stated that the settlement received was "inadequate, "very inadequate," not "fair and reasonable," and "basically for nuisance value." The trial court struck (1) a paragraph assigning a general dollar value of $2 to $3 million to his case, (2) a sentence stating that Jose could have gotten more than $50,000, and (3) a statement that settlements in BP cases were higher than most personal-injury lawsuits in Texas. Because the foundation for Gonzalez's non-stricken statements about adequacy of the settlement was excluded, the remaining statements the Elizondos rely on are conclusory, speculative, and unsupported by any underlying facts. *See 1001 McKinney Ltd. V. Credit Suisse First Boston Mortgage Capital*, 192 S.W.3d 20, 27 (Tex. App.—Houston [14th Dist.] 2005,

pet. denied.) (conclusory statements are those that do not provide underlying facts to support conclusion). Unsupported, conclusory opinions of a witness do not constitute evidence of probative force and will not support a jury finding. *See, e.g.*, *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009); *Gen. Motors Corp. v. Iracheta*, 161 S.W.3d 462, 471 (Tex. 2005). Such opinions are simply not evidence. *See Iracheta*, 161 S.W.3d at 471. Without his stricken testimony as a factual basis, therefore, Gonzalez's other statements do not raise a genuine fact issue as to damages.

Because the Elizondos have not presented more than a scintilla of competent evidence of their damages arising from the Lawyers' allegedly wrongful conduct, the trial court did not err in granting summary judgment on this ground. We therefore overrule the Elizondos' first and second issues. Because we have determined that the trial court did not err in granting summary judgment on the Elizondos' claim based on no evidence of damages, we need not reach the Elizondos' third issue, that the trial court erred in granting summary judgment regarding the termination of Jose's representation, or their fourth issue, that the trial court erred in granting summary judgment on their claims other than malpractice.

C

In their fifth issue, the Elizondos contend that the trial court erred in granting summary judgment on fee forfeiture as another form of relief—other than damages—for their claims. *See Burrow*, 997 S.W.2d at 240 (holding that a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client). Specifically, they argue that the trial court erred in granting summary judgment on the grounds that fee forfeiture should not be applied to disgorge fees that BP paid to Ronald Krist and The Krist Law Firm for work performed for BP in conflict with the lawyers' ongoing representation of Jose and Guillermina.

It is undisputed that the Elizondos paid no fees to the Lawyers and so the Lawyers have no fees from them to disgorge. Instead, the Elizondos argue, the Lawyers should be required to disgorge fees they were paid by BP, a third party. In support of this contention, the Elizondos cite the eminent jurist Judge Learned Hand, who wrote that if an attorney represents opposing interests:

> The usual consequence has been that he is debarred from receiving any fee from either, no matter how successful his labors. Nor will the court hear him urge, or let him prove, that in fact the conflict of his loyalties has had no influence upon his conduct; the prohibition is absolute and the consequence is a forfeiture of all pay.

Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 920–21 (2d Cir. 1950) (citations omitted). Initially, we observe that a requirement that a lawyer who represents conflicting interests must disgorge "all pay" does not necessarily lead to the conclusion that one client may be awarded the fees paid by the other client. Another interpretation of the quoted language is that the attorney must disgorge to each client the fees that each client paid to the lawyer. Further, we note that an automatic forfeiture of "all pay," without regard to the value of any services rendered to the client, conflicts with *Burrow v. Arce*, in which our supreme court instructs that fee forfeiture is available only for "clear and serious" violations of a lawyer's duty, and even then total fee forfeiture may not always be appropriate. *See Burrow*, 997 S.W.2d at 241–42.

Further, courts that have considered this specific issue have concluded that plaintiffs should not be allowed to recover fees paid by a third party. *See Swank v. Cunningham*, 258 S.W.3d 647, 673–74 (Tex. App.—Eastland 2008, pet. denied) (holding parties were not entitled to fees paid to law firm by third parties, even in related matters); *Liberty Mut. Ins. Co. v. Gardere & Wynne. L.L.P.*, 82 Fed. Appx. 116, 121 (5th Cir. 2003) (holding that forfeiture of other client's fees paid to attorneys, even in related matters, is an improper extension of *Burrow v. Arce*).

We conclude that the Elizondos are not entitled to the remedy of forfeiture of fees BP paid to the lawyers, and therefore the trial court did not err in granting summary judgment in favor of Ronald Krist and the Krist Law Firm. We overrule the Elizondos' fifth issue.

* * *

We overrule the Elizondos' first, second, fifth, and six issues, and do not reach the third and fourth issues. Accordingly, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Frost, Brown, and Christopher (Brown, J., majority, Christopher, J., concurring and dissenting).