



**COURT OF APPEALS  
SECOND DISTRICT OF TEXAS  
FORT WORTH**

**NO. 02-16-00063-CV**

DEBORAH LOGSDON

APPELLANT

V.

MARK E. LOGSDON

APPELLEE

-----  
FROM THE 96TH DISTRICT COURT OF TARRANT COUNTY  
TRIAL COURT NO. 096-273485-14

-----  
**MEMORANDUM OPINION<sup>1</sup>**  
-----

Appellant Deborah Logsdon appeals from the trial court's summary judgment granted in favor of appellee Mark E. Logsdon. Because we conclude the trial court did not err, we affirm the trial court's judgment. See Tex. R. App. P. 43.2(a).

---

<sup>1</sup>See Tex. R. App. P. 47.4.

## **I. BACKGROUND**

### **A. DIVORCE AND LIQUIDATION OF ASSETS BY AUCTION**

Deborah and Mark married in 1984 and jointly operated a business, Champion Sweeping. In 2010, the couple separated, and Deborah filed for divorce on February 10, 2012. When Deborah filed for divorce, their son was 22 and their daughter was 15. As described by Mark, “[t]o say the Logsdon’s divorce was contentious would be a monumental understatement.” The family court appointed a receiver “to take charge and possession” of their assets, including Champion Sweeping, based on Deborah and Mark’s voluntary agreement to the appointment.

The family court heard the divorce action on October 21 and 22, 2013. During the trial, the family court heard evidence that Deborah began depleting Champion’s assets in January 2012 by transferring business funds into her and their son’s bank accounts. At the conclusion of the trial, the family court orally recognized that although Deborah had “engaged in fraud” on the community, the fraud was not an independent action but “a property division consideration.” The family court also stated, “The divorce is granted today.”

Three days later on October 25, 2013, Mark filed a certificate of assumed name, forming a new company—New Mark Property Services (NMPS). On November 4, 2013, the family court entered a written rendition of judgment, reflecting its property division and ordering “all assets” of Champion to be liquidated. In the rendition, the family court found that Deborah had committed

actual fraud against the community estate and awarded Mark 75% and Deborah 25% of the net proceeds from the liquidation of Champion. On February 3, 2014, the family court signed a final divorce decree, which reflected the property division that had been provided in the written rendition and ordered the receiver to liquidate much of the community estate, including Champion. On May 14, 2014, Mark filed an assumed name certificate for Champion, effective as of July 1, 2014, and listed himself as the owner.

In June or July 2014, the receiver auctioned the assets of Champion, with the exception of its name, good will, and customer list. The net proceeds of the auction totaled \$333,986.86. Mark bought some of the assets at the auction.<sup>2</sup> This court affirmed the property division as ordered by the trial court even though Mark had been given a larger portion of the community estate based on Deborah's fraud on the community. *Logsdon v. Logsdon*, No. 02-14-00045-CV, 2015 WL 7690034, at \*5–7, \*8–10 (Tex. App.—Fort Worth Nov. 25, 2015, no pet.) (mem. op.).

## **B. POST-DIVORCE LITIGATION**

At some point in early 2015, Deborah filed suit against the receiver for breach of fiduciary duty, fraud, negligence, and gross negligence. She argued that the receiver's failure to sell the business as a whole, including its name, good will, and customer list, allowed Mark to use all of Champion's assets for the

---

<sup>2</sup>The record does not specify which assets Mark bought.

benefit of NMPS. She later added Mark as a defendant and raised claims for fraud, negligence, and gross negligence against him. Deborah's claims against Mark centered on his formation of NMPS before the divorce decree was signed and his use of Champion assets in his new business both before and after the 2014 auction.

On June 25, 2015, the trial court granted the receiver's motion for summary judgment on Deborah's claims against him and severed those claims from those brought against Mark. We affirmed the trial court's summary judgment in favor of the receiver based on the receiver's derived judicial immunity from liability. *Logsdon v. Owens*, No. 02-15-00254-CV, 2016 WL 3197953, at \*5 (Tex. App.—Fort Worth June 9, 2016, no pet.) (mem. op.).

On September 21, 2015, Mark filed a traditional and no-evidence motion for summary judgment, supported by summary-judgment evidence, directed to Deborah's claims raised against him and on his affirmative defenses of res judicata and collateral estoppel. See Tex. R. Civ. P. 166a(b)–(c), (i). Deborah responded to Mark's motion and proffered additional summary-judgment evidence. On December 8, 2015, ten days before the scheduled hearing on Mark's motion, Deborah amended her petition (the amended petition) to drop the claims against the receiver and to add claims against Mark for (1) a declaration of the community-property character of NMPS, (2) an accounting, (3) conversion, (4) violations of the Theft Liability Act, (5) unjust enrichment, and (6) knowing participation in the receiver's breach of fiduciary duty. She further requested a

partition and a constructive trust. These claims were based on Mark's formation of NMPS and use of Champion's unsold name and good will.<sup>3</sup> All of these actions occurred after the family court had orally granted the divorce on October 22, 2013.

On December 15, 2015, three days before the hearing, Deborah filed a supplemental petition against Mark (the supplemental petition), raising the same claims as those raised in the amended petition but clarifying that she sought "to recover all such actual damages from [Mark]," not the receiver. The trial court held a hearing on Mark's motion on December 18, 2015, and took the motion under advisement. On February 5, 2016, the trial court granted Mark's traditional and no-evidence motion in a general order and subsequently denied Deborah's motion to modify, correct, reform, or vacate it. See Tex. R. Civ. P. 329b.

### **C. APPEAL**

Deborah now appeals the summary judgment entered in favor of Mark. In her first issue, she argues that her claims against Mark were not barred by res judicata or collateral estoppel and were not an impermissible collateral attack on the divorce decree. In her second and third issues, she contends that she raised genuine issues of material fact regarding her fraud and negligence claims. In her fourth issue, she asserts that her fraud claim was not an impermissible claim for

---

<sup>3</sup>Although Deborah alleged that Mark "monopolized" and was "allowed to trade on and acquire Champion's good will, customer lists, name, property, and employees" to establish NMPS, her causes of action alleged only that Mark improperly acquired and used Champion's name and good will.

fraud on the community as argued by Mark in his summary-judgment motion. Deborah's final issue asserts that the trial court erred by granting a final summary judgment because Mark failed to move for summary judgment on all claims raised against him in the amended petition.

## **II. STANDARD OF REVIEW**

Mark moved for a traditional summary judgment on his affirmative defenses of res judicata and collateral estoppel and for a traditional and no-evidence summary judgment on Deborah's claims, the granting of which we review de novo. See *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). Although each type of motion has differing burdens, because both Mark and Deborah brought forth summary-judgment evidence in the context of Mark's hybrid motion, we need only determine whether a fact issue exists. See *Buck v. Palmer*, 381 S.W.3d 525, 527 & n.2 (Tex. 2012). In short, we are simply to look for genuine and material fact issues raised by the summary-judgment evidence on each element of Deborah's claims and on Mark's affirmative defenses, which we view in the light most favorable to Deborah. See *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013).

## **III. FACT ISSUES ON CLAIMS**

### **A. FRAUD**

In her second issue, Deborah argues that the summary judgment was in error because genuine issues of material fact existed on her fraud claim. In her amended petition, Deborah alleged that Mark committed "fraud . . . , including but

not limited to, common-law [fraud] (fraudulent misrepresentation and/or fraudulent inducement), fraud by non-disclosure and/or statutory fraud.” Again, she focused on Mark’s actions after the divorce was orally granted:

[Mark] intentionally and maliciously acted to perpetrate a fraud against [Deborah] in the creation of [NMPS] and in the disposition of the business of Champion . . . . [Mark] intentionally depleted, stole, and/or wasted [Deborah’s] community assets and/or assets jointly owned by [Deborah] and [Mark] post-divorce. [Mark] defrauded [Deborah] of her interests in community property disposed of during the divorce. Specifically, [Mark] filed an assumed name certificate for Champion . . . to trade on its name and good will and, in fact, has traded on its name and good will. [Deborah] was awarded an interest in this asset and [Mark] intentionally defrauded her of that interest to her damage. [Mark] intentionally created [NMPS] to facilitate this fraudulent conduct and defraud [Deborah] of her interest in [NMPS], Champion, and other community assets, to her damage.

Mark asserted in his summary-judgment motion that Deborah had no evidence of any of the elements of a fraud claim (i.e., that he made a material representation that was false when made, that he either made the representation recklessly with no knowledge of its truth or knew the representation was false when he made it, that he made the representation intending for Deborah to act on it, that Deborah actually and justifiably relied on the representation, or that Deborah suffered injury). *See Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015).

The issue of justifiable reliance generally is a question of fact. *Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 584 (Tex. App.—San Antonio 2011, no pet.). But the issue becomes a question of law when the undisputed or conclusively proven facts show circumstances under which

reliance cannot be justified as a matter of law. See, e.g., *Sawyer v. E.I. Du Pont De Nemours & Co.*, 430 S.W.3d 396, 401–02 (Tex. 2014); *Simulis, L.L.C. v. Gen. Elec. Capital Corp.*, 439 S.W.3d 571, 576–77 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Rinard v. Bank of Am.*, 349 S.W.3d 148, 152–53 (Tex. App.—El Paso 2011, no pet.); *Ortiz v. Collins*, 203 S.W.3d 414, 424 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (op. on reh’g). These are such circumstances.

At the time Mark made the alleged representations or nondisclosures about NMPS and Champion, Mark and Deborah had been declared divorced and could no longer accumulate community property.<sup>4</sup> They were then parties to a liquidation of community assets overseen by a court-appointed receiver, and Deborah’s failure to “exercise ordinary care and reasonable diligence for the protection of [her] own interests . . . is not excused by mere confidence in the honesty and integrity of the other party.” *Miller Global Props., LLC v. Marriott Int’l, Inc.*, 418 S.W.3d 342, 348 (Tex. App.—Dallas 2013, pet. denied). Further, “a person may not justifiably rely on a representation if ‘there are “red flags” indicating such reliance is unwarranted.’” *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010) (quoting *Lewis v. Bank of Am. NA*, 343 F.3d 540, 546 (5th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004), and *In re Mercer*, 246 F.3d 391, 418 (5th Cir. 2001) (en banc op. on reh’g)). We

---

<sup>4</sup>Deborah states in her brief that “Deborah sued Mark for his conduct and activities committed after the Divorce Decree and for the community property existing after the Divorce Decree.”



conclude that any reliance by Deborah on Mark’s alleged misrepresentations or nondisclosures about NMPS or Champion was not justified as a matter of law and supported the trial court’s summary judgment on this claim. See, e.g., *id.*; *Mikob Props., Inc. v. Joachim*, 468 S.W.3d 587, 598–99 (Tex. App.—Dallas 2015, pet. denied); *Am. Dream Team, Inc. v. Citizens State Bank*, 481 S.W.3d 725, 740–41 (Tex. App.—Tyler 2015, pet. denied) (op. on reh’g). We overrule issue two. Because this ground was sufficient to support the summary judgment on Deborah’s fraud claim, we need not address the other bases upon which the summary judgment regarding fraud could have been based. See *Star–Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995) (“The appellate court must affirm the summary judgment if any one of the movant’s theories has merit.”).

## **B. NEGLIGENCE**

In her third issue, Deborah argues that fact issues regarding her claims grounded in Mark’s negligence precluded summary judgment in his favor.<sup>5</sup> On appeal, as he did in the trial court, Mark argues that Deborah “has no evidence to establish the required element of a duty owed by Mark” because “no fiduciary relationship or duty of care between [Deborah] and Mark existed” after Deborah

---

<sup>5</sup>Deborah does not separately argue the impropriety of the summary judgment regarding gross negligence, but raises a general issue regarding “negligence.” Indeed, she alleged these claims in a single section of her amended petition entitled “NEGLIGENCE/GROSS NEGLIGENCE.” We will do likewise.

filed for divorce. Mark succinctly asserts that he “cannot breach a duty that does not exist.”

Deborah’s negligence allegations rested on her assertion that Mark’s duty to her arose from his status as a joint owner of NMPS because it was an undisposed community asset. Mark formed NMPS three days after the trial court had orally granted the divorce and found that Deborah had committed fraud on the community by depleting Champion’s assets. Deborah argues that because Mark formed NMPS before the final divorce decree was signed, it was an undivided community asset.

Indeed, by orally granting the divorce without addressing custody of Mark and Deborah’s daughter and without formally dividing the marital property, the family court’s judgment was interlocutory for appellate purposes. See *Ault v. Mulanax*, 724 S.W.2d 824, 830 (Tex. App.—Texarkana 1986, no writ). However, the family court’s clear statement at the conclusion of the trial on October 22, 2013—“The divorce is granted today”—fully and finally dissolved Mark and Deborah’s marriage. See *In re Marriage of Joyner*, 196 S.W.3d 883, 886–87 (Tex. App.—Texarkana 2006, pet. denied); see also *Blackburn v. Blackburn*, No. 02-12-00369-CV, 2015 WL 2169505, at \*5–6 (Tex. App.—Fort Worth June 4, 2015, no pet.) (mem. op.). As such, they could not accumulate community property after that date. See *Joyner*, 196 S.W.3d at 892; *Blackburn*, 2015 WL 2169505, at \*12. NMPS, which was formed three days after the family court’s oral pronouncement of divorce, was not a community asset that was undivided.

Therefore, Mark owed no duty to Deborah as to the auction of Champion's assets or the formation of NMPS, which occurred after their divorce had been orally granted. See, e.g., *Torres v. Torres*, No. 14-12-00436-CV, 2013 WL 776278, at \*2 (Tex. App.—Houston [14th Dist.] Feb. 28, 2013, no pet.) (mem. op.). The trial court did not err by granting summary judgment on Deborah's negligence claim, and we overrule issue three. We need not address the other grounds supporting the negligence summary judgment.

#### **IV. SUMMARY JUDGMENT ON NEWLY ADDED CLAIMS**

In her fifth issue, Deborah argues that the trial court erred by denying her motion to modify, correct, reform, or vacate the finality of the summary judgment because Mark had not moved for summary judgment on all claims raised in her amended petition. Indeed, Deborah's amended petition added claims (1) requesting a declaration regarding the parties' rights and duties as to Champion and NMPS; (2) requesting a constructive trust be imposed on her interest in NMPS and Champion's name and good will; (3) requesting that their interests in Champion and NMPS be partitioned; (4) requesting an accounting regarding NMPS; (5) for Mark's conversion of Champion and NMPS; (6) for violations of the Theft Liability Act regarding NMPS and Champion's name and good will; (7) for unjust enrichment regarding Champion's name and good will; and (8) for knowing participation in the receiver's breach of fiduciary duty. Mark's summary-judgment motion, which was filed before Deborah's amended petition, necessarily did not address these claims; therefore, Deborah argues that the trial

court's "final" summary judgment impermissibly granted relief on claims not addressed in Mark's motion. See *Johnson v. Rollen*, 818 S.W.2d 180, 183 (Tex. App.—Houston [1st Dist.] 1991, no writ) (holding if plaintiff amends petition to add new claims, defendant must amend summary-judgment motion to address the newly pleaded cause of action to support final summary judgment).

#### **A. DEFECT IN AMENDED PETITION**

The parties focus at length on the fact that in the "ACTUAL DAMAGES" paragraph of her amended petition, Deborah sought "to recover all such actual damages from [the receiver]." Mark asserts this is a "fatal defect" in Deborah's amended petition, thereby precluding the trial court from considering on summary judgment the new claims she raised in it. Deborah asserts that we may presume the trial court considered her supplemental petition, filed three days before the hearing and in which she added Mark to the actual-damages paragraph, because the trial court did not specifically deny Deborah leave to file it. See *generally Goswami v. Metro. Sav. & Loan Assoc.*, 751 S.W.2d 487, 490 (Tex. 1988) (assuming trial court considered and based summary judgment on amended petition, filed four days before summary-judgment hearing, absent record evidence to the contrary).

But in her amended petition, Deborah clearly sought damages from Mark in her factual allegations supporting each cause of action. For example: (1) regarding fraud, she alleged that she "hereby seeks to recover all such damages from Defendant [i.e., Mark]"; (2) in seeking an accounting, Deborah

specifically asked for it “from Mr. Logsdon”; (3) regarding unjust enrichment, Deborah alleged that “Mr. Logsdon should be required to make restitution for those benefits”; and (4) Deborah alleged that Mark knowingly participated in the receiver’s breach of fiduciary duty and should be held “jointly and severally liable for the damages suffered by [Deborah] as a result of the breach.” There was no fatal defect in the amended petition regarding Deborah’s damage requests.

In any event, Deborah’s new claims requested damages from Mark as well as from the receiver and were raised in her amended petition, which was filed more than seven days before the summary-judgment hearing. Therefore, Mark’s argument that the alleged defect in the amended petition and the untimely supplemental petition did not put these new claims at issue is incorrect. See Tex. R. Civ. P. 63, 65, 69.

#### **B. EXTENSION OF MOTION TO NEW CLAIMS**

Mark also argues that because Deborah’s new claims “were all directly dependent on the [prior] allegations lodged by Deborah,” his summary-judgment motion applied to the new claims as well. Indeed, if an amended petition reiterates the same essential elements in another fashion, the original motion for summary judgment will cover the new variations. See *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011); *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 436–37 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (corrected op.).

Deborah's claims requesting an accounting as to NMPS, requesting a declaration regarding the character of NMPS, requesting a constructive trust be placed on NMPS, requesting a partition of their interests in NMPS, and for theft of her interest in NMPS all arose out of her contention that NMPS was an undivided community asset, which is incorrect as a matter of law as we previously discussed. Mark argued in his summary-judgment motion that there was no duty or special relationship between he and Deborah, an essential element of her claims. This ground applies with equal force to her claims arising out of her mistaken contention that she and Mark were joint owners of NMPS. Therefore, she has no evidence of these claims as they relate to Mark's formation of NMPS, which was fairly raised by Mark in his motion for summary judgment on an element common to even the newly pleaded claims. *See Lampasas*, 988 S.W.2d at 436–37; *cf. Yeske v. Piazza Del Arte, Inc.*, No. 14-15-00633-CV, 2016 WL 7436507, at \*15 (Tex. App.—Houston [14th Dist.] Dec. 22, 2016, no pet. h.) (“To be entitled to an accounting, a plaintiff usually must have a contractual or fiduciary relationship with the party from which the plaintiff seeks the accounting.”).

The remainder of Deborah's newly pleaded claims in her amended petition relied on Mark's use of Champion's name and good will, primarily by filing an assumed name certificate as Champion's owner before the auction. In his summary-judgment motion, Mark argued that Deborah's original claims were subject to judgment as a matter of law because she had no evidence of any

damage caused by Mark's actions. Deborah responded that her claims revealed at most uncertainty about the amount of her damages, which is not fatal to her claims, and not uncertainty about their existence, which is. But Mark attached as summary-judgment evidence the receiver's testimony that he did not auction Champion's name and good will because they had no value, as confirmed by the court-appointed business-valuation analyst. Because the name and good will did not have independent value, the receiver did not include them in the auction items. Deborah's claims regarding Champion were likewise subject to summary judgment because she proffered no evidence of the fact of any damage, which Mark raised in his summary-judgment motion. We overrule issue five.

## **V. CONCLUSION**

Deborah's claims in her amended petition were barred as a matter of law based on her failure to establish a genuine and material fact issue on each element of her claims. Although Mark did not specifically extend his summary-judgment arguments to Deborah's added claims, which were filed after his summary-judgment motion, Deborah's claims were derivative of her original claims, and the claim elements Mark attacked in his motion were similarly lacking in her newly added claims. Therefore, Mark's motion fairly encompassed all of Deborah's claims. See *G & H Towing*, 347 S.W.3d at 297–98. We need not address Deborah's other issues attacking additional possible grounds upon

which the trial court's summary judgment could have been based because it was sufficiently supported by other bases.<sup>6</sup> We affirm the trial court's judgment.

PER CURIAM

PANEL: GABRIEL and KERR, JJ.; and KERRY FITZGERALD (Senior Justice, Retired, Sitting by Assignment).

DELIVERED: February 16, 2017

---

<sup>6</sup>Therefore, we do not address issues one and four.