Affirmed in Part; Reversed and Remanded in Part; Majority and Concurring and Dissenting Opinions filed October 21, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00420-CV

CHARLES W. BURNETT, Appellant

V.

DAVID SHARP, Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 51711

CONCURRING AND DISSENTING OPINION

I agree that the district court's order operates as a dismissal of inmate Charles W. Burnett's *in forma pauperis* action against his former attorney, David Sharp, under Chapter 14 of the Texas Civil Practice and Remedies Code. *See Minix v. Gonzales*, 162 S.W.3d 635, 637 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 14.003(a)(2), (b)(2) (Vernon 2009)). I also agree that the trial court

properly dismissed Burnett's "negligence" claim against Sharp because that claim has no arguable basis in law under section 14.003(b)(2).

My disagreements focus on (1) the characterization of Burnett's remaining claims against Sharp; (2) the explanation for an expansive characterization of Burnett's remaining claims based upon the absence of special exceptions in a suit that was dismissed before service; and (3) the breach of fiduciary duty analysis.

This court should affirm the trial court's dismissal of the "legal malpractice" claims Burnett labeled in his original petition as "breach of fiduciary duty," "deception," and "negligence." It should reverse only the trial court's determination that dismissal is with prejudice, and affirm the trial court's judgment as modified to specify that dismissal is without prejudice. This court's disposition is erroneous insofar as it reverses the trial court's judgment as to breach of fiduciary duty and remands that claim for further consideration, along with claims for conversion and money had and received that Burnett did not assert.

Therefore, I join only sections I., II.A., and II.C.3. of this court's opinion. I concur in this court's judgment in part and respectfully dissent in part.

Analysis

We usually apply an abuse of discretion standard to review dismissal of claims brought *in forma pauperis* by an inmate. *Hickman v. Adams*, 35 S.W.3d 120, 123 (Tex. App.—Houston [14th Dist.] 2000, no pet.). But when a lawsuit is dismissed without a hearing pursuant to Chapter 14 because it "has no arguable basis in law," our review is *de novo*. *Minix*, 162 S.W.3d at 637; *Retzlaff v. Tex. Dep't of Crim. Justice*, 94 S.W.3d 650, 653 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). A claim has no arguable basis in law if it is based on (1) wholly incredible or irrational factual allegations; or (2) an "'indisputably meritless legal theory.'" *Minix*, 162 S.W.3d at 637 (quoting *Gill v. Boyd Distrib. Ctr.*, 64 S.W.3d 601, 603 (Tex. App.—Texarkana 2001, pet. denied)).

In "Plaintiff's Original Petition," Burnett complained "of and about David Sharp, Defendant, alleging legal malpractice . . . ." This pleading included headings entitled "Parties and Service," "Discovery Control Plan," "Jury Demand," "Jurisdiction and Venue," "Facts," and "Prayer." The factual and legal bases for Burnett's specific causes of action are alleged in numbered paragraphs in the "Facts" section of his pleading:

> 6. In June of 2006, plaintiff retained defendant to represent plaintiff in a criminal matter. Defendant received $3000.00 from plaintiff for [his] . . . services.
>
> 7. Defendant made an appearance in court for plaintiff's first court appearance, and reset the cause.
>
> 8. Defendant made four additional court appearances for plaintiff, all of which defendant reset for the next month.
>
> 9. Defendant was replaced with another attorney. Defendant did not render any more services for the fee paid to defendant.
>
> 10. Plaintiff called defendant from the jail facility. Defendant's secretary accepted one collect call from plaintiff. Afterwards, the secretary did not accept [any more] . . . collect calls from plaintiff.
>
> 11. Plaintiff's family called defendant on many [occasions] . . . to request a refund, minus defendant's services rendered. Defendant failed to refund any of plaintiff's funds.
>
> 12. Plaintiff's family continued to call defendant requesting a refund until plaintiff served defendant a written request for a return of [his] . . . funds in September of 2008. Defendant failed to respond nor did defendant refund plaintiff's funds.
>
> 13. Defendant has breached [his] . . . fiduciary duty owed to plaintiff, by deception and negligence.

In the "Prayer," Burnett asked that "Defendant be cited to appear and answer . . . ." He also asked for "compensatory damages in the amount of $10,000.00;" "punitive damages in the amount of $5,000.00;" and "all relief, in law and in equity, to which Plaintiff [may be] . . . entitled."

The factual allegations quoted above are neither irrational nor wholly incredible. Burnett alleges the existence of a dispute with his former attorney arising from Burnett's post-termination request for a partial refund of the fee he paid to the attorney during the representation, and his attorney's post-termination failure to do so. Burnett's factual allegations provide no basis for concluding that his suit is frivolous.

Accordingly, the dispositive issue in this appeal is whether the pleaded legal theories are "'indisputably meritless.'" *Minix*, 162 S.W.3d at 637 (quoting *Gill*, 64 S.W.3d at 603). Answering this question requires us first to identify Burnett's pleaded legal theories. To do so, we must construe a *pro se* appellant's brief and a *pro se* petition that was dismissed before service of process was accomplished on the defendant. There is no appellee's brief and no trial court pleading by the defendant to assist us in identifying the causes of action at issue. Nor are these causes of action identified by name in the dismissal order. The order states that the trial court "reviewed the pleadings in the above referenced cause" and concludes as follows: "It appearing that the Plaintiff has failed to state a cause of action as a matter of law, it is ORDERED that the cause is dismissed with prejudice to the rights of the Plaintiff to refile the same."

I. Determining Which Legal Theories Burnett Asserted Against Sharp

Identifying the legal theories Burnett pleaded is made more difficult by his appellate brief's nonspecific references to a "legal malpractice claim." Burnett contends on appeal that he has asserted a non-frivolous claim for "legal malpractice." He asserts that "[a]ll of the elements for a legal malpractice claim [were] presented in appellant's petition." Burnett does not refer in his brief to causes of action for "breach of fiduciary duty," "deception," or "negligence," which are the labels he used in his petition.

This court has identified "a potential nomenclature problem . . . caused by the fact that a 'legal malpractice claim' might be thought of by some as any claim brought by a client against that client's attorney." *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 184 n.1 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *see also Beck v. The*

Law Offices of Edwin J. (Ted) Terry, Jr., P.C., 284 S.W.3d 416, 427 n.10 (Tex. App.—Austin 2009, no pet.). "[W]hen cases refer to 'legal malpractice' or 'a legal malpractice claim,' often they are referring to a negligence claim in which the issue is whether the attorney exercised that degree of care, skill, and diligence as attorneys of ordinary skill and knowledge commonly possess and exercise." *Deutsch*, 97 S.W.3d at 184 n.1. (citing *Goffney v. Rabson*, 56 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)); *see also Duerr v. Brown*, 262 S.W.3d 63, 69-70 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Taking this potential nomenclature problem into consideration, the proper approach on appeal is to address the legal viability of Burnett's "legal malpractice" claim under Chapter 14 by examining it in light of the specific "breach of fiduciary duty," "deception," and "negligence" labels he expressly invoked in his petition to describe his causes of action against Sharp.

II. Determining the Disposition of Burnett's Legal Theories

A. Conversion and Money Had and Received

Burnett sued Sharp for "legal malpractice" based on an allegation that Sharp "has breached [his] . . . fiduciary duty owed to plaintiff, by deception and negligence." This allegation does not assert claims for conversion or money had and received.

Section II.B. of the plurality opinion explains a broad interpretation of Burnett's allegation on grounds that Sharp did not file special exceptions to the original petition. In so doing, the plurality opinion relies on inapposite case law arising outside the Chapter 14 context. *See London v. London*, 192 S.W.3d 6, 13 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (citing *Boyles v. Kerr*, 855 S.W.2d 593, 600-01 (Tex. 1993)). This explanation does not withstand scrutiny because Sharp could not be expected to file special exceptions to a petition that was dismissed under Chapter 14 before it was served on him. Moreover, Sharp would not have been required to file special exceptions even if Burnett's

petition had been served on him. The absence of special exceptions has no bearing on whether Burnett asserted legally viable claims under Chapter 14. The erroneous incorporation of special exception standards into the Chapter 14 analysis threatens to sow confusion.

Chapter 14 operates according to its own distinct procedures. "Because a trial court is authorized to dismiss a claim *before* service of process, i.e., before the defendant has filed an answer, we find the court has continuing authority to dismiss a cause of action even where the defendant files no answer." *McCollum v. Mt. Ararat Baptist Church, Inc.*, 980 S.W.2d 535, 537 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (original emphasis). "In fact, the applicability of chapter fourteen is not contingent on the defendant's satisfaction of *any* procedural rule." *Id.* (original emphasis). "This is consistent with the purpose of chapter fourteen which is 'to control the flood of frivolous lawsuits being filed in the courts of this State by prison inmates, consuming valuable judicial resources with little offsetting benefit.'" *Id.* (quoting *Hickson v. Moya*, 926 S.W.2d 397, 399 (Tex. App.—Waco 1996, no pet)).

This reasoning has been applied to reject contentions that special exceptions are required before dismissal under Chapter 14. *See Hughes v. Massey*, 65 S.W.3d 743, 745 (Tex. App.—Beaumont 2001, no pet.) (Special exceptions are not required before dismissal of inmate's *in forma pauperis* action under Chapter 14; "the inmate has no right to notice of a motion to dismiss or to an opportunity to amend."); *see also Bonds v. Rodriguez*, No. 04-02-00156-CV, 2003 WL 141043, at *3 (Tex. App.—San Antonio Jan. 22, 2003, pet. denied) (mem. op.) (Special exceptions are not required before dismissal under Chapter 14; "[h]ad the Legislature intended to impose such a requirement on defendants in a suit subject to chapter 14, it would have done so. In fact, the Legislature indicated otherwise by permitting the trial court to dismiss a suit as frivolous even before process is served."); *Thomas v. Bush*, No. 07-99-0302-CV, 2000 WL 21272, at *3 (Tex. App.—Amarillo 2000 January 13, 2000, no pet.) (per curiam) (not designated for

publication) ("Because a trial court is authorized to dismiss a claim before service of process, i.e., before the defendant has even filed an answer, we find that the court's authority to dismiss a cause of action does not depend upon a defendant specially excepting to the petition) (not designated for publication).

Chapter 14 allows dismissal under circumstances in which dismissal would not be permitted in other contexts. *Cf. Fort Bend County v. Wilson*, 825 S.W.2d 251, 253 (Tex. App.—Houston [14th Dist.] 1992, no writ) ("Although Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for a motion to dismiss for failure to state a claim upon which relief can be granted, the Texas Rules of Civil Procedure do not contain any analogous provision. . . . Under the Texas Rules of Civil Procedure, a special exception is the appropriate vehicle for urging that the plaintiff has failed to plead a cause of action, and the pleader must be given, as a matter of right, an opportunity to amend the pleading.") (citing *Centennial Ins. v. Commercial Union Ins.*, 803 S.W.2d 479, 482 (Tex. App.—Houston [14th Dist.] 1991, no writ), and *Moseley v. Hernandez*, 797 S.W.2d 240, 242 (Tex. App.—Corpus Christi 1990, no writ)). Because a defendant need not be served and need not file special exceptions before dismissal under Chapter 14 is appropriate, the absence of special exceptions cannot properly be relied upon to explain an expansive interpretation of the allegations made in an inmate's *in forma pauperis* action. We should not mix apples and oranges.

Burnett did not plead causes of action for conversion or money had and received when he sued Sharp for "legal malpractice" based on an allegation that Sharp "breached [his] . . . fiduciary duty owed to plaintiff, by deception and negligence." The absence of special exceptions does not transform Burnett's narrow allegation into a claim for conversion or money had and received. Therefore, this court errs when it concludes that the trial court erred under Chapter 14 by dismissing causes of action for conversion and money had and received that Burnett did not plead.

B. Breach of Fiduciary Duty

A legally viable claim for breach of fiduciary duty requires the existence of a fiduciary relationship between Burnett and Sharp. *See, e.g.*, *Trousdale v. Henry*, 261 S.W.3d 221, 239 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Such a relationship existed while Sharp represented Burnett. *See Duerr*, 262 S.W.3d at 69. The attorney-client relationship ended upon Burnett's termination of Sharp's representation. *See Stephenson v. LeBoeuf*, 16 S.W.3d 829, 836 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Under these circumstances, Burnett cannot rely upon a claim for breach of fiduciary duty to address a post-representation dispute with his former attorney that is based wholly on conduct alleged to have occurred after the representation ended.

The circumstances here parallel *Stephenson*, 16 S.W.3d at 836, in which this court rejected a breach of fiduciary duty claim in connection with a dispute over certain escrowed sums that arose in 1992 between attorney Stephenson and his former client LeBoeuf. "Stephenson argues his representation of LeBoeuf in her divorce could not give rise to a fiduciary duty with respect to the escrow account because that representation terminated upon her divorce in 1983." *Id*. "We agree." *Id*. "The attorney-client relationship is based [on] a contractual relationship in which the attorney agrees to render professional services for the client." *Id*. "In the absence of an agreement to the contrary, an attorney-client relationship generally terminates upon the completion of the purpose of the employment." *Id.* This court concluded that the terminated representation provided no basis for a breach of fiduciary duty claim by LeBoeuf predicated entirely on Stephenson's conduct after the representation had ended. *Id*.

Just as there was no attorney-client relationship in existence when Stephenson committed the conduct of which LeBoeuf complained, here too there was no attorney-client relationship in existence when Sharp is alleged to have committed the conduct of which Burnett complains. Therefore, Burnett's allegation does not present a legally viable claim for breach of fiduciary duty. *See id*.

Section II.C.1. of the plurality opinion relies on *Avila v. Havana Painting Co.*, 761 S.W.2d 398, 399-400 (Tex. App.—Houston [14th Dist.] 1988, writ denied), for the proposition that "[a] lawyer who refuses to pay or deliver funds belonging to his former client upon termination of the representation has breached a fiduciary duty owed to the former client." *See ante*, at 8. This reliance on *Avila* is misplaced.

The client hired attorney Avila to collect past-due accounts and paid him a fee to do so. *Avila*, 761 S.W.2d at 399. During the representation, Avila collected $8,755 belonging to the client but refused to tender that sum to the client and demanded payment of an additional fee. *Id.* The client then sued Avila, alleging that he "breached his fiduciary duty to his client, Havana, and . . . converted funds which belonged to Havana." *Id*. at 399-400. The trial court rendered judgment in the client's favor following a bench trial, and Avila appealed. *Id*.

This court affirmed. *Id*. at 400. "At trial, Havana presented evidence that Avila received funds from Woodland Oaks Apartments which Havana was entitled to receive and that Avila refused to deliver those funds to Havana until Havana sued Avila and requested an injunction to compel Avila to release the funds." *Id*. "Havana also presented evidence that it was necessary to hire an attorney to bring suit against Avila to collect the money to which Havana was entitled." *Id.* This court held that sufficient evidence established Avila's breach of his fiduciary duty to the client. *Id.*

Avila addresses an attorney's conduct ***during*** the representation that breached a fiduciary obligation owed ***during*** the representation in connection with a fee dispute that arose ***during*** the representation and then continued after the representation ended. *Id.* Contrary to the plurality opinion's conclusion, *Avila* does not establish that a breach of fiduciary duty claim is available to address a post-representation dispute between an attorney and a former client that is based wholly on attorney conduct occurring ***after*** the representation has ended. Therefore, *Avila* does not control the resolution of Burnett's appeal. *Stephenson* does.

The plurality opinion cannot bolster its position by asserting that Sharp had a "duty" to refund to Burnett any unearned part of the retainer upon termination of his representation of Burnett. *See ante*, at 9-10 (citing Tex. Disciplinary R. Prof'l Conduct 1.15(d), *reprinted in* Tex. Gov't. Code Ann., tit. 2, subtit. G, app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9)). No additional clarity is provided by discussion of a free-floating "duty" that exists only in the abstract, untethered to a specific cause of action. In any event, this assertion does not resolve the fiduciary duty question because "[t]hese rules do not undertake to define standards of civil liability of lawyers for professional conduct." Tex. Disciplinary R. Prof'l Conduct Preamble: Scope ¶ 15, *reprinted in* Tex. Gov't. Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9). "Violation of a rule does not give rise to a cause of action nor does it create any presumption that a legal duty to a client has been breached." *Id*. "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." *Id*.

The plurality opinion's approach would effect a significant change in this court's case law. Left unaddressed are the potential consequences of expanding far-reaching fiduciary obligations to encompass disputes between an attorney and a former client that are predicated entirely on attorney conduct occurring after the representation has ended. Because *Avila* focuses on a different situation, that decision also does not address the existence, duration, scope and consequences of a fiduciary duty that applies to a dispute based wholly on an attorney's post-representation conduct.

We should follow *Stephenson* and affirm dismissal of Burnett's claim for breach of fiduciary duty.

C. Negligence

A "legal malpractice" claim predicated on professional negligence focuses on whether an attorney represented a client with the requisite level of skill. *Duerr*, 262 S.W.3d at 70. "If the gist of a client's complaint is that the attorney did not exercise that

degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim." *Deutsch*, 97 S.W.3d at 189.

Burnett's allegations do not support a legally viable claim against Sharp predicated on professional negligence. Burnett contends that Sharp failed to respond after Burnett replaced him with another attorney and then requested a partial refund of Sharp's fee. Burnett does not challenge the quality of Sharp's professional activity while he represented Burnett, and he does not contend that Sharp failed to exercise the degree of care, skill, or diligence commonly possessed by attorneys of ordinary skill. Therefore, Burnett's "legal malpractice" claim is based on an indisputably meritless legal theory insofar as he asserts a claim for professional negligence arising from a post-termination dispute over a partial refund of the portion of Sharp's fee that, according to Burnett, Sharp did not earn before being terminated. *Cf. Duerr*, 262 S.W.3d at 70 (professional negligence claims were predicated on allegations that attorneys mishandled filing of client's requests for additional benefits pursuant to class settlement).

D. "Deception"

It is not clear whether Burnett's pleaded claim for "deception" refers to a statutory claim under the Texas Deceptive Trade Practices Act ("DTPA") or to common law fraud. Burnett fails to assert a legally viable claim for "deception" under either theory.

Burnett cannot assert a legally viable statutory cause of action for "deception" against Sharp under the circumstances alleged because the DTPA does not apply to "a claim for damages based on the rendering of a 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). Burnett has not identified circumstances that would invoke an exception to this exemption.[1] *Cf. Latham v. Castillo*,

[1] Section 17.49(c)'s exemption does not apply to an express misrepresentation of a material fact that cannot be characterized as advice, judgment, or opinion; a failure to disclose information in violation of

972 S.W.2d 66, 69 (Tex. 1998) (attorney engaged in "unconscionable action" under sections 17.50(a)(3) and 17.45(5) by making affirmative misrepresentation to client that he had filed lawsuit and was actively prosecuting it.).

Similarly, Burnett cannot assert a legally viable common law fraud claim absent circumstances in which Sharp made affirmative misrepresentations or failed to disclose information when there was a duty to disclose it. *See, e.g., Johnson v. Brewer & Prichard, P.C.*, 73 S.W.3d 193, 211 n.45 (Tex. 2002) (fraud based on affirmative misrepresentation); *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001) ("As a general rule, a failure to disclose information does not constitute fraud unless there is a duty to disclose the information."). No such circumstances are described here.

III. Determining Whether Dismissal Should be With Prejudice

Burnett contends that the trial court erred in dismissing his claims "with prejudice." Dismissal with prejudice constitutes an adjudication on the merits and operates as if the case had been fully tried and decided. *Hickman*, 35 S.W.3d at 124. Orders dismissing cases with prejudice have full *res judicata* and collateral estoppel effect, barring subsequent litigation of the same causes of action or issues between the same parties. *Id.* Dismissal with prejudice is proper under Chapter 14 when an inmate's failure to comply with statutory filing requirements cannot be remedied; otherwise, dismissal should be without prejudice. *See id.*

Although Burnett's allegations do not comport with his stated causes of action, I cannot say that Burnett's failure to comply with Chapter 14's requirements is beyond remedy given the gist of his factual allegations. Therefore, the proper disposition in this case is dismissal without prejudice. *See Hickman*, 35 S.W.3d at 124.

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section 17.46(b)(24); an unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion; breach of an express warranty that cannot be characterized as advice, judgment, or opinion; or a violation of section 17.46(b)(26), which prohibits sales of annuity contracts in certain circumstances. *See* Tex. Bus. & Com. Code Ann. § 17.49(c)(1)-(5).

Conclusion

The trial court's April 14, 2009 order dismissing Burnett's suit with prejudice should be modified to state that Burnett's suit is dismissed without prejudice. As modified, the April 14, 2009 dismissal order should be affirmed. Therefore, I concur in the court's judgment in part and dissent in part.

/s/ William J. Boyce
Justice

Panel consists of Justices Frost, Boyce, and Sullivan. (Frost, J., majority) (Sullivan, J., concurring without opinion).