



In The  
**Eleventh Court of Appeals**

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No. 11-15-00142-CV

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**DAN C. COTTON, Appellant**

**V.**

**ROBERT LEE JONES, JR., INDIVIDUALLY, AND AS  
INDEPENDENT CO-EXECUTOR OF ESTATE OF TEXA JONES  
BALL, DECEASED, AND LORITA FLOY CLINKINBEARD,  
INDIVIDUALLY, AND AS INDEPENDENT CO-EXECUTOR OF  
ESTATE OF TEXA JONES BALL, DECEASED, Appellees**

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**On Appeal from the County Court  
Scurry County, Texas  
Trial Court Cause No. PR-0078-11**

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**MEMORANDUM OPINION**

This is a permissive appeal brought from the partial denial of a motion for summary judgment. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (West Supp. 2016); TEX. R. APP. P. 28.3. Appellant, Dan C. Cotton, is an attorney. He contends that, as a matter of law, Appellees' claims against him for breach of

contract, breach of fiduciary duty, fraud, violation of the DTPA, and negligent misrepresentation are subsumed under their claims against him for professional negligence under the anti-fracturing rule. *See Won Pak v. Harris*, 313 S.W.3d 454, 457 (Tex. App.—Dallas 2010, pet. denied); *Beck v. Law Offices of Edwin J. (Ted) Terry, Jr. P.C.*, 284 S.W.3d 416, 426–27 (Tex. App.—Austin 2009, no pet.). The trial court denied Appellant’s motion for summary judgment on this ground. Appellant obtained permission from the trial court to pursue a permissive appeal of the denial of summary judgment on his anti-fracturing defense ground. We subsequently granted Appellant’s petition seeking a permissive appeal on the anti-fracturing ground. We reverse and remand.

#### *Background Facts*

Appellees, Robert Lee Jones, Jr. and Lorita Floy Clinkinbeard, are the children of Texa Jones Ball, deceased. They are also the independent co-executors of Texa’s estate. Appellant prepared a gift deed for Texa wherein she conveyed a parcel of real estate to Appellees, subject to a life estate for Texa’s life. Texa died in 2011. At the time of her death, Texa was married to Harlon Clois Ball. After Texa’s death, Harlon asserted a surviving spouse’s homestead right to the property. *See* TEX. CONST. art. XVI, § 52; TEX. EST. CODE ANN. § 102.003 (West 2014). In a separate lawsuit, Appellees filed a declaratory judgment to determine Harlon’s rights in the property.

Appellees subsequently sued Appellant for legal malpractice, breach of contract, breach of fiduciary duty, fraud, DTPA, and negligent misrepresentation based on the preparation of the gift deed. Appellant filed a motion for summary judgment on five grounds, one of which alleged that the claims for breach of contract, breach of fiduciary duty, fraud, DTPA, and negligent misrepresentation were improper attempts to fracture a legal malpractice claim. Appellant also alleged that Appellees’ claims for legal malpractice, negligent misrepresentation, and DTPA

violations were barred by the statute of limitations. The trial court granted Appellant's summary judgment motion based on the statute of limitations defense concerning Appellees' legal malpractice, negligent misrepresentation, and DTPA claims. However, the trial court denied Appellant's motion for summary judgment on Appellant's anti-fracturing ground.

#### *Analysis*

Section 51.014(d) of the Civil Practice and Remedies Code allows a permissive appeal when the trial court makes a substantive ruling on a controlling question of law. This appeal presents a controlling question of law because it concerns the viability of Appellees' non-malpractice claims apart from their legal malpractice claim.

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). Appellant presented his anti-fracturing ground as a traditional ground for summary judgment. A party moving for traditional summary judgment bears the burden of proving that there is no genuine issue of material fact as to at least one essential element of the cause of action being asserted and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017). When reviewing a traditional motion for summary judgment, we review the evidence in the light most favorable to the nonmovant, indulge every reasonable inference in favor of the nonmovant, and resolve any doubts against the motion. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). A defendant who conclusively negates a single essential element of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 509 (Tex. 2010).

The rule against fracturing claims prevents plaintiffs from converting what are actually professional negligence claims against an attorney into other claims such as

fraud, breach of contract, breach of fiduciary duty, or DTPA violations. *Won Pak*, 313 S.W.3d at 457; see *Kemp v. Jensen*, 329 S.W.3d 866, 871–72 (Tex. App.—Eastland 2010, pet. denied). The rule prevents legal malpractice plaintiffs from “opportunistically transforming a claim that sounds only in negligence into other claims” to avail themselves of longer limitations periods, less onerous proof requirements, or other tactical advantages. *Beck*, 284 S.W.3d at 427 (quoting *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.)).

For the anti-fracturing rule to apply, the gravamen of a client’s complaints must focus on the quality or adequacy of the attorney’s representation. *Murphy v. Gruber*, 241 S.W.3d 689, 692–93 (Tex. App.—Dallas 2007, pet. denied). “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. If, however, the client’s complaint is more appropriately classified as another claim, for example, fraud, DTPA, breach of fiduciary duty, or breach of contract, then the client can assert a claim other than negligence. *Id.* In particular, claims of breach of fiduciary duty against an attorney focus on whether the attorney obtained an improper benefit from representing the client. *Won Pak*, 313 S.W.3d at 457.

“Merely characterizing conduct as a ‘misrepresentation’ or ‘conflict of interest’ does not necessarily transform what is really a professional negligence claim into a fraud or breach of fiduciary duty claim.” *Id.* The claimant must do more than “merely reassert the same claim for legal malpractice under an alternative label.” *Duerr v. Brown*, 262 S.W.3d 63, 70 (Tex. App.—Houston [14th Dist.] 2008, no pet.). “The plaintiff must present a claim that goes beyond what traditionally has been characterized as legal malpractice.” *Id.*

When determining whether an allegation states a claim for negligence or some other cause of action, the court is not bound by the parties' own characterization of the pleadings. *Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, LLP*, 404 S.W.3d 75, 82 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Whether certain allegations asserted against an attorney and labeled as some other type of claim are actually claims for professional negligence is a question of law to be determined by the court. *Murphy*, 241 S.W.3d at 692. We accept as true the allegations pleaded by Appellees in support of their claims. *See Beck*, 284 S.W.3d at 428.

Appellees' live pleadings consisted of their original petition and a supplemental petition filed after Appellant filed his motion for summary judgment. Appellees' original petition contained a section near the beginning labeled "Factual Allegations" where Appellees alleged that Texa and Clinkinbeard employed Appellant in 2009 to prepare a gift deed for Texa to convey the real property to Appellees. Appellees alleged that the purpose of the gift deed was to vest clear title in the property in Appellees upon Texa's death, along with immediate possession and control of the property at her death, without the necessity of probate. Appellees further alleged that Appellant "had an attorney-client relationship with [Texa and Appellees] that was formed when the parties explicitly agreed for [Appellant] to perform legal services, including to give legal advice and to draft a gift deed." Appellees pleaded that Appellant knew that Texa and Harlon lived on the property. Appellees asserted in the factual allegations that they suffered damages of at least \$476,168.43 "as a direct result of [Appellant's] failure to obtain the signature of Harlon Clois Ball on the Gift Deed [Appellant] prepared, or on any waiver or ratification, with full knowledge that the Property was the homestead of Mr. and Mrs. Ball."

Appellees followed the Factual Assertions section by pleading a “Claim for Breach of Contract.” They began this portion of the pleading with a paragraph that “incorporate[d] by reference the allegations set forth above.” Appellees included this same “incorporation by reference” paragraph at the beginning of each of their other alleged theories of recovery, incorporating all of their previous pleadings. Appellees premised their breach of contract claim on the allegation that “[Appellant] completely failed to perform his contractual obligations. Specifically, [Appellant] failed to obtain the signature of Harlon Clois Ball, the spouse of Texa Jones Ball, on the Gift Deed, and on any document ratifying the Gift Deed or waiving his homestead right.”

Appellees then pleaded their “Claim for Negligence and Gross Negligence.” They alleged that Appellant had an attorney-client relationship with them and Texa. Appellees further alleged that Appellant “failed to exercise the degree of care, skill, and diligence an attorney owes a client,” and they alleged the following acts and omissions on the part of Appellant constituting negligence:

- a. giving erroneous legal opinion and advice;
- b. not giving advice, opinion, and relevant information when legally obligated to do so;
- c. disobeying his clients’ lawful instructions;
- d. failing to obtain the signature of Harlon Clois Ball on the Gift Deed;  
and
- e. failing to obtain the signature of Harlon Clois Ball on a document that would have waived his homestead rights or that would have ratified the Gift Deed.

In addition to seeking damages for mental anguish and exemplary damages, Appellees also asserted that Appellant “must disgorge, forfeit, and/or return to Plaintiffs any and all fees and expenses, or any other financial or economic benefits” that he obtained as a result of his actions.

Appellees next pleaded their “Claim for Breach of Fiduciary Duty.” They alleged that Appellant owed them a fiduciary duty and that he breached it by failing “to advise [Appellees] that the Gift Deed had no legal effect against the homestead rights of Harlon Clois Ball.” As a part of their damages for the breach of fiduciary duty claim, Appellees asserted claims for fee disgorgement and mental anguish.

Appellees next pleaded their “Claim for Fraud.” They alleged that Appellant made a material representation to them and Texa that the Gift Deed would transfer complete title to the property to Appellees immediately upon Texa’s death. They further asserted that Appellant knew the misrepresentation was false because he had personal knowledge of the homestead character of the property. Appellees asserted damage claims for fee disgorgement and mental anguish under the fraud claim.

Appellees then pleaded their “Claim for Deceptive Trade Practices.” They alleged various “laundry list” violations under TEX. BUS. & COMM. CODE ANN. § 17.46(b) (West Supp. 2016), including representing that certain goods or services are of a particular standard, quality, or grade when they are not, and representing that an agreement confers or involves rights, remedies, or obligations which it does not have. Appellees asserted that Appellant engaged in these acts “knowingly,” and they sought to recover “multiple damages” as provided by the DTPA.

Finally, Appellees pleaded their “Claim for Negligent Misrepresentation.” They pleaded that Appellant provided them with false information for Appellees’ guidance and that he did not exercise reasonable care or competence in obtaining or communicating this information. Appellees sought damages for mental anguish in addition to their claims for economic loss.

Appellees’ supplemental petition contained a section labeled “Factual Allegations of Ongoing Fraudulent, False, Misleading, and Deceptive Acts.” In this section, Appellees alleged that, after Harlon asserted his homestead claim, Appellant made representations to them that “the Gift Deed is good.” Appellees further alleged

that Appellant made these representations in an effort to prevent or delay a lawsuit being brought against him. Accordingly, Appellees directed their supplemental petition toward Appellant's limitations defense.

Our review of Appellees' pleadings indicates that the crux of Appellees' claims against Appellant for breach of contract, breach of fiduciary duty, fraud, DTPA violations, and negligent misrepresentation focuses on the quality and adequacy of Appellant's legal representation and are therefore claims for legal malpractice. *Beck*, 284 S.W.3d at 428; *Kimleco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 924 (Tex. App.—Fort Worth 2002, pet. denied). These non-malpractice claims are based on the same operative facts as alleged in Appellees' Factual Assertions: “[Appellant's] failure to obtain the signature of Harlon Clois Ball on the Gift Deed [Appellant] prepared, or on any waiver or ratification, with full knowledge that the Property was the homestead of Mr. and Mrs. Ball.” All of Appellees' claims against Appellant arise from his alleged “bad legal advice or improper representation.” *Kimleco Petroleum, Inc.*, 91 S.W.3d at 924. Thus, “the ‘real issue remains one of whether the professional exercised that degree of care, skill, and diligence that professionals of ordinary skill and knowledge commonly possess and exercise.’” *Id.* (quoting *Averitt v. PriceWaterhouseCoopers L.L.P.*, 89 S.W.3d 330, 333 (Tex. App.—Fort Worth, 2002, no pet.)).

Appellees assert that they have done more than “merely reassert the same claim for legal malpractice under an alternative label.” *Duerr*, 262 S.W.3d at 70. We disagree. As noted previously, the claims all emanate from the same operative factual allegation that Appellant did not obtain Harlon's effective consent to the gift deed or a renunciation of his homestead rights. Appellees also assert that their non-malpractice claims are not improperly fractured because there is no showing that they are “improper or ‘opportunistic.’” However, there is no authority requiring a showing of an improper motive on the part of the plaintiff in order for



the anti-fracturing rule to apply. Appellees also contend that the rule should not be applied because their non-malpractice claims are “self-sustaining.” However, there is no authority for the anti-fracturing rule being inapplicable if the non-malpractice claims are independently viable.

Appellees also contend that some non-malpractice claims have been permitted when there is a claim that the attorney obtained an improper benefit. *See Murphy*, 241 S.W.3d at 693. We addressed the “improper benefit” argument in *Kemp v. Jensen* where we stated:

A professional negligence claim arises when an attorney provides improper representation. This can happen by giving an erroneous legal opinion or advice; by delaying or failing to handle a matter entrusted to the attorney’s care; or by not using ordinary care in preparing, managing, and prosecuting a case. Conversely, a breach of fiduciary duty involves the attorney’s integrity and fidelity and focuses on whether counsel obtained an improper benefit from representing the client. An attorney breaches his fiduciary duty when he benefits improperly from the attorney-client relationship by, among other things, subordinating his client’s interest to his own, retaining the client’s funds, engaging in self-dealing, improperly using client confidences, failing to disclose conflicts of interest, or making misrepresentations to achieve these ends.

329 S.W.3d at 871–72 (citations omitted). Appellees argue on appeal that Appellant obtained an improper benefit in the form of “preserv[ing] his business and his license.” We disagree that an attorney’s preservation of his ability to continue practicing law is the type of improper benefit contemplated by a breach of fiduciary duty. *See id.* In this regard, the only financial benefit that Appellant received for preparing the gift deed was his fee of \$75. Accordingly, we conclude that Appellees’ claims against Appellant for breach of contract, breach of fiduciary duty, fraud, DTPA violations, and negligent misrepresentation are impermissibly fractured, professional negligence claims. *See Won Pack*, 313 S.W.3d at 457; *Murphy*, 241 S.W.3d at 692–93. We sustain Appellant’s sole issue.

*This Court's Ruling*

We reverse the trial court's order denying Appellant's motion for summary judgment on his anti-fracturing defense ground, and we remand the cause for further proceedings consistent with this opinion.

JOHN M. BAILEY  
JUSTICE

August 17, 2017

Panel consists of: Wright, C.J.,  
Willson, J., and Bailey, J.