AFFIRMED and Opinion Filed April 17, 2024

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00497-CV

COMMISSION FOR LAWYER DISCIPLINE, Appellant
V.
SIDNEY POWELL, Appellee

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-22-02562

MEMORANDUM OPINION

Before Justices Garcia, Breedlove, and Kennedy
Opinion by Justice Garcia

In the underlying disciplinary proceeding, the trial court granted Sidney Powell's no-evidence and traditional motions for summary judgment on the Commission for Lawyer Discipline's (the "Bar's") claims that Powell violated certain Texas Disciplinary Rules of Professional Conduct ("DR's"). On appeal, the Bar argues the trial court erred in sustaining Powell's objections to its summary judgment evidence and in granting summary judgment in favor of Powell. Concluding the Bar's arguments are without merit, we affirm the trial court's judgment.

I. BACKGROUND

Powell is an attorney, licensed by the State Bar of Texas to provide legal services to clients in the State of Texas. As such, her conduct as an attorney is subject to the Texas Rules of Disciplinary Procedure and the Texas Disciplinary Rules of Professional Conduct. *See* TEX. GOV'T CODE ANN. § 81.072(d).

A complaint filed with the Bar alleging violation of certain DR's, lead to the filing of a formal disciplinary action pursuant to the State Bar Act. *See id*. at § 81.001. The Disciplinary Petition alleged that in late November 2020, after the states certified the results of the November 3, 2020 general election, Powell filed numerous federal lawsuits against state election officials to prevent the certification of election results in Arizona, Georgia, Michigan, and Wisconsin.[1]

The lawsuits alleged a vast election fraud conspiracy involving U.S. Dominion, Inc. ("Dominion"), a company that manufactures voting machines, foreign actors, state and party officials, and county elections workers. The Bar asserted that Powell had no reason to believe the lawsuits were not frivolous and attached evidence from "wholly unreliable" sources to the Complaints she filed.[2]

In addition to allegations concerning lawsuits filed in Michigan, Wisconsin, and Arizona, the Bar alleged that two exhibits attached to the 570 page Georgia

[1] Powell was lead counsel, but local counsel and several other attorneys were listed on the pleadings.

[2] None of the lawsuits were successful and the Eastern District of Michigan sanctioned Powell for her conduct.

Complaint, a certificate of compliance issued by the Georgia Secretary of State reporting that the voting machines were in compliance with the election code, and a test report of the voting system, were "altered." Specifically, the Complaint described these exhibits as undated, and the copies attached were undated, but the documents were in fact dated. According to the Bar, this filing and other conduct violated DR's 3.01, 3.02, 3.03(a)(1), 3.03(a)(5), 3.04(c)(1), and 8.04(a)(3). *See* Tex. Disciplinary Rules of Professional Conduct R., 3.01, 3.02, 3.03(a)(1), 3.03(a)(5), 3.04(c)(1), and 8.04(a)(3), reprinted in TEX. GOV'T CODE ANN. tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, §9).

Powell answered and the parties engaged in discovery. The case was set for trial and continued. Powell filed two motions for summary judgment. The first, a traditional motion, sought summary judgment on the Bar's alleged violations of DR's 3.03(a)(1), 3.03(a)(5), and 8.04(a)(3). The evidence attached to the motion included Powell's declaration and the declaration of Harry MacDougald, local counsel in the Georgia case.

The MacDougald declaration describes how numerous attorneys were working around the clock in a short time frame to get the Georgia complaint filed. MacDougald communicated with two other attorneys about the substance of the complaint and the exhibits to be attached. The documents attached as exhibits were provided by one of these other lawyers, and MacDougald did not communicate with Powell about the exhibits. After the complaint was filed, MacDougald learned that

two of the exhibits (the certification and the test report) were copied in landscape rather than portrait mode, causing the bottom of the pages (showing the dates) to be cut off.

Powell's declaration states that she did not draft the complaint or compile or attach any of the exhibits, and relied on other counsel to download the exhibits before they were filed. Powell further states that the date or signature on the certificate was in the public record, not an issue, and an "indisputable fact."

The Bar responded, (the "First Response") and moved to continue the summary judgment hearing. The Bar subsequently amended its summary judgment response (the "First Amended Response").

Powell then filed a no-evidence motion for summary judgment on all six alleged DR violations. At the same time, the Bar filed its second motion for continuance of the summary judgment hearing. The Bar later filed an amended response (the "Second Amended Response"). That response reiterated the Bar's request for a continuance of the summary judgment hearing, but the request was made as an alternative ground for relief and was not verified. Although the Second Amended Response indicated that Exhibits A-F were attached in an appendix, the exhibits that were actually attached were marked as A-H.

The parties elected to forego oral argument on Powell's motions and submitted the motions to the court for consideration. The court granted summary judgment in favor of Powell. The court's order provides, in pertinent part that:

II. DEFECTS IN COMMISSION'S RESPONSE

Page two of the Commission's second amended response lists six documents purportedly included in its appendix, Exhibits A through F. The actual documents attached to the response were marked Exhibits A through H, and did not match the documents described in the brief. The Court alerted the parties to difficulty locating materials cited in the Commission's brief, but the Commission responded that no corrective action was necessary.

The Commission's second amended response contained only three citations to purported summary judgment evidence. The first and second citations were to Exhibit F at page 7, paragraph 12, and to Exhibit F at page 8, paragraph 12. These citations appear to refer correctly to the document marked and attached as Exhibit F, though the exhibit appears to have been originally listed as Exhibit D on page two of the Commission's response. The third citation was to Exhibit E at page 8, footnote 8, which appears to have been intended to refer to the document marked and attached as Exhibit G.

For clarity of the summary judgment record, in light of the numerous defects in the Commission's exhibits, the Court did not consider any document identified by the Commission that the Commission failed to cite or attach. Similarly, the Court did not consider any document attached by the Commission that the Commission failed to cite or identify. In short, the only exhibits considered by the Court were the two documents cited as summary judgment evidence and attached by the Commission: the documents marked Exhibits F and G.

…

IV. NO-EVIDENCE SUMMARY JUDGMENT

The Commission did not respond to Powell's no-evidence motion challenging elements of the Commission's claims under Rules 3.01, 3.02, or 3.04. Accordingly, the motion is granted as to those claims.

With the Commission's sole competent summary judgment evidence being Exhibit F, considered solely for its limited purpose—evidence of a pleading filed by Powell and others—the Commission has failed to meet its burden on the challenged elements of the Commission's claims under Rules 3.03(a)(1), 3.03(a)(5), and 8.04(a)(3). Accordingly, the motion is granted as to those claims.

The court also granted Powell's traditional motion for summary judgment on the Bar's claims under DR's 3.03(a)(1), 3.03(a)(5), and 8.04(a)(3) and denied the requested continuance.[3]

The Bar moved for reconsideration and/or a new trial, which the trial court denied. This timely appeal followed.

II. ANALYSIS

A. Standard of Review and Applicable Law

We review both traditional and no-evidence summary judgments de novo. *See Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014) (per curiam); *Flood v. Katz*, 294 S.W.3d 756, 761 (Tex. App.—Dallas 2009, pet. denied). Although the trial court granted both the traditional and no-evidence motions for summary judgment, we consider only the no-evidence motion because it is dispositive. *See* Tex. R. App. P. 47.1.

After an adequate time for discovery has passed, a party may move for a no-evidence summary judgment asserting that no evidence exists to support one or more essential elements of a claim on which the adverse party bears the burden of proof. TEX. R. CIV. P. 166a(i); *see Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006). The burden then

[3] The Order states: "On the Commission's express motion for continuance of Powell's partial motion for summary judgment, and to the extent, if any, the Commission intended to include Powell's no-evidence motion, the Court rules that the request, being unsupported by affidavit and wholly failing to comply with Texas Rules of Civil Procedure 251 and 252, is DENIED."

shifts to the nonmovant to produce evidence raising a genuine issue of material fact on the challenged elements of his claim. TEX. R. CIV. P. 166a(i); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). A no-evidence summary judgment is improper if the nonmovant brings forth more than a scintilla of probative evidence raising a genuine issue of material fact. *Forbes Inc. v. Granada Biosciences., Inc*., 124 S.W.3d 167, 172 (Tex. 2003).

"Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact." *King Ranch v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). More than a scintilla of evidence exists if the evidence would allow reasonable and fair-minded people to differ in their conclusions. *Id.* Unless the nonmovant raises a genuine issue of material fact, the trial court must grant summary judgment. TEX. R. CIV. P. 166a(i). In determining whether sufficient evidence exists to defeat a no-evidence summary judgment, we review the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *King Ranch*, 118 S.W.3d at 751.

We will affirm a no-evidence summary judgment when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *See City of Keller v.*

Wilson, 168 S.W.3d 802, 816 (Tex. 2005); *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244, 248 (Tex. 2013).

B. Objections to the Summary Judgment Evidence

Although the Bar generally notes that the court sustained Powell's objections to several of the Bar's summary judgment exhibits, it appears to only challenge the court's rulings on Exhibits F and G, the Georgia pleading and undated attachments, and a brief filed by the opposing party in the Georgia case.[4]

The Bar maintains the trial court "should have considered the pleadings from the Georgia case in light of the actual allegations of misconduct against Powell." *See McIntyre v. Comm'n for Lawyer Discipline*, 169 S.W.3d 803, 811–814 (Tex. App.—Dallas 2005, pet. denied) (considering pleadings containing misrepresentations). This argument ignores that the trial court did consider the Georgia pleading (the Complaint and undated exhibits), albeit for the limited purpose of demonstrating that it was filed. As we understand the Bar's argument, the filing of the pleading with inaccurate information was the fact the Bar was seeking to establish. The Bar fails to explain why the court's limitation to this fact was erroneous or identify another evidentiary purpose the pleading was intended to serve.

[4] To the extent the Bar intended to argue other exhibits were improperly excluded by objection and the court's ruling, the argument is waived for inadequate briefing. *See* TEX. R. APP. P. 33.1.

Moreover, even if the trial court abused its discretion, reversal is only appropriate if the error was harmful, that is, if it probably resulted in an improper verdict. *U-Haul Int'l., Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012); TEX. R. APP. P. 44.1. To establish harmful error, the complaining party must demonstrate that the judgment turns on the complained-of evidentiary ruling. *See Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004). The Bar does not argue that it was harmed by the limitation, nor do we see any indicia of harm. Accordingly, we conclude the trial court's ruling on Exhibit F was not erroneous.

We next consider Exhibit G. Significantly, Powell and her Georgia litigation team did not file Exhibit G, a brief in the Georgia case.[5] The brief was filed by the opposing parties. The Second Amended Response contains one reference to the brief (referencing Exhibit E but apparently intending to reference Exhibit G), and essentially argues Powell knew the certificate was dated because her litigation opponent argued that it was. The brief was filed after the Compliant, and according to the Bar, demonstrates Powell "knew of the falsity of the evidence she presented and did nothing to correct the same," in violation of DR 3.03(b). But the Disciplinary Petition did not allege, nor did the summary judgment proceeding involve an alleged violation of DR 3.03(b).

[5] The Bar appears to include the brief in its argument that the court erred in excluding "the pleadings." We note, however, that a brief is not a pleading.

Further, Exhibit G is not competent summary judgment evidence regardless of the alleged DR violation it was offered to support. The Bar offers no explanation of the purported significance of the exhibit and supplies no authority to suggest that an *opposing party's* arguments and allegations have any cognizable relationship to the claims asserted against Powell. Powell objected that Exhibit G does not constitute competent summary judgment evidence. We agree. *See Anglo-Dutch Petrol. Intern., Inc. v. Haskell*, 193 S.W.3d 87, 89 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (unsubstantiated facts and legal conclusions not competent summary judgment evidence); *Weiss v. Comm'n for Lawyer Discipline*, 981 S.W.2d 8, 18 (Tex. App.—San Antonio, 1998, pet. denied) (evidence in a disciplinary proceeding must be admissible under the Rules of Evidence). The Bar's complaints about the trial court's evidentiary rulings are overruled.

C. The Remaining Evidence on Which Summary Judgment was Decided

Having concluded that the only competent summary judgment evidence attached to the Second Amended Response consisted of a single exhibit, admitted for the limited purpose of showing that Powell filed the Georgia case, we consider whether the Bar met its no-evidence summary judgment burden. *See* TEX. R. CIV. P. 166a(i); *Mack Trucks*, 206 S.W.3d at 582.

Powell moved for a no-evidence summary judgment on all six alleged violations of the DR's, but the Bar appeals only the dismissals of its alleged

violations of DR's 3.01(a)(1), 3.03(a)(5), and 8.04(a)(3). These DR's provide as follows:

> DR 3.03(a)(1): "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal." Tex. Disciplinary Rules of Professional Conduct R. 3.03(a)(1).
>
> DR 3.03(a)(5): "A lawyer shall not [i] knowingly offer or use evidence that the lawyer [ii] knows to be [iii] false." Tex. Disciplinary Rules of Professional Conduct R. 3.03(a)(5).
>
> DR 8.04(a)(3): "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Tex. Disciplinary Rules of Professional Conduct R. 8.04(a)(3).

The trial court's order notes that, in addition to the evidence excluded by objection, the court did not consider any documents the Bar failed to cite or identify. Nonetheless, the Bar argues that we should consider all summary judgement evidence attached to the several responses filed prior to the Second Amended Response. This argument is not persuasive.

The Bar acknowledges that an amended motion supersedes and replaces all prior motions, *see Frias v. Atl. Richfield Co*., 999 S.W.2d 97, 102 (Tex. App.—Houston [14th Dist.] 1999, pet. denied), but relies on *Dixie Dock Enters. v. Overhead Door Corp*., No. 05–01–00639–CV, 2002 WL 244324, at *3 (Tex. App.—Dallas Feb. 21, 2002, no pet.) (mem. op.) to argue that an amended summary judgment filing does not preclude consideration of summary judgment evidence attached to an original filing. While this proposition is generally true, consideration of earlier filed evidence nonetheless requires that a party cite to it, argue about it, and generally

advise the court that it is relying on that evidence to defeat summary judgment. *See generally*, *Leija v. Laredo Cmty. Coll.*, No. 04-10-00410, 2011 WL 1499440, at *5 (Tex. App.—San Antonio Apr. 20, 2011, no pet.) (mem. op.) ("When a summary judgment respondent fails to direct the reviewing court to specific summary judgment evidence, a fact issue cannot be raised sufficient to defeat summary judgment."). A non-movant does not meet his burden to respond to a no-evidence motion for summary judgment by the mere existence in the court's file of a response to an earlier motion. *Saenz v. S. Union Gas Co*., 999 S.W.2d 490, 494 (Tex. App.—El Paso 1999, pet. denied).

It is well-established that to defeat a no-evidence motion, the nonmovant must produce evidence raising a genuine issue of material fact as to the challenged elements. *Id*. This burden requires the nonmovant to specifically identify the supporting proof it seeks to have considered by the trial court and explain why it demonstrates a fact issue exists. *Mack Trucks,* 206 S.W.3d at 582; *White v. Calvache*, No. 05-17-00127-CV, 2018 WL 525684, at *4 (Tex. App.—Dallas Jan. 24, 2018, no pet.) (mem. op.); *Skrastina v. Breckinridge-Taylor Design*, LLC, No. 05-17-00796-CV, 2018 WL 3078689, at *4 (Tex. App.—Dallas June 20, 2018, no pet.) (mem. op.); *Landero v. Future Healthcare Sys., Inc*., No. 05-21-00881-CV, 2023 WL 4571925, at *2 (Tex. App.—Dallas July 18, 2023, no pet.) (mem. op.) (internal citations omitted); *Parkchester Holdings, Inc. v. Carrier Corp.*, No. 05-04-00912-CV, 2005 WL 995357, at *3 (Tex. App.—Dallas Apr. 29, 2005, no pet.)

(mem. op.) ("A party responding to a no-evidence motion for summary judgment has the burden of pointing out to the trial court where the issues raised in its response can be found in its offered evidence."). Absent a summary-judgment response identifying evidence raising a fact issue, a trial court is not required to review a nonmovant's other filings to find any such evidence. *Lee v. Palacios*, No. 14-06-00428-CV, 2007 WL 2990277, at *2 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, pet. denied) (mem. op.).

To this end, the Bar's reliance on *Lance v. Robinson*, 543 S.W.3d 723, 732–783 (Tex. 2018) to argue that we must consider the entire record is misplaced. While *Lance* approved the consideration of evidence previously filed with the court, the party relying on that evidence "expressly referenced and specified" that it was relying on that evidence in support of its summary judgment motion. *Id*. at 732; *see also De La Garza v. Bank of New York Melton*, No. 02-17-00427-CV, 2018 WL 5725250, at *3 (Tex. App.—Fort Worth Nov. 1, 2018, no pet.) (mem. op.) (even if evidence is on file, if movant does not point it out to the trial court, it must be ignored). There was no express reference here.

By its own admission, the Bar misidentified or failed to include multiple exhibits it claims to have relied on in its Second Amended Response. The Bar argues that Exhibit A "was identified in, but not actually attached to the Second Amended Response," Exhibit B "was actually attached and marked as Exhibit D," Exhibit C "was actually attached and marked as Exhibit E," Exhibit D "was actually attached

and marked as Exhibit F," and Exhibit E "was actually attached and marked" as Exhibit G. But the deficiencies go far beyond mislabeling exhibits.

The Bar insists that it "generally referenced" "additional exhibits" it "actually attached" to its Second Amended Response. Those exhibits include Exhibit A, a "copy of Powell's Response to First Requests for Production of Documents and Rule 196.4 First Request of Production of Electronic Documents," Exhibit B, a "copy of Powell's Response to Interrogatories," Exhibit C, identified as the "trial court's letter ruling dated October 12, 2022," and Exhibit H, identified as an "[e]-mail from Powell's counsel with Powell's Categorization of Documents Responsive to Requests." The record reflects otherwise.

The Second Amended Response has no reference, general or otherwise, to any of these exhibits. As the trial court correctly observed, the Second Amended Response contained "only three citations to purported summary judgment evidence," specifically, two references to Exhibit F and one reference to Exhibit E (apparently intending to refer to Exhibit G). Indeed, the Bar not only failed to cite to or argue about any additional documents—the documents are not mentioned at all.

Further, even if additional exhibits had been referenced, reference alone will not suffice. Merely citing generally to voluminous summary judgment evidence in response to either a no-evidence or traditional motion for summary judgment is not sufficient to raise an issue of fact to defeat summary judgment. *Nguyen v. Allstate Ins. Co*., 404 S.W.3d 770, 775–76 (Tex. App.—Dallas 2013, pet. denied); *Gillham*

v. Sanchez, No. 05-17-01449-CV, 2019 WL 2082466, at *6 (Tex. App.—Dallas May 13, 2019, pet. denied) (mem. op.) (holding plaintiff's response, which did not inform trial court of what evidence related to which elements challenged by defendant's motion for summary judgment, was insufficient to raise genuine issue of material fact and trial court was not required to sift through plaintiff's voluminous evidence to determine whether any of it raised fact question on challenged elements).

As our sister court observed:

> The issue is whether the trial court must search through all of non-movant's evidence to determine if a fact issue exists without any guidance concerning what evidence creates an issue on a particular element. Under the Rules of Civil Procedure, the party seeking to avoid the effects of a well-pleaded no-evidence motion for summary judgment bears the burden to file a written response that raises issues preventing summary judgment, and that points to evidence supporting those issues. Where the nonmovant fails to meet that burden, the trial court is not required to supply the deficiency, but instead must grant the motion.

Burns v. Canales, No. 14-04-00786-CV, 2006 WL 461518, at *4 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, pet. denied) (mem. op.); *see also Chambers v. Allstate Ins. Co*., No. 05-15-01076-CV, 2016 WL 3208710, at *12 (Tex. App.—Dallas June 9, 2016, pet. denied) (mem. op.). In short, a trial court "does not abuse its discretion when it does not consider summary judgment proof to which a movant does not specifically direct the trial court's attention." *Burns*, 2006 WL 461518, at *4.

Without referencing specific exhibits, the Bar's Second Amended Response states that Powell "attached two exhibits in her pleadings in the Georgia lawsuit that

excluded the dates, even though both exhibits were actually dated," and Powell's pleading specified that the exhibits were undated. Accordingly, the Bar argued that "[t]he circumstances surrounding the doctored exhibits and the misrepresentation in [Powell's] pleading could suggest to a reasonable minded person that [Powell] did have knowledge of the false evidence and her misrepresentation." The Bar further argued that '[t]he same evidence that supports [the Bar's] claim that [Powell] violated TDRPC 3.03(a)(1) and TDRPC 3.03(a)(5) supports [the Bar's] claim that [Powell] violated TDRPC 8.04(a)(3)." These references, and one other reference to evidence that was excluded, comprise the entirety of the Bar's summary judgment evidence identified and argued by the Bar.[6]

General reference to documents in the court's file and the claims asserted, however, does not constitute express presentation of an issue to the court. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993) (issues are not expressly presented by mere summary). A trial court is not required, sua sponte, to assume the role of [non-movant's] advocate and supply his arguments for him. *Burns*, 2006 WL 461518, at *4; *see also Rogers v. Ricane Ent., Inc.*, 772 S.W.2d 76, 81 (Tex. 1989) (motion for summary judgment must do more "than refer to whatever may have been 'on file.'").

[6]Although the Bar identifies evidence from other documents in its appellate brief, it cites to its appendix rather than the record, and does not specifically identify the document or when it was filed with the court, or explain how that evidence was presented or argued in the court below.

Therefore, evidence the Bar did not rely expressly on in responding to a challenged element is not included in our review of whether the Bar raised a genuine issue of material fact as to that element. *See Intelitrac, Inc. v. UMB Financial Corp.*, No. 05-22-00635-CV, 2024 WL 1171383, at *5 n.4 (Tex. App.—Dallas Mar. 19, 2024, no pet. h.) (mem. op.). Our consideration of the Bar's evidence is limited to Exhibit F (collectively including the Complaint and the two undated attachments). *See DeGrate v. Exec. Imprints, Inc.*, 261 S.W.3d 402, 408 (Tex. App.—Tyler 2008, no pet.) (in determining whether an appellant has raised more than a scintilla of evidence regarding the grounds on which a no evidence motion for summary judgment was based, we are limited to the summary judgment proof produced in the response).

Regardless of facts that may have been established elsewhere and outside the record, Exhibit F does not raise a material fact issue about whether Powell knowingly made a false statement of material fact to a tribunal, or knowingly offered or used evidence that she knew was false. *See* Tex. Disciplinary Rules of Professional Conduct R. 3.03(a)(1), 3.03(a)(5). At best, Exhibit F demonstrates that Powell and others filed a pleading in Georgia stating that a certificate and report were undated and attached a copies of these documents that appeared to be undated.

The Bar adduced no evidence to establish that the originals of the attachments to the Complaint were actually dated. Instead, it relies on Powell's summary judgment evidence, specifically the portion of the Powell declaration stating that the

dating of the certificate is "indisputable fact." While this establishes that the statement in the pleading about it being undated was inaccurate, the absence of evidence demonstrating that Powell knowingly made a false statement of material fact or knowingly offered or used false evidence is fatal to the Bar's claims.

With respect to attorney disciplinary matters, "'knowingly, known, or knows' [d]enotes actual knowledge of the fact in question . . . ." *Cohn v. Comm'n for Lawyer Discipline*, 979 S.W.2d 694, 699 (Tex. App.—Houston 14th Dist.] 1998, no pet.). In *Cohn*, Goff, a party appearing pro se, advised the court that he had filed a motion for permission to seek bankruptcy protection, and requested a continuance on that basis. Cohn, an attorney, had previously filed several bankruptcy petitions that were dismissed. After Goff appeared in court, he requested that Cohn check on the status of his bankruptcy motion. Cohn contacted the bankruptcy clerk and was advised that the bankruptcy case had not been reopened. Nonetheless, he sent a letter to the court in which Goff's case was pending advising that Goff's bankruptcy had been reopened and an automatic stay was in effect. *Id.* The court postponed the case based on that representation.

In the resulting disciplinary proceeding against him, Cohn argued that he had disclosed all information available at the time, but admitted he did not examine the bankruptcy court file to confirm the status of the case. *Id.* Cohn testified that the bankruptcy clerk advised him that the case appeared to have been reopened. But the bankruptcy clerk testified that she read Cohn the bankruptcy court's order denying

relief. On these facts, the court concluded that Cohn's misrepresentations were made knowingly, and he failed to disclose a material fact. *Id.* Unlike *Cohn*, there is no competent summary judgment evidence that Powell had actual knowledge that the pleading included false information.

The other cases the Bar relies on are similarly unpersuasive. For example, in *Olsen v. Comm's for Lawyer Discipline*, 347 S.W.3d 876, 883 (Tex. App.—Dallas 2011, pet. denied), this court concluded that an attorney violated DR 8.04(a)(3) when he knowingly filed a will that included a jurat he knew was false and represented to the court that the will was self-proving. *Id.* In *McIntyre*, we concluded that an attorney violated DR 3.03(a)(3) when he stated unequivocally six times in a verified motion that he was seeking relief on behalf of a bankruptcy trustee in a case where no trustee had been appointed. *McIntyre*, 169 S.W.3d at 812. These cases reflect a more concrete evidentiary showing than the evidence of a careless filing established here.

Although the Bar characterizes Exhibit F as "doctored," and "altered," there is no competent summary judgment evidence to establish the accuracy of these characterizations or to demonstrate that Powell knowingly made a false statement about the exhibits. Thus, there is nothing to establish or raise a fact issue about a 3.03(a)(1) or 3.03(a)(5) violation.

Likewise, there is no evidence to support an 8.04(a)(3) violation. DR 8.04(a)(3) provides that "A lawyer shall not engage in conduct involving dishonesty,

fraud, deceit, or misrepresentation." Tex. Disciplinary Rules of Professional Conduct R. 8.04(a)(3). In the court below, the Bar argued that 8.04(a)(3) does not require that an attorney act "knowingly." On appeal, the Bar argues that Powell's reliance on the absence if intentional conduct supporting an 8.04(a)(3) violation is misplaced because the rule does not expressly mention intent. The Bar does not explain whether it views "knowing" and "intentional" as synonymous, not does it identify the mental state it contends 8.04(a)(3) requires or how the summary judgment evidence establishes an 8.04(a)(3) violation.

The disciplinary rules define "fraud" to include "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." *See Olsen*, 347 S.W.3d at 882–83; *Ponce v. Comm'n for Lawyer Discipline*, No. 04-20-00267-CV, 2022 WL 1652147, at *6 (Tex. App.—San Antonio May 25, 2022, no pet.) (mem. op.). Because the rules do not define "dishonesty," "deceit," or "misrepresentation," courts have given those terms their ordinary meanings, and have concluded that they generally mean a "lack of honesty, probity, or integrity in principle" and a "lack of straightforwardness." *Id.* (citing *Brown v. Comm'n for Lawyer Discipline*, 980 S.W.2d 675, 680 (Tex. App.—San Antonio 1998, no pet.)); *see also Rosas v. Comm'n for Lawyer Discipline*, 335 S.W.3d 311, 319 (Tex. App.—San Antonio 2010, no pet.).

We are troubled by the Bar's implicit suggestion that application of the ordinary meaning of the term dishonesty means the DR encompasses imprecise

pleadings and carelessly filed exhibits. Regardless of whether the challenged conduct must be knowing, intentional, or otherwise, a question we need not resolve here, it is axiomatic that dishonesty involves some conscious perversion of truth. *See, e.g., State Bar of Texas v. Lerner*, 859 S.W.2d 496, 499 (Tex. App.—Houston [1st Dist.] 1993, no pet.) (no violation where "conduct not done with intentional dishonesty"); *Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 234 (Tex. App.—Houston 14th Dist.] 2000, no pet.) (trial court could have inferred attorney knowingly engaged in conduct involving dishonesty or misrepresentation); *Eureste v. Comm'n for Lawyer Discipline*, 76 S.W.3d 184, 198 (Tex. App.—Houston 14th Dist.] 2002, no pet.) (describing conscious decision to submit false information and disregard requirements).

As common sense dictates, and the case law illustrates, dishonesty involves something more than carelessness or inadvertent conduct. *See Steinberg v. Comm'n for Lawyer Discipline*, 180 S.W.3d 352, 357 (Tex. App.—Dallas 2005, no pet.) (attorney advertising he was licensed to practice in Arizona when he was not licensed there); *Robins v. Comm'n for Lawyer Discipline*, No. 01-19-00011-CV, 2020 WL 101921, at *12 (Tex. App.—Houston [1st Dist.] Jan. 9, 2020) (mem. op.) (attorney failed to disclose client deceased and continued litigating case); *Thawer v. Comm'n for Lawyer Discipline*, 523 S.W.3d 177, 187 (Tex. App.—Dallas 2017, no pet.) (attorney appeared at immigration hearing after suspension and represented to clients suspension had been reversed); *Onwateaka v. Comm'n for Lawyer Discipline*, No.

14-07-00544-CV, 2009 WL 620253, at *7 (Tex. App.—Houston [14th Dist.] Mar. 12, 2009, pet. denied) (mem. op.) (attorney did not disclose recoveries to clients, charged illegal fees, and did not segregate fees from money owed to medical providers); *Rosas*, 335 S.W.3d at 319–20 (attorneydid not disclose details of business transaction with client and lack of candor prevented client from understanding transaction and caused him to enter transaction he would not have otherwise entered).

Here, the summary judgment evidence does not evince or raise a fact question about a lack of honesty or integrity. Exhibit F, together with the Powell declaration, does not establish that Powell violated Rule 8.04(a)(3) by engaging in fraud, dishonesty, deceit, or misrepresentation.

The Bar employed a "scattershot" approach to the case, which left this court and the trial court "with the task of sorting through the argument to determine what issue ha[d] actually been raised." *See Great Hans LLC, v. Liberty Bankers Life Ins. Co*., No. 05-17-01144-CV, 2019 WL 1219110, at *6 n.6 (Tex. App.—Dallas Mar. 15, 2019, no pet.). Having done so, the absence of competent summary judgment compels our conclusion that the Bar failed to meet its summary judgment burden.

Therefore, under these circumstances and on this record, we conclude the trial court did not err in granting Powell's no-evidence motion for summary judgment. *See White*, 2018 WL 525684, at *4 (concluding that in reviewing trial court's grant of no-evidence summary judgment, appellate court would consider only evidence

for which appellant provided trial court specific reference to where evidence was located in record); *Nguyen v. Allstate Ins. Co*., 404 S.W.3d 770, 776–77 (Tex. App.—Dallas 2013, pet. denied) (trial court did not abuse discretion in concluding summary judgment response lacked specificity when nonmovant merely referenced groups of exhibits consisting of hundreds of pages and failed to cite, quote, or otherwise point out evidence relied upon); *Levine v. Unique Beverage Co*., No. 05–11–01467–CV, 2013 WL 1281896, at *3 (Tex. App.—Dallas Mar. 19, 2013, pet. denied) (mem. op.) (concluding trial court was not required to search through ninety-eight pages of evidence attached to plaintiff's response to locate summary judgment evidence raising genuine issue of material fact without more specific guidance from plaintiff). Having reached this conclusion, we need not address the traditional motion for summary judgment. *See* TEX. R. APP. P. 47.1.

We resolve all the Bar's issues against it, and affirm the trial court's judgment.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

COMMISSION FOR LAWYER DISCIPLINE, Appellant	On Appeal from the 116th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-22-02562.
No. 05-23-00497-CV V.	Opinion delivered by Justice Garcia. Justices Breedlove and Kennedy participating.
SIDNEY POWELL, Appellee	

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered April 17, 2024.